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2015-16 Continuing Legal Education Seminars

Sign Law in 2015 & Beyond – A Bold New Frontier

November 12, 2015

Reed v. Town of Gilbert: Analysis, Application, and Aftermath

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Reed v. Town of Gilbert:
Analysis, Application, and Aftermath

By Attorney Daniel D. Crean

This session of the 2015 NHMLA Sign Law Up-date CLE seminar discusses and analyzes the United States Supreme Court decision (and its various opinions) in the case or *Reed v. the Town of Gilbert*, issued on June18, 2015. Though the decision is now only several months old, it has been the discussion of much debate, discussion, and concern. Indeed, numerous commentators have suggested that virtually every sign ordinance in the country may be vulnerable to attack as violating the free speech protections of the First Amendment to the United States Constitution. The rich variety of the commentary is demonstrated by the reference materials selected for inclusion in the materials for this session in addition to this paper and accompanying presentation:

- Appendix 1: The SCOTUS Decision – and the concurring opinions.
- Appendix 2: *Regulating Election Signs*, Randal Morrison, Municipal Lawyer magazine, July/August 2008, reprinted with permission.
- Appendix 3: *Reed's Aftermath: Strict Scrutiny on Every Corner?* Amanda Kellar, Associate Counsel and Director of Legal Advocacy, International Municipal Lawyers Association, reprinted from Municipal Lawyer magazine, October/November 2015, reprinted with permission.
- Appendix 4: Materials from NHMA's sign law webinar, November 4, 2015.
- Appendix 5: IMLA DRAFT Model Sign Code

The summary and analysis in this paper include:

- Overview
- Pt. 1: Pre-*Reed* Sign Law: Content-Based Regulation
- Pt. 2: *Reed* - What it Says
- Pt. 3: *Reed* – What it Means – or More Properly – What it May or May Not Mean for Sign Controls
- Pt. 4: Implications for Other Local Government Controls

Overview. On its face, *Reed v. Gillbert* hardly seems to have been a case that would be viewed with the dire consequences now being forecast. The Town of Gilbert, Arizona,[1] had a sign code that likely bore a resemblance, in many aspects, to sign codes that exist in many New Hampshire communities. The sign (Fig. 1) that gave birth to the case was not unlike many of those seen on

[1] The town is a suburb of Phoenix with a population of about 200,000.

roadsides in many communities. The political signs on the roadside (Fig. 2) are similar to those seen in many NH communities at election time.

◄ F**ig. 1. The temporary directional sign indicating the location of religious services.**[2]

Fig. 2. Political Signs also subject to the Gilbert ordinance, but treated differently. ►

Gilbert's sign ordinance provided different display requirements (size and timing) for non-commercial signs.[3] At issue in the case were the provisions for temporary, non-commercial directional signs for what the ordinance called "qualifying events." As stated in Justice Thomas' opinion, the "Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions." One of the categories is 'Temporary Directional Signs Relating to a Qualifying Event,' loosely defined as signs directing the public to a meeting of a nonprofit group. §4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages." Justice Thomas then said "We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny."

These differences in treatment under the Gilbert ordinance included:

Nonpolitical, non-ideological, non-commercial "qualifying event" signs:

- May not exceed 6 sq. ft.
- Maximum time allowed: 12 hours before, until 1 hour after the event

Political temporary signs:

- May not exceed 32 sq. ft. (in nonresidential zones)
- Maximum time allowed: 60 days before and 15 days after elections

Ideological Signs:

- Up to 20 square feet (larger than qualifying event signs but not as large as political signs).
- Maximum display time unlimited,[4] but could not be displayed in the public right-of-way.

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[2] Some pictures and graphics in this paper are adapted from presentations made at the 2015 Annual Conference of the International Municipal Lawyers Association and an IMLA Land Use Webinar presented on July 20, 2015, and are used with IMLA permission. Further use is not authorized without IMLA authorization.

[3] Some commentators have suggested that municipalities may continue to distinguish between commercial and non-commercial signs and between on-premises and off-premises signs. The manner in which SCOTUS and other courts will be viewing sign regulation, though, suggests that any disparate treatment of signs be considered carefully.

[4] Perhaps reflecting the requirements of *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

The size differences for these non-commercial signs are depicted graphically in Figure 3.

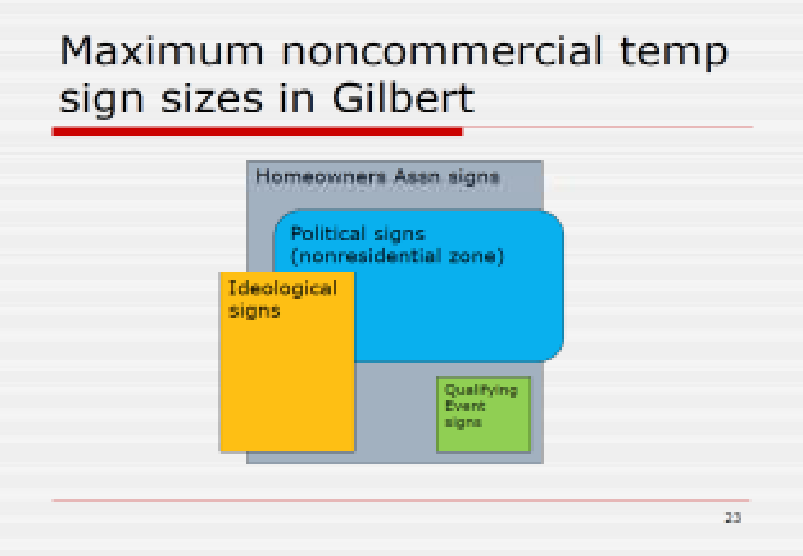

Fig. 3. Graphical depiction of temporary size limits under Gilbert ordinance (not to scale). Source: IMLA 2015 Land Use Law Webinar, see note 2.

The plaintiffs who challenged Gilbert's sign controls were a small church, its pastor, and church members. The Church was a "homeless" church in that it did not conduct services in its own building, but met in varying places depending on availability. To advise people of the location of their services, they used movable, temporary signs as depicted in Figure 1. The signs in question were deemed to violate the size and display requirements of the Gilbert ordinance for qualifying event signs. Reed and the church challenged the application of the ordinance to their directional signs.

Prior to reaching the Supreme Court, the case was heard in the District Court and Ninth Circuit. Given the nature of the Supreme Court decision, this paper omits a full review of those actions and decisions, except as described in Part. 2.

The starting point in the case, of course, was the First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Though the text of the amendment mentions and restricts only Congress, it applies to state and local government by virtue of the 14th Amendment. Also, though it speaks to making "**no** law," decisions over the years have created a hierarchy of tests to determine validity of governmental action, primarily involving standard, intermediate, and strict levels of scrutiny. Ordinances that may affect the exercise of protected rights are not invalid *per se,* but may be required to meet the compelling governmental interest and least restrictive interference requirements of the strict scrutiny test.

Traditionally, sign controls of the type at issue in *Gilbert* had been analyzed as time, place, and manner controls under intermediate scrutiny.[5] Thus, aesthetic and traffic safety goals often served the purpose of justifying governmental controls. A major exception to intermediate scrutiny arose when an ordinance could be seen as being content-based, which then made it subject to the strict scrutiny standard. [See part 1, Pre-*Reed* Sign Law.]

The most significant aspect of *Reed v. Gilbert* likely will be the manner in which an ordinance will be viewed to determine if it is content-based, invoking strict scrutiny. A second aspect will involve the manner in which non-sign communication (e.g., panhandling, parades, and the like) may be regulated (See part 4, Implications for Other Local Government Controls.)

One certain result of *Gilbert* will involve reconsidering the notion that preserving a certain level of discretion in land use law is beneficial. This favorable view of discretion resulted from the views that: things change, the ability to adapt to change benefits the parties, and rigid rules may have unforeseen consequences (after all, you can't predict everything). These traditional concepts, though, have created concerns with respect to First Amendment rights of expression. *Gilbert* may teach that discretion and variation in regulating protected speech are problematic, especially if the discretion and variety result from the seemingly new approach to determining if the regulation is content-based. Re-writing a sign ordinance to a simple set of generally applicable rules to achieve content neutrality may risk over-inclusivity. A blend of standard rules and consideration of the needs of the municipality will be key factors in success or failure in the face of likely challenges. A focus should be kept on the degree of scrutiny to be applied should the ordinance be challenged. (See Part 3.)

Pt. 1: Pre-Reed Sign Law: Content-Based Regulation.

It is risky, of course, to attempt to summarize, in just a few paragraphs, the evolution and development of sign law which occurred over many years. An initial step is to look at the various factors and frameworks, within the general scope of speech and sign law, which developed over a number of years, including the distinctions mentioned in the Overview regarding commercial and non-commercial signs.

Though commercial speech (including signs) is speech protected by the First Amendment,[6] it is "less favored" and, hence, less protected speech. To be encompassed within protection, commercial speech must concern legal products or services and not be false or deceptive, and governmental

[5] Intermediate scrutiny requires that the ordinance serve a substantial governmental interest and be narrowly tailored to serve that interest, e.g., *Ward v. Rock Against Racism*, 491 U.S. 871 (1989). See also Appendix 3.
[6] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

regulation must serve a substantial interest, directly advance that interest, and should not be more extensive than necessary.[7] That formative case appears to have the ability to survive intact after *Gilbert*.

Aesthetic concerns may be used to support commercial sign regulation.[8] A related doctrine holds that non-commercial speech (sometimes called "pure speech") merits greater protection than its counterpart. Accordingly, regulations treating commercial speech more favorably than free speech have been found improper.[9]

A whole category of cases involve controls over expression generally described as those involving sexually oriented businesses (SOBs). A review of that subject is beyond the scope of this seminar, but the manner in which local governments continue to control this "right of expression" likely will continue to evolve.

Another aspect of commercial sign regulation which may continue to plague municipal lawyers will be efforts to define and determine the dividing line between commercial and non-commercial speech. Discussion and analysis of that issue, likewise is beyond the scope of this seminar, but look for more guidance in the immediate future.

With respect to non-commercial signs, few, if any, courts had held that variations among types of regulation of pure speech were absolutely content-neutral and permissible without restraint. However, an ordinance distinguishing between the types of "qualifying event" signs at issue in *Gilbert*, compared to the treatment of political and ideological signs, would have seemed to pose little risk of censorship or persecution of the speaker. Materials for this seminar include a copy of an article, *Regulating Election Signs,* by national recognized sign law attorney, Randal Morrison. The article appeared in IMLA's Municipal Lawyer, July/August 2008, and is used with IMLA permission. Though that article predates the *Gilbert* decision, it provides a summary of political sign regulation at that time (2008) and appears to have correctly predicted some of the concerns and issues that arose in *Gilbert*.

The Morrison article includes the following cautions which appear to continue to be sound:

- Avoid singling out election signs for separate treatment (even more so under *Gilbert*) – i.e., purge ordinances of such distinctions;
- Allow all properties to display a reasonable amount of pure speech message at all times, perhaps adding in some time, place, and manner controls;
- Be careful of limits on the number of signs or issues addressed per property;
- Watch out for restrictions on hand-held signs;
- Allow for message substitution.

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[7] *Central Hudson Gas & Electric Corp. v. Public Service Commission* , 447 U.S. 557 (1980).
[8] *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).
[9] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

With respect to non-commercial signs, controls would be subject to elevated scrutiny if they appeared to be content-based, while those that would have been viewed as viewpoint based (e.g., banned or regulated due to government disagreement with message) likely would not have survived any level of scrutiny. Under *Ward* (n. 2), the principal inquiry as to content neutrality (in speech cases generally and time, place and manner cases specifically) was whether the government had adopted or applied the regulation due to disagreement with the message it conveyed. This formulation might now be designated as motive-derived, particularly in contrast to *Reed v. Gilbert*'s newly-minted test for that determination as discussed in Part 2.

Pt. 2: Reed - What it Says

(A) **J. Thomas for the "Majority."** The Thomas opinion can be viewed as encompassing accepted, not surprising, views and reasoning, along with what most commentators have described as surprising views, somewhat (at least) at odds with prior First Amendment content-based jurisprudence. Thomas opened with the following description of Gilbert's sign regulation regime:

> The sign code prohibits the display of outdoor signs anywhere within the town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

He then reviewed the ideological, political and qualifying-event temporary directional sign provisions described in the overview, and noted the "Code treats temporary directional signs even less favorably than political signs."

He said the church was

> . . . a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street.

[The signs typically]

> displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

The church was cited twice for violation of Gilbert's sign code – for exceeding time limits for display of temporary directional signs and then for the same offense with the added complaint of failing to include the dates of the events on the signs. The church sought a preliminary injunction which was denied by the District Court (affirmed in the Circuit Court). On remand, the District Court granted summary judgment to Gilbert and the Circuit Court again affirmed, stating:

> . . . the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . 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.

Citing *Hill v. Colorado,*[10] the Ninth Circuit ruled that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." Accordingly, the ordinance was not content-based and passed intermediate level scrutiny.

The Supreme Court granted review. Thomas's views might be classified as follows:

Not so surprising views:

- Content-based regulation is presumptively unconstitutional and requires a compelling governmental interest (p. 6, opinion part II A).
- Government regulation of speech is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed (*Ibid.*).

