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A Look Back at *Reed v. Town of Gilbert*

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Special Contribution

A Look Back at *Reed v. Town of Gilbert*

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Three years have passed since the Supreme Court of the United States invalidated the Sign Code enacted by the Town of Gilbert, Arizona (the Town), and virtually every other sign ordinance enacted by local governments across the country.[1] *Reed v. Town of Gilbert*[2] arose when the Town determined that temporary signs advertising the place and time of the transient Sunday services conducted by the Good News Community Church (the Church), led by Pastor Clyde Reed, violated its Sign Code. The Church was cited for Sign Code violations, and the Church challenged the Sign Code on constitutional grounds in the United States District Court for the District of Arizona. The district court upheld the constitutionality of the Town's Sign Code on summary judgment, and the United States Court of Appeals for the Ninth Circuit affirmed.[3] The Supreme Court granted certiorari.[4] Overruling the lower courts, the

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1. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015). *Reed* is of note in the State of Georgia because the author of the majority opinion, Justice Clarence Thomas, is a Georgia native and several attorneys that represented the Town are based in the state.

2. 135 S. Ct. 2218 (2015).

3. *Id.* at 2225–26.

4. *Id.* at 2226.

Supreme Court subjected the Town's Sign Code to strict scrutiny analysis and held that it violated the First Amendment of the United States Constitution[5] as an unconstitutional regulation of speech content.[6] Instantly, every jurisdiction that had passed a sign ordinance learned that its regulations must pass constitutional muster under strict scrutiny analysis and that any sign regulation could be interpreted as content-based on its face.[7]

After *Reed*, many sign ordinances are still in effect yet contain unchallenged, potentially unconstitutional content-based regulations. Even though *Reed* purports to establish a simple rule that content-based sign regulations violate the First Amendment, the line between an "entirely reasonable"[8] sign regulation and one that is constitutionally infirm after being subjected to strict scrutiny constitutional analysis has yet to be drawn. As Justice Kagan poignantly noted in her concurrence:

> The consequence of [the majority opinion]—unless courts water down strict scrutiny [for First Amendment sign challenges] to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.[9]

On the other hand, "entirely reasonable" sign ordinances may need to give way. As Justice Thomas espoused, "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'"[10] Thus, the constitutionality of sign regulations under the jurisprudence of the United States Court of Appeals for the Eleventh Circuit will not be settled until the contours of *Reed*'s sweeping rule are refined in cases with the right factual circumstances and litigants.

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5. U.S. CONST. amend. I.

6. *Reed*, 135 S. Ct. at 2228–29, 2233.

7. *Id.* at 2228–29.

8. *See id.* at 2239 (Kagan, J., concurring) ("Because I see no reason why such an easy case calls for us to cast a constitutional pall on *reasonable regulations* quite unlike the law before us, I concur only in the judgment." (emphasis added)).

9. *Id.* at 2237.

10. *Id.* at 2231 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)).

I. *REED'S* ELEVENTH CIRCUIT AND GEORGIA PREDECESSORS

Constitutional challenges to sign ordinances based on alleged unconstitutional content regulation in Georgia and the Eleventh Circuit precede *Reed* by more than twenty years. *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*,[11] the premier Georgia case involving a constitutional challenge to a sign ordinance based on content regulation, involved a sign ordinance that distinguished between "on-premise" and "off-premise" signs.[12] An "on-premise" sign was typically a sign which advertises "a product, service, [or] person . . . located or obtainable on . . . the lot where such sign is located."[13] Conversely, an "off-premise" sign was defined as a sign which advertises "a product, service, [or] person . . . located or obtainable elsewhere other than the lot where such sign is located."[14] The restriction limited "on-premise" signs to commercial messages concerning the goods or services offered at the site of the particular business.[15] This content-based distinction sparked the constitutional challenge.[16]

