ORDINANCES OF THE CITY OF HELENA, MONTANA

AN ORDINANCE REVISING THE REGULATION OF SIGNS BY AMENDING CHAPTER 23 OF TITLE 11 OF THE HELENA CITY CODE

NOW, THEREFORE, BE IT ORDAINED BY THE COMMISSION OF THE CITY OF HELENA, MONTANA:

That Title 11 of the Helena City Code is hereby amended by repealing Chapter 23, General Sign Regulations, in its entirety and adopting this new Chapter 23, Sign Regulations, in lieu thereof:

CHAPTER 23

SIGN REGULATIONS

SECTION:

11-23-1: INTENT: This chapter is intended to provide standards for the erection, design, and placement of signage. The standards established by this chapter are intended to achieve proper relationship of signs to their environment, enhance the outward appearance of the community as a whole, secure pedestrian and vehicular safety, and preserve the historic aspects of the city.

Ord. No. _____

11-23-2: DEFINITIONS: For purposes of this chapter, the following terms and their derivations shall have the meanings given herein.

AWNING SIGN:	A sign that is affixed to a roof-like structure; generally composed of a skeletal frame covered in a fabric or other skin-type material typically open on the bottom side, that extends along and projects beyond the wall of the building and is generally designed and constructed to provide protection from the weather.
BILLBOARD SIGN:	A sign that is larger than two hundred fifty (250) square feet in area which is designed to advertise products, services, or businesses not located on the premises on which the sign is located by temporary poster panels or painted bulletin panels.
BUILDING FAÇADE:	The portion of any exterior elevation of a building extending from grade to the top of the parapet wall or eaves for the entire width of the building elevation, or that portion comprising the exterior elevation of one business located in a multiple-tenant structure.
BUILDING FRONTAGE:	The side of a building which faces a public street right of way.

DIRECTIONAL SIGN:	A permanently erected and incidental sign designed to guide or direct pedestrian or vehicular traffic to and within the property.
ELECTRONIC MESSAGE DISPLAY:	A sign capable of displaying words, symbols, figures or images that can be electronically changed by remote or automatic means.
FREESTANDING SIGN:	A sign supported by structures or supports that are placed on, or anchored in, the ground, and that are independent from any building or any other structure.
HEIGHT OF SIGN:	The vertical distance measured from the highest point of the sign to the highest adjacent street grade or surface beneath the sign, whichever is less.
MARQUEE SIGN:	A sign attached to or constructed on a canopy structure which is attached to and projecting horizontally beyond the wall of a building that generally is designed and constructed to provide protection from the weather.
PORTABLE MESSAGE CENTER:	A freestanding sign that is not permanently affixed or attached to the ground.
PROJECTING SIGN:	A sign affixed to the exterior wall of a structure and extends perpendicular to the facade of the building or structure.

ROOF SIGN:	A sign erected upon or above any portion of a roof or parapet wall of a building that is wholly or partially supported by the building.
SIGN:	Any identification, description, graphics, illustration, or device that is visible from any public place and exposed to the public which directs attention to a product, service, place, activity, person, institution, business, or solicitation, designed to advertise, identify, or convey information.
SIGN AREA:	The entire area within any type of perimeter or border which encloses the outer limits of writing, representation, emblem, figure, or character. The area of the sign having no such perimeter or border is computed by enclosing the entire area with parallelograms, triangles, or circles of the smallest size sufficient to cover the entire area of the sign and computing the area of these parallelograms, triangles, or circles. The area for double-faced or multiple-faced signs is the aggregate area of all the sign faces visible from any one direction at any one time.
WALL SIGN:	A sign affixed in any manner to the exterior wall of a building or

Commented [A1]: Update to reflect Reed..requires reading the sign.

structure with its face parallel to the building façade, including signs affixed to awnings.

Commented [A2]: Would have to read the content given the definition of "sign." How to distinguish from "art" or "murals" without reading the sign?

WINDOW: A sign installed inside or upon the window surgace for the purpose of viewin from outside the premises.

11-23-3: PROHIBITED SIGNS:

A. Signs that are not listed as permitted within a district are prohibited except as may be separately approved by variance granted by the Board of Adjustment.

B. No blade banners, pennants, flags, balloons, portable message centers, or air activated devices for the purposes of drawing attention to services or sales offered on the property may be erected, placed, or maintained.

B. Signs may not be erected in such a manner that they obstruct or create a hazard by blocking the clear view of vehicular, bicycle, or pedestrian traffic as set forth in section 7-3-7 of this code; or where they may obstruct the view of any traffic control device. No sign or its illumination may interfere with traffic safety or simulate emergency services.

C. Signs may not be placed on or extend into any public rights-of-way, nor be affixed to any post, tree, or pole located in any public right-of-way or upon any city owned property, including signs held by a person, except for signs placed by authorized agents of the city or except as permitted by Title 7, Chapter 13 of this code. Signs on vehicles parked on public rights-of-way for the express purpose of displaying signage is prohibited.

D. No sign may be constructed or erected that resembles any official marker erected by the city, state, or any governmental agency, or that by reason of position, shape,

or color would conflict with the proper functioning of any traffic sign or signal.

E. Signs that are flashed or projected on walls or other structures by means of a slide projector or other device are prohibited.

11-23-4: EXEMPT SIGNS: The following signs are allowed by right in all zoning districts without a permit, but must adhere to the specific size restrictions in this chapter.

A. House numbers and street names, for purposes of identifying the property for emergency services and mail delivery.

B. Legal notices that are required by law posted by a lawful officer or agent.

C. Signs required by state, federal, or local law to designate accessible parking and accessible routes of travel.

11-23-5: REGULATIONS FOR SPECIFICIED DISTRICTS: In addition to the above regulations relating to prohibited and permit exempt signs the regulations govern the specific sign standards for each zoning district within the city. Any type of sign that is not specifically listed in this section as permitted is prohibited.

A. R-1, R-2, and R-3 Districts:

1. Each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership in the R-1, R-2, and R-3 zoning districts may have one freestanding sign that may be placed and maintained on the property indefinitely and without a permit. The freestanding sign may be a maximum of _____ feet tall and not larger than ____ square feet/inches in sign area. The freestanding sign may not be permanently affixed or attached to the ground.

2. In addition to the one permit exempt freestanding sign, each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have up to _____ temporary freestanding signs without a permit. These temporary freestanding signs cannot be placed or maintained on the property for more than ____ days each calendar year and may not be permanently affixed or attached to the property in any way. Each individual temporary frees maye maximum of up _____inches/feet tall and not larger than ____ square feet/inches in individual sign area.

3. _____ wall or window sign up to ___ in sign area may be maintained on the property.

B. R-4, R-O, and B-1 Districts:

1. For residential uses:

a. Each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership in the R-1, R-2, and R-3 zoning districts may have one freestanding sign that may be placed and maintained on the property indefinitely and without a permit. The freestanding sign may be a maximum of _____ feet tall and not larger than ____ square feet/inches in sign area. The freestanding sign may not be permanently affixed or attached to the ground.

b. In addition to the one permit exempt freestanding sign, each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have up to _____ temporary freestanding signs without a permit. These temporary freestanding signs cannot be placed or maintained on the property for more than ____ consecutive or total days each calendar year and may not be permanently affixed or attached to the property in any way. Each individual temporary freestanding sign may be a maximum of up to_____inches/feet tall and not larger than ____ square feet/inches in individual sign area.

c. _____ wall or window sign up to ___ in sign area may be maintained on the property.

Commented [A3]: Allowing for on-going temporary signage for purposes of changing political messages/campaigns/elections, etc…But can specify the period allowed, number of signs, and size…for any message.No permit required.

Commented [A4]: Allows office and limited retail uses.

Commented [A5]: Need to distinguish between commercial and residential in RO/R-4 since both types of uses are allowed.

Commented [A6]: Allowing for on-going temporary signage for purposes of changing political messages/campaigns/elections, etc…

2. For non-residential uses:
a. Each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have ____ freestanding sign/signs that may be placed and maintained on the property indefinitely after obtaining a sign permit from the city. Freestanding sign/signs may be a maximum of _____ feet tall and not larger than ____ square feet/inches in sign area.

b. In addition to the permit approved freestanding sign/signs, each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have up to _____ temporary permit exempt freestanding signs without a permit. These temporary freestanding signs cannot be placed or maintained on the property for more than ____ consecutive or total days each calendar year and may not be permanently affixed or attached to the property in any way. Each individual temporary freestanding sign maybe maximum of up _____inches/feet tall and not larger than ____ square feet/inches in individual sign area.

c. _____ wall and/or _____window/awning/marquee sign up to ___ in sign area may be maintained and displayed on the property.

C. B-2 District:

1. One freestanding sign no more than thirty four feet (34') in overall height and one hundred and fifty (150) square feet per lot, tract, or parcel that is affixed or attached to the ground.

2. In addition to the permit approved freestanding sign, each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have up to _____ temporary permit exempt freestanding signs without a permit. These temporary freestanding signs cannot be placed or maintained on the property for more than ____ consecutive or total days each calendar year and may not be permanently affixed or attached to the property in any way. Each individual temporary freestanding sign maybe maximum

of up _____inches/feet tall and not larger than ____ square feet/inches in individual sign area.

Commented [A7]: Blade banners, pennants, and the like…?

3. Wall, awning, or marquee signs up to thirty percent (30%) of the building facade to which they are attached or two hundred (200) square feet in aggregate sign area, whichever is less.

4. Signs on windows may not exceed twenty five percent (25%) of the total window area. If the sign on a window exceeds that limitation, the sign is considered a wall sign and subject to the wall sign limitation above.

5. One projecting sign that is no more than forty (40) square feet in size.

6. One roof sign that is no more than one hundred fifty (150) square feet in size.

7. One electronic message displays subject to the specific size and luminance regulations in this chapter. No electronic message display sign may be erected or maintained closer than one hundred feet (100') from any OSR, R-1, R-2, R-3, R-4, R-O, or Airport zoning districts unless the sign is constructed and oriented in such a manner that the sign cannot be seen from said districts.

8. Directional signs that do not exceed six (6) square feet in area and four feet (4') in height. Logo identification on directional signs may not be more than twenty five percent (25%) of the sign area. If the logo identification is more than 25% then the sign is not a directional sign and is considered a freestanding sign.

E. B-3 District:

1. A wall, awning, or marquee signs up to thirty percent (30%) of the building facade to which they are attached or two hundred (200) square feet in aggregate sign area, whichever is less.

2. Sandwich board sign that is no taller than ___ feet and ___ in area is permitted on the adjacent public right-of-way subject to encroachment permit approval pursuant to Title 7, Chapter 13 of this code.

3. Signs on windows may not exceed twenty five percent (25%) of the total window area. If the sign on a window exceeds that limitation, the sign is considered a wall sign and subject to the wall sign limitation above.

4. One projecting sign that is no more than forty (40) square feet in size.

F. M-I and CLM Districts:

1. 1. One freestanding sign no more than thirty four feet (34') in overall height and three hundred (300) square feet per lot, tract, or parcel that is affixed or attached to the ground.

2. In addition to the permit approved freestanding sign/signs, each lot, tract, or parcel, or group of lots, tracts, or parcels held in common ownership may have up to _____ temporary permit exempt freestanding signs without a permit. These temporary freestanding signs cannot be placed or maintained on the property for more than ____ consecutive or total days each calendar year and may not be permanently affixed or attached to the property in any way. Each individual temporary freestanding sign maybe maximum of up _____inches/feet tall and not larger than ____ square feet/inches in individual sign area.

3. Wall, awning, or marquee signs up to thirty percent (30%) of the building facade to which they are attached or three hundred and ten (300) square feet in aggregate sign area, whichever is less.

3. Signs lettered on the exterior or interior of a window may not exceed twenty five percent (25%) of the window on which they are lettered or a maximum of four (4) square feet, whichever is more. If the sign on a window exceeds

those limitations, the sign is considered a wall sign and subject to the wall sign limitation above.

4. One roof sign that is no more than three hundred (300) square feet in aggregate sign area.

5. One projecting sign that is no more than two hundred (200) square feet in aggregate sign area.

6. One electronic message display subject to the specific size and luminance regulations in this chapter. No electronic message display sign may be erected or maintained closer than one hundred feet (100') from any OSR, R-1, R-2, R-3, R-4, R-O, or Airport zoning districts unless the sign is constructed and oriented in such a manner that the sign cannot be seen from said districts.

7. Directional signs that do not exceed six (6) square feet in area and four feet (4') in height. Logo identification on directional signs may not be more than twenty five percent (25%) of the sign area. If the logo identification is more than 25%, then the sign is not a directional sign and is considered a freestanding sign.

G. PLI District:

1. Freestanding, wall, awning, or marquee signs whose aggregate sign area may not exceed more than one hundred (100) square feet per per lot, tract, or parcel that is held in common ownership. Freestanding signs may not exceed eighteen feet (18') in overall height.

2. Signs lettered on the exterior or interior of a window may not exceed twenty five percent (25%) of the window on which it is lettered or a maximum of four (4) square feet, whichever is more. If the sign on a window exceeds those limitations, the sign is considered a wall sign and subject to the wall sign limitation above.

3. One electronic message display subject to the specific size and luminance regulations in this chapter. No

electronic message display sign may be erected or maintained closer than one hundred feet (100') from any OSR, R-1, R-2, R-3, R-4, R-O, or Airport zoning districts unless the sign is constructed and oriented in such a manner that the sign cannot be seen from said districts.

4. Directional signs that do not exceed than six (6) square feet in area and four feet (4') in height. Logo identification on directional signs may not be more than twenty five percent (25%) of the sign area. If the logo identification is more than 25%, then the sign is not a directional sign and is considered a freestanding sign.

H. Airport District:

1. One freestanding sign no more than twenty four feet (24') in overall height and one hundred (100) square feet of sign area per lot, tract, or parcel that is held in common ownership.

2. Wall, awning, or marquee signs up to thirty percent (30%) of the building facade to which they are attached or two hundred and ten (200) square feet in aggregate sign area, whichever is less.

3. Signs lettered on the exterior or interior of a window may not exceed twenty five percent (25%) of the window on which it is lettered or a maximum of four (4) square feet, whichever is more. If the sign on a window exceeds those limitations, the sign is considered a wall sign and subject to the wall sign limitation above.

6. One roof sign that is no more than three hundred (300) square feet in aggregate sign area.

7. One electronic message display subject to the specific size and luminance regulations in this chapter. No electronic message display sign may be erected or maintained closer than one hundred feet (100') from any OSR, R-1, R-2, R-3, R-4, R-O, or Airport zoning districts unless the sign is constructed and oriented in such a manner that the sign cannot be seen from said districts.

8. Directional signs that are no larger than six (6) square feet in area and four feet (4') in height. Logo identification on directional signs may not be more than twenty five percent (25%) of the sign area. If the logo identification is more than 25%, then the sign is not a directional sign and is considered a freestanding sign.

9. All signs must be installed and designed in accordance with the rules regulations promulgated by the United States federal aviation administration.

11-23-6: GENERAL SIGN STANDARDS:

A. Wall signs may not project more than eighteen inches (18") from the wall and may not extend more than six inches (6") above the parapet, eaves, or facade of the building upon which they are located.

B. A roof sign must appear to be free of any extra bracing, angle iron, guywires, cables, etc. The supports must be an architectural feature and integral part of the building. Supporting columns of round, square, or shaped steel members may be erected if the required bracing that is visible to the public is minimized or covered. The roof sign height may not exceed eight feet (8') measured from the lowest point of attachment to the roof nor exceed the allowable height of a structure for the underlying zoning.

C. Projecting signs may not extend more than ten feet (10') measured at a right angle between the outer extremity of the sign and the wall or structure to which it is attached. The sign must appear to be free of any extra bracing, angle iron, guy wires, cables, etc., and sign supports must appear to be an architectural feature and integral part of the building. A projecting sign may not extend more than six inches (6") above the parapet, eave, or facade of the building to which it is attached.

D. Signs that are permitted to be lighted may only be lighted in such a manner that the light therefrom may shine only on

the sign or on the property on which it is located and may not shine onto any other property, in any direction, except by indirect reflection. No lighting arrangement is permitted which, by reason of brilliance or reflected light, is a detriment to surrounding properties or prevents the reasonable enjoyment of residential uses.

E. Electronic message display luminance must have ambient light monitors and automatic controls so that the electronic message display does not exceed 7650 nits between sunrise and sunset and 1350 nits between sunset and sunrise. Electronic message displays may not exceed fifty percent (50%) of the total allowable sign area allowed in the district or a maximum of seventy-five (75) square feet, whichever is less, and must be computed as part of the sign's total area.

11-23-7: NONCONFORMING SIGNS: Nonconforming signs are permitted to remain, subject to the following exceptions and restrictions:

A. The abandonment of a nonconforming sign terminates the right to maintain such sign.

B. A nonconforming sign may be continuously maintained or repaired in its original form with materials compatible with the existing construction until damaged or destroyed from any cause in excess of seventy percent (70%) of replacement costs or until the sign becomes substandard structurally, materially, or electrically from obsolescence or other cause, so as to pose a hazard or endangerment to the public, and is not promptly repaired as ordered by the sign administrator.

C. When a nonconforming sign is replaced or relocated, a sign permit must be obtained and the sign must then comply with this chapter.

D. A nonconforming sign may be altered only when the proposed alterations bring the sign fully into conformance with the restrictions for the district in which the sign is located.

E. A nonconforming sign shall cease to be used when the business, activity or use on, or to which the property is put, is enlarged in excess of fifty percent (50%) of either the original lot area or the building area lot coverage in place at the time the sign was installed.

G. Billboard signs must be removed after ten (10) years of the effective date of this ordinance.

11-23-8: REMOVAL OF SIGNS: The city may remove unauthorized signs from public rights-of-way and city property without notice to the owner. The city shall make all reasonable efforts to ascertain the owner of the sign and inform the owner where the signs can be retrieved.

FIRST PASSED BY THE COMMISSION OF THE CITY OF HELENA, MONTANA, THIS ___ DAY OF _____, 2016.

_____
MAYOR

ATTEST:

_____
CITY CLERK

FINALLY PASSED BY THE COMMISSION OF THE CITY OF HELENA, MONTANA, THIS _____ DAY OF _____, 2016.

_____
MAYOR

ATTEST:

_____
CITY CLERK

Community Development Department
Planning Division
211 South Williams Street
Royal Oak, MI 48067

Sign Ordinance Updated
Impact of Supreme Court Ruling Reed v. Gilbert

October 13, 2015

The Honorable Mayor Ellison and
Members of the City Commission:

A ruling earlier this year by the U.S. Supreme Court dramatically changes the way all local governments must now regulate signs. Previously, most federal courts ruled that cities could enforce a limited number of content-based regulations on signs – regulations relating to the actual content of a sign's message – provided such standards were not intended to censor or restrict speech. In Reed v. Gilbert, the U.S. Supreme Court ruled that if a sign has to be read in order to determine if a certain regulation applies, then that regulation is content-based and presumed to be unconstitutional.

The case involved a sign ordinance from the Town of Gilbert, Arizona. The town's ordinance exempted several categories of signs from permitting requirements, including political signs, ideological signs, and temporary directional signs. The town did not prohibit any of these signs but it did enforce different regulations for each separate category.

A local church in Gilbert did not have a permanent location and rented space for services in various community facilities such as schools. To inform people of their services and locations the church placed temporary signs advertising religious services throughout the town for a period of approximately 24 hours before each service. The town cited the church for violations of their sign ordinance since the time period the church's signs were posted exceeded that allowed under their sign ordinance for temporary directional signs.

The church eventually sued Gilbert claiming violations of the free speech and free exercise clauses of the First Amendment to the U.S. Constitution. In the U.S. Supreme Court's decision, all nine justices agreed that the town's sign ordinance was unconstitutional, but they differed in their opinions as to why they ruled that way.

As a result of the court's decision, content-specific regulations within our sign ordinance are no longer enforceable. The city can no longer dictate what message signs may or may not contain. Sign regulations should only specify which types of signs are allowed, where they may be placed, and what size they can be, not what they say. Content-specific regulations should therefore be eliminated from throughout the city's sign ordinance.

Unfortunately, Royal Oak's sign ordinance contains many similar if not identical regulations to those in Gilbert's code that were struck down. Many of our current sign regulations require a sign to be read in order to determine what regulations apply and are therefore considered content-based because of this ruling. Here are just a few of the standards currently in our sign ordinance that could be considered content-based due to the Reed ruling:

- Requiring that all signs contain only a commercial message.

- Exempting flags for public institutions from regulation while prohibiting flags with commercial messages.

- Exempting murals from regulation provided they don't contain a commercial message or identify any business or product.

- Allowing banners for community groups or non-profit organizations but prohibiting them for commercial businesses.

- Applying different standards to various temporary signs based on what they advertise, i.e., real estate signs, political signs, construction signs, garage sale signs, etc.

- Applying different standards to various permanent signs based on what they advertise, i.e., product price signs for gasoline stations, menu boards for drive-through restaurants, and shopping center signs that advertise only the name of the shopping center and not individual tenants.

- Prohibiting commercial messages on incidental signs, traffic direction signs, pennants, etc.

Current language in the city's sign ordinance that references "commercial" or "non-commercial" messages, or any standards that refer to the actual content of a sign's message, such as political signs, real estate signs, etc., will need to be either significantly revised or eliminated. This will require a substantial re-writing of Royal Oak's entire sign ordinance.

The Reed decision will have the most significant impact on Royal Oak's standards for temporary signs such as flags, banners, real estate signs, and political signs. The city's current regulations are entirely content specific – staff must read a sign to determine if it's a real estate sign, a political sign, etc., or to ensure flags or pennants don't contain a commercial message.

The city should instead draft uniform regulations for all temporary signs based on where they are placed and how they are built, and not on what they say. Different standards could apply whether temporary signs are placed in a designated sign area along a commercial corridor or if they are placed in a residential neighborhood. A maximum number of temporary signs that are allowed will need to be determined based either on a set number per lot, a property's linear feet of street frontage, or some other standard. Maximum size and height standards should also be required.

Adopting uniform standards for all temporary signs will obviously be controversial. Many people will want to strictly limit (or even prohibit) temporary signs allowed for businesses, but not restrict how many signs a homeowner may place in their front yard during an election or when they're selling their home.

Flags are also going to be a difficult issue. They are currently defined and allowed only as symbols for public institutions (governments, schools, armed services, etc.) or noncommercial entities. They are essentially exempted from regulation; there are no existing requirements applicable to flags other than for wind load capacity and pole anchoring. Unfortunately the city can no longer rely on the existing definition that prohibits flags with commercial messages. Adopting any kind of standards for flags will no doubt be extremely unpopular, but due to the Reed decision there may be no feasible alternative.

The Reed decision could also force the city to change how we deal with billboards. The court's majority opinion in the Reed decision mentions the possibility of allowing cities to regulate off-premises signs or billboards differently from on-premises signs, or signs that identify a given business on a property. But this may not work in actual practice as you must read the content of a sign to determine if it is a billboard or on-premises sign. That would violate the court's primary ruling. This could force the city to remove all differences between off-premises and on-premises signs and significantly change how billboards are treated under the sign ordinance and zoning ordinance.

Murals, paintings, sculptures and other artworks will be another problem. The city can no longer rely on the current content-based definition of a "mural" as a type of sign with no commercial message or that doesn't identify an eligible advertiser, thereby exempting them regulation. Specific standards may need to be adopted if the city wants to allow murals and other works of art without undue restrictions. Otherwise, murals and other art forms – including the paintings that are regularly attached to downtown buildings and sculptures planned for the 11 Mile Road corridor – could fall under the regulations for signs. If treated as signs many of these artworks would technically be prohibited as most could not meet existing standards.

Attached for background information regarding the Reed decision are a handout (attachment 1) and presentation (attachment 2) from the annual conference for the Michigan chapter of the American Planning Association. Also attached is a research paper (attachment 3) from Cleveland State University's Cleveland-Marshall College of Law and another presentation from the American Planning Association's Ohio chapter regarding the Reed decision (attachment 4). The chapter on legal context and constitutional considerations from the Michigan Sign Guidebook: The Local Planning and Regulation of Signs by Michigan State University's Planning and Zoning Center is also attached (attachment 5).

There are certain steps the city should take in light of the Reed decision. First, staff should thoroughly review the sign ordinance and identify any regulations that are content-based. These would include any regulations that are based on the content or subject of the message, the person and/or group delivering the message, or an event(s) taking place.

Once identified new or amended regulations should then be drafted that are as content-neutral as possible, while accepting that, if the regulations are not entirely content-neutral, there will be some legal risk that could otherwise be avoided.

All temporary signs and signs that are exempt from permitting requirements should also be identified. The number of exceptions from permitting and separate categories for signs should be reduced, eliminating as many of both as possible.

A substitution clause should be added to the sign ordinance that allows any sign permitted under the ordinance to contain either a commercial or a non-commercial message. The severability clause contained within the adopting ordinance language should also be added as a part of the actual sign ordinance text.

Royal Oak's sign ordinance is not formally subject to review by the planning commission prior to action by the city commission in the same manner as the zoning ordinance. The city commission has, however, sought input from the planning commission in the past prior to amending the sign ordinance. Due to the complicated nature of the Reed decision, it may also be beneficial to engage an outside consultant to assist staff in reviewing the sign ordinance and identifying necessary changes that must be made.

The following resolution is recommended:

Be it resolved, the city commission directs and authorizes staff to review chapter 607, signs, of the city's code of ordinances, for necessary revisions due to the U.S. Supreme Court's ruling in Reed v. Town of Gilbert, Arizona, and engage planning and/or legal consultants with suitable experience drafting sign regulations to assist in that review.

Be it further resolved, the city commission directs staff to present any proposed revisions to chapter 607 to the planning commission for review and recommendation prior to being formally presented to the city commission for first reading.

Respectfully submitted,
Timothy E. Thwing
Director of Community Development

Approved,

Donald E. Johnson
City Manager

5 Attachments

Attachment 1

SIGNS, SIGNS, EVERYWHERE A SIGN

Supreme Court Ruling Questions Answered

DO YOU KNOW IF THE SIGN REGULATIONS IN YOUR COMMUNITY ARE CONTENT-NEUTRAL AND COMPLIANT WITH THE FIRST AMENDMENT? FIND OUT NOW.

1. The U.S. Supreme Court's unanimous decision in Reed v. Gilbert impacts almost every sign ordinance in the U.S. Specifically, forms of noncommercial speech cannot be regulated differently based on the content of the sign's message.

2. The Supreme Court said: *"In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral."* Communities must review their sign regulations immediately and identify "innocuous justifications" that favor certain types of signs. Because many types of signs are noncontroversial and/or exempt from permitting requirements, they are often ignored when evaluating the sign ordinance. While amendments may be necessary, communities can craft content-neutral standards while still achieving the purpose of their sign regulations.

3. Looking ahead, emerging LED technology has allowed better control of brightness and frequency of message changes. While many communities prohibit illuminated signs and changeable message signs based on fears and negative experiences, communities should study the latest technology and best practices to determine if there are suitable regulations it can implement while still maintaining their character.

McKenna ASSOCIATES

DALTON TOMICH

ISA International Sign Association

RESOURCES (Future editions may be published after Reed v. Gilbert)

Michigan Sign Guidebook, Scenic Michigan, December 2011

Street Graphics and the Law, American Planning Association, PAS Report 580, Fourth Edition (published after Reed v. Gilbert)

International Sign Association (ISA) "**Resources for Local Officials**" website, with examples of sign regulations including nighttime brightness levels for Electronic Message Centers (EMC's): www.signs.org/GovernmentRelations/ResourcesforLocalOfficials.aspx

Best Practices in Regulating Temporary Signs, Signage Foundation, Inc., 2015: www.thesignagefoundation.org/Portals/0/Best_Practices_in_Regulating_Temporary_Signs.pdf

A Framework for On-Premise Sign Regulations, Signage Foundation, Inc., March 2009: www.thesignagefoundation.org/Portals/0/OnPremiseSignRegulations.pdf

Model On-Premise Sign Code, Unites States Sign Council (USSC), 2011: www.usscfoundation.org/USSCModelOn-PremiseSignCode.pdf

Attachment 1

The Signage Foundation, Inc.
1001 North Fairfax Street
Suite 301
Alexandria, VA 22314
www.thesignagefoundation.org

Drafting and Enforcing Sign Codes after *Reed v Town of Gilbert*

The U.S. Supreme Court's decision in *Reed v Town of Gilbert* on June 18, 2015 is, undoubtedly, the most definitive and far-reaching statement that the Court has ever made regarding day-to-day regulation of signs. While the sign code provisions challenged in *Reed* involved only the regulation of temporary non-commercial signs, the Court's 6-3 majority decision, authored by Justice Clarence Thomas, applies to the regulation of *all* signs: permanent signs as well as temporary signs, business signs as well as residential signs, and to both commercial and non-commercial signs. If you're wondering "what about onsite vs. offsite signs?" - more on that later.

The rules that Justice Thomas announced in *Reed* could not be more straight-forward. A sign regulation that "on its face" considers the message on a sign to determine how it will be regulated is content-based. Justice Thomas emphasized that if a sign regulation is content-based "on its face" it does not matter that government did not intend to restrict speech or to favor some category of speech for benign reasons. He wrote: "In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral." Further, a sign regulation that is facially content-neutral, if justified by – or that has a purpose related to – the message on a sign, is also a content-based regulation. For example, a code provision that allowed more lawn signs between mid-August and mid-November would be facially content-neutral but might be challenged as being justified by or have a purpose related to allowing "election campaign" messages.

Whether content-based "on its face" or content-neutral but justified in relation to content, Justice Thomas specified that the regulation is presumed to be unconstitutional and will be invalidated unless government can prove that the regulation is narrowly tailored to serve a compelling governmental interest. This is known as the "strict scrutiny" test and few, if any, regulations survive strict scrutiny. This may be particularly true in regards to sign regulations given that a number of federal courts have previously ruled that aesthetics and traffic safety, the "normal" governmental interests supporting sign regulations, are not "compelling interests."

Every Sign Code Should Be Scrutinized

Justice Thomas's opinion calls into question almost every sign code in this country: few, if any, codes have no content-based provisions under the rules announced in *Reed*. For example, almost all codes contain content-based exemptions from permit requirements for house nameplates, real estate signs, political and/or election signs, garage sale signs, "holiday displays," etc. Almost all codes also categorize temporary signs by content, and then regulate them differently; for example, a "real estate" sign can be bigger and remain longer than a "garage sale" sign, or the code allows the display of more "election" signs than "ideological" or "personal" signs but the "election" signs must be removed "x" days after the election while the "personal" or "ideological" signs can remain indefinitely.

Many sign codes also have content-based provisions for permanent signs. Because the *Reed* rules consider "speaker-based" provisions to be content-based, differing treatment of signs for "Educational Uses" vs. "Institutional Uses" vs. "Religious Institutions" would be subject to strict scrutiny. The strict

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scrutiny test would also apply for differing treatment of signs for "gas stations" vs. "banks" vs. "movie theaters."

Reed does not, however, cast doubt on the content-neutral "time, place, or manner" regulations that are the mainstay of almost all sign codes, provided they are not justified by or have a purpose related to the message on the sign. Justice Thomas acknowledged that point, noting that the code at issue in *Reed* "regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts and portability." Justice Alito's concurring opinion, joined by Justices Kennedy and Sotomayor, went further.

