

First Amendment Focus: Stemming the Tide of *Reed*

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Reed v. Town of Gilbert was one of the biggest Supreme Court decisions for local government lawyers in recent years, with sweeping implications for First Amendment jurisprudence and local government regulations pertaining to everything from sign ordinances to robo-calls. Since the case was decided a year and a half ago, IMLA has been providing amicus support on multiple fronts to reduce the impact of *Reed* on municipalities' lawful regulatory power. This article previews a few of those cases both at the Supreme Court level and at the lower court levels.

As of this writing, the Supreme Court has already accepted three First Amendment cases this term, and may accept more before all is said and done in June 2017. Though it is debatable as to why the Supreme Court has accepted so many First Amendment cases, it is likely because the First Amendment is seen as a "safe" area for the usually ideologically divided eight Justice Court. Additionally, the First Amendment is an area of particular interest to Chief Justice Roberts, who has generally been protective of First Amendment rights.

While none of the cases the Court has accepted this term seem to present huge issues for local governments on their face, they all have potential *Reed* issues lurking in the background. It is certainly possible, though perhaps less likely, that the Court accepted this large number of First Amendment cases so as to further clarify the scope of *Reed*. IMLA hopes that by participating in some of these cases as an amicus, the result of this First Amendment-heavy term will be to provide some additional clarity for local government lawyers on the scope of *Reed* and also to potentially help walk back some of *Reed's* broader impacts.

Expressions Hair Design v. Schneiderman

This Supreme Court case involves the issue of credit card surcharges, which at first blush appears mundane, but below the surface the case involves a larger commercial speech issue that could implicate *Reed*. In fact, one amicus brief at the certiorari stage argued that *Reed* applied to commercial speech and strict scrutiny should therefore apply in this case.

In this case, a New York law prohibits sellers/merchants from imposing a surcharge on purchasers who use a credit card rather than cash. However, the law does not apply where merchants provide a discount to customers who pay in cash. Thus, per a "no-surcharge" law, if the regular price of an item is $100, then credit-card customers may not be charged $103 and cash customers $100. But if the regular price is $103, then credit-card customers may be charged that regular price and cash customers may be provided a discounted price of $100. (The reason for the difference in treatment between credit card surcharges and cash discounts pertains to studies done that people are more likely to balk at a surcharge even where the result is the same amount charged on the credit card). The state law is modeled off of the expired federal law.

Expressions Hair Design ("Expressions") wants to post a single price for its goods and services, but charge more to credit-card customers, which would violate the New York law. Expressions brought suit, claiming that the law violates the First Amendment. The Second Circuit concluded that the New York law regulates conduct and not speech and it therefore does not violate the First Amendment. The Eleventh Circuit, however, previously held that these types of laws do violate the First Amendment, creating a circuit split on the issue.

The issue before the Supreme Court is whether state no-surcharge laws unconstitutionally restrict speech conveying price information or whether they regulate economic conduct.

While this case seems like an unlikely candidate to extend *Reed* to commercial speech, as noted above, an amicus brief filed on behalf of a number of retailers asking the Court to hear this case argues that the Court should use this as an opportunity to rule that *Reed* applies to commercial speech and that strict scrutiny should therefore be used when analyzing these laws. IMLA is concerned about any case that seeks to expand *Reed*, particularly into the commercial speech arena and IMLA will therefore be joining the SLLC brief in this case. As of this writing, the briefs arguments are not fully formulated and will depend on what the petitioner and other *amici* argue. But assuming similar arguments are made concerning *Reed* as were made at the certiorari stage, IMLA will seek to persuade the Court that any expansion of *Reed* is unwarranted and would have serious deleterious effects on local governments. A positive scenario for this case would be a ruling that specifically and definitively holds that *Reed* does not apply to commercial speech.

See Expressions Hair Design v. Schneiderman 803 F.3d 94 (2d Cir. 2015), *cert. granted* 2016 U.S. Lexis 4464 (U.S. Sept. 29, 2016) (No. 15-1391).

Packingham v. North Carolina

This case involves a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, such as Facebook, YouTube, and the New York Times. Lester Packingham was charged with violating this statute because he accessed Facebook. Packingham brought suit, claiming that the statute violates the First Amendment both on its face and as applied to him.

The North Carolina Supreme Court held that North Carolina's law is constitutional. In so holding, the court concluded that the law regulates "conduct" and not "speech" and that even under *Reed* (which the court noted applied to speech, not conduct), the law was content neutral. Specifically, on this point, the court provided:

On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content

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46. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980).
47. Tate, 401 U.S. at 671 n. 5. It is also important to note that "[t]he State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." *Id.* at 671.
48. *See* 392 U.S. 514 (1968). The Supreme Court rejected the principal that "[criminal] penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 533.
49. Michele Estrin Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495 (January 2013).
50. Joseph Ax, *Philadelphia, Eying Democratic Convention, to Decriminalize Minor Offenses*, Philadelphia Inquirer (June 8, 2016) http://www.philly.com/philly/news/politics/dnc/20160607_Reuters_L1N18Z1VA_Philadelphia eying Democratic_convention to_decriminalize_minor_offenses.html.
51. Dareh Gregorian, *Littering, Public Urination and Other Minor Offenses in Manhattan Will Lead to Summons and Not Arrest*, New York Daily News (March 1, 2016) http://www.nydailynews.com/new-york/nyc-crime/minor- offenses-manhattan-no-longer-result-arrests-article- 1.2549474.
52. Jennifer Fermino, *Mayor de Blasio, City Council Working on Plan to Purge NYPD Warrants for Small Crimes*, N.Y. Daily News (February 12, 2016) http://www.nydailynews.com/news/politics/mayor-council- purge-old-warrants-small-crimes-article-1.2530407.
53. George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, City J., Winter 2015
54. Thomas Fuller, *San Francisco Torn as Some See 'Street Behavior' Worsen*, N.Y. Times (April 24, 2016) http://mobile.nytimes.com/2016/04/25/us/san-francisco-torn- as-some-see-street-behavior-worsen.html?referer=.
55. *See* U.S. Const., amend. X.
56. Since 1948, it has been well-settled law in Texas that driving an automobile on public roads is not a constitutionally-protected right, but a privilege. Taylor v. State, 151 Tex. Crim. 568, 569, 209 S.W.2d 191, 191 (1948); Naff v. State, 946 S.W.2d 529, 531 (Tex. App.—Fort Worth 1997); *Ex parte* Arnold, 916 S.W.2d 640, 642 (Tex. App.—Austin 1996). This privilege is subject to reasonable regulation under the State's police power in the interest of the welfare and safety of the general public. *Naff*, 946 S.W.2d at 533. ML

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or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Website are available for use by a minor. (368 N.C. 380, at 386)

Because it concluded that the law was content-neutral, the court applied intermediate scrutiny. It found that the statute was "carefully crafted" by prohibiting registered sex offenders from accessing websites where they could gather information about minors, while still allowing them to use websites "exclusively devoted to speech," including instant messaging services and chat rooms and websites where users must be at least 18 years old to maintain a profile. In this respect, North Carolina had sought to distinguish its statute from similar statutes in Indiana and Louisiana that did not allow registered sex offenders to use chat rooms and messaging services and were subsequently struck down.

The dissent took issue with the majority's characterization of the law as one regulating conduct and not speech and it also indicated that under *Reed* there was a "strong argument" that the statute was "content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites . . ."

The issue before the Supreme Court, as characterized in the petition for certiorari, is whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and NY Times.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

Although this case involves a state statute, it is directly applicable to local governments as it is a case involving the First Amendment / speech issues, and the North Carolina Supreme Court discussed *Reed* in its decision. IMLA therefore views this as a case that warrants participation as an amicus and will be joining the SLLC brief in this case. And as with *Expressions*, IMLA's arguments will depend on what the petitioner and other *amici* argue. This case has the potential to broaden the application to *Reed* into laws that regulate conduct and not just speech. That being said, it seems likely that the Court will determine that this regulation limits speech and does not pertain just to conduct. Assuming that is the case, IMLA hopes to be able to persuade the Court to push more laws and regulations into the realm of intermediate scrutiny under *Reed* by arguing that this is a content-neutral regulation.

See State v. Packingham, 368 N.C. 380, 777 S.E. 2d 738 (2015).

Lower Court First Amendment / *Reed* Cases

In addition to the foregoing Supreme Court cases, IMLA has also been involved in a number of cases in the lower federal and state courts involving important *Reed* issues. IMLA believes the *Reed* decision is of such importance to our members, that we filed an amicus brief in a federal district court case (which is extremely unusual as IMLA almost exclusively files briefs at the appellate levels). Because this case could easily become persuasive authority in a post-*Reed* world, IMLA believes our members deserve a voice in helping to shape the outcome of these cases.

Thomas v. Schroer, a case out of the Western District of Tennessee, involves the constitutionality of the core provisions of the Tennessee Highway Beautification Act (which is modeled on the Federal Highway Beautification Act), including local authority to regulate billboards. The issues in this case include: 1) whether the distinction between offsite signs and onsite signs is content-based; and 2) whether government signs are government speech.

Shortly after the *Reed* decision came down, the district court judge granted the plaintiff's preliminary injunction, concluding that the plaintiff was likely to succeed on the merits regarding its argument that the provision of the law distinguishing between on premise and off-premise signs was a content-based distinction.

The law in this area after *Reed* is still in its infancy, and IMLA wants to ensure that local governments' interests are represented in these cases. Because IMLA believes this case could pose a threat to billboard regulation across the country as it could be used as persuasive authority elsewhere, IMLA participated as an amicus in this case at the district court level.

See Thomas v. Schroer, No. 2:13-cv-02987 (W.D. Tenn. Sept. 13, 2016).

IMLA's legal advocacy program is just one of the benefits of IMLA membership. To learn more about the legal advocacy program, contact Amanda Kellar at akellar@imla.org. ML