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Separate Because Unequal: The Ninth Circuit's Mangling of the First Amendment in *Reed v. Gilbert*

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INTRODUCTION

An appellate court decision is like a marriage. Sometimes it is childless. Sometimes it produces healthy progeny. And sometimes it is doomed to spawn generations of deformed doctrine. The U.S. Court of Appeals for the Ninth Circuit's holding last year in *Reed v. Gilbert II*[1] falls in this last class of matrimony, and is in need of a hasty and merciful divorce.

Reed II allows city governments to "achieve" constitutionality by carving up a sign code into increasingly narrow categories. *Reed II* also allows government officials to play favorites, anointing some non-commercial messages as higher in value than others in the pantheon of First Amendment protection. Thus, the Ninth Circuits holding in *Reed II* resembles a reincarnation of the debasing doctrine in *Plessy v. Ferguson*[2]: various non-commercial speech may be treated separately because they are not equal. The U.S. Supreme Court's granting of a writ of certiorari in the summer of 2014 creates an opportunity to eradicate this potentially destructive doctrinal deformity.

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1. Reed v. Town of Gilbert (*Reed II*), 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

2. Plessy v. Ferguson, 163 U.S. 537 (1896).

I. THE TOWN, THE CHURCH, AND SOME SIGNS

Gilbert, Arizona[3] regulates the size, location, quantity, and duration of the display of signs posted in public. The city requires the issuance of a permit before a sign may be posted, but exempts from this requirement certain types of signs, including political signs,[4] ideological signs,[5] and directional signs regarding a temporary qualifying event.[6] The city ordinance requires these temporary directional signs to "be no greater than 6 feet in height and 6 square feet in area."[7] The ordinance also provides that such signs "shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends."[8]

Political and ideological signs are subject to different requirements. Political signs may be up to 16 square feet in residential areas and up to 32 square feet on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way.[9] Also, political signs may be posted up to 60 days prior to a primary election and must be taken down no later than 15 days following a general election.[10] Ideological signs have no display duration restrictions, are permitted in all zoning districts, and "shall be no greater than 20 square feet in area and 6 feet in height."[11] Furthermore, while only four temporary event directional signs may be posted on a property, the number of political or ideological signs is not capped.[12]

In *Reed II*, the Good News Community Church ("Good News"), lacking a building, met in an elementary school for Sunday worship

3. This Article will refer to Gilbert, Arizona as "Gilbert" and "the Town" interchangeably.

4. Gilbert, Ariz., Ordinance 1625 § 4.402(D)(7) (Feb. 1, 2005). The ordinance defines a "Political Sign" as "[a] temporary sign designed to influence the outcome of an election called by a public body." *Id.* at Glossary of General Terms.

5. *Id.* § 4.402(D)(8). An "Ideological Sign" is "a sign communicating a message or ideas for non-commercial purposes that is not a *Construction Sign*, *Directional Sign*, *Temporary Directional Sign Relating to a Qualifying Event*, *Political Sign*, *Garage Sale Sign*, or a sign owned or required by a governmental agency." *Id.* at Glossary of General Terms.

6. *Id.* § 4.402(D)(15). "Temporary Directional Signs Relating to a Qualifying Event" are temporary signs that are "intended to direct pedestrians, motorists, and other passerby to a 'qualifying event'"; a "qualifying event" is defined as "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at Glossary of General Terms.

7. *Id.* § 4.402(P)(1).

8. *Id.* § 4.402(P)(3).

9. Gilbert, Ariz., Ordinance 1625 § 4.402(I) (Feb. 1, 2005).

10. *Id.*

11. *Id.* § 4.402(J).

12. *Id.* §§ 4.402(I)(J)(P).

services.[13] Based on its interpretation of Biblical scripture, Good News felt under divine commandment to invite the community to attend services with them.[14] The church placed numerous signs around the elementary school early on Saturday mornings advertising the worship service, and removed the signs following Sunday services.[15] A city code compliance officer notified Good News via e-mail that it had violated the city's ordinance regarding temporary directional signs for qualifying events.[16] A few months later, a code compliance officer issued an advisory notice informing the church that they had again violated several aspects of the city ordinance.[17] Specifically, the signs were posted outside of the allowable pre- and post-event time window, were placed in a public right of way, and did not have an event date on the sign.[18] In response to the e-mail and advisory notice, Good News reduced the number of signs as well as the amount of time prior to the service that the signs were displayed. The church then mounted a facial and as-applied challenge to the city ordinance in Arizona federal court.[19]

