

City of Copperas Cove Information Item No.

JULY 30, 2016

POLITICAL SIGNS

Contact – Andrea M. Gardner, City Manager, 547-4221
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SUBJECT: REGULATION OF POLITICAL SIGNS.

1. BACKGROUND/HISTORY

During the “Items for Future Agendas” section of the July 7, 2016 Regular Meeting of the City Council, Council Member Lack requested an item on political signs.

FINDINGS/CURRENT ACTIVITY

Under state law, a city generally may not prohibit or restrict the size of signs with a primarily political message, like a campaign sign, located on private land, unless the sign has billboard-like proportions. TEX. LOC. GOV'T CODE 216.903. A City may not charge a placement fee, require permits for political signs, or charge more for removal than it would for other signs. The courts have also dealt with signs with a noncommercial or political message that are located on residential property, and have held invalid city regulations that would prohibit or severely regulate such signs. See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

A city has the authority to regulate and prohibit signs in its rights-of-way, including political signs. A sign owner must request a city's permission before a sign can be placed in a city's right-of-way. TEX. TRANSP. CODE Ch. 393. Under this code, a city may choose to regulate sign placement in the city's rights-of-way. Absent city regulation, state law generally prohibits signs in city rights-of-way. However, for free speech reasons, a city cannot generally prohibit signs in its rights-of-ways based on content. For example, a city may not prohibit all political signs in the rights-of-way and allow other types of signs.

The information provided in the prior two paragraphs was copied from the Texas Municipal League Texas Town & City Magazine July 08 edition Volume XCV Number 7, Written by Lauren Mueller.

Since the publication of the July 2008 Texas Town & City magazine article on sign regulations, a court case heard by the Supreme Court, *Reed v. the Town of Gilbert, Arizona*” could impact the enforceability of current State Law. The Supreme ruling subjects content-based regulations to strict scrutiny. A copy of a presentation on the case is attached for Council review.

Signs are not authorized to be placed in City rights-of-way and are removed by the Code Compliance staff if not authorized by City Council. The City's sign ordinance provides the regulations of signs and that ordinance is enforced by City staff. Political signs are not regulated by the City unless the signs are placed on City property to include rights-of-way. Staff refers all complaints regarding political signs to the Texas Ethics Commission.

FINALLY...SOMETHING THE SUPREME COURT AGREES ON:

REED V. TOWN OF GILBERT

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The Parties:



- **Town of Gilbert, Arizona**
 - Population as of June 2015: 233,028
 - Doubled every five years from 1980-2000
 - By 2030, approx. population 305,000.
 - About the size of Lubbock or Plano
 - Median Population Age: 31.9
 - 77% of population under age 50
 - 33% of population under age 19
 - Highest median incomes in the state of Arizona: \$80,080
 - Psychographics:
 - Up and coming families (\$64,000)
 - Soccer moms (\$84,000)
 - Boomburgs (\$105,000)
 - <http://www.gilbertedi.com/demographics.php#income>.

The Parties:



- **The Good News Community Church**
 - Small and cash-strapped (lawsuit)
 - Did not own a facility
 - “Mobile” services
 - Used temporary signs to advertise services
 - Pastor Clyde Reed
- All they wanted to do was advertise their church services.



Town of Gilbert, Arizona – Sign Code

- Adopted a comprehensive sign code in 2005
 - Appendix “A”: Sign Code as of 11-30-14
- **Purpose:**
 - Promote optimum conditions for serving sign owners’ needs
 - Respecting [sign owners] rights to identification while balancing the community’s aesthetic interests
- **Necessary and in the public interest because:**
 - A. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.
 - B. To enhance the beauty, unique character, and quality of the Town of Gilbert, which will attract commerce, businesses, residents and visitors.
 - C. To promote economic development and the value of commercial properties, be sensitive to surrounding land uses and maintain an attractive community appearance.
 - D. To promote general safety by ensuring properly designed and located signs.
 - E. To encourage signs that are clear and legible to the user.
 - F. To emphasize small town historical character by promoting pedestrian oriented and appropriately scaled signage in the Heritage Village Center zoning district.

Town of Gilbert, Arizona – Sign Code

- **Ideological Signs:**

- any sign communicating a message or ideas for non-commercial 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

- **Political Signs:**

- any temporary designed to influence the outcome of an election called by a public body.