In its opinion in *Union City*, the Georgia Supreme Court noted that, in *Messer v. City of Douglasville*,[17] the Eleventh Circuit upheld the constitutionality of an ordinance that distinguished between "on-premise" and "off-premise" content, determining that the "on-premise/off-premise distinction is viewpoint neutral and, 'regulates signs not based on the viewpoint of the speaker, but based on the location of the signs.'"[18] However, the Georgia Supreme Court instead followed the Supreme Court of the United States' holding in *Metromedia, Inc. v. City of San Diego*,[19] affirming the trial court's holding that the "prohibition against the display of noncommercial messages in places where commercial signs are permitted violate[s] the First Amendment of the United States Constitution and the Free Speech Clause of the Georgia Constitution."[20] Subsequently, in *Fulton County v. Galberaith*,[21] the Georgia Supreme Court similarly held that a provision of the Fulton County sign

11. 266 Ga. 393, 467 S.E.2d 875 (1996).
12. *Id.* at 394, 467 S.E.2d at 878.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See id.* at 394–95, 467 S.E.2d at 878.
17. 975 F.2d 1505 (11th Cir. 1992).
18. *Union City*, 266 Ga. at 397, 467 S.E.2d at 880 (quoting *Messer*, 975 F.2d at 1509).
19. 453 U.S. 490 (1981).
20. *Union City*, 266 Ga. at 394–97, 467 S.E.2d at 878–79.
21. 282 Ga. 314, 647 S.E.2d 24 (2007).

ordinance, which prohibited off-premise signs in commercially-zoned areas, violated the First Amendment.[22]

Simultaneously, the Eleventh Circuit and federal district courts in Alabama, Florida, and Georgia became embroiled in sign ordinance test cases brought by three companies–Granite State Outdoor Advertising, Inc. (Granite State), KH Outdoor, LLC (KH) and Tanner Advertising Group, LLC (Tanner) (collectively, Advertisers). The exact relationship between these companies is unclear, but they shared counsel and plainly cooperated in litigation to challenge sign ordinances in all three states.[23] Their target jurisdictions had enacted sign regulations that limited the location and size of billboards and restricted billboard content to commercial speech. The Advertisers submitted multiple sign permit applications in each jurisdiction, anticipating their denial. Once the permits were denied, the contrived challenge to the constitutionality of content-based sign regulation was postured, and an immediate challenge to permit denial on constitutional grounds was filed with the applicable federal district court.[24]

The Advertisers' legal challenges to sign ordinances foreshadowed *Reed*. Unrelated to the Advertisers, the United States District Court for the Northern District of Georgia held in *Lamar Advertising Co. v. City of Douglasville*[25] that Douglasville's sign ordinance was unconstitutional under First Amendment strict scrutiny analysis because it was content-based and granted unbridled discretion to approve sign permits.[26] However, the Eleventh Circuit seemed less strict in cases involving the Advertisers, focusing on standing and procedural limitations while avoiding the facial constitutional attacks on the regulating ordinances. In *Granite State Outdoor Advertising, Inc. v. City of Clearwater*,[27] the court held that it was proper to deny a permit for an oversized sign under a sign ordinance that was content-neutral.[28] In *Granite State Outdoor*

22. *Id.* at 319, 647 S.E.2d at 28.

23. KH and Granite were parties to a settlement agreement with the City of John's Creek on October 20, 2014, resolving thirty-one billboard permit applications that were first challenged in 2006. *See generally* Settlement Agreement, Action Outdoor Advert. JV, LLC v. Fulton Cty. (Oct. 20, 2014), Nos. 2005CV10977, 2005CV107555, 2005CV109918, 2006CV114781, 2006CV117063, *available at* https://johnscreekpost.com/wp-content/uploads/2016/09/Billboard_settlement_agreement.pdf; *see also* KH Outdoor, LLC v. Fulton Cty., 433 F. App'x 775 (11th Cir. 2011). Wayne Charles is identified as a principal of Granite State in *Coffey v. Fayette County*, 289 Ga. App. 153, 153, 656 S.E.2d 262, 263 (2008).

24. *Id.*

25. 254 F. Supp. 2d 1321 (N.D. Ga. 2003).

26. *Id.* at 1339–40.

27. 351 F.3d 1112 (11th Cir. 2003).

28. *Id.* at 1117.

