

Practical Strategies for Speech Regulation in a Post-*Reed* World

Signs, Panhandling, Artwork, Public Forum (to name a few)

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About the Speakers



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- Chair, Municipal Land Use and Zoning Group; Board-certified in City County and Local Government Law by the Florida Bar; Town Attorney
- Drafter and defender of numerous local government sign ordinances, and of other regulations related to land uses protected by the First Amendment, such as religious uses and adult uses
- Former adjunct professor, and frequent author and lecturer on First Amendment and other land use and zoning matters
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About the Speakers



Brian J. Connolly, Esq.

- Land use, litigation, and real estate groups at Otten Johnson in Denver, Colorado
- Assist public- and private-sector clients on all types of land use matters
- Sign code drafting, consulting on sign and other First Amendment/land use litigation
- Author/editor of several books and articles on First Amendment and land use topics, including *Michigan Sign Guidebook* and forthcoming ABA book *Local Government, Land Use and the First Amendment*, and frequent speaker on these topics
- Editor of Rocky Mountain Sign Law blog on First Amendment and land use issues

Overview

Susan:

- Sign Regulation and *Reed v. Town of Gilbert*

Brian:

- What has been the impact of *Reed* outside of sign law?


DWAIN for Sekretary of Freedom
I Am For Being Against No Freedom!
CHRISTINE JONES GOVERNOR
Doug Ducey
Arizona Teacher's Association
WALKER
House of Representatives LD-25
Justin PIERCE
SECRETARY OF STATE
MARK BRNOVICH
ATTORNEY GENERAL
Jordan RAY
John Huppenthal
FOR SALE
HALLMAN
TREASURER


Trains To Port Jervis
Chestnut Street


planet
CASINO ENTRANCE
planet hollywood


NO
Gulf
WAR


YIELD


ENTER

Sign regulation is about:

- Place making and community building
- Economic development
- Aesthetics
- Safety for all modes of travel
- Property values
- Democracy

Remember, it's not just about legality

First Amendment Principles

Relevant to Sign Regulation:

The World Before *Reed*

First Amendment

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

The First Amendment Approach to Regulation

- Discretion
- Tailoring
- Practicality
- Prior Restraint

Content Neutral

- Some content is not protected – i.e., obscenity, defamation, fighting words
- Commercial speech has been protected since the 1970s, but only by a lesser level of scrutiny than core ideological speech
- If dealing with protected speech:
  - Regulations cannot discriminate based on sign content
  - Content-based *exceptions* to regulations or procedures (variations in treatment of signs), can invalidate the regulation or prohibition itself – if you really needed this regulation, it would need to apply uniformly
  - However, the Supreme Court and U.S. Courts of Appeals have not been consistent in their tests of what "content neutrality" means.

Intermediate Scrutiny

- This means the law need only be
  - Narrowly tailored to serve a *significant* content-neutral government interest that would be achieved less effectively without the regulation, and
  - Leave open ample alternative channels for communication of the information.
- Intermediate scrutiny is seldom fatal.

Strict Scrutiny

- If content based, to survive strict scrutiny, the law must:
  - Be necessary to further a *compelling* government interest; and
  - be narrowly tailored to achieve it
- The government usually loses, if the court gets to this point of the analysis
- Not always fatal: *Burson v. Freeman*, 504 US 191 (1992) (regulation of signs near polling places)

Tests for Content Neutrality

Literal Test

The rigid, "literal" test for content-neutrality: If you "need to read" the sign in order to apply the sign law, the sign law is content-based.

Pragmatic Test

The more pragmatic test for content-neutrality: so long as you can **justify** the sign law without reference to the sign's content, and did not adopt the law **because of disagreement with the message** it conveys, it's content neutral.

Case Law

Literal Test

- *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981) (yet this case clearly endorses on site , off-site distinction as long as non-commercial is not banned)
- *City Council of Los Angeles v Taxpayers for Vincent*, 466 U.S. 789, 816 (1984)
- Eighth Circuit: *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011)
- Eleventh Circuit: *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005)

Pragmatic Test

- *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
- *Hill v. Colorado*, 530 U.S. 703, 707 (2000)
- *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014)
- Third Circuit: *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1008, 178 L. Ed. 2d 828 (2011); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994)
- Fourth Circuit: *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012)
- Sixth Circuit: *H.D.V.-GREEKTOWN, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009)
- Seventh Circuit: *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012)
- Ninth Circuit: *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006); *Desert Outdoor Adver., Inc. v. City of Oakland*, 506 F.3d 798, 803-04 (9th Cir. 2007)

The Law Before *Reed*

- Avoid "content-based regulation," whatever that means
- Limit discretion, either explicitly or implicitly (through undue vagueness)
- "Just right" narrow tailoring of the regulation to substantially advance a significant interest
  - Not substantially **overbroad** (exceeding the scope of the governmental interest justifying regulation)
  - Not substantially **under inclusive** (so narrow or exception-ridden that the regulation fails to further the asserted governmental interest)
- Regulate noncommercial speech no more strictly than commercial speech
- Avoid prior restraints and viewpoint discrimination

Reed v. Town of Gilbert, 2015

The Background

- Plaintiffs are a small "homeless" church, Pastor Reed, and its members
  - The church lacks a building of its own, and meets in other available places such as schools and nursing homes
  - They use temporary directional signs to guide people to their weekly services
- Defendant is a large town, 75 square miles, with 208,000 residents as of 2010 census. It is southeast of Phoenix, AZ