In the ensuing litigation, Good News argued that the sign restrictions violated the Free Speech and Free Exercise Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Arizona Religious Freedom Restoration Act.[20] The district court denied the church's motion for a preliminary injunction, finding that the city ordinance (1) was content-neutral, (2) was narrowly tailored to protect the significant government interests of aesthetics and traffic control, (3) allowed for alternative channels of communication, (4) did not impermissibly favor commercial over noncommercial speech, and (5) did not violate equal protection because any disparate effects unintentionally flowed from the content-neutral ordinance.[21]

On appeal, the Ninth Circuit unanimously affirmed the district court's denial of the preliminary injunction. The court found the section of the ordinance addressing temporary event signs, § 4.402P, to be constitutional because it did not distinguish between types of qualifying events or sign content[22] and because it did not "impermissibly favor

13. *Reed II*, 707 F.3d 1057, 1060 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).
14. *Id.*
15. *Id.*
16. Reed v. Town of Gilbert (*Reed I*), 587 F.3d 966, 972 (9th Cir. 2009).
17. *Id.*
18. *Id.*
19. *Reed II*, 707 F.3d 1057, 1060 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).
20. *Id.* at 1061.
21. *Id.* at 1062–64.
22. The First Amendment requires that restrictions on non-commercial speech must (1) be content-neutral, (2) be narrowly tailored, (3) serve a significant governmental

commercial speech over noncommercial speech."[23] The court also denied Good News's facial challenge, stating it was indistinguishable from its as-applied challenge.[24] However, the Ninth Circuit remanded the case to the district court to consider the church's First and Fourteenth Amendment claims that the ordinance *as a whole* was not content neutral because it impermissibly distinguished between different types of noncommercial speech by allowing political and ideological signs to be larger, more numerous, and displayed longer than temporary event signs.[25]

On remand, the district court found the ordinance's varying restrictions on the different types of signs to be permissible.[26] The district court explained that to distinguish between signs a government officer "need only skim the sign to determine the speaker (e.g., is a non-profit speaking?) and the event at issue (e.g., does this relate to an election or a Qualifying Event?)," and thus not reach the content of the sign's message.[27] The district court found that the defendants were entitled to summary judgment on all issues.[28] On appeal a second time, a new panel affirmed the district court's grant of summary judgment.[29] The *Reed II* majority held that the ordinance used permissible distinctions that did not rely on the content of the signs.[30] Unfortunately, the majority misunderstood the purpose of the original panel's remand and, instead of analyzing the sign ordinance *across* sections of the code, merely analyzed each section of the code in isolation.[31] That error would prove fatal. Furthermore, the majority also surmised, in the face of clear contrary Free Speech doctrine, that ideological and political signs deserved greater constitutional protection than signs advertising public events and meetings.[32]

interest, and (4) allow ample alternative channels of communication. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

23. *Reed I*, 587 F.3d at 983.

24. *Id.* at 974.

25. Under the ordinance, political or ideological signs were allowed to be larger in size and to be displayed longer than temporary event signs. Reed v. Town of Gilbert (*Reed II DC*), 832 F. Supp. 2d 1070, 1080 (D. Ariz. 2011), *aff'd*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

26. *Id.* at 1081.

27. *Id.*

28. *Id.* at 1085–86.

29. *Reed II*, 707 F.3d 1057,1077 (9th Cir. 2013).

30. *Id.* Judge Paul Watford dissented, finding the ordinance was not content-neutral and therefore violated the First and Fourteenth Amendments. *Id*. at 1078 (Watford, J., dissenting). He would have remanded to see if the unconstitutional provisions were severable. *Id.* at 1081.

31. *Id.* at 1069.

32. *Id*. at 1074-75.

II. THE NINTH CIRCUIT'S MANGLING

The *Reed II* majority committed five mistakes in their decision: (1) they misunderstood the purpose of the original remand, leading to the wrong analysis; (2) they misapplied the Ninth Circuit's own content-neutrality test; (3) they misapplied U.S. Supreme Court precedent; (4) they determined some speech is of more value than other speech, and can be favored; and (5) they failed to note that there was no logical connection between the city's regulatory purposes and the ordinance's differential treatment of signs.

A. Reed II misunderstands the purpose of Reed I's remand, resulting in the wrong analysis.

The *Reed II* majority opinion shows confusion over the purpose of the remand in *Reed I*. *Reed I* focused on the constitutionality of just one section of the sign code (temporary event signs), utilizing viewpoint neutrality analysis to examine that section in isolation, and then remanded for an analysis looking *across* sections of the sign code. Thus, although the court found that the section of the code on temprorary event signs was constitutional *in isolation*, it left open the question of whether different treatment of different categories of signs *as a whole* was constitutional. Unfortunately, *Reed II* used the same method of analysis—viewpoint neutrality—and examined the other sections of the sign code in isolation, finding each of them to be constitutional.[33] It is impossible, however, to determine whether the differential treatment of noncommercial speech *across* sections of the sign code is constitutional when one only examines the treatment of noncommercial speech *within* a section of the sign code. In other words, viewpoint neutrality is necessary but not sufficient to have content neutrality, and even if within each distinct section of the code there is viewpoint neutrality, it does not make the interaction of the various sections content-neutral overall.[34] Thus, because the *Reed II* majority asked the wrong question, it came up with the wrong answer.

