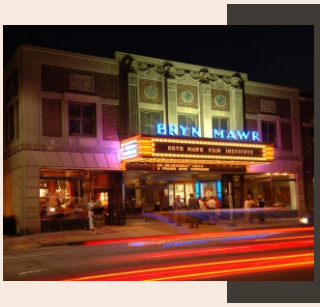

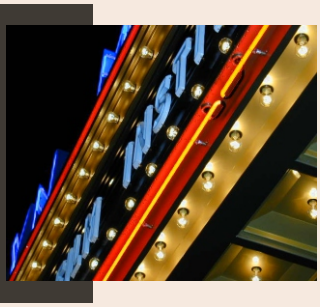

FREE SPEECH LAW FOR ON PREMISE SIGNS

Daniel R. Mandelker

2016 REVISED EDITION

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PREFACE FOR THE 2016 REVISED EDITION

ABOUT THE AUTHOR

Professor Daniel R. Mandelker is the Stamper Professor of Law at Washington University in St. Louis, where he is a leading scholar and teacher of land use law, state and local government law, property law and environmental law. Professor Mandelker's publications include Street Graphics and the Law (Fifth Edition 2015), coauthored with John M. Baker and Richard Crawford, and published by the American Planning Association as Planning Advisory Report No. 580, a treatise and model code for on premise signs that has been widely followed. They also include Sign Regulation and Free Speech: Spooking the Doppelganger in Trends in Land Use Law from A to Z (American Bar Association, 2001), and Decision Making in Sign Codes: The Prior Restraint Barrier, Zoning and Planning Law Report, Sept. 2008. He is the coauthor of Land Use Law (6th ed. 2015), and coauthor of law school casebooks including Planning and Control of Land Development (9th ed. 2016), and State and Local Government in a Federal System (8th ed. 2015).

Professor Mandelker was the principal consultant for the American Planning Association's Legislative Guidebook (2002), which proposed model planning and zoning legislation, and for a joint American Bar Association committee that prepared a model land use procedures law adopted by the ABA House of Delegates. He also was the principal author of amendments to the New Orleans city charter that require a comprehensive planning process and give the comprehensive plan the force of law. Mandelker received the ABA’s State and Local Government Section Daniel J. Curtin Lifetime Achievement Award in 2006.

Professor Mandelker is a frequent lecturer at national and regional conferences on land use and environmental law. He has also lectured internationally, including the keynote lecture at a Conference on World Urbanism held by the International Federation of Housing and Planning in Oslo, Norway, and the Fifteenth Denman Lecture at the Department of Land Economy, University of Cambridge, England. Professor Mandelker has consulted in several states on sign ordinance litigation and on the drafting of sign codes.

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A NOTE

All statutes cited in this handbook were current at the time of publication. Omissions in quotations from cases are shown by an ellipsis.

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CHAPTER I: AN INTRODUCTORY NOTE

§ 1:1. Why This Handbook Was Written

Free speech law is critically important for on premise sign regulation. Signs are an expressive form of free speech protected by the free speech clause of the Federal Constitution. Courts decide how local governments can regulate signs, including on premise signs, in order to ensure that sign regulations observe free speech principles. If a sign ordinance does not meet free speech requirements, courts will hold it unconstitutional. This handbook explains the free speech principles that apply to the regulation of on premise signs.

Free speech law need not be discouraging. Courts often classify on premise sign messages as commercial speech, and usually find the regulation of commercial speech does not present constitutional problems. On premise sign ordinances also have constitutional support because they seldom prohibit the display of signs. Instead, sign ordinances allow but regulate the display of on premise signs. Local governments can regulate sign displays without creating constitutional problems through content-neutral sign ordinances that are fair, objective, even-handed and supported by accepted government purposes. A recent Supreme Court case decided in 2015[1] adopted more stringent requirements for content neutrality, but local governments can meet these requirements through careful drafting. The American Planning Association has published a Planning Advisory Service Report, Street Graphics and the Law,[2] which discusses best practices for on premise sign regulation, and includes a model ordinance that considers the problems the recent Supreme Court decision creates.

§ 1:2. What This Handbook Is About

This handbook begins in Chapter II by discussing Supreme Court cases that decided the basic principles of free speech law. These principles apply to laws that regulate commercial speech, such as on premise sign ordinances. Content neutrality is one of the most important principles. A law is content-neutral if it does not specify the content of the speech that is regulated, and the chapter discusses the changes made in content neutrality law by the Supreme Court's recent free speech decision. The chapter next discusses the tests the Supreme Court has developed for regulating commercial speech, and related requirements for time, place and

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[1] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[2] Daniel R. Mandelker, John M. Baker & Richard Crawford, Street Graphics and the Law (American Planning Association, Planning Advisory Report No. 580, 5th Edition 2015), hereinafter Street Graphics.

manner regulation. A final section discusses prior restraint doctrine, which requires an adequate process for making decisions about the display of signs, and adequate standards for these decisions.

Chapter III discusses basic issues concerning on premise sign ordinances, such as how a municipality can show that an ordinance advances its aesthetic and traffic safety objectives, the importance of a statement of purpose, how on premise signs should be defined, sign exemptions and the treatment of on premise signs under the Federal Highway Beautification Act. Chapter IV reviews the law that applies to the different types of on premise signs, such as time and temperature signs, portable signs and digital signs. A final chapter discusses standards for the display of on premise signs, such as size, height and spacing regulations. Objective sign standards based on research, such as that conducted by the United States Sign Council, can help decide what kind of regulations to adopt.[3]

§ 1:3. How to Use This Handbook

This handbook discusses the free speech case law that applies to the regulation of on premise signs. There are two sets of cases. Supreme Court cases are one set. They interpret the constitutional free speech clause that applies to all laws, including sign ordinances. Only a few of these cases considered sign ordinances, but all Supreme Court free speech decisions apply to and may affect their constitutionality. Lower federal court and state court cases are the second set. They interpret and apply free speech principles adopted by the Supreme Court. The important decisions that affect the display of on premise signs are in the lower federal and state courts, because the Supreme Court takes few cases on appeal. They provide the guidelines municipalities must use for on premise sign ordinances, because they indicate what kinds of ordinances will receive judicial approval, and what kind will not.

The textual discussion usually includes discussion of one or two critical decisions that provide a primer for the topic being discussed. This discussion provides basic guidance on the free speech principles that apply. The footnotes provide more detail through additional citations that support and explain the decisions discussed in the text. Contrary decisions are included if there are any. Footnote decisions and law review articles cited in the footnotes provide leads to

[3] See, for example, Chapter 4 of Street Graphics, supra note 2.

additional detail on the case law. The intention is to make the list of citations as complete as possible.

Most important, using this handbook requires judgment. Free speech law is rarely precise, and judgment is required to decide what law is relevant, and how courts should apply it.

CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:1. Basic Concepts

Free speech is the dominant constitutional issue in sign regulation. State law dealing with aesthetic and other issues is important, but free speech law overrides state law because sign ordinances must satisfy constitutional free speech principles. One important principle is that free speech law modifies the presumption of constitutionality that laws regulating economic activity usually enjoy. A sign ordinance is a law regulating an economic activity. The presumption of constitutionality allows a legislature to make choices when there is reasonable disagreement about what a law should contain. Free speech law modifies this presumption and places a greater burden on government to uphold a sign regulation. How free speech law limits the discretion legislatures can exercise when enacting sign ordinances is a major issue that decides whether they are constitutional.

The standard of review courts use when they review the constitutionality of sign ordinances decides how this legislative discretion is limited. Courts uphold economic regulation if there is a rational relationship between the law and the legislative purpose it serves. Aesthetic purposes justify the enactment of sign ordinances, for example, so a court will uphold a sign ordinance under the rational relationship standard of judicial review if it relates rationally to its aesthetic purpose.

Free speech law changes the standard of judicial review that courts apply. Two alternatives are available. The Supreme Court adopted an intermediate standard of judicial review for laws that regulate commercial speech, such as sign ordinances.[4] That standard places some limits on legislative discretion in adopting legislation, but is not impossible to meet. When a law regulates the content of speech, however, the Court applies a strict scrutiny standard of judicial review that requires a compelling governmental interest to support the constitutionality of a law.[5] A sign ordinance that specifies the message a sign can contain is a regulation of content, and courts call this kind of ordinance content-based. Strict scrutiny judicial review is usually fatal. Courts rarely, if ever, find a compelling governmental interest that justifies content-based legislation. The Supreme Court also rejects laws that treat noncommercial speech less favorably than commercial speech.

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[4] Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557 (1980).

[5] § 2:4[1].

These principles are straightforward. Unfortunately, the courts do not apply them with the clarity and predictability they require. There are a number of reasons for this failure. One is that the free speech clause requires an important balancing of the constitutional interest in freedom of expression against government's need to regulate in the public interest. Balancing these competing interests demands a sensitivity from the courts that is difficult to express in categorical, bright-line rules.

§ 2:2. Federal and State Court Decisions and What They Mean

The Supreme Court is the binding interpreter of the constitution, but its decisions on free speech are sometimes inconsistent and contain ambiguities that lower courts find difficult to interpret. Its decisions may also not gain a majority of the Court and may attract only a plurality of four or fewer Justices, including an important decision on sign regulation. These decisions may have limited precedential value. Only a few of the Court's free speech decisions considered sign ordinances, and only a few of these considered the regulation of on premise signs. The question is how much respect Supreme Court free speech decisions should receive that did not consider sign ordinances, especially since the Court has held that signs are a medium of expression that requires special treatment.[6]

Despite ambiguities in Supreme Court free speech law, lower federal courts have provided helpful guidance on free speech principles that apply to sign ordinances, including on premise sign regulation. There are conflicts on some issues, however, some of them important. To understand the role of the lower federal courts, and what these conflicts mean, it is important to understand the differences between federal district courts and federal courts of appeal in the federal court system. The courts of appeal are appellate courts that hear appeals from single-judge district courts, which are the federal trial courts with original jurisdiction, and court of appeal decisions deserve the most attention. There are courts of appeal for 11 different geographic circuits, and an additional court of appeal for the District of Columbia. They decide cases in panels of three, which differ from case to case and may reach different conclusions on the same issue in the same circuit. An entire court of appeal en banc sometimes reconsiders panel decisions.

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[6] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) ("With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape.").

Decisions by the court of appeal having jurisdiction over the state in which a local government is located are controlling. Sometimes there are no court of appeal decisions in the geographic circuit on the problem at issue, so decisions by courts of appeal in other circuits and by the federal district courts require consideration. District courts must follow decisions by the court of appeal in its geographic circuit, if there are any. When there are no court of appeal decisions in its circuit that apply, a district court judge is free to apply decisions by other courts of appeal or by other district court judges. These decisions are important but have less precedential value because they are by a single judge.

State courts also apply the federal free speech clause because the federal constitution is enforceable in state courts. They are free to select from federal court of appeal and district court decisions, but federal courts do not have to follow state court decisions on the federal constitution and seldom cite them. This handbook cites state court decisions as examples of how the free speech clause of the federal constitution can be applied to sign ordinances. They usually apply federal cases faithfully, and have done so in on premise sign cases. Better staffing and more familiarity with federal free speech law are reasons to sue in federal court, though state courts have more flexibility in choosing federal precedent.

§ 2:3. Commercial and Noncommercial Speech

§ 2:3[1]. The Commercial/Noncommercial Distinction and What it Means

The Supreme Court has explained the difference between commercial and noncommercial speech, and has held that laws regulating noncommercial speech require a higher standard of judicial review:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[7]

Courts do not allow sign ordinances to treat commercial speech more favorably than noncommercial speech.[8] An example is a sign ordinance that includes more restrictive display

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[7] hralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). For discussion of whether the commercial/noncommercial distinction raises a content neutrality problem see § 2:4[4], supra.

[8] KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261 (11th Cir. 2006); John Donnelly & Sons v. Campbell, 639

requirements for noncommercial signs than it does for commercial signs, such as a smaller size requirement. A court will hold this difference in treatment unconstitutional, and may invalidate the entire ordinance.[9] This problem is easily fixed by a substitution clause in the sign ordinance, which provides that any sign authorized by the ordinance may display noncommercial messages.[10] An ordinance authorizing signs to display commercial speech would then be constitutional, because the substitution clause allows the display of noncommercial messages on all signs. The courts have upheld sign ordinances authorizing the display of commercial messages if they have a substitution clause.[11]

Courts also hold sign ordinances unconstitutional that discriminate between different types of signs with noncommercial messages. As a plurality of the Supreme Court held in the Metromedia sign case, "[a]lthough the city may distinguish between the relative values of

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F.2d 6 (1st Cir. 1980).

[9] This happened in the Metromedia case on remand from the Supreme Court to the state supreme court. Metromedia, Inc. v. City of San Diego, 649 P.2d 902 (Cal. 1982).

[10] Here is an example: "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations that apply to such signs."

[11] Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007); Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329 (11th Cir. 2005) (substitution clause mooted constitutional claim); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810 (9th Cir. 2003) (ordinances neutral concerning noncommercial speech because substitution clause guaranteed that political and other noncommercial messages not limited by type of sign-structure); Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1113 (9th Cir. 2003); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) (substitution clause made ordinance content-neutral as it affected noncommercial speech); Georgia Outdoor Advertising, Inc. v. Waynesville, 833 F.2d 43 (4th Cir. 1987) ("any sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy."); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986) (same); Lamar Advert. of S. Dakota, Inc. v. City of Rapid City, 2014 WL 692956 (D.S.D. 2014), order vacated in part on reconsideration on other grounds, 138 F. Supp.3d 1119 (D.S.D. 2015); Citizens for Free Speech, LLC v. County of Alameda, 62 F. Supp.3d 1129, 1139 (N.D. Cal. 2014); Lamar Adver. of Penn, LLC v. Town of Orchard Park, 2008 WL 781865 (W.D.N.Y. 2008), vacated in part, aff'd, and remanded, 356 F.3d 365 (2d Cir. 2004); Covenant Media of Cal., L.L.C. v. City of Huntington Park, 377 F. Supp. 2d 828 (C.D. Cal. 2005); Outdoor Sys. v. City of Lenexa, 67 F. Supp. 2d 1231 (D. Kan. 1999); City & County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815 (1987) (messages of any kind permissible if they relate to some on premise activity); Gannett Outdoor Co. v. City of Troy, 409 N.W.2d 719 (Mich. App. 1986) (on premises signs could contain noncommercial messages). See also Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (4th Cir. 2007) (off-premises/on-premises distinction not dependent on whether sign contained commercial or noncommercial advertising); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987) (state highway beautification statute content-neutral because it permitted commercial and non-commercial signs in protected areas if signs related to activity on the premises); National Advertising Co. v. Babylon, 703 F. Supp. 228, 240 (E.D.N.Y. 1988) (recommending adoption of substitution clause to protect constitutionality of sign ordinance). But see Beaulieu v. City of Alabaster, 454 F.3d 1219, 1233 (11th Cir. 2006) (substitution clause did not cure ordinance when political signs not treated equally). See contra, where ordinance did not include a substitution clause, Adirondack Advert., LLC v. City of Plattsburgh, N.Y., 2013 WL 5463681, at *7 (N.D.N.Y. 2013); Maldonado v. Kempton, 422 F. Supp. 2d 1169, 1175 (N.D. Cal. 2006).

different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."[12] The ordinance provided exceptions for some noncommercial signs but not others. The courts consistently strike down sign ordinances that treat different types of noncommercial signs differently.[13]

§ 2:3[2]. How to Decide When a Sign Message is Commercial or Noncommercial

A test for deciding whether a sign ordinance regulates noncommercial or commercial speech is necessary because courts apply different standards of judicial review to each. Defining these categories of speech is difficult,[14] and the Supreme Court admitted, "ambiguities may exist at the margins of the category of commercial speech."[15] These ambiguities are evident in a series of examples given by a Supreme Court Justice in one case.[16] He compared a billboard containing the message "Visit Joe's Ice Cream Shoppe" with another containing the message "Joe's Ice Cream Shoppe Uses Only The Highest Quality Dairy Products." The first message is commercial, while the second combines a noncommercial message about dairy products with an arguably commercial message about the store. How should the courts characterize the second message? Supreme Court tests for deciding whether speech is commercial or noncommercial, including intermingled speech, as in the second example, do not give clear and unambiguous guidance.

