

Can't You Read the Sign?

Sign Regulation after Reed v. Town of Gilbert, AZ

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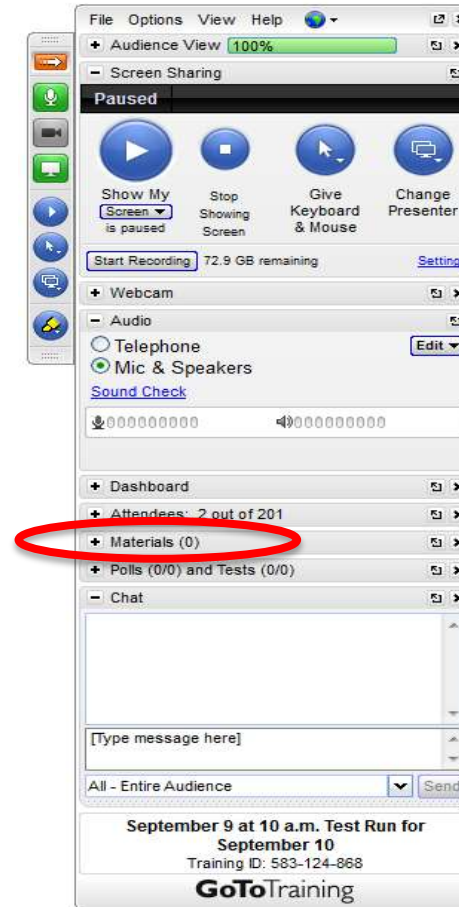
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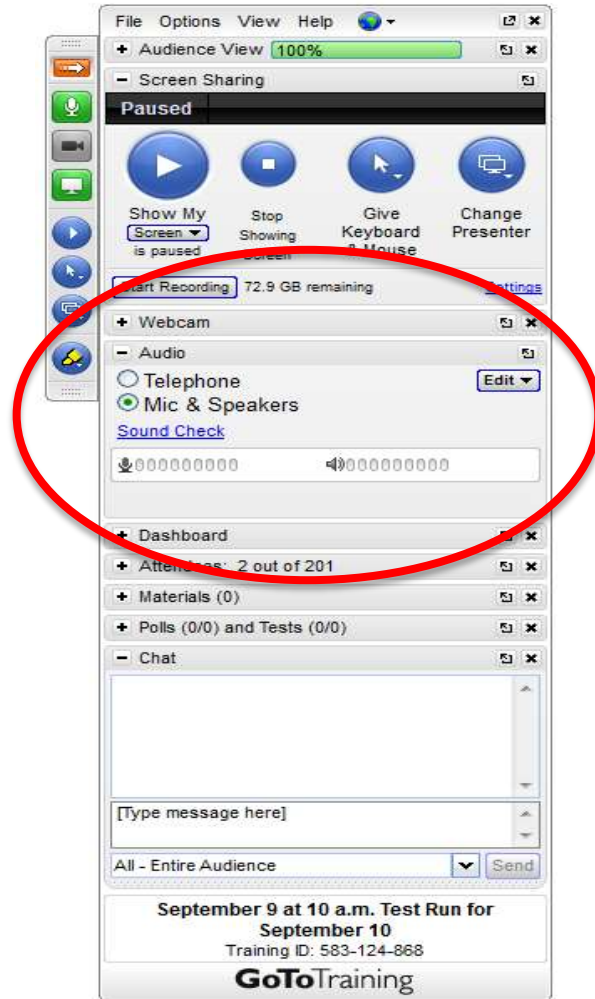
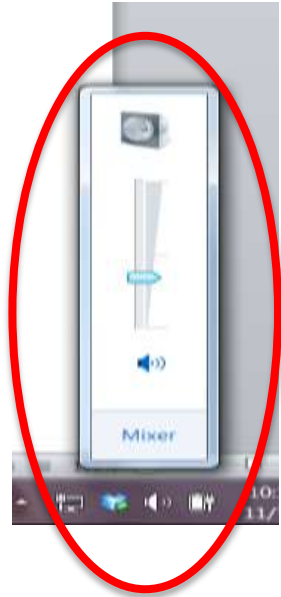
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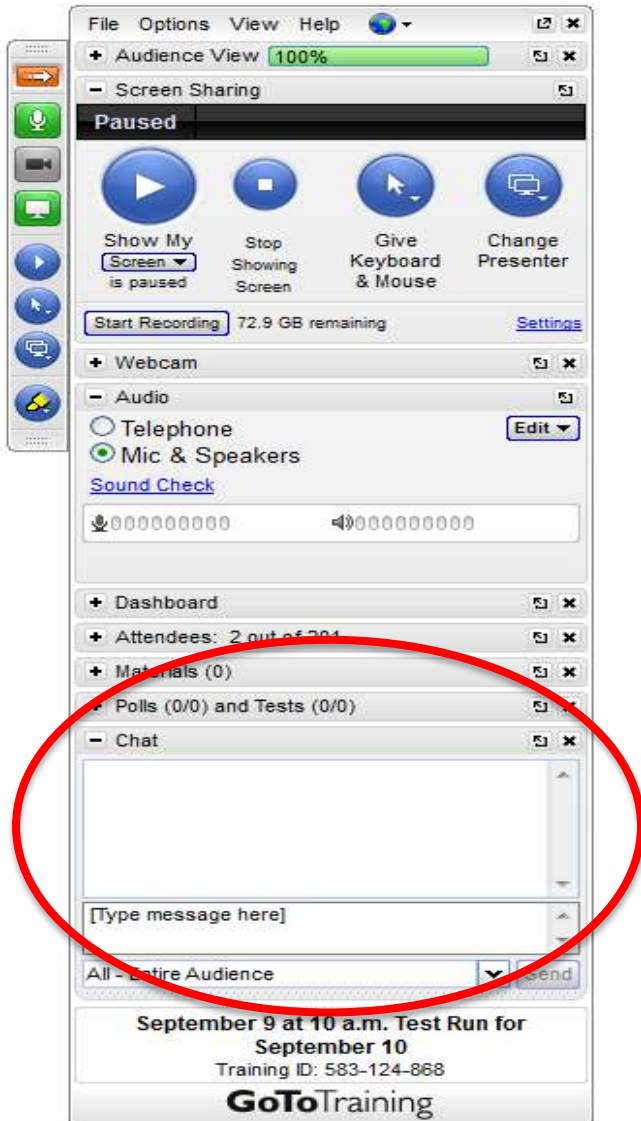