Temporary Sign Regulations:

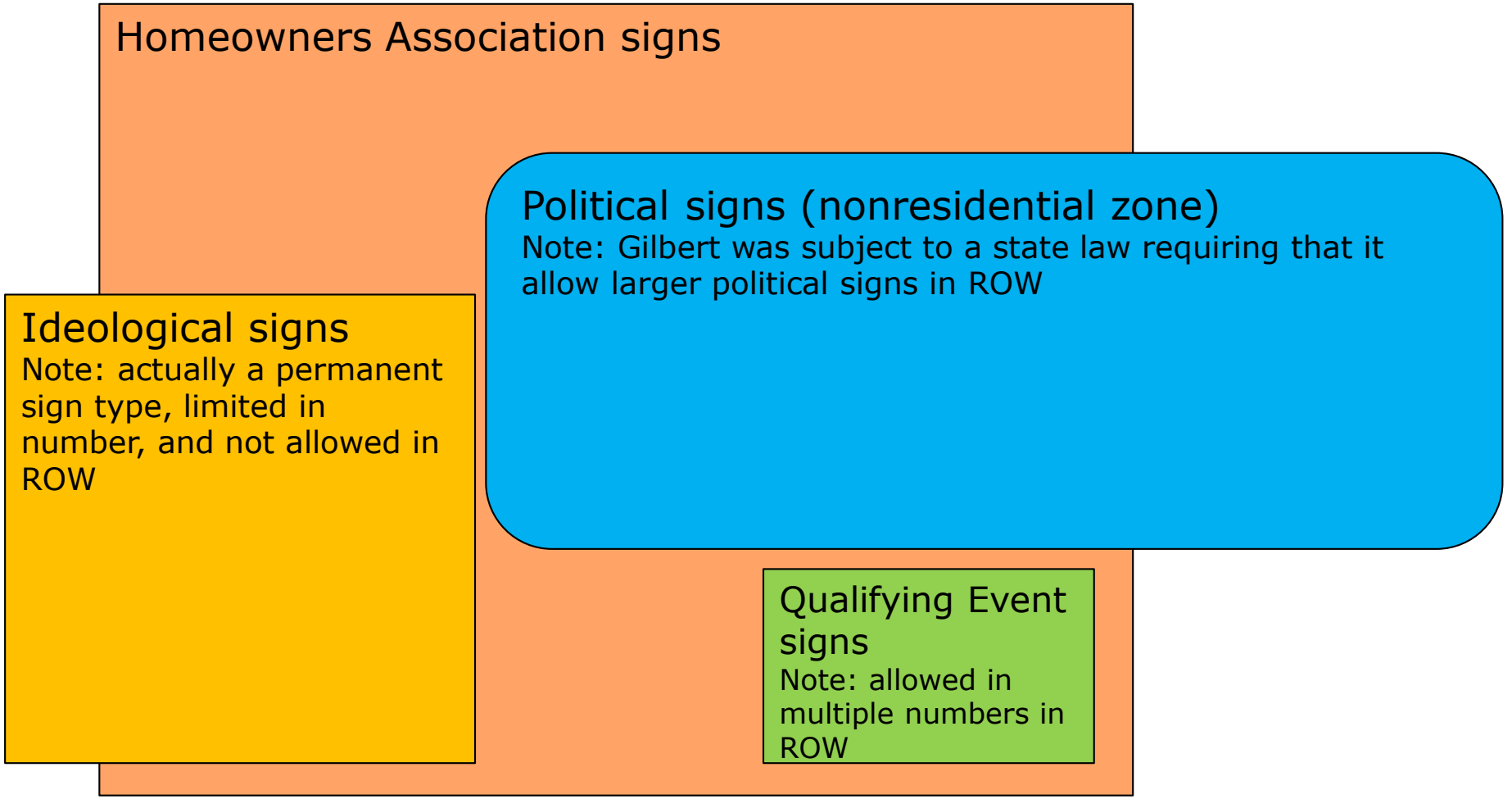


- Nonpolitical, non-ideological, non-commercial event signs: 6 sq. ft.
- Maximum duration: 12 hours before, until 1 hour after the event



- Political temporary signs: 32 sq. ft. (in nonresidential zones)
- Maximum duration: 60 days before and 15 days after elections

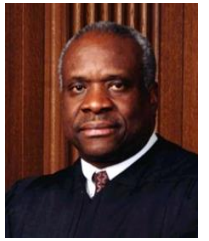
Maximum Sign Sizes



Per *Reed's* Counsel

Outcome

All nine justices agreed that the Ninth Circuit should not have ruled in the Town's favor, but they did not all agree on a rationale for that result.



