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REED V. TOWN OF GILBERT: SIGNS OF (DIS)CONTENT?

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Reed v. Town of Gilbert, Arizona is a case about signs, and their regulation by a town government. Underlying this seemingly prosaic dispute – which somehow made its way to the United States Supreme Court – is a twisted tale of doctrinal confusion, and, perhaps, collapse. The case raises questions about the very meaning of the most basic principle of modern First Amendment doctrine: the distinction between content-based and content-neutral laws. The lower court decisions in this case, along with numerous other appellate decisions, demonstrate a fundamental confusion among the lower courts about the meaning of the phrase "content based." This confusion, in turn, has been spawned at least in part by some loose language in various Supreme Court opinions. More fundamentally, however, judicial rulings refusing to categorize laws such as Gilbert's regulation of signs as content-based – despite obvious doctri-

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nal reasons for doing so – suggest resistance on the part of the lower courts to the Supreme Court's insistence that all content-based restrictions on protected speech are presumptively unconstitutional. Moreover, I will argue, there are good reasons to question this rule, despite its canonical status.

THE TOWN OF GILBERT, ARIZONA AND PASTOR CLYDE REED

Like many municipalities, the Town of Gilbert, Arizona has adopted rules restricting the display of outdoor signs, both on private and public property. Article 4.4 of the Town of Gilbert Land Development Code establishes a default rule requiring a permit to display *any* outdoor sign, but then exempts from the permit requirement (with restrictions, as we shall see) nineteen different types of signs.[2] Three of those exemptions are relevant for our purposes: "Political Signs," "Ideological Signs," and "Temporary Directional Signs Relating to a Qualifying Event" (henceforth, "Qualifying Event Signs"). A Political Sign is defined as a "temporary sign which supports candidates for office or urges action on any other matter on the ballot . . ."[3] An Ideological Sign is a "sign communicating a message or ideas for noncommercial purposes that is not," among other things, a Political Sign or a Qualifying Event Sign.[4] Finally, a Qualifying Event Sign is a "temporary sign intended to direct pedestrians, motorists, and other passersby to" an assembly or event promoted by a religious or other nonprofit group.[5]

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[2] Reed v. Town of Gilbert, Arizona, 587 F.3d 966, 972 & n.2 (9th Cir. 2009) ("*Reed I*"). The Gilbert sign ordinance has been amended repeatedly over the course of the *Reed* litigation. I will generally focus on its most current incarnation, though occasionally note differences from previous versions.

[3] Reed v. Town of Gilbert, Arizona, 707 F.3d 1057, 1061 (9th Cir. 2013) ("*Reed II*").

[4] *Id*.

[5] *Reed I*, 587 F.3d at 972 n.3. Originally, this exemption was limited to Religious Assemblies, but Gilbert amended the ordinance soon after Good News filed suit. *Id*. at 972-73.

While Gilbert permits all three of these types of signs without a permit, it has imposed very different restrictions on each type of sign. Political Signs may be up to 32 square feet in size, may be put in place any time prior to an election (though they must be taken down 10 days after), and are not subject to numerical limits.[6] Ideological signs can be up to 20 square feet in size, and face no time or numerical restrictions.[7] Qualifying Event Signs, on the other hand, are limited to 6 square feet in size, can be erected only 12 hours before the relevant event, must be taken down within one hour after the event ends, and cannot exceed four signs on any single piece of property.[8] Finally, until October of 2011, Qualifying Event Signs, unlike Political and Ideological Signs, were excluded from public rights of way.[9]

Enter Clyde Reed. Reed is the Pastor of the Good News Community Church, a relatively small Christian congregation with fewer than fifty members.[10] Good News lacks a permanent sanctuary, and so meets in rented space – originally at an elementary school in Gilbert,[11] and later at an elementary school in neighboring Chandler, Arizona.[12] Reed and Good News believe the Bible requires them to "go and make disciples of all nations," and have for many years erected signs in Gilbert inviting others to their services, as the best means of carrying out this obligation.[13] Good News's signs, all concede, are "Qualifying Event Signs," subject to Gilbert's

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[6] *Reed II*, 707 F.3d at 1061.

