

Reed v. Town of Gilbert

Sign Codes and the First Amendment

Daniel Kenny – Ogden Murphy Wallace



OGDEN
MURPHY
WALLACE
ATTORNEYS

Sign Code Provisions

The Town of Gilbert's comprehensive sign code prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant to this case.

"Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions.

"Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season.

"Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Ideological Signs

This category includes any “sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.”

The Code treats ideological signs most favorably.

- Up to 20 square feet in area
- All “zoning districts”
- No time limits

Political Signs

These signs include any “temporary sign designed to influence the outcome of an election called by a public body.”

The Code treats these signs less favorably than ideological signs.

- Up to 16 square feet on residential property
- Up to 32 square feet on nonresidential property, undeveloped municipal property, and “rights-of-way.”
- May be displayed up to 60 days before a primary election and up to 15 days following a general election.

Temporary Directional Signs

These signs includes any “Temporary Sign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’”

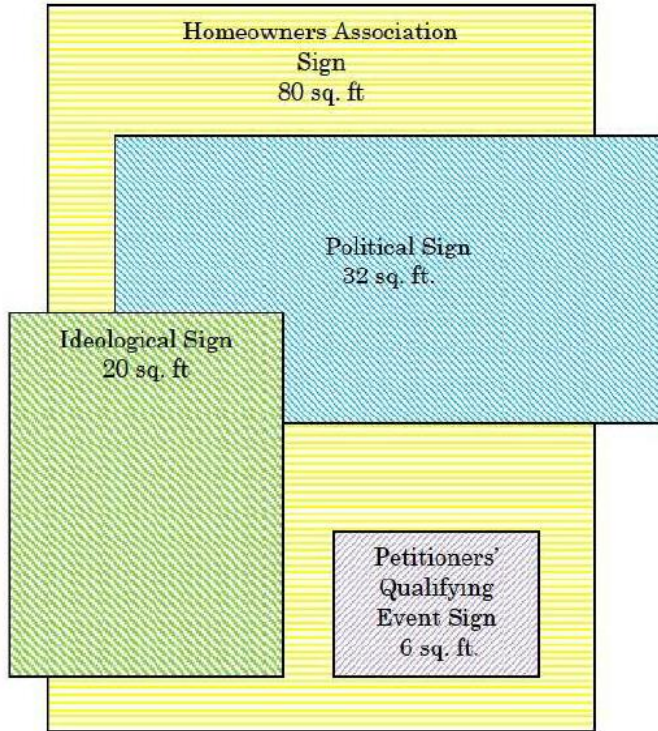
A “qualifying event” is defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.”

The Code treats temporary directional signs even less favorably than political signs.

- No larger than six square feet
- Permitted on private property or on a public right-of-way
- No more than four signs may be placed on a single property at any time
- May be displayed no more than 12 hours before the “qualifying event” and no more than 1 hour afterward.