Four opinions were issued:



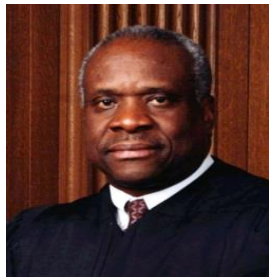
- Majority opinion (Justice Clarence Thomas, joined by **Scalia**, Roberts, and the Alito group)
- One Concurrence (Justice Samuel Alito, joined by Sotomayor and Kennedy: 3 of the 6 justices in the majority)



- Two Concurrences in the judgment only (Justice Stephen Breyer for himself; Justice Elena Kagan, joined by Justices Ginsburg and Breyer)

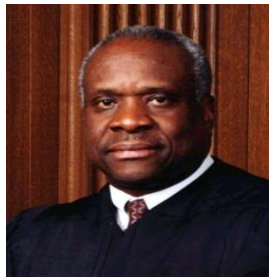


Majority Opinion: Thomas



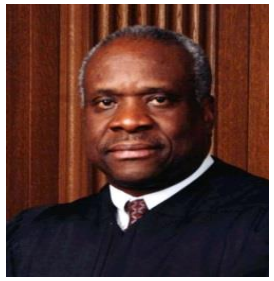
- Content-based regulation is **presumptively unconstitutional,** strict scrutiny applies, and **compelling governmental interest** is required.
- "Government regulation of speech is content based if a law **applies to particular speech because of the topic** discussed **or the idea or message** expressed."
- Even a purely directional message, which merely gives "the time and location of a specific event," is one that "conveys an idea about a specific event." A category for directional signs is therefore content-based.

Majority Opinion: Thomas



- If a sign regulation, on its face, is content-based, its purpose, its justification and its function does not matter. If content neutral, then can consider these factors. Innocent motives do not eliminate the danger of content-based laws being used to censor.
  - Cites to *City of Cincinnati v. Discovery Network, Inc.*, 507 US 410, 429 (1993)
  - *Note: Seems to reject or limit Ward*

Majority Opinion: Thomas



- Even assuming arguendo that aesthetics and traffic safety are compelling governmental interests, the Gilbert regulation was under inclusive and thus not narrowly tailored enough to advance these interests and thereby satisfy strict scrutiny.
  - Strict size and durational limits on temporary directional signs to an event
  - Much less limited rules for political and ideological signs, resulting in significant sign clutter
- Certain signs that may be essential, for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety **might** well survive strict scrutiny.

Alito Concurrence

(Alito, Sotomayor and Kennedy)



- "I join the opinion of the Court but add a few words of further explanation." Safe harbor for municipalities.
- "I will not attempt to provide anything like a comprehensive list, but here are some rules that *would not be* content-based"
- Rules that change based on lighting, change of message, location (public or private property, zoning district, other locational), size are permissible
- The government itself may "put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots."
  - Note: See *Walker v. Sons of Confederate Veterans,* 135 S. Ct. 2239, 576 US __, released same day as *Reed*. Government speech doctrine is alive and well.
  - Alito on 3d Cir. thought directional signs might satisfy strict scrutiny: *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994)
- "Rules restricting the total number of signs per mile of roadway"
  - *Note: Sign rights are per property – cannot deny rights to a small property*

Alito Concurrence

(Alito, Sotomayor and Kennedy)



A key distinction Alito endorses would also be supported by the other concurrences and thus narrows the holding of the case:

- "Rules distinguishing between on-premises and off-premises signs"
  - *Note: requires reading the sign, but regulates by location*

Alito Concurrence

(Alito, Sotomayor and Kennedy)



- "**Properly understood**, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."
- Not listed as permissible distinctions… but remember, it's not supposed to be a comprehensive list:
  - Commercial vs non-commercial
  - Temporary vs permanent
  - Private directional signs and identification signs
  - Regulating by land use instead of zoning district

Kagan Opinion

(Kagan, Breyer and Ginsburg)



- *On Justice Alito*: "Even in trying (commendably) to limit today's decision, Justice Alito's concurrence highlights its far-reaching effects." It also contradicts Thomas:
  - *Thomas*: Gilbert Code is content based because it singles out signs communicating the time and location of particular event
  - *Alito*: strict scrutiny not required for regulations for sign advertising a "one-time event" which are "akin to rules restricting times within which speech or music is allowed."
- The reasons for First Amendment protection are simply not present in most subject matter exemptions in sign codes – e.g., directional or identification signs.
  - "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" and
  - "to ensure that the government has not regulated speech 'based on hostility—or favoritism— towards the underlying message expressed.'"

Kagan Opinion



(Kagan, Breyer and Ginsburg)

- The majority approach will either lead to a watering down of strict scrutiny review, or lead to the Court acting as a "veritable Supreme Board of Sign Review" invalidating many perfectly reasonable, democratically adopted regulations.
- Dilemma: repeal useful exemptions or open the doors to sign clutter
- The Court has repeatedly upheld such content-based distinctions in cases not overruled—or even cited—by the *Reed* majority.

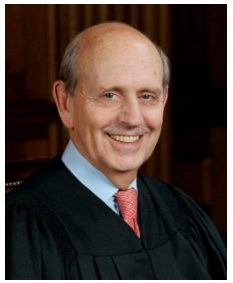
Kagan Opinion



(Kagan, Breyer and Ginsburg)

- As in *Ladue*, all justices agree that Gilbert's regulation fails intermediate scrutiny – and the "laugh test," so the majority's whole discussion of strict scrutiny is unnecessary dicta.
  - Compare Justice Scalia in *McCullen*: "The gratuitous portion of today's opinion is Part III, which concludes—in seven pages of the **purest dicta**—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need **not** meet the strict-scrutiny standard applicable to content based speech regulations. **Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.**"

