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Practical Strategies for Speech Regulation in a Post-Reed World

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

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REGULATING SIGNS IN A CONTENT NEUTRAL MANNER SATISFYING FIRST AMENDMENT LIMITATIONS WILL BE MORE DIFFICULT FOR LOCAL GOVERNMENTS FOLLOWING THE U.S. SUPREME COURT'S 2015 DECISION IN *REED V. TOWN OF GILBERT, ARIZONA*.[1] In *Reed*, all nine Supreme Court justices agreed that the Town of Gilbert's sign code violated the guarantee of freedom of speech in the First Amendment, although the justices arrived at that conclusion in different ways.

As this article will discuss, the Court's opinion in *Reed* focused on the appropriate meaning of content neutrality as a central requirement of the First Amendment with respect to the regulation of noncommercial speech, such as signs. Since the early 1970s, the Supreme Court has required that regulations of speech must avoid any regulation of message or subject matter under the theory that government control of the content of speech—like government control of viewpoint—equates to government control of ideas.[2] In so holding, the Court has broadly classified content regulation as a suspect form of speech regulation, and has subjected so-called "content based" regulation to

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1. 576 U.S. —, 135 S. Ct. 2218 (2015). Before the United States Supreme Court granted certiorari in *Reed*, the parties had appeared before the lower courts four separate times—twice before the federal district court in Arizona and twice before the U. S. Court of Appeals for the Ninth Circuit. *See* discussion *infra* Part I.B. This article discusses the history of the litigation, beginning with the Ninth Circuit's decision in 2009 when it heard Reed's first appeal from the 2008 federal district court decision.

2. *See, e.g.*, Chicago v. Mosley, 408 U.S. 92 (1972) (striking down restriction on picketing at schools and ruling that any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open).

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heightened judicial scrutiny and its concomitant burden on government defendants.[3]

The *Reed* ruling, which resolves a long-standing split between federal circuit courts of appeal on the meaning of content neutrality, carries significant consequences for the validity of local sign regulations. Indeed, many local codes may become unconstitutional as a result of the case's outcome. Sign litigation can be expensive and risky,[4] and it is likely to become more frequent after *Reed*.

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

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

A. *Factual Background*

Reed is the first U.S. Supreme Court case to address local sign regulations since *City of Ladue v. Gilleo*,[5] decided in 1994. *Reed* addressed a challenge to Gilbert's sign code, which contained a general requirement that all signs obtain a permit, but exempting several categories of signs from that requirement.[6] These provisions treated certain categories of exempted signs differently.[7] As with many other sign codes around the United States, Gilbert's sign code recited traffic safety and aesthetics as the reasons for its existence.[8]

3. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (subjecting content-based restriction on displaying signs near foreign embassies to strict scrutiny).

4. Although not resolved as of this writing, the plaintiff in *Reed* had filed a claim for attorney's fees totaling $1.023 million.

5. 512 U.S. 43 (1994) (*Gilleo*).

6. *Reed*, 135 S. Ct. at 2224.

7. *Id.* at 2224–25.

8. GILBERT, ARIZ. LAND DEV. CODE, ch. 1 § 4.401 (2014).

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Three of the exempted categories were at issue in *Reed*: "political signs," "ideological signs," and "temporary directional signs."[9] While the town did not *prohibit* any of these categories of speech, each category was treated *differently* by the sign code. The Town's regulations of political signs, defined as "temporary sign[s] designed to influence the outcome of an election called by a public body," allowed such signs to have a sign area of up to 16 square feet on residential property and up to 32 square feet on nonresidential property, and such signs could be displayed beginning up to 60 days before a primary election and ending up to 15 days following a general election.[10] Political signs were allowed to be placed in public rights-of-way, with any number of signs permitted to be posted.[11]

Temporary directional signs were defined as a "[t]emporary [s]ign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'"[12] A "qualifying event" was any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[13] Temporary directional signs could not exceed six square feet in sign area, could be placed on private property with the consent of the owner or in the public right-of-way, and no more than four signs could be placed on a single parcel of private property at once.[14] Additionally, temporary directional signs could be displayed for no more than 12 hours before the qualifying event, and no more than one hour after the qualifying event.[15] The date and time of the qualifying event were required to be displayed on each sign.[16]

9. *Reed*, at 2224-25; *see also* GILBERT, ARIZ. LAND DEV. CODE, ch. 1 §§ 4.402(I), (J), (P) (as amended).

10. *Reed*, 135 S. Ct. at 2224–25. Note that Arizona has a statute that prohibits local governments from removing certain political signs placed in connection with an election. ARIZ. REV. STAT. § 16-1019(C) (2015). At oral argument in *Reed*, this statute was raised by attorneys for the town as a defense to the town's facially content based sign code. Oral Argument at 42:25–44:00, *Reed*, 135 S. Ct. 2218, *available at* http://www.supremecourt.gov/oral_arguments/audio/2014/13-502. While the effect of this statute was hotly debated during the pendency of the case, the authors are of the position that this statute is not violative of the First Amendment, nor does it require localities in Arizona to enact code provisions violative of the First Amendment.

11. GILBERT, ARIZ. LAND DEV. CODE § 4.402(I).

12. *Reed*, 135 S. Ct. at 2225.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.* at 2231.

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Finally, "ideological signs" were defined as any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency."[17] Ideological signs could be as large as 20 square feet and could be placed in any zoning district without limitations on display time.[18]

Good News Community Church, of which Clyde Reed is pastor, lacked a permanent church structure and instead rented space in local community facilities, such as schools, for Sunday services.[19] In order to inform passersby of its services and the locations thereof, Good News and Pastor Reed placed temporary signs advertising religious services throughout the community.[20] The signs were typically posted for a period of approximately 24 hours.[21] Because the time of the posting exceeded the time limits provided for temporary directional signs, Gilbert attempted in July 2005 to enforce its sign code against the church's signs, and town officials removed at least one of the church's signs.[22] After receiving the advisory notice that it was in violation of the code, the church reduced the number of signs it placed and its signs' display time, but friction with Gilbert persisted.[23]

B. *Court Proceedings*

Having failed to reconcile its differences with the town, in March 2008, Reed and the church filed an action in federal district court claiming violations of the Free Speech and Free Exercise clauses of the First Amendment and the Equal Protection Clause of the

17. *Id*. at 2224.

18. The sign code was amended twice during the pendency of the *Reed* litigation. *Reed*, 135 S. Ct. at 2225, n.4 (citations omitted). When litigation began in 2007, the code defined the signs at issue as "Religious Assembly Temporary Directional Signs." *Id.* 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.* In 2008, Gilbert 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." *Id.* In 2011, Gilbert amended the code to authorize placement of temporary directional signs in the public right-of-way. *Id.*

19. Reed v. Town of Gilbert, Ariz., 587 F.3d 966, 971 (9th Cir. 2009).

20. *See id*.

21. *See id*.

22. *Reed*, 135 S. Ct. at 2225.

23. *Reed*, 587 F.3d at 972.

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Fourteenth Amendment, as well as related state law violations.[24] Good News's claims centered on the contention that the town's sign code was *content based*—that is, the code's distinctions between political signs, ideological signs, and temporary event signs, as well as some other distinctions, impermissibly discriminated between messages and speakers based on the content of the regulated speech or speaker.[25]

The federal district court denied the church's motion for a preliminary injunction against enforcement of the sign code.[26] On appeal, the U.S. Court of Appeals for the Ninth Circuit unanimously affirmed,[27] finding the temporary event sign regulations content neutral as applied. However, the appeals court remanded to the district court on the question of whether the town impermissibly distinguished between forms of noncommercial speech on the basis of content.[28]

On remand, the district court granted summary judgment in favor of the town, holding the town's exemptions from permitting content neutral, despite the fact that the code regulated on the basis of message category.[29] The Ninth Circuit again affirmed, this time in a 2-1 decision,[30] with the majority finding the code's distinctions between temporary event signs, political signs, and ideological signs content neutral. In so holding, the Ninth Circuit found that the town "did not adopt its regulation of speech because it disagreed with the message conveyed" and that the town's regulatory interests were unrelated to the content of the signs being regulated.[31] Applying intermediate scrutiny to the content neutral exemptions, the Ninth Circuit majority determined that the exemptions were narrowly-tailored to advance the city's substantial government interests in aesthetics and traffic safety, and found the code left the church with ample alternative avenues of communication.[32]

C. *Circuit Split*

The Ninth Circuit majority relied principally on the government's regulatory *purpose* in determining that the town's sign regulations were content neutral, specifically rejecting the conclusion that the Gilbert

24. *See Reed*, 587 F.3d at 972-73. Only the Free Speech Clause claims were at issue on appeal.
25. *Id.*
26. *Id.* at 973.
27. *Id.* at 966.
28. *Id.*
29. Reed v. Town of Gilbert, Ariz., 832 F. Supp. 2d 1070, 1085 (D. Ariz. 2011).
30. 707 F.3d 1057, 1060 (9th Cir. 2013).
31. *Id.* at 1071-72.
32. *Id.* at 1074-76.

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sign code was content based because it discriminated on its face between categories of noncommercial speech.[33] Despite the fact that the sign code expressly created three separate categories for political, ideological, and temporary event signs, and treated each of these categories differently—regulation based on content in the literal sense—the Ninth Circuit's decision relied on the absence of an invidious, discriminatory governmental purpose in upholding the code.

This decision perpetuated a split between the federal circuit courts of appeal regarding the extent to which government may distinguish between speech or signs based on category or function.[34] This holding was in line with prior Ninth Circuit decisions[35] and paralleled similar decisions in other federal circuit courts of appeal, including the Third,[36] Fourth,[37] Sixth,[38] and Seventh[39] circuits. These courts had

33. *See id*. at 1071-72.

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

35. *See also* G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1076 (9th Cir. 2006) (finding sign regulation to be content-neutral where it does not favor speech based on the idea expressed); Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798, 803–04 (9th Cir. 2007) (upholding sign code with various arguably content-based exceptions). Earlier decisions of the Ninth Circuit applied a more strict approach to content neutrality. *See, e.g.*, Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 820 (9th Cir. 1996); Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988). These decisions were called into question by later Ninth Circuit cases. This transition is evident in the Ninth Circuit's 1998 decision in *Foti v. City of Menlo Park*, which found portions of the municipal code in question content based, but applied a purpose-based test for content neutrality. *See* 146 F.3d 629, 636, 638 (9th Cir. 1998).

36. *See, e.g.*, Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389 (3d Cir. 2010), *cert. denied*, 562 U.S. 1180 (2011) (finding that a consideration of a sign's content does not by itself make a regulation content-based); *see also* Rappa v. New Castle Cnty., 18 F.3d 1043, 1047 (3d Cir. 1994) (finding that a regulation may contain content-based exceptions if the content exempted is significantly related to the particular area in which the sign is viewed because it either identifies the property on which the sign sits or is aimed at an audience, such as motorists on a highway, that traverses the area).

37. *See, e.g.*, Brown v. Town of Cary, 706 F.3d 294, 304–05 (4th Cir. 2013) (finding that the content on signs can be regulated so long as the distinction is not made based on the message conveyed); Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359, 373 (4th Cir. 2012) (rejecting claim that code is content-based when it requires a general inquiry into the nature of a display and the relationship to the business on which it is displayed to *determine if a display is a "business sign" rather than a "non-business-related mural")*.

