2015

6/18/15 *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)

HELD: The U.S. Supreme Court unanimously struck down Gilbert's sign code which banned outdoor signs without a permit, but which exempted 23 categories of signs from that requirement. The 23 sign categories were broken down into 3 groups – temporary directional signs, political signs and ideological signs – the restrictions depended solely on the message/content of the sign.

7/9/15 *California Outdoor Equity Partners v. City of Corona*, CV 15-03172 MMM AGRX, 2015 WL 4163346 (C.D. Cal. July 9, 2015)

"*Reed* does not concern commercial speech, let alone ban 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."

HELD: The City's sign ban is therefore not patently unconstitutional.

7/16/15 *Citizens for Free Speech, LLC v. County of Alameda*, 114 F. Supp. 3d 952 (N.D. Cal. 2015)

HELD: *Reed* does not alter the analysis for laws regulating off-site commercial speech.

7/28/15 *Contest Promotions, LLC v. City & County of San Francisco*, 15-CV-00093-SI, 2015 WL 4571564 (N.D. Cal. July 28, 2015)

Contest Promotions argued, in light of *Reed,* that Section 602.3's distinction between primary and non-primary business uses is a content-based regulation of speech subject to strict scrutiny. However, the court emphasized that *Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test. The court further noted that at least six U.S. Supreme Court 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.

HELD:

8/3/15 *Timilsina v. W. Valley City*, 121 F. Supp. 3d 1205 (D. Utah 2015)

Restaurant owner alleged that the city's sign ordinance prohibiting A-frame signs violated the operator's free speech rights. The city argued that the prohibition against A-frames was based on traffic safety and aesthetics. Timilsina asked the court to demand proof in

the form of studies proving that A-frame signs are aesthetically displeasing or an impediment to traffic safety. The court rejected the request and determined that because the case concerned commercial signage, it need not address how the regulation would fare under the *Reed* case holding. The Court held that, **"By narrowly constructing a restriction targeting one category of signage deemed harmful to traffic safety and aesthetic considerations, the City Council abided by *Central Hudson's* restrictions and barred no more speech than necessary to accomplish its objections."**

Question to ask? Does your sign code allow businesses other avenues of advertising? If an A frame is prohibited, can the business use the windows or banners, feather signs, or flags for advertising? Do you have Planning conduct studies regarding how A-frame sign affect safety or aesthetics?[1]

9/30/15 *Marin v. Town of Se.*, 136 F. Supp. 3d 548 (S.D.N.Y. 2015)

Resident sued town challenging constitutionality of certain town sign ordinances. "It is common ground that governments may regulate the physical characteristics of signs…" *See* ***City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).** Ordinances restricting political signs are unconstitutional.

HELD:

Question to ask? Does your sign code favor certain types of temporary commercial signs over noncommercial political signs?

12/14/15 *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910 (N.D. Ill. 2015)

Court refused to interpret *Reed* broadly to include commercial signage distinctions. HELD: "Notwithstanding any broad statements made in *Reed*, the restrictions in the code still only need to survive *Central Hudson's* intermediate scrutiny test." The court further held that aesthetics and traffic safety qualify as substantial government interests.

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[1] ***Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995)** [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case apply strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense." The U.S. Supreme Court has not demanded specific proof in the form of studies and/or reports establishing that a regulation or set of regulations furthers the stated interests. "[W]e do not however, require that "empirical data come … accompanied by a surfeit of background information….

2016

3/10/16 *Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 245 Cal. App. 4th 610, 199 Cal. Rptr. 3d 620 (2016)

Billboard company sued city challenging city ordinance restricting off-site outdoor advertising.

HELD: Court rejected plaintiff's argument that "under *Reed*, the ban is content-based and subject to strict scrutiny." Neither *Reed* nor *Sorrell*[2] supports the notion that sign ordinances may no longer distinguish between commercial and noncommercial speech or between on-site and off-site signs.[3]

5/20/16 *Geft Outdoor LLC v. Consol. City of Indianapolis & County of Marion, Indiana*, 187 F. Supp. 3d 1002 (S.D. Ind. 2016)

Billboard company brought action challenging the constitutionality of sign ordinance. During the litigation, the city amended sign ordinance, the court considered the amended ordinance content neutral and subjected it to intermediate scrutiny. The court stated that applying Reed's strict scrutiny to regulations distinguishing between on-site and off-site commercial signs is "on, at best a shaky footing" because "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."

