



Sixth Circuit applies *Reed v. Town of Gilbert* to offsite commercial billboard advertising adult bookstore

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The U.S. Supreme Court's decision in *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 S.Ct. 2218 (2015), has maintained a place in the back of local planning and zoning officials' minds for nearly six years. *Reed* stands for the proposition that regulation of noncommercial signs will be considered "content-based," and subject to nearly-always-fatal strict scrutiny, if the regulation "turns on the topic discussed, or the idea or message expressed." In other words, if the size limitation applicable to the sign hinges on whether the sign says, "Church services Sunday 10 AM"—a "temporary directional sign relating to a qualifying event," such as at issue in *Reed*—or whether it says "Vote for Jim"—a "political sign"—then that distinction is subject to strict scrutiny review. The plaintiff in *Reed*, a pastor of a small church congregation that simply wanted to advertise the dates and locations of its itinerant services, was a sympathetic plaintiff compared to the heavy-handed town of Gilbert and its bewildering 23-category sign code.

The implications of *Reed* were vast, as local governments across the country have regulations on the books that categorize noncommercial signs by their message. And so, many local governments have likely had a "*Reed*-compliant sign code revision" on the to-do list, carried over from one annual goal-setting meeting to the next yet never quite gaining traction. But recent activity in the U.S. Sixth Circuit Court of Appeals suggests that *Reed* is starting to have a real-world effect on sign controls.

Recently, the Sixth Circuit decided *L.D. Management Company v. Gray*, 2021 WL 567817 (Feb. 16, 2021). L.D. Management Company operates Lion's Den, an adult-oriented retailer that (as delicately put by Judge Sutton, writing for the Sixth Circuit panel), "sells 'books,' 'magazines,' and other items not worth belaboring." In other words, not what most would consider being a sympathetic, baseball-and-apple-pie plaintiff.

Gray is Kentucky Transportation Cabinet Secretary Jim Gray, who had the doomed task of defending Kentucky's Billboard Act (the "Act"). The Act "imposes special requirements on roadside billboards that advertise offsite activities, those offered off the property on which the billboard is located." Crucially, as it turned out, the requirements in the Act's text "apply to commercial and non-commercial speech and do[es] not apply to on-site billboards." The Lion's Den, having placed a sign advertising one of its superstores on a tractor-trailer of a neighboring field, violated the Act's prohibition against off-site billboards that are not affixed to the ground and that have not obtained a permit.

The Sixth Circuit relied on *Reed* to conclude that the Act was content-based, because it turned on the topic discussed—an "off-site" activity as opposed to an "on-site" activity. If the sign had said "This Billboard Space for Rent," instead of "Lion's Den Adult Superstore Exit Now," it would not have crossed the Act. The State argued that "intermediate scrutiny," a more government-friendly rubric long-applied to commercial speech restrictions, should be used to evaluate the Act's application to the Lion's Den advertisement. The Sixth Circuit rejected this argument, stating that it has "held that content-based statutes that sweep in commercial and noncommercial speech alike are subject to strict scrutiny across the board." Once the court decided to apply strict scrutiny, the Kentucky Billboard Act did not stand a chance.

The *L.D. Management* decision shows that the Sixth Circuit is committed to *Reed*'s principle that sign regulations will be considered content-based, and subject to strict scrutiny, if the applicable regulation is contingent on the topic of the sign. The Sixth Circuit now has gone further than concurring justices in *Reed* were willing to go, by eliminating the safe harbor of on-site/off-site distinctions. The remaining question unanswered by *L.D. Management* is whether intermediate scrutiny will continue to apply to regulations that apply only to commercial speech.

L.D. Management is an example that the time is now for local governments to take *Reed* seriously. It is possible to develop sign regulations that protect community interests in aesthetics and traffic safety but doing so requires careful attention to *Reed* as well

as the developing case law that is emerging in *Reed*'s wake.

If you have questions about your sign regulations as they relate to *Reed*, please contact [Thad Boggs](#), [Scott Phillips](#), [Yaz Ashrawi](#) or any attorney with Frost Brown Todd's [Government Services](#) practice group.

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