The Supreme Court has adopted general guidelines, however. Speech is commercial even though it contains "discussions of important public issues,"[17] and does not lose its commercial

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[12] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981).

[13] Ackerley Comm'ns of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 37 (1st Cir. 1996) (invalidating exemption only for on premise noncommercial signs); National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988) (only certain noncommercial signs exempted from restrictions); Savago v. Village of New Paltz, 214 F. Supp. 2d 252, 257 (N.D.N.Y 2002) (some noncommercial signs that exceeded size restrictions were subject to the permit requirement, but others were not); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258, 1264 (D. Kan. 1999) (noncommercial signs allowed to limited extent).

[14] City of Cincinnati v. Discovery Network, 507 U.S. 410, 419 (1993), reviewed the cases that defined noncommercial and commercial speech and concluded "[t]his very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."

[15] Edenfield v. Fane, 507 U.S. 761, 765 (1993). See Nat Stern, In Defense of the Imprecise Definition of Commercial Speech, 58 Md. L. Rev. 55 (1999).

[16] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 538, 539 (1981) (Justice Blackmun, concurring).

[17] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67, 68 (1983).

character because it "links a product to a current public debate."[18] Speech is not commercial simply because money is spent to advertise it, or because it solicits a purchase.[19] These statements provide only general principles, and the Court has supplemented them with tests that are more detailed.

The test for commercial speech most often applied by the Court is the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[20] This test, if literally applied, means that most on premise signs would not contain commercial speech if they only contained information about a business. Price and quantity information about a product is commercial.[21]

Bolger v. Youngs Drug Prods. Corp.,[22] shows how these tests apply to intermingled speech. There the Court struck down a federal law that prohibited the mailing of information about contraceptives as an unjustified regulation of commercial speech. Most of the mailings fell within the "core notion" of commercial speech that proposes a transaction, but they also included informational pamphlets. The informational mailings were not necessarily commercial speech, though they were conceded to be advertisements, referred to a specific product and had an economic motivation for mailing them. However, the combination of all these characteristics provided strong support for a conclusion that the informational mailings were commercial speech, even though they contained discussion of important public issues. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."[23]

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[18] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980).

[19] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976) (citing cases).

[20] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). This test was first proposed in Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376, 385 (1973), and recently confirmed in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001). The Court has also defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Central Hudson, 447 U.S. at 561. Later cases have not applied this definition, however. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993).

[21] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 n.12 (1983).

[22] 463 U.S. 60 (1983).

[23] Id. at 68.

The Supreme Court considered this problem again in Board of Trustees v. Fox,[24] where it upheld a state university regulation that did not allow "private commercial enterprises" to operate on state campuses. The university applied the regulation to prohibit a demonstration of commercial products that included noncommercial topics, such as how to be financially independent and how to run an efficient home, in a student dormitory. However, the commercial and noncommercial elements were not so "inextricably commingled" that the entire presentation was noncommercial. There was nothing "inextricable" about the noncommercial aspects of the presentations. "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."[25] This case suggests a sign is commercial even though it has commercial and noncommercial messages.

§ 2:3[3]. Must a Sign Ordinance Define Noncommercial and Commercial Speech?

Should a sign ordinance define the distinction between commercial and noncommercial signs because this distinction is so critical to the constitutional issues? The courts have held a definition is not required. The Fourth Circuit Court of Appeals, for example, rejected an argument that a sign ordinance was unconstitutionally vague because it lacked standards and held:

> Although the ordinance provides no definition of "commercial" or "non-commercial" speech, sufficient guidance is given for such determination by City officials by the various decisions of the Court relating to billboards and commercial speech. We agree with the district court that "no codification of these terms is necessary, since the Supreme Court has already defined them."[26]

Other courts agree with the Fourth Circuit.[27]

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[24] 492 U.S. 469 (1989).

[25] Id. at 474. The Court distinguished Riley v. National Fed'n of Blind, 487 U.S. 781 (1988), where charitable fundraising presentations were considered noncommercial speech when state law required commercial content to be "inextricably intertwined" with them.

[26] Major Media of Southeast, Inc. v. Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986).

[27] National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); City of Salinas v. Ryan Outdoor Advertising, 234 Cal. Rptr. 619 (Cal. App. 1987); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300 (Ill. App. 1990).

§ 2:4. Content Neutrality

§ 2:4[1]. What This Requirement Means

Another important free speech principle is that laws must have a neutral effect on speech. Most on premise sign ordinances have a neutral effect on speech because they regulate the way in which signs are displayed, such as the size, number and height of signs. Problems may arise, however, if on premise sign regulations violate the neutrality requirement.[28] Two types of neutrality are required: viewpoint neutrality and content neutrality.[29] A sign ordinance violates viewpoint neutrality if it regulates a point of view.[30] An example is a sign ordinance that prohibits signs that oppose the hunting of whales. A sign ordinance violates content neutrality if it regulates the content of a sign. An example is a sign ordinance that prohibits any sign about whales. The neutrality principle has important consequences, because a high standard of strict scrutiny judicial review applies to content-based regulations of noncommercial speech.[31] This standard of judicial review requires that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[32] Because courts seldom find a narrowly tailored compelling interest sufficient to justify a content-based regulation of speech, this standard of judicial review is usually strict scrutiny in theory, but fatal in fact.[33] A less-burdensome alternative to the regulation is also required if it is available,[34] and a law must leave open ample alternate means of communication.[35]

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[28] But see City of Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating ordinance that prohibited display of message sign in window of residence; content neutrality rule not applied).

[29] See Dan V. Koslowski, Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine, 13 Comm. L. & Pol'y 131 (2008); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991).

[30] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), suggested that sign ordinances need only be viewpoint neutral, but this suggestion has not been followed.

[31] Sugarman v. Village of Chester, 192 F. Supp. 2d 282 (S.D.N.Y. 2002) (political signs; held unconstitutional).

[32] Boos v. Barry, 485 U.S. 312, 321 (1988).

[33] Professor Gerald Gunther coined the phrase. See The Supreme Court, 1971 Term --Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972); Tamara R. Piety, "A Necessary Cost of Freedom"? The Incoherence of Sorrell v. Ims, 64 Ala. L. Rev. 1, 54 (2012)

[34] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[35] Thomas v. Chicago Park District, 534 U.S. 316 (2002) (stating all three requirements).

Although the Supreme Court had indicated that strict scrutiny does not apply to content-based regulations of commercial speech,[36] it seemed to hold in Sorrell v. IMS Health Inc., that strict scrutiny applies if commercial speech is content-based.[37] The Court held invalid, as a burden on commercial speech, a Vermont law that restricted the sale, disclosure or use of pharmacy records that revealed prescribing practices by physicians. Vermont intended the law to prevent the sale of prescription data to drug manufacturers, who would use the data to market drugs to physicians. These marketing strategies would lead to prescription decisions that unfairly benefited drug companies. The Court held the Vermont statute "disfavor[ed] marketing, i.e., speech with a particular content," and so was subject to "[h]eightened judicial scrutiny."[38] Moreover, the law's burden was more than incidental and "directed at certain content and ... aimed at particular speakers."[39] The Court did not explain how it would apply strict scrutiny, but held "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."[40] It then applied the Central Hudson test to hold the law invalid.

Lack of clarity in the Sorrell opinion has led most courts to hold it does not introduce a new framework for assessing content neutrality in commercial speech cases. A Fourth Circuit case upholding a sign ordinance that applied to murals is an example.[41] The cases are mixed,

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[36] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("By contrast, regulation of commercial speech based on content is less problematic".). See also North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000) (content-based restrictions on commercial speech receive intermediate scrutiny).

[37] 131 S. Ct. 2653 (2011).

[38] Id. at 2656, 2657.

[39] Id. at 2665.

[40] Id. at 2667.

[41] Wag More Dogs v. Cozart, 680 F.3d 359, 366 n.4 (4th Cir. 2012) ("Sorrell did not signal the slightest retrenchment from its earlier content-neutrality jurisprudence."). See also Massachusetts Ass'n of Private Career Sch. v. Healey, 2016 WL 308776, at *9 (D. Mass. 2016) (regulations intended to prevent unfair and deceptive practices in recruiting and enrollment of students at for-profit schools; "Sorrell does not stand for the proposition that strict scrutiny applies to all commercial-speech restrictions, especially regulations that have neutral justifications, such as consumer protection."); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr.3d 620, 629 (Cal. App. 2016) (explaining Sorrell, and noting it does not apply to billboards).

For discussion see Oleg Shik, The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. Ims Health, 25 Fordham Intell. Prop. Media & Ent. L.J. 561 (2015) (discussing majority rule); Note, Hunter B. Thomson, Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. Ims Health, 47 Colum. J.L. & Soc. Probs. 171, 196 (2013); Ernest A. Young, Sorrell v. Ims Health and the End of the Constitutional Double Standard, 36 Vt. L. Rev. 903 (2012); Tamara R. Piety, ''A Necessary Cost of Freedom"? The Incoherence of Sorrell v. IMS, 64 Ala. L. Rev. 1 (2012).

however, and some courts have held that Sorrell did establish a new strict scrutiny standard for content-based regulation of commercial speech.[42] The Supreme Court's recent case[43] applying strict scrutiny judicial review to content-based sign regulation does not resolve this conflict.

§ 2:4[2]. Reed v. Town of Gilbert: Defining Content Neutrality

The Supreme Court rewrote the rules for content neutrality in Reed v. Town of Gilbert.[44] A sign ordinance required a permit for signs, but exempted 23 categories of signs from the permit requirement and applied different requirements to each category. Exempt categories included ideological signs, political signs and Temporary Directional Signs Relating to a Qualifying Event. The church, which had no building and met in different temporary locations, placed signs, frequently in the public right-of-way, indicating when it would hold services. The town cited it twice for violating the code in part because the church exceeded time limits for display. Litigation followed, and the Court held that different restrictions that applied to these signs violated the free speech clause.[45]

Reversing the Ninth Circuit Court of Appeal, which upheld the exceptions, the Supreme Court held that courts must determine content neutrality on the face of an ordinance. Concluding this ordinance was a "paradigmatic example of content-based discrimination,"[46] the Court held the commonsense meaning of content-based regulation requires courts to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.[47]

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[42] Compare National Ass'n of Tobacco Outlets, Inc. v. City of Worcester, Mass., 851 F. Supp. 2d 311, 319 (D. Mass. 2012) (relying on Sorrell to strike down ordinance prohibiting outdoor advertising of tobacco products because it did not directly advance a governmental interest).

[43] § 2:4[2].

[44] 135 S. Ct. 2218 (2015). For discussion, see Brian J. Connolly & Alan C. Weinstein, Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty, 47 Urb. Law. 569 (2015); Note, Free Speech Doctrine After Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016).

[45] For example, ideological signs could be up to 20 square feet and displayed in all zoning districts without time limits. Political signs could be "up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and 'rights-of-way.'" Reed, 135 S. Ct. at 2224.

[46] Reed, 135 S. Ct. at 2230.

[47] Id. at 2227. This holding disapproves other court of appeal cases agreeing with the Ninth Circuit that sign ordinances could make distinctions based on the sign category regulated. E.g., Brown v. Town of Cary, 706 F.3d

A separate and different category of laws, though facially neutral, is content-based if it cannot be "'justified without reference to the content of the regulated speech,'" or if they were adopted by the government "because of disagreement with the message [the speech] conveys."[48] These additions to the Court's view of content neutrality are ambiguous and need interpretation. What does "without reference to the content" mean? The sign code was content-based on its face, the Court held, as the definition of a sign depended on its communicative content. For example, the code defined a political sign as a sign whose message was "designed to influence the outcome of an election." The Court then considered whether an ordinance would be content-based if it is speaker-based, a problem discussed below.[49]

The Court rejected justifications for the ordinance the Ninth Circuit accepted. Strict scrutiny review applied despite a government's benign motive, a content-neutral justification, or a lack of animus toward the ideas contained in the speech. "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."[50] Neither was the ordinance content-neutral because it was viewpoint-neutral.[51]

The Court then considered regulations for events that were at issue, such as the sign code's allowance for political signs before and after elections. This type of sign, "because it conveys an idea about a specific event," was as much content-based as a regulation that targets a sign because of its ideas.[52] Although the Court did not discuss them, this holding would also cover other types of event signs such as an ordinance allowing a temporary sign with the message "grand opening."

294, 304–05 (4th Cir. 2013); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 623 (6th Cir. 2009). A few other courts of appeal took a contrary view. See Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 632 (4th Cir. 2016) (holding invalid Brown and other similar Fourth Circuit cases after Reed). See, e.g., Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (applying content neutrality rule pre-Reed).

[48] Citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[49] See § 2:5.

[50] Reed, 135 S. Ct. at 2228. The Court interpreted an earlier case to mean that government purpose is relevant only when a law is content-neutral.

[51] Reed, 135 S. Ct. at 2229. An earlier decision suggested that viewpoint neutrality was enough. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (noting general principle that free speech clause requires only viewpoint neutrality), applied in Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992).

[52] Id. at 2231.

Having decided the ordinance was content-based, the Court applied strict scrutiny. It rejected aesthetic and traffic safety interests asserted by the town, assuming them compelling but holding the code's distinctions were "hopelessly under-inclusive."[53] Aesthetically, temporary signs were no greater eyesore than directional and political signs, yet the ordinance allowed the unlimited proliferation of the larger ideological signs but strictly limited the number, size, and duration of the smaller directional ones. Neither did the town show that limiting temporary directional signs was necessary for traffic safety, but that limiting other types of signs was not.