- **Temporary Directional Signs relating to Qualifying Event:**

- any "temporary sign" intended to direct pedestrians, motorists, and other passersby to a "qualifying event."

Town of Gilbert, Arizona – Sign Code

<u>SIGN TYPE</u>	<u>SIGN SIZE</u>	<u>AREAS / DISTRICTS ALLOWED</u>
Ideological Signs	Up to 20 sq. ft.	All Districts
Political Signs	Up to 16 sq. ft.	Residential
	Up to 32 sq. ft.	Non-Residential, Undeveloped, Municipal Property, Right of Ways (ROWs)
Temporary Direction Signs	Up to 6 sq. ft. (4 sign max at one time)	Private Property, Public ROWs



Town of Gilbert, Arizona – Sign Code

- **Temporary Sign Placement:**

- 4 sign limit at one time
- Original code said:
 - 2 hours before any religious assembly
 - 1 after any religious assembly
- 2008 revised code said:
 - 12 hours before any qualifying event
 - 1 hour after any qualifying event



- **As applied:**

- 9:00 a.m. Sunday Service? 9:00 pm install
- 12:00 p.m. service dismissal? 1:00 p.m. removal

- **Sign Code Compliance Manager cited Church twice.**

The Lawsuit: Procedural History

- July 2005
 - Gilbert sends the Church an email noting their violation of sign code because sign were placed too early in the public ROW.
- A few months later...
- Gilbert sends the Church an "advisory notice" that Church's signs displayed outside of the allowed window of time for display *and* did not include a date for the Church's service.
- Church reduced the number of signs and limited times
- CCM told Church "no leniency under the Code..."
- Church filed lawsuit in March 2008

The Lawsuit: Procedural History (cont).

- Church filed lawsuit in March 2008 – U.S.D.C. in Arizona
- Sign Code violated 1st and 14th Amendments on its face and as applied.
- Church moved for preliminary injunction to stop Gilbert enforcement of Code
- Gilbert stipulated to the preliminary injunction as a sign of “good faith” while it reviewed and amended the ordinance
- Church objected to the amended ordinance
- September 2008 – preliminary injunction denied
 - Court concluded Sign Code was content-neutral and passed intermediate scrutiny
 - Sign Code did not favor commercial speech over noncommercial
 - Sign Code did not violate equal protection

The Lawsuit: 1st Appeal

- 587 F.3d 966 (9th Cir. 2009)
- Appeal of September 2008 denial of preliminary injunction
- Sign Code is content-neutral (“speaking thru the sign”)
- Time, Place Manner Restrictions
 - Narrowly tailored to achieve Town’s aesthetic and traffic control objectives
 - Ample alternative channels for communication (no error)
- Equal Protection
 - Sign Code does not impermissibly favor commercial speech over noncommercial speech.
- U.S.D.C. Judgment Affirmed
- Remanded to determine if Sign Code is unconstitutional in favoring some noncommercial speech over other forms.

The Lawsuit: 2nd Appeal

- 707 F.3d (9th Cir. 2013)
- On remand, case submitted on cross-motions for summary judgment
- Summary judgment for Gilbert that Sign Code is not unconstitutional
- Church appealed
- U.S.D.C. accepted their opinion in Reed #1 as the law of the case
- Concluded that Sign Code constitutional because
 - No content-based restrictions
 - Narrowly tailors to serve significant government interests
 - Gilbert's amendments to Sign Code during appeal do not moot the case
 - Church can file a new lawsuit over the new ordinance if they want

The Lawsuit: SCOTUS

- 576 U.S. ____ (2015)
- **Justice Thomas** – opinion
 - Facially content-based
 - Strict scrutiny analysis
 - Not narrowly tailored
 - Somewhat chastises the 9th Circuit for getting it wrong.
- **Justice Alito** concurred – strict scrutiny analysis, municipal power preserved, and by the way...here's a helpful list.
 - Justice Kennedy & Justice Sotomayor joined
- **Justice Breyer** concurred – strict scrutiny “hybrid”
 - Joined Justice Kagan's opinion
- **Justice Kagan*** concurred – content based, but could have defeated the ordinance by going the intermediate scrutiny route.
 - Justice Ginsburg and Justice Breyer joined

* Town of Gilbert's defense does not pass...even the laugh test.



