

Avoiding Unnecessary Litigation in the Enforcement of Sign Codes

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INTRODUCTION

Signs used by citizens to convey messages to the public are generally regulated by local town codes and ordinances. Restrictions on the use of such signs can create constitutional issues that municipalities must be wary of when enforcing the provisions of their particular code. Sign use restrictions in an Arizona town's code were recently challenged and were ultimately found to be unconstitutional. In *Reed v. Town of Gilbert* 135 S. Ct. 2218 (U.S. 2015), the United States Supreme Court detailed an analytical framework for assessing the constitutionality of sign codes. In light of the recent decision, all sign regulations should be reviewed within the context of the Court's analysis, so as to avoid constitutional challenges.

THE CONSTITUTIONALITY OF SIGN CODE RESTRICTIONS

At issue in *Reed* was Land Development Code, ch. 1 § 4.402 (2005) ("Code"), regulating the use of various outdoor signs in the town of Gilbert, Arizona ("Town"). The Code was challenged by a community church and its pastor ("Petitioners") on the basis that the provisions of the Code abridged their right to free speech. Specifically, Petitioners alleged that the regulations regarding the signs they used to direct parishioners to their weekly services were content based restrictions on the Petitioners' First and Fourteenth Amendment rights to free speech. The Supreme Court of the United States agreed.

At the outset of its analysis, the Supreme Court noted that "[u]nder [the First Amendment], 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.'" *Reed v. Town of Gilbert* 135 S. Ct. 2218, 2226 (U.S. 2015). If a law applies to a particular mode of speech because of the topic discussed, or the message conveyed, then regulation of that speech is content based. *Id.* at 2227.

The Code in question identified three different categories of signs, each distinguishable based on the information the sign conveyed. Under the Code, each category of signs was subject to different restrictions, including but not limited to the location

of the sign and the duration of time that it could be displayed. The category of signs the Petitioners took issue with was the "temporary directional signs relative to a qualifying event" category, used to direct the public to an "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2225 (U.S. 2015). Of the categories discussed in the opinion, this was the category with the most restrictions, as the Code required the signs to be no larger than six square feet, that no more than four signs be placed on any one property at any time, and that the signs be placed no more than 12 hours before the "qualifying event" and no more than one hour afterward. *Id.* at 2226.

The Petitioners tried to use their signs as a cost efficient way to direct parishioners to weekly church services, as Sunday services were not held in the same location from week to week. Nevertheless, under the Code, the Petitioners' temporary directional signs were treated less favorably than political signs. Political signs, under the Code, were limited to 16 square feet or 32 square feet, depending on the property on which they were displayed, and could be displayed up to 60 days before a primary election and up to 15 days following a general election. *Id.* 2225. On two occasions, Petitioners were cited by the Town for violations of the Code. Petitioners were cited once for exceeding the Code's time limits for displaying temporary directional signs and another time for failure to include the date of the event on the sign.

Thereafter, Petitioners filed suit in the United States District Court for the District of Arizona alleging constitutional violations. The District Court denied the Petitioners' motion for a preliminary injunction and ultimately entered summary judgment in favor of the town. The Ninth Circuit Court of Appeals affirmed. The United States Supreme Court reversed, holding that the Code's regulations on temporary directional signs were content-based regulations that did not survive the strict scrutiny standard, meaning that they did not further a compelling interest and were not narrowly tailored to achieve that interest.

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Importantly, the Supreme Court, with Justice Thomas writing the majority opinion, explained that laws that are content-based on their face are subjected to the “strict scrutiny” test regardless of the motivation of the particular law. The Supreme Court also explained that the question of whether a law is content based on its face is the first question a reviewing Court should answer, before ever considering the proposed justification for the law. This explanation was given in response to the Town’s argument that it did not adopt the regulations in the Code because it disagreed with the message being sent by the signs in question, but instead because it was concerned about the aesthetic appeal of the town and because of traffic safety issues. “... An innocuous justification cannot transform a facially content-based law into one that is content neutral.” *Id.* at 2228. In other words, the motivation for the law in question does not always matter when evaluating whether a law abridges the freedom of speech, and in this case because the law restricting various types of signs was based on content, i.e. ideological signs, political signs, and temporary directional signs to a qualifying event, it was subjected to strict scrutiny, regardless of the legislature’s motivation for enacting the law in the first place.

The Supreme Court also made quick work of the Town’s “traffic safety justification” for the regulations by explaining:

... A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers – such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses – well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes.

Id. at 2232.

In sum, when a law draws distinctions based on the particular message a speaker conveys, it is considered to be content based. If a law is content based, it will be subjected to strict scrutiny, an analysis that weighs heavily in favor of invalidating the law. The Supreme Court’s opinion is not an absolute ban on such sign laws or codes, rather, it stands for the proposition that content based laws are subject to strict scrutiny whereas content neutral laws are less rigidly interpreted.

RECOMMENDATIONS

Municipalities with similar sign codes, meaning ones that regulate signs based on the type of message being conveyed, need to closely examine the codes to determine their compliance with *Reed*. Particular attention should be paid to whether the code distinguishes between certain kinds of signs based solely on the content of the sign itself. When reviewing your code restrictions, consider the following:

Does the restriction depend entirely on the communicative content of the sign?

For example: Are signs conveying political messages regulated in a similar way to signs conveying ideological messages? If the regulations of these two types of signs are different, be advised, in light of *Reed*, a court will consider the justification for these differences after it considers whether the regulations are content based on their face. If the regulations are found to be content based on their face, the justification for the differences will not matter, and the code likely amounts to a constitutional violation.

Any regulations that fall within the above example should be carefully reviewed in the context of *Reed* so the government can avoid challenges that sign regulations are content based, and are therefore constitutionally invalid.



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