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Regulating Signs After *Reed v. Town of Gilbert*

- Presented by 1000 Friends of Florida
- Bill Jonson
- *Clearwater Councilmember; Citizens for a Scenic Florida President*
- Bill Brinton, Esq.
- *Rogers Towers*
- Susan Trevarthen, Esq., FAICP
- *Weiss Serota Helfman Cole & Bierman, PL*

About the Speakers

- **Bill Jonson**
 - 11 years Councilman for City of Clearwater
 - Co-Founder and President of Citizens for a Scenic Florida
 - Founder and President of Citizens for a Better Clearwater
- **William D. Brinton, Esq.**
 - AV-rated Shareholder, Rogers Towers, P.A., based in Jacksonville
 - Co-Founder and Former Chairman of Citizens for a Scenic Florida
 - Litigator and appellate attorney handling complex commercial and First Amendment sign code cases
 - Drafter and defender of numerous local government sign ordinances
 - Recipient of numerous awards for advocacy and service related to his First Amendment practice
- **Susan L. Trevarthen, Esq., FAICP**
 - AV-rated Member, Weiss Serota Helfman Cole & Bierman, PL in Fort Lauderdale
 - Chair, Municipal Land Use and Zoning Group; Board-certified Town Attorney
 - Drafter and defender of numerous local government sign ordinances, and of other regulations related to land uses protected by the First Amendment, such as religious uses and adult uses
 - Former adjunct professor, and frequent author and lecturer on First Amendment and other land use and zoning matters



