

# Reed vs. Town of Gilbert: The Supreme Court's New Rule for Temporary and other signs

VITAL SIGNS, VIBRANT COMMUNITIES.

Professor Alan C. Weinstein  
Cleveland-Marshall College of Law  
Maxine Goodman Levin College of Urban Affairs  
Cleveland State University  
*a.weinstein@csuohio.edu*



# Speaker Introductions



**Moderator**

**James Carpentier AICP**

Manager State & Local Government Affairs

International Sign Association



**Speaker**

**Professor Alan Weinstein**

Cleveland-Marshall College of Law

Maxine Goodman Levin College of Urban Affairs

# Speaker Introductions



**Speaker**  
**Wendy Moeller AICP**  
Principal  
Compass Point Planning

# First Amendment in Sign Regulation

- The First Amendment applies to *every* sign
- Government regulation of signs loses the normal presumption of constitutionality and is subject to *heightened scrutiny*
- Sign litigation is common, expensive, and risky
- Most sign ordinances contain at least a few provisions of questionable constitutionality

# First Amendment Concepts

- Content (or message) neutrality
  - Time, place or manner regulations
  - Commercial vs. non-commercial speech
- Off-site vs. on-site signs
  - Bans and exceptions
  - Permits and prior restraints
  - Vagueness and Overbreadth

# Content neutral vs. Viewpoint neutral

- Content neutral looks at **subject matter**
- Viewpoint neutral looks at **point of view**
  - a ban on **all signs** is content neutral *and* viewpoint neutral
  - a ban on **all political signs** is *not* content neutral but *is* viewpoint neutral
  - a ban on **signs that criticize government** is neither content neutral nor viewpoint neutral



Is this a “content-based” provision?

“Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.”

# Is this a “content-based” provision?

“Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.”

## What about this sign?





Is this a “content-based” provision?

“Directional signs indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”

# Is this a “content-based” provision?

Are these signs legal under that provision?

“Directional signs indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”



# “Time, place or manner” Regulations

- Maximum size/height
- Maximum number per
  - lot/building
  - support structure
- Specify locations
  - prohibitions
  - corner lots
  - setbacks/spacing
- Regulate
  - lighting
  - flashing/animation
  - neon
  - materials/colors

**Note: Regulating color may be a problem when applied to federally-registered trademarks.**

# Define signs based on their structure

- freestanding signs
  - pole
  - monument
- temporary vs. permanent signs
- portable signs
- “snipe” signs
- “blade” signs
- building signs
  - roof
  - wall
  - window
  - marquee/awning
  - projecting and suspended
- “A-frame” signs
- “wind-signs”

# Commercial speech vs. Non-commercial speech

## Commercial speech

- “speech that proposes a commercial transaction” or promotes intelligent market choices
- protected under First amendment ... but not as much as “traditional” (non-commercial) speech

## Non-commercial speech

- speech about political, ideological, religious, *etc.* ideas
- highest degree of First amendment protection

# Commercial signs vs. Noncommercial signs

## Commercial Signs

On-premise and off-premise signs that advertise products and services.

## Non-Commercial Signs

- political signs
- personal signs
- public service signs
- official signs
- directional signs

# On-site vs. Off-site

- On-site signs identify the use, or advertise products or services offered, **at the location** where the sign is displayed
- Off-site signs identify a use, or advertise products or services offered, **somewhere other than the location** where the sign is displayed

# On-site vs. Off-site

- “at the location where the sign is displayed vs. somewhere other than the location where the sign is displayed”
- works great for commercial messages
- but is the following message on-site or off-site?



# On-site vs. Off-site signs

- “at the location where the sign is displayed vs. somewhere other than the location where the sign is displayed” works great for commercial messages ...but is this message on-site or off-site?

## “Honest AI” For Mayor



“I lie less than my opponents”

# Bans and exemptions

- Court has upheld some total bans
  - commercial billboards in *Metromedia*
  - signs posted on public property in *Vincent*
- Struck down others
  - real estate lawn signs in *Linmark*
  - personal lawn signs in *Ladue*

# Bans and exemptions

- Exemptions to a general prohibition are always problematic
  - exempting time/temperature from ban on changeable copy signs
  - exempting “grand opening” signs from ban on inflatable signs
  - exempting real estate signs from ban on portable and temporary signs

# Bans and exemptions

- Burden is on government to justify the exemption ... must show
  - why the exemption does not interfere with achieving the basic goal of the ban or regulation
  - how the exemption relates to the regulatory interest the city seeks to advance

## *Reed v. Town of Gilbert, AZ*

- *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966 (9<sup>th</sup> Cir. 2009), *on remand*, 832 F.Supp.2d 1070 (D. Ariz. 2011), *affirmed*, 707 F.3d 1057 (9th Cir. 2013), *reversed and remanded*, 135 S.Ct. 2218 (2015).