Breyer Opinion



- Content categories are not enough to solve this legal problem. They are analytical tools that should be used as rules of thumb rather than triggers for invalidation
- All kinds of government activities involve regulation of speech with content discrimination. If that triggers strict scrutiny, the court has written "a recipe for judicial management of ordinary government regulatory activity."
  - Securities regulations
  - Airline safety announcements
  - Pharmaceutical and other consumer health and safety regulations

After *Reed*

Commercial Speech Doctrine

- *Reed* is not a commercial speech case. In prior cases, clear majorities of justices endorsed less than strict scrutiny.
- *Reed* did not overrule any case. Implicit overruling is disfavored:
  - "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997)
- Outdoor advertising industry concedes this point: September 2015 analysis by Lawrence Tribe
- *Peterson v. Village of Downers Grove*, ND Illinois Feb. 4, 2016: Absent an express overruling by the Supreme Court of *Central Hudson*, which clearly applies to commercial speech, *Central Hudson* remains controlling of sign code challenge

After *Reed*

Regulating commercial signs differently from noncommercial signs.

- **Commercial speech** doctrine – *Central Hudson Gas & Elec. Co. v. Pub. Svc. Comm'n of NY*, 447 US 557 (1980) intermediate scrutiny
- ***Metromedia*** requires that commercial not be treated more favorably than noncommercial. Substitution clauses.
  - **Noncommercial** speech should **always be considered as the onsite speech** of the property owner, so that offsite sign bans do not ban noncommercial speech – *Metromedia*; *Southlake Prop. Associates v. City of Morrow, Ga.*, 112 F.3d 1114 (11th Cir. 1997) (noncommercial speech is always onsite because "[a]n idea, unlike a product, may be viewed as located wherever the idea is expressed, i.e., wherever the speaker is located . . . [or] wherever the speaker places it)

Treating real estate signs differently from other commercial signs in in residential zoning districts – *Linmark Assoc., Inc. v. Twp. of Willingboro,* 431 U.S. 85, 96 (1977) requires allowance of real estate signs on residential lots. Why should that case lead to all manner of commercial signs being allowed in single family neighborhoods?

Regulation of political signs more strictly than other temporary signs is never going to work – see, e.g., *Marin v. Town of Southeast*, SD New York 2015

Post-*Reed*: Sample of Cases

Commercial/noncommercial distinction missed

- *Central Radio Company, et al., v. Norfolk, Va*. Decision upholding sign code was vacated and remanded for further consideration in light of *Reed*. **Brian**
  - **Jan 29, 2016**: 4th Cir rev'd in part – sign code with exceptions for noncommercial flags and art was content based and failed strict scrutiny as applied to regulate 375 sq ft banner which contained business' logo, but challenge was mooted by City's timely amendment to sign code. 4th Cir. would not hear challenge to new regulation prior to remand:
  - "(the amended sign code) **no longer exempts** certain flags, emblems, and works of art from regulation, but does **specify that works of art and flags are "examples of items which typically do not satisfy" the code's definition of "sign."**
  - Nominal damages are **not** mooted out

Post-*Reed*: Sample of Cases

On site, offsite distinction remains valid

Commercial speech doctrine valid

- *Contest Promotions LLC v. City & Cnty. of San Francisco,*, 2015 WL 4571564, at *4 (N.D. Cal. 2015) (concluding that "**at least six Justices continue to believe that regulations that distinguish between on-site and offsite signs are not content-based, and therefore do not trigger strict scrutiny**")
- *Citizens for Free Speech, LLC v. Cnty. Of Alameda*, ___ F. Supp. 3d ___, 2015 WL 4365439, at *13 (N.D. Cal. 2015) (***Reed* does not alter the analysis for laws regulating off-site commercial speech**; "Plaintiffs have not identified any distinct temporal or geographic restrictions on different categories of permitted signs in Section 17.52.520 based on those signs' content. Consequently, *Reed* does not apply here")
- *Calif. Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. 2015) ("***Reed* does not concern commercial speech, let alone bans on off-site billboards.** The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it. *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.")

Post-*Reed*: Sample of Cases

Pending Remand

- *Wagner v. Garfield Heights*. Vacated and remanded for further consideration in light of *Reed*.

Sign Code Not Content Based

- *Herson and East Bay Outdoors, Inc., v. City of Richmond* (9th Cir. **Jan. 22, 2016**). Unpublished. Challenge to repealed regulations was moot, but damages claim survived mootness. Damages denied because signs at issue violated content neutral size and height restrictions of prior code.
- *Peterson v. Village of Downers Grove* (N.D. Ill. **Dec. 14, 2015**). Sign Ordinance's prohibition on painted wall signs was valid content-neutral time, place, or manner restriction, and restriction on the size and number of wall signs a business may display was a valid restriction on commercial speech under *Central Hudson*.