Justice Alito, in a concurring opinion, provided some relief from the majority decision by offering examples of sign regulations that would meet the Reed test for content neutrality.[54] They include rules regulating the size, location and placement of signs, regulations commonly applied to on premise signs.[55] Justice Alito's opinion, though concurring, is not controlling.[56]

§ 2:4[3]. What Reed v. Town of Gilbert Means

Reed v. Town of Gilbert means what it says. Sign ordinances must be content-neutral on their face. A district court, for example, later held invalid a state highway beautification act which, like the federal law, exempted on premise signs advertising "the sale or lease of property on which they are located;" and provided an exception for "[d]irectional or other official signs

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[53] Id. at 2231.

[54] But see Thomas v. Schroer, 127 F. Supp.3d 864, 873 (W.D. Tenn. 2015) (Justice Alito's "concurrence fails to provide any analytical background as to why an on-premise exemption would be content neutral," and "concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction that 'a speech regulation targeted at specific subject matter is content based'").

[55] Reed, 135 S. Ct. at 2233 (Alito, J., concurring). Here is the complete list:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below. Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings. Rules distinguishing between lighted and unlighted signs. Rules distinguishing between signs with fixed messages and electronic signs with messages that change. Rules that distinguish between the placement of signs on private and public property. Rules distinguishing between the placement of signs on commercial and residential property. Rules distinguishing between on-premises and off-premises signs. Rules restricting the total number of signs allowed per mile of roadway. Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. Id.

However, despite Alito's suggestion, rules "imposing time restrictions on signs advertising a one-time event" are content-based under the majority opinion.

[56] Separate concurring opinions agreed with the judgment, but expressed concern about the majority opinion's absolute rule.

and notices."[57] Applying Reed, the court held that "[t]he only way to determine whether a sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the 'activities conducted on the property on which they are located.'"[58] This provision is common to all state highway beautification acts. A court will hold an ordinance is not content-based when it has no temporal or geographic restrictions on permitted signs based on content.[59]

Most on premise sign ordinances do not present a content neutrality problem because they regulate spacing, size, structural and display elements, which are content-neutral. Problems will arise with ordinances that regulate sign messages or that adopt different requirements for different categories of signs. The message of Reed v. Town of Gilbert is that sign ordinances must treat all categories of signs equally that have the same effect on the environment, and they should not authorize signs with messages. This advice means there should not be separate categories in the ordinance for different kinds of temporary signs. The model ordinance in Street Graphics and the Law[60] contains definitions and regulations for signs, such as temporary signs, that meet the requirements of Reed v. Town of Gilbert.

§ 2:4[4]. Whether Earlier Supreme Court Free Speech Cases Still Apply

An unsettled question raised by the Reed decision is what effect it has on prior Supreme Court decisions that decided free speech sign issues. For example, the Court did not discuss the Central Hudson case, which established an intermediate rather than strict scrutiny judicial review for sign ordinances regulating commercial speech.[61] Neither did the Court discuss Metromedia v. City of San Diego,[62] which upheld different regulations for commercial as compared with

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[57] Thomas v. Schroer, 127 F. Supp.3d 864, 872 (W.D. Tenn. 2015), and holding that "the content or message of the sign must be considered to determine whether a sign is on-premise. Id. at 873. See also Free Speech Coal., Inc. v. Attorney Gen. United States of Am., 2016 WL 3191474 (3d Cir. 2016) (overruling earlier decision and holding federal child pornography statute unconstitutional as content-based).

[58] Thomas, 127 F. Supp.3d at 873. The court rejected an argument that the on-premise distinction "is content neutral because 'it is entirely based on location or placement of the signs.'" Id. at 872.

[59] Citizens for Free Speech, LLC v. County of Alameda, 114 F. Supp.3d 952, 968 (N.D. Cal. 2015).

[60] Street Graphics, supra note 2. The model ordinance does not define Grand Opening signs, as that definition would be content-based.

[61] § 2:6.

[62] § 2:6[3].

noncommercial speech, and for on premise as compared with off premise signs. It also addressed the content neutrality problem. A plurality of the Court there held invalid a list of exemptions in the ordinance that defined signs by their content, such as government signs, realty signs and temporary political signs. These exemptions permitted, and did not suppress, speech.

The question is whether these cases are still good law, or whether Reed overruled them. The answer is that Reed did not expressly overrule either Central Hudson or Metromedia, or any of the other Supreme Court free speech sign cases it failed to cite. In the absence of an express overruling, lower courts must continue to follow a case that is not overruled.[63] As the Court has pointed out, if a Supreme Court case directly applies, "yet appears to rest on reasons rejected in some other line of decisions," lower courts should follow the case that directly controls but not rejected in the other decisions, leaving the Court the prerogative to overrule its own precedent.[64] The lower courts have continued to apply the earlier Supreme Court decisions post-Reed.[65]

2:4[5] Whether Reed Applies to Commercial Speech

Some courts and commentators suggest there are a number of open questions after Reed. One question potentially is whether Reed applies only to noncommercial speech, or whether it applies to both commercial and noncommercial speech. If it does not apply to ordinances, or parts of ordinances, that regulate commercial speech, then they are not subject to strict scrutiny. On premise sign regulations governing commercial speech have historically been subjected to intermediate scrutiny judicial review. Yet some have suggested that the Reed case is not clear on whether intermediate scrutiny judicial review still controls , and arguments can be made either way.

The argument for applying Reed to all signs and all Sign Codes, whether they relate to commercial speech or noncommercial speech, is that this is exactly what the Court did. Reed

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[63] "The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 207 (1997).

[64] Agostini v. Felton, 521 U.S. 203, 207, (1997), quoted in Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at *10 (S.D. Ind. 2016) (upholding regulations distinguishing between on-premises and off-premises signs). See also Peterson v. Village of Downers Grove, 2015 WL 8780560, at *10 (N.D. Ill. 2015) (Central Hudson applies absent an express overruling: upholding ban on painted wall signs and limits on total signage area and number of permitted wall signs).

[65] E.g., Citizens for Free Speech, LLC v. County of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015); California Outdoor Equity Partners v. City of Corona, 2015 WL 4163346, at * 10 (C.D. Cal. 2015); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 635 (Cal. App. 2016) (Reed did not overrule Metromedia).

also involved a Sign Code that regulated both commercial and noncommercial speech, sometimes in the very same Code sections. The Court focused on content neutrality across the board, not distinguishing or placing any limitations on whether the ruling applied to commercial or noncommercial signs. However, many lower courts to date have considered the commercial speech question and have concluded that Reed does not apply to sign ordinances that regulate commercial speech because the Court did not address this issue. [66]

2:4[6] The Off Premise v. On Premise Sign Distinction

The plurality in the Supreme Court's Metromedia case upheld regulations that distinguished between off premise and on premise signs,[67] and most courts followed Metromedia pre-Reed.[68] The Reed case did not cite Metromedia, but Reed could mean the distinction is content-based because defining off premise and on premise signs may require defining their content. A federal district court held this distinction content-based because "it violated the majority opinion's clear instruction [in Reed] that 'a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject

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[66] Peterson v. Village of Downers Grove, 2015 WL 8780560, at *10 (N.D. Ill. 2015) (on premise signs); Contest Promotions, LLC v. City and County of San Francisco, 2015 WL 4571564, at *4 (N.D. Cal. 2015) ("Reed does not concern commercial speech"); California Outdoor Equity Partners v. City of Corona, 2015 WL 4163346, at * 10 (C.D. Cal. 2015) (same); Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at *10 (S.D. Ind. 2016);_CTIA-The Wireless Ass'n v. City of Berkeley,_139 F. Supp. 3d 1048 (N.D. Cal. 2015) (ordinance requiring cell phone retailers provide notice regarding radiofrequency (RF) energy emitted by cell phones to any customer who buys or leases a cell phone); Timilsina v. W. Valley City, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) Citizens for Free Speech, LLC v. County of Alameda, 114 F.Supp.3d 952, 969 (N.D. Cal.2015) (Reed does not alter analysis for laws regulating off-site commercial speech); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 629 (Cal. App. 2016) ("Neither Reed nor Sorrell supports the notion that sign ordinances may no longer distinguish between commercial and noncommercial speech.").

[67] § 2:6[3].

[68] E.g., Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (held not content-based); Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810, 813 (9th Cir. 2003); Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993); National Advertising Co. v. City & County of Denver, 912 F.2d 405 (10th Cir. 1990); Major Media of Southeast, Inc. v. Raleigh, 792 F.2d 1269 (4th Cir. 1986); Action Outdoor Adver. JV, L.L.C. v. Town of Shalimar, 377 F. Supp. 2d 1178 (N.D. Fla. 2005); Infinity Outdoor Inc. v. City of New York, 165 F. Supp. 2d 403 (E.D.N.Y. 2001); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999); National Advertising Co. v. Bridgeton, 626 F. Supp. 837 (E.D. Mo. 1985); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 n.15 (N.D. Ill. 1990) , aff'd,F 989 F.2d 502 (7th Cir. 1992); National Advertising Co. v. Downers Grove, 561 N.E.2d 1300 (Ill. App. Ct. 1990); State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) (highway beautification act); Summey Outdoor Advertising, Inc. v. County of Henderson, 386 S.E.2d 439 (N.C. Ct. App. 1989). See also Pigg v. State Dep't of Highways, 746 P.2d 961 (Colo. 1987) (highway beautification act; regulations construed ideological signs as on premise signs). Contra Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act).

matter.'"[69] This decision invalidated an exemption in a state highway beautification act for signs "advertising activities conducted on the property on which they are located," and for other on premise signs, such as signs that advertise "the sale or lease of property on which they are located." Exemptions like these are typical in state highway beautification acts, and in sign ordinances that regulate signs for on premise business. It is not necessary to distinguish between off premise and on premise signs, however, in order to regulate on premise signs. Sign ordinances can simply provide regulations for different types of signs without making this distinction.[70]

Other courts held the distinction in sign ordinances between off premise and on premise signs survives Reed.[71] These decisions support sign ordinances that treat on premise businesses separately.

§2:4[7] What Strict Scrutiny Means

Strict scrutiny applies if a sign regulation is content-based, which is more likely to occur since the Reed decision. Local governments face a high burden in overcoming strict scrutiny review, particularly because courts apply a presumption of unconstitutionality to content-based regulations. Strict scrutiny is often strict in theory but fatal in fact.

To survive strict scrutiny, a governmental interest must be compelling. The Supreme Court's Metromedia case held traffic safety and aesthetic interests acceptable for purposes of intermediate scrutiny review,[72] but the question is whether courts will consider these interests compelling after Reed, A few cases held these interests are not compelling post-Reed.[73]

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[69] Thomas v. Schroer, 127 F. Supp. 3d 864, 872 (W.D. Tenn. 2015) (and rejecting suggestion in Alito concurrence that the distinction is valid). Accord, Outdoor Media Dimensions, Inc. v. Department of Transportation , 132 P.3d 5 (Or. 2006) (similar definitions in similar statute; applying Oregon constitution).

[70] The Street Graphics model ordinance takes this approach, and does not define the terms "off premise" or "on premise." Street Graphics, supra note 2, Ch. 8.

[71] Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at *11 (S.D. Ind. 2016) (applying Metromedia and Seventh Circuit precedent); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 629 (Cal. App. 2016) ("Neither Reed nor Sorrell supports the notion that sign ordinances may no longer distinguish ... between onsite and offsite signs.").

[72] § 2:6[3].

[73] Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 633 (4th Cir. 2016); Marin v. Town of Southeast, 136 F. Supp. 3d 548, 568 (S.D.N.Y. 2015). These decisions cited the following pre-Reed cases: Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 738 (8th Cir. 2011) (on premise sign; interests in aesthetics and traffic safety significant but not compelling"); Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569–70 (11th Cir. 1993) (flags; meager evidence on aesthetics and traffic safety not a compelling state interest that justifies content-

Even if a governmental interest is compelling, an ordinance must also be narrowly tailored to achieve that interest if it is to pass strict scrutiny review. The sign ordinance in Reed did not meet the narrow tailoring requirement, because there was no showing that signs treated more restrictively than others presented a greater aesthetic or traffic safety problem. Courts since Reed faced with similar differences in restrictions have reached the same conclusion. The problem arises when, as in the Reed case, a sign ordinance applies different restrictions to different kinds of signs solely because of their content, and without any relationship to the different aesthetic or traffic safety concerns created by these signs.

For example, in Central Radio Co. Inc. v. City of Norfolk,[74] a sign code exempted governmental or religious flags and emblems from the code, but did not exempt private and secular flags and emblems. It also exempted "works of art" that "in no way identif[ied] or specifically relate[d] to a product or service," but did not exempt art that referenced a product or service. The Fourth Circuit held the code was not narrowly tailored. A flag of a private or secular organization was "no greater an eyesore" than a flag of a government or religion. Works of art that referenced a product or service did not necessarily detract from the city's physical appearance any more than other works of art. Neither did the record show that secular flags were any more distracting than religious ones, or that a large work of art that referred to a product threatened the safety of motorists any more than a work of art that did not refer to a product. The sign code was underinclusive. Other courts found similar codes did not meet the narrow tailoring requirement.[75]

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based regulation); Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham, 352 F. Supp. 2d 297, 303 (N.D.N.Y. 2005) (billboards); McCormack v. Township of Clinton, 872 F.Supp. 1320, 1325 n. 2 (D.N.J. 1994) (political signs; no court has ever held these interests compelling). See also Bee's Auto, Inc. v. City of Clermont, 8 F. Supp. 3d 1369, 1382 (M.D. Fla. 2014) ("general and abstract aesthetic, business, and traffic safety interests are *not per se* so compelling as to justify content-based restrictions on signs," emphasis in original); North. Olmsted Chamber of Commerce v. City of N. Olmsted, 86 F. Supp. 2d 755, 767 (N.D. Ohio 2000) ("[T]he Court has never determined that these interests are compelling enough to justify content-based restrictions on fully protected speech."). But see Thomas v. Schroer, 127 F. Supp. 3d 864, 874 (W.D. Tenn. 2015) (post-Reed; "at least the governmental interest in driver safety is a compelling interest").

[74] 811 F.3d 625, 633 (4th Cir. 2016).

[75] Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at *9 (S.D. Ind. 2016) (no explanation for these differing regulations that would demonstrate their narrow tailoring in furtherance of its compelling interests in aesthetics and traffic safety, such as differences in sign sizes); Marin v. Town of Southeast, 136 F. Supp. 3d 548, 569 (S.D.N.Y. 2015) (temporary signs that reference a particular activity or event do not have a greater effect on aesthetics or traffic safety than construction, for sale, or holiday signs, or other exempted signs, some of which are just as temporary as political signs); Thomas v. Schroer, 127 F. Supp. 3d 864, 874 (W.D. Tenn.