Overview

- Why sign regulation matters to local governments and to citizens
- First Amendment principles relevant to sign regulation
- *Reed v. Town of Gilbert* (June 18, 2015)
 - Background and briefing
 - Outcome
- What should local officials and planners be doing in response to *Reed*
- What does *Reed* mean to those concerned with scenic preservation and community aesthetics

What is Sign Regulation and Why Does It Matter to Local Governments and to Citizens

Elements of most sign codes

- Categorical definitions of sign types, and definitions of other key terms
- Prohibited sign types
- Permitted sign types
- Time, place and manner limits that apply to the permitted sign types
 - Area, height, setbacks, number, lighting, spacing
 - Prohibitions or special rules for new billboards
- Sign types that are exempt from permitting (or regulation altogether)
- Sign permit procedures

Additional elements of most sign codes

- A purpose statement
- Location-specific sign regulations
 - Tighter controls in residential zoning districts
 - Added exemptions for entertainment or other high intensity zoning districts
 - Unique rules for areas of special character, such as corridors and planned developments
- Restrictions on digital or changing signs
- Rules for temporary signs

Agnes Rice Hawk at Rocky Point (AROUND 1935)









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Jonson's Journey – First Clearwater Impression -

UGLY



New Clearwater Redevelopment Code 1985

- Banned Portable Signs, Banners, Pennants
- Required reduction in business sign sizes after seven years
- Required removal of billboards after seven years
- **But** allowed billboards on Gulf to Bay to stay forever

Citizens Initiative to Remove Gulf to Bay Billboards - 1988

- Collected over 6,000 signatures
- Adopted by the City Council in 1989,
- Now only one billboard on Gulf to Bay
- Almost 30 years later that one remaining billboard to be removed by November 1, 2015



"Communities should be planned with an eye to the effect on the human spirit of being continually surrounded by a maximum of beauty."

--Thomas Jefferson

“Every City has the moral imperative to provide beauty for each of its citizens.”

--*Joe Riley, Mayor Charleston S.C. (1975 – present)*

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1986
Hwy 19

First Amendment Principles Relevant to Sign Regulation

•

First Amendment

Governments “shall make no law

[1] respecting an establishment of religion, or prohibiting the free exercise thereof;

[2] or **abridging the freedom of speech**, or of the press;

[3] or the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.”**



What is wrong with this sign? Permanent political protest/free speech sign

1. Size?
2. Fluorescent color?
3. Painted wall sign?

The First Amendment changes how we approach regulation: Discretion

- In typical police-power and land-use regulation, preserving discretion is good
 - You can't foresee everything
 - Rigid rules can have unforeseen consequences
 - Your judgment is generally presumed to be valid, and courts will defer to you
- With First Amendment-protected uses, preserving discretion creates problems
 - Because signs are expressive conduct, **courts distrust discretion** and do not defer to your judgment
 - Even if you never actually exercise discretion, an ordinance that *allows* you to exercise unbridled discretion over sign applications may be unconstitutional
 - Significant monetary damages and attorneys fees are possible, along with lengthy and controversial litigation

The First Amendment changes how we approach regulation: Tailoring and the “Goldilocks” Principle

- In typical police-power and land-use regulation, the best regulations are often the most precise and specific
- The substantive standard of review requires narrow tailoring of the regulation to the governmental interests that the regulation is intended to advance
- In sign law, the process of fine-tuning your ordinance (by treating different types of signs differently) can lead to content-discrimination, which is a problem
- Yet reducing a sign ordinance to a simple set of generally applicable rules to achieve content-neutrality can cause those rules to be overly broad, creating different problems)

The First Amendment changes how we approach regulation: Practicality

- Most regulations are created in response to practical problems, using practical solutions.
 - Trying to anticipate and avoid too many potential problems can be a waste of time and resources when the deferential standard of review allows you to just change the rules to adapt to new issues with little chance of liability
- In sign cases, judges often lack understanding of the practical issues and may invalidate your ordinance based on abstract and unlikely hypothetical fact patterns that may never occur
 - Overly-broad rules can sometimes be attacked regardless of what people actually seek permission to do

Sign Codes Must be Content-Neutral

- Some content is not protected – i.e., obscenity, defamation, fighting words
- Commercial speech is protected, but only by a lesser level of scrutiny
- If dealing with protected speech:
 - Regulations cannot discriminate based on sign content
 - Content-based *exceptions* to regulations, or variations in treatment of signs, can invalidate the regulation or prohibition itself – if you really needed this regulation, it would need to apply uniformly
 - However, the Supreme Court and U.S. Courts of Appeals have not been consistent in their tests for what “content neutrality” means.

