Missouri Law Review

Volume 85 | Issue 2 Article 10

Spring 2020

Compliance Issues: The Supreme Court's Confusing Messages to Municipalities

Abigail Greene

NOTE

Compliance Issues: The Supreme Court's Confusing Messages to Municipalities

Willson v. City of Bel-Nor, Missouri, 924 F.3d 995 (8th Cir. 2019)

*Abigail Greene**

I. INTRODUCTION

Local municipalities are vested with the power to enact zoning ordinances that prohibit signs and flags in residential areas for aesthetic purposes.[1] This power directly competes with an individual's constitutional right to use private property to express their views. The United States Supreme Court recently struck a balance for this conflict in *Reed v. Town of Gilbert*.[2] The United States Court of Appeals for the Eighth Circuit applied this test in *Willson v. City of Bel-Nor, Missouri*[3] and demonstrated the impracticability of the approach the Supreme Court created for municipalities when drafting ordinances.

This Note argues that the Eighth Circuit's decision illustrates the unreasonably nuanced approach required by the Supreme Court's new test. To a constitutional specialist, *Reed* makes sense. However, while attractive at first glance, it expects too much of local municipalities by requiring them to undertake an extensive analysis to pass a constitutionally sound ordinance. *Willson* is a good example of how careful municipalities must be to ensure they are drafting facially content-neutral ordinances. This facial distinction is often the difference between an enforceable and unenforceable ordinance.

A more detailed ordinance, however, does not equate with the ordinance being enforceable. In fact, more detailed and comprehensive ordinances – often invoking definitions and exemptions – are more likely to be struck down as unconstitutional. Small changes in drafting can be the difference between withstanding or failing a First Amendment challenge, and this is the essence

* B.J., University of Missouri, 2018; J.D. Candidate, University of Missouri School of Law, 2021; Associate Member, *Missouri Law Review*, 2019–2020. I am grateful to Dean Lyrissa Lidsky for her insight, guidance, and support during the writing of this Note, as well as the *Missouri Law Review* for its help in the editing process.

1. Stephanie L. Bunting, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in* City of Ladue v. Gilleo, 20 HARV. ENVTL. L. REV. 473, 474 (1996).

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

3. 924 F.3d 995 (8th Cir. 2019).

of the practical problem municipalities face in the wake of *Reed*. Municipalities must include enough detail to protect the interests at issue, while excluding any details that reference the content of the speech sought to be regulated.

Part II of this Note provides the facts and holding of *Willson*. Then, part III examines the development of First Amendment law, including the recent developments of *Reed* and subsequent cases. Part IV discusses the instant decision of the Eighth Circuit in *Willson*, and Part V describes why *Willson* illustrates the challenging precedent created by *Reed*. Finally, Part VI evaluates the continuing challenges municipalities will face when attempting to draft constitutional speech restrictions.

II. FACTS AND HOLDING

In September 2017, the city of Bel-Nor passed Ordinance 983 ("the Ordinance"), codified as Bel-Nor Municipal Code Section 400.120(E).[4] Bel-Nor is a northwestern suburban city located in St. Louis County, Missouri,[5] and as of the 2010 census, it had a population of 1499.[6] Under the Ordinance, "each improved parcel may have up to one stake-mounted, freestanding sign"[7] and "[n]ot more than one (1) flag."[8] A sign is defined as:

> Any poster, object, devise [sic], or display, situated outdoors, which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, idea, belief or location by any means, including but not limited to words, letters, figures, designs, symbols, colors, logos, fixtures, cartoons or images.[9]

A flag is defined as "any fabric or bunting containing distinctive colors, patterns or symbols used as a symbol of a government or institution."[10] Additionally, the Ordinance explicitly states that "'flags' shall not be considered 'signs.'"[11]

4. *Id.*

5. *About Bel-Nor*, CITY OF BEL-NOR, https://www.cityofbelnor.org/about [perma.cc/4BDR-Y35C] (last visited Mar 8, 2020).

6. *Bel-Nor Village, Missouri*, AM. FACT FINDER, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk [perma.cc/AC5Q-RPLB] (last visited Mar. 8, 2020).

7. *Willson*, 924 F.3d at 999.

8. *Id.* at 999–1000.

9. *Id.* at 1000.

10. *Id.*

11. *Id.*

At the time of the proceedings, Lawrence Willson was a resident of Bel-Nor.[12] In December 2017, Willson was charged with violating the Ordinance because he had three "stake-mounted, freestanding signs" in the front yard of his home.[13] Since 2016, he had displayed "Clinton Kaine" and "Jason Kander U.S. Senate" signs, and since 2014, he had displayed a "Black Lives Matter" sign.[14] Willson sought a preliminary injunction on the grounds that the Ordinance was in violation of the First Amendment's Free Speech Clause, as it was content-based because "its flag exemption imposes different restrictions on signs depending on their content."[15] The City of Bel-Nor asserted the Ordinance was not content-based.[16] According to Bel-Nor, the Ordinance included an "exceptionally broad definition of institution, encompassing any significant practice, relationship or organization in a society or culture."[17] Additionally, the City argued there was no risk of infringing on First Amendment rights because there were three different surfaces, specifically two different sides of a sign and one flag, on which to communicate thoughts and ideas.[18] Further, Bel-Nor asserted the Ordinance was justified by traffic safety as well as aesthetic concerns and was narrowly tailored to serve those interests.[19]