§ 2:4[8]. The "Need to Read" Requirement

Sign ordinances may require an officer to read a sign in order to decide how the ordinance applies. If an ordinance regulates murals, for example, an officer will have to read, or look at, a sign to decide whether it qualifies for mural treatment. The question is whether the "need to read" a sign to decide whether or how an ordinance applies means the ordinance is content-based. A court of appeals pointed out the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based.[76]

The Reed case did not consider the "need to read" requirement, even though it could be an important factor in deciding whether a sign ordinance is content-based. Earlier Supreme Court cases did not adopt a "need to read" requirement, and they are still good law because Reed did not expressly overrule them. The Court held, for example, that a federal statute regulating currency reproductions did not regulate content because the statute had color and size requirements. An official did not have to evaluate a message when deciding whether it violated the statute.[77] Then, in Hill v. Colorado,[78] the Court upheld a state statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility. The statute made it unlawful within regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other

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2015) (limiting off-premise signs does not result in greater driver safety than limiting signs "advertising activities conducted on the property on which they are located"; regulation of one type of content will not reduce visual clutter and overcrowding more effectively than regulation of other types of content). Accord pre-Reed: Bee's Auto, Inc. v. City of Clermont, 8 F. Supp. 3d 1369, 1381 (M.D. Fla. 2014) (restrictions dependent on content and not explained); Lusk v. Village of Cold Spring, 418 F. Supp. 2d 314, 321 (S.D.N.Y. 2005) (sign definition excluded any flag, badge or insignia of any governmental agency or any civic, charitable, religious, patriotic, fraternal or similar organization), rev'd in part on other grounds, 475 F.3d 480 (2d Cir. 2007).

[76] Reed v. Town of Gilbert, 587 F.3d 966, 978 (9th Cir. 2009) ("to the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based"), aff'd, 707 F.3d 1057, 1063 (9th Cir. 2013), rev'd and remanded on other grounds, 135 S. Ct. 2218 (2015).

[77] Regan v. Time, Inc., 468 U.S. 641 (1984) (federal statute regulating currency reproductions). See also Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (ordinance not invalid because town officials must read permit applications to determine whether a sign meets lighting and/or size specifications); Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C. 1995) (color, size, and other restrictions affected only format or manner in which plaintiff's artwork was displayed).

[78] 530 U.S. 703 (2000), noted, 114 Harv. L. Rev. 289 (2000).

person." The statute did not apply to persons who were not leafletters or sign carriers, unless their approach was for the purpose of engaging in oral protest, education, or counseling.

The Court upheld the statute as a content-neutral time, place and manner regulation.[79] It rejected an argument that the law was content-based, because the content of oral statements by approaching speakers sometimes had to be examined to decide whether the statute covered them. The Court held it was "common in the law to examine the content of a communication to determine the speaker's purpose," and that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."[80] It would not be necessary to know "exactly what words were spoken" in order to decide whether they were covered by the statute. "[C]ursory examination" to decide whether speech was casual conversation excluded from the coverage of a regulation of picketing would not be problematic.[81]

The Supreme Court cases are not consistent, however. In an earlier case[82] the Court held invalid as content-based a statute prohibiting editorials by noncommercial radio stations. It noted that enforcement authorities had to examine the content of a message in order to decide whether a statement by station management was a prohibited editorial.

Lower federal courts vary in their interpretation of the Supreme Court decisions. The Fourth Circuit held a sign ordinance is not content-based just because "officials must superficially evaluate a sign's content to determine the extent of applicable restrictions."[83] Other cases have adopted a similar analysis.[84]

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[79] See § 2:7.

[80] Hill, 530 U.S. at 721.

[81] Id. at 731-732.

[82] FCC v. League of Women Voters, 468 U.S. 364, 384 (1984). See also Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (ordinance authorizing fees for permits for parades and assemblies held invalid; administrator must examine content to determine amount of fee because county often required that fee be based on content of speech).

[83] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) ("That Arlington officials must superficially evaluate a sign's content to determine the extent of applicable restrictions is not an augur of constitutional doom."). Accord on this point, Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).

[84] Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007) ("to the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based"); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1079 (9th Cir. 2006) ("A grandfather provision requiring an officer to read a sign's

A number of other cases held, however, that the need to read a sign to decide whether an ordinance applied,[85] or whether there was an exemption from the ordinance, made the ordinance content-based.[86] Similarly, other courts held an ordinance content-based when an official had to examine the content of a sign to decide what size and duration requirements applied,[87] or whether a sign was on premise or off premise in order to determine whether a fee was due.[88]

The Supreme Court gave the most detailed attention to the "need to read" requirement in Hill v. Colorado, and its decision there deserves the most respect. The need for a cursory examination to decide whether and how an ordinance applies to a sign should not make it content-based.

§ 2:5. Speaker-Based Neutrality

Speaker-based neutrality is another form of content neutrality. Reed v. Town of Gilbert considered this issue.[89] There the Court decided whether exemptions included in the ordinance were content-based because they were speaker-based. The ordinance defined a sign depending on who was "speaking," such as an ideological speaker for a sign allowed having ideological content. What the Court decided on this point is not clear. Speaker-based distinctions, the Court

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message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's regulations, is not content based."); LaTour v. City of Fayetteville, 442 F.3d 1094, 1096 (8th Cir. 2004) ("It takes some analysis to determine if a sign is 'political,' but one can tell at a glance whether a sign is displaying the time or temperature."); Kennedy v. Avondale Estates, 414 F. Supp. 2d 1184, 1220 (N.D. Ga. 2005); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (reading to determine neutral information to decide type of sign or whether banned as billboard, or to distinguish real estate and business signs, does not make an ordinance content-based);Supp. 2d; B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (deciding whether a sign is an identification or advertising sign). See also accord American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012) (eavesdropping statute).

[85] Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (must look at content of sign to determine whether particular object qualifies as a "sign" subject to regulation, or is a "non-sign" or exempt from regulation); Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (off premise/on premise distinction); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) ("city must evaluate the content of the sign to determine whether it is allowed").

[86] Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (definition of sign); Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998) (exemptions for "open house" real estate signs and safety, traffic, and public informational signs were content-based); Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (certain off site noncommercial signs); National Advertising Co. v. Orange, 861 F.2d 246 (9th Cir. 1988) (same).

[87] Advantage Media, L.L.C. v. City of Hopkins, 379 F. Supp. 2d 1030 (D. Minn. 2005); Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham, 352 F. Supp. 2d 297 (N.D.N.Y 2005).

[88] Clear Channel Outdoor, Inc. v. City of St. Paul, 2003 WL 21857830 (D. Minn. 2003).

[89] 135 S. Ct. 2218 (2015).

said, "are all too often simply a means to control content."[90] It added that "we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."'[91] It is not clear from this statement whether speaker-based speech must be content-based before it is subject to strict scrutiny. A federal district court held after Reed that it must be content-based.[92]

This problem can be important in sign regulation. Sign ordinances usually assign sign types to different land uses. The question is whether the ordinance is speaker-based because the designated land use is a "speaker" for the sign.

Some Supreme Court decisions had not required speaker-based neutrality. Turner Broadcasting System v. Federal Communications Commission (I),[93] which is cited in Reed, upheld the "must-carry" provisions of a federal statute. It required cable operators to carry, according to a statutory formula, a certain number of the broadcast signals from "local commercial television stations" and "noncommercial education television stations." The Court held that "speaker-partial" laws are not presumed invalid, and adopted the limited view that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference,"[94] which is language quoted in Reed. A court of appeals applied this holding when it upheld a speaker-based sign regulation that exempted some signs from a fee and permit process.[95]

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

[91] Reed, 135 S. Ct. at 2230 (quoting Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 658 (1994)).

[92] Timilsina v. West Valley City, 121 F. Supp. 3d 1205, 1216 (D. Utah 2015) (strict scrutiny required only if "speaker preference reflects a content preference," quoting Turner). See also California Outdoor Equity Partners, LLC v. City of Los Angeles, 2015 WL 7259731, at *6 (C.D. Cal. 2015) (rejecting allegation that ordinance prefers certain speakers over others, such as operators of on-site signs; Reed not cited). See also Citizens for Free Speech, LLC v. County of Alameda, 2016 WL 3648555, at *8 (N.D. Cal. 2016) (applying Reed analysis of speaker-based speech with content in finding ordinance with exemptions violated equal protection).

[93] 512 U.S. 622 (1994).

[94] Id. at 658. See also Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding collective bargaining agreement providing that the exclusive bargaining representative, but no other union, would have access to the interschool mail system; speaker-based restrictions "may be impermissible in a public forum," but are permissible in a nonpublic forum if "they are reasonable in light of the purpose which the forum at issue serves.").

[95] G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077 (9th Cir. 2006) ("That the law affects plaintiffs more than other speakers does not, in itself, make the law content based.").

Despite these decisions, some lower courts struck down sign regulations found to be speaker-based.[96] One ordinance, for example, held invalid an exemption for signs located on fences or walls surrounding athletic fields and within sports arenas and stadiums, but not signs on fences and walls located elsewhere.[97] Language in some Supreme Court cases supported these decisions by indicating that speaker-based limitations on speech are content-based.[98]

The Supreme Court, in Sorrell v. IMS Health, Inc.,[99] held invalid a Vermont law providing that information identifying prescribers of medical prescriptions could not be sold by pharmacies or similar entities, disclosed by them for marketing purposes, or used for marketing by pharmaceutical manufacturers, unless the prescriber consented. The Court held the law invalid, in part, because it imposed a burden based on "the identity of the speaker," and was "aimed at particular speakers," such as the pharmacies and manufacturers controlled by the law.[100] It did not provide an explanation for this conclusion. Lack of clarity in the opinion has led most courts to hold it did not establish a new strict scrutiny standard for commercial speech.[101] The dissent argued it was not unusual for "particular rules" to be speaker-based because they affected only a class of entities, such as firms subject to an energy regulation that imposed labeling requirements for home appliances.[102]

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[96] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1266 (11th Cir. 2005) (e.g., noncommercial signs displayed by public utilities). See also Ackerley Communications of Mass., Inc. v. City of Somerville, 878 F.2d 513, 518 (1st Cir. 1989) (striking down a sign ordinance whose "grandfather" clause allowed certain speakers to use nonconforming signs, observing that "even if a complete ban on nonconforming signs would be permissible, we must consider carefully the government's decision to pick and choose among the speakers permitted to use such signs").

[97] Bonita Media Enters., LLC v. Collier County Code Enforcement Bd., 2008 WL 423449 (M.D. Fla. 2008).

[98] E.g., First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."). But see US West v. United States, 48 F.3d 1092 (9th Cir. 1994) (citing Bellotti and similar cases, and holding that Turner "flatly rejected the contention that all regulations distinguishing among speakers warrant strict scrutiny"), vacated and remanded to decide mootness, 516 U.S. 1155 (1996), dismissed as moot, sub nom., Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir. 1996).

[99] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011). Reed cited and quoted from but did not explain the holding in Sorrell. See Tamara R. Piety, ''A Necessary Cost of Freedom"? The Incoherence of Sorrell v. IMS, 64 Ala. L. Rev. 1 (2012) (decision "makes a hash of the commercial speech doctrine").

[100] Sorrell, 131 S. Ct. at 2657.

[101] § 2:4[1].

[102] Sorrell, 131 S. Ct. at 2678.

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[1]. An Overview

This section considers the standards the Supreme Court has adopted for the review of regulations that affect content-neutral commercial speech.[103] Beginning with its Central Hudson decision in 1980, the court has applied an intermediate scrutiny four-factor balancing test to commercial speech regulation that is less than strict scrutiny,[104] but stronger than the weaker rational basis review courts apply to economic regulation.[105] The Central Hudson test applies to sign ordinances, but only the third and fourth factors can be problematic.[106]

The Supreme Court has adopted another free speech test it applies to time, place and manner regulations, which include sign regulations.[107] Although the Court has stated this test somewhat differently from the Central Hudson test, it has indicated that the judicial review provided by each test is substantially similar.[108] Lower courts may decide to apply only one of these tests, however, in place of the other.

§ 2:6[2]. The Central Hudson Case: A Four-Factor Test for the Regulation of Commercial Speech

The leading case that established the intermediate scrutiny standard of judicial review is Central Hudson Gas & Elec. Corp. v. Public Service Commission.[109] The Court held invalid a Commission regulation that completely banned promotional advertising by electric utilities, but that allowed informational advertising designed to shift consumption to off-peak periods. It first

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[103] For a review of commercial speech doctrine see Oleg Shik, The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. Ims Health, 25 Fordham Intell. Prop. Media & Ent. L.J. 561 (2015).

[104] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[105] Edenfield v. Fane, 507 U.S. 76 (1993) ("Unlike rational basis review, the Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions.").

[106] §§ 2:6[5], 2:6[6].

[107] § 2:7[1].

[108] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (tests substantially similar, citing Fox); United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993) ("the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context"); San Francisco Arts & Athletics, Inc.. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (tests substantially similar); Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989) (same, quoting San Francisco Arts). Accord Hucul Advert., LLC v. Charter Twp. of Gaines, 748 F.3d 273, 276 (6th Cir. 2014).

[109] 447 U.S. 557 (1980).

recognized the distinction between commercial and noncommercial speech, and the accepted rule that commercial speech requires "lesser protection." It also provided a contextual commentary, that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[110]

The Court then adopted a four-factor test for the judicial review of laws affecting commercial speech. Inserted parenthetical numbers identify the four factors:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, (1) it at least must concern lawful activity and not be misleading. Next, we ask (2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.[111]

Although a law that fails any one of the four factors violates the free speech clause, the four factors are not discrete but are interrelated.[112]

Sign ordinances have not usually been a problem under the first two Central Hudson tests. They usually are not unlawful or misleading, and the Supreme Court has accepted the aesthetic and traffic purposes of sign ordinances as substantial for purposes of intermediate scrutiny review. The important tests for sign ordinances are the third "directly advance" factor and the fourth factor, sometimes called a "narrow tailoring" factor. The third factor is an ends/means test that requires an acceptable fit between the regulation and its objective. The fourth factor is similar, and limits legislative discretion by requiring selection of the alternative that does the least damage to commercial speech.

In Central Hudson the Court found the utility's advertising was protected speech. It also held the regulation served substantial governmental interests, because it would promote energy conservation and prevent rate inequities that promotional advertising might create. The regulation partly satisfied the third "directly advance" factor because the advertising ban directly advanced the state's interest in energy conservation. It partly failed the third factor because the link between promotional advertising and rate inequity was "highly speculative." The advertising

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[110] Id. at 563.

[111] Id. at 566.

[112] Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 184 (1999).

ban failed the "critical" fourth factor because it banned all promotional advertising, even advertising that promoted energy-efficient products or that did not affect energy use. A more limited regulation of commercial speech could promote the state's interest in energy conservation. As an alternative, the Court suggested the Commission could restrict the format and content of utility advertising by requiring, for example, that advertising include information about the energy efficiency and expense of an advertised utility service.

The Court in Central Hudson did not provide criteria it could apply in later cases to decide whether the four factors for commercial speech had been met, but applied the test ad hoc to the Commission's regulation. The Court has kept the Central Hudson test, though several Justices have urged its rejection, and the Court reaffirmed it in a recent decision.[113] That reaffirmance has not kept a number of commentators from recommending rejection and reform.[114] Two Justices joined the Court since recent cases that applied the Central Hudson test. One of these new Justices joined the majority in a recent case striking down a state statute as content-based.[115]

§ 2:6[3]. The Metromedia Case: Applying the Central Hudson Test to Sign Ordinances

One year after Central Hudson, the Supreme Court in Metromedia v. City of San Diego[116] applied the Central Hudson test to a sign ordinance from San Diego that completely banned commercial billboards, exempted a selected group of signs, and made special provision for on premise signs. A badly split Court produced a plurality opinion signed by four Justices that most federal courts follow in free speech cases involving sign ordinances.[117] The Third Circuit is an

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[113] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544, 555 (2001).