If the regulation or its application is content neutral, then intermediate scrutiny applies

- This means the law need only be
 - Narrowly tailored to serve a *significant* content-neutral government interest that would be achieved less-effectively without the regulation, and
 - Leave open ample alternative channels for communication of the information.
- Intermediate scrutiny is seldom fatal.

If the regulation or its application is content-based, then strict scrutiny applies

- If content based, to survive strict scrutiny, the law must:
 - Be necessary to further a *compelling* government interest; and
 - be narrowly tailored to achieve it
- The government usually loses, if the court gets to this point of the analysis
 - “Strict scrutiny, like a Civil War stomach wound, is generally fatal.”

The federal courts' inconsistent tests for content neutrality

- The rigid, “literal” test for content-neutrality: If you “need to read” the sign in order to apply the sign law, the sign law is content-based.
- The more pragmatic test for content-neutrality: so long as you can *justify* the sign law without reference to the sign’s content, and did not adopt the law *because of disagreement with the message* it conveys, it’s content neutral.

So, what must cities do?

- Avoid discrimination on the basis of the content of speech, whatever that means (See *Reed*)
- Limit discretion, either explicitly, or implicitly (through undue vagueness)
- “Just right” narrow tailoring of the regulation to substantially advance a significant interest
 - Not substantially overbroad (exceeding the scope of the governmental interest justifying regulation)
 - Not substantially underinclusive (so narrow or exception-ridden that the regulation fails to further the asserted governmental interest)