33. For instance, the majority defends Gilbert's ordinance as content-neutral by noting that the size and display durations are not contingent on "which candidate is supported, who sponsors the event, or what ideological perspective is asserted." *Id.* at 1069.

34. Boos v. Barry, 485 U.S. 312, 319 (1988) ("[A]lthough we agree the provision is not viewpoint based . . . it does not render the statute content neutral.").

B. Reed II misapplies the circuit's content-neutrality test from G.K. Ltd.

Reed II relies heavily on a comparison between the Ninth Circuit's decision in *G.K. Ltd. Travel v. City of Lake Oswego*[35] and the facts in the present case to support its conclusion that Gilbert's sign ordinance is not content-based. *G.K. Ltd.* dealt with a city sign ordinance that exempted certain entities, such as hospitals, from the general permit requirement for posted signs.[36] The ordinance also regulated the posting of signs on residential property, permitting one sign per property, *regardless of content*, that could be posted up to 90 days before an election and that had to be removed within five days following the election.[37] The ordinance also allowed for a second sign per property, which could be posted *on any topic* as long as it was not posted more than eight days each month.[38] The U.S. District Court for the District of Oregon held the ordinance to be content-neutral and granted summary judgment for the city regarding the challenge to that specific portion of the law.[39] The Ninth Circuit affirmed the district court's decision, holding that the exemption to the permit requirement for certain entities was content-neutral because it did not require an enforcement officer to assess the content of a sign in order to determine whether the sign had been posted by a permissible entity.[40] The Ninth Circuit also held that the exemption for temporary signs was not content-based because a government officer needed to determine only when the described event would occur, *regardless of the content of the sign*.[41]

Relying on *G.K. Ltd.*, *Reed II* held that the Gilbert sign ordinance merely looked to see if there is a triggering event rather than relying on content-based restrictions.[42] However, this finding is incongruous with the facts of *G.K. Ltd.* as the ordinance in that case did not turn on what the signs actually said. Therefore, a government officer did not have to read a sign to determine the applicable regulations; he only needed to determine whether the sign complied with the timing restrictions. In contrast, Gilbert's ordinance requires an enforcement officer to assess the content of a sign to determine, for example, whether it is a political sign or a temporary directional sign.

35. G.K. Ltd. v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006).
36. *Id.* at 1069.
37. *Id.* at 1077.
38. G.K. Ltd. v. City of Lake Oswego, No. 02-1147-KI, 2004 WL 817142, at *7 (D. Or. Mar. 29, 2004), *aff'd*, 436 F.3d 1064 (9th Cir. 2006).
39. *Id.* at *7, *16.
40. *G.K. Ltd.*, 436 F.3d at 1076, 1078.
41. *Id.* at 1078.
42. *Reed II*, 707 F.3d 1057, 1077 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

Furthermore, the Gilbert sign code discriminates among messages about the *same* event. For example, a sign that says "Vote for Hillary Clinton in the Democratic Primary," a political sign, may be posted longer and be larger than a temporary directional sign that says "Vote Here Today in the Democratic Primary from 7 AM to 7 PM". And a sign that says "Hillary Clinton is a War Criminal Running for President," an ideological sign, could be posted indefinitely and could be larger than a directional sign, but must be smaller than a political sign. The Gilbert ordinance regulates each of the messages drastically differently, even though all three signs refer to the same Democratic primary election. Thus, the *Reed II* majority's reliance on *G.K. Ltd*. is mistaken, as a government officer in Gilbert must examine the specific content of a sign rather than simply apply objective, external knowledge regarding the date of an event in determining the applicable regulation.

Additionally, it is unclear on remand why the district court and the *Reed II* majority relied on *G.K. Ltd.*'s analysis of speaker-based exemptions: the speaker-based distinctions of *G.K. Ltd.* have no relevance to the facts at issue here.[43] For example, Good News could post three signs. The first invites people to join the church for Sunday services and provides the time, date, and directions. The second sign urges people to vote for Pastor Reed for President in November. The third simply states: "Do your part to save the planet: recycle!" The speaker—the church—is the same for each sign, but the applicable restrictions would vary for all three. Hence, a government officer cannot simply look to the speaker behind the message in the Gilbert ordinance; the officer must stop and analyze the content of the sign to determine which restrictions apply.[44]

43. The ordinance at issue in *G.K. Ltd.* allowed exemptions based on the identity of the speaker, such as hospital signs. 436 F.3d at 1076.