[114] E.g., Charles Fischette, A New Architecture of Commercial Speech Law, 31 Harv. J.L. & Pub. Pol'y 663 (2008); Alan Howard, Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework, 41 Case W. Res. L. Rev. 1093 (1991); Note, Shannon M. Hinegardner, Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong, 43 New Eng. L. Rev. 523 (2009); Brian J. Waters, Comment, A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech, 27 Seton Hall L. Rev. 1626 (1997).

[115] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), discussed in § 2:4[1], supra.

[116] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), noted, 95 Harv. L. Rev. 211 (1981). Justice White wrote the opinion for the plurality, joined by Justices Stewart, Marshall, and Powell. Chief Justice Burger, then-Justice Rehnquist and Justice Stevens each wrote dissenting opinions. Justice Brennan, joined by Justice Blackmun, wrote a concurring opinion. None of these Justices are presently on the Court.

[117] Randall M. Morrison, Sign Regulation, in Protecting Free Speech and Expression: The First Amendment and

exception, and rejected the Metromedia plurality for a different judicial review standard.[118] Cases since Reed continue to apply the Central Hudson test to sign ordinances regulating commercial speech.[119]

As explained by the plurality in Metromedia,[120] the San Diego ordinance prohibited signs on a building or other property that displayed goods or services produced or offered elsewhere. This provision effectively prohibited off premise billboards. Noncommercial advertising, unless within specified exemptions, was prohibited everywhere. Signs advertising goods or services available on the premises were allowed. The plurality upheld the billboard ban, but struck down the on premise sign limitation to commercial advertising and the sign exceptions allowed by the ordinance.

The plurality began its discussion of the billboard ban by noting "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[121] This statement confirms the Court's rule, that its application of free speech law differs with the medium of expression to which it is applied. There was "little controversy" over the first, second and fourth Central Hudson tests. Commercial advertising was neither unlawful nor misleading, the traffic safety and aesthetic goals that supported the ordinance were substantial governmental interests, and the ordinance was no

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Land Use Law 105, 139 n. 95 (Daniel R. Mandelker & Rebecca L. Rubin eds., American Bar Association, 2001) (listing decisions by circuit).

[118] Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994) ("when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the Metromedia concurrence: i.e. the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.").

[119] E.g., Citizens for Free Speech, LLC v. County of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015); Timilsina v. W. Valley City, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) ("Neither the Central Hudson test nor subsequent cases applying it make any attempt to first distinguish whether the restriction relates to form or content before deciding which test to apply."); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 635 (Cal. App. 2016).

[120] Metromedia, 453 U.S. at 503. See also id. at 493 n.2.

[121] Id. at 500.

broader than necessary. Obviously "the most direct and perhaps the only effective approach" was to prohibit them.[122]

Whether the ordinance met the third Central Hudson test was the "more serious" question, but the plurality held the billboard ban substantially advanced the governmental interests it served. Though the record on the relationship between traffic safety and the elimination of billboards was meager, the California Supreme Court, as a matter of law, did not set aside the legislative judgment that billboards are traffic safety hazards. Agreeing with the California court, the plurality held that "[w]e likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety," citing several cases.[123] Whether the plurality adopted a universal "common sense" test for applying the third Central Hudson test, or whether the weight of legislative judgment and judicial opinion convinced it that the necessary relationship existed, is not clear. The plurality also held the billboard ban substantially advanced the city's interest in aesthetics. It was not "speculative" to recognize that billboards were aesthetic harms wherever they were located, and however they were constructed.

On premise advertising issues also received attention. The plurality held that allowing on premise while prohibiting off premise advertising did not detract from the traffic safety and aesthetic purposes of the ordinance and was acceptable.[124] There were three reasons. Prohibiting off premise advertising related to the traffic safety and aesthetic objectives of the ordinance. Neither was the ordinance underinclusive because it permitted on premise advertising. The city may also have believed that off premises advertising, with its "periodically changing content," presented more of a problem. Finally, the city could decide there was a stronger public interest in advertising places of business and the products and services available there than in advertising "commercial enterprises available elsewhere."

Justice Stevens concurred in the Court's holding on commercial speech,[125] and because Chief Justice Burger and then-Justice Rehnquist would have held the entire ordinance

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[122] Id. at 508.

[123] Id. at 509.

[124] The Court noted that all of the cases considering this issue had upheld this distinction. Id. at 511 n. 17.

[125] Id. at 514.

constitutional, it is reasonable to assume they concurred as well. A majority of the Court thus agreed with the plurality's decision on the commercial speech issues.

Two features of the ordinance were held invalid by the plurality. It held invalid a provision in the ordinance limiting on premise signs to commercial speech, holding that the communication of commercial messages could not be of greater value than the communication of noncommercial information. It also held invalid a provision of the ordinance that allowed the display anywhere of 12 exempted signs. Some of these signs carried noncommercial messages, such as signs with religious symbols, signs with news, time and temperature signs and temporary political campaign signs. Though the city could distinguish between the relative values of different types of commercial speech, it could not distinguish between different types of noncommercial speech. It could not allow signs with some types of commercial speech while prohibiting others. These exceptions were content-based, and the plurality held the lack of content neutrality was a problem because the city could "not choose the appropriate subjects for public discourse."[126]

§ 2:6[4]. Taxpayers for Vincent: Applying the Central Hudson Test to Sign Regulation After Metromedia

In Metromedia, a plurality of the Supreme Court applied the Central Hudson test in a lenient manner to uphold restrictions on commercial speech in a sign ordinance. Members of City Council v. Taxpayers for Vincent,[127] a case decided a few years later, continued this trend. In Vincent, a majority decision, a Los Angeles ordinance prohibited the posting of signs on public property. A weekly sign report indicated the removal of 1207 signs from public property, including 48 campaign signs posted by Vincent on utility poles. After discussing other cases to hold that a municipality has a "weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression," the Court affirmed the holding by seven Justices in Metromedia, that a city's interest in visual clutter is sufficient to justify a prohibition on billboards. "The problem addressed by this ordinance -- the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property -- constitutes a significant substantive evil within the City's power to prohibit."[128] Although the case was not a

[126] Id.

[127] 466 U.S. 789 (1984).

[128] Id. at 807.

typical sign case because it considered a restriction on the use of public property, the Court's holding on aesthetic interest is significant, especially because signs posted on public property are a type of on premise sign.

This case also followed the Metromedia plurality's application of the fourth Central Hudson test, holding the prohibition on posting signs on public property was not substantially broader than necessary to protect the city's aesthetic interest.[129] The Court upheld the ordinance as a reasonably tailored time, place and manner regulation.[130] It applied to posted signs, where the Metromedia plurality concluded that such signs, wherever constructed or located, were an aesthetic harm.[131]

§ 2:6[5]. Later Supreme Court Cases Applying Central Hudson's Third "Directly Advance" Factor

After Metromedia, the third "directly advance" factor adopted in Central Hudson became an important factor in free speech cases involving sign ordinances. The Supreme Court has said that this factor, which requires a reasonable "fit" between the ends and means of regulation, is critical.[132] For this reason, later free speech cases in the Court that did not involve sign ordinances but that considered the "directly advance" factor are important. Some of these cases departed from the lenient application of the Central Hudson test in Metromedia and Taxpayers for Vincent, and used it to strike down legislation under the free speech clause. Whether this shift in opinion reflects a change in attitude, or merely the different free speech issues raised by the legislation the Court considered, is not clear.

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[129] Justice Stevens stated he was applying tests adopted in United States v. O'Brien, 391 U.S. 367 (1968), to viewpoint-neutral regulations of speech. The O'Brien tests, which were first adopted for regulations of symbolic speech, are similar to the Central Hudson tests, and Justice Stevens explicitly relied on Metromedia's interpretation of the Central Hudson tests in his decision.

[130] See § 2:7.

[131] The Court rejected an argument that a prohibition on unattractive signs could not be justified unless it applied to all unattractive signs everywhere. The validity of the aesthetic interest in eliminating signs in public property was not compromised by a failure to extend it to private property. This disparate treatment was justified by the private citizen's interest in controlling the use of his property, a less than total ban allowed the display of temporary signs, and a content-neutral ban would enhance the city's appearance even if some visual blight remained. Taxpayers for Vincent, 466 U.S. at 811.

[132] Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). In Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 95-96 (1977), a case decided before Central Hudson, the Court struck down an ordinance that prohibited the display of for sale signs in order to prevent racial panic selling. In a holding that echoed and applied what became the third Central Hudson test, the Court held that prohibiting for sale signs would not reduce public awareness of real estate sales in the township.

An initial question is whether the Court has modified how the Metromedia plurality applied the third "directly advance" factor. There the plurality adopted a "common sense" rule for this factor. It did not require studies or reports to justify the billboard ban, and held it was not "speculative" to recognize that billboards were aesthetic harms that could justify their prohibition everywhere. Edenfield v. Fane[133] took a different view. The Supreme Court elaborated the implication in Metromedia that the "directly advance" factor requires more than "mere speculation and conjecture." Instead, the Court held, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[134] The Court struck down a state board's ban on the solicitation of business clients by certified public accountants, noting the board did not prove with studies that solicitation would lead to fraud, overreaching or compromised independence. A report of a national accountant's organization and the literature actually disputed the board's concerns. Other Supreme Court cases applied the Edenfield rule that speculation and conjecture do not satisfy the "directly advance" test, sometimes upholding and sometimes striking down regulations affecting commercial speech.[135]

In later cases, the Court also backed away from earlier decisions that applied axiomatic assumptions to find that laws directly advanced a governmental interest. In these cases the Court struck down laws that prohibited or regulated advertising for "vice" products and activities, such

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[133] 507 U.S. 761, 770 (1993). See Note, David S. Modzeleski, Lorillard Tobacco v. Reilly: Are We Protecting the Integrity of the First Amendment and the Commercial Free Speech Doctrine at the Risk of Harming our Youth?, 51 Cath. U.L. Rev. 987 (2002).

[134] Edenfield, 507 U.S. at 770-771.

[135] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999) (striking down federal legislation prohibiting advertising for gambling; statute and exemptions pierced with exceptions and inconsistencies); 44 Liquormart v. State of Rhode Island, 517 U.S. 484 (1996) (striking down statute that prohibited advertising of liquor prices; plurality decision), noted, 110 Harv. L. Rev. 216 (1996); Florida Bar v. Went for It, 515 U.S. 618, 628, 629 (1995) (upholding ban on direct-mail solicitation in the immediate aftermath of accidents by attorneys as supported by bar studies), noted, 109 Harv. L. Rev. 191 (1995); Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (striking down federal statute prohibiting advertising of alcohol content on beer labels; no "credible evidence" to support statute); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 143 (1994) (striking order prohibiting use of certified public account designation as misleading). See also Thompson v. Western States Medical Ctr., 535 U.S. 357 (2002) (Edenfield not cited, but striking down federal statute prohibiting advertising of compounded drugs); United States v. Edge Broadcasting Co., 509 U.S. 418 (U.S. 1993) (same, and upholding federal statute prohibiting broadcast of lottery advertisements); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding Puerto Rico statute and regulations restricting casino advertising pre-Edenfield, relying on legislative belief that advertising would increase demand for gambling).

as beer and casino gambling.[136] The implication is that this kind of advertising does not deserve less protection under the free speech clause. In one of these cases, a badly divided Court struck down a state law that prohibited price advertising for liquor products.[137] The lack of a majority for this decision weakens it as precedent.

The Supreme Court applied the Edenfield speculation and conjecture test to a regulation by the Massachusetts attorney general that prohibited smokeless tobacco and cigar advertising within 1000 feet of a radius of a school or playground,[138] but held the regulation met the "directly advance" requirement. The Court extensively discussed Federal Drug Administration and other studies supporting the state's argument, that advertising plays a significant and important contributing role in a young person's decision to use tobacco products. Earlier in the decision the Court also emphasized it did not require empirical data to justify free speech restrictions. Studies and anecdotes could be enough.[139] The Court held that the prohibition failed the fourth Central Hudson test, however.[140] Lower court free speech cases have not relied on Edenfield to require evidentiary support for government objectives, such as aesthetics, that governments use to justify sign ordinances.[141]

§ 2:6[6]. Later Supreme Court Cases Applying Central Hudson's Fourth "More Extensive than is Necessary" Factor

In its fourth Central Hudson factor, the Supreme Court requires courts to consider whether a regulation is "more extensive than is necessary to serve" the governmental interest. This is a reasonable fit tailoring test that complements the third "substantially advance" test,[142]

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[136] The Greater New Orleans, Liquormart and Rubin cases qualified the earlier Edge Broadcasting and Posadas cases, which had upheld such advertising laws. See the previous footnote. The Greater New Orleans case also clearly extinguished the "greater-includes-the-lesser" argument, that government power to ban a product or activity reduces free speech protection for truthful, non-deceptive commercial speech about that product or activity. See Michael Hoefges & Milagros Rivera-Sanchez, "Vice" Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 Hastings Comm. & Ent. L.J. 345 (2000).

[137] Liquormart v. State of Rhode Island, 517 U.S. 484 (1996).

[138] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[139] Id. at 555, quoting Florida Bar v. Went for It, 515 U.S. 618, 628 (1995).

[140] The Court also held that a restriction on point-of-sale advertising of smokeless tobacco and cigars failed the third Central Hudson factor. Id. at 566.

[141] § 3:2.

[142] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

and which the Supreme Court has called the "critical inquiry."[143] Regulations must be narrowly tailored to avoid unconstitutional burdens on free speech.

Ambiguity in how this test was stated raises questions about what it means. A need to consider different alternatives seems implied, so that a regulation will have the alternative most narrowly tailored. What is not clear is whether tailoring demands more, and requires selection of the least-burdensome meansto achieve the regulatory purpose.[144] As applied to sign regulation, a least-burdensome means requirement demands selection of the alternative that places the least burden on commercial speech. For example, a court might require an ordinance that allowed the display of digital signs as an alternative to prohibiting their display. Though the Supreme Court first applied the fourth Central Hudson factor liberally, later cases applied it to strike down commercial speech regulations. No bright line rule has emerged.

The Court first applied the fourth factor shortly after Central Hudson in the Metromedia case.[145] There it deferentially upheld a ban on billboards, and dealt curtly with an argument that it was more extensive than necessary by deferring to the city's legislative judgment. "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[146] Moreover, the city had not prohibited all billboards, but allowed onsite advertising and exempted some signs.

In a case decided a few years later, Posadas de Puerto Rico Associates v. Tourism Co.,[147] the Court was even more permissive, and upheld a Puerto Rico statute that prohibited casino advertising to Commonwealth residents. It again dealt curtly with the fourth Central Hudson factor, rejecting a government-sponsored advertising campaign to discourage gambling by

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[143] Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557, 569 (1980).