# *Reed v. Gilbert AZ*

- Temporary Directional Signs Relating to a Qualifying Event (non-profit)
  - 6' x 6' sign allowed for 12 hrs before/1 hr after event
  - no more than 4 signs on any property (w/ owner consent)
- Political Signs
  - unlimited number of signs up to 32 s.f.
  - no time limit before election - removal 10 days after
- Ideological Signs
  - Unlimited number/time for signs up to 20 s.f.

Homeowners Assn signs

Political signs  
(nonresidential zone)

Ideological  
signs

Qualifying  
Event  
signs

# *Reed v. Gilbert, AZ*

## Example of Signs at Issue





# *Reed v. Gilbert AZ*

- Church: rules disfavor “temporary directional signs” compared to political and ideological signs
- City: each classification and its restrictions are based on objective factors relevant to Gilbert’s creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign

# Content-neutrality Circuit Split

## “Need to Read” – 5, 8 & 11

- Do you have to look at the message to determine if the rule applies?
- If so, it is content-based.
  - political or election signs
  - real estate signs
  - directional/identification signs
  - instructional signs
  - construction signs
  - nameplate signs
  - price signs
  - home occupation signs

## “No-censorship” – 3, 4, 6, 7 & 9

- Is the government trying to regulate or censor content?
- If not, it is content-neutral because:
  - local government needs some leeway in navigating through First Amendment law
  - a limited number of content-based provisions that are not intended to censor or restrict speech is acceptable

# *Reed v. Gilbert AZ*

- Court rules 9-0 that challenged code provision is unconstitutional
- 6-3 majority opinion (Thomas, joined by Roberts, Scalia, Kennedy, Alito & Sotomayor), *plus* concurrence by Alito w/ Kennedy & Sotomayor)
- Breyer and Kagan (joined by Breyer and Ginsburg) each file opinion concurring only in the judgment

# *Reed v. Gilbert AZ*

## Majority Opinion

**“On its face” Rule:** If you have to read the message displayed to determine how a sign is regulated, then that regulation is content-based.

“Some facial distinctions based on a message are obvious, **defining regulated speech by particular subject matter**, and others are more subtle, **defining regulated speech by its function or purpose**. Both are distinctions based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”

# *Reed v. Gilbert AZ*

## Majority Opinion

**Plus ...** a “facially” content-neutral regulation will be considered content-based if:

- a regulation can't be justified without reference to the content ... or
- a regulation was adopted because of disagreement with the message conveyed

# *Reed v. Gilbert AZ*

## Majority Opinion

If a sign regulation is content-based, it is subject to *strict scrutiny* ...

• Presumed unconstitutional ... so gov't bears burden of proof/persuasion to show:

- Serves a *compelling* governmental interest
- *Narrowly-tailored* to achieve that interest

# *Reed v. Gilbert AZ*

## Majority Opinion

Categorical  
signs are  
“content-based”

- political/election signs
- real estate signs
- directional/Identification signs
- instructional signs
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- price signs
- home occupation signs

# *Reed v. Gilbert AZ*

## Majority Opinion

“Speaker-based”  
“Event-based”  
signs are  
“content-based”

- “displayed on a lot with a property for sale or rent”
- “displayed on a lot where construction is taking place”
- “gasoline station signs”
- “theater signs”



# *Reed v. Gilbert AZ*

## Majority Opinion

So what does that mean?

- Fact that government's purpose or justification for regulation had nothing to do with trying to limit speech does not matter
- Strict scrutiny usually means gov't loses



# *Reed v. Gilbert AZ*

## Majority Opinion

Still lots that government can do ...

- “regulate many aspects of signs that have nothing to do with a sign’s message”
- prohibit signs on public property, so long as regulation is content-neutral
- certain signs may be essential (*e.g.*, for safety purposes) and “well might survive strict scrutiny

# *Reed v. Gilbert AZ*

## Alito Concurring Opinion

“Here are some rules that would not be content-based”

**size and location, including placement on private property vs. public property**

lighting

fixed vs. changing message,  
including electronic

on-site vs. off-site

rules restricting total # of signs per  
mile of roadway

“rules imposing time restrictions on signs advertising a one-time event”

Government “may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.”

