

Reed v. Town of Gilbert

Presented by
Michael F. Connelly



Etter, McMahon, Lamberson, Van Wert & Oreskovich, P.C.

618 W. Riverside Ave., Ste. 210

Spokane, WA 99201

Ph: 509.747.9100 Fax: 509.623.1439

mfc@ettermcmahon.com

Pre-Gilbert

Impermissible content regulation is where speech is restricted because of the idea conveyed, or because the government disapproves of the message, or in some way discriminated against the sender, unless protected speech was implicated, i.e. political speech, religious speech etc. See *Collier v. City of Tacoma*, 121 Wash. 2d 737 (1993), (limiting time period for political signs found unconstitutional).

Reed v. Town of Gilbert 135 S.Ct. 2218 (2015)

The Town of Gilbert sign ordinance prohibited the display of outdoor signs without a permit, but exempted 23 categories of signs, including **Ideological Signs** which had no placement or time restrictions, **Political Signs** that could only be displayed during an election season and **Temporary Directional Signs** that could only be displayed 12 hours before a “qualifying event” and one hour after.

Town of Gilbert

A church, which held Sunday services at various temporary locations, posted signs early each Saturday morning bearing the Church name and time and location of the next service, and removed the signs around midday Sunday.

They were cited for exceeding the time limitations for Temporary Directional Signs and failure to include an event date.

They filed suit claiming that the code abridged their freedom of speech.

Town of Gilbert

The U.S. Supreme Court found that the code provisions were **content-based regulations** and failed to survive the strict scrutiny test. The majority decision was joined by six justices, a concurring opinion was filed by three justices, one justice filed an individual opinion concurring in the judgment, and three justices filed another opinion concurring in the judgment.

The First Amendment

The First Amendment of the U.S. Constitution prohibits the enactment of laws “abridging the freedom of speech.” That is, a municipal government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Department of Chicago v. Mosely*, 408 U.S. 92,95 (1972).

The First Amendment-Strict Scrutiny

Regulations that target speech based on its communicative content “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992), *Simon and Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

The First Amendment-Content Based

“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.” *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663-2664 (2011).

“This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys.” *Sorrell*, 131 S. Ct. at 2664.

First Amendment – Content Neutral

Laws that are content neutral are subject to lesser scrutiny. That is, they are “are narrowly tailored to serve a significant governmental interest”. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. taxpayers for Vincent*, 466 U.S. 789 (1984).

The First Amendment – Commercial Speech

- Definition: Expression related solely to the economic interests of the speaker and its audience. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980); speech that does no more than propose a commercial transaction *United States v. United Foods, Inc.* 533 U.S. 405, 409 (2001).
- Hudson test: The Hudson test is applicable to commercial speech regardless of whether it regulates content or form. See *Timilsina*, 121 F. Supp. 3d at 1215. Under the Hudson test, advertising can be banned if it is illegal or likely to deceive the public. If not, regulation must be supported by a substantial governmental interest, directly advances the interest involved, and is not more extensive than is necessary to serve that interest. See also *Ballen v. City of Redmond*, 466 F. 3d 736 (2006); *Demarest v. City of Leavenworth*, 876 F. Supp. 1186 (E.D. Wash. 2012). *Kitsap County v. Mattress Outlet/Gould*, 153 Wash. 2d 506 (2005).

Town of Gilbert

Justice Thomas's Majority Opinion

- The sign code identified various categories of signs based upon the type of information they convey (Temporary Directional Signs were “loosely defined as signs directing the public to a meeting of a nonprofit group”.)
- The code imposed more stringent restrictions on Temporary Directional Signs than on signs conveying other messages.
- This restriction was content based “on its face” because Temporary Directional Signs were defined “on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event” as opposed to an ideological or political message.
- These content-based restrictions did not survive strict scrutiny.

Town of Gilbert

Justice Thomas's Majority Opinion

“If a sign informs the 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 as sign expressing an ideological view rooted in Locke’s theory of government. More to the point, the Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign code is a content-based regulation of speech.”