[144] The Court used this phrase when it discussed this requirement as it might apply under the fourth Central Hudson factor, but the phrase "less-restrictive means" has also been used to describe this requirement in other regulatory contexts.

[145] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[146] Id. at 508.

[147] 478 U.S. 328 (1986). The trial court narrowed the statute and its regulations by permitting certain local advertising addressed to tourists even though it might incidentally reach the attention of residents, and adopted other exceptions.

residents as a less-burdensome means. It was "up to the legislature" to decide whether this less-burdensome means would be effective.[148]

A definitive interpretation of the fourth Central Hudson factor came a few years later in Board of Trustees of the State University of New York v. Fox.[149] As noted earlier, in this case the Court upheld a state university regulation that did not allow "private commercial enterprises" to operate on state campuses, which the university applied to prohibit a demonstration of commercial products in a student dormitory. The Court held the university did not have to select a less-burdensome means,[150] called the fourth factor an ends and means test and adopted a deferential "reasonableness" standard of judicial review:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," [citing Posadas] -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," [citing case]; that employs not necessarily the least restrictive means but, as we have put it ..., a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.[151]

The Court added that it required "the government goal to be substantial, and the cost to be carefully calculated."[152] Government has the burden of proof.

A few years later, however, in City of Cincinnati v. Discovery Network,[153] the Court applied the fourth Central Hudson factor to strike down an ordinance that prohibited newsracks that distributed commercial handbills on public property, but not newspapers. For purposes of the decision, the Court assumed the ordinance prohibited commercial, but allowed

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[148] Id. at 344. The authority of this case is questionable, however. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999) (striking down federal legislation prohibiting advertising for gambling; statute and exemptions pierced with exceptions and inconsistencies).

[149] 492 U.S. 469 (1989). See Todd J. Locher, Comment: Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards, 75 Iowa L. Rev. 1335 (1990). For a case applying Fox to uphold offsite advertising regulations see Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 104, 105 (2d Cir. 2010) ("That the City considered, and rejected, an alternative scheme is of no constitutional moment.").

[150] The Court commented "The ample scope of regulatory authority ... [over commercial speech] would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." Id. at 477.

[151] Id. at 480.

[152] Id.

[153] 507 U.S. 410 (1993). See 107 Harv. L. Rev. 224 (1993).

noncommercial, speech.[154] This distinction, however, bore no relationship to the interests the city asserted. The city's interest in aesthetics was not served, because the newsracks containing commercial handbills were no more unattractive than newsracks containing newspapers. A bare assertion of the low value of commercial speech was not enough for this selective ban. The city had not established "a 'reasonable fit' between its legitimate interests in safety and aesthetics and its choice of a limited and selective prohibition on newsracks as the means chosen to serve those interests."[155] In addition, the regulation was content-based because its basis was the difference in content between ordinary newspapers and commercial speech.[156].

A footnote[157] distinguished Metromedia, because that ordinance treated two types of commercial speech differently by banning outdoor but permitting on site commercial advertising.[158] In another footnote, the Court clarified the standard of judicial review that should apply. It rejected "mere rational-basis review," but did not reject Fox by adopting a less-burdensome means test. However, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[159] The city had not "carefully calculated" the costs and benefits associated with the ban, because it failed to consider regulating their size, shape, appearance or number as a less-burdensome means.

Later Supreme Court cases struck down or upheld commercial speech regulations under the fourth Central Hudson factor, but did not always consider the less-burdensome means requirement nor clarify how the Fox and Discovery Network decisions applied it.[160] One of these

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[154] The Court held that its holding was narrow. It did "not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks." Id.

[155] Id. at 416.

[156] Another factor that certainly weighed on the calculation of costs and benefits was the city's reliance on an outdated regulation, aimed at littering, which it used to ban commercial handbills from distribution on public property.

[157] Discovery Network, 507 U.S.,. at 425, n.20.

[158] See § 2:6[3], supra.

[159] Id. at 418, n.13. Chief Justice Rehnquist, dissenting, believed the Court had revived the discredited less-burdensome means test. Id. at 441.

[160] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (citing Fox but not Discovery Network, the Court upheld a federal statute that prohibited broadcasting stations from advertising state-run lotteries in a state that did not

cases was an important advertising case discussed earlier, Lorillard Tobacco Co. v. Reilly.[161] Here the Court struck down Massachusetts regulations that prohibited the advertising of smokeless tobacco and cigars within 1000 feet of schools or playgrounds, which the state adopted to protect youth from the harm of smoking. Noting that the regulations prohibited advertising in a substantial portion of major metropolitan areas in the state, the Court held their uniformly broad geographical sweep demonstrated a lack of tailoring. In addition, a ban on all signs of any size was "ill suited to target the problem of highly visible billboards, as opposed to smaller signs."[162] To the extent that studies identified advertising and promotional practices that appealed to youth, "tailoring would involve targeting those practices while permitting others."[163] The regulations made no such distinction. They failed the fourth Central Hudson factor because they impinged unduly on the ability to propose a commercial transaction, and the opportunity of an adult listener to obtain information about products.

The Court did not discuss the Metromedia case, where it upheld a ban on commercial billboards under the fourth Central Hudson factor. The purpose for which the ban was adopted distinguishes the two decisions. In Metromedia the purpose was to further the aesthetic and traffic safety interests of the city, and the Court believed only a billboard ban could be effective. In Lorillard the purpose was to protect youth from the harm of tobacco, and the state could have adopted some means other than a ban. Nevertheless, as in Metromedia, the Court in Lorillard

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run a lottery; it handled the "reasonable fit" issue by holding that the prohibition "advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia."); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (the Court struck down a federal statute that prohibited the disclosure of the alcohol content of beer on labels or in advertising; without citing any authority, it held that other alternatives to the prohibition existed, such as directly limiting the alcohol content of beer); Florida Bar v. Went for It, 515 U.S. 618 (1995) (upholding Florida Bar's restriction on targeted mail, and finding many alternatives for "communicating necessary information about attorneys;" Fox and Discovery Network quoted); Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) (same; invalidating federal scheme for regulating broadcast of gambling advertisement because "pierced by exemptions and inconsistencies"); Thompson v. Western States Medical Center, 535 U.S. 357 (U.S. 2002) (striking down ban on advertising compounded drugs; government must "achieve its interests in a manner that does not restrict speech, or that restricts less speech;" Fox and Discovery Network not cited).

[161] 533 U.S. 525 (2001). Following Lorillard: N.A. of Tobacco Outlets v. City of Worcester, 851 F. Supp.2d 311 (D. Mass. 2012). Cf. 44 Liquormart v. State of Rhode Island, 517 U.S. 484 (1996) (invalidating state statute prohibiting price advertising of liquor products; plurality opinion per Stevens, J., "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"), discussed in 110 Harv. L. Rev. 216 (1996).

[162] Id. at 564.

[163] Id.

could have held that a ban on advertising was the only effective way to protect youth from the harm of tobacco. Its close examination of the narrow tailoring requirement shows it might be equally as demanding when it considers other sign ordinances.

The Supreme Court's application of the fourth Central Hudson factor is mixed. Discovery Network modified the generous interpretation adopted in Fox, but the Court did not reconcile the tension between the two cases in later decisions and did not always explicitly rely on either one. Later cases may have modified its earlier relaxed application of the test in Metromedia to uphold a ban on billboards. The Court has also been inconsistent in applying the less-burdensome means requirement. It was quick to find less-burdensome means as an alternative when it held a law invalid, but sometimes ignored such possibilities when it upheld a law. What emerges is a case-by-case calculation of costs and benefits based on regulatory purpose that does not produce a bright line rule.

§ 2:7. Time, Place and Manner Regulations

§ 2:7[1]. Supreme Court Doctrine

Long before the Supreme Court adopted the four factors for reviewing the regulation of commercial speech in Central Hudson, it adopted rule for regulations it called time, place and manner regulations that had an effect on free speech. They had their origin in early licensing cases, where the Court upheld content-neutral regulations in the public forum, such as regulations for licensing parades on public streets.[164] Courts also uphold time, place and manner regulations outside public forums. Sign regulations are defensible as time, place and manner regulations, which courts view as a category constitutionality different from but similar to other categories the courts apply to commercial speech.

Ward v. Rock Against Racism[165] clarified Supreme Court doctrine on time, place, and manner regulations. New York City regulated the volume of amplified music that could be played at rock concerts at a park band shell. It had to be satisfactory to the audience, but could not intrude on those using an adjacent quiet grassy area designated for passive recreation, or on those living in nearby apartments and residences. The Court decided the case as if the band shell

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[164] E.g., Cox v. New Hampshire, 312 U.S. 569 (1941) (licensing upheld). For discussion of this history see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 636-645 (1991).

[165] Ward v. Rock Against Racism, 491 U.S. 781(1989).

were a public forum, where the government's right to regulate free speech was subject to first amendment protections. It held:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[166]

The rules for time, place and manner regulations are similar but add to the Central Hudson tests for commercial speech. Content neutrality is required. City of Cincinnati v. Discovery Network[167] illustrates a case where the Court held a law was not a time, place and manner regulation because it was content-based. An ordinance prohibited commercial handbills in newsracks, but not newspapers containing noncommercial speech. The Court held the ordinance content-based because its very basis was the difference in content between ordinary newspapers and commercial speech. There was no acceptable justification for the ordinance, because the city's only justification was its "naked assertion" that commercial speech has low value.[168]

The narrow tailoring requirement is similar to the fourth Central Hudson "more extensive than is necessary" factor. In language echoing that factor, the Court in Ward held a regulation must not be substantially broader than necessary, and may not burden a substantial portion of speech in a manner that does not achieve its goals. Narrow tailoring is met if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[169] The adoption of a less-burdensome-alternative is not required.[170] "[O]ur cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on

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[166] Id. at 791, citing cases. The Court in Reed inverted this language by holding that laws that cannot be "justified without reference to the content of the regulated speech" are content-based. Reed, 135 S. Ct. at 2227.

[167] 507 U.S. 410 (1993). See § 2:6[6].

[168] Id. at 429.

[169] Id. at 799, quoting from case. The Court added that judges do not have to agree that a "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," or on the degree to which those interests should be promoted. Id. at 800.

[170] In the cases applying the Central Hudson fourth test the Court used the phrase "less-burdensome alternative," but the two phrases are equivalent.

speech.'"[171] Recall it is not clear whether a less-burdensome alternative is required under the fourth Central Hudson test.

The requirement for ample alternative channels of communication as a basis for upholding time, place and manner regulations differs from narrow tailoring, and is not part of the Central Hudson requirements. Ample alternative channels exist if there are other adequate means for communicating the expressive conduct whose communication is affected by the regulation. This test is concerned with the speaker's ability to communicate, not with governments' ability to regulate.

These differences would seem to distinguish time, place and manner regulations from the Central Hudson tests for commercial speech, but the Court has held the two doctrines are substantially similar.[172] Litigants have nevertheless relied on the rules for time, place and manner regulations to uphold advertising regulations where the Supreme Court also considered the Central Hudson factors. The next section discusses these cases.

§ 2:7[2]. Supreme Court Cases Applying Time, Place and Manner Doctrine to the Regulation of Advertising

The Court has considered the rules for time, place and manner regulations in four cases involving the regulation of advertising. All of these cases considered an ordinance that banned a particular type of sign. The Court struck down three of these ordinances in a group of decisions that arguably are inconsistent.

In the first case, Linmark v. Township of Willingboro,[173] decided before Central Hudson, the ordinance banned for sale and sold signs, except signs on model homes, in order to prevent white flight from the township and promote racial integration. The Court held the ordinance was not a time, place and manner regulation because ample alternate channels of communication were not available. Alternatives, such as newspaper advertising and listing with real estate agents, were less effective because they were less likely to reach persons not deliberately seeking

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[171] Discovery Network, 507 U.S. at 797, citing case. The dissenting Justices disagreed with this holding.

[172] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (tests substantially similar, citing Fox); United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993) ("the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context"); San Francisco Arts & Athletics, Inc.. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (tests substantially similar); Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989) (same, quoting San Francisco Arts).

[173] 431 U.S. 85 (1977).

sales information. Neither was the ordinance "genuinely" concerned with the place and manner of speech on the signs. It was content-based because it regulated particular signs based on their content, but the township's interest in regulating content was not enough to save the ordinance.[174]

Time, place and manner issues appeared next in the Metromedia case,[175] where a plurality upheld a ban on commercial billboards, but struck down exceptions that favored certain types of noncommercial speech over others. Its discussion of the city's time, place and manner defense appears in that part of the opinion dealing with the exceptions, where it was curtly rejected. The plurality held the ordinance was not a "manner" regulation because signs were banned everywhere, an apparent reference to the ban on noncommercial billboards.[176] This is a puzzling statement, because the Court had upheld the ban on billboards under the Central Hudson tests, and later upheld a ban on posting signs on public property as a time, place and manner regulation. The Court in Metromedia also held it could not assume that alternate channels of communication were available because the parties had stipulated the opposite. Finally, the distinctions made in the ordinance were content-based, an apparent reference to the special treatment given to some noncommercial signs. What the Court apparently meant was that it would not consider a time, place and manner defense as an alternate basis for upholding the ordinance.

The Court next applied time, place and manner doctrine, in part, to uphold an ordinance banning signs on public property. In Taxpayers for Vincent v. City of Los Angeles[177] the Court

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[174] The goal of stable, racially integrated housing did not save the ordinance, because the evidence did not show that the ordinance was needed for this purpose. This holding suggests the ordinance would not meet the Central Hudson factor, that a regulation must directly serve a governmental interest. More basically, the Court said, the ordinance prevented citizens of the township from obtaining vital information, but only because the township feared homeowners would make decisions inimical to its interests by leaving if sale and rental information could be displayed on signs. Relying on an earlier case, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748. (1976), the Court rejected the "claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading." Linmark, 431 U.S. at 97. Because the ordinance was content-based, a court today would probably say the governmental interest was not compelling.

[175] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

[176] But see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 637 (1991) (arguing that the time, place and manner doctrine applies to total bans).

[177] 466 U.S. 789 (1984). The Court rejected an argument that the signs deserved special treatment because the sign posts where the signs were posted were a public forum. Id. at 813-814. This case was decided five years before the Court restated the time, place and manner doctrine in Ward v. Rock Against Racism. The free speech analysis in Vincent is mixed. See Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev.

held an ordinance that prohibited the posting of signs on public property, as applied to prohibit the posting of campaign signs, was content-neutral. "The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest."[178] The city "did no more than eliminate the exact source of the evil it sought to remedy" by prohibiting signs that caused visual clutter and blight. The ordinance curtailed no more speech than was necessary to achieve its purpose.