HELD: The court found that the regulations between on-site and off-site signs directly advanced municipal interests and were narrowly tailored and not more extensive than necessary to serve municipal interests.

06/08/16 *Lamar Central Outdoor, LLC*, 245 Cal. App. 4th 610

City of Los Angeles instituted a ban on off-site signs (i.e. billboards) with digital displays. Lamar sued stating that the ban was subject to strict scrutiny under *Reed* and was unconstitutional. The court of appeals stated that distinctions between commercial and noncommercial and distinctions between on and off site billboards, **do not** offend established First Amendment principles.

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[2] "The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on commercial speech." ***Heller v. Doe by Doe*, 509 U.S. 312, 113 S. Ct. 2637, 2664, 125 L. Ed. 2d 257 (1993).**

[3] The "Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. See ***Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).**

HELD: The court of appeals held that *Reed* is of no help to Lamar because the Supreme Court in *Reed* did not eliminate the distinction between commercial and noncommercial speech. *Reed* did not overrule or disapprove of *Metromedia II*[4].

6/23/16 *Ball v. City of Lincoln, Nebraska*, 197 F. Supp. 3d 1177 (D. Neb. 2016)

Citizen who distributed religious leaflets on a walkway outside of a city owned arena challenged city's policy of reserving exterior plaza area for use by arena tenants only stating that the city violated his First Amendment right to freedom of speech. Citizen argued that the walkway was a public forum. While the court agreed that sidewalks are generally considered traditional public forums, it emphasized that the location and appearance of a walkway are key indicators in determining whether it is a sidewalk for purposes of public form analysis. The court determined that the plaza area should **not** be accorded the same level of constitutional protection as a traditional public forum.

HELD: City's policy is reasonable because it is content neutral, the area is limited and there is a nearby area open for expression.

Question to ask? Do we allow or restrict speech in our traditional public forums such as sidewalks and if so, do we limit the expression based on content of message?

7/1/16 *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192 (9th Cir. 2016)

The Ninth Circuit held that the city's mobile billboard ban regulates the manner – not the content – of affected speech and that the ordinances address only the types of sign-bearing vehicles and discriminates against prohibited billboards on basis of size and mobility and are thus content neutral. The Ninth Circuit emphasized that the *Reed* decision "does not alter our conclusion" because the ordinances do not single out a specific subject matter for different treatment nor is any kind of mobile billboard exempted from regulation based on its message.

HELD: The mobile billboard ban is content neutral, narrowly tailored to serve the governments' significant aesthetic and safety interests, and leave open ample alternative channels of communication.

8/23/16 *Nat'l Ass'n for Advancement of Colored People v. City of Philadelphia*, 834 F.3d 435 (3d Cir. 2016)

NAACP sued the city alleging that its written policy preventing private advertisers from displaying noncommercial content at city airport violated the First Amendment. City initially

[4] U.S. Supreme Court addressed a San Diego ordinance that allowed on-premises advertising but prohibited off-premises advertising on billboards. The Court upheld the regulation as to commercial speech, focusing the analysis on whether the subject regulation directly advances the City's interests in traffic safety and aesthetics. Most courts continue to apply *Metromedia*, notwithstanding *Reed*, where a law regulating sign locations and billboards is challenged.

argued that its intention behind the ban was to maximize revenue and avoid controversy by shielding travelers from noncommercial content may be offensive to some. However, not only did the city did not offer any evidence to establish that the ban will further the goal of revenue making, its only expert contradicted the justifications.

HELD: The city failed to meet the burden of proof establishing that the ban was a reasonable content-based restriction in a **limited public or nonpublic forum**. The court held that the evidence produced by the city failed to meet the "reasonableness" standard and, therefore, the ban violates the First Amendment.

Questions to ask? What is the proper forum analysis? If it is "reasonableness," then you still must prepare your witnesses! Is the sign ban related to revenue making or conflict avoidance? If so, provide record evidence to directly support the propositions. Use testimony and affidavits to provide support for the purported purpose of the sign ban.