The United States District Court for the Eastern District of Missouri denied Willson's motion for a preliminary injunction, holding he was unlikely to succeed on the merits of his First Amendment claim.[20] First, the district court determined that Willson lacked standing to challenge the flag exemption, as there was "no evidence that it affected" him.[21] The court further held that the Ordinance was content-neutral and narrowly-tailored to address the aesthetics and traffic safety concerns of Bel-Nor.[22]

The United States Court of Appeals for the Eighth Circuit reversed and remanded the district court's decision.[23] First, the Eighth Circuit found that Willson had standing to challenge the "portions of the [Ordinance] which provide the basic definitional structure for the terms used in the violated

12. Willson v. City of Bel-Nor, Mo., 298 F. Supp. 3d 1213, 1215 (E.D. Mo. 2018), *rev'd and remanded*, 924 F.3d 995 (8th Cir. 2019)

13. *Willson*, 924 F.3d at 999.

14. *Id.*

15. *Id.* at 1000. Willson also argued that Ordinance 983 was vague and overbroad, also in violation of the First Amendment's Free Speech Clause, however, I do not analyze either of these claims in depth for the purposes of this Note.

16. *Id.* at 1001.

17. *Id.* at 1001 (internal quotations omitted).

18. *Id.* at 1003.

19. *Id.* To support the contention that the ordinance is narrowly tailored, the city offered testimony of the Mayor, who discussed concern about distracted driving and stated the ordinance reflects that interest in public policy. *Id.* at 1002.

20. *Id.* at 999.

21. *Id.* at 1000.

22. *Id.* at 999. The district court also rejected Willson's overbreadth challenge. *Id.*

23. *Id.* at 1004.

sections and which more generally define the scope of signs allowed by the violated sections."[24] Next, the Eighth Circuit held that the Ordinance was content-based and therefore subject to strict scrutiny.[25] Further, the court stated it was not narrowly tailored to meet a compelling government interest and thus did not satisfy the strict scrutiny requirement.[26] The Eighth Circuit ultimately held that the preliminary injunction should be granted because Willson was likely to succeed on the merits of his First Amendment challenge.[27]

III. LEGAL BACKGROUND

The First Amendment prohibits laws that restrict expression because of "its message, its ideas, its subject matter, or its content."[28] Both written and spoken word clearly fall within the parameters of First Amendment protection.[29] The First Amendment also protects particular actions that express ideas, in other words, "expressive conduct."[30] The Supreme Court has articulated a test to determine whether expressive conduct is protected under the First Amendment: "[A]n individual claiming an activity [is] protected . . . must show that the activity is intended to express a particularized message that would likely be understood by others."[31] For example, the Court has found that burning an American flag to protest government actions is protected.[32]

Local municipalities are vested with the power to enact ordinances that restrict the permitted uses of property in a given area.[33] This power directly competes with individual rights and the desire to live without governmental interference.[34] An example of this tension is easily seen in municipal ordinances that "restrict or prohibit the flying of flags, pennants, or banners by individuals in a noncommercial setting" because these limitations can

24. *Id.* at 1000 (quoting Neighborhood Enter., Inc. v. City of St. Louis, 644 F.3d 728, 735 (8th Cir. 2011)).

25. *Id.* at 1001.

26. *Id.*

27. *Id.* at 1004.

28. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

29. Angelica M. Sinopole, *"No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets*, 113 PENN ST. L. REV. 329, 335 (2008).

30. *Id.*

31. *Id.* (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569–71 (1995); Spence v. State of Wash., 418 U.S. 405, 409 (1974)).

32. Texas v. Johnson, 491 U.S. 397, 490 (1989).

33. Bunting, *supra* note 1, at 476.

34. Jay M. Zitter Annotation, *Validity, Construction, and Application of Zoning Ordinances Regulating Display of Noncommercial Flags or Banners*, 103 A.L.R. 5th 445 (2002).

interfere with First Amendment rights.[35] Furthermore, the Supreme Court has noted the importance and uniqueness of residential signs as a mode of expression, as they are "unusually cheap and convenient" and "[d]isplaying a sign in one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means."[36]

A. Levels of Scrutiny

Not all laws that restrict speech are analyzed under the same standard. The level of scrutiny a court applies to a constitutional challenge depends on whether the restriction is content-based or content-neutral.[37] Two different levels of scrutiny are applied based on the type of speech restriction: strict scrutiny and intermediate scrutiny.[38] This distinction is critical, as restrictions subject to intermediate scrutiny have a much higher chance at surviving a constitutional challenge, while strict scrutiny is generally fatal.[39]

Content-based restrictions limit speech based on the message conveyed.[40] These restrictions are presumptively unconstitutional and subject to strict scrutiny, meaning they are only justified if the government shows they further a compelling interest and are "narrowly tailored to achieve that interest."[41] To satisfy the narrowly tailored requirement, the facts must demonstrate "a real need for the government to act to protect its interests."[42] The government must be able to prove that "no less restrictive alternative" would serve its purpose.[43] Some common examples of content-based restrictions are "laws that prohibit seditious libel, ban the publication of confidential information, forbid the hiring of teachers who advocate the

35. *Id.*

36. City of Ladue v. Gilleo, 512 U.S. 43, 44, 56 (1994).

37. Sinopole, *supra* note 29, at 358.

38. *Id.* at 334.

39. "[A] law rarely survives [strict] scrutiny." Burson v. Freeman, 504 U.S. 191, 200 (1992). "Content-based laws receive strict scrutiny, which nearly always proves fatal." Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012). "If there is one First Amendment rule that is clearer than any other, it is that the determination that a regulation is content-based or content-neutral will almost always determine if the regulation will be invalidated or upheld." Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 92 (2017).

40. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983).

41. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226, 2231 (2015); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010); R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

42. Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1099 (8th Cir. 2013).

43. United States v. Playboy Entm't Grp., Inc, 529 U.S. 803, 813 (2000).

violent overthrow of government, or outlaw the display of the swastika in certain neighborhoods."[44]

Conversely, content-neutral restrictions limit speech regardless of the message conveyed.[45] These restrictions "do not pose the same inherent dangers to free expression" because the restriction is not related to the subject or topic of the speech.[46] They are subject to intermediate scrutiny, meaning the restriction will be constitutional "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[47] Examples of this type of restriction are "laws that prohibit noisy speeches near a hospital, ban billboards in residential communities, impose license fees for parades and demonstration, or forbid the distribution of leaflets in public places."[48] Notably, laws that restrict signs solely based on numbers are largely found content-neutral.[49]

B. The Supreme Court's Standards of Review

Prior to the Supreme Court's ruling in *Reed v. Town of Gilbert*, the standard for determining if a law was content-neutral was whether "the government has adopted a regulation of speech because of disagreement with the message it conveys."[50] If the purpose and justification of the law was neutral, the restriction usually received lesser scrutiny.[51] Consequently, courts generally presumed sign ordinances were valid.[52] However, the Supreme Court, in 2015, developed a new content-discrimination methodology to balance speech rights and governmental interests.[53] This

44. Stone, *supra* note 40, at 190.

45. *Id.* at 189–90.

46. Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 213 (1997) (quoting Turner Broad. Sys., Inc. v. F.F.C., 512 U.S. 622, 661 (1994)) (citation omitted).

47. *Id.* "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, so long as they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." George L. Blum, *Construction and Application of* Reed v. Town of Gilbert, Ariz*., Providing that Speech Regulation Targeted at Specific Subject Matter Is Content-Based Even If It Does Not Discriminate Among Viewpoints Within That Subject Matter*, 24 A.L.R. 7th Art. 6 (2017).

48. Stone, *supra* note 40, at 189–90.

49. "The state's first obligation under the Speech Clause is to treat ideas equally and impartially, and content-neutral restrictions treat ideas equally and impartially, *irrespective of the nature or number of ideas that they actually restrict*." Armijo, *supra* note 39, at 65, 95 (emphasis added).

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

51. *Id.*

52. Bunting, *supra* note 1, at 474.

53. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015).

revised analysis delayed determining the government's intent, making that inquiry relevant only if the law was facially neutral.[54]

1. *Reed v. Town of Gilbert*

In *Reed v. Town of Gilbert*, the Town of Gilbert adopted a sign code that prohibited displaying outdoor signs anywhere in the town without a permit, with the exception of twenty-three categories of signs, including ideological signs, political signs, and temporary directional signs.[55] In determining whether the Town's Sign Code was a content-based restriction, the Court set out an analytical framework to determine content-neutrality. First, the reviewing body must determine whether the restriction is "content neutral on its face."[56] The Court noted that some regulations are more obviously facially content-based, while other regulations are more subtle.[57] Therefore, courts must inquire into not only if a regulation defines speech by a particular subject matter but also whether a regulation defines speech by its function or purpose.[58] This illustrates that a speech restriction is deemed content-based

54. Armijo, *supra* note 39, at 67.

55. Reed, 135 S. Ct. 2224–25.

> Three categories of exempt signs are particularly relevant here. The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial 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." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits. The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby 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." The Code treats temporary directional signs even less favorably than political signs. Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward.

Id. (internal citations omitted).

56. *Id.* at 2228.

57. *Id.* at 2227.

58. *Id.*

"even if it does not discriminate among viewpoints within that subject matter."[59] A restriction that is content-based on its face will be subject to strict scrutiny regardless of the government's motive.[60] "In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral."[61] Further, some facially content-neutral laws may be deemed content-based if "there is a content-based purpose behind their application."[62] Put differently, "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys" are content-based.[63]

The Court held the sign restriction was content-based on its face, triggering strict scrutiny without the need to consider "justifications or purposes for enacting the code."[64] Additionally, the Town's alleged governmental interests in enacting the restriction were to preserve aesthetic appeal and enhance traffic safety.[65] The Court found that even if it were to consider those compelling interests, the restrictions "fail as hopelessly underinclusive"[66] because the restriction "leaves appreciable damage to that supposedly vital interest unprohibited."[67] In the unanimous decision, all justices agreed the ordinance at issue was unconstitutional because the restriction "depend[ed] entirely on the communicative content of the sign."[68] However, not all agreed on how far the opinion went in creating a new analysis for content-neutrality. In a concurring opinion, Justice Kagan discussed the significance of this decision and its impact on the thousands of reasonable town ordinances that could be invalidated.[69] Justice Kagan wrote, "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" and determined a possible consequence of this decision would be that "[t]his Court may soon find itself a veritable Supreme Board of Sign Reviews."[70]

---

59. *Id.* at 2230.

60. *Id.* at 2228.

61. *Id.*

62. RONALD KROTOSZYNSKI ET AL., THE FIRST AMENDMENT: CASES AND THEORY (3d ed. 2017).

63. *Reed*, 135 S. Ct. at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

64. *Id.*

65. *Id.* at 2231.

66. *Id.*

67. *Id.* (quoting Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002)).

