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REED APPLIED: THE SIGN APOCALYPSE OR ANOTHER BUMP IN THE ROAD

By Sarah J. Adams-Schoen*

Before and after the Court issued its opinion in *Reed v. Town of Gilbert*[1] commentators warned that the Court's approach to sign regulations could portend the "sign apocalypse."[2] Susan Trevarthen, who represented the American Planning Association in its amicus curiae brief in *Reed*, warned "that adoption of the strict scrutiny test [urged by the petitioner] has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation."[3] And the Court did indeed adopt a mechanical test that at least purports to apply strict scrutiny to all sign codes that require enforcement officers to read signs in order to know whether the code applies—prompting Justice Breyer to admonish in his concurrence that the majority's approach to content neutrality casts a net that encompasses such a wide range of regulations that it threatens not only municipal sign ordinances, but regulations of airplane warnings, drug warnings, securities regulations, energy conservation labeling, and even signs at petting zoos.[4]

A year has now passed since the Court issued its decision in *Reed*, and the Court's decision has been interpreted and applied by dozens of lower courts throughout the country. This article summarizes the Court's approach in *Reed* and surveys a year of post-*Reed* decisions, asking whether the Court's approach did indeed portend the sign apocalypse.

I. The *Reed* Decision

Prior to *Reed*, the Circuit Courts of Appeals were split regarding regulation of signs based on the category or function of the sign, with some circuits adopting a functional approach consistent with the Supreme Court's opinion in *Ward v. Rock Against Racism*[5] and its progeny and others adopting a strict, mechanical approach consistent with the Supreme Court's opinion in *Metromedia,* *Inc. v. City of San Diego*[6] and its progeny.[7] The functional approach, adopted by the Third,[8] Fourth,[9] Sixth,[10] Seventh[11] and Ninth[12] circuits, recognized that sign codes that differentiated among sign types based on category or function—for example, political, temporary directional, and real estate signs—were content neutral unless the government's purpose was to control content. As the Court in *Ward* explained:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."[13]

In contrast, the mechanical approach to content neutrality, adopted by the Eighth[14] and Eleventh[15] circuits, recognized a sign code as content based if a code enforcement officer had to read the message on a sign to determine if the code applied. *Reed*, which involved a local government's regulation of signs based on category and function, allowed the Court to weigh in on this split.

To summarize, the facts of *Reed* were as follows. The Town of Gilbert had a sign code that restricted the size, number, duration, and location of many types of signs, including temporary directional signs. The code generally required anyone who wished to post a sign to obtain a permit, with numerous exceptions for specific types of signs including "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event."[16] Like many sign codes throughout the country, the Town of Gilbert's code established a hierarchy of restrictions, with the fewest restrictions on ideological signs and the most restrictions on temporary directional signs.[17]

The Church, which lacked a permanent church structure and instead rented space in local community facilities, placed signs in the surrounding area announcing the time and location of services. Treating these signs as temporary directional signs, the Town issued code enforcement notices to the Church. The Church then sued the Town, claiming that the sign code violates the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to the Church. The district court denied the Church's motion for a preliminary injunction and the Ninth Circuit affirmed this ruling[18]; the district court then granted summary judgment for the Town,[19] which the Ninth Circuit also affirmed.[20]

The Ninth Circuit concluded that the Town of Gilbert's sign ordinance was content neutral because the town's motivation for adoption of the code was not disagreement with the mes-

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sage conveyed.[21] In its first opinion in the *Reed* matter, the Ninth Circuit affirmed the petitioners' motion for a preliminary injunction, despite recognizing that an enforcement officer would have to read the sign to determine what provisions of the sign code applied. The court explained that this "kind of cursory examination" for the purposes of determining function "was not akin to an officer synthesizing the expressive content of the sign."[22] On a later appeal of the district court's summary judgment for the petitioners, the court reasoned that the distinctions in the Town's code 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."[23] The plaintiffs appealed to the Supreme Court and the Court granted certiorari.[24]

On June 18, 2015, nine justices agreed with the petitioners that the Town's sign code was content-based on its face, that strict scrutiny therefore applied, and that the code did not pass constitutional muster.[25] But, the justices took such varying routes to this conclusion that attorneys may find it difficult to determine which categorical sign regulations are content based, and therefore likely unconstitutional under a strict scrutiny analysis.

