Welcome to Pace Law School

A conference celebrating its past, acknowledging its perils, and anticipating its promise.

Past
Perils
Promise

Happy Birthday Zoning: 1916-2016

Recent Challenges to Zoning Case Law Update

- **Patricia E. Salkin,** Dean and Professor of Law, Touro Law Center
- **John R. Nolon,** Distinguished Professor of Law; Counsel, Land Use Law Center, Pace Law School
- **Donald L. Elliott,** FAICP, Director, Clarion Associates
- **Michael Allan Wolf,** Professor of Law & Richard E. Nelson Chair in Local Government Law, University of Florida Levin College of Law
- **Dwight H. Merriam,** FAICP Partner, Robison & Cole

Opening Remarks

Michael Allan Wolf, Moderator

Cases to be covered

- Koontz v. St. John's Water District
- CBIA v. San Jose
- ICP v. Texas Department of Housing
- Horne v. Department of Agriculture
- Reed v. Gilbert

Dean Patricia E. Salkin

Koontz v. St. Johns River Water Management District

Koontz v. St. Johns River Water Management District

- *Koontz* facts:
  - Koontz owned 15 acres of land in the St. Johns River watershed and wanted to develop 4 acres.
  - Land was subject to District regulations requiring 10:1 ratio of protected land to developed land on a parcel.
  - The District gave Koontz two options:
    - reduced his development to 1 acre and place a conservation easement over 14 acres or
    - build on the 4 acres and pay $150,000 for wetlands remediation on other District lands.
- Koontz rejected the options and sued.

Paradigm Shift: Koontz v. St. Johns River Water Management District

- What did the Supreme Court do with takings law in the wake of *Koontz*?
  - One word: Mystifying
  - Two words: Mystifyingly complicated
  - Three words: Mystifyingly complicated mess

Paradigm Shift: Koontz v. St. Johns River Water Management District

- Supreme Court ignored past precedent, including *Lingle*, and decided the following:
  - A taking was found where nothing was actually taken – the chilling of development negotiations
  - Ad hoc development approvals must pass higher review standards in *Nollan/Dolan* (nexus & rough proportionality)
  - Taking claim can be made on monetary conditions and analyzed under *Nollan/Dolan* nexus and rough proportionality tests
- Dark Ages! A chilled development negotiation process

Post Koontz: Municipal Planning

- Bolster comprehensive plan
  - Consider development areas and policies to shape development patterns
  - Careful consideration to environmentally sensitive and other open space areas
  - Concretely tie development policies to regulations
  - Consider interaction of land development patterns to establish a policy framework for placing conditions on development
- Comp plans balance multi-factor *Penn Central* analysis and create new regulatory environment

Post Koontz: Municipal Regulations

- Amend development regulations:
  - Bolster purpose statements
    - Tie back to comprehensive plan findings
  - Add common ad hoc development conditions
  - Remove ambiguity in planned development ordinances and add “normal” conditions imposed
  - Require development agreements

Post Koontz: Applications and Negotiations

- Reconsider applications and add development conditions section to prompt developer offers
- Add disclaimers in applications
  - Responses to offers are suggestions not demands
  - Communication with staff is encouraged but not required
  - Discussions serve only to balance developer's proposal with community's planning policies and regulations
- Be careful what you say in development negotiations
- Let developers make condition offers first
- Be prepared to reject more applications without providing reasons

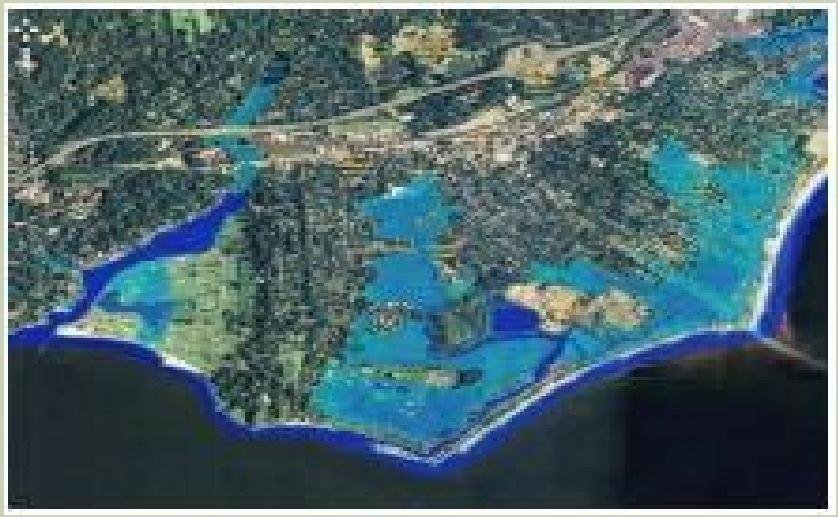
Post Koontz: The Practical Side

- Developers are some of the most rational economic actors in the marketplace
- Litigation is costly and time consuming
- Developers like to have amenable reputations
- Be guarded, but if both sides know each other, likely maintain normal predispositions to each other
- Be wary of “that” developer

The Effect of *Koontz*

Higher Scrutiny Now Applies to Permit Denials and Monetary Exactions

Under *Koontz* permit denials and monetary exactions are now subject to higher scrutiny. From this flow several other consequences and concerns.



More Land Use Decisions are Subject to Doubt vs. Deference

- Before *Koontz*, all but title exactions were subject to a judicial presumption of validity and a burden imposed on the applicant to prove that denials or monetary exactions were unreasonable.