68. *Id.* at 2227.

69. *Id.* at 2239 (Kagan, J., concurring).

70. *Id.*

C. Implications of Reed *on Subsequent Free Speech Challenges in Circuit Courts*

In the wake of *Reed*, lower courts have applied the elements of content-neutrality as specified; however, there have been varying outcomes based on small intricacies. This Section discusses the differing outcomes of the United States Courts of Appeals for the Ninth Circuit, District of Columbia, Fourth Circuit, and Sixth Circuit.

1. Ninth Circuit

In 2016, the Ninth Circuit examined five city ordinances regulating mobile billboards and held all of the ordinances to be "content-neutral, reasonable, time, place, and manner restrictions on speech."[71] These ordinances are variations on a ban of advertisements attached to non-motorized and motorized vehicles, and they permit civil penalties and impounding of vehicles that violate the ordinance.[72] The plaintiffs owned billboards that were subject to the bans.[73] The plaintiffs contended the bans were facially invalid because they distinguished between billboards that advertise and signs that do not.[74] The Ninth Circuit recognized the ordinances

---

71. Lone Star Sec. & Video, Inc. v. Los Angeles, 827 F.3d 1192, 1195 (9th Cir. 2016).

72. *Id.* at 1196, 1198.

> [S]ection 87.54 of the Los Angeles Municipal Code (the "motorized mobile billboard ordinance") provides, in pertinent part:
>
> > A motor vehicle may contain advertising signs that are painted directly upon or are permanently affixed to the body of, an integral part of, or fixture of a motor vehicle for permanent decoration, identification, or display and that do not extend beyond the overall length, width, or height of the vehicle. Advertising signs that are painted directly upon or permanently affixed to a motor vehicle shall not be painted directly upon or permanently affixed in such a manner as to make the motor vehicle unsafe to be driven, moved, parked or left standing on any public street or public lands in the City. Motor vehicles that pose a safety hazard shall be impounded pursuant to [the] California Vehicle Code . . . .
>
> The other four ordinances (the "non-motorized mobile billboard ordinances") make it unlawful to park a "mobile billboard advertising display" on any public street within city limits. The non-motorized mobile billboard ordinances all incorporate the definition of "mobile billboard advertising display" codified at California Vehicle Code section 395.5: "advertising display[s]" that are attached to non-motorized vehicles, carry a sign or billboard, and are "for the primary purpose of advertising."

Id. at 1196 (internal citations omitted).

73. *Id.* at 1196.

74. *Id.* at 1197.

did not define "advertising," but Ninth Circuit precedent did.[75] Therefore, the court concluded the ordinances regulated the *manner* of speech, not the content.[76] Specifically, the court determined the ordinances addressed "only the types of sign-bearing vehicles subject to regulation, and discriminate[d] against prohibited billboards on the basis of their size and mobility alone, and are thus content neutral."[77]

2. District of Columbia

The District of Columbia Circuit examined a regulation of signs on public lampposts and found it to be a content-neutral restriction.[78] The plaintiffs, two nonprofit organizations that used lampposts to advertise events, sued the District of Columbia, challenging the constitutionality of the ordinance.[79] The court discussed how the government may impose content-neutral limitations on the "duration and manner in which the public uses government property for expressive conduct like sign-posting."[80] The District of Columbia Circuit distinguished this ordinance, one that "requires that, whatever their content or viewpoint . . . signs be removed within thirty days after the event to prevent them from accumulating as visual clutter," from a content-based ordinance that would target the communicative message "by distinguishing among various events by topic."[81] Therefore, "The rule's

---

75. *Id.* at 1199 ("[T]he California Court of Appeal has already recognized that the word 'advertising' refers to the activity of displaying a message to the public, not to any particular content that may be displayed.").

76. *Id.* at 1200.

77. *Id.*

78. Act Now to Stop War and End Racism Coal. v. District of Columbia, 846 F.3d 391, 396 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. (2017).

> In 2012, the District revised the regulation once more, yielding the version now before us. Section 108 currently provides that any sign – including those announcing events – may be affixed to a publicly owned lamppost for a maximum of 180 days, but that signs relating to specific events must be removed within 30 days after the event. The regulation also continues to restrict the method of affixing signs on public lampposts: All signs must be "affixed securely to avoid being torn or disengaged by normal weather conditions," but cannot "be affixed by adhesives that prevent their complete removal from the fixture, or that do damage to the fixture." Signs may not be posted on "any tree in public space," and no more than three copies of any sign may be posted on either side of the street on a given block. The 2012 revision also added subsection 108.13, which defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

Id. at 399 (citations omitted).

79. *Id.* at 397.

80. *Id.* at 403.

81. *Id.*

clutter-minimizing rationale does not depend on the content of a sign's message."[82]

3. Fourth Circuit

In *Central Radio Co. Inc. v. City of Norfolk, Virginia*,[83] the Fourth Circuit determined a sign ordinance, which restricted the size of the signs and required eligible signs to be backed by a sign certificate showing the sign complies with the code, was content-based.[84] The plaintiffs were a "radio manufacturing and repair business and two of its managers" who placed a 375-square-foot banner on the company's building that stated "Eminent Domain Abuse . . . 50 YEARS ON THIS STREET / 78 YEARS IN NORFOLK / 100 WORKERS / THREATENED BY / EMINENT DOMAIN."[85] The banner was used to symbolize a feud with the Norfolk Redevelopment and Housing Authority.[86] The plaintiffs filed suit to enjoin the City of Norfolk from enforcing the sign ordinance.[87] The plaintiffs alleged that the ordinance was unconstitutional because it "exempted certain 'flag[s] or emblem[s]' and 'works of art' from any similar limitations."[88] The alleged reasoning for the restriction was to "'enhance and protect the physical

82. *Id.*

83. 811 F.3d 625 (4th Cir. 2016).

