

After *Reed*, viewpoint neutral regulation is no longer synonymous with content-neutral regulation.

Sign Regulation Turned On Its Head

by Evan Seeman, Esq., Robinson & Cole, LLP



Communities across the country must now scrutinize sign codes with even more care following the recent U.S. Supreme Court decision in *Reed v. Town of Gilbert*. Content-based sign laws — those targeting speech based on communicative content — have long been presumed to be unconstitutional violations of free speech unless they are narrowly tailored to serve compelling government interests (known as strict scrutiny judicial review). Many thought that sign codes were content-neutral if they could be “justified without reference to the content of the regulated speech” or not adopted by the government “because of disagreement with the message.” But that may have all changed with *Reed*. Now, sign codes that regulate based on “topic” or “subject matter” alone (e.g., no temporary signs in a public right-of-way except those giving directions to an event at a nonprofit), even without distinguishing among different viewpoints within that topic or subject matter (e.g., no temporary signs in a public right-of-way giving directions to

a neo-Nazi or any other “hate group”), will likely be put to strict scrutiny. After *Reed*, viewpoint neutral regulation is no longer synonymous with content-neutral regulation.

The Town of Gilbert’s sign code prohibited outdoor signs without a permit, but exempted twenty-three categories from this requirement, including temporary directional, ideological, and political signs. Good News Community Church, described as a “small, cash-strapped entity that owns no building,” used temporary directional signs to advertise the changing location of its services to the public. The

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Church, which holds religious worship services in elementary schools or other locations in and near the Town, placed about 15 to 20 temporary signs around Town. Among other restrictions, the sign code limited temporary directional signs to being placed on private property or a public right-of-way no more than twelve hours before the event being advertised and no more than one hour after the event. Signs conveying other messages, such as ideological and political signs, were subject to less stringent restrictions than the temporary directional signs used by the Church.

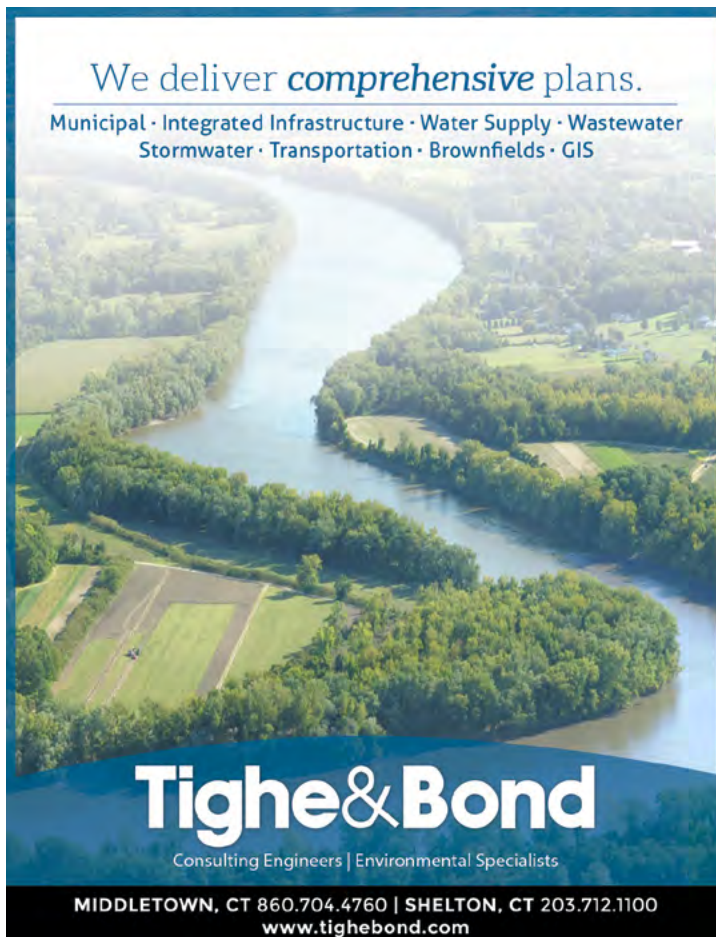
The Town's sign compliance manager twice cited the Church for violating the sign code — first for exceeding the time limits for signage and second for both exceeding the time limits and failing to include the date of the event on the signs. The Church claimed that the sign ordinance made impermissible content-based distinctions between the different categories of signs, but the U.S. Court of

Appeals for the Ninth Circuit disagreed. Relying on established signage regulation law, the Ninth Circuit found that the sign code did not violate free speech doctrine because “the distinction between Temporary Directional Signs, Ideological Signs, and Political Signs...are based on objective factors relevant to Gilbert’s creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign.”