Is *Koontz* Beneficial to Developers?

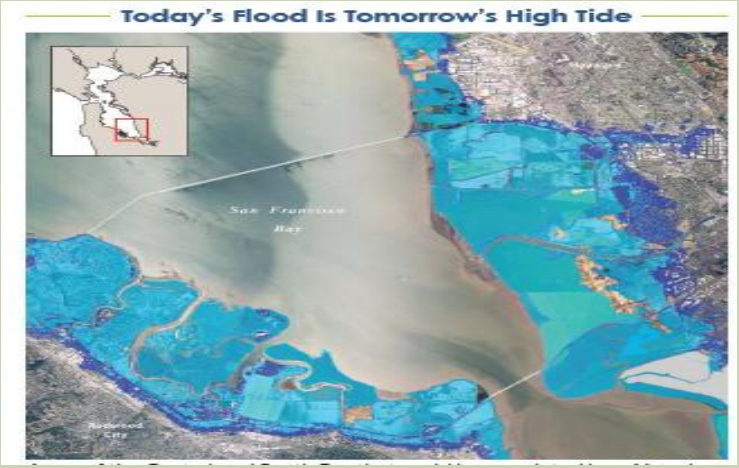
- Federal takings law is notoriously vague and flawed. Its many conflicting, perplexing, and complex doctrines of this body of law are now seated at the head of the table regarding the many land use decisions to which *Koontz* might be applied.
- This may not benefit developers; it may sap the system of predictability, could lead to more restrictive zoning standards, and might require them to pay the costs of the now-required municipal studies.

Land Use Decision Processes are Subject to Doubt

- The give-and-take negotiations among applicants, affected stakeholders, and land use boards, is now subjected to doubt.
- Under the majority's decision, *suggestions* that the applicant modify the proposed project to mitigate environmental conditions may be unconstitutional conditions that will be subjected to higher scrutiny and that can result in monetary damage awards against state and local agencies.

Potential Responses to Koontz

1. More stilted development negotiation process
2. More projects may be simply turned down
3. Inferior projects approved.
4. Communities may use non-regulatory strategies that cause projects to be withdrawn.
5. Additional zoning standards.
6. Market realities still control.



Professor John R. Nolon

Inclusionary Zoning
California Building Industry Association
California Supreme Court, 2005

What is the Issue?

Does a mandatory inclusionary housing ordinance adopted by the local legislature constitute a regulatory taking or violate property owners' due process rights.

Koontz (2013), according to some, questions whether such an ordinance violates property rights and subjects the legislation to a higher level of scrutiny.

This answer is not clear.

The implications are serious.

Why is this Issue Important?

- Westchester County has promulgated a mandatory inclusionary zoning ordinance for local governments that many have adopted.
- Similar laws have been adopted elsewhere.
- This model requires that in all housing projects of 5 or more units include 10% of the units must be affordable to households whose incomes are at or below 80% of Area Median Income.
- It also suggests that bonus densities be awarded to get more than 10% affordable units.

Affirmatively Furthering Fair Housing

- Westchester promulgated this model as part of its responsibilities under the settlement of a Fair Housing case.
- Adopting mandatory inclusionary zoning is a key method of complying with the Fair Housing Act and of certifying to HUD that good faith efforts are being taken to overcome impediments to fair and affordable housing.
- Such ordinances are clearly important to remedying discrimination and providing affordable housing.

Issues Raised by the San Jose Case

- Does such an ordinance violate developers' due process rights?
- Is such an ordinance, in certain cases, invalid as a regulatory taking?
- In answering these questions, are such inclusionary zoning ordinances subject to a higher level of judicial scrutiny than other land use legislation?

If the Answers are No Then…

Courts will apply the following judicial rules to cases challenging inclusionary zoning laws:

- The court will defer to the local legislature's determinations about the local housing shortage and the positive effect of mandatory inclusion.
- The ordinance will be presumed constitutionally valid
- Those who challenge the law will have a very high burden of proof.

If the Answers are Yes, Then

- local governments are going to have to prove the relationship between building market rate housing and the existence of a local affordable housing shortage.
- Other similar legislation may be subject to higher scrutiny, putting a chill on land use law making.

What Did the City of San Jose Do?

- Adopted an inclusionary zoning law that applies city-wide
- All residential projects with 20+ units are covered.
- 15% of all units must be affordable to households making 120% of median income or less.
- A variety of incentives are available, including density bonuses.
- Developers have the option of paying a fee.
- A waiver is available if there is no reasonable relationship between the impact of a proposed development and the local housing shortage.

Is this an Exaction or Traditional Land Use Requirement?

- Does this ordinance constitute an exaction subject to the unconstitutional conditions doctrine or
- Is it a land use regulation that is subject to a presumption of constitutional validity?

State Help in Proving Reasonableness

- The California state legislature has made it clear that the provision of affordable housing is a critical public policy objective, of vital statewide importance. State legislation requires local governments to make adequate provision for housing needs of all economic groups.

How Did the Court Decide The Case?

- The court held that such requirements are like typical zoning provisions, such as use, height, and set-back provisions.
- Developers hold their property subject to reasonable regulations.
- Thus, the ordinance is not subject to higher scrutiny.
- It is presumptively valid.
- The court applied a reasonable basis test.

Lessons Learned

- Note the careful crafting of the San Jose ordinance.
- Note the importance of the waiver.
- Note the importance of the incentives.
- Note the importance of the state legislation.