84. *Id.* at 629, 633.

> The former sign code applied to "any sign within the city which is visible from any street, sidewalk or public or private common open space." However, as defined in the ordinance, the term "sign" did not encompass any "flag or emblem of any nation, organization of nations, state, city, or any religious organization," or any "works of art which in no way identify or specifically relate to a product or service." Such exempted displays were not subject to regulation under the former sign code. With respect to signs that were eligible for regulation, the former sign code generally required that individuals apply for a "sign certificate" verifying compliance with the code. Upon the filing of such an application, the City was required to issue a "sign certificate" if the proposed sign complied with the provisions that applied in the zoning district where the sign was to be located. In the "I-1" industrial zoning district in which plaintiff Central Radio Company Inc.'s (Central Radio) property is located, the former sign code restricted the size of signs. The size restrictions varied depending on whether a sign was categorized as a "temporary sign," which was permitted to be as large as 60 square feet, a "freestanding sign," which was permitted to be as large as 75 square feet, or an "other than freestanding sign," which was permitted to be as many square feet as the number of linear feet of building frontage facing a public street. The City did not patrol its zoning districts for violations of size restrictions or other provisions of the former sign code, but did inspect displays in response to complaints made by members of the public.

Id. at 629 (citations omitted).

85. *Id.* at 628–30.

86. *Id.* at 630.

87. *Id.* at 630.

88. *Id.*

appearance of all areas of the city,' and to 'reduce the distractions, and obstructions and hazards to pedestrian and auto traffic caused by the excessive number, size or height, inappropriate types of illumination, indiscriminate placement or unsafe construction of signs.'"[89] The Fourth Circuit deemed this sign ordinance content-based and subject to strict scrutiny, which it could not withstand.[90] The court stated the ordinance was content-based on its face because "it applied or did not apply as a result of content, that is, 'the topic discussed or the idea or message expressed.'"[91] Namely, "[I]t exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems."[92] Further, the ordinance did not satisfy strict scrutiny because the City's preferred compelling interests of aesthetics and traffic safety were not compelling government interests.[93]

4. Sixth Circuit

The Sixth Circuit reconsidered a sign ordinance in light of the *Reed* decision and deemed it content-based as well as subject to strict scrutiny.[94]

89. *Id.* at 628.

90. *Id.* at 631.

91. *Id.* at 633 (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015)).

92. *Id.*

93. *Id.*

94. Wagner v. City of Garfield Heights, 675 F. App'x 599, 607 (6th Cir. 2017).

> [T]he City has enacted Garfield Heights Codified Ordinances Chapter 1140, a comprehensive code of regulations that governs whether, when, and for how long its residents, businesses, and visitors may post signs. These regulations generally prohibit signs in residential areas. But given that Garfield Heights acknowledges "the rights of [its] residents" to "speak freely," Sections 1140.04(f) and 1140.361 of the Codified Ordinances allow residents to place "temporary signs" measuring less than twelve square feet in surface area on their lawns . . . . But "for-sale signs, sold signs, open house, for-rent, and leasing signs, and signs of a religious, holiday, personal or political nature" are subject to additional, more restrictive rules. Under Section 1140.361, only one "for-sale, sold, for-rent, leasing, open house, religious, holiday or personal sign' not exceeding six square feet is permitted on a given lot in single-family residential districts. Section 1140.362 extends this six-square-foot limit to political signs and goes even further by providing that the limitation applies to all political signs throughout Garfield Heights, including those in commercial and industrial districts. By contrast, "religious," "holiday," "personal," and other non-political temporary signs in commercial and industrial districts can generally be as large as twelve square feet in sign area without a permit, and up to thirty-two square feet with a permit. Despite being subject to more restrictive size constraints in non-residential areas, in residential areas, political signs are subject to fewer overall restrictions than "for-sale, sold, for-rent, leasing, open house, religious, holiday [and] personal" signs. Whereas residents must remove these other signs within forty-eight hours after the signs "fulfil[l] [their] purpose," residents may leave political signs up for up to seventy-two hours after an election. Additionally, despite some language in the City's ordinances to the contrary, Garfield Heights maintains that whereas residents may post only one "for sale, sold, for-rent, leasing, open house,

The plaintiff lived in the residential suburb of Cleveland, Ohio and placed a sixteen-square-foot political sign on his lawn opposing a councilwoman's plan to implement a new municipal tax.[95] He was charged with violating an ordinance that placed limitations on the size of political signs residents could have on their lawns.[96] The plaintiff asserted that because the ordinance distinguished between political signs and other signs, it was content-based.[97] The court concluded that "the fact that a regulatory scheme requires a municipality to examine the content of a sign to determine which ordinance to apply should merely be seen as indicative, not determinative, of whether a government has regulated for reasons related to content appears to run afoul of *Reed*'s central teaching."[98]

In 2019, the Sixth Circuit revisited the issue in *Thomas v. Bright*,[99] where it held the Tennessee Billboard Regulation and Control Act was content-based and unconstitutional.[100] The plaintiff owned over thirty billboards in

---

> religious, holiday or personal" sign on their property, they may erect as many political lawn signs as they want until they run up against a regulation that restricts the "total sign face area of all temporary signs on a lot" to 0.675 square feet per foot of frontage. Thus, a Garfield Heights resident with fifty feet of frontage could presumably post any number of political lawn signs so long as their total sign face area does not exceed 33.75 square feet.

