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Legal Alert

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QUESTION: Can a Town Punish a Church For Signs About Sunday Church Services?

ANSWER: Sign Ordinances Can't Treat Church Signs Differently From Other Signs!

Where's the Church?

The Town of Gilbert, Arizona, had a sign ordinance that favored "Ideological Signs" and "Political Signs" over signs that advertised the time and location of Sunday church services. So, for example, a large permanent sign denouncing religion would be treated better than temporary signs posted on Saturday mornings and removed on Sunday afternoons telling people where church services were being held. *Reed v. Town of Gilbert*, 576 U.S. ____ (2015). Heck, the Gilbert Sign Code treated the Church's "temporary directional signs even less favorably than political signs."

The Good News Community Church and its pastor, Clyde Reed, wanted to let people know where and when the Church held Sunday services. "The Church is a small cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town." To let people know where and when the Sunday services would be held, church members would place 15 to 20 temporary signs near Gilbert streets. The signs included the name of the Church and the time and location of the upcoming service. The signs were posted on Saturday mornings and removed shortly after noon on Sundays.

"This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code." The compliance manager told the pastor that he would allow "no leniency under the Code" and would punish the Church for violations. "Town officials even confiscated one of the Church's signs...." The Church and the pastor sued.

All nine of the Supreme Court justices agreed that the sign code violated the First Amendment. Nevertheless, the justices required four separate opinions to explain why the ban on advertising of church services violated the First Amendment guarantee of freedom of speech.

Content-based restrictions on speech must meet a "strict scrutiny" test.

The majority opinion of six of the justices said that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or

its content." "Content-based laws" are presumed to be unconstitutional unless the government proves "they are narrowly tailored" and promote "compelling state interests." The majority said that content-based restrictions abridging the freedom of speech were subject to a "strict scrutiny test."

The "laugh test" versus the strict scrutiny test.

Justice Kagan, on the other hand, said that Gilbert's Sign Code presented "an easy case" for the Court to decide that the code was unconstitutional. She didn't need a "strict scrutiny" test to decide the case. "The Town of Gilbert's defense of its sign ordinance—most notably the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."

Justice Kagan was concerned whether the Court's approach would ban "Blind Pedestrian Crossing," "Hidden Driveway," and "George Washington Slept Here" signs. She thought that the "Court and others will regret the majority's [opinion]." "This Court may soon find itself a veritable Supreme Board of Sign Review."

The "Rule of Thumb" test!

Justice Breyer didn't think that a strict scrutiny test was needed. Justice Breyer thought that "content discrimination" could be decided "as a rule of thumb." "The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb…."

What Sign Restrictions might be constitutional?

Justice Alito and two other justices agreed that a "strict scrutiny" test was needed, but provided a list of examples of signs that would be okay. Justice Alito said that rules would be constitutional if they were content-neutral and dealt with: (1) the size of signs; (2) the locations of signs; (3) the lighting of signs; (4) signs with changing messages; (5) signs on private as opposed to public property or vice versa; (6) signs on commercial or residential properties; (7) signs that are either on or off premises; (8) the number of signs; or (9) time restrictions on signs.

Justice Kagan commended Justice Alito's attempt to limit, the Court's opinion, but didn't think it would save many "entirely reasonable" sign ordinances from judicial jeopardy.

If you don't have time to read four overlapping Supreme Court opinions and you are concerned whether government is "abridging the freedom of speech," please call me for practical advice.

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