Understanding Development Economics

- These ordinances require internal cross subsidies.
- Is there adequate profit from the market rate units?
- Do profits change from project to project and year to year?
- Are incentives needed for some projects?
- A Napa, California law provides a complete waiver if meeting the requirement is simply not economical.

Will This Holding Survive?

- The case was appealed to the U.S. Supreme Court, which decided the Koontz case.
- If Cert is denied, the matter will be settled in state courts.
- If granted SCOTUS will decide.
- Either way, fairness in all land use laws, particularly those that impose serious costs, is critical.

The Koontz Case

- In dictum, the court recognizes the legitimacy of land use standards that require that "landowners internalize the negative externalities of their conduct."
- This practice is a "hallmark of responsible land use policy, and we have long sustained such regulations against constitutional attack."
- Note the emphasis on showing negative externalities and the reasonableness of land use laws.

How to Insure Fairness

Regardless of who has the burden of proof:

Studies are needed documenting the relationship between building market rate housing and the lack of affordable housing:

- use of scarce land,
- inflation of local land values and housing prices,
- Perception of overcrowding increasing opposition,
- etc.

Developers must be involved in these studies.

The End Story of the Dolan Case

- Mrs. Dolan, in settling the case after remand to the Oregon courts, required that the City place a plaque on the bicycle path that reads:

"Nor shall property be taken for a public use without just compensation. In Honor of John and Florence Dolan."

- The Dolans felt they were not treated fairly.

Donald L. Elliott, FAICP
Director, Clarion Associates LLC

Inclusive Communities v. Texas Department of Housing and Community Affairs

U.S. Supreme Court, 2015

THE ICP CASE & NEW AFFH DUTIES

Don Elliott Clarion Associates Dec. 11 2015

ICP and AFFH

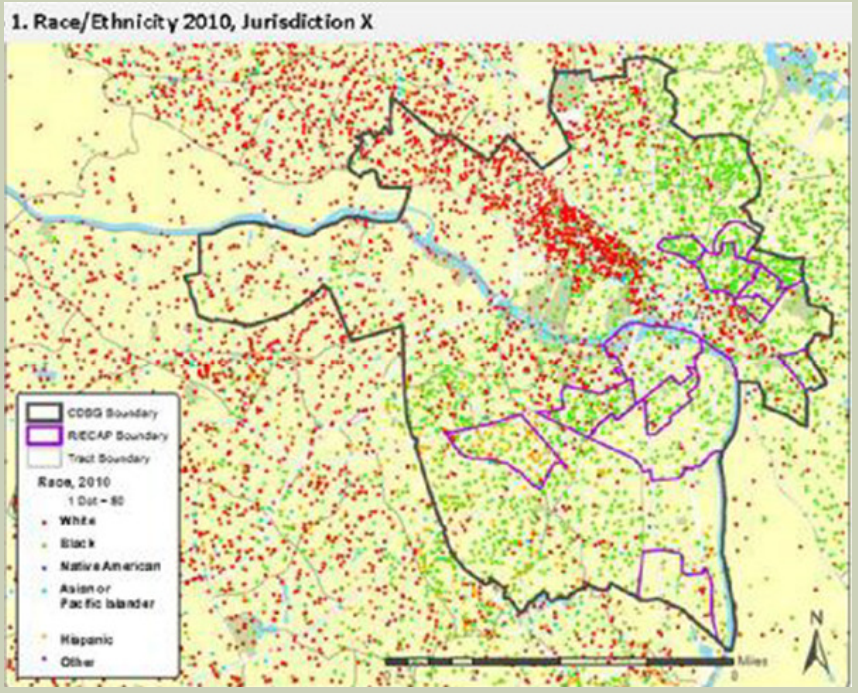
Inclusive Communities v. Texas Department of Housing and Community Affairs

- June 25, 2015 U.S. Supreme Court decision resolved long-standing question mark regarding whether "disparate impact" claims are cognizable under the Fair Housing Act
- Because "disparate impact" is not explicitly mentioned in the FHAA
- Court majority determined that Fair Housing Act purpose, background case law supported disparate impact under Title VIII
- While not directly connected, AFFH is rooted in disparate impact: local government obligations under HCDA, FHA require removal of barriers to fair housing
- Limited to broad policies, not one-time actions
- Plaintiff still has to prove the policy caused the violation of AFFH

ICP and AFFH

New HUD AFFH Rules – Pending before ICP Decision but finalized soon after

- HUD will be providing lots of information (29 databases?) of data regarding distribution of persons protected by AFFH and needed facilities or services
- Local governments need to consider and respond to data as to part of AFFH certification process – answer whether "determinants" are creating disparate impacts ("impediments")

