



# “Take this as a Sign” Supreme Court Sends Strong Message to Municipalities Concerning Content Based Sign Codes

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On June 18, The United States Supreme Court decision in [Reed v. Town of Gilbert](#), Arizona, No. 13-502 imposed a new strict test for municipalities to prove that their sign regulations are truly content neutral. Local ordinances that regulate signs differently—dependent upon the type of message conveyed—may be found to be unconstitutional unless they support compelling government interests and are narrowly tailored to achieve those goals.

## Summary of Decision

A church and its pastor challenged the Town of Gilbert’s sign ordinance that imposed different restrictions on political, ideological, and directional signs. The church had placed temporary directional signs advertising church services throughout the town. The ordinance limited the size of temporary directional signs to six square feet, and limited the time they could remain posted to one hour following completion of services. Political signs, however, could be as large as 32 square feet and stay in place for months. Ideological signs could be 20 square feet and placed temporarily but in unlimited number. The Ninth Circuit Court of Appeals had found the town’s sign code content-neutral and upheld its constitutionality because the town had not adopted the sign code based on disagreement with the messages conveyed and the City had no discriminatory intent.

The Supreme Court reversed. The Court’s opinion, authored by Justice Thomas, found that the Town’s ordinance, on its face, was a content-based restriction on free speech because it regulated in a different manner the size, location and time limits on signs depending on whether the sign conveyed a political, ideological, or directional message. Thomas’ opinion represents a new stringent approach for determining whether sign regulations are in violation of the First Amendment. In essence, Justice Thomas states that any regulation treating different forms of public expression differently necessarily regulates the message in each form of expression disparately. Therefore, when reviewing the Town’s sign code Justice Thomas applied the most stringent constitutional test (“strict scrutiny”) for whether the regulation might be warranted, even if its application may result in rendering some speech more valuable than other types. Under strict scrutiny, the government must show it has a compelling interest which the law is narrowly tailored to achieve. The Court held that Gilbert’s sign code was not tailored to achieve the purported governmental interest of preserving the town’s aesthetic appeal and traffic safety, because temporary direction signs are no greater an eyesore than larger signs of an ideological or political nature.

In separately-written concurrences, which read like dissents, Justices Kagan and Breyer cautioned that the broad sweep of Thomas’s theory of discriminatory sign regulation would likely leave few surviving municipal sign codes intact. Breyer argued for a more measured approach, and against a theory which automatically triggers strict scrutiny analysis any time the regulation at issue treats different content disparately. Kagan warned that the opinion will open the door to challenges of entirely reasonable local regulations on signage, and that the Court “may soon find itself a veritable Supreme Board of Sign Review.”

In a separate concurrence, Justices Alito, Kennedy, and Sotomayor attempted to demonstrate that despite the potential breadth of Thomas’s opinion, it would leave government sufficient room to

regulate signs. The Justices provided examples of signage regulations which, under the test set out in the decision, would not be considered content-based.

### **What this means for Municipalities**

Sign codes are a common means for municipalities to control the location, size, quantity, and other characteristics of signs and their structures. However, because signs convey messages, and are protected First Amendment speech, municipalities must walk a fine line to achieve a specific public interest (e.g. protection of aesthetics, traffic safety, property values, etc.) while avoiding unconstitutional content-based sign regulation.

Under Justice Thomas' opinion, the manner in which content neutrality is applied to sign regulations has been significantly narrowed. It is no longer sufficient for a government to claim "benign motive" in adopting a sign code regulations. The mere fact that a sign code singles out specific types of sign content for differential treatment as the Town of Gilbert did for political, ideological and directional signs, is likely to be considered a content-based regulation of speech, subject to strict scrutiny.

Municipalities should review their code provisions with an aim to avoid inconsistencies in the manner they regulate categories of signs, temporary or otherwise, based on the content of the message. Any differences in treatment must be justified by compelling public interests and narrowly tailored to achieve those interests. While the concurring opinions in the decision help to clarify the intent of the ruling, Thomas's conservative interpretation serves as the new basis for adoption or improvement of any sign regulation and will likely lead to considerable litigation.

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