Surprising (or at least different) views:

- 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.[11]
- Regulations that cannot be justified without reference to content of the regulated speech are content-based.
- Some facial distinctions are obvious, such as those regulating speech by particular subject matter, while others are more subtle, as they apply on the basis of function or purpose.
- Categorical signs, such as directional signs, are content-based and regulation of signs associated with events are not content-neutral.
- Purpose or intent of the regulation is irrelevant if the regulation is content-based.

The Ninth Circuit, in Thomas' view:

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

Though a content-based purpose underlying an ordinance may be sufficient to demonstrate content-based regulation, it is not an essential requirement for such a showing. Thus, Gilbert's code is

> Content-based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event."

[10] 530 U. S. 703 (2000),

[11] Apparently as opposed to the concept that content-based was formulated, at its least in part, to consider the government's motive in adopting/applying the regulation.

Political signs are defined by whether they seek to influence the outcome of an election and ideological signs are defined by whether they fit into the ordinance's other categories. Each of the three categories is treated differently. Thus, in Thomas' view the proper content-based inquiry is:

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

Thomas rejected arguments from the Circuit Court decision including:

- The Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." [Fails to consider if ordinance is content-neutral on its face.]
- *Ward* (n .2) . . . suggest(s) that a government's purpose is relevant even when a law is content based on its face. [*Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.]
- The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." [12] [This argument conflates government regulation based on ideology, opinion or perspective of the speaker with regulations aimed at prohibiting public discussion of an entire topic.]
- (The Court of Appeals) characterized the Sign Code's distinctions as turning on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." [The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them.[13] Even if this were "speaker-based regulation," speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Once Thomas decides the ordinance is content-based, invoking strict scrutiny, he determines that it cannot meet that test. His discussion of the aesthetic and traffic safety purposes are omitted here.

Core components of Thomas' view include:

> 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.

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[12] He also states that Gilbert's argument expanded on this. "In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is 'endorsing or suppressing 'ideas or viewpoints,'' and the provisions for political signs and ideological signs 'are neutral as to particular ideas or viewpoints' within those categories."

[13] If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger - and kept them up for far longer - than signs inviting people to attend his church services.

> Speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

Thomas concludes on what he views as a positive note for local government:

> Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "absolutist" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," . . . but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.

He concludes by looking at sign regulations that are proper (e.g., size, building materials, lighting, moving parts, and portability), but a full review of that brief listing is omitted here in favor of looking at Justice Alito's more expansive concurring opinion.

(B) J. Alito's Concurring Opinion. Justice Alito begins his concurrence noting "Content-based laws merit this (strict scrutiny) protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." Agreeing that Gilbert's ordinance is "replete with content-based distinctions," he concurs in the result but adds a non-comprehensive list of regulations that would not be content-based. Commentators have opined that Alito's opinion, when viewed in the context of the line-up of justices who concurred, could be a solid basis for Gilbert and other municipalities in the future.

Alito included in this list of permissible, non-content based regulations controls such as:

- Size regulation differences that are based on content-neutral criteria;
- Regulation as to where signs may be located;
- Regulation differences as to:
    - Lit and unlit signs;
    - Fixed message versus electronic changeable messages;
    - Placement of signs on public property versus private property or commercial versus residential property;
    - Distinctions between on-premises and off-premises signs;
    - Limits on number of signs per mile;
    - Time restrictions on signs for "one-time" events, similar to time limits for the events themselves.
- A government may erect its own signs such as those promoting safety, directional signs, or signs designating historic or scenic sites.

(C) Concurrences in the Judgment by Breyer And Kagan.

Justice Breyer, seemingly, looks for a new manner of assessing these cases:

> The 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. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

He argues, not against content-based analysis, but against its use as an automatic trigger leading to strict scrutiny. Surely cases will exist when content really does mean viewpoint discrimination or may lead to unfair management of a public forum. Content discrimination used in this way could "write a recipe for judicial management of ordinary governmental regulatory activity."

After listing a litany of governmental actions which he feels should not be subject to strict scrutiny, he opines 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 a determinative legal tool, in an appropriate case, to determine the strength of a justification.

Though he believes Gilbert's sign regulations do not warrant strict scrutiny, he concurs with Justice Kagan that they violate the First Amendment.

Justice Kagan (joined by J. Breyer and J. Ginsberg) cites an array of existing and previously acceptable sign regulations that would be put in jeopardy by J. Thomas' views.[14] His views will put local governments in an "unenviable bind." They'd have to eliminate exemptions that allow for helpful signs on streets and sidewalks or repeal their sign restrictions altogether and face the resulting clutter.

The interests said to be supported by J. Thomas (preserving an uninhibited market place of ideas in which truth will ultimately prevail and preventing regulation based on hostility or favoritism to the message expressed) are not implicated by most sign ordinances. The purpose of applying strict scrutiny should exist when there is a "realistic possibility that official suppression of ideas is afoot."

To apply strict scrutiny to regulations which are entirely reasonable does not further its purpose to prevent the government from skewing the public's debate of ideas.

As noted in the discussion of J. Breyer's opinion, J. Kagan, nonetheless, finds Gilbert's ordinance lacking:

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[14] "So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?)"

> The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance - most notably, the law's distinctions between directional signs and others - does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. . . . The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. . . . the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet.

Pt. 3: Reed – What it Means – or More Properly – What it May or May Not Mean for Sign Controls

Assuming, for purposes of discussion, that Alito's concurrence may represent the implications of the decision,[15] local governments, perhaps, are not as bereft of sign regulatory powers as early analysts feared, at least in areas such as commercial sign controls and on- and off-premises sign control differences. A real concern, though, will exist where differences in treatment can somehow be linked to content. Some instances in which clarity may be derived by future cases include the following.

(A) Government Traffic Information Signs. With regard to Alito's comment on government signs (including directional signs), consider government signs on the Interstate System providing information as to services such as fuel, lodging, and food. Will inclusion of logos of the services on signboards located near exits remove these directional "governmental speech" signs from that category, opening challenges by, e.g., businesses that do not wish to pay to be located on the signs? See, for example, the description of the Washington State Motorist Information Sign Program (including eligibility criteria and annual fees up to almost $1,000).[16]

New Hampshire Department of Transportation's Tourist Oriented Directional Sign (TODS) manual similarly sets eligibility criteria for commercial signs, such as hours of operation, number of rooms for lodging establishments, and seating capacity for restaurants. New Hampshire's regulations also include criteria for churches and places of worship to be listed, including one or more services per week in a permanent structure with an established schedule; qualifying for property tax exemption under RSA 72:23; and not serving as an accessory or subsidiary use to any other use on the property.[17] Given J. Thomas' description of the church in *Gilbert*, one might question the requirement to hold services in a permanent structure in order to qualify for listing.

Local government roadside information signs may not be as widespread as those adopted by states. While J. Alito's concurrence, does suggest that *Gilbert* should not affect government speech in

[15] Concurrence by Breyer and Kagan would seem to so indicate.
[16] http://www.wsdot.wa.gov/Operations/Traffic/Signs/faq.htm.
[17] Manual including part 602 of NH Code of Administrative rules and other information available at: https://www.nh.gov/dot/org/operations/traffic/documents/TODsignpolicy.pdf.

this manner, and J. Kagan mentions these types of signs, a prudent municipality will carefully consider any differences concerning the placement of civic, religious, historical, or other non-commercial information on municipal signs.

(B) RSA 674:54. One reading of cases like *Gilbert* is premised upon improper categorization of speech signs by a governmental unit. New Hampshire (probably in a manner similar to other states) has adopted state law governing applicability of local land use controls to other units of government. The enactment of RSA 674:54 replaced the common law doctrine requiring analysis of governmental uses and proprietary uses, so that now independent "governmental uses" of property, in general, are not subject to local land use controls.

Some governmental units have installed electronic, changeable text signs on some governmental buildings or facilities. In some cases, the municipality in which that use is located bars or regulates such electronic signs. In at least one instance, a church apparently has asserted that a school's installation of such a sign, when the church has been denied the ability to do so, violates *Gilbert* and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

At least as to *Gilbert* compliance, one inquiry may ask if it is the governmental unit with the sign ordinance that can be alleged to be discriminating when the disparate treatment arises from action by a governmental unit acting under authority of state law.[18] If the challenge is upheld, would this mean that any local government control subject to preemption under RSA 674:54 could be at risk of violating First Amendment rights?

(C) Non-Commercial Sign Distinctions. Even if J. Alito's views are correct statements of the net impact of *Reed*, of immediate concern are provisions of ordinances that imposed differing requirements for signs which do not fall within the category of commercial speech. Courts have expressed continuing concern over treating similar speech differently whether in the context of verbal, speech, protests, parades, or other gatherings. Conventional guidance after *Gilbert* seems to have centered on elimination of any distinction in treatment between non-commercial signs.

Thus, some commentators suggest removing even the listing of and definition of "religious," "civic," or "charitable – not-for-profit" as categories of signs regulated in a municipality. If there is any basis for distinction, the distinction may need to be such as to pass strict scrutiny. Thus, limiting the size

[18] Remember that New Hampshire, as a Dillon's Rule state, vests the state with plenary control over local government, including exercise of land use powers.

and number of political signs on a property must be considered in light of how similar requirements will be applied to religious or ideological signs.[19]

(D) Drafting Guidance. Prior to *Gilbert*, First Amendment concerns in regulating signs were often met by attempts to limit discretion by very specific delineation. After *Gilbert*, such specific categorization may invoke content-based review and strict scrutiny. As mentioned at the outset of this paper, municipalities may be left in the unenviable position of having overly broad regulations in the search for content-neutrality.

(1) Procedural Guidance. Though not a "cure-all" for content-based issues, adopting procedures for acting on sign applications and permits with objective standards and minimal procedural delays may assist in defending ordinances. Clear and prompt review should be available internally, as, of course, judicial review is governed by state law. When First Amendment issues are involved, special procedures for prompt processing and review may assist in deflecting prior restraint complaints.

(2) Justification for Differences. Where different treatment of non-commercial signs may be sought, the issue should be thoroughly considered. If the regulation is truly needed, what basis, if any, can be shown not to apply it universally, i.e., why should any category of sign be exempt?

(3) Standard for Content-Based Regulation. Absent viewpoint control, content-based controls very often fail strict scrutiny – but not always. Strict scrutiny sets a high, but not insurmountable, bar, e.g. regulation of election signs near polling places.[20]

(4) Purpose Statement. Review the purpose statement (if there is one) to ensure it is strong, but relevant, and accurate.

(5) *Simplify, within Reason*. Reduce the number of categories of signs regulated and decrease the number of regulations.

(6) *Severability Clauses.* If not already subject to a severability clause, the sign ordinance should include one. However, if the zoning ordinance, or the municipal code of ordinances generally, includes a severability clause, consider how including a separate clause in the sign ordinance will be interpreted, i.e., why is it duplicated in sign ordinance but not elsewhere. So, if a "duplicate" clause is used, include language that recognizes existence of other clause and states intent behind its use.

(E) Post-Gilbert Decisions. Insufficient time has passed since Gilbert was announced for subsequent cases to provide a developed body of law. Yet a number of cases have been decided which

[19] Without specifically adopting or endorsing its suggestions, Appendix 5 includes a "Do's and Don't's" List of suggested actions and changes.
[20] *Burson v. Freeman*, 504 US 191 (1992).

may serve as a guide to some extent. The following list is from a presentation on Gilbert for IMLA. These cases have not been Shepardized or otherwise reviewed for this paper.

- *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 offsite signs are not content based, and, therefore, do not trigger strict scrutiny")

- *Citizens for Free Speech, LLC v. Cnty. Of Alameda,* ___ F. Supp. 3d ___, 2015 WL 4365439, at 13 (N.D. Cal., 2015) (*Reed* does not alter the analysis for laws regulating off-site commercial speech; "Plaintiffs have not identified any distinct temporal or geographic restrictions on different categories of permitted signs in Section 17.52.520 based on those signs' content. Consequently, *Reed* does not apply here.")

- *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. The fact that Reed has no bearing on this case is abundantly clear from the fact that Reed does not even cite *Central Hudson*, let alone apply it. *Metromedi*a, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is, therefore, not patently unconstitutional.")

- *Thomas v. Schroer*, ___ F. Supp. 3d ___, 2015 WL 4577084, at 4 (W.D. Tenn., 2015) (challenge to the Tennessee highway advertising act calls several of that law's distinctions into question, including the on-site/off-site distinction, after considering but rejecting the Alito concurrence, but finding driver safety to be a compelling interest.)

- *State ex rel. Icon Groupe, LLC v. Washington County, Or*., 272 Or. App. 688 (Or. Ct. App. 2015) (state law case; case law under Oregon state constitution rejects the distinction between on-premise and off-premise signs; Applicant sign company was entitled to issuance of its requested permits - i.e., permits for the specific "holiday signs" on a land use mandamus claim, because they met an exemption in the regulations, despite County's concerns that signs would be later converted to advertising signs; Oregon law provided for vested right in law at time of application; stating that "it is fairly clear that the 'safety sign' exemption would render the count's code vulnerable to invalidation in a facial challenge under the First Amendment" under *Reed*.)

