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By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

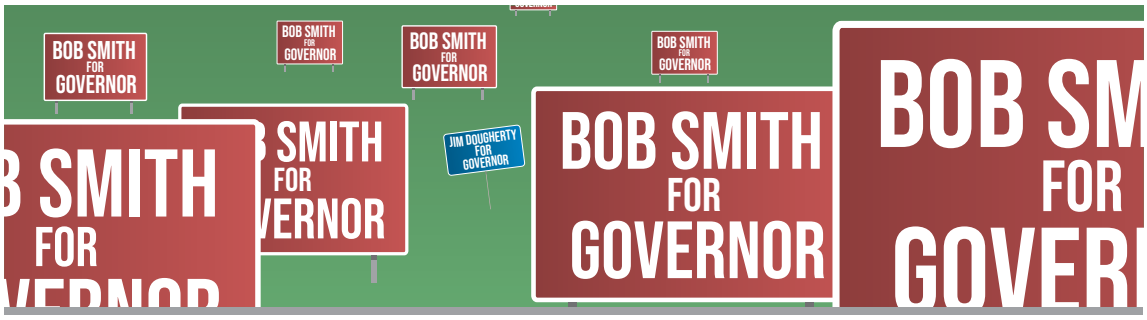
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By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

The question of when overtime is payable—or is not, due to one or more exemptions in the law—is hugely consequential, including to local governments who are collectively among the largest employers in the nation. Recent Department of Labor pronouncements provide additional clarity on the subject.

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Deputy General Counsel and Director of Legal Advocacy

On the Virtue of Going There

One of the many rewarding attributes of work at IMLA is the organization's role in bringing local government lawyers together at our annual conferences and programs. But an equally gratifying element is the opportunity to participate in our members' educational events, attending as speakers and travelling to various venues around the country. It is inspiring to meet with colleagues who do the work, every day, that is the subject of our IMLA educational curriculum.

I had one such experience late last month, speaking at the Michigan Association of Municipal Attorneys conference in Mackinac Island. The location was memorable—a forested island off the Upper Peninsula straddling lakes Michigan and Huron, reached by pedestrian ferry and allowing only bicycles and horse-drawn carriages once on shore. Stately homes, the incomparable Grand Hotel, imposing Fort Mackinac built to ward off the British, and a scenic eleven-mile bike trail around its periphery made the island a special conference site.

Also exemplary was the MAMA program. One speaker was Michigan Supreme Court Justice Richard Bernstein, who has ascended to the state's highest judicial platform despite being blind since birth. Possessed of extraordinary memory which aided his success in law school, he was an engaging figure, answering any question posed to him by the group. In addition to recognizing the societal contributions made by the audience, he mentioned two things that resonated in particular: First, the importance of amicus briefs—he reads each one, and often values their context and policy observations as much as the parties' legal arguments. Second, given the Supreme Court update I had delivered earlier in the day, it was rewarding to hear Justice Bernstein refer to the then-upcoming *Grants Pass* decision, emphatically noting that local governments must have the authority to address the problems of homelessness around the country.

Those elements alone made meeting Justice Berstein an honor. Only later, when I consulted Wikipedia's commentary about the Justice, would I learn that he has completed 17 marathons and one Ironman triathlon. So, an inspirational figure at a well-run and very enjoyable gathering of our great colleagues on an island in Michigan. That was merely one of many such experiences afforded IMLA lawyers; that same week Executive Director Amanda Karras spoke before local government lawyers in Boise, Idaho, and next month our colleague Deanna Shahnami will be speaking to a similar audience in Missouri.

Now a segue from a just-ended conference to the holiday ahead. Against a backdrop of national political tumult and tectonic Supreme Court pronouncements as Independence Day 2024 arrives, it seems useful to take a step back—towards the relative simplicity and (hopefully) less volatile milieu of Main Street. After all, there is no other celebration that is so paradigmatically (to employ parlance favored by the Court) local in the American calendar. Behind the parades, communal barbeques in parks and recreation areas, and throngs watching skyward well into the night is municipal government—organizing events, issuing permits, controlling traffic, managing crowds, ensuring safety, cleaning up after the festivities, and more.

Central to this holiday is the subject of fireworks. A review of *American Legal Publishing's* compendium of municipal codes unlocks a diverse trove of municipal rules and regulations governing pyrotechnics. Boone, North Carolina appears to permit fireworks generally, but prohibits them in parks--and at certain early morning hours: "The following noises are declared to be in violation of § 82.02 if generated between the hours of 10:00 p.m. and 6:00 a.m. . . " Unalaska, Alaska's ordinance prohibits use, except for "display carried out pursuant to a fireworks display permit issued by the Alaska State Fire Marshal's Office" and use of Class C common fireworks by persons age 18 years or older, but only with the consent of the property owner where the fireworks are being activated, and only on New Years and Independence Day celebrations. Pompano Beach, Florida is far more restrictive: "No person shall ignite, or cause to be ignited, any fire balls, fire crackers, or other fireworks within the corporate limits, without a written permit from the Chief of the Fire Department or the City Manager." And Lincoln County, Nevada's prohibition is even broader: "It is unlawful for any person, firm, company, corporation or association within the county to sell, or to keep for sale, or on display, or to possess or keep under his control, or to discharge any rocket, squib, firecracker, Roman candle, torpedo, sparkler, or other fireworks or explosive substance designed or intended for pyrotechnic display or other use." Again, local government at play.

We join IMLA members in celebrating the Fourth of July, wishing that, whether you will be lighting small-time sparklers in your own driveway, watching a neighborhood show in a city park, observing the Boston Pops spectacular on the Charles River Esplanade, the St. Louis display over the Arch, America's extravaganza on the national Mall—or from Conkling Heritage Park on Mackinac Island--your holiday will be safe and peaceable. And we hope you find this issue of *Municipal Lawyer* useful in your service to the local governments which help us celebrate our Independence.

Best regards,
Erich Eiselt

PRESIDENT'S LETTER



BY: **ROSE HUMWAY-WARMUTH,**
City Solicitor, Wheeling, West Virginia and IMLA President

Quotes, throughout history, can be inspirational, motivational, educational, simply humorous, or personally meaningful, among other things. And for purposes of my message, positive quotes about various aspects of life can be insightful in the context IMLA's mission and the day-to-day practice of a municipal lawyer. I offer some of these:

"Start where you are, use what you have, do what you can" - Arthur Ashe

As a municipal law practitioner, either young or old, the work can sometimes be a bit daunting. Whether it's a matter concerning land use, police action, health and safety, homelessness and social issues, public funding and private development, contractual matters and so on, challenges can arise at any time. Starting where you are now as a member of IMLA brings so many resources to assist you.

"Alone we can do so little. Together we can do so much." - Helen Keller

Similar to the thoughts above, if one is a solo practitioner or with a small firm the many educational opportunities that can be accessed through the IMLA website and brought into your office are a fantastic tool. The networking amongst fellow IMLA members is a great resource, valuable via IMLA's listserv and online workgroups, and phenomenal when members convene at IMLA's meetings each year.

"If you want to go fast go alone, if you want to go far, go together."-African Proverb

IMLA has been a tried-and-true mainstay of municipal educational excellence for many decades. Together with its members, IMLA has has indeed gone far to enhance the knowledge and tools for success of municipal practitioners.

"It's amazing how much you can accomplish when it doesn't matter who gets the credit." - Harry Truman

This quote makes me think of the IMLA Executive Director and Staff. Many times, you have heard a President or Board Member, past or present, praise the small yet excellent group that comprise IMLA's team. Although individually they have specific duties and areas of expertise, they work together to achieve excellent outcomes for the organization and its members.

"You can't use up creativity. The more you use, the more you have." - Maya Angelou

Although occasionally our daily practice can be challenging, one can almost always find a new creative approach to everyday municipal matters. IMLA seminars, conferences, and other educational opportunities provide information and instruction that will spark creativity in the way that you may evaluate particular issues in a manner that you may not have considered previously.

"We are what we repeatedly do. Excellence, therefore, is not an act but a habit." - Aristotle

Over these many years IMLA has refined a winning format. The Mid-year, Conference, Fellows program, *Municipal Lawyer,* online learning and resource opportunities are true examples of excellence being repeated.

"Your most important work is always ahead of you, never behind you."
- Stephen Corey

Although IMLA has a winning format it maintains a strong focus on the future. Members of the Board, along with the Officers of the organization, work together with the to review past programs and comments from attendees to shape upcoming offerings, many times planned several years into the future.

"The only way to do great work is to love what you do, if you are working on something that you really care about you don't have to be pushed. The vision pulls you." - Steve Jobs

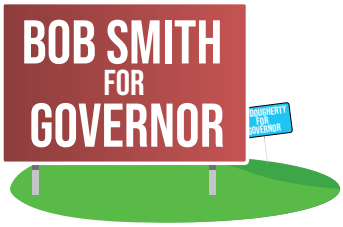
As municipal attorneys or those that serve governmental agencies, we all can appreciate that it's not the money that drives our interest in doing our work. Most municipal attorneys, I do believe, are committed to the practice because we have a love of the work we do, and we truly care about that work and the communities we serve.

"If everyone is moving forward together, then success takes care of itself." - Henry Ford

As we and IMLA move forward together, I believe we are headed towards continued success for this esteemed organization. And I hope that you will take time to be a part of that forward progress by joining us at the Annual Conference this September in Orlando, Florida-- where together we can experience another successful IMLA educational and social event! ML

Regulation of Political Signs After *Reed* and *Reagan National Advertising*

By: ERIC SHYTLE, *General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and* SEAN SCOOPMIRE, *Planning and Law Associate, White & Smith LLC, Greenville, South Carolina*



INTRODUCTION

Municipal practitioners know well that the United States Supreme Court made a muddle of sign regulation in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). *Reed* effectively invalidated thousands of local sign ordinances across the country, with little practical guidance for the well-intentioned local government trying to maintain even modest aesthetic constraints on sign clutter. Despite the majority's insistence that its decision would "not prevent governments from enacting effective sign laws,"[1] Justice Kagan knew better: "This Court may soon find itself a veritable Supreme Board of Sign Review."[2]

The uncertainty resulting from *Reed* presents itself with particular force in the context of regulating political signs. In a presidential election year, only the most fortunate municipal lawyer will avoid difficult questions about election-related signs.

Many of these questions must await definitive answers. This article, however, attempts to provide practical guidance for the municipal lawyer in the meantime. We begin with a review of *Reed* itself. We then consider the one sign case decided by the United States Supreme Court since *Reed*, which upheld the continuing validity of distinctions between on-premises and off-premises signs.[3] Next, we discuss a recent illustrative case applying *Reed* and *Reagan National Advertising*. Finally, we propose a taxonomy of content-neutral distinctions among signs after *Reed* and discuss content-neutral rules for political signs within that taxonomy.

The *Reed* Decision

The Town of Gilbert, Arizona, had an unusually detailed sign code that created 23 separate exemptions from the general requirement that no outdoor sign could be displayed without a permit.[4] A "small, cash- strapped" church in Gilbert had no permanent house of worship and thus held its service in various temporary locations throughout the community.[5] To direct members to Sunday services, the church would post temporary signs throughout the town beginning on Saturday mornings and ending by Sunday afternoons.[6]

Gilbert's sign code classified these signs as "Temporary Directional Signs Relating to a Qualifying Event," which legally could not exceed six square feet and could be displayed no more than twelve hours before and no more than one hour after the event.[7] The church's signs violated Gilbert's sign code in several respects, including by exceeding the permitted posting duration.[8] After Gilbert issued two citations and confiscated signs, the church sued under the First Amendment. As described by the Supreme Court, the main issue was that other sign categories, including "Ideological Signs" and "Political Signs," received more favorable treatment under Gilbert's sign code.[9]

The Supreme Court unanimously held that Gilbert's sign ordinance violated the First Amendment, with six Justices concurring in the opinion. Three Justices (Breyer, Kagan, and Ginsburg) concurred only in the judgment, concluding that Gilbert's sign code violated the First Amendment by a more flexible analysis than the majority adopted.[10]

Justice Thomas, writing for the majority, favored a bright-line rule that would invalidate many, if not most, local sign codes. In his view, the First Amendment requires strict scrutiny of any "law [that] applies to particular speech because of the topic discussed or the idea or message expressed."[11] Courts refer to such laws as "content based," which in Justice Thomas's formulation means a law that "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[12] If a law is content based in this sense, strict scrutiny applies; only if the regulation

is content neutral on its face may a court inquire into the government's motives or purposes in enacting it. Commentators refer to this approach as the *Reed* two-step analysis.[13]

Applying this standard, the majority opinion made quick work of Gilbert's sign code. "The Town's Sign Code is content based on its face.... The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign."[14] Because the sign code was content based, strict scrutiny applied. In turn, the sign code failed the rigorous balancing test.[15] Commentators have concisely summarized the rule in *Reed* to be that if you must read the sign to know the rule, then strict scrutiny applies.

Justice Alito, concurring, offered examples of "reasonable sign regulations" that would survive the majority's standard.[16] Relevant to the *Reagan National Advertising* case discussed below, these examples included "rules distinguishing between on-premises and off-premises signs."[17] Relevant to regulation of political signs, these examples further included "rules regulating the size of signs," "rules regulating the locations in which signs may be placed," "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 restricting the total number of signs allowed per mile of roadway," and "rules imposing time restrictions on signs advertising a one-time event."[18]

The *Reagan National Advertising* Decision

Following *Reed*, the most pressing question was whether local governments could continue to distinguish on-premises signs from off-premises signs. Less than seven years after *Reed*, in *City of Austin v. Reagan Nat'l Advert. of Austin*, LLC, 596 U.S. 61 (2022), the Supreme Court ruled that they could. The City of Austin, Texas, distinguished between on-premises and off-premises signs in its sign code[19] and prohibited the construction of new off-premises signs after the code's effective date.[20] For grandfathered, nonconforming, off-premises signs, the owner could maintain the sign but could not "increase the degree of nonconformity," including by digitizing the sign.[21] Reagan National Advertising owned nonconforming signs that it wished to digitize. When Austin denied the application, Reagan National Advertising sued and argued that Austin's sign code was unconstitutional under *Reed*.