A. THE THOMAS MAJORITY: "A VERY WOODEN DISTINCTION"

Six justices joined Justice Thomas's majority opinion, which took a literal (some say "wooden"[26]) approach to the question of content neutrality. Essentially, the Thomas majority opinion stands for the principle that, if distinctions in a sign code require reading the sign to determine if the distinctions apply, the code is content based, any content neutral justifications for the distinctions are irrelevant to the determination of content neutrality, and strict scrutiny applies. Moreover, a code justified by aesthetics and traffic safety will not survive strict scrutiny if it places more lenient restrictions on political or ideological signs than it places on temporary directional signs—because no difference exists between these categories of signs in terms of their impact on aesthetics and traffic safety.

In so holding, the Court rejected several theories the Ninth Circuit had relied upon to support the conclusion that the code was content neutral. First, the Court explained that the Ninth Circuit's reliance on *Ward*[27] was misplaced because the question of whether a regulation has a neutral justification is irrelevant when the regulation is content based on its face.[28] The Court characterized the question of whether a regulation "draws distinctions based on the message a speaker conveys"[29] as "the crucial first step in the content-neutrality analysis."[30] Only if the answer at the first step is "no," does the analysis move to the second step, which asks whether a facially content-neutral law is still content based as a result of its content-based justification or adoption by the government "because of disagreement with the message."[31] Thus the Court resoundingly rejected the notion that "an innocuous justification" can transform a facially content-based sign code into one that is content neutral.[32]

Second, the Court rejected the Ninth Circuit's reasoning that the content neutrality analysis "should be applied flexibly with the goal of protecting viewpoints and ideas from government censorship or favoritism."[33] This reasoning, the Court explained, erroneously equates with speech regulation generally a particularly egregious subset of speech regulation—that is, regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[34] In doing so, the Court admonished the Ninth Circuit's failure to recognize the well-established application of the First Amendment to speech regulation that targets a specific subject matter—such as political speech generally—as opposed to a specific perspective.[35]

Rejecting classification of codes that distinguish based on function alone as content neutral, the Court explained that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose," but "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[36] Citing *Ward*, the Court explained that there are two categories of laws that are content based: (1) those that are content based on their face including those that regulate speech by its function or purpose, and (2) those that cannot be " 'justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.' "[37] Rejecting the functional approach adopted by the Ninth Circuit, the Court explained that where the regulation is content-based on its face, the government's justifications or purposes for enacting the regulation are irrelevant to the determination of whether it is subject to strict scrutiny.

Finally, the Court rejected on factual and legal grounds the Ninth Circuit's characterization of the sign code's distinctions as "turning on the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[38] As a factual matter, the Court observed that the Town of Gilbert's distinctions were not speaker based, but rather categorized by message type—political, ideological or directional—and the applicable category depended on the content of the message, not the identity of the speaker. Moreover, the Court observed in dicta that "the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral."[39] Rather, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry."[40] Indeed, " 'speech restrictions based on the identity of the speaker are all too often simply a means to control content.' "[41]

The Court emphasized three guiding principles that compelled the result. First, a content-based restriction on speech is subject to strict scrutiny regardless of the government's motive and thus "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[42] Second, "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" and thus the mere fact that a law is viewpoint neutral does not insulate it from strict scrutiny.[43] Third, whether a law is speaker-based or event-based makes no difference for purposes of determining whether it is content-based.[44]

B. THE ALITO CONCURRENCE: AN ATTEMPT TO STAVE OFF THE SIGN CODE APOCALYPSE

Justice Alito, joined by Justices Sotomayor and Kennedy, joined the majority opinion and wrote separately to "add a few words of further explanation."[45] In an apparent attempt to assuage fears that the Court's decision was a harbinger of the sign code apocalypse, the Alito concurrence explains that certain distinctions between signs are content neutral and provides a non-exhaustive list of sign regulations that would not trigger strict scrutiny, including: (1) regulations that distinguish between free-standing versus attached signs, (2) regulations of electronic signs with content that changes, and (3) regulations of the placement of signs on public versus private property or on- versus off-premises signs.

But, puzzlingly, the list of content neutral examples also includes signs advertising a one-time event. As the Kagan concurrence discussed below points out, this example is in conflict with the majority opinion, an opinion that the Alito concurrence joined with respect to the result and reasoning. Under the majority's reasoning, regulations that target one-time event signs are content based. How would one know that a particular sign was covered by the regulation without reading the sign, and this simple, literal test is the majority test for whether a regulation is content-based.