Reed v. Town of Gilbert



The Background of *Reed v. Town of Gilbert*

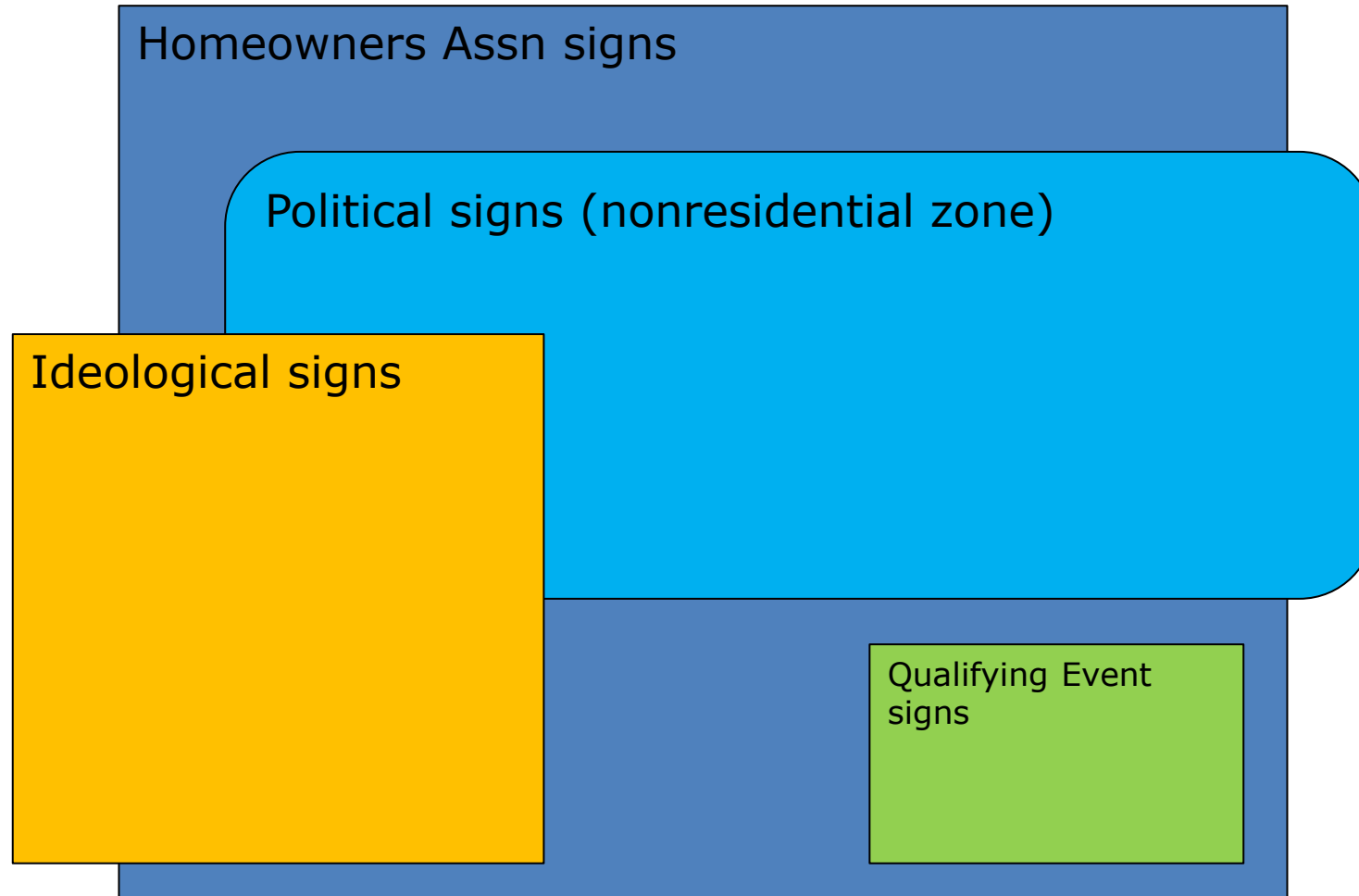
- Plaintiffs are a small “homeless” church, Pastor Reed, and its members
 - The church lacks a building of its own, and meets in other available places such as schools and nursing homes
 - They use temporary directional signs to guide people to their weekly services
- Defendant is a large town, 75 square miles, with 208,000 residents as of 2010 census. It is southeast of Phoenix, AZ

- Plaintiffs' "qualifying event" signs

- Candidates' "political" signs



Maximum Temporary Sign Sizes



Temporary Sign Regulations: Event Signs and Election Signs

- Nonpolitical, non-ideological, non-commercial event signs: 6 sq. ft.
- Maximum duration: 12 hours before, until 1 hour after the event
- Political temporary signs: 32 sq. ft. (in nonresidential zones)
- Maximum duration: 60 days before and 15 days after elections

“Ideological” Signs (for non-commercial expression unrelated to an election)

- Ideological signs could be larger (i.e. 20 sq. ft.) than “qualifying event” signs but not as big as political signs in a nonresidential zone
- They could be displayed for an unlimited period of time.
- However, they couldn’t be displayed in the right-of-way.

Litigation History

- Reed was cited for a sign code violation in September 2005
- Reed sued in 2007, and was unsuccessful getting court to enjoin Gilbert
- Gilbert modified its code to be more defensible during litigation
- Gilbert prevailed four times before reaching the US Supreme Court, including two Ninth Circuit decisions in its favor

Brief of Amici Curiae

- Seven organizations joined in a single amicus brief out of concern for the impact of the Supreme Court's decision on local governments.
- National League of Cities, United States Conference of Mayors, National Association of Counties, International City County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America, Inc.

Brief of Amici Curiae

- Amici: If the mere categorization of signs by function renders them “content-based,” per Petitioners’ absolutist approach, few sign regulations will meet the exacting strict scrutiny test.
- Amici: The adoption of the absolutist approach to defining “content-neutrality” will prevent local governments from legislating common sense classifications for temporary and permanent signage.