The Fifth Circuit Court of Appeals agreed with Reagan National Advertising. "To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an obvious content-based inquiry, and it does not evade strict scrutiny simply because a location is involved."[22] Unsurprisingly, Austin's sign code did not withstand strict scrutiny.[23]

The Supreme Court reversed. The majority opinion first summarized the history of billboard regulation in the United States and noted that "jurisdictions have regulated outdoor advertisements for well over a century."[24] The Court then observed that the lower court's analysis, "which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent."[25] In the majority's view, although an enforcement officer must read a sign to classify it under Austin's sign code, the question to be answered by the reading is not *itself* content based. The referent is the sign's location, not its content. As explained by the Court, "it is regulations that discriminate based on 'the topic discussed or the idea or message expressed' that are content based."[26] Austin's distinction between on-premises and off-premises signs was different: "A given sign is treated differently based solely on whether it is *located on the same premises as the thing being discussed or not*. The message on the sign matters only to the extent that it informs the sign's relative location."[27] Thus had Austin attempted to regulate "the thing being discussed," the ordinance would have been content based; instead, Austin's sign code specified where that discussion could occur.

Justice Thomas dissented, joined by Justices Gorsuch and Barrett. "A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not."[28] A blunt-force application of his *Reed* analysis – "a speech regulation is content based if it targets speech based on its communicative content"[29] – therefore compels strict scrutiny review.

In summary, although *Reagan National Advertising* left many questions

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Sean Scoopmire is a senior planning and law associate with White & Smith LLC in Greenville, South Carolina, where his practice focuses on all aspects of updating local governments' zoning and land development regulations to implement planning priorities. Sean's work particularly focuses on sign regulations, wireless communications, tree preservation, and zoning and subdivision procedures. Sean received a B.A. in economics from Davidson College, a J.D. from the University of South Carolina, and an MRCP degree from Clemson University.

unanswered, it did soften the impact of *Reed* for municipal practitioners: reading a sign's messaging to determine whether it is an on-premises or off-premises sign does not implicate strict scrutiny.

Illustrative Case: *Village of St. Bernard*

In *Norton Outdoor Advert., Inc. v. Vill. of St. Bernard*, 99 F.4th 840 (6th Cir. 2024), the court struck down a portion of a village's sign ordinance. St. Bernard's sign code distinguished between "advertising signs" and "business signs." The court concluded, and the parties agreed, that "these two categories essentially refer to those advertising a subject matter that is on-premises, and those advertising the same off-premises."[30] After *Reagan National Advertising*, this distinction is legal.

The provisions applicable to advertising signs (i.e., off-premises signs), however, exempted "signs primarily intended to promote the sale of goods, products, services, or events on the same premises as the sign; public traffic signs; signs located on property for sale; and public service signs which disclose information such as time or weather."[31] *Reagan National Advertising* justified the exemption for "signs located on property for sale," which "undeniably relates to something on the same premises of the sign— namely, real property for sale or rent."[32] And the court was untroubled by the exemption for public traffic signs: "Because such signs pertain to government speech, they cannot constitute content-based regulation of private speech."[33]

But the final exemption for "public service signs which disclose information such as time or weather" ran afoul of *Reed*. The lower court found the exemption constitutional on the assumption that, appearing in the section applicable to advertising signs, it applied only to commercial speech. The Court of Appeals rejected this argument:

> [T]here is a universe of signs that would be encompassed by the definition of outdoor advertising sign that is exempted by operation of the public-service-sign definition. Therein lies the problem. To exempt this universe of signs from the regulations pertaining to outdoor advertising signs, we must inherently look to the content of the signs.[34]

This conclusion, under *Reed*, inexorably led to the application of strict scrutiny and the invalidation of the provision.

Village of St. Bernard emphasizes some foundational issues post-*Reed*. First, it makes clear that even trivial departures from content neutrality (in this case, an ambiguous exemption from a rule that by its terms applies only to off-premises advertising signs) will lead to strict scrutiny. Second, it underlines the importance of definitional clarity and the risk of over-inclusiveness in regulating a "universe of signs." Finally, it dodged the question of whether distinctions between commercial signs and noncommercial signs, as well as distinctions applicable *only* to commercial signs, are subject to strict scrutiny under *Reed* or remain subject to intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

A Proposed Constitutional Taxonomy of Signs

The Supreme Court has held that, when reviewing a law that burdens "core political speech," it "applies 'exacting scrutiny,' [and will uphold] the restriction only if it is narrowly tailored to serve an overriding state interest."[35] The tension that arises in regulating political signs is thus between *Reed*'s demanding interpretation of content neutrality, which forbids carving out political speech from otherwise generally applicable rules, and pre-*Reed* precedent, which is significantly protective of political speech. This interplay raises two analytical challenges. The first is to find the narrowest taxonomy that can include political signs without reference to the content of the sign. The second is to find the most restrictive rules that can be applied to the entire resulting classification without overburdening political expression. Once these limits are determined, the municipal practitioner may determine to steer well clear of them – for example, by using broader classifications or less restrictive rules – or to test them to respond to pressing local concerns.

This section addresses the first analytical challenge, proposing a constitutional taxonomy that includes political signs. Despite the reach of *Reed*, governments remain free to regulate based on the physical characteristics of the sign.[36] The salient physical characteristic of the vast majority of political signs is that they are temporary; the foundational task is thus to define "signs" and to create a sub-class of "temporary signs." Governments may further classify temporary signs based on their location. Finally, although the question remains contested, it may be permissible to distinguish between commercial and noncommercial signs. In creating this taxonomy, however, the municipal lawyer must consider possibly preemptive state laws; this section offers examples of such laws.

Defining Signs

Defining the term "sign" requires careful drafting to ensure that it includes the devices and objects to be regulated while remaining content neutral. The definition of "sign" in the illustrative case of *Village of St. Bernard*, discussed above, provides

a useful example of the definitional pitfalls. The court quotes only portions of the definition of "sign" in the opinion. The Village's complete definition provides:

> A "sign" means any writing, pictorial representation, emblem, flag or any other figure or similar character which is a structure or part thereof or is attached to or painted on or in any means represented on a building or structure; and is used to announce, direct attention to, or advertise; and is visible from outside a building. When within a building, the sign shall include writing, representation, or other figure of similar character only when illuminated and/or located in a window. "Sign" includes "billboard" but does not include the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event. Further, this definition shall not be held to include any board, sign or surface used to display any official notices, issued by any court or public office or posted by a public officer in the performance of a public duty.[37]

The court found that the plaintiff lacked standing to challenge this definition because it had applied for a billboard permit under another chapter of the code. However, the plaintiff argued that the definition is not content neutral, in that it exempts "the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event." The definition exempts official flags but regulates flags bearing words like "Clearance!" or "Going out of Business!" as signs. While the court decided the plaintiff's contentions based on standing, this content distinction likely implicates Reed.[38]

Paring the definition of "sign" to the essential elements in the first sentence would improve its compliance with *Reed*.[39] A local government that insists on special treatment for official flags should create a separate section with exemptions, rather than including the exemption in the definition itself. This approach would allow a stronger argument for severability of the exemption in a facial challenge to the ordinance in a case not involving flags.

Therefore, the essential considerations in drafting the definition of "sign" are to make it no broader than necessary, to limit potentially content-based exemptions, and to separate any locally required exemptions from the definition itself.

Defining Temporary Signs

Generally, post-*Reed* sign codes should replace existing content-based categories such as political signs, special event signs, real estate signs, or construction signs with a content-neutral definition of "temporary signs" based on physical characteristics. Since *Reed*, municipalities have used a variety of new definitions to identify "temporary signs." The Unified Government of Wyandotte County and Kansas City, Kansas, adopted one of the first post-*Reed* sign codes in 2015 and defined a temporary sign as: "A sign typically made of lightweight or flimsy material that can be easily or quickly mounted or removed (such as cloth, canvas, vinyl, cardboard, wallboard, or other light temporary materials), with or without a structural frame, intended for a temporary period of display."[40] Oklahoma City adopted an updated sign code earlier this year and defined a temporary sign as: "A sign constructed of cloth, canvas, light fabric, cardboard, wood, wallboard, metal, or other light materials, with or without frames, which is intended to be displayed for a limited period of time only."[41] The IMLA draft model sign ordinance uses the following definition: "A banner, pennant, poster or advertising display constructed of paper, cloth, canvas, plastic sheet, cardboard, wallboard, plywood or other like materials and that appears to be intended or is determined by the code official to be displayed for a limited period of time (rather than permanently attached to the ground or a structure)."[42] The essential common element of these three definitions is the temporary nature of the sign's use regardless of its content.

Municipal practitioners should use their own judgment and the recommendations of the local planners to draft an appropriate definition of temporary signs. The key consideration is that the definition should be based on physical characteristics, with one caveat. In light of the Supreme Court's allowance of a "cursory inspection" in *Reagan National Advertising*, it may be permissible to allow the enforcement official to consider the content of the sign as an element in determining whether it is intended to be temporary. This question, however, remains open.

The practitioner should take particular care to avoid overbroad definitions of "sign" and "temporary sign" because they could lead to unnecessary exemptions and create difficulties with enforcement. For example, many definitions of "sign" include devices or objects that are intended to attract attention. This component of the definition leads to a concern that all objects or devices that attract attention are signs, including pennants, strings of lights, bunting, and holiday decorations, and must be exempted. Specific exemptions for these devices would likely be found content based. A narrower definition without exemptions would be more defensible under *Reed* and would be significantly easier to draft, interpret, and enforce.

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Political Signs *cont'd from page 9*

State Preemption

State laws that protect signs based on content significantly complicate local regulation of temporary signs, including political signs. The practitioner should review the applicable state statutes and cases to identify state-level authorities that may preempt or prohibit the regulation of political signs and other temporary signs. For example, several states preempt or limit local governments' regulation of political signs by statute. These statutes include the preemption of regulation of political signs in the right-of-way[42] as well as on private property.[43]

If state law establishes a preference for political signs or other content-based sign types, the local government will find itself facing the horns of a dilemma; it may specifically respect the state law preference and risk violating *Reed*'s content-neutrality rule, or it may comply with *Reed* and risk violating the state's preemptive law. Local governments must therefore balance the risks of facial and as-applied challenges. An explicit exemption in the ordinance for the state's preferred signs risks a facial challenge under *Reed*, but using a content-neutral taxonomy while respecting the state's preference by way of selective enforcement risks an as-applied challenge.[44]

Perhaps a court would find that state statues preferring political signs or other content-based temporary signs violate *Reed* and are therefore unenforceable against a local government. Alternatively, a citizen or state official seeking to vindicate the state's additional protections of political signs could argue that the state law does not implicate the First Amendment at all because it limits the local government's authority to regulate political signs and not the citizen's right to display them.[45] Resolving such claims will depend not just on the parties and facts, but also on the source and scope of local government authority, including concepts such as Dillon's rule, home rule, and the relevant planning and zoning enabling act. Therefore, the resolution of preemption questions will differ significantly from state to state.

Location-Based Distinctions

Another important classification within a constitutional sign taxonomy is to distinguish signs based on where they are located. The most general location-based distinction would be between public property and private property. Local governments could further classify temporary signs based on zoning districts, overlay zones, historic preservation areas, or other land-use distinctions, provided that such distinctions do not depend on underlying or implicit content-based considerations.

In making this classification, however, the municipal practitioner should consider constitutional issues that arise irrespective of *Reed*. For example, the First Amendment provides greater protection for communicative expression on private property. With respect to public property, the local government may significantly restrict the display of temporary signs. The *Reed* majority opinion noted that "on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."[46] Well before *Reed*, the Supreme Court upheld a Los Angeles ordinance that prohibited posting signs on public property in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The prohibition at issue applied only to certain city-owned infrastructure.[47] The Supreme Court found that the public property to which the prohibition applied was not a traditional public forum.[48] With that limitation, the Supreme Court held that a total ban on the posting of signs on public property was constitutional. The question of whether a government could completely ban signs in a traditional public forum was reserved for another day. The scope of *Vincent* has been debated, but for these purposes, it seems likely that a court would uphold a content-neutral law that prohibited the posting of temporary signs on public property.[49]

On the other hand, the local government must offer greater protection for temporary signs on private property. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court struck down a city's ban of almost all residential signs. Likewise, in *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), the Court invalidated an ordinance that limited residential property owners to only two campaign signs as overly restrictive of core political speech.

As discussed above in the section on state preemption, municipal practitioners must also consider state law in classifying signs by location. Many states have laws that protect the posting of political or other types of signs in specified locations.

Commercial and Noncommercial Distinctions

One of the most vexing questions after *Reed* is whether a local government may continue to distinguish between commercial and noncommercial signs. Historically, courts provided lesser protections for commercial speech than for noncommercial speech.

The primary authority that commercial signs may be regulated more strictly than non-commercial signs is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1980). In that case, San Diego adopted an ordinance restricting outdoor advertising signs. The stated purposes of the ordinance were traffic safety and the

appearance of the city. The ordinance included twelve exceptions, including one for "onsite" signs. The Court found the San Diego ordinance unconstitutional. The plurality opinion, applying *Central Hudson Gas & Electric Co. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), held that the limitations on commercial signs were constitutional.[50] But the Court further reasoned that the ordinance overreached by prohibiting some types of noncommercial on-premises speech: "[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech."[51] The Court noted that "we continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be."[52] It appears that two rules arise from *Metromedia*: Strict scrutiny does not apply to regulations of commercial speech, but such regulations cannot treat commercial speech more favorably than noncommercial speech. Unfortunately, the lack of a majority opinion in *Metromedia*, together with the numerous concurring opinions, makes application of the holding difficult.

The majority opinion in *Reed* did not distinguish between commercial and noncommercial speech. Perhaps the Court did not discuss this distinction because the opinion related only to noncommercial signs, or perhaps *Reed* foretells of heightened scrutiny for all content-based distinctions, even a simple binary distinction between commercial and noncommercial signs.[53] The conceptual issue is whether the first question for a court to ask arises from *Central Hudson* or from *Reed*. *Central Hudson* suggests that all regulations of commercial speech are subject to a form of intermediate scrutiny, while *Reed* suggests that any content-based distinction, perhaps including between commercial and noncommercial speech, is subject to strict scrutiny.

The municipal practitioner should note, however, that stricter regulations for commercial signs might not survive even the more permissive *Central Hudson* standard because the distinction does not clearly relate to the stated purposes of traffic safety and community aesthetics.[54] For now, then, the safe course would be to make no distinction between commercial and noncommercial signs. Municipal lawyers that feel compelled by local circumstances or political will to impose stricter controls on commercial signs should make as few content-based distinctions as possible – likely only between signs containing commercial speech as defined in *Metromedia* and all other signs – and should carefully document the government interests that justify the stricter regulation of commercial signs.

