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Billboard Cases in the Sixth Circuit Raise Questions on the Application of *Reed v Town of Gilbert*

By Gerald A. Fisher

Have you ever read a new case decided by the Supreme Court of the United States and immediately felt like you had just driven by a sign with a blinking red light expressing "Rough Road Ahead?" It's easy to imagine that feeling after an initial reading of the decision in *Reed v Town of Gilbert,* 135 S. Ct. 2218 (2015). After all, most communities had acceptable sign ordinances prior to January 2015, only to have the *Reed* decision come along and cause a major disruption. Justice Kagan characterized this event in an opinion concurring in the *Reed* judgment (but not in the Court's analysis):

> Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. . . Given the Court's analysis, many sign ordinances . . . are now in jeopardy. [The majority acknowledges] that 'entirely reasonable' sign laws 'will sometimes be struck down' under its approach. . . . When laws 'single out specific subject matter,' they are 'facially content based'; and when they are facially content based, they are automatically subject to strict scrutiny.

Obliterating several well-founded assumptions that had been made by local governments in preparing their sign regulations over many years, *Reed* has rewritten the book on determining whether a sign regulation is "content-based" and thus must be scrutinized under the crushing weight of "strict scrutiny." Of course, once the conclusion is reached that strict scrutiny applies, the government is given the almost insurmountable task of proving a compelling government interest for the regulation, and that the regulation is narrowly tailored.

Reed, which involved a challenge to non-commercial sign regulation, directs that a regulation may be content-based, giving rise to strict scrutiny, if either of two triggers applies: First, an ordinance may be content-based on its face if it draws distinctions based on the message conveyed or the topic of the speech; or second, an ordinance may be content-based if the regulation "cannot be justified without reference to the content of the regulated speech." The majority opinion in the case also raises the prospect that a sign may be found to be content based if it is necessary to read the sign in order to determine whether it complies with the ordinance (the "Need-to-Read" test). However, this test was not part of the Court's analysis or holding on the merits.

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The Sixth Circuit U.S. Court of Appeals has applied *Reed* in ruling against the government in two important billboard cases. In September 2019, the Court handed down *Thomas v Bright,* 937 F.3d 721 (6th Cir. 2019), basing invalidation of the Tennessee Billboard Act on the Need-to-Read test. More recently, in September, 2020, the Sixth Circuit held in *International Outdoor v City of Troy,* Case Nos. 19-1151/1399, that a City regulation of the plaintiff's commercial billboard must pass the strict scrutiny test of *Reed v Town of Gilbert,* and remanded the case for an analysis under *Reed*. (The District Court had held that the "intermediate scrutiny" rule established by *Central Hudson Gas & Electric v Public Service Commission,* 447 U.S. 557 (1980) was applicable because the regulation merely had the effect of restricting plaintiff's commercial speech.)

It is respectfully suggested that, in each of these Sixth Circuit cases, the Court's analysis shows potentially fatal vulnerabilities upon rigorous examination. Of course, these decisions remain the law unless overturned.

Thomas v Bright

In *Thomas v Bright,* the subject was the Tennessee Billboard Act, which established a permit requirement for all outdoor signage proposed to be located within a certain distance of a public roadway. This general permit requirement was not at issue. What concerned the court was the Act's exception to the general permit requirement for signs advertising activities conducted on the same property, i.e., the exception carved out in the Act for "on-premises" signs. It is fairly standard to make a distinction between on-premises and off-premises signs. But in order to administer such a law, an official must read the content of a proposed sign to determine whether it advertises activities conducted on the same property. Using this analysis, the Court applied the "Need-to-Read" test from *Reed* and concluded that the "on premises" exception in the general permit requirement in the Billboard Act amounted to a content-based regulation requiring application of strict scrutiny, which the Tennessee Act failed to meet.