C. THE KAGAN CONCURRENCE: BAD FACTS MAKE BAD LAW

Justices Ginsburg, Breyer, and Kagan rejected the notion that a content-based regulation must necessarily trigger strict scrutiny, and concurred only in the judgment. The Kagan concurrence agrees that the Town of Gilbert regulation was invalid, but warns that the majority approach will lead to either a watering down of strict scrutiny review or courts invalidating many democratically enacted laws. Echoing the warnings of amici the American Planning Association, the Kagan concurrence recognizes that as a result of the Court's decision many municipalities will have to repeal many sign regulations.

In contrast to the literal approach adopted by the majority and endorsed by the Alito concurrence, the Kagan concurrence takes a functional approach, observing that the purpose underlying First Amendment protection simply is not implicated by many categorical sign codes. Rather, the Kagan concurrence argues that regulation of signs by function, even when ascertaining a sign's function requires reading the sign, does not threaten the uninhibited marketplace of ideas. Under the majority's simple, literal test, warns Kagan, the Court will "find itself a veritable Supreme Board of Sign Review."[46] The Kagan concurrence also criticizes the majority for ignoring the last fifty years of sign code jurisprudence, and, indeed, the only sign code case cited by the majority opinion is *City of Ladue v. Gilleo*.[47]

But, bad facts can certainly make bad law, and according to the Kagan concurrence the Town of Gilbert sign ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[48] Like many municipal codes, the Town's sign code banned outdoor signs without a permit and created exceptions for specific sign types. However, the range of those exceptions was, as conceded by the Town's counsel at oral argument, "silly."[49] Town of Gilbert's code created 23 exemptions to the outdoor sign ban for specific types of signs and placed varying restrictions on the signage depending on which exemption it fell into.

D. THE BREYER CONCURRENCE: A REGULATORY APOCALYPSE ALL ROUND

In addition to joining the Kagan concurrence, Justice Breyer wrote a concurrence in which he warned not only of the invalidating effect of the Court's approach on municipal sign ordinances, but on a host of other regulations that require the regulated text to determine the applicability or enforcement of the regulation. According to Justice Breyer, the Court's all-or-nothing approach to content neutrality casts a net that will encompass a wide range of regulations including regulations of airplane warnings, drug warnings, securities regulations, energy conservation labeling, and even signs at petting zoos.[50]

II. The Fate of Municipal Sign Codes Post-*Reed*

The Court's decision in *Reed* has significant consequences for the validity of local sign regulations. The key holding in *Reed* in terms of impact on municipal authority to regulate signs is the holding that categorical sign ordinances are content based when the category is defined by an aspect of the sign's message, which follows from the Court's adoption of the mechanical approach to the content neutrality analysis. Additionally, the majority opinion resolved the circuit split by clarifying that *both* facial content neutrality *and* a neutral purpose are required for sign codes, thereby calling into question hundreds of lower court decisions that had relied on *Ward* in upholding municipal sign codes that regulated signs according to category or function but which included clearly-articulated content neutral purpose statements.[51] Thus, it follows from *Reed* that sign ordinances that regulate signs based on their function—such as directional signs, event signs, and advertisements—like those on the books of many municipalities, are content based and therefore subject to strict scrutiny. As a result, not only is regulating signs in a content neutral manner that satisfies First Amendment limitations now more difficult for local governments, but many existing local codes are unconstitutional, and sign litigation, which was already expensive and risky, is likely to become even more frequent after *Reed*.[52]

A. CATEGORICAL NONCOMMERCIAL SIGN REGULATIONS

Perhaps most significantly for the thousands of municipalities with sign codes that contain some element of categorical or functional sign regulation, *Reed* left open the question of whether any regulation of signs by reference to their function or purpose can be content neutral. Clearly, following *Reed*, a sign code that regulates, for example, real estate signs and defines such signs by reference to their message (e.g., "[s]igns that identify or advertise the sale, lease or rental of a particular structure or land area"[53]) are content-based and subject to strict scrutiny. But *Reed* left open the question of whether a code is also content-based if it regulates based on function and function is determined by reference to something other than the sign's message (e.g., a code that regulates "a temporary sign placed on property which is actively marketed for sale, as the same may be evidenced by the property's listing in a multiple listing service"[54]). Connolly and Weinstein warn that "the *Reed* majority might find such a regulation to fail the content neutrality test, since *Reed* expresses concern about code provisions that define speech 'by its function or purpose.' "[55]