Post-*Reed*: Sample of Cases

Onsite/Offsite distinction questioned in only two cases

- *Thomas v. Schroer*, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015) (challenge to the Tennessee highway advertising act calls several of that law's distinctions into question, including the on-site/off-site distinction, survived motion to dismiss after court considered but rejected the Alito concurrence; finding driver safety to be a compelling interest). **March 30, 2016**: Denial of plaintiff's motion for summary judgment. Tenn **Act likely content based and unlikely to survive strict scrutiny, but issues of fact remain regarding government's compelling interests**.
- *State ex rel. Icon Groupe, LLC v. Washington County, Or.*, 272 Or. App. 688 (Or. Ct. App. 2015) (state law case; caselaw under Oregon state constitution **rejects the distinction between on premise and off premise signs**; Applicant sign company was entitled to issuance of its requested permits—i.e., permits for the specific "holiday signs" on a land use mandamus claim, because they met an exemption in the regulations, despite County's concerns that signs would be later converted to advertising signs; Oregon law provided for vested right in law at time of application; stating that "it is **fairly clear that the "safety sign" exemption would render the county's code vulnerable to invalidation** in a facial challenge under the First Amendment" under *Reed*)

Responses to *Reed*

- Steps to Take
- Strategies to Consider
- Questions and Issues to Ponder

Aesthetics & Safety

- Content neutral need not mean more signage
- Content neutral need not mean you have to allow it on public property
- No reason to think properly drafted commercial sign regulation and billboard regulation is affected
- Does the Florida Constitution's guarantee of scenic beauty amount to a compelling governmental interest? Does compliance with the comprehensive plan represent a compelling governmental interest?
- Planning and human factors studies to establish safety and aesthetic interests
- Enhanced risk of litigation, which could lead to court orders invalidating all (or a portion) of a sign code

What Governments Should Do?

- Review your sign code NOW for potential areas of content bias. If fixing your sign code will take a while, coach permit and enforcement staff to *avoid enforcing content-based distinctions*.
- Make sure your sign code has a strong *purpose statement*. Tie the purpose statement and regulatory approach to data, wherever possible. Reference your comprehensive plan, and any other relevant laws supporting governmental purposes (check state constitution). Include references to the caselaw, and an explanation for the regulatory approach in some detail in the preambles or even in the adopted text. Make explicit legislative findings.
- Reduce the number of sign categories.
- Simplify temporary sign regulation
- Remember threshold defenses: standing, ripeness, mootness

What Governments Should Do?

- Fix the older problems.
  - Add a severability clause now if you don't have one.
  - Be sure your code contains a substitution clause that allows noncommercial substitution.
  - Ensure viewpoint neutrality – e.g., flags.
  - Reduce exceptions to permitting and exceptions to prohibitions as much as possible.
  - Meet prior restraint
  - Don't favor commercial speech over noncommercial speech, e.g. location, size, height, etc.
- Evaluate other regulations that may be based on content, e.g., solicitation ordinances
- Figure out how to deal with the open issues

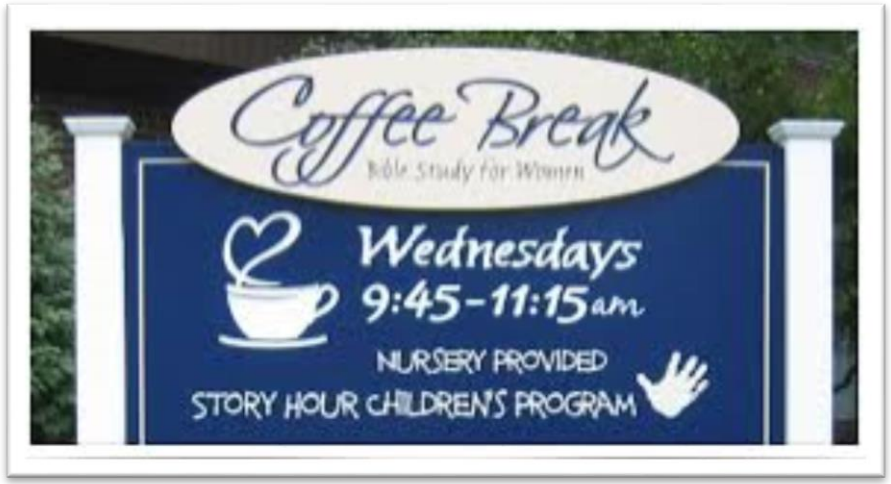
Issues to Ponder:

How to deal with private address signs, identification signs, and directional signs?









Problems: "Sign"

- Scope. How to define "Sign" in a way that is not content based. Typical exclusions in many sign codes:
  - Murals or art: **Brian**
    - No text
    - No more than certain square footage or height of letters as text
    - Logos
    - No commercial content
  - Holiday decorations
  - Governmental signs
  - Traffic Control Devices
  - Merchandise visible through a shop window
  - Flags
- Can you sever the definition of sign? No.
- Can you sever an exception from it?

Problems: Temporary Non-commercial Signs

- Allotments for temporary signs that make sense year round, while allowing for additional noncommercial signage at election time without being content based, and respecting the Supreme Court cases requiring governments to allow certain sign types even on residential lots
  - Non-commercial – *Ladue* requires allowance of protest signs on residential lots

Sample approach: Non-commercial signs

- Every property has a particular amount of square feet of signage that they can use for any temporary signs on their property, year round
  - For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs, and perhaps the spacing of signs from one another
- Additional signage?
  - For particular periods of times (such as before an election), all size and number restrictions on noncommercial temporary signs are suspended?
  - For particular periods of times (such as before an election), an additional allotment of sign area is available?

Problems:

- Allowing extra signage for certain land uses or activities without having to increase the overall allotment of signs year-round. A type of speaker-based regulation? *Reed* says speaker-based regulations are not necessarily content-based. Separate from zoning district regulations, which are clearly permissible

Sample approaches

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new BTR (real estate or grand opening signs)?
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs)?
- Allowing additional sign when special event permit is active for property (special event signs)?
- Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity. Or can you do that if it is a commercial message?