Content-Neutral Regulatory Approaches

With an appropriate sign taxonomy in hand, the municipal practitioner may turn to the regulations to apply within it. Neither *Reed* nor *Reagan National Advertising* made any claim to invalidate content-neutral time, place, and manner regulations. The applicable regulations, however, must respect the constitutional deference afforded to political signs within the regulatory taxonomy.

Duration of Display

Content-neutral regulations of temporary signs can impose uniform durational limits. Planning officials, however, might disfavor this approach for a number of reasons. A citizen could essentially evade such a durational limit by posting a formally different but substantially identical sign once the uniform durational limit expires, or a citizen might leave event-related temporary signs up well after the event is over.

One approach would be to allow each distinct parcel within the community to display temporary signs, regardless of content, for a maximum number of days during a year. This approach would reduce visual clutter while remaining content neutral but would require diligence to enforce on a per-parcel basis.

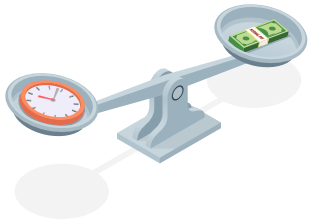
Another approach would be to adopt special durational limits to signs that relate to an event. Under *Reed*, such a regulation can make no distinction based on the nature of the event, whether it be a garage sale, an outdoor festival, or an upcoming election. Under *Reed*, even a regulation that says all temporary signs (regardless of content) relating to an event (regardless of the nature of the event) may be erected no more than ninety days before the event and must be removed no more than ten days after the event might be invalid because it requires the enforcement officer to read the sign to know whether it relates to an event.

At least one court has upheld an event-related durational limit after *Reed*. In 2017, the D.C. Circuit Court of Appeals upheld a local law that applied durational limits to temporary signs, while further distinguishing between temporary signs in general and temporary signs that relate to an event.[55] The law in question allowed "a posted sign to remain on a public lamppost for up to 180 days," but provided that "a sign relating to an event must be removed within 30 days after the event, whether the 180-day period has expired or not."[56] At least in some cases, this rule would treat event-related signs less favorably than other temporary signs. Having considered *Reed*, however, the Court of Appeals determined that the local law was content neutral and subject to intermediate scrutiny.[57] Applying intermediate scrutiny, the court upheld the District's lamppost law.[58] It is far

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Independent Contractors and Overtime Exemptions: The DOL's Long-Awaited Rules

By: MICHELLE WHITE,
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The Department of Labor ("DOL") recently issued two controversial updates to regulations under the Fair Labor Standards Act ("FLSA")—the Independent Contractor Rule and the Overtime Exemption Salary Threshold. These long-awaited changes are generally considered to be employee-friendly, and multiple legal challenges have been filed seeking to invalidate these rules. Employers should be aware of how these changes may impact their employees and take appropriate steps to review their consulting agreements, salaries, and job duties to remain in compliance.

The FLSA and Independent Contactors

With an effective date of March 11, 2024, the DOL issued its final rule addressing independent contractor classification under the FLSA.[1] The FLSA provides legal protections for employees, as opposed to independent contractors or volunteers; however, the FLSA does not provide a method to distinguish independent contractors from employees.

Historically, courts have used a multi-factor economic reality test to differentiate between independent contractors and employees, which the DOL supported in informal guidance. While courts varied in the number and weight of factors considered, most courts reviewed relationships on a case-by-case basis by considering:

1. Worker's opportunity for profit or loss;
2. Investments in equipment or materials by the worker and the employer;
3. Degree of permanence and duration of the work relationship;
4. Nature and degree of control over the manner in which work is performed;
5. Degree to which the work performed is integral to the employer's business; and
6. Whether the work requires special skills and initiative.[2]

In 2021, the DOL published a final rule with a new five-factor test.[3] This new business-friendly test primarily considered two core factors—the worker's opportunity for profit or loss and the nature and degree of control exercised by the employer. When these factors produced an unclear result, the analysis moved to three guidepost factors—the relationship's length or permanence, the worker's special skills, and the work's integration into the principal's operations. With the concurrent change in administration, the DOL attempted to delay and withdraw the rule days after the final rule was published, but these actions were rejected as violations of the Administrative Procedure Act and the rule remained in effect.[4]

The New Independent Contractor Rule

In October 2022, the DOL proposed a new rule to rescind the 2021 rule and replace it with a return to a "totality of the circumstances" test.[5] The proposed rule, which has almost uniformly been described as tending towards a determination that the worker is an employee rather than an independent contractor, became effective on March 11, 2024. The "totality of the circumstances" test considers the six factors of the economic reality test (described above) while allowing other relevant factors to be considered. None of these factors carry a pre-determined weight, and the weight of each factor may vary, depending on the particular circumstances of each case. The new rule further clarified these factors and provided examples to illustrate their applicability.

Challenges to the New Independent Contractor Rule

Several challenges to the rule have been filed claiming the rule broadly classifies workers as employees, the rulemaking was outside the scope of DOL authority, and the rule is arbitrary and capricious in violation of the Administrative Procedure Act.[6] Freelance workers have also chal-

lenged the rulemaking alleging similar violations while further seeking to "vindicate the right of individual entrepreneurs to remain independent in the face of a concerted effort to force them into employment relationships they neither want nor need."[7] These complaints all sought preliminary and permanent injunctions of the rule.

In addition to challenges in court, Congressional Review Act Resolutions have been introduced in both the Senate and the House of Representatives.[8] This process would require both houses of Congress to approve a joint resolution of disapproval, and the President would be required to sign the joint resolution. If vetoed, Congress can vote to override the veto. If this lengthy process is successful, the rule would be unenforceable.

Despite the many legal challenges, including multiple lawsuits seeking preliminary and permanent injunctions, the rule has not been enjoined or invalidated, and the new independent contractor rule became effective March 11, 2024. While these many legal challenges are pending, the rule remains in effect.

Impact of New Independent Contractor Rule

Employers with independent contractors or consultants should carefully review the circumstances of each independent contractor agreement to ensure appropriate classification under the final rule. Any agreements that do not meet the test under the final rule will need to be carefully evaluated to determine appropriate changes, including reclassification to employees, if necessary.

FLSA Exemption Salary Threshold

On April 23, 2024, the DOL announced a final rule which would raise the salary threshold for overtime exemptions under the Fair Labor Standards Act (FLSA).[9]

Under the FLSA, employees are classified based on their eligibility for overtime pay for any time worked over 40 hours in a workweek. The FLSA requires non-exempt employees to be paid for overtime hours worked while exempt employees are exempt from this requirement. While the language of the FLSA creates the executive, administrative, and professional exemptions ("EAP exemptions"), the requirements to meet these exemptions are found in the FLSA regulations "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]."[10]

Under the FLSA regulations, to be classified as exempt, the employee must meet the salary basis test, the salary threshold, and specific requirements related to job duties. There are several different tests available, depending on job duties and other job-related factors, but common exemptions include the EAP exemptions and highly compensated employee (HCE) exemptions.[11] While the duties requirements vary between these common exemptions, they all utilize a salary basis test and a minimum salary threshold that employees must be paid to be eligible for exemption. Some less common exemptions do not include a salary basis test or salary threshold, but most exemptions include these or substantially similar tests. In addition to the applicable job duties test, salary basis test, and salary threshold, the HCE exemption requires an employee to meet a total annual compensation threshold.

Over the past decade, the DOL has attempted to raise the salary threshold twice, with mixed results. The first attempt was a final rule issued in May 2016, which raised the salary threshold from $455 to $913 per week, which is $23,660 to $47,476 annually.[12] This May 2016 rule also created a mechanism to update the salary threshold every three years, with the next increase occurring in January 2020 and raising the salary threshold to $984 per week, or $51,158 annually. This 2016 rule was scheduled to become effective in December 2016, but on November 22, 2016, a Texas court enjoined the rule from becoming effective nationwide.[13] On August 31, 2017, that court issued a permanent injunction, reasoning that the agency "has exceeded its authority and gone too far with the Final Rule" by implementing a salary basis test that effectively eliminates the job duties test.[14]

After this, the DOL began the rulemaking process again to reevaluate raising the salary threshold, and a new final rule was issued in September 2019.[15] This 2019 final rule formally rescinded the 2016 final rule and raised the salary threshold from $455 to $684 per week, which is $23,660 to $35,568 annually. The 2019 final rule also raised the HCE annual compensation threshold from $100,000 to $107,432. Unlike the previous rule, this rulemaking process did not include any structure to automatically increase the threshold every three years. However, when published in the Federal Register, the 2019 final rule inadvertently included the structure providing for automatic increases every three years and inadvertently omitted some existing rules related to the HCE exemption. To address this, the DOL issued a June 2020 correction to the 2019 final rule to restore the omitted rules and to remove the structure for automatic increases.[16]

A challenge to the 2019 final rule was filed in August 2022, asserting the

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DOL Rules *cont'd from page 13*

salary threshold test to be unlawful or unconstitutional and seeking an injunction.[17] However, in September 2023, after considering cross-motions for summary judgment, the court granted the DOL's motion for summary judgment, holding in relevant part that (1) the final rule did not exceed the DOL's authority under the FLSA, (2) the FLSA does not unconstitutionally delegate legislative authority by empowering the DOL to determine salary threshold requirements. Although the 2024 final rule has since been issued, this case remains on appeal in front of the Fifth Circuit Court of Appeals. The salary threshold and HCE annual compensation threshold defined in the 2019 final rule remain in effect until the 2024 final rule becomes effective on July 1, 2024.

Salary Threshold 2024 Final Rule

The DOL published the most recent final rule in the Federal Register on April 26, 2024.[18] Like the previous changes to the FLSA overtime regulations, the 2024 final rule does not alter any of the job duties tests, but this final rule made changes to the salary threshold and the HCE annual compensation threshold. This 2024 final rule includes a staggered increase, with the first change becoming effective July 1, 2024, and an additional increase to be effective January 1, 2025.

Effective July 1, 2024, the salary threshold will increase to $844 per week, or $43,888 annually; and the HCE total annual compensation threshold will increase to $132,964. Additionally, effective January 1, 2025, the salary threshold will increase to $1,128 per week, or $58,656 annually; and the HCE total annual compensation threshold will increase to $151,164.

The 2024 final rule also included an automatic increase structure, similar to the structure of the 2016 final rule that was rejected as administrative overreach. Beginning January 1, 2027, the salary threshold and the HCE annual compensation threshold will continue to be automatically adjusted every three years based on concurrent wage data.

Challenges to the 2024 Final Rule

Some members of Congress have acted to prevent an increase in the salary threshold. Before the 2024 final rule was issued as a final rule, Missouri Representative Eric Burlison introduced H.R. 7367, the "Overtime Pay Flexibility Act."[19] This bill was designed to prevent the DOL from finalizing, implementing, or enforcing the 2024 rule. However, since being referred to the House Committee on Education and the Workforce on February 15, 2024, this bill has not made further progress.

On May 22, 2024, several businesses and business associations filed suit against the DOL in the Eastern District of Texas—the same court that permanently enjoined the 2016 final rule based on administrative overreach.[20] While the plaintiffs in this case did not request injunctive relief, more recently filed cases in Texas have requested injunctive relief, including a case filed by the State of Texas in the Eastern District of Texas on June 3, 2024.[21] The complainants allege the DOL "largely repeats" the same errors of the 2016 final rule by raising the salary threshold and exceeding the DOL's authority. In the complaint filed by the State of Texas, plaintiff further argues that the creation of any salary threshold is outside the authority of the DOL.[22]

Impact of New Salary Threshold Rule

Although it is possible that the 2024 final rule may be enjoined prior to becoming effective, there is no guarantee that an injunction will be granted. Unless this 2024 final rule is enjoined prior to the effective date, employers should prepare for these new thresholds to be effective on the applicable dates. Any employee whose salary is below the new salary threshold on each increase date will no longer meet the requirements for exemption and will be entitled to overtime compensation under the FLSA. Prior to July 1, 2024, all employers should review the salary of all of their exempt employees to determine whether their exemptions will be jeopardized by the increased salary threshold on either July 1, 2024, or January 1, 2025. Employers with exempt employees whose pay would no longer meet either threshold should review their individual circumstances to determine whether to (1) increase employee salary to meet the new salary threshold or (2) reclassify the applicable employees as non-exempt and therefore eligible for overtime pay.

Employers who determine their salary levels will only be affected by the January threshold may consider postponing their evaluation by a few months, pending the outcome of the legal challenges. However, employers affected by the July effective date should prioritize these evaluations. While factors in the evaluation processes may vary, depending on the particular circumstances of the employer, several factors should be considered in these processes. A few examples are listed below.

- Employees impacted by the July threshold will necessarily be impacted by the January threshold. As such, employers may consider whether it would be more efficient to make immediate changes based on the January threshold, instead of repeating this analysis within a six-month period. However, with the pending legal challenges, it may be prudent to conduct the immediate analysis based on both thresholds, while waiting to implement changes until the applicable effective date.
- Employers should determine whether an employee's salary would reasonably be able to be raised to meet both thresholds, and, if not, whether it would be more efficient to reclassify the employee as non-exempt prior to January 2025.
- The employer's cost of increasing an employee's salary should be compared against the estimated cost of overtime, if the employee were reclassified as non-exempt. If an employee would work sufficient overtime to surpass the salary threshold, and their position meets the applicable duties test, raising

their salary to meet the new threshold may be more cost effective.