Id. at 601–02 (citations omitted).

95. *Id.* at 602.

96. *Id.*

97. *Id.* at 604.

98. *Id.* (internal quotations omitted).

99. 937 F.3d 721 (6th Cir. 2019).

100. *Id.* at 738.

> The Billboard Act parallels the HBA in most relevant respects and prohibits all outdoor signage within 660 feet of a public roadway unless expressly permitted by TDOT permit. But the Act also provides exceptions under which certain signs may be posted without permit, including an exception for signage "advertising activities conducted on the property on which [the sign is] located." This is referred to as the "on-premises exception" and corresponds to the HBA's third limitation. Under the Act's implementing regulations:
>
> > A sign will be considered to be an on-premise[s] sign if it meets the following requirements: (a) Premise[s] - The sign must be located on the same premises as the activity or property advertised. (b) Purpose - The sign must have as its purpose (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising.
>
> The regulations elaborate further:
>
> > The following criteria shall be used for determining whether a sign has as its purpose [ ] the identification of the activity located on the premises or its products or services, . . . rather than the business of outdoor advertising.
> >
> > (a) General
> >
> > 1. Any sign which consists solely of the name of the establishment is an on-premises sign.
> >
> > 2. A sign which identifies the establishment's principle [sic] or accessory product or services offered on the premises is an on-premises sign.

Tennessee and used one billboard on a vacant lot to post a sign in support of the 2012 United States Summer Olympic Team.[101] The Act "prohibits all outdoor signage within 660 feet of a public roadway unless expressly permitted by . . . permit" but also contains exceptions "under which certain signs may be posted without a permit."[102] The court stated that textually, the Act "is a blanket, content-neutral prohibition on any and all signage speech except for speech that satisfies an exception."[103] However, this exception, which "favors certain content over others," makes the Act content-based on its face.[104] The court also noted that it is irrelevant that this content-discrimination was part of the exception, rather than the restriction itself.[105]

The preceding cases are just a few of many that illustrate how *Reed* affected lower courts and the vast amount of cases dealing with municipal ordinances and sign regulations, specifically those that are allegedly supported by the governmental interests of aesthetics and traffic safety. In fact, the amount of detail in the ordinances themselves had the greatest influence on determining whether the ordinance was content-based or content-neutral. As illustrated, ordinances with more overarching prohibitions were found to be content-neutral and had a much greater chance at surviving a constitutional challenge. Conversely, ordinances that either have lots of detail in the ordinance itself, or within definitions and exceptions to the ordinance, were found to be content-based and more difficult to defend when faced with a constitutional challenge.

> 3. An example of an accessory product would be a brand of tires offered for sale at a service station.
>
> (b) Business of Outdoor Advertising
>
> 1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle [sic] activity, it shall be considered the business of outdoor advertising and *not an on-premises sign*. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.
>
> 2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is *not an on-premises sign*. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating "Skeet Range Here," or "Dog Kennels Here." The on-premises activity would only be the skeet range or dog kennels.

Id. at 725–26 (citations omitted); *see also* TENN. CODE ANN. § 54-21-101, et. seq. (2019).

101. *Id.* at 726–27.

102. TENN. CODE. ANN. § 54-21-101, et. seq (2019); *Thomas*, 937 F.3d at 725.

103. 937 F.3d at 728.

104. *Id.*

105. *Id.*

IV. INSTANT DECISION

A three-judge panel of the Eighth Circuit deemed Ordinance 983 ("the Ordinance") content-based and unconstitutional, reversing the lower court's decision.[106] The panel ultimately determined Willson would likely succeed on the merits of his First Amendment challenge, stating the preliminary injunction should be granted.[107]

In an opinion written by Judge Benton, the Eighth Circuit first determined the ordinance was content-based because "as written, Ordinance 983 draws distinctions based on the message a speaker conveys."[108] The court analyzed the definition of a sign compared to the definition of a flag[109] and concluded that "the *content* of a flag or sign determines whether it is a flag or sign."[110] Therefore, to determine whether something is a flag or a sign, one must inquire into "the topic discussed or the idea or message expressed" to conclude if it will be prohibited by the Ordinance.[111] The Eighth Circuit rejected Bel-Nor's contention that the Ordinance contains an exceptionally broad definition of institution that does not pose a threat to free speech.[112] Further, the Eighth Circuit dismissed Bel-Nor's assertion that it would be "difficult to imagine a message omitted by the Ordinance's definition of a flag as a symbol of a government or institution."[113] The court supported this decision by finding the Ordinance drew a distinction "based on the message the speaker conveys."[114] In fact, the court accepted Willson's argument that the Ordinance was written so broadly as to apply to "tacking up a 'Welcome Home' banner on the garage, sticking an ADT Security window cling to the front window, displaying Christmas lights, and tying a 'Happy Birthday' balloon to a front door on the day of a birthday party."[115]

The Eighth Circuit next concluded that the Ordinance failed to satisfy the strict scrutiny analysis required for a content-based restriction.[116] The Eighth Circuit conducted this analysis with the understanding that Bel-Nor had the burden to demonstrate a compelling interest that the Ordinance was narrowly tailored to achieve.[117] Bel-Nor advanced justifications of traffic safety and aesthetics.[118] The court determined these are not compelling