38. *See, e.g.*, H.D.V.-GREEKTOWN, LLC v. City of Detroit, 568 F.3d 609, 623 (6th Cir. 2009) (rejecting an "overly narrow" interpretation of content-neutrality and noting that nothing in the record before it indicated that the distinctions between various types of signs reflected a preference for one type of speech over another).

39. *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (rejecting notion that a law is content-based merely because a

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

Two other circuits, the Eighth[40] and Eleventh,[41] had previously taken a more strict or "absolutist" approach to content neutrality that demanded that sign regulations should not in any way differentiate among signs based upon the message displayed. Under this approach, if a code enforcement officer was required to read the message displayed on a sign to properly enforce the code, the sign code should be deemed content based.[42] Thus, for example, a sign code that distinguished between a political sign and an event sign on the basis that the former contains a campaign message and the latter advertises a particular event would be content based and thus subject to strict scrutiny, which would likely prove constitutionally fatal.[43] The lone dissenting Ninth Circuit judge argued, in line with these decisions, that "Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed."[44]

The federal appeals courts were not alone in their confusion regarding the meaning of content neutrality as applied in the context of sign

court must look at the content of an oral or written statement to determine if the law applies).

40. *See, e.g.*, Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (*Neighborhood Enters., Inc. II*), *cert. denied*, City of St. Louis v. Neighborhood Enterprises, Inc., 132 S. Ct. 1543 (2012), (quoting Whitton v. City of Gladstone, 54 F.3d 1400, 1403–04 (8th Cir. 2011) and citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)), finding that a code exemption for any sign display meeting the definition of a "mural" was impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction." *Neighborhood Enters., Inc.*, 644 F.3d at 736.

41. *See, e.g.*, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (finding exemptions from sign code based on content—rather than the time, place, or manner—of the message discriminates against certain types of speech based on content and thus are content-based).

42. For this reason, the strict approach has often been called the "need to read" approach. *See* Connolly *supra* note 34, at 201.

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

44. *Reed*, 707 F.3d at 1080 (Watford, J., dissenting).

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codes. Beginning over forty years ago, the Supreme Court began developing two separate lines of cases regarding content neutrality. One approach took a rather simplistic yet strict view of the doctrine, while the other advocated a more functional approach that better accommodated government regulations of speech. The strict approach originated with the Court's first express announcement of the content neutrality doctrine in *Police Department of Chicago v. Mosley*, decided in 1972, where the Court stated, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[45] In making that declaration, the Court invalidated a Chicago ordinance which prohibited all picketing in areas near schools but exempted "peaceful labor picketing" from the general ban.[46] Nine years later, in *Metromedia, Inc. v. City of San Diego*, the Court struck down a municipal ordinance that distinguished between forms of noncommercial speech displayed on billboards, and in doing so made similarly sweeping statements regarding content neutrality.[47] And in 1984, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, the Court suggested in dicta that differential treatment of political speech, as compared with other types of noncommercial speech, could have potentially created content neutrality problems for an otherwise content neutral ordinance banning the posting of private signs on light posts in the public right-of-way.[48] These cases all stated or implied that categorization of speech on the basis of even broad subject matter should be condemned under the First Amendment.

The Supreme Court's decisions in *Mosley*, *Metromedia*, and *Taxpayers for Vincent* contrasted with another line of Supreme Court

45. 408 U.S. 92, 95 (1972). The inherent problem with the Chicago ordinance was, for example, that labor advocates could engage in picketing outside of schools while civil rights advocates or Vietnam War protestors could not do so. *Id.*

46. *Id.* at 94.

47. 453 U.S. 490, 515 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.' ") (internal citations omitted). The San Diego ordinance in question exempted from the ban, "government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and '[t]emporary political campaign signs.' " *Id.* at 494-95.

48. 466 U.S. 789, 816 (1984) (noting that a "political speech" exception to a general ban which did not apply equally to other forms of noncommercial speech could be problematic under the content neutrality doctrine).

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cases focusing on the government's stated purpose for the challenged regulation. *Ward v. Rock Against Racism*,[49] decided in 1989, is one of the leading cases adopting this approach. In *Ward*, the Court upheld a requirement that performers using a public bandshell utilize municipal sound amplification equipment and personnel for their performances. The regulation was intended to control noise emanating from the bandshell.[50] In finding the regulation content neutral, the Court stated,

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."[51]

The Court's focus on governmental purpose as the determinant of whether a regulation is content neutral is also evident in the line of cases addressing governmental regulation of protest activities near abortion clinics. In *Hill v. Colorado*,[52] the Court upheld a state law which made it "unlawful within . . . regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.' "[53] In so doing, the Court specifically rejected the absolutist approach while noting the proliferation of laws requiring enforcement officials to review communicative content in order to determine the law's applicability to that content.[54] The approach adopted by *Ward* and *Hill*, cited frequently by courts adopting the functional approach advocated in *Reed*, differs substantially from the approach advocated by *Mosley* and its progeny.

The Court's most immediate pre-*Reed* statement on content neutrality appeared to continue the *Ward-Hill* purposive approach to content

49. 491 U.S. 781 (1989).
50. *Id.* at 787.
51. *Id.* at 791 (internal citations omitted).
52. 530 U.S. 703, 735 (2000).
53. *Id.* at 707 (citing COLO. REV. STAT. § 18-9-122(3) (1999)). The Colorado statute at issue in *Hill* was emblematic of laws enacted by state and local governments to limit the extent to which protesters could inhibit access to abortion clinics. Judges have noted the unique political dynamics involved in the abortion clinic cases. *Id.* at 741 (Scalia, J., dissenting).
54. *See id.* at 721–22 ("[W]e have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.").

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neutrality. In its 2014 ruling in *McCullen v. Coakley*, the Court invalidated a Massachusetts law prohibiting certain expressive activities within a specified distance of a "reproductive health care facility"—abortion clinics were at the center of the law's purview—but not before a majority of the Court found the law to be content neutral.[55] While acknowledging that the law in question had a differential effect on speech surrounding abortion clinics, Chief Justice Roberts, writing for the majority, found that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[56] Moreover, the Court repeated the *Ward* test for determining content neutrality, and in finding the Massachusetts law content neutral, relied on the law's stated intent to advance the interests of public safety, access to health care, and unobstructed use of public sidewalks and roads.[57] The approach to content neutrality set forth in *McCullen v. Coakley* continued the more lenient approach to content neutrality in sign cases that favored local governments and appeared to reject the more plaintiff-friendly strict approach beginning with *Mosley*.

Recognizing this split among the courts of appeals, and perhaps in recognition of the inconsistencies in its own doctrine, the Supreme Court granted *certiorari* review in *Reed*.[58] In the Supreme Court's *Reed* decision, all nine justices agreed that the town's sign code was unconstitutional, but differed as to why that was so.

D. *Majority Opinion*

The *Reed majority* opinion was authored by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito and Sotomayor. While not explicitly acknowledging the circuit split, the Court resolved it in favor of the absolutist "need to read" position: a sign regulation that "on its face" considers the message on a sign to determine how it will be regulated is content based.[59] As the Court said, the "common sense 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."[60]

55. 134 S. Ct. 2518, 2531 (2014).
56. *Id.*
57. *See id.*
58. *See Reed*, 135 S. Ct. at 2226 (citing the Court's decision to grant certiorari, Reed v. Town of Gilbert, Ariz., 134 S. Ct. 2900 (2014)).
59. *See Reed*, 135 S. Ct. at 2227.
60. *Id.*

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Thus, if a sign code makes *any* distinctions based on the message of the speech, the sign code is content based. Further, the majority held that regulations of speech must be both *facially* content neutral and content neutral in their *purpose*.[61] According to the majority, only after determining whether a sign code is neutral on its face should a court inquire as to whether the law is neutral in its justification.[62]

Justice Thomas's opinion dismissed several theories the Ninth Circuit majority had offered to justify its viewing the Gilbert code as content neutral. The first theory claimed that a sign regulation is content neutral so long as it was not adopted based on disagreement with the message conveyed and the justification for the regulation was "unrelated to the content of the sign."[63] Justice Thomas refuted that theory on the ground that it "skips the crucial first step in the content-neutrality analysis: determining whether the law is content-neutral on its face."[64] Indeed, the majority opinion expresses concern about the possibility that government officials might explicitly justify regulations or actions in content neutral terms, while still writing such regulations or taking such actions with an underlying censorial motive.[65] His opinion states: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech."[66]

Next, the Court majority addressed the Ninth Circuit's finding that the Gilbert code was content neutral "because it 'does not mention any idea or viewpoint, let alone single one out for differential treatment.' "[67] Justice Thomas dismissed that finding, recognizing that it conflated two distinct First Amendment limits on regulation of speech—government discrimination among viewpoints and government discrimination as to content—and noting that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[68]

61. *See id.* at 2222.
62. *See id.*
63. *Id.* at 2226 (citing *Reed*, 707 F.3d at 1071-72).
64. *Id.* at 2222.
65. *Id.* at 2228. "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." *Id.*
66. *Id.* at 2228 (citing *Discovery Network*, 507 U.S. at 429).
67. *Id.* at 2229 (quoting *Reed I*, 587 F.3d at 977).
68. *Id.* at 2229–30.

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Finally, the Court majority addressed the Ninth Circuit's statement that the Gilbert code was content neutral because it made distinctions based on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[69] After noting that this claim was factually incorrect,[70] Justice Thomas argued that the claim was legally incorrect as well. The problem with "speaker-based" distinctions, in the majority's view, is that they "are all too often simply a means to control content."[71] Thus, because laws containing a speaker preference may reflect a content preference, they must be subject to strict scrutiny.[72]

In response to the finding that "event-based" distinctions were content neutral—a "novel theory," according to Justice Thomas—the majority found that "[a] regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea."[73] Acknowledging that a sign code that made event based distinctions may be "a perfectly rational way to regulate signs," the majority stated that "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because

69. *Id*. at 2230 (quoting *Reed II*, 707 F.3d at 1069).

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

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

72. The authors of this article struggled to understand the Court's statement that "we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference,' " *Reed*, 135 S. Ct. at 2230 (quoting Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 658 (1994)). It is not clear from the Court's statement whether the majority believes that *all* speaker-based regulations should be subject to strict scrutiny, or if there is an interim analysis that must occur in order to determine that the "legislature's speaker preference reflects a content preference." *Reed*, 135 S. Ct. at 2224. We note that the Court, in *Turner Broadcasting*, stated expressly that not "all speaker-partial laws are presumed invalid," and indeed, the Court rejected an argument that a speaker based law should be subjected to strict scrutiny. *Turner Broad. Sys.*, 512 U.S. at 658. Neither *Turner Broadcasting* nor *Reed* provides any useful guidance as to what indicators might be used to determine that the legislature's speaker preference reflects a content preference. See *infra* Section II.F.

73. *Reed*, 135 S. Ct. at 2231.