Advertising, Inc. v. City of Fort Lauderdale,[29] *Granite State Outdoor Advertising, Inc. v. Cobb County*,[30] and *Granite State Outdoor Advertising, Inc. v. City of Roswell*,[31] Granite State lacked standing to challenge alleged prior restraints on speech in the ordinances, which did not impact the permit applications.[32]

On the other hand, the Advertisers succeeded in *KH Outdoor, LLC v. City of Trussville*,[33] challenging an ordinance that restricted the content of billboards to commercial speech and their location to property adjoining interstate highways.[34] The Eleventh Circuit applied strict scrutiny analysis and held that the Trussville ordinance was an unconstitutional content-based speech regulation under the First Amendment.[35] The City of Trussville was enjoined from denying KH all eleven permits for which it applied.[36] In *Coffey v. Fayette County*,[37] the Georgia Supreme Court held that the Georgia Constitution provided "even broader protection than the First Amendment . . . requir[ing the] government to adopt the least restrictive means of achieving its [legislative] goals."[38] The *Coffey* litigation included several appeals to Georgia's appellate courts. Where they were unsuccessful, the Advertisers usually petitioned for Supreme Court review. However, the Supreme Court denied each application for certiorari.[39] Had certiorari been granted to the Advertisers' appeals, the Supreme Court would have confronted challenges to sign regulations on the same grounds presented in *Reed*.

II. PASTOR REED'S CHURCH AND THE TOWN'S SIGN ORDINANCE

Justice Thomas's opinion in *Reed* proffers a pure strict scrutiny analysis by which all sign ordinances that can conceivably be facially

29. 194 F. App'x 754 (11th Cir. 2006).

30. 193 F. App'x 900 (11th Cir. 2006).

31. 283 Ga. 417, 658 S.E.2d 587 (2008).

32. *City of Fort Lauderdale*, 194 F. App'x at 757–58; *Cobb Cty.*, 193 F. App'x at 905–06; *City of Roswell*, 283 Ga. at 421–22, 658 S.E.2d at 590.

33. 458 F.3d 1261 (2006).

34. *Id.* at 1264–65.

35. *Id.* at 1271.

36. *Id.* at 1273.

37. 279 Ga. 111, 610 S.E.2d 41 (2005). Coffey was joined as a plaintiff by Wayne Charles, a principal of Granite State. *See* Coffey v. Fayette Cty., 289 Ga. App. 153, 153, 656 S.E.2d 262, 263 (2008).

38. *Id.* at 111, 610 S.E.2d at 42. *See also* Tinsley Media, LLC v. Pickens Cty., 2005 WL 6211222 (N.D. Ga. 2005).

39. Granite State Outdoor Advert., Inc. v. City of Fort Lauderdale, 551 U.S. 1102 (2007); Granite State Outdoor Advert., Inc. v. City of Clearwater, 543 U.S. 813 (2004).

content-based will be judged. All of the justices, concurring in at least the judgment, reached the conclusion that, because the Town's Sign Code on its face regulated "signs based on the type of information they convey" and imposed "different restrictions" based thereon, it was unconstitutionally underinclusive.[40] The problem evident in the multiple separate opinions filed is that the justices appear to have very different ideas of what constitutes a proper regulation.

The Church, in *Reed*, lacked a set location at which to hold their services. Therefore, it deployed twenty or less temporary signs bearing the Church's name and the time and location of its next service. Typically, the Church placed the signs in the public right-of-way from Saturday morning until Sunday afternoon. Under the Sign Code, the Town required a permit to display an outdoor sign unless it fell within one of twenty-three categories of exceptions. The rules and regulations applicable to each sign varied with the categories.[41] The Church's signs constituted "Temporary Directional Signs Relating to a Qualifying Event" (Temporary Directional Sign), which were permitted during a limited time frame.[42] Specifically, a Temporary Directional Sign could be displayed on private property or in the public right-of-way for only twelve hours before a "qualifying event"[43] and one hour thereafter with a maximum of four signs per parcel. Additionally, a Temporary Directional Sign could not be more than six square feet in area. The Town twice cited the Church for violating the time limitation.[44]

However, the Sign Code gave a "Political Sign," for example, more favorable treatment than Temporary Directional Signs. Defined as a "temporary sign designed to influence the outcome of an election called by a public body," a political sign could be erected sixty days before a primary election and for fifteen days after the general election.[45] Such a sign could also be placed on undeveloped municipal property, residential and nonresidential property, and the public right-of-way. Finally, a political sign was limited to a maximum area of thirty-two square feet,

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40. *Reed*, 135 S. Ct. at 2224.