09/2/16 *RCP Publications Inc. v. City of Chicago*, 204 F. Supp. 3d 1012 (N.D. Ill. 2016)

RCP was cited for posting commercial advertising material. RCP sued the city and argued that the city's ordinance was an improper content-based restriction and should be struck down under *Reed*. The city moved for summary judgment. The district court denied the city's motion and instructed the city to answer the complaint.

Dicta: Court noted that the Seventh Circuit has not addressed whether *Reed* applies to commercial speech for differential treatment, and in fact as stated in *BBL, Inc.*, that it does not believe the Supreme Court's decision in *Reed* will "upend established doctrine" for evaluation the regulation of businesses or that *Reed* will rewrite the Supreme Court's free speech jurisprudence.

9/15/16 *E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 146 A.3d 623 (2016)

Township ordinance prohibited digital billboards but permitted static billboards along an interstate highway. E&J sought to install a digital billboard in the Township and challenged the ordinance on constitutional grounds. The trial court agreed with E&J. The appellate court reversed stating that the ordinance passed "constitutional muster," and stated that the Townships reasons for the billboard ban –aesthetics and safety – provided "a rational, objective basis" for the ban. During the trial, the Township presented the number of traffic accidents along the subject highway, but the Court noted that the Township did not submit evidence that the accidents were caused by the billboards along the highway. The Court also reasoned that the Township allowed three static billboards along the highway, yet did not state how digital billboards were any less harmful to the aesthetics and safety of the Township. The numbers standing alone does not lead inexorably to the conclusion that the installation of a single digital billboard in the Township will exacerbate the accident rate as the accidents may be caused by weather, road design or road maintenance. The Court noted that the Township did not submit

a safety impact analysis of the installation of the three static billboard signs had on traffic accidents.

HELD: Supreme Court reversed the appellate division noting **the absence of factual support** that lead to the Township's decision-making on its aesthetics and public safety concerns about billboards. The Court emphasized that **"[s]imply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day."**

Question to ask? Does the municipality have evidence to substantiate the billboard digital sign ban when it allows static billboards? Does the municipality have facts, figures, statistics, evidencing that the digital billboard signs cause aesthetic blight and clutter and the statistical analysis evidencing the safety impact to traffic safety? (Not just the accident numbers, but data and research substantiating digital signs cause more accidents than static billboards).

12/08/16 *Auspro Enterprises, LP v. Texas Dep't of Transp.*, 506 S.W.3d 688 (Tex. App. 2016)

Court applied strict scrutiny under *Reed* to invalidate Texas Highway Beautification Act advertising regulations restricting both commercial and noncommercial speech as content-based: "While we have acknowledged that *Reed's* holding seems to affect only restrictions of noncommercial speech, the plain language of the Texas Act defines "outdoor advertising" so broadly that the Act's restrictions on speech apply to commercial and noncommercial speech."[5]

2017

1/13/17 *Wagner v. City of Garfield Heights*, 675 Fed. Appx. 599 (6th Cir. 2017)

Wagner placed a 16 square foot street facing political sign on his lawn. After receiving a warning letter, Wagner filed suit alleging that the ordinance was unconstitutional and challenged the ordinance that limited the size of political signs that residents could place on their lawns. The district court enjoined the city from enforcing the ordinance. The appellate court reversed and remanded the case stating that the ordinance survived the intermediate scrutiny test. However, on remand and after the *Reed* case was decided, *Wagner* argued that strict scrutiny applies – not intermediate scrutiny.

HELD: The court of appeals vacated its prior judgment and applied the strict scrutiny test from *Reed* and affirmed the district court's injunction against the city. Court found that the city limited political signs to six square feet, but permitted other kinds of temporary signs to be twice the size. Court found that the city failed to offer rationale as to why political signs "mar the city's aesthetic appeal in such a way as to merit an arbitrarily smaller size restriction."

[5] The Court held that under *Reed* the THBA's outdoor-advertising regulations are, as written, unconstitutional "content-based" regulations (as defined under *Reed*) of noncommercial speech because they do not pass strict scrutiny analysis. The Legislature may see fit to amend the Act in an attempt to conform to *Reed* or to amend it such that it regulates only commercial speech within the applicable constitutional bounds.