Alternate modes of expression were adequate. Individuals could speak and distribute literature at the same place where the ordinance prohibited the posting of signs. Any advantage obtained by the posting of political signs was available by other means. "[N]othing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication."[179] In a footnote, the Court added that it had shown "special solicitude" for expressive forms that were less expensive than feasible alternatives, but that "this solicitude has practical boundaries."[180]

Ten years after Vincent the Court rejected a time, place and manner defense in another sign case, City of Ladue v. Gilleo.[181] There it struck down an ordinance that prohibited a political sign on the lawn of a home, but allowed the display in residential areas of residence identification signs, for sale signs, and signs warning of safety hazards. Commercial establishments, churches, and nonprofit private organizations could display signs not allowed in residential areas. Ladue asserted a time, place and manner defense by claiming residents could convey their messages by other means, such as hand-held signs, speeches and banners. The

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615, 650-651 (1991). See also, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), decided six weeks later.

[178] Taxpayers for Vincent, 466 U.S. at 807.

[179] Id. at 811. The Court added that ever-increasing restrictions on expression did not threaten plaintiffs' ability to communicate effectively.

[180] Id. n.30.

[181] 512 U.S. 43 (1994). For discussion of the Ladue case, see Note,, Stephanie L. Bunting, Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo, 20 Harv. Envtl. L. Rev. 473 (1996). For discussion by the lawyers who argued the case see Jordan B. Cherrick, Do Communities Have the Right to Protect Homeowners from Sign Pollution?: The Supreme Court Says No in City of Ladue v. Gilleo, 14 St. Louis U. Pub. L. Rev. 399 (1995) (attorney for city); Gerald P. Greiman, City of Ladue v. Gilleo: Free Speech for Signs, A God Sign for Free Speech, 14 St. Louis U. Pub. L. Rev. 439 (1995) (attorney for plaintiff).

Court rejected these alternatives, holding that "[r]esidential signs are an unusually cheap and convenient form of communication,"[182] and that a sign displayed from a residence can often carry a message quite distinct from placing a message someplace else.

The Court's application of the alternate channels of communication requirement in these cases is inconsistent. It is difficult to see why alternate modes of expression were adequate in the Vincent case but not in the Linmark and Ladue cases, unless advertising homes for sale, and the display of signs on residential property, have a more protected place under free speech law than advertising on public property. Neither did the Court provide clear guidance on when it would hold alternate channels of communication adequate, beyond its decisions on the facts in these cases. The solicitude for less expensive means of communication was apparently more important in the Ladue, than it was in the Vincent, case. Nevertheless, the factual context of these cases may provide an explanation. In Linmark and Ladue the Court was protecting the display of information, and the Ladue ordinance favored commercial over noncommercial signs. In Vincent the interest of the public in preventing displays on public property may have influenced the Court.

§ 2:8. The Prior Restraint Doctrine[183]

§ 2:8[1]. General Principles

Prior restraints are the most serious and least tolerable infringements on free speech rights.[184] A prior restraint occurs when a law like a sign ordinance includes a discretionary administrative review procedure.[185] A requirement for a sign permit is a typical example. Sign

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[182] Ladue, 512 U.S. at 56. The Court earlier assumed the ordinance was content- and viewpoint-neutral. Id. at 46. Justice O'Connor's concurring opinion disagreed with this characterization. Id. at 59.

[183] See Daniel R. Mandelker, Decisionmaking in Sign Codes: The Prior Restraint Barrier, Zoning and Planning Law Report, Vol. 31, No. 8, at 1 (2008), (discussing standing to challenge laws as prior restraint and validity of substantive standards), available at www.ussc.org.

[184] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Some courts have indicated that whether the prior restraint doctrine applies to commercial speech is an open question. E.g., Hunt v. City of Los Angeles, 638 F.3d 708, 718 n.3 (9th Cir. 2011), quoting Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557, 571 n.13 (1980) ("We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.").

[185] The prior restraint doctrine does not apply to legislative decisions. An exception is when a legislature reserves decisionmaking authority to itself. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 688 (9th Cir. 2010).

ordinances may also include discretionary review procedures for conditional uses, also known as special exceptions, and variances.

A discretionary review procedure in a sign ordinance is invalid as a prior restraint unless it contains required procedural and substantive standards.[186] The procedural standards prevent delays in making decisions. The substantive standards prevent arbitrary decisions. An ordinance will suppress the expression of speech if decisions can be delayed for too long a time, or if arbitrary decisions denying approval can be made because the ordinance does not provide adequate substantive standards. The burden to show that procedural and substantive standards are adequate is a heavy one.[187]

§ 2:8[2]. The Procedural Standards

The leading Supreme Court case on procedural standards is Freedman v. Maryland,[188] which held invalid a statute that required approval by a state board of censor to approve movies before they could be shown. The Court adopted three procedural standards. Government has the burden of initiating judicial review, prompt judicial review within a specified brief period is required, and any restraint prior to judicial review must be limited to the shortest period compatible with a sound judicial resolution.[189] These standards are the "Freedman Standards," after the case in which they were adopted.

Later Supreme Court cases do not entirely explain how courts should apply the Freedman Standards to land use regulations like sign ordinances. FW/PBS, Inc. v. City of Dallas[190] considered the Freedman Standards as applied to a conditional use for an adult business, a use protected as free speech. A plurality of three Supreme Court Justices accepted the legitimate and customary role that licensing plays in land use laws. It found a weaker inference that censorship was involved in such laws, as in the Freedman case. For adult uses, it applied only two of the three Freedman standards: that a decision must occur within a specified reasonable time during

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[186] For a detailed review of Supreme Court cases on the prior restraint doctrine as it applies to signs see Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law and Litigation §§ 4:26-4:30..

[187] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[188] 380 U.S. 51(1965).

[189] These are the standards as restated in Blount v. Rizzi, 400 U.S. 410, 417 (1971).

[190] FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990). The Court was split three ways in three opinions, each with three Justices.

which the status quo is maintained, and that there must be prompt judicial review. A later Supreme Court decision[191] in an adult use case held a state's ordinary rules of judicial review were adequate to meet the prompt judicial review requirement. This case means that state judicial review procedures will also satisfy the prompt judicial review Freedman standard for sign ordinances.[192]

A later case, Thomas v. Chicago Park District,[193] created an exemption from the Freedman Standards for content-neutral regulation that may apply to sign ordinances, and may mean these ordinances do not need time limits. The Thomas case upheld a Chicago ordinance that required a permit for large-scale events in public parks. It concluded "Freedman is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."[194] Public forum regulations for parks that ensure safety and convenience, it held, were consistent with civil liberties, and provide the good order on which civil liberties ultimately depend. This traditional exercise of authority did not raise censorship concerns that required "the extraordinary procedural safeguards on the film licensing process in Freedman." The Court distinguished the FW/PBS case, where it applied two of the Freedman Standards, because it "involved a licensing scheme that 'targeted businesses purveying sexually explicit speech.'"[195] Like the licensing scheme in Thomas, sign regulation that is content-neutral should be considered a traditional exercise of authority exempt from the Freedman Standards because it does not involve censorship.[196]

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[191] City of Littleton v. Z. J. Gifts D-4, L.L.C, 541 U.S. 774 (2004). The Court also held the ordinance did not involve censorship because it had neutral and nondiscretionary criteria that applied to the operation of adult businesses.

[192] But see Lusk v. Village of Cold Spring, 475 F.3d 480, 492 n.14 (2d Cir. 2007) (licensing scheme not brief, no judicial review, and village not required to initiate litigation when disapproving a sign).

[193] 534 U.S. 316 (2002), noted, 12 Seton Hall Const. L.J. 825 (2002). See also Robert H. Whorf, The Dangerous Intersection at "Prior Restraint" and "Time, Place, Manner": A Comment on Thomas v. Chicago Park District, 3 Barry L. Rev. 1, 8026 (2002).

[194] Thomas, 534 U.S. at 322.

[195] Id. n. 2. This statement is puzzling, because the Court had previously held that a zoning ordinance regulating adult uses was content-neutral. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[196] The Court's statement in Thomas, that the permit ordinance was a time, place and manner regulation, may present a problem for sign ordinances because the tests for time, place and manner regulations are somewhat different from, though similar to, the Central Hudson tests for commercial speech. See § 2:7. However, the Court in Thomas merely mentioned that the permit ordinance was a time, place and manner regulation, and did not actually

The rejection of the Freedman Standards in the Thomas case should include its time limit requirement, but the case creates confusion because the Chicago ordinance contained a 28-day time limit, which is probably adequate. The Court noted but did not discuss the time limit.[197] This failure makes it unclear whether the Court's mention of the time limit means a time limit is required, even in content-neutral regulations. A number of federal courts have not adopted this interpretation, and read Thomas to mean that sign ordinances do not require time limits if they are content-neutral, like the regulation in that case.[198] The Sixth Circuit Court of Appeals, for example, reached this conclusion in a case involving an adult business ordinance. Requiring time limits, it held, would "negate" the holding in Thomas that content-neutral time, place and manner regulations do not have to meet the Freedman Standards.[199]

Despite these cases, local governments should use caution in omitting time limits from permit and other procedures in sign ordinances that require discretionary decision making. A sign ordinance can omit time limits if it is content-neutral, but difficulties in defining content neutrality mean a court can find an ordinance content-based if it is challenged in court. Including acceptable time limits avoids the risk that a sign ordinance is an invalid prior restraint. If an ordinance is required to, but does not contain, time limits, a court will hold it invalid.[200]

§ 2:8[3]. The Substantive Standards: Controlling Administrative Discretion

If an ordinance is a prior restraint on speech it requires clear substantive standards for discretionary administrative and executive decisions, even if it is content-neutral. As the

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apply the requirements for these regulations to the permit ordinance.

[197] Id. at 318.

[198] Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421 (4th Cir. 2007); Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112 (11th Cir. 2003); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003); National Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003). Accord in cases not involving sign ordnances: Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128 (9th Cir. 2004) (Oregon Mass Gathering Act); Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002) (regulation applied to prohibit display of Confederate flag at national cemetery; procedural requirements only apply to explicit censorship schemes). But see Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. Fla. 2005) (time limits required when ordinance content-based).

[199] H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009).

[200] Citizens for Free Speech, LLC v. County of Alameda, 62 F. Supp. 3d 1129, 1142 (N.D. Cal. 2014); Nittany Outdoor Advert., LLC v. College Twp., 22 F. Supp. 3d 392, 412 (M.D. Pa. 2014); Mahaney v. City of Englewood, 226 P.3d 1214 (Colo. App. 2009) (wall murals in sign ordinance Thomas not cited).

Supreme Court held in the Thomas case,[201] "[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." This rule is well established. Another Supreme Court case added, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[202]

A sign ordinance that does not contain any standards for decision making is clearly an invalid prior restraint.[203] Conversely, an ordinance that contains objective and precise standards for decision making, such as size, height, location, area, and setback standards is not a prior restraint. A permit requirement in a sign ordinance with such standards is an example.[204]

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[201] Thomas, 534 U.S. at 323. The Court has also pointed out that the absence of express standards makes it impossible to distinguish between " a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." See also City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988); Heffron v. Intl. Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (uncontrolled discretion may suppress a particular point of view).

[202] Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969). As the Court also stated in City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763, (1988), without standards controlling the exercise of discretion, government officials may determine "who may speak and who may not based upon the content of the speech or viewpoint of the speaker."

[203] Café Erotica of Fla., Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir. 2004) (billboards; permits to be reviewed by County Administrator "in accordance with Standard Building Code", but no specific grounds for denial in Code); Citizens for Free Speech, LLC v. County of Alameda, 62 F. Supp. 3d 1129, 1141 (N.D. Cal. 2014) (signs to be placed on or attached to bus stop benches or transit shelters); Lamar Co., L.L.C. v. City of Marietta, 538 F. Supp. 2d 1366 (N.D. Ga. 2008) (unguided discretion to grant, deny or waive a permit); Covenant Media of Illinois, L.L.C. v. City of Des Plaines, Ill., 391 F. Supp. 2d 682, 693 (N.D. Ill. 2005) (no criteria for approving billboard permit); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (no precise and objective standards for temporary sign permits); King Enters. v. Thomas Twp., 215 F. Supp. 2d 891 915 (E.D. Mich. 2002); Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000) (temporary permits for signs in the public interest).

[204] H.D.V. - Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009) (very particular requirements for sign permits, including limitations on size, height, location, area, and setback conditions); Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112 (11th Cir. 2003) (objective criteria for permits such as height, size, or surface area of a proposed sign); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003) (billboard permits; only on lot zoned commercial/industrial; only if no other structures are there; only one off-premise sign per lot; height, area, separation, and setback requirements); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (sign must be within the maximum number of signs permitted for each zoning district, must meet square footage, height, and setback requirements, must not be located on the roof of a building; must meet restrictions on illuminated signs, must meet definite, objective standards for a temporary permit; portable and banner signs have maximum square footage requirement and time limit; signs prohibited "which prevent safe vehicular or pedestrian passage along public rights-of-way or sidewalks"); Township of Pennsauken v. Schad, 733 A.2d 1159 (N.J. 1999) (number, size, location and placement). See also Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (approving objective standards for park permit).

Contest Promotions, LLC v. City & Cty. of San Francisco, 100 F. Supp. 3d 835, 844 (N.D. Cal. 2015)

Substantive standards that fall between these two extremes present more difficult prior restraint problems. Standards for sign variances are an example.[205] Though not as objective as size and setback standards, courts have found them specific enough to avoid prior restraint problems. A court of appeals, for example, upheld a variance provision that contained typical "practical difficulty" and "unnecessary hardship" standards.[206] The ordinance also required the city to consider whether a denial "would deprive the applicant of privileges enjoyed by owners of similarly zoned property," whether a variance would constitute a "grant of special privilege," and whether a variance would allow the applicant to engage in conduct otherwise forbidden by the city. Other courts upheld similar standards,[207] though a few cases held ordinances invalid that had "general welfare" or similar vague standards.[208]

Historic district ordinances usually require permit or other procedure to decide whether a proposed development or modification of an existing structure is compatible with the character of the district. These procedures can raise a prior restraint problem, though a district's historic character can provide an acceptable reference point that validates a substantive compatibility

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upheld pre-Reed an ordinance defining a Business Sign as a "[a] sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such sign is located, or to which it is affixed." The court held that term "primary" was sufficiently precise, but the definition is content-based under Reed.

[205] Sign variances can disrupt the administration of a sign ordinance and are not recommended. If authority for variances is included, the variance provision should be restrictive. The Street Graphics model ordinance authorizes sign variances only from height and setback requirements, and requires that the variance vary not more than 25 percent from code requirements. Street Graphics, supra note 2, at 91..

[206] Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007).

[207] Rzadkowolski v. Metamora Twp., 2016 WL 3230535, at *3 (E.D. Mich. 2016) (uniqueness, would deprive of rights enjoyed by others, whether self-created, "practical difficulty on the subject site" defined); Citizens for Free Speech, LLC v. County of Alameda, 62 F. Supp. 3d 1129, 1141 (N.D. Cal. 2014) (area variance; "a parcel's 'size, shape, topography, location or surroundings' deprive the property of privileges enjoyed by nearby parcels in the same zoning classification"); Int'l Outdoor, Inc. v. City of Harper Woods, 2016 WL 1682799, at *5 (Mich. Ct. App. 2016) (be in harmony with the general purpose and intent of the sign ordinance, not be injurious to immediate neighborhood or adjacent land use, sufficiently compatible with architectural and design character of immediate neighborhood, and not be hazardous to passing traffic or otherwise detrimental to public safety and welfare); Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (objective, physical aspects of sign and extent to which sign would significantly increase street level sign clutter, adversely dominate visual image of an area, be inconsistent with plan or design district objectives, create traffic or safety hazards, be of exceptional design or style so as to enhance an area or be a visible landmark, and be more consistent with site architecture and development).