Brief of Amici Curiae

- Amici: In this brief, amici hope to clarify the true nature of sign regulations and explain why application of strict scrutiny would wreak havoc.
- Amici: Amici begin with an overview of how sign codes typically work in the United States.
- Amici: To preserve the ability of local governments to advance important objectives such as aesthetics and safety, these temporary sign categories should be reviewed under intermediate scrutiny which properly balances the interests involved.

Brief of Amici Curiae

- Amici: Description of Exemptions and Exceptions, Prohibited Signs, Warning Signs, and Permitting for Allowed Sign Types.
- Amici: Description of Regulated Signs – Temporary Signs and Permanent Signs.
- Amici: If the absolutist approach is adopted, sign regulations nationwide will be upheld as unconstitutional.

Amicus Brief of the United States

- The United States filed an amicus brief in support of Pastor Reed and the Good News Community Church but took the position that intermediate scrutiny was the applicable standard, not strict scrutiny.
- The United States took the position that a sign regulation based solely on safety and aesthetics should be subject to intermediate scrutiny.
- The United States took the position that the Town's sign ordinance failed intermediate scrutiny.

Outcome

All nine justices agreed that the Ninth Circuit should not have ruled in the Town's favor, but did not all agree on a rationale for that result.

Four opinions were issued:

- Majority opinion (Justice Clarence Thomas, joined by five others)
- One Concurrence (Justice Samuel Alito, joined by two others comprising 3 of the 6 justices in the majority)
- Two Concurrences in the judgment (Justice Stephen Breyer for himself; Justice Elena Kagan, joined by Justice Ruth Ginsburg and by Breyer)

Majority Opinion



Content-based regulation is **presumptively unconstitutional** and requires a **compelling governmental interest**

Majority Opinion



“Government regulation of speech is content based if a law **applies to particular speech because of the topic discussed or the idea or message expressed.**”

Majority Opinion



Even a purely directional message, which merely gives “the time and location of a specific event,” is one that “conveys an idea about a specific event.”

Majority Opinion



A category for directional signs is therefore content-based.

Majority Opinion



Event-based regulations are not
content neutral

Majority Opinion



If a sign regulation, on its face, is content-based, its purpose does not matter.

Majority Opinion



If a sign regulation, on its face, is content-based, its justification does not matter.

Majority Opinion



If a sign regulation, on its face, is content-based, its function does not matter.

Kagan/Breyer Opinions: Concurring Only in the Judgment

- Justice Kagan wrote for Breyer, Ginsburg and herself. Justice Breyer wrote a separate concurrence also.
- All 9 justices agree that the particular Gilbert sign regulations at issue violate the First Amendment, but the analyses of these 3 justices differ dramatically from the majority

Kagan Opinion



- The majority approach will either lead to a watering down of strict scrutiny review, or lead to the Court acting as a “veritable Supreme Board of Sign Review” invalidating many perfectly reasonable, democratically adopted regulations.
- Dilemma: repeal useful exemptions or open the doors to sign clutter

Kagan Opinion



Alito concurrence's list of sign types that are valid contradicts the reasoning of the majority opinion:

- Thomas: Gilbert Code is content based because it singles out signs with the message of the time and location of particular event
- Alito: strict scrutiny not required for regulations for sign advertising a one-time event

Kagan Opinion



- The reasons for First Amendment protection are simply not present in most subject matter exemptions in sign codes – e.g., directional or identification signs.
- The Court has repeatedly upheld such content-based distinctions in cases not overruled—or even cited—by the *Reed* majority.
- As in *Ladue*, all justices agree that Gilbert’s regulation fails intermediate scrutiny – and the “laugh test,” so the majority’s whole discussion of strict scrutiny is unnecessary dicta.

Breyer Opinion



- Content categories are not enough to solve this legal problem. They are analytical tools that should be used as rules of thumb rather than triggers for invalidation
- All kinds of government activities involve regulation of speech with content discrimination. If that triggers strict scrutiny, the court has written “a recipe for judicial management of ordinary government regulatory activity.”