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of their content-based nature.' "[74] This discussion of event based signage concentrated on the Gilbert code's allowance for signs with political messages only before and during election periods, and the code's prescribed language for other event based signage;[75] however, the opinion is not limited to that circumstance. For example, a sign code allowing a temporary sign with the message "Grand Opening" but prohibiting one with any other message (e.g., "Going Out of Business") could be seen as event based and thus content based.

Having found the challenged provisions of the Gilbert code to be content based, Justice Thomas next addressed whether the town could satisfy strict scrutiny, that is, demonstrating that its distinctions among the various types of signs furthered a compelling governmental interest and was narrowly tailored to achieve that interest. According to the majority, it could not.[76]

The majority opinion concluded by briefly noting that the town's "current Code regulates many aspects of signs that have nothing to do with a sign's message,"[77] and that the town had failed to tailor its regulations to the regulatory interests—traffic safety and aesthetics—identified in the code.[78] The majority did note, indeed somewhat curiously, that a sign ordinance that was narrowly tailored to allow certain signs that "may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety" well might survive strict scrutiny.[79] The majority opinion did not address whether the town's asserted governmental interests—traffic safety and aesthetics—constitute compelling governmental interests for purposes of strict scrutiny analysis.[80]

Thus, because Gilbert's sign code differentiated "on its face" between political, ideological, and event signs based on the message of the sign, the code was found content based. Upon making that finding, the majority applied *strict scrutiny*, the most demanding form of

74. *Id*. at 2231 (O'Connor, J., concurring) (quoting *Gilleo*, 512 U.S. at 60.

75. *See Reed*, 135 S. Ct. at 2231.

76. *Id*. at 2231-32. The town claimed the distinctions served interests in aesthetics and traffic safety. Justice Thomas assumed for the sake of argument that these are compelling interests, but found that the code's distinctions were underinclusive and thus not narrowly tailored. *Id.*

77. *Id*. at 2232 (noting, as examples, regulating "size, building materials, lighting, moving parts and portability.").

78. *Id*. at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.").

79. *Id*. at 2232.

80. *Id*. at 2231.

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constitutional review, requiring the government to show that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[81] As exemplified by *Reed*, regulations subjected to strict scrutiny rarely survive a court's review. Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement.

E. *Concurrences*

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

Justice Alito's opinion further identified the regulations that, in his view, should be considered content neutral. While disclaiming he was providing "anything like a comprehensive list," Justice Alito noted "some rules that would not be content based."[82] These included:

> 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.[83]

81. *Id.* (citation omitted).
82. *Id.* at 2233 (Alito, J., concurring).
83. *Id.*

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Justice Alito further noted that "government entities may also erect their own signs consistent with the principles that allow government speech"[84] and claimed that "[p]roperly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."[85]

In his list of acceptable sign regulations, Justice Alito approved of two rules that may conflict with Justice Thomas's "on its face" language. Alito claimed that rules "distinguishing between on-premises and off-premises signs" and rules "imposing time restrictions on signs advertising a one-time event" would be content-neutral.[86] But rules regarding "signs advertising a one-time event" clearly are facially content-based, as Justice Kagan noted in her opinion concurring in the judgment,[87] and the same claim could be made regarding the distinction between onsite and offsite message commonly seen in local sign codes and state highway advertising laws.[88] Neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and non-commercial signs, a point raised by Justice Breyer in his opinion concurring in the judgment.[89]

Justices Breyer and Kagan, while concurring in the judgment, wrote opinions critical of Justice Thomas's absolute rule about content-neutrality. Justice Breyer argued that because "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny' would permit."[90] While acknowledging that strict scrutiny "sometimes makes perfect sense," he argued that regulations that engage in content discrimination "cannot and should not *always*

84. *Id.* at 2233 (arguing that this included "all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.").

85. *Id.* at 2233-34.

86. *Id.* at 2233. On-site, also called "on-premises," signage generally refers to signage where the message relates to an activity occurring on the same premises as the sign, whereas off-site or off-premises signage refers to signage advertising an activity not located on a common property with the sign. As we discuss in greater detail in Part II.C, the onsite-offsite distinction with respect to commercial speech was upheld in *Metromedia v. City of San Diego*, 453 U.S. 490, 511-12 (1981), even though the Court rejected the notion that onsite commercial speech could be permitted to the exclusion of necessarily offsite noncommercial speech. *Id.* at 513.

87. *Reed*, 135 S. Ct. at 2237, n.* (Kagan, J., concurring). This is, of course, only the case if the code defines event based signage as the Gilbert code did.

88. *See* discussion *infra* Part II.C.

89. *Reed*, 135 S. Ct. at 2235.

90. *Id.* at 2234 (Breyer, J., concurring).

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trigger strict scrutiny."[91] He also expressed concern that courts, forced to apply strict scrutiny "to all sorts of justifiable government regulations," might water down the approach in a way that "will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force."[92] In his view, the "better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of the justification."[93] Justice Breyer would "use content discrimination as a supplement to a more basic analysis, which, tracking most of [the Court's] 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."[94] To illustrate his concern regarding the application of strict scrutiny to *all* content based laws, Justice Breyer lists several laws—federal securities regulations, federal energy consumption labeling requirements, prescription drug labeling, doctor-patient confidentiality laws, and income tax statement disclosure laws—which contain certain elements of content regulation and which might be suspect under the majority's sweeping statements.[95]

Justice Kagan's opinion, joined by Justices Breyer and Ginsburg, expressed great concern that the majority's absolute rule would, as Justice Thomas himself acknowledged, lead to "entirely reasonable" sign laws being struck down.[96] In Justice Kagan's view, there was no need for the majority to discuss strict scrutiny at all because the code provisions at issue did not pass "intermediate scrutiny, or even

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

92. *Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring).

93. *Id.*

94. *Id.* at 2235-36. Justice Breyer explained that answering that question "requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so." *Id*. at 2236.

95. *Id.* at 2235.

96. *Id.* at 2236 (Kagan, J., concurring) (citing Thomas, J., at 2231–32).

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the laugh test."[97] More basically, she argues that strict scrutiny of many content based provisions in sign regulations is not needed because such provisions do not implicate the core First Amendment concerns that justify the application of strict scrutiny.[98] Justices Breyer and Kagan would each have applied intermediate scrutiny, a less demanding constitutional standard that requires the government to demonstrate that a speech regulation is narrowly tailored to achieve a significant (as opposed to compelling) governmental interest[99] and leaves open ample alternative avenues of communication. Both Justices Breyer and Kagan found the Gilbert sign code unconstitutional, however, because its sign categories were not tailored to the code's stated regulatory purposes. As the majority found, the distinctions between temporary event signs, political signs, and ideological signs did nothing to further the government's goal of beautifying the community and reducing traffic hazards.

F. *Clarifying Elements of the Decision*

Reed provides four points of clarification. First, the decision reaffirmed the principle that content based regulations are subject to strict scrutiny and presumptively unconstitutional. To the chagrin of Justices Breyer and Kagan, the *Reed* majority applied a now-familiar mechanical approach to content neutrality analysis in which the Court first determined whether the law was content based.[100] Finding that the law was content based,[101] the *Reed Court* then proceeded to apply strict scrutiny, requiring the town to prove that its sign code "furthers a compelling governmental interest and is narrowly tailored to that end."[102] This mechanical approach, first articulated in Justice O'Connor's

97. *Id.* at 2239. There is some support for the argument that the Court's entire discussion of content neutrality in the *Reed* majority opinion is *dicta*, given that the majority and the concurrences come out in the same place: that the Gilbert code failed the narrowly-tailored requirement of both intermediate and strict scrutiny. *See* McCutcheon v. Federal Election Comm'n, 572 U.S. ___, 134 S. Ct. 1434, 1446 (2014). In *McCullen v. Coakley*, Justice Scalia's concurrence chided the majority opinion, authored by Chief Justice Roberts, for undertaking the content neutrality analysis when the decision ultimately concluded that the Massachusetts law was not narrowly tailored. 134 S. Ct. at 2541-42 (Scalia, J., concurring) (referring to the Court's discussion of content neutrality as "seven pages of the purest dicta.").

98. *See Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring).

99. *See, e.g.*, Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984). Traffic safety and aesthetics, for example, are significant governmental interests. *Id.* at 807.

100. *Reed*, 135 S. Ct. at 2226-27.

101. *Id.* at 2227.

102. *Id.* at 2231.

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concurring opinion in *Gilleo*,[103] was carried forward by the majority in *McCullen*,[104] and now appears to be the conclusive method for analyzing speech regulations for content neutrality purposes, although questions remain about its application to regulation of offsite signs and adult entertainment businesses.[105]

Second, the majority opinion resolved the prior split between the circuit courts of appeal by requiring *both* facial content neutrality and a neutral purpose for sign regulations, and determined that a regulation's purpose is irrelevant if the regulation is not neutral on its face. The majority opinion in *Reed calls* into question hundreds of lower court decisions that relied on the Court's statements in *Ward* and *Hill* in upholding municipal sign regulations that regulated signs according to category or function but which relied upon clearly-articulated content neutral purpose statements and justifications in so doing.[106] At the same time, the *Reed* decision affirms the lower courts that took the strict or absolutist view of content neutrality and that placed less reliance on governmental purpose in favor of scrutinizing the facial neutrality of sign regulations. Courts are now required to undertake a two-step content neutrality analysis to review speech regulations for both facial neutrality and purposive neutrality.

Third, the Court determined that categorical signs, such as directional signs, real estate signs, construction signs, etc., are content based where they are defined by aspects of the signs' message. Many local sign codes currently define these signs by reference to the content of the sign. For example, "real estate sign" might be defined as "a sign advertising for sale the property on which the sign is located." Similarly, local codes have often regulated each of these sign types differently, even if the code's stated or implied purpose in doing so was merely a recognition of the different functions of, and thus need for, these types of signs. To the extent local codes define these signs according to the message stated on the face of the sign, *Reed* concludes that such regulations are presumptively unconstitutional. As we discuss below, however, there may be several options for regulating these signs in a content neutral manner.

Fourth, the Court stated that regulations purporting to be "speaker based," that is, the regulation applies to certain speakers but not others,

103. *See* 512 U.S. at 59 (O'Connor, J., concurring).
104. *See* 134 S. Ct. at 2530.
105. *See* discussion *infra* Sections II.C. & II.E.
106. *See* Cahaly v. Larosa, — F.3d —, 2015 WL 4646922, at *4 (4th Cir. 2015).

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may be found content based and subjected to strict scrutiny. That is, regulations that distinguish between speakers are neither by necessity content neutral, nor are they automatically excused from content neutrality analysis, although they may be permissible. First Amendment doctrine regarding speaker based regulation is incredibly murky, so while the *Reed* majority's statements on the matter may provide some clarification, questions regarding speaker based regulation remain and are discussed further below.

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

II. Remaining Questions After *Reed*

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

A. *Regulations of Speech by Category and Function: Where Do They Stand?*

One of the most immediate questions following *Reed* is whether regulation of signs by category or function continues to be permissible. Virtually all local sign codes contain some element of categorical or functional sign regulation that, if rendered unconstitutional by *Reed*, could potentially give rise to constitutional liability.

