



# Land Use and the First Amendment After *Reed*: A Case Law Update

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# The First Amendment

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

# First Amendment and Land Use

- Sign regulation
- Adult business regulation
- Religious land uses
- Parades, marches, demonstrations
- Regulation of sidewalk speech – panhandling and solicitation, leafleting, etc.
- Artwork, murals, etc.

# Program Outline

- Discuss *Reed v. Town of Gilbert* in brief
- Overview of post-*Reed* case law relating to free speech
- Update on religious land use regulation
- Practice tips
- Questions and answers

# Sources of Sign Law

- First Amendment
- Other constitutional provisions
  - Fifth Amendment Takings Clause, Fourteenth Amendment Due Process and Equal Protection clauses
- State constitution
- Federal Highway Beautification Act of 1965, state highway advertising acts
- Zoning enabling laws
- Local codes

# Free Speech Clause Concepts

- ✓ Content (or message) neutrality
  - Time, place or manner regulations
- ✓ Commercial vs. non-commercial speech
- ✓ Off-site vs. on-site signs
- ✓ Bans and exceptions
  - Permits and prior restraints
  - Vagueness and Overbreadth
  - Public forum doctrine

# Important Cases

- *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1975)
- *Linmark Associates v. Willingboro Twp.*, 431 U.S. 85 (1977)
- *Metromedia v. City of San Diego*, 453 U.S. 490 (1981)
- *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)
- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)
- *Hill v. Colorado*, 530 U.S. 703 (2000)
- *McCullen v. Coakley*, 134 S. Ct. 2518 (2014)
- *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)



# *Reed v. Town of Gilbert.* The Case

# *Reed v. Town of Gilbert*: Background



Source: azcentral.com

- § 4.402.A requires all signs to be permitted, unless excepted by § 4.402.D
- § 4.402.D contained 23 exceptions to permitting requirement, including:
  - “Political signs”
  - “Ideological signs”
  - “Temporary directional signs relating to a qualifying event”

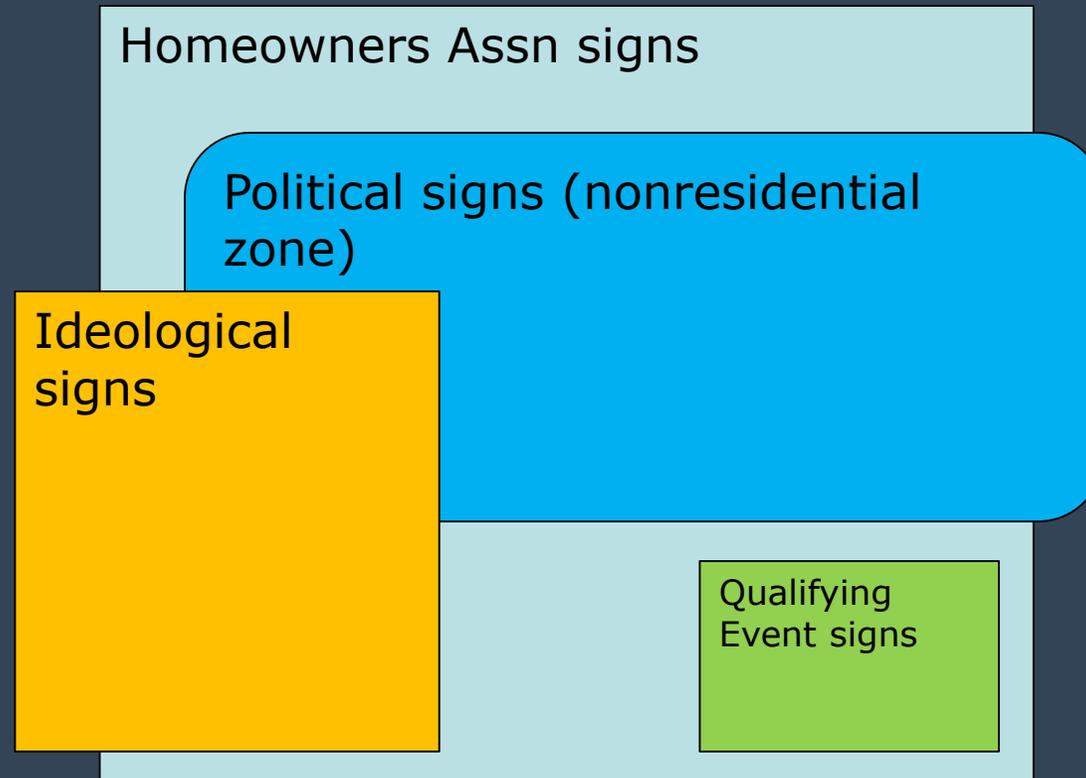
# Gilbert Sign Code

- **Political signs:** “A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general or special elections relating to any national, state or local election.”
  - Up to 16 square feet on residential property, 32 square feet on nonresidential property, up to 6 feet in height
  - Must be removed 10 days after election
- **Ideological signs:** “Sign communicating a message or ideas for non-commercial purposes” (that is not also another sign type)
  - Up to 20 square feet, 6 feet in height