44. It is also not clear how *Reed II* can be squared with either *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (applying the Supreme Court's rule that a content-neutral regulation cannot by its very terms single out particular content for differential treatment), or *United Brotherhood of Carpenters and Joiners of America Local 586 v. NLRB*, 540 F.3d 957, 964 (9th Cir. 2008) (applying the Supreme Court's principle that content-neutral speech-regulating rules cannot be related to the subject or topic of the speech). And in the wake of *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010), speaker-based distinctions may no longer be allowable:

> Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. . . . The First Amendment protects speech and speaker, and the ideas that flow from each.

C. Reed II misapplies U.S. Supreme Court precedent.

The holding in *Reed II* also relied heavily on *Hill v. Colorado,*[45] where the Court upheld a restriction on speech around abortion clinics.[46] The *Reed II* court noted that "[i]n *Hill* . . . the Supreme Court indicated that not all *types* of noncommercial speech need to be treated the same."[47] Again, the relevant facts in *Hill* sufficiently distinguish it from *Reed II*. The statute in *Hill* prevented speakers within one hundred feet of a "health care facility" from approaching within eight feet of another person to protest, educate or counsel. The *Hill* Court held that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or *any subject matter* that may be discussed by a speaker."[48] As Judge Watford's *Reed II* dissent correctly points out, *Hill* allowed the regulation of "a *particular mode* of communication . . . without regard to the subject of the speaker's message."[49] In the present case, the Gilbert ordinance deals with the same *mode* of communication (signs) as *Hill*, but requires different messages to comply with different regulations.

If the statute at issue in *Hill* were applied to the facts of *Reed II*, the town of Gilbert would essentially be saying that if you want to share an ideological message with someone, you may approach as close as you would like and speak in a loud tone; if you want to share a political message you may approach to within six feet and shout; and if you want to share the time, location and directions to an event you must stand 775 feet away and whisper.[50] Such differential treatment is not supported by *Hill*.

Citizens United v. Fed Election Comm'n., 558 U.S. 310, 340-41 (2010) (citations omitted).

45. Hill v. Colorado, 530 U.S. 703 (2000).

46. *Id.* at 735.

47. *Reed II*, 707 F.3d at 1077 (emphasis added).

48. *Hill*, 530 U.S. at 723 (emphasis added).

49. *Reed II*, 707 F.3d at 1079 (Watford, J., dissenting) (emphasis added).

50. The closeness and loudness values are equivalent to the display duration and sign size values in the Gilbert ordinance. The distances and volume used are proportional to the actual differences in display duration and sign size in the ordinance. The political signs are allowed to be 1.6 times larger than the ideological signs (32 compared to 20 square feet, Gilbert, Ariz., Ordinance 1625 § 4.402(I), (J) (Feb. 1, 2005)), and 5.3 times larger than the temporary direction signs (32 compared to 6 square feet, *id.* § 4.402(I), (P)(1)). The ideological signs are allowed to be displayed infinitely longer than either the political (at least 75 days, *id.* § 4.402(I)) or temporary direction signs (13 hours, *id.* § 4.402(P)(3)), and the political signs can be displayed 138 times longer than the temporary direction signs (at least 1800 hours versus approximately 13 hours, *id.* § 4.402(I), (P)(3)).

D. There is no hierarchy of values in noncommercial speech.

Even if an ordinance is content-neutral, it must be narrowly tailored to serve a significant government interest and leave open alternative channels of communication.[51] *Reed II* defends the Gilbert ordinance as narrowly tailored to serve significant governmental interests, despite the fact that ideological and political signs are subject to more favorable restrictions than mere temporary directional signs. The court argued that political, ideological and religious speech are deserving of greater constitutional protection.[52] *Reed II* thus implies that there is a categorical difference between speech that expresses thoughts (i.e., a message) and speech that merely expresses information (i.e., facts), and that content-based regulation of the former is prohibited, but not the latter because pure information is not substantive content.

Such a view, deceptively commonsensical on its surface, is problematic for two reasons. First, it is not clear that *mere information* should be relegated to second-class status as compared to the expression of thought. The U.S. Supreme Court has held that "the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[53] The Court has also noted that "a narrow, succinctly articulable message is not a condition of constitutional protection," and constitutional protection should not be confined only "to expressions conveying a 'particularized message.'"[54]

Distinguishing between expressions of thought and mere facts would allow the government to place more onerous restrictions on someone shouting the current time than someone shouting "The U.S. government is corrupt." What about distinctions among fact-based signs? A sign giving the time of and directions to a Tea Party meeting, and a sign accurately stating that, "The national debt increased more in Obama's first four years than in all of Bush's eight," are both merely statements of fact. Assumedly, most would view the second fact-based sign as inherently involving a thought, although it certainly is not explicit. This official sanction of differential treatment creates a dangerous amount of discretion for a government officer, allowing him to deem one man's facts another man's opinions, restricting the first and allowing the second.

51. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
52. *Reed II*, 707 F.3d at 1074–75.
53. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011) (citations omitted).
54. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

Moreover, it is important to note that facts carry an implicit message. For example, the Good News Church's directional signs contain the implied ideas that (a) Christian worship is good; and (b) you should worship with us Sunday morning. In the area of commercial speech, the Ninth Circuit has recognized that advertising can have either an express or implied message.[55] The Circuit has also held, in a case involving the selling of t-shirts, that a "city's argument that the message conveyed must be either explicit or implicit but obvious in order to merit protection must fail,"[56] thus extending protection even to implied unobvious messages. Why should commercial speech earn such protection, but noncommercial speech should not? The Gilbert ordinance defines an ideological sign as a "sign communicating a message or ideas for non-commercial purpose," but does not differentiate between implied and express messages. It could easily be argued that the Good News Church's signs are a form of religiously-motivated speech that communicates an implied message about Christian worship and Sabbath day observance. The signs also facilitate core First Amendment activities: assembly, the free exercise of religion, and more speech.

Reed II also misses one of the communicative purposes of the temporary directional signs. Although the majority notes that "a person is unlikely to seek directions to an event more than 12 hours before the event,"[57] temporary directional event signs both direct people to find the location of the event, as well as *inform people an event will take place*. The function the sign serves depends on when someone reads it. Hence, Good News cannot advertise an event more than 12 hours beforehand, and many people, particularly families, make plans for their weekend at least a day, if not many days, in advance.[58] And the function of the sign also depends on *who* reads it. The sign sends a different message to someone who is already planning on attending the event, but needs to know when and where the worship service will occur, compared to someone who knows nothing about the church or the service. For the first sign observer, the message is mostly informational, but for the second observer the sign also has a proselytizing function.

Finally on this point, a historical hypothetical may help illustrate the folly of the Ninth Circuit's logic. Imagine Boston in the year 1774. The Crown-appointed governor of Massachusetts Colony strolls down Beacon Street and sees three signs. The first states: "Elect John Adams

55. FTC v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994).
56. White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007).
57. *Reed II*, 707 F.3d at 1075.
58. The 12-hour pre-event display duration restriction appears more reasonable as it relates to providing directions, but seems significantly less reasonable as to advertising an upcoming event.

to the Continental Congress." The second states: "No Taxation Without Representation." The third states: "Meeting of the Sons of Liberty, Tomorrow, 7 PM, at the Green Dragon Tavern."[59] Which sign would the royal governor see as the most threatening, and, therefore, most valuable to the Patriots' cause and in need of greater protection from government suppression? Arguably the last, which, though merely a fact-based sign, it is only devoid of the expression of thought in the strictest, most technical sense. Thus, a bright line division between fact-based and political or ideological speech is indefensible as it ignores context and subtext. In the end it is nothing more than free speech gerrymandering.

Hence, *Reed II*'s suggestion that political or ideological speech is more valuable, and thus merits greater First Amendment protection than directional speech, creates precarious precedent and has been rejected before by the Supreme Court: "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."[60] The argument by the *Reed II* majority that the ordinance does not foreclose any type of sign to the appellant, since it can display political or ideological signs as well, is hardly comforting to members of the Good News Church, who must compete in the cluttered marketplace of signs on unequal grounds when it comes to the main type of speech they desire to engage in—inviting and directing people to their worship services.

E. No logical link exists between regulatory purpose and differing restrictions

In a First Amendment context, the U.S. Supreme Court has held that the government carries the burden of explaining how the law furthers governmental interests.[61] Regulations, if content-neutral, must also be

59. Obviously selection of Continental Congress delegates did not occur via a public political campaign, and the Sons of Liberty met in secret. The Green Dragon Tavern was called the "Headquarters of the Revolution" by Daniel Webster, but the "nest of treason" by the British. *See* GAVIN R. NATHAN, HISTORIC TAVERNS OF BOSTON 66 (2006). In it "Samuel Adams and James Otis penned their complaints and resistance of the 1765 Stamp Act." *Id.* Paul Revere and his compatriots—the "Revolution Club"—met there in 1771, and it was from the Green Dragon that Revere left for his immortal ride in 1775 to warn of the British marching on Lexington. *Id.* Its basement was used by the Sons of Liberty for their meetings, and is where they planned the Boston Tea Party. *Id.* at 68; *see also* PATRICK MENDIS, TRADE FOR PEACE 85-88 (2009).

60. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981).

61. City of Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993) ("It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and

"narrowly tailored to serve a significant governmental interest."[62] The City of Gilbert never explains how treating ideological and political signs more favorably than signs announcing and directing people to a worship service furthers the town's claimed regulatory interest in aesthetics and traffic safety. The lack of such an argument may reveal the difficulty in making it. Because the favored political and ideological signs are allowed to be larger and posted longer than the disfavored signs, aesthetics and traffic safety appear unimportant to the city as the ordinance is woefully under-inclusive as to its purported aims: ideological and political signs can be posted longer, be much larger, and be unlimited in number compared to temporary event signs, cluttering the town, particularly near roads.[63]

Furthermore, *Reed II* finds "no showing that the restrictions on Temporary Directional Signs interfere with their purpose: directing interested individuals to temporary events."[64] This contention ignores the advertising purpose of these signs and the fact that Good News experienced a 26.7 percent higher level of attendance at its services when allowed to display signs approximately 24 hours prior to an event.[65] In reality, the ordinance disproportionately impacts smaller organizations that meet in the morning. As Judge Watford's dissent correctly noted, most of the 12-hour window in which one can post a sign before an event will be shrouded in darkness when one is advertising a morning event.[66]

Reed II also found that there were ample alternative channels of communication open to the church to convey its message regarding worship services. Relying on the analysis in *Reed I*, the court suggested that Good News could engage in "distributing leaflets, sending email messages or mail advertisements, walking the sidewalks with signs advertising the church services, posting signs carrying religious messages on their own property, and advertising in the newspaper, phonebook or other print media."[67] However, only larger organizations have the money and manpower to utilize alternative channels of communication. Given that Good News is a church of about 25-30

esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.").

62. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

63. *See also* Ballen v. City of Redmond, 466 F.3d 736, 743 (9th Cir. 2006) ("The City has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs.").

64. *Reed II*, 707 F.3d 1057, 1075 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

65. *See Reed II DC*, 832 F. Supp. 2d 1070, 1085 (D. Ariz. 2011), *aff'd*, 707 F.3d 1057 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900 (2014).

66. *Reed II*, 707 F.3d at 1079 (Watford, J., dissenting).

67. *See id.* at 1063-64, 1077 (majority opinion); *Reed I*, 587 F.3d 966, 980 (9th Cir. 2009).

members (four to ten of those being children) and does not have its own property,[68] it is a stretch to say that any of these alternative channels of communication are realistic options to attract prospective worshippers. The *Reed II* majority appears to be thinking more of a mega-church with deep financial pockets and an army of congregants, quite different than the facts at hand.

III. CONTENT-NEUTRALITY TESTS AND THE WIDENING CIRCUIT SPLIT

Much of the disagreement between the majority and the dissent in *Reed II* rests on differing interpretations of content-neutrality, sometimes called the "officer must read it test"—a disagreement that can be found amongst the circuits.[69] Five circuits take a more formalistic, literal approach that narrowly reads content-based restrictions to disallow any restriction requiring a government officer to read the content of a message.[70] And five circuits, the Ninth Circuit included, take an

68. *Reed II DC*, 832 F. Supp. 2d at 1073.

69. *See infra* Appendix A.

70. Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985) (involving political signs on residential property):

> The defendants respond by asserting that the bylaw does not discriminate on the basis of "content," but rather on the basis of "function." This argument is unpersuasive. The "function" of any sign is to communicate the information written on it. The defendants' preference for the "functions" of certain signs over those of other (e.g., political) signs is really nothing more than preference based on *content*.

Id. at 60 (emphasis in original); Nat'l Adver. Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir. 1990) (involving billboards in commercial & industrial zoned areas) ("The district court properly followed *Metromedia* in concluding that the exceptions to the ban for temporary political signs and for signs identifying a grand opening, parade, festival, fund drive or other similar occasion impermissibly discriminate between types of noncommercial speech based on content.") *Id*.; Service Employees International Union, Local 5 v. City of Houston, 595 F.3d 588, 596 (5th Cir. 2010) (regarding amplified oral communication in a park or during a parade): "A regulatory scheme that requires the government to 'examine the content of the message that is conveyed' is content-based regardless of its motivating purpose." *Id*. (citations omitted); Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (discussing an ideological sign/mural in a residential zone):

> [T]he zoning code's definition of "sign" is impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction." . . . Thus, an object of the same dimensions as Sanctuary's "End Eminent Domain Abuse" sign/mural would not be subject to regulation if it were a "[n]ational, state, religious, fraternal, professional and civic symbol[] or crest[], or on site ground based measure display device used to show time and subject matter of religious services.