Take, for example, real estate signs.[107] As noted above, many local codes define real estate signs by the message on the sign, *i.e.*, "[s]igns that identify or advertise the sale, lease or rental of a particular structure or land area."[108] This definition clearly identifies and defines the sign by the message on the face of the sign, in turn requiring a local code enforcement officer to read the message of the sign and to determine that the sign's message is, first, advertising; second, discussing the property on which it is located; and third, regarding the sale of

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

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

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that particular property. Under the *Reed* majority's treatment of facially content based laws, such a regulation would be subject to strict scrutiny and presumptively unconstitutional.[109] Similar problems exist for local code definitions of construction signs ("a sign advertising the project being constructed and stating the name and address of the contractor"),[110] directional signs ("a sign located within ten feet of a driveway entrance, containing words, arrows, or other symbols directing motorists into the driveway entrance"),[111] and grand opening signs ("a temporary sign advertising the opening or reopening of a business"),[112] to name a few.

With all of these functional or categorical sign regulations potentially unconstitutional after *Reed*, what is a local government to do? An alternative approach in the case of real estate signs could be to define "real estate sign" as "a temporary sign placed on property which is actively marketed for sale, as the same may be evidenced by the property's listing in a multiple listing service." Such a definition does not contain the same type of content problems that the prior definition had, and appears to define the sign not by the content of the message, but rather by the status of the property, *i.e.*, whether it is actively marketed for sale. Even so, the *Reed* majority might find such a regulation to fail the content neutrality test, since *Reed* expresses concern about code provisions that define speech "by its function or purpose."[113] Therefore, the status and constitutionality of sign regulations relating to so-called functional signs is an open question after *Reed.*[114] We discuss some of the regulatory issues associated with this problem below.

109. *See Reed*, 135 S. Ct. at 2227.

110. *See, e.g.*, SANDOVAL CNTY., N.M., SIGN ORDINANCE § 5.A (2005).

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

112. *See, e.g.*, KINGMAN, ARIZ., SIGN CODE § 25.200 (2015).

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

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

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B. *Definitional Issues with the Term "Sign" and Related Problems*

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

A recent Eighth Circuit case, *Neighborhood Enterprises, Inc. v. City of St. Louis*,[115] exemplifies this issue. The code provision in question defined the term "sign" and then listed numerous exemptions that would not be considered to be a "sign":

> Sign. "Sign" means any object or device or part thereof situated outdoors which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, motion illumination or projected images. Signs do not include the following:
>
> a. Flags of nations, states and cities, fraternal, religious and civic organization;
> b. Merchandise, pictures of models of products or services incorporated in a window display;
> c. Time and temperature devices;
> d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
> e. Works of art which in no way identify a product.
>
> If for any reason it cannot be readily determined whether or not an object is a sign, the Community Development Commission shall make such determination.[116]

The city's Board of Adjustment upheld the denial of a sign permit for painted wall art critical of St. Louis's eminent domain practices. The applicant sued, claiming that what the city termed a "sign" was actually a "mural" exempt from the city's sign regulations.[117] The district court granted summary judgment to the city.[118] On appeal, the Eighth Circuit noted that objects of the same dimension as the sign—or "mural"—at issue would not be subject to the regulations if they were symbols of certain organizations, and thus the content of the message displayed

115. *See Neighborhood Enters. Inc.*, 644 F.3d at 728.

116. Neighborhood Enters., Inc. v. City of St. Louis,. 2014 WL 5564418, at *1-2 (E.D. Mo. 2014).

117. *See Neighborhood Enters., Inc.*, 644 F.3d at 733–34; Neighborhood Enters., Inc. v. City of St. Louis, 718 F. Supp. 1025 (E.D. Mo. 2010).

118. *Neighborhood Enters., Inc.*, 644 F.3d at 734.

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determined whether the object was or was not regulated as a "sign."[119] The court found that the sign code's definition of "sign" was impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction."[120] In applying strict scrutiny, the court stated that the city's asserted interests in traffic safety and aesthetics had never been found compelling,[121] and ruled that even if these were compelling interests, the code's treatment of exempt and non-exempt "signs" was not narrowly-tailored to the city's asserted goals and thus the provision was unconstitutional.[122]

In so ruling, the Eighth Circuit followed the absolutist approach to determining whether a code was content based, in line with what is now required of all courts under *Reed*. In contrast, the ruling in *Wag More Dogs, LLC v. Cozart*,[123] a 2012 Fourth Circuit decision following the purposive approach to content neutrality, shows how such rulings cannot stand after the Court's ruling in *Reed*.

Wag More Dogs was a pet daycare business in Arlington, Virginia.[124] After the business relocated to a site opposite a popular dog park, the owner commissioned an artist to paint a 960 square foot artwork on the rear of building that included several of the cartoon dogs featured in the business's logo.[125] Shortly after the artwork was completed, the city cited the owner for violating the sign code by displaying a sign that exceeded the code's size limits.[126] After discussions with the owner, the city offered to allow her to retain the "mural"

119. *Id.* at 736.
120. *Id.*
121. *Id.* at 738; *see* discussion *infra* Section II.G.
122. *Neighborhood Enters., Inc.*, 644 F.3d at 738. Because the district court had never considered whether the provision was severable, the Eighth Circuit remanded the case to allow the lower court to determine whether the unconstitutional provisions were severable from the remainder of the code. On remand, the district court found the new sign ordinance to be content neutral, Neighborhood Enters., Inc. v. City of St. Louis, 17 F. Supp. 3d 907 (E.D. Mo. 2014), but later vacated that finding, determining that the definition of "sign" in the code could not be severed from the balance of the code. *Neighborhood Enters., Inc.*, 2014 WL 566418, at *1 (E.D. Mo. 2014).
123. 680 F.3d 359 (4th Cir. 2012).
124. *Id.* at 363.
125. *Id.*
126. *Id.* at 362-64. The sign code defined the term "sign" as "[a]ny word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors." *Id.* at 362. It further provided as a general rule that "[a] sign permit shall be obtained from the Zoning Administrator before any sign or advertising is erected, displayed, replaced, or altered so as to change its overall dimensions." *Id.*

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on condition she added the words "Welcome to Shirlington Park's Community Canine Area" above the artwork. In the city's view, the addition of these words would convert the painting from an impermissible sign into an informational sign not requiring a permit under the sign code. The owner declined the offer and sued, claiming that the code was impermissibly content-based both facially and as-applied.[127]

The Fourth Circuit ruled in favor of the city, rejecting the owner's claim that a sign ordinance differentiating based on the content of a sign must be found content based.[128] The court stressed that the sign code's distinctions were adopted "to regulate land use, not to stymie a particular disfavored message" and, thus, in the court's view "the Sign Ordinance's content neutrality is incandescent."[129]

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

After *Reed*, such content based exceptions would be subject to strict scrutiny. To avoid that, local governments that want to retain such exemptions will need to reformulate them to be content neutral. In many cases, such reformulation is fairly simple: although a "nameplate" sign is content based, allowing the display of a "permanent sign no larger than one square foot placed on the front of a residential structure, or mounted in the front lawn of a residential property, or . . . etc." is content neutral. We explore this approach further in Section III.E.

127. *Id.* at 364.
128. *See id.* at 366-67.
129. *Id.* at 368.

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C. *Continued Validity of the On-premises/ Off-premises Distinction*

Reed also creates some uncertainty about whether a sign code provision distinguishing between on-site and off-site signs should be considered a content-based regulation. The provision challenged in *Reed* applied only to temporary non-commercial signs. Justice Thomas's majority opinion did not discuss regulation of on-site versus off-site signs, but that issue was addressed, albeit peremptorily, in Justice Alito's concurrence.[130] The extent to which the two opinions conflict regarding whether a sign code provision that distinguishes between on-site and off-site signs is unclear.

Historically, judges, lawyers and sign owners have disagreed on whether the distinction between on- and off-site signs discriminates on the basis of content, or if it is simply a content neutral regulation of a sign's location.[131] On one hand, the distinction turns on the location of a sign—a clearly content neutral method of sign regulation, even after *Reed*.[132] On the other hand, this distinction clearly relies upon the message displayed, for example, by defining an on-site sign as one that displays a message concerning products or services offered for sale, rental, or use on the premises where the sign is located.[133]

With respect to regulations of commercial speech, the Supreme Court conclusively determined in *Metromedia* that the distinction between on- and off-site signs was permissible, subject to certain limitations.[134] The on-site/off-site distinction is more complicated, however, relative to noncommercial speech. Since noncommercial signage, such as a political advertisement or religious proclamation, rarely has a locational component, it is almost always off-premises in a literal sense. For example, a restaurant owner who displays a sign reading "Barack Obama for President" is not advertising or otherwise calling attention to any activity on the premises where the sign is located.

130. *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

131. *Compare Metromedia Inc.*, 453 U.S. at 511-12 (upholding on-premises/off-premises distinction as it relates to commercial speech) *with* Outdoor Media Dimensions, Inc. v. Dep't of Transp., 132 P.3d 5, 16-17 (Or. 2006) (finding on-premises/off-premises distinction to be content-based under state constitution).

132. *See, e.g.*, Contest Promotions, LLC v. City and Cnty. of San Francisco, 2015 WL 4571564, at *4 (N.D. Cal. 2015) ("The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises.").

133. *See, e.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES § 28-6 (2015).

134. *Metromedia Inc.*, 453 U.S. at 511-12.

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Thus, a sign code prohibiting all off-site signage would ban a fair amount of noncommercial speech. The Supreme Court recognized this problem in *Metromedia*, and established a rule that the government cannot favor commercial over noncommercial speech through, for example, complete bans on off-premises signage without provision for off-premises noncommercial copy.[135] Under the holding in *Metromedia*, it follows that the on-premises/off-premises distinction is only available for *commercial* signs, and should be avoided for noncommercial signage.

Under a literal reading of Justice Thomas's majority opinion in *Reed*, the on-premises/off-premises distinction is probably content based "on its face" because it is the content of the message displayed that determines whether a sign should be classified as on-site or off-site.[136] But Justice Alito's concurring opinion included "[r]ules distinguishing between on-premises and off-premises signs" among a list of "some rules that would not be content-based."[137] It follows that Justice Alito likely views the on-premises/off-premises distinction as simply regulating signs' location. All of the foregoing suggests that a challenge to sign code exemptions for non-commercial, off-site signs from bans on off-site signs should still be judged by applying the lower level of scrutiny under the *Central Hudson* four-part test[138] for regulations of commercial speech, similar to *Metromedia*.[139] If we assume without argument that *Reed* addresses only noncommercial sign regulations and has no bearing on regulations of commercial signs—a big assumption that is discussed further below—the on-premises/off-premises distinction remains unaffected by *Reed.*

These suggestions are strongly reinforced by the doctrine that prior Supreme Court decisions should not be overruled by implication. As the Court reaffirmed in *Agostini v. Felton*: "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should

135. *See id*. at 513.

136. *See Reed*, 135 S. Ct. at 2227.

137. *Id.* at 2233 (Alito, J., concurring).

138. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (determining the constitutionality of a regulation of commercial speech by applying a four-part test: (1) to be protected, the speech (a) must concern lawful activity and (b) must not be false or misleading; if the speech is protected, then the regulation must: (2) serve a substantial governmental interest; (3) directly advance the asserted governmental interest; and (4) be no more extensive than necessary to serve that interest).

139. *See Metromedia Inc.*, 453 U.S. at 507 (1981) (applying the four-part test from Central Hudson).

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follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."[140] Thus, despite the fact that Justice Thomas's "on its face" rule for determining whether a code is content based conflicts with the *Metromedia* court's ruling that the on-site/off-site distinction should be treated as content neutral (and, as discussed below, may conflict with the commercial/noncommercial distinction), because *Reed* did not expressly overrule *Metromedia*, the latter remains good precedent on that point.

Of course, the above discussion leaves open the question of whether the Court would overturn *Metromedia* if the opportunity arose. If that question were presented to the Court as presently constituted, *i.e.*, the same justices who decided *Reed*, the answer appears to be "no" by at least a 6-3 vote. Justice Alito's three-justice concurrence found that the on-site/off-site distinction is not content-based. We then can add Justices Breyer, Ginsburg, and Kagan, who concurred in the judgment in *Reed* but rejected the majority's "on its face" rule,[141] as three more anticipated votes for upholding *Metromedia*.

As of this writing, four lower federal courts have decided post-*Reed* cases involving challenges to prohibitions or restrictions applicable to off-premises billboard advertising. Three of these courts, acknowledging *Reed*'s applicability only to noncommercial speech, upheld the challenged restrictions, specifically citing the rules for commercial off-site signage established in *Metromedia*.[142] One of these cases specifically observed what we have observed above: "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny."[143] A fourth case, addressing a challenge to the Tennessee highway advertising act, calls several of that law's distinctions into question, including the on-site/off-site distinction,[144] seemingly ignoring Justice Alito's concurrence as it relates to the on-premises/off-

140. 521 U.S. 203, 237 (1997) (quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

141. *See, e.g., Contest Promotions, LLC*, 2015 WL 4571564, at *4 (concluding that "at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny.").

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

143. *Contest Promotions LLC*, 2015 WL 4571564, at *4.

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

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premises distinction. Given the divisions in the lower courts regarding the continuing validity of the on-premises/off-premises distinction, we can only assume that *Reed* has created an open question on this issue that may take years to resolve.

D. *Regulation of Commercial Speech*

What does *Reed* mean for commercial speech regulation? Technically, *Reed* applies only to noncommercial speech, the regulation of which has historically been subjected to a more exacting standard of review than commercial speech regulations, but some of the references in *Reed* point to cases that reviewed commercial speech regulations. Specifically, *Reed* cites extensively to *Sorrell v. IMS Health*,[145] which some First Amendment observers saw as limiting—if not gutting—the commercial speech doctrine in favor of a uniform approach to reviewing commercial and noncommercial speech regulations.[146]

Sorrell was a 2011 case involving a challenge by pharmaceutical companies and other individuals to a Vermont law restricting the sale, disclosure or use of pharmacy records to reveal the prescribing practices of individual physicians.[147] Vermont claimed that the law safeguarded medical privacy, diminishing the likelihood that "data miners" would compile prescription data for sale to drug manufacturers who would then use it to tailor drug marketing to individual physicians.[148] Vermont claimed that such targeted marketing strategies would lead to prescription decisions benefiting the drug companies to the detriment of patients and the state.[149] The plaintiff pharmaceutical manufacturers and individual "data-miners" claimed that speech in aid of pharmaceutical marketing is a form of expression protected by the First Amendment and that the challenged law impermissibly prohibited the exercise of their First Amendment right to free expression.[150]

145. 131 S. Ct. 2653 (2011).

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

147. *See Sorrell*, 131 S. Ct. at 2663.

148. *Id.* at 2659.

149. *Id.*

150. *Id.*

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

Given the parallels between *Sorrell* and *Reed*—and the *Reed* majority's extensive reliance on the *Sorrell* majority opinion—what effect might these cases have on the Court's future treatment of commercial sign regulation? Two issues are worth consideration. First, the Court's application of content neutrality review in *Sorrell* seems to upset prior judicial approaches to reviewing commercial speech regulations, and the Court's reliance on *Sorrell* in the *Reed* opinion may foreshadow an extension of this change into the sign regulation arena. Before *Sorrell*, it was generally accepted that commercial speech regulations were not required to be content-neutral.[151] Without rigorous analysis or discussion, the *Sorrell* Court rejected Vermont's arguments that the commercial speech doctrine and *Central Hudson* test should apply to the commercial speech regulation at issue in that case.[152] *Reed*'s reliance on *Sorrell* may therefore portend a cut-back or overruling of the commercial speech doctrine and *Central Hudson* test with respect to sign regulation, potentially meaning that all regulations of commercial signage would be subjected to content neutrality analysis.[153]

151. *See, e.g.*, *Metromedia Inc.*, 453 U.S. at 514 ("Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."). *But see* N. Olmsted Chamber of Commerce v. City of N. Olmsted, 86 F.Supp.2d 755 (N.D. Ohio 2000) (holding that sign ordinance's content-based restrictions on truthful, non-misleading commercial speech violated First Amendment).

152. *See* Sorrell, 131 S. Ct. at 2667-68.

153. For an example of a case which has apparently taken this approach, see *Thomas*, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. June 24,

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The second implication of *Reed* and *Sorrell* is similarly complex. The majority in *Sorrell* found that the Vermont law "on its face" imposed "content and speaker based restrictions on the sale, disclosure, and use of prescriber-identifying information" that was commercial speech protected under the First Amendment and imposed "heightened"—but not strict—scrutiny.[154] When these same Justices found, in *Reed*, that the Gilbert code "on its face" had imposed "content- and speaker-based restrictions" on non-commercial signs, they imposed strict scrutiny.[155] Critically, while Justice Thomas's majority opinion in *Reed* cited *Sorrell* extensively, it never suggested that the strict scrutiny standard, required when a regulation of non-commercial speech "on its face" was content based, was also required when a regulation of commercial speech "on its face" was content based.

That distinction is very telling because Justice Kennedy's *Sorrell* opinion explicitly noted both that commercial speech raises legitimate concerns that may require content based regulations and that commercial speech can be regulated to a greater extent than non-commercial speech: "It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than non-commercial speech.' "[156]

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

2015) (calling into question Tennessee's highway advertising act, which prohibits off-premises commercial advertising without a permit and exempts on-premises signage from the permit requirement).

154. *Sorrell*, 131 S. Ct. at 2663.

155. *Reed*, 135 S. Ct. at 2230-31.

156. *Sorrell*, 131 S. Ct. at 2672 (citations omitted).

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E. *Regulation of Adult Businesses*

Does the *Reed* majority opinion have any effect on how courts should view regulation of adult entertainment businesses? Such regulations have long been treated as an exception to the way courts normally treat the issue of content-neutrality. Adult entertainment business regulations *distinguish* such businesses from others by looking to the content of their expression, but *regulate* them because of concerns about the so-called "secondary effects" associated with these businesses, such as increases in criminal activity and neighborhood deterioration;[157] reasons that are unrelated to the content of the expression. This "secondary effects" doctrine[158] holds that regulations of certain types of speech, such as adult entertainment, are content neutral when they are justified on the grounds that certain types of speech have negative secondary effects on the surrounding community.[159] While the doctrine arguably could be applied in contexts outside of adult entertainment regulation, it has largely been confined to that context and rejected in others.[160]

The secondary effects doctrine is at odds with both the *Reed* majority's "on its face" rule and the concerns about limiting disfavored messages underlying that rule. On that ground it seems a likely candidate to be revisited in the near future. But the likelihood that the Supreme Court would overrule the secondary effects doctrine is diminished based on the Court's decision in *City of Los Angeles v. Alameda Books, Inc*.[161]

Adult entertainment regulations are content-based "on their face": such regulations apply "to particular speech because of the topic discussed or the idea or message expressed" and "draws distinctions

157. *See generally* Alan C. Weinstein & Richard D. McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L.J. 565 (2011).

158. *See generally* Christopher Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002).

159. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (*Alameda Books*).

160. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (ruling that a Washington, D.C. ordinance barring messages critical of foreign governments within 500 feet of an embassy could not be justified under the secondary effects doctrine because "[t]he emotive impact of speech on its audience is not a 'secondary effect.' "). *But see* Def. Distributed v. U.S. Dept. of State, 2015 WL 4658921, at *8 (W.D. Tex. 2015) (analogizing to secondary effects doctrine in upholding a content-based restriction in federal regulations banning the export of certain firearms).

161. *See Alameda Books*, 535 U.S. at 425.

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based on the message a speaker conveys."[162] Further, the rationale for the secondary effects doctrine's treating the distinction between "adult" and "non-adult" expression as content-neutral—that the distinction is *justified* without reference to the content of the regulated speech—was explicitly rejected by the majority opinion in *Reed*. *Reed* clearly states that such an approach:

> [S]kips 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."[163]

Moreover, the secondary effects doctrine contradicts the *Reed* majority's rationale underlying the "on its face" rule. Explaining why the majority rejected the claim "that a government's purpose is relevant even when a law is content-based on its face," Justice Thomas wrote:

> 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 . . . . "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."[164]

Despite the secondary effects doctrine's doctrinal vulnerability after *Reed*, the Court's most recent decision on adult entertainment regulation suggests the Justices may not be eager to revisit the issue. Moreover, the Court's doctrinal opposition to overruling prior decisions by implication seems to weigh in favor of continued life for the secondary effects doctrine.[165] The Court last considered the appropriate standard of review for a challenge to an adult entertainment regulation in *Alameda Books*.[166] Justices Thomas and Scalia joined Justice O'Connor's plurality opinion criticizing

162. *Reed*, 135 S. Ct. at 2227.
163. *Id.* at 2228 (citations omitted).
164. *Id.* at 2228-29 (citations omitted).
165. *See* discussion *supra* notes 140-41.
166. *Alameda Books*, 535 U.S. at 425. The Court did subsequently consider a challenge to an adult entertainment business licensing scheme in City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004), but that decision dealt solely with the issue of the procedures required to provide the "prompt judicial review" of licensing decisions that had been called for in an earlier ruling, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990). In *City of Littleton*, seven Justices agreed that in the context of adult business licensing, the "prompt judicial review" language in FW/PBS required a prompt judicial decision, not just an assurance of prompt access to the courts. *City of Littleton*, 541 U.S. at 774. *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION, 548-56 (2014 ed.)

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the Ninth Circuit for imposing too high an evidentiary bar for cities seeking merely to address the secondary effects of adult businesses,[167] but Justice Scalia wrote a concurring opinion reiterating his long-standing claim that businesses engaged in "pandering sex" are not protected under the First Amendment and that communities may not merely regulate them with impunity, but may suppress them entirely.[168] Given that view, while Justice Thomas's opinion in *Reed* might portend a vote to overturn the secondary effects doctrine and subject cities to strict scrutiny when they regulate adult businesses, it seems unlikely that Justice Scalia would do so.