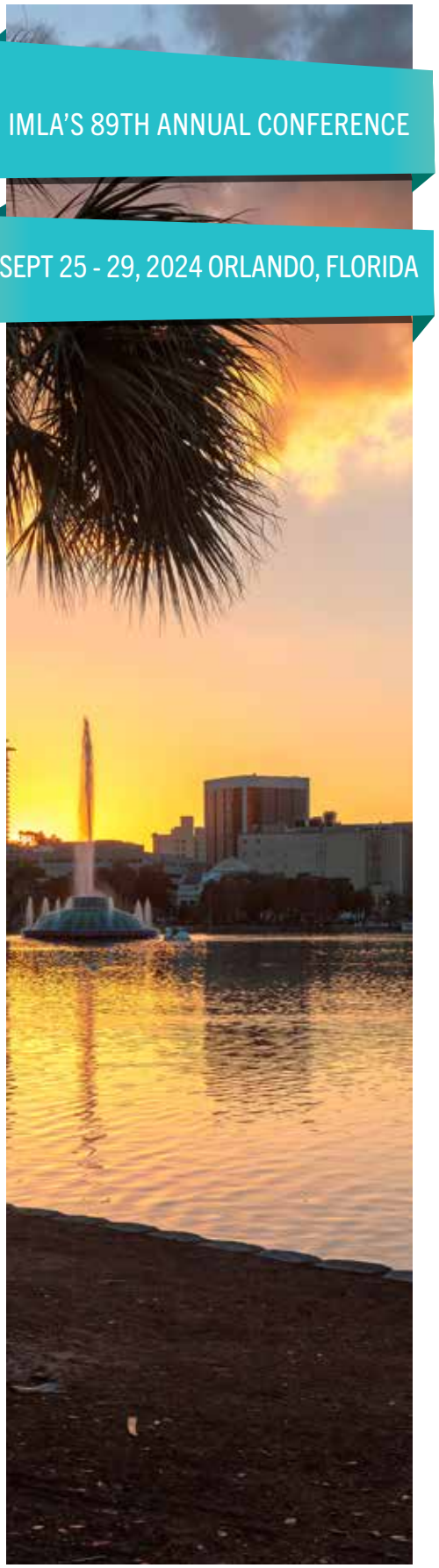
Since there are a wide range of factors to consider in these evaluations, employers should consult with local counsel with questions or concerns about maintaining compliance.

Conclusion

In the challenges to both rules, the complaints summarily allege that the actions taken by the DOL are arbitrary and capricious, an abuse of discretion, and outside the DOL's statutory authority under the FLSA. However, as long as these final rules remain effective, employers should evaluate their consultant agreements, relationships, and salaries to remain in compliance. Misclassification under either rule can result in serious repercussions for employers. Examples of these repercussions include possible lawsuits, back taxes, penalties, fines, unpaid wages, interest on unpaid wages, and DOL audits, which may lead to charges of further employment law violations. Employers with questions or concerns about these rules should seek advice from employment council in their jurisdiction. ML

Notes

1. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).
2. *Id.* at 1641–44.
3. *Id.* at 1644–45.
4. *Id.* at 1645.
5. *Id.*
6. *See* Complaint, Frisard's Transp., LLC v. DOL, 2:24-CV-347 (E.D. La., filed Feb. 8, 2024).
7. Complaint, Warren, et al. v. Su, 2:24-CV-0007 (N.D. Ga., filed Jan. 16, 2024); see also Complaint, Littman and Chesak v. DOL, 3:24-CV-194 (M.D. Tenn., filed Feb. 21, 2024).
8. H.R.J.Res. 116, 118th Cong. (Mar. 6, 2024); S.J.Res. 63, 118th Cong. (Mar. 6, 2024).
9. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).
10. 29 U.S.C. § 213(a)(1).
11. 29 C.F.R. pt. 541.
12. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541) (permanently enjoined in Aug. 2017).
13. Nevada v. United States Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).
14. Nevada v. United States Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).
15. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sep. 27, 2019) (to be codified at 29 C.F.R. pt. 541) (replaced by corrected final rule in June 2020).
16. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Correction, 85 Fed. Reg. 34969 (Jun. 8, 2020) (to be codified at 29 C.F.R. pt. 541) (replaced by new final rule effective July 2024).
17. Mayfield v. U.S. Dep't of Labor, No. 1:22-CV-792-RP, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023).
18. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 89 Fed. Reg. 32842 (Apr. 26, 2024) (to be codified at 29 C.F.R. pt. 541).
19. H.R. 7367, 118th Cong. (Feb. 15, 2024).
20. Complaint, Plano Chamber of Commerce, et al. v. Su, 4:24-CV-468 (E.D. Tex., filed May 22, 2024).
21. Complaint, State of Texas v. Su, 4:24-CV-00499 (E.D. Tex., filed Jun. 3, 2024); *see also* Complaint, Flint Ave., LLC, v. Su, 5:24-CV-00130-H (N.D. Tex., filed Jun. 3, 2024).
22. Complaint, State of Texas v. Su, 4:24-CV-00499, at 5 (E.D. Tex., filed Jun. 3, 2024).



DAY IN THE LIFE

WALTER WILSON,
Associate County Attorney, Montgomery County, Maryland

Interview by Avery Morris, IMLA Editorial Staff



Local government lawyer, global traveller!

Hello, Walter! Why don't you start by telling us about where you're from and your path to becoming a municipal lawyer?

I grew up in a small town in Virginia called Farmville in Prince Edward County. Prince Edward County was one of the jurisdictions that was involved in the Brown vs. Board of Education decision. There were four cases pending before the Supreme Court-- they all got consolidated into Brown--and one of them was from Prince Edward County, Virginia. In 1959 they closed all their public schools to avoid integration, so there was no public education in Prince Edward County for five years.



My mom was a schoolteacher, and she got a job teaching in Lynchburg, Virginia, so that's where I started school. We eventually came back to Farmville after the schools reopened. I ended up graduating from Prince Edward County High School, and then came to Baltimore for college at Morgan State University. I was a foreign language major in college. Right after college I did a year of graduate work at the University of Neuchatel in Switzerland on a Fulbright. I wasn't ready to come home when my program was up, so I spent two months working in a Swiss chocolate factory. With the money I earned I spent the next several weeks backpacking around Europe. Eventually the money ran out so I finally came home.

So how did your carer begin?

I started teaching because I thought that's what I wanted to do. I began in a middle school in inner-city Baltimore, and that lasted for less than a semester. I thought, "Maybe this isn't for me." I then took a position with an organization called the Northwest Baltimore Corporation as a community organizer. That's how I started becoming familiar with local government affairs. I used to have to attend lots of meetings by these community groups, particularly the neighborhood improvement associations that dealt with zoning issues. Often, there would be issues before the Baltimore BMZA (Board of Municipal and Zoning Appeals). A lot of the time, I would go with people from the community to hearings at the BMZA and advocate for them, along with them. People would say, "Oh, you should've been a lawyer. You missed a calling."

I really didn't pay much attention to it, but after working for a couple of years as a community organizer I decided to go back to school and get a master's in public administration. In the meantime, I worked with a mental health organization called the Black Mental Health Alliance for Education and Consultation. I was their Executive Director at the same time I was in graduate school. When I finished my graduate program at the University of Baltimore, I thought, "Well, how do I want to continue my education?" That's when I thought, "You know, maybe I should go to law school." Around that same time, I took a position at the University of Maryland Institute for Governmental Service as a Governmental Management Consultant, which was right in my field, with a master's in public administration. I decided to go to University of Maryland Law School because, by being a University of Maryland employee, I got partial tuition remission, which really came in handy when it came time to pay back the law school loans.

How did you begin using your legal education?

At the Institute for Governmental Service, pretty much all my clients were local governments. We did all kinds of studies, but we also did some legislative. After graduating, I became a staff attorney there, As a staff attorney I was drafting ordinances. There are at least six towns in Maryland where I have helped put together the together the municipal code because they just had groups of ordinances that had never been codified. The other thing that we did; Maryland has three types of counties: charter home







rule, code home rule, and commissioner counties. Some of the commissioner counties were interested in becoming charter home rule counties, which meant they would have to propose a county charter that would go to the voters. We would work with those counties and help them draft a proposed county charter.

One of those counties was Carroll County, where Chuck Thompson was the County Attorney. Chuck was also very active at IMLA. When I left the Institute of Governmental Service, I left to take a job with IMLA as part of the legal staff. I was there for six years, and by the time I left IMLA, I was Senior Associate Counsel. In the meantime, Chuck had gone from being the County Attorney for Carroll County to being the County Attorney of Montgomery County. On various occasions, he talked about what a great place Montgomery County was to work. Eventually there was an opening in the Montgomery County Attorney's Office, and he encouraged me to apply. So I did, and the rest is history. I've been with the County Attorney's Office since 1999. I apparently enjoy it, because I've been here for 25 years!

Nice to see the link with Chuck Thompson and IMLA! Have have you had any mentors or colleagues that have been especially valuable on your journey?
There's such a breadth of experience and expertise among my colleagues within the Office of the County Attorney ("OCA") that has guided my work over my several years here that there are several of them that I could possibly name as mentors. However, if I had to pick one person in particular who stands out it would have to be Marc Hansen, the previous County Attorney who, as Chief of OCA's General Counsel Division back when I joined the office in 1999, was my immediate supervisor. As with any large government law office, there's a high degree of specialization within OCA. However, if there was one "go to" lawyer in the office with experience in just about every practice area of municipal law applicable to Montgomery County it was always Marc.

How has your job changed during your time with Montgomery County?
The change has been in the sense that my portfolio has been expanded, mostly. I started off as legal counsel to the County's Department of Environmental Protection, and the Commission on Common-Ownership Communities, which is a quasi-judicial agency that hears cases involving HOAs, condominiums, and co-ops. What eventually got added was the Department of Recreation, then the Commission on Landlord-Tenant Affairs, another quasi-judicial board that hears cases involving landlords and tenants. I'm their Principal Counsel. Along with that came the Office of Landlord-Tenant Affairs, which staffs the Commission on Landlord-Tenant Affairs. After that was the Historic Preservation Commission, and then the Animal Matters Hearing Board, and now the Regional Service Centers.

As you can imagine, my work is very varied. I would say that the bulk of my work has come from the Department of Environmental Protection because a lot of the issues they deal with are more complex than those of other agencies. That's where I've had some of my most challenging cases. One of the first cases that I had to defend the County against was a noise pollution case involving the Department of Environmental Protection. Another case that stands out was a lawsuit involving the County's pollutant discharge permit. That case, which I had to defend the County in, was in litigation for seven years. On one side was Montgomery County and the Maryland Department of Environmental Protection, and on the other side were four environmental groups and two individuals. We went round and round many times before what is now the Appellate Court of Maryland, and finally it went up to the Maryland Supreme Court.

What are the best things about working in the Montgomery County Attorney's Office?
The best thing about working in the Montgomery County OCA is the variety of challenging legal issues that come our way on any given day. With a population slightly north of one million, Montgomery County is the largest local jurisdiction in the State of Maryland. It is also a county that enjoys a high degree of home rule governing authority. Consequently, the County legislates in many more areas than might be typical for a local government serving a large population. Furthermore, the County tends to be on the cutting edge of environmental matters and several other areas that it regulates. As a result, its legal staff is often called upon to deal with numerous issues, some of which do not always fall neatly within what is typically thought

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from clear, however, that the Supreme Court would uphold an event-based durational limit.

Another example of an attempted content-neutral regulation would be to allow temporary signs only during certain times of the year, or to provide longer durational limits during such times or around certain events like elections. Such approaches would likely violate *Reed* as favoring certain types of content. For example, the federal District Court for the Central District of California rejected a temporary sign ordinance that provided "an additional flag may be displayed for three days before and after Memorial Day, Independence Day, and Veterans Day -- but not for other holidays or celebrations."[59] The city argued that the ordinance was content neutral because it would permit the flying of any additional flag, regardless of its content. The court disagreed, reasoning that the ordinance's "authorization of an additional flag around Memorial Day, Independence Day, and Veterans Day reflects a content preference for speech concerning those particular holidays." *Id*. It follows that an ordinance applying special durational limits around elections, but not other events, would be vulnerable to challenge as a content-based regulation.

Any applicable durational limit must be sufficiently long to avoid overburdening political speech. Courts have divided over the issue and no constitutionally required minimum durational limit has emerged. Moreover, most cases considering durational limits, even pre-*Reed*, turned on the content-neutrality issue rather than on the permitted duration itself.[60] At least one court, however has invalidated an ordinance that imposed a 60-day pre-election limit on political signs.[61]

We therefore suggest a 90-day durational limit for all temporary signs; shorter periods may certainly be constitutional, but municipal lawyers should consider cases from their own circuit in using such shorter periods. The municipal lawyer should also consider whether the sign code should allow one "permanent temporary" sign (i.e., no durational limit) per parcel to allow real estate or other signs that necessarily may need to remain displayed for a longer period.

Local governments that are willing to test the limits of *Reed* to satisfy the community's desire to reduce visual clutter might consider an event-based durational limit that makes no reference to the nature of the event. The remaining approaches discussed above should probably be rejected – in the case of a per-parcel durational limit because of enforcement difficulties, and in the case of seasonal or other timing-based limits because of the risk that such as approach is implicitly content based.

Number of Signs

Local governments may impose limits on the number of temporary signs permitted, either on a per-parcel basis or on other objective criteria like street frontage of square footage. A per-parcel limitation would be easiest to enforce but might in extreme cases expose the local government to as-applied challenges. For example, an owner of a very large parcel might argue that a per-parcel limitation overburdens political speech of the owner relative to the owner of a much smaller parcel.

As with durational limits, the municipal lawyer should be careful to avoid overburdening core political speech with a numerosity limit. As an example, in striking down an ordinance that allowed only two political signs on private property in residential districts, the Fourth Circuit applied "exacting scrutiny" because "the two-sign limit … infringes on political speech."[62] A review of existing sign codes suggests that an appropriate numerosity limit is between six and ten temporary signs per year.

Size of Signs Allowed

Finally, local governments may impose uniform size limitations on all temporary signs. As with both durational and numerosity limits, the challenge is to find a size limitation that prevents visual clutter, preserves traffic safety, and adequately regulates the universe of all temporary signs without overburdening the subset of political signs. In practice, a logical starting place would be to consider the largest existing size limitation for temporary signs in the area to be regulated and to apply that limit to all temporary signs in the area. A review of existing signs codes suggests that an appropriate size limitation in residential areas would be between four and six square feet and in commercial areas would be between 16 and 32 square feet. Smaller size limits might be constitutional even as applied to political signs, but municipal attorneys should consult caselaw within their jurisdiction for guidance.

Summary Recommendation

Following *Reed* and *Reagan National Advertising*, it appears that a municipality has limited options to directly regulate political signs. On the other hand, courts would likely approve a general regulation of temporary signs. As explained more fully below, we offer the following recommendations:

- Local governments should carefully draft definitions of "sign" and "temporary sign" based on the physical characteristics of the sign and should place political signs within the definitional category of temporary signs.
- Local governments may classify signs based on location but should consider possibly preemptive state laws.
- The safe course would be to refrain from distinguishing between commercial and noncommercial signs. If the local government makes any such distinction, it must make no distinctions within the classification of noncommercial signs and must not favor commercial speech over noncommercial speech.