41. *Id.* at 2224–25.

42. *Id.* at 2225 (quoting Gilbert, Ariz., LAND DEV. CODE § 4.402(P) (2005)).

43. *Id.* The Ordinance defined a *qualifying event* as an "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, education, or other similar nonprofit organization." *Id.* (quoting Gilbert, Ariz., LAND DEV. CODE, Glossary of Gen. Terms 25 (2005)).

44. *Id.* (quoting Gilbert, Ariz., LAND DEV. CODE § 4.402(P)). The second citation also noted "the Church's failure to include the date of the event on the signs." *Id.*

45. *Id.* at 2224 (quoting Gilbert, Ariz., LAND DEV. CODE, Glossary of Gen. Terms 23); Gilbert, Ariz., LAND DEV. CODE § 4.402(I) (2005).

except for a political sign on residential property which could only be up to sixteen square feet.[46]

Additionally, a sign with a message that qualified it as an "Ideological Sign" received even more preferential treatment. An Ideological Sign was defined as one "communicating a message or ideas for noncommercial purposes" and not qualifying as "a Construction Sign, Directional Sign, Temporary Directional Sign . . . Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency."[47] Such a sign could be up to twenty square feet and "be placed in all 'zoning districts' without time limits."[48]

After the Church was told that the Town would grant it "no leniency under the [Sign] Code," the Church, led by Pastor Reed, filed suit in the United States District Court for the District of Arizona alleging that the Sign Code was unconstitutional on its face and violated freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States of America. The district court denied the Church's request for a preliminary injunction, and the Ninth Circuit affirmed. On remand, the district court found that the Sign Code's categories of signs were content-neutral and passed constitutional scrutiny. The Ninth Circuit again affirmed.[49] The Supreme Court granted certiorari and reversed.[50]

III. JUSTICE THOMAS'S OPINION

Justice Thomas's opinion began by reiterating that content-based sign regulations are restrictions on freedom of speech that "are presumptively unconstitutional" and must survive strict scrutiny analysis.[51] The enacting government bears the burden of proof to show that a content-based sign regulation is "narrowly tailored to serve compelling state interests."[52] A law is content-based if, on its face, it distinguishes speech based on topic, idea, or message.[53] Content-based regulations are obviously *facially content-based* if they regulate speech based on either the particular subject matter or the function or purpose of the speech.[54] However, *facially content-neutral* regulations are still content-based

46. *Reed*, 135 S. Ct. at 2224–25; Gilbert, Ariz., LAND DEV. CODE § 4.402(I).

47. *Reed*, 135 S. Ct. at 2224 (quoting Gilbert, Ariz., LAND DEV. CODE, Glossary of Gen. Terms 23).

48. *Id.* (quoting Gilbert, Ariz., LAND DEV. CODE § 4.402(J) (2005)).

49. *Id.* at 2225–26.

50. *Id.* at 2226.

51. *Id.*

52. *Id.* at 2226, 2231.

53. *Id.* at 2227.

54. *Id.*

regulations if they are unable to "be 'justified without reference to the content of the regulated speech'" or are based on the government's disagreement with the message.[55] If the sign regulation's justification is content-based, then its facial neutrality is irrelevant to constitutional analysis.[56] Additionally, the government's motive for enacting the sign regulation is only relevant if the regulation is content-neutral.[57]

Clearly, the Town's Sign Code regulated signs differently based on their "communicative content"—the topic[58] of the sign—and thus, constituted a facially content-based regulation.[59] Drawing an example from his current reading list, Justice Thomas demonstrated the Sign Code's facially content-based nature.[60] Justice Thomas noted that various signs, all related to John Locke's Two Treatises of Government, are treated differently under the ordinance.[61] A Temporary Directional Sign advertising the time and location of a book club discussion of Locke's treatises is treated differently than a "Political Sign" supporting a candidate that follows Locke's principles.[62] Further, both signs receive inferior privileges to "a sign expressing an ideological view rooted in Locke's theory of government."[63] Since the Church's signs were treated differently from other signs based on their content—information about a "qualifying event"—the Sign Ordinance was content-based on its face and, therefore, subject to strict scrutiny.[64]