While disclaiming he was providing "anything like a comprehensive list," Justice Alito noted "some rules that would not be content based." These included rules regulating the size and location of signs, including distinguishing between building and free-standing signs; "distinguishing between lighted and unlighted signs;" "distinguishing between signs with fixed messages and electronic signs with messages that change;" distinguishing "between the placement of signs on private and public property" and "between the placement of signs on commercial and residential property;" and rules "restricting the total number of signs allowed per mile of roadway."

But Justice Alito also approved of two rules that seem at odds with Justice Thomas's "on its face" language. Alito claimed that rules "distinguishing between on-premises and off-premises signs" and rules "imposing time restrictions on signs advertising a one-time event" would be content-neutral. But rules regarding "signs advertising a one-time event" clearly are facially content-based, as Justice Kagan noted in her opinion concurring in the judgment, and the same claim could be made regarding the onsite/offsite distinction. Further, neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and non-commercial signs, a point raised by Justice Breyer in his concurring opinion. Thus, it seems clear that the lower federal courts will soon face claims that codes that differentiate between commercial and non-commercial signs or that regulate on-site and off-site signs differently are content based and subject to strict scrutiny. Stay-tuned!

Keep in mind, however, that even content-neutral "time, place or manner" sign regulations are subject to intermediate judicial scrutiny rather than the deferential "rational basis" scrutiny applied to regulations that do not implicate constitutional rights such as freedom of expression or religion. Intermediate scrutiny requires that government demonstrate that a sign regulation is narrowly tailored to serve a substantial government interest and leave "ample alternative avenues of communication." Because intermediate scrutiny requires only a "substantial," rather than a "compelling," government interest, courts are more likely to find that aesthetics and traffic safety meet that standard. That said, courts have struck down a number of content-neutral sign code provisions because the regulations were not "narrowly tailored" to achieve their claimed aesthetic or safety goals.

Cities Must Respond

So…what's a city to do after *Reed*? Some cities are enacting moratoria on sign regulation while they try to figure that out. A court would likely view with disfavor a total moratorium on issuing *any* sign permits (or, worse yet, displaying any new signs) as an unconstitutional prior restraint on speech. In

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contrast, a moratorium of short duration – certainly no more than 30 days – targeted at permits issued under code provisions that are questionable after *Reed* is far more likely to be upheld. Cities are also well-advised to suspend enforcement of code provisions – particularly regulation of temporary signs – that are questionable after *Reed*. Obviously, however, *all* sign code structural provisions directly related to public safety should continue to be enforced.

As we all know, drafting a fair and effective sign code that appropriately balances a community's interests in allowing both residents and businesses to use signs to meet their communication needs while achieving the community's interests in maintaining property values and achieving aesthetics and traffic safety goals is no easy task. Trying to do that during a short moratorium is even harder. But it is certainly not impossible.

Opportunities to Improve Your Sign Code Post-*Reed*

1. **Remove from the sign code all references to the content of a sign other than the few examples directly related to public safety noted in Justice Thomas's opinion.** Most of these content-based provisions likely will relate to temporary signs. Rather than referring to "real estate" or "political" or "garage sale" signs, your code should treat these all as "yard" signs or "residential district" signs. You then regulate their number, size, location, construction and amount of time they may be displayed, keeping in mind how your residents want to use such signs. You would use the same approach for temporary signs in business districts: replace references to "Grand Opening" or "Special Sale" signs with "temporary business sign" and regulate their number, size, location, construction and amount of time they may be displayed based on business needs for such signs.

2. All the provisions in your code that refer to number, area, structure, location and lighting of permanent signs are content-neutral and unaffected by *Reed*. If your code does have some content-based provisions for permanent signs, either by specifying content that must (or must not) be on a sign or because you distinguish among uses (e.g., "gas-station signs"), those provisions will be subject to strict scrutiny if challenged. None of these content-based provisions should be retained unless public safety would be so threatened by removal that the provision would survive strict scrutiny. Permanent signs should be regulated in a content-neutral manner with regulations distinguished not by type of use (because that would be "speaker-based") but by either zoning districts or "character" districts or by reference to street characteristics such as number of lanes or speed-limit. The International Sign Association has a number of resources that can help your community revise your sign code based on the latest research, sign industry expertise, and sign-user perspectives.

3. If your sign code does not have a severability clause and a substitution clause they should be added. A severability clause provides that if any specific language or provision in the code is found to be unconstitutional, it is the intent of the city council that the rest of the code remain valid. For example: "If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word in this code is declared invalid, such invalidity shall not affect the validity or enforceability of the remaining portions of the code." A substitution clause allows a non-commercial message to be displayed on *any* sign. While *Reed* did not discuss the commercial/non-commercial distinction, prior U.S. Supreme Court cases established that commercial speech should not be favored over non-commercial speech. A

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substitution clause thus can safeguard you against liability that could result from mistakenly doing just that by prohibiting the display of a non-commercial message or citing it as a code violation. For example: "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."

4. Understand that *Reed* has left several questions unanswered. As previously noted, treatment of the onsite/offsite and commercial/non-commercial distinctions remains uncertain. *Reed* also failed to provide an answer to how we provide for the public's desire for more signage during election campaigns in a wholly content-neutral manner. We also don't know what, if any, content-based regulations might survive strict scrutiny. In light of these uncertainties, arguably the best course for cities is to err on the side of allowing for less restrictive, rather than more restrictive, sign regulations until the courts provide more guidance on the above questions and others that are certain to be raised.

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Attachment 2

SIGNS, SIGNS, EVERYWHERE A SIGN

Supreme Court Ruling Questions Answered

Michigan Association of Planning 2015 Annual Conference

October 8, 2015

McKenna Associates

Dalton Tomich

International Sign Association

Presenters

- **Larry Opalewski**
  Dalton & Tomich, PLC
- **Kenneth Peskin**
  Director of Industry Programs,
  International Sign Association (ISA)
- **Patrick Sloan, AICP**
  Principal Planner, McKenna Associates
- **Christopher Khorey, AICP**
  Principal Planner, McKenna Associates

Introduction

- Reed v. Gilbert, Decided by U.S. Supreme Court on June 18, 2015
- All sign codes in the United States are impacted
- Brief Reed v. Gilbert Summary
  - Town of Gilbert sign code provisions deemed in violation of the First Amendment because it treated noncommercial speech differently based on the content of the speech
  - Subject of the case was the regulation of noncommercial signs (e.g., political signs, ideological signs, and directional signs)
  - However, the Supreme Court required content neutrality for all signs without explicitly addressing previous Supreme Court rulings on commercial speech.

History of First Amendment in Sign Regulation

- The Court has upheld some total bans…
  - Of off-site commercial billboards in *Metromedia*
  - Of signs on public property in *Vincent*
- …while it has struck down others.
  - Of real estate lawn signs in *Linmark*
  - Of personal lawn signs in *Ladue*
- Exemptions are typically problematic.
  - Can lead to evaluations of content.
- The key question – is the ordinance content-based?
  - The answer determines the level of scrutiny the ordinance will face

Attachment 2

Levels of Scrutiny

- Strict Scrutiny
- Intermediate Scrutiny
- Rational Basis

Strict Scrutiny

- Most plaintiff-friendly test
- Almost always fatal to an ordinance
- Requires the City to show that the ordinance (1) furthers a “compelling government interest” and is (2) “narrowly tailored” to further the government interest.
- The presence of a less restrictive alternative to accomplish the government’s purpose is typically fatal to an ordinance under strict scrutiny.

Intermediate Scrutiny

- Closest thing to an “in-between” level of scrutiny.
- The City must show that the ordinance is (1) “narrowly tailored” to (2) serve a “significant government interest,” and (3) leaves open “ample alternative channels” for communication of the information.
- The “narrow tailoring” of this test is less strict.
  - The “least restrictive means” test does not apply.
- A “significant” government interest is easier to show than a “compelling” government interest.

Rational Basis Scrutiny

- Most government-friendly test.
- Ordinances almost always upheld.
- The challenger must show that the ordinance is “rationally related” to a “legitimate” government interest.
- Not used in First Amendment challenges.
  - Since the right to free speech is a “fundamental right,” it triggers one of the two heightened forms of scrutiny

Content Neutrality

- Again, this is important because it determines the level of scrutiny an ordinance will face in a First Amendment challenge.
- Content neutrality focuses on the subject matter of the sign.
  - Less obvious than viewpoint neutrality
  - Example – an ordinance banning all signs relating to abortion will violate this
- Viewpoint neutrality, a closely-related concept, focuses on the point of view advocated on the sign.
  - Much more obvious and easier to avoid violations
  - Example – an ordinance banning all anti-abortion signs will violate this
- Both will typically trigger strict scrutiny.

Time, Place and Manner Restrictions

- This is what an ordinance should aim for.
- Whether a sign is permitted, regardless of the actual content of the sign.
- Ordinances which regulate some of the following:
  - Size/Height
  - Locations
  - Maximum numbers
  - Lighting, etc.
- Be cautious – an otherwise acceptable time, place, and manner restriction can be ruined by exemptions based on content.

Commercial and Noncommercial Speech

- Commercial Speech
  - "proposes a commercial transaction" or "promotes intelligent market choices"
  - Is protected by First Amendment, but to a lesser degree
- Noncommercial Speech
  - Speech about politics, religion, philosophy, etc. (essentially any noncommercial ideas)
  - Receives highest degree of First Amendment protection
- Reed v. Gilbert involves noncommercial speech

On-Site and Off-Site Signs

- On-site Signs
  - Identify the use, or advertise products or services offered, at the location where the sign is displayed
- Off-site Signs
  - Identify a use, or advertise products or services offered, somewhere other than the location where the sign is located

Important Cases Preceding Reed v. Gilbert

- Virginia Pharmacy Board v. Virginia Citizens Consumer Council (1976)
  - Struck down a ban on advertising prescription drug prices – commercial speech
- Central Hudson v. Public Services Commission of New York (1980)
  - Struck down a ban on promotional advertising by electric utility companies – commercial speech – ban was more extensive than necessary
- Metromedia, Inc. v. City of San Diego (1981)
  - Struck down a ban on on-site noncommercial signs
- City of Ladue v. Gilleo (1994)
  - Ordinance did not leave sufficient alternative channels for communication – failed intermediate scrutiny

Reed v. Gilbert Background

- Town of Gilbert Sign Regulations:
  - Temporary Directional Signs Relating to a Qualifying Event (non-profit)
    - 6 ft. x 6 ft. sign allowed for 12 hours before and 1 hour after the event
    - No more than 4 signs on any property, with the consent of the property owner
  - Political Signs
    - Unlimited number of signs up to 32 sq. ft.
    - No time limit on placement before the election, and removal 10 days after the election
  - Ideological Signs
    - Unlimited number/time for signs up to 20 sq. ft.

Reed v. Gilbert – Lower Courts

- Church tried to work with City – to no avail ("no leniency")
- District Court denied Plaintiff's (Church's) motion for preliminary injunction
- The 9th Circuit affirmed – held that the ordinance was content neutral
- District Court then granted summary judgment to the City
- The 9th Circuit affirmed again
  - Held that the ordinance was content neutral
  - Because the ordinance was not adopted based on disagreement with the message conveyed on the signs.

Reed v. Gilbert – Supreme Court

- 9-0 on the judgment
- 6-3 Majority opinion written by Thomas (a relative rarity)
  - The important rule from this case: <u>If you need to read the message on a sign to determine how that sign is regulated, the ordinance is content based.</u>
  - Intent to regulate the content is a sufficient, but not necessary, condition of a content based ordinance.
  - In other words, it does not matter whether the City *intended* to favor or disfavor any certain ideas, topics, etc.
    - This is also fatal, but not required to trigger strict scrutiny.
  - The ordinance was thus subjected to strict scrutiny and struck down because it was not narrowly tailored to a compelling government interest.

Reed v. Gilbert – Supreme Court

- Thomas used the following example to critique Gilbert's 3 separate regulations for directional signs, political signs, and ideological signs:
  - A directional sign informing readers of the time and place of a book club to discuss John Locke's Two Treatises of Government is treated differently than:
  - A political sign expressing the view to vote for one of John Locke's followers in an upcoming election, which is treated differently than:
  - An ideological sign expressing a viewpoint rooted in Locke's theory of government.
- "Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination."
  - Because it requires an enforcement officer to read the sign.

Reed v. Gilbert – Supreme Court (Thomas)

- 6-3 (Thomas, Scalia, Roberts, Alito, Kennedy, and Sotomayor)
  - All content-based distinctions subject to strict scrutiny
  - Municipalities can still regulate:
    - Size
    - Building materials
    - Lighting
    - Moving parts
    - Portability
    - Postings on public property, provided it is even-handed and content-neutral
  - The following regulations might survive strict scrutiny if they are narrowly tailored to the challenges of protecting safety of pedestrians, drivers, and passengers:
    - Warning signs marking hazards on private property
    - Signs directing traffic
    - Street numbers associated with private houses

Reed v. Gilbert – Supreme Court (Thomas)

- 6-3 (Thomas, Scalia, Roberts, Alito, Kennedy, and Sotomayor)
  - Content-based distinctions, subject to strict scrutiny, include the following
    - Speaker-based signs – e.g., gas station signs, theater signs, farm market signs, etc.
    - Event-based signs – e.g., displayed while the property is for sale or rent, displayed while construction is taking place, etc.

Reed v. Gilbert – Supreme Court (Alito Concurrence)

- Alito, joined by Kennedy and Sotomayor
  - Rules that would not be content-based (includes conflicts with Thomas' list):
    - Sizes of signs
    - Locations in which signs can be placed (e.g., freestanding, building-mounted)
    - Lighted vs. unlighted signs
    - Signs with fixed messages vs. electronic messages that change
    - Placement of signs on private vs. public property
    - Placement of signs on commercial vs. residential property
    - **On-premises vs. off-premises signs**
    - Total number of signs allowed per mile of roadway
    - **Time restrictions on signs advertising a one-time event**
    - Governmental speech (promote safety, directional signs, signs indicating historic and scenic spots)

Reed v. Gilbert Supreme Court (Kagan Concurrence)

- Kagan, joined by Ginsburg and Breyer
- Concurred only with the judgment
- From Kagan:
  - "The consequence….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."
  - Advocates what she would call a "common-sense" approach which would review whether or not the ordinance was designed to favor or disfavor certain topics or viewpoints.
    - Essentially advocating for considering the government's intent.
  - "This Court may soon find itself a veritable Supreme Board of Sign Review."

Reed v. Gilbert – Supreme Court (Breyer Concurrence)

- Concurred only with the judgment
- Only part of the decision that cited *Central Hudson*
- From Breyer:
  - Thinks the content neutrality test is better thought of as a rule of thumb than an automatic trigger when it comes to strict scrutiny
  - Worries about regulation of commercial speech receiving strict scrutiny
  - Thinks that there are “many” justifiable examples of content based noncommercial regulations

Reed v. Gilbert – Key Remaining Questions

- Is commercial speech is still subject to intermediate scrutiny?
  - In *Reed,* the Supreme Court did not explicitly overturn prior decisions (Metromedia, Central Hudson, Virginia, etc.)?
- Is commercial speech now subject to strict scrutiny?
  - In *Reed,* the Supreme Court stated that <u>any</u> content-based distinction is subject to strict scrutiny.
- Can rules distinguishing between on-premise and off-premise signs be enforced?
- Can rules imposing time restrictions on signs advertising a one-time event be enforced?

What Communities Must Do Right Now

- Review Sign Regulations that are:
  - Content-Based – Based on the content or subject of the message
  - Speaker-Based – Based on the person, group, etc. delivering the message
  - Event-Based – Based on an event(s) taking place
- Work with Municipal Attorney to:
  - Review Sign Regulations
  - Strive for as much content-neutrality as possible
  - Determine Risk of Making Distinctions Between:
    - Off-Site vs. On-Site Signs
    - Commercial Speech vs. Noncommercial Speech
  - Enforcement (or Non-Enforcement) of Current Regulations
  - Consider severability clauses

Attachment 2

MAP Annual Conference
10 *Post Reed* Regulatory Principles

VITAL SIGNS, VIBRANT COMMUNITIES.

Kenny Peskin - International Sign Association

October 8, 2015

INTERNATIONAL SIGN ASSOCIATION

Issues

What issues are you dealing with in regards to complying with Reed?

Opening Thought

When updating your sign code *Post Reed*…
rather than consider signs as a land use

First and foremost consider signs as
"constitutionally protected free speech."

Challenges

"Sign Regulations is one of the more vexing tasks that a local government faces on a routine basis."*

The challenge when regulating signs is to balance:

- Myriad of legal issues-along with *Reed*
- Traffic safety
- Aesthetics/Policies
- Economic
- Business and Institutional needs
- Neighborhood Groups…

*PAS QuickNotes No. 18

Attachment 2

10 *Post Reed* Regulatory Principles

1. Interim-avoid content-based enforcement/permit review
2. Content Neutral
3. A sign ordinance should contain a substitution clause
4. A sign ordinance should contain a severability clause
5. Minimize categories-temporary signs
6. Minimize categories-other signs
7. State purpose/rationale in detail at start of code
8. Clearly define all critical words and phrases
9. Minimize exemptions
10. Simplify the regulatory scheme

1. Prior to Adoption of a New Sign Code

Interim - Avoid content-based enforcement/permit review

2. Ensure as Much Content-Neutrality as Possible

"Ensure that the ordinance is as content-neutral as possible, while accepting that, if the regulations are not 100% content-neutral, there will be some legal risk that otherwise could be avoided."

2. Ensure as Much Content-Neutrality as Possible

Sign Code Purpose, Spokane, WA

"To ensure that the constitutionally guaranteed right of free speech is protected"

Part of the Sign Code Purpose, Spokane, WA

http://www.spokanecity.org/services/documents/smc/?Section=17C.240.010

2. Ensure as Much Content-Neutrality as Possible

Content-neutral Administration of Land Use Reviews.

Notwithstanding any other provision of this chapter or of related standards referenced in this chapter, applications will be reviewed only with respect to sign structure or placement, or with reference to copy only to the extent of color or typeface and excluding any reference to message, category, subject, topic, or viewpoint.

http://www.spokanecity.org/services/documents/smc/?Section=17C.240.290

2. Ensure as Much Content-Neutrality as Possible

Content Neutral Temporary Sign Definition

"A sign bearing a message which is displayed before, during and after an event, to which the sign relates, and which is scheduled to take place at a specific time and place."

– Collier County, FL

3. Substitution Clause

- Required practice after *Metromedia, Inc. v. City of San Diego*
- Commercial speech cannot be favored over non-commercial speech; thus, non-commercial copy must be permitted on any lawful sign.
- Lakeville, MN Section 9-3-4: "Signs containing *noncommercial speech* are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."
- This statement, and similar statements, prevents inadvertent preferential treatment of commercial speech over non-commercial speech

4. Severability Clause

- A sign ordinance should contain a Severability Clause
- If a section of the sign code is found unlawful that can be removed without invalidating the entire code
- The Zoning Ordinance should have a general Severability Clause, and the sign section should reference the Severability Clause or duplicate it

5. Minimize Categories – Temporary Signs

Portable Signs. *

1. One portable sign which is six square feet or less in size may be displayed on a site per business (licensee) without any sign permit for a period not to exceed two consecutive days. Such signs are not to be counted in the maximum allowable sign area or number of signs limitations. Portable signs must comply with the following standards:

*Sparks, NV

5. Minimize Categories – Temporary Signs

Temporary signs.

1. **Permit Required; Duration.** At the discretion of the property owner and with the issuance of a temporary sign permit, each occupant of a building or the owner of a vacant site may display up to two (2) signs on a site for: per public street entrance, not to exceed eight (8) signs and restricted to a period as designated or specified on the Temporary Sign Permit application. Display of temporary signs shall be based on a calendar year between January to December and must be reapplied for annually.

5. Minimize Categories – Temporary Signs

Standards, requirements and limitations:

a. No more than two temporary signs in any combination shall be allowed for each site at any one time. The temporary sign permit application must be approved / signed by the site owner/manager. If a site has more than one occupant who wishes to put up signs at the same time, the site owner or manager must determine who can display the signs.

b. Temporary signs may not be placed in a prohibited sign area (Section 20.56.070).

c. Any temporary sign shall be located on private property and setback at a minimum of one (1) foot for every foot of height from the nearest travel lane. No temporary sign shall be higher than roof or parapet of the building.

d. The maximum size of a temporary sign shall be eighteen (18) square feet. Any sign over this size will require a sign permit and must

5. Minimize Categories – Temporary Signs

Additional signs during election periods.

A. **Election period.** An election period begins the first day of filing before and ends ten days after any election conducted under federal, state, county, or city laws or ordinances in which residents of Sparks are entitled to vote, including elections or votes regarding selection or recall of any federal, state, county or city officials, any ballot questions, referendum or advisory vote.

B. **Additional signs during election period.** Additional signs containing any message may be displayed on any site during an election period, subject to the following limitations, standards and requirements.

5. Minimize Categories – Temporary Signs

1. **Number and size.** There is no limitation on the number or size of additional signs. Signs which comply with this subsection do not count against the maximum allowable sign area, per Section 20.56.110, or the maximum number of signs allowed under Sections 20.56.150 or 20.56.170.

2. **No sign permit required.** A sign permit is not required for any election period sign which otherwise complies with this section. However, building permits may be required under Section 15.08 of the Sparks Municipal Code depending on the size and nature of the sign.

5. Minimize Categories – Temporary Signs

- Other options?

6. Minimize Categories – Other Signs

- Ground/monument
- Minor signs-under a certain sq. ft.
- Generalize

7. State Purpose/Rationale in Detail at Start of Code

- Provide as much rationale as possible
- Conduct research (if possible & budget allows) or cite ***reputable*** studies

8. Clearly Define All Critical Words and Phrases

Spokane Code

- Nonconforming Signs
  - "Sign maintenance, sign repair, and changing of permanent sign faces is allowed so long as **structural alterations** are not made and the sign is not increased in size."

- Definition of "structural alteration"
  - "Modification of a sign, sign structure or awning that affects size, shape, height, or sign location; changes in structural materials;
    or replacement of electrical components with other than comparable materials. The replacement of wood parts with metal parts, the replacement of incandescent bulbs with light emitting diodes (LED), or the addition of electronic elements to an non-electrified sign would all be structural alterations. Structural alteration does not include ordinary maintenance or repair, repainting an existing sign surface, including changes of message or image, exchanging painted and pasted or glued materials on painted wall signs, or exchanging display panels of a sign through release and closing of clips or other brackets."

9. Minimize Exemptions

- Phoenix code has 19 exemptions and numerous sign types exempt from permits
- Among these exemptions are barber poles:

"Signs which do not require a sign permit.

A barber pole, animated or not, which is appurtenant to the barber business and affixed directly to the wall of the exterior of the occupied space.

1. *Barber poles shall be no taller than 36" and no wider than 10".*
2. *Requests to deviate from these requirements are subject to obtaining a use permit in accordance with the provisions of Section 307."*

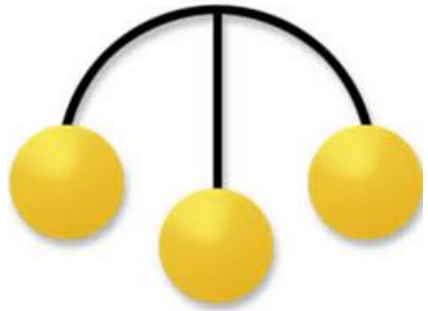
9. Minimize Exemptions

- Why does Phoenix exempt barber poles?
  - Barber poles not considered specific “advertisement”
  - Barber poles are considered a universal trademark

- In other words: “Barber poles are a standardized, well-understood, and distinctive trademark that has characterized & identified this profession across national and linguistic barriers for hundreds of years”

9. Minimize Exemptions

- **Example:**
  How is a barber pole different from?
  - Cadeceus
  - Mortar & Pestle
  - Comedy & Tragedy
  - 3 Gold Spheres



10. Simplify the Regulatory Scheme

- Look at overall approach simplify…simplify

- Remember that “innocuous justifications” favoring one type of sign are no longer a defense for inequitable treatment

Examples of Common Content-Based Regulations and Amendments to Consider

- Political Signs
- Ideological Signs
- Directional Signs
  - Temporary
  - Permanent
- Real Estate Signs
- Agricultural Sales Signs
- Gasoline Station Signs
- Time and Temperature Signs

For 100% Content-Neutrality

- Permit signage by regulating **non-content aspects** such as:
  - Number of signs
  - Area
  - Height
  - Placement
  - Lighting
  - Movement
  - Duration (permanent or temporary)
  - WITHOUT RESPECT TO CONTENT
- Make content-neutral distinctions based on zoning district, lot/building frontage, number of building units/tenants, etc.

"Safest" Option

- **100%** content-neutral
- No changes in number or area based on an **event (e.g., election season)**
- Require **maintenance or removal** of a sign that has deteriorated
- Be mindful of restrictions on **number of signs**, to avoid prohibiting:
  - Flags
  - Political Signs
  - Real Estate Signs
  - Garage Sale Signs
  - Other common temporary signs

Attachment 2

Example:

Political Signs

Example of a Content-Based Regulation: Political signs advertise candidates or proposals on a ballot and may not be placed 30 days prior to the election or 7 days after the election

Example:

Political Signs

- **Content-Neutral Amendment Option**
  - Permit **temporary signage** by regulating only **number of signs, area, height, and placement** at all times without respect to content.
- **Consider:** Whether to classify a "political sign" as:
  - A "temporary sign" without respect to content OR
  - A "non-commercial temporary sign"
    - Caution: Distinctions between "commercial signs" and "non-commercial signs" should be **s**upported by **a strong purpose statement and your municipal attorney**
- **Also Consider:** Whether to permit additional "temporary signage" or "non-commercial temporary signage" during **certain periods of time** surrounding an election.
  - Caution: Event-based regulations, if adopted, should be supported by a **strong purpose statement and your municipal attorney**

Example:

Ideological Signs

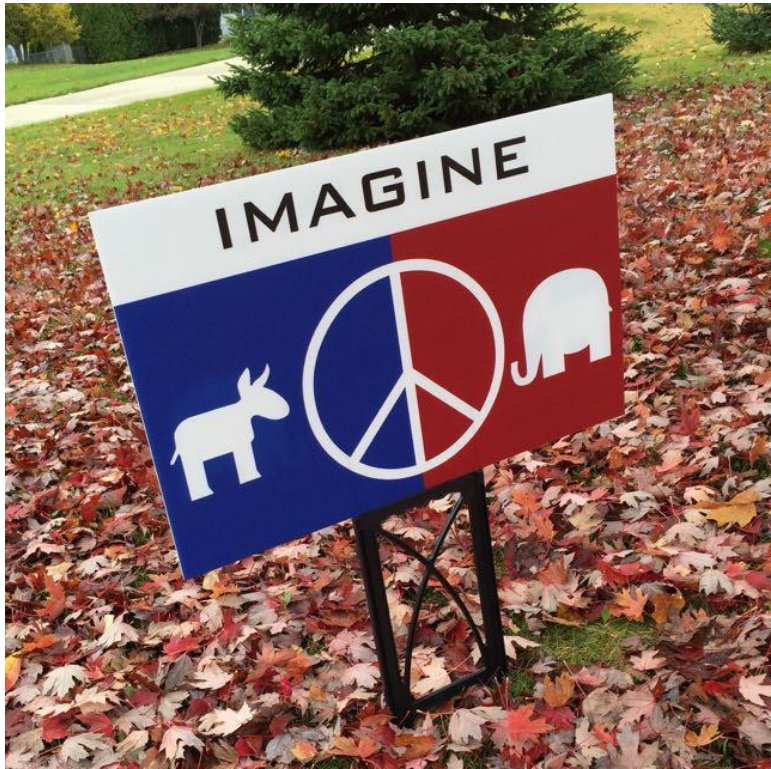
- **Example of a Content-Based Regulation:** Ideological signs advertise religious, civic, or opinion speech

Example:

Ideological Signs

- **Content-Neutral Amendment Option :** Like political signs, permit **temporary signage** by regulating only **number of signs, area, height, and placement** at all times without respect to content.

- **Consider:** Whether to classify an "ideological sign" as:
  - A "temporary sign" without respect to content OR
  - A "non-commercial temporary sign"
    - Caution: Distinctions between "commercial signs" and "non-commercial signs" should be **s**upported by **a strong purpose statement and your municipal attorney**



Example:

Temporary Directional Signs

- **Example of a Content-Based Regulation:** Signs advertising a temporary off-site event and permitted 24 hours before and 12 hours after an event.

Example:

Temporary Directional Signs

- **Content-Neutral Amendment Option: Temporary signage** regulated by **number of signs, area, height, and placement** without respect to content.

- **Consider:** Whether to classify an "off-site directional sign" as simply an example to "temporary sign" without respect to content or as an "off-site temporary sign"

  - Caution: Distinctions between "on-site signs" and "off-site signs" are content-based and should be supported by **a strong purpose statement and your municipal attorney**

Example:

Temporary Directional Signs

- **Also Consider:** Whether to permit additional "temporary signage" or "off-site temporary signage" during **certain periods of time**, with the consent of the property owner.
  - Caution: Content- and event-based regulations, if adopted, should be supported by **a strong purpose statement and your municipal attorney**

Example:

Permanent Directional Signs

- **Example of a Content-Based Regulation:** Signs that direct on-site traffic with text and arrows, without including commercial speech

Example:

Permanent Directional Signs

- **Content-Neutral Amendment Option:** Permit additional freestanding signage based on:
  - **Zoning and Use:** e.g., do not permit on single-family residential lots
  - **Area:** e.g, not more than 6 sq. ft.
  - **Height:** e.g., not more than 4 ft.
  - **Placement:** e.g., within 6 feet of a driveway or sidewalk
  - **Number:** e.g., 1 at each curb cut, 1 per 100 linear feet of driveway, etc.
  - **Content-Neutral:** Don't refer to them as "directional signs." Also, do not prohibit commercial speech.

Example:

Real Estate Signs

- **Example of a Content-Based Regulation:** Real estate signs advertise property for sale or lease on the site and may be placed only when the property is listed for sale or lease.

Example:

Real Estate Signs

- **Content-Neutral Amendment Option:** Permit **temporary signage** by regulating only number of signs, area, height, and placement at all times without respect to content.

- **Consider:** Whether to classify a "real estate sign" as simply an example of "temporary sign" without respect to content or as a "temporary on-site commercial sign"

    - Caution: Distinctions between "commercial signs" and "non-commercial signs" and distinctions between "on-site signs" and "off-site signs" are content-based and, if adopted, should be supported by **a strong purpose statement and your municipal attorney.**

- **Also Consider:** Whether to permit additional "temporary signage" or "temporary on-site commercial signage" during certain periods of time surrounding when a property is listed for sale or lease.

    - Caution: Event-based regulations, if adopted, should be supported by **a strong purpose statement and your municipal attorney**

Example:

Agricultural Sales Signs

- **Example of a Content-Based Regulation:** Agricultural signs advertise sites where produce is grown and sold and may be placed only produce is for sale.

Example:

Agricultural Sales Signs

- **Content-Neutral Amendment Option:** Permit temporary signage by regulating only **number of signs, area, height, and placement** at all times without respect to content. For temporary land uses, require a temporary land use permit under which additional temporary signage may be placed during the duration of the permit.

