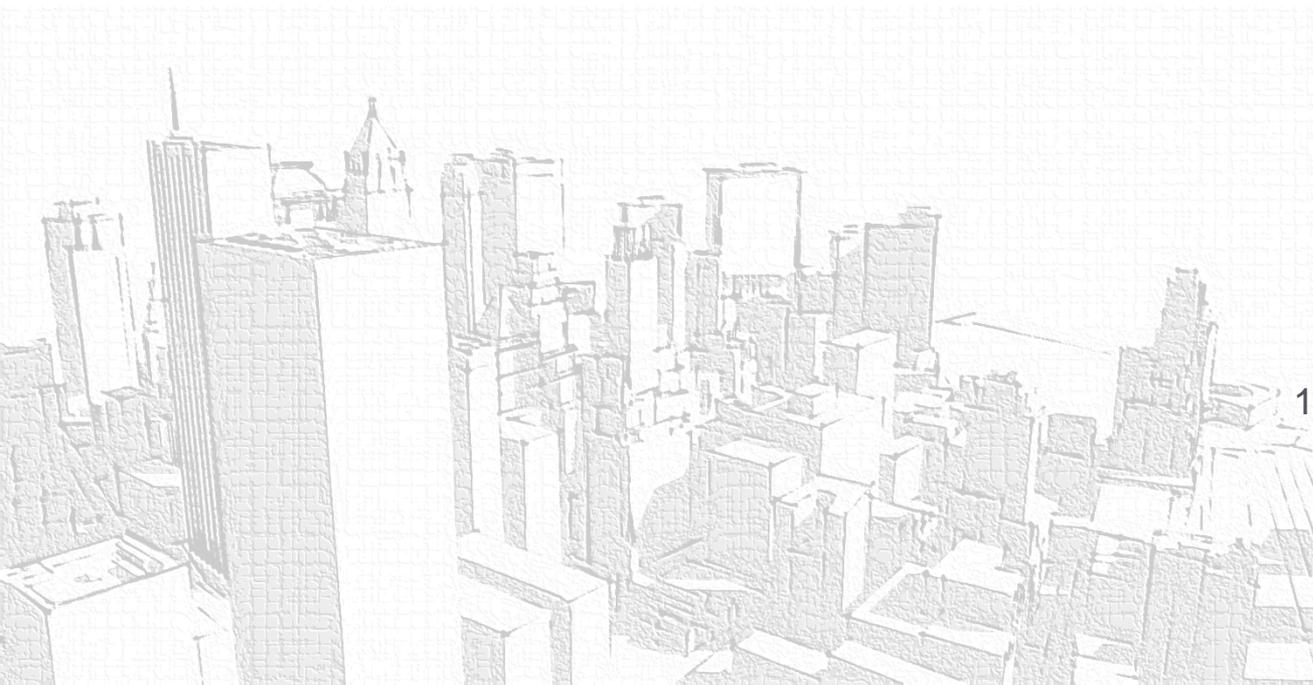


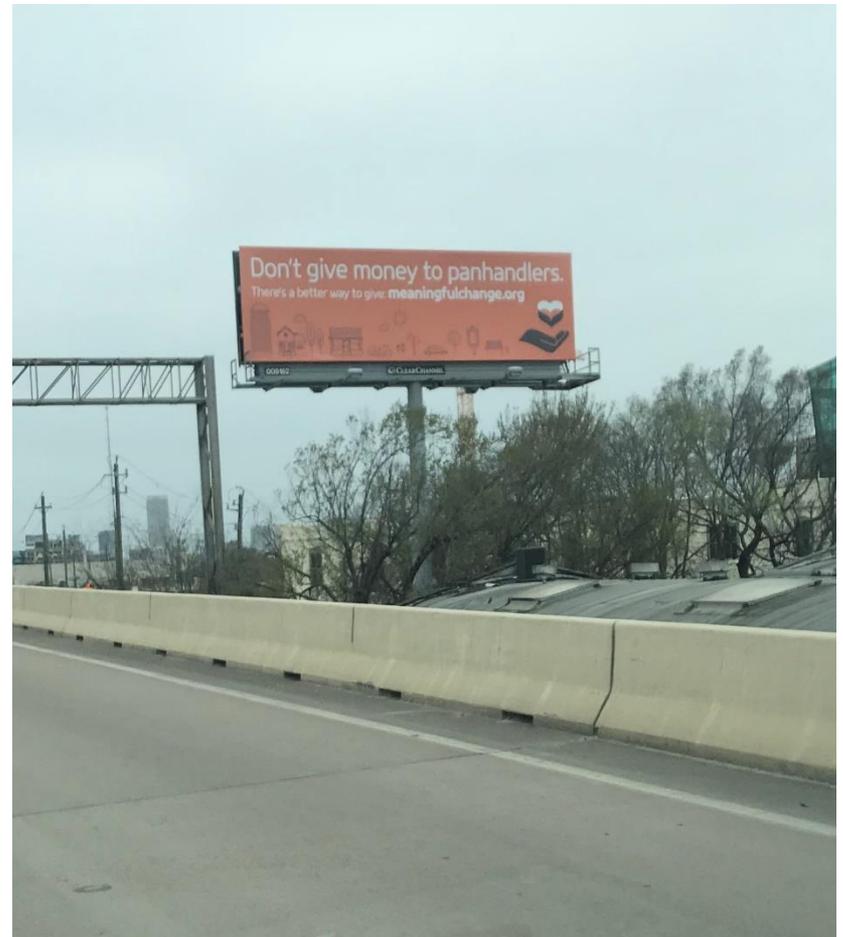