Question to ask? Do we have a size limit based on a type or category of sign (i.e. political, directional, real estate, garage sale)? Are political signs allowed to be 10 square feet and developer signs are allowed to be 16 square feet? Better have a valid reason.

1/24/17 ***Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*****, 846 F.3d 391, 396 (D.C. Cir. 2017)**

Two nonprofit organizations, the Act Now to Stop War and End Racism Coalition (ANSWER) and the Muslim American Society Freedom Foundation (MASF) (together, the organizations), challenge the District's sign-posting rule event-related signs . MASF first argues that the distinction between event-related and other signs is content based yet cannot meet strict First Amendment scrutiny and that, even if the rule is not content based, it fails the intermediate scrutiny applicable to content-neutral time, place, and manner restrictions. Second, MASF contends that the regulation delegates an impermissible degree of enforcement discretion to the District's inspectors in violation of due process. It further challenges what it contends is strict liability on the originators of posters for any violation of the sign-posting rule, which MASF argues the regulations also contravene its speech and due process rights.

HELD: The regulation of the public's use of the city lampposts is a content-neutral time, place, and manner restriction that is sufficiently tailored to a significant governmental interest in avoiding clutter to comport with the First Amendment. No matter the content or viewpoint, event-related signs be removed within 30 days after the event to prevent visual clutter. That is not "regulation of speech" but a "a regulation of the places where some speech may occur." ***Hill v. Colorado*****, 530 U.S. 703, 719, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).** Regulation does not target the "communicative content" of those signs, such as by distinguishing among events by topic, but uniformly restricts the duration that event notices may remain physically affixed to public lampposts. The clutter-minimizing rationale does not depend on the content of a sign's message. *See* ***Hill*****, 530 U.S. at 723, 120**. "The fact that District officials may look at what a poster says to determine whether it is "event-related" does not render the District's lamppost rule content-based." So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based.

1/27/17 ***Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida*****, 8:15-CV-2576-T-30JSS, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017)**

The town's sign code prohibited displays of non-commercial and commercial signs without a permit, but exempted from the permit requirement more than 17 categories of signs based on the content of the message (i.e. warning signs, garage sale signs, national flags, memorial signs, holiday decorations or signs, real estate open house and auction directional signs).

HELD: Sign code is facially unconstitutional under the First Amendment and fails to survive strict scrutiny because it enumerates permit requirement exemptions that create a

content based scheme of speech regulation that is not narrowly tailored to serve a compelling government interest.

Question to ask? Does our sign code distinguish the sign's message based on content-based categories? If yes, it is likely unconstitutional under *Reed.*

1/27/2017 *Signs for Jesus v. Town of Pembroke*, 15-CV-482-PB, 2016 WL 4083723 (D.N.H. Aug. 1, 2016)

Town code barred electronic changing signs. The church was denied a permit and then sued stating that strict scrutiny should apply because the ban only applied to new speakers. The church argued that because "government land users are not subject to the electronic sign ordinance" and the distinction between government and non-government land users draws an improper speaker-based distinction that warrants strict scrutiny.

Held: The court found that the ordinance did not regulate based on content of the speech and did not trigger strict scrutiny. The court agreed with the Town that government land users are exempt from local zoning ordinances pursuant to state and common law.[6]

3/31/17 *Thomas v. Schroer*, 13-CV-02987-JPM-CGC, 2017 WL 1208672 (W.D. Tenn. Mar. 31, 2017)

The trial court granted a temporary injunction against enforcement of the Tennessee Billboard Regulation and Control Act. This section exempts outdoor advertising of "activities conducted on the property on which they are located" from regulation under § 54–21–104. Similar to the sign code exemptions in *Reed*, § 107(a)(1) "draws distinctions based on the message a speaker conveys." The only way to determine whether a sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the "activities conducted on the property on which they are located."

HELD: Consequently, under the *Reed* test, the on-premises exemption is facially content-based and subject to strict scrutiny.