Even accepting as compelling the Town's stated interests of preserving aesthetic appeal and protecting traffic safety, the Sign Code's categories of twenty-three exemptions failed the strict scrutiny analysis "as hopelessly underinclusive."[65] The Town could not show that the different rules for the various categories of signs were narrowly tailored to preserve aesthetics and assist traffic safety.[66] For example, Temporary Directional Signs were limited in number while Ideological Signs were allowed "unlimited proliferation,"[67] though both can distract drivers and

55. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
56. *Id.*
57. *Id.* at 2228–29.
58. *Id.* at 2230.
59. *Id.* at 2227.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 2231.
66. *Id.* at 2231–32.
67. *Id.* at 2231.

impact traffic safety.[68] The Court, in its rebuke of the circuit court's analysis, justified its sharp rule, stating: "The First Amendment requires no less. 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."[69]

Justice Thomas enumerated several valid criteria that can be used to regulate signs, including: "size, building materials, lighting, moving parts, and portability."[70] Additionally, his opinion would allow a total prohibition of signs posted on public property if the regulation "does so in an evenhanded, content-neutral manner."[71] Presumably, other criteria, such as distinctions among zoning districts may also be permissible. The majority opinion, however, only provided an illustrative, but certainly not exhaustive, list of possible bases for regulation that may survive strict scrutiny analysis, but otherwise, it did not offer much guidance.[72] Finally, Justice Thomas offered the consolation that a sign ordinance might survive strict scrutiny if it is narrowly tailored to, for example, ensuring safety of drivers, passengers, and pedestrians.[73] However, such ordinances are rare.

IV. THE ALITO CONCURRENCE JUSTIFIES AND ATTEMPTS TO CLARIFY

Justice Alito's concurrence, joined by Justices Kennedy and Sotomayor, attempted to give some guidance to local governments on the revisions required to make their sign ordinances comply with *Reed*.[74] First, Justice Alito reiterated the need for *Reed*'s sharp rule: "Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."[75] Then, he tried to identify safe harbors that will not run afoul of *Reed*.[76] He suggested that non-content-based regulations could relate to: (1) the "locations," presumably zoning districts, "in which signs may be placed;" (2) fixed versus electronic or moving messages; (3) signs on-premises and off-premises; (4) sign density; and (5) temporary restrictions for one-time

68. *Id.* at 2232.
69. *Id.* at 2229.
70. *Id.* at 2232.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2233 (Alito, J., concurring).
75. *Id.*
76. *Id.*

events.[77] Justice Alito's concurrence ignores that on- and off-premise sign regulations by definition regulate sign content, as noted above in the Eleventh Circuit cases that precede *Reed*. Further, his concurrence shows that identification of unconstitutional content-based sign regulations may depend on the personal sensibilities of the justices or other appellate court. As Justice Kagan noted in a footnote to her concurrence:

> Even in trying (commendably) to limit today's decision, Justice Alito's concurrence highlights its far-reaching effects. According to Justice Alito, the majority does not subject to strict scrutiny regulations of "signs advertising a one-time event." But of course it does. On the majority's view, a law with an exception for such signs "singles out specific subject matter for differential treatment" and "defin[es] regulated speech by a particular subject matter." Indeed the precise reason the majority applies strict scrutiny here is that "the [Sign] Code singles out signs bearing a particular message: the time and location of a specific event."[78]

Then, Justice Alito rebutted that a temporary sign for a one-time event is like temporal ordinances related to oral speech or music—in other words, noise ordinances.[79]

V. THE BREYER AND KAGAN CONCURRENCES—READ, DISSENTS

Justice Kagan, joined by Justices Ginsburg and Breyer, concurred with the judgment of the court, but separately refuted *Reed*'s majority rule. Her concurrence noted that local governments across the country have sign ordinances that "exempt[] certain categories of signs based on their subject matter."[80] And, these ordinances will most likely be struck down because "it is the 'rare case[] in which a speech restriction withstands strict scrutiny.'"[81] She urged that the invalidation of a substantial number of local governments' sign ordinances does not support the majority's articulated rationale for subjecting content-based regulations to strict scrutiny.[82] Specifically, nullifying sign ordinances, even those that regulate based on subject matter, does not preserve the

77. *Id.*

78. *Id.* at 2237 n.* (Kagan, J., concurring) (quoting *id.* at 2227, 2230 (majority opinion), *id.* at 2233 (Alito, J., concurring)).