The Impact:

- Why use a shotgun when a rifle will do?
- Justice Kagan's opinion might have been the right way to go in terms of defeating the Gilbert's ordinance with a lesser level of scrutiny
 - Time, place and manner restrictions unconstitutional because they violated equal protection?
 - Did Gilbert's restrictions value ideological speech over political over "event related" speech
- If any regulation that relies on content is content-based that fails strict scrutiny analysis, are we now faced with crafting sign regulations that are constitutional only if they pass the "blindfold" test?

Questions?

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KAGAN, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF
GILBERT, ARIZONA, ET AL.ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e.g.*, City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as “Blind Pedestrian Crossing” and “Hidden Driveway” can be posted without a permit, even as other permanent signs require one. See, *e.g.*, Code of Athens-Clarke County, Ga., Pt. III, §7–4–7(1) (1993). Elsewhere, historic site markers—for example, “George Washington Slept Here”—are also exempt from general regulations. See, *e.g.*, Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, §4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to “scenic and historical attractions” or advertise free coffee. See 23 U. S. C. §§131(b), (c)(1), (c)(5).

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. See *ante*, at 14 (acknowledging

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that “entirely reasonable” sign laws “will sometimes be struck down” under its approach (internal quotation marks omitted)). Says the majority: When laws “single[] out specific subject matter,” they are “facially content based”; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante*, at 12, 16–17. And although the majority holds out hope that some sign laws with subject-matter exemptions “might survive” that stringent review, *ante*, at 17, the likelihood is that most will be struck down. After all, it is the “rare case[] in which a speech restriction withstands strict scrutiny.” *Williams-Yulee v. Florida Bar*, 575 U. S. ___, ___ (2015) (slip op., at 9). To clear that high bar, the government must show that a content-based distinction “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 231 (1987). So on the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They 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.*

*Even in trying (commendably) to limit today’s decision, JUSTICE ALITO’s concurrence highlights its far-reaching effects. According to JUSTICE ALITO, the majority does not subject to strict scrutiny regulations of “signs advertising a one-time event.” *Ante*, at 2 (ALITO, J., concurring). But of course it does. On the majority’s view, a law with an exception for such signs “singles out specific subject matter for

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Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, *ante*, at 14, I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 573 U. S. ___, ___–___ (2014) (slip op., at 8–9) (internal quotation marks omitted). The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, 189 (2007) (quoting *R. A. V.*, 505 U. S., at 390). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It is also the case (except in non-public or limited public forums) when a law restricts “discussion of an entire topic” in public debate. *Consolidated*

differential treatment” and “defin[es] regulated speech by particular subject matter.” *Ante*, at 6, 12 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that “the Code singles out signs bearing a particular message: the time and location of a specific event.” *Ante*, at 14.

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Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 537, 539–540 (1980) (invalidating a limitation on speech about nuclear power). We have stated that “[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating.’” *Id.*, at 537–538 (quoting *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest[] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 785 (1978); accord, *ante*, at 1 (ALITO, J., concurring) (limiting all speech on one topic “favors those who do not want to disturb the status quo”). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test. *R. A. V.*, 505 U. S., at 387 (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive. *Ante*, at 14. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, . . . strict scrutiny is unwarranted.” *Davenport*, 551 U. S., at 188; see *R. A. V.*, 505 U. S., at 388 (approving certain content-based distinctions when there is “no significant danger of idea or viewpoint discrimination”). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must

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sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. See *Davenport*, 551 U. S., at 188 (noting that “we have identified numerous situations in which [the] risk” attached to content-based laws is “attenuated”). In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating “historical, cultural, or artistic event[s]” from a generally applicable limit on sidewalk signs. *Id.*, at 792, n. 1 (listing exemptions); see *id.*, at 804–810 (upholding ordinance under intermediate scrutiny). After all, we explained, the law’s enactment and enforcement revealed “not even a hint of bias or censorship.” *Id.*, at 804; see also *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was “designed to prevent crime, protect the city’s retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views”). And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance’s exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.*, at 46–47, and n. 6 (listing exemptions); *id.*, at 53 (noting this assumption). We did not need to, and so did not, decide the

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level-of-scrutiny question because the law’s breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*’s tack here. The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante*, at 14–15 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs “need to be smaller because they need to guide travelers along a route.” Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to “time, place, or manner” speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority’s insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” *Ante*, at 14. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no

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one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.