Pt. 4: Implications for Other Local Government Controls.

Appendix 4 provides a discussion via IMLA' *Municipal Lawyer* magazine of some instances and places of how and where *Gilbert* may impact local governments.

The following are selected samples of post-*Gilbert* decisions (once again, derived from an IMLA presentation and again not Shepardized or otherwise independently reviewed).

Panhandling/solicitation ordinances at risk

- *Norton v. City of Springfield*, 7th Cir., 2015 (anti-panhandling ordinance was content-based under *Reed* and failed strict scrutiny).
- *Cutting v. City of Portland, ME*, (1st Cir., 2015) (ordinance that prohibits standing, sitting, staying, driving, or parking on median strips was content-neutral but violated First Amendment because not narrowly tailored; allegedly official interpretation against applying ordinance to political signs was not properly at issue due to principle of constitutional avoidance).
- *Centro De La Comunidad Hispana De Locust Valley et al. v. Town of Oyster Bay*, NY (EDNY, 2015) (ban on day labor solicitation was regulation of potentially lawful commercial speech advancing traffic safety that was governed by *Central Hudson*, despite being content-based under *Reed*; however, ban was stricken because it was not narrowly tailored enough).

- *Watkins v. City of Arlington, TX* (ND Texas, 2015) (ban on roadside solicitation upheld; refusing to apply limiting construction involving application with state law creating an exemption for municipal solicitation, while noting that was very likely "speaker-based and therefore content-based" under *Reed*).
- *Thayer v. Worcester*, 755 F.3d 60 1st Cir., 2014) vacated and remanded to district court for reconsideration in light of *Reed*.

Compelled Commercial Speech

- *CTIA-the Wireless Association v. City of Berkeley*, (ND Cal., 2015) (rejecting applicability of *Reed* to law requiring consumer disclosures re RF emissions from telecommunications devices because it related to commercial speech; "nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid . . . Ironically, the classification of speech between commercial and noncommercial is itself a content-based distinction. Yet it cannot seriously be contended that such classification itself runs afoul of the First Amendment." Compelled disclosure of commercial or governmental speech was not governed by *Central Hudson* and was only subject to rational basis review).

Other regulations of non-commercial speech at risk

- *Cahaly v. LaRosa*, 4th Cir., 2015 (receding from prior sign cases *Brown v. Town of Cary* and *Wag More Dogs* using functional approach to content neutrality, and applying *Reed* to strike an anti-robocalling statute as content-based, because it applied only to consumer and political robocalls; less restrictive alternatives include time of day limits, do not call registries, and disclosure requirements).
- *Commonwealth v. Lucas*, Mass. App. Ct., 2015 at note 10 (statute criminalized certain false statements about political candidates or questions submitted to voters; stricken as inconsistent with the fundamental right of free speech guaranteed by art. 16 of the Massachusetts Declaration of Rights, with reference to *Reed* as similar)
- *Rideout v. Gardner*, (DC NH, 2015) (NH statute banning ballot selfies was content based under *Reed*, and stricken despite availability of alternative means of communication of one's vote; it was over inclusive; there was insufficient evidence in the record of actual threat to compelling governmental interest of avoiding vote buying; other statutes already banned vote buying; completed ballots were not government speech like license plates; less restrictive regulation was possible – ban only ballot selfies used to sell a vote).
- *Defense Distributed v. US Dep't of State*, (WD Tex., 2015) (noting *Reed*, but upholding regulation of weapons export, including ban on internet posting of technical data regarding guns, under intermediate scrutiny, by relying on analogy to adult use secondary effects cases, open meetings act, licenses for tour guides, and the abortion protest case *McCullen v. Coakley, 134 S. Ct. 2518 (2014).*

Concluding Comments. Has *Reed* changed First Amendment law governing signs? It certainly has changed the prior framework and analysis regarding the manner of determining if an ordinance is content-based. At a minimum, local governments need to consider the manner in which differences in treatment of categories arise and the bases for such distinctions. In particular, exemptions from generally applicable standards and regulations must be exempted to see if they can pass the *Reed* content-neutrality test. A determination that a distinction is content-based will not automatically invalidate the ordinance, but likely will raise the burden on the local government to meet strict scrutiny.

Another consideration will be the amount of discretion to be vested in administrators and land use boards (e.g., special exceptions for various signs).

IMLA's draft sign ordinance – and remember, at this time, this is a DRAFT and is subject to revision, included as an appendix here, does provide a framework for sign code revision. Certainly, the dimensions and other provisions of the draft may not "fit" the New Hampshire environment. Specifics as to these matters must be determined locally, but with due regard for the content-based considerations evident from *Reed v. Gilbert*.

IMLA Model Sign Code – 3rd Rough Draft

This Model proposes a content neutral sign code developed based on the decision of *Reed v. Town of Gilbert, ___U.S.___, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061, 83 U.S.L.W. 4444, 25 Fla. L. Weekly Fed. S 383 (U.S. 2015)*. The sign code recognizes that government signs are government speech intended to ensure public safety. These government signs include those described and regulated in the Manual on Uniform Traffic Control Devices and signs that are necessary to identify properties and to implement the laws of the state. The skeleton of this Model derives from the Washington County, Oregon sign regulations which were found to be content neutral by the United States District Court for Oregon, Portland Division in *Icon Groupe, LLC v. Washington Cnty.,* 2015 U.S. Dist. LEXIS 67682 (D. Or. May 26, 2015).

This Model accepts at face value the Supreme Court's unanimous view that governments may regulate signs. In *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 2041-2042, 129 L. Ed. 2d 36, 42-43, (U.S. 1994) writing for a unanimous court Justice Stevens explained that "While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs -- just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. See, e. g., *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949)." In *Ladue,* the Court concluded that the City's regulation banning almost all residential signs went too far in restricting speech. At the same time the Court noted that its decision did not eliminate the city's ability to restrict some types of signs: "Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban." *City of Ladue v. Gilleo*, 512 U.S. 43, 58, 114 S. Ct. 2038, 2045, 129 L. Ed. 2d 36, 49, (U.S. 1994). Thus, *Ladue* teaches us that governments may impose limits on some signs and impose regulations short of a complete ban.

In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S. Ct. 2882, 2892, 69 L. Ed. 2d 800, 814-815 (U.S. 1981) a majority of the Justices of the Supreme Court concluded that a government could distinguish between commercial and non-commercial speech when regulating signs: "Finally, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), we held: 'The Constitution . . .

accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.' Id., at 562-563 (citation omitted). We then adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. Id., at 563-566.

"Appellants agree that the proper approach to be taken in determining the validity of the restrictions on commercial speech is that which was articulated in *Central Hudson*, but assert that the San Diego ordinance fails that test. We do not agree."

Despite concluding that San Diego's ordinance regulating billboard's survived the *Central Hudson* test, four members of the majority reached the conclusion that the city's ordinance was facially unconstitutional because it allowed commercial speech at certain locations where it prohibited non-commercial speech. "It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-513, 101 S. Ct. 2882, 2895, 69 L. Ed. 2d 800, 818 (U.S. 1981)

Because *Metromedia* offers scant support for developing content based regulations of commercial signs, i.e., regulations that use the message to define whether the sign is commercial, this Model does not attempt to distinguish regulations of commercial versus non-commercial signs, but prohibits commercial signs in some locations. Arguments can be made and definitions constructed that could effectively allow or prohibit signs based on whether they are commercial versus non-commercial, but where commercial signs are allowed, Metromedia informs the conclusion that non-commercial signs must also be allowed.

Where this Model uses time limits or size limits, those should be considered as illustrative only and are not intended to form a part of the Model except for illustrative purposes.

Definitions.

1.1 Sign. A name, identification, description, display or illustration, which is affixed to, painted or represented directly or indirectly upon a building, or other outdoor surface which directs attention to or is designed or intended to direct attention to the sign face or to an object, product, place, activity, person, institution, organization or business and where sign area means the space enclosed within the extreme edges of the sign for each face, not including the supporting structure or where attached directly to a building wall or surface, the outline enclosing all the characters of the word. Signs located completely within an enclosed building, and not exposed to view from a street, shall not be considered a sign. Each display surface of a sign or sign face shall be considered to be a sign.

1.1.1 Electric. Any sign containing electric wiring. This does not include signs illuminated by an exterior floodlight source.

1.1.2 Flashing. Any illumined sign on which the artificial light is not maintained stationary or constant in intensity and color at all times when such sign is in use. For the purpose of this Code any moving illuminated sign, except digital billboards, shall be considered a flashing sign.

1.1.3 Freestanding. A sign erected and maintained on a freestanding frame, mast or pole not attached to any building, and not including ground mounted signs.

1.1.4 Government Sign. A government sign is a sign that is constructed, placed or maintained by the federal, state or local government or a sign that is required to be constructed, placed or maintained by the federal, state or local government either directly or to enforce a property owner's rights.

Comment: This model recognizes, as did the Supreme Court in Reed v. Town of Gilbert, ___U.S. ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061, 83 U.S.L.W. 4444 (U.S. 2015), that the government must speak and in doing so is not regulated as private individuals under the First Amendment. While the Government often speaks directly, its speech can often be found in requirements of law that demand members of a community, residents and property owners to post notices to protect the rights afforded by the government. This Cat's Paw form of speech finds protection in this Model as when a property owner must post a property against trespassing, solicitors and others; or where a property owner must warn of dangers on the property to protect public safety and limit liability such as warning of dangerous animals, high voltage, sinkholes, gun or weapon usage among other dangers. While these postings are sometimes voluntary, all are required by the government to be in a certain form and constitute the government's speech (they would not be considered private speech under the axiom: actus me invito factus non est meus actus. Compelled speech generally finds little support under First Amendment analysis and in the cases decided by the Supreme Court. Nevertheless, compelled commercial speech such as warning labels on cigarette packaging and requirements imposed by the SEC on business communications affecting investors have been sustained. Here the types of compelled speech that fall within the government speech definition are forms of speech required by law to warn of dangers or to assert rights protected by the law. A community attempting to rely on these forms of compelled speech should only do so after a full review and analysis by its attorney.

1.1.5 Ground Mounted. A sign which extends from the ground, or has support which places the bottom of the sign less than two (2) feet from the ground.

1.1.6 Highway Sign. A Freestanding sign, Integral Sign or Flat Mounted Sign that is erected and maintained within the view of motorists who are driving on a highway.

1.1.6 Integral. A sign that is embedded, extruded or carved into the material of a building façade. A sign made of bronze, brushed stainless steel or aluminum, or similar material attached to the building façade.

1.1.7 Marquee. A canopy or covering structure bearing a signboard or copy projecting from and attached to a building.

1.1.8 Original Art Display. A hand-painted work of visual art that is either affixed to or painted directly on the exterior wall of a structure with the permission of the property owner. An original art display does not include: mechanically produced or computer generated prints or images, including but not limited to digitally printed vinyl; electrical or mechanical components; or changing image art display.

1.1.9 Outdoor Advertising. A sign which advertises goods, products or services which are not sold, manufactured or distributed on or from the premises or facilities on which the sign is located.

Comment: *This definition is necessarily content based as it requires one to determine from reading or looking at the sign if a product is being advertised that is not sold, manufactured or distributed on or from the premises.*

1.1.10 Portable Sign. Any structure without a permanent foundation or otherwise permanently attached to a fixed location, which can be carried, towed, hauled or driven and is primarily designed to be moved rather than be limited to a fixed location regardless of modifications that limit its movability.

1.1.11 Projecting. A sign, other than a wall sign, which projects from and is supported by a wall of a building or structure.

1.1.12 Roof Sign. A sign located on or above the roof of any building, not including false mansard roof, canopy, or other fascia.

1.1.13 Temporary. A banner, pennant, poster or advertising display constructed of paper, cloth, canvas, plastic sheet, cardboard, wallboard, plywood or other like materials and that appears to be intended to be displayed for a limited period of time.

1.1.14 Flat Wall (Façade-Mounted). A sign affixed directly to or painted on or otherwise inscribed on an exterior wall and confined within the limits thereof of any building and which projects from that surface less than twelve (12) inches at all points.

1.1.15 Digital Billboard. A sign that is static and changes messages by any electronic process or remote control.

1.2 Prohibited Signs.

Signs are prohibited in all Districts unless:

1.2.1 Constructed pursuant to a valid building permit when required under this Code; and

1.2.2 Authorized under this Code.

1.3 Authorized Signs.

The following signs are authorized under Section 1.2.2 in every District:

1.3.1 Government signs in every zoning district which form the expression of this government when erected and maintained according to law and include the signs described and regulated in 1.3.1.1, 1.3.1.2 , 1.3.1.3 and 1.3.1.4.

1.3.1.1 Traffic control devices on private or public property must be erected and maintained to comply with the Manual on Uniform Traffic Control Devices adopted in this state and if not adopted by this state with the Manual on Uniform Traffic Control Devices adopted by the Federal Highway Administration.