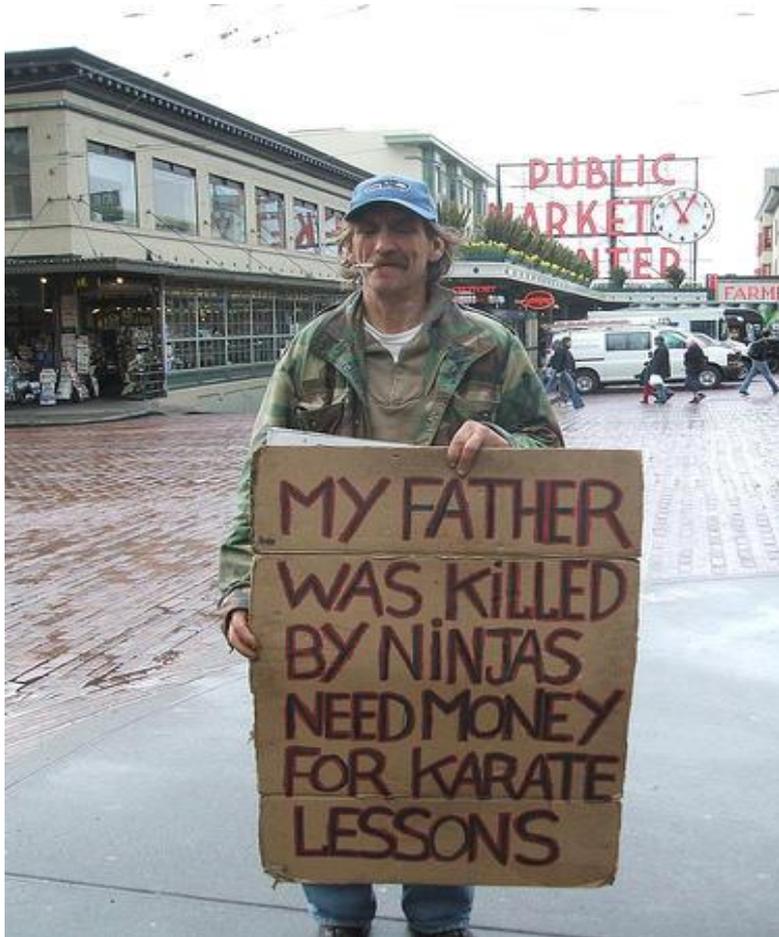
MUNICIPAL SIGN REGULATION:

WHERE DO WE STAND AFTER REED V. TOWN OF GILBERT



Christopher L. Nichols
THE NICHOLS FIRM, PLLC
The Warrant Building
1010 N. San Jacinto St., Ste. 100
Houston, Texas 77002
713.275.7832 – T
chris@nicholsfirm.com

“Competing 1st Amendment Interests”



It all began in the “desert.”

- **Town of Gilbert, Arizona**

- Population as of June 2015: 233,028
- Doubled every five years from 1980-2000
- Median Population Age: 31.9
 - 77% of population under age 50
 - 33% of population under age 19
- Highest median incomes in the state of Arizona: \$80,080



- **The Good News Community Church (Pastor Reed)**

- Small and cash-strapped (lawsuit)
- Did not own a facility
- “Mobile” services
- Used temporary signs to advertise services
- All they wanted to do was advertise their church services.



Everything was *fine* until...

- Gilbert adopted a comprehensive sign code in 2005
 - Appendix “A”: Sign Code as of 11-30-14
- **Purpose:**
 - Promote optimum conditions for serving sign owners’ needs
 - Respecting [sign owners] rights to identification while balancing the community’s aesthetic interests
- **Necessary and in the public interest because:**
 - A. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.
 - B. To enhance the beauty, unique character, and quality of the Town of Gilbert, which will attract commerce, businesses, residents and visitors.
 - C. To promote economic development and the value of commercial properties, be sensitive to surrounding land uses and maintain an attractive community appearance.
 - D. To promote general safety by ensuring properly designed and located signs.
 - E. To encourage signs that are clear and legible to the user.
 - F. To emphasize small town historical character by promoting pedestrian oriented and appropriately scaled signage in the Heritage Village Center zoning district.

Categorical Content Regulations

- **Ideological Signs:**

- any sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency

- **Political Signs:**

- any temporary designed to influence the outcome of an election called by a public body.

- **Temporary Directional Signs relating to Qualifying Event:**

- any "temporary sign" intended to direct pedestrians, motorists, and other passersby to a "qualifying event."

Town of Gilbert, Arizona – Sign Code

<u>SIGN TYPE</u>	<u>SIGN SIZE</u>	<u>AREAS / DISTRICTS ALLOWED</u>
Ideological Signs	Up to 20 sq. ft.	All Districts
Political Signs	Up to 16 sq. ft.	Residential
	Up to 32 sq. ft.	Non-Residential, Undeveloped, Municipal Property, Right of Ways (ROWS)
Temporary Direction Signs	Up to 6 sq. ft. (4 sign max at one time)	Private Property, Public ROWs

Good News Presbyterian gets some *not so good news*...

- **Temporary Sign Placement:**

- 4 sign limit at one time
- Original code said:
 - 2 hours before any religious assembly
 - 1 after any religious assembly
- 2008 revised code said:
 - 12 hours before any qualifying event
 - 1 hour after any qualifying event

- **As applied:**

- 9:00 a.m. Sunday Service? 9:00 pm install
- 12:00 p.m. service dismissal? 1:00 p.m. removal

- **Sign Code Compliance Manager cited Church twice.**



The Lawsuit: Procedural History

- July 2005
 - Gilbert sends the Church an email noting their violation of sign code because signs were placed too early in the public ROW.
- A few months later...
- Gilbert sends the Church an “advisory notice” that Church’s signs displayed outside of the allowed window of time for display *and* did not include a date for the Church’s service.
- Church reduced the number of signs and limited times
- CCM told Church “no leniency under the Code...”
- Church filed lawsuit in March 2008

The Lawsuit: Procedural History (cont).