- Local governments may impose uniform durational limits on temporary signs; more nuanced approaches, like event-based durational limits, risk challenge under *Reed* but may be constitutional. The durational limits must be sufficiently long to avoid overburdening core political speech.
- Local governments may limit the number of temporary signs that may posted, either on a per-parcel, street frontage, or square footage basis. The number limits must be sufficiently permissive to avoid overburdening core political speech.
- Local governments may limit the size of temporary signs, but again the size limits must be sufficiently permissive to avoid overburdening core political speech.

Although these limits appear modest, until the Supreme Court clarifies the outer reaches of *Reed*, municipal lawyers must exercise caution in drafting and updating local sign codes. ML

Notes

1. *Reed*, 576 U.S. at 172.
2. *Id.* at 185 (Kagan, J., concurring).
3. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61 (2022).
4. *Reed*, 576 U.S. at 159.
5. *Id.* at 161.
6. *Id.*
7. *Id.* at 160-61.
8. *Id.* at 161.
9. *Id.*
10. *See Reed*, 576 U.S. at 175 (Breyer, J., concurring in the judgment), and 576 U.S. at 179 (Kagan, J., concurring in the judgment).
11. *Reed*, 576 U.S. at 163.
12. *Id.*
13. As described by a commentator supportive of the *Reed* majority opinion: "Government purpose, in other words, cannot save content-based laws from strict scrutiny; it can only doom content-neutral laws that are content-discriminatory in their purpose or intent." Enrique Armijo, *The Content-Discrimination Two-Step Post-Reed and Austin*, Cato Sup. Ct. Rev., 2021-2022, 141, 147–48.
14. *Reed*, 576 U.S. at 164.
15. *Id.* at 171-72.
16. *Reed*, 576 U.S. at 174 (Alito, J., concurring). Justice Alito's concurrence should not be read to mean that the Court as a whole would find these distinctions permissible. This article uses his list only as a helpful catalog of regulations to consider.
17. *Id.* at 175.
18. *Id.* at 174–75 (cleaned up).
19. Austin's "sign code defined the term 'off-premise sign' to mean 'a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.'" *Reagan National Advertising*, 596 U.S. at 66 (quoting the Austin city code).
20. *Id.*
21. *Id.*
22. Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020) (cleaned up).
23. *Reagan National Advertising*, 972 F.3d at 710.
24. *Reagan National Advertising*, 596 U.S. at 65. The Court's conservative majority has increasingly relied on a "text, history, and tradition" approach to other constitutional guarantees, but not (yet) to the Free Speech Clause of the First Amendment. See Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 Duke J. Const. L. & Pub. Pol'y 59 (2023). The *Reagan National Advertising* majority did not explicitly adopt a "text, history, and tradition" approach, but it was clearly influenced by the pervasive historical practice of regulating billboards.
25. *Reagan National Advertising*, 596 U.S. at 69.
26. *Id.* at 73–74.
27. *Id.* at 71 (emphasis added).
28. *Id.* at 90 (Thomas, J. dissenting).

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Day in the Life *cont'd from page 17*



of as municipal law, such as intellectual property rights and admiralty law. The opportunity to become conversant to so many substantive areas is a huge benefit of working in the County Attorney's Office. Not to be overlooked is that fact that I benefit greatly from working with some fantastic colleagues and also have a great working relationship with the staff of every County agency to which I am assigned as general counsel.

What does a typical day look like for you in and out of the office?
On a typical day, my emails can be non-stop. Most of those emails have documents attached to them, and the documents can be anything from an MOU that needs to be reviewed and edited to a draft decision and order from one of my quasi-judicial boards that I need to review and edit and send back to the Chair of the hearing panel. A lot of the emails are requests for legal opinions, and some can be answered really quickly, some may require legal research. That's another interesting thing that has changed over the time that I've been here. When I first started, requests for legal opinions used to come by a memo from a client and then you would write a nice extensive memo. Now, everything comes by email! In terms of what I do outside of work, I try to work out every day. On weekends if the weather is nice I ride my bike. My biggest hobby is international travel. At this point, I have been to 82

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CONSTRUCTION

By: JENNIFER DECURTIS,
Senior Assistant City Attorney,
City of Irving, Texas

Use of Construction Manager-at-Risk Contracts

A Construction Manager-at-Risk (CMAR), if available in the jurisdiction, may benefit public projects that are large in scope, or may benefit public entities that do not have enough internal resources to project manage or audit invoices. A CMAR is an alternative delivery method for the construction, rehabilitation, alteration, or repair of a public project and as such, usually has state specific requirements. The benefits include having a contractor involved in value engineering and constructability during the design of a project, controlling costs, and providing project management. Further, a public entity should take advantage of this method if there are too many projects being developed at one time, since each CMAR will be able to provide individualized attention to that particular project.

Generally, a design professional must be designated concurrently with or prior to the award of a project to a CMAR. Jurisdictions may allow for a two-step process, using an RFQ method whereby qualifications are first examined and then price negotiated; or, a one-step process, using an RFP based on best value for the entity, which would include a negotiation of the CMAR management fee and general conditions fee. Some states require a certain number of finalists from which to negotiate in the two-step process.

CMAR projects are usually structured into phases such as pre-construction and construction phases. In the pre-construction phase, the CMAR is responsible for cost estimates, schedules, and further development of the design documents in order to comment on value engineering/cost reductions, and constructability. In value engineering, the CMAR analyzes the building features and systems, the equipment used, and the material selections to achieve desired functions and a reduction in cost over the life of the project. For example, if a CMAR determines that the materials the architect wants to use are not going to work in practical construction, the CMAR may suggest a cheaper alternative that is more flexible to value engineer the project and analyze constructability. This method may be contrasted with a design-build project where the contractor has its own design professional. The public entity in that case would be able to have a constructability review but would not have as much control as they would have using a separately bid design professional. The CMAR method would allow cost and schedule advantages over the design-build approach. It is worth noting that some jurisdictions even limit the number of design-build contracts that a public entity may have within a one-year period. It is a best practice for the CMAR to provide estimates during the pre-construction phase when the design development is at least at 30% and 60% completion so that the public entity may ensure that the original project budget estimate has not fluctuated in a dramatic way. Additionally, the contract should provide that any cost savings must accrue to the public entity.

Some jurisdictions include the pre-construction phase and the construction phase in one agreement, but others have two separate agreements. A benefit of a separate agreement for each phase is clarity on any bonds required; however, some courts have reviewed cases where terms were not able to be agreed upon for the construction phase after a contracted for pre-construction phase is completed, and yet a portion of the construction has already started. In those cases, courts such as New York and Georgia, have analyzed these cases based on a theory of *quantum meruit*. Either method will allow costs to be bid out for both phases. The pre-construction phase is usually bid as one lump sum.

Once 100% of the construction documents are completed, the

guaranteed maximum price (GMP) may be established through an amendment to the contract if there is one agreement for all phases. The GMP is the total cost of the project, beyond which the CMAR absorbs the extra costs. The total cost of the project includes any of the direct costs to include labor performed by the CMAR, labor performed by subcontractors, and materials and equipment used to complete the work. CMARs, unlike other construction manager agents, are often allowed to do part of the work themselves which would be billed as a direct cost and not part of the management fee. A management fee is generally allowed which is represented by a percentage of the total project budget. This percentage goes by industry standard and is not regulated in many jurisdictions; however, some places such as Nevada put a range on the percentages that may be paid.

Further, CMARS may seek reimbursement for general conditions up to a fixed percentage of the project budget. General conditions are usually the operational indirect costs that are not direct costs to construction but are essential to the project, such as work vehicles, temporary cooling and heating, project site facilities, etc. This is *not* home office overhead. Once the CMAR with the best value for the public entity (or other standard as required by that particular jurisdiction) is identified, an entity must establish and/or negotiate the percentages of management and general conditions fees prior to award. Oftentimes a CMAR will not bid onsite project managers in the management fee, so the general conditions fees tend to be much higher than the management fee.

CMARs are at *risk* for any costs over the GMP to include any costs over their CMAR management fee and general conditions fee; provided that overruns are not caused by the owner. Because the CMAR bids out and enters into the subcontracts instead of the public entity, they are also potentially at risk for defective work as it pertains to a sub's labor. For defective designs, some cases in the United States hold that the public entity provides an implied warranty of the accuracy of plans and specs in favor of a contractor, called the "Spearin Doctrine"; however, a CMAR can generally only take advantage of the Spearin Doctrine if they relied on the plans and specs in good faith since that method is so similar to a design-build method due to the participation in the design. Since this is an implied warranty, it can be waived by contract. Generally, the CMAR is in the best position to detect defects because the CMAR is on site often during the construction phase.

Another area that should be carefully reviewed is any bond required by statute for those areas authorizing the use of the CMAR delivery method. Many statutes require the CMAR to provide performance and payment bonds at the time of the initial contract (through the relevant Little Miller Act statute); however, some statutes either only require one of those bonds or none at all. Some states, such as Texas and California, require performance and payment bonds in the amount of the entire project budget at the time of the initial contract. (Review the relevant state's Little Miller law). Some CMARS express dissatisfaction in providing bonds for the entire project amount at the pre-construction phase (in the case of one contract for all phases) when they may not be reimbursed for costs until the next phase. Fortunately, some states, such as Texas, allow for an alternative security bond to be set in place during the pre-construction phase and then payment and performance bonds to be required at construction. Each jurisdiction has its own requirements on the bonding.

Other CMAR challenges have been primarily those of regular construction claims. However, overall, the CMAR delivery method is a tool that should be considered for public entities if it is authorized as a delivery method in that jurisdiction. Larger and/or multiple projects can benefit from the use of this delivery method due to value engineering and scheduling. The project management functions that a CMAR provides is often critical for smaller cities or cities with few project managers and too many projects, or even larger cities with very large projects. Overall, each public entity must determine which delivery method is best for its particular type of project. **ML**



Jennifer DeCurtis serves as a Senior Assistant City Attorney for Irving, Texas, where she handles a variety of matters for the city involving real estate, eminent domain, construction, development, housing, and purchasing, also serving as the staff attorney for the Capital Improvements Advisory Committee. Previously, Jennifer worked for the City of Dallas where she handled extensive litigation involving code, land use, fair housing, and criminal nuisance cases. She has also worked as an attorney for the City of Denton and the City of Arlington, as well as working in private practice with a boutique municipal law firm.Jennifer has lectured at several conferences and training seminars and has co-authored papers on a broad range of topics concerning government entities. Jennifer is an IMLA Local Government Fellow and certified as a municipal lawyer by the TCAA. She is a graduate of the University of Texas at Dallas and earned her J.D. from Texas A&M University School of Law.

IMLA Nominating Committee for 2024 Elections

Pursuant to the IMLA By-Laws, IMLA is announcing the 2024 Nominating Committee. The Committee encourages people interested in being nominated for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents to make their interest known to the Committee. Vacant Positions this year include open positions on the IMLA Board of Directors and the 4th Circuit, 8th Circuit (North), 10th Circuit (South) and 11th Circuit Regional Vice President.

In addition to filling vacancies, the Committee is charged with nominating the Board's officers: including. Treasurer and President-elect. Some members of the Board will be term limited and cannot seek reelection. As a result, there will be a vacancy or vacancies open. It is IMLA's goal to have a Board that represents the organization's diversity of region, gender, race, age and ethnicity and the Board welcomes all who wish to serve.

Unlike other non-profits, IMLA does not require Board members to contribute money to the organization but does seek persons who are interested in advancing its mission, increasing its membership and attendance at its programs.

This year, the nominating process will be similar to last year's. The Nominating Committee will be conducting Zoom interviews PRIOR to the Annual Conference and will introduce its slate of nominees at its meeting during the Annual Conference. It is important to hear of your interest as soon as possible to allow for the Zoom interviews to be set up. Our hope is to reduce the amount of time members must spend away from our educational programming and to thoroughly consider each applicant. In applying, the Committee hopes that you can offer the Committee an explanation about how you can advance the mission of IMLA and increase its membership and attendance as well as innovative ideas for advancing the interests of our membership.

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The current copy of IMLA's amended By-Laws, which describe the qualifications for service on IMLA's Board of Directors or other IMLA office, can be found at https://imla.org/imla-by-laws/

The Nominating Committee deadline is July 15.



Day in the Life *cont'd from page 19*

countries. The only continent I haven't visited is Antarctica.

That's impressive! Do you see yourself getting there?
Maybe, maybe. Maybe I'll save that for retirement. In the meantime, in a typical year I'll do–depending on if I can get away–maybe three international trips. I tend to follow the sun. When it's winter or fall here, I'll go to southern hemisphere destinations, because it's summer in the southern hemisphere when it's winter up here. I go to northern hemisphere destinations like Europe in the late spring or early fall.

Speaking of Europe, we noticed that you seemed to converse fluently with our Italian presenters at the recent Mid-Year Seminar. Do you speak other languages?
I can converse in French, Spanish, German, and Italian. There are several other languages that I speak bits and pieces of. I would say I have "phrase book" competency in Greek, Dutch, some Japanese, a little bit of Mandarin, and some Croatian. Before visiting a country, I typically learn a bit of the local language ahead of time. I'll get a phrase book or will go online and learn some essential phrases. That will usually break the ice and, you know, people are really impressed with that when I'm in their country. With certain languages, they're really shocked. They're like "Oh, wow! That's nice, but why would you do that to yourself? Croatian?"

The first foreign language that I learned was Spanish. I started in sixth grade. In Farmville there was a Cuban family that had moved to my town; a brother and sister got put in my sixth-grade class and they didn't speak any English. The local college–which is now Longwood University–had a couple Spanish majors teach a bilingual class a few times a week for these students. My sixth-grade teacher wanted some of the American kids to go to this special bilingual class, and I was one of the students that she selected. I learned Spanish while they learned English. My parents sought to encourage it, so two years later, when I was fourteen, they sent me to summer school in Saltillo, Mexico to learn Spanish under a special program provided by the University of Coahuila. I went with seven other high school students from E.C. Glass High School in Lynchburg, Virginia. We went all the way by bus, actually. It took us three days to get there. After that, I started teaching myself other languages through home-study courses. I started teaching myself French and then Italian that way. It wasn't until I got to college that I formally took classes in Spanish and French. I'm completely self-taught in Italian. I would say that my best language is French, because after college I spent a year studying at the University of Neuchatel, which is in the French-speaking part of Switzerland. Every year, I go somewhere in Latin America. There are lots of Spanish-speaking people here, and I have Spanish-speaking friends, so that helps me keep it up.