# Gilbert Sign Code

- **Temporary directional signs:** Temporary sign “intended to direct pedestrians, motorists and other passersby to a ‘qualifying event.’”  
Qualifying event is an event sponsored or hosted by religious, charitable, community service, educational, or other nonprofit organization.
  - 6 feet in height, 6 square feet in area, 4 signs per property
  - May be placed 12 hours before event, must be removed 1 hour after

# Gilbert Sign Code



# *Reed v. Town of Gilbert*: Outcome



- Distinctions between forms of noncommercial speech are content based
  - “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.”
  - “[C]ommonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”

# *Reed v. Town of Gilbert*: Outcome



- Apply strict scrutiny
- Law was not narrowly tailored to Town's proffered interests
  - Town failed to show that limiting temporary event signs more than other temporary signs reduced visual clutter, etc.

# *REED V. GILBERT:* A PRACTICAL UPDATE

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# *Reed* In a Nutshell

- Clearly requires code amendments
  1. No categories of signs
  2. No different sizes
- Simple test for problems
  1. Code enforcement official—blind or illiterate

# A Survey of Case Law as of March 1, 2017

- 125 cases decided in the past 21 months
- 25 in state courts
- 100 in federal courts

# *Reed* in State Courts

- Half are Criminal Cases
- Political Campaign Regulation (3)
- Billboards (3)
- Panhandling (2)
- Labor Relations

# *Reed* in Federal Courts

- Panhandling (6)
- Elections / Campaigns (6)
- Abortion (5)
- Telemarketing (4)
- Billboards (2)
- Education (2)
- “True” Sign Code Cases (5)

# What Are The Ripples?

- Land Use is a small slice of *Reed*
- *Reed* is not causing much new litigation at the margin
- More of a First Amendment case than a Land Use case

# Other Considerations

- §1983 Actions
- Fee Exposure
- Level Up or Level Down?

# Arizona: A Tale of Two Cities

Chandler: We Surrender Fast

Scottsdale: We Scream, Then Surrender

# Municipal Exposure Requires Multiple Levels of Failure

1. Failure to Update Code
2. Failure to Change Enforcement
3. Failure to Capitulate

# If You Hear Them Coming

- Bend but do not break
- Dismiss charges
- Settle
- Better off getting sued?

# In Case of Surprise Attack

- Real risk may be from lawyers, not litigants
- No defense if code is truly bad
- Analogy to ADA shakedown lawsuits

Robinson+Cole

# Religious Land Use and Institutionalized Persons Act Claims



# RLUIPA Provisions

## The Basics:

### Substantial Burden

42 U.S.C. § 2000cc(a)

### Equal Terms

42 U.S.C. § 2000cc(b)(1)

### Nondiscrimination

42 U.S.C. § 2000cc(b)(2)

### Exclusions and Limitations

42 U.S.C. § 2000cc(b)(3)



# When Does RLUIPA Apply?

“[A] zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”

*24 U.S.C. 2000-5(5)*



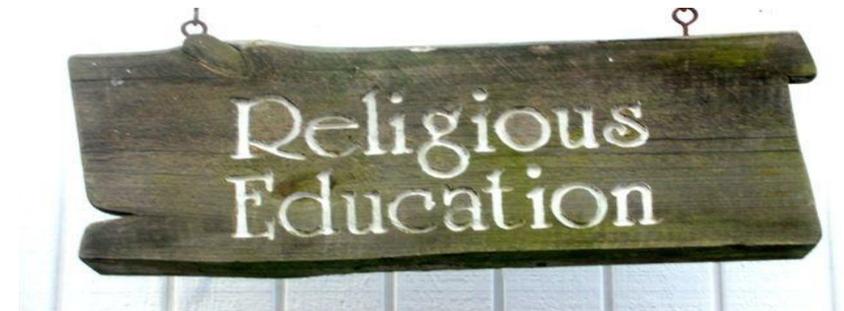
# What is a “Land Use Regulation”?

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- Building & Safety Codes – No.
  - *Salman v. City of Phoenix* (D. AZ 2015).
  - *Affordable Recovery Housing v. City of Blue Island* (N.D. Ill 2016)
- Environmental Review – Possibly.
  - *Fortress Bible Church v. Feiner* (2d Cir. 2012).
- Eminent Domain – Maybe, but probably not.
  - *St. John’s United Church of Christ v. City of Chicago* (7th Cir. 2007);  
*Congregation Adas Yerim v. City of New York* (E.D.N.Y. 2009).