106. Willson v. City of Bel-Nor, Mo., 924 F.3d 995, 1004 (8th Cir. 2019).
107. *Id.*
108. *Id.* at 1001 (internal quotations omitted).
109. *See supra* Part II.
110. 924 F.3d at 1000 (emphasis added).
111. *Id.* at 1001.
112. *Id.*
113. *Id.* (citations omitted).
114. *Id.*
115. *Id.* at 1002–03 (internal quotations omitted).
116. *Id.* at 1002.
117. *Id.* at 1001–02.
118. *Id.* at 1001.

interests, meaning they fail the strict scrutiny test.[119] It noted these commonly asserted interests, while significant, have never been held to be compelling.[120] The Eighth Circuit went on to say that even if the interests were compelling, the Ordinance was not narrowly tailored, as Bel-Nor did not advance any evidence stating it furthers the interests.[121] The court rejected testimony from Bel-Nor's Mayor, determining the city's abstract interest in public safety did not satisfy the required "genuine nexus between the regulation and the interest it seeks to serve."[122]

Finally, the Eighth Circuit noted the risk of substantial limitation of free expression rights, as residential signs have long been held to be an important and distinct mode of expression.[123] This is significant because the remaining modes of communication are inadequate when viewed in light of the particular benefits of residential signs, and therefore, there are not ample alternative channels for communication.[124] "Due to the special significance of the right to speak from one's own home, severe restrictions of this right do not afford adequate alternatives."[125] The Eighth Circuit reversed and remanded, refusing to take any further action regarding the Ordinance, as "[t]his court will not rewrite a law to conform it to constitutional requirements."[126]

V. COMMENT

The Eighth Circuit in *Willson v. City of Bel-Nor* correctly applied the content-neutral analysis established in *Reed v. Town of Gilbert*. However, *Willson* is a clear example of the practical consequences of *Reed* on municipal sign ordinances, as well as the difficulties that arise when the analysis is applied. The message *Reed* sends to local municipalities is: if a municipal ordinance is going to be upheld, it must be facially-content neutral. Furthermore, all aspects of the ordinance, including exemptions and definitions, must satisfy this standard. Because municipalities have a right to enact ordinances, it is important to examine the competing interests of both the individuals within the community that are subject to the ordinance and the municipalities drafting it.[127]

---

119. *Id.* at 1002.

120. *Id.*; *see also* Neighborhood Enters. v. St. Louis, 644 F.3d 728, 738 (8th Cir. 2011); Whitton v. Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995).

121. 924 F.3d at 1002.

122. *Id.*

123. *Id.*; *see also* City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

124. 924 F.3d at 1003.

125. *Id.* at 1004; *see also Gilleo*, 512 U.S. at 57 ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.").

126. 924 F.3d at 1004 (quoting United States v. Stevens, 559 U.S. 460, 481 (2010)).

127. Zitter, *supra* note 34.

In the aftermath of *Reed*, municipalities around the country, including the City of Bel-Nor, Missouri, have attempted to regulate the posting of signs, mostly in the interests of aesthetics and traffic safety.[128] As controlling precedent, *Reed* subjects local municipalities to potential First Amendment constitutional challenges by causing confusion during the drafting process of sign ordinances. By encouraging municipalities to remove content-based references in sign ordinances, *Reed* "significantly reduc[ed] the likelihood that municipalities might regulate signage."[129]

Municipalities and localities use ordinances, such as Ordinance 983, to restrict "the uses of property in the area to improve conditions for the residents in general."[130] Notably, "ordinances [are often] passed in order to rein in the most severe abuses, not to restrict reasonable uses, but . . . the language used [in the ordinances is] broad enough to cover a wide variety of essentially innocent or unobtrusive flags or banners."[131] However, the majority in *Reed* acknowledged the exact consequence lower courts are now facing:

> Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "absolutist" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," . . . but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.[132]

When examining *Reed*'s effect on lower courts' decisions and interpretations of local sign ordinances, the ordinances that were deemed content-based largely contained more detail, either in the form of definitions or exemptions.[133] Essentially, a municipality must strike a balance between drafting an ordinance with enough detail to effectively regulate land usage as desired, while eliminating any references to the content of the message sought to be regulated. This balance has been difficult to reach, as evidenced by lower court decisions striking down numerous municipal ordinances in various forms.[134]

Applying that to the case at hand, it is important to consider how the Ordinance may have been altered to be constitutionally sound. Specifically, would the Ordinance have been found facially content-neutral if there was no distinction between a sign or flag? The Eighth Circuit recognized this possibility by stating "even if Bel-Nor were to enforce the Ordinance without distinguishing between flags and signs based on content, this court will 'not

128. *See supra* Part III.

129. Armijo, *supra* note 39, at 74.

130. Zitter, *supra* note 34.

131. *Id.*

132. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015) (emphasis in original); *see* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984).

133. *See supra* Part III.

134. *See supra* Part III.

uphold an unconstitutional statute merely because the government promise[s] to use it responsibly.'"[135] This seems to imply that if Bel-Nor had not distinguished between the definitions of a "sign" and a "flag," the Ordinance would have been constitutional. Further, the Eighth Circuit went on to state that "as written, the ordinance draws a distinction based on the message conveyed."[136] Again, this indicates the nuanced approach that the Eighth Circuit took when analyzing the Ordinance.