Are you also steeped in the cultures of the countries whose languages you speak—foods, customs and so on?
I am most definitely steeped in the cultures of the countries whose languages I speak. The opportunity to meet people from around the world and experience the local food and customs is something that I look forward to during every trip abroad. As an avowed foodie, I'm always looking to check out the local food scene wherever I go. I have participated in group food tours and once took a one-day Moroccan cooking class while vacationing in Marrakesh. I have also had the culturally enriching experience of living and studying abroad in Mexico and Switzerland. Beyond that, however, have traveled to 82 countries and have personally gotten to know people on every inhabited continent. When traveling internationally I tend to forgo the major hotels in favor of being hosted in private homes by locals, which affords me the opportunity to experience life as a local during my visit. I have also had the pleasure of playing host and local tour guide to some of my former hosts from abroad when they come to visit Washington, D.C.

Thanks a lot, Walter. Let us know when you reach Antarctica! ML

LISTSERV

By: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

Are Listservs Dead in Light of Recent ABA Opinions? (Or just changed forever?)

Some recent American Bar Association opinions have generated robust discussion on the listserv about the propriety of discussing representation matters on the listserv… Ironic, isn't it? A long discussion about whether it is proper to do what we are already doing in the discussion?

A May 8, 2024 article in the ABA Journal reports that "The American Bar Association Standing Committee on Ethics and Professional Responsibility released a formal opinion today that provides guidance for when a lawyer can seek advice on a listserv," noting that model rules in most cases forbid posting questions or comments relating to a representation — "even in hypothetical or abstract form."

According to the article, "Formal Opinion 511 cites Rule 1.6 on confidentiality of the ABA Model Rules of Professional Conduct to say use of a listserv, beyond enabling lawyers to "keep abreast of changes in the law and its practice," and "seeking advice about a client matter" would "require a client's informed consent in most cases."

The ABA opines that "seeking advice on a listserv would be unethical if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved."

The explanation continues "A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation."

According to the article, the listserv opinion "drew from several prior ABA formal opinions dating back to 1998, as well as recent bar opinions in Oregon and Maryland. Those state opinions spotlighted the value of listservs to lawyers to test their understanding of legal principles and to clarify the best way to proceed in unique situations."

However, the article stressed that the ABA opinion emphasized "the more unusual the situation … the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6." Further, it indicated "participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter."

The standing committee periodically issues ethics opinions to guide lawyers, courts and the public in interpreting and applying ABA model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior. (Drawn from ABA Journal May 8, 2024)

As you can guess, this opinion drew many reactions on our beloved listserve. Some folks saw a distinction from the opinion for in-house government lawyers, and some did not. A few of the comments reveal the nature of our discussion. Here they are, both pro and con:

"That opinion seems addressed to attorneys in private practice. As others point out, my client's identity is a matter of public record – heck, it's even on my business cards."

"What about the fact that if you are a lawyer who works for the City, you are both the lawyer AND the client. In some cities, the City Attorney and their counterparts have the power to make certain decisions, enter into contractual agreements, etc. on behalf of the City. So, if I have given myself permission to float a question out to the listserv, shouldn't that count for something?"

"Now, I still do not give away confidential information… But if something has been discussed publicly, is a matter of public record, and there is only one client then how do you run afoul of this article?"

"Maybe get formal client consent to participate in the listserv or, better, to submit questions to IMLA for publication on the listserv without attribution?"

"As usual, the Ivory Tower ABA ethics mavens and state supreme court judges: Setting impossibly high standards and making things impossibly difficult for the actual, practicing attorney…Not that I have strong feelings…"

"What about questions asked at the end of a CLE presentation? I suppose that you could preface all the

listserve questions with "I am asking for a friend...."

"This is interesting … I note that it says it is unethical if the reader could infer the identity of the client… I only have one client, so that is not hard to do… But my client is a member of IMLA and knows I participate in the listserve… In fact, it is one of the benefits…. Also, it is a matter of public record that I represent my client. Does anyone think any of this makes a difference???"

"This is very timely… I just got a call from a private practice lawyer who wants to see a fiber optic cable franchise agreement our town signed with a fiber optic company. He represents another city. The agreement is already in place… It is a public document… It is not confidential… As their lawyer, am I prohibited from sending a copy to him (without permission) since it is a product of my representation? Do I have to get permission from my client? I am willing to learn here, but this sounds well, ridiculous… I guess I could just let any other employee here release it for me since they are not a lawyer? It can be requested under FOIA anyway, can't it?"

"How far do you go with this? If it is a violation to reveal the identity of a client without permission, is it a violation for me to answer when somebody asks me what I do for a living and I tell them where I work? Should I take my city name of my business card and email?"

A couple of points from the other side of the coin:

"I don't think private/gov't practice distinction is material. The GC of any non-gov't company would have the same public-recognition-of-client issues as a gov't lawyer."

"Well, we just attended an ethics CLE that touched on this issue. Apparently, ABA model Rule 1.6(c) on Confidentiality of Information, includes disclosing even public information the client does not authorize to be released.

'…(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.'

So, while it may already be in public discourse, if the client does not authorize it to be discussed/disclosed, there's an argument it still cannot be revealed by an attorney."

"We live by different rules in the public sector and reconciling some of them with the practice guidelines can sometimes be very difficult. In fact, sometimes they don't seem to make sense. However, it is the world we live in, and we signed up for it."

*****

A few points were made on the comments above:

"In House Counsel for a private business attorney is not subject to the Freedom of Information Act and their work product is not already a matter of public record."

"A lawyer can't release the public information, but can a non-lawyer release it since it is already a matter of public record?"

"It doesn't do any good to present the scenario as a hypothetical or "Asking for a friend" situation if it can be inferred from the question that the lawyer represents a specific client."

Well, you get the point. This debate could rage on. I hope it doesn't put a damper on the success of listserves. My client has benefitted greatly from my participation on the IMLA listserve. Let's see if we can keep this thing going while keeping our limits in mind.

***

On a lighter note, we had an accident in town recently involving a private citizen and a bakery truck. During the testimony, the police officer revealed that the truck was a "Tastykake" truck. The officer continued to tell that the truck spilled its load internally and that when the driver opened his door "Tastykakes" spilled out onto the road. The word "Tastykake" was used so many times that the judge grinned and said the officer was making him hungry. Later pictures of the cakes ended up in the officer's mailbox and on his cell phone. His attention to detail was admirable, but his repetition drew him a little ribbing.

We recently received a call from a "citizen" who sharply advised us to immediately post "Alligator Warning" signs at a lake in one of our public parks. This is despite the fact there has never in history been a single report of an alligator sighting in our fair city. Also, it is despite the Department of Natural Resources statement that there is no known record of alligators inhabiting the area, and their general guideline that alligators do not live above the fall line.

All of this was relayed to the caller, who vehemently stated "That is a bunch of ****! I'm from **** and I know what alligator waters look like and I guarantee you there are alligators in that lake. What? No, I've never seen one. No, I have not been there before."

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Finally, I have to get in my usual IMLA Conference plug. We're roughly 90 days until the IMLA Annual Meeting at the Hilton Bonnet Creek near Orlando. You've heard it here before, and here it is again. These seminars are worth every bit of the money. If you have a chance, please attend. Besides being informative, they are quite a bit of fun! Hope to see you there!

The prosecution rests, your honor… ML

INSIDE CANADA

By: MONICA CIRIELLO,
Director of Municipal Law and Licensing Compliance,
City of Hamilton, Ontario

Kneeling Buses, Falling Trees, Wayward Trailers, and More.

Discrimination on the City Bus Goes Round and Round
Lavides v. Mississauga (City), 2024 HRTO 723 https://canlii.ca/t/k4vb0
The Applicant alleged discrimination in services based on a disability contrary to the *Human Rights Code*, R.S.O. 1990, c. H. 19 by City of Mississauga ("City") transit operators, on various occasions while riding the City bus.

HELD: Application dismissed.

DISCUSSION: The onus is on the Applicant to prove on a balance of probabilities that her protected characteristics were a factor in the City's actions. The City did not dispute that it is responsible for the conduct of its transit operators but argued that it did not discriminate against the Applicant on any occasion. The Applicant submitted that she was discriminated against by seven different transit operators prior to boarding and disembarking City buses. She alleged that the discrimination occurred when she had to gesture or explicitly ask the transit operators to lower the entrance door to facilitate boarding, colloquially known as "kneeling the bus," even though she had a visible physical disability and walked with a cane. While the Applicant did not provide any evidence to support her claim, the City did acknowledge that each transit operator has many tasks to complete at each stop, and its training practice as outlined in the internal policy "Use of the Bus Accessible Features" requires a transit operator to finish serving one customer prior to serving the next. The City suggested that this practice may have led to a delay in kneeling the bus for the Applicant, but it was due to policy, not the Applicant's disability. The Tribunal was satisfied that on a balance of probabilities the Applicant's disability was not a factor in her interactions with the transit operators. The Tribunal held that it was clear that the Applicant was dissatisfied with the service provided; however the Applicant failed to prove that her disability was a factor in any of her interactions with the City or transit operators. Application dismissed.

An All or Nothing Approach to Tax Exemptions
The Assessor for the City of Winnipeg et al. v. The Board of Revision for the City of Winnipeg et al., 2024 https://canlii.ca/t/k5317
The Assessor for the City of Winnipeg and the City of Winnipeg ("City") appealed the decision of the Board of Revision ("Board") that found that an institution that operates in the City as Aveda Institute and Academy ("Aveda") should receive a 100% exemption from paying school taxes. Aveda argued that the City's appeal is without merit and should be dismissed. The City's application was for the school tax exemption to only apply to 73.6% of Aveda's property.

HELD: Application dismissed.

DISCUSSION: It is undisputed between the parties that Aveda is a seminary of learning, also known as a place of education, within the meaning of section 23(1)(d) of the *Municipal Assessment Act*, C.C.S.M. c. M226 ("*Act*") and as such is entitled to some level of tax exemption. The City relied on the evidence of an inspector, who determined that despite Aveda having a 100% leasehold interest in the property, some of the property was vacant, unused, and looking to be sublet. The calculation presented by the City was that only 73.6% of the property was occupied and used by Aveda for education purposes and therefore the remaining 26.4% of the property was taxable. The City cited section 23(1) of the *Act* which provides that there is an exemption from school taxes if the property is owned by and *used by* a seminary of learning (emphasis added). It was the City's position that the legislative intent of this language was to ensure that only when a property was in use would the school tax exemption apply and as such Aveda was required to pay taxes on the unused

26.4% of the property.

Aveda argued that the entirety of its property as a seminary of learning should be tax exempt, as it is not necessary for every area of every building on the property to be strictly used for educational purposes. Aveda relied on a similar case in *Winnipeg (City) Assessor v. Gateway Soap & Chemical Co. Ltd*, 2004 MBCA 3 which held that the entirety of the property carried out the *objectives* of the corporation and as such the corporation was entirely exempt from municipal taxation. Aveda submitted that similar to *Gateway Soap & Chemical Co. Ltd*, it leases and uses the entire property for the purpose or objective of learning, and as such the school tax exemption applies to the entirety of the property. The Court agreed with Aveda, finding that even though the entire property was not actively used for the purposes of a seminary of learning, the contemplated future uses of the entire property are auxiliary to the use of the property as a seminary of learning. The Court held that the case law does not support the City's position that all portions of the property must be fully utilized by Aveda before a full exemption is granted. Application dismissed.

Don't Park Your Trailer in Your Yard

Hallman v Woodstock (City), 2024 CanLII 51675 (ON LT) https://canlii.ca/t/k5382

The Committee of Adjustment at the City of Woodstock ("City") denied the Appellant's minor variance request to construct a parking pad for a trailer on his single detached dwelling property. The Appellant appealed to the Ontario Land Tribunal ("Tribunal").

HELD: Appeal dismissed.

Discussion: The Appellant appealed to the Tribunal for a minor variance seeking relief from the City's Zoning By-law to permit a trailer to be parked in the exterior side yard of his property, a residential zone. The appellant did not put forward any planning evidence to the Tribunal, but rather explained the practicality of his request. The Appellant submitted that there is a growing trend of both homelessness and crime throughout the City, thereby increasing the risk of a break-in or property theft; therefore he sought to park his trailer on his own property rather than at a storage facility. The City relied on section 45 of the *Planning Act,* R.S.O. 1990, c. P.13 ("*Act*") which outlines the four tests the Appellant bears the onus of demonstrating have been met. Namely, that the requested variance: first, maintains the general intent and purpose of the official plan; second, maintains the general intent and purpose of the zoning by-law; third, is desirable for the appropriate development or use of the land, building or structure; and fourth, is minor in nature. The City argued that as a right, the approval of the variance would directly contradict the City's Official Plan and Zoning By-law which prohibits parking trailers on residential lots and would set an undesirable precedent throughout the City. Furthermore, the intent of the Official Plan and the Zoning By-law is to ensure that driveways of dwellings remain available for parking and in this case, the trailer would not have access leading to the driveway and therefore would require to be driven across the curb, boulevard, and sidewalk, causing damage to public property. The Tribunal was persuaded by the City's evidence and satisfied that the Appellant's variance did not meet the general intent and purpose of the Official Plan or Zoning By-law. Therefore, the variance requested by the Appellant was not minor. The Tribunal held that the application did not comply with the criteria established in section 45 (1) of the *Act*. Appeal dismissed.

Time's Up: No Jurisdiction where the Appeal is Tardy

CIDEX Holdings Ltd. & ALBARI Holdings Ltd. v Calgary (City), 2024 ABLCSAB 10 https://canlii.ca/t/k4tbk

The Appellant received an Order to Comply ("Order") from the City of Calgary ("City") requiring the Appellant to either obtain a building permit and commence work on the property or demolish the structure by a certain date. The Appellant appealed the Order to the City's Licence and Community Standards Appeal Board ("Board"). In response, the City argued that the Board did not have jurisdiction as the appeal was filed after the Order's limitation period.

HELD: Appeal dismissed.