- **Consider:** Whether to classify a "agricultural sign" as simply an example of "temporary sign" without respect to content or as a "temporary on-site commercial sign" or "temporary off-site commercial sign"

  - Caution: Distinctions between "commercial signs" and "non-commercial signs" and distinctions between "on-site signs" and "off-site signs" are content-based and, if adopted, should be supported by **a strong purpose statement and your municipal attorney.**

Additional Considerations for Temporary Signs

- **Temporary Sign Types to Define and Regulate:**
  - Air-Activated Signs and Balloon Signs
  - Banner Signs
  - Blade Signs
  - Flags
  - Light Pole or Support Pole Signs
  - Moving Sign
  - People Sign
  - Portable Message Sign
  - Projected-Image Sign
  - Sandwich Board Sign
  - Sidewalk Signs
  - Vehicle Message Signs
  - Window Signs
  - Yard Signs

- ***Best Practices in Regulating Temporary Signs*, Signage Foundation, Inc.**

Changeable Message Signs and Electronic Message Centers (EMC's)

- **Common Fears**
  - They will be too bright
  - The animation, scrolling, and blinking will be distracting
  - They will degrade the character of the area
  - Businesses will make all of their signage EMC

Example:

Gasoline Sales Signs

- **Example of a Content-Based Regulation:** Signs advertising the price of fuel, with message changes only when the price of fuel changes.

Example:

Gasoline Sales Signs

- **Content-Neutral Amendment Option:** Permit changeable message signage for all uses in the zoning district without respect to content or specific land use. However, the size of the changeable message area, location, frequency of message changes, transition timing, and illumination can be regulated.

Example:

Time and Temperature Signs

- **Example of a Content-Based Regulation:** Signs displaying only the time and temperature of the area.

- **Content-Neutral Amendment Option:** Like with gas stations, permit changeable message signage for all uses in the zoning district without respect to content or specific land use. However, the size of the changeable message area, location, frequency of message changes, transition timing, and illumination can be regulated.

EMC's: Controlling Brightness

- **Footcandles** vs **NITs**
- ISA recommends a night-time brightness level of **0.3 foot candles** measured at an appropriate distance.
- Many light ordinance **prohibit any light trespass** at the property line or allow a maximum of **0.5 foot candles**.
- Maximum brightness generally **10,000 NITs** (always changing – avoid percentages)
- Night-time brightness generally **700 NITs** (less likely to change with technology)

Attachment 2

EMC's: Controlling Message Changes

- Set a minimum message change interval (e.g., 5 seconds, 10 seconds, 1 minute, etc.)
- Determine whether to require changes to be static or allow animation effects (scrolling, circle out, zooming, full motion video, etc.)
- Consider other changeable message signs in view

EMC's: Controlling General Location

- Consider permitting only in certain zoning districts (e.g., commercial, office, etc.)
- Consider prohibiting in special zoning districts or areas (e.g., downtown district, historic district, on lots that contain a historic building, etc.)
- Consider permitting within automobile-oriented areas (e.g., freeway interchanges)
- Consider prohibiting within a certain proximity of residential districts

EMC's: Controlling Site Location

- Consider limiting to a certain number per lot (e.g., 1 EMC per lot)
- Consider limiting area of a sign to be EMC (e.g., Not more than 50% of a permanent sign may be EMC)
- Consider prohibiting in on certain signs (e.g., EMC's shall be prohibited on wall signs)

Your Sign Ordinance: A General Outline

- **Purpose**
  Address traffic and pedestrian safety. Should address community aesthetics, protection of free speech, and prevention of blight and clutter.

- **Definitions**
  Be mindful of content restrictions.

- **Substitution Clause**
  Allow noncommercial speech on any lawful sign.

- **Prohibited Signs**
  Focus on signs types, with limited references to content (e.g., signs resembling a traffic control sign)

- **Severability Clause**
  Or reference existing Severability Clause in ordinance.

Your Sign Ordinance: A General Outline

- **Sign Measurement**
  Be descriptive of how the area and height are measured. Use graphics.

- **Temporary Sign Provisions**
  See previous slides. Focus on content-neutrality

- **Permitting**
  Distinguish signs requiring permits vs. those that are exempt, without regard to content.

- **District Standards**
  Zoning Districts (including overlay districts) should have standards for each sign type (wall signs, freestanding signs, temporary signs, etc.)

Last Thoughts

- Keep Educating Yourself
  - Presentations, Publications (see handout), Municipal Attorney, etc.
  - Know what the unknowns are.
  - After *Reed*, lower courts will interpret *Reed* based on their understanding of the Supreme Court's intent.
- Amend Your Ordinance
  - Review for content-based regulations
  - Strive for content-neutrality
  - Don't enforce sign regulations that are now unconstitutional
  - Consider the risk of having the following content-based distinctions:
    - Commercial Speech and Noncommercial Speech
    - On-Premise Speech and Off-Premise Speech

Any Questions?

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Attachment 3

Research Paper 15-285
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Sign Regulation after *Reed:* Suggestions for Coping with Legal Uncertainty

by

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Accepted Paper

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Attachment 3

Sign Regulation After *Reed*: Suggestions for Coping with Legal Uncertainty

Alan C. Weinstein[*] and Brian J. Connolly[**]

Regulating signs in a content neutral manner satisfying First Amendment limitations will be more difficult for local governments following the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert, Arizona*.[1] In *Reed*, all nine Supreme Court justices agreed that the Town of Gilbert's sign code violated the guarantee of freedom of speech in the First Amendment, although the justices arrived at that conclusion in different ways.

As this article will discuss, the opinion in *Reed* focused on the appropriate meaning of content neutrality as a central requirement of the First Amendment with respect to the regulation of noncommercial speech, such as signs. Since the early 1970s, the Supreme Court has required that regulations of speech must avoid any regulation of message or subject matter, under the theory that government control of the content of speech—like government control of viewpoint—equates to government control of ideas. In so holding, the Court has broadly classified content regulation as a suspect form of speech regulation, and has subjected so-called "content based" regulation to heightened judicial scrutiny and its concomitant burden on government defendants.

The *Reed* ruling, which resolves a long-standing split between federal circuit courts of appeal on the meaning of content neutrality, carries significant consequences for the validity of local sign regulations. Indeed, many local codes may become unconstitutional as a result of the

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[1] 576 U.S. ---, 135 S. Ct. 2218 (2015).

case's outcome. Sign litigation can be expensive and risky,[2] and it is likely to become more frequent after *Reed*.

This article explores the *Reed* decision and its implications for local government sign regulation. Section I reviews the *Reed* case, with an overview of the context of the decision, the procedural history of the case, and the Supreme Court's decision—including the "mechanical" majority opinion and three divergent concurrences. Section II discusses several of the unanswered questions following *Reed*, identifying both doctrinal inconsistencies and practical problems. Finally, Section III provides practical guidance regarding post-*Reed* sign code drafting and enforcement for local governments, their lawyers and planners, who are tasked with the day-to-day regulation of outdoor signage and advertising.

I. *Reed v. Town of Gilbert*: Facts and Court's Rulings

A. Factual background

Reed was the first U.S. Supreme Court case to address local sign regulations since *City of Ladue v. Gilleo*,[3] decided in 1994**.** *Reed* addressed a challenge to Gilbert's sign code, which contained a general requirement that all signs obtain a permit, but exempting several categories of signs from that requirement.[4] These provisions treated certain categories of exempted signs differently. As with many other sign codes around the United States, Gilbert's sign code recited traffic safety and aesthetics as the reasons for its existence.

Three of the exempted categories were at issue in *Reed*: "political signs," "ideological signs," and "temporary directional signs."[5] While the town did not *prohibit* any of these categories of speech, each category was treated *differently* by the sign code. The Town's

[2] Although not resolved as of this writing, the plaintiff in Reed had filed a claim for attorney**'s** fees totaling $1.023 million.
[3] 512 U.S. 43 (1994).
[4] *Reed*, 135 S. Ct. at 2224.
[5] Gilbert, Ariz. Land Development Code, ch. 1 §§ 4.402(I), 4.402(J) & 4.402(P) (as amended).

regulations of political signs, defined as "temporary sign[s] designed to influence the outcome of an election called by a public body," allowed such signs to have a sign area of up to 16 square feet on residential property and up to 32 square feet on nonresidential property, and such signs could be displayed beginning up to 60 days before a primary election and ending up to 15 days following a general election.[6] Political signs were allowed to be placed in public right-of-ways, with any number of signs permitted to be posted.[7]

Temporary directional signs were defined as a "[t]emporary [s]ign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'"[8] A "qualifying event" was any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[9] Temporary directional signs could not exceed six square feet in sign area, could be placed on private property with the consent of the owner or in the public right-of-way, and no more than four signs could be placed on a single parcel of private property at once. Additionally, temporary directional signs could be displayed for no more than 12 hours before the qualifying event, and no more than one hour after the qualifying event. The date and time of the qualifying event were required to be displayed on each sign.

Finally, "ideological signs" were defined as 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

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[6] *Id*. at 2224. Note that Arizona has a statute that prohibits local governments from removing certain political signs placed in connection with an election. A.R.S. § 16-1019(C). At oral argument in *Reed*, this statute was raised by attorneys for the town as a defense to the town's facially content based sign code. Reed v. Town of Gilbert, No. 13-502, Tr. at 40:19-42:7. While the effect of this statute was hotly debated during the pendency of the case, the authors are of the position that this statute is not violative of the First Amendment, nor does it require localities in Arizona to enact code provisions violative of the First Amendment.

[7] GILBERT, ARIZ. LAND DEVELOPMENT CODE § 4.402(I) (2014).

[8] *Id.* at 2225.

[9] *Id.*

owned or required by a governmental agency."[10] Ideological signs could be as large as 20 square feet and could be placed in any zoning district without limitations on display time.[11]

Good News Community Church, of which Clyde Reed is pastor, lacked a permanent church structure and instead rented space in local community facilities, such as schools, for Sunday services. In order to inform passersby of its services and the locations thereof, Good News and Pastor Reed placed temporary signs advertising religious services throughout the community. The signs were typically posted for a period of approximately 24 hours. Because the time of the posting exceeded the time limits provided for temporary directional signs, Gilbert attempted in July 2005 to enforce its sign code against the church's signs, and town officials removed at least one of the church's signs. After receiving the advisory notice that it was in violation of the code, the church reduced the number of signs it placed and its signs' display time, but friction with Gilbert persisted.

B. **Court Proceedings**

Having failed to reconcile its differences with the town, in March 2008, Reed and the church filed an action in federal district court claiming violations of the Free Speech Clause and Free Exercise clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as related state law violations.[12] Good News's claims centered on the contention that the town's sign code was *content based*—that is, the code's distinctions between political signs, ideological signs, and temporary event signs, as well as some other distinctions,

[10] *Id*. at 2224.

[11] The Sign Code was amended twice during the pendency of the *Reed* litigation. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Directional Signs." The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. In 2008, the Town redefined the category as "Temporary Directional Signs Related to a Qualifying Event," and it expanded the time limit to 12 hours before and 1 hour after the "qualifying event." In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Reed*, 135 S. Ct. at 2225, fn. 4, citations omitted.

[12] Only the Free Speech Clause claims were at issue on appeal.

impermissibly discriminated between messages and speakers based on the content of the regulated speech or speaker.

The district court denied the church's motion for a preliminary injunction against enforcement of the sign code. On appeal, the Ninth Circuit Court of Appeals unanimously affirmed,[13] finding the temporary event sign regulations content neutral as applied. However, the appeals court remanded to the district court on the question of whether the town impermissibly distinguished between forms of noncommercial speech on the basis of content.[14]

On remand, the district court granted summary judgment in favor of the town, holding the town's exemptions from permitting content neutral, despite the fact that the code regulated on the basis of message category.[15] The Ninth Circuit again affirmed, this time in a 2-1 decision,[16] with the majority finding the code's distinctions between temporary event signs, political signs, and ideological signs content neutral. In so holding, the Ninth Circuit found that the town "did not adopt its regulation of speech because it disagreed with the message conveyed" and the town's regulatory interests were unrelated to the content of the signs being regulated.[17] Applying intermediate scrutiny to the content neutral exemptions, the majority determined that the exemptions were narrowly-tailored to advance the city's substantial government interests in aesthetics and traffic safety, and found the code left the church with ample alternative avenues of communication.[18]

C. **Circuit Split**

[13] Reed v. Town of Gilbert, 587 F.3d 966 (9th Cir. 2009) (*Reed I*).
[14] *Id.*
[15] Reed v. Town of Gilbert, 832 F. Supp. 2d 1070 (D. Ariz. 2011).
[16] Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013) (*Reed II*).
[17] *Reed II,* 707 F.3d at 1071-72.
[18] *Id*. at 1074-76.

The *Reed II* majority relied principally on the government's regulatory *purpose* in determining that the town's sign regulations were content neutral, specifically rejecting the conclusion that the Gilbert sign code was content based because it discriminated on its face between categories of noncommercial speech.[19] Despite the fact that the sign code expressly created three separate categories for political, ideological, and temporary event signs, and treated each of these categories differently—regulation based on content in the literal sense—the Ninth Circuit's decision relied on the absence of an invidious, discriminatory governmental purpose in upholding the code.

This decision perpetuated a split between the federal circuit courts of appeal regarding the extent to which government may distinguish between speech and/or signs based on category or function.[20] *Reed II* was in line with prior Ninth Circuit decisions[21] and paralleled similar decisions in other federal circuit courts of appeal, including the Third,[22] Fourth,[23] Sixth,[24] and

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[19] *Id*. at 1071-72.

[20] Brian J. Connolly, *Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation*, 2 MICH. J. ENVTL & ADMIN. L. 185, 197 (2012).

[21] G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006) (finding sign regulation to be content-neutral where it does not favor speech based on the idea expressed); Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798, 803-04 (9th Cir. 2007) (upholding sign code with various arguably content-based exceptions). Earlier decisions of the Ninth Circuit applied a more strict approach to content neutrality, *see, e.g.*, Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 820 (9th Cir. 1996); Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988), but these decisions were called into question by later Ninth Circuit cases. This transition is evident in the Ninth Circuit's 1998 decision of Foti v. City of Menlo Park, which found portions of the municipal code in question content based, but applied a purpose-based test for content neutrality. 146 F.3d 629, 636, 638 (9th Cir. 1998).

[22] *See, e.g.*, Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1008, 178 L. Ed. 2d 828 (2011) (finding that a consideration of a sign's content does not by itself make a regulation content-based); *see also*, Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994) (finding that a regulation may contain content-based exceptions if the content exempted is significantly related to the particular area in which the sign is viewed because it either identifies the property on which the sign sits or is aimed at an audience, such as motorists on a highway, that traverses the area).

[23] *See, e.g.*, Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013) (add parenthetical); Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359 (4th Cir. 2012) (rejecting claim that code is content-based when it requires a general inquiry into the nature of a display and the relationship to the business on which it is displayed to determine if a display is a ''business sign'' rather than a ''non-business-related mural").

[24] *See, e.g.,* H.D.V.-GREEKTOWN, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) (rejecting an ''overly narrow'' interpretation of content-neutrality and noting that nothing in the record before it indicated that the distinctions between various types of signs reflected a preference for one type of speech over another).

Seventh[25] circuits. These courts had all determined that sign codes differentiating among sign types based on broad categories or sign function—*i.e.*, political, real estate, construction, etc.—did not contain the type of content discrimination prohibited by the First Amendment. Under this "functional" or "purposive" approach to content neutrality, a sign code would be held content based only if the local government's intent was to control content; this approach was highly favorable to government defendants.

Two other circuits, the Eighth[26] and Eleventh,[27] had previously taken a more strict or "absolutist" approach to content neutrality that demanded that sign regulations should not in any way differentiate among signs based upon the message displayed. Under this approach, if a code enforcement officer was required to read the message displayed on a sign to properly enforce the code, the sign code should be found content based.[28] Thus, for example, a sign code that distinguished between political signs and event signs on the basis that the former contains a campaign message and the latter advertises a particular event would be content based and thus subject to strict scrutiny which would likely prove constitutionally fatal.[29] The lone dissenting judge in *Reed II* argued, in line with these decisions, that "Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs

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[25] *See, e.g.*, American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651, 184 L. Ed. 2d 459 (2012) (rejecting notion that a law is content-based merely because a court must look at the content of an oral or written statement to determine if the law applies).

[26] *See, e.g.*, Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) (finding that code exemption for any sign display meeting the definition of a "mural" was impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction"), *citing* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993).

[27] *See, e.g.*, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (finding exemptions from sign code based on content—rather than the time, place, or manner—of the message discriminates against certain types of speech based on content and thus are content-based).

[28] For this reason, the strict approach has often been called the "need to read" approach.

[29] This mechanical sequence for reviewing speech regulations was clearly identified by Justice O'Connor in her concurrence in *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring), and prior to *Reed*, had been utilized by most courts reviewing challenges to sign regulations.

promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed."[30]

The federal appeals courts were not alone in their confusion regarding the meaning of content neutrality as applied in the context of sign codes. Beginning over forty years ago, the Supreme Court began developing two separate lines of cases regarding content neutrality. One approach took a rather simplistic yet strict view of the doctrine, while the other advocated a more functional approach that better accommodated government regulations of speech. The strict approach originated with the Court's first express announcement of the content neutrality doctrine in *Police Department of Chicago v. Mosley*, decided in 1972, where the Court stated, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[31] In making that declaration, the Court invalidated a Chicago ordinance which prohibited all picketing in areas near schools, but exempted "peaceful labor picketing" from the general ban.[32] Nine years later, in *Metromedia, Inc. v. City of San Diego*, the Court struck down a municipal ordinance that distinguished between forms of noncommercial speech displayed on billboards, and in doing so made similarly sweeping statements regarding content neutrality.[33] And in 1984, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, the Court suggested in dicta that

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[30] *Reed II,* 707 F.3d at 1080. (Watford, J., dissenting).

[31] 408 U.S. 92, 95 (1972). The inherent problem with the Chicago ordinance was, for example, that labor advocates could engage in picketing outside of schools while civil rights advocates or Vietnam War protestors could not do so. *Id.*

[32] *Id.* at 94.

[33] 453 U.S. 490, 515 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.'") (internal citations omitted). The San Diego ordinance in question exempted from the ban, "government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and '[t]emporary political campaign signs.'" *Id.* at 494-95.

differential treatment of political speech as compared with other types of noncommercial speech could have potentially created content neutrality problems for an otherwise content neutral ordinance banning the posting of private signs on light posts in the public right-of-way.[34] These cases all stated or implied that categorization of speech on the basis of even broad subject matter should be condemned under the First Amendment.

The Supreme Court's decisions in *Mosley*, *Metromedia*, and *Taxpayers for Vincent* contrasted with another line of Supreme Court cases focusing on the government's stated purpose for the challenged regulation. *Ward v. Rock Against Racism,*[35] decided in 1989, is one of the leading cases adopting this approach. In *Ward*, the Court upheld a requirement that performers using a public bandshell utilize municipal sound amplification equipment and personnel for their performances. The regulation was intended to control noise emanating from the bandshell.[36] In finding the regulation content neutral, the Court stated,

> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."[37]

The Court's focus on governmental purpose as the determinant of whether a regulation is content neutral is also evident in the line of cases addressing governmental regulation of protest activities near abortion clinics. In *Hill v. Colorado*, the Court upheld a state law which made it

[34] 466 U.S. 789, 816 (1984) (noting that a "political speech" exception to a general ban which did not apply equally to other forms of noncommercial speech could be problematic under the content neutrality doctrine).
[35] 491 U.S. 781 (1989).
[36] *Id.* at 787.
[37] *Id*. at 791 (internal citations omitted).

"unlawful within . . . regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. . . .'"[38] In so doing, the Court specifically rejected the absolutist approach while noting the proliferation of laws requiring enforcement officials to review communicative content in order to determine the law's applicability to that content.[39] The approach adopted by *Ward* and *Hill*, cited frequently by courts adopting the functional approach advocated in *Reed II*, differs substantially from the approach advocated by *Mosley* and its progeny.

The Court's most immediate pre-*Reed* statement on content neutrality appeared to continue the *Ward-Hill* purposive approach to content neutrality. In its 2014 ruling in *McCullen v. Coakley*, the Court invalidated a Massachusetts law prohibiting certain expressive activities within a specified distance of a "reproductive health care facility"—abortion clinics were at the center of the law's purview—but not before a majority of the Court found the law to be content neutral.[40] While acknowledging that the law in question had a differential effect on speech surrounding abortion clinics, Chief Justice Roberts, writing for the majority, found that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[41] Moreover, the Court repeated the *Ward* test for determining content neutrality, and in finding the Massachusetts law content neutral, relied on the law's stated intent to advance the interests of public safety, access to health care, and unobstructed use

[38] 530 U.S. 703, 707 (2000), citing Colo. Rev. Stat. § 18-9-122(3) (1999). The Colorado statute at issue in *Hill* was emblematic of laws enacted by states and local governments to limit the extent to which protesters could inhibit access to abortion clinics, and; judges have noted the unique political dynamics involved in the abortion clinic cases. *Id.* at 741 (Scalia, J., dissenting).
[39] *Id.* at 721, 722 ("[W]e have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.")
[40] 134 S. Ct. 2518, 2531 (2014).
[41] *Id.*

of public sidewalks and roads.[42] The approach to content neutrality set forth in ***Coakley*** ~~*McCullen*~~ continued the more lenient approach to content neutrality in sign cases that favored local governments and appeared to reject the more plaintiff-friendly strict approach beginning with *Mosley*.

Recognizing this split among the courts of appeals, and perhaps in recognition of the inconsistencies in its own doctrine, the Supreme Court granted *certiorari* review in *Reed*.[43] In the Supreme Court's *Reed* decision, all nine justices agreed that the town's sign code was unconstitutional, but differed as to why that was so**.**

D. **Majority Opinion**

The *Reed* majority opinion was authored by Justice Clarence Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito and Sotomayor. While not explicitly acknowledging the Circuit split, the Court resolved it in favor of the absolutist "need to read" position: a sign regulation that "on its face" considers the message on a sign to determine how it will be regulated is content based.[44] As the Court said, the "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[45] Thus, if a sign code makes *any* distinctions based on the message of the speech, the sign code is content based. Further, the majority held that regulations of speech must be both *facially* content neutral and content neutral in their *purpose*. According to the majority, only after determining whether a sign code is neutral on its face should a court inquire as to whether the law is neutral in its justification.

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[42] *Id.* at
[43] 573 U.S. ---, 134 S. Ct. 2900, 189 L.Ed.2d 854 (2014).
[44] *Reed*, 135 S. Ct. at 2227.
[45] *Id*.

Justice Thomas's opinion dismissed several theories the *Reed II* majority had offered to justify its viewing the Gilbert code as content neutral. The first theory claimed that a sign regulation is content neutral so long as it was not adopted based on disagreement with the message conveyed and the justification for the regulation was "unrelated to the content of the sign."[46] Justice Thomas refuted that theory on the ground that it "skips the crucial first step in the content-neutrality analysis: determining whether the law is content-neutral on its face." Indeed, the majority opinion expresses concern about the possibility that government officials might explicitly justify regulations or actions in content neutral terms, while still writing such regulations or taking such actions with an underlying censorial motive.[47] His opinion states: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech."[48]

Next, the majority addressed the Ninth Circuit's finding that the Gilbert code was content neutral "because it 'does not mention any idea or viewpoint, let alone single one out for differential treatment.'"[49] Justice Thomas dismissed that finding, recognizing that it conflated two distinct First Amendment limits on regulation of speech—government discrimination among viewpoints and government discrimination as to content—and noting that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[50]

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[46] *Id.,* citing *Reed II,* 707 F.3d at 1071-72.
[47] *Id.* at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them.").
[48] *Id.*at 2228, citing *Discovery Network*, 507 U.S. at 429.
[49] *Id*. at 2229, quoting *Reed I*, 587 F.3d at 977.
[50] *Id.*at 2229-30.

Finally, the majority addressed the Ninth Circuit's statement that the Gilbert code was content neutral because it made distinctions based on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'"[51] After noting that this claim was factually incorrect,[52] Justice Thomas argued that the claim was legally incorrect as well. The problem with "speaker-based" distinctions, in the majority's view, is that they "are all too often simply a means to control content."[53] Thus, because laws containing a speaker preference may reflect a content preference, they must be subject to strict scrutiny.[54]

In response to the finding that "event-based" distinctions were content neutral—a "novel theory," according to Justice Thomas—the majority found that "[a] regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea."[55] Acknowledging that a sign code that made event based distinctions may be "a perfectly rational way to regulate signs," the majority stated that "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck

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[51] *Id*. at 2230, quoting *Reed II*, 707 F.3d at 1069.

[52] *Id.* at 2230-31. Justice Thomas noted that the code was not speaker-based because the restrictions for ideological, political and temporary event signs applied equally regardless of who sponsored the signs. He then argued that the code was not "event based" because citizens could not put up a sign on any topic prior to an election, but rather were limited to signs that were judged to have "political" or "ideological" content. Because those provisions were content-based on their face, they could not escape strict scrutiny merely because an event, such as an election, was involved.

[53] *Id.* at 2230, quoting Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[54] The authors of this article struggled to understand the Court's statement that "we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference,'" *Reed*, 135 S. Ct. at 2230, *quoting* Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 658 (1994). It is not clear from the Court's statement whether the majority believes that *all* speaker-based regulations should be subject to strict scrutiny, or if there is an interim analysis that must occur in order to determine that the "legislature's speaker preference reflects a content preference." *Reed*, 135 S. Ct. at 2230. We note that the Court, in *Turner Broadcasting*, stated expressly that not "all speaker-partial laws are presumed invalid," *Turner*, 512 U.S. at 658, and indeed, the Court in Turner rejected an argument that a speaker based law should be subjected to strict scrutiny. Neither *Turner* nor *Reed* provides any useful guidance as to what indicators might be used to determine that the legislature's speaker preference reflects a content preference. See further analysis below in Section II.F.

[55] *Id.* at 2231.

down because of their content-based nature.'"[56] This discussion of event based signage concentrated on the Gilbert code's allowance for signs with political messages only before and during election periods, and the code's prescribed language for other event based signage;[57] however, the opinion is not limited to that circumstance. For example, a sign code allowing a temporary sign with the message "Grand Opening" but prohibiting one with any other message (e.g., "Going Out of Business") could be seen as event based and thus content based.

Having found the challenged provisions of the Gilbert code to be content based, Justice Thomas next addressed whether the town could satisfy strict scrutiny, that is, demonstrating that its distinctions among the various types of signs furthered a compelling governmental interest and was narrowly tailored to achieve that interest. According to the majority, it could not.[58]

The majority opinion concluded by briefly noting that the town's current code regulates many aspects of signs that have nothing to do with the sign's message,[59] and that the town had failed to tailor its regulations to the regulatory interests—traffic safety and aesthetics—identified in the code.[60] The majority did note, indeed somewhat curiously, that a sign ordinance that was narrowly tailored to allow certain signs that "may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety" well might survive strict scrutiny.[61] The majority opinion did not address whether the town's asserted governmental interests—traffic

[56] *Id*. at 2231, quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).
[57] *Reed*, 135 S. Ct. at 2231.
[58] *Reed*, 135 S.Ct. at 2231-32. The town claimed the distinctions served interests in aesthetics and traffic safety. Justice Thomas assumed for the sake of argument that these are compelling interests, but found that the code's distinctions were underinclusive and thus not narrowly tailored.
[59] *Id*. at 2232, noting, as examples, regulating "size, building materials, lighting, moving parts and portability."
[60] *Id*. at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.").
[61] *Id*.at 2232.

safety and aesthetics—constitute compelling governmental interests for purposes of strict scrutiny analysis.[62]

Thus, because Gilbert's sign code differentiated "on its face" between political, ideological, and event signs based on the message of the sign, the code was found content based. Upon making that finding, the majority applied *strict scrutiny*, the most demanding form of constitutional review, requiring the government to show that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[63] As exemplified by *Reed*, regulations subjected to strict scrutiny rarely survive a court's review. Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement.

E. **Concurrences**

Three concurring opinions were filed in the case. Justice Samuel Alito filed a concurrence, joined by Justices Kennedy and Sotomayor, in which he agreed with the majority's ruling, but listed nine forms of sign regulation that he would find content neutral. In two concurring opinions, one by Justice Stephen Breyer and the other by Justice Elena Kagan, three justices concurred in the judgment but disagreed with the majority's application of strict scrutiny to the Gilbert code.

Justice Alito's opinion further identified the regulations that, in his view, should be considered content neutral. While disclaiming he was providing "anything like a comprehensive list," Justice Alito noted "some rules that would not be content based."[64] These included:

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[62] *Id*. at 2231.
[63] *Id*. at 2231 (citation omitted).
[64] *Id*. at 2233 (Alito, J., concurring).

> Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
>
> Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
>
> Rules distinguishing between lighted and unlighted signs.
>
> Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
>
> Rules that distinguish between the placement of signs on private and public property.
>
> Rules distinguishing between the placement of signs on commercial and residential property.
>
> Rules distinguishing between on-premises and off-premises signs.
>
> Rules restricting the total number of signs allowed per mile of roadway.
>
> Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.[65]

Justice Alito further noted that "government entities may also erect their own signs consistent with the principles that allow government speech"[66] and claimed that "[p]roperly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."[67]

In his list of acceptable sign regulations, Justice Alito approved of two rules that may conflict with Justice Thomas's "on its face" language. Alito claimed that rules "distinguishing between on-premises and off-premises signs" and rules "imposing time restrictions on signs

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[65] *Id.*
[66] *Id.* at 2233, arguing that this included "all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots."
[67] *Id.* at 2233-34.

advertising a one-time event" would be content neutral.[68] But rules regarding "signs advertising a one-time event" clearly are facially content based, as Justice Kagan noted in her opinion concurring in the judgment,[69] and the same claim could be made regarding the distinction between onsite and offsite message commonly seen in local sign codes and state highway advertising laws.[70] Neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and non-commercial signs, a point raised by Justice Breyer in his opinion concurring in the judgment.[71]

Justices Breyer and Kagan, while concurring in the judgment, wrote opinions critical of Justice Thomas's absolute rule about content-neutrality. Justice Breyer argued that because "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny' would permit."[72] While acknowledging that strict scrutiny "sometimes makes perfect sense," he argued that regulations that engage in content discrimination "cannot and should not *always* trigger strict scrutiny."[73] He also expressed concern that courts, forced to apply strict scrutiny "to all sorts of justifiable

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[68] On-site, also called "on-premises," signage generally refers to signage where the message relates to an activity occurring on the same premises as the sign, whereas off-site or off-premises signage refers to signage advertising an activity not located on a common property with the sign. As we discuss in greater detail *infra* in Section II.C, the onsite-offsite distinction with respect to commercial speech was upheld in *Metromedia v. City of San Diego*, 453 U.S. 490, 511-12 (1981), even though the Court rejected the notion that onsite commercial speech could be permitted to the exclusion of necessarily offsite noncommercial speech. *Id.* at 513. This problem is further illustrated below.

[69] *Id.* at 2237, fn *. This is, of course, only the case if the code defines event based signage as the Gilbert code did.

[70] *See* discussion in Section II C *infra*.

[71] *Id.* at 2235.

[72] *Id.* at 2234 (Breyer, J., concurring).

[73] *Id*. at 2235, emphasis in original. Justice Breyer's opinion did not acknowledge that its approach—not requiring strict scrutiny for content based laws—conflicts with the broadly-accepted rule that content based laws should be subject to strict scrutiny analysis. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014); City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.").

government regulations," might water down the approach in a way that "will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force."[74] In his view, the "better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of the justification."[75] Justice Breyer would "use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives."[76] To illustrate his concern regarding the application of strict scrutiny to *all* content based laws, Justice Breyer lists several laws—federal securities regulations, federal energy consumption labeling requirements, prescription drug labeling, doctor-patient confidentiality laws, and income tax statement disclosure laws—which contain certain elements of content regulation and which might be suspect under the majority's sweeping statements.[77]

Justice Kagan's opinion, joined by Justices Breyer and Ginsburg, expressed great concern that the majority's absolute rule would, as Justice Thomas himself acknowledged, lead to "entirely reasonable" sign laws being struck down.[78] In her view, there was no need for the majority to discuss strict scrutiny at all because the code provisions at issue did not pass

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[74] *Id.*
[75] *Id.*
[76] *Id. at* 2235-36. Justice Breyer explained that answering that question "requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so." *Id*. at 2236.
[77] *Id*. at 2235.
[78] *Id*. at 2236, citing Justice Thomas, at 2231.