# What is Religious Exercise?

- “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”
- “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”



# Examples of Religious Uses

- Soup kitchen
- Food pantry
- Provision of clothes
- Medical services
- Home bible study
- Cemeteries



# What is a Substantial Burden?

- Congress intentionally left the term “substantial burden” undefined.
- The term ‘substantial burden’ as used in this Act is not intended to be given any broader definition than the Supreme Court’s articulation of the concept of substantial burden or religious exercise. Joint Statement, 146 Cong. Rec. 16,700 (2000)



# Where Might a Substantial Burden Claim Arise?

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- Complete or partial denial of application for zoning relief (special permit, rezone, site plan, etc.)
- Approval of application for zoning relief subject to conditions
- Order from local official (i.e., cease and desist order, notice of violation, etc.)
- Text of zoning regulations

# What constitutes a “substantial burden” on religious exercise?

## Very Likely Yes

- Nowhere to locate in the jurisdiction.
- Unable to use property for religious purposes.
- Imposing excessive and unjustified delay, uncertainty or expense.
- Religious animus expressed by City Officials.

## Very Likely No

- \* Timely denial that leaves other sites available.
- \* Denial that has a minimum impact.
- \* Denial where no reasonable expectation of an approval.
- \* Personal preference, cost, inconvenience.

# Compelling Interests

- MERE SPECULATION, not compelling; need specific evidence that religious use at issue jeopardizes the municipality's stated interests
- Compelling interests are interests of the highest order (public health and safety)



## Examples of Compelling Interests

- Preservation of a municipality's rural and rustic single family residential character of a residential zone. *Eagle Cove Camp Conf. Ctr. v. Town of Woodboro* (7th Cir. 2013)
- Ensuring the safety of residential neighborhoods through zoning. *Harbor Missionary Church Corp. v. City of San Buenaventura* (9th Cir. 2016)
- Traffic? Possibly. *Westchester Day Sch. v. Vill. of Mamaroneck* (2d Cir. 2004)

# Least Restrictive Means

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- “We do not doubt that cost may be an important factor in the least restrictive means analysis ... Government may need to expend additional funds to accommodate citizens’ religious beliefs.” *Burwell v. Hobby Lobby* (2014)
- “‘The least-restrictive-means standard is exceptionally demanding,’ and it requires the government to ‘sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].’” *Holt v. Hobbs* (2015)(quoting *Hobby Lobby*)

## More On Least Restrictive Means

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- Denial of zoning application without consideration of any conditions or alternatives fails this test. *Westchester Day Sch.* (2d Cir. 2007)
- “But nothing in the Court’s opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA’s least restrictive means requirement.” *Holt v. Hobbs* (2015) (Sotomayor, J., concurring) (emphasis added)
- Must strike “delicate balance” between religious practice and governmental interest. *Jova v. Smith* (2d Cir. 2009)

# Nondiscrimination Provision

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“No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”

*42 U.S.C. Section 2000cc(b)(2)*



# Exclusions & Limits Provision

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No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

*42 U.S.C. Section 2000cc(b)(3)*

# Individual Liability

- RLUIPA creates an express private cause of action allowing relief against a *government*. 42 U.S.C. § 2000cc-2(a).
- In *Sossamon v. Texas* (2011), the Supreme Court held that sovereign immunity forecloses the availability of money damages as a remedy against states and state actors in their official capacities under RLUIPA. Does this holding extend to land uses cases?
- A resounding yes from the Sixth Circuit



## RLUIPA's “Safe Harbor” Provision

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“A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.”

*42 U.S.C Section 2000c-3(e)*

# Safe Harbor Provision

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- Rarely used, but should be invoked more
- Feared admission of fault
- Recent example:
  - *Riverside Church v. City of St. Michael* (D. Minn. 2016)



# Avoiding a RLUIPA Claim

- Assess your zoning code
  - How are *all* assembly uses treated?
  - Do distinct standards apply to places of worship?
- What other RLUIPA provisions are commonly a part of facial claims?