DISCUSSION: The Board's authority to hear appeals is governed by the Licence and Community Standards Appeal Board By-law ("By-law") and section 546 of the *Municipal Government Act*, R.S.A. 2000 c. M-26 ("*Act*"). The language in both the By-law and the *Act* requires a Notice of Appeal to be filed by an appellant within seven days after receiving an Order. The Appellant conceded that the Notice of Appeal was submitted beyond the seven-day timeline and made three separate arguments for why the appeal should still proceed. First, the Appellant relied on the doctrine of legitimate expectations, arguing that the City owes the Appellant the duty of procedural fairness. Since the appeal

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29. *Reagan National Advertising*, 596 U.S. at 87–88 (quoting *Reed*).
30. *Village of St. Bernard*, 99 F.4th at 842 (internal quotations removed).
31. *Id.* at 843 (cleaned up).
32. *Id.* at 848.
33. *Id.*
34. *Id.* at 850.
35. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 334–35 (1995)
36. *See*, *e.g.*, *Reed*, 576 U.S. at 174 (Alito, J., concurring) (identifying "rules that would not be content based" to include size of signs, lighted or unlighted signs, and fixed messages or electronic signs).
37. Codified Ordinances of The Village of St. Bernard, Oh § 1185.1(a) (2024).
38. Although the definition may be challenged as unconstitutionally content-based, the Village's flag exception is practically important because it exempts many commonly used flags, like the flags of nations, states, cities, and organizations while regulating flags with other content. This type of exemption allows residents who fly official flags to do so without a permit or review. If a local government seeks to accomplish this outcome, then it should allow all flags without regard to content but subject flags to a limit on the number of flags, the size of the flags, and the height of the flagpoles.
39. For a particularly helpful discussion of crafting and evaluating exceptions for content neutrality, *see* Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 The Urban Lawyer 569 at 612-14 (2015).
40. Code of The Unified Government of Wyandotte County/Kansas City, Kan. § 27-729(b)(1).
41. Oklahoma City, Ok, Ordinance No. 27,526 (adopted Feb. 13, 2024) (Sign Code § 59-16119.B.).
42. IMLA Model Sign Code, 6th Draft, https://imla.org/resource/library/sign-code-6th-draft/ (last accessed June 26, 2024).43. *See* Minn. Stat. § 211B.045 (preempting local governments' regulation of all noncommercial signs during election season); Tex. Elec. Code Ann. § 259.003 (preempting regulation of all political signs on private property).
44. *See, e.g.*, Hoye v. City of Oakland, 653 F.3d 835, 854 (9th Cir. 2011) ("Courts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees would risk becoming an empty formality….").
45. For example, the Arizona Attorney General concluded that Ariz Rev. Stat. § 16-1019 is not invalidated by *Reed* because it does not limit the right to speech by citizens, but instead limits government authority to prevent the display of political signs. *See* Ariz. Att'y Gen. Op. I15-011 (2015).
46. *Reed*, 576 U.S. at 173.
47. Specifically, it prohibited posting signs on "any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign." *Vincent*, 466 U.S. at 792 n.1.
48. *Vincent*, 466 U.S. at 815.
49. As previously noted, however, governments must resist the temptation to inject content-based considerations through exemptions. For example, the regulation at issue in *Vincent* exempted "the installation of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality." *Vincent*, 466 U.S. at 792 n.1. Under *Reed*, the emphasized language is not content neutral.
50. The four-part test provides a framework for evaluating "the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Metromedia*, 453 U.S. at 507 (summarizing the test in Central Hudson Gas & Electric Co., 447 U.S. at 563-66).
51. *Metromedia*, 453 U.S. at 512.
52. *Id.* at 506.
53. The only substantive discussion of the distinction was in the concurring opinion of Justice Breyer: "Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to commercial speech. But I have great concern that many justifiable instances of content-based regulation are non-commercial. And, worse than that, the Court has applied the heightened strict scrutiny standard even in cases where the less stringent commercial speech standard was appropriate." *Reed*, 576 U.S. at 178 (Breyer, J., concurring) (cleaned up).
54. *See* Morris v. City of New Orleans, 399 F.Supp.3d 624 (E.D. La. 2019) (finding that a distinction between commercial and noncommercial murals does not pass the intermediate scrutiny test because "[i]nsofar as that purpose is related to community aesthetics, there is nothing in the record to suggest that commercial messages in artwork are more unsightly than non-commercial messages in artwork.")
55. Act Now to Stop War & End Racism Coal. v. District of Columbia,

846 F.3d 391, 396 (D.C. Cir. 2017).
56. *Act Now to Stop War*, 846 F.3d at 396.
57. The court noted that the local law applied to postings on the District's lampposts, which were a limited or designated public forum. "But once [the District] allows members of the public to post signs on its lampposts, the government lacks the power to restrict expression because of its message, its ideas, its subject matter, or its content." *Act Now to Stop War*, 846 F.3d at 403 (cleaned up). Therefore, the court's holding did not depend on forum analysis, and its conclusion should permit similar laws applicable even to traditional public forums.
58. The Fifth Circuit Court of Appeals considered and rejected the D.C. Circuit's analysis in *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) – the very case about off-premises sign regulations that was reversed by the United States Supreme Court in *Reagan National Advertising*, 596 U.S. 61. "We do not see, as the D.C. Circuit does, an exception for mere 'cursory' inquiries into content in the holding of *Reed*." *Reagan Nat'l Advert. of Austin*, 972 F.3d at 705. zUnfortunately, the Supreme Court, in reversing this decision, did not discuss event-based durational limits in its opinion.
59. *www.RicardoPacheco.com v. City of Baldwin Park*, No. 216CV-09167CASGJSX, 2017 WL 2962772, at *7 (C.D. Cal. July 10, 2017).
60. *See, e.g.,* Whitton v. City of Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995).
61. Collier v. City of Tacoma, 854 P.2d 1046, 1057 (Wash. 1993) ("Tacoma has not shown that its restrictive time period of 60 days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of political speech.").
62. Arlington Cnty. Republican Comm. v. Arlington Cnty., 983 F.2d 587, 593 (4th Cir. 1993).

Inside Canada *cont'd from page 27*

was already scheduled before the Board, the Appellant argued it had a legitimate expectation that the hearing would be proceed: Second, the Appellant relied on the doctrine of estoppel relying on *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34 for the principle that when a public authority makes a clear and unambiguous promise to its citizens to induce the citizens to perform certain acts, the public authority is estopped from not following through on the promise. The Appellant argued that after it filled an appeal it received a hearing notice letter from the Board which constituted a promise that the hearing would proceed. Third, the Appellant relied on the doctrine of relief from forfeiture, relying on *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 SCR 490 to put forward the argument that it had an honest belief the appeal was submitted on time and there would be no prejudice to the City if the appeal were to proceed.

The Board disagreed with the Appellant. The Board's authority to hear an appeal is clearly outlined in both the By-law and the *Act* and neither provides authority to the Board to vary a timeline or extend a deadline. In doing so the Board would be in contravention of both. The Board held that the doctrines of legitimate expectation and estoppel do not apply; furthermore there was no reasonable expectation nor promise that the Board would hear and decide an appeal regardless of whether the appeal deadlines had been followed. Appeal dismissed.

If a Tree Falls on a Motorhome, Is it the City's Fault?
Morissette v. City of Courtenay, 2024 BCCRT 528 https://canlii.ca/t/k542h
The Applicant, a resident of the City of Courtenay ("City") filed a claim seeking property damage caused by a City tree that fell on his motorhome. The City submitted that it is not legally responsible for the damage caused by the fallen City tree as it acted reasonably and in accordance with its Tree Removal Policy ("Policy").

HELD: Claim dismissed.

DISCUSSION: The Applicant submitted that the City was negligent by not dealing with the trees in the vicinity of his property in a timely manner despite ongoing complaints. The City submitted that it responded to the Applicant's complaints in compliance with its reactive Policy and sent an arborist to review and assess the trees in the vicinity of the Applicant's home. The 2018 arborist risk assessment found that the trees located within the vicinity of the Applicant's home were at a low risk of falling, a follow up re-assessment was completed in 2020 which recommended mitigation of the trees in one year or less. In compliance with the assessment, the City removed some of the trees in the area; however, one tree that was toppled but not removed fell on the Applicant's motorhome. The City argued that it did not breach a standard of care as it followed the steps of its Policy by completing a risk assessment reactively when it received a complaint, and removed the trees based on a risk assessment and available resources. Furthermore, the Applicant bears the onus to prove that the City's actions fell below the required standard of care. The Court was not satisfied that the Applicant provided any persuasive evidence from an arborist or expert to suggest that the City's risk assessment was unreasonable. Therefore, the Court held that the City was not negligent. Claim dismissed. ML

PRACTICE TIPS

By: MARIANNE LANDERS BANKS, *Attorney at Law, Bojorquez Law Firm, Austin, Texas*

What to Expect from a Land Survey

INTRODUCTION

There are a variety of opportunities for municipal attorneys to be exposed to a land survey. Certainly if you are involved in purchasing or selling any City-owned property, development projects, capital improvement projects, or even in dealing with code enforcement matters, a land survey may be a tool that would be necessary to your legal work. This article is intended to bring to your attention a trend that my colleagues and I have seen developing over the last few years concerning the background title work that is used by surveyors in preparing their survey documents.

History-and a troubling trend.
Clearly it is important to know what the boundaries of a parcel of land are, and this need has existed dating back to Egyptian times. It was the Romans who first recognized the profession of "gromatici," so named after their primary surveying tool, the "groma." The work was considered half mathematical and half legal, and the gromatici actually were the ones to assist in resolving disputes over legal boundaries.

That history explains a bit of how today's surveying professionals became expected to use land title documents to support their work. Most states require land surveyors to review recorded land title documents in preparation for performing on the ground survey work. Interestingly, at least one state prohibits surveyors from researching the title documents themselves and requires them to purchase the title history from the state.

Historically, modern surveyors used abstracts of title and other original land records to provide the evidence of boundary information and monumentation, before performing work on site to locate the corner pins and other markers for the property. Today very few true abstract companies exist, but certainly original real property records are maintained in county or regional government offices. Many surveyors have come to depend on a title history document prepared by a title company to serve as the foundation of their land title research. This is where a trend has arisen that raises some concern for municipal practitioners.

The need to dig deeper.
When reviewing a land survey, it is not just the boundary of the parcel that may be needed. With so much infrastructure underground, from water and wastewater utilities, to natural gas and electric, as well as potentially multiple fiber and telecommunication lines, it is important to know the extent of existing easements impacting the property, as well as any rights of way for dedicated streets and alleys, and any other unique encumbrances or specific use limitations. These may be found in subdivision plats and restrictive covenants, rather than simply in the deeds making up the chain of title ownership.

One big red flag is if the land survey you receive shows no utility easements. This is very unlikely since so many sites are crossed by major utility lines, pipelines, and so on, as utility services are available to many properties, particularly those within the developed area of the city. A call to your utility locating company or observation on site of any evidence of existing utility infrastructure – electric poles, telephone boxes, manholes, etc. – are cause to contact your surveyor

to be sure they checked closely for easements.

Also inquire of your surveyor how many years back the title history is being run. Some of these quick "title run sheets" that various of our surveyors have received are only going back ten years, which is wholly inadequate. Again, many times the surveyors that I spoke with did not realize they were being shorted years of information. One document I read from an international right of way organization was that a minimum of sixty years should be checked. Again, there may be documents older than that, but sixty is certainly better than ten.

One thing I have found missing that is older than sixty years are "blanket" electric, water and pipeline easements. These are easements that have been placed on a parent tract of property, burdening the entire parcel with an easement, usually with the promise that the company will come back and reduce the easement area once they determine where the line will be placed … but rarely is any release or narrowing of the easement area recorded. And many times it is hard to locate the successor in interest of the company that owns the easement.

With the advent of access to land title records through electronic means, services have become available that purport to provide easy access to title history. Unfortunately, some of the companies offering this service provide a more limited scope of records. Some title companies seem to be depending on these services more than performing their own specialized title research. While title attorneys may spend more focused time reviewing the title documents before closing, and raise questions over certain documents that may not have had adequate review, unfortunately this can create difficulties with the land survey and re-work to be done by the surveyor to produce an adequate survey for the closing on the transaction. And this can create time delays, which may be problematic for your clients.

On a number of occasions over the last few years, we have found that the detail we are receiving with a title commitment before closing was not the same as what our surveyor was provided at the time they were preparing to perform their site work. Many times no easements for utilities have been identified at all. In discussing this trend with both surveyors and real estate attorneys in our area and in some other states, many have been experiencing the same issues.

Avoiding unnecessary delay.
Discovering easements or utilities in unexpected locations late in acquisition has caused delays for project construction. In order to avoid re-work on the survey at the end near closing, we have begun ordering title work at the beginning for our benefit, and providing that documentation to the surveyor in addition to whatever title information they have secured. This has significantly reduced the amount of survey revisions needed before closing on purchases. If we are confident in our client needing the property, which is normally the case, we will order a title commitment at the outset.

It has been a challenge to help title companies understand why we are wanting to order the title commitment so early, before we even have a survey, but the surveyors have really appreciated the detail we are able to provide, as the forms they historically had received from some title companies simply have not had the necessary detail that they used to get. It provides us with the detail needed for any curative measures and much better documentation than had been received from the title run that the surveyors had requested.

Final thoughts.
Some title companies are still providing good and detailed title information for surveyors, particularly with established companies that you or your surveyor may have many years of experience. Where we have seen this trend has been with more of the new companies that seem to be popping up. Surveyors may search for a title company that can get them a quicker response, and then simply not realize that they are receiving incomplete title history. This is certainly not the case for all title companies, but just a trend to monitor and discuss with the surveyors who will be performing your work. Compare notes, share what title work you have early on, specifically request easements be located, and that teamwork may save your clients time (and frustration) in the long run. ML



Marianne Landers Banks – Marianne has practiced municipal law in Texas since 1987, first with the City of College Station, then as City Attorney for Georgetown for eleven years before entering private practice in 2001. She expanded her practice in 2002, working for the City of Springfield, Missouri over the next fourteen years and serving on the Board for the Missouri Municipal Attorneys Association until 2017. She maintains a solo practice in Lampasas, Texas, and is Of Counsel to the Bojorquez Law Firm in Austin. She was previously City Attorney for Big Spring and Lorena, Texas, and now serves as City Attorney for Fairfield, Texas, and as special counsel for a number of other Texas cities. Marianne is an IMLA Local Government Fellow, a past recipient of IMLA's Distinguished Public Service Award, and an Amicus Award winner. She previously served on the IMLA Board of Directors and is a Past Chair of IMLA's Land Development, Planning and Zoning Section and Past Texas State Chair. She has presented on topics on land use, code enforcement, law office management, and currently serves on the Fellows and Membership Committees. Marianne holds a BA in mathematics from The University of Texas at Austin and a J.D, from St. Mary's University in San Antonio. She enjoys spending time with her three grown daughters, two sons-in-law, and four grandchildren.

