



# Courtside *Newsletter*

## SCOTUS Rules on Sign Codes: What Does this Mean for REALTORS®?



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In mid-June, the Supreme Court of the United States (“SCOTUS”) issued a ruling on sign codes that could affect how real estate practitioners conduct business throughout the country. In Reed v. Town of Gilbert, Ariz. the Supreme Court addressed the question of whether a Sign Code with exemptions based on the type of sign violated the First Amendment right to freedom of speech.

### GILBERT, ARIZONA LAND DEVELOPMENT CODE

Like many cities and towns across the United States, the town of Gilbert, Arizona (hereinafter “Town”) adopted a comprehensive Land Development Code (“Sign Code” or “Code”) to assist with the governance of the Town. This Code identifies categories of signs, subjecting the categories to different restrictions. It also prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs from that requirement. Of particular interest to the court were three different exemptions to the outdoor Sign Code, and how the Town treated them:

- **Ideological Signs:** includes any “sign communicating a message or idea for noncommercial purposes that is not a ... Political Sign...” Ideological signs are treated the most favorably of the three categories scrutinized by the court. These signs are allowed to be up to 20 square feet and can be placed in all zoning districts, without time limits.
- **Political Signs:** includes any “temporary sign designed to influence the outcome of an election called by a public body.” The Sign Code allows political signs to be up to 16 square feet on residential property and 32 square feet on non-residential property, undeveloped municipal property, and rights-of-way. The signs are also subject to time limitations, and may be displayed up to 60 days prior to a primary election and 15 days following a general election.

- **Temporary Directional Signs Relating to a Qualifying Event:** includes any “temporary sign intended to direct pedestrians, motorists, and other passerbys to a ‘qualifying event.’” A qualifying event is defined as any “assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” These signs have the least favorable treatment of the three the Court focused on. They can be no larger than 6 square feet, and no more than four signs can be placed on a single property at any time. The signs may only be displayed for no more than 12 hours prior to an event, and must be removed no more than 1 hour following the event.

### BACKGROUND

In the instant action, Clyde Reed (“Reed”) is the pastor at Good News Community Church (“Church”), a small, cash-strapped entity that does not have a specific location in which to hold services. Instead, services are held in or around town, mainly on Sundays. Temporary signs, such as those temporary directional signs described above, are posted to inform the public of that week’s services time and location. The signs would be posted the Saturday prior and removed midday Sunday.

As a result of this practice, the Church was cited twice by the Town’s Sign Code compliance manager. The first citation indicated that the Church exceeded the time limits to post the signs, and the second included that same violation, as well as the fact that the date of the service was not listed on the sign. Reed attempted to reach a resolution with the Sign Code Compliance Department, but was told that there would be “no leniency under the code.”

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Reed thereafter filed a suit in U.S. District Court, alleging that the Sign Code abridged freedom of speech in violation of the First and Fourteenth Amendments. Both the District Court and, later, the Court of Appeals disagreed. The courts held that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. Both courts found that the Sign Code's categories were content neutral, and the distinctions within the Code were "based on objective factors relevant to [the Town's exemptions from permit requirements.]" Those factors did not take into consideration the substance of the signs, and the Town's "interests in regulat[ing] temporary signs are unrelated to the content of the sign." In light of this content-neutral decision, the Courts applied a lower level of scrutiny and concluded that the law did not violate the First Amendment.

Following this unfavorable outcome, Reed requested that SCOTUS review the matter, and was granted certiorari.

### SCOTUS REVIEW

Under the First Amendment a "municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." As such, content-based laws, e.g. those that target speech based on content, are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." In the instant action, the Court was tasked to determine whether the Town's Sign Code was content based. According to the Court, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." For Gilbert, Arizona, the Court found that the Sign Code is content based on its face since the restrictions that apply to "any given sign are dependent entirely on the communicative content of the sign." Therefore, the Court must subject the Code to strict scrutiny, regardless of the Town's benign motive for the restrictions.

This scrutiny took place in the second half of the Court's review. The Town was required to prove that the Code's restrictions further a "compelling interest" and are "narrowly tailored to achieve that interest." Essentially, the town had to prove it had a good reason for creating different sign restrictions based on the content of the signs, and that the restrictions were narrowly tailored to achieve that end. However, the Town was unable to prove it had an acceptable reason for the restrictions. According to the Court, "preserving the Town's aesthetic appeal and traffic safety" are not good reasons, especially when other types of signs are

allowed that cause that same issue/concern. Furthermore, there are ample content-neutral options available to the Town to resolve issues with aesthetics and safety, such as "size, building materials, lighting, moving parts, and portability."

Ultimately, SCOTUS found that the "Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter." The Sign Code is therefore unconstitutional, and the decision of the Court of Appeals was reversed by the Supreme Court.

### IMPACT ON REALTORS®

Although the Supreme Court justices unanimously concurred with the decision, it has nonetheless come under fire. Many, including the Supreme Court justices, are questioning whether it will prevent governments from enacting efficient sign laws. Content-based signs may include everything from temporary directional signs to signs advertising free coffee or places of historical importance. In a separate albeit concurring opinion, Justices Kagan, Ginsburg and Breyer state, "Given the Court's analysis, many [content-based] sign ordinances ... are now in jeopardy..." and the "Court may soon find itself a veritable Supreme Board of Sign Review." While Justices Alito, Kennedy and Sotomayor provided examples of non-content based sign regulations in their concurring opinion, the issue remains that all signs that could be content-based will suffer strict scrutiny before the court. This could, in turn, create a much more litigious environment for local municipalities.

This could prove an issue for real estate professionals as well, considering the use of signs within the profession. "For Sale/Rent" and "Open House" signs could be subject to scrutiny if they are impacted by content-based ordinances such as those seen in Reed v. Town of Gilbert, Ariz. Many cities currently have sign laws that could affect how a REALTOR® conducts business. Real estate professionals should keep this case in mind, should any issues arise.

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