"intermediate scrutiny, or even the laugh test."[79] More basically, she argues that strict scrutiny of many content based provisions in sign regulations is not needed because such provisions do not implicate the core First Amendment concerns that justify the application of strict scrutiny.[80] Justices Breyer and Kagan would each have applied intermediate scrutiny, a less demanding constitutional standard that requires the government to demonstrate that a speech regulation is narrowly tailored to achieve a significant (as opposed to compelling) governmental interest[81] and leaves open ample alternative avenues of communication. Both Justices Breyer and Kagan found the Gilbert sign code unconstitutional, however, because its sign categories were not tailored to the code's stated regulatory purposes. As the majority found, the distinctions between temporary event signs, political signs, and ideological signs did nothing to further the government's goal of beautifying the community and reducing traffic hazards.

F. **Clarifying Elements of the Decision**

Reed provides four points of clarification.

First, the decision reaffirmed the principle that content based regulations are subject to strict scrutiny and presumptively unconstitutional. To the chagrin of Justices Breyer and Kagan, the *Reed* majority applied a now-familiar mechanical approach to content neutrality analysis in which the Court first asked the question, "is the law content based?" Answering the first question in the affirmative, the *Reed* Court then proceeded to apply strict scrutiny, asking the

[79] *Id*. at 2239. There is some support for the argument that the Court's entire discussion of content neutrality in the *Reed* majority opinion is *dicta*, given that the majority and the concurrences come out in the same place: that the Gilbert code failed the narrow tailoring requirement of both intermediate and strict scrutiny. *See* McCutcheon v. Federal Election Comm'n, 572 U.S. ___, 134 S. Ct. 1434, 1446 (2014). In *McCullen*, Justice Scalia's concurrence chided the majority opinion, authored by Chief Justice Roberts, for undertaking the content neutrality analysis when the decision ultimately concluded that the Massachusetts law was not narrowly tailored. 134 S. Ct. at 2541-42 (Scalia, J., concurring) (referring to the Court's discussion of content neutrality as "seven pages of the purest dicta").
[80] *Id*. at 2237.
[81] Traffic safety and aesthetics, for example, are significant governmental interests; *see, e.g*., Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984).

question, "is the regulation narrowly tailored to a compelling governmental interest?" This mechanical approach, first articulated in Justice O'Connor's concurring opinion in *Gilleo*,[82] was carried forward by the majority in *McCullen*,[83] and now appears to be the conclusive method for analyzing speech regulations for content neutrality purposes, although questions remain about its application to regulation of offsite signs and adult entertainment businesses.[84]

Second, the majority opinion resolved the prior split between the circuit courts of appeal by requiring *both* facial content neutrality and a neutral purpose for sign regulations, and determined that a regulation's purpose is irrelevant if the regulation is not neutral on its face. The majority opinion in *Reed* calls into question hundreds of lower court decisions that relied on the Court's statements in *Ward* and *Hill* in upholding municipal sign regulations that regulated signs according to category or function but which relied upon clearly-articulated content neutral purpose statements and justifications in so doing.[85] At the same time, the *Reed* decision affirms the lower courts that took the strict or absolutist view of content neutrality and that placed less reliance on governmental purpose in favor of scrutinizing the facial neutrality of sign regulations. Courts are now required to undertake a two-step content neutrality analysis to review speech regulations for both facial neutrality and purposive neutrality.

Third, the Court determined that categorical signs, such as directional signs, real estate signs, construction signs, etc., are content based where they are defined by aspects of the signs' message. Many local sign codes currently define these signs by reference to the content of the sign. For example, "real estate sign" might be defined as "a sign advertising for sale the property on which the sign is located." Similarly, local codes have often regulated each of these sign

[82] 512 U.S. at 59.
[83] 134 S. Ct. at 2530.
[84] *See* discussion in Sections II C & E *infra*.
[85] Cahaly v. Larosa, --- F.3d ---, 2015 WL 4646922, at *4 (4th Cir. 2015).

types differently, even if the code's stated or implied purpose in doing so was merely a recognition of the different functions of, and thus need for, these types of signs. To the extent local codes define these signs according to the message stated on the face of the sign, *Reed* concludes that such regulations are presumptively unconstitutional. As we discuss below, however, there may be several options for regulating these signs in a content neutral manner.

Fourth, the Court stated that regulations purporting to be "speaker based," that is, the regulation applies to certain speakers but not others, may be found content based and subjected to strict scrutiny. That is, regulations that distinguish between speakers are neither by necessity content neutral, nor are they automatically excused from content neutrality analysis, although they may be permissible. First Amendment doctrine regarding speaker based regulation is incredibly murky, so while the *Reed* majority's statements on the matter may provide some clarification, questions regarding speaker based regulation remain and are discussed further below.

As for unanswered questions following *Reed*, there are many and we explore them in the following section.

II. Remaining Questions After *Reed*

While there are four points of clarification following *Reed*, there are several questions that arise as a result of the decision. As we have authored this article in the immediate aftermath of the decision, our list of questions represents the authors' initial reactions to some of the issues raised by the decision.

A. Regulations of speech by category and function—where do they stand?

One of the most immediate questions following *Reed* is whether regulation of signs by category or function continues to be permissible. Virtually all local sign codes contain some

element of categorical or functional sign regulation that, if rendered unconstitutional by *Reed*, could potentially give rise to constitutional liability.

Take, for example, real estate signs.[86] As noted above, many local codes define real estate signs by the message on the sign, *i.e.*, "[s]igns that identify or advertise the sale, lease or rental of a particular structure or land area."[87] This definition clearly identifies and defines the sign by the message on the face of the sign, in turn requiring a local code enforcement officer to read the message of the sign and to determine that the sign's message is, first, advertising; second, discussing the property on which it is located; and third, regarding the sale of that particular property. Under the *Reed* majority's treatment of facially content based laws, such a regulation would be subject to strict scrutiny and presumptively unconstitutional.[88] Similar problems exist for local code definitions of construction signs ("a sign advertising the project being constructed and stating the name and address of the contractor"),[89] directional signs ("a sign located within ten feet of a driveway entrance, containing words, arrows, or other symbols directing motorists into the driveway entrance"),[90] and grand opening signs ("a temporary sign advertising the opening or reopening of a business"),[91] to name a few.

With all of these functional or categorical sign regulations potentially unconstitutional after *Reed*, what is a local government to do? An alternative approach in the case of real estate signs could be to define "real estate sign" as "a temporary sign placed on property which is

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[86] This example assumes, without argument, that real estate signs are noncommercial and that regulation and enforcement of such signs is subject to the content neutrality analysis. This example further assumes that the speaker posting the sign has a First Amendment interest on par with, say, an owner of a sign advocating for an election issue. There is certainly a persuasive argument that any real estate sign is commercial speech, however, real estate signs posted in residential districts are at times treated differently.

[87] *See, e.g.*, DENVER, COLO., ZONING CODE § 10.10.3.1.G (2015); AMARILLO, TEX., SIGN ORDINANCE § 4-2-2 (2015).

[88] *Reed*, 135 S. Ct. at 2227.

[89] *See, e.g.*, SANDOVAL COUNTY, N.M., SIGN ORDINANCE § 5.A (2015).

[90] *See, e.g.*, WICHITA FALLS, TEX., SIGN REGULATIONS § 6720 (2015).

[91] *See, e.g.*, KINGMAN, ARIZ., SIGN CODE § 25.200 (2015).

actively marketed for sale, as the same may be evidenced by the property's listing in a multiple listing service." Such a definition does not contain the same type of content problems that the prior definition had, and appears to define the sign not by the content of the message, but rather by the status of the property, *i.e.*, whether it is actively marketed for sale. Even so, the *Reed* majority might find such a regulation to fail the content neutrality test, since *Reed* expresses concern about code provisions that define speech "by its function or purpose."[92] Therefore, the status and constitutionality of sign regulations relating to so-called functional signs is an open question after *Reed*.[93] We discuss some of the regulatory issues associated with this problem below.

B. Definitional issues with the term "sign" and related problems

Many sign codes contain provisions that differentiate between what is and what is not a "sign" by reference to the content of the message displayed and/or who is displaying the message. The code then regulates "signs" and non-"signs" differently. The *Reed* decision calls these provisions into question.

A recent Eighth Circuit case, *Neighborhood Enterprises, Inc. v. City of St. Louis*,[94] exemplifies this issue. The code provision in question defined the term "sign" and then listed numerous exemptions that would not be considered to be a "sign":

> Sign. "Sign" means any object or device or part thereof situated outdoors which is used to advertise, identify, display, direct or attract attention to an object,

[92] *Reed*, 135 S. Ct. at 2227 ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.").

[93] In the case of real estate signs, the problem is even more complicated than for other types of functional signs. Supreme Court precedent holds that local governments may not prohibit property owners from posting real estate signs to advertise property for sale, as doing so constitutes suppression of protected speech. Linmark Assoc., Inc. v. Twp. of Willingboro, 431 U.S. 85, 96 (1977). Some other types of functional signs, such as construction signs, grand opening signs, etc., could probably be prohibited without questions as to the constitutionality of such a ban.

[94] Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011), cert. den.132 S. Ct. 1543 (2012).

> person, institution, organization, business product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, motion illumination or projected images. Signs do not include the following:
>
> a. Flags of nations, states and cities, fraternal, religious and civic organization;
>
> b. Merchandise, pictures of models of products or services incorporated in a window display;
>
> c. Time and temperature devices;
>
> d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
>
> e. Works of art which in no way identify a product.
>
> If for any reason it cannot be readily determined whether or not an object is a sign, the Community Development Commission shall make such determination.[95]

The city's Board of Adjustment upheld the denial of a sign permit for painted wall art critical of St. Louis's eminent domain practices. The applicant sued, claiming that what the city termed a ''sign'' was actually a ''mural'' exempt from the city's sign regulations.[96] The district court granted summary judgment to the city.[97] On appeal, the Eighth Circuit noted that objects of the same dimension as the sign—or "mural" –at issue would not be subject to the regulations if they were symbols of certain organizations, and thus the content of the message displayed determined whether the object was or was not regulated as a "sign." The court found that the sign code's definition of "sign" was impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction."[98] In applying strict scrutiny, the court stated that the city's asserted interests in traffic safety and aesthetics had never

[95] Neighborhood Enterprises, Inc. v. City of St. Louis, Mo. 2014 WL 5564418, at *1-2 (E.D. Mo. 2014).
[96] Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d at 733-34*; see* Neighborhood Enterprises, Inc. v. City of St. Louis, 718 F. Supp. 1025 (E.D. Mo. 2010).
[97] *Id.* at 735.
[98] *Id.* at 736.

been found compelling,[99] and ruled that even if these were compelling interests, the code's treatment of exempt and non-exempt "signs" was not narrowly-tailored to the city's asserted goals and thus the provision was unconstitutional.[100]

In so ruling, the Eighth Circuit followed the absolutist approach to determining whether a code was content based, in line with what is now required of all courts under *Reed*. In contrast, the ruling in *Wag More Dogs, LLC v. Cozart*,[101] a 2012 Fourth Circuit decision following the purposive approach to content neutrality, shows how such rulings cannot stand after the Court's ruling in *Reed*.

Wag More Dogs was a pet daycare business in Arlington, Virginia. After the business relocated to a site opposite a popular dog park, the owner commissioned an artist to paint a 960 square foot artwork on the rear of building that included several of the cartoon dogs featured in the business's logo. Shortly after the artwork was completed, the city cited the owner for violating the sign code by displaying a sign that exceeded the code's size limits.[102] After discussions with the owner, the city offered to allow allowed her to retain the "mural" on condition she added the words "Welcome to Shirlington Park's Community Canine Area" above the artwork. In the city's view, the addition of these words would convert the painting from an impermissible sign into an informational sign not requiring a permit under the sign code. The

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[99] *Id.* at 738*; see* discussion in Section II G*, infra.*

[100] *Id*. Because the district court had never considered whether the provision was severable, the Eighth Circuit remanded the case to allow the lower court to determine whether the unconstitutional provisions were severable from the remainder of the code. On remand, the district court found the new sign ordinance to be content neutral, Neighborhood Enterprises, Inc. v. City of St. Louis, Mo., 17 F.Supp.3d 907 (E.D. Mo. 2014), but later vacated that finding, determining that the definition of "sign" in the code could not be severed from the balance of the code. Neighborhood Enterprises, Inc. v. City of St. Louis, Mo., 2014 WL 566418 (E.D. Mo. 2014).

[101] Wag More Dogs Ltd. Liab. Corp. v. Cozart, 680 F.3d 359 (4th Cir. 2012).

[102] *Id*. at 362-64. The sign code defined the term "sign" as "[a]ny word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors." It further provided as a general rule that "[a] sign permit shall be obtained from the Zoning Administrator before any sign or advertising is erected, displayed, replaced, or altered so as to change its overall dimensions."

owner declined the offer and sued, claiming that the code was impermissibly content-based both facially and as-applied.[103]

The Fourth Circuit ruled in favor of the city, rejecting the owner's claim that a sign ordinance differentiating based on the content of a sign must be found content based.[104] The court stressed that the sign code's distinctions were adopted "to regulate land use, not to stymie a particular disfavored message" and, thus, in the court's view "the Sign Ordinance's content neutrality is incandescent."[105]

The *Wag More Dogs* approach to content neutrality in defining a sign is, of course, no longer viable after *Reed*. The more crucial point, however, is that the regulatory approach to defining signs seen in both of these cases is no longer viable after *Reed*. The problem with each – and with most sign codes – is not the definition of "sign" *per se*, but rather the various content based exemptions or exceptions from regulations that apply to the non-exempted signs. In both cases, for example, the codes differentiated between signs and murals. More generally, almost all codes require a sign permit to display a permanent sign, *i.e.,* a sign that will be displayed for a lengthy, but indefinite, period, such as a sign on the façade of a commercial building, but exempt from the permit requirement numerous other signs defined by their content, such as "nameplates" on residences or signs advertising a property for sale or rent.

After *Reed*, such content based exceptions would be subject to strict scrutiny. To avoid that, local governments that want to retain such exemptions will need to reformulate them to be content neutral. In many cases, such reformulation is fairly simple: although a "nameplate" sign is content based, allowing the display of a "permanent sign no larger than one square foot placed

[103] *Id*. at 364.
[104] *Id.* at 366-67.
[105] *Id*. at 368.

on the front of a residential structure, or mounted in the front lawn of a residential property, or … etc." is content neutral. We explore this approach further in Section III.E.

C. Continued validity of the on-premises/off-premises distinction

Reed also creates some uncertainty about whether a sign code provision distinguishing between on-site and off-site signs should be considered a content-based regulation. The provision challenged in *Reed* applied only to temporary non-commercial signs. Justice Thomas's majority opinion did not discuss regulation of on-site versus off-site signs, but that issue was addressed, albeit peremptorily, in Justice Alito's concurrence.[106] The extent to which the two opinions conflict regarding whether a sign code provision that distinguishes between on-site and off-site signs is unclear.

Historically, judges, lawyers and sign owners have disagreed on whether the distinction between on- and off-site signs discriminates on the basis of content, or if it is simply a content neutral regulation of a sign's location.[107] On one hand, the distinction turns on the location of a sign—a clearly content neutral method of sign regulation, even after *Reed*.[108] On the other hand, this distinction clearly relies upon the message displayed, for example, by defining an on-site sign as "a sign displaying a message concerning products or services offered for sale, rental, or use on the premises where the sign is located."[109]

With respect to regulations of commercial speech, the Supreme Court conclusively determined in *Metromedia* that the distinction between on- and off-site signs was permissible,

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[106] *Reed*, 135 S.Ct. at 2233-34.
[107] *Compare, e.g.,* Metromedia, 453 U.S. at 511-12 (upholding on-premises/off-premises distinction as it relates to commercial speech) *with* Outdoor Media Dimensions, Inc. v. Dep't of Transp., 132 P.3d 5, 16-17 (Or. 2006) (finding on-premises/off-premises distinction to be content-based under state constitution).
[108] *See, e.g.*, Contest Promotions, LLC v. City and Cnty. of San Francisco, 2015 WL 4571564, at *4 (N.D. Cal. 2015) ("The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises.")
[109] *See, e.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES § 28-6 (2015).

subject to certain limitations.[110] The on-site/off-site distinction is more complicated, however, relative to noncommercial speech. Since noncommercial signage, such as a political advertisement or religious proclamation, rarely has a locational component, it is almost always off-premises in a literal sense. For example, a restaurant owner who displays a sign reading "Barack Obama for President" is not advertising or otherwise calling attention to any activity on the premises where the sign is located. Thus, a sign code prohibiting all off-site signage would ban a fair amount of noncommercial speech. The Supreme Court recognized this problem in *Metromedia*, and established a rule that the government cannot favor commercial over noncommercial speech through, for example, complete bans on off-premises signage without provision for off-premises noncommercial copy.[111] Under the holding in *Metromedia*, it follows that the on-premises/off-premises distinction is only available for *commercial* signs, and should be avoided for noncommercial signage.

Under a literal reading of Justice Thomas's majority opinion, the on-premises/off-premises distinction is probably content based "on its face" because it is the content of the message displayed that determines whether a sign should be classified as on-site or off-site.[112] But Justice Alito's concurring opinion included "[r]ules distinguishing between on-premises and off-premises signs" among a list of "some rules that would not be content-based."[113] It follows that Justice Alito likely views the on-premises/off-premises distinction as simply regulating signs' location. All of the foregoing suggests that a challenge to sign code exemptions for non-commercial off-site signs from bans on off-site signs should still be judged by applying the lower

[110] *Metromedia*, 453 U.S. at 511-12.
[111] *Id*. at 513.
[112] *Reed*, 135 S. Ct. at 2227.
[113] *Id*. at 2233 (Alito, J., concurring).

level of scrutiny under the *Central Hudson* four-part test[114] for regulations of commercial speech, similar to *Metromedia*.[115] If we assume without argument that *Reed* addresses only noncommercial sign regulations and has no bearing on regulations of commercial signs—a big assumption that is discussed further below—the on-premises/off-premises distinction remains unaffected by *Reed.*

These suggestions are strongly reinforced by the doctrine that prior Supreme Court decisions should not be overruled by implication. As the Court reaffirmed in *Agostini v. Felton*: "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." [116] Thus, despite the fact that Justice Thomas's "on its face" rule for determining whether a code is content based conflicts with the *Metromedia* court's ruling that the on-site/off-site distinction should be treated as content neutral (and, as discussed below, may conflict with the commercial/noncommercial distinction), because *Reed* did not expressly overrule *Metromedia*, the latter remains good precedent on that point.

Of course, the above discussion leaves open the question of whether the Court would overturn *Metromedia* if the opportunity arose. If that question were presented to the Court as presently constituted, *i.e.,* the same justices who decided *Reed*, the answer appears to be "no" by at least a 6-3 vote. Justice Alito's three-justice concurrence found that the on-site/off-site

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[114] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Under *Central Hudson,* a court determines the constitutionality of a regulation of commercial speech by applying a four-part test: (1) to be protected, the speech (a) must concern lawful activity and (b) must not be false or misleading; if the speech is protected, then the regulation must: (2) serve a substantial governmental interest; (3) directly advance the asserted governmental interest; and (4) be no more extensive than necessary to serve that interest. *Id.*, 447 U.S. at 566.

[115] 453 U.S. 490 (1981).

[116] 521 U.S. 203, 237 (1997), quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

distinction is not content-based. We then can add Justices Breyer, Ginsburg and Kagan, who concurred in the judgment in *Reed* but rejected the majority's "on its face" rule,[117] as three more anticipated votes for upholding *Metromedia*.

As of this writing, four lower federal courts have decided post-*Reed* cases involving challenges to prohibitions or restrictions applicable to off-premises billboard advertising. Three of these courts, acknowledging *Reed*'s applicability only to noncommercial speech, upheld the challenged restrictions, specifically citing the rules for commercial off-site signage established in *Metromedia*.[118] One of these cases specifically observed what we have observed above: "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny."[119] A fourth case, addressing a challenging to the Tennessee highway advertising act, calls several of that law's distinctions into question, including the on-site/off-site distinction,[120] seemingly ignoring Justice Alito's concurrence as it relates to the on-premises/off-premises distinction. Given the divisions in the lower courts regarding the continuing validity of the on-premises/off-premises distinction, we can only assume that *Reed* has created an open question on this issue that may take years to resolve.

D. Regulation of commercial speech

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[117] *See, e.g.,* Contest Promotions, LLC v. City & Cnty. of San Francisco, 2015 WL 4571564, at *4 (N.D. Cal. 2015) (concluding that "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny")

[118] *Contest Promotions*, 2015 WL 4571564, at *4 (N.D. Cal. 2015); Citizens for Free Speech, LLC v. Cnty. of Alameda, ___ F. Supp. 3d ___, 2015 WL 4365439, at *13 (N.D. Cal. 2015); Calif. Outdoor Equity Partners v. City of Corona, 2015 WL 4163346, at *10 (C.D. Cal. 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards.")

[119] *Contest Promotions*, at *4.

[120] Thomas v. Schroer, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015).

What does *Reed* mean for commercial speech regulation? Technically, *Reed* applies only to noncommercial speech, the regulation of which has historically been subjected to a more exacting standard of review than commercial speech regulations, but some of the references in *Reed* point to cases that reviewed commercial speech regulations. Specifically, *Reed* cites extensively to *Sorrell v. IMS Health*,[121] which some First Amendment observers saw as limiting—if not gutting—the commercial speech doctrine in favor of a uniform approach to reviewing commercial and noncommercial speech regulations.[122]

Sorrell was a 2011 case involving a challenge by pharmaceutical companies and other individuals to a Vermont law restricting the sale, disclosure or use of pharmacy records to reveal the prescribing practices of individual physicians.[123] Vermont claimed that the law safeguarded medical privacy, diminishing the likelihood that "data miners" would compile prescription data for sale to drug manufacturers who would then use it to tailor drug marketing to individual physicians.[124] Vermont claimed that such targeted marketing strategies would lead to prescription decisions benefiting the drug companies to the detriment of patients and the state.[125] The plaintiff pharmaceutical manufacturers and individual "data-miners" claimed that speech in aid of pharmaceutical marketing is a form of expression protected by the First Amendment and

[121] 131 S. Ct. 2653 (2011).
[122] *See, e.g.,* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1171 (2013) (referring to *Sorrell* as having "marked the most recent step in the gradual elevation of commercial speech from 'its subordinate position in the scale of First Amendment values' to its status as a form of expression that routinely enjoys robust protection from the Court."); Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 553 (2013) ("[B]eneath that illusion of stability [in the commercial speech doctrine] lies tremendous uncertainty. Intense debate continues about how to apply the existing tests, whether they should be discarded, and what would replace them.").
[123] *Id.* at 2660.
[124] *Id.* at 2661.
[125] *Id.*

that the challenged law impermissibly prohibited the exercise of their First Amendment right to free expression.[126]

In a 6-3 decision, the Supreme Court found the law in question unconstitutional, with the "line-up" of Justices and their rationales exactly mirroring *Reed*. Justice Kennedy authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito and Sotomayor, the same majority as in *Reed*. Justice Breyer dissented, joined by Justices Ginsburg and Kagan, the same Justices who rejected the majority's "on its face" rule in *Reed* and concurred only in the judgment. As with *Reed*, the *Sorrell* majority applied a higher degree of judicial scrutiny than the dissenting Justices would have imposed and held the regulation unconstitutional. *Sorrell* differs from *Reed* in that the dissenters in *Sorrell* would have upheld the challenged statute under their lower standard, while the same Justices in *Reed* argued that the sign code was unconstitutional under their lower standard.

Given the parallels between *Sorrell* and *Reed*—and the *Reed* majority's extensive reliance on the *Sorrell* majority opinion—what effect might these cases have on the Court's future treatment of commercial sign regulation? We think that two issues are worth consideration. First, the Court's application of content neutrality review in *Sorrell* seems to upset prior judicial approaches to reviewing commercial speech regulations, and the Court's reliance on *Sorrell* in the *Reed* opinion may foreshadow an extension of this change into the sign regulation arena. Before *Sorrell*, it was generally accepted that commercial speech regulations were not required to be content neutral.[127] Without rigorous analysis or discussion, the *Sorrell*

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[126] *Id.*at 2659.

[127] *See, e.g.*, *Metromedia*, 453 U.S. at 514 ("Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."). *But see*, North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F.Supp.2d 755 (N.D. Ohio 2000) (holding

Court rejected Vermont's arguments that the commercial speech doctrine and *Central Hudson* test should apply to the commercial speech regulation at issue in that case.[128] *Reed*'s reliance on *Sorrell* may therefore portend a cut-back or overruling of the commercial speech doctrine and *Central Hudson* test with respect to sign regulation, potentially meaning that all regulations of commercial signage would be subjected to content neutrality analysis.[129]

The second implication of *Reed* and *Sorrell* is similarly complex. The majority in *Sorrell* found that the Vermont law "on its face" imposed "content and speaker based restrictions on the sale, disclosure, and use of prescriber-identifying information" that was commercial speech protected under the First Amendment and imposed "heightened" – but not strict – scrutiny.[130] When these same Justices, in *Reed*, found that the Gilbert code "on its face" had imposed "content- and speaker-based restrictions" on non-commercial signs, they imposed strict scrutiny. Critically, while Justice Thomas's majority opinion in *Reed* cited *Sorrell* extensively, it never suggested that the strict scrutiny standard, required when a regulation of non-commercial speech "on its face" was content based, was also required when a regulation of commercial speech "on its face" was content based.

That distinction is very telling because Justice Kennedy's *Sorrell* opinion explicitly noted both that commercial speech raises legitimate concerns that may require content based regulations and that commercial speech can be regulated to a greater extent than non-commercial speech: "It is true that content-based restrictions on protected expression are sometimes

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that sign ordinance's content-based restrictions on truthful, non-misleading commercial speech violated First Amendment).

[128] *Sorrell*, 131 S. Ct. at 2667-68.

[129] For an example of a case which has apparently taken this approach, *see* Thomas v. Schroer, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015). *Thomas* calls into question Tennessee's highway advertising act, which prohibits off-premises commercial advertising without a permit and exempts on-premises signage from the permit requirement.

[130] *Id.* at 2663.

permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'[131]

In light of the above, it appears that *Reed* does *not* require that content-based regulations of commercial signs, including distinctions between commercial and noncommercial messages, be subject to strict scrutiny. Rather, such regulations at most would be subject to some form of intermediate scrutiny. It may, however, be the case that *Sorrell* and *Reed* require courts to analyze commercial sign regulations for content bias. That said, *Metromedia*'s rule that noncommercial signs must be treated at least as favorably as commercial signs remains valid, so a regulation that prefers commercial to non-commercial signs would be struck-down. In Section III.C.2, we advise on how to avoid inadvertently creating such preferences by adding a "substitution clause" to local sign codes.

E. Regulation of adult businesses

Does the *Reed* majority opinion have any effect on how courts should view regulation of adult entertainment businesses? Such regulations have long been treated as an exception to the way courts normally treat the issue of content-neutrality. Adult entertainment business regulations *distinguish* such businesses from others by looking to the content of their expression, but *regulate* them because of concerns about the so-called "secondary effects" associated with these businesses, such as increases in criminal activity and neighborhood deterioration;[132] reasons that are unrelated to the content of the expression. This "secondary effects" doctrine[133]

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[131] *Id.* at 2672, citations omitted.
[132] *See generally*, Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO A&E L. REV. 565 (2011).
[133] *See generally*, Christopher Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002).

holds that regulations of certain types of speech, such as adult entertainment, are content neutral when they are justified on the grounds that certain types of speech have negative secondary effects on the surrounding community [134] While the doctrine arguably could be applied in contexts outside of adult entertainment regulation, it has largely been confined to that context and rejected in others.[135]

The secondary effects doctrine is at odds with both the *Reed* majority's "on its face" rule and the concerns about limiting disfavored messages underlying that rule. On that ground it seems a likely candidate to be revisited in the near future. But we think the likelihood that the Supreme Court would overrule the secondary effects doctrine is diminished based on the Court's decision in *City of Los Angeles v. Alameda Books, Inc*.[136]

Adult entertainment regulations are content-based "on their face": such regulations apply "to particular speech because of the topic discussed or the idea or message expressed" and "draws distinctions based on the message a speaker conveys."[137] Further, the rationale for the secondary effects doctrine's treating the distinction between "adult" and "non-adult" expression as content-neutral—that the distinction is *justified* without reference to the content of the regulated speech—was explicitly rejected by the majority opinion in *Reed*. *Reed* clearly states that such an approach "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to

[134] *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).
[135] *See, e.g.,* Boos v. Barry, 485 U.S. 312, 321 (1988) (ruling that a Washington, D.C. ordinance barring messages critical of foreign governments within 500 feet of an embassy could not be justified under the secondary effects doctrine because "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *But see*, Defense Distributed v. U.S. Dept. of State, 2015 WL 4658921 (W.D. Tex. 2015) (analogizing to secondary effects doctrine in upholding a content-based restriction in federal regulations banning the export of certain firearms).
[136] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).
[137] *Reed*, 135 S. Ct. 2227.

strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained in the regulated speech.'"[138]

Moreover, the secondary effects doctrine contradicts the *Reed* majority's rationale underlying the "on its face" rule. Explaining why the majority rejected the claim "that a government's purpose is relevant even when a law is content-based on its face," Justice Thomas wrote: "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech . . . . 'The vice of content-based legislation . . . is not that it is always used for invidious, thought control purposes, but that it lends itself to use for those purposes.'"[139]

Despite the secondary effects doctrine's doctrinal vulnerability after *Reed,* the Court's most recent decision on adult entertainment regulation suggests the Justices may not be eager to revisit the issue. Moreover, the Court's doctrinal opposition to overruling prior decisions by implication seems to weigh in favor of continued life for the secondary effects doctrine.[140] The Court last considered the appropriate standard of review for a challenge to an adult entertainment regulation in *Alameda Books*.[141] Justices Thomas and Scalia joined Justice O'Connor's plurality opinion criticizing the Ninth Circuit for imposing too high an evidentiary bar for cities seeking merely to address the secondary effects of adult businesses,[142] but Justice Scalia wrote a concurring opinion reiterating his long-standing claim that businesses engaged in "pandering

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[138] *Id*. at 2228, citations omitted.
[139] *Id.* at 2229, citations omitted.
[140] *See* discussion at n. 116 *supra.*
[141] Alameda Books, *535 U.S. 425 (2002)*. The Court did subsequently consider a challenge to an adult entertainment business licensing scheme in City of Littleton, Colo. V. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004), but that decision dealt solely with the issue of the procedures required to provide the "prompt judicial review" of licensing decisions that had been called for in an earlier ruling, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990). In *City of Littleton*, seven Justices agreed that in the context of adult business licensing, the "prompt judicial review" language in FW/PBS required a prompt judicial decision, not just an assurance of prompt access to the courts. *See generally,* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION, 548-556 (2014 ed.)
[142] *Alameda Books,* 535 U.S. *at* 436-38.

sex" are not protected under the First Amendment and that communities may not merely regulate them with impunity, but may suppress them entirely.[143] Given that view, while Justice Thomas's opinion in *Reed* might portend a vote to overturn the secondary effects doctrine and subject cities to strict scrutiny when they regulate adult businesses, it seems unlikely that Justice Scalia would do so.