Town of Gilbert

Justice Thomas's Majority Opinion

The ordinance, as written, was found to not be narrowly tailored to further the arguably compelling governmental interest of the preservation of aesthetic or traffic safety. Primarily because there was little factual distinction between the signs being regulated and other types of signs, i.e., ideological or political.

Town of Gilbert

Justice Thomas's Majority Opinion

Permissible regulations include:

- Regulation of size, building materials, lighting, moving parts and portability.
- Forbidding signs on public property “so long as it does so in an evenhanded, content-neutral manner.” See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S.789, 817 (1984).
- Warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses.

Town of Gilbert

Justice Alito's Concurring Opinion
(3 Justices)

Rules would not be content based that regulate:

- Size
- Location distinguishing between free standing and attached
- Lighted and unlighted signs
- Distinguishing between signs with fixed messages/messages that change
- Placement on private and public property
- Placement of signs on commercial and residential property
- Distinguishing between on-premises/off-premises signs
- Restricting the total number of signs
- Imposing time restrictions on signs advertising a one-time event
- Signs erected by governmental bodies to promote safety, directional signs, signs pointing out historic sites and scenic spots

Town of Gilbert

Justice Kagen's Concurring Opinion (3 Justices)

When subject matter regulation may have the intent or effect of favoring some ideas over others, “**When that is realistically possible** ... we insist that the law pass the most demanding constitutional test. But when that is not realistically possible, we may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive.”

Town of Gilbert

Justice Breyer's Concurring Opinion
(Concurring with Justice Kagan's opinion)

“In my view, the category ‘content discrimination’ is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain legal condemnation.”

Contest Promotions, LLC

2015 WL 4571564 (not reported)

(Under appeal to the 9th Circuit)

The City of San Francisco banned the use of “off-site” signs (General Advertising Signs) but permitted “on-site” signage (Business Signs).

A Business Sign advertises the business to which it is affixed, General Advertising Signs advertise for a third-party product or service which is not sold on the premises to which the sign is affixed. Contest Promotions used billboards placed outside a variety of stores advertising the sale of products.

An initial lawsuit filed by Contest Promotions in 2010 was settled, First Amendment claims were dismissed, and part of the settlement required Contest Promotions to submit applications for re-permitting its signs.

Contest Promotions LLC

Prior to re-application, the City changed the code as follows:

Section 602.3 now defines a Business Sign as “[a] sign which directs attention to a *the primary* business, commodity, service, industry or other activity which is sold, offered, or conducted, *other than incidentally*, on the premises upon which such sign is located, or to which it is affixed.” (the highlighted words were removed).

Contest Promotions LLC

The City then denied the reapplications as not being in compliance with the revised code.

With respect to the First Amendment, the Court held:

First Amendment protections apply to commercial speech only if the speech concerns a lawful activity and is not misleading. Once it has been established that the speech is entitled to protection, any government restriction on that speech must satisfy a three-part test: (1) the restriction must seek to further a substantial government interest, (2) the restriction must directly advance the government's interest, and (3) the restriction must reach no further than necessary to accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–66 (1980).

Gilbert and Commercial Speech

...Reed does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediary scrutiny as defined by the *Central Hudson* test.

Further, as noted above, at least six justices continue to believe that regulations that distinguish between on-site and off-site signs are not content based, and therefore do not trigger strict scrutiny. See *Contest Promotions, LLC v. City of Cty. of San Francisco*, 2015 WL 4571564, at page 4 (N.D. Cal. (2015)), affirmed by the Ninth Circuit 2017 WL 3499800.

Geft Outdoor LLC v. Consolidated City of Indianapolis,
187 F. Supp. 3d 1002, (S.D. Ind. 2016, appeal dismissed
Jan. 20 2017)

Geft was an action by a billboard company challenging an existing and revised sign ordinance. The existing ordinance's noncommercial exemption defined "noncommercial opinion signs" on the basis of whether a sign "expresses an opinion or point of view, such as, a political, religious, or other ideological sentiment or support or opposition to a candidate or proposition for a public election."