Comment: *The Federal Highway Administration has established uniform standards for signs that regulate traffic or that are erected and maintained within road rights of way or adjacent property. These uniform standards are intended to be used by the owners of private property that is open to the public to reduce confusion and limit the risk of accident. While these signs are content specific they serve an extraordinarily important public function.*

1.3.1.2 Each property owner must mark their property using numerals that identify the address of the property so that public safety departments can easily identify the address from the public street. Where required under this code or other law the identification must be on the curb and may be on the principal building on the property. The size and location of the identifying numerals and letters if any must be proportional to the size of the building and the distance from the street to the building. In cases where the building is not located within view of the public street, the identifier shall be located on the mailbox or other suitable device such that it is visible from the street.

Comment: *The local government should establish a required dimensional limitation on identification signs based on the size of the structure and its distance from the public road if the structure is visible from the public road. The design and dimensions should conform to reasonable standards set to ensure that emergency responders can identify the property if necessary.*

1.3.1.3 Where a federal, state or local law requires a property owner to post a sign on the owner's property to warn of a danger or to prohibit access to the property either generally or specifically, the owner must comply with the federal, state or local law to exercise that authority by posting a sign on the property.

Comment: *As noted in Reed v. Town of Gilbert some content based signs are necessary to protect the public and are likely to survive strict scrutiny. Signs prohibiting trespassing or solicitors; warning of the dangers of "high voltage" or other hidden dangers may be required for a person to assert property rights or to protect a property owner from liability. A local government should establish dimensional limitations, quantity limitations and other regulations designed to ensure the purpose of the sign is furthered while protecting the aesthetics of the community and protecting traffic and other public safety goals.*

1.3.1.4 A flag that has been adopted by the federal government, this State or the local government may be displayed as provided under the law that adopts or regulates its use.

Comment: *Flags can be problematic. Most communities want to regulate them, to avoid the used car lots and other businesses that use multiple flags to attract attention. On the other hand, communities that adopt laws that restrict the flags face condemnation for restricting the the American Flag. While an argument can be made that displaying the federal, state and local flags merely affirm the government's adoption of those symbols, a person may wish to express different views by using flags as speech. IMLA believes that if flags are allowed as provided in 1.3.1.4, they are not likely to be found to be government speech and restrictions on other flags are not likely to survive a challenge under a strict scrutiny analysis.*

For that reason, IMLA suggests limiting a person to having no more than three flag poles on a property, the location of the flag poles and the size of the flags.

1.3.1.5 The signs described in Sections 1.3.1.1, 1.3.1.2 , and 1.3.1.3, are an important component of measures necessary to protect the public safety and serve the compelling governmental interest of protecting traffic safety, serving the requirements of emergency response and protecting property rights or the rights of persons on property.1.3.1.6 The flags described in Section 1.3.1.4 are permitted to serve a compelling governmental interest in promoting the rule of law by establishing symbolic representations of the governments who pass, protect and preserve those laws.

1.3.2 Temporary Signs, Generally.

1.3.2.1 Temporary signs allowed at any time:

a) A property owner may place one sign with a sign face no larger than two (2) square feet on the property at any time.
b) A property owner may place a sign no larger than 8.5 inches by 11 inches in one window on the property at any time.

1.3.2.2 One temporary sign per 0.25 acre of land may be located on the owner's property for a period of thirty (30) days prior to an election involving candidates for a federal, state or local office that represents the district in which the property is located.

1.3.2.3 One temporary sign may be located on the owner's property when:

a. that property is being offered for sale through a licensed real estate agent;

b. if not offered for sale through a real estate agent, when that property is offered for sale through advertising in a local newspaper of general circulation; and

c. for a period of 15 days following the date on which a contract of sale has been executed by a person purchasing the property.

1.3.2.4 One temporary sign may be located on the owner's property on a day when the property owner is opening the property to the public; provided, however, the owner may not use this type of sign in a Residential District on more than two days in a year and the days must be consecutive and may not use this type of sign in any [Commercial District] for more than 14 days in a year and the days must be consecutive. For purposes of this Section 1.3.2.4 a year is counted from the first day on which the sign is erected counting backwards and from the last day on which the sign exists counting forward.

1.3.2.5 During the 26 day period December 15 to January 10, a property owner may place [insert number] temporary signs on the property.

1.3.2.6 A property owner may place and maintain one temporary sign on the property on July 4.

1.3.2.7 A person exercising the right to place temporary signs on a property as described in this Section 1.3.2 must limit the number of signs on the property per 0.25 acre at any one time to 2 plus a sign allowed in 1.3.2.1(b).

1.3.2.8 The sign face of any temporary sign, unless otherwise limited in this Section 1.3.2 must not be larger than two (2) square feet.

Comment: Section 1.3.2 allows property owners to place temporary signs on their property during certain time periods and allows the property owner to select whatever message the owner chooses during those periods. This provision complies with both Reed v Town of Gilbert and City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36, 1994 U.S. LEXIS 4448, 62 U.S.L.W. 4477 (U.S. 1994) as it allows a property owner the ability to make use of the property for free expression but in a manner designed to reduce clutter and advance aesthetic interests of the community without any content based limitations.

1.3.3 For purposes of this Section (1.3) the lessor of a property is considered the property owner as to the property the lessor holds a right to use exclusive of others (or the sole right to occupy). If there are multiple lessors of a property then each lessor shall have the same rights and duties as the property owner as to the property the lessor leases and has the sole right to occupy and the size of the property shall be deemed to be the property that the lessor has the sole right to occupy under the lease.

1.3.4 A property owner may not accept a fee for posting or maintaining a sign allowed under Section 1.3.2 and any sign that is posted or maintained in violation of this provision is not authorized.

1.3.5 In residential zones or on property used for non-transient residential uses, commercial signs are not authorized.

Comment. This provision 1.3.5 may limit home occupations and transient residential uses, so should be considered carefully if adopted. An alternative might be to provide "except for those properties on which a home occupation or a transient residential use has been approved."

1.4 Specific Sign Regulations

The following sign regulations shall apply to all Use Districts as indicated.

1.4.1 Residential Districts

1.4.1.1 Scope:

This Section (1.4.1) shall apply to all Residential Districts.

1.4.1.2 Size:

A. When a sign is authorized on a property, the sign must not exceed two (2) square feet in area. Where attached dwellings exist on a property the total square footage of signs must not exceed two square feet per dwelling unit and must not exceed a total of twelve (12) square feet in area per structure.

B. For Residential Developments (including subdivision identification) the maximum size and number of signs that the owner or owners of the residential development may erect and maintain at the entrances to the development shall be controlled according to the following:

(1) Residential developments four (4) acres or less in area may have a sign or signs with a total area of no more than thirty-two (32) square feet.

(2) Residential developments over four (4) acres but less than forty (40) acres in area may have a sign or signs which have a total area of no more than forty-eight (48) square feet.

(3) Residential developments of forty (40) acres or more in area may have a sign or signs with a total area of no more than one hundred two (102) square feet.

1.4.1.3 Location:

Permitted signs may be anywhere on the premises, except in a required side yard or within ten (10) feet of a street right-of-way.

1.4.1.4 Height:

The following maximum heights shall apply to signs:

A. If ground-mounted, the top shall not be over four (4) feet above the ground; and

B. If building mounted, shall be flush mounted and shall not project above the roof line.

1.4.1.6 Illumination:

Illumination if used shall not be blinking, fluctuating or moving. Light rays shall shine only upon the sign and upon the property within the premises.

1.4.1.7 The following signs are not allowed: Highway Signs, Portable Signs, Marquee Signs, Digital Billboard, Outdoor Advertising Sign, and Projecting Sign.

1.4.2 Commercial and Institutional Districts

1.4.2.1 Scope:

This Section (1.4.2) shall apply to all [insert appropriate titles Commercial Districts and the Institutional District].

1.4.2.2 Number and Size:

For each lot or parcel a sign at the listed size may be authorized:

A. [insert name of district] signs shall not exceed thirty-five (35) square feet. [For additional standards for the [insert name of district] District see Section [if additional standards apply insert here]].

B. [insert appropriate district titles here: Community Business District (CBD), General Commercial District (GC) and Rural Commercial District (R-COM)] signs shall not exceed the following area requirements based on the speed limit and number of traffic lanes of the adjacent public street:

Maximum Speed Limit	No. of traffic lanes	Max. Sq. Footage of sign
30 mph or less	3 or less	32 sq. ft.
35 mph or more	3 or less	50 sq. ft.
30 mph or less	4 or more	40 sq. ft.

35 mph or more	4 or more	72 sq. ft.

C. Two (2) or more lots or parcels having a combined linear frontage of eighty-five (85) feet may combine their sign areas allowed by Section 1.4.2.2 B. for the purpose of providing one common free-standing or ground-mounted sign. The sign shall not exceed one hundred fifty (150) square feet.

D. Corner Lots:

Where a lot fronts on more than one street, only the square footage computed for each street frontage shall face that street frontage.

E. If not otherwise regulated as to maximum sign area in this code, signs are governed by the following:

Maximum Sign Area	Street Frontage
20 sq. ft.	85 ft. or less
25 sq. ft.	86-90 ft.
30 sq. ft.	91-99 ft.
35 sq. ft.	100 ft. or more

F. Commercial Center:

Signs used for Commercial Centers shall be allowed as follows:

(1) Only one (1) sign of one hundred fifty (150) square feet shall be permitted for centers less than five (5) acres and greater than one (1) acre.

(2) A maximum of two (2) signs of four hundred (400) square feet shall be permitted for complexes for five (5) to fifty (50) acres.

(3) A maximum of three (3) signs of four hundred (400) square feet shall be permitted for complexes of more than fifty (50) acres.

(4) Individual businesses are allowed a face building mounted sign pursuant to Section 1.4.2.2 A. and B.

G. Highway Signs:

Highway signs, including Digital Billboards and Outdoor Advertising Signs, shall be permitted only in the [insert appropriate district here, for example: General Commercial (GC) District]. Such signs shall not exceed three hundred (300) square feet per face, nor shall the face exceed a length of twenty-five (25) feet or a height, excluding foundation and supports, of twelve (12) feet. In determining these limitations, the following shall apply:

(1) Minimum spacing shall be as follows:

Type of Highway	Minimum space from	Minimum space between

	Interchange (in feet)	signs on same side of Highway (in feet)
Interstate Hwy	500	1000
Limited Access (Freeway)	500	1000
Other Roads	None	500

2) For the purpose of applying the spacing requirements of Section (1) above, the following shall apply:

(a) Distances shall be measured parallel to the centerline of the highway;
(b) Measurements for the spacing between signs shall be based on when the construction of the sign:
  i. Received final approval by the Code Official measuring from the first sign to have received that approval; or
  ii. If the Code Official has not given final approval to a sign that will be limited by the spacing requirement once it is constructed, then
    1)Measured from the first sign given a building permit that is not cancelled or void at the time of measurement; or
    2)When no permit has been issued that is still valid, measured from the first fully complete application for a building permit received by the Code Official that has not been cancelled or which is void; and
(c) A back-to-back, multiple signs on one freestanding pole, double-faced or V-type sign shall be considered as one sign.

1.4.2.3 Location:

A. Flat Wall Signs may be located on any wall of the building.

B. Freestanding Signs must have a minimum clearance of eight (8) feet six (6) inches above a sidewalk and [fifteen (15)] feet above driveways or alleys.

C. One Freestanding or Ground-Mounted sign per lot or parcel except as provided in Section 1.4.1.2 B. and 1.4.2.2 F. may be located anywhere on the premises except as follows:

(1) A ground-mounted sign shall not be located in a required side yard, rear yard or within five (5) feet of a street right-of-way.

(2) A freestanding sign shall not be located in a required side or rear yard. A freestanding sign may project up to the street right-of-way provided there is a minimum ground clearance of [eight (8) feet six (6) inches] and provided the location complies with the Manual on Uniform Traffic Control Devices.

D. Marquee Signs or signs located on or attached to marquees must have a minimum clearance of not less than [eight (8) feet six (6) inches (8' 6")]. The maximum vertical dimension of signs shall be determined as follows:

Height above Grade	Vertical Dimension
8' 6" up to 10'	2' 6" high
10' up to 12'	3' high
12' up to 14'	3' 6" high
14' up to 16'	4' high
16' and over	4' 6" high

E. Wall signs shall not extend above the top of a parapet wall or a roofline at the wall, whichever is higher.

F. Permitted highway signs, including digital billboards, may be allowed anywhere on the premises except in a required side yard, rear yard or within twenty (20) feet of a street right-of-way.

G. No portion of a digital billboard shall be located within two hundred and fifty (250) linear feet of the property line of a parcel with a residential land use designation or residential use that fronts on the same street and within the line of sight of the billboard face.

1.4.2.4 Height:

A. Ground-mounted signs shall not exceed four (4) feet in height from ground level.

B. Freestanding signs shall not exceed twenty-eight (28) feet in height from ground level.

C. Highway signs, including digital billboards, shall not exceed thirty-five (35) feet in height from ground level.

1.4.2.5 Content:

A. Any of the signs pursuant to this Section (1.4.2) may be changeable copy signs.

B. The primary identification sign as allowed under 1.3.1.2 for each firm shall contain its street number. The street number shall be clearly visible from the street right-of-way.

1.4.2.6 Illumination:

Shall be as provided in Section 1.4.6.

1.4.3 Industrial

1.4.3.1 Scope:

This Section shall apply to the Industrial District.

1.4.3.2 Number and Size:

A. One (1) sign for each street frontage, each with a maximum area of five (5) percent of the total square footage of the face of the building facing that street frontage shall be permitted.