Id. at 736–37 (citations omitted); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1259-60 (11th Cir. 2005) (involving an electronic sign at a place of business requiring a permit):

> [M]any of the sign code's exemptions are plainly content based. . . . [W]hile a "Re-Elect Mayor Smith" yard sign could be posted for a maximum of sixteen

informal, functional approach, based on their interpretation of *Hill* and *Ward v. Rock Against Racism*.[71] Under this approach, the courts broadly read content-based restrictions to require "that a regulation do more than merely differentiate based on content to qualify as content based."[72] Specifically, the circuits on the functional side of the divide focus on the intent of the regulation rather than its effects.

Prior to *Reed II*, the Ninth Circuit's view appeared to have been between the two camps in the circuit split, but leaning toward the functional side. The Ninth Circuit had previously held in *G.K. Ltd.* that officers could read signs to determine whether an exemption applied as long as they did so "without regard for the actual substance of the message."[73] But the Ninth Circuit refused to extend *G.K. Ltd.*, and thus moved closer to the functional camp in *ACLU of Nevada v. City of Las Vegas*,[74] which regarded an ordinance prohibiting solicitations in a downtown area. There the Ninth Circuit found that "[t]he exceptions to the 'officer must read it' test identified in *Hill* and *G.K. Ltd.* do not apply in the present case, where officers must evaluate the substantive content of a message to know whether the solicitation ordinance applies."[75]

> days, the illuminated parking sign may remain indefinitely. . . . Moreover, electioneering signs are the only form of political expression spared from the sign code's permit requirement. To express any political message not directly related to an upcoming election, a would-be speaker must comply with the sign code's permitting rules and all of its other restrictions.

Id. at 1264–65.

71. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

72. *See* Wag More Dogs, Ltd. Liab. Corp. v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012); Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389 (3d Cir. 2010); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) (regarding temporary commercial signs at a business location):

> An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. . . . There is simply nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another.

Id. at 621–22; ACLU v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012) (discussing audio recordings of public police interactions with citizens):

> Although the line between content-neutral and content-based laws is sometimes hard to draw, "the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" . . . A law is not considered "content based" simply because a court must "look at the content of an oral or written statement in order to determine whether a rule of law applies.

Id. (citations omitted).

73. G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1078 (9th Cir. 2006).

74. ACLU v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006).

75. *Id.* at 796 n.12.

Even among the sister circuits to which the Ninth Circuit is closer,[76] no circuit allows for speech restrictions to be justified based on differing values of non-commercial speech, as *Reed II* holds. Thus, *Reed II* has not only shifted the Ninth Circuit's position in this inter-circuit spat over tests determining content-neutrality, it has set up a new split with the Ninth Circuit on one side, and the remaining circuits on the other.

CONCLUSION

The Ninth Circuit erred in *Reed II* when it applied viewpoint neutrality within sections of a sign code to determine content neutrality across sections of the code. Likewise, the court created precedent injurious to core First Amendment values when it held that all non-commercial sign speech is not created equal, and therefore speech perceived to be of a lesser value may be less free. Hopefully the Supreme Court will remove this doctrinal deformity to avoid further contagion of the First Amendment.

76. The Third, Fourth, Sixth and Seventh Circuits. *See* note 74.

Appendix A

"Content-Neutrality Test" Circuit Split

Circuit	*First Amendment Approach*	*Primary SCOTUS Precedent*	*Type & Location of Communication*	*Prohibition or Regulation of Speech*	*Ordinance Content Neutral?*	*Case*
1st	Formalistic (literal interpretation)	*Mosley (1972); Linmark (1977)*	Political signs on residential property	Prohibition	NO[a]	*Matthews v. Town of Needham*, 764 F.2d 58 (1985)
2nd	Formalistic (literal interpretation)	*Metromedia (1981)*	Billboards in commercial & industrial zoned areas	Prohibition	NO[b]	*National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (1990)
3rd	Pragmatic (flexible interpretation)	*Metromedia (1981)*	Political signs near highways	Prohibition	NO[c]	*Rappa v. New Castle County,* 18 F.3d 1043 (1994)
4th	Pragmatic (flexible interpretation)	*Ward (1989); Hill (2000)*	Signs on residential property	Regulation	YES[d]	*Brown v. Town of Cary*, 706 F.3d 294 (2013).
5th	Formalistic (literal interpretation)	*Ark Writer's Project (1987)*	Amplified oral communication in park or during parade	Prohibition	YES[e]	*Serv. Emp. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (2010)
6th	Pragmatic	*Ward (1989); Hill (2000);*	Temporary commercial			*H.D.V.-Geektown, LLC v.*

