



Drafting and Enforcing Sign Codes after *Reed v Town of Gilbert*

The U.S. Supreme Court's decision in *Reed v Town of Gilbert* on June 18, 2015 is, undoubtedly, the most definitive and far-reaching statement that the Court has ever made regarding day-to-day regulation of signs. While the sign code provisions challenged in *Reed* involved only the regulation of temporary non-commercial signs, the Court's 6-3 majority decision, authored by Justice Clarence Thomas, applies to the regulation of *all* signs: permanent signs as well as temporary signs, business signs as well as residential signs, and to both commercial and non-commercial signs. If you're wondering "what about onsite vs. offsite signs?" - more on that later.

The rules that Justice Thomas announced in *Reed* could not be more straight-forward. A sign regulation that "on its face" considers the message on a sign to determine how it will be regulated is content-based. Justice Thomas emphasized that if a sign regulation is content-based "on its face" it does not matter that government did not intend to restrict speech or to favor some category of speech for benign reasons. He wrote: "In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral." Further, a sign regulation that is facially content-neutral, if justified by – or that has a purpose related to – the message on a sign, is also a content-based regulation. For example, a code provision that allowed more lawn signs between mid-August and mid-November would be facially content-neutral but might be challenged as being justified by or have a purpose related to allowing "election campaign" messages.

Whether content-based "on its face" or content-neutral but justified in relation to content, Justice Thomas specified that the regulation is presumed to be unconstitutional and will be invalidated unless government can prove that the regulation is narrowly tailored to serve a compelling governmental interest. This is known as the "strict scrutiny" test and few, if any, regulations survive strict scrutiny. This may be particularly true in regards to sign regulations given that a number of federal courts have previously ruled that aesthetics and traffic safety, the "normal" governmental interests supporting sign regulations, are not "compelling interests."

Every Sign Code Should Be Scrutinized

Justice Thomas's opinion calls into question almost every sign code in this country: few, if any, codes have no content-based provisions under the rules announced in *Reed*. For example, almost all codes contain content-based exemptions from permit requirements for house nameplates, real estate signs, political and/or election signs, garage sale signs, "holiday displays," etc. Almost all codes also categorize temporary signs by content, and then regulate them differently; for example, a "real estate" sign can be bigger and remain longer than a "garage sale" sign, or the code allows the display of more "election" signs than "ideological" or "personal" signs but the "election" signs must be removed "x" days after the election while the "personal" or "ideological" signs can remain indefinitely.

Many sign codes also have content-based provisions for permanent signs. Because the *Reed* rules consider "speaker-based" provisions to be content-based, differing treatment of signs for "Educational Uses" vs. "Institutional Uses" vs. "Religious Institutions" would be subject to strict scrutiny. The strict



scrutiny test would also apply for differing treatment of signs for “gas stations” vs. “banks” vs. “movie theaters.”

Reed does not, however, cast doubt on the content-neutral “time, place, or manner” regulations that are the mainstay of almost all sign codes, provided they are not justified by or have a purpose related to the message on the sign. Justice Thomas acknowledged that point, noting that the code at issue in *Reed* “regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts and portability.” Justice Alito’s concurring opinion, joined by Justices Kennedy and Sotomayor, went further.

While disclaiming he was providing “anything like a comprehensive list,” Justice Alito noted “some rules that would not be content based.” These included rules regulating the size and location of signs, including distinguishing between building and free-standing signs; “distinguishing between lighted and unlighted signs;” “distinguishing between signs with fixed messages and electronic signs with messages that change;” distinguishing “between the placement of signs on private and public property” and “between the placement of signs on commercial and residential property;” and rules “restricting the total number of signs allowed per mile of roadway.”

But Justice Alito also approved of two rules that seem at odds with Justice Thomas’s “on its face” language. Alito claimed that rules “distinguishing between on-premises and off-premises signs” and rules “imposing time restrictions on signs advertising a one-time event” would be content-neutral. But rules regarding “signs advertising a one-time event” clearly are facially content-based, as Justice Kagan noted in her opinion concurring in the judgment, and the same claim could be made regarding the onsite/offsite distinction. Further, neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and non-commercial signs, a point raised by Justice Breyer in his concurring opinion. Thus, it seems clear that the lower federal courts will soon face claims that codes that differentiate between commercial and non-commercial signs or that regulate on-site and off-site signs differently are content based and subject to strict scrutiny. Stay-tuned!

