



# Iowa General Assembly

## 2015 Legal Updates

Legislative Services Agency – Legal Services Division

[http://www.supremecourt.gov/opinions/14pdf/13-502\\_9olb.pdf](http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf)

**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### FREE SPEECH - LOCAL GOVERNMENT SIGNAGE REGULATIONS AND FIRST AMENDMENT

Filed by the United States Supreme Court  
June 18, 2015

Reed et al. v. Town of Gilbert, Arizona et al.

No. 13-502, 135 S.Ct. 2218 (2015)

[http://www.supremecourt.gov/opinions/14pdf/13-502\\_9olb.pdf](http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf)

**Factual Background.** In 2005, the town of Gilbert, Arizona (Town) adopted a Sign Code (Code) to prohibit the display of outdoor signs without a permit. The Code regulated the size and appearance of, and the display period for, permitted signs. Ideological signs, political signs, and temporary directional signs were among the classes of signs categorized and regulated. Under the Code, ideological signs, those communicating noncommercial ideas, could be up to 20 square feet in area and were not subject to display period restrictions; political signs, designed to influence the outcome of an election, could be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in area, and be displayed from 60 days prior to a primary election until 15 days after a general election; temporary directional signs, directing pedestrians and motorists to an event, could be up to six square feet in area and be displayed 12 hours prior to until one hour after an event.

The Good News Community Church (Church), led by its pastor, Clyde Reed (Reed), did not congregate at a permanent physical site, but each week held its religious services at different locations in the Town. The Church placed temporary directional signs around the Town each week to inform the public about the location and time of upcoming services. The Church did not comply with the Code's time restrictions for temporary directional signs, and the Town cited the Church twice for violating the Code.

**Procedural Background.** Following attempts to reach an accommodation with the Town, Reed, on behalf of the Church, filed a complaint in the United States District Court for the District of Arizona (District Court) asserting that the Code abridged their freedom of speech, as protected under the First and Fourteenth Amendments. The District Court denied Reed's motion for a preliminary injunction to stop enforcement of the Code. The Ninth Circuit Court of Appeals (Ninth Circuit) affirmed the District Court's ruling, finding that the Code's restrictions on temporary directional signs did not regulate speech on the basis of content, and remanded the case to the District Court to determine whether the sign classifications and regulations under the Code constituted content-based restrictions of speech.

On remand, the District Court held that the Code's classifications and regulation of different types of signs were content neutral and the Ninth Circuit affirmed, finding that the Town's interest in regulating temporary directional signs was unrelated to the content of those signs themselves. After finding that the Code was content neutral, the Ninth Circuit applied a deferential standard of review and held that the Code did not violate the First Amendment. The United States Supreme Court granted certiorari.

**Issues.** Whether a local government may classify different types of signs based upon the sign's general topic and regulate the size, appearance, and display of different types of signs on such a basis.

**Holding.** The Court held that the Code, treating classes of signs differently based upon the general topic of those signs, constituted content-based restrictions of speech in violation of the First Amendment, applied to the Town through operation of the Fourteenth Amendment.

**Majority Opinion by Justice Thomas.** Justice Thomas' majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor, reversed the decision of the Ninth Circuit Court of Appeals, holding that different

provisions of the Town's Code constituted content-based restrictions of speech in violation of the First Amendment. The Court stated that a government has no power to restrict expression because of its message, ideas, subject matter, or content.

The Court found that Code provisions constituted content-based restrictions on their face, without need to look beyond the text of the Code itself. The Court noted that the Code defines temporary directional signs on the basis of whether a sign directs the public to a church service or to some other event, political signs on the basis of whether a sign is designed to influence an election, and ideological signs on the basis of whether a sign communicates noncommercial ideas. The Court then noted that the Code applies different restrictions on these different classes of signs, and reasoned that the restrictions imposed upon the size and display of a sign are determined entirely by the content of the sign itself. By way of example, the Court noted that under the Code, a sign regarding the time and place of a book club discussion of a treatise by John Locke would be treated differently than a sign supporting a candidate for office who is a John Locke adherent, which would in turn be treated differently than a sign expressing John Locke's political ideas.

In reversing the Ninth Circuit's ruling, the Court asserted that the First Amendment is hostile to regulations that prohibit or regulate public discussion of an entire topic, and is not simply hostile to restrictions placed on the expression of certain viewpoints. The Court reasoned that classifying regulated speech by its function or purpose restricts the message of the speaker. In preferring a bright line rule for content-based restrictions of speech, the Court held that the Code's restrictions on speech are based on the content of signs themselves rather than solely upon the identity of the speaker or on the occurrence and time of an event.

The Court found that the Code imposed content-based restrictions on free speech and applied a strict scrutiny analysis in holding that the Code violated the First Amendment. The Court declared that the Code was underinclusive and that the Town's enforcement of different restrictions on different categories of signs was not justified by the Town's asserted interests in preserving aesthetics and ensuring traffic safety. The underinclusiveness within the Code could plausibly be remedied by subjecting all permitted signs to the same size, appearance, and display period restrictions.

**Concurrence by Justice Alito.** Justice Alito filed a concurring opinion, joined by Justices Kennedy and Sotomayor, to provide further explanation of the powers of local governments to enact and enforce constitutional, content-neutral sign restrictions and to provide multiple examples of allowable restrictions in this area.

**Concurrence by Justice Breyer.** Justice Breyer filed a separate opinion, concurring only in the judgment of the Court. Justice Breyer argued against applying a bright line rule to the analyses of content-based restrictions of free speech. He stated that to hold that "such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity" in areas such as securities regulation, energy conservation labeling-practices, prescription drugs, doctor-patient confidentiality, income tax statements, commercial airplane safety briefings, and even signs at petting zoos. Justice Breyer opined that the Court should treat content discrimination as strongly weighing against upholding a content-based restriction with implications in the areas of public forum and viewpoint discrimination jurisprudence, but argued that content discrimination in other areas should only serve as a useful analytical tool without being absolutely determinative.

**Dissent by Justice Kagan.** Justice Kagan filed a separate opinion, joined by Justices Ginsburg and Breyer, concurring only in the judgment of the Court. Justice Kagan challenged the Court's uniform application of the strict scrutiny standard in all content-based regulations of speech. Justice Kagan noted that there are two important reasons that justify subjecting such regulations to a strict scrutiny standard: preserving an uninhibited marketplace of ideas and showing hostility or favoritism toward an underlying message.

Justice Kagan opined that strict scrutiny is warranted when subject-matter restrictions of speech realistically show the intent or effect of favoring some ideas, but that the Court should be less vigilant in analyzing subject-matter restrictions when such intent or effect is not realistically possible and when a regulation's enactment and enforcement does not reveal governmental bias or censorship. Justice Kagan also discussed the broad impacts that the Court's decision will have on local government around the country, which have adopted and enforced similar signage codes, and the impacts on the federal court system which will have to hear new challenges to countless local signage regulations.

**Implications for Iowa.** The Court's decision will impact local governments in Iowa that have regulated signage in a manner similar to the Town's Sign Code (distinguishing between signs based upon subject-matter content). Beyond impacting only temporary directional signs, the Court's decision is also likely to impact local ordinances that seek to treat political signs differently than other categories of signs, unless a local government can prove that such a regulation is narrowly tailored to achieve a compelling governmental interest.

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