Geft Outdoor LLC

The Court found this to be content based regulation subjecting such signs to restrictions different from those applied to real estate signs or temporary signs for grand openings and city-recognized special events. The preservation of aesthetic appeal and traffic safety were not found to constitute a compelling governmental interest or to be narrowly construed. The Court invalidated the entire sign ordinance.

Geft Outdoor LLC

The City amended its ordinance by removing the noncommercial exemption and adding provisions. The Court stated:

“Noncommercial messages may be displayed on any sign authorized to display commercial messages.” Indianapolis, Ind. Code § 734-101(b). The definitions of “on-premises,” “off-premises,” and “advertising signs” remained the same as those in the original Sign Ordinance. Similarly, there was no change in the regulations regarding digital components for those sign types. The City's amendments to the ordinance make clear that the limitations set forth in each of those definitions “[do] not apply to the content of noncommercial messages.” § 734-501(b). **Accordingly, under the Amended Ordinance, the on-premises and off-premises distinction now explicitly applies only to commercial speech.** (Emphasis added).

Geft Outdoor LLC

The Court then concluded:

Since *Reed* did not pertain to commercial speech and omitted any mention of *Central Hudson* and its progeny, including *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), in which the Supreme Court directly addressed the issue of on/off-premises regulations in the commercial context, we have adopted the approach taken by a majority of the courts who have addressed the issue and hold that, since *Reed* does not change the controlling precedent, the Amended Sign Ordinance's on/off-premises distinction, which applies only to commercial speech, is subject to intermediate rather than strict scrutiny.

Geft Outdoor LLC

The Court then found that the City's amended ordinance, distinguishing between on-site and off-site signage and imposing digital requirements, (ban on digital off-premise signs/40% limit on on-premise signs) survived the intermediate scrutiny test.

Timilsina v. West Valley City, 121 F. Supp. 3d 1205, 1215 (2015)

The City ordinance prohibited A-Frame signs.
The Court held:

Because the parties agree this case concerns commercial speech and the *Central Hudson* applies, the Court need not address how the regulation would fare under the recent Supreme Court case, [Reed v. Town of Gilbert](#),...

Timilsina

Limitation of commercial signs based upon aesthetics and/or traffic safety do not require empirical data of such impact. The Court cited the U.S. Supreme Court, stating:

We do not, however, require that “empirical data come ... accompanied by a surfeit of background information.... [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.”

The prohibition of A-Frame signs in areas outside of the City Center, except under certain limited circumstances, was upheld.

www.RicardoPacheco.com v. City of Baldwin Park, 2017 WL 2962772

Here the court declined to follow *Timilsina*, where the city's code provided specific authorization for certain speaker based signs, i.e. new business's and businesses promoting a special event, stating:

The court finds that there are “serious questions” as to whether the City's preference for speakers that are businesses, in particular businesses hosting special events, reflects a content preference for commercial speech. See *Alliance for the Wild Rockies*, 632 F. 3d at 1132.

- The court explained:
- The Timilsina court concluded that the speaker-based distinction embodied in the Grand Opening exception did not reflect the legislature's content preference because the ordinance “place[d] no restrictions on the content of the sign a new business licensee erects.” [121 F. Supp. 3d at 1218](#). This Court declines to follow Timilsina, which is not binding authority and does not appear to accord with Reed.

Wagner v. City of Garfield Heights,
Ohio, 135 S. Ct. 2888 (2015), 2017 WL
129034, at page 607

Where the court, on remand, found that an ordinance that treated political signs differently from other signs, (Political signs were limited to six square feet, other signs to twelve square feet) was an impermissible restriction.