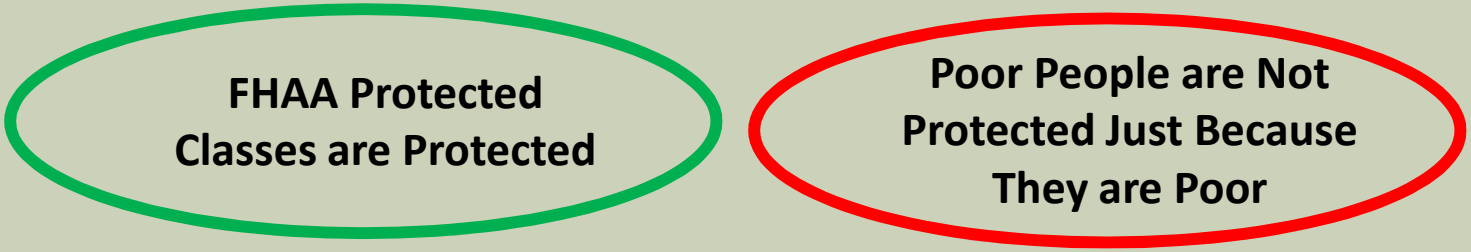


ICP and AFFH

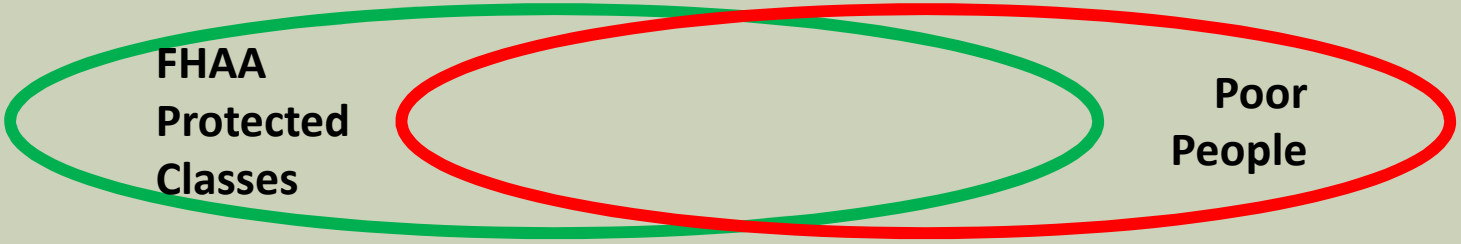
Fair Housing and Affordable Housing

-- a much more complicated distinction than it sounds

In Theory

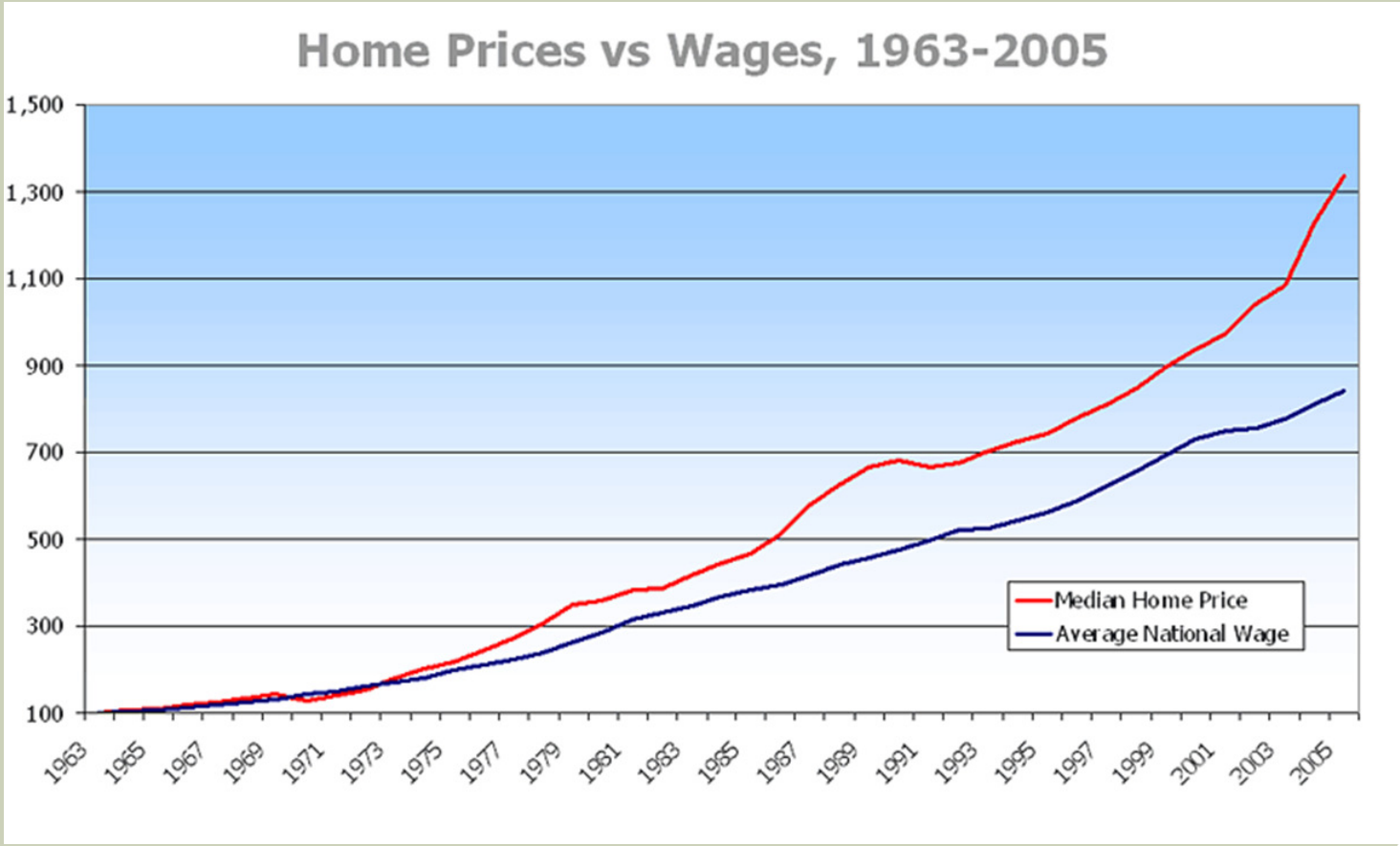


In Reality – the two circles overlap – a LOT



ICP and AFFH

Housing affordability is a structural problem of the U.S. (and global) economy



ICP and AFFH

Planners Contributed to this Problem through

- High lot size requirements
- Minimum house size requirements
- High parking requirements
- Excessive subdivision improvements
- Underzoning for attached and multifamily product