Problems:

- What about the appearance of rights of way and public realm? Is there an enhanced role for spacing between signs to address clutter?

Sample approaches

- Protect the public right-of-way and public property by prohibiting privately placed signs. Under government speech doctrine, you have broad discretion over use of public property.
  - Remove all regulations of traffic control devices from the sign regulations, such as references to them being exempt from permitting or prohibitions. Add findings that traffic control devices serve the interest in safety, and do not hamper the interest in aesthetics. Get a public safety affidavit?
  - No banners over roadways unless the government is a sponsor for the event on the banner
- Allow, but limit proliferation with size, location and spacing criteria
  - Realize you cannot control the content. Could be hate speech. Is it really worth it?

IMLA Model Sign Code

- A "one size fits all" model is not possible, but the draft is worthy of review, educates you on the issues, and stimulates many questions
- In general, realize that decisions regarding sign regulations have a major impact on the appearance of your community and your planners must play a role in developing and tailoring standards that preserve your community identity.
- Realize Oregon is the most restrictive state in the country, so their cases are not representative.
- Government and compelled signs: Scope of regulation is key issue.
- The sign industry is out there offering free advice to you and your planners. Consider the source. Some are valid; others do not accurately reflect *Reed*. Source of graphics, identification of different sign types and technologies, data about legibility and proportionality, and other technical information (although invariably they end up allowing more signage than necessary).



Source: fairchangecs.wordpress.com

Reed v. Town of Gilbert: The Postscript

Panhandling, Public Forum, and Artwork (among others)

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Post-*Reed* Fallout: Signs Plus

- **Panhandling/solicitation laws**
  - Courts have struck down several cities' panhandling laws on grounds that prohibition on certain speech was content based
- **Public forum doctrine**
  - Courts have little tolerance for special regulations restricting political speech
- **Other cases: ballot selfies, tattoos, medical privacy**
- **Doctrinal questions**

Panhandling and Solicitation Laws



Source: ktrs.com

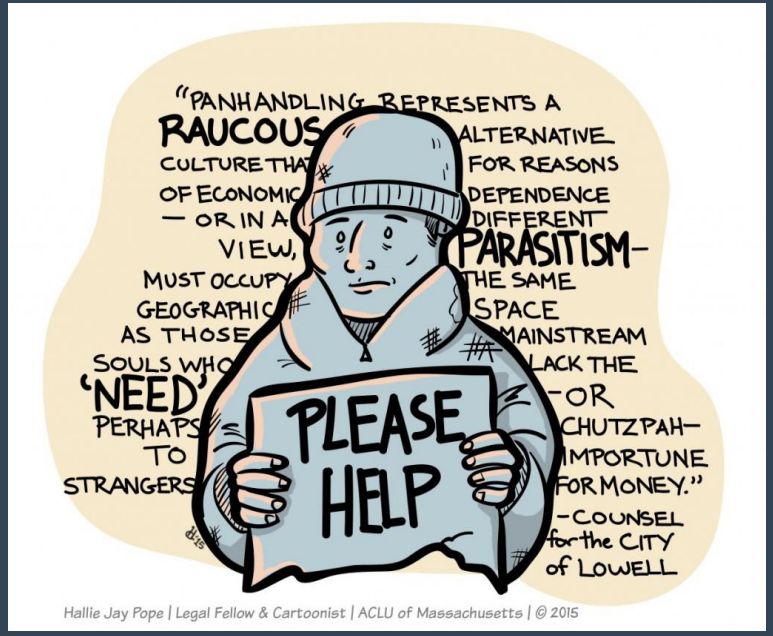
- Typical structure
  - "Vocal appeal for an immediate donation"
  - Targeting the approach "for the purpose of"
  - Aggressiveness
  - Standing in medians, traffic islands, drive lanes
- Inherent tensions
  - Safety and comfort of public, aesthetics, economic development, vibrant public spaces *vs.*
  - Free speech of underprivileged, minority community members

Pre-*Reed* Treatment

- Panhandling bans found content based:
  - **ACLU v. City of Las Vegas**, 466 F.3d 784 (9th Cir.2006) (Solicitation: "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization.")
  - **Clatterbuck v. City of Charlottesville**, 708 F.3d 549 (4th Cir. 2013) ("Solicit means to request an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value. A solicitation may take the form of, without limitation, the spoken, written, or printed word, or by other means of communication (for example: an outstretched hand, an extended cup or hat, etc.).")
  - **Speet v. Schuette**, 726 F.3d 867 (6th Cir.2013) (Michigan statute criminalizing begging)
- Panhandling bans found content neutral:
  - **ISKCON of Potomac, Inc. v. Kennedy**, 61 F.3d 949, 954-55 (D.C.Cir.1995) (National Park Service regulation of displays on the National Mall enforced against Krishna sankirtan)
  - **Thayer v. City of Worcester**, 755 F.3d 60 (1st Cir.2014) (Souter, J.) ("the text of the ordinances does not identify or affect speech except by reference to the behavior, time or location of its delivery, identifying circumstances that raise a risk to safety or that compromise the volition of a person addressed to avoid solicitation")

Panhandling and Solicitation Laws

- **McLaughlin v. City of Lowell**, ___ F. Supp. 3d ___, 2015 WL 6453144 (D. Mass. Oct. 23, 2015) (aggressive panhandling)
- **Thayer v. City of Worcester**, ___ F. Supp. 3d ___, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (SCOTUS granted cert, vacated, remanded)
- **Working America, Inc. v. City of Bloomington**, ___ F. Supp. 3d ___, 2015 WL 67567089 (D. Minn. Nov. 4, 2015) (licensing for solicitation: "Going from place-to-place (1) advertising or selling any product, service, or procuring orders for the sale of merchandise or personal services for future delivery or future performance; or (2) seeking donations of money or property on behalf of any person, organization or cause.")
- **Browne v. City of Grand Junction**, ___ F. Supp. 3d ___ (D. Colo., Sept. 30, 2015)



Source: ACLU of Mass.

