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November 28, 2018

ATTORNEY GENERAL OPINION NO. 2018- 16

The Honorable Blake Carpenter
State Representative, 81st District
2425 N. Newberry, Apt. 3202
Derby, Kansas 67037

Re: Elections—Voting Places and Materials Therefor—Placement of Political Signs during Election Period; Constitutionality

Constitution of the State of Kansas—Bill of Rights—Liberty of Press and Speech; Libel; Placement of Political Signs

Constitution of the United States—Amendments—Freedom of Speech; Placement of Political Signs

Synopsis: K.S.A. 2018 Supp. 25-2711 does not abridge the freedom of speech and, therefore, is not subject to scrutiny under the First Amendment of the United States Constitution. Cited herein: K.S.A. 2018 Supp. 25-2711; U.S. Const., Amend. I, U.S. Const., Amend. XIV; Kan. Const., Bill of Rights, § 11.

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Dear Representative Carpenter:

As State Representative for the 81st District, you request our opinion regarding whether, in light of the United States Supreme Court's decision in *Reed v. Town of Gilbert, Ariz.*,[1] K.S.A. 2018 Supp. 25-2711 violates the First and Fourteenth Amendments to the Constitution of the United States.

[1] ___ U.S. ___, 135 S.Ct. 2218 (2015).

The First Amendment states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech or of the press."[2] "The First Amendment of the United States Constitution applies to the states through the Fourteenth Amendment."[3]

During the 2015 legislative session, the Kansas Legislature enacted K.S.A. 2018 Supp. 25-2711, which states:

> No city or county shall regulate or prohibit the placement of or the number of political signs on private property or the unpaved right-of-way for city streets or county roads on private property during the 45-day period prior to any election and the two-day period following any such election. Cities and counties may regulate the size and a set-back distance for the placement of signs so as not to impede sight lines or sight distance for safety reasons.

On June 18, 2015, the United States Supreme Court determined in *Reed* that the Town's sign code established content based restrictions on speech that could not withstand strict scrutiny. Because K.S.A. 2018 Supp. 25-2711 does not burden or restrict the exercise of speech, whether commercial or noncommercial, it is not subject to the same review as the sign code in *Reed*. K.S.A. 2018 Supp. 25-2711 does not violate the First and Fourteenth Amendments to the United States Constitution.

Reed v. Town of Gilbert

The Town of Gilbert, through a comprehensive code, prohibited the display of outdoor signs without a permit, with 23 exempt categories.[4] The display of a sign was subject to different size, time, number and location restrictions, depending on the category into which it fell. The Court deemed three categories relevant for its review:

> "Ideological Signs," defined as any "sign communicating a message or ideas for noncommercial 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;"

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[2] The Kansas Constitution contains a similar provision in Section 11 of the Kansas Bill of Rights. ("The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.") The First Amendment and Section 11 are "generally considered coextensive." *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 37 (2001); *State v. Russell*, 227 Kan. 897, 899 (1980).

[3] *Prager*, 271 Kan. 1, 33 (2001) (internal citations omitted).

[4] *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 135 S.Ct. 2218, 2224 (2015).

> "Political Signs," which included any "temporary sign designed to influence the outcome of an election called by a public body;" and
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> "Temporary Directional Signs Relating to a Qualifying Event," which was any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" "Qualifying Event" was defined in the code as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[5]

The constitutionality of the code was challenged by a church that placed "15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street," directing persons to the locations at which it would conduct church services.[6] The church was cited twice for exceeding the time limitation for posting the signs and once for not including the date of one of its services.[7]

In determining the appropriate level of scrutiny to which the Town's sign code would be subjected, the Supreme Court stated:

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "*abridging the freedom of speech*." Under that Clause, a government, including a municipal government vested with state authority, "has *no power to restrict expression because of its message, its ideas, its subject matter, or its content*." Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.
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> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the

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[5] *Reed*, 135 S.Ct. at 2224-25.
[6] *Id.* at 2225.
[7] *Id.*

> message a speaker conveys, and, therefore, are subject to strict scrutiny.[8]

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[9]

The Court found:

> The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat(es) a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.
>
> The *restrictions in the Sign Code that apply to any given sign* thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.[10]

The town asserted two governmental interests in support of the sign code's classifications: preserving the Town's aesthetic appeal and traffic safety. The Court determined that, even "[a]ssuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive."[11]

K.S.A. 2018 Supp. 25-2711

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[8] *Id.* at 2226-27 (internal citations omitted; emphasis added).
[9] *Id.* at 2228 (internal citation omitted).
[10] *Id.* at 2227 (emphasis added).
[11] *Id.* at 2231.