There is no doubt that the opinion of the court in *Reed* included a discussion of the "Need-to-Read" test. However, the *Reed* court found that the Town of Gilbert's sign regulation was *facially* content based, so mention of

the Need-to-Read test was merely dicta, and not analyzed or adopted as part of the ruling on the merits of the case. Perhaps for this reason, a majority of Federal Circuits have not held the "Need-to-Read" test to be an analysis required under *Reed*.

Moreover, three justices of the six-justice majority in *Reed* joined in a concurring opinion written by Justice Alito, in which it was announced that an ordinance would not be content-based if it contained "Rules distinguishing between on-premises and off-premises signs." Certainly, a concurring opinion is not a binding component of the opinion of the majority. But such a statement by half of the justices forming the majority should not be deemed irrelevant in interpreting the Court's holding.

All things considered, while the opinion in *Thomas v Bright* stands as the rule in the Sixth Circuit, it is suggested that application of the Need-to-Read test to ordinances distinguishing between on-premises and off-premises signs is not without serious weakness.

International Outdoor v City of Troy

Turning to *International Outdoor v City of Troy,* the Court analyzed whether *Reed v Town of Gilbert* must be read as creating a new rule, deviating from the established test created in *Central Hudson,* which broadly confines commercial speech to a lower rung of importance on the free-speech hierarchy. Specifically, *Central Hudson* held that a regulation of commercial speech is to be subjected to what is effectively recognized as "intermediate scrutiny." Under the *Central Hudson* formulation, in order to be protected by the Free Speech Clause of the First Amendment, a commercial expres-

sion may not be illegal, false or deceptive. If the expression survives this initial gauntlet, intermediate scrutiny applies, the government must demonstrate that its regulation of the expression meets three requirements: first, that the regulation serves a substantial government interest; second, that such interest is directly advanced by the regulation; and third, that the regulation is no more extensive than necessary to achieve the government's interest. While this *Central Hudson* test is clearly more rigorous than the rational basis test, it is considerably less demanding than the strict scrutiny test which is nearly always lethal to government regulations.

The District Court in *International Outdoor* applied the *Central Hudson* test to the City of Troy's regulation of plaintiff's proposed commercial billboard and concluded that the City's ordinance prevailed under that level of scrutiny. On appeal, the *Sixth Circuit* acknowledged that other Federal Circuits have continued to rely on *Central Hudson,* but nonetheless determined that *Reed* compelled the application of strict scrutiny because the City of Troy ordinance amounted to a content-based regulation. (The Court also found that the Troy ordinance is content based because it regulated non-commercial as well as commercial speech, and that the Need-to-Read test must be applied to distinguish the two types of regulation. Recall that this test is founded on mere dicta from *Reed,* as explained above). This determination to apply strict scrutiny because the regulation of commercial speech is content based, does not rest soundly on the express holding in *Reed* considering that the opinion of the court in *Reed* did not mention the commercial speech doctrine or rely on it as a basis for its holding. Indeed, the facts in *Reed* involved non-commercial signage. So, the Sixth Circuit's application of *Reed* necessarily assumes that *Central Hudson* was overruled by implication. Such an assumption is contradicted by two post-*Reed* Supreme Court cases which recognized that *Central Hudson* is still good law: *Matal v Tam,* 137 S. Ct. 1744 (2017), and *National Institute of Family & Life Advocates v Becerra*, 138 S. Ct. 2361 (2018).

Adding to the question of an overruling of *Central Hudson* by implication is Justice Breyer's concurrence in the judgment (but not analysis), which expressly points out that "the Court has said . . . that we should apply less strict standards to 'commercial speech,'" citing *Central Hudson.*

Some may conclude that the pre-*Reed* case of *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), referenced in *International Outdoor,* should be read as undermining the *Central Hudson* rule. Such a conclusion does not have solid footing. In *Sorrell,* the Court reviewed a convoluted regulatory scheme with a scope considerably broader than the usual conflict between the government and persons proposing to use signage and other expressive methodology to advance commercial interests. *Sorrell* involved a pervasive impairment of protected expressions in connection with the delivery of medical services. The state law reviewed in *Sorrell* encompassed a restriction on the ability to gather information for later use, a ban on certain uses of information, and a prohibition on the disclosure of particular information. The regulatory scheme also imposed a speech limitation targeting particular speakers. In the words of the Court: "Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers." When the Court addressed the precise level of scrutiny that should apply in the case, it suggested that "heightened judicial scrutiny" was needed, but no precise standard was articulated. The decision on the merits of *Sorrell* was made without an express or clearly implicit alteration of the *Central Hudson* rule, and the Court did not announce a change in law with regard to the level of scrutiny generally applicable to commercial speech.