# Avoiding a RLUIPA Claim

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- When an application under your zoning code is filed by a religious organization, perform a RLUIPA analysis
  - Determine the reasons for the application (i.e. what burdens on religion now exist)
  - Attempt to identify and measure the burden that might be imposed if the application is denied in whole or in part
  - Compare the nature and extent of the application to that of other applicants that could be regarded as comparators
  - Attempt to determine the risk of an equal terms claim if application is denied in whole or in part

# Avoiding a RLUIPA Claim

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- Invite the applicant to propose a less intensive use (can municipal goals be met in a less restrictive manner?)
- Negotiate a new location
- Plan for religious use (inventory of all sites where religious use permitted)
- Educate local officials **NOW**
- Insure that RLUIPA claims are covered under your governmental liability policy

# Defending a RLUIPA Claim

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- Invariably Expensive
  - Time and Money – lawyers, coincident environmental proceedings, experts (land use, damages, environmental)
- Probably document intensive
  - Equal terms, free exercise, facial, and as-applied challenges usually involve extensive documentation
  - Document Intensive
- Cases are fact intensive

# Defending a RLUIPA Claim

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- Once brought, difficult to settle
  - Legal fees
  - Strong emotions on both sides
- Difficult to defend at trial
  - Usually a jury trial
  - God vs. Government bias potential
  - Cross-examination of church officials requires tact not ferocity
  - Jury instructions invariably confusing
  - Federal judiciary rarely has RLUIPA or land use experience

# Time for Trial

- Strategies
- Choice of Forum
- Jury or Bench Trial
- Be prepared for discovery and potentially unflattering documents
- Politics/media
- Dispositions Short of Trial



# Time for Trial

## More Strategies

- Expert Witnesses
- Focus Groups/Mock Trials
- Post-Trial Matters
- Finding the Right Balance
  - Aggressive Defense vs. Respect for Religion



# RLUIPA DEFENSE BLOG

- Visit <https://www.rluipa-defense.com/>

## RLUIPA Defense

Religious Land Uses, Zoning, and the Courts



### Resources

- RLUIPA
- Trial Materials
- Appellate Materials
- Articles
- Legislative History

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# Resources

## Rocky Mountain Sign Law

([www.rockymountainlaw.com](http://www.rockymountainlaw.com))

Rocky Mountain Sign Law Blog  
Regulatory, Best Practices and Other First Amendment News from Colorado's Leading Land Use Law Firm

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### Another Anti-Panhandling Ordinance Bites the Dust

By Brian J. Connolly on March 21, 2016  
POSTED IN PANHANDLING & SOLICITATION

The post-*Reed* assault on panhandling bans continued when a federal court in Massachusetts held that the City of Worcester's ordinance prohibiting aggressive panhandling was content based and unconstitutional. In 2014, in an

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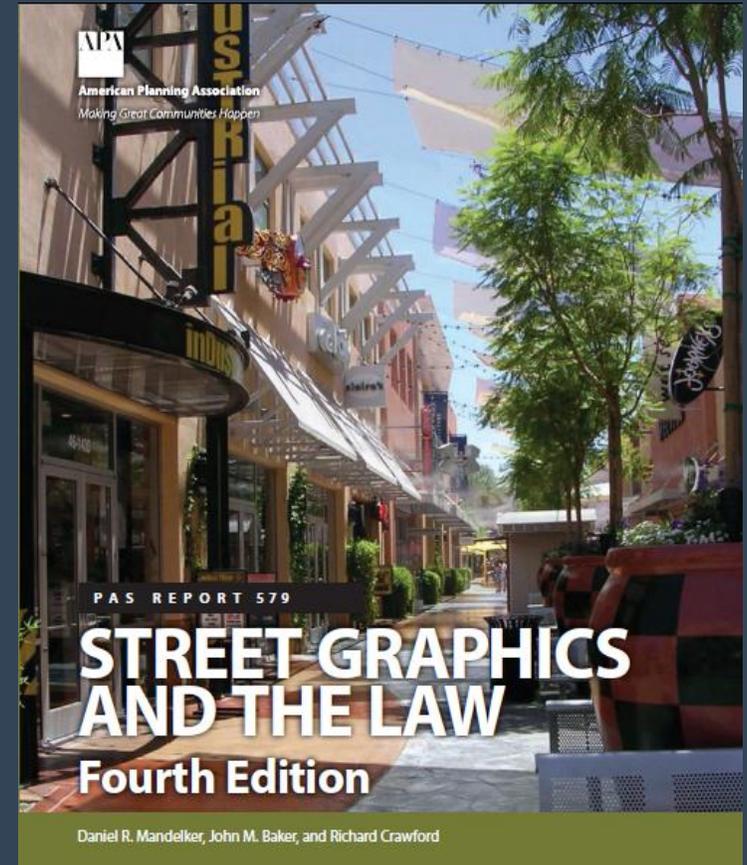
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# Additional Resources

- Daniel Mandelker, John Baker and Richard Crawford, *Street Graphics and the Law*, revised edition (American Planning Association, forthcoming 2015)
- *Local Government, Land Use and the First Amendment*, Brian Connolly, ed. (ABA, forthcoming 2017)
- Brian J. Connolly & Alan C. Weinstein, *Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty*, 47 Urb. Law. 569 (2015)



# Questions and Answers



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