GOLDWATER INSTITUTE

BACKGROUNDER

SHEARER V. CITY OF SCOTTSDALE

Executive Summary

For years, Aaron Shearer has successfully run farmers markets, where people looking for fresh, organic produce can meet and buy from local farmers. She's learned by experience that farmers markets work best when they're well-advertised—particularly by signs placed on sidewalks in the area. By the 2013-14 season, Aaron was running two profitable markets that brought her and her participating farmers good incomes. That was before officials with the City of Scottsdale issued her an order forcing her to stop posting the signs that directed potential customers to the markets. Without the signs, attendance plummeted, and Aaron was forced to close one of them down entirely. City fathers denied her request to post signs directing customers to her other market—she could only post four signs at locations they selected. Although Aaron appealed that decision, the city's order soon forced her to close the second market as well.

All of this despite the fact that other Scottsdale businesses are given greater latitude to post signs off-premises, and state law almost entirely bars cities from prohibiting signs advertising political candidates. In other words, Scottsdale's sign restrictions allow some signs without any permit, require other signs to get a permit first, and totally prohibits still other signs.

This differential treatment is unconstitutional. In its 2015 ruling, *Reed v. Town of Gilbert,* the U.S. Supreme Court held that cities cannot impose different rules on signs based on the messages they convey.[1] Scottsdale's ordinance breaks this rule because the only way the city can know which rules apply is to classify the signs based on message—exactly what the *Reed* case forbids.

The Problem

Scottsdale is picking and choosing who can speak and what they can say. The Supreme Court, however, has made clear that only in rare cases can government impose rules based on the content of a message or the identity or motive of the speaker.[2]

Under Scottsdale's code, Aaron's farmers market is considered a "special event," and she is allowed to post both on- and off-premises signs for the market only as part of her special event

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[1] *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

[2] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *Reed*, *supra*.

application.[3] The application requires Aaron to provide a map identifying all the locations where she wants place signs, as well as a description of all of her signs.[4] But the code provides no clear guidelines for officials to review an application, which means that city officers have unlimited discretion to decide how many signs Aaron can use, where she can place them, and how long they can be posted.[5] This unfettered discretion means that some applicants are allowed to put up more signs than Aaron and some fewer, based on the preferences of government officials, or on the arbitrary distinctions imposed by Scottsdale's sign code.

The code differentiates, for example, between signs that advertise farmers markets and signs that direct people to an open house. Open house signs don't need an off-premises sign permit.[6] And if Aaron were selling Christmas trees, she would not need an on-premises permit.[7] Nor would she need a permit if she wanted to post signs supporting political candidates or ballot measures.[8] But because the message she wants to convey on her signs promotes her farmers market and directs people to it, she is not given the same freedom to speak that others' have.

The arbitrary preferences in the sign code even change from year to year. Despite filing virtually identical applications in 2015 and 2016, Aaron was approved for one sign in 2015, and eight the following year. In the end, Aaron and other Scottsdale business owners can never know how many signs they will be allowed to put up, or where—even though businesses like theirs depend on advertising signs for their success.

The Law

Aaron's experience with the City of Scottsdale is remarkably similar to the experiences that led to the *Reed v. Gilbert* case. The plaintiffs in *Reed* challenged Gilbert's sign code because it severely restricted their ability to post signs announcing their church services. The sign code in Gilbert, like the code in Scottsdale, was comprehensive, identifying "various categories of signs based on the type of information they convey, then subject[ing] each category to different restrictions."[9] For example, the town exempted 23 categories of signs from its permit requirement, including the 3 categories the court analyzed: ideological signs, political signs, and "Temporary Directional Signs Relating to a Qualifying Event."[10] Gilbert imposed more stringent restrictions on temporary directional signs and treated political signs more favorably than temporary signs and ideological signs more favorably than both political and temporary signs.[11] Analyzing Gilbert's code, the Court determined that these provisions were content-based

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[3] Scottsdale Zoning Ordinance (SZO) § 8.537(i)(b)
[4] *Id*.
[5] *Id*.
[6] SZO § 8.601(d)
[7] SZO § 8.303(ii)(c)
[8] SZO § 8.303(ii)(d); SZO § 8.106(vi); A.R.S. § 16-1019
[9] *Id*. at 2224.
[10] *Id*. at 2224–25.
[11] *Id*. at 2224–25.

regulations of speech, and therefore subject to "strict scrutiny," the Supreme Court's most demanding level of constitutional protection.[12]

The Court held that Gilbert's sign code failed that test. Any "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter,"[13] the Court ruled. Gilbert's sign code was under-inclusive, meaning that it was too narrow to actually serve the government's legitimate interests in preventing visual clutter or traffic accidents.[14] And the code was also over-inclusive because it applied to more signs than were necessary to serve those interests.[15] Because the rules were both too broad and too narrow, they failed the strict scrutiny test, which requires sign restrictions to precisely target those signs that pose a real danger—and to so in a way unrelated to the messages they convey.