# *Reed v. Gilbert AZ*

## Breyer and Kagan Concurring Opinions

### Breyer

- The majority rule “goes too far” and will lead to “judicial management of ordinary government regulatory activity”

### Kagan

- Cities “will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.”

# *Reed v. Gilbert AZ*

## What Don't We Know?

- Billboards?
- Commercial Signs?
- Compelling interests?
- Narrowly Tailored?

# Do's and Don'ts After *Reed*

## DO

- **review** code to identify content-based regulations; e.g. “categorical” regs.
- add a **severability** clause and a **substitution** clause if you do not have one
- have a strong **purpose clause** and link that to regulations

## DON'T

- **enforce** content-based regulations
- enact a **moratorium** on ***all*** sign permits

# Severability Clause

“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.”

# Regulatory Purposes

1. To promote the creation of an attractive visual environment that promotes a healthy economy by:

- a. Permitting businesses to inform, identify, and communicate effectively; and
- b. Directing the general public through the use of signs while maintaining attractive and harmonious application of signs on the buildings and sites.

2. To protect and enhance the physical appearance of the community in a lawful manner that recognizes the rights of property owners by:

- a. Encouraging the appropriate design, scale, and placement of signs.
- b. Encouraging the orderly placement of signs on the building while avoiding regulations that are so rigid and inflexible that all signs in a series are monotonously uniform.
- c. Assuring that the information displayed on a sign is clearly visible, conspicuous, legible and readable so that the sign achieves the intended purpose.

3. To foster public safety along public and private streets within the community by assuring that all signs are in safe and appropriate locations.

4. To have administrative review procedures that are the minimum necessary to:

- a. Balance the community's objectives and regulatory requirements with the reasonable advertising and way finding needs of businesses.
- b. Allow for consistent enforcement of the Sign Code.
- c. Minimize the time required to review a sign application.
- d. Provide flexibility as to the number and placement of signs so the regulations are more responsive to business needs while maintaining the community's standards.



# Regulatory Purposes

- A. To allow businesses, institutions, and individuals to exercise their right to free speech by displaying an image on a sign, and to allow audiences to receive such information.
- B. To promote and maintain visually attractive, residential, retail, commercial, historic open space and industrial districts.
- C. To provide for reasonable and appropriate communication and identification for on-premise signs in commercial districts in order to foster successful businesses.
- D. To provide for reasonable and appropriate communication for on-premise signs within industrial districts.
- E. To encourage the use of creative and visually attractive signs.
- F. To ensure that signs are located and designed to reduce sign distraction and confusion that may be contributing factors in traffic congestion and accidents, and maintain a safe and orderly pedestrian and vehicular environment.
- G. To protect property values.
- H. To promote the public health, safety and welfare by avoiding conflicts between signs and traffic control devices, avoiding traffic hazards, and reducing visual distractions and obstructions.
- I. To protect and preserve the aesthetic quality and physical appearance of the Township.

# What should be in your code?

- regulatory purposes
  - definitions
  - standards for measuring sign areas/heights
  - regulations for:
    - sign placement
    - height/area
    - setback/spacing/density
    - type/time of lighting
  - enforcement
- regulations for:
    - billboards, etc.
    - temporary/portable signs
    - window/awning signs
  - prohibited signs
  - non-conforming signs
  - administration
    - permitting provisions
    - variances
    - appeals

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Wendy Moeller AICP  
Compass Point Planning  
[wmoeller@compasspointplanning.com](mailto:wmoeller@compasspointplanning.com)



# Practical Implications

- **With sign regulations, it is easiest to regulate permanent signs.**
  - A permanent structure much like a fence, shed, or building
  - The biggest issue typically relates to off-premise signs (a.k.a., billboards)



# Practical Implications

- **With sign regulations, it is easiest to regulate permanent signs.**
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  - The biggest issue typically relates to off-premise signs (a.k.a., billboards)



# Practical Implications

- Free speech challenges related to a permanent sign are less common...but they are out there.