79. *Id.* at 2233 (Alito, J., concurring).

80. *Id.* at 2236 (Kagan, J., concurring).

81. *Id.* (alteration in original) (quoting Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015)).

82. *Id.* at 2237.

free marketplace of ideas or ensure that the government has not regulated speech based on favoritism or hostility toward the message or speaker.[83] In short, these ordinances reflected no "realistic possibility that official suppression of ideas is afoot."[84]

Instead, Justice Kagan suggested that the Court apply its content-based regulation precedent "with a dose of common sense,"[85] thereby leaving regulations that do not implicate these concerns undisturbed.[86] In fact, she argued in her concurrence that the Court's precedent shows that it has done just that, contrary to the majority's assertion that binary tests like *Reed*'s rule have been the norm.[87] She cited *Members of City Council of Los Angeles v. Taxpayers for Vincent*,[88] decided thirty-one years earlier, where the Court declined to require strict scrutiny analysis to evaluate the constitutionality of an ordinance that exempted markers commemorating cultural, historical, or artistic events and address numbers from a regulation limiting the maximum number of sidewalk signs.[89] Justice Kagan noted that, in *Members*, the Court applied intermediate scrutiny and upheld the ordinance because the government's "enactment and enforcement revealed 'not even a hint of bias or censorship.'"[90]

Similarly, she cited *City of Ladue v. Gilleo*,[91] in which the Court held that a regulation exempting safety signs, for-sale signs, and address signs in a residential zoning district did not trigger strict scrutiny,[92] though the underinclusive nature of the regulation meant it was unconstitutional under any level of scrutiny.[93] In *City of Ladue,* the sign regulation's underinclusiveness was the same as in *Reed* or, as Justice Thomas noted in the majority opinion, the ordinance was "hopelessly underinclusive."[94] Accordingly, Justice Kagan argued that there was no need for the majority to adopt *Reed*'s rule and effectively invalidate every local government sign ordinance across the country that contains a

83. *Id.*

84. *Id.* (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

85. *Id.* at 2238.

86. *Id.*

87. *Id.*

88. 466 U.S. 789 (1984).

89. *Id.* at 804–10.

90. *Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring) (quoting *Members of City Council of Los Angeles*, 466 U.S. at 804).

91. 512 U.S. 43 (1994).

92. *Id.* at 46–47, 47 n.6.

93. *Id.* at 58.

94. *Reed*, 135 S. Ct. at 2231.

subject-matter exemption.[95] *Reed*'s rule, nonetheless, will raise its head in courts throughout the land destroying "entirely reasonable" sign regulations when "vindication of First Amendment values [does not] require[] that result."[96]

Justice Breyer's disdain for *Reed*'s rule compelled him to file a separate concurring opinion, but join Justice Kagan's concurrence.[97] He argued, like Justice Kagan, that the court should apply common sense to sign regulations because content regulation "cannot and should not *always* trigger strict scrutiny"[98] since regulation almost always impacts content.[99] According to Justice Breyer, *Reed*'s strict scrutiny analysis prescribes judicial management of normal regulatory activity.[100] However, Justice Breyer believed that the Town's Sign Code was unconstitutional.[101] His concurrence suggested the following approach: "[G]enerally 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 . . . ."[102] In other words, the Court's First Amendment analysis should weigh the harm to First Amendment rights against the regulation's objectives, based on analysis factors which include: (1) the harm to First Amendment interests; (2) the importance of the regulation's objectives; (3) the extent to which the regulation will achieve those objectives; and (4) whether other, less restrictive means exists.[103]

VI. THE RESPONSE TO *REED*, ITS IMPACT AND SIGNIFICANCE

When first issued, the *Reed* decision initially threw local governments into a frenzy. There was much hand-wringing over the prospect that sign ordinances everywhere were unconstitutional and subject to immediate challenge. There was a rush to develop compliant sign regulations. Discussions immediately commenced about enacting sign permit moratoria. As time passed, some jurisdictions acted promptly, while others did not. Local governments had two choices: strip ordinances down to the majority's criteria, whatever that might be, or wait and see. A non-scientific survey of jurisdictions within Alabama, Florida, and Georgia