[7] *Id*.

[8] *Id*.

[9] *Id*. In October of 2011, Gilbert amended its ordinance to remove this restriction. *Id.* at 1061 n.2. At the same time, it added a new restriction that Qualifying Event Signs had to refer to events within Gilbert. *Id*. at 1065. As we shall see, this new restriction had consequences for the plaintiffs in the *Reed* litigation, though not fatal ones.

[10] *Id*. at 1060.

[11] *Reed I*, 587 F.3d at 971.

[12] *Reed II*, 707 F.3d at 1060.

[13] *Id*. at 1060; *Reed I*, 587 F.3d at 971.

fairly onerous restrictions on such signs (notably, the combination of the 12 hour restriction and the timing of the Good News service at 9 a.m. means the signs are permitted primarily when it is dark[14]). Good News received several citations from Gilbert finding their signs in violation of the Code (primarily the durational limits), and eventually filed suit challenging Gilbert's code provisions regulating signs.[15]

The lower code proceedings were complex. In the first round of proceedings, the District Court concluded that § 4.402(P) of the Sign Code – the specific exemption for Qualifying Event Signs – was content-neutral, and survived intermediate scrutiny.[16] The Ninth Circuit affirmed these holdings, but remanded to consider whether the Gilbert Code's differential treatment of Political, Ideological, and Qualifying Event Signs posed a constitutional problem.[17] On remand, the District Court again found the Code as a whole content-neutral, and again denied relief.[18] On appeal, the Ninth Circuit again affirmed the District Court in all respects (though this time over a dissent).[19] Reed and Good News then filed for certiorari at the Supreme Court, arguing that the lower court decisions magnified a three-way circuit split over how to determine whether a sign regulation is content-based.[20] The Court granted cert.[21]

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[14] *Reed II*, 707 F.3d at 1079 (Watford, J., dissenting).
[15] *Reed I*, 587 F.3d at 972.
[16] *Id.* at 973.
[17] *Id.* at 982-983.
[18] *Reed II*, 707 F.3d at 1064-1065.
[19] *Reed II*, *passim.*
[20] *Reed v. Town of Gilbert, Arizona*, Petition for Writ of Certiorari 19-27, 2013 WL 5720386 (Oct. 21, 2013).
[21] Reed v. Town of Gilbert, Arizona, 134 S. Ct. 2900 (2014).

CONFUSION ABOUT CONTENT

It is perfectly clear that in its two decisions in this case, *Reed I* and *Reed II*, the Ninth Circuit held that neither § 4.402(P) of the Gilbert Sign Code nor the Sign Code as a whole regulated speech on the basis of content. As a consequence, pursuant to canonical Supreme Court doctrine, the law was subject to relatively deferential intermediate scrutiny rather than usually fatal strict scrutiny.[22] What was far less clear from the opinions was *why* the court reached this conclusion. In several places, both panels strongly suggested that the reason was because the Town of Gilbert was not motivated by the purpose of suppressing particular ideas. Thus in *Reed I*, the Ninth Circuit quoted the Supreme Court for the proposition that exemptions from otherwise neutral laws must be scrutinized because "an exemption . . . may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people."[23] The court went on to emphasize that "[n]othing in the regulation suggests any intention by Gilbert to suppress ideas through the Sign Code."[24] Similarly, in *Reed II* the court quoted language from *Colorado v. Hill* stating that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys,"[25] and then concluded that the Gilbert regulation is content neutral because "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed."[26] This certainly looks like an equation of content with intent.

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[22] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

[23] *Reed I*, 587 F.3d at 975 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994)).

[24] *Id*.

[25] *Reed II*, 707 F.3d at 1071 (quoting *Hill v. Colorado*, 530 U.S. 703, 719 (2000)).