That said, many municipalities make functional distinctions between noncommercial sign types that can only be applied by reference to the content of the signs, and, according to the mechanical two-step test laid out in the majority opinion such sign ordinances are subject to strict scrutiny. So far (and not surprisingly), post-*Reed* cases involving noncommercial sign regulations have closely followed *Reed's* mechanical approach. Indeed, the sign ordinances in *Central Radio Co. v. City of Norfolk* and *Wagner v. City of Garfield Heights*, two cases the Court vacated and remanded following *Reed*, will probably appear familiar to many municipal attorneys and planners.[56] *Central Radio Co.* involved a zoning ordinance that governed the placement and size of signs with various restrictions depending on whether a sign is categorized as a "temporary sign," "freestanding sign," or an "other than freestanding sign,"[57] and *Wagner* involved a sign ordinance that, in essence, allowed more political lawn signs than non-political lawn signs in residential districts.[58] In each of these cases, the lower court had concluded that the regulation, although content-based on its face, was justified by valid governmental interests and was therefore subject to intermediate scrutiny.[59] But, under the first step of the *Reed* analysis, a content-neutral justification is irrelevant and each of these ordinances is subject to strict scrutiny.

Likewise, and unsurprisingly in light of *Reed*, in *Marin v. Town of Southeast*,[60] the

Southern District of New York held that the provisions of a town sign code that distinguished between political and non-political signs were facially unconstitutional. Like many sign codes across the country, the Town's code had exempted political signs from permit requirements provided the political signs met certain requirements, including certain durational requirements, and the code partially or fully exempted from these durational and other requirements several other types of signs, including temporary signs and directional signs.[61] Following *Reed*, the court held that the distinctions in the code between political and non-political signs were content based "because the restrictions on the signs 'depend[ed] entirely on the communicative content of [those] sign[s],' "[62] and the court rejected aesthetics and traffic safety as justifications for the content-based restrictions because the distinctions " 'fail as hopelessly underinclusive,' " because "[t]here is no reason to believe that temporary signs that reference a particular activity or event have a greater effect on aesthetics or traffic safety than construction, for sale, or holiday signs, or other signs that are exempted . . . , some of which are just as temporary as political signs."[63]

B. COMMERCIAL SIGN REGULATIONS

The sweeping invalidation of legitimate municipal exercises of the police power that would follow from broad application of *Reed* suggests that lower courts are more likely to apply *Reed* narrowly, relegating to dicta those portions of the opinion that cannot be synthesized with prior sign ordinance cases that took a more functionalist approach. Under a literal reading of Justice Thomas's majority opinion, even an on-premises/off-premises distinction is content based because the classification can only be enforced by reference to the content of the message. However, the on-premises/off-premises distinction was noted in Justice Alito's concurrence as one of the "rules that would not be content-based."[64] Moreover, the majority opinion in *Reed* did not expressly overrule, or even mention, *Central Hudson Gas & Electric Corp. v. Public Service Commission*[65] or *Metromedia, Inc. v. City of San Diego.*[66] Given that the Supreme Court disfavors a practice of overruling its own precedent by implication,[67] it would appear that distinctions between on- and off-site signs may still be judged by applying the lower level of scrutiny under the *Central Hudson* four-part test for regulations of commercial speech.[68]

Indeed, two weeks after *Reed* was decided the Central District of California ruled in *California Outdoor Equity Partners v. City of Corona* that "*Reed* does not concern commercial speech, let alone bans on off-site billboards," observing that "[t]he fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it."[69] Similarly, in *Citizens for Free Speech v. County of Alameda*, the Northern District of California distinguished *Reed*, holding that a sign ordinance that applied to commercial speech only was content neutral despite the fact that the determination of whether a sign is commercial requires reading the sign. Citing the court's duty to interpret zoning ordinances as constitutionally valid if fairly possible, the court held that "*Reed* has no applicability to the issues before the Court" because *Reed* was specifically concerned with a sign code's application of different restrictions, including temporal and geographic restrictions, to permitted signs based on their content" and the plaintiffs in *Citizens for Free Speech* had "not identified any distinct temporal or geographic restrictions on different categories of permitted signs [in the code at issue] based on those signs' content."[70] In *Contest Promotions, LLC v. City & Cnty. of San Francisco*, another Northern District of California decision, the court concluded that an on-site/off-site distinction survived intermediate scrutiny. The court explained that