Panhandling and Solicitation Laws

Norton v. City of Springfield, No. 15-3276, slip op., 2015 WL 8023461 (C.D. Ill. Dec. 4, 2015)

- New challenge to revised Springfield ordinance
- Old ordinance: "The ordinance defines panhandling, in pertinent part, as '[a]ny solicitation made in person... in which a person requests an immediate donation of money or other gratuity.' But the ordinance explicitly exempts from the definition of panhandling the passive display of a sign that invites donations without making a 'vocal request.'"
- New ordinance: Illegal: "[p]anhandling while at any time before, during, or after the solicitation knowingly approaching within five feet of the solicited person." Panhandling: "'vocal appeal' for 'an immediate donation of money or other gratuity.'"

Panhandling and Solicitation Laws

Norton v. City of Springfield, No. 15-3276, slip op., 2015 WL 8023461 (C.D. Ill. Dec. 4, 2015)

- 7th Circuit: old ordinance was content neutral time, place, manner regulation (768 F.3d 713 (2014))
- Supreme Court decided *Reed*
- 7th Circuit rehearing in 2015: old ordinance was content based on its face (806 F.3d 411 (2015))
- New ordinance passes—still content based!

Public Forum Doctrine

- Addresses treatment of government property for First Amendment purposes
  - i.e. public plazas vs. military bases vs. prisons vs. the White House
- Three (sometimes four) categories:
  - **Traditional public forum**: streets, sidewalks*, parks
  - **Designated public forum**: opened for speech by government fiat
  - **Limited public/nonpublic forum**: not opened for speech
  - **(Nonforum)**: military bases, prisons

Public Forum Doctrine

- Traditional/designated
  - Content neutral regulation
  - Significant governmental interest, narrow tailoring, ample alternative channels for communication
- Limited/nonpublic
  - Viewpoint neutral regulation
  - Reasonable in light of purposes of the forum



Source: patch.com

Public Forum Doctrine

- **Left Field Media LLC v. City of Chicago**, ___ F. Supp. 3d ___ (N.D. Ill. Oct. 5, 2015) (upholding Wrigley Field adjacent sidewalks peddling license requirement with "newspaper exception")
- **His Healing Hands Church v. Lansing Hous. Comm'n**, Case No. 1:15-CV-1059 (W.D. Mich. 2016) (prohibition on religious uses of public housing community room was viewpoint based restriction in a limited public forum)
- **Recycle for Change v. City of Oakland**, No. 15-CV-05093-WHO, slip op., 2016 WL 344751 (N.D. Cal. Jan. 28, 2016) (dispersal and dimensional restrictions on donation boxes were content neutral)

Public Forum Doctrine

- **Cutting v. City of Portland**, 802 F.3d 79 (1st Cir. 2015)
  - "No person shall stand, sit, stay, drive or park on a median strip ... except that pedestrians may use median strips only in the course of crossing from one side of the street to the other."
  - Median strip is traditional public forum; content neutral restriction on location
- *See also* **Watkins v. City of Arlington**, No. 4:14-CV-381-O (N.D. Tex. Aug. 12, 2015)

Artwork

- **Cent. Radio, Inc. v. City of Norfolk**, 811 F.3d 625 (4th Cir. 2016)
  - Exemption for "works of art which in no way identify or specifically relate to a product or service."
  - Challenge to ordinance related to anti-eminent domain mural



Source: ij.org

Secondary Effects Post-*Reed*

- **BBL, Inc. v. City of Angola**, 809 F.3d 317 (7th Cir. 2015)
  - Footnote: "In its recent decision in *Reed v. Town of Gilbert*, the Supreme Court clarified the concept of "content-based" laws, which are presumptively unconstitutional and get strict scrutiny. The Court held that '[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.' We don't think Reed upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection" (citations omitted).

Government Speech Doctrine



- **Vista Graphics, Inc. v. Va. Dep't of Transp.,** ___ F. Supp. 3d ___ (E.D. Va. Mar. 18, 2016)
  - First Amendment challenge by tourism advertiser against state government fees for placement of brochures in public rest areas
  - Excessive fee allegation
  - Court: information kiosks are government speech

