

Client Alert

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Supreme Court Decision Expected to Touch Off Wave of Sign Litigation

In an important decision for billboard companies, advertisers and cities, the US Supreme Court in *Reed v. Town of Gilbert, Arizona*, No. 13-502, held that a sign code that discriminates on the basis of content will be subjected to the strictest of judicial scrutiny even if adopted for content-neutral objectives.

Although that principle had been well established, cities for decades had worked to find ways around it and often had succeeded. This new decision should put a halt to those efforts and in many instances will require courts to overturn prior rulings and cities to clean up the content-based rules that litter their codes.

For nearly 35 years, outdoor advertising litigation has been governed by the principals set forth in *Metromedia, Inc. v. San Diego*, 453 U. S. 490 (1981), in which a majority held that commercial billboards could be banned even though similar on-site commercial signs were allowed, but in which no majority of justices agreed on anything else.

The fractured decision spawned confusion almost every time it was applied, including especially when cities claimed the motives were pure even though their words were not. *Reed* now makes crystal clear that when cities treat different content differently, their regulations will be subjected to strict scrutiny, and almost certainly invalidated.

Background

The Town of Gilbert, like many municipalities, had a sign code that prohibited the display of outdoor signs without a permit. Gilbert's sign code exempted 23 categories of signs. A small, cash-strapped church, which owned no building and met at different locations each week, was cited for violating restrictions on "temporary directional signs," which directed the faithful to its services. The Code imposed heavier restrictions on such signs than on "ideological signs" or "political signs."

The church sued, claiming the code violated its freedom of speech.

The Ninth Circuit affirmed summary judgment for the town. Even though an enforcement officer had to read a sign to determine which provisions of the sign code applied to it, the court held the code's categories were content-neutral because the categories had been designed to achieve content-neutral objectives such as improved aesthetics and traffic safety, and not upon the town's opposition to the message conveyed.

The Supreme Court reversed in a 6-3 majority opinion by Justice Clarence Thomas. Justices Breyer, Kagan and Ginsburg concurred in the judgment but disagreed with the majority's holding that strict scrutiny applied.

Majority Opinion

The majority opinion held content-based laws — "those that target speech based on its communicative content" — are presumptively unconstitutional and may be justified only if the government proves they are

narrowly tailored to serve compelling state interests. This test, the Court held, applies whenever a regulation draws distinctions based on content.

There is “no need” to consider the government’s justifications or purposes for enacting the code to determine whether it is subject to strict scrutiny. The Court made clear that “an innocuous justification cannot transform a facially content-based law into one that is content neutral.” And, even if a restriction is not content-based on its face, strict scrutiny will apply if the law cannot be justified without reference to the content of the regulated speech or the law was adopted by the government because of disagreement with the message conveyed.

Reed clarifies an issue that was causing much confusion among lower courts. A number of circuit courts had interpreted *Hill v. Colorado*, 530 U.S. 703 (2000), as requiring a finding of content neutrality as long as no evidence revealed a governmental preference for speech based on the idea expressed. Those decisions are effectively overruled by *Reed*.

The town had asked the Court to uphold its code based on the claim that it improved the appearance of the town and helped with traffic safety. Applying strict scrutiny, the Court held the code was not properly tailored because the most heavily restricted signs, temporary directional signs, created no more of an eyesore or threat to traffic safety than other types of signs.

Concurring Opinions

Justice Alito wrote separately to reassure cities that they “are not powerless to enact and enforce reasonable sign regulations.” He said cities can regulate the size of signs or locations in which signs may be placed; distinguish between lighted and unlighted signs, signs with fixed messages and electronic signs with messages that change, placement of signs on public or private property or commercial and residential property, and on-premises and off-premises signs; restrict the total number of signs allowed per mile of roadway; and impose time restrictions on signs advertising a one-time event. In addition, Justice Alito observed, government entities may erect their own signs consistent with the principles that allow government speech.

Justice Breyer also wrote separately to express his view that content discrimination should not always trigger strict scrutiny, cautioning that content discrimination is found in many types of government regulation, ranging from securities laws to doctor-patient confidentiality to income tax laws.

Justice Kagan predicted that many sign ordinances across the country are now in grave jeopardy. In her view, the Court should not have addressed whether strict scrutiny applied because Gilbert’s sign code did not even pass the “laugh test.” She predicted that the Court “will regret the majority’s insistence on” determining that strict scrutiny applies, as challenges to sign codes inevitably will increase and courts will invalidate sign codes throughout the country.

Implications for Outdoor Advertising Litigation & Beyond

Justice Kagan undoubtedly is correct that sign codes throughout the country will be challenged with renewed vigor. In the Third, Fourth, Sixth and Ninth Circuits, at least, ordinances that courts had deemed content-neutral can now be challenge as content-based.

Reed continues a trend in which the Supreme Court has used the First Amendment in an increasingly aggressive fashion to strike down government regulations. In *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), for example, Hunton & Williams LLP persuaded the Court to invalidate a Vermont drug marketing law on First Amendment grounds. That decision has been used in courts across the country to challenge all manner of state and federal regulations that restrict or burden information flows. *Reed* strengthens and compliments the *Sorrell* ruling.

Outdoor advertising companies likely will still face significant standing, ripeness and mootness obstacles in challenging sign codes. See, e.g., *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112, 1116-17 (11th Cir. 2003). But *Reed* undoubtedly will give new vigor to those intent on staking out new billboard territory wherever other signs are free to tread.

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*** Hunton & Williams LLP has extensive experience in billboard litigation, including prosecuting First Amendment challenges to sign codes and defense of administrative enforcement actions against outdoor advertising companies.

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