> The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises. Therefore unlike the law in *Reed*, [the sign code at issue here] does not 'single[] out specific subject matter [or specific speakers] for disfavored treatment.' "[71]

In reaching this conclusion, the court noted both Justice Alito's concurrence, which stated that regulations that distinguish between on-site and off-site signs are not content-based, and that "*Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny."[72]

Similarly, the court in the Northern District of Illinois case *Peterson v. Village of Downers Grove*[73] ruled that Reed's mechanical test did not apply to commercial-based distinctions. Although the court observed that "[t]here are certain broad statements in *Reed* that could be read that way . . . , other statements tug the other way."[74] Despite this ambiguity, the *Peterson* court explained that "absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny . . . binding."[75] Likewise, the District of Utah found in *Timilsina v. West Valley City*[76] that it need not address how the regulation would fare under *Reed* because the case concerns commercial speech and therefore *Central Hudson* applies.

However, to the extent municipalities intend to rely on the Alito concurrence's list of examples of content neutral sign categories, including, for example, on- and off-premises distinctions, they should do so cautiously. The Alito concurrence is inconsistent with the majority reasoning, does not provide reasoning or citations to authority in support of the list of supposedly content neutral examples, and does not bind the lower courts. Recognizing these limitations, the court in the Western District of Tennessee case *Thomas v. Schroer* applied the *Reed* test to an on-premises/off-premises distinction when it granted a temporary restraining order[77] and preliminary injunction[78] for a billboard owner in a challenge to Tennessee's outdoor advertising law, which was adopted as a condition to receive Federal Highway funds. Although *Thomas* involved an on-premises/off-premises distinction in the context of noncommercial speech, the *Thomas* court observed that the statement in Justice Alito's concurrence in *Reed* that an on-premises exemption would be content neutral "ring[s] 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.' "[79] *Thomas* noted additionally that "[n]ot only is the concurrence not binding precedent, but the concurrence fails to provide any analytical background as to why an on-premise exemption would be content neutral."[80] Having concluded that the on-premises/off-premises distinction in the billboard law was likely content-based, *Thomas* then found that the distinction likely could not survive strict scrutiny.

> Similar to the petitioners in *Reed*, Defendants have failed to establish that limiting off-premise signs results in greater driver safety than limiting signs "advertising activities conducted on the property on which they are located." Nor have Defendants shown that imposing more stringent restrictions on off-premise signage affords superior protection of the public's investment in the highways or increases the promotion of recreational value of public travel and natural beauty.[81]

The *Thomas* court also observed in dicta that the same reasoning would apply "to preferential treatment of directional signs, signs advertising the sale or lease of property on which they are located, and signs pertaining to natural wonders and scenic and historical attractions."[82]

C. THE DEFINITION OF "SIGN"

Notably, many sign codes define the term "sign" itself by reference to the content of the message or who is displaying the message, and such distinctions are likely subject to strict scrutiny under the *Reed* test. For example, the Eighth Circuit ruled in *Neighborhood Enterprises, Inc. v. City of St. Louis*[83]—a pre-*Reed* decision that applied the mechanical content neutrality test—that a code provision that defined the term "sign" was content-based where it contained numerous exemptions including exemptions for flags, symbols and crests of certain organizations. The court found that the sign code's definition of "sign" was content-based because "the message conveyed determines whether the speech is subject to the restriction."[84] The court then held that even if the city's asserted interests in traffic safety and aesthetics were sufficiently compelling, the code's treatment of exempt and non-exempt signs was not narrowly-tailored to the city's asserted goals and thus the provision was unconstitutional.[85]

D. REMAINING AREAS OF UNCERTAINTY

Reed left open numerous questions. For example, the Court noted in dicta that "speaker based" regulations—i.e., ordinances that distinguish between who is giving the message (e.g., signs for gas stations)—are not necessarily content neutral, and therefore may also be subject to strict scrutiny.[86]