[26] *Id*.

It must be conceded, however, that the court was not at all clear that this was what it was doing. In particular, in *Reed I* the court explicitly said that "Gilbert's unimpeached intentions, however, do not satisfy our inquiry."[27] It then went on to discuss two precedents regarding the nature of content regulation (both involving signs), and concludes that "our focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance."[28] Applying this principle, the court concluded that § 4.402(P) was not content-based because the definition of a Qualifying Event sign was triggered by "'who' is speaking and 'what event' is occurring" rather than by the singling out "an idea or viewpoint."[29] In *Reed II*, the court followed its previous decision to conclude that the ordinance as a whole was content neutral, concluding that the distinctions between Political, Ideological, and Qualifying Event signs "are based on objective factors relevant to Gilbert's creation of the specific exemption . . . and do not otherwise consider the substance of the sign."[30] While it is hard to know what exactly the court meant by that statement (the subsequent discussion is similarly un-illuminating), the court's repeated citations to *Reed I* suggest it is following the earlier panel's analysis, and treating the distinctions between the exemptions as content neutral because they relate to the nature of the "event" that was the topic of the sign, rather than to the message.

However the Ninth Circuit defined content, its analysis cannot be reconciled with the Supreme Court's extant doctrine. If the Ninth Circuit was defining content based on the government's

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[27] *Reed I*, 587 F.3d at 975.
[28] *Id.* at 976.
[29] *Id.* at 977-978.
[30] *Reed II*, 707 F.3d at 1069.

censorial intent, this is clearly inconsistent with binding precedent. Justice Kennedy's separate and controlling opinion in *Los Angeles v. Alameda Books, Inc*. explicitly states that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content-based."[31] The Court has similarly rejected the argument that that legislative intent to suppress ideas is necessary to find a law content based in many other cases.[32]

As noted earlier, however, it may well be that the Ninth Circuit was not equating content regulation with censorial intent, but rather relying on the "objective factors" triggering the sign ordinance exemptions. This approach, however, is equally flawed. To conclude, as both *Reed* panels did, that a law which treats different kinds of signs differently is content neutral because it is "based on objective criteria"[33] such as the nature of the event or the identity of the speaker is nonsensical. It is like saying that a law banning signs about the War in Afghanistan is triggered not by content, but by the nature of the event (the War). Clearly the Gilbert ordinance distinguishes signs for regulatory purposes based on the subject

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[31] 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

[32] *See, e.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 117 (1991) (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)) ("The Board next argues that [a law] is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'"); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-230 (1987) (finding a selective tax on publications to be content-based despite "no evidence of an improper censorial motive"); *cf.* Burson v. Freeman, 504 U.S. 191 (1992) (finding a law banning campaign speech near polling places to be content based, even though the law did not distinguish among ideas); Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972) (striking down law banning picketing outside of schools but permitting labor picketing, despite lack of evidence of hostility to particular ideas).

[33] *Reed II*, 707 F.3d at 1069.

matter of the sign – politics, ideology, or the location of an event. That is the very definition of a content-based law.

Whether the *Reed* panels were focusing on censorial intent or "objective factors," their analytic error appears to rest on confusion between content and viewpoint neutrality. Thus in *Reed I*, the court emphasized that "[n]othing in the regulation suggests any intention by Gilbert to suppress certain ideas."[34] Similarly, in *Reed II* the court noted that under the ordinance exemptions "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."[35] This, however, is the language of viewpoint discrimination, not content. To continue the Afghan War analogy, the court appears to believe that a law banning all discussion of the Afghan War would be content neutral, but only a law banning either support or opposition to the War content-based. This, however, is clearly incorrect. "[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."[36]

DISCONTENT WITH CONTENT

The analysis set forth in the previous section is fairly straightforward, black-letter stuff. How then did the Ninth Circuit get things so wrong, not once but twice? And why, given the seeming clarity of existing doctrine, has a three-way circuit split developed over the meaning of content? In the remainder of this paper, I will argue that the answers to both these questions can be found in developing (albeit subterranean) discomfort with the foundational principle of modern free speech doctrine: that all distinctions between speech based on content are presumptively impermissible.