And We Have an Obligation to Help Fix It – which could include:

- Allowing a wider diversity of housing (particularly small lot, attached, and multi-family)
- Reducing parking requirements and open space ratios
- Loosening up occupancy requirements when housing stock is significantly mis-matched to market needs
- Considering Inclusionary Housing Ordinances (IHOs) – which will continue to expand whether or not they are "right"

(California Building Industry Association v. San Jose)

Michael Allan Wolf

Horn v. Department of Agriculture

U.S. Supreme Court, 2015

Raisin' Objections: Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015)

Michael Allan Wolf
Richard E. Nelson Chair in Local Government Law
University of Florida Levin College of Law

Land Use and Sustainable Development Conference
Reflecting on the Past, Planning for the Future:
Celebrating 100 Years of Zoning
Pace Law School
December 11, 2015

Under the **United States Department of Agriculture's California Raisin Marketing Order**, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is **whether the Takings Clause of the Fifth Amendment bars** the Government from imposing such a demand on the growers without just compensation.

Nor shall private property be taken for public use, without just compensation.

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE (CFR Title 7, Subtitle B, Chapter IX)

ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

AVOCADOS GROWN IN SOUTH FLORIDA

FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

KIWIFRUIT GROWN IN CALIFORNIA

APRICOTS GROWN IN DESIGNATED COUNTIES IN WASHINGTON

SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

DATA COLLECTION, REPORTING AND RECORDKEEPING REQUIREMENTS APPLICABLE TO CRANBERRIES NOT SUBJECT TO THE CRANBERRY MARKETING ORDER

PEARS GROWN IN OREGON AND WASHINGTON

CRANBERRIES GROWN IN STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

OLIVES GROWN IN CALIFORNIA

IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

IRISH POTATOES GROWN IN WASHINGTON

IRISH POTATOES GROWN IN COLORADO

IRISH POTATOES GROWN IN SOUTHEASTERN STATES

VIDALIA ONIONS GROWN IN GEORGIA

SWEET ONIONS GROWN IN THE WALLA WALLA VALLEY OF SOUTHEAST WASHINGTON AND NORTHEAST OREGON

ONIONS GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

ONIONS GROWN IN SOUTH TEXAS

TOMATOES GROWN IN FLORIDA

VEGETABLES; IMPORT REGULATIONS

ALMONDS GROWN IN CALIFORNIA
HAZELNUTS GROWN IN OREGON AND WASHINGTON

PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

WALNUTS GROWN IN CALIFORNIA

MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

DRIED PRUNES PRODUCED IN CALIFORNIA

MINIMUM QUALITY AND HANDLING STANDARDS FOR DOMESTIC AND IMPORTED PEANUTS MARKETED IN THE UNITED STATES

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. **The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge.** The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. **In 2002-2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003-2004, 30 percent.**

Growers generally ship their raisins to a raisin "handler," who physically separates the raisins due the Government (called "reserve raisins"), pays the growers only for the remainder ("free-tonnage raisins"), and packs and sells the free-tonnage raisins. It sells **The Raisin Committee acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion.**them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by "any other means" consistent with the purposes of the raisin program.

TABLE 1 ***WHAT EXACTLY IS A FIFTH AMENDMENT TAKING?***		
TYPE OF TAKING	**REPRESENTATIVE DECISION**	**OPERATIVE LANGUAGE**
Affirmative exercise of the sovereign power of eminent domain (**ED**)	*Kelo v. City of New London*[18]	"[I]t is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking."[19]
Government-required, permanent, physical occupation (**PO**)	*Loretto v. Teleprompter Manhattan CATV Corp.*[20]	"We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[21]
Total deprivation of use and/or value (**TD**)	*Lucas v. S.C. Coastal Council*[22]	"[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[23]

Partial taking that falls short of a total deprivation (**PT**)	*Penn Cent. Transp. Co. v. City of New York* [24]	"The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[25]

Exaction of a property interest even if the value of the subject property would be enhanced by grant of the conditional permit (**EX**)	*Dolan v. City of Tigard*[26]	"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[27]
Judicial taking (**JT**)	*Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*[28]	"If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[29]

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' applies only to real property **and not to personal property**."

The answer is no.

[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, (at least if the property's only economically **he ought to be aware of the possibility that new regulation might even render his property economically worthless** productive use is sale or manufacture for sale). *See Andrus v. Allard*, 444 U.S. 51, 66-67(1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

---Justice Antonin Scalia in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)

***Lucas*, however, was about regulatory takings, not direct appropriations.** Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away. Our cases have stressed the "longstanding distinction" between government acquisitions of property and regulations.

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee's raisins must be physically segregated from free-tonnage raisins. **Reserve raisins are sometimes left on the premises of handlers**, but they are held "for the account" of the Government. The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

The Government contends that the reserve requirement is not a taking because **raisin growers voluntarily choose to participate in the raisin market**. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." Brief for Respondent 32 (brackets and internal quotation marks omitted).

"Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history.

The Government thinks it "strange" and the dissent "baffling" that the Hornes object to the reserve requirement, when they nonetheless concede that "the government may prohibit the sale of raisins without effecting a per se taking." . . . A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. **The Constitution, however, is concerned with means as well as ends.** The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution." As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire **by a shorter cut than the constitutional way**." *Pennsylvania* Coal, 260 U.S., at 416.

The Government correctly points out that a taking does not violate the Fifth Amendment unless there is no just compensation, and argues that the Hornes are free to seek compensation for any taking by bringing a damages action under the Tucker Act in the Court of Federal Claims. But we held in *Horne I* that the Hornes may, in their capacity as handlers, **raise a takings-based defense to the fine levied against them**. We specifically rejected the contention that the Hornes were required to pay the fine and then seek compensation under the Tucker Act.

Four problems for local and state government, officials, lawyers, and planners:

1. The **eagerness** with which the majority brings personal property (raisins in this case, money in the *Koontz* case) into the Takings category.
2. The emphasis on **means and shortcuts**.
3. The Court's failure to make a distinction between **mandatory and voluntary** government programs.
4. The risk that a takings claim may be raised and taken seriously by the courts **as a property owner's defense** to a fine levied by the government, thus allowing the owner to leap over some significant ripeness barriers.

Dwight H. Merriam, FAICP
Partner, Robinson & Cole LLP

Reed v. Gilbert,
U.S. Supreme Court, 2015

A Little Background

The dramatis personae:

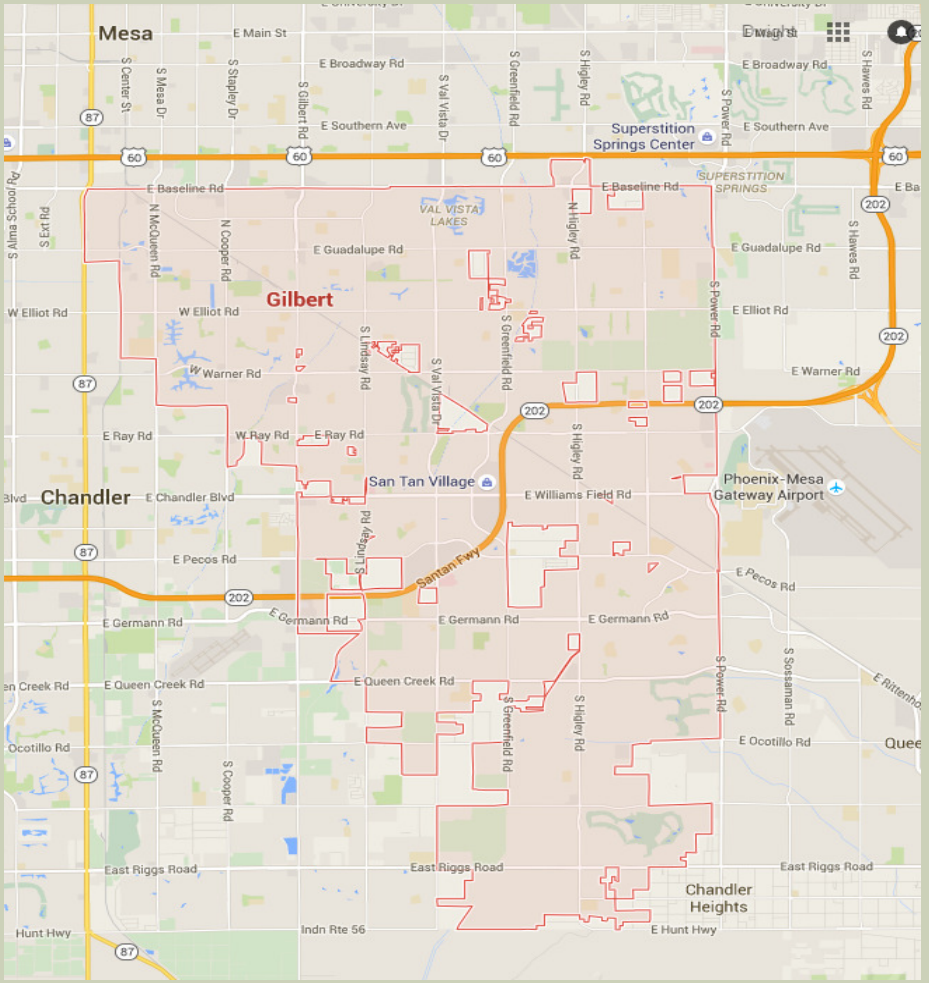
Pastor Clyde Reed

Location

Town of Gilbert

Pop. 229,972

76 sq. mi.