Of the remaining Justices in the *Reed* majority, only Justice Kennedy was on the *Alameda Books* Court. He authored a concurring opinion that criticized the plurality's approach because it skipped a critical inquiry: "how speech will fare under the city's ordinance."[144] That criticism suggests that he might also vote to overturn the secondary effects doctrine, but, as we note below, perhaps not.

Justices Ginsburg and Breyer were also on the *Alameda Books* Court and joined Justice Souter's dissent that expressed concern about the significant risk that courts would uphold adult entertainment business ordinances that effectively regulate speech based on government's distaste for the viewpoint being expressed.[145] While this concern suggests that Justices Ginsburg and Breyer might vote to overturn the secondary effects doctrine, both joined Justice Kagan's opinion concurring in the judgment in *Reed*, which specifically approved of the doctrine.[146] Arguably, that suggests they would not vote to overturn.

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[143] *Alameda Books,* 535 U.S. at 443–44 (Scalia, J., concurring) (citing his opinions in City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring), and FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 256–61 (1990) (Scalia, J., dissenting in part and concurring in part)). The holding in *FW/PBS* was subsequently modified by City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004).

[144] *Id. at* 450. In his view, shared by Justice Souter's dissenting opinion, a "city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id. at* 449. In short, "[t]he rationale of the ordinance must be that it will suppress secondary-effects-and not by suppressing speech. *Id. at* 449-50.

[145] *Id. at* 457 (Souter, J., dissenting). His dissent stated: "Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove." *Id.*

[146] *Reed,* 135 S. Ct. at 2238, citing 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

Based on the above discussion, we believe that, today, only Justice Thomas is very likely interested in overturning the secondary effects doctrine since the doctrine raises concerns about the risk of censorship identical to those he noted in *Reed*. Chief Justice Roberts and Justice Alito might also vote to overturn, but seem far less likely to do so in light of the doctrinal nuance shown by Chief Justice Roberts in *McCullen* and Justice Alioto in *Reed*. Four Justices would likely not vote to overturn: Justices Ginsburg, Breyer, Kagan and, for the reason noted, Scalia. That leaves Justices Kennedy and Sotomayor who were on the same side in both *Sorrell* and *Reed*. While it is unclear how Justice Sotomayor might vote, if Justice Kennedy voted to overturn the secondary effects doctrine, his concurring opinion in *Alameda Books*, which now sets the evidentiary standard for adult entertainment cases, effectively is nullified. We suspect that he would not want to do that, which means that the Court currently lacks the four votes needed to revisit the secondary effects doctrine.

F. What is speaker-based regulation and where does *Reed* leave it?

In making its finding that the Gilbert sign code was content neutral, the Ninth Circuit's opinion in *Reed II* relied in part on the notion that the Gilbert sign code did not impermissibly regulate on the basis of content, but instead validly distinguished between speakers.[147] *Reed II*'s reliance on the constitutionality of speaker based regulation was not the first time the Ninth Circuit had invoked the concept of speaker based regulation to uphold arguably facially content based sign regulations.[148] In *Reed II*, the Ninth Circuit found that the temporary event sign

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to prevent crime, protect the city's retail trade, [and] maintain property values ..., not to suppress the expression of unpopular views")

[147] *Reed II*, 707 F.3d at 1077 ("[D]istinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers").

[148] *See, e.g.*, G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077 (9th Cir. 2006) (finding that exemptions from sign permitting for public agencies, hospitals and railroad companies did not establish any content preference, but rather simply allow certain speakers the ability to speak without a permit).

regulations were based in part on the party displaying the sign: "Qualifying Event Sign" was defined in a manner that permitted only certain nonprofit organizations and other entities to display such signs.[149] In the Ninth Circuit's view, such a regulation does not indicate any preference for a particular type of content.

The concept of and legal doctrine associated with speaker based regulation are murky, and *Reed* does disappointingly little to provide clarification in this regard. The Supreme Court majority in *Reed* disagreed both with the Ninth Circuit's finding that Gilbert's code provision was even speaker based at all, and with the lower court's determination that speaker based laws are automatically constitutionally permissible. In rejecting the Ninth Circuit's statements on speaker based regulation, Justice Thomas wrote, "the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral," and went on to say that the Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'"[150] Justice Thomas used two examples to explain his point: a law limiting the content of newspapers alone "could not evade strict scrutiny simply because it could be characterized as speaker based" and, similarly, a law regulating the political speech of corporations could not be made content neutral by singling out corporations.[151]

It is not clear from the majority opinion, however, whether the Court's intends that *all* speaker based regulations be subject to strict scrutiny. The Court's statement that a law should be subjected to strict scrutiny when a speaker preference reflects a content preference suggests that an intermediate step might be required to determine whether a speaker based regulation has

[149] *Reed II*, 707 F.3d at 1062.
[150] *Reed*, 135 S. Ct. at 2230, quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 658 (1994).
[151] *Id.*

an improper legislative purpose or motivation. One of the authors notes that Justice Thomas's statement in *Reed* could simply require an application of strict scrutiny to speaker based regulations, but that the better approach would be to shift the burden to government to demonstrate that its speaker characterization is not based on a speaker preference, an inquiry akin to what happens under the secondary effects analysis. Only when government fails to meet that burden would strict scrutiny apply.

The Supreme Court's prior decisions referencing speaker based regulation provide little meaningful assistance in interpreting *Reed*. *Turner Broadcasting*, which contains the most significant discussion of speaker based regulation, unanimously upheld a 1992 law requiring cable television operators to carry local broadcast stations.[152] The appellants in that case suggested that the law in question was unconstitutional in part because it favored one set of speakers over another, *i.e.*, broadcast programmers over cable programmers.[153] Justice Kennedy, writing for the majority, rejected the notion that all speaker based regulations must be subject to strict scrutiny,[154] and stated instead that speaker based laws should be strictly scrutinized only when such laws "reflect the Government's preference for the substance of what the favored speakers have to say."[155] As with Justice Thomas's *Reed* opinion, Justice Kennedy's *Turner Broadcasting* opinion contains no guidance as to how a court should determine that a speaker based law is reflective of such an impermissible content preference.

Curiously, Justice O'Connor's concurrence in *Turner Broadcasting*, which was joined by Justices Thomas, Scalia and Ginsburg, might provide more insight into the thinking of some of

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[152] *Turner Broad.*, 512 U.S. at 634.
[153] *Id.* at 657.
[154] *Id.* ("To the extent appellants' argument rests on the view that all regulations distinguishing between speakers warrant strict scrutiny . . . it is mistaken.")
[155] *Id.* at 658.

the current Court with respect to speaker based regulation. Justice O'Connor, while stating expressly that some speaker based laws "need not be subject to strict scrutiny," questioned the *Turner Broadcasting* majority's view that the speaker based law in question did not reflect a content preference.[156] Justice O'Connor found that Congress's justification for the broadcast programmer preference was not neutrally justified, because it referenced a desire for programming diversity, which Justice O'Connor believed implicated content.[157]

More recently, a majority of the current Court, in *Citizens United v. Federal Election Commission*, overturned campaign finance laws limiting the political speech of corporations—a well-defined class of speaker—without making a single reference to the notion of speaker based regulation.[158] And *Sorrell*—discussed above with respect to the commercial speech doctrine—makes several disapproving references to speaker based regulation, going to great lengths to describe the doomed law in question as "content- and speaker-based," but fails to engage in any discussion regarding the speaker based nature of the law.[159] Indeed, Justice Breyer's *Sorrell* dissent noted that the Court had not previously imposed strict scrutiny on speaker based laws and the regularity with which regulations of commercial speech are speaker based.[160]

The confusion regarding the constitutionality and analysis of speaker based laws exhibited by the Supreme Court has unfortunately extended to lower courts as well. Some of the federal courts of appeals have relied on *Sorrell* to require that *any* speaker based law be subject to strict scrutiny.[161] And yet, just ten days after the Supreme Court decided *Reed*, the Eleventh Circuit, in reviewing a Florida law restricting medical professionals from inquiring about

[156] *Id.* at 676
[157] *Id.* at 678.
[158] 558 U.S. 310 (2010).
[159] 131 S. Ct. at 2663, 2666, 2667.
[160] 131 S. Ct. at 2677-78 (Breyer, J., dissenting).
[161] *See* 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045, 1054 (8th Cir. 2014); U.S. v. Caronia, 703 F.3d 149, 165 (2d Cir. 2012) (finding law speaker-based and subject to heightened scrutiny).

patients' firearm ownership and use, relied upon Supreme Court precedent upholding regulations of speech by professionals and characterized such permissible regulations as speaker based laws.[162]

All of the foregoing should underline the extreme confusion among the courts regarding speaker based laws. The Supreme Court precedent discussed above suggests at the very least that local sign regulations distinguishing between speakers on the basis of the speakers' identity should be content neutral both on their face and in their justification. After *Reed*, it seems near impossible that a court will allow speaker based regulation to be used as a constitutional "escape valve" for facially content based laws. Moreover, if a sign regulation purports to be speaker based, the justification for the regulation should not evidence or imply a governmental preference for the content or message of a particular speaker over another.

Local jurisdictions may be unable to avoid some forms of speaker based sign regulation. For example, most local sign codes distinguish between signs based upon the land use(s) occurring where the sign is located: sign size, height, and type allowances typically vary according to the zoning district where the sign is located. It is arguable that regulation of speech on the basis of land use is a form of speaker based regulation if, say, the owners of manufacturing businesses are allowed more sign area than neighborhood churches. Neither of the authors of this article believe that this type of regulation, whether correctly considered speaker based or not, is impermissible after *Reed*,[163] yet further drilling-down of sign regulations according to specific land uses may implicate the type of speaker based regulation that the Supreme Court and lower courts dislike. For example, a sign code distinguishing between the

[162] Wollschlager v. Governor of Fla., ___ F.3d ___, 2015 WL 4530452, at *24 (11th Cir. 2015).
[163] Justice Alito's concurrence approves of the distinction between "placement of signs on commercial and residential property." 135 S. Ct. at 2233 (Alito, J., concurring).

signs displayed on properties in accordance with highly-specific subcategories of land uses—single-family residential, multi-family residential, restaurant, general retail, religious institution, manufacturing and assembly, etc.—may reflect a content preference, or simply a speaker preference that a court finds improper. More problematic sign code provisions are those that differentiate among specific business-types, *i.e.*, "speakers," as regards allowable signage, such as a code allowing gasoline filling stations to have taller or larger signs with changeable copy, while limiting automobile tire stores to shorter or smaller signs without changeable copy.

With all of the foregoing said, it is patently clear that the concept and constitutionality of speaker based regulation remains unsettled, and local governments are therefore advised to proceed cautiously in this area of sign regulation.

G. **Application of strict scrutiny**

After *Reed,* if a challenged provision in a sign regulation "on its face" considers the message on a sign to determine how it will be regulated, the regulation is content-based and subject to strict scrutiny.[164] The *Reed* majority emphasized that if a sign regulation is content-based "on its face" it does not matter that government did not intend to restrict speech or to favor some category of speech for benign reasons: "In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral."[165] Further, a sign regulation that is facially content-neutral, if justified by, or that has a purpose related to, the message on a sign, or that was adopted "because of disagreement with the message the speech convers," is also a content-based regulation.[166] Whether content-based "on its face" or content-neutral but justified in relation to content, Justice Thomas specified that the regulation is subject

[164] *Reed,* 135 S.Ct. at 2227.
[165] *Id. at* 2228.
[166] *Id. at* 2227, citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

to strict judicial scrutiny: it will be presumed to be unconstitutional and will be invalidated unless the government can prove that the regulation is narrowly-tailored to serve a compelling governmental interest.[167]

1. What are compelling interests?

Court rulings prior to *Reed* found that aesthetics and traffic safety, the governmental interests most commonly cited to support sign regulations, are not compelling interests. For example, the Eighth[168] and Eleventh[169] circuits recently reaffirmed that traffic safety and aesthetics are *not* compelling interests; and two federal district court decisions found that while traffic safety and aesthetics are substantial governmental interests, they are not compelling enough to justify content-based restrictions on fully-protected noncommercial speech.[170] But the *Reed* majority opinion calls these rulings into question, at least as regards traffic safety, stating that a sign ordinance that was narrowly tailored to allow certain signs that "may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety" well might survive strict scrutiny.[171]

An Eleventh Circuit decision supports the notion that traffic safety could be found to be a compelling governmental interest. In *Solantic, LLC v. City of Neptune Beach*,[172] although the court rejected the city's claim that traffic safety was a compelling governmental interest, it noted:

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[167] *Id. at* 2226.
[168] Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728, 738 (8th Cir. 2011), cert. den. by City of St. Louis v. Neighborhood Enterprises, Inc., 132 S. Ct. 1543 (2012) (ruling that "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling").
[169] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (concluding that a city's "asserted interests in aesthetics and traffic safety" are not "compelling").
[170] Bowden v. Town of Cary, 754 F. Supp. 2d 794 (E.D. N.C. 2010), *rev'd and remanded on other grounds*, 706 F.3d 294 (4th Cir. 2013); King Enterprises, Inc. v. Thomas Township, 215 F. Supp. 2d 891 (E.D. Mich. 2002). *But see,* City of Sunrise v. D.C.A. Homes, Inc., 421 So.2d 1084 (Fla. App. 1982) (ruling that aesthetics, in and of itself, was a "compelling governmental interest" for purposes of determining legality of billboard ordinance).
[171] *Reed* at 2222.
[172] 410 F.3d 1250 (11th Cir. 2005)

"We do not foreclose the possibility that traffic safety may in some circumstances constitute a compelling government interest, but [the city] has not even begun to demonstrate that it rises to that level in this case."[173] *Solantic* thus stands for the proposition that, with adequate factual support such as traffic impact studies and expert witness testimony, traffic safety could be found to be a compelling governmental interest.[174]

Reed, of course, does not alter the lesser standard of review that courts apply in challenges to sign code provisions that are determined to be content-neutral. For example, a content neutral ban on all signs posted on public property will still be subject only to some form of intermediate scrutiny. [175] But intermediate scrutiny still means that a sign regulation loses its presumption of constitutionality, requiring the government to demonstrate that a regulation serves a substantial governmental purpose unrelated to the suppression of speech, is narrowly tailored to achieve that purpose, and leaves ample alternative avenues of communication.[176]

Even before *Reed*, numerous sign codes could not meet that lesser burden. For example: a federal court overturned an ordinance that limited the number of portable signs and the maximum time periods they could be used because the city presented no evidence at trial to justify the restrictions;[177] the Ohio Supreme Court struck down a regulation excepting signs on parking lots from a general on-site requirement because government offered no explanation for the exception;[178] and a New Jersey appellate court struck down a restriction on neon lighting

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[173] *Id*. at 1268.
[174] *But see,* ***e.g.,*** Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D. N.Y. 2005) (rejecting expert testimony on traffic safety as "infected with industry bias").
[175] *See, e.g.*, Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).
[176] *See, e.g., id*.
[177] Rhodes v. Gwinnett County, Ga., 557 F. Supp. 30 (N.D. Ga. 1982).
[178] Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St.2d 539, 23 Ohio Op. 3d 462, 433 N.E.2d 198 (1982).

when the local government could not demonstrate how the ban advanced its purported aesthetic goals.[179]

The extent of the burden these cases impose upon government is not entirely clear, but it has sometimes been onerous. For example, one federal court refused to consider aesthetics as a justification for regulating portable signs because the city had not included the protection of aesthetics in its recital of purposes.[180] Whether that decision is doctrinally sound is debatable, but it cautions local governments to include in a sign code a purpose statement setting forth the interests underlying the code, as well as offering their justifications in court.

2. What is narrow tailoring?

Although Justice Thomas used the term "narrowly-tailored" in describing the strict scrutiny test,[181] that term can be confusing since it is also used in describing the standard for intermediate scrutiny.[182] In *Ward v. Rock Against Racism*,[183] the Supreme Court explained how the narrow tailoring requirement differs between the two standards:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[184]

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[179] State v. Calabria, Gillette Liquors, 301 N.J. Super. 96, 693 A.2d 949 (Law Div. 1997).
[180] Dills v. City of Marietta, Ga., 674 F.2d 1377 (11th Cir. 1982). *See also* National Advertising Co. v. Town of Babylon, 703 F. Supp. 228 (E.D. N.Y. 1989), judgment *aff'd in part, rev'd in part*, 900 F.2d 551 (2d Cir. 1990) and *aff'd*, 970 F.2d 895 (2d Cir. 1992) (holding unconstitutional ordinance that contained no statement of purposes and government offered no evidence at hearing or by way of affidavit about purposes); the court stated: "Mere assertions in a memorandum of law, otherwise unsubstantiated in the record, are . . . insufficient." National Advertising, 703 F. Supp. at 235. Contra, Bell v. Stafford Tp., 110 N.J. 384, 541 A.2d 692 (1988) (dictum, *citing cases).*
[181] "[N]arrowly tailored to serve compelling state interests." *Reed* at 2226.
[182] "[N]arrowly tailored to serve a significant governmental interest." Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).
[183] 491 U.S. 781 (1989).
[184] *Id*. at 798-99

As the Court made clear in *Ward*, narrow tailoring as applied under strict scrutiny is far more demanding than when applied under intermediate scrutiny, requiring that the regulation be the "least restrictive means" for achieving the compelling governmental interest.

But what must government show to demonstrate that a challenged sign regulation is the "least restrictive means" of achieving its governmental interest? Obviously, it requires that government demonstrate that no alternative regulation will achieve the regulatory objective at issue while imposing a lesser burden on speech.[185] In practice, this means that a plaintiff must make a prima facie showing that a hypothetical alternative regulation is both less restrictive and equally effective as compared with the challenged regulation. The burden then shifts to the government to refute the plaintiff's claim.[186]

3. **How strict is strict scrutiny going to be?**

Reed dramatically expands the regulatory scenarios in which strict scrutiny now applies. Provisions that the majority of federal Circuits had previously considered to be content-neutral – such as regulation of "categorical" signs – are now subject to strict scrutiny.[187] In Justice Kagan's words, "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."[188] Because, in Justice Kagan's view, most of these provisions are entirely reasonable, an unintended consequence of *Reed*'s expansion of strict scrutiny may be its dilution: "The consequence—*unless courts water down strict scrutiny to something unrecognizable*—is that our

[185] *See generally*, Alan O. Sykes, *The Least Restrictive Means*, 70 U. Chi. L. Rev. 403 (2003)
[186] While this approach has been criticized because it allows the judiciary to second-guess a legislative body without being subject to the realities of the democratic process, *see, e.g.,* Quadres, *Content-Neutral Public Forum Regulations*, 37 Hastings L.J. 439, 473 (1986), such criticism is misplaced because it elevates legitimate "political" concerns over individual rights guaranteed by the First Amendment.
[187] *See, e.g.*, Cahaly v. Larosa, ___ F.3d ___, 2015 WL 4646922, at *4 (4th Cir. 2015) (acknowledging that prior circuit precedent regarding facially content based regulation is overruled by *Reed*).
[188] *Reed* at 2236.

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."[189]

Justice Breyer went further, observing that many government activities involve the regulation of speech, and that such regulations "almost always require content discrimination."[190] He argued, "to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[191] Echoing Justice Kagan's concern about the potential dilution of strict scrutiny, Breyer wrote, "I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force."[192]

While these are legitimate concerns, Justice Kagan's sense of alarm is likely overstated as regards sign regulation. We think there is a good likelihood that courts will refrain from any significant "dilution" of strict scrutiny as applied to sign regulations, particularly as regards the "least restrictive means" prong. Rather, we think that courts will become more open to finding that traffic safety and pedestrian safety concerns, when supported by technical/scientific studies and competent expert reports, are compelling government interests.[193] With that said, however, we do not believe it likely that courts will find aesthetic interests compelling, as there is a fair

[189] *Reed* at 2237, emphasis added.
[190] *Reed* at 2234.
[191] *Id*.
[192] *Id*. at 2235.
[193] This prediction is mitigated by the fact that lower courts are frequently loath to find that the requirements of strict scrutiny have been satisfied, however, a 2006 study showed that 22% of cases applying strict scrutiny in the free speech context upheld the government regulation in question. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006).

amount of circuit precedent rejecting the notion the aesthetics should be deemed a compelling interest.[194] In contrast, because Justice Breyer's concern extends well beyond sign regulation, it may well sound an appropriate note of caution.

III. Suggestions for Legal and Planning Practice: A Risk Management Approach

While the Supreme Court's *Reed* decision is still very young and the decision's complete impact remains to be seen, lawyers, planners, and local government officials can take steps now to minimize legal risk in the wake of the Court's decision. Even before *Reed*, most local sign codes contained at least some provisions of questionable constitutionality, and the authors acknowledge that developing a 100% content neutral sign code may be impossible for some, or even most, local governments. Further, as Justice Kagan noted, such a code might not function well in addressing legitimate aesthetic and traffic safety concerns. Sign code drafting is an often imprecise exercise, subject to the influences of planning, law, and, perhaps most importantly, local politics. Planners and local government lawyers should therefore view sign regulation with an eye toward risk management. If the local government is willing to tolerate some degree of legal risk, it may be appropriate to take a more aggressive, if less constitutionally-tested approach to sign regulation. Conversely, if the local government is unwilling to accept the risks associated with more rigorous regulation of signs, it would be advisable to adopt a more strictly content neutral—if less aesthetically effective—approach.

In a risk management approach to sign regulation, the local government's adopted regulations should reflect a balance between the community's desire to achieve certain

[194] *See, e.g.*, *Solantic*, 410 F.3d at 1267; Whitton v. City of Gladstone, 54 F.3d 1400, 1409 (8th Cir. 1995); Arlington County Repub. Committee v. Arlington County, Va., 983 F.2d 587, 594 (4th Cir. 1993).

regulatory objectives and the community's tolerance for legal risk.[195] Regardless of some of the uncertainties that we have presented in this article, *Reed*'s outcome increases the level of legal risk associated with many aspects of sign regulation. In keeping with our recommendations, communities are advised to review sign regulations for potential areas of content discrimination and to take precautions against potential sign litigation, but the authors also advise communities to consider (or perhaps reconsider) the level of legal risk that the community is willing to tolerate in order to preserve the aesthetic character of the community and to further the safety interests of community members. In some areas of sign regulation and for some local jurisdictions, preservation of aesthetic character may run counter to minimizing legal risk, and it will be up to planners, lawyers, political leaders, and community members to determine the appropriate balance between the community's desired planning outcomes and the community's risk tolerance.

In all communities, special care should be taken to avoid regulating signs that have minimal impact on the community's established interests in sign regulation. For example, avoiding regulation of signs which are not visible from a public right-of-way, or which are small enough in size so as to have a negligible visual impact is good sign regulation practice and is in keeping with the notion that regulations should only go as far as necessary to further the interests of the regulating body. In the same vein, communities should focus on addressing "problem areas" of sign regulation specific to the community instead of regulating for problems that do not exist. Employing this approach to sign regulation will likely result in the outcomes desired by the community while providing an appropriate level of protection against costly and time-consuming litigation.

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[195] CONNOLLY & WYCKOFF, *infra* note 203, at 1-3 – 1-4.

With these observations in mind, this section provides some practical advice for lawyers and planners navigating sign regulation issues in the post-*Reed* world.

A. Review local sign codes *now* for areas of content bias

Because local sign codes frequently contain at least some areas of content bias, in the immediate future, lawyers and planners should undertake a microscopic review of local sign codes to determine where and how the code engages in the types of content discrimination called into question by *Reed*. Local sign codes are often an amalgam of reactionary regulatory provisions that respond to discrete sign regulation problems that have arisen in the community. Furthermore, the most common sense reactions to many sign regulation problems may be the reactions that raise the greatest problems in First Amendment analysis; for example, addressing a proliferation of temporary political signs by imposing strict regulations on such signs could be catastrophic from a liability perspective. Therefore, even sign codes enacted comprehensively can contain elements of content bias that would be invalidated by a court following *Reed*.

Where a municipal attorney or local planner lacks certainty as to whether a particular provision is content neutral, contact a lawyer well-versed in First Amendment issues and sign regulation. Even if a sign code "fix" is not possible in the near term, knowing the sign code's areas of vulnerability, and coaching permitting and enforcement staff to limit potential problems, can be a crucial step toward protecting a local government from liability.

To guide the process of reviewing local codes for content based provisions, we have created a short list of critical areas to review.

1. Review exceptions to permitting requirements

Exceptions to permitting requirements are common features of sign codes, but these exceptions often raise constitutional problems. The Gilbert sign code at issue in *Reed* mirrored many codes in place throughout the nation; the code had a general requirement that all signs

obtain a permit, with several categories of excepted signs.[196] Exceptions from permitting can be problematic from both a content neutrality and narrow tailoring perspective. On the content neutrality side, local governments should closely review how the excepted signs are defined. For example, are there exceptions to permitting requirements for political signs, election signs, campaign signs, religious signs, real estate signs, construction signs, address signs, governmental flags, or any other types of signs that might be defined by the message(s) displayed on the signs?

On the narrow tailoring side, local governments should consider whether the exceptions to permitting requirements further the asserted purpose for the sign code or are at least sufficiently limited to avoid undercutting the stated purpose. For example, if a code contains the express goal of eliminating sign clutter to improve traffic safety and aesthetics, does allowing "Grand Opening Signs" somehow nullify that aesthetic interest—or nullify the government's interest in prohibiting myriad other temporary signs? Or if a code allows certain types of unpermitted noncommercial signs to be larger than real estate signs, is the government undermining its general interest in reducing driver distractions (since drivers can be distracted just as easily by political signs as by real estate signs)? Removing content based definitions from exceptions to permitting requirements, and reconsidering whether the exceptions undermine the regulatory purposes of the sign code will assist local governments in mitigating liability going forward.

2. Reduce or eliminate exceptions and sign categories

Section III.A.1 instructs lawyers and planners to review exceptions to permitting requirements, thus it follows that the number of permitting exceptions should be reduced wherever possible, while maintaining those permitted exceptions—and their definitions—that are

[196] *See, e.g.*, DENVER, COLO. ZONING CODE § 10.10.3.1 (containing a list of signs not subject to a permit).

necessary to reduce litigation risk or achieve stated goals of the sign code. The same holds true for differentially-treated categories of signs. The Gilbert sign code in *Reed* contained 23 categorical exceptions to the town's basic permitting requirement. While neither of the authors was present for the enactment of these 23 exceptions, we can assume without any comprehensive investigation that at least some of these exceptions—and the differential treatment between the various categories of exceptions—were not necessary to achieve the code's stated goals of traffic safety and community aesthetics. It is the authors' observation from our combined experience in sign regulation that excessive "slicing and dicing" of sign categories frequently leads to more litigation and liability for local governments. Thus, local governments are encouraged to exercise restraint in creating permitting exceptions and avoid multiple categories of permitted exceptions.

The foregoing is not to say, however, that local governments should avoid ***all*** exceptions to permitting and require permits for all signs. Permitting requirements carry additional constitutional obligations for local governments, most importantly the obligation to avoid unconstitutional prior restraints on speech. For a permitting requirement to avoid such concerns, it should contain adequate procedural safeguards. Such a requirement should provide strict yet brief review timeframes to which the local government must adhere and must not vest unbridled discretion in local government officials, *i.e.*, the code should contain clearly-articulated approval criteria for signs subject to a permit.[197] If a local government opts to require that noncommercial signs be permitted prior to installation, the code should avoid content discrimination in the requirements for permitted noncommercial signs. Precisely because of prior restraint concerns and the sensitivity of noncommercial sign owners to prior restraints, many local governments opt

[197] *See, e.g.*, Café Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274, 1282 (11th Cir. 2004); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 485-87 (2d Cir. 2007).

to except certain forms of noncommercial signage from permitting requirements. If the sign code drafters desire to except political signs from a permitting requirement, that exception—and the treatment of the excepted signs in terms of size, height, lighting, etc.—should apply equally to all noncommercial signs, regardless of the message on the sign.

3. Remove "problem" definitions such as "political signs," "religious signs," "event signs," "real estate signs," and "holiday lights"

To avoid post-*Reed* liability associated with certain types of noncommercial speech, local governments should remove or reconsider potentially problematic categories and definitions in sign codes. Some of these problem definitions include "political signs," "religious signs," "event signs," "real estate signs," and "holiday lights." These categories are problematic for two reasons. First, when used in local sign codes, these categories typically rely upon the subject matter or message of the sign itself to define the category, which is presumptively unconstitutional after *Reed*, thus giving rise to potential liability for the government.[198] The second reason is that, in most cases, these categories relate to core First Amendment-protected speech, with concomitant heightened public sensitivity that can easily lead to litigation. Whereas many commercial business owners are disinclined to spend time and money litigating over sign regulations, individuals and not-for-profit organizations, many of whom are represented by *pro bono* legal counsel in First Amendment cases, are inclined to spend time and money to preserve core First Amendment rights.[199] *Reed* is a perfect example: the litigation lasted eight years, and Pastor Reed and Good News were represented by *pro bono* legal counsel.

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[198] *Reed,* 135 S. Ct. at 2227.

[199] Because first amendment challenges to sign codes are normally brought under the federal Civil Rights Act, 42 U.S.C. § 1983, which allows for the award of attorneys' fees under 42 U.S.C. § 1988, *pro bono* – and other -- counsel may be very interested in representing plaintiffs in these challenges. *See, e.g.,* Cleveland Area Bd. of Realtors v. City of Euclid, 965 F. Supp. 1017, 1026 (N.D. Ohio 1997) (awarding $308,825.70 in attorneys' fees and costs in sign code case). Adjusting for inflation, that award is equal to $457,225.60 in current dollars.

In some cases, the problem areas can be regulated with sign code definitions that do not directly control or restrict the content of the sign in question. As discussed above, a potentially content neutral definition of "real estate sign" could be "a temporary sign posted on property that is actively marketed for sale." Such a definition does not address the content of the sign, but rather deals with the status of the property and location of the sign. Thus, a for-sale property could theoretically be posted with a "Save the Whales" sign under this definition, but it is likely that the economic motives of the seller would dictate otherwise. While this approach lowers legal risk, it does not eliminate it. If such a provision were challenged, a plaintiff might successfully claim that the purpose for the facially content-neutral definition was to allow for the display of real estate signs, which would then subject the provision to strict scrutiny. Similarly, if the definition of "event sign" is "a temporary sign displayed within 500 feet of property on which a one-time event is held, and which sign may be displayed for up to five days before and one day after such event," the "event sign" could read "Smoke Grass," but the event proponent's interest in promoting the event would likely win the day.

In other cases, some of the problem sign types should simply be avoided. For example, it is nearly impossible to define "political sign" or "religious sign" in a manner that does not create serious content bias issues. If a community has concerns regarding proliferation of these sign types, the problem is best addressed with regulations applicable to all noncommercial signs. As *Reed* espouses, it is not within the purview of local government to pick and choose the subject matter or message of noncommercial speech, or to favor certain types of noncommercial speech over others. To the extent local political leaders are concerned about proliferations of political or religious signs, lawyers and planners should endeavor to educate political leaders about the risks associated with sign regulations of this nature.