The Supreme Court, in a majority opinion, authored by Justice Thomas, reversed and ruled the Town’s sign code unconstitutional on its face, since the different signage restrictions “entirely depend on the communicative content of the sign.” It reasoned that speech regulation aimed at specific “subject matter” or an “entire topic” is content-based even if it does not discriminate among viewpoints within the subject matter or topic. According to Justice Thomas, regulation of a temporary directional sign displaying “the time and location of a specific event” is impermissibly content-based.

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The Court gave an example to illustrate its point: “If a sign informs its reader of the time and place a book club will discuss John Locke’s *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government.” The

compelling interests advanced by the Town to justify the different treatments (aesthetics and traffic safety) did not pass strict scrutiny, because the regulation was “hopelessly underinclusive” by failing to place the same restrictions on ideological and political signs.

Reed appears to have expanded the types of sign codes that will be deemed content-based and subject to strict scrutiny. This should be troubling for communities across the country, as many, if not most, sign codes regulate signs in a similar way to that found unconstitutional in *Reed*.

While the Supreme Court’s decision was unanimous, the Justices wrote three separate concurring opinions. Perhaps encouraging is Justice Breyer’s concurring opinion taking the position that content-based discrimination “cannot and should not always trigger strict scrutiny” because “virtually all government activities involve speech, many of which involve the regulation of speech.” However, Justice Kagan, in her concurring opinion joined by Justices Ginsburg and Breyer, prophesizes that courts will now be required to invalidate numerous “entirely reasonable” sign ordinances, making the Court “a veritable Supreme Board of Sign Review.”

Justice Alito, joined by Justices Kennedy and Sotomayor, added “a few words of further explanation” to stress that local governments are not powerless to regulate signage. They provided a non-inclusive list of content neutral criteria to regulate signs: (a) the locations in which signs may be placed; (b) lighted and unlighted signs; (c) signs with fixed messages and electronic signs with messages that change; (d) the placement of signs on private and public property; (e) the placement of signs on commercial and residential property; (f) on-premises and off-premises signs; (g) restricting the total number of signs allowed per mile of roadway; and (h) imposing time restrictions on signs advertising a one-time event. It is not clear whether the authors of the majority opinion, or even some of the other concurring Justices, agree with this list. Justice Alito’s list, which includes rules

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distinguishing between on-premises and off-premises signs and rules that restrict signs advertising a one-time event, appear to conflict to some extent with Justice Thomas' majority opinion.

In the *Reed* aftermath, courts have been split about whether distinctions between on-premises and off-premises signs are content-based and subject to strict scrutiny. In *Contest Promotions, LLC v. City and County of San Diego*, a federal court in California concluded that *Reed* does not apply to commercial speech and therefore the distinction between on- and off-premises signs in that case was subject only to intermediate scrutiny. The court in *Contest Promotions* relied on Justice Alito's explanatory list to reach this result. But a federal court in Tennessee reached the opposite conclusion in *Thomas v. Schroer* and expressly found that Justice Alito's concurrence was "not binding precedent" and noted that "[t]he 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." Therefore, the applicability of *Reed* to commercial speech appears to be an open question.

It is not just sign codes that will feel the effect of *Reed*. Recently, the U.S. Court of Appeals for the Seventh Circuit, in *Norton v. City of Springfield*, applied *Reed* to conclude that a panhandling ordinance was unconstitutional. The

ordinance prohibited panhandling, defined as "an oral request for an immediate donation of money," in the downtown historic district. The ordinance, however, did not prohibit oral pleas for deferred donations or signs requesting money. Just as the Supreme Court rejected the Town of Gilbert's justification that its sign ordinance was neutral with respect to ideas and viewpoints, the Seventh Circuit rejected the same argument advanced by the City of Springfield. *Norton* explains that "[t]he majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."

Following *Reed* and now *Norton*, local governments across the country find themselves scrambling to review and revise sign ordinances and other ordinances regulating speech. Because local governments have long regulated by topics and subject matter such as those at issue in *Norton* (oral requests for money) and *Reed* (temporary directional signs), it seems likely that these types of challenges may be more often encountered and problematic. To get out ahead of a potential constitutional quandary, sign codes and all ordinances affecting speech should be carefully reviewed with an eye on *Reed* and amended as necessary. ■

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