*“...it is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations.”*

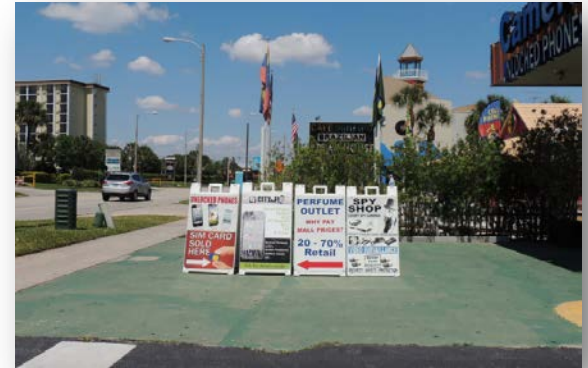
- *City of Tipp City v. Michael F. Dakin, et. al.*

*Court of Appeals of Ohio, 2<sup>nd</sup> District, Miami County*



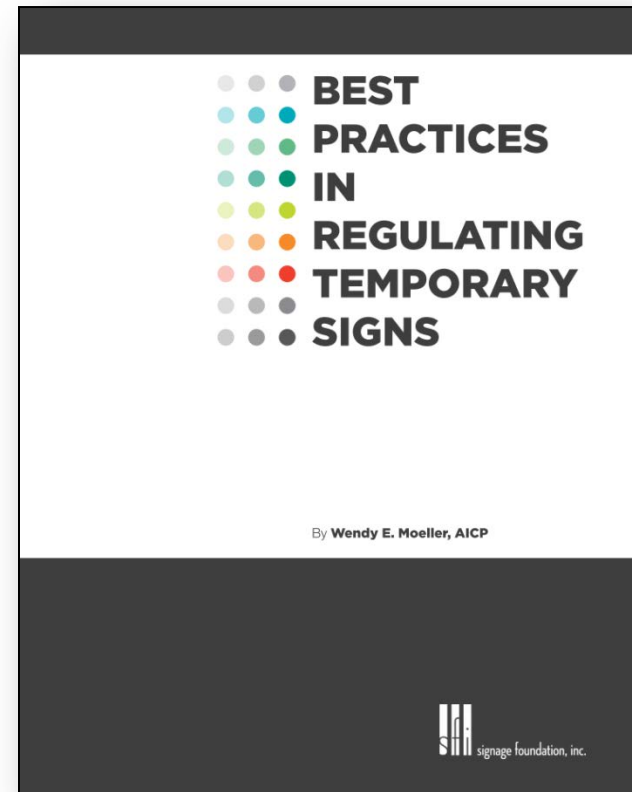
# Practical Implications

- **The biggest struggles tend to be temporary signs.**
  - Administration and enforcement is typically more complicated (not a one time deal).
  - Temporary signs are constantly evolving.
  - What is a reasonable number or size?
  - How long is temporary? At what point do they morph into a permanent sign?
  - No permanent location
  - Content-neutrality



# Best Practices Guide

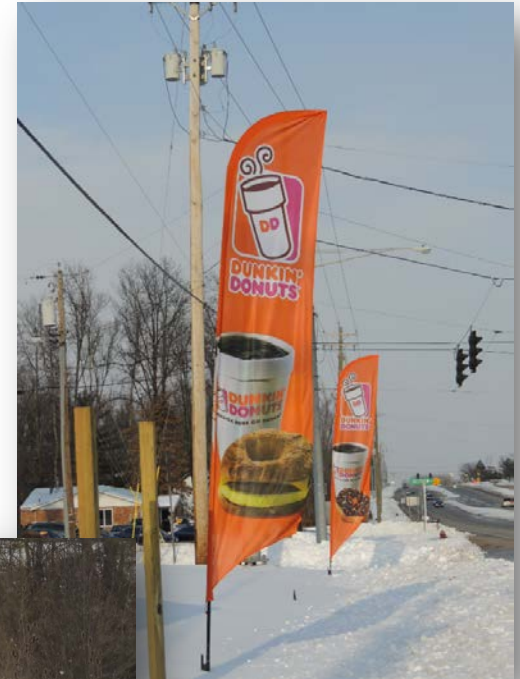
- A year of research
- Survey – 99 communities across 31 states
- Ordinance review
- Review committee
- General research
- Development of guide
  - General best practices
  - Best practices by temporary sign type





# Temporary Sign vs. Message

- **Temporary Sign**
  - The entire structure is temporary or portable.
  - Not ***intended*** to be a permanent installation.