B. Avoid strict enforcement of content based distinctions and moratoria

Local governments are also well-advised to suspend enforcement of code provisions—particularly regulation of temporary signs—that are called into question by *Reed*. Obviously, however, *all* sign code *structural* and *locational* provisions directly related to public safety should continue to be enforced. In a case decided shortly before *Reed*, a federal court upheld an Oregon county's decision to cease enforcement of content based provisions in the county code and to instead review applications for temporary sign permits under the remaining, content neutral provisions of the code.[200] This decision provides a superb road map for a jurisdiction considering how it might administer, in the near term, a content based local sign code.

Some local governments may believe that a prudent response to *Reed* is to enact a moratorium on the issuance of sign permits during the pendency of code revisions. That approach is problematic. Moratoria, if challenged, would in most circumstances constitute an unconstitutional prior restraint on expression.[201] Courts strongly disfavor moratoria on issuing *any* sign permits or, worse yet, displaying any new signs. In contrast, a moratorium of short duration – certainly no more than 30 days – that is narrowly tailored to address only the issues raised by *Reed* might possibly be upheld, however, the authors do not recommend this approach.

C. Ensure that sign codes contain the three "basic" sign code requirements

While the authors understand the complexity inherent in sign regulation following *Reed*, there are three easy steps that lawyers and planners can take now to reduce legal risk associated with sign code litigation. These are discussed in this Section.

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[200] Icon Groupe, LLC v. Washington Cnty. 2015 WL 3397170, at *8 (D. Or. 2015).

[201] *See, e.g.,* Schneider v. City of Ramsey, 800 F.Supp. 815 (D.Miinn. 1992), aff'd sub nom. Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1994) (invalidating, as prior restraint, moratorium passed to allow city time to draft zoning regulations for adult uses); Howard v. City of Jacksonville, 109 F. Supp. 2d 1360 (M.D. Fla. 2000) (finding a moratorium on the issuance of permits for adult entertainment businesses invalid as an unconstitutional prior restraint on expression).

1. Purpose statement

All sign codes must have a strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.[202] After all, the first prong of both the intermediate scrutiny and strict scrutiny tests focuses on whether the government has established a "significant" (intermediate) or "compelling" (strict) regulatory interest.

In *Metromedia*, the Supreme Court upheld both traffic safety and community aesthetics as significant governmental interests sufficient to satisfy the intermediate scrutiny examination. Since that time, it has been standard practice for local governments to articulate traffic safety and aesthetics as regulatory interests supporting sign regulations. Although these are certainly the most-recited regulatory interests in local sign codes, and the ones most routinely acknowledged by courts as meeting the intermediate scrutiny test's requirement of a significant governmental interest, other regulatory interests may suffice as well. Other regulatory interests articulated in local sign codes include blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection.[203]

2. Substitution clause

The second sign code "must-have" is frequently called a "substitution clause." A substitution clause is designed to avoid the problem identified in Section II.C above:

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[202] In Desert Outdoor Advertising v. City of Moreno Valley, the Ninth Circuit struck down a local sign ordinance simply on the grounds that it failed to articulate a regulatory purpose. 103 F.3d 814, 819 (9th Cir. 1996). A local government's articulation of a regulatory purpose provides an evidentiary basis for the first prong of the intermediate and strict scrutiny tests.

[203] BRIAN J. CONNOLLY & MARK A. WYCKOFF, MICHIGAN SIGN GUIDEBOOK: THE LOCAL PLANNING AND REGULATION OF SIGNS, 12-3, 13-3 (2011), available at http://scenicmichigan.org/sign-regulation-guidebook.

unconstitutional, content based preferences for commercial speech over noncommercial speech resulting from bans or limitations on off-premises signage, or generous allowances for certain commercial signs. A very simple statement, the substitution clause expressly allows noncommercial copy to replace the message on any permitted or exempt sign.[204] For example, where a sign code allows onsite signs for, say, big-box retailers to be larger than other signs allowed in the community, the message substitution clause allows the big box retailer to replace the onsite sign with a noncommercial message advocating a political position or supporting a particular cause, avoiding the constitutional problem that would otherwise arise if a commercial sign were permitted to the exclusion of a noncommercial sign.[205]

3. **Severability clause**

Severability clauses are added to sign regulations—and statutory provisions more broadly—to uphold the balance of a code in the event a court finds a particular provision invalid.[206] In the context of sign regulations, severability clauses have always been extremely important and are even more so after *Reed*.[207] Facial challenges to sign codes are more common than facial challenges to zoning codes or other local regulations. Severability clauses hedge against the possibility that a court will rule that a sign code is invalid in its entirety rather than merely invalidating one or more provisions. Without a severability clause, an invalidated sign

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[204] *See, e.g.*, DANIEL R. MANDELKER WITH ANDREW BERTUCCI & WILLIAM EWALD, PLANNING ADVISORY SERV. REP. NO. 527, STREET GRAPHICS AND THE LAW 51 (Am. Plan. Ass'n rev. ed. 2004).

[205] The authors note that many of the problems of the Gilbert sign code at issue in *Reed* would have been resolved with a strong substitution clause, although it is questionable whether such a clause would have achieved the town's pre-*Reed* regulatory objectives.

[206] *See, e.g.*, BOERNE, TEX., SIGN ORDINANCE § 18 ("If any portion of this ordinance or any section or subdivision thereof be declared unconstitutional or in violation of the general laws of the state, such declaration shall not affect the remainder of this ordinance which shall remain in full force and effect."); CITY OF FARMINGTON, MICH. ZONING ORDINANCE § 35-233 ("This chapter and the various components, articles, sections, subsections, sentences and phrases are hereby declared to be severable. If any court of competent jurisdiction shall declare any part of this chapter to be unconstitutional or invalid, such ruling shall not affect any other provision of this chapter not specifically included in said ruling.").

[207] Even if the sign code is contained within the zoning code, the authors strongly recommend a separate severability clause be placed in the sign code.

code could result in a regulatory vacuum without sign regulations, forcing local governments to either allow all signs—an aesthetic anarchy from which recovery would be difficult—or to adopt roughshod regulations or moratoria that could cause additional constitutional problems. For these reasons, adopting a severability clause into the sign code is an important protective step for local governments to take.

D. Apply an empirical approach to justify sign regulations, where possible

As discussed above in Section III.C.1, sign codes require justification with purpose statements. Recitations of regulatory purposes should be supported by some form of empirical study or data. Short, glib statements regarding regulatory purposes do not reflect any degree of thoughtfulness regarding sign regulations, and they leave a local government without evidentiary support for its stated purposes in the event of litigation. To that end, local governments should consider employing at least some study and analysis in preparing regulatory purpose statements. Two approaches are discussed below. Using a comprehensive planning process to identify aesthetic concerns generated by signage, or employing traffic safety analysis can assist in purpose statement preparation.

1. Traffic safety studies

While many local sign codes recite traffic safety as a central purpose for sign regulation, very few substantiate the conclusion that a proliferation of signs—or certain types of signs—has actually caused traffic safety concerns in the community. Indeed, some lawyers and sign industry advocates have questioned whether signs—particularly in a world of smart phones, navigation systems, and other driver distractions—contribute at all to driver distraction and traffic incidents. Local governments are therefore advised to conduct studies, or at least consult studies prepared by national experts, to more carefully determine the safety concerns associated

with outdoor signage.[208] Local government fire and safety personnel may also be helpful in documenting, even if only anecdotally, their concerns about traffic safety issues associated with too much or too little signage. For example, employing traffic safety study data or documentation provided by fire and safety personnel to determine the appropriate location, height, size, brightness, etc. of signage along major thoroughfares provides a local government with the type of evidence required to craft sign regulations that respond to stated traffic safety concerns, as well as the evidentiary support necessary to defend a sign code in the event of litigation.

Evidence-based sign regulation is a growing area of study, and complete coverage of this issue is tangential to the subject of this article. Readers are advised to consult the resources in the footnotes to learn more about this trend.

2. **Comprehensive planning**

Comprehensive planning is another source of empirical study that can be used to justify and defend sign codes. Signs are not often the focus of comprehensive planning, however, the visual impact of signs on communities and corridors weighs in favor of including sign issues in communities' land use planning processes. To the extent signs are addressed in a local comprehensive plan, the plan can help to identify and direct sign regulation toward the most pressing sign issues in the community. Moreover, a good comprehensive plan containing robust analysis of sign issues in the community provides good evidentiary support in sign code litigation.

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[208] *See, e.g.*, FEDERAL HIGHWAY ADMIN., THE EFFECTS OF COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS) ON DRIVER ATTENTION AND DISTRACTION: AN UPDATE, PUBLICATION NO. FHWA-HRT-09-018 (Feb. 2009), available at: http://www.fhwa.dot.gov/real_estate/cevms.pdf. *See also* DAWN JOURDAN ET AL, AN EVIDENCE BASED MODEL SIGN CODE (2011), available at http://www.dcp.ufl.edu/files/8c71fa03-9cbf-4af2-9.pdf.

E. Regulation of sign function in a content neutral world: construction signs, real estate signs, wayfinding signs, political/ideological signs, etc.

Perhaps the most vexing post-*Reed* problem faced by local jurisdictions is how to continue to regulate signs according to function or category without becoming crosswise with a district court judge. For some communities, it may be possible to avoid functional sign regulation altogether through uniform regulations of temporary signs—regardless of message. For other jurisdictions, however, that may not be possible for various planning or political reasons.

Reed condemns all facial distinctions between messages, including those that "are more subtle, defining regulated speech by its function or purpose."[209] Therefore, as a starting point, local governments must avoid defining functional sign types according to the language or message that appears on the face of the sign. By now, it should be clear that establishing distinct rules for political, religious, or ideological signs is virtually impossible without engaging in content regulation. A local government that maintains regulations specific to these sign types risks treating forms of noncommercial messages differently, which may precipitate a sign code challenge. As much as some local politicians may wish to see regulation of political signs, specialized political sign regulations are simply barred after *Reed*.

This is not to say, however, that local governments cannot regulate signs according to structural, temporal, or other time, place, and manner-type distinctions. For example, local governments may still regulate permanent signs differently from temporary signs in a content neutral manner. These signs are easily distinguished based on structural characteristics—permanent signs are permanently affixed to the ground, a wall, or some other device, while temporary signs are not. Permanent and temporary signs may also be made of different

[209] *Reed*, 135 S. Ct. at 2227.

materials; permanent signs are frequently made of stone, metal or wood, while temporary signs are predominantly made of plastic or cardboard. Local governments may also regulate display time for temporary signs. It is not unconstitutional for a local government to say, for example, that a temporary sign may be placed for a maximum of 90 days at a time. Moreover, sign regulations may continue to place size limits and numerical limits on total amount of signage per property.

It is therefore not inconceivable to think that a local government could regulate political, ideological and other forms of noncommercial signage as follows: "Notwithstanding any other provision of this code, each parcel of real property shall be allowed, without a permit, an additional thirty two (32) square feet of temporary noncommercial signage, not to exceed four (4) signs at any one time, for a period not to exceed ninety (90) days per calendar year." This provision would allow non-permitted temporary noncommercial signage, but restrict that signage to certain size and number requirements, and to a certain display time. Moreover, this code provision is content neutral, as it does not limit or restrict what the sign might say—except that it must be noncommercial.

While the authors believe that the foregoing code provision would likely satisfy *Reed*, we also recognize that it may be difficult to enforce and that it may not accomplish all of the objectives of the local government. Another approach, albeit one with greater risk exposure, is to define signs according the activities occurring where the sign is located. For example, a content neutral definition of a "construction sign" might be "a temporary sign placed within a parcel of property upon which construction activities of any type are being actively performed." The code could contain definitions similar to this one for real estate signs. "Grand opening signs" could be defined as "a temporary sign placed within a parcel of property, not to exceed

thirty two (32) square feet, and which may be displayed for a period not to exceed ninety (90) days following the sale, lease, or other conveyance of the parcel or any interest therein." Event-based signs could fall under a regulation that defines an "event sign" as "a sign not to exceed twelve (12) square feet that is placed no more than two (2) weeks prior to and no more than two (2) days following a registered event," and which requires a registration of events with the permitting jurisdiction.

Assuming the code provided a category for general temporary noncommercial signage, these code provisions would be more likely to satisfy *Reed* than a code that articulates definitions based solely on the message of signs. We note, however, that the aforementioned provisions have not been tested in courts, and even *Reed* may call into the question the validity of such regulations under the rationale that these regulations exhibit subtle content bias. Even so, to the extent local governments desire to regulate signs according to function, the authors advise against such regulation, as any type of functional or categorical regulation *will* lead to increased risk exposure for the local government.

F. Permitting and enforcement

As with other areas of regulation, in addition to being informed by the local government's tolerance for risk management, sign regulations should also be based upon the local government's appetite for and ability to enforce the regulations. Enforcement of sign regulations is rarely an easy task, and improper enforcement of sign regulations can lead to serious trouble.[210] Local governments should therefore consider the enforcement of sign regulations before and during the drafting process, rather than after adoption of the regulations.

[210] Selective enforcement claims arising in the enforcement of speech regulations may give rise to liability for local governments. *See, e.g.*, LaTrieste Restaurant and Cabaret, Inc. v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994).

The authors have noted that the availability of online registration systems may greatly ease enforcement headaches of local governments. For example, it may be possible for a local government to require any person displaying a temporary sign to register the sign with the local government on its website. Such an online registration system would not act as a bar to an individual's right to display a temporary sign, and would provide the local government with a registry of the properties at which signs are posted, which would in turn allow for better enforcement of size, height, and time restrictions on signs. In such a scenario, the local government could cite property owners with unregistered signs.

With the advent of digital technology, there is significant room for creativity in enforcing sign regulations, so long as the local government is not using such enforcement mechanisms to subvert First Amendment obligations.

IV. Conclusion

Reed is likely to precipitate a significant shift in courts' treatment of sign codes under a First Amendment challenge. Local governments thus would be wise to undertake sign code reviews and, if necessary, revise now to ensure that the code does not contain any of the content based distinctions that created problems for Gilbert. Where necessary, local governments should consult resources—including planners and lawyers knowledgeable in First Amendment issues—to be certain that sign codes do not carry more risk than the local government desires to bear.

Portions of this article are adapted with permission from Brian J. Connolly, *U.S. Supreme Court Reiterates First Amendment Requires Content Neutral Sign Regulations*, 33 PLAN. & ZONING NEWS 2 (Jul. 2015).

Attachment 4

Reed vs. Town of Gilbert: The Supreme Court's New Rule for Temporary and other signs

VITAL SIGNS, VIBRANT COMMUNITIES.

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Attachment 4

Speaker Introductions

Moderator

James Carpentier AICP

Manager State & Local Government Affairs

International Sign Association

Speaker

Professor Alan Weinstein

Cleveland-Marshall College of Law

Maxine Goodman Levin College of Urban Affairs

Attachment 4

Speaker Introductions

Speaker
Wendy Moeller AICP
Principal
Compass Point Planning

First Amendment in Sign Regulation

- The First Amendment applies to *every* sign
- Government regulation of signs loses the normal presumption of constitutionality and is subject to *heightened scrutiny*
- Sign litigation is common, expensive, and risky
- Most sign ordinances contain at least a few provisions of questionable constitutionality

Attachment 4

First Amendment Concepts

- Content (or message) neutrality
- Time, place or manner regulations
- Commercial vs. non-commercial speech

- Off-site vs. on-site signs
- Bans and exceptions
- Permits and prior restraints
- Vagueness and Overbreadth

Attachment 4

Content neutral vs. Viewpoint neutral

- Content neutral looks at subject matter
- Viewpoint neutral looks at point of view
  - a ban on all signs is content neutral *and* viewpoint neutral
  - a ban on all political signs is *not* content neutral but *is* viewpoint neutral
  - a ban on signs that criticize government is neither content neutral nor viewpoint neutral

Attachment 4

Is this a “content-based” provision?

“Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.”

Attachment 4

Is this a “content-based” provision?

“Identification signs may include the principal type of goods sold or services rendered; however, the listing of numerous goods or services, prices, sale items, and telephone numbers shall not be permitted.”

What about this sign?

Is this a “content-based” provision?

“Directional signs indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”

Is this a “content-based” provision?

“Directional signs indicating only the direction of pedestrian and vehicular circulation routes on the lot on which the sign is located.”

Are these signs legal under that provision?

"Time, place or manner" Regulations

- Maximum size/height
- Maximum number per
  - lot/building
  - support structure
- Specify locations
  - prohibitions
  - corner lots
  - setbacks/spacing

- Regulate
  - lighting
  - flashing/animation
  - neon
  - materials/colors

Note: Regulating color may be a problem when applied to federally-registered trademarks.

Attachment 4

Define signs based on their structure

- freestanding signs
  - pole
  - monument
- temporary vs. permanent signs
- portable signs
- “snipe” signs
- “blade” signs

- building signs
  - roof
  - wall
  - window
  - marquee/awning
  - projecting and suspended
- “A-frame” signs
- “wind-signs”

Attachment 4

Commercial speech vs. Non-commercial speech

Commercial speech

- "speech that proposes a commercial transaction" or promotes intelligent market choices
- protected under First amendment … but not as much as "traditional" (non-commercial) speech

Non-commercial speech

- speech about political, ideological, religious, *etc*. ideas
- highest degree of First amendment protection

Attachment 4

Commercial signs vs. Noncommercial signs

Commercial Signs

On-premise and off-premise signs that advertise products and services.

Non-Commercial Signs

- political signs
- personal signs
- public service signs
- official signs
- directional signs

On-site vs. Off-site

- On–site signs identify the use, or advertise products or services offered, at the location where the sign is displayed

- Off-site signs identify a use, or advertise products or services offered, somewhere other than the location where the sign is displayed

On-site vs. Off-site

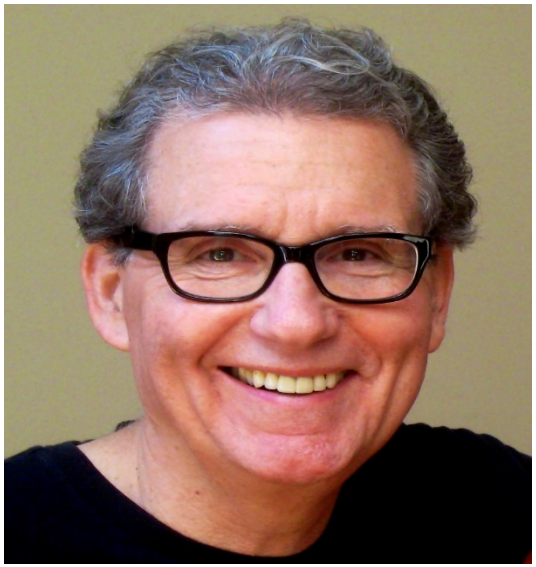
- “at the location where the sign is displayed vs. somewhere other than the location where the sign is displayed”
- works great for commercial messages
- but is the following message on-site or off-site?

Attachment 4

On-site vs. Off-site signs

- "at the location where the sign is displayed vs. somewhere other than the location where the sign is displayed" works great for commercial messages …but is this message on-site or off-site?

"Honest Al" For Mayor



"I lie less than my opponents"

Bans and exemptions

- Court has upheld some total bans
  - commercial billboards in *Metromedia*
  - signs posted on public property in *Vincent*
- Struck down others
  - real estate lawn signs in *Linmark*
  - personal lawn signs in *Ladue*

Bans and exemptions

- Exemptions to a general prohibition are always problematic
  - exempting time/temperature from ban on changeable copy signs
  - exempting “grand opening” signs from ban on inflatable signs
  - exempting real estate signs from ban on portable and temporary signs

Bans and exemptions

- Burden is on government to justify the exemption … must show
  - why the exemption does not interfere with achieving the basic goal of the ban or regulation
  - how the exemption relates to the regulatory interest the city seeks to advance

Attachment 4

Reed v. Town of Gilbert, AZ

- *Reed v. Town of Gilbert, Ariz*., 587 F.3d 966 (9th Cir. 2009), *on remand*, 832 F.Supp.2d 1070 (D. Ariz. 2011), *affirmed*, 707 F.3d 1057 (9th Cir. 2013), *reversed and remanded*, 135 S.Ct. 2218 (2015).

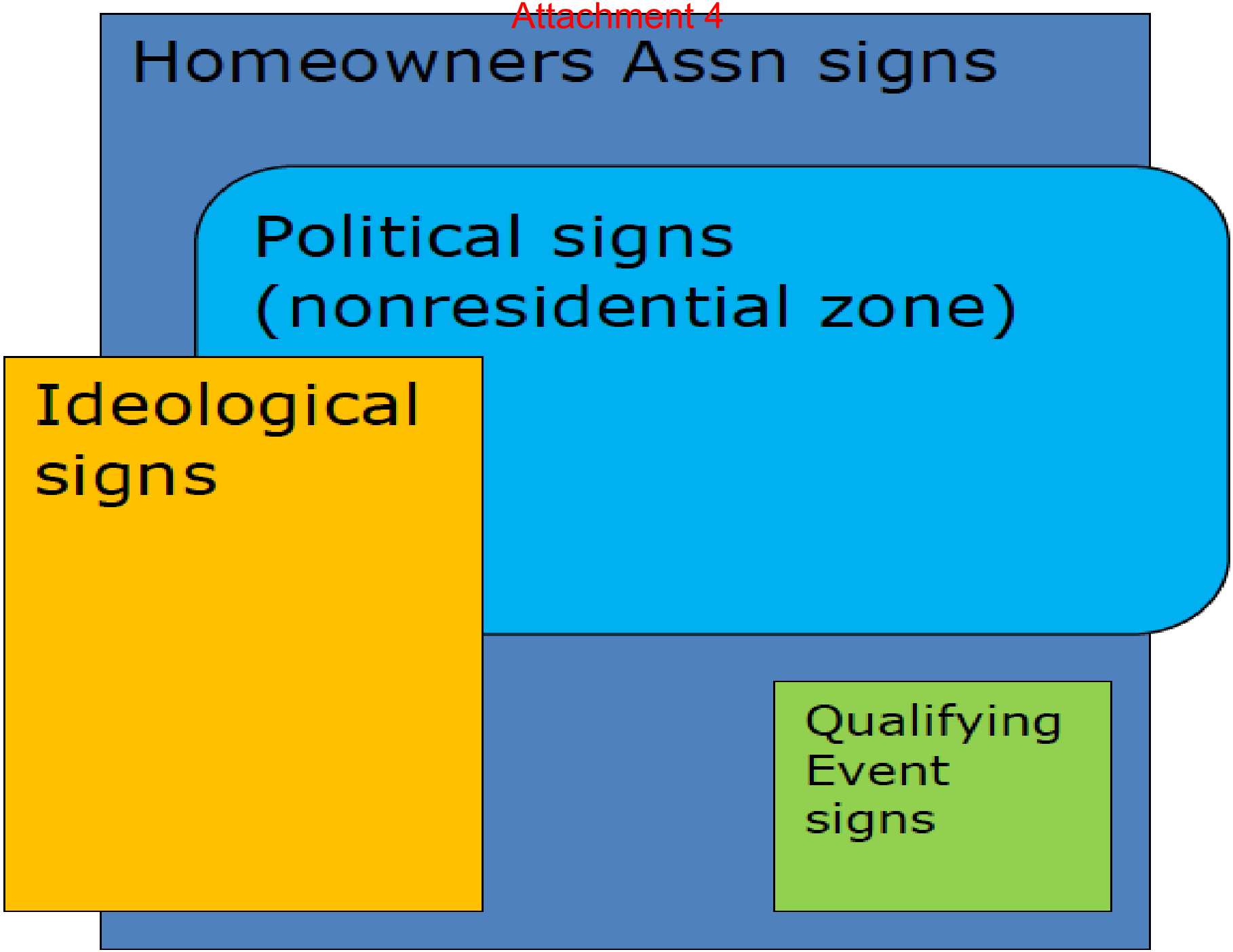
Attachment 4

Reed v. Gilbert AZ

- Temporary Directional Signs Relating to a Qualifying Event (non-profit)
  - 6’ x 6’ sign allowed for 12 hrs before/1 hr after event
  - no more than 4 signs on any property (w/ owner consent)

- Political Signs
  - unlimited number of signs up to 32 s.f.
  - no time limit before election - removal 10 days after

- Ideological Signs
  - Unlimited number/time for signs up to 20 s.f.


Homeowners Assn signs
Political signs
(nonresidential zone)
Ideological
signs
Qualifying
Event
signs

Attachment 4

Reed v. Gilbert, AZ

Example of Signs at Issue

Attachment 4

Reed v. Gilbert AZ

- Church: rules disfavor “temporary directional signs” compared to political and ideological signs
- City: each classification and its restrictions 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

Attachment 4

Content-neutrality Circuit Split

"Need to Read" – 5, 8 & 11

- Do you have to look at the message to determine if the rule applies?
- If so, it is content-based.
  - political or election signs
  - real estate signs
  - directional/Identification signs
  - instructional signs
  - construction signs
  - nameplate signs
  - price signs
  - home occupation signs

"No-censorship" – 3, 4, 6, 7 & 9

- Is the government trying to regulate or censor content?
- If not, it is content-neutral because:
  - local government needs some leeway in navigating through First Amendment law
  - a limited number of content-based provisions that are not intended to censor or restrict speech is acceptable

Attachment 4

Reed v. Gilbert AZ

- Court rules 9-0 that challenged code provision is unconstitutional
- 6-3 majority opinion (Thomas, joined by Roberts, Scalia, Kennedy, Alito & Sotomayor), *plus* concurrence by Alito w/ Kennedy & Sotomayor)
- Breyer and Kagan (joined by Breyer and Ginsburg) each file opinion concurring only in the judgment

Reed v. Gilbert AZ
Majority Opinion

"On its face" Rule: If you have to read the message displayed to determine how a sign is regulated, then that regulation is content-based.

"Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."

Reed v. Gilbert AZ
Majority Opinion

Plus … a "facially" content-neutral regulation will be considered content-based if:

- a regulation can't be justified without reference to the content … or
- a regulation was adopted because of disagreement with the message conveyed

Reed v. Gilbert AZ
Majority Opinion

If a sign regulation is content-based, it is subject to *strict scrutiny* …

•Presumed unconstitutional … so gov't bears burden of proof/persuasion to show:

- **Serves a *compelling* governmental interest**
- ***Narrowly-tailored* to achieve that interest**

Reed v. Gilbert AZ
Majority Opinion

Categorical signs are "content-based"

- political/election signs
- real estate signs
- directional/Identification signs
- instructional signs
- construction signs
- nameplate signs
- price signs
- home occupation signs

Reed v. Gilbert AZ
Majority Opinion

"Speaker-based"
"Event-based"
signs are
"content-based"

- "displayed on a lot with a property for sale or rent"
- "displayed on a lot where construction is taking place"
- "gasoline station signs"
- "theater signs"

Reed v. Gilbert AZ
Majority Opinion

So what does that mean?

- Fact that government's purpose or justification for regulation had nothing to do with trying to limit speech does not matter
- Strict scrutiny usually means gov't loses

Reed v. Gilbert AZ
Majority Opinion

Still lots that government can do …

- "regulate many aspects of signs that have nothing to do with a sign's message"
- prohibit signs on public property, so long as regulation is content-neutral
- certain signs may be essential (*e.g.*, for safety purposes) and "well might survive strict scrutiny

Reed V. Gilbert AZ
Alito Concurring Opinion

"Here are some rules that would not be content-based"

size and location, including placement on private property vs. public property	
lighting	fixed vs. changing message, including electronic
on-site vs. off-site	rules restricting total # of signs per mile of roadway
"rules imposing time restrictions on signs advertising a one-time event"	
Government "may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots."	

Attachment 4

Reed v. Gilbert AZ

Breyer and Kagan Concurring Opinions

Breyer

- The majority rule "goes too far" and will lead to "judicial management of ordinary government regulatory activity"

Kagan

- Cities "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."

Reed v. Gilbert AZ
What Don't We Know?

- Billboards?
- Commercial Signs?
- Compelling interests?
- Narrowly Tailored?

Do's and Don'ts After *Reed*

DO

- review code to identify content-based regulations; e.g. "categorical" regs.
- add a severability clause and a substitution clause if you do not have one
- have a strong purpose clause and link that to regulations

DON'T

- enforce content-based regulations
- enact a moratorium on *all* sign permits

Attachment 4

Severability Clause

"If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word in this code is declared invalid, such invalidity shall not affect the validity or enforceability of the remaining portions of the code."

Attachment 4

Regulatory Purposes

1. To promote the creation of an attractive visual environment that promotes a healthy economy by:

    a. Permitting businesses to inform, identify, and communicate effectively; and

    b. Directing the general public through the use of signs while maintaining attractive and harmonious application of signs on the buildings and sites.

2. To protect and enhance the physical appearance of the community in a lawful manner that recognizes the rights of property owners by:

    a. Encouraging the appropriate design, scale, and placement of signs.

    b. Encouraging the orderly placement of signs on the building while avoiding regulations that are so rigid and inflexible that all signs in a series are monotonously uniform.

    c. Assuring that the information displayed on a sign is clearly visible, conspicuous, legible and readable so that the sign achieves the intended purpose.

3. To foster public safety along public and private streets within the community by assuring that all signs are in safe and appropriate locations.

4. To have administrative review procedures that are the minimum necessary to:

    a. Balance the community's objectives and regulatory requirements with the reasonable advertising and way finding needs of businesses.

    b. Allow for consistent enforcement of the Sign Code.

    c. Minimize the time required to review a sign application.

    d. Provide flexibility as to the number and placement of signs so the regulations are more responsive to business needs while maintaining the community's standards.

Attachment 4

Regulatory Purposes

A. To allow businesses, institutions, and individuals to exercise their right to free speech by displaying an image on a sign, and to allow audiences to receive such information.

B. To promote and maintain visually attractive, residential, retail, commercial, historic open space and industrial districts.

C. To provide for reasonable and appropriate communication and identification for on-premise signs in commercial districts in order to foster successful businesses.

D. To provide for reasonable and appropriate communication for on-premise signs within industrial districts.

E. To encourage the use of creative and visually attractive signs.

F. To ensure that signs are located and designed to reduce sign distraction and confusion that may be contributing factors in traffic congestion and accidents, and maintain a safe and orderly pedestrian and vehicular environment.

G. To protect property values.

H. To promote the public health, safety and welfare by avoiding conflicts between signs and traffic control devices, avoiding traffic hazards, and reducing visual distractions and obstructions.

I. To protect and preserve the aesthetic quality and physical appearance of the Township.

What should be in your code?

- regulatory purposes
- definitions
- standards for measuring sign areas/heights
- regulations for:
  - sign placement
  - height/area
  - setback/spacing/density
  - type/time of lighting
- enforcement

- regulations for:
  - billboards, etc.
  - temporary/portable signs
  - window/awning signs
- prohibited signs
- non-conforming signs
- administration
  - permitting provisions
  - variances
  - appeals

Attachment 4

Reed vs. Town of Gilbert: The Supreme Court's New Rule for Temporary and other signs

VITAL SIGNS, VIBRANT COMMUNITIES.

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APA County Planning

sfi signage foundation, inc.

ISA International Sign Association

Practical Implications

- **With sign regulations, it is easiest to regulate permanent signs.**
  - A permanent structure much like a fence, shed, or building
  - The biggest issue typically relates to off-premise signs (a.k.a., billboards)

Practical Implications

- **With sign regulations, it is easiest to regulate permanent signs.**
  - A permanent structure much like a fence, shed, building
  - The biggest issue typically relates to off-premise signs (a.k.a., billboards)

Practical Implications

- **Free speech challenges related to a permanent sign are less common…but they are out there.**

"…it is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations."