Keep in mind, however, that even content-neutral “time, place or manner” sign regulations are subject to intermediate judicial scrutiny rather than the deferential “rational basis” scrutiny applied to regulations that do not implicate constitutional rights such as freedom of expression or religion. Intermediate scrutiny requires that government demonstrate that a sign regulation is narrowly tailored to serve a substantial government interest and leave “ample alternative avenues of communication.” Because intermediate scrutiny requires only a “substantial,” rather than a “compelling,” government interest, courts are more likely to find that aesthetics and traffic safety meet that standard. That said, courts have struck down a number of content-neutral sign code provisions because the regulations were not “narrowly tailored” to achieve their claimed aesthetic or safety goals.

Cities Must Respond

So...what’s a city to do after *Reed*? Some cities are enacting moratoria on sign regulation while they try to figure that out. A court would likely view with disfavor a total moratorium on issuing *any* sign permits (or, worse yet, displaying any new signs) as an unconstitutional prior restraint on speech. In



contrast, a moratorium of short duration – certainly no more than 30 days – targeted at permits issued under code provisions that are questionable after *Reed* is far more likely to be upheld. Cities are also well-advised to suspend enforcement of code provisions – particularly regulation of temporary signs – that are questionable after *Reed*. Obviously, however, *all* sign code structural provisions directly related to public safety should continue to be enforced.

As we all know, drafting a fair and effective sign code that appropriately balances a community's interests in allowing both residents and businesses to use signs to meet their communication needs while achieving the community's interests in maintaining property values and achieving aesthetics and traffic safety goals is no easy task. Trying to do that during a short moratorium is even harder. But it is certainly not impossible.

Opportunities to Improve Your Sign Code Post-*Reed*

1. Remove from the sign code all references to the content of a sign other than the few examples directly related to public safety noted in Justice Thomas's opinion. Most of these content-based provisions likely will relate to temporary signs. Rather than referring to “real estate” or “political” or “garage sale” signs, your code should treat these all as “yard” signs or “residential district” signs. You then regulate their number, size, location, construction and amount of time they may be displayed, keeping in mind how your residents want to use such signs. You would use the same approach for temporary signs in business districts: replace references to “Grand Opening” or “Special Sale” signs with “temporary business sign” and regulate their number, size, location, construction and amount of time they may be displayed based on business needs for such signs.

2. All the provisions in your code that refer to number, area, structure, location and lighting of permanent signs are content-neutral and unaffected by *Reed*. If your code does have some content-based provisions for permanent signs, either by specifying content that must (or must not) be on a sign or because you distinguish among uses (e.g., “gas-station signs”), those provisions will be subject to strict scrutiny if challenged. None of these content-based provisions should be retained unless public safety would be so threatened by removal that the provision would survive strict scrutiny. Permanent signs should be regulated in a content-neutral manner with regulations distinguished not by type of use (because that would be “speaker-based”) but by either zoning districts or “character” districts or by reference to street characteristics such as number of lanes or speed-limit. The [International Sign Association](#) has a number of resources that can help your community revise your sign code based on the latest research, sign industry expertise, and sign-user perspectives.

3. If your sign code does not have a severability clause and a substitution clause they should be added. A severability clause provides that if any specific language or provision in the code is found to be unconstitutional, it is the intent of the city council that the rest of the code remain valid. For example: “If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word in this code is declared invalid, such invalidity shall not affect the validity or enforceability of the remaining portions of the code.” A substitution clause allows a non-commercial message to be displayed on *any* sign. While *Reed* did not discuss the commercial/non-commercial distinction, prior U.S. Supreme Court cases established that commercial speech should not be favored over non-commercial speech. A



substitution clause thus can safeguard you against liability that could result from mistakenly doing just that by prohibiting the display of a non-commercial message or citing it as a code violation. For example: “Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs.”

4. Understand that *Reed* has left several questions unanswered. As previously noted, treatment of the onsite/offsite and commercial/non-commercial distinctions remains uncertain. *Reed* also failed to provide an answer to how we provide for the public’s desire for more signage during election campaigns in a wholly content-neutral manner. We also don’t know what, if any, content-based regulations might survive strict scrutiny. In light of these uncertainties, arguably the best course for cities is to err on the side of allowing for less restrictive, rather than more restrictive, sign regulations until the courts provide more guidance on the above questions and others that are certain to be raised.

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