# Temporary Sign vs. Message

- **Temporary Message**

- The sign structure is permanently installed but designed so the message can change manually or electronically.



# Avoid Treating all Temporary Signs the Same

- Many communities have one time-limit for all temporary signs
- Poses a problem for:
  - Commercial signs on properties for sale/lease\*
  - Sidewalk signs
  - Temporary, seasonal uses



\* Note that these are commercial signs tied to an activity, not “real-estate signs” that are tied to content

# Administration and Enforcement

## – Identified by planners as one of their biggest issues

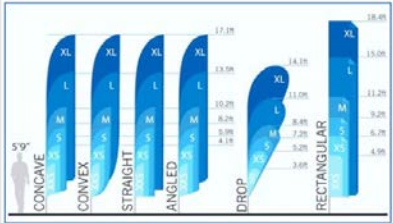
- Movement to use more technology
  - Online permitting
  - Use of calendar apps
- Putting more burden on the applicants
  - Stickers or tags

**Type of signs permitted**

Only the temporary advertising signs specified below are allowed. No other type of signage is allowed.

**Permitting and enforcement**

In order to expedite permitting for the signs, the City is implementing a web-based self-sign-up permit system for business owners at [northlibertyiowa.org/signpermit](http://northlibertyiowa.org/signpermit). A PDF version of this page is [available for download](#). Owners may simply enter information there for the desired sign(s) to self-permit. It is also a resource to track sign usage, and City staff will review the list to make sure all signs in use are on the list. If a business does not have access to the self-sign-up, they may contact Dean Wheatley, Planning Director, at 529-5747 for assistance, or stop by City Hall. Citations will be issued to businesses placing signs that are not permitted.



Sign Type	Sub-Type	Height	Width
CONCAVE	XL	17.00'	5.00'
	L	13.00'	3.50'
	M	10.25'	2.75'
	S	5.00'	1.50'
CONVEX	XL	17.00'	5.00'
	L	13.00'	3.50'
	M	10.25'	2.75'
	S	5.00'	1.50'
STRAIGHT	XL	17.00'	5.00'
	L	13.00'	3.50'
	M	10.25'	2.75'
	S	5.00'	1.50'
ANGLED	XL	17.00'	5.00'
	L	13.00'	3.50'
	M	10.25'	2.75'
	S	5.00'	1.50'
DROP	XL	18.00'	3.00'
	L	13.00'	2.25'
	M	8.00'	1.50'
	S	3.00'	0.75'
RECTANGULAR	XL	18.00'	15.00'
	L	15.00'	11.25'
	M	8.00'	6.75'
	S	4.50'	4.50'

**Cost of permit**

At this time there is no fee for the permit.

**When signs can be placed**

The signs are allowed to be displayed for up to 10 days up to 5 times per 12-month period. Owners can track their usage with the online permitting system.







# Sign Types



# Balloon Signs & Air Activated Graphics



# Banner Signs





# Blade Signs



INTERNATIONAL  
SIGN ASSOCIATION

[www.signs.org](http://www.signs.org)



# Freestanding/Yard Signs



INTERNATIONAL  
SIGN ASSOCIATION

[www.signs.org](http://www.signs.org)

# People Signs



# Sidewalk Signs





# Vehicle Signs/Wraps



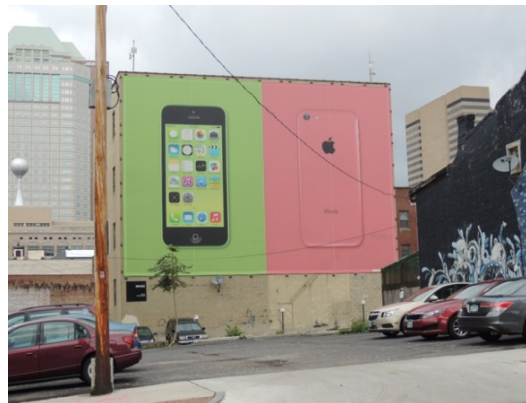
# Other Temporary Sign Types



**Temporary Window Signs**



**Portable Message Centers**



**Advertising Murals**

# Questions and Answers

## **James Carpentier AICP**

Manager State & Local Government Affairs

International Sign Association

<http://www.signs.org/GovernmentRelations/ResourcesforLocalOfficials>

[James.carpentier@signs.org](mailto:James.carpentier@signs.org)

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