The Concurrence of Justices Alito, Sotomayor and Kennedy



- **“I join the opinion of the Court but add a few words of further explanation.”**
- Justice Kagan in her concurring opinion noted the following about Justice Alito’s concurrence: **“Even in trying (commendably) to limit today's decision, JUSTICE ALITO's concurrence highlights its far-reaching effects.”**

The Alito Concurrence



- “I will not attempt to provide anything like a comprehensive list, **but here are some rules that *would not be* content-based:**”
 - Rules regulating **size** “based on any content-neutral criteria,
 - Rules regulating **the locations** in which signs may be placed

The Alito Concurrence



- Rules distinguishing between –
 - “**lighted** and **unlighted** signs”
 - “signs with **fixed messages** and electronic signs with **messages that change**”
 - “placement of signs on
 - public** and **private property**”
 - commercial** and **residential property**”

The Alito Concurrence



- “Rules **distinguishing between on-premises and off-premises signs**”
- “Rules restricting the total **number of signs per mile** of roadway”
- Rules imposing **time restrictions on signs advertising a one-time event**,” which are “akin to rules restricting times within which speech or music is allowed.”

The Alito Concurrence



- The **government itself** may “**put up all manner of signs** to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.”

The Alito Concurrence



- “Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”

Responses to *Reed*

- *Questions and Issues to Ponder*

How to define and regulate address signs, identification signs, and directional signs?



Impact on commercial signs?



Are these identification/directional signs or commercial signs?



Problems:

What do we do at election time?

Do we need to be concerned about election time?

What about real estate signs?

What about other temporary commercial signs?

Are all our sign type definitions invalidated?

Must all specific temporary sign regulations be removed?

Where do we begin?

Problems:

Is there an enhanced role for spacing between signs to address clutter?

What about other kinds of regulations involving speech?

What about the appearance of our rights of way and public realm?

Is there now a greater need than before to protect the public right-of-way and public property?

Problems:

How may Reed open the door to Hate Speech within the public right-of-way or on public property when other temporary noncommercial or commercial signage is allowed?

Scenic implications

- Content neutral need not mean more signage
- Content neutral does not mean you have to allow it on public property
- Issue: To accommodate certain kinds of preferred signage, such as election signs, overall signage allotments will need to increase
- No reason to think properly drafted commercial sign regulation and billboard regulation is affected
- Enhanced risk of litigation, which could lead to court orders invalidating all or a portion of a sign code
- Does the Florida Constitution's guarantee of scenic beauty amount to a compelling governmental interest?
- Planning and human factors studies to establish safety and aesthetic interests

What governments should do

1. Review your sign code NOW for potential areas of content bias.
2. If fixing your sign code will take a while, coach permit and enforcement staff to avoid enforcing content-based distinctions.
3. Add a severability clause now if you don't have one.
4. Be sure your code contains a substitution clause that allows noncommercial substitution.
5. Make sure your sign code has a strong purpose statement.

What governments should do

6. Review exceptions to permitting requirements, and reduce wherever possible
7. Check for the common “problem areas” of sign regulation, including political/ideological signs, religious signs, event signs, real estate signs, and holiday lights
8. Reduce the number of sign categories.
9. Tie the purpose statement and regulatory approach to data, wherever possible.
10. Evaluate other regulations based on content, e.g., solicitation ordinances

What governments should do

11. Consider including in the preambles to the adopting ordinance references to the current state of the law and an explanation for the regulations in some detail
12. If expansive provisions for temporary noncommercial speech, consider restrictions on temporary commercial speech to reduce clutter
13. Be careful about provisions for temporary commercial speech because temporary noncommercial speech cannot be treated less favorably – including location, size, height, etc

Sample approaches – additional signs based on time
without specifying that they must be used for the event
triggering the timing

- Every property has a particular amount of square feet of signage that they can use for any temporary noncommercial signs on their property
 - For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and the spacing of signs from one another
- All properties get a base amount of temporary noncommercial signs year-round, and additional signs at certain times
 - For particular periods of times (such as before an election or tied to issuance of special event permit), properties get more signs OR
 - For particular periods of times (such as before an election), all size and number restrictions on signs are suspended

Sample approaches – additional signs based on activity on the site, without specifying how the additional signs are used for content

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new BTR
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater
- Allowing additional sign when special event permit is active for property
- Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity

Questions?