B. One freestanding or ground-mounted sign not exceeding fifty (50) square feet per lot or parcel.

C. The maximum size and number of signs that the owner or owners of an Industrial Park development may erect and maintain at the entrances to the development shall be controlled according to the following:

(1) A maximum of two (2) signs of three hundred (300) square feet per face shall be permitted for industrial parks or complexes of less than ten (10) acres;

(2) A maximum of three (3) signs of four hundred (400) square feet shall be permitted for complexes of ten (10) acres or more. More than three (3) signs may be approved through [a Type I procedure], provided the total sign area does not exceed twelve hundred (1200) square feet.

1.4.3.3 Location:

Shall be as provided in Section 1.4.2.3.

1.4.3.5 Illumination:

Shall be as provided in Section 1.4.6.

1.4.4 Agriculture District

1.4.4.1 Scope:

This Section shall apply to the [insert appropriate language describing rural/agricultural and forestry areas] outside the [insert appropriate designation such as: Urban Growth Boundaries].

1.4.4.2 Size:

a. Signs other than highway signs shall have a maximum area that does not exceed thirty-two (32) square feet per sign.
b. Highway signs must comply with Section 1.4.2.G

1.4.4.3 Location:

a. Signs other than highway signs shall be at least twenty-five (25) feet from a right-of-way, and shall be at least twenty-five (25) feet from an adjacent lot.
b. Highway signs shall be
    a. at least twenty-five feet from a right of way and shall be
    b. at least 250 feet from a residence on an adjacent property; and
    c. comply with the distance and spacing requirements of Section 1.4.2 G.

1.4.4.4 Illumination:

As provided in Section 1.4.6.

1.4.4.5 Maximum number of signs:

Acreage	No. of Signs
0 – 20	2
21 – 40	3
41 – 60	4
61 & over	5

1.4.5 Supplemental Criteria in all Districts

1.4.5.1 Temporary Signs:

Temporary signs are subject to the following standards:

A. Shall not on one property exceed a total of sixteen (16) square feet in area;

B. Shall not be located within any right-of-way whether dedicated or owned in fee simple or as an easement;

C. Shall only be located on property that is owned by the person whose sign it is and shall not be placed on any utility pole, street light, similar object, or on public property;

D. Shall not be illuminated except as allowed in 1.4.1.6 or 1.4.6 based on the District in which the sign is located; and

E. Shall be removed within fourteen (14) days after the election, sale, rental, lease or conclusion of event which is the basis for the sign under 1.3.2 or if a different standard is required in Section 1.3.2 shall be removed within the time period required by that Section.

1.4.5.2 Bench Signs:

On street benches provided:

A. The benches shall not be higher than four (4) feet above ground;

B. Limited to fourteen (14) square feet in area;

C. The benches are not located closer than five (5) feet to any street right-of-way line;

D. Benches are located in a manner not to obstruct vision;

E. Shall be included as part of the total permitted sign area of the premise on which it is located.

1.4.5.3 Integral Signs:

There are no restrictions on sign orientation including whether it is freeway-oriented. Integral sign shall not exceed seventy-two (72) square feet per façade. Integral signs may be illuminated externally but shall not be illuminated internally.

1.4.5.4 Private Traffic Direction:

Illumination of signs erected as required by the Manual on Uniform Traffic Control Devices shall be in accordance with Section 1.4.6. Horizontal directional signs flush with paved areas are exempt from these standards.

1.4.5.5 Original Art Display

Original art displays are allowed provided that they meet the following requirements:

A. Located [designate where they are allowed such as: Urban Growth Boundary];

B. Shall not be placed on a dwelling;

C. Shall not extend more than six (6) inches from the plane of the wall upon which it is painted or to which it is affixed;

D. Shall be no more than sixty-four (64) square feet in size, per lot or parcel;

E. Compensation will not be given or received for the display of the original art or the right to place the original art on site; and

F. Shall not be illuminated.

1.4.6 Illumination

No sign shall be erected or maintained which, by use of lights or illumination, creates a distracting or hazardous condition to a motorist, pedestrian or the general public. In addition:

1.4.6.1 No exposed reflective type bulb, par spot or incandescent lamp, which exceeds twenty-five (25) Watts, shall be exposed to direct view from a public street or highway, but may be used for indirect light illumination of the display surface of a sign.

1.4.6.2 When neon tubing is employed on the exterior or interior of a sign, the capacity of such tubing shall not exceed three hundred (300) milliamperes rating for white tubing or one hundred (100) milliamperes rating for any colored tubing.

1.4.6.3 When fluorescent tubes are used for the interior illumination of a sign, such illumination shall not exceed:

A. Within Residential districts:

Illumination equivalent to four hundred twenty-five (425) milliamperes rating tubing behind a Plexiglas face with tubes spaced at least seven inches, center to center.

B. Within land use districts other than Residential:

Illumination equivalent to eight hundred (800) milliampere rating tubing behind a Plexiglas face spaced at least nine (9) inches, center to center.

1.4.6.4 Digital billboards allowed pursuant to Section 1.4.2.2 G shall:

A. Display only static messages that remain constant in illumination intensity and do not have movement or the appearance or optical illusion of movement;

B. Not operate at an intensity level of more than 0.3 foot-candles over ambient light as measured at a distance of one hundred and fifty (150) feet;

C. Be equipped with a fully operational light sensor that automatically adjusts the intensity of the billboard according to the amount of ambient light;

D. Change from one message to another message no more frequently than once every ten (10) seconds and the actual change process is accomplished in two (2) seconds or less;

E. Be designed to either freeze the display in one static position, display a full black screen, or turn off in the event of a malfunction; and

F. Not be authorized until the Code Official is provided evidence that best industry practices for eliminating or reducing uplight and light trespass were considered and built into the digital billboard.

1.4.7 Prohibited Signs

The following signs or lights are prohibited which:

1.4.7.1 Are of a size, location, movement, coloring, or manner of illumination which may be confused with or construed as a traffic control device or which hide from view any traffic or street sign or signal;

1.4.7.2 Contain or consist of banners, posters, pennants, ribbons, streamers, strings of light bulbs, spinners, or other similarly moving devices or signs which may move or swing as a result of wind pressure. These devices when not part of any sign are similarly prohibited, unless they are permitted specifically by other legislation;

1.4.7.3 Have blinking, flashing or fluttering lights or other illuminating devices which exhibit movement, except digital billboards as permitted pursuant to this Code;

1.4.7.4 Are roof signs except as allowed in Section 1.4.5.4;

1.4.7.5 Are freeway-oriented signs except as allowed as Highway signs;

1.4.7.6 Would be an Original Art Display but does not have the permission of the owner of the property on which it is located or is graffiti; or

1.4.7.6 Are portable signs that do not comply with the location, size or use restrictions of this Code.

1.4.8 Procedures

Applications for a sign permit shall be processed through [insert appropriate permitting procedure here].

1.4.9 Nonconformity and Modification

Except as provided in Section 1.4.9.2 of this Chapter, signs lawfully in existence on the date the provisions of this Code were first advertised, which do not conform to the provisions of this Code, but which were in compliance with the applicable regulations at the time they were constructed, erected, affixed or maintained shall be regarded as nonconforming. Provided, however, a sign constructed during the period of time following the day on which the Supreme Court released its opinion in *Reed v. Town of Gilbert, ___U.S. ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061, 83 U.S.L.W. 4444 (U.S. 2015)* and the date the provisions of this Code were first advertised for adoption shall not be considered a non-conforming sign unless it conformed to the regulations in effect on the day immediately preceding the release of the Supreme Court's decision in *Reed v. Town of Gilbert, ___U.S.___, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061, 83 U.S.L.W. 4444 (U.S. 2015)*.

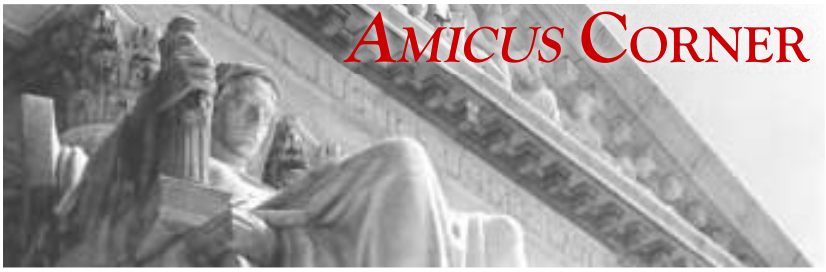
Comment: This section attempts to address two issues common to regulation. 1. The race to vest – often a person who sees a regulation being proposed attempts to establish a vested right before the regulation can take effect where notice and public hearing are required. This race to vest often leads to a flurry of activity that can be difficult to process and allows uses that are considered undesirable to flourish while the government attempts to limit them. Allowing an ordinance to apply to properties based on the date it is first advertised provides a more fair solution allowing the government to provide public notice and give thoughtful contemplation to the issues involved rather than engaging in a race to adopt a measure before its utility is thwarted by a rash of construction and that insures the limited effect on individual property owners and the community as whole that the public process embraces. 2. The effect of a regulated business enjoying a period where there is no regulation due to a court decision. Clearly, the Supreme Court did not aim to eliminate sign regulation; it only sought to eliminate content based sign regulation. Rather than allow the decision in Reed v. Gilbert to extend authority beyond its intent, the Model limits the effect of an unregulated period by recognizing that signs constructed during that period do not deserve protection from the application of the law.

1.4.9.1 For the purpose of amortization, these signs may be continued from the effective date of this Code for a period not to exceed ten (10) years unless under a previous regulation the signs were to be amortized and in that case the amortization period shall be as previously required or ten years whichever is less.

1.4.9.2 Signs which were nonconforming to the prior Ordinance and which do not conform to this Code shall be removed immediately.

1.4.10 Compliance

Any sign which is altered, relocated, replaced or shall be brought immediately into compliance with all provisions of this Code.



Reed's Aftermath: Strict Scrutiny on Every Corner?

By Amanda Kellar, IMLA Associate Counsel and Director of Legal Advocacy

Introduction

The Supreme Court's decision in *Reed v. Town of Gilbert*, decided on June 18, 2015, is shaping up to be one of the most significant cases for local governments in years, requiring municipalities across the nation to review and in most cases, rewrite their sign codes. On its surface, *Reed* was about the Town of Gilbert, Arizona's regulations that treated temporary directional signs, ideological signs, and political signs differently in terms of size and duration. The Court concluded that the Town's ordinance regulating these signs was content-based on its face and therefore subject to strict scrutiny (which is almost always a death knell for regulations, as it was in this case). Prior to *Reed*, municipalities and courts had understood that strict scrutiny would generally not apply to a sign ordinance unless the government was discriminating against viewpoints or subject matter. *See Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2238-2239 (U.S. 2015) (Kagan, J. concurring) (discussing circumstances in which the Court had previously applied strict scrutiny to content-based regulation). On this point, Justice Kagan, who concurred in the judgment only, notes:

> To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended [45] function.
>
> And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2238-2239 (U.S. 2015) (Kagan, J. concurring) (discussing prior Supreme Court cases applying intermediate scrutiny to laws similar to the one in question).

Lower Courts' Application of *Reed*

As the lower courts grapple with the implications of *Reed,* it is becoming increasingly evident that, at least so far, *Reed* seems to be about a lot more than just signs. After only a few short months, *Reed* has already been used to strike down a panhandling ordinance, a prohibition against robocalls, a ban on voters posting photos of their completed ballots on social media, and regulations distinguishing between on-premise and off-premise signs. Given the fact that the Supreme Court granted certiorari and remanded a First Circuit panhandling case to be decided in light of the *Reed* decision, it is not entirely surprising that lower courts are interpreting *Reed* broadly. *See Thayer v. City of Worcester,* 135 S.Ct. 2887 (U.S. 2015).

Panhandling

While those in the First Circuit wait for the decision in *Thayer* after its remand, the Seventh Circuit has already weighed in on the issue of content-based panhandling ordinances in light of the *Reed* decision.[1] *See Norton v. City of Springfield,* No. 13-3581, 2015 U.S. App. LEXIS 13861 (7th Cir. Aug. 7, 2015). *Norton* involved a city ordinance that prohibited panhandling in its "downtown historic district" and defined panhandling as an "oral request for an immediate donation of money." *Id.* at *2. The plaintiff argued that this prohibition was a form of content discrimination while the city contended that the ordinance did not make any distinctions based on the content of the speech. *Id.* The Seventh Circuit originally agreed with the city, noting that the regulation does not "interfere with the marketplace of ideas, that it does not practice viewpoint discrimination" and that it was therefore not content based. *Id.* at *2-3.

On a petition for rehearing, the court deferred consideration until the Supreme Court decided *Reed,* and on rehearing, the panel reversed its original holding, concluding that "*Reed* understands content discrimination differently...[and] effectively abolishes any distinction between content regulation and subject-matter regulation" and that in light of *Reed,* contrary to its earlier holding, the ordinance was in fact content based. *Id.* at *4. Judge Manion concurred with the panel's decision in *Norton,* but wrote separately to indicate that in his belief, *Reed* overruled the Supreme Court's decision in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), at least on its point that "the principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at *5-6 (Manion, J. concurring).