	(flexible interpretation)	*Thomas (2002)*	signs at business location requiring permit	Regulation	YES[f]	*City of Detroit,* 568 F.3d 609, 622 (2009)
7th	Pragmatic (flexible interpretation)	*Ward (1989); Hill (2000)*	Audio recordings of police in public	Prohibition	YES[g]	*ACLU of Ill. V. Alvarez,* 679 F.3d 583, 603 (2012)
8th	Formalistic (literal interpretation)	*Discovery Network (1993)*	Ideological sign/mural in residentially zone area	Regulation	NO[h]	*Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736 (2011)
9th	Pragmatic (flexible interpretation)	*Ward (1989); Hill (2000)*	As-applied: signs on poles; Facial: permit exemptions, signs must be clear & readable	As-applied: Prohibition; Facial: Regulation	NO[i]	*G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1070 (2006)
10th	N/A					
11th	Formalistic (literal interpretation)	*Metromedia (1981)*	Electronic sign at place of business requiring a permit	Regulation	NO[j]	*Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (2005)
DC	N/A					

Purpose

Face	Neutral	Discriminatory
Neutral	Unconstitutional: No Circuits	Unconstitutional: 3rd, 4th, 6th, 7th, 9th
Discriminatory	Unconstitutional: 1st, 2nd, 5th, 8th	Unconstitutional: All Circuits

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[a] "The defendants respond by asserting that the bylaw does not discriminate on the basis of 'content,' but rather on the basis of 'function.' This argument is unpersuasive. The 'function' of any sign is to communicate the information written on it. The defendants' preference for the 'functions' of certain signs over those of other (e.g., political) signs is really nothing more than preference based on *content*." Matthews v. Town of Needham, 764 F.2d 58, 60 (1985) (emphasis in original).

[b] "The district court properly followed *Metromedia* in concluding that the exceptions to the ban for temporary political signs and for signs identifying a grand opening, parade, festival, fund drive or other similar occasion impermissibly discriminate between types of noncommercial speech based on content." National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (1990).

[c] "[S]tatutes aimed at a legitimate end unrelated to the suppression of speech but which nonetheless restrict speech in a certain locality may constitutionally contain content-based exceptions as long as the content exempted from restriction is significantly related to the particular area in which the sign is viewed." Rappa v. New Castle County, 18 F.3d 1043, 1047 (1994).

[d] "[W]e reject any absolutist reading of content neutrality, and instead orient our inquiry toward why—not whether—the Town has distinguished content in its regulation." Brown v. Town of Cary, 706 F.3d 294, 301 (2013).

[e] "A regulatory scheme that requires the government to 'examine the content of the message that is conveyed' is content-based regardless of its motivating purpose." Serv. Emp. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588, 596 (2010) (citations omitted).

[f] "An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech . . . There is simply nothing in the record to indicate that the distinctions between the various types of signs reflect a

meaningful preference for one type of speech over another." H.D.V.-Geektown, LLC v. City of Detroit, 568 F.3d 609, 621-22 (**2009**).

[g] "Although the line between content-neutral and content-based laws is sometimes hard to draw, 'the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.' . . . A law is not considered 'content based simply because a court must 'look at the content of an oral or written statement in order to determine whether a rule of law applies.'" ACLU of Ill. V. Alvarez, 679 F.3d 583, 603 (2012) (citations omitted).

[h] "[The] zoning code's definition of 'sign' is impermissibly content-based because 'the message conveyed determines whether the speech is subject to the restriction.' . . . Thus, an object of the same dimensions as Sanctuary's 'End Eminent Domain Abuse' sign/mural would not be subject to regulation if it were a '[n]ational, state, religious, fraternal, professional and civic symbol[] or crest[], or on site ground based measure display device used to show time and subject matter of religious services.'" Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728, 736–37 (2011) (citations omitted).

[i] "Neither the speaker- nor event-based exemptions implicate [content discrimination] insofar as neither requires law enforcement officers to 'read a sign's message to determine if the sign is exempted from the ordinance.' In the speaker category, officers decide whether an exemption applies by identifying the tentity speaking through the sign without regard for the actual substance of the message. In the case of event-based exemptions to the permitting process, the officer must determine only whether a specific triggering event has occurred and if the temporary sign has been erected within the specified time frame." G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1078 (2006) (citations omitted).

[j] "[M]any of the sign code's exemptions are plainly content based…while a 'Re-Elect Mayor Smith' yard sign could be posted for a maximum of sixteen days, the illuminating parking sign may remain indefinitely . . . Moreover, electioneering signs are the only form of political expression spared from the sign code's permit requirement. To express any political message not directly related to an upcoming election, a would-be speaker must comply with the sign code's permitting rules and all of its other restrictions." Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1264-65 (2005).