- Church filed lawsuit in March 2008 – U.S.D.C. in Arizona
- Sign Code violated 1st and 14th Amendments on its face and as applied.
- Church moved for preliminary injunction to stop Gilbert enforcement of Code
- Gilbert stipulated to the preliminary injunction as a sign of “good faith” while it reviewed and amended the ordinance
- Church objected to the amended ordinance
- September 2008 – preliminary injunction denied
 - Court concluded Sign Code was content-neutral and passed intermediate scrutiny
 - Sign Code did not favor commercial speech over noncommercial
 - Sign Code did not violate equal protection

The Lawsuit: 1st Appeal

- 587 F.3d 966 (9th Cir. 2009)
- Appeal of September 2008 denial of preliminary injunction
- Sign Code is content-neutral (“speaking thru the sign”)
- Time, Place Manner Restrictions
 - Narrowly tailored to achieve Town’s aesthetic and traffic control objectives
 - Ample alternative channels for communication (no error)
- Equal Protection
 - Sign Code does not impermissibly favor commercial speech over noncommercial speech.
- U.S.D.C. Judgment Affirmed
- Remanded to determine if Sign Code is unconstitutional in favoring some noncommercial speech over other forms.

The Lawsuit: 2nd Appeal

- 707 F.3d (9th Cir. 2013)
- On remand, case submitted on cross-motions for summary judgment
- Summary judgment for Gilbert that Sign Code is not unconstitutional
- Church appealed
- U.S.D.C. accepted their opinion in Reed #1 as the law of the case
- Concluded that Sign Code constitutional because
 - No content-based restrictions
 - Narrowly tailors to serve significant government interests
 - Gilbert's amendments to Sign Code during appeal do not moot the case
 - Church can file a new lawsuit over the new ordinance if they want

The Lawsuit: SCOTUS

- 576 U.S. ____ (2015)
 - **Justice Thomas** – opinion
 - Facially content-based
 - Strict scrutiny analysis
 - Not narrowly tailored
 - Somewhat chastises the 9th Circuit for getting it wrong.
 - **Justice Alito** concurred – strict scrutiny analysis, municipal power preserved, and by the way...here's a helpful list.
 - Justice Kennedy & Justice Sotomayor joined
 - **Justice Breyer** concurred – strict scrutiny “hybrid”
 - Joined Justice Kagan's opinion
 - **Justice Kagan*** concurred – content based, but could have defeated the ordinance by going the intermediate scrutiny route.
 - Justice Ginsburg and Justice Breyer joined
- * Town of Gilbert's defense does not pass...even the laugh test.



The Impact:

- Why use a shotgun when a rifle will do?
- Justice Kagan's opinion might have been the right way to go in terms of defeating Gilbert's ordinance by applying a lesser level of scrutiny
 - Time, place and manner restrictions unconstitutional because they violated equal protection?
 - Did Gilbert's restrictions value ideological speech over political over "event related" speech
 - Isn't the speech really just how they distinguished between types of signs?
- If any regulation that relies on content is content-based that fails strict scrutiny analysis, are we now faced with crafting sign regulations that are constitutional only if they pass the "blindfold" test?

Distinguishable??



vs.



After *Reed*...

- **Thayer v. City of Worcester, 135 S. Ct. 2887 (2015)**
 - The timing was weeks after the *Reed* decision came out
 - Worcester adopted 2 ordinances in Jan. 2013
 - Designed to control aggressive panhandling
 - Ord. 9-16:
 - *“unlawful for any person to beg, panhandle or solicit in an aggressive manner.”*
 - Ord 13-77:
 - *no standing or walking on a traffic island or roadway except for crossing an intersection / crosswalk or to enter or exit a vehicle for some other lawful purpose.*

Who sued?

