

Signs of Trouble:

Your Town's Sign Ordinance is Probably Unconstitutional

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This past June, in a relatively brief and seemingly mundane opinion, the U.S. Supreme Court invalidated a municipal sign ordinance that gave less favorable treatment to signs that advertised church services than signs promoting other messages. The case may not appear remarkable at first glance, but its implications are far-reaching: By many accounts, the opinion calls into question the constitutionality of virtually every municipal sign ordinance in the country.

In *Reed v. Town of Gilbert*,¹ the Supreme Court considered a sign ordinance that allowed the display of temporary outdoor signs without a permit, so long as the signs met certain restrictions enumerated in the ordinance. Not unlike many sign codes, the Town's sign ordinance imposed different size, quantity, and length-of-display requirements on different types of signs. Under the Town's ordinance, "ideological signs" that communicated a message or idea could be up to 20 square feet in size, whereas "political signs" designed to influence the outcome of an election could be up to 32 square feet in size—although political signs could only be displayed during an election season. In contrast, "temporary directional signs" that directed the public to assemblies, gatherings, or meetings sponsored by religious or non-profit organizations were limited to a maximum of four signs per advertised event, each of which could not exceed six square feet in size and could not be displayed more than 12 hours before the event or one hour after the event.

The case arose when the Good News Community Church displayed a dozen or so temporary directional signs bearing the Church's name and the time and location of the next service. Members of the Church would install the signs around town on Saturday morning and would remove them around midday Sunday. The Town cited the Church for exceeding the time limits for displaying temporary directional signs and for failing to include the date of the event on the signs. In turn, the Church challenged the constitutionality of the Town's sign ordinance, contending that the ordinance unlawfully allowed some groups wide latitude to communicate messages through signage while stymying the ability of other groups to do so. In other words, the Church argued that because the ordinance



One of the signs that was posted around town by members of the Good News Community Church.

established rules for temporary directional signs that were more restrictive than the rules for other categories of temporary signs, the ordinance abridged the Church's right of free speech guaranteed under the First Amendment.

Under the First Amendment, a government may not restrict expression because of its message, its ideas, its subject matter, or its content.

Under the First Amendment, a government may not restrict expression because of its message, its ideas, its subject matter, or its content. When a regulation singles out specific subject-matter for differential treatment, courts will therefore presume that the regulation is unconstitutional. So-called content-based laws are justified only if they satisfy the most rigorous judicial test called strict scrutiny—that is, the law must further a compelling governmental interest using the least restrictive means possible. This is a steep judicial hurdle. As Adam Liptak succinctly explained in a recent New York Times article discussing the case, “strict scrutiny, like a Civil War stomach wound, is generally fatal.”²

In *Reed*, the Supreme Court determined that because the Town's sign ordinance defined the categories of directional, political, and ideological signs on the basis of their messages and then subjected each category to different restrictions, those restrictions “depend[ed] entirely on the sign's communicative content” and were therefore content-based. Although the Town offered two long-recognized compelling governmental interests in support of its sign ordinance—preserving the Town's aesthetic appeal and traffic safety—it could not explain why temporary directional signs posed a greater threat to aesthetics or safety than other types of temporary signs. Because the Town failed to

justify its more restrictive rules for directional signs, the Court concluded that the sign ordinance failed the strict scrutiny test and was unconstitutional.

Notably, the Supreme Court struck down a previously-applied judicial rule that might have saved the Town's sign ordinance from its unconstitutional fate. Before *Reed*, a rule restricting “who” is speaking (say, a realtor versus a political candidate) or “what event” is occurring (say, a community supper versus a mattress sale) was usually deemed content-neutral so long as the rule paid no regard to the message itself. Content-neutral laws are constitutional if they further an important governmental interest by means that are substantially related to that interest—a judicial test far less demanding than strict scrutiny. The Supreme Court rejected this analytical approach, however, and instead adopted a novel theory: Whenever a law treats different categories of public expression differently, the law discriminates against those *entire categories* of speech and only passes constitutional muster if it survives strict scrutiny. Consequently, a sign code based on who is speaking about what event, without regard to the substance of the message, is no longer safe from a free speech challenge.

Even though the Supreme Court clearly raised the bar on constitutionally permissive sign regulations, the Court stressed that its decision would not prevent governments from enacting effective sign laws. The Court noted that sign regulations might well survive strict scrutiny if they are “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.” The Court also acknowledged that governments have “ample content-neutral options available to resolve problems with safety and aesthetics” by regulating aspects of signs—such as size, building materials, lighting, moving parts, and portability—that have nothing to do with a sign's message.

Indeed, in a concurring opinion, three of the Supreme Court Justices enumerated the following rules that would likely be lawful:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be placed, including rules that distinguish between freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on temporary signs.

While a concurring opinion is not binding on courts, it does signal that a sign ordinance in keeping with these rules would likely satisfy the heightened *Reed* test—at least in the view of three Supreme Court Justices.

In sum, while the *Reed* decision instructs courts to be highly skeptical of codes that impose different standards for different categories of signs, the ruling is not intended to prevent governments from regulating signs in a way that protects public safety and serves other legitimate governmental objectives.

Post-*Reed* Pointers For Municipal Officials

The *Reed* decision implicitly calls on municipal officials to reexamine their sign ordinances in light of the Court's expansion of what constitutes a content-based sign regulation. This is not an simple task. Determining whether a rule is content-based involves complex legal analysis, even with the guidance provided in the concurring opinion. But municipal officials can quickly spot whether their sign ordinance is at risk based on a relatively straightforward question:

Does your code enforcement officer need to classify a sign in order to figure out if it violates your sign ordinance?

Put another way, does your sign ordinance make reference to *types* of signs (for example, real estate signs, political signs, business relocation signs, construction signs, open house signs, farm stand signs, or community events signs) and does the ordinance establish rules (such as dimensional requirements, quantity limits, or restrictions on the time of year or duration when a sign may be displayed) that *vary* based on those sign types? If so, then your ordinance is probably content-based.

Just because an ordinance is content-based does not mean it is per se unconstitutional. But a municipal official who answers the above question in the affirmative should not wait to take action. There are many ways to fix a sign ordinance so that it does not run up against *Reed*, and towns do not necessarily need to abandon the common practice of regulating signs based on categories to be on the right side of the First Amendment. The key to avoiding a legal challenge is to spot the issue early and consult with a qualified legal professional on ways to safely enforce your existing sign ordinance while making revisions that pass constitutional muster.

Endnotes

1. *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218 (2015).
2. Liptak, Adam, Court's Free-Speech Expansion Has Far-Reaching Consequences (August 17, 2015), available at <http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>.

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