What if "used as a symbol of a government or institution" was not included in the definition of a "flag"?[137] This seems to be the sticking point of the First Amendment challenge. The court noted that "applying the ordinary meaning of 'government or institution,' a fabric with a Cardinals logo is a 'sign,' while a fabric with an Army logo is a 'flag.'"[138] Therefore, the court concluded this inquiry shows the Ordinance's prohibitions depend on content and rejected Bel-Nor's argument that the broad definition would encompass "[a]ny significant practice, relationship or organization in a society or culture."[139] The definition of a sign contained a longer list of uses and means, but the court focused on the language of the definition of a "flag" in the content-neutral analysis.[140]

Based on these observations, it is fair to assume that perhaps an ordinance with a more general ban – possibly allowing two flags and/or signs – may be constitutional because determining the Ordinance's applicability does not turn on the content of the communication but rather solely the number of signs. However, the practical effects on residents of Bel-Nor are the same under both this presumed constitutionally sound ordinance and Ordinance 983: they can place two mediums on their residential property to express their views.

This demonstrates the problem with the precedent created by *Reed*. Practically, how is an ordinance that limits solely the number of mediums a resident can place in their yard any more constitutional or less infringing on free speech rights than one that allows for one of each defined type of sign and flag? The First Amendment prohibits the government from regulating speech based on the content of the speech, but how does regulating and restricting the *medium* of how ideas are expressed not abridge First Amendment rights? According to the *Reed* analysis, this restriction would likely be constitutional because it would be subject to less scrutiny, solely because of its facial content-neutrality. "By giving content-neutral restrictions only the most cursory level of review regardless of

135. Willson v. City of Bel-Nor, 924 F.3d 995, 1001 (8th Cir. 2019) (quoting United States v. Stevens, 559 U.S. 460, 480, (2010)).

136. *Id.* (internal quotations omitted).

137. *Id.* at 1000.

138. *Id.* at 1000–01.

139. *Id.*

140. *Id.* at 1000–01.

those restrictions' effects on speakers . . . the First Amendment has lost its way."[141]

The Eighth Circuit correctly examined the Ordinance on its face to determine content neutrality, prior to inquiring into Bel-Nor's alleged justifications. Bel-Nor invoked aesthetics and traffic safety as compelling interests. Notably, these interests seem to be the two most invoked rationales for local sign ordinances.[142] As noted above, however, aesthetics and traffic safety are never found to be compelling governmental interests, and therefore, will not satisfy the strict scrutiny standard.[143] Conversely, aesthetics and traffic safety are significant interests, which would have satisfied the intermediate scrutiny standard applied to content-neutral restrictions.[144]

This brings Bel-Nor's intentions in passing the Ordinance into question. As Bel-Nor only presented evidence of aesthetic and traffic safety concerns, this suggests that Bel-Nor thought the ordinance was facially content-neutral. Under intermediate scrutiny, the Ordinance only needed to be supported by significant interests, which aesthetics and traffic safety would satisfy.

Because these frequently invoked governmental interests are never found to be compelling, it is important that municipalities draft constitutional ordinances from the start, with great focus on making the restrictions facially content neutral. Otherwise similar ordinances, although not necessarily intended to be wide ranging, will likely be held unconstitutional.

In theory, it would be relatively easy for local municipalities to draft a constitutional ordinance. So long as the municipality is aware of and follows the jurisdiction's requirements, it is possible to enact a rather restrictive and constitutionally sound ordinance. While the courts in question applied *Reed* equally, it is important to take a step back from this nuanced approach to municipal sign ordinances.[145]

The tension between an individual's right to do what he or she wants without interference and a government's right to enact ordinances restricting speech to protect compelling governmental interests will continue under the content-neutrality analysis created in *Reed*. Further, it will lead to increasingly divergent results across jurisdictions based on nuances in specific clauses and sentences. Municipalities will continue to be perplexed by these results, as they hinge on facial distinctions, regardless of the practical implications of the ordinances or the municipalities' intent.

---

141. Armijo, *supra* note 39, at 92.

142. "This is so not merely because of the *Reed* decision, but also because of *a long line of cases* finding that government interests in aesthetics and safety concerns related to signage, such as lost or distracted drivers, are not compelling." *Id.* at 70 (emphasis added).

143. *See supra* Part III.

144. Cynthia Mosher, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN. ST. L. REV. 587, 612 (2007).

145. "[I]t is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable." City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

VI. CONCLUSION

In *Willson v. City of Bel-Nor, Missouri*, the Eighth Circuit used the nuanced approach laid out by the Supreme Court in *Reed* to determine the content-neutrality of a municipal sign ordinance. This approach condenses the content-neutrality analysis down to a specific step-by-step requirement while disregarding the tension it creates with practical outcomes.

Moving forward, municipalities must pay very close attention to the speech restrictions they issue to comply with the stringent parameters set by the Supreme Court and the interpretations of lower courts. If municipalities want a chance to withstand a constitutional challenge, commonly drafted speech restrictions need to pass through the first hurdle, which is the first step of *Reed*: being facially content-neutral. Otherwise, the commonly alleged interests of aesthetics and traffic safety will not be compelling.

The theoretically attractive reasoning of *Reed* will continue to affect local municipalities in ways that appear to conflict with the general resources available to municipalities and their ability to draft constitutional ordinances. Without extensive research of their jurisdiction's requirements and interpretations of the *Reed* methodology, municipalities may think that including more details in ordinances will lead to more effective regulations; however, these details will determine whether a municipality finds itself under stricter scrutiny of the courts.