The case also left open how sign ordinance cases and related doctrine not cited in *Reed* will be applied in the future. Did the Court implicitly abrogate them, or, will lower courts attempt to synthesize *Reed* and the pre-*Reed* sign ordinance jurisprudence?[87] For example, *Reed* did not cite to or expressly abrogate cases applying the public forum doctrine,[88] secondary effects doctrine,[89] or government speech doctrine.[90] Post-*Reed* lower court rulings on commercial sign regulations, most of which continue to apply the *Central Hudson* test, suggest that the commercial speech doctrine remains good law.[91] Similarly, a recent Tenth Circuit opinion applied the public forum doctrine and did not apply, or even cite, *Reed* in reaching its determination that a court order that prohibited individuals from passing out jury nullification literature in a plaza outside the courthouse was content neutral (albeit not narrowly tailored).[92] With respect to the secondary effects doctrine, the Seventh Circuit in *BBL, Inc.*, recently explained that it does not "think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection."[93] Likewise, in *Vista-Graphics*, the Eastern District of Virginia rejected application of *Reed* and held that under the government speech doctrine displays of private group's informational materials and advertisements in state-owned welcome centers and rest areas are government speech not protected by the First Amendment.[94]

III. Conclusion

At a minimum, following *Reed* municipalities that have not already done so should act quickly to amend their sign codes if they regulate different categories of signs differently. For example, codes that place different restrictions on political or ideological signs than on directional signs will not withstand judicial review—such distinctions are now clearly content-based and therefore subject to strict scrutiny, and if the governmental justifications for the distinction are aesthetics and traffic safety, which they so often are, the distinction likely cannot withstand judicial review. Municipal attorneys should carefully consider distinctions in sign codes and other local laws that define regulated speech based on message, function or purpose, heeding *Reed's* warning that "[s]ome facial distinctions based on a message are obvious, . . . and others are more subtle, . . . [but] [b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[95]

Whether various related doctrines such as the commercial speech, public forum, secondary effects, and government speech doctrines, which were not at issue in *Reed*, remain good law is an open question, although lower courts appear disinclined to apply *Reed's* mechanical content neutrality approach to commercial sign regulations, and a few courts have held that *Reed* did not abrogate by implication these other doctrines. However, regardless of whether most courts ultimately apply *Reed* narrowly or broadly, uncertainty regarding the scope of *Reed* is likely to result in more claims that sign ordinances and other government regulations that distinguish based on categories that can be discerned only by reading or listening are unconstitutional. Indeed, the Seventh Circuit has already extended the holding of *Reed* to an ordinance that prohibited panhandling[96] and the Fourth Circuit has applied *Reed* to an anti-robocall statute that carved out exemptions for debt collectors among others, concluding that the statute failed under *Reed's* first step "because it makes content distinctions on its face," and, as a result, strict scrutiny applied whether or not the government's justification for the statute was content neutral.[97] Thus, although Reed as applied by the lower courts appears to be less sweeping in scope than Justice Breyer warned, the Court's adoption of the mechanical test invalidated many municipal sign codes, and the majority opinions' failure to address other relevant sign jurisprudence has increased uncertainty about the law, thereby increasing litigation risk and cost for many already cash-strapped municipalities.

ENDNOTES:

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[1]See Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

[2]This article incorporates with permission portions of Sarah J. Adams-Schoen, *Land Use Law Update: Will* Reed v. Town of Gilbert *Require Municipalities Throughout the Country to Rewrite Their Sign Codes?*, 29 Municipal Lawyer 16 (Winter 2015), and Sarah J. Adams-Schoen, *Land Use Law Update:* Reed v. Town of Gilbert *Redux*, 29 Municipal Lawyer 39 (Fall 2015).

[3]Weiss Serota Helfman Cole & Bierman, Blog, *Susan Trevarthen Co-Authors Amicus Curiae Brief to the US Supreme Court*, http://www.wsh-law.com/blog/17146/#sthash.LemdFBTW.dpuf (last visited Mar. 5, 2015).

[4]Reed v. Town of Gilbert, Ariz., 135 S. Ct. at 2235 (Breyer, J. concurring) (citing N.Y. Gen. Bus. Law Ann. § 399-ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit " 'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area' ")).

[5]Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); see also Hill v. Colorado, 530 U.S. 703, 721-22, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ("[W]e have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic."); McCullen v. Coakley, 134 S. Ct. 2518, 2531, 189 L. Ed. 2d 502 (2014) (recognizing that "by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects," but nevertheless finding the law facially neutral because it serves purposes unrelated to the content of expression and is justified without reference to the content of the regulated speech).

[6]Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816, 104 S. Ct. 2118, 80 L. Ed.

2d 772 (1984) (observing that differential treatment of political speech could create content neutrality problems for an otherwise content neutral ordinance banning the posting of private signs on light posts in the public right-of-way).