Other Concepts

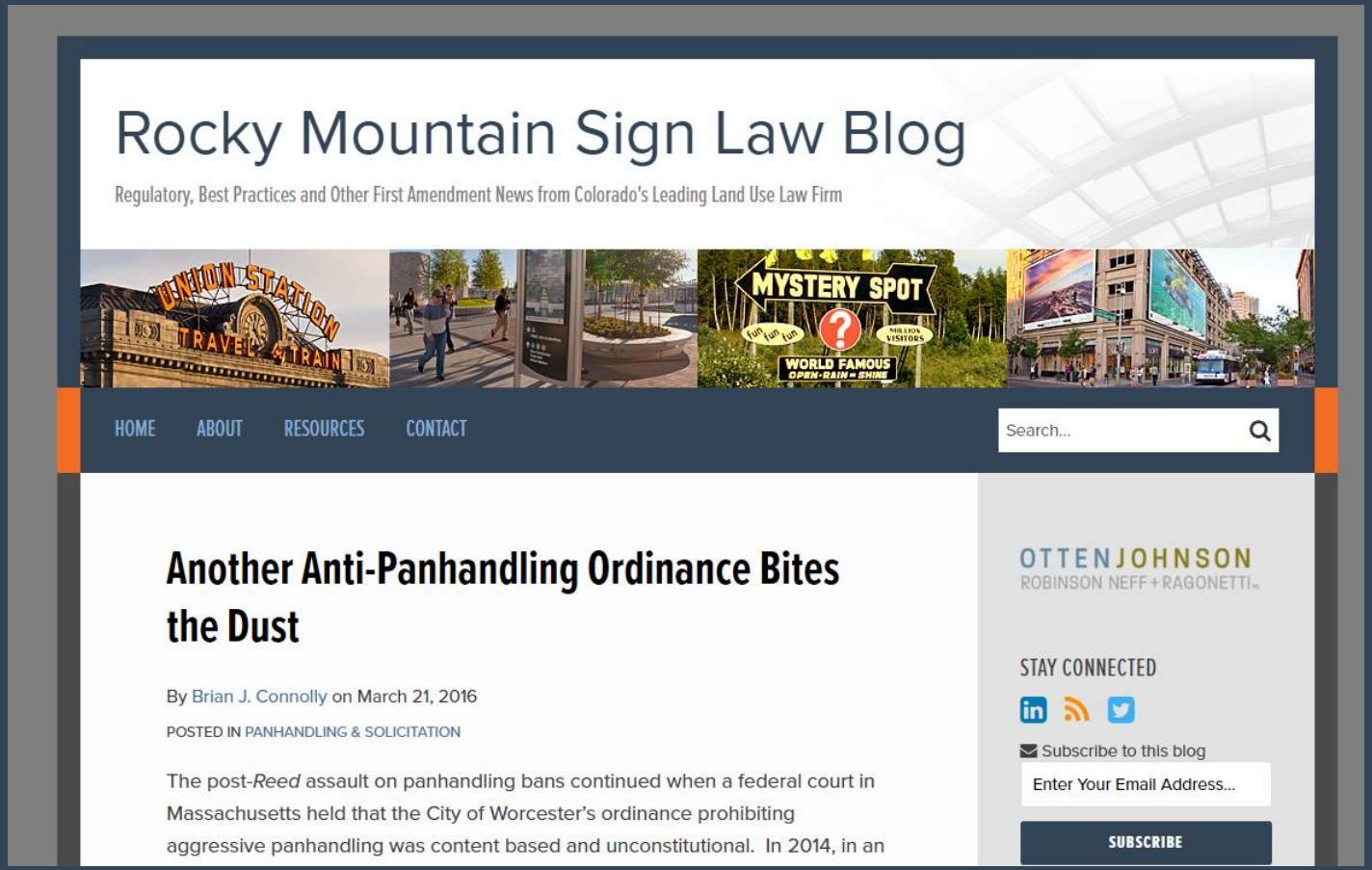
- Transit advertising (forum analysis, restrictions on noncommercial advertising)
  - Supreme Court denied cert again (**American Freedom Defense Initiative v. King County**, 577 U.S. ___, No. 15-584 (Mar. 7, 2016))
- Ballot selfies (**Rideout v. Gardner**, Case No. 14-cv-489-PB (D.N.H. Aug. 11, 2015))
- False statements about politicians (**Comm. v. Lucas**, 472 Mass. 387 (2015)) and robocalls (**Cahaly v. LaRosa**, 796 F.3d 399 (4th Cir. 2015))
- Local advertising regulations, consumer protection measures (**CTIA v. City of Berkeley**, No. C-15-2529 EMC (N.D. Cal. Sept. 21, 2015))
- Speech by licensed professionals (**Wollschlaeger v. Florida**, __ F.3d __ (11th Cir. 2015))
- Entertainment ordinances (**Funtana Vill., Inc. v. City of Panama Beach**, No. 5:15CV282-MW/GRJ, slip op., 2016 WL 375102 (N.D. Fla. Jan. 28, 2016))

And the Same Old Issues…

- Significant governmental interest and narrow tailoring
  - **Buehrle v. City of Key West**, 813 F.3d 973 (11th Cir. 2015) (prohibition on tattoo parlors in historic district was unsupported by evidence of tailoring to significant interest)
  - Verlo v. City and County of Denver, 124 F. Supp. 3d 1083 (D. Colo. 2015) (court policy prohibiting distribution of pamphlets in courthouse plaza was not narrowly tailored)

Resources

- Rocky Mountain Sign Law blog (www.rockymountainsignlaw.com)
- RLUIPA Defense (www.rluipa-defense.com)
- *Local Government, Land Use and the First Amendment*, Brian J. Connolly, ed. (ABA, forthcoming 2016)
- *Street Graphics and the Law*, John Baker and Dan Mandelker, Planners Advisory Service (updated 2015)



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