

United States Supreme Court on Reed Challenge

Jun 12 2018

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On May 29, 2018 the United States Supreme Court decided not to take a case involving a *Reed v. Gilbert* challenge to San Francisco's restrictions permitting on-premise advertising but prohibiting off-premise advertising. The Court's declining to take the case leaves intact the decisions of the United States District Court and the 9th United States Circuit Court of Appeals upholding the restrictions based upon the application of "intermediate scrutiny" rather than "strict scrutiny" to be used for sign code restrictions that are deemed to be content-based.

Since *Reed v. Gilbert*, Courts have been left with a much easier standard to determine that a given sign code is "content-based." It is now far easier to determine that the code in question is dependent upon or driven by the content of the sign's message rather than some other criteria.

When *Reed v. Gilbert* was first handed down (June 18, 2015), the question arose whether the "on-premise" vs. "off-premise" distinction was literally a "content-based" factor that could ultimately result in the demise of the Highway Beautification Act going all the way back to 1965 and state sign codes "mirroring" the Highway Beautification Act. The Outdoor Advertising Association of America took the position early on that *Reed v. Gilbert* did not disturb the on-premise vs. off-premise dichotomy nor make such within a sign code a content-based factor. By not accepting the San Francisco case for review, the Supreme Court may be indicating just how it will treat this subject in future cases. But, it may also be that the Supreme Court made its decision not to review the 9th Circuit opinion only because *Reed vs. Gilbert* concerned the regulation of "non-commercial" "religious" speech, while San Francisco's ban applies to "commercial" speech (for example business advertisements). Whether the Court's decision foretells a broader basis for its future decision making in this area only time will tell. If so, the Court's most recent decision appears to be consistent with Justice Alito's concurring opinion in *Reed* which appears to have been the majority view. Justice Alito wrote that the on-premise vs. off-premise distinction does not trigger a finding of content-based thus invoking strict scrutiny.