Other First Amendment Applications of *Reed*

As noted, it's not altogether surprising that a court would apply *Reed* to a panhandling ordinance in light of the decision to grant certiorari in *Thayer* and remand the decision for further consideration in light of *Reed.* Some of the other decisions applying *Reed* are more unexpected, however. For example, in *Rideout v. Gardner,* the legislature was concerned about voter buying and coercion and therefore passed an amendment to a statute prohibiting voters from posting photographs of their completed ballots on social media. *Rideout v. Gardner*, No. 14-cv-489, 2015 U.S. Dist. LEXIS 105194, 2015 DNH 154 (D.N.H. Aug. 11, 2015). After discussing the *Reed* decision, the

New Hampshire district court concluded that regardless of the legislature's good intentions, the statute in question here was also content-based on its face. *Id.* at *24. The court reasoned that the only images that were prohibited by the statute were those of a marked ballot, whereas unmarked ballots and copies of ballots could be shared without restriction, thus making the restriction content-based and subject to strict scrutiny (which it could not survive). *Id.*

Another somewhat unusual application of the *Reed* decision came out of the Fourth Circuit. *See Cahaly v. Larosa*. No. 14-1651, 2015 U.S. App. LEXIS 13736 (4th Cir. July 1, 2015). In *Cahaly*, a political consultant was arrested for violating the South Carolina anti-robocall statute, which restricts robocalls that are unsolicited and of either a consumer or political nature. *Id.* at *2-3. The Fourth Circuit concluded that the Supreme Court had recently "clarified the content-neutrality inquiry in the First Amendment context" in *Reed v. Town of Gilbert* and that under that framework, the South Carolina anti-robocall statute was unconstitutional. *Id.* at *9-10. The Fourth Circuit reasoned that the anti-robocall statute only applied to robobcalls made with a consumer or political message but not calls made for another purpose and was therefore content-based on its face and could not survive strict scrutiny. The court noted that *Reed* abrogated Fourth Circuit precedent in this area that had previously held that "when conducting the content-neutrality inquiry, '[t]he government's purpose is the controlling consideration.'" *Id.* at 9.

Meanwhile, in the Second Circuit, the eastern district of New York recently applied *Reed* to an ordinance prohibiting people from standing in public right-of-ways and stopping vehicles to solicit employment. *See De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay,* 2015 U.S. Dist. LEXIS 117926, *1-2 (E.D.N.Y. Sept. 3, 2015). The Town maintained that the ordinance did not fall within the purview of the First Amendment because it prohibited conduct, not speech. *Id.* at *27-28. The court disagreed, however, finding that the solicitation of employment is commercial speech. Although the *Reed* decision did not concern commercial speech, the court in *De La Communidad Hispana* nonetheless determined that *Reed* provided the framework to determine whether the ordinance was content based, and concluded that it was because it did not address any type of roadside solicitation except the solicitation of employment. *Id.* at *32-34. The court reasoned that in order for the Town's enforcement authorities to determine if someone had violated the ordinance, those authorities would have to ascertain the content of the speech, *i.e.,* whether the vehicle was stopped "for the purpose of soliciting employment."[2] *Id.* at *34.

Signs: On-Premise v. Off-Premise Distinctions

Thus far, courts are split as to how to apply *Reed* to distinctions in sign codes for on-premise versus off-premise signs. California and Utah federal courts have found that *Reed* simply does not apply to commercial speech and therefore distinctions between on-premise and off-premise signs do not fall under its rubric. *See Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-cv-00093-SI, 2015 U.S. Dist. LEXIS 98520 (N.D. Cal. July 28, 2015); *Citizens for Free Speech, LLC v. Cnty of Alameda,* No. C14-02513 CRB, 2015 U.S. Dist. LEXIS 92998 (N.D. Cal. July 16, 2015); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM, 2015 U.S. Dist. LEXIS 89454, *26-27 (C.D. Cal. July 9, 2015); *Timilsina v. West Valley City*, 2015 U.S. Dist. LEXIS 101949, *17 (D. Utah June 30, 2015). In Tennessee, however, municipalities may need to start revising their sign codes that provide distinctions for on-site and off-site signs as one federal court for that jurisdiction has concluded, for the purposes of a temporary restraining order, that such distinctions are likely content-based and subject to strict scrutiny under *Reed* (and therefore likely unconstitutional). *See Thomas v. Schroer*, No. 2:13-cv-02987, 2015 U.S. Dist. LEXIS 101491 (W.D. Tenn. June 24, 2015).

Turning first to California, in *Contest Promotions,* San Francisco banned off-site signs but allowed signs that were "on-site" and the plaintiff sued, contending that under *Reed* the sign ordinance was subject to strict scrutiny. *Contest Promotions,* 2015 U.S. Dist. LEXIS 98520, at *8. The court disagreed, concluding that *Reed* did not concern commercial speech and therefore the ordinance need only survive intermediate scrutiny. *Id.* at *8-11. The court relied in part, on Justice Alito's concurrence, which provides a "non-exhaustive list of signage regulations that would not trigger strict scrutiny, which included, *inter alia,* '[r]ules distinguishing between on-premise and off-premise signs.'" *Id.* at *10, *quoting Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2234-39 (U.S. 2015) (Alito, J. concurring). Although Justice Alito's list of permissible regulations is contained in a concurrence, the court in *Contest Promotions* relied on the makeup of the Court, noting that Justice Alito's concurrence was joined by two other Justices who had also joined the majority and that still three other Justices concurred in the judgment only, and that those other three Justices "rejected the notion that a content-based regulation must necessarily trigger strict scrutiny..." *Id.* at *10-11. Thus, according to the court, "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." *Contest Promotions,* 2015 U.S. Dist. LEXIS 98520, at *11.

Similarly, the court in *Cal. Outdoor Equity Partners v. City of Corona* concluded that *Reed* simply did not apply to the city's ban of off-site commercial billboards. *Cal. Outdoor Equity Partners v. City of Corona,* 2015 U.S. Dist. LEXIS 89454, *3. The court reasoned:

> *Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it. *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.

As noted above, at least one federal court has disagreed with the foregoing analysis and has applied *Reed* to regulations that distinguish between on-premises and off-premise signs, even though such regulations pertain to commercial speech. *See Thomas v. Schroer*, 2015 U.S. Dist. LEXIS 101491 at *7. The court in *Thomas* reasoned that *Reed* applied to the Tennessee Billboard Regulation and Control Act's distinctions between on-premise and off-premise signs because "[t]he only way to determine whether a

Continued on page 30

Supreme Court, Cont'd from page 29

Gun control

The Roberts Court has decided two landmark gun control cases, and many anxiously await further gun control rulings. Both were decided 5-4. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court held the Second Amendment protects an individual's right to possess a gun for traditionally lawful purposes, such as self-defense, within the home. In *McDonald v. Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment right of individuals to keep and bear arms in self-defense is incorporated through the Fourteenth Amendment to apply against state and local government as well as the federal government. One of the next big issues the Court could decide soon is whether and how state and local government can regulate guns carried outside the home.

Conclusion

State and local government are affected by most Supreme Court cases. That is unlikely to change no matter who is Chief Justice or who is on the Court. The Roberts Court in its first 10 years hasn't shied away from controversial issues no matter who the parties are or who is affected. That is also unlikely to change in the future. But how the Roberts Courts will decide cases over the next decade for state and local government—and everyone else—may be largely in the hands of future Justices who will be appointed over taht time frame. ML

Second Look, Cont'd from page 18

I hope it never becomes necessary for a city to have to find answers to such questions.

Notes

1. __F.3d __, 2015 WL 5102591 (11th Cir. Sept. 1, 2015).
2. __F.3d __, 2015 WL 5102581 (11th Cir. Sept. 1, 2015).
3. __F.3d __, 2015 WL 5102609 (11th Cir. Sept. 1, 2015).
4. A much more difficult question, and one that fascinates me, is whether a city might ever be a 42 U.S.C. § 1983 plaintiff. The answer under current case law probably is never. However, the issue is thoroughly discussed and the current law intelligently criticized in Caswell F. Holloway, IV, Comment, City v. City: The Case for Full Municipal Personhood Under § 1983, 2001 U. Chi. Legal F. 479 (2001).
5. 24 C.F.R. §§ 103.200, *et seq.*
6. 24 C.F.R. §§ 103.300, *et seq.*
7. 339 F.3d 702, 713-14 (8th Cir. 2003).
8. 817 F.2d 149, 157–160 (1st Cir. 1987).
9. 336 F. Supp. 2d 477, 487-88 (D. Md. 2004).
10. *See* 42 U.S.C. § 3608(e)(5) (HUD's duty to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter").
11. 28 U.S.C. § 1361 (district courts have original jurisdiction in nature of mandamus to compel an officer or employee of the United States or any federal agency to perform constitutional or statutory duty owed to plaintiff). The plaintiff must have no alternative statutory remedy, Stanley v. Hogsten, 277 Fed. Appx. 180, 181 (3d Cir. 2008), and entitlement to relief under the underlying statute, aside from section 1361, must be clear and non-discretionary. *See Stevens v. Colt*, 2011 WL 1500599 (11th Cir. 2011) (not officially pub.).
12. *See*, *e.g.*, Woodard v. Marsh, 658 F.2d 989 (5th Cir. 1981), *cert.* denied, 455 U.S. 1022 (1982).
13. 5 U.S.C. §§ 701, *et seq.*
14. Armstrong v. Executive Office of the President, 821 F. Supp. 761 (D.D.C.), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993), *on remand*, 877 F. Supp. 690 (D.D.C. 1995). Any monetary civil contempt sanctions would be paid into the court registry, not to another party in the litigation. 821 F. Supp. At 772.
15. 28 U.S.C. §§ 1346(a)(2) (district courts have jurisdiction for takings claims not exceeding $10,000); 1492(a)(1) (Federal Court of Claims jurisdiction over takings claims exceeding $10,000).
16. *See* Love Terminal Partners v. United States, 97 Fed. Cl. 355, 375 (2011).
17. *See* 28 U.S.C. § 2680. ML

Amicus, Cont'd from page 23

sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located." *Id.* at *9 (internal quotations omitted).

Conclusion

So, what do we know in the wake of *Reed*? We know that signs codes that distinguish between non-commercial speech will trigger strict scrutiny regardless of the government's motive or whether the government was discriminating against certain viewpoints or even a subject matter. We also know that municipalities may regulate signs in a number of content-neutral ways, such as regulations pertaining to size, location, lighting, fixed messages versus electronic messages, free-standing signs versus those attached to buildings, and the total number of signs per lot.

But there still remains a fair amount of uncertainty in this area. Are the California federal courts right that *Reed* simply does not apply to commercial speech? There is certainly an argument that they are, given the fact that *Reed* failed even to mention *Central Hudson*, let alone explicitly overrule it and that the Court "does not normally overturn, or so dramatically limit, earlier authority *sub silento*..." Shalala v. Ill. Council on Long Term Care, 529 U.S. 1, 5 (U.S. 2000). So municipalities certainly have a plausible argument to continue to make otherwise constitutional distinctions in the commercial speech area. A related unanswered question in the wake of *Reed* is whether distinctions between on-premise and off-premise signs are content-based as at least one court has held, or if they are content-neutral or possibly not subject to *Reed* because they are regulations pertaining to commercial speech. Justice Alito and perhaps five other Justices seem to believe that such regulations would not be content-based. Time will provide us some clarity and answers to these questions, but it may be that Justice Kagan was prescient with her observation that the Supreme Court will become a "veritable Supreme Board of Sign Review" in the aftermath of the Court's decision in *Reed*.

Notes

1. Although the First Circuit has not yet decided *Thayer*, it did rule on the constitutionality of a panhandling ordinance in September 2015. In Cutting v. City of Portland, the city's ordinance prohibited any person from standing / sitting in a median strip, with the exception of pedestrians crossing the street. *Cutting v. City of Portland*, No. 14-1421, 2015 U.S. App. LEXIS 16206, *2 (1st Cir. Sept. 11, 2015). The First Circuit held that

Regulating Election Signs

— by Randal R. Morrison —

The periodic flood of election signs will soon be upon us. Even though most of these signs display only names, symbols, and slogans and contain little, if any, meaningful debate, the courts view them as "classic" or "core" or "pure" free speech, entitled to the highest level of protection under the First Amendment. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," noted the court in *Eu v. San Francisco Cty. Democratic Central Committee*.[1] This article discusses the degree and manner in which election, political, and candidate signs can be regulated within constitutional limits.

Choosing the Topic of Debate

Can election signs be regulated as a distinct class? Any law that regulates election-oriented signs as a distinct class runs the risk of being subjected to strict scrutiny because it is not content-neutral, or being invalidated for "choosing the subject of debate"[2] or favoring one type of noncommercial speech over others.