Of the remaining Justices in the *Reed* majority, only Justice Kennedy was on the *Alameda Books* Court. He authored a concurring opinion that criticized the plurality's approach because it skipped a critical inquiry: "how speech will fare under the city's ordinance."[169] That criticism suggests that he might also vote to overturn the secondary effects doctrine, but, as we note below, perhaps not.

Justices Ginsburg and Breyer were also on the *Alameda Books* Court and joined Justice Souter's dissent that expressed concern about the significant risk that courts would uphold adult entertainment business ordinances that effectively regulate speech based on government's distaste for the viewpoint being expressed.[170] While this concern suggests that Justices Ginsburg and Breyer might vote to overturn the secondary effects doctrine, both joined Justice Kagan's opinion concurring in the judgment in *Reed*, which specifically approved of the doctrine.[171] Arguably, that suggests they would not vote to overturn the secondary effects doctrine.

167. *See Alameda Books*, 535 U.S. at 436-38.

168. *Alameda Books*, 535 U.S. at 443-44 (Scalia, J., concurring) (citing City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring) and *FW/PBS, Inc.*, 493 U.S. at 256–61 (Scalia, J., dissenting in part and concurring in part)). The holding in *FW/PBS, Inc.* was subsequently modified by *City of Littleton*, 541 U.S. at 774.

169. *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring). In Justice Kennedy's view, shared by Justice Souter's dissenting opinion, a "city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. In short, "[t]he rationale of the ordinance must be that it will suppress secondary effects-and not by suppressing speech." *Id.* at 449–50.

170. *Id.* at 457 (Souter, J., dissenting). Justice Souter's dissent stated:

> Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove. Id.

171. *See Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)) ("[A]pplying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because

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

F. *What is Speaker-based Regulation and Where Does* Reed *Leave It?*

In making its finding that the Gilbert sign code was content neutral, the Ninth Circuit's opinion in relied in part on the notion that the Gilbert sign code did not impermissibly regulate on the basis of content, but instead validly distinguished between speakers.[172] That court's reliance on the constitutionality of speaker-based regulation was not the first time the Ninth Circuit had invoked the concept of speaker-based regulation to uphold arguably facially content-based sign regulations.[173] In *Reed*, the Ninth Circuit found that the temporary event sign regulations were based in part on the party displaying the sign: "Qualifying Event Sign" was defined in a manner that permitted only certain nonprofit organizations and other entities to display such signs.[174] In the Ninth Circuit's view, such a regulation does not indicate any preference for a particular type of content.

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

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

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

174. *See Reed*, 707 F.3d at 1062.

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The concept of, and legal doctrine associated with, speaker based regulation is murky, and the Supreme Court does disappointingly little to provide clarification in this regard. The Supreme Court majority in *Reed* disagreed both with the Ninth Circuit's finding that Gilbert's code provision was even speaker based at all, and with the lower court's determination that speaker based laws are automatically constitutionally permissible. In rejecting the Ninth Circuit's statements on speaker based regulation, Justice Thomas wrote, "the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral," and went on to say that the Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.' "[175] Justice Thomas used two examples to explain his point: a law limiting the content of newspapers alone "could not evade strict scrutiny simply because it could be characterized as speaker based" and, similarly, a law regulating the political speech of corporations could not be made content neutral by singling out corporations.[176]

It is not clear from the majority opinion, however, whether the Court's intends that *all* speaker based regulations be subject to strict scrutiny. The Court's statement that a law should be subjected to strict scrutiny when a speaker preference reflects a content preference suggests that an intermediate step might be required to determine whether a speaker based regulation has an improper legislative purpose or motivation. Justice Thomas's statement could simply require an application of strict scrutiny to speaker based regulations, but the better approach would be to shift the burden to government to demonstrate that its speaker characterization is not based on a speaker preference, an inquiry akin to what happens under the secondary effects analysis. Only when government fails to meet that burden would strict scrutiny apply.

The Supreme Court's prior decisions referencing speaker-based regulation provide little meaningful assistance in interpreting *Reed*. *Turner Broadcasting*, which contains the most significant discussion of speaker based regulation, unanimously upheld a 1992 law requiring cable television operators to carry local broadcast stations.[177] The appellants in that case suggested that the law in question was unconstitutional in part because it favored one set of speakers over another,

175. *Reed*, 135 S. Ct. at 2230 (quoting *Turner Broad. Sys.*, 512 U.S. at 658).
176. *Reed*, 135 S. Ct. at 2230.
177. *Turner Broad. Sys.*, 512 U.S. at 634.

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i.e., broadcast programmers over cable programmers.[178] Justice Kennedy, writing for the majority, rejected the notion that all speaker based regulations must be subject to strict scrutiny,[179] and stated instead that speaker based laws should be strictly scrutinized only when such laws "reflect the Government's preference for the substance of what the favored speakers have to say."[180] As with Justice Thomas's *Reed* opinion, Justice Kennedy's *Turner Broadcasting* opinion contains no guidance as to how a court should determine that a speaker based law is reflective of such an impermissible content preference.

Curiously, Justice O'Connor's concurrence in *Turner Broadcasting*, which was joined by Justices Thomas, Scalia and Ginsburg, might provide more insight into the thinking of some of the current Court with respect to speaker based regulation. Justice O'Connor, while stating expressly that some speaker based laws "need not be subject to strict scrutiny," questioned the *Turner Broadcasting* majority's view that the speaker-based law in question did not reflect a content preference.[181] Justice O'Connor found that Congress's justification for the broadcast programmer preference was not neutrally justified, because it referenced a desire for programming diversity, which Justice O'Connor believed implicated content.[182]

More recently, a majority of the current Court, in *Citizens United v. Federal Election Commission*, overturned campaign finance laws limiting the political speech of corporations—a well-defined class of speaker—without making a single reference to the notion of speaker based regulation.[183] And *Sorrell*—discussed above with respect to the commercial speech doctrine—makes several disapproving references to speaker based regulation, going to great lengths to describe the doomed law in question as "content- and speaker-based," but fails to engage in any discussion regarding the speaker based nature of the law.[184] Indeed, Justice Breyer's *Sorrell* dissent noted that the Court had not previously imposed strict scrutiny on speaker-based laws and the regularity with which regulations of commercial speech are speaker based.[185]

178. *Id.* at 657.
179. *Id.* ("To the extent appellants' argument rests on the view that all regulations distinguishing between speakers warrant strict scrutiny . . . it is mistaken.").
180. *Id.* at 658.
181. *Id.* at 676 (O'Connor, J., concurring).
182. *Id.* at 678.
183. *See Citizens United*, 558 U.S. 310.
184. *See Sorrell*, 131 S. Ct. at 2663, 2666, 2667.
185. *See id.* at 2677-78 (Breyer, J., dissenting).

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The confusion regarding the constitutionality and analysis of speaker-based laws exhibited by the Supreme Court has unfortunately extended to lower courts as well. Some of the federal courts of appeals have relied on *Sorrell* to require that *any* speaker-based law be subject to strict scrutiny.[186] And yet, just ten days after the Supreme Court decided *Reed*, the Eleventh Circuit, in reviewing a Florida law restricting medical professionals from inquiring about patients' firearm ownership and use, relied upon Supreme Court precedent upholding regulations of speech by professionals and characterized such permissible regulations as speaker-based laws.[187]

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

Local jurisdictions may be unable to avoid some forms of speaker based sign regulation. For example, most local sign codes distinguish between signs based upon the land use(s) occurring where the sign is located: sign size, height, and type allowances typically vary according to the zoning district where the sign is located. It is arguable that regulation of speech on the basis of land use is a form of speaker based regulation if, say, the owners of manufacturing businesses are allowed more sign area than neighborhood churches. Neither of the authors of this article believe that this type of regulation, whether correctly considered speaker-based or not, is impermissible after *Reed*,[188] yet further drilling-down of sign regulations according to specific land uses may implicate the type of speaker based regulation that the Supreme Court and lower courts dislike. For example, a sign code distinguishing

186. *See* 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1054–55 (8th Cir. 2014); U.S. v. Caronia, 703 F.3d 149, 165 (2d Cir. 2012) (finding law speaker-based and subject to heightened scrutiny).

187. *See* Wollschlager v. Governor of Fla., ___ F.3d ___, 2015 WL 4530452, at *24 (11th Cir. 2015).

188. *See Reed*, 135 S. Ct. at 2233 (Alito, J., concurring) (approving of the distinction between "placement of signs on commercial and residential property.").

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

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

G. *Application of Strict Scrutiny*

After *Reed*, if a challenged provision in a sign regulation "on its face" considers the message on a sign to determine how it will be regulated, the regulation is content-based and subject to strict scrutiny.[189] The *Reed* majority emphasized that if a sign regulation is content-based "on its face" it does not matter that government did not intend to restrict speech or to favor some category of speech for benign reasons: "In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral."[190] Further, a sign regulation that is facially content-neutral, if justified by, or that has a purpose related to, the message on a sign, or that was adopted "because of disagreement with the message [the speech] conveys," is also a content-based regulation.[191] Whether content-based "on its face" or content-neutral but justified in relation to content, Justice Thomas specified that the regulation is subject to strict judicial scrutiny: it will be presumed to be unconstitutional and will be invalidated unless the government can prove that the regulation is narrowly-tailored to serve a compelling governmental interest.[192]

1. WHAT ARE COMPELLING INTERESTS?

Court rulings prior to *Reed* found that aesthetics and traffic safety, the governmental interests most commonly cited to support sign regulations,

189. *See Reed*, 135 S. Ct. at 2227.
190. *Id.* at 2228.
191. *Id.* at 2227 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
192. *See id.* at 2227.

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are not compelling interests. For example, the Eighth[193] and Eleventh[194] Circuit recently reaffirmed that traffic safety and aesthetics are *not* compelling interests, and two federal district court decisions found that while traffic safety and aesthetics are substantial governmental interests, they are not compelling enough to justify content-based restrictions on fully-protected noncommercial speech.[195] But the *Reed* majority opinion calls these rulings into question, at least as regards to traffic safety, stating that a sign ordinance that was narrowly tailored to allow certain signs that "may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety" well might survive strict scrutiny.[196]

An Eleventh Circuit decision supports the notion that traffic safety could be found to be a compelling governmental interest. In *Solantic, LLC v. City of Neptune Beach*,[197] although the court rejected the city's claim that traffic safety was a compelling governmental interest, it noted: "We do not foreclose the possibility that traffic safety may in some circumstances constitute a compelling government interest, but [the city] has not even begun to demonstrate that it rises to that level in this case."[198] *Solantic* thus stands for the proposition that, with adequate factual support such as traffic impact studies and expert witness testimony, traffic safety could be found to be a compelling governmental interest.[199]

Reed, of course, does not alter the lesser standard of review that courts apply in challenges to sign code provisions that are determined to be content-neutral. For example, a content neutral ban on all signs posted on public property will still be subject only to some form of

193. *Neighborhood Enters., Inc. II*, 644 F.3d at 738 (ruling that "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.").

194. *Solantic*, 410 F.3d at 1267 (concluding that a city's "asserted interests in aesthetics and traffic safety" are not "compelling.").

