

## LEGAL AND REGULATORY NOTES, OCTOBER 2015

### U.S. Supreme Court Rules Town's Sign Code Violates the First Amendment

Early this summer, the U.S. Supreme Court issued a decision that significantly impacts many ordinances and zoning bylaws that regulate signage throughout Vermont and across the country. In *Reed v. Town of Gilbert*, 576 U.S. \_\_\_ (2015), the Court unanimously held that the Sign Code of the Town of Gilbert, Arizona – which treated various categories of signs differently based on the information they contained – violated the First Amendment to the U.S. Constitution. In the wake of this decision, towns in Vermont with sign regulations are advised to review, and if necessary revise their regulations so that they comply with the Court's ruling in this case.

The case was brought by a church and its pastor, Clyde Reed, who used temporary directional signs to publicize the location of Sunday services because the church had no permanent building. The signs were erected every Saturday morning and removed the next day after the morning service. The church was cited by the Town for exceeding the time limits for display of temporary directional signs, as set by the Town ordinance, and for failing to include an event date on the signs. The church claimed (among other things) that the Town's Sign Code violated the Free Speech Clause of the First Amendment, which ensures against governmental restriction of the right to free speech.

The Town of Gilbert's Sign Code prohibited the display of outdoor signs without a permit but exempted 23 categories of signs, three of which were relevant to this case:

- "Ideological Signs," defined as signs "communicating a message or idea" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions;
- "Political signs," defined as signs "designed to influence the outcome of an election," may be 32 square feet and may only be displayed during an election season; and
- "Temporary directional signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: There may be no more than four signs on a single property at any time, signs are limited to 6 square feet in size, and they may be displayed no more than 12 hours before the "qualifying event" and only one hour after.

Put simply, Gilbert's Sign Code treated temporary directional signs less favorably than political and ideological signs.

The first issue to be decided by the Supreme Court was the level of scrutiny to be applied to the Sign Code. Challenges based on a the right to free speech under the First Amendment are either given "intermediate scrutiny" or a more stringent "strict scrutiny." Under strict scrutiny review, content-based laws that target speech based on its communicative content are presumed to be unconstitutional unless the government proves that they are narrowly tailored to serve a compelling government interest.

The Town of Gilbert argued that its Sign Code was content-neutral regulation and therefore should be subject to only intermediate scrutiny. The church countered that the Sign Code was content-based and, therefore, subject to strict scrutiny.

The lower court applied only intermediate scrutiny because it determined that the Sign Code was content-neutral. This was based on the fact that the Town “did not adopt its regulation of speech [based on] disagreement with the message conveyed,” in those signs; its justification for regulating temporary directional signs was “unrelated to the content of the sign.” The court noted that the Sign Code “[did] not mention any idea or viewpoint, let alone single one out for differential treatment,” because the regulations did not depend on the identity of the candidate, the sponsor of the event, or the ideological perspective asserted in the signs. Finally, the court characterized the Sign Code as turning on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.”

The Supreme Court, however, came to a different conclusion: it ruled the Sign Code was content-based “on its face” and therefore subject to strict scrutiny review. The Court noted that the regulations defined the categories of signs on the basis of their messages – temporary directional signs convey a message directing the public, political signs are designed to influence the outcome of an election, and ideological signs communicate a message or an idea – and subjected each category to a different restriction. Therefore, the Court found that by regulating the message, the Sign Code regulated the “communicative content of the sign.” Even though the ordinance may have had a content-neutral justification, “innocent motives do not eliminate the danger of censorship presented by a facially content-neutral statute, as future government officials may one day wield such statutes to suppress disfavored speech.”

The Supreme Court’s next step was to determine whether the Sign Code could survive strict scrutiny, i.e., whether it was narrowly tailored to serve a compelling government interest. The Court found that the two interests asserted – preserving aesthetic and traffic safety – were “hopelessly underinclusive” and not adequate justifications to pass strict scrutiny review. It reasoned that temporary directional signs are “no greater an eyesore” and pose no greater a threat to public safety than ideological or political signs. Further, “[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.” With regard to traffic safety, “[t]he Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.” Consequently, the Court ruled that the Town failed to meet its burden to prove that the Sign Code was narrowly tailored to serve a compelling government interest.

Although the ruling in the *Gilbert* case was unanimous, the justices’ opinions were varied, resulting in three justices joining the majority but offering their own explanatory concurrences and three others with separate concurring opinions. These fractured opinions make it difficult to discern the full scope of the decision and the true impact it will have on towns. However, it is clear from the majority opinion that the Court was aware of the impact the ruling could have on sign regulations across the country. In the majority opinion, Justice Thomas noted that the decision did not limit a town’s ability to regulate signage, so long as the regulation is content-neutral. For example, he explained signs that warn for hazards on private property and signs directing traffic and street numbers associated with private houses may be regulated without

reference to a sign's message. Content-neutral regulations addressing safety and aesthetics concerns may still be regulated with regard to size, lighting, building materials, moving parts, and portability of signs. Further, he said that a town could even forbid the posting of signs on public property, "so long as it does so in an evenhanded, content-neutral manner."

It won't be until federal courts begin applying this decision to signage litigation in the future that we will understand the full scope of the case. In the meantime, towns must be very careful to regulate all signage in a manner that is very clearly content-neutral in order to fully comply with the *Gilbert* ruling. Currently, many municipal sign regulations distinguish between certain categories of signs based on content. Common examples are sign regulations that target political signs, garage sale signs, and real estate signs. We now know that such classifications are unconstitutional. Towns with these types of distinctions will need to remove them from the regulations and address signs in a content-neutral manner. We strongly encourage towns to review – and, if necessary, revise – their current sign regulations or zoning bylaws. Contact your town attorney or the Municipal Assistance Center for assistance with this issue.

The *Gilbert* decision is achieved at [http://www.supremecourt.gov/opinions/14pdf/13-502\\_9olb.pdf](http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf).

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