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[34] *Reed I*, 587 F.3d at 975.
[35] *Reed II*, 707 F.3d at 1069.
[36] Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion).

As noted earlier, modern free-speech law is based on the foundational premise that content-based restrictions on speech are subject to strict scrutiny, and will almost always be invalidated. Moreover, because of the Court's broad definition of content, this rule encompasses not only laws that prefer certain ideas or viewpoints over others, but also laws which favor speech on certain subjects over others. The implications of this approach for the *Reed* litigation are clear, and well stated by Judge Watford, dissenting in *Reed II*:

> What we are left with, then, is Gilbert's apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations. That is precisely the value judgment that the First and Fourteenth Amendments forbid Gilbert to make.[37]

Judge Watford faithfully describes current law. The question he does not address, and which the majority also elides by finding the Sign Code content neutral, is *why* that should be so – why the First Amendment forbids Gilbert officials to make the "value judgment" that political speech is "categorically more valuable" than directional signs to events.

Perhaps the premise here is that all speech is created equal. But we know that is not true, since the Supreme Court has denied protection to certain categories of speech defined by content.[38] Even within the sphere of protected speech, the Court has held that at least one form of speech – commercial speech – is of lower value

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[37] *Reed II*, 707 F.3d at 1080 (Watford, J., dissenting).

[38] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Roth v. United States, 354 U.S. 476 (1957) (obscenity); New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Virginia v. Black, 538 U.S. 343 (2003) (cross burning).

than other protected speech, and so subject to greater regulation.[39] If these distinctions can be made, why can't courts – and legislatures – draw further distinctions based on subject matter among different forms of fully-protected speech, so long as it can be demonstrated that the distinction does not distort debate or favor particular viewpoints? No answer is evident.

That current doctrine – as correctly described by Judge Watford – forbids placing higher value on political and ideological speech than other speech is particularly bizarre. It is, after all, well-established, and the Supreme Court has repeatedly stated, that the primary – if not necessarily the only – underlying purpose of the First Amendment is to advance democratic self-government, and therefore political speech *is* the most valuable from of speech from a First Amendment perspective.[40] If the Court can acknowledge the central place of political speech in the First Amendment pantheon, why is it that the Town of Gilbert cannot?

It is unsurprising this question has come to a head in disputes over signs, as the conundrum that Gilbert officials faced illustrates. Space on public rights of way is limited and, even on private property, an excess of signs can threaten safety and aesthetic values. The Town could, I suppose, have flatly banned all signs in rights of way, and sharply restricted signs visible from public places – such an approach would at the least be content-neutral. But access to rights of way is critical to be able to effectively communicate political messages, especially during election season, so such an approach would have huge social costs. The implication of current doctrine, however, is that once the Town opens the rights of way to political signs or permits large political signs, it must permit *all*

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[39] Central Hudson Gas v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562-63 (1980).

[40] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 269-270 (1964); Buckley v. Valeo, 424 U.S. 1, 53 (1976); Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011); Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012).

signs on the same terms. Indeed, the Court's doctrine (particularly bizarrely) suggests that the Town cannot even exclude commercial signs if it permits noncommercial ones.[41] In essence, the doctrine tells the town that Gilbert cannot allocate a limited resource – public rights of way and visual space – to its highest value use. In any other context we would say that this is the height of irrationality. Yet in free speech law we have enshrined it as a core constitutional principle. The question that *Reed* permits the Supreme Court to consider is whether it wishes to continue on this rigid and seemingly irrational path.

[41] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (striking down ordinance banning news racks containing commercial handbills while permitting news racks containing newspapers as an impermissible content-based regulation).