In *Police Dept. of Chicago v. Mosley*,[3] the U.S. Supreme Court considered an ordinance prohibiting picketing within 150 feet of a school, with an exception for the peaceful picketing of any school involved in a labor dispute. The Court held that the "central problem" with the ordinance was that it regulated permissible picketing in terms of the subject matter: "The operative distinction is the message on a picket sign. But, 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."[4]

Some municipalities have addressed this concern by including election signs within broader classes, like "temporary signs," or "signs displaying noncommercial messages, such as political, campaign or election signs."[5] Several courts have approved this approach.[6] The "choosing the topic" problem can usually be avoided by adding a "message substitution" provision to the ordinance, allowing the sign owner to change the display face on an existing legal sign to any variety of noncommercial message.[7] While message substitution avoids many problems, it is not a panacea. For example, when a lawyer ran for an elective judgeship and displayed a political sign in support of her candidacy at her office, the court held that she should not have to cover up her law office sign in order to display a campaign sign.[8]

Banning Signs

City-Wide Bans. Municipal laws banning all, or nearly all, election signs have been consistently struck down by the courts. A leading case is *Peltz v. City of South Euclid*,[9] in which the Ohio Supreme Court invalidated, under both the state and federal constitutions, an ordinance prohibiting all political signs within the city. As the court explained,

> [a] municipality is not powerless to enact and enforce reasonable regulations directed against those responsible for littering the streets or private property. It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters. It may not, on the other hand, enforce a wholesale prohibition against them.[10]

Public Property and Traditional Public Fora. The U.S. Supreme Court has held that a city can completely prohibit the posting of signs on utility poles.[11] However, there is an important distinction between "posting" signs and "holding" them. In *Sussli v. City of San Mateo*,[12] a court upheld an ordinance that prohibited all "inanimate modes" of posting (leaving behind) signs on public property. *Sussli* is supported by several federal appellate decisions holding that, even in traditional public fora, the government may require that noncommercial signs or displays be hand-held or personally attended.[13] Such rules, however, must operate in a content-neutral manner, at least as to

continued on page 18

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continued from page 17

noncommercial speech.[14] Hand-held protest signs cannot be completely banned from a sidewalk connected to a main pedestrian circulation system,[15] whether it surrounds the U.S. Supreme Court building, or is owned by a church or a casino.[16] In the few states that follow the theory in *PruneYard Shopping Center v. Robins*[17] (i.e., that privately-owned regional shopping centers are traditional public fora), the same rule presumably applies. In areas that are government-owned but not traditional public fora, the government may ban all noncommercial messages while accepting commercial ads,[18] but if any noncommercial messages are allowed, most courts require that all be allowed.[19]

Residential Properties. In *City of Ladue v. Gilleo*,[20] the U.S. Supreme Court held that a municipality could not prohibit residential window signs protesting the first Iraq war, a conclusion also reached by earlier appellate courts.[21] However, reasonable "time, place and manner rules" (such as a limit on the display area) can be imposed.[22] The *City of Ladue* principle does not apply when the government imposes a "no political sign" rule on an employee in furtherance of an important governmental purpose, such as assuring the public that police officers are politically neutral.[23] In another case, dealing with a non-government entity's attempt to regulate its residents' ability to campaign, a New Jersey court held that the State constitution's guarantee of free expression was an affirmative right that could sometimes be applied against private parties; nonetheless, the court upheld the restrictive sign rules of a private homeowners' association.[24] A few states do override homeowners' or condo association rules banning political signs.[25] The Supreme Court of Washington recently held that a public housing project could not completely ban signs on individual residents' doors in an apartment building.[26]

Any law that regulates election-oriented signs as a distinct class runs the risk of being subjected to strict scrutiny because it is not content-neutral, or being invalidated for "choosing the subject of the debate" or for favoring one type of noncommercial speech over others.

Other Private Property. The Supreme Court's plurality in *Metromedia, Inc. v. City of San Diego* held that, when regulating signs on private property, a local government cannot favor commercial over noncommercial speech.[27] Thus, in any location where any commercial message may be displayed on a sign, an equal display right must be available for all noncommercial messages.

Limits on Size, Height and Number

"Time, place and manner" rules have been upheld provided that they operate in a content-neutral manner, are reasonable, and leave open alternative avenues for expression.[28] In *Baldwin v. Redwood City*,[29] the U.S. Court of Appeals for the Ninth Circuit upheld a 16-square-foot size limit on individual signs and an 80-square-foot cumulative total area for all signs; however, area limits that applied to individual candidates or issues were found not to be sufficiently justified.[30] Similarly, the U.S. Court of Appeals for the Fourth Circuit has invalidated a rule that limited the number of political signs to two per resident.[31] If a size or height rule applies only to political signs, or grants superior display rights to commercial messages, it will likely fail judicial review.[32]

Duration Rules

Many ordinances impose a time limit on the display of election signs. This issue has been litigated many times. Cases on durational limits for political signs are listed in *Collier v. City of Tacoma*[33] and *Outdoor Systems, Inc. v. City of Lenexa*.[34] In all but a couple of aberrant cases,[35] such time limits have been struck down.[36] Sometimes, the courts find the fatal flaw is the fact that other temporary signs are not so time-limited;[37] in other cases, favoritism of commercial speech results in the invalidation. For example, in *Whitton v. City of Gladstone*,[38] the U.S. Court of Appeals for the Eighth Circuit found a sign ordinance impermissibly favored commercial speech, after comparing a 90-day display time for temporary construction signs with a 30-day limit for political signs. However, in *Brayton v. City of New Brighton*,[39] the court upheld an ordinance that allowed a resident to post one noncommercial opinion sign on his or her property at any time, and additional noncommercial signs for each candidate and issue during the election season. This did not violate the First Amendment because, during the campaign season, a resident was not limited to political speech, but could put up as many noncommercial opinion signs as there were issues and ballots.[40]

Removal Requirements

One case addressed a county ordinance that imposed durational limits with respect to political campaign signs posted by individuals on private property: posting campaign signs more than 45 days before an election was prohibited, and the signs of an unsuccessful candidate had to be removed within ten days after a primary. The court held that insofar as the ordinance imposed durational limitations on the posting of political campaign signs at private homes, it unconstitutionally impinged upon First Amendment rights, noting:

> A few courts have held that regulations requiring removal of signs following an election, as opposed to pre-election posting limitations, are permissible .... The problem with

continued on page 36

continued from page 18

> these decisions is [that] they fail to consider when the post-election period ends and the next pre-election period begins. If an individual wishes to promote a candidate, the candidate's cause, or both by posting a sign on residential property several months or years before the next political election, the logic of [*City of Ladue v. Gilleo*] would certainly seem to permit it.[41]

Permits, Registrations, Fees, and Removal Bonds

Rules that impose special permit, registration, fee, or removal bond requirements on election signs are almost always invalidated,[42] unless such rules apply without regard to content and do not constitute a special tax or burden on expression.[43] Content-neutral laws may not be selectively enforced—for example, by requiring the removal of campaign signs advocating one particular point of view.[44]

Mandatory Disclosure of Sponsorship

In *McIntyre v. Ohio Elections Commission*,[45] the U.S. Supreme Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature, finding that political campaigners had a right to speak anonymously. Post-*McIntyre*, the U.S. Court of Appeals for the Ninth Circuit has invalidated similar statutes.[46] However, a state can validly require the production of photo identification as precondition of voting.[47]

Signs Near Polls

In *Burson v. Freeman*,[48] a plurality of four justices (plus one concurring in the judgment) of the U.S. Supreme Court upheld a Tennessee statute that banned the solicitation of votes and the display of campaign materials within 100 feet of an entrance to a poll on election day. However, subsequent cases dealing with increases to such "buffer zones" are inconsistent.[49]

The Supreme Court's plurality in *Metromedia, Inc. v. City of San Diego* held that, when regulating signs on private property, a local government cannot favor commercial over noncommercial speech. Thus, in any location where any commercial message may be displayed on a sign, an equal display right must be available for all noncommercial messages.

Staying Out of Trouble

In summary, here's a checklist of recommendations for municipal lawyers in dealing with sign regulations:

- Avoid the "choosing the topic of debate" issue by eliminating rules that apply exclusively to election signs; instead, regulate "temporary signs" (defined by structural characteristics) or "temporary signs displaying noncommercial messages."
- Allow all properties to display a reasonable amount of noncommercial messages at all times; if this area limit is increased for a stated period before and after an election, it should qualify as a "time, place and manner" rule.
- Do not place limits on the number of signs per property or the "number of signs per candidate or proposition."
- Do not ban hand-held or personally attended signs with noncommercial messages on sidewalks, streets or parks.
- Purge local laws of any provisions that apply exclusively to election signs and require special permits, registration, fees, removal bonds or the mandatory disclosure of sponsorship.
- Make sure the sign ordinance contains an adequate "message substitution" provision.
- In addition to the display area available under "message substitution," allow a defined area for the display of noncommercial messages only, at all times, and on all properties.

Notes

1. 489 U.S. 214, 223 (1989).
2. Maguire v. City of American Canyon, No. C-06-05681 JCS, 2007 WL 1875974, *12 (N.D. Cal. 2007); *see also* Brazos Valley Coalition for Life, Inc. v. City of Bryan, 421 F.3d 314, 323 (5th Cir. 2005) (challenger argued that, under prior sign code, it was unclear if abortion protest signs came within the definition of political sign).
3. 408 U.S. 92 (1972).
4. *Id.* at 95. *Mosley* was decided before First Amendment protection was extended to commercial speech. The four-vote plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981) cited to *Mosley* and limited its principle to noncommercial messages. *See also*, Arizona Life Coalition Inc. v. Stanton, 515 F. 3d 956 (9th Cir. 2008).
5. *See, e.g.*, The City of Newport Beach, Cal. guidelines, *Restrictions on the Display of Temporary Political Signs*, at http://www.city.newport-beach.ca.us/ClerkNotices/Election2006/SignGuidelines.pdf.
6. G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077 (9th Cir. 2006), Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. App. 1994), Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. 1992), Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972) (upholding original ordinance, which held political signs to same standards as temporary signs and increased the display rights to 60 days before an election); *but see*, Intervine Outdoor Adver., Inc. v. Gloucester City Zoning Bd., 674 A.2d 1027(N.J. Super. Ct. App. Div. 1996) (invalidating ordinance that treated all noncommercial signs equally but still favored commercial messages).
7. Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 608 (9th Cir. 1993), Get Outdoors II, LLC v. City of Chula Vista, 407 F. Supp.2d 1172, 1174 (S.D. Cal. 2005); *see also* Get Outdoors II, LLC v. City of San Diego, 506 F. 3d 886, 890 (9th Cir. 2007).
8. Beaulieu v. City of Alabaster, 454 F. 3d 1219 (11th Cir. 2006).
9. Peltz v. City of South Euclid, 228 N.E.2d 320 (Ohio 1967).
110. *Id.* at 324. *See also*, Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985), Runyon v. Fasi, 762 F. Supp. 280 (D. Haw. 1991), Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972), People v. Middlemark, 420 N.Y.S.2d 151 (N.Y. Dist. Ct. 1979).
11. Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); *see also*, Frumer v. Cheltenham Twp., 709 F.2d 874 (3d Cir. 1983), City of Seattle v. Mighty Movers, Inc., 96 P.3d 979 (Wash. 2004), Johnson v. City and County of Philadelphia, No.08-1748, 2008 WL 1776417 (E.D. Pa. Apr. 16, 2008).
12. Sussli v. City of San Mateo, 120 Cal. App.3d 1 (Cal. Ct. App. 1981).