195. *See* Bowden v. Town of Cary, 754 F. Supp. 2d 794 (E.D. N.C. 2010), *rev'd and remanded on other grounds*, 706 F.3d 294 (4th Cir. 2013); King Enters., Inc. v. Thomas Twp., 215 F. Supp. 2d 891 (E.D. Mich. 2002). *But see* City of Sunrise v. D.C.A. Homes, Inc., 421 So. 2d 1084 (Fla. Dist. Ct. App. 1982) (ruling that aesthetics, in and of itself, was a "compelling governmental interest" for purposes of determining legality of billboard ordinance).

196. *Reed*, 135 S. Ct. at 2232.

197. *Solantic*, 410 F.3d 1250.

198. *Id.* at 1268.

199. *Id. But see, e.g.*, Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D. N.Y. 2005) (rejecting expert testimony on traffic safety as "infected with industry bias . . . .").

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intermediate scrutiny.[200] But intermediate scrutiny still means that a sign regulation loses its presumption of constitutionality, requiring the government to demonstrate that a regulation serves a substantial governmental purpose unrelated to the suppression of speech, is narrowly tailored to achieve that purpose, and leaves ample alternative avenues of communication.[201]

Even before *Reed*, numerous sign codes could not meet that lesser burden. For example: a federal court overturned an ordinance that limited the number of portable signs and the maximum time periods they could be used because the city presented no evidence at trial to justify the restrictions;[202] the Ohio Supreme Court struck down a regulation excepting signs on parking lots from a general on-site requirement because government offered no explanation for the exception;[203] and a New Jersey appellate court struck down a restriction on neon lighting when the local government could not demonstrate how the ban advanced its purported aesthetic goals.[204]

The extent of the burden these cases impose upon government is not entirely clear, but it has sometimes been onerous. For example, one federal court refused to consider aesthetics as a justification for regulating portable signs because the city had not included the protection of aesthetics in its recital of purposes.[205] Whether that decision is doctrinally sound is debatable, but it cautions local governments to include in a sign code a purpose statement setting forth the interests underlying the code, as well as offering their justifications in court.

2. WHAT IS NARROW TAILORING?

Although Justice Thomas used the term "narrowly-tailored" in describing the strict scrutiny test,[206] that term can be confusing because

200. *See, e.g.*, Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984).

201. *See, e.g.*, *id.* at 805.

202. *See* Rhodes v. Gwinnett Cnty., 557 F. Supp. 30, 32–33 (N.D. Ga. 1982).

203. *See* Norton Outdoor Adver., Inc. v. Vill. of Arlington Heights, 433 N.E.2d 198, 201 (Ohio 1982).

204. *See* State v. Calabria, Gillette Liquors, 693 A.2d 949, 955 (N.J. Super. Ct. Law Div. 1997).

205. *See* Dills v. Marietta, 674 F.2d 1377 (11th Cir. 1982)*; see also* Nat'l Adver. Co. v. Town of Babylon, 703 F. Supp. 228, 235 (E.D. N.Y. 1989) (holding unconstitutional an ordinance that contained no statement of purposes, and the government offered no evidence at hearing or by way of affidavit about purposes, stating "[m]ere assertions in a memorandum of law, otherwise unsubstantiated in the record, are . . . insufficient."), *aff'd in part, rev'd in part*, 900 F.2d 551 (2d Cir. 1990), *aff'd*, 970 F.2d 895 (2d Cir. 1992); Bell v. Stafford Twp., 541 A.2d 692, 700 (1988).

206. *Reed*, 135 S. Ct. at 2226 ("[N]arrowly tailored to serve compelling state interests.").

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it is also used in describing the standard for intermediate scrutiny.[207] In *Ward v. Rock Against Racism*,[208] the Supreme Court explained how the narrow tailoring requirement differs between the two standards:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[209]

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

But what must government show to demonstrate that a challenged sign regulation is the "least restrictive means" of achieving its governmental interest? Obviously, it requires that government demonstrate that no alternative regulation will achieve the regulatory objective at issue while imposing a lesser burden on speech.[210] In practice, this means that a plaintiff must make a prima facie showing that a hypothetical alternative regulation is both less restrictive and equally effective as compared with the challenged regulation. The burden then shifts to the government to refute the plaintiff's claim.[211]

3. HOW STRICT IS STRICT SCRUTINY GOING TO BE?

Reed dramatically expands the regulatory scenarios in which strict scrutiny now applies. Provisions that the majority of federal circuit courts had previously considered to be content-neutral—such as regulation of "categorical" signs—are now subject to strict scrutiny.[212] In Justice Kagan's words, "Countless cities and towns across America have adopted ordinances regulating the posting of signs, while

207. *Ward*, 491 U.S. at 796 ("[N]arrowly tailored to serve a significant governmental interest.").

208. *Ward*, 491 U.S. 781 (1989).

209. *Id.* at 798-99.

210. *See generally* Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003).

211. While this approach has been criticized because it allows the judiciary to second-guess a legislative body without being subject to the realities of the democratic process, *see, e.g.*, Harold L. Quadres, *Content-Neutral Public Forum Regulations*, 37 HASTINGS L.J. 439, 473 (1986), such criticism is misplaced because it elevates legitimate "political" concerns over individual rights guaranteed by the First Amendment.

212. *See, e.g.*, Cahaly v. Larosa, ___ F.3d ___, 2015 WL 4646922, at *4 (4th Cir. 2015) (acknowledging that prior circuit precedent regarding facially content based regulation is overruled by *Reed*).

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exempting certain categories of signs based on their subject matter."[213] Because, in Justice Kagan's view, most of these provisions are entirely reasonable, an unintended consequence of *Reed*'s expansion of strict scrutiny may be its dilution: "The consequence—*unless courts water down strict scrutiny to something unrecognizable*—is that our 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."[214]

Justice Breyer went further, observing that many government activities involve the regulation of speech, and that such regulations "almost always require content discrimination."[215] He argued, "to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[216] Echoing Justice Kagan's concern about the potential dilution of strict scrutiny, Breyer wrote, "I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force."[217]

While these are legitimate concerns, Justice Kagan's sense of alarm is likely overstated as regards sign regulation. We think there is a good likelihood that courts will refrain from any significant "dilution" of strict scrutiny as applied to sign regulations, particularly as regards the "least restrictive means" prong. Rather, we think that courts will become more open to finding that traffic safety and pedestrian safety concerns, when supported by technical/scientific studies and competent expert reports, are compelling government interests.[218] With that said, however, we do not believe it likely that courts will find aesthetic interests compelling, as there is a fair amount of circuit

213. *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring).
214. *Id.* at 2237 (emphasis added).
215. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).
216. *Id.*
217. *Id.* at 2235.
218. This prediction is mitigated by the fact that lower courts are frequently loath to find that the requirements of strict scrutiny have been satisfied, however, a 2006 study showed that 22% of cases applying strict scrutiny in the free speech context upheld the government regulation in question. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006).

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precedent rejecting the notion the aesthetics should be deemed a compelling interest.[219] In contrast, because Justice Breyer's concern extends well beyond sign regulation, it may well sound an appropriate note of caution.

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

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

In a risk management approach to sign regulation, the local government's adopted regulations should reflect a balance between the community's desire to achieve certain regulatory objectives and the community's tolerance for legal risk.[220] Regardless of some of the uncertainties that we have presented in this article, *Reed*'s outcome increases the level of legal risk associated with many aspects of sign regulation. In keeping with our recommendations, communities are advised to review sign regulations for potential areas of content discrimination and to take precautions against potential sign litigation, but the authors also advise communities to consider (or perhaps reconsider) the level of legal risk

219. *See, e.g.*, *Solantic*, 410 F.3d at 1267; *Whitton*, 54 F.3d at 1409; Arlington Cnty. Repub. Comm. v. Arlington Cnty., 983 F.2d 587, 594 (4th Cir. 1993).

220. *See* CONNOLLY & WYCKOFF, *infra* note 230, at 1-3 to 1-4.

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that the community is willing to tolerate in order to preserve the aesthetic character of the community and to further the safety interests of community members. In some areas of sign regulation and for some local jurisdictions, preservation of aesthetic character may run counter to minimizing legal risk, and it will be up to planners, lawyers, political leaders, and community members to determine the appropriate balance between the community's desired planning outcomes and the community's risk tolerance.

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

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

A. *Review Local Sign Codes* Now *for Areas of Content Bias*

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

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

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

1. REVIEW EXCEPTIONS TO PERMITTING REQUIREMENTS

Exceptions to permitting requirements are common features of sign codes, but these exceptions often raise constitutional problems. The Gilbert sign code at issue in *Reed* mirrored many codes in place throughout the nation; the code had a general requirement that all signs obtain a permit, with several categories of excepted signs.[221] Exceptions from permitting can be problematic from both a content neutrality and narrow tailoring perspective. On the content neutrality side, local governments should closely review how the excepted signs are defined. For example, are there exceptions to permitting requirements for political signs, election signs, campaign signs, religious signs, real estate signs, construction signs, address signs, governmental flags, or any other types of signs that might be defined by the message(s) displayed on the signs?

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

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

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exceptions undermine the regulatory purposes of the sign code will assist local governments in mitigating liability going forward.

2. REDUCE OR ELIMINATE EXCEPTIONS AND SIGN CATEGORIES

Section III.A.1 instructs lawyers and planners to review exceptions to permitting requirements, thus it follows that the number of permitting exceptions should be reduced wherever possible, while maintaining those permitted exceptions—and their definitions—that are necessary to reduce litigation risk or achieve stated goals of the sign code. The same holds true for differentially-treated categories of signs. The Gilbert sign code in *Reed* contained 23 categorical exceptions to the town's basic permitting requirement. While neither of the authors was present for the enactment of these 23 exceptions, we can assume without any comprehensive investigation that at least some of these exceptions—and the differential treatment between the various categories of exceptions—were not necessary to achieve the code's stated goals of traffic safety and community aesthetics. It is the authors' observation from our combined experience in sign regulation that excessive "slicing and dicing" of sign categories frequently leads to more litigation and liability for local governments. Thus, local governments are encouraged to exercise restraint in creating permitting exceptions and avoid multiple categories of permitted exceptions.

The foregoing is not to say, however, that local governments should avoid ***all*** exceptions to permitting and require permits for all signs. Permitting requirements carry additional constitutional obligations for local governments, most importantly the obligation to avoid unconstitutional prior restraints on speech. For a permitting requirement to avoid such concerns, it should contain adequate procedural safeguards. Such a requirement should provide strict yet brief review timeframes to which the local government must adhere and must not vest unbridled discretion in local government officials, *i.e.*, the code should contain clearly-articulated approval criteria for signs subject to a permit.[222] If a local government opts to require that noncommercial signs be permitted prior to installation, the code should avoid content discrimination in the requirements for permitted noncommercial signs. Precisely because of prior restraint concerns and the sensitivity of noncommercial sign owners to prior restraints, many local governments

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

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

3. REMOVE "PROBLEM" DEFINITIONS SUCH AS "POLITICAL SIGNS," "RELIGIOUS SIGNS," "EVENT SIGNS," "REAL ESTATE SIGNS," AND "HOLIDAY LIGHTS"

To avoid post-*Reed* liability associated with certain types of noncommercial speech, local governments should remove or reconsider potentially problematic categories and definitions in sign codes. Some of these problem definitions include "political signs," "religious signs," "event signs," "real estate signs," and "holiday lights." These categories are problematic for two reasons. First, when used in local sign codes, these categories typically rely upon the subject matter or message of the sign itself to define the category, which is presumptively unconstitutional after *Reed*, thus giving rise to potential liability for the government.[223] The second reason is that, in most cases, these categories relate to core First Amendment-protected speech, with concomitant heightened public sensitivity that can easily lead to litigation. Whereas many commercial business owners are disinclined to spend time and money litigating over sign regulations, individuals and not-for-profit organizations, many of whom are represented by *pro bono* legal counsel in First Amendment cases, are inclined to spend time and money to preserve core First Amendment rights.[224] *Reed* is a perfect example: the litigation lasted eight years, and Pastor Reed and Good News were represented by *pro bono* legal counsel.[225]

223. *See Reed*, 135 S. Ct. at 2227.