Town of Gilbert's sign regulations

SIZE

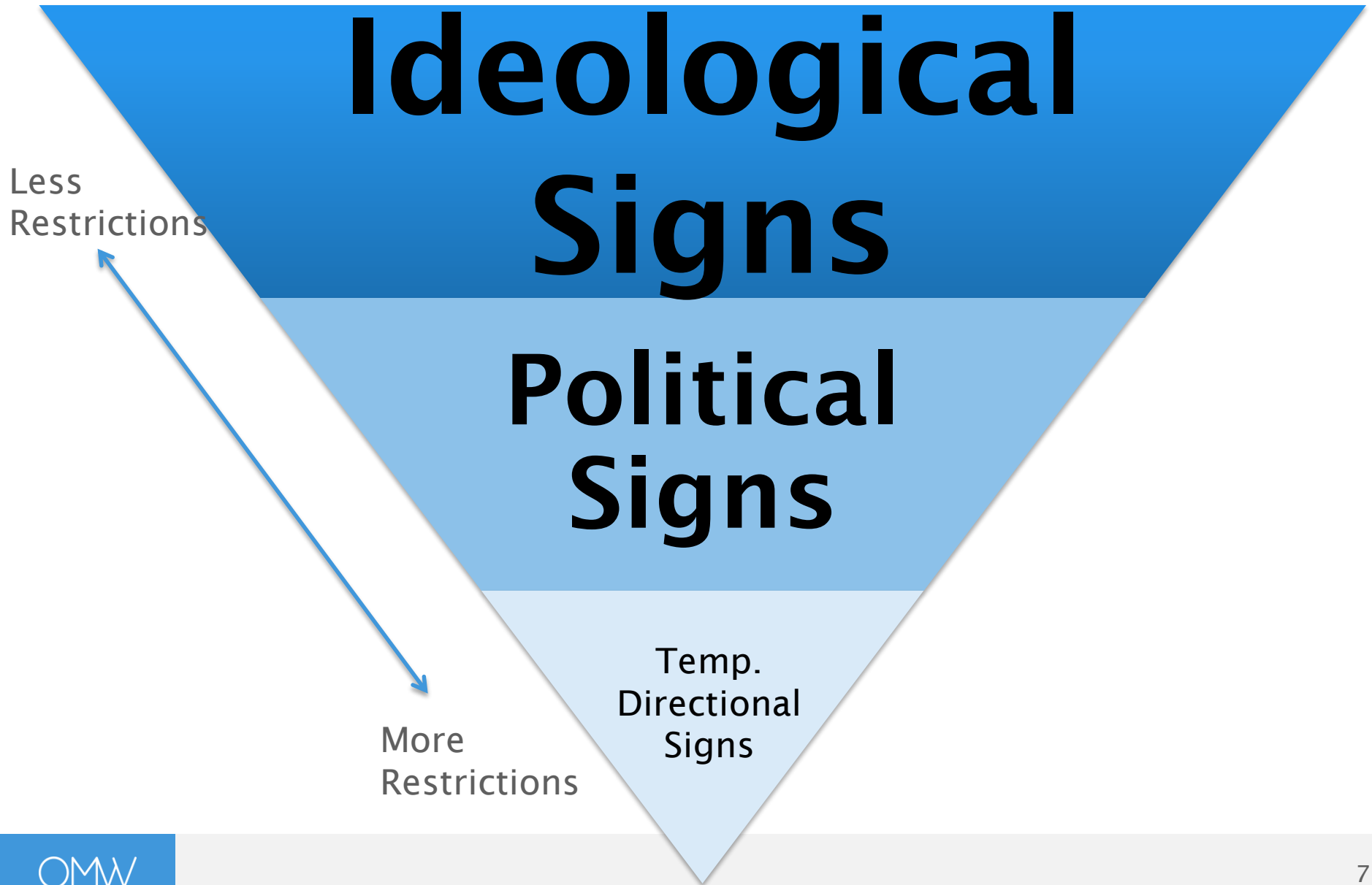


DURATION

Display Time Before	Sign Content	Display Time After
← Unlimited	Ideological	Unlimited →
← 4 ½ Months	Election	15 Days →
← 30 Days	HOA Event	→ 48 hrs
16 hrs ←	Real Estate Sale	→ 36 hrs
12 hrs ←	Religious Event	→ 1 hr

Graphic available at www.adfmedia.org

Hierarchy of Outdoor Signs



Good News Community Church

- Small Church with no permanent meeting location.
- Uses 15-20 temporary signs in order to inform the community where the current week's service will be held.
- The signs typically displayed the Church's name, along with the time and location of the upcoming service.
- Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday.



Citations

The Church was cited two times for violations of the sign code.

- First, the Church exceeded the time limits for displaying its temporary directional signs.
- Second, the Church again exceeded time limits and also failed to include the date of the event on the signs.

Lower court decisions

“Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed” and its “interests in regulat[ing] temporary signs are unrelated to the content of the sign.”

“[T]he distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . 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.”

Accordingly, the court believed that the Code was “content neutral as that term [has been] defined by the Supreme Court.”

The Basics of the Supreme Court's Review

All nine justices agreed that the Ninth Circuit should not have ruled in the Town's favor, but did not all agree on a rationale for that result.

Four opinions were issued:

- Majority opinion (Justice Clarence Thomas, joined by five others)
- One Concurrence (Justice Samuel Alito, joined by two others))
- Two Concurrences in the judgment (Justice Stephen Breyer, Justice Elena Kagan, joined by Justice Ruth Ginsburg)

Content Based Laws

Three types of content based laws.

First, typical content based regulation of law occurs where the law applies to particular speech because of the topic discussed or the idea or message expressed. (*Ex. No signs supporting Abraham Lincoln for president.*)

Second, the Government regulation of speech can also be content based “on its face.” Read the sign, then see what regulations apply.

