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The Fallout From the Supreme Court's Sign Ordinance Ruling

Tony Mauro, ***Supreme Court Brief***

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Bruce Ellefson / Alliance Defending Freedom

For years, many of the lawyers who litigate over government regulation of signs would tell you that almost all sign ordinances are at least a little bit unconstitutional, imposing rules that would not fly for other forms of speech.

If there was ever any doubt about that axiom, the U.S. Supreme Court's June 18 ruling in Reed v. Town of Gilbert makes it truer than ever, holding localities to a "strict scrutiny" First Amendment standard that makes it difficult for governments to treat certain kinds of signs better or worse than others.

The ruling struck down a sign ordinance from Gilbert, Arizona, that favored some signs but sharply restricted temporary directional signs that a local church relied on to attract attendees. The town defended the rules as designed to reduce clutter and promote traffic safety, but Justice Clarence Thomas, writing for the court, said "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."

The unanimous decision has already prompted lawyers for local governments to dust off sign codes for a fresh look. Reed is also likely to trigger litigation that could affect political signage in next year's presidential election and could spill into other areas of First Amendment litigation, far afield from signage disputes.

"Some experts say that every sign code has a problem," said Lisa Soronen (left), executive director of the State and Local Legal Center, who closely follows Supreme Court cases that affect governments. "After Reed, I'd say every sign ordinance needs a facelift."

Institute for Justice lawyer Robert Frommer said, "Reed is a game-changing opinion that will increase speech protections for a wide class of speakers. Thousands of sign codes are now constitutionally suspect."

The institute, a libertarian litigation group, is gearing up a campaign to contact localities around the country and offer assistance in revising sign codes. "We will tell them we are willing to work with you and fix these codes," Frommer said.

Some of the most persistent code provisions that need fixing, Frommer said, are rules that regulate the size and duration of political campaign signs but not, for example, real estate signs—or regulations that allow the display of national flags, but not banners for sports teams or clubs. "You can have common sense sign codes that don't play favorites."

Gilles Bissonnette, legal director of the American Civil Liberties Union of New Hampshire, said the Reed decision will promote campaign speech via lawn and other signs, just in time for the New Hampshire primary next year. Just before Reed was issued, he said the New Hampshire town of Rochester eliminated its 32-square-foot restriction on the size of political signs. He hopes other localities will follow suit.

Lisa Soronen, executive director of the State & Local Legal Center, January 7, 2014. Photo by Diego M. Radzinschi/THE NATIONAL LAW JOURNAL.

Diego M. Radzinschi

Not all lawyers see an upheaval in the law. An American Planning Association webinar on July 21 asked if Reed was a "sign regulation apocalypse," but **Susan Trevarthen**, one of the panelists, said her answer was no. "It is time to stop and take a look at your sign code," Trevarthen acknowledged however. **A member of Weiss Serota Helfman Cole & Bierman in Florida, Trevarthen defends local governments in sign litigation.**

She pointed to the concurring opinion in Reed by Justice Samuel Alito Jr., joined by two other justices. Alito agreed that content-based regulations should be examined under "strict scrutiny." But he added: "This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations." Alito offered a list of permissible regulations that are content-neutral, including size limits and distinctions between free-standing and attached signs.

John Baker of Greene Espel in Minneapolis, another sign lawyer who has studied the Reed case, agreed its impact won't be apocalyptic, but "it probably will result in litigation" and re-examination of codes. "There's a lot of brainstorming going on."

Outdoor advertising or billboard companies might also see the Reed decision as an opening to challenge regulations on that industry. E. Adam Webb of Webb, Klase & Lemond in Atlanta, who represents billboard companies in sign litigation, said the Reed decision is one of those Supreme Court rulings that "excites people" and triggers "an enormous amount of litigation."

The Reed ruling has already been cited in a petition to the Supreme Court that is not related to sign codes. In Hines v. Alldredge, Texas veterinarian Ronald Hines is challenging a rule that kept him from giving pet advice on the Internet. The regulation bars vets from giving any medical advice about an animal they have not examined in person. He sued on First Amendment grounds, and his Institute for Justice lawyers invoked the Reed decision to argue that the regulation should be viewed as a content-based restriction on speech, even if it has benign purposes. "A noncensorial purpose for a speech regulation cannot inoculate it from First Amendment scrutiny," Sommers said.

In New Hampshire, the ACLU's Bissonnette has also invoked Reed in a nonsign case. In Rideout v. Gardner, the ACLU is challenging the state's so-called "ballot selfie" law, which prohibits voters from publicly revealing how they marked their ballot. That too is content-based and would fall under the strict scrutiny required by Reed, Bissonnette told the federal district court judge in New Hampshire in a supplemental statement.