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

225. Pastor Reed and Good News were represented *pro bono* by the Alliance Defending Freedom. *See* Alliance Defending Freedom, *Vital Signs: One tiny church prompts a Supreme Court debate on whether some speech is more valuable than others*, FAITH & JUSTICE (vol. VIII, issue 2, 2015), *available at* http://www.adflegal.org/detailspages/faith-and-justice-details/vital-signs.

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

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

B. *Avoid Strict Enforcement of Content Based Distinctions and Moratoria*

Local governments are also well-advised to suspend enforcement of code provisions—particularly regulation of temporary signs—that are called into question by *Reed*. Obviously, however, *all* sign code *structural* and *locational* provisions directly related to public safety should continue to be enforced. In a case decided shortly before *Reed*, a federal court upheld an Oregon county's decision to cease enforcement of content based provisions in the county code and to

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instead review applications for temporary sign permits under the remaining, content neutral provisions of the code.[226] This decision provides a superb road map for a jurisdiction considering how it might administer, in the near term, a content based local sign code.

Some local governments may believe that a prudent response to *Reed* is to enact a moratorium on the issuance of sign permits during the pendency of code revisions. That approach is problematic. Moratoria, if challenged, would in most circumstances constitute an unconstitutional prior restraint on expression.[227] Courts strongly disfavor moratoria on issuing *any* sign permits or, worse yet, displaying any new signs. In contrast, a moratorium of short duration—certainly no more than 30 days—that is narrowly tailored to address only the issues raised by *Reed* might possibly be upheld. The authors, however, do not recommend this approach.

C. *Ensure that Sign Codes Contain the Three "Basic" Sign Code Requirements*

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

1. PURPOSE STATEMENT

All sign codes must have a strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.[228] After all, the first prong of both the intermediate scrutiny and strict scrutiny tests focuses on whether

226. *See* Icon Groupe, LLC v. Washington Cnty. 2015 WL 3397170, at *8, *13 (D. Or. 2015).

227. *See, e.g.*, Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992), aff'd sub nom. Holmberg v. City of Ramsey, 12 F.3d 140, 144–45 (8th Cir. 1994) (invalidating, as prior restraint, moratorium passed to allow city time to draft zoning regulations for adult uses); Howard v. City of Jacksonville, 109 F. Supp. 2d 1360, 1365 (M.D. Fla. 2000) (finding a moratorium on the issuance of permits for adult entertainment businesses invalid as an unconstitutional prior restraint on expression).

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

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the government has established a "significant" (intermediate) or "compelling" (strict) regulatory interest.[229]

In *Metromedia*, the Supreme Court upheld both traffic safety and community aesthetics as significant governmental interests sufficient to satisfy the intermediate scrutiny examination. Since that time, it has been standard practice for local governments to articulate traffic safety and aesthetics as regulatory interests supporting sign regulations. Although these are certainly the most-recited regulatory interests in local sign codes, and the ones most routinely acknowledged by courts as meeting the intermediate scrutiny test's requirement of a significant governmental interest, other regulatory interests may suffice as well. Other regulatory interests articulated in local sign codes include blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection.[230]

2. SUBSTITUTION CLAUSE

The second sign code "must-have" is frequently called a "substitution clause." A substitution clause is designed to avoid the problem identified in Section II.C above: unconstitutional, content based preferences for commercial speech over noncommercial speech resulting from bans or limitations on off-premises signage, or generous allowances for certain commercial signs.[231] A very simple statement, the substitution clause expressly allows noncommercial content to replace the message on any permitted or exempt sign.[232] For example, where a sign code allows onsite signs for, say, big-box retailers to be larger than other signs allowed in the community, the message substitution clause allows the big box retailer to replace the onsite sign with a noncommercial message advocating a political position or supporting a particular cause, avoiding the constitutional problem that would otherwise arise if a commercial sign were permitted to the exclusion of a noncommercial sign.[233]

229. *See Reed*, 135 S. Ct. at 2231.

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

231. *See* discussion *infra* section II.C.

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

233. The authors note that many of the problems of the Gilbert sign code at issue in *Reed* would have been resolved with a strong substitution clause, although it is

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3. SEVERABILITY CLAUSE

Severability clauses are added to sign regulations—and statutory provisions more broadly—to uphold the balance of a code in the event a court finds a particular provision invalid.[234] In the context of sign regulations, severability clauses have always been extremely important and are even more so after *Reed*.[235] Facial challenges to sign codes are more common than facial challenges to zoning codes or other local regulations. Severability clauses hedge against the possibility that a court will rule that a sign code is invalid in its entirety rather than merely invalidating one or more provisions. Without a severability clause, an invalidated sign code could result in a regulatory vacuum without sign regulations, forcing local governments to either allow all signs—an aesthetic anarchy from which recovery would be difficult—or to adopt roughshod regulations or moratoria that could cause additional constitutional problems. For these reasons, adopting a severability clause into the sign code is an important protective step for local governments to take.

D. *Apply an Empirical Approach to Justify Sign Regulations, Where Possible*

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

questionable whether such a clause would have achieved the town's pre-*Reed* regulatory objectives.

234. *See, e.g.*, BOERNE, TEX., SIGN ORDINANCE § 18 (2008) ("If any portion of this ordinance or any section or subdivision thereof be declared unconstitutional or in violation of the general laws of the state, such declaration shall not affect the remainder of this ordinance which shall remain in full force and effect."); CITY OF FARMINGTON, MICH. ZONING ORDINANCE § 35-233 ("This chapter and the various components, articles, sections, subsections, sentences and phrases are hereby declared to be severable. If any court of competent jurisdiction shall declare any part of this chapter to be unconstitutional or invalid, such ruling shall not affect any other provision of this chapter not specifically included in said ruling.").

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

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generated by signage, or employing traffic safety analysis can assist in purpose statement preparation.

1. TRAFFIC SAFETY STUDIES

While many local sign codes recite traffic safety as a central purpose for sign regulation, very few substantiate the conclusion that a proliferation of signs—or certain types of signs—has actually caused traffic safety concerns in the community. Indeed, some lawyers and sign industry advocates have questioned whether signs—particularly in a world of smart phones, navigation systems, and other driver distractions—contribute at all to driver distraction and traffic incidents. Local governments are therefore advised to conduct studies, or at least consult studies prepared by national experts, to more carefully determine the safety concerns associated with outdoor signage.[236] Local government fire and safety personnel may also be helpful in documenting, even if only anecdotally, their concerns about traffic safety issues associated with too much or too little signage. For example, employing traffic safety study data or documentation provided by fire and safety personnel to determine the appropriate location, height, size, brightness, etc. of signage along major thoroughfares provides a local government with the type of evidence required to craft sign regulations that respond to stated traffic safety concerns, as well as the evidentiary support necessary to defend a sign code in the event of litigation.

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

2. COMPREHENSIVE PLANNING

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

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

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the community. Moreover, a good comprehensive plan containing robust analysis of sign issues in the community provides good evidentiary support in sign code litigation.

E. *Regulation of Sign Function in a Content Neutral World: Construction Signs, Real Estate Signs, Wayfinding Signs, Political/ideological Signs, etc.*

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

Reed condemns all facial distinctions between messages, including those that "are more subtle, defining regulated speech by its function or purpose."[237] Therefore, as a starting point, local governments must avoid defining functional sign types according to the language or message that appears on the face of the sign. By now, it should be clear that establishing distinct rules for political, religious, or ideological signs is virtually impossible without engaging in content regulation. A local government that maintains regulations specific to these sign types risks treating forms of noncommercial messages differently, which may precipitate a sign code challenge. As much as some local politicians may wish to see regulation of political signs, specialized political sign regulations are simply barred after *Reed.*

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

237. *Reed*, 135 S. Ct. at 2227.

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signs. It is not unconstitutional for a local government to say, for example, that a temporary sign may be placed for a maximum of 90 days at a time. Moreover, sign regulations may continue to place size limits and numerical limits on total amount of signage per property.

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

While the authors believe that the foregoing code provision would likely satisfy *Reed*, we also recognize that it may be difficult to enforce and that it may not accomplish all of the objectives of the local government. Another approach, albeit one with greater risk exposure, is to define signs according the activities occurring where the sign is located. For example, a content neutral definition of a "construction sign" might be "a temporary sign placed within a parcel of property upon which construction activities of any type are being actively performed." The code could contain definitions similar to this one for real estate signs. "Grand opening signs" could be defined as "a temporary sign placed within a parcel of property, not to exceed thirty two (32) square feet, and which may be displayed for a period not to exceed ninety (90) days following the sale, lease, or other conveyance of the parcel or any interest therein." Event-based signs could fall under a regulation that defines an "event sign" as "a sign not to exceed twelve (12) square feet that is placed no more than two (2) weeks prior to and no more than two (2) days following a registered event," and which requires a registration of events with the permitting jurisdiction.

Assuming the code provided a category for general temporary noncommercial signage, these code provisions would be more likely to satisfy *Reed* than a code that articulates definitions based solely on the message of signs. We note, however, that the aforementioned provisions have not been tested in courts, and even *Reed* may call into the question the validity of such regulations under the rationale that these regulations

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exhibit subtle content bias. Even so, to the extent local governments desire to regulate signs according to function, the authors advise against such regulation, as any type of functional or categorical regulation *will* lead to increased risk exposure for the local government.

F. *Permitting and Enforcement*

As with other areas of regulation, in addition to being informed by the local government's tolerance for risk management, sign regulations should also be based upon the local government's appetite for and ability to enforce the regulations. Enforcement of sign regulations is rarely an easy task, and improper enforcement of sign regulations can lead to serious trouble.[238] Local governments should therefore consider the enforcement of sign regulations before and during the drafting process, rather than after adoption of the regulations.

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

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

IV. Conclusion

Reed is likely to precipitate a significant shift in courts' treatment of sign codes under a First Amendment challenge. Local governments thus would be wise to undertake sign code reviews and, if necessary, revise now to ensure that the code does not contain any of the content-

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

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based distinctions that created problems for Gilbert. Where necessary, local governments should consult resources—including planners and lawyers knowledgeable in First Amendment issues—to be certain that sign codes do not carry more risk than the local government desires to bear.

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