In the *International Outdoor* case, there is a strong argument that the District Court was correct in applying the level of scrutiny applicable to commercial speech, outlined in *Central Hudson.* Accordingly, the City of Troy has an opportunity to seek further review of this Sixth Circuit determination.

Conclusion

All of the concurring justices in *Reed,* which importantly included six of the nine justices then sitting on the Supreme Court, appear to prefer a level of scrutiny for sign regulation which permits reasonable and common-sense results. Justice Alito's concurring opinion, joined by Justices Kennedy and Sotomayor, expressed that *Reed* does not leave municipalities "powerless to enact and enforce reasonable sign regulations." Justice

Kagan's concurring opinion, joined by Justices Ginsburg and Breyer, offered a parallel message that "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."

Based on personal anecdotal analysis, officials who have attempted to conform their ordinances to the *Reed* requirements generally agree with the point that an intervention of reasonableness and common sense would be very welcome to this area of the law. Let us be optimistic that the Sixth Circuit will start moving the needle in that direction.

About the Author

Gerald A. Fisher *served for many years as general counsel for cities, villages and townships, and later as a full-time professor at the WMU Cooley Law School, teaching property, constitutional law and state and local government law. He has argued several state Supreme Court cases on behalf of local government. Active in the Michigan municipal law community, Mr. Fisher has served as a past chair of the Government Law Section and has co-authored two books on the subjects of municipal law and zoning law, both published by the Michigan ICLE. In addition, Mr. Fisher serves as on the Board of Scenic Michigan, a non-profit dedicated to enhancing the scenic beauty of Michigan's rural and urban landscapes.*

The Commercialization of Electronic Public Records Requests

By Kyle O'Meara

Our world is continuing to become more reliant on "big data" or the aggregation of information to help predict behaviors and guide decisions. Municipalities are similarly relying on information and analytics to help optimize activities such as code enforcement. On the other hand, the private sector also recognizes that the information held by governmental bodies has value. [1] A 2013 McKinsey & Company study suggested that if governments made all their data available in an open format, the global economy could benefit in excess of $3 trillion dollars from the use of that data in sectors such as consumer finance, consumer products, and healthcare.[2]

As data held by municipalities becomes more utilized and valuable to the private sector, there will be a greater demand for entities to utilize public records statutes to obtain that data. This article analyzes how municipalities can use Michigan's public records statutes, the Michigan Freedom of Information Act, MCL 15.231 *et seq.* ("FOIA") and the Enhanced Access to Public Records Act, MCL 15.441 *et seq.* ("Enhanced Access Act") to meet this demand for data. More specifically, it reviews the potential role of the Enhanced Access to Public Records Act to provide access to electronic records, but at the same time allow municipalities to charge reasonable fees for such electronic information in situations where the FOIA will only allow imposing nominal fees.

The FOIA Provides an Initial Mechanism for Providing Electronic Public Records, But Often at the Expense of Municipalities

Many municipalities rely on the FOIA to provide electronic records to requestors. The FOIA became law in 1976, but the legislature has since amended the FOIA many times to allow persons and entities to request electronic (and not just paper records) from municipalities.[3] Despite the various amendments, there are a variety of

reasons that the FOIA is not designed to adequately reimburse municipalities for maintaining and providing electronic records, especially in the context of commercial requests.

