

2018 Replacement Sign Regulations

The purpose of this memo is to outline why it is necessary to replace the current sign regulations that were adopted in 2005, outline the points made in the Supreme Court case *Reed v Gilbert*, briefly describe the legal concepts included in the decision, and identify what is changed in the local sign regulations. This court decision necessitates replacing the sign regulations in their entirety. This also provides an opportunity to fix problems and simplify the sign regulations.

In the summer of 2015 the United States Supreme Court in the case *Reed v Gilbert* not only reaffirmed a broad prohibition on *content-based speech* restrictions in sign regulations it also placed additional burdens of proof on jurisdictions in *content-based speech* first amendment cases require jurisdictions to justify content-based cases filed under a legal concept called *strict scrutiny*. Regulations reviewed under the *strict scrutiny* test can only be upheld if they are *narrowly tailored* to a compelling government interest such as public safety.

Supreme Court decisions pertaining to any type of speech regulation, not just signs, require that regulations of speech *must avoid regulation of message, subject matter, or speaker*. Content regulation has long been considered a suspect form of speech regulation. Rules that are deemed content based are subject to the highest level of judicial scrutiny called "strict scrutiny." Under strict scrutiny the government entity bears the legal burden of demonstrating that there is a *compelling government interest* for constraining speech. Merely claiming that a type of sign is a danger to traffic safety or damages community aesthetics is insufficient. Demonstrating a compelling government interest requires that the government demonstrate that *fact based data* exists to support the claim of a compelling government interest. Additionally, the rule must be narrowly tailored and be the minimum level of regulation required for achieving the purpose.

Attached to the back of this memo is a Washington Post article from June 18, 2015 that provides one of the best short discussions of the key points from *Reed v Gilbert*.

Our actions

The first step is to eliminate any remaining content related references and all exemptions. Exemptions can and do inadvertently grant certain types of speech special/superior status thereby discriminating against other types of speech which is the crux of *Reed v. Gilbert*. It will then be necessary to develop rules that are based strictly on time, size, sign area of individual signs and sign programs, number of signs allowed such as one freestanding sign per property, number of signs (both permanent and temporary) along property frontage, number of temporary signs and temporary sign area per property, spacing between permanent freestanding signs.

Other proposed differences include simplifying and reducing the use of formulas to determine a sign program, standardizing sign heights, eliminating, reducing the number of tables, and eliminating sections that were never used and are unlikely to ever be used.

Reed v. Town of Gilbert, Arizona background

The Gilbert sign code required sign permits, but *exempted several categories of signs* from the permit requirement *and treated different categories of exempted signs differently*. As with most sign codes the Gilbert sign code included references to *traffic safety and aesthetics as a purpose of the sign code*. Three exempted categories of signs included in the lawsuit were *political signs, ideological signs* and *temporary directional signs*. The town of Gilbert did not prohibit any of these categories of speech, but each was treated differently under the sign code with regards to size, time-frame and number of signs per lot when there was no practical difference on how each type of sign affected public safety and aesthetics.

Definitions that differentiate types of speech should also be avoided. Examples from Gilbert, AZ code language that were problems.

Political signs. Temporary signs intended to influence the outcome of an election called by a public body.

Temporary directional signs. Temporary signs intended to direct pedestrians, motorists and other passerby to a ‘qualifying event’ which were any “assembly, gathering, activity, or meeting sponsored by a religious, charitable, community service, educational, or other similar non-profit organization.

Ideological signs A sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owner by a governmental agency.

The following table demonstrates how differently three different uses of temporary signs were treated under the Gilbert, Arizona sign code. Based on traffic safety and aesthetic rationales there is no defensible reason for treating these uses differently.

Type of sign	Maximum size		Time frame		Location	Number of signs
	Residential lot	Commercial lot	Install	removal		
political	16 sf.	32	60 days before primary	15 days after general	Allowed within Right-of-way	No limit per lot
Temporary directional	6 sf.	6 sf.	12 hours before event	1 hour after event	With owner consent on private property, within Right-of-way	4 signs per parcel
Ideological	20 sf. in any zoning district		No time limit		Private property or Right-of-way	No limit per lot

Supreme Court review

All nine justices found the Reed sign code unconstitutional, but with some differences on why. The majority opinion of six justices, which is the law of the land, based the decision on a “need to read” position, which means that a sign regulation that requires reading a sign to determine how it will be regulated is content based.

The first step was for the court to analyze whether the sign code was neutral on its face. The code failed this test.

The second step is to inquire as to whether the law is neutral in its purpose. The decision *also rejected speaker based* distinctions, which includes clauses such as “qualifying event”. In this case the speaker based provision regarding event based signs was not content neutral because each class of speaker was regulated differently.

The majority discussion concentrated on Gilbert’s code allowances and time restrictions for political signs and other event based signs. An example from this ordinance was the allowance for “Grand Opening” signs, but prohibiting one with any other message such as a “Going out of Business” sign.

Once the court determined that the challenged provisions and purpose were content based, the court addressed whether the town could meet the strict scrutiny test. The Town of Gilbert failed to meet the strict scrutiny test. The town’s argument did not demonstrate that the distinctions between how the signs were regulated *furthered a compelling public interest*. The majority also found that *the Town failed to narrowly tailor its regulations* to the stated regulatory interests of *traffic safety and aesthetics*.

The code failed *strict scrutiny* because the code placed strict limits on temporary event signs but more freely allowed political and ideological signs. The code failed the narrow tailoring test because each type of sign has the same effect on traffic safety and community aesthetics.

Four points Reed clarified

1. Content based regulations are subject to strict scrutiny and presumptively unconstitutional. If a court determines that the law is content based courts will apply strict scrutiny. To pass *strict scrutiny* the regulation must be narrowly tailored and the minimum required for achieving a compelling government interest.
2. A regulation's purpose is irrelevant if the regulation is not neutral on its face. Courts must now use a two step neutrality analysis to review speech regulations for both facial neutrality and neutral purpose.
3. Signs such as directional signs, real estate signs, construction signs and such are content based because they are defined by the message and are presumed to be unconstitutional.
4. *Speaker based* regulations that apply to certain speakers, but not others may be found as content based and subject to strict scrutiny. Such regulations are not by their nature necessarily content neutral, nor are they automatically excused from content neutrality analysis although they may be permissible.