As previously noted, the First Amendment prohibits the enactment of laws "abridging the freedom of speech." K.S.A. 2018 Supp. 25-2711 provides that "[n]o city or county *shall regulate or prohibit* the placement of or the number of political signs" in the designated locations during the 45-day period prior to any election and the two-day period following the election. The statute does not burden, prohibit, require, or restrict the expression of any speech whatsoever. Nor does it require local jurisdictions to regulate speech differently based on content. Generally, First Amendment challenges to a governmental entity's actions are based on its attempts to restrict or compel speech.[12] But here, the state statute on its face does not restrict or otherwise regulate speech at all; rather, it restricts and regulates the authority of cities and counties to enact or enforce their own local restrictions on speech.[13] Thus, the state statute is not implicated by the *Reed* decision.

We recognize that the manner in which local jurisdictions elect to comply with the requirements of K.S.A. 2018 Supp. 25-2711 could present First Amendment concerns similar to those addressed in *Reed* but it also certainly is possible for local jurisdictions to comply with both the state statute and the First Amendment. For example, a local jurisdiction could elect to enforce no local sign regulations at all or could enforce regulations that do not regulate or prohibit the placement of or the number of *any* signs, regardless of content, in the designated locations during the 45-day period prior to any election and the two-day period following the election. Or if the local jurisdiction elects to treat political speech differently than other speech, the local jurisdiction may be able to show that its ordinance is narrowly tailored to serve a compelling governmental interest. Thus, to the

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[12] *McCullen v. Coakley*, ____ U.S. ____,134 S.Ct. 2518 (2014) (statute made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed; "Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is 'very limited.'"); *Sorrell v. IMS Health, Inc*, 564 U.S. 552, (2011) (law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (city ordinance prohibited bias-motivated disorderly conduct; "The First Amendment generally prevents government from proscribing speech. . ."); *Burson v. Freeman*, 504 U.S. 191 (1992) (statute prohibited solicitation of votes and displays or distributions of campaign materials within 100 feet of polling place; statute did not address other categories of speech, such as commercial solicitation, distribution, and display); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (Son of Sam law placed financial burden on speech; "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214 (1989) (state election code prohibited official governing bodies of political parties from endorsing or opposing candidates in primary elections); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (peaceful picketing on the subject of a school's labor-management dispute was permitted, but all other peaceful picketing was prohibited; "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[13] *See* Kan.Const. Art. 12, § 5 (legislature may regulate cities through uniform enactments); *Board of County Com'rs of Sedgwick County v. Noone*, 235 Kan. 777, 784 (1984) (counties are subject to specific statutory limitation and restriction).

extent the content-based analysis in *Reed* may apply, it would operate to invalidate an unconstitutional local ordinance or enforcement regime, not the state statute.

Rather than restricting speech, K.S.A. 2018 Supp. 25-2711 seeks to *protect* political speech. It does not require that local jurisdictions treat other types of speech differently based on their content or otherwise. "[P]olitical speech in the course of elections [is] the speech upon which democracy depends."[14] Because K.S.A. 2018 Supp. 25-2711 does not abridge the freedom of speech, it is not subject to scrutiny under the First Amendment. The statute does not violate the First Amendment of the United States Constitution.

Sincerely,

Derek Schmidt
Kansas Attorney General

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb

[14] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (Kennedy, J., dissenting). *See also Citizens United v. FEC*, 588 U.S. 310, 339-40 (2010), quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. at 223 ("The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.")