DWAIN for
Sekretary
of Freedum
I Am For
Being Against
No Freedum!
CHRISTINE
JONES
GOVERNOR
Doug Ducey
Supported by
Arizona Teacher's Association
WALKER
House of Representatives LD-25
Justin
PIERCE
SECRETARY OF STATE
MARK
BRNOVICH
ATTORNEY GENERAL
Integrity Experience Results
Jordan
RAY
Town Council
FOR SALE
BY OWNER
John Huppenthal
High Expectations
Reading by 1st Grade
Accountability
English for All Students
Reverend
Steven
HALLMAN
TREASURER • 2014
BALANCE
ARIZONA'S
Rusty


HELLO MY NAME IS...
David Bradley
No Utility Rate increase
CORPORATION COMMISSION
PROTECT OUR CONSTITUTION
VOTE NO!
ALL BALLOT PROPOSITIONS
PIERCE
CORPORATION COMMISSION
The Taxpayer's Retiring
Treasurer
CHERNY
Bill Montgomery
MICHAEL
JEANES
CLERK OF THE COURT
VOTE YES
PROP 203


GILBERT
ANDY
BIGGS
WARREN
PETERSEN
ENDORSED BY
SMALL BUSINESS
ALLIANCE
Re-Elect
Judge Don
DODGE
RE-ELECT
JOHN
LEWIS
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Community
Coronado Elementary School
480-982-4331


Good News
Presbyterian
Worship 9:30 AM
480-982-4331
YOUR COMMUNITY CHURCH
www.goodnewspres.com

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.