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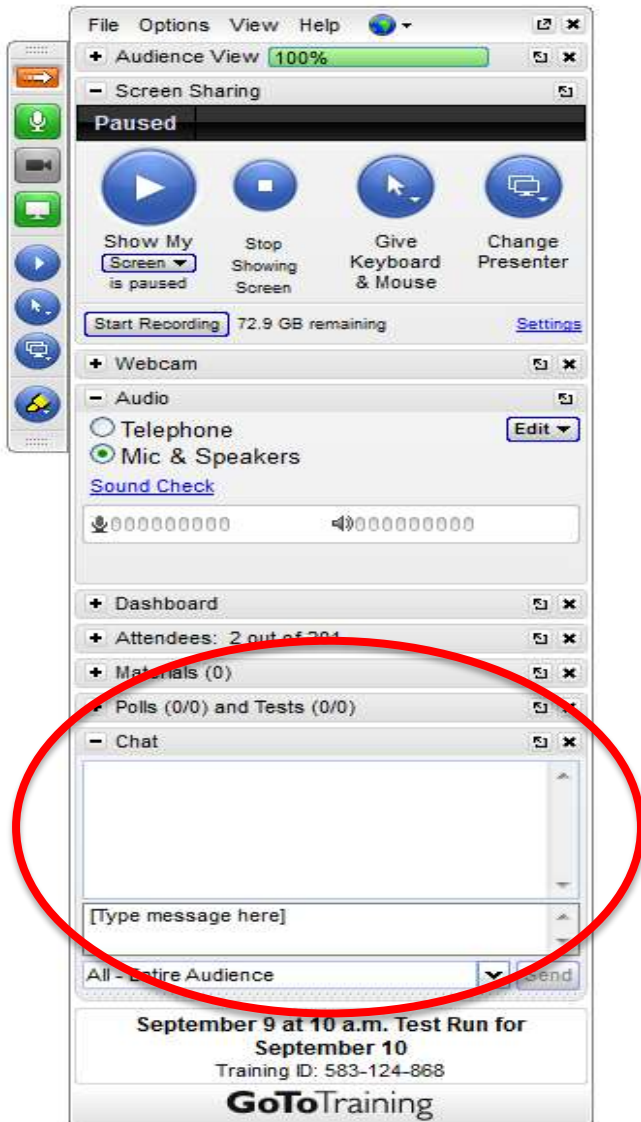
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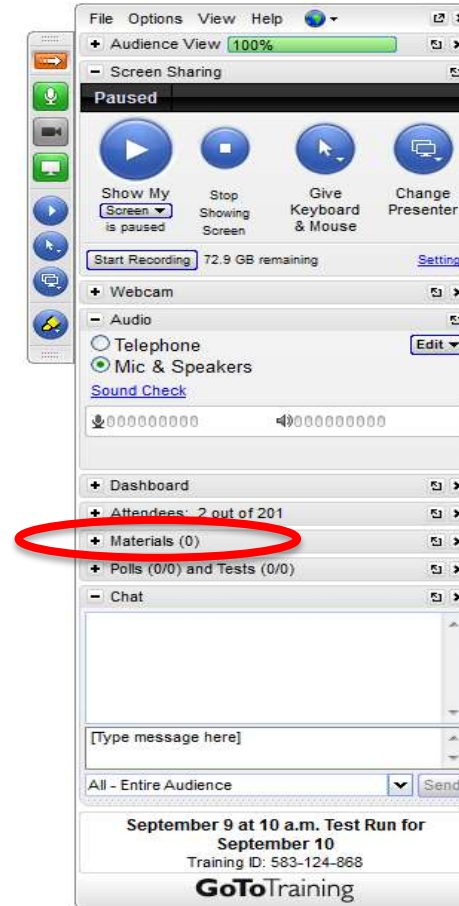
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