

# MEASURE FOR MEASURE



LEGAL AFFAIRS

## THE RECENT GILBERT DECISION AND MUNICIPAL SIGN CODES

**TEMPORARY DIRECTIONAL SIGNS**, political signs, ideological signs: these are standard code categories. But in *Reed v. Town of Gilbert*, the U.S. Supreme Court decided that Gilbert, Arizona’s use of these categories violated the First Amendment. In a short decision, in which all nine justices agreed with the result but not the reasoning, the Court determined that the town’s sign code was “content based.” That triggered “strict scrutiny,” and the Court struck down the code.

Some, including the three justices who concurred in the result only, have predicted dire outcomes. “As the years go by, courts will discover that thousands of towns have such ordinances, many of them entirely reasonable. ... And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of *First Amendment* values requires that result.”

Whether that happens may depend on how much weight is given to the majority opinion in future appeals. A concurring opinion, which three justices joined, can be viewed as more nuanced than Justice Thomas’s hard-line lead analysis.

Another opinion written by three justices who agreed with only the result was considerably more nuanced. Together, the opinions suggest that at least six justices may support a more practical approach to sign code regulation, and that the appropriate line of analysis for addressing First Amendment sign code questions remains undefined. The ultimate fallout of the decision may also depend on whether *Gilbert* can be distinguished factually.

The case resulted from facts that had been rather neatly established for high court review, involving a church without sufficient funds for its own building. Each week, services were held at a different location, and the church would post 15–20 temporary signs identifying the location of that week’s service. In itself, this action was code compliant, but the church’s failure to remove the signs within the code-established time frame was not. Eventually, code enforcement noticed, and litigation ensued.

Citing one of its more controversial decisions, *Citizens United*, the Court determined that the code was not content neutral, as regulatory restrictions on noncommercial speech

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### What’s Eating Gilbert?

If a sign has to be read to determine regulatory compliance, instead of simply measured, consider the code in light of *Gilbert*. In *Gilbert*, the U.S. Supreme Court struck these code provisions as violating the First Amendment because various categories of noncommercial signs were treated differently.

■ **POLITICAL SIGNS**

Up to 32 square feet, 16 square feet in residential zones; allowed during election season

■ **TEMPORARY DIRECTIONAL SIGNS**

Up to 6 square feet; only 4 per property; display 12 hours before the event and 1 hour after

■ **IDEOLOGICAL SIGNS**

Up to 20 square feet; may be located in all zoning districts; no time restrictions



differed based on a sign's purpose. The code divided signs into categories: political signs (signs relating to any matter on the ballot), directional signs (signs directing the public to noncommercial events), and ideological signs (other noncommercial signs communicating a message or idea). Depending on how the sign was categorized, different size, location, and duration restrictions applied.

Many sign codes have a similar structure, so many municipalities are considering whether local sign codes should be revised. Recognizing that this reaction was likely, three justices were concerned enough to issue a concurring opinion offering guidance, stating that the below rules "would not be content based" and therefore subjected to strict scrutiny.

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules distinguishing between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.
- In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Consistent with the above items, the focus in drafting a sign code is now on how to incorporate criteria that can be measured with a ruler. *Gilbert*, at its core, encourages

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use of the “form based” code, meaning a code that does not use the function of the sign, or how it will be used, but rather regulates structure “envelopes” and location in a way that can be mathematically measured. The approach is not entirely practical. For example, political signs are up only during election season, but other noncommercial signs are posted throughout the year. Treating the signage differently helps protect against a pervasive state of roadside clutter.

Recognizing the need for more-practical considerations, the Ninth Circuit had considered whether there was an intent to interfere with speech. In light of the fact that the First Amendment’s purpose is to allow for an engaged citizenry and the lively debate of the issues of the day, it makes sense to consider intent and real-world ramifications. If a code is not interfering with speech and is not intended to, then one would assume that those factors might be relevant to the legal analysis.

However, the lead opinion in *Gilbert* dismissed animus as irrelevant. The central question instead was: On its face, is the ordinance “content based”? If so, that triggers strict scrutiny, which means the code probably will not be upheld. With that approach, the Court found that the Town of Gilbert’s sign code categories warranted strict scrutiny. So, at least to address *Gilbert*, municipalities considering sign code revisions should ignore intent, tread carefully, and use a ruler. **C**

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