Question to ask? Does our sign code distinguish the sign's message based on content-based categories? If yes, it is likely unconstitutional under *Reed.*

2/3/17 *Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals*, 147 A.D.3d 1427, 46 N.Y.S.3d 725 (N.Y. App. Div. 2017)

Plaintiffs requested variances from the Zoning Board of Appeals for permission to construct billboards on land that would be visible from the highway. The town denied plaintiffs variance requests and plaintiffs sued alleging that the ordinance was an

6 This is a helpful case if you are challenged based on what signs you allow in the public ROW (i.e. government signs) and ban from the public ROW (all other commercial or non-commercial signs).

unconstitutional restraint of freedom of speech because it improperly distinguishes between on-site and off-site commercial signs. The town offered substantial evidence (i.e., maps and photographs showed the quantity and nature of billboards already in existence along the highway) to the Zoning Board to substantiate that construction of billboards visible from highway would have a negative and adverse effect on character of neighborhood. The appellate court stated that the *Reed* case "did not overturn the prevailing intermediate scrutiny test for restrictions on commercial set forth in *Central Hudson*."

HELD: The Supreme Court affirmed the lower court's dismissal of the action by holding that the Town had offered into the Board's record substantial evidence that billboards would have a negative and adverse effect on the character of neighborhood. *Reed* did not overturn "the prevailing intermediate scrutiny test for restrictions on commercial speech set forth in *Central Hudson.*"

Question to ask? Do you have enough information from your Zoning Board's record of a denial to a variance request to sustain an appeal of the courts? Ensure that your Planning & Zoning department offers ample evidence, in the form of reports, studies, pictures and maps, to substantiate the denial of a use permit for a billboard.

4/4/17 *Palmer v. City of Missoula, Montana*, CV-16-54-M-DLC, 2017 WL 1277460 (D. Mont. Apr. 4, 2017)

Plaintiffs wanted to use balloons as wind signs to advertise his car dealership. However, city enacted sign ordinance prohibiting "banners, flags, pennants, streamers, spinners or other types of wind signs." After Plaintiffs were criminally charged with sign code violation, they brought suit against the city arguing that the sign ordinance violates their free speech rights. The court found that the ordinance was content neutral because it prohibited all balloons with commercial or noncommercial messages. Applying the *Central Hudson* test, the court found that the ordinance satisfies a substantial government interest by promoting traffic safety and preserves aesthetic values by limiting attention-getting devices near the roadway. The court also noted that the city did not foreclose all avenues of communication only prohibited signs that wave in the wind and district and annoy drivers and passersby.

HELD: The court held that the sign ordinance does not restrict speech on the basis of content because the city does not make any distinction based on the words or symbols printed on the signs.

7/10/2017 *www.RicardoPacheco.com v. City of Baldwin Park*, 216CV09167CASGJSX, 2017 WL 2962772 (C.D. Cal. July 10, 2017)

Plaintiffs alleged that the city enforced an allegedly unconstitutional ordinance that restricts core political speech on private property and requested a preliminary injunction to stop enforcement. The city amended its sign ordinance. However, the parties disagreed as to the extent to which the amendments satisfied the Plaintiff's complaint. Plaintiffs complained

that the Special Event and New Business Provisions (create a preference for commercial over non-commercial speech), Additional Flag Provision (additional flag may displayed for Memorial Day, Independence Day and Veterans Day, but not for other holidays) and the Election Provision (limits duration/size of additional signs around elections) were unconstitutional.

HELD: The Court granted plaintiffs' request for a preliminary injunction with respect to the Business Provisions, Additional Flag Provisions and the Election Provisions and denied the plaintiffs' request on the size of residential sign provisions. The Court held that the speaker based restrictions are content-based and not narrowly tailored to satisfy compelling, or even substantial, government interests. The Court found that the Business Provisions impose a speaker-based distinction because the provisions prefer some speakers (new businesses and businesses promoting a special event) to other entities.

Question to Ask? Does your ordinance have a "content preference"? Does your ordinance allow election signs to be displayed longer or in more locations than other signs? Do you have an event based distinction? Does that distinction allow more flags or signs during certain holidays?

08/16/2017 ***Contest Promotions, LLC v. City and County of San Francisco*, 2017 WL 3499800 (C.A.9 (Cal.), 2017)**

HELD: Ninth Circuit rejected argument that *Reed* has eliminated a municipality's prerogative to discriminate between commercial and non-commercial signage. The Court found that San Francisco's prohibition on new commercial billboards meets intermediate scrutiny requirements of *Central Hudson*.