- ***City of Tipp City v. Michael F. Dakin, et. al.***

  Court of Appeals of Ohio, 2nd District, Miami County

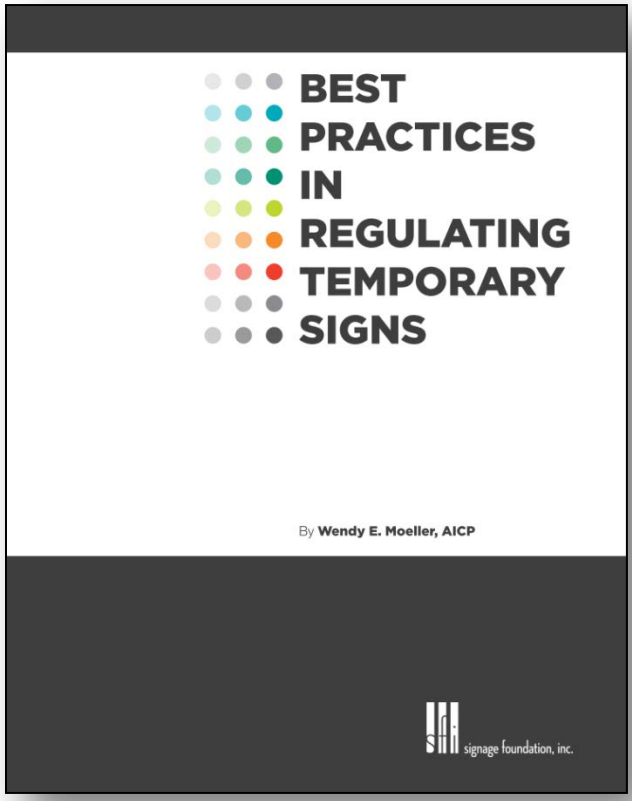
Practical Implications

- **The biggest struggles tend to be temporary signs.**
  - Administration and enforcement is typically more complicated (not a one time deal).
  - Temporary signs are constantly evolving.
  - What is a reasonable number or size?
  - How long is temporary? At what point do they morph into a permanent sign?
  - No permanent location
  - Content-neutrality

Attachment 4

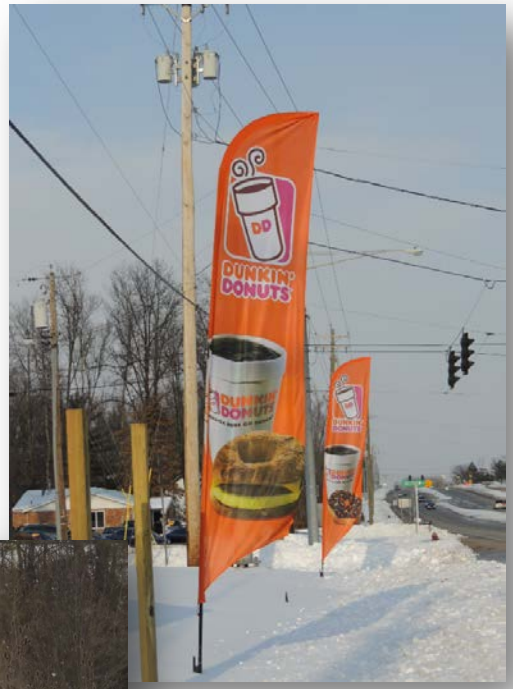
Best Practices Guide

- A year of research
- Survey – 99 communities across 31 states
- Ordinance review
- Review committee
- General research
- Development of guide
  - General best practices
  - Best practices by temporary sign type



Temporary Sign vs. Message

- **Temporary <u>Sign</u>**
  - The entire structure is temporary or portable.
  - Not ***intended*** to be a permanent installation.



Temporary Sign vs. Message

- **Temporary <u>Message</u>**
  - The sign structure is permanently installed but designed so the message can change manually or electronically.

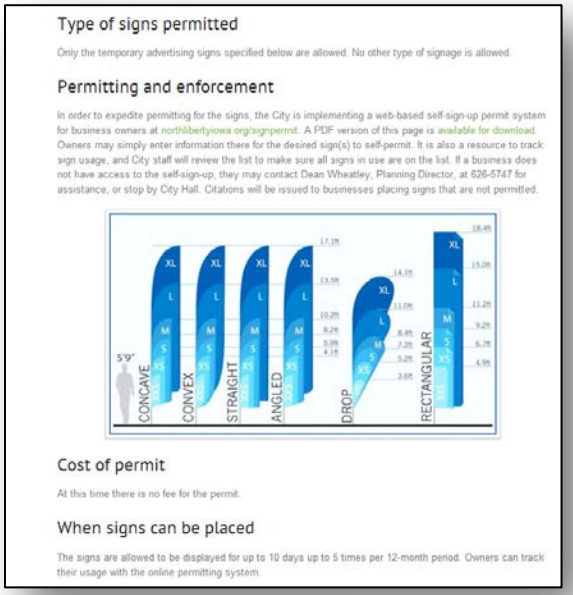
Avoid Treating all Temporary Signs the Same

- **Many communities have one time-limit for all temporary signs**
- **Poses a problem for:**
  - Commercial signs on properties for sale/lease*
  - Sidewalk signs
  - Temporary, seasonal uses

** Note that these are commercial signs tied to an activity, not "real-estate signs" that are tied to content*

Administration and Enforcement

- **Identified by planners as one of their biggest issues**
  - Movement to use more technology
    - Online permitting
    - Use of calendar apps
  - Putting more burden on the applicants
    - Stickers or tags



Type of signs permitted

Only the temporary advertising signs specified below are allowed. No other type of signage is allowed.

Permitting and enforcement

In order to expedite permitting for the signs, the City is implementing a web-based self-sign-up permit system for business owners at northlibertyiowa.org/signpermit. A PDF version of this page is available for download. Owners may simply enter information there for the desired sign(s) to self-permit. It is also a resource to track sign usage, and City staff will review the list to make sure all signs in use are on the list. If a business does not have access to the self-sign-up, they may contact Dean Wheatley, Planning Director, at 626-5747 for assistance, or stop by City Hall. Citations will be issued to businesses placing signs that are not permitted.

Cost of permit

At this time there is no fee for the permit.

When signs can be placed

The signs are allowed to be displayed for up to 10 days up to 5 times per 12-month period. Owners can track their usage with the online permitting system.

Attachment 4

Sign Types

Balloon Signs & Air Activated Graphics

Attachment 4

Banner Signs

Attachment 4

Blade Signs

Attachment 4

Freestanding/Yard Signs

Attachment 4

People Signs

Sidewalk Signs

Attachment 4

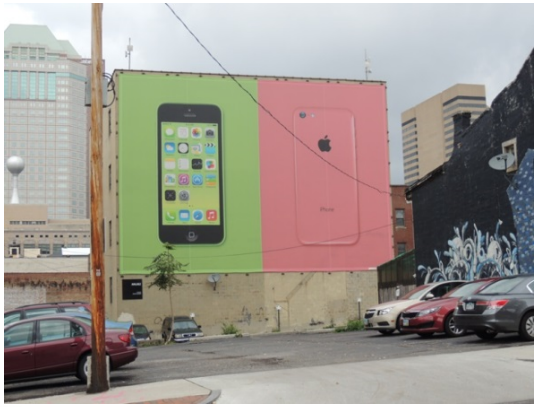
Vehicle Signs/Wraps

Attachment 4

Other Temporary Sign Types

Temporary Window Signs

Portable Message Centers



Advertising Murals

Attachment 4

Questions and Answers

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Attachment 5

Chapter Six: Legal Context and Constitutional Considerations

Grand Rapids, Kent County.

Legal challenges to sign regulations touch on four distinct but related areas of constitutional law. Recently, most litigation over sign regulation has dealt with the First Amendment to the U.S. Constitution and the right of sign owners to freely express their views and messages. Still, however, constitutional—both federal and state—issues of *due process*, *takings* and *equal protection* are also caught up in modern legal disputes over the regulation of signage. While the Michigan Constitution provides parallel protections to the Federal Constitution, these legal considerations are reviewed in the context of federal constitutional law, since federal courts have jurisdiction over these issues.

FREE SPEECH AND FIRST AMENDMENT RIGHTS

The vast majority of modern litigation over sign regulations concerns the right to free speech contained in the First Amendment to the U.S. Constitution. Since signs with words or designs inherently contain elements of speech, a sign owner has a constitutionally guaranteed right to convey his or her message. Attorney Randal Morrison sums up the basic First Amendment concerns regarding sign regulation:

> *"The principal legal issue of sign regulation is when, how, and why the First Amendment right to 'speak' by displaying a sign may be limited by regulation for the public good. Although the foundation concept—reasonable limitation which balances the free speech right against the character and history of a place—seems simple enough, applying this glittering generality to specific disputes has vexed many courts, and produced a substantial body of case law which is as notable for its inconsistency as for its diversity."*[1]

The modern history of First Amendment litigation pertaining to sign regulations can be traced to the mid-1970s. Before that time, the U.S. Supreme Court had never given First Amendment protection to commercial speech. In 1976, the U.S. Supreme Court declared in **Virginia Pharmacy Board v. Virginia Citizens Consumer Council** that *"commercial speech, like other varieties, is protected."*[2] The protection of commercial speech exposed sign regulations to a host of new potential challenges from commercial advertisers. The Court first discussed First Amendment implications as they pertain to outdoor signage in **Linmark Associates, Inc. v. Willingboro**, where it struck down a municipal ban on residential real estate signs.[3]

The U.S. Supreme Court's thorough articulation of First Amendment principles as they relate directly to sign regulations came in **Metromedia, Inc. v. City of San Diego**.[4] A billboard company challenged San Diego's ordinance permitting on-premises commercial signs but restricting off-premises billboards, with 12 exemptions from the billboard ban, including exemptions (or exceptions) for government signs and temporary political signs. The U.S. Supreme Court struck down the ordinance on the grounds that the ordinance contained unconstitutional exemptions based on the content of the signs by excluding political campaign signs, historic and religious markers, time and temperature signs, and others from the general ban. Furthermore, the Court found that the city's prohibition against off-premises non-commercial signage while permitting on-premises commercial signage was an unconstitutional content-based preference for commercial speech over non-commercial speech. The Court further held

1. Randal R. Morrison, *Sign Regulation*, in **Protecting Free Speech and Expression: The First Amendment and Land Use Law** 105–06 (Daniel R. Mandelker & Rebecca L. Rubin, eds., 2001) (citations omitted).

2. 425 US 748, 771 (1976).
3. 431 US 85 (1977).
4. 453 US 490 (1981).

Attachment 5

What is Commercial Speech?

Since **Virginia Pharmacy Board** and **Central Hudson**, the courts assume that the distinction between commercial and non-commercial speech is clear, but to the lay ordinance reader, it may not be.

Black's Law Dictionary refers to commercial speech as "*[c]ommunication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience.*" In essence, commercial speech proposes a transaction which will produce an economic profit to at least one party. A message encouraging an individual to buy or sell a certain item is the standard example, although displays of corporate logos are also commercial speech.

Non-commercial speech, on the other hand, is any speech that does not propose a transaction. Classic examples of non-commercial speech include political candidate advertising or a statement advocating a position on a political or social issue.

Generally, as long as a sign contains some form of commercial speech—a corporate logo or an advertisement—it is a commercial sign and may be regulated as such.

that the ordinance's differential treatment of on-premises and off-premises commercial advertising was acceptable.

While the outcome of **Metromedia** is confusing given the multitude of opinions produced by the Court, three key principles were articulated in the case. First, "*the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals*" sufficient for regulating speech.[5] Second, controls on design, size, height, shape and similar aspects of signage are valid as "*time, place and manner*" restrictions on speech, so long as they do not discriminate based on the *content* of the signs. Third, the U.S. Supreme Court justices agreed on the notion that prohibiting billboards and off-premises commercial signs is a constitutional content-neutral restriction, but that commercial speech may not be permitted when non-commercial speech is otherwise prohibited:

> "*[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.*"[6,7]

Metromedia set the stage for increased First Amendment litigation over sign regulation. The U.S. Supreme Court reaffirmed its approval of the aesthetic rationale for regulation of speech in **Members of City Council of the City of Los Angeles v. Taxpayers for Vincent**. In that case, on the grounds that alternative channels of communication were available to political candidates, the Court upheld a municipal ban on posting campaign advertising on utility poles in the public right-of-way, despite the fact that the ordinance contained some exceptions to the general ban.[8] However, the Court struck down a municipal ordinance banning all residential signage except signs falling within one of 10 exempt categories in **City of Ladue v. Gilleo**, on the grounds that the ordinance went too far in restricting speech and did not provide residents with ample alternative channels in which to express their views.[9]

5.453 US at 507.

6.453 US at 513.
7.Although the Metromedia majority found that bans on off-premises signage were acceptable as long as they did not favor commercial speech, the Michigan courts have imposed restrictions on municipalities' ability to ban billboards (see Chapter 7).
8.466 US 789 (1984).
9.512 US 43 (1994).

Content-neutrality demands that government not dictate any part of the message of the sign.

There are several complicated aspects of First Amendment law as they relate to sign regulations, each of which are discussed below. See **Figure 6–1—Basic First Amendment Analysis of a Sign Regulation** for an elementary "*roadmap*" of a courtroom analysis of these issues.

Content-Neutrality

Professor and land use attorney Daniel Mandelker sums up content-neutrality as follows:

> *"A law cannot regulate viewpoint. A sign ordinance, for example, cannot prohibit signs that advocate saving whales. A sign ordinance must also be content-neutral. An example of a law regulating the content of speech is a sign ordinance that prohibits all signs carrying messages about nuclear power no matter what they say."*[10]

In essence, content-neutrality demands that government not dictate any part of the message of the sign. Content-based sign regulations—including all regulations which are not content-neutral—will almost always prove fatal in a courtroom review:

> *"The Supreme Court applies a strict scrutiny test when it reviews a law that violates content-neutrality. A law regulating the content of speech is constitutional if it is (1) necessary to achieve a compelling governmental interest, and (2) narrowly drawn to achieve that end. Laws that regulate content are usually held unconstitutional under this test."*[11]

See **Table 6–1—Overview of Supreme Court tests for Constitutionality of a Regulation** for a tabular display of the various tests applied by the courts to analyze the constitutionality of government regulations.

A common, if simplistic, adage says that a municipality's sign regulation is content-neutral if a non-English speaker could perform sign code enforcement duties, since the enforcement officer should not have to read the content of the sign being regulated. In reality, determining whether an ordinance is content-neutral is a sticky subject. Attorney Susan Trevarthen writes,

> *"The cases are conflicted as to how to define content-based speech. More literal-minded courts ask: 'Do you have to look at the message to determine whether the rule applies?' If so, it is content-based. Under this approach, regulation of 'for sale' signs, 'directional' signs, 'identification' signs, 'grand opening' signs, and 'stop' signs would always be content-based, would be subjected to strict scrutiny, and would likely be invalidated. Other, more functionally minded courts ask: 'Is the government trying to regulate or censor content?' If so, it is content-based. Under this approach, sign regulations allowing U.S. flags but not other flags would be content-based, and would be subjected to strict scrutiny and invalidated."*[12]

The U.S. Supreme Court's most recent statement on the distinction between a content-neutral and content-based regulation came in **Hill v. Colorado**, where the Court held that a content-neutral regulation is one where (1) the regulation is not a regulation of speech,

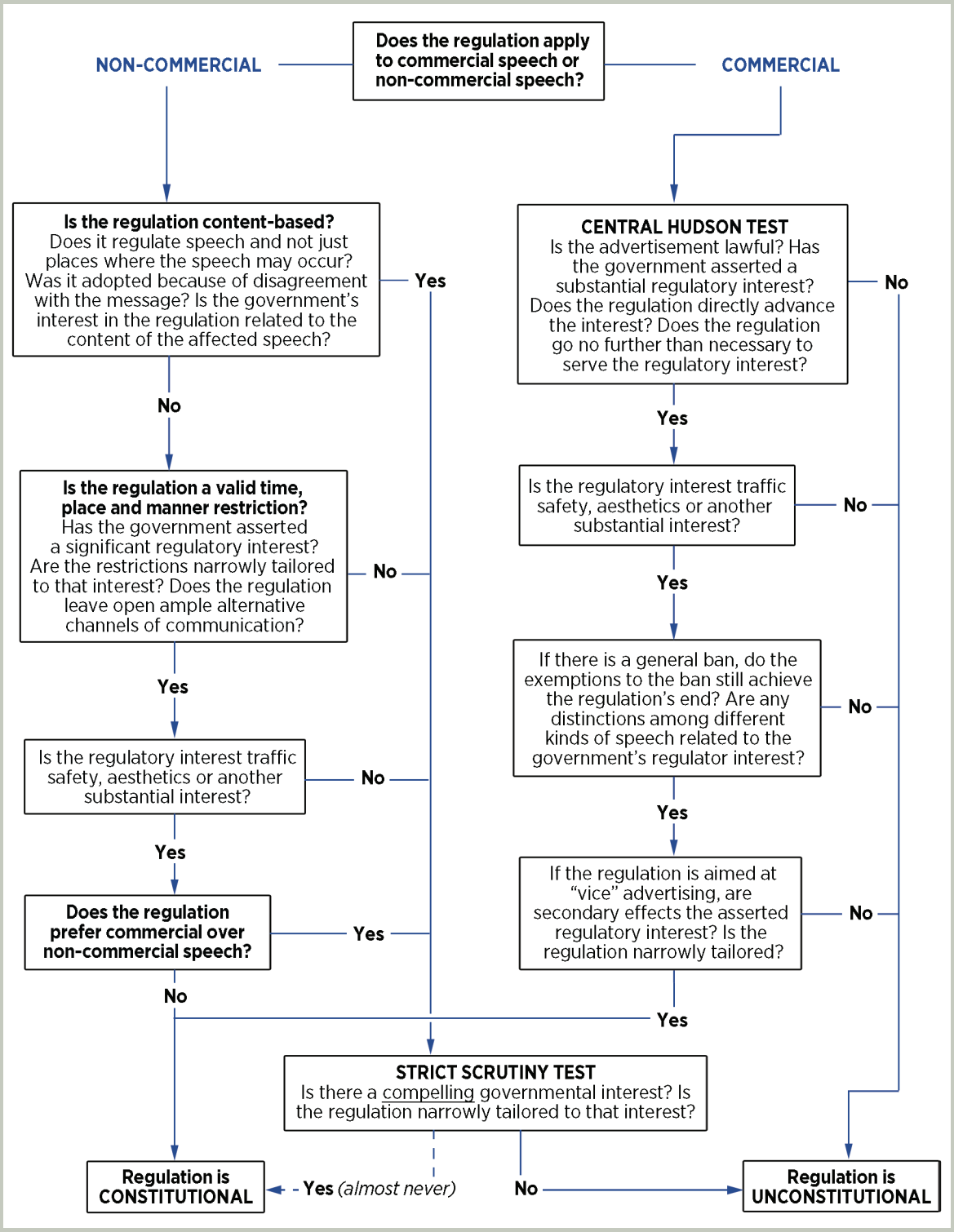
10.Daniel Mandelker with Andrew Bertucci and William Ewald, Planning Advisory Service Report No. 527, **Street Graphics and the Law** 114 (American Planning Ass'n rev. ed. 2004). The origins of the notion of content-neutrality are not particularly clear. The Supreme Court's first reference to the idea of content-neutrality came in Police Department of City of Chicago v. Mosley, where the Court said, "*the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip(s) from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted.*" 408 U.S. 92, 99 (1972) (quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 **Sup. Ct. Rev.** 1, 29). A number of cases then adopted this notion of content-neutrality with regard to time, place and manner restrictions, including Virginia Pharmacy Board and Linmark. Consolidated Edison v. Public Service Commission articulated the principal reason for content-neutrality: "*[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'*" 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). Content-neutrality was then adopted by the Supreme Court into the realm of sign regulation in Metromedia.

11.Mandelker et al., *supra*, at 114.

12.Susan L. Trevarthen, *Best Practices in First Amendment Land Use Regulations*, 61 **Plan. & Envtl. L.**, no. 6, Jun. 2009 at 3.

Attachment 5

Figure 6–1: Basic First Amendment Analysis of a Sign Regulation



Attachment 5

Table 6-1: Overview of Supreme Court Tests for Constitutionality of a Regulation

	Strict Scrutiny	Intermediate Scrutiny (Central Hudson Test)	Rational Basis
Trigger(s)	• Content-based regulation of speech • Fundamental constitutional right (i.e., life, liberty, property, First Amendment rights) being deprived—in due process cases • Protected class (i.e., members of one race) being intentionally discriminated against, with disparate impact	• Content-neutral regulation of speech • Regulations applying specifically to commercial speech	• Non-fundamental constitutional right (i.e., right to profit, right to do business, etc.) being deprived or diminished—in due process cases • Any equal protection claim asserting discriminatory intent and disparate impact between members of non-protected classes (i.e., business owners, property owners in different zoning districts, etc.)
Governmental Interest Requirement	Compelling—traffic safety and community aesthetics are NOT compelling	Substantial—traffic safety and community aesthetics are substantial	Legitimate—traffic safety and community aesthetics are legitimate
Tailoring Requirement	Regulation must be narrowly tailored to serve the governmental interest	Regulation must directly advance the governmental interest and not be more extensive than necessary to serve the interest	Regulation must rationally relate to the governmental interest
Likelihood that the Government Will Prevail	VERY LOW	MODERATELY HIGH	HIGH

but controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech.[13] Although one outcome of **Hill** is that *"a sign code is not content-based simply because a government official must review the content of the sign to determine which provision of the ordinance applies,"*[14] there is still a great deal of courtroom wrangling over the true meaning of content-neutrality.

Content-Based Regulations

Examples of ordinance provisions that have been found to be content-based include:

- Placement of durational and display limits only on signs displaying political messages;[15]
- Permitting only time and temperature readings on electronic signs;[16] and
- Permitting only the display of flags of recognized government entities while prohibiting displays of non-governmental, non-commercial flags.[17]

Exceptions to general bans on certain types of signage—such as exemptions for political, governmental or religious signs when other signs are banned—are also subjected to

13.530 US 703 (2000).
14.John M. Baker and Robin M. Wolpert, *The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Municipal Billboard and Sign Regulations*, 38 **Plan. & Envtl. L.**, no. 10, Oct. 2008 at 3.
15.Beaulieu v. City of Alabaster, 454 F3d 1219 (CA 11, 2006); Whitton v. City of Gladstone, Mo., 54 F3d 1400 (CA 8, 1995).
16.Naser Jewelers, Inc. v. City of Concord, N.H., 513 F3d 27 (CA 1, 2008); Solantic, LLC v. City of Neptune Beach, 410 F3d 1250 (CA 11, 2005).
17.Dimmitt v. City of Clearwater, 985 F2d 1565 (CA 11, 1993).

particularly rigorous scrutiny because they are potentially content-based.[18]

Despite the fact that **Metromedia** upheld the distinction between on-premises and off-premises signage, even that distinction has been found to be content-based in some jurisdictions on the grounds that a code enforcement officer must read a sign's content to determine whether or not it relates to the premises on which it is located—that is to say, a code enforcement officer would need to read a sign to know whether or not it relates to a business on the property.[19] However, Michigan courts have endorsed the notion that *"[t]he fact that the government official must review the content of the sign's message to determine which provision of the ordinance [i.e., on-premise or off-premise] applies does not render the ordinance content-based."*[20]

Content-Neutral Regulations

Content-neutral regulations of commercial and non-commercial speech, on the other hand, are given much greater deference by courts:

An ordinance that permits only time and temperature readings to be displayed on electronic signs is a content-based regulation because it dictates the message of the sign. Above, a time and temperature display on a sign in the City of Frankenmuth, Saginaw County.

> *"[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"*[21]

Content-neutral time, place and manner restrictions are routinely upheld by courts under a version of the intermediate scrutiny test. See **Table 6-2—Applying First Amendment Principles to Common Sign Regulation Goals**

18.Metromedia, Inc. v. City of San Diego, 453 US 490 (1981); Foti v. City of Menlo Park, 146 F3d 629 (CA 9, 1998); Nat'l Adver. Co. v. Town of Niagara, 942 F2d 145 (CA 2, 1991); State v. DeAngelo, 963 A2d 1200 (N.J. 2009).
19.Solantic, LLC v. City of Neptune Beach, 410 F3d 1250 (CA 11, 2005); Vono v. Lewis, 594 F Supp 2d 189 (D RI, 2009); Outdoor Media Dimensions, Inc. v. Dept. of Transportation, 132 P3d 5 (Or, 2006).
20.Baker and Wolpert at 10 (*citing* Outdoor Sys., Inc. v. City of Clawson, 262 Mich App 716, 686 NW2d 815 (2004); Gannett Outdoor Co. of Mich. v. City of Troy, 156 Mich App 126, 409 NW2d 719 (1986)).
21.Ward v. Rock Against Racism, 491 US 781, 791 (1989), *quoting* Clark v. Community for Creative Non-Violence, 453 US 288, 293 (1984).

Time, Place and Manner Restrictions

Content-neutral regulations of speech are most often characterized as time, place and manner restrictions. Examples of some types of sign regulations that fit into the time, place and manner framework include:

Time: Restricting the display time of temporary signs or limiting the hours in which a "sandwich" board portable sign may be displayed.

Place: Providing minimum setbacks, prohibiting projecting signs, or limiting signs to a minimum spacing distance.

Manner: Limiting the size and height of signs, controlling for the design and materials of the sign structures, or regulating illumination of signs.

for an illustration of how content-neutrality applies to common local sign regulation issues.

Regulatory Purpose

Early sign regulations were upheld by courts only where the government demonstrated sufficient purposes for the regulation.

> *"The courts first considered the constitutionality of sign ordinances early in the last century. Some courts in this period upheld sign ordinances but did not approve their aesthetic purposes.* ***St. Louis Gunning Advertising Co. v. City of St. Louis***[22] *is an important decision in this group of cases. The Missouri Supreme Court upheld a municipal ordinance regulating the size, height, and location of billboards. It gave a number of reasons for its holding, including its belief that billboards promote immorality, create hiding places for criminals, and cause the spread of fire."*[23]

Like early sign cases, modern First Amendment sign cases also require that the government develop a regulatory purpose. While traffic safety and community aesthetics—the two most common rationales for sign regulation—have been rejected as *compelling* government interests under strict scrutiny review, these rationales are *significant* governmental interests for the purposes of time, place and manner restrictions. Therefore, even if the government uses traffic safety and aesthetics to justify its regulation of speech, a content-based regulation still will not survive a courtroom review because the government's failure to demonstrate a compelling interest fails the strict scrutiny test.

It is important, however, that the government carefully justify its regulations because *"[n]ormally, the government is presumed to be right, but with land uses protected by the First Amendment, this presumption is greatly diminished or even extinguished."*[24] Although courts accept traffic safety, aesthetics and other rationale for sign regulation, sign regulations which fail to establish a governmental interest and provide a robust purpose and rationale for regulating signage will almost always be rendered unconstitutional, even if the regulation is content-neutral (Chapters 4 and 13 devote significant discussion to purpose statements).[25]

Note on aesthetic regulation in Michigan: Pre-**Metromedia** Michigan cases, chief among them **Wolverine Sign Works v. City of Bloomfield Hills**, held that aesthetics could be an incidental, but not the primary, purpose of sign regulations.[26] Michigan municipalities were thus required to demonstrate a traffic safety or other significant regulatory interest in enacting sign regulations. However, in **Gannett Outdoor Co. v. City of Troy**, decided after **Metromedia**, the Michigan Court of Appeals, citing heavily from **Metromedia** and **Vincent**, wrote, *"the city's aesthetic interests alone are sufficient to justify billboard regulation,"*[27] suggesting that Michigan courts now accept aesthetics as a primary regulatory interest.

Commercial Speech Restrictions and Favoring Issues

Although the U.S. Supreme Court established in **Virginia Pharmacy Board** that commercial speech was protected by the First Amendment, the Court clarified in **Central Hudson Gas & Electric Corp. v. Public Service Commission of New York** that commercial speech is not protected to the same degree as non-commercial speech.[28] The Court went on to outline a less rigorous four-part test—referred to as "*intermediate scrutiny*"—for reviewing commercial speech restrictions:

> *"For commercial speech to come within [*the category of protected speech*], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both*

22.137 SW 929 (Mo 1911).
23.Mandelker et al., *supra*, at 78.
24.Trevarthen, *supra*, at 5.
25.*See, e.g.*, Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F3d 814 (CA 9, 1996).
26.279 Mich 205, 271 NW 823 (1937).
27.156 Mich App 126, 136, 409 NW2d 719, 723 (1986).
28.447 US 557 (1980).

Attachment 5

Table 6-2: Applying First Amendment Principles to Common Sign Regulation Goals

Government Goal	Content-Neutral, Constitutionally Permissible Option(s)	Common Content-Based, Unconstitutional, or Otherwise Risky Ordinance Provisions
Limit the Proliferation of Real Estate Signs	• Allow a single additional temporary sign per parcel only during times when the parcel on which the sign is located is being offered for sale. Impose a height and area requirement for the permitted sign, and allow only signs constructed with certain materials. (Note: permitting the display of a temporary sign only when the property is being offered for sale has nothing to do with the message, but only is concerned with the for sale status of the property. The ordinance should contain a set of criteria that evidences when a property is "offered for sale.")	• Ban all real estate signs. • Allow only window- or wall-mounted real estate signs while restricting yard signs. • Allow only very small—largely illegible—real estate signs. • Impose message requirements on real estate signs. • Impose specific number, height, size or materials requirements that only apply to real estate signs.
Limit the Proliferation of Political Signs	• Allow temporary signs totaling a certain amount of sign area per parcel (i.e., eight square feet), limit the height of any individual sign, and designate the types of materials that may be used for temporary signage. (Note: allowing a total sign area instead of a total number of signs allows an individual or business to convey as many messages—or support as many political candidates—as desired, therefore not suppressing speech.) • Require the removal of poorly maintained signs and require the removal of all political signs relating to a specific event or election within a reasonable number of days after the event or election.	• Ban on all political signs. • Ban on all temporary signs. • Impose specific height, size or materials requirements that apply only to political signs. • Restrict the number of political—or temporary signs in general—permitted on a parcel in a manner that is too limiting. • Impose display time restrictions on political sign displays before an election.
Eliminate or Reduce the Number of Billboards	• Allow only one fixed ground sign per parcel in non-residential districts—regardless of whether the sign is on-premises or off-premises—and provide for a maximum height and area of each sign. (Note: allowing one ground sign means that, if there is a business on the parcel, the business will probably use its ground sign for an on-premises commercial sign; even if it is used for off-premises advertising, strict height and area maximums reduce the negative impact of off-premise billboards.)	• Ban on all commercial signage. • Ban on off-premises signage with or without a substitution clause (Note: a ban on off-premises signage with a substitution clause would meet constitutional muster in most states, but violates various provisions of Michigan law discussed in Chapter 7).

inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[29]

Because **Metromedia** clearly established that traffic safety and aesthetic regulation are substantial governmental interests, the vast majority of litigation under the **Central Hudson** test surrounds the third and fourth prongs. Exceptions to general bans on certain forms of commercial advertising bring about much of this litigation. While courts recognize that a partial ban on forms of commercial signage can directly further the government's interest in traffic safety and aesthetics, exceptions to bans which undermine that interest are impermissible and considered *underinclusive:*

"[R]egulations are unconstitutionally underinclusive when they contain exceptions that bar one source of a given harm while specifically exempting another in at least two situations. First, if the exception 'ensures that the [regulation] will fail to achieve [its] end,' it does not 'materially advance its aim.' [. . .] Second, exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance."[30]

Examples of such unconstitutionally underinclusive exceptions include:

- Banning all electronic signage but exempting time and temperature readings;[31]
- Banning all inflatable signs except those announcing a grand opening;[32]
- Banning portable and temporary signs but exempting real estate signs;[33]
- Banning large non-accessory changeable signs but permitting large non-accessory, non-changeable signs;[34] and
- Banning all temporary signs but allowing the display of certain temporary signs for 60 days per year.[35]

29.Id. at 566.

