

Legal

Sign code uncertainty after Supreme Court ruling

In 2015, the U.S. Supreme Court issued a decision in the case of *Reed v. Town of Gilbert* establishing that the town's sign code violated the First Amendment freedom of speech by imposing more stringent restrictions on certain categories of signs based on the messages conveyed instead of in a content-neutral manner.

The court held that for a sign code to be considered content-neutral, an enforcement officer should not have to read the sign to determine the sign's type and which sign code provisions should apply. In other words, a content-neutral sign code looks only to the sign's size, height, structure, material, shape, placement or other characteristics to determine how to regulate it instead of its content. Therefore, regulating political and real estate signs differently than other types of signs necessitates reading the sign in order to regulate it, and thus violates the First Amendment.

Since many local sign codes countrywide contain some level of regulation based on content similar to the town of Gilbert, *Reed* triggered a wave of sign code revisions. However, because the case concerned a noncommercial sign and because noncommercial speech is protected more rigorously by the First Amendment than commercial speech, the ruling created uncertainty as to whether *Reed* requires content neutrality in every aspect of a sign code or whether *Reed* applies more narrowly.

This article is the first in a series



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of three that will explain *Reed* and address these uncertainties to help commercial developers better understand the new landscape as to local sign codes.

• **Background.** The town of Gilbert had a comprehensive sign code that prohibited the display of outdoor signs without a permit, but exempted 23 categories of signs from such requirement. One sign category, "temporary directional signs," defined signs intended to direct the public to a "qualifying event," which included any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by religious, charitable, community service, educational, or other similar non-profit organization." Among other regulations, these signs could not be displayed more than 12 hours before the "qualifying event" and one hour thereafter.

The Good News Community Church and its pastor, Clyde Reed, held church services at various temporary locations in and near the town and posted temporary directional signs throughout the community with times and locations of the services. The signs were not always taken down within the hour following the services and often exceeded the town's allowable time limits in violation of sign code provisions.



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The town cited the church several times. Failing to resolve the issue with the town, the church filed suit claiming the sign code violated its First Amendment freedom of speech. The district court denied the church's motion for a preliminary injunction, and the Ninth Circuit affirmed on appeal. In holding the exemptions were content-neutral, the Ninth Circuit determined the sign code satisfied the test for intermediate scrutiny accorded to content-neutral regulations of speech because the exemptions were narrowly tailored to advance the town's substantial government interest in traffic safety and aesthetics.

The Supreme Court granted certiorari review and unanimously decided the town's sign code was unconstitutional, reasoning that a sign regulation that "on its face" considers the message on a sign to determine how it will be regulated is content-based regardless of whether the purpose is to prohibit any particular type of speech. The court concluded that only after making a determination as to whether a sign code is neutral on its face should a court inquire as to whether the law's purpose is neutral in its justification.

• **Practical implications and recommendations.** Many municipalities and counties have revised their sign

codes or enacted temporary moratoria on their sign regulations to comply with *Reed*. In particular, we have observed removal of references to the content of a sign when differentiating the categories of signs. For example, instead of referring to "real estate" or "garage sale" signs, *Reed*-compliant sign codes refer generically to "yard" or "residential district" signs, which are then regulated by size, number, placement, shape, material and allowable time of display.

Additionally, we have increasingly seen inclusion of a severability clause within the sign code stating if any specific provision or language in the code is found to be unconstitutional, the rest of the code shall remain valid, and a substitution clause that serves to allow a non-commercial message to be displayed on any sign. Both clauses may serve to safeguard a municipality or county against liability if their sign code is determined to favor one type of speech over another.

• **Uncertainties remain.** While *Reed* clarified that content neutrality must be applied to noncommercial signs, whether *Reed* applies more broadly to commercial signs – e.g., the distinction that exists in most local sign codes between on- and off-premise signs – remains unclear. While this issue has been addressed in some lower court decisions since *Reed*, such rulings have been divided. The next article will outline these decisions and explore whether erring on the side of content-neutrality in all areas is broader than what *Reed* requires. ▲



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