Michigan courts have stated that the purpose of the FOIA is to promote the public's understanding of the function of government.[4] Likewise, the statute itself states the purpose of making public records available is to allow the public to fully participate in the democratic process.[5] The FOIA allows municipalities to recoup ***some*** of the expenses they incur to fulfill public records requests; however, many of these are better tailored towards paper records searches such as the labor spent to make copies and to locate public records.[6]

For electronic records, it may take only a few clicks to provide records to a requestor resulting in nominal FOIA fees. But municipalities often incur substantial costs to keep records available in electronic formats (e.g. software and hardware). Furthermore, records requests from private entities that aggregate and resell electronic public records (e.g. municipal purchasing information) frustrates the purpose of the FOIA to obtain records to participate in the democratic process as these requests have little to do with engaging with a public body.[7]

Municipalities May Want to Consider Using the Enhanced Access Act to Provide Certain Public Records

Although the utilization of electronic governmental data by private entities and the trend of "big data" is a more recent phenomenon, the Michigan legislature created a statute in 1996 to incentivize fair disclosure of electronic public records.

In 1996, Michigan enacted the Enhanced Access Act. This Act allows municipalities to provide access to electronic records and charge reasonable fees for such electronic records if a governing body creates an Enhanced Access Policy.[8] The Enhanced Access Act incorporates references to the FOIA including using the FOIA's definitions of "public record," "person," and "public body" by citing to the FOIA.[9] Even though this statute exists, it is not utilized by many municipalities.

There are various important considerations under the Enhanced Access Act. First, the statute uses the term "enhanced access" when describing a municipality providing electronic public records. "Enhanced access" generally means the "immediate availability" of electronic public records; however, immediate is undefined.[10] It is also important to note that unlike the FOIA, the Enhanced Access Act allows municipalities to broadly charge "reasonable fees" (charges calculated over time to recoup operating expenses related to providing enhanced access to public records) for electronic records instead of the strict fee calculation provisions under the FOIA.[11] For example, a "reasonable fee" under the Enhanced Access Act could reasonably relate to the costs of computers, software, and staff to maintain such records; all costs that are not compensable under the FOIA. Municipalities can calculate and develop their own fee schedules for "reasonable fees."

A municipality may want to create an Enhanced Access Policy to provide electronic records for certain records requests. For example, our office has noticed various municipalities frequently receiving requests for complete assessing records. Although a municipality may be able to simply download and send an electronic file with all of this information (for free or for nominal costs under the FOIA) to a private entity that is likely to resell the information, that method does not recoup costs associated with paying money to host all of the information on BS&A or other software platforms. Instead, that method imposes those costs on the public.

Municipalities may want to consider adopting Enhanced Access Policies to provide enhanced access to certain electronic records that are frequently requested by private entities for commercial purposes to recoup their costs for hosting such information.

Potential for Conflict: FOIA vs Enhanced Access Act

Assuming a municipality attempts to recoup reasonable fees for maintaining electronic public records with an Enhanced Access Policy, there is an unresolved question of what happens if a requestor requests records under FOIA or mentions FOIA in a request for records covered under a municipality's Enhanced Access Policy.

As stated above, fees under the Enhanced Access Act will generally be higher than FOIA fees. The most conservative position a municipality could take in this situation is to provide electronic records under the FOIA (likely with minimal fees). Michigan courts have not appeared to address this issue between the two statutes.

On the other hand, there are a variety of arguments that suggest a municipality could still charge fees under its Enhanced Access Policy. The first reason is because statutes should be read in harmony, that it is a harmonious reading of the FOIA and Enhanced Access Act to apply fees under Enhanced Access Act because the Enhanced Access Act incorporates definitions and other content from the FOIA and appears intended to "replace" responses under the FOIA for enhanced access to electronic public records.[12] A second reason is a court may find "commercial" requests (e.g. for assessing information) not consistent with the purposes of FOIA to shed light on the operations of government.