AMICUS

By: ERICH EISELT,
IMLA Deputy General Counsel and Director of Legal Advocacy

A Frenzied Finish to the October 2023 Term

As the last sessions of the Supreme Court's October 2023 Term came to a close on July 1, 2024, the Court raced to issue many of the Term's most pivotal decisions, passing judgment on presidential immunity, agency deference, January 6 obstruction charges, and more. These last-minute, headline-grabbing opinions clearly have national consequences, but their effect at the local level is less discernable. Other of the Court's late-breaking decisions have more obvious significance for local government. They include *Grants Pass v. Johnson* (construing homeless regulations), *United States v. Rahimi* (criminalizing firearm possession), and *Murthy v. Missour*i (analyzing government speech)—all matters in which IMLA chose to file an amicus brief to voice the interests of our membership.

***Grants Pass*:**

In *Grants Pass v. Johnson*, the Court held that the city's enforcement of generally applicable laws regulating camping on public property does not violate the Eighth Amendment's Cruel and Unusual Punishments clause. The factual setting will be familiar to many localities around the country: Grants Pass, an Oregon city comprising 38,000 residents, faced challenges in dealing with as many as 600 homeless persons. It enacted various ordinances directed at "camping" which made it nearly impossible to sleep outside on public property with any bedding or shelter. Single camping violations resulted in fines, but more consequential was a "park exclusion" provision, where persons could be barred from a city park for 30 days if they were cited two or more times in one year for violating the camping ordinances. A subsequent violation of the park exclusion would then constitute criminal trespass.

The legal precursor to *Grants Pass* was *Martin v. Boise*, a 2019 Ninth Circuit decision construing Boise's ordinance that made it a misdemeanor to use "streets, sidewalks, parks, or public places" for "camping." The Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." Accordingly, Ninth Circuit local governments could no longer enforce public-camping ordinances against homeless individuals who lacked "access to alternative shelter." Boise, supported by many local government amici, petitioned the Court for cert, but was denied.

Based on the prohibitions against enforcement of anti-camping laws in *Martin v. Boise*, two homeless persons filed a class action against Grants Pass on behalf of the "involuntarily homeless" in the city, arguing that its anti-camping ordinances are unconstitutional under the Cruel and Unusual Punishments Clause. After denying en banc review over the objection of 17 judges writing five separate opinions, the Ninth Circuit upheld the district court's class certification and affirmed the lower court's holding that "the anti-camping ordinances violated the Cruel and Unusual Punishments Clause to the extent they prohibited homeless individuals from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"

Grants Pass successfully sought certiorari, supported by numerous governmental amici, bringing *Martin* squarely into focus. Reversing the Ninth Circuit, Justice Gorsuch wrote for the 6-3 majority which squarely disagreed with the Circuit's reading of the Eighth Amendment: "The Cruel and Unusual Punishments Clause focuses on the question what 'method or kind of punishment' a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense." The majority also challenged the intrusion of the judiciary into the complexities of unhoused persons, explaining that the "Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest … [the] rights and responsibilities from the American people" to decide "how best to handle a pressing social question like homelessness" and "in their place dictate this Nation's homelessness policy."

In his opinion, Justice Gorsuch included numerous citations from amicus briefs supporting Grants Pass and documenting the scope and complexity of homelessness problems across America. This included the Local Government Legal Center brief, in which IMLA, in collaboration with the National Association of Counties and the National

League of Cities--and joined by numerous other local governments--not only raised federalism and separation of powers issues, but focused on the fact that generally applicable anti-camping ordinances can be a valuable mechanism for bringing homeless persons into programs designed to remedy their situation. As Gorsuch put it, by prohibiting enforcement of anti-camping bans, the *Martin* court "took one of [the] tools [needed to address homelessness] off the table."

A variant of the Eighth Amendment argument proposed by the *Grants Pass* plaintiffs was that the city was criminalizing the *status* of being homeless. In *Robinson v. California,* 370 U. S. 660 (1962) the Court had held that a California law effectively criminalizing the status of narcotics addiction constituted cruel and unusual punishment under the Eighth Amendment. The Court in *Robinson* noted that if the government punishes the "status" of being an addict, "[e]ven one day in prison would be . . . cruel and unusual." But the *Grants Pass* majority declined to extend the *Robinson* analogy; while a person addicted to drugs is unable to act otherwise, those violating a public camping ban--whether a homeless person or a backpacker--may have other options and cannot all be covered under one rubric. As the Court noted, various amicus briefs documented that in some jurisdictions, upwards of 70% of offers for shelter are rejected by homeless persons.

The shelter rejection data also made unworkable the Ninth Circuit's categorization of the "involuntarily homeless" which *Martin* had advanced, revealing the impracticality of a federal judiciary purporting to make decisions better left to local leaders and their constituents:

> Under *Martin*, cities must allow public camping by those who are "involuntarily" homeless. But how are city officials and law enforcement officers to know what it means to be "involuntarily" homeless, or whether any particular person meets that standard? Posing the questions may be easy; answering them is not. Is it enough that a homeless person has turned down an offer of shelter? Or does it matter why? . . . If there are answers to those questions, they cannot be found in the Cruel and Unusual Punishments Clause. Nor do federal judges enjoy any special competence to provide them.

In dissent, Justice Sotomayor was joined by Justices Kagan and Jackson. They argued that because sleep is a biological necessity, it cannot be a crime for people who have no other option but to sleep outside; the ordinances at issue therefore criminalize status under *Robinson* and do violate the Eighth Amendment. The dissent further suggested that, even if held to be valid under the Eighth Amendment analysis by the majority, anti-camping measures such as the Grants Pass ordinances might be susceptible to Due Process and other challenges: "The Court's misstep today is confined to its application of *Robinson*. It is quite possible, indeed likely, that these and similar ordinances will face more days in court."

Rahimi:

In *United States v. Rahimi*, the Court resoundingly rejected the Fifth Circuit's conclusion that a federal law facially violates the Second Amendment in criminalizing continued possession of a firearm by a demonstrably dangerous person who has been prohibited from having a gun under a state domestic violence protective order. The subject of the case was Zackey Rahimi, a Texan who had assaulted his girlfriend, threatened to shoot her, and continued to fire weapons on numerous occasions after being prohibited from further possession. He had been expressly notified by the Texas court imposing the order that continued gun possession would run afoul of federal criminal law. He ignored that advisory and was subsequently found to be keeping firearms.

A federal grand jury indicted Rahimi for violating 18 U.S.C. §922(g)(8), which makes it unlawful for anyone subject to a post-hearing court order that restrains the person from "harassing, stalking, or threatening" an intimate partner or child of such intimate partner and "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child" to "possess in or affecting commerce, any firearm or ammunition." He was sentenced to six years in prison—a punishment initially upheld by the Fifth Circuit—and sought en banc review.

Enter *New York State Pistol & Rifle Association v. Bruen*, where a 6-3 Supreme Court majority (including four separate concurrences) signed onto Justice Thomas' emphatic pronouncement that, following on *Heller*, any governmental restriction on Second Amendment rights must fit within the Nation's historical tradition of firearm regulation. In light of *Bruen*, the Fifth Circuit panel withdrew its opinion and sought supplemental briefing. The Circuit found that, viewed through *Bruen's* "history and tradition" lens, the Government's proffered historical analogues were not sufficiently close to justify the modern-day federal firearm deprivation law. It reversed the district court holding and vacated Rahimi's conviction.

Solicitor General Elizabeth Prelogar rapidly sought certiorari on the following: "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment on its face."

At the High Court, the SG's arguments met a far more receptive audience. Writing for an 8-1 majority which decisively reversed the Fifth Circuit, Chief Justice Roberts con-

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firmed that Second Amendment rights have never been unlimited: "[T]his Court explained in *Heller* that the right to keep and bear arms belongs only to 'law-abiding, responsible citizens.' And in *Bruen*, the Court stated that the Second Amendment protects the right of 'an ordinary, law-abiding citizen' to possess and carry arms for self-defense." Roberts delivered a much more definitive pronouncement for the likes of Mr. Rahimi: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." The majority found that the Fifth Circuit had been overly restrictive in its rejection of the government's proposed comparators, finding that "like the dissent, it read *Bruen* to require a 'historical twin' rather than a 'historical analogue.'" Here, the government had adequately defined historical antecedents that validated the statute's criminal sanctions for firearm possession: "As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."

The sole dissent in *Rahimi* was Justice Thomas, who had authored *Bruen's* history and tradition-based opinion. He objected to relative lack of comparability being accepted by the *Rahimi* majority:

> [T]he Government's "law-abiding, dangerous citizen" test—and indeed any similar, principle-based approach— would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets "unfit" persons. And, of course, Congress would also dictate what "unfit" means and who qualifies. . . .The historical understanding of the Second Amendment right would be irrelevant. In fact, the Government posits that Congress could enact a law that the Founders explicitly rejected.

In rebuttal, Justice Sotomayor challenged the proposition that history must be rigidly construed:

> According to the dissent, the solution cannot be "materially different" even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, see, e.g., R. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L. J. 2117, 2154–2170 (1996), it is no surprise that that generation did not have an equivalent to §922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.

Murthy

Murthy v. Missouri was initially brought by a group of five medical professionals against federal government agencies and administrators after the professionals' social media posts criticizing governmental Covid policies and mandates were replaced by federal government Covid messaging. Missouri and Louisiana then joined, alleging that they and their residents were harmed by the social media platforms' censorship of their speech. The suit named the Surgeon General, the CDC, the FBI, White House and dozens of Administration officials. While the Administration contended that it was merely attempting to "mitigate the hazards of online misinformation" by flagging content that violated the social media platforms' own policies, the plaintiffs argued that the government "coerced, threatened, and pressured" the social media platforms into suppressing their views, making the platforms state actors and violating the First Amendment.

In July 2023, the U.S. District Court for the Western District of Louisiana agreed with the plaintiffs, finding that the Administration "apparently engaged in a massive effort to suppress disfavored conservative speech." It granted a broad preliminary injunction prohibiting the White House and numerous federal agencies from "urging, encouraging, pressuring, or inducing in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech."

On appeal, the Fifth Circuit limited the order to the White House, the Surgeon General, the FBI, and the CDC, but otherwise largely upheld the sweeping injunction. The Circuit applied a four-factor test to distinguish "attempts to convince" from "attempts to coerce," evaluating "(1) the speaker's 'word choice and tone'; (2) 'whether the speech was perceived as a threat'; (3) 'the existence of regulatory authority'; and, 'perhaps most importantly, (4) whether the speech refers to adverse consequences.' " It found that the White House had coerced: "[T]he officials threatened—both expressly and implicitly—to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply."

Justice Barrett, writing for a 6-3 majority, reversed. The Court held that the plaintiffs—whether individual or state--lacked standing to sue. To establish standing, the plaintiffs must show they have "suffered or will suffer, an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to

the challenged action; and redressable by a favorable ruling.'"

Here, the plaintiffs could not demonstrate concrete injury, past or future, based on alleged governmental actions. Justice Barrett cited longstanding policies initiated by the social media companies which predated the challenged governmental communications:

> For years, the platforms have targeted speech they judge to be false or misleading. For instance, in 2016, Facebook began fact checking and demoting posts containing misleading claims about elections. Since 2018, Facebook has removed health-related misinformation, including false claims about a measles outbreak in Samoa and the polio vaccine in Pakistan. Likewise, in 2019, YouTube announced that it would "demonetize" channels that promote anti-vaccine messages. In 2020, with the outbreak of COVID–19, the platforms announced that they would enforce their policies against users who post false or misleading content about the pandemic. . . . After the election, the platforms took action against users or posts that questioned the integrity of the election results.

These facts undercut the plaintiffs' required showing of causation. Because the platforms initiated their own content moderation policies, including consultation with outside private experts, merely identifying general communications between government agencies and the platforms was insufficient: "The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation. The District Court made none. Nor did the Fifth Circuit, which approached standing at a high level of generality."

A final basis for relief advanced by the individual plaintiffs was the "right to listen" theory – which postulates that they were deprived of a First Amendment right to read and engage with content removed by the platforms. The Court rejected that argument: "This theory is startlingly broad, as it would grant all social-media users the right to sue over someone else's censorship—at least so long as they claim an interest in that person's speech. This Court has 'never accepted such a boundless theory of standing.'"

The state plaintiffs claimed their own version of the "right to listen" theory, asserting a sovereign interest in hearing from their citizens on social media. But both versions of "right to listen" suffered from the same flaw—an inability to identify any specific speakers or topics that the plaintiffs were unable to hear or follow.

IMLA had filed an amicus brief in this case on behalf of neither party, seeking to protect government speech. While the case was reversed on standing grounds, it was regarded in some quarters as a validation of the Administration's assertion that it has the right to communicate its point of view.

The view that *Murthy* involves more than standing is clearly shared by Justice Alito, joined in his dissent by Justices Thomas and Gorsuch. As he sees it:

> If the lower courts' assessment of the voluminous record is correct, this is one of the most important free speech cases to reach this Court in years. . . . [H]ere is what the record plainly shows. For months in 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID–19-related speech. Not surprisingly, Facebook repeatedly yielded.

The implications of *Murthy* are that government, including at the local level, continues to have the right to promote its viewpoint, although that promotional activity must remain in the realm of persuasion and cannot cross the line into coercion. Somewhat ironically, given the states' efforts in Murthy to limit federal government speech, was the Court's last-day decision in *Moody v. Netchoice LLC* and *Netchoice v. Paxton*. These consolidated cases construed statutes where, due to concerns that conservative messaging was being impeded, the legislatures of Florida and Texas had mandated that social media sites not exercise editorial discretion in determining which posts and information they chose to display. While the Court unanimously reversed both the Eleventh Circuit and Fifth Circuit based on their failure to apply the proper analytic construct, an associated message was clear: laws that impose editorial standards are inconsistent with free speech. Writing for a unanimous Court, Justice Kagan was particularly critical of the Texas law:

> Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on be low—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. . . . Texas has thus far justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.

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