13. In *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996), the Seventh Circuit counted eight votes from *Capitol Square v. Pinette*, 515 U.S. 753 (1995), for the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." *Accord*, Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F. 3d 25 (1st Cir. 2001); Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001).
14. Gerritsen v. City of Los Angeles, 994 F. 2d 570, 579 (9th Cir. 1993) (approving a general ban that made an exception for real estate signs on city property). However, the exception for real estate signs is arguably in conflict with *Ballen v. City of Redmond*, 466 F. 3d 736 (9th Cir. 2006); *but see* Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994) (content-based exceptions may be justified by site relevance).
15. U.S. v. Kokinda, 497 U.S. 720 (1990); State v. Carr, 215 Or. App. 306 (Or. Ct. App. 2007) (walkway between school and sidewalk not a traditional public forum); Carr v. City of Hillsboro, 497 F. Supp. 2d 1197 (D. Or. 2007); Parks v. City of Columbus, 395 F.3d 643, 649 (6th Cir. 2005).
16. U.S. v. Grace, 461 U.S. 171 (1983) (U.S. Supreme Court building), First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002) (sidewalk owned by church), Venetian Casino Resort, LLC v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937 (9th Cir. 2001) (sidewalk owned by casino).
17. 447 U.S. 74 (1980); Fashion Valley Mall, LLC v. N.L.R.B., 172 P.3d 742 (Cal. 2007). For a list of states that have followed *Prune-Yard* and those which have declined to do so, *see* Cross v. State, No. 08-03-00283-CR, 2004 WL 1535606 (Tex. Ct. App. July 8, 2004).
18. Lehman v. City of Shaker Heights, 418 U.S. 298 (1977), Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), DiLoreto v. Downy Unified School Dist. Bd. of Educ., 196 F. 3d 958 (9th Cir. 1999).
19. Brown v. Cal. Dept. of Transp., 321 F.3d 1217 (9th Cir. 2003), Christ's Bride Ministries, Inc. v. SEPTA, 148 F. 3d 242 (3d Cir. 1998), AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transit Auth., 42 F. 3d 1 (1st Cir. 1994). *See also*, Matt Ames, *The Regulation of Advertising in Transit Facilities Under the Public Forum Doctrine*, MUNICIPAL LAWYER, March-April 2008, at 10.
20. 512 U.S. 43 (1994).
21. Matthews v. Town of Needham, 764 F. 2d 58, 59 (1st Cir. 1985).
22. Kroll v. Steere, 759 A.2d 541 (Conn. App. Ct. 2000).
23. Horstkoetter v. Dept. of Public Safety, 159 F.3d 1265 (10th Cir. 1998); *compare* Kansas Judicial Review v. Stout, 519 F.3d 1107 (10th Cir. 2008) and Bauer v. Shepard, No. 3:08-CV-196-TLS, 2008 WL 1994868 (N.D. Ind. May 06, 2008) (both concerning limits on campaigns by candidates for elective judgeships).
24. Committee For a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007).
25. *See, e.g.*, MD. CODE ANN., REAL PROP., § 11-111.2, 11B-111.2 (West 2008).
26. Resident Action Council v. Seattle Housing Auth., 174 P.3d 84 (Wash. 2008).
27. 453 U.S. 490, 513 (1981).
28. Tierney v. City of Methuen, 12 Mass. L. Rptr. 340 (Mass. Super. 2000); *see also* Candidates' Outdoor Graphic Service v. City and County of San Francisco, 574 F. Supp. 1240 (N.D. Cal. 1983).
29. 540 F. 2d 1360 (9th Cir. 1976).
30. *Id.* at 1369, *but see* Coffey v. Fayette County, 631 S.E.2d 703 (Ga. 2006).
31. Arlington County Republican Comm. v. Arlington County, 983 F. 2d 587, 593-94 (4th Cir. 1993).
32. Verrilli v. City of Concord, 548 F. 2d 262, 265 (9th Cir. 1977) (political signs in single- family residential areas were limited to one sign of four square feet and a 64-square-foot limit applied to campaign headquarters; both rules were unconstitutional); Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274, 1290 (11th Cir. 2004) (size limit on political signs was 1/17 that of commercial signs; invalid).
33. 854 P. 2d 1046 (Wash. 1993).
34. 67 F. Supp. 2d 1231 (D. Kan. 1999).
35. Huntington v. Estate of Schwartz, 63 Misc. 2d 836, 313 N.Y.S.2d 918 (N.Y. Dist. Ct. 1970) (provision exempting political signs for a period of 42 days before an election within city's police power); Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972) (original version of ordinance, which held political signs to the same standards as temporary signs and increased political signage rights 60 days before election, upheld).
36. *Collier*, 854 P.2d 1046 (Wash. 1993) (60-day limit was not narrowly tailored); John Donnelly & Sons v. Campbell, 639 F. 2d 6, 15 (1st Cir. 1980) (three weeks was not enough time to publicize a campaign); Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 733 N.E.2d 1152 (Ohio 2000) (17 days before election); McCormack v. Twp. of Clinton, 872 F. Supp. 1320 (D.N.J. 1994) (ten days before and three days after the event); City of Antioch v. Candidates Outdoor Graphic Service, 557 F. Supp. 52 (D.C. Cal. 1982) (60-day time limit for outdoor political signs, but not commercial signs); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 63 (Colo. 1981) (durational limits on all ideological signs "sweeps too broadly"); Van v. Travel Info. Council, 628 P.2d 1217 (Or. Ct. App. 1981) (60 days before an election; special treatment based on content; decision rested on both federal and state constitutions); Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (D.C. N.Y. 1977) (political wall signs limited to six weeks before election, while commercial wall signs were not similarly limited); Farrell v. Teaneck Twp., 315 A.2d 424 (N.J. Super. Ct. Law. Div. 1974) (city "failed to demonstrate to what degree, if at all, an ordinance which allowed a restricted type of sign for a limited period prior to elections would precipitate a decline in property values"); Knoeffler v. Town of Mamakating, 87 F. Supp.2d 322 (S.D.N.Y. 2000) (durational limits on political signs were unconstitutional); Christensen v. City of Wheaton, No. 99 C 8426, 2000 WL 204225 (N.D. Ill. 2000); Maguire v. City of American Canyon, No. C-06-05681 JCS, 2007 WL 1875974 (N.D. Cal. 2007) (90-day time window meant that political speech was banned for three-fourths of the year); Bell v. Baltimore County, No. CCB-07-305, 2008 WL 1953475 (D. Md. Mar. 31, 2008) (45 days before election; attorney's fee award: $67,789.50).
37. City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. Ct. 1992) (the phrase "such as election signs" was used as an example only; the limit applied to all temporary signs regardless of content. *Contrast* Intervine Outdoor Adv., Inc. v. City of Glouceste City Zoning Bd., 674 A.2d 1027 (N.J. Super Ct. App. Div. 1996) (time limits applied to specified types of noncommercial signs but did not apply to commercial signs).
38. 54 F.3d 1400, 1404-05 (8th Cir. 1995).
39. 519 N.W.2d 243 (Minn. Ct. App. 1994).
40. *Id.* at 246.
41. Curry v. Prince George's County 33 F. Supp.2d 447, 455 fn10 (D. Md 1999). *This dictum illustrates the wisdom* of allowing a defined area for expression of noncommercial messages, at all times and on all properties, *in addition* to message substitution.
42. Baldwin v. Redwood City, 540 F. 2d 1360 (9th Cir. 1976), Verrilli v. City of Concord 548 F.2d 262, 264 (9th Cir. 1977), *Curry* 33 F. Supp. 2d at 455, Bella Vista United v. City of Philadelphia, No. Civ.A. 04-1014, 2004 WL 825311 (E.D. Pa. April 15 2004). *See also*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999) and Watchtower Bible and Tract Soc'y of New York v. Village of Stratton, 536 U.S. 150 (2002).
43. *Baldwin*, 540 F. 2d at 1371; Riel v. City of Bradford, 485 F. 3d 736 (3d Cir. 2007).
44. Bondar v. D'Amato, No. 06-C-109, 2008 WL 906129 (E.D. Wis. Mar. 31, 2008).
45. 514 U.S. 334 (1995).
46. WIN v. Rippie, 213 F. 3d 1132 (9th Cir. 2000), A.C.L.U. of Nevada v. Heller, 378 F. 3d 979 (9th Cir. 2004).
47. Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (April 28, 2008).
48. 504 U.S. 191 (1992).
49. For a review of the rulings on various "buffer zones," see *Anderson v. Spear*, 356 F. 3d 651, 662 (6th Cir. 2004). ML

Municipal Sign Ordinances after *Reed v. Town of Gilbert*

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes *any* distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding 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.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (<10 sq. ft., < 48 inches in height, and <six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign <36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

REED ET AL. *v*. TOWN OF GILBERT, ARIZONA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–502. Argued January 12, 2015—Decided June 18, 2015

Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held: The Sign Code's provisions are content-based regulations of

Syllabus

speech that do not survive strict scrutiny. Pp. 6–17.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E.g., R. A. V.* v. *St. Paul*, 505 U. S. 377, 395. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell* v. *IMS Health, Inc.*, 564 U. S. ___, ___–___. And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.,* at ___. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be " 'justified without reference to the content of the regulated speech,' " or were adopted by the government "because of disagreement with the message" conveyed. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791. Pp. 6–7.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. Pp. 7.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed 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 strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 429. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints

is a "more blatant" and "egregious form of content discrimination," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829, but "[t]he First Amendment's hostility to content-based regulation [also] extends . . . to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. This same analysis applies to event-based distinctions. Pp. 8–14.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. ___, ___. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network*, *supra,* at 425. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 14–15.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 817. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e.g.,* warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny. Pp. 16–17.

Syllabus

707 F. 3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, §4.402 (2005).[1] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. §4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

[1] The Town's Sign Code is available online at http://www.gilbertaz.gov/departments/development-service/planning-development/land-development-code (as visited June 16, 2015, and available in Clerk of Court's case file).

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes 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 owned or required by a governmental agency." Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits. §4.402(J).

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." Glossary 23.[2] The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." §4.402(I).[3] These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

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[2] A "Temporary Sign" is a "sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." Glossary 25.

[3] The Code defines "Right-of-Way" as a "strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." *Id.,* at 18.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" Glossary 25 (emphasis deleted). A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional signs even less favorably than political signs.[4] Temporary directional signs may be no larger than six square feet. §4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Ibid.*

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different loca-

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[4]The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Direction Signs." App. 75. 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. *Id.,* at 75–76. 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." *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.,* at 89.

tions, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F. 3d 966, 979 (2009). It reasoned that, even though an enforcement

officer would have to read the sign to determine what provisions of the Sign Code applied to it, the "'kind of cursory examination'" that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." *Id.*, at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . 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." 707 F. 3d 1057, 1069 (CA9 2013). Relying on this Court's decision in *Hill* v. *Colorado*, 530 U. S. 703 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F. 3d, at 1071–1072. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Ibid.* Accordingly, the court believed that the Code was "content-neutral as that term [has been] defined by the Supreme Court." *Id.,* at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.*, at 1073–1076.

We granted certiorari, 573 U. S. ___ (2014), and now reverse.

II

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U. S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118 (1991).

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell* v. *IMS Health, Inc.*, 564 U. S. ___, ___–___ (2011) (slip op., at 8–9); *Carey* v. *Brown*, 447 U. S. 455, 462 (1980); *Mosley*, *supra,* at 95. This 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. *Sorrell*, *supra,* at ___ (slip op., at 8). 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.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to

the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." Glossary 25. It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id.,* at 24. And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. *Id.,* at 23. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F. 3d, at 1071–1072. In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the regulated speech.'" Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward, supra*, at 791; emphasis deleted).

But this analysis 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 strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster, supra,* at 117. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642 (1994). In other words, an

innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, *e.g., Sorrell*, *supra,* at ___–___ (slip op., at 8–9) (statute was content based "on its face," and there was also evidence of an impermissible legislative motive); *United States* v. *Eichman*, 496 U. S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression" (internal quotation marks omitted)); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States* v. *O'Brien*, 391 U. S. 367, 375, 377 (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether the "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a

city-owned music venue, of sound amplification systems not provided by the city. 491 U. S., at 787, and n. 2. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" *Id.,* at 791. But *Ward*'s framework "applies only if a statute is content neutral." *Hill*, 530 U. S., at 766 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.,* at 765.

The First Amendment requires no less. 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. U. S. Const., Amdt. 1. "'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.'" *Hill, supra,* at 743 (SCALIA, J., dissenting).

For instance, in *NAACP* v. *Button*, 371 U. S. 415 (1963), the Court encountered a State's attempt to use a statute prohibiting "'improper solicitation'" by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.,* at 438. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Id.,* at 438–439. Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church's

substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Discovery Network,* 507 U. S., at 429. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." 587 F. 3d, at 977. It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." 707 F. 3d, at 1069.

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." Brief for Respondents 22. In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" *id.*, at 27, and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories. *Id.*, at 37.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of

content discrimination." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra,* at 428. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. 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.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'" 707 F. 3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up

signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner,* 512 U. S., at 658. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United, supra*, at 340–341. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). Glossary 24. That obvious content-based

inquiry does not evade strict scrutiny review simply because an event (*i.e.,* an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra,* at 6. 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. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but 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 down because of their content-based nature." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 60 (1994) (O'Connor, J., concurring).

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,'" *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. ___, ___ (2011) (slip op., at 8) (quoting *Citizens United*, 558 U. S.*,* at 340). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tai-

lored to that end. See *ibid.*

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network*, 507 U. S., at 425, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. 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.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,'" *Republican Party of Minn.* v. *White*, 536 U. S. 765, 780 (2002), the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "'absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," Brief for Respondents 34–35, but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark*, 468 U. S., at 295.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. See, *e.g.,* §4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent*, 466 U. S., at 817 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, *e.g., Solantic, LLC* v. *Neptune Beach*, 410 F. 3d 1250, 1264–1269 (CA11 2005) (sign categories similar to the town of Gilbert's were content based and subject to strict scrutiny); *Matthews* v. *Needham*, 764 F. 2d 58, 59–60 (CA1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue*, 512 U. S., at 48. At the same time, the presence of certain

signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

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.*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

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*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

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[June 18, 2015]

JUSTICE BREYER, concurring in the judgment.

I join JUSTICE KAGAN's separate opinion. Like JUSTICE KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The 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. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g., Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995); see also *Boos* v. *Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all

speakers. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993). I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management

of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.,* 15 U. S. C. §78*l* (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.,* 42 U. S. C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.,* 21 U. S. C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e.g.,* 38 U. S. C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e.g.,* 26 U. S. C. §6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e.g.,* 14 CFR §136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.,* N. Y. Gen. Bus. Law Ann. §399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit "'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area'"); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened

"strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. ___, ___ (2011) (BREYER, J., dissenting) (slip op., at ___). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust* v. *Sullivan*, 500 U. S. 173, 193–194 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

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.

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 a justification. I 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. Answering this 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. See, *e.g., United States* v. *Alvarez*, 567 U. S. ___, ___–___ (2012) (BREYER, J., concurring in judgment) (slip op., at 1–3); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that JUSTICE KAGAN sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

SUPREME COURT OF THE UNITED STATES

No. 13–502

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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