- **Thayer v. City of Worcester, 135 S. Ct. 2887 (2015)**
 - 3 panhandlers / solicitors sued Worcester for an injunction
 - Federal District Court
 - DENIED
 - First Circuit Court of Appeals
 - AFFIRMED DENIAL
 - Massachusetts ACLU
 - APPEALED TO SUPREMES
 - Argued that the ordinance conflicted with *McCullen v. Coakley*
 - *Regulation that prohibited the distribution of abortion counseling materials within thirty-five feet (35') of an entrance, exit and driveway of clinics.*
 - *Sidewalks, etc. are a recognized public forum*
 - *The counseling materials were dependent upon a particular delivery system – meaning the counselor had to make contact with persons entering or exiting the clinic in order to do their counseling.*
 - *Same true for Worcester Plaintiffs – panhandling and soliciting is dependent upon being allowed in and upon traditional public forums (i.e., sidewalks)*

Constitutionality?

- **Thayer v. City of Worcester, 135 S. Ct. 2887 (2015)**
 - Passed the “content-neutral” test
 - Blanket prohibition on all aggressive panhandling / soliciting
 - Intermediate scrutiny applied
 - Failed the “narrowly tailored” test
 - Eliminated all other alternative channels because the only place you can panhandle is on a sidewalk, street, public thoroughfare.
 - Apparently an all out ban is not the least restrictive means possible
 - End result is Worcester requires you to dissect the characteristics of the forum being regulated
 - Specifically identify the threat to public safety you are attempting to address
 - Craft a regulation that is narrowly tailored to address the public safety concern

What are local governments supposed to do now?

- When it comes to regulating panhandling and soliciting:
 - Regulate with blind eyes and deaf ears
 - Specifically identify the threat to public safety that is of concern
 - Craft regulations that specifically target the public safety threats at specific locations:
 - ATM machines / Banks
 - Post Offices
 - Airports
 - Venues that are not recognized as public forums for speech

Since *Reed*...

Despite Changes, Dallas Panhandling Enforcement Still Probably Illegal

STEPHEN YOUNG | JANUARY 5, 2018 | 4:00AM

San Antonio's Plan To Criminalize Giving To Panhandlers Is Drawing Fire

BY DAN SOLOMON

DATE SEP 9, 2014

As Panhandling Laws Are Overturned, Cities Change Policies

Restrictions on panhandling are toppling across the U.S., frustrating some city officials who say the laws protect public safety

By *Joe Palazzolo*

Aug. 8, 2017 11:00 a.m. ET

Federal Judge Halts Houston's Homeless Ordinance Banning Public Camping

A federal judge has put a temporary halt to a Houston homeless ordinance banning public camping after ruling the law may criminalize the status of people who can't find permanent shelter.

By *John Council* | **UPDATED** Oct 13, 2017 at 04:54 PM

Judge: Panhandling Protected by the First Amendment

A federal judge says a New Orleans suburb's ordinance requiring a panhandling license violates the First Amendment right to free speech.

June 21, 2017, at 4:37 p.m.

The next SCOTUS case in the pipeline? *(I thought it was going to be....)*

- *AusPro Enterprises, LP v. Texas Dep't of Transportation*, 2016 WL 4506161 (Tex. App., Aug. 25, 2016)
- “Ron Paul for President” political sign (2011 election)
 - NOTE: Nothing to do with off-premises billboard regulation
- 3rd District Court of Appeals (Austin) held that the Texas Highway Beautification Act is unconstitutional because content-based
- 4/2018 – Texas Supreme Court granted Petition for Review and dismissed the underlying case as moot.
- HBA was amended – replaced the term “off-premise sign” with “commercial sign”
- Meaning? Statute no longer distinguishes signs by reading the sign

Want to talk more?

THE NICHOLS FIRM, PLLC

Houston:

1010 N. San Jacinto St., Suite 100

Houston, Texas 77002

T: 713-275-7832

Austin:

221 W. 5th Street, Suite 900

Austin, Texas 78701

T: 512-488-9119

Chris Nichols

Josh Brockman

chris@nicholsfirm.com

josh@nicholsfirm.com