[7]See generally Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 Urb. Law. 569, 573 (2015); Brian J. Connolly, *Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation*, 2 Mich. J. Envtl & Admin. L. 185, 197 (2012).

[8]See, e.g., Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389 (3d Cir. 2010).

[9]See, e.g., Brown v. Town of Cary, 706 F.3d 294, 304-05 (4th Cir. 2013).

[10]See, e.g., H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 623 (6th Cir. 2009).

[11]See, e.g., ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012).

[12]See, e.g., Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798, 803-04 (9th Cir. 2007).

[13]491 U.S. at 791 (citations omitted).

[14]See, e.g., Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011), cert. denied, City of St. Louis v. Neighborhood Enterprises, Inc., 132 S. Ct. 1543 (2012).

[15]See, e.g, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005). See Connolly & Weinstein, supra n. 7, at 623 n. 43 (noting that "[t]his mechanical sequence for reviewing speech regulations was clearly identified by Justice O'Connor in her concurrence in Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring), and, prior to *Reed*, had been utilized by most courts reviewing challenges to sign regulations").

[16]Gilbert Sign Code § 4.402.

[17]Id.

[18]Reed v. Town of Gilbert, Ariz., 587 F.3d 966 (9th Cir. 2009).

[19]The district court's unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).

[20]Reed v. Town of Gilbert, Ariz., 707 F.3d 1057 (9th Cir. 2013), cert. granted, 134 S. Ct. 2900, 189 L. Ed. 2d 854 (2014) and rev'd and remanded, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

[21]Id. at 1071-72.

[22]Reed v. Town of Gilbert, Ariz., 587 F.3d 978 (9th Cir. 2009).

[23]707 F.3d at 1069.

[24]134 S. Ct. 2900 (2014).

[25]Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

[26]Justice Kennedy suggested at oral argument that the petitioner was "forcing us into making a very wooden distinction that could result in a proliferation of signs for birthday parties or for every conceivable event," all of which would enjoy the benefits of political signs. A transcript and audio recording of the oral argument can be accessed at http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona/?wpmp_switcher=desktop (last accessed Aug. 31, 2015).

[27]Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[28]Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228, 192 L. Ed. 2d 236 (2015).

[29]Id. at 2227.

[30]Id. at 2228.

[31]Id. at 2227 (quoting Ward, 491 U.S. at 791).

[32]Id. at 2228.

[33]Id. at 2229 (internal quotation marks and citation omitted).

[34]Id. at 2230 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[35]Id. at 2230.

[36]Id. at 2227.

[37]Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[38]Id. at 2230 (quoting 707 F.3d at 1069 (internal quotation marks omitted)).

[39]Id.

[40]Id.

[41]Id. (quoting Citizens United v. Fed'l Election Comm'n, 558 U.S. 310, 340 (2010)).

[42]Id. at 2222.

[43]Id. at 2230-31 (internal quotation marks and citation omitted).

[44]Id.

[45]Id. at 2233 (Alito, J., concurring).

[46]Id. at 2239 (Kagan, J., concurring).

[47]512 U.S. 43 (1994).

[48]135 S. Ct. at 2239 (Kagan, J., concurring).

[49]For a summary of the oral argument, see Lyle Denniston, *Argument Analysis: If a Law Turns Out to Be "Silly"* . . ., SCOTUS Blog, Jan. 12, 2015, 2:09 pm, http://www.scotusblog.com/2015/01/argument-analysis-if-a-law-turns-out-to-be-silly/.

[50]135 S. Ct. at 2235 (Breyer, J. concurring).

[51]Connolly & Weinstein, supra n. 7, at 586, citing Cahaly v. Larosa, 796 F.3d 399, 405 (4th Cir. 2015) (stating that Reed "abrogates [the court's] previous descriptions of content neutrality" and citing cases which held that, "when conducting the content-neutrality inquiry, '[t]he government's purpose is the controlling consideration' ") (citations omitted).

[52]Id. at 570.

[53]See Connolly & Weinstein, supra n. 7, at 588, citing Denver, Colo., Zoning Code § 10.10.3.1.G (2015); Amarillo, Tex., Sign Ordinance § 4-2-2 (2015).

[54]Id.

[55]Id.