Ideological Signs

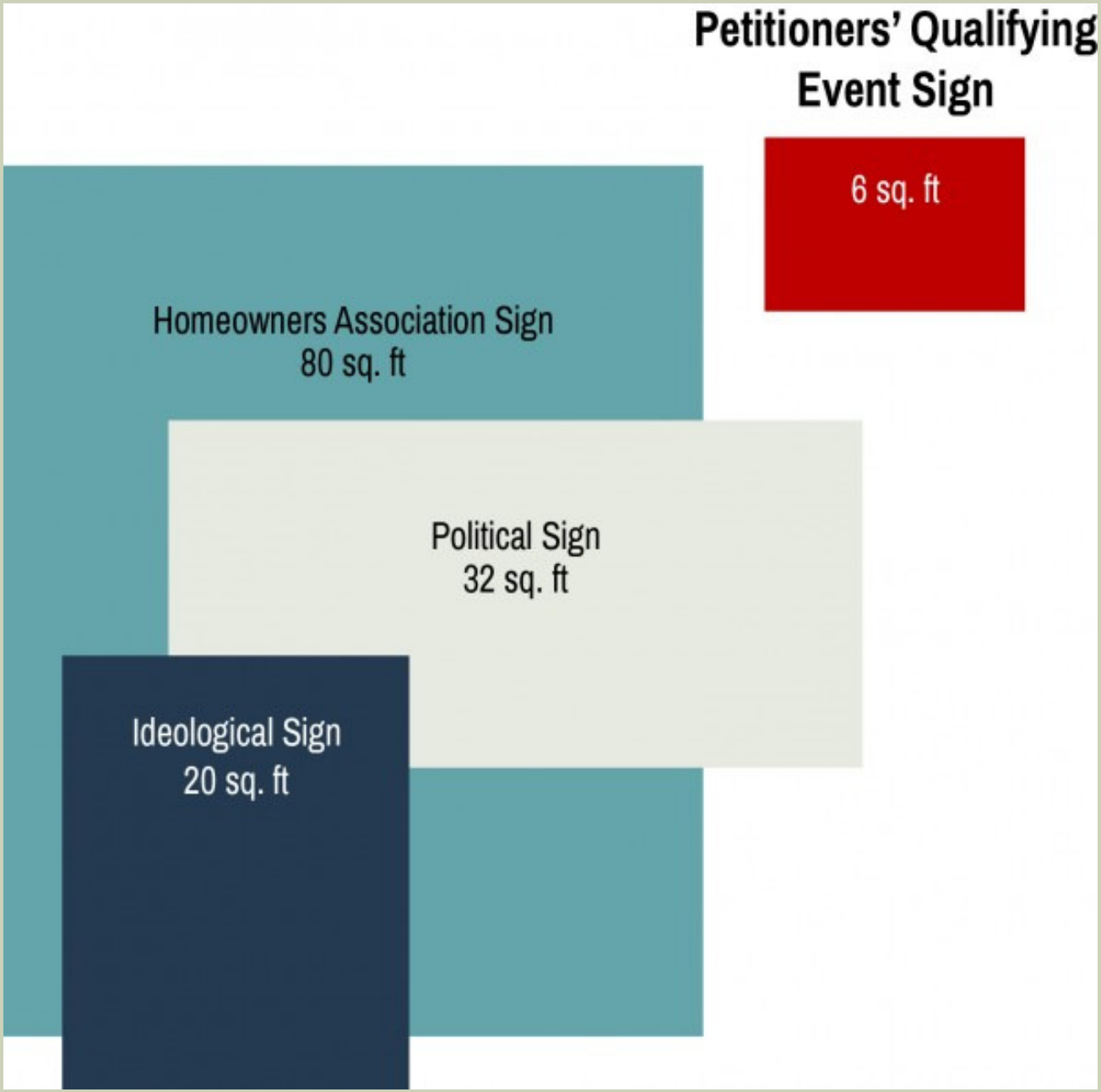
Political Signs

Temporary Directional Signs Relating to a Qualifying Event

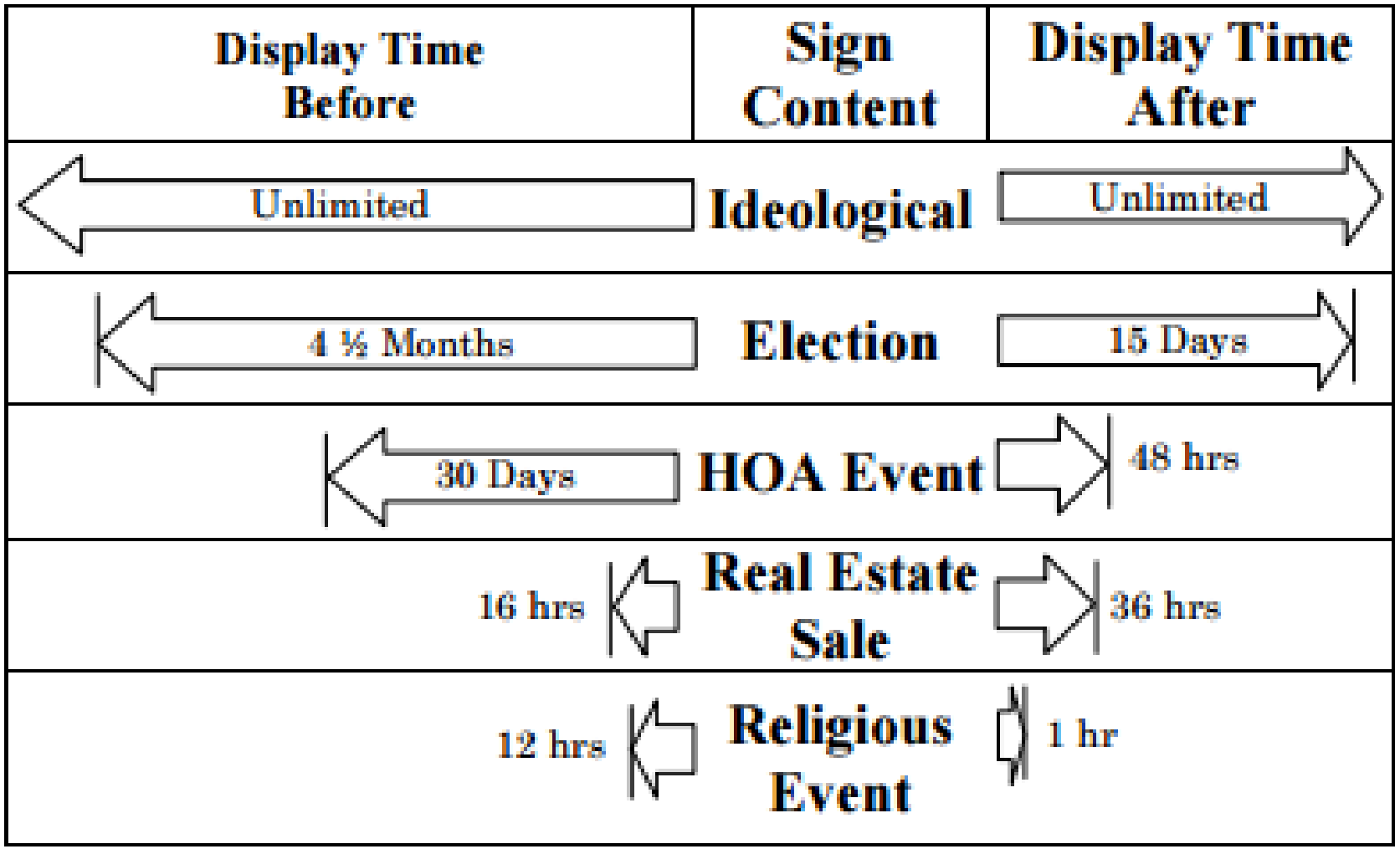
P. ***Temporary Directional Signs Relating to a Qualifying Event***. Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

4. *Location*. Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs may be placed in the right-of-way or, with permission of the private property owner, on private property. Signs shall relate only to events occurring within the Town.

Temporary Directional Signs Relating to a Qualifying Event. *Temporary Directional Signs Relating to a Qualifying Event* means a *Temporary Sign* intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.


Petitioners' Qualifying Event Sign
6 sq. ft
Homeowners Association Sign
80 sq. ft
Political Sign
32 sq. ft
Ideological Sign
20 sq. ft

DURATION


Display Time Before
Sign Content
Display Time After
Unlimited
Ideological
Unlimited
4 ½ Months
Election
15 Days
30 Days
HOA Event
48 hrs
16 hrs
Real Estate Sale
36 hrs
12 hrs
Religious Event
1 hr

The Basic Rules Remain the Same

If a regulation is content-neutral, then the time, place, and manner of the speech in any sign can be regulated under the easy rational relationship test.

If it is content-based -- hold on tight -- you are subject to strict scrutiny and need to show a compelling governmental objective.

Facts and Holdings

- **Gilbert cited church for exceeding time limits and failing to include dates on the signs**
- **Trial court: Gilbert wins summary judgment**
- **Ninth Circuit: Upholds Gilbert win**
- **SCOTUS: Four opinions, and the holdings are…**

- Content-based regulations are subject to *strict scrutiny*
- Must be facially content-neutral *and* neutral as to purpose
- Regulation of *categorical signs* is content-based when defined by signs themselves
- *Speaker-based* sign regulation is content-based

Alito's Roadmap

Size of signs based on any content-neutral criteria

Locations in which signs may be placed including freestanding signs v. those attached to buildings

Lighted v. unlighted signs

Signs with fixed messages and electronic signs with messages that change

Placement of signs on private and public property

Placement of signs on commercial and residential property

On-premises v. off-premises signs

Restricting the total number of signs allowed per mile of roadway

Time restrictions on signs advertising a one-time event

"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. "

Lessons Learned

- Be calm
- Keep it simple
- Don't sweat the little stuff
- Follow legal developments


Keep Calm
and
and
Rugulate
Signage