30.Metro Lights, L.L.C. v. City of Los Angeles, 551 F3d 898, 906 (CA 9, 2009) (citations omitted).
31.King Enterprises, Inc. v. Thomas Twp., 215 F Supp 2d 891 (ED Mich, 2002).
32.State v. DeAngelo, 963 A2d 1200 (NJ, 2009).
33.Ballen v. City of Redmond, 466 F3d 736 (CA 9, 2006).
34.Outdoor Sys., Inc. v. City of Clawson, 262 Mich App 716, 686 NW2d 815 (2004).
35.Dills v. City of Marietta, Ga., 674 F2d 1377 (CA 11, 1982); Risner v. City of Wyoming, 147 Mich App 430, 383 NW2d 226 (1985).

Quiz on Content-Neutrality

Which of the following ordinance clauses is the most content-neutral?

A. *"On any parcel for which a building permit has been issued but on which construction related to such building permit is incomplete, one additional temporary sign measuring no more than 16 square feet in area and no more than six feet in height may be displayed without a permit."*

B. *"Construction signs may be displayed on parcels undergoing any form of construction, development or redevelopment, and may display information about the project in progress, including the name of the project, the name and address of the developer, the name and address of the architect, and the name and address of any contractor working on the project."*

C. *"Temporary signs relating to an active construction project on a parcel may be displayed without a permit on that parcel for which the building permit was issued related to the construction project."*

Correct answer: (A) Answer (B) dictates the content of the message, so is clearly content-based. Answer (C) is a context-sensitive approach, and may be upheld by a court, as it follows Metromedia's on-premises/off-premises distinction. However, answer (A) does not relate in any way to the message of the sign; while the developer of a construction project could theoretically place, say, a political advertisement as the one additional temporary sign, he or she is unlikely to do so because there is an economic interest in advertising the project.

The above regulations were underinclusive because they did not directly further the regulatory interest. It is simple to see why. If the government bans electronic signage in the interest of reducing driver distraction, then how does exempting time and temperature readings from such a ban *not* distract drivers? Or if the local government determines that portable and temporary signs detract from community aesthetic character, then how does an exemption for real estate signs *not* contribute to the same deterioration of character?

Furthermore, a ban on off-site commercial signage may not meet the third prong of **Central Hudson** if the ban does not sufficiently further the municipality's regulatory interests given the community's existing patterns of industrial or other noxious land uses.[36] Additionally, restricting people from wearing clothing advertising a commercial enterprise is impermissible because such advertising has little impact on traffic safety or aesthetics.[37]

Under the fourth **Central Hudson** prong, a restriction on commercial signage may simply reach further than necessary, thus rendering the restriction unconstitutional. Examples of regulations that have been struck down include:

- A complete ban on residential real estate signage;[38]
- Suppression of all commercial advertising by a utility company;[39] or
- Limiting residential real estate signs only to window signs.[40]

Favoring Commercial Speech

In addition to articulating the **Central Hudson** test, the U.S. Supreme Court has stated that "*commercial speech cases have consistently accorded non-commercial speech a greater degree of protection than commercial speech.*"[41] Since **Metromedia**, regulations giving commercial speech preference over non-commercial speech have been consistently rejected as content-based. Sign regulations may not restrict the display of non-commercial messages in locations where commercial messages are permitted, nor may the regulations limit the size[42] or display time[43] of non-commercial messages more strictly than commercial messages. See

36.Park Outdoor Adver. of New York, Inc. v. Town of Onondaga, N.Y., 708 F Supp 2d 241 (ND NY, 2010) (striking down sign ordinance that prohibited off-premises advertising from industrial areas in the interest of aesthetic improvement; court found that continuation of industrial uses would undermine the billboard ban).
37.Kitsap County v. Mattress Outlet, 104 P3d 1280 (Wash. 2005).
38.Linmark Associates, Inc. v. Willingboro Twp., 431 US 85 (1977).
39.Central Hudson at 570–71.
40.Cleveland Area Bd. of Realtors v. City of Euclid, 88 F3d 382 (CA 6, 1996).
41.Metromedia, 453 US at 513.
42.Cafe Erotica of Florida, Inc. v. St. Johns County, 360 F3d 1274 (CA 11, 2004).
43.Whitton v. City of Gladstone, Mo., 54 F3d 1400 (CA 8, 1995).

Noncommercial messages cannot be restricted from signs on which commercial advertisements may be displayed, such as this off-premises billboard in Cadillac, Wexford County.

Figure 6–1—Basic First Amendment Analysis of a Sign Regulation for a graphic describing the commercial speech analysis.

Substitution Clauses

Tough courtroom scrutiny of regulations which effectively favor commercial speech requires sign regulations to carry a substitution clause.

> *"The purpose of a substitution clause is to assure, in one fell swoop, that if the sign code allows a sign containing commercial copy, it shall also allow a non-commercial sign to the same extent. It should apply to every possible dimension of the sign, including location, duration of posting, size or area, materials or design requirements, requirement for permit, etc."*[44]

See Chapter 13 for an example of a substitution clause. Since **Metromedia**, sign regulations without substitution clauses have almost always been struck down on grounds that they favor commercial speech over non-commercial speech.[45]

Future Trends

Although the U.S. Supreme Court has never formalized equal degrees of protection for commercial and non-commercial speech,

> *"[s]ome have discerned . . . a general trend towards ever greater levels of protection for commercial advertising. Most critics focus on two issues: one, the categorization problem—too much speech cannot easily be cast as either commercial or non-commercial, since it contains elements of both; and two, the utilitarian justification: truthful speech about a legal product or service should receive full protection because it contributes to the proper functioning of the economic system."*[46]

Local regulators may want to consider this trend in crafting sign regulations, and *avoid commercial/non-commercial distinctions* to the greatest possible degree.

Note on First Amendment issues pertaining to sign regulations for adult businesses, tobacco products, and alcoholic beverages: Special restrictions on advertising of "*vices*"—adult businesses, tobacco products and alcoholic beverages, among other things—are not justified using the typical aesthetics and traffic safety rationale, but rather under the "*secondary effects*" doctrine. "*[W]hen regulation aims at controlling the secondary or neighborhood spillover effects of sexually explicit but not legally obscene speech, then the regulation is considered content-neutral*" (citations omitted).[47] As with other sign regulations, however, regulators must carefully outline a robust secondary effects rationale for regulating vice advertising, and such rationale may be based on the experience of other communities.[48] Narrow tailoring is also critically important in crafting regulations of vice advertising. In **Lorillard Tobacco Co. v. Reilly**, the U.S. Supreme Court found that a Massachusetts prohibition against tobacco advertising within 1,000 feet of a school was justified by the secondary effects doctrine, but was not narrowly tailored because it was not limited to particular zoning districts and would effectively ban tobacco advertising in the state's three largest cities.[49] See Chapter 7 for a discussion of Michigan laws dealing with vice advertising.

Prior Restraint

The term *prior restraint* refers to a governmental regulation or restriction on speech before the speech is actually expressed. Some prior restraints are perfectly legitimate regulations, but others may violate the Constitution. Professor and land use attorney Alan Weinstein writes, "*[w]hen a government regulation requires an official approval as a pre-condition to 'speaking'—for example, displaying a sign—courts are concerned that the approval requirement could be an unlawful 'prior restraint' on freedom of expression by prohibiting or unnecessarily delaying the*

44.Trevarthen, *supra*, at 9.
45.*See, e.g.*, Cafe Erotica of Florida, Inc. v. St. Johns County, 360 F3d 1274 (CA 11, 2004).
46.Morrison, *supra*, at 110 (citations omitted).
47.Morrison, *supra*, at 108.
48.Scott D. Bergthold, Effective Zoning of *Sexually Oriented Businesses*, in **Protecting Free Speech and Expression: The First Amendment and Land Use Law** 24–25 (Daniel R. Mandelker & Rebecca L. Rubin, eds., 2001).
49.533 US 525 (2001).

communication."[50] Although some degree of prior restraint is permissible, some regulations may unconstitutionally restrain free speech. At the outset, it should be noted that content-neutral ordinances are rarely struck down on prior restraint grounds.[51]

There are two dimensions of prior restraints that could render an ordinance unconstitutional. First, the ordinance could lack *procedural safeguards*, which means that it does not set out a prompt timeframe for review of a permit application. Where an ordinance is content-neutral, it is not required to have a definite timeframe, but the timeframe may not be arbitrarily long.[52]

Second, the ordinance could grant government officials *unbridled discretion* in approving or denying the permit if the language of the ordinance does not provide sufficient direction for review of the permit application. An archetypal example of an ordinance granting unbridled discretion is one that requires the code enforcement officer or planning commission to review sign permit applications for consistency with "*general health, safety and welfare*," and nothing else.[53] Requiring design review on the basis of material composition, exterior structural design, appearance and size are permissible standards for review. Elastic sign code design review criteria requiring reasonable discretion of city officials does not alone make a sign code unconstitutional.[54]

If a sign ordinance is challenged on prior restraint grounds, the first part of the courtroom analysis is to determine whether the ordinance is content-neutral or content-based. If the ordinance is at all content-based, the timeframe for permit review must be specifically defined—in days, weeks, months, etc.—to meet the procedural safeguard requirement.[55] No recent case has struck down a content-neutral ordinance on grounds that it lacked procedural safeguards; every ordinance that lacked procedural safeguards was content-based.

Although a content-neutral ordinance is likely to be upheld on prior restraint grounds, two recent federal court cases in Michigan demonstrate that even content-neutral regulations can grant unbridled discretion to local officials if the criteria for permit review is not sufficiently definite.[56] To pass constitutional muster under the prior restraint doctrine, sign regulations should strive to be as definite as possible—both in the timeframe allowed for reviewing permit applications and in the criteria on which the application is reviewed.

Vagueness

Vagueness is closely related to the prior restraint doctrine discussed above and procedural due process, described below. A law that is unconstitutionally vague is defined by **Black's Law Dictionary** as one which "*impermissibly delegat[es] basic policy matters to administrators and judges [t]o such a degree as to lead to arbitrary and discriminatory application.*" Sign regulations lacking clarity are typically challenged as being unconstitutionally vague.

50.Alan C. Weinstein, Inc. and D.B. Hartt, Inc. *A Framework for On-Premise Sign Regulations* 16 (March 2009), available at http://www.thesignagefoundation.org/OnPremiseSignRegulations.
51.Alan C. Weinstein, Inc. and D.B. Hartt, Inc., *supra*, at 16.
52.Covenant Media Of SC, LLC v. City Of N. Charleston, 493 F3d 421 (CA 4, 2007); G.K. Ltd. Travel v. City of Lake Oswego, 436 F3d 1064 (CA 9, 2006); Lamar Adver. Co. v. Twp. of Elmira, 328 F Supp 2d 725 (E.D. Mich, 2004).
53.Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F3d 814 (CA 9, 1996); Macdonald Adver. Co. v. City of Pontiac, 916 F Supp 644 (E.D. Mich, 1995).
54.Riel v. City of Bradford, 485 F3d 736 (CA 3, 2007); G.K. Ltd. Travel v. City of Lake Oswego, 436 F3d 1064 (CA 9, 2006).
55.Thomas v. Chicago Park Dist., 534 US 316, 322 (2002); Solantic, LLC v. City of Neptune Beach, 410 F3d 1250 (CA 11, 2005); King Enterprises, Inc. v. Thomas Twp., 215 F Supp 2d 891 (ED Mich, 2002).
56.Lamar Adver. of Michigan, Inc. v. City of Utica, 2011 WL 1641770 (ED Mich, 2011) (granting in part plaintiff's motion for summary judgment where city ordinance stated that "*[t]he Planning Commission may waive location and sign area requirements when … non-accessory signs are located on City owned property*" but gave no standards on which to base such waiver); CBS Outdoor, Inc. v. City of Kentwood, 2010 WL 3942842 (WD Mich, 2010) (striking down ordinance requiring Planning Commission to determine that a special use, including billboards, (1) "*[b]e designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance, with the existing or intended character of the general vicinity and . . . will not change the essential character of the area in which it is proposed*"; (2) "*[b]e compatible and in accordance with the goals, objectives and policies of the master plan and promote the intent and purpose of the zoning district in which it is proposed to locate*"; and (3) "*[b]e subject to stipulations by the Planning Commission of additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of this ordinance will be observed.*").

An ambiguity granting regulators some degree of flexibility does not automatically render the regulation unconstitutional.[57] *But careful definitions of ordinance terms protect the ordinance from being struck down as vague.* For example, a careful definition of "*sign*" could incorporate any device or display that the municipality wishes to regulate, including for example, wall murals.[58] On the other hand, examples of sign regulations that have been found unconstitutionally vague include a city ordinance banning the erection of "*signs or any other street graphics displaying any statement, word, character or illustration of an obscene, indecent or immoral nature*"[59] and an exemption for signs on "*vehicles that are not parked to attract attention*" from a city ordinance generally banning the posting of signs on public property.[60] In both of these examples, an ordinance reader or enforcement officer would be hard-pressed to define terms like *obscene* or *indecent*, or to make an on-the-spot determination as to whether a car was parked to attract attention.

Of particular note, plaintiffs have challenged the distinctions between commercial and non-commercial copy and the distinction between on-premise and off-premise signage as being vague, but these challenges have been rejected.[61]

Suppression of Speech and Overbreadth

Regulations on physical type, size, height, design and placement of signage are content-neutral time, place and manner restrictions that are generally constitutionally valid.[62] But some regulations, even if they are content-neutral, may simply restrict too much speech and provide insufficient alternatives to be heard, commonly called *overbreadth*.[63]

A complete restriction on yard signs does not leave ample alternative channels for communication. Above, a residential real estate sign in Oakland Township, Oakland County.

Examples of content-neutral restrictions that have been found to be too restrictive of speech and which do not provide ample alternative channels of communication include:

- A complete restriction on residential yard signs; [64]
- A restriction on the total number of temporary political signs permitted to be displayed at once;[65]
- A complete ban on residential real estate signs;[66]
- A restriction of residential real estate signs to window signs[67] or signs of an illegibly small size;[68] and
- A complete ban on residential wall signs while allowing political signs, especially if houses in the community do not have front yards to display political messages on yard signs.[69]

57.G.K. Ltd. Travel v. City of Lake Oswego, 436 F3d 1064 (CA 9, 2006).
58.Wag More Dogs, LLC v. Artman, 2011 WL 652473 (ED Va, 2011).
59.Solomon v. City of Gainesville, 763 F2d 1212 (CA 11, 1985).
60.Foti v. City of Menlo Park, 146 F3d 629 (CA 9, 1998).
61.Maldonado v. Morales, 556 F3d 1037 (CA 9, 2009); Lavey v. City of Two Rivers, 171 F3d 1110 (CA 7, 1999); Major Media of the Se., Inc. v. City of Raleigh, 792 F2d 1269 (CA 4, 1986).
62.Rzadkowolski v. Vill. of Lake Orion, 845 F2d 653 (CA 6, 1988); CBS Outdoor, Inc. v. City of Kentwood, 2010 WL 3942842 (WD Mich, 2010); City of Rochester Hills v. Schultz, 459 Mich 486, 592 NW2d 69 (1999).
63.City of Ladue v. Gilleo, 512 US 43 (1994).
64.Id.
65.Arlington County Republican Comm. v. Arlington County, Va., 983 F2d 587 (CA 4, 1993); Dimas v. City of Warren, 939 F Supp 554 (ED Mich, 1996).
66.Linmark Associates, Inc. v. Willingboro Twp., 431 US 85 (1977).
67.Cleveland Area Bd. of Realtors v. City of Euclid, 88 F3d 382 (CA 6, 1996).
68.Real Estate Bd. of Metro. St. Louis v. City of Jennings, 808 SW2d 7 (Mo Ct App, 1991).
69.Forest Park v. Pelfrey, 669 NE2d 863 (Ohio Ct App, 1995).

Time, place and manner restrictions that leave open alternative channels of communication, including restrictions on posting of signs on utility poles in the public right-of-way,[70] restrictions on commercial billboard placement and construction,[71] and restrictions on the number of temporary signs that may be displayed at one time,[72] have not been found to be suppressive of speech. While time, place and manner restrictions must be narrowly tailored to meet the government's regulatory interest, they are not required to be the *least* restrictive means of regulating signs.[73]

Note on the public forum doctrine and regulating speech on public property:

> *"The public forum doctrine arises from the intersection of the government's property ownership rights and the limits imposed by the First Amendment on its power to regulate speech. Essentially, the property rights of the government give it greater latitude in regulating speech on its own property—or property in which it has a right to possession—than it has when acting as a regulator."*[74]

Public property is categorized into three fora: the traditional public forum, the designated public forum, and the non-public forum.[75] Traditional and designated public fora are places that have, either by tradition or government statement or action, been opened for speech or expressive activity, such as town halls or public assembly places such as squares or public parks. Non-public fora, on the other hand, are places where the government can create reasonable restrictions on access and expression so long as they are not designated because of public officials' opposition to the speaker's views. Advertising space on transit vehicles or public benches is an example of non-public fora; the government is permitted to freely sell such advertising space, and can actually favor commercial advertising or non-commercial speech in such spaces (but see footnote).[76] Moreover, other public property may simply be non-fora, where the government may completely prohibit speech; such a prohibition is only acceptable on government property with a particular dedicated use that would be undermined by allowing speech in such places. Utility poles were declared a non-forum in **Vincent**, and road rights-of-way have also been found to be non-fora.[77] See Chapter 9 for more discussion on public signs and public property.

DUE PROCESS

The Fourteenth Amendment to the U.S. Constitution states: "*nor shall any State deprive any person of life, liberty, or property, without due process of law.*" For analytical purposes, the concept of due process is divided into procedural and substantive parts.

Procedural due process focuses on sufficient notice and a fair hearing. In the context of sign regulation, an ordinance with vague standards would violate the Due Process Clause because it would provide insufficient notice to a potential sign owner and would provide unclear grounds upon which government officials could determine whether the sign meets the ordinance standards. Procedural due process claims arise where the government deprives a sign owner of a permit to place a sign or fails to grant a variance, and any legal challenge requires a court to review the clarity of the criteria on which the government makes its determination. Clear restrictions on sign size and height, for example, are sufficiently definite so as to pass muster under procedural due process.[78] Because free speech is at issue in most signage cases, procedural due process

70.Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 US 789 (1984).
71.Maldonado v. Morales, 556 F3d 1037 (CA 9, 2009).
72.Riel v. City of Bradford, 485 F3d 736 (CA 3, 2007).
73.Bd. of Trustees of State Univ. of New York v. Fox, 492 US 469 (1989); City of Rochester Hills v. Schultz, 459 Mich 486, 592 NW2d 69 (1999).
74.Morrison, *supra*, at 125 (citation omitted).
75.Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F3d 910 (CA 9, 2006).
76.Children of the Rosary v. City of Phoenix, 154 F3d 972 (CA 9, 1998) (finding that prohibiting non-commercial signs on City-owned transit vehicles while allowing commercial advertising was consistent with the government's need to remain neutral on political issues, and that display of anti-abortion advertising on City transit vehicles would undermine that neutrality interest).
77.Morrison, *supra*, at 132.
78.Norman Corp. v. City Of E. Tawas, 263 Mich App 194, 687 NW2d 861 (2004).

matters related to vagueness of ordinances are discussed in the First Amendment section of this chapter.

Conversely, *substantive due process* deals with whether the substance of the regulation unconstitutionally deprives individuals of life, liberty, property or another fundamental constitutional right, such as the right to free speech. If a fundamental right is being deprived, the courts apply strict scrutiny to determine whether the government has advanced a compelling interest in the regulation and whether the regulation is narrowly tailored to advance that interest. If the right being deprived is not a fundamental right, the rational basis test applies, which simply requires that the regulation be rationally related to a legitimate government interest.

If the government fails to make out any rational basis for the enactment of sign restrictions, the ordinance provisions are declared "*arbitrary and capricious*" and fail the rational basis test.[79] However, there is no fundamental right to operate a business or any right to profitability, so regulations that restrict a sign owner's discretion in displaying a sign or which may eventually put billboard companies in a community out of business do not violate the Due Process Clause.[80]

Another aspect of substantive due process which inheres in sign regulations is that of fees charged for sign permits. As Professor Weinstein notes, "*[l]ocal government may lawfully charge a sign permit fee so long as the amount of the fee is reasonably related to the costs actually incurred in the administration and enforcement of the permit system.*" He goes on to say, "*this includes the administrative costs for processing and reviewing applications and renewals, and the cost of inspections, such as the salaries of inspectors.*"[81] Permit fees that are unreasonably high unconstitutionally deprive sign owners of property, or would amount to a wrongfully enacted tax, and would be struck down.

TAKINGS

The Fifth Amendment Takings Clause says, "*nor shall private property be taken for public use, without just compensation.*" While most people are familiar with the concept of a direct taking of private property via eminent domain, broad regulations may rise to the level of a *regulatory taking* if they have the effect of taking private property. Under the U.S. Supreme Court's test outlined in **Lingle v. Chevron**, a regulation affects a taking if there is (1) a physical invasion of private property, (2) it otherwise denies an owner of all economically viable use of his land, or (3) if an ad-hoc analysis finds that the regulation has a serious economic impact on the clamant, the regulation interferes with distinct investment-backed expectations, or the character of the government's action warrants compensation.[82]

It is well-established that sign owners have a property interest in their signs.[83] However, sign controls limiting sign displays on private property have not been found to amount to a regulatory taking, since property owners almost always have another economically viable use of their land.[84] The problem of regulatory takings is particularly relevant to government efforts to remove *nonconforming* signs, which are signs that existed prior to the enactment of an ordinance but do not meet the standards established by the new ordinance. Courts have found that ordinances which require *amortization*, or phased removal, of nonconforming signs do not constitute a regulatory taking because the sign owner can remove the sign to another location, the property on which the sign is placed may be used for other purposes, and amortization provides a period for the owner to recoup his

79.Cent. Adver. Co. v. City of Ann Arbor, 391 Mich 533, 218 NW2d 27 (1974).
80.Georgia Outdoor Adver., Inc. v. City of Waynesville, 833 F2d 43 (CA 4, 1987); Sun Oil Co. v. City of Madison Heights, 41 Mich App 47, 199 NW2d 525 (1972).
81.Alan C. Weinstein, Inc. and D.B. Hartt, Inc., *supra*, at 19.
82.544 US 528 (2005).
83.Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F3d 690 (CA 8, 1996); Outdoor Sys., Inc. v. City of Mesa, 997 F2d 604 (CA 9, 1993); Randy Disselkoen Properties, LLC v. Charter Twp. of Cascade, 2008 WL 114775 (WD Mich, 2008).
84.Daniel R. Mandelker, **Land Use Law** § 11.07 (5th ed., 2003).

or her investment in the sign.[85, 86] Due regard must be given to substantial investments, so it would probably be unconstitutional to require immediate removal of nonconforming signs upon enactment of a new ordinance, except in serious circumstances affecting public health and safety.[87] Amortization is a particularly troublesome legal issue in Michigan; refer to Chapters 7 and 11 for more information.

If a property owner with a lease to a sign owner is responsible for the redevelopment of the property, the government does not owe just compensation because it was the property owner's breach of the lease terms that resulted in the removal of the billboard.[88] Furthermore, actions that obscure a sign from view—such as planting trees along a street and blocking the sign—probably will not result in a taking because these actions do not amount to a *removal* of the sign.[89]

The federal courts' constitutional approach to regulatory takings is largely echoed by Michigan courts. In **Adams Outdoor Advertising v. City of East Lansing (Adams II)**, the Michigan Supreme Court held that when a local government regulates signage, an absolute right to display a sign does not inure in the

85.Forcing immediate—as opposed to phased or amortized—removal of a sign is not necessarily a constitutional or statutory taking. Signs are considered by Michigan and many other states to be personal property, not real property. In essence, this understanding means that a sign's value is not compensable if it is required to be removed, since the sign could be taken down and reconstructed elsewhere. But other compensable property interests could be at stake. For example, a billboard lease (either between the landowner and the sign owner or between the sign owner and the advertiser) is a compensable property interest. Also, the local government could be required to compensate the owner for the moving costs associated with removing and replacing the sign structure (per In re Acquisition of Billboard Leases and Easements, 205 Mich App 659 (1994)). Even assuming there were no takings liability for forcing immediate removal of a sign, such a requirement could violate the Due Process Clause, since it may be an unreasonable exercise of the police power. Only situations where a sign posed an immediate threat to public safety or health, thus demanding its immediate removal, would a court definitely uphold an immediate removal requirement.
86.Randy Disselkoen Properties, LLC v. Charter Twp. of Cascade, 2008 WL 114775 (WD Mich, 2008).
87.Alan C. Weinstein, Inc. and D.B. Hartt, Inc., *supra*, at 17.

88.Burkhart Adver., Inc. v. City of Fort Wayne, 918 NE2d 628 (Ind Ct App, 2009).
89.Regency Outdoor Adver., Inc. v. City of Los Angeles, 139 P3d 119 (Cal, 2006).

What is Amortization?

Amortization as applied to nonconforming signage refers the gradual removal or bringing into conformity of nonconforming signage, with the understanding that, eventually, all signage in the community will conform to the ordinance.

Understandings of the meaning of *amortization* vary. Compelled removal of nonconforming signage based on a specified event, such as the transfer of a business, could be characterized as a form of *amortization*. However, courts and most authors have taken a narrow view of the meaning of the term *amortization*. In **Street Graphics and the Law**, Professor Mandelker sums up this narrow meaning in the following way:

> *"Amortization is [a] method requiring the removal of a nonconforming use after a designated period of time during which it is allowed to remain. When this time period ends, the nonconforming use must be removed or modified to comply with the ordinance."* (Mandelker *et al.* at 96).

Most ordinances handle amortization by establishing a final date after which all signage in the community must conform to the ordinance. The legal consequences of amortization schemes in Michigan are discussed more thoroughly in Chapter 7.

Even though the definition of amortization may only refer to an ordinance provision specifying a time period for removing nonconforming signs, other means for removing nonconformities are still available to municipalities. Refer to Chapter 11 for an in-depth discussion on dealing with nonconforming signage.

property owner and thus a requirement that the sign be removed after an amortization period would not deprive the owner of all economically beneficial use of his or her property.[90]

Note, however, that Michigan statutes alter the constitutional treatment of nonconforming signs in a significant way. The Highway Advertising Act, 1972 PA 106, as amended, MCL 252.301 *et seq.*, expressly requires just compensation for the removal of nonconforming signage within its scope. Furthermore, the Michigan Zoning Enabling Act, 2006 PA 110, as amended, MCL 125.3101 *et seq.*, restricts municipalities' ability to amortize nonconforming uses. The removal of nonconforming signs is a particularly thorny legal issue in Michigan. See Chapters 7, 9 and 11 for more discussion on this issue. If used, it could only be in a separate sign ordinance, and not in a zoning ordinance.

EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment protects any person from being denied equal protection of the laws. A limited number of suits regarding sign regulations have brought equal protection claims, but most have failed.

An equal protection claim must show discriminatory *intent* as well as a disparate treatment.[91] When an equal protection claim demonstrates discriminatory intent and treatment toward a *protected class* of individuals (i.e., the discrimination is race-based), courts apply the strict scrutiny test, requiring a compelling governmental interest and narrow tailoring of the regulation, which is typically impossible for the government to overcome. However, when the equal protection claim is made out as between other classes of individuals, courts apply the rational basis test, simply requiring that the regulation be rationally related to a legitimate government interest.

Individuals and businesses displaying signs are, for the most part, not protected classes warranting the application of strict scrutiny. Courts have specifically declared that off-site billboard advertisers,[92] citizens posting signs on public property,[93] and sexually oriented business owners[94] are not protected classes requiring the application of strict scrutiny. Property owners in different zoning districts are also not protected classes, meaning that a municipality can establish different districts and regulate them differently. However, a municipality that enacts a sign ordinance without establishing a sufficient rationale for the regulation could still be exposed to an equal protection claim, as such an ordinance fails the rational basis test.[95] Furthermore, a person or group improperly being denied fundamental constitutional rights, such as the First Amendment rights inherent in sign displays, may trigger strict scrutiny.[96] An improper denial of First Amendment rights can include a content-based sign regulation.[97]

90.463 Mich 17, 614 NW2d 634 (2000).
91.Vill. of Arlington Heights v. Metro. Housing Development Corp., 429 US 252 (1977).
92.Maldonado v. Morales, 556 F3d 1037 (CA 9, 2009); Outdoor Media Group, Inc. v. City of Beaumont, 506 F3d 895 (CA 9, 2007).
93.Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 US 789 (1984).
94.Passions Video, Inc. v. Nixon, 375 F Supp 2d 866 (WD Mo, 2005).
95.N. Olmsted Chamber of Commerce v. City of N. Olmsted, 86 F Supp 2d 755, 763 (ND Ohio, 2000).
96.Id.
97.Maldonado v. Morales, 556 F3d 1037 (CA 9, 2009).

Suggestions for Practice

Drafters of sign regulations should keep the following constitutional elements in mind as they prepare new or updated sign regulations:

- **Regulatory Interest:** Developing a specific and detailed purpose and rationale for enacting sign regulations and tailoring it to each particular part of the regulations is the most crucial aspect of a good sign ordinance. The planning process may be used to create findings on the need for sign regulations. A non-existent, incomplete or poorly drafted purpose and rationale exposes the municipality to the possibility of having sign regulations struck down.

- **Content-Neutrality:** Make the regulations as content-neutral as possible. Discarding regulations that relate to the category or subject—such as political, real estate, grand opening or other sign designations—of the message is a good first step. Rely instead on time, place and manner restrictions. Limiting the size, height, number, display time (for temporary signs), and spacing and crafting regulations by district or character area are good options. While one or two disagreeable signs may occasionally crop up, fully content-neutral regulations will hardly ever be struck down.

- **Substitution Clause:** Insert a substitution clause, regardless of how content-neutral the regulations are. A substitution clause provides a virtual guarantee that the regulations will not be struck down on the grounds that they favor commercial speech over non-commercial speech.

- **Exemptions from General Bans:** If the community bans a particular type of sign, consider limiting the exemptions (or exceptions) to the ban. Exemptions from a general ban create a serious likelihood that the regulations will be found to be underinclusive.

- **Prior Restraint:** Providing a clear timeframe for review of sign permit applications and limiting any ambiguities in the application review process are good ordinance drafting practice. Clear and objective standards on sign size, height, illumination, etc., will suffice. If design review is required in some districts, making the criteria as objective as possible reduces the possibility that the ordinance will be challenged as granting unbridled discretion.

- **Suppression and Overbreadth:** Even if the regulations are completely content-neutral, take care to ensure that they leave alternative channels for speech and expression. In particular, fight the urge to limit signage in residential areas to such an extent that it limits free expression of ideas. Private property rights are king in residential areas, and residents should be given the right to display messages. Let residents' self-interest in property values and aesthetics regulate residential signage.

- **Amortization and Takings:** In Michigan, regulators should take special caution when creating amortization programs to remove nonconforming signage. Keep amortization schemes away from areas near state highways and do not include them in the zoning ordinance. Amortization may only be included in a separate sign ordinance. See more on this topic in Chapters 7 and 10.