KANSAS ASSOCIATION OF COUNTIES

Testimony of the Kansas Association of Counties
to the House Local Government Committee on
HB 2210
February 9, 2017

Madam Chairman and Members of the Committee:

Thank you for the opportunity to testify in support of HB 2210.

I have attached an article I wrote in 2016 outlining the 2015 U.S. Supreme Court case of *Reed v. Gilbert*, a case involving the regulation of signs. Given this decision, government cannot regulate signs based on content; meaning, the state, counties, and cities cannot assign different categories of regulation based on what the sign says. The particular statute at issue in HB 2210 references "political" signs and in doing so, creates state regulation based on content. Regulation of signs based on content is subject to strict scrutiny, and must withstand a compelling state interest in order to be ruled constitutional.

HB 2210 brings K.S.A. 25-2711 into compliance with the law as interpreted by the U.S. Supreme Court in *Reed v. Gilbert*. KAC would suggest, however, restating the first sentence of Section 1 to make it clearer. Our suggested language is below:

> Cities and counties may only prohibit the placement or limit the number of temporary signs outside the 45-day period prior to any election or the two-day period following any election. Within this time period, individuals may place temporary signs on private property or the unpaved right-of-way of any city street or county road adjoining a residence with the resident's consent excepting only the restriction in K.S.A. 25-2711(b).

KAC asks the committee to support the bill with amended language. I would be happy to answer questions.

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THE LOCAL LAWYER

By Melissa Wangemann, General Counsel and Director of Legislative Services

REGULATING SPEECH AFTER GILBERT

The 2015 decision of *Reed v. Gilbert* from the U.S. Supreme Court impacted local government regulation of signs. Why is the Supreme Court reviewing local regulation of signs? The First Amendment to the U.S. Constitution says that Congress shall make no law that abridges the freedom of speech, and signs are a form of expression covered by the First Amendment right of freedom of speech.

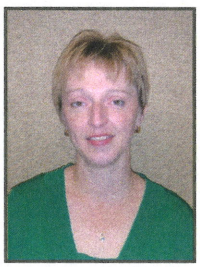
The discussion on regulation of signs begins with case law pertaining to planning and zoning. The U.S. Supreme Court validated planning and zoning as a legitimate exercise of police power that does not violate due process, liberty or property rights of the public, so long as it is reasonable. *See Euclid v. Ambeler*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928). While the First Amendment only mentions Congress, the regulation of speech has also evolved over time to apply to state governments –*Gitlow v. People of New York*, 268 U.S. 652 (1925) and local government, *Lovel v. Griffin*, 303 U.S. 444 (1938).

The U.S. Supreme Court has historically allowed reasonable regulation of signs, holding that the First Amendment does not guarantee the right to communicate at any time, place or any manner.

Speech can come in the form of signs or verbal expression such as flag burning, music or other sounds. Signs are often regulated because –unlike oral speech— they use space, obstruct views and create distractions. Municipalities may regulate signs to control clutter, promote esthetics in the community, reduce distractions, and to protect the visibility of intersections.

The U.S. Supreme Court has historically allowed reasonable regulation of signs, holding that the First Amendment does not guarantee the right to communicate at any time, place or any manner. The Court has over time created nuanced distinctions for on-site and offsite signs, commercial and noncommercial speech.

In *Reed v. Town of Gilbert*, the U.S. Supreme Court reviewed a city sign code that required all signs to have a permit but then exempted 23 categories, based on message content. The U.S. Supreme Court found that the rules were content-based and subject to strict scrutiny, under which the sign regulations did not survive. Under strict scrutiny, the sign code must serve a compelling governmental interest, a test that is seldom met. Strict scrutiny generally leads to invalidation of the governmental regulation as it did in *Reed*.



Based on *Reed*, a court will examine first if the regulation on signs does in fact restrict speech. If so, does the regulation look to message content for determining the extent of the regulation? If so, the standard of review will be strict scrutiny. Note that *Reed* applies to noncommercial speech, i.e., nonprofit church signs, and therefore an argument can be made that it does not to apply to commercial speech.

While commercial speech was delayed in its application of First Amendment rights, case law began to expand in the 1970s to cover commercial speech. Beginning with *Linmark Realty v. Willingboro* which ruled a ban on residential real estate sale signs was unconstitutional, and the creation of commercial speech protections in *Central Hudson Gas and Electric v. Public Service* Commission that invalidated a ban on promotional advertising by a utility. With regard to commercial billboards, *Metromedia v. San Diego* created the test, which test appears to still stand even after *Reed*: the government can ban billboards; the regulation cannot prefer commercial speech over noncommercial speech; and the sign regulation may not favor certain categories of non-commercial speech over others.

Reed has created a new standard on sign regulation; however, there is a long list of cases relating to the First Amendment rights assigned to signage, and a complete review of the cases is in order when reviewing your sign regulations. ■