Interestingly, courts have expressly stated that requestor "motives" are relevant when determining appropriate FOIA responses.[13] Therefore, if a case does analyze this potential conflict, a court may be more likely to side with charging higher reasonable fees for FOIA requests motivated by commercial purposes. As a practical matter, a municipality may decide to try to use its Enhanced Access Policy fees before relegating to nominal costs under the FOIA due to a reduced litigation risk since requestors must file internal FOIA fee appeals with a municipality's governing body before being able to file an appeal in court.[14]

Even though the Enhanced Access Act allows charging higher fees for electronic records than the FOIA, municipal attorneys should be aware that there is still an open question regarding what happens if a requestor mentions or insists a request needs to be processed under the FOIA.

Closing Thoughts

If a municipality is frequently providing electronic records (e.g. assessing records) to entities that are likely aggregating the data to resell under the FOIA for minimal fees, it may want to consider adopting an Enhanced Access Policy to recoup the expenses associated with storing such records that they will otherwise not receive under the FOIA. Because there is no case law analyzing the relationship between responses under the FOIA and the Enhanced Access Act, municipalities should carefully analyze the risks and benefits of when to apply fees under the Enhanced Access Act or process a request under the FOIA.

Moreover, municipalities should also carefully consider what types of records to make available with enhanced access and how it interprets the Enhanced Access Act's reference to the "immediate" availability of public records (e.g. does immediate mean instantaneous or can it mean a request will be immediately processed by a municipality for transmittal of public records within one or two business days). Under the right circumstances, the Enhanced Access Act is a means to help address the seemingly increasing number of "commercial" requests for electronic governmental information and something more municipalities should consider using to recoup costs associated with maintaining electronic records.

About the Author

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Endnotes

1 Gover, Analytics in City Government, Harvard Kennedy School Ash Center for Democratic Governance and Innovation, https://datasmart.ash.harvard.edu/news/article/analytics-city-government, (July 13, 2018).

2 Chui *et al*, *How Government Can Promote Open Data and Help Unleash Over $3 Trillion in Economic Value - Innovation in Local Government Open Data and Information Technology (McKinsey & Company)*, http://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/public%20sector/gdnt/gdnt_innovation%20in%20local%20gov_open%20data_it_full_book.ashx, (2014).

3 See generally, MCL 15.232 (definitions under the FOIA incorporate electronic records).

4 *Detroit Free Press, Inc v Dept of Consumer & Industry Services*, 246 Mich App 311, 315; 631 NW2d 769, 772 (2001).

5 MCL 15.231(2).

6 See MCL 15.234(1).

7 See for example the firm SmartProcure which aggregates municipal purchasing data to resell to other municipal-

ities for the purposes of making better purchasing decisions. https://smartprocure.us/about-us/

8 See generally, MCL 15.443.

9 See generally, MCL 15.442.

10 MCL 15.442(a).

11 MCL 15.442(g) and MCL 15.443(1)(b).

12 *G.C. Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (statutes should be read in harmony).

13 *Cashel v Smith*, 117 Mich App 405, 410; 324 NW2d 336, 338 (1982).

14 MCL 15.240a(1)(b) (requestor must file internal fee appeal with public body before filing lawsuit).

Opinions of the Attorney General Dana Nessel

By Assistant Attorney General
George M. Elworth

Editor's note: *Assistant Attorney General George M. Elworth of the State Operations Division and a member of the Publications Committee furnished the text of the headnote of the opinion. The full text of the opinion may be accessed at* www.mi.gov/ag.

Opinion No. 7312 (December 18, 2020)

ANALYZING: CONST 1963, ART XI, § 5; INSURANCE CODE; CIVIL SERVICE.

The position of executive director of the Automotive Theft Protection Authority is included in the State's classified service pursuant to Chapter 61 of the Insurance Code of 1956, 1956 PA 218, MCL 500.6101 et seq, and article 11, § 5 of the Constitution.

Don't forget to update your member record. In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- Login to SBM Member Area with your login name and password and make the changes online.
- Complete contact information change form and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- Name Change Request Form—Supporting documentation is required