[56]See Cent. Radio Co. v. City of Norfolk, 776 F.3d 229, 232-33 (4th Cir.), cert. granted, judgment vacated sub nom., 135 S. Ct. 2893 (2015); Wagner v. City of Garfield Heights, 577 F. App'x 488, 489-90 (6th Cir. 2014), cert. granted, judgment vacated, 135 S. Ct. 2888 (2015). The Court also vacated and remanded for consideration in light of *Reed* a case involving ordinances that prohibited panhandling and soliciting and restricted standing or walking on traffic islands or roadways. See Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014), cert. granted, judgment vacated sub nom., 135 S. Ct. 2887 (2015).

[57]776 F.3d at 232-33.

[58]577 F. App'x at 489-90.

[59]Wagner, 577 F. App'x at 492 (citing and quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 (1961)).

[60]Marin v. Town of Se., 136 F. Supp. 3d 548 (S.D.N.Y. 2015).

[61]Id. at 552.

[62]Id. at 568, citing Reed, 135 S. Ct. at 2227.

[63]Id. at 569, citing Reed, 135 S. Ct. at 2231. Note that in another Southern District of New York case, *Vosse v. City of New York*, the court refrained from applying *Reed* to a ban on illuminated signs above 40 feet because the plaintiff Vosse had no standing to challenge the Zoning Resolution as impermissibly content-based. No. 12 CIV. 8004 (JSR), 2015 WL 7280226, at *2 (S.D.N.Y. Nov. 18, 2015).

[64]Reed, 135 S. Ct. at 2233 (Alito, J., concurring).

[65]Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[66]Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

[67]See Agostini v. Felton, 521 U.S. 203, 237 (1997).

[68]See generally Connolly & Weinstein, supra n. 7.

[69]No. CV 15-03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015).

[70]Citizens for Free Speech, LLC v. Cnty. of Alameda, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015).

[71]Contest Promotions, LLC v. City & Cnty. of San Francisco, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).

[72]Id.

[73]Peterson v. Vill. of Downers Grove, No. 14 C 9851, 2015 WL 8780560, at *10 (N.D. Ill. Dec. 14, 2015) (citations omitted).

[74]Id. (citations omitted).

[75]Id. (citations omitted).

[76]Timilsina v. West Valley City, 121 F. Supp. 3d 1205 (D. Utah 2015).

[77]Thomas v. Schroer, 116 F. Supp. 3d 869 (W.D. Tenn. 2015), subsequent determination, 127 F. Supp. 3d 864 (W.D. Tenn. 2015).

[78]Thomas v. Schroer, 127 F. Supp. 3d 864 (W.D. Tenn. 2015).

[79]Id. at 873.

[80]Id.

[81]Id. at 874-75 (citations omitted).

[82]Id.

[83]Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011), cert. denied, City of St. Louis v. Neighborhood Enterprises, Inc., 132 S. Ct. 1543 (2012).

[84]Id. at 736.

[85]Id. at 738.

[86]Reed, 135 S. Ct. at 2230. See also Connolly & Weinstein, supra n. 7, at 586-87 and 601-05 (discussing *Reed* and speaker-based regulations).

[87]But see Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

[88]See, e.g., Verlo v. Martinez, No. 15-1319, 2016 WL 1395205, at *10 (10th Cir. Apr. 8, 2016).

[89]See, e.g., BBL, Inc. v. City of Angola, 809 F.3d 317, 326 (7th Cir. 2015).

[90]See, e.g., Vista-Graphics, Inc. v. Virginia Dep't of Transp., No. 2:15CV363, 2016 WL 1117479 (E.D. Va. Mar. 18, 2016).

[91]See supra Part II.B.

[92]Verlo, 2016 WL 1395205, at *10-*16; see also Left Field Media LLC v. City of Chicago, No. 15-3233, 2016 WL 2956879 (7th Cir. May 23, 2016) (affirming denial of publisher's motion for preliminary injunction in challenge to city's ordinances prohibiting peddling on public sidewalks adjacent to stadium and prohibiting peddling on public ways without peddler's license).

[93]BBL, Inc., 809 F.3d at 326 (citing City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000)).

[94]2016 WL 1117479, at *9-*10.

[95]Reed, 135 S. Ct. at 2227.

[96]Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015), cert. denied, 136 S. Ct. 1173 (2016).

[97]Cahaly v. Larosa, No. 14-1651, 2015 WL 4646922, at *4 (4th Cir. Aug. 6, 2015) (citing *Reed*, 135 S. Ct. at 2228 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.")).