95. *Id.* at 2239 (Kagan, J., concurring).
96. *Id.* (emphasis omitted).
97. *Id.* at 2234 (Breyer, J., concurring).
98. *Id.* (Breyer, J., concurring).
99. *Id.*
100. *Id.*
101. *Id.* at 2236.
102. *Id.* at 2235.
103. *Id.* at 2235–36.

suggests many local governments have not amended their sign ordinances to conform to *Reed*. As they wait for additional cases to interpret *Reed* and provide more guidance as to its application, their sign ordinances are subject to challenges that may be waiting in the wings. At some point, jurisdictions must develop content-neutral sign regulations that do not run afoul of *Reed*. Until the regulatory revisions implemented in response to *Reed* are judicially tested in a series of opinions, there will be no authoritative guidance. However, there is obvious risk inherent in a jurisdiction's decision to wait and see.[104]

Interestingly, there is no evidence that the Advertisers who aggressively challenged sign ordinances within Eleventh Circuit jurisdictions are back at work, three years post-*Reed*. The apparent inactivity could mean that the Advertisers believe that the Church did their work for them in *Reed*, and they recognize they are beneficiaries of that decision. Or, the inactivity could mean that the Advertisers grew tired of incurring the costs required to support a decade-long battle against sign regulations. Irrespective, research shows that the Eleventh Circuit has yet to address a sign regulation challenge in light of *Reed*. Eleventh Circuit precedent indicates it will not water down or erode *Reed*.[105] The same precedent suggests that *Reed's* impact will be tempered by the Eleventh Circuit's stringent requirement that the regulation challenger show standing.

In some respects, *Reed* does not dramatically change First Amendment, free speech constitutional standards applied to sign regulations. Prior case law applied strict scrutiny analysis to sign regulations that facially applied different regulatory treatment to sign content. But, the tenor of *Reed* is stronger, and its language is more disciplinary than in prior cases. Also, it is important to recognize that the Supreme Court granted review of *Reed*, while it rejected review of the Advertisers' cases from the Eleventh Circuit—even though they presented the same constitutional challenge. This begs the question: Why *Reed*?

The answer may be quite simple: *Reed* is not a case about signs. Instead, *Reed* is a result-driven opinion intended to protect religious exercise shrouded in the context of a challenge to sign regulations. *Reed* presented the Supreme Court with a challenge to the Town's Sign Code

104. *See* Sweet Sage Café, LLC v. Town of N. Redington Beach, 2017 U.S. Dist. LEXIS 11413 (M.D. Fla. Jan. 27, 2017) (invalidating a sign ordinance under *Reed* and Eleventh Circuit precedent as "hopelessly underinclusive"). *Sweet Sage Café* is the only case research reviewed that analyzed a sign ordinance in the Eleventh Circuit under *Reed*.

105. *See, e.g.*, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1268–69 (11th Cir. 2005) (applying strict scrutiny to and invalidating a content-based sign regulation that, like the Town of Gilbert's, prohibited all signs except for certain subject-matter categories).

which regulated the Church's signs but, more importantly, impacted the ability of its followers to learn about the location of its services and engage in religious expression. A tiny church was confronted with sign regulations, hyper-imposed by a Town that would grant "no leniency" from their strict enforcement. The Supreme Court, having rejected appeals from the Advertisers and possibly others, did not seem as concerned about the same content-based constitutional violations resulting from ordinances when challenged by commercial businesses. The Supreme Court had the opportunity to reach the same conclusions about similarly constitutionally infirmed content-based ordinances long before the facts of *Reed* arose, but it did not. It is doubtful that the Supreme Court would have expressed its opinion in the same tenor and with the same breadth and scope had the Town enforced its unconstitutional Sign Code against the Kiwanis Club advertising its Pancake Day or a secular school group advertising its fundraising car wash. The reality is that the Supreme Court, in one swoop, voided sign ordinances across the country on the basis of unconstitutional content-based regulation when its real purpose was to aid the free exercise of religion.