(*Ex. The regulations at issue in Reed v. Gilbert - Political signs must be less than 20 inches and only may be located in commercial districts. Different restrictions for temporary directional signs, etc.*)

Third, facially content neutral laws that cannot be justified without reference to the content of the regulated speech or that were adopted by the government because of disagreement with the message the speech conveys.

Gilbert's Sign Code is Content Based on its Face

In Gilbert, in order to understand the restrictions that apply to any given sign, you must look to the communicative content of the sign. Only when you look to the content of the sign will you know if it is a Temporary Directional Sign, a Political Sign, or an Ideological Sign.

On its face, the sign code is a content based regulation of speech.

Strict Scrutiny

Content-based laws (all categories) are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling government interest.

This is **strict scrutiny**.

Cannot avoid strict scrutiny even with a benign motive, content-neutral justification, or lack of animus to the ideas contained in the regulated speech.

Strict Scrutiny v. Intermediate Scrutiny

Time, place, and manner restrictions must withstand intermediate scrutiny.

These restrictions must:

- Be content neutral
 - Immediately takes restrictions like those in *Gilbert* to strict scrutiny.
- Be narrowly tailored
- Serve a significant governmental interest
- Leave open ample alternative channels for communication

Gilbert's Claimed Governmental Interests in Adopting the Sign Code Regulations

- Court held that temporary directional signs are no greater an eyesore than the other types of signs
- The City is without justification to allow unlimited proliferation of larger ideological signs while strictly limited the number, size, and duration of smaller directional signs.

Traffic Safety

- Gilbert offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs.

Consequently, Gilbert failed to meet its burden to prove that its sign code is narrowly tailored to further a compelling government interest.

Failed the strict scrutiny test. Therefore, the sign code provisions were an unconstitutional restriction on speech in violation of the First Amendment.

The Rule Now

If, when regulating speech, the regulation is split into categories which require you to look to the content of the sign, and those categories are treated differently, that regulation is content based on its face and must withstand strict scrutiny.

Next Steps

Because strict scrutiny is normally fatal, many sign codes may need to be rewritten to remove content based provisions. Your City Attorney can work with City staff to try and find ways to accomplish the same goals while removing the offending provisions.

What about other areas of the code??

This case was decided in June of this year and there have already been MANY cases that have applied the *Reed v. Gilbert* holding to other, non-sign code provisions.

What areas of your code could be impacted?

Ask yourself:

- What code provisions impact speech?
 - When thinking about “speech,” think broadly.
- Do those provisions require you to look at the content of the activity?
- If yes, then that code provision may be content based on its face. Depending on the type of speech, either intermediate scrutiny or strict scrutiny

Recent Decisions

Since *Reed v. Gilbert*, courts have held:

- An ordinance prohibiting voters from taking and disclosing digital or photographic images of completed election ballots was “plainly a content-based restriction of speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter.”
- An ordinance that barred oral requests for money (*panhandling*), but did not regulate requests for money later, is content based on its face.
- An ordinance only addressing the roadside solicitation of employment (*day laborers*) but does not address other types of solicitation or non-solicitation was content based.
- How will temporary signs be treated? Will there be a case that does the same for commercial speech? Still lots to be determined.

Other (*non-sign code*) Areas To Consider

Types of Speech that may be regulated by your city:

- Tattoo Parlors
- Erotic Dancing
- Street Performers
- Bikini Baristas
- Non-profit Solicitation
- Art studios/installations
- Neighborhood Fair and Market registrations
- Free Speech Zones
- Protests or marches
- Others??

Are they treated differently?

- Zoned differently?
- Business license requirements stricter?
- Health code requirements stricter?
- Noise restrictions?
- Hours of operation restrictions?
- What else??

Will the reasons for being treated differently survive strict scrutiny?

Next Steps

- Before rewriting your sign code, consult your resources.
 - Speak with your City Attorney.
 - Include planning staff, code enforcement officers, etc. to get all perspectives.
 - If an AWC city, review model *Reed-compliant* code.
 - Scan articles and online resources – there are many.
1. Start by identifying offending provisions.
 2. Then write down the underlying goal or policy driving that provision.
 3. Brainstorm ways to accomplish those same goals without content based regulation.

Daniel P. Kenny
Attorney
Ogden Murphy Wallace

phone - (206) 447-2258
email - dpkenny@omwlaw.com
web - omwlaw.com

OMW