Scottsdale's code makes the same kind of unconstitutional content-based distinctions among categories of signs, meaning that some signs are favored over others. At election time, political signs can be placed in any right of way without permit.[16] Off-premises directional signs for open houses can be placed without a permit the day of the open house.[17] Signs for Christmas tree sales do not require permits.[18] Temporary noncommercial signs do not require permits at all,[19]—yet if Aaron wanted to place one of her temporary signs in the exact same spot, she would need a permit.[20] Worse, there are no standards for granting or denying permits, and no standards for how long a sign can stay up.[21] Given that Scottsdale allows noncommercial signs without limit-including political signs and signs for special events that draw thousands of attendees—its sign code is under-inclusive; and given that Scottsdale's limitations on certain types of signs is also broader than necessary to serve legitimate government interests, the city's sign code is an unconstitutional restriction on speech.

The bottom line is this: the only way a Scottsdale code enforcement officer could know which rule applies to Aaron's sign—whether it requires a permit or not–would be to read it. That alone means that Scottsdale's code is content-based—and therefore plainly unconstitutional, just like Gilbert's sign code.[22] What's more, Scottsdale's Zoning Ordinance gives officials unfettered discretion in deciding whether to approve signs, the rules also constitute a "prior restraint" on speech. Prior restraints on speech occur when government requires a permit and a fee before allowing someone to speak—and courts have made clear that prior restraints are virtually never acceptable,[23] because they create the risk that government officials can suppressing particular

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[12] *Id*. at 2224
[13] *Id*. at 2230.
[14] *Id*. at 2231–32.
[15] *Id*.
[16] SZO § 8.303(ii)(d); SZO § 8.106(vi); A.R.S. § 16-1019
[17] SZO § 8.601(d)
[18] SZO § 8.303(ii)(c)
[19] SZO § 8.303(ii)(d)
[20] SZO § 8.537(i)(b)
[21] *Id*.
[22] *Reed*, 135 S. Ct. at 2230.
[23] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992).

opinions or forms of expression based on their own subjective preferences.[24] To obviate that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority."[25] As Scottsdale's permitting process provides no standards whatsoever, it is plainly an unconstitutional prior restraint.

As sweeping as the First Amendment's speech protection is, Arizona's Constitution is even broader. It provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."[26] This language protects speech rights to a greater degree than the First Amendment does. Thus although federal courts have sometimes distinguished between commercial and non-commercial speech—and allowed more government control over speech that the courts label "commercial"—Arizona state courts are required to protect even the speech of business owners to the fullest extent. Indeed, Arizona courts have never found that the Arizona Constitution makes a the same distinction between commercial and non-commercial speech.[27] Given Arizona Constitution's broad protections for free speech, such a distinction should not exist.

Case Logistics

The plaintiff in this case is Aaron Shearer. The defendants are the Board of Adjustment and the City of Scottsdale.

The case was filed in the Arizona Superior Court in Maricopa County on October 5, 2016.

The Legal Team

Jared Blanchard is a staff attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. He has successfully litigated property rights, school choice, and First Amendment cases in multiple states for the Goldwater Institute. Before he joined Goldwater, Jared worked in private practice in Florida.

Jim Manley is a senior attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. Before joining the Goldwater Institute, Jim served six years as a staff attorney at Mountain States Legal Foundation. In his first case after graduating from law school, he secured a victory at the Colorado Supreme Court protecting the right to self-defense on

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[24] *Id*.
[25] *Id.* (internal citations omitted).
[26] See, e.g., *State v. Stummer*, 219 Ariz. 137, 141-42, 194 P.3d 1043, 1078-78 (2008) (Arizona free speech protection generally greater than the First Amendment).
[27] *Salib v. City of Mesa*, 212 Ariz. 446, 454 (App. 2006), as corrected (May 5, 2006); *see also Outdoor Sys., Inc.,* 997 F.2d at 614 ("The Arizona courts have yet to determine whether their state constitution's free speech provision allows a distinction between commercial and noncommercial speech."); *State ex rel. Corbin v. Tolleson,* 160 Ariz. 385, 389 n. 3 (App.1989).

college campuses. His cases defending free speech, the right to keep and bear arms, taxpayer rights, and property rights have set important precedents in state and federal courts.

Adi Dynar is a Staff Attorney at the Goldwater Institute. He litigates cases across the United States relating to fundamental civil rights, free enterprise, freedom of speech and association, and freedom of information, among others. Prior to joining the Goldwater Institute, Adi worked in the areas of constitutional law and immigration law.

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