Marin v. Town of Se., 136 F. Supp. 548,
565 (S.D. N. Y. 2015)

Where specific restrictions on Political signs were not applicable to other categories of sign found to no meet the requisite “strict scrutiny”. The court cited Reed for its definition of “content based” speech, i.e. “governmental regulation of speech is content based if a law applies to a particular speech because of the topic discussed or message expressed.”

*Lone Star Sec. & Video, Inc. v. City of
Los Angeles*, 827 F. 3d 1192, 1198-
1201 (9th Cir. 2016)

Where the court upheld ordinances that regulated both motorized mobile billboards and non-motorized billboards, limiting motorized billboards to those not impairing safety and prohibited parking a non-motorized billboard display on any public street within city limits.

Equal Protection

See *Citizens for Free Speech, LLC v. County of Alameda*, 194 F. Supp. 3d 968 (2016), where the Court held that allowing “official public signs” but not noncommercial signs by private individuals was a content-based regulation, did not pass the strict scrutiny test, and was a violation of equal protection under the Constitution. (See also 2017 WL 912188 awarding nominal damages and partial attorney fees)

Gilbert and begging/panhandling or soliciting ordinances

- *Norton v. City of Springfield*, 806 F. 3d 411 (7th Cir. 2015);
- *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015);
- *Mclaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015);
- *City v. Willis*, 186 Wash. 2d 210 (2016).

Norton v. City of Springfield

(Review denied by U.S. Supreme Court)

The panhandling ordinance prohibited oral requests for immediate payment of money, but permitted signs requesting money and oral requests to send money later. The ordinance was found to not be content neutral under *Reed v. Gilbert*, strict scrutiny applied and the ordinance was found unconstitutional.

“The 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.”

Thayer v. City of Worcester (No appeal)

Panhandlers and campaigners challenged the ordinance that prohibited panhandling and soliciting in an aggressive manner and restricted standing or walking on traffic islands or roadways. The Court held:

1. Ordinance making it unlawful to solicit in an aggressive manner was content based and failed strict scrutiny test, citing *Reed v. Gilbert*. (Panhandling and political speech both protected by the First Amendment.)
2. Ordinance restricting pedestrian use of traffic islands and roadways content neutral but found to not be narrowly tailored to serve governments legitimate needs. (Failed to identify specific roadways or medians where public safety was a risk.)

McLaughlin v. City of Lowell (No appeal)

City ordinance banning vocal panhandling in downtown and aggressive panhandling in the rest of the City was content based and failed to meet strict scrutiny, citing *Reed v. Gilbert*.

City v. Willis

(No appeal)

Defendant convicted of begging. The Court found that provisions of the ordinance prohibiting begging at freeway ramps and major intersections were facially overbroad.

“The government can impose certain restrictions on speech in a public forum, such as reasonable time, place, and manner restrictions. But it cannot impose restrictions based on content.”

Here the law restricted solicitation with a particular purpose, i.e., “obtaining money or goods as a charity”; a content restriction that fails to meet strict scrutiny.

Guidelines

- If it is noncommercial speech, strict scrutiny applies if the regulation is content based. A regulation is content based if you have to examine the sign to determine what code restrictions apply. If it is content neutral, then intermediate scrutiny applies.
- If it is commercial speech, the Hudson test is applies.

Recommendations

MRSC – “To comply with *Reed*, local jurisdictions should eliminate the category of political signs in their sign codes (along with other content-based categories). Instead, a jurisdiction will have to craft rules for these signs independent of content likely based on a category such as ‘temporary signs’”.

Recommendations

MRSC: A sign code may be subject to strict scrutiny if it applies different standards based upon:

- A sign's content.
- The purpose of the sign.
- Who is putting up the sign.

Recommendations

- Have a strong purpose statement for your regulations.
- Cite specific factual studies, analyses and identified adverse impacts resulting in specific sign restrictions.
- Add a severability clause.
- Add a substitution clause allowing noncommercial signs where commercial signs are allowed.
- Limit exemptions (usually content based).
- Removal requirements for temporary signs should not be based upon the content of the sign.