[208] Nittany Outdoor Advert., LLC v. College Twp., 22 F. Supp. 3d 392, 416 (M.D. Pa. 2014) ("detrimental to the public welfare"); City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983) ("will not be injurious to public welfare" and "shall be in harmony with the general purpose and intent of the [sign] ordinance and general plan"). See also Pica v. Sarno, 907 F. Supp. 795 (D.N.J. 1995) (invalid, no standards provided).

standard. A court of appeal, for example, upheld an ordinance that required the review of sign permit applications "for conformity in exterior material composition, exterior structural design, external appearance and size of similar advertising or information media used in the architectural period of the district in accordance with the Resource Inventory of building architectural styles of the Bradford Historic District." The presence of individuals knowledgeable about historic preservation on the review board also guarded against arbitrary decision making.[209] A district court, however, reached a contrary conclusion in a sign permit case, and held a similar but less complete set of standards invalid.[210]

The most difficult prior restraint problem created by decision making procedures occurs in sign ordinances that apply outside historic districts but that contain similar compatibility standards, such as ordinances authorizing conditional uses.[211] The cases that considered these ordinances are difficult to classify because the ordinances vary, but some courts hold them invalid when standards are in general terms without additional detail. In Desert Outdoor Advertising v. City of Moreno Valley,[212] for example, all off-site signs required a conditional use

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[209] Riel v. City of Bradford, 485 F.3d 736, 755 (3d Cir. 2007). See also Lusk v. Village of Cold Spring, 475 F.3d 480 (2d Cir. 2007) ("alteration of designated property shall be compatible with its historic character, and with exterior features of neighboring properties;" in applying compatibility principle Review Board to consider "(a) The general design, character and appropriateness to the property of the proposed alteration or new construction; (b) The scale of proposed alteration or new construction in relation to the property itself, surrounding properties, and the neighborhood; (c) Texture and materials, and their relation to similar features of the properties in the neighborhood; (d) Visual compatibility with surrounding properties, including proportion of the property's front facade, proportion and arrangement of windows and other openings within the facade and roof shape; and (e) The importance of architectural or other features to the historic significance of the property"); Lamar Tennessee, LLC v. City of Knoxville, 2016 WL 746503, at *17 (Tenn. Ct. App. 2016) (historic district standards clearly set forth)..

[210] Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) ("effect on the aesthetic, historic, or architectural significance and the value of the historic property," as well as "any design review guidelines which may be developed by the commission").

[211] Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 962 (N.D. Cal. 2015) (holding invalid sign ordinance that allowed officials to decide whether proposed use "materially change[s] the provisions of the approved land use and development plan" for the property, which determines whether a conditional use is necessary).

[212] 103 F.3d 814 (9th Cir. 1996). See also accord Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) (requirement that "all signs shall conform, generally, to the aesthetics of the immediate area in which they are placed"); CBS Outdoor, Inc. v. City of Royal Oak, 2012 WL 3759306, at *6 (E.D. Mich. 2012) (billboard; special land use provision; standards included compliance with master plan, harmonious in appearance with general vicinity, not disturbing to existing and reasonably anticipated uses, will be served adequately by essential public services, and similar standards); Macdonald Advertising Co. v. City of Pontiac, 916 F. Supp. 644 (E.D. Mich. 1995) (billboard, standards applied to all special exceptions: that the proposed development will not unreasonably injure the surrounding neighborhood or adversely affect the development of the surrounding neighborhood, and that any proposed building shall not be out of harmony with the predominant type of building in the particular district by reason of its size, character, location, or intended use); City of Indio v. Arroyo, 191 Cal. Rptr. 565 (Cal. App. 1983)

permit. The ordinance authorized a permit if "such a display will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses." The Ninth Circuit held the ordinance conferred an unbridled discretion because it placed "no limits" on a decision to deny a permit. Though courts in cases not involving free speech issues have upheld similar standards,[213] the Moreno case indicates that generally stated standards of this type are an invalid prior restraint under the free speech clause.

The Fourth Circuit, however, upheld a similar compatibility standard for exemptions from the ordinance,[214] and courts have upheld such standards when the ordinance provided more detailed direction and content. In G.K. Ltd. Travel v. City of Lake Oswego,[215] for example, the

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(sign's relationship to overall appearance of subject property as well as surrounding community; compatible design, simplicity and sign effectiveness). See generally, Daniel R. Mandelker & Michael Alan Wolf, Land Use Law §§ 6.50-6.56 (6th ed. 2015).

[213] Land Use Law, supra note 212, at § 6.03.

[214] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (board may grant exemption if it finds that the ordinance will not "(1) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use; (2) be detrimental to the public welfare or injurious to property or improvements in the neighborhood; [or] (3) be in conflict with the purposes of the master plans of the County.") The court held that the "normally amorphous" general welfare standard was not a problem because it was modified by the language after the "or" in clause (2).

[215] 436 F.3d 1064 (9th Cir. 2006). See also accord Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007) (can approve application within 15 days if in conformance with chapter and consistent with its intent and purpose, which included encouraging a desirable urban character with minimum of overhead clutter; enhancing the economic value of the community and each area thereof through the regulation of the size, number, location, design and illumination of signs; and encouraging signs that are compatible with on-site and adjacent land uses; signs must also be compatible with the style and character of existing improvements upon lots adjacent to the site, including incorporating specific visual elements such as type of construction materials, color, or other design detail); Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 964 (N.D. Cal. 2015) (required by the public need; properly related to other land uses and transportation and service facilities in the vicinity; materially affect adversely the health or safety of persons residing or working in the vicinity, or materially detrimental to the public welfare or injurious to property or improvements in the neighborhood; and will be contrary to the specific intent clauses or performance standards established for the district, in which it is to be located); Lamar Corp. v. City of Twin Falls, 981 P.2d 1146 (Idaho 1999) (distinguishing Moreno; standards were that location and placement of sign will not endanger motorists; that sign will not cover or blanket prominent view of structure or facade of historical or architectural significance; that sign will not obstruct views of users of adjacent buildings to side yards, front yards, or to open space; that sign will not negatively impact visual quality of a public open space; that sign is compatible with building heights of existing neighborhood and does not impose a foreign or inharmonious element to an existing skyline; and that sign's lighting will not cause hazardous or unsafe driving conditions for motorists). But see, holding standards invalid, CBS Outdoor, Inc. v. City of Kentwood, 2010 WL 3942842 (W.D. Mich. 2010) (whether request "preserves the health, safety, and welfare of the public, and is in harmony with the general purpose and intent of this ordinance;" whether request "may have a substantial and permanent adverse effect on neighboring property;" whether request "is generally aesthetically compatible with its surroundings;" proposed use must "[b]e designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance, with the existing or intended character of the general vicinity;" and "The construction or maintenance of a billboard may not

Ninth Circuit upheld sign permit standards that required signs to be "compatible with other nearby signs, other elements of street and site furniture and with adjacent structures." The ordinance provided directions for the compatibility determination, stating that "[c]ompatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering." This standard, the court held, provided a "limited and objective set of criteria" more specific than the standard it held invalid in Moreno. The court in Lake Oswego also held that a requirement that reasons must be stated for approvals or denials, a fourteen-day processing period, and the availability of an appeal to the city council helped support the validity of the ordinance.[216]

None of these cases considered the validity of a design review process, which sign ordinances can include for on premise signs, and which may authorize a special design review board to review sign designs. A design review ordinance contains design standards that specify the design elements the design review board applies. They can include compatibility and similarity standards that require a sign to relate to the building on which it is displayed, and to the surrounding area. For example, the Street Graphics and the Law model ordinance provides for a design review process by authorizing the submission and approval of a Program for Graphics for groups of signs.[217]

A design review process can also contain design standards not based on compatibility. For example, one of the design standards in the West Hollywood, California sign ordinance for Creative Signs states that the design shall "[p]rovide strong graphic character through the imaginative use of graphics, color, texture, quality materials, scale, and proportion."[218] This standard is similar to the standard upheld in the Lake Oswego case, because it identifies the design elements a review board must consider. The GK case suggests that courts will uphold design review standards of this type because they are sufficiently detailed and specific.

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act as a detriment to adjoining property, act as an undue distraction to traffic on nearby streets, or detract from the aesthetics of the surrounding area").

[216] An ordinance is valid even though it provides that the decisionmaking body "may" rather than "must" give approval if a proposal meets the standards in the ordinance.. Thomas, 534 U.S. at 324-325. See also Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012).

[217] Street Graphics, supra note 2, at 88.

[218] West Hollywood, California Sign Ordinance, § 19.34.060 (standards for creative signs), available at landuselaw.wustl.edu. The West Hollywood ordinance, also contains design quality, contextual quality and architectural quality criteria.

A district court case upheld an ordinance for a tourist destination city in Washington State that adopted a Bavarian theme for its commercial districts. It prohibited any sign within the commercial districts that was "not compatible in design, lettering style, and color with the Old World Bavarian-Alpine theme."[219] A Design Review Board (DRB) reviews applications for sign permits to decide whether a sign complies with policies and design guidelines that apply, with a primary focus on the Bavarian Theme. Though the criteria for compliance with the Bavarian theme were elastic and required the exercise of reasonable discretion by the DRB, the lack of rigid definitions did not make the sign code an unconstitutional prior restraint. The sign permitting process reflected the city's overall legitimate interest in aesthetics, the DRB members were knowledgeable about the theme, the city created a portfolio of photos to assist permit applicants, and the code contained multiple procedural safeguards. Any person could request administrative interpretations or seek administrative and judicial review of DRB decisions. Other courts have upheld design standards that are clearly specified.[220]

However, the previous discussion highlights a conundrum presented by a sign design review process under free speech law. If it is true that sign ordinances in general and sign design review specifically should attempt to avoid content-based regulations, and instead suggest objective content-neutral time, place and manner regulations, then design review may require special consideration. For instance, can local sign regulations give a design review process a power over aesthetics and sign character that a local zoning department could not exercise (i.e. subjective power over a sign's color, shape, size, and so forth)? Finally, what the courts have not done to date is give consideration to the validity of a design review process where aesthetic standards and rules conflict with traffic safety standards related to on premise signs.

[219] Demarest v. City of Leavenworth, 876 F. Supp.2d 1186 (E.D. Wash. 2012).

[220] Lamar Tennessee, LLC v. City of Knoxville, 2016 WL 746503, at *17 (Tenn. Ct. App. 2016).

CHAPTER III: SOME BASIC CONSTITUTIONAL ISSUES CONCERNING ON PREMISE SIGN REGULATIONS

§ 3:1. An Overview

On premise sign regulations[221] can raise additional significant free speech issues, and this chapter considers several of them. One issue is whether a municipality must introduce evidence to show that a sign ordinance directly advances its aesthetic and traffic safety purposes, in order to satisfy the third Central Hudson factor. Another issue is whether a municipality must show that a sign regulation's purposes are directly advanced as applied to the plaintiff who brought the case to court. Whether a sign ordinance must have a statement of purpose is another problem. The chapter also discusses the noncommercial message requirement and exemptions. It concludes by discussing free speech issues raised by the regulation of on premise signs under the Federal Highway Beautification Act.

§ 3:2. Is Evidentiary Proof that a Sign Regulation Directly Advances its Aesthetic and Traffic Safety Purposes Necessary?

The third Central Hudson factor states that a law regulating commercial speech should directly advance its governmental purposes. In Metromedia[222] a plurality of the Supreme Court adopted a "common sense" approach to this issue. They did not require studies or reports to show that a billboard ban directly advanced aesthetic and traffic safety purposes. The Supreme Court has affirmed this rule.[223] Later Supreme Court cases, such as Edenfield v. Fane,[224] may have undermined the easy handling of this issue by requiring studies or reports to show that aesthetic and traffic safety purposes are directly advanced. Almost all of the cases, however, have held, as in Metromedia, that empirical supporting evidence is not necessary.[225].

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[221] A model on premise sign ordinance is included in Street Graphics, supra note 2, Chapter 8. For a case rejecting free speech objections to a sign ordinance based on an earlier version of this model see National Advertising Co. v. City of Bridgeton, 626 F. Supp. 837 (E.D. Mo. 1985).

[222] See § 2:6[3].

[223] We do not, however, require that "empirical data come ... accompanied by a surfeit of background information .... [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (sign regulation), citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).

[224] 507 U.S. 761 (1993), see § 2:6[5]. The Court struck down a ban on solicitation by accountants, because there were no studies proving that solicitation would lead to fraud, overreaching or compromised independence.

[225] However, extensive guidance in studies of on premise signs by the United States Sign Council can provide

Ackerley Communications of the Northwest v. Krochalis[226] illustrates these cases. The Ninth Circuit upheld a Seattle ordinance placing restrictions on billboards that included a statement of purpose expressing its interest in aesthetics and traffic safety. Both parties offered evidence on whether the ordinance met its announced goal that billboards require regulation because they can be traffic hazards, contribute to visual blight, and reduce property values. The district court held a trial was not necessary on whether the ordinance met the Central Hudson test, and granted summary judgment to the city. The plaintiff disagreed and argued Metromedia was distinguishable because it came up on stipulated facts, and because later cases placed a greater evidentiary burden on municipalities to justify a restriction on commercial speech.

The court of appeals affirmed the district court, held the Metromedia plurality was still good law, and that a Supreme Court majority confirmed in the Vincent case[227] that an interest in avoiding visual clutter justified a prohibition on billboards. "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests."[228] Almost all courts have held that evidentiary support of an aesthetic or traffic interest is not necessary for billboard and on premise sign regulations.[229] The

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support for on premise sign regulation. The studies are available on the Council's web site, www.ussc.org. A well-written statement of purpose is also an essential part of any ordinance. See § 3:3.

[226] 108 F.3d 1095, 1098 (9th Cir. 1997). Other courts relied on statements of purpose in a sign ordinance to hold that evidence was not needed to support the governmental interest in signs. Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (billboards; statement of purpose of sign code was "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City;" that is all our review requires to prove a significant interest); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231, 1238-1239 (D. Kan. 1999) (billboards; following Metromedia and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice).

[227] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). There the Court extended its Metromedia holding by recognizing the aesthetic interest of the city in prohibiting "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property." Id. at 808.

[228] Krochalis, 108 F.3d at 1099.

[229] E.g., Paramount Contractors & Developers, Inc. v. City of Los Angeles, 516 F. App'x 614, 617 (9th Cir. 2013) (supergraphics); Naser Jewelers, Inc. v. City Of Concord, 513 F.3d 27, 35 (1st Cir. 2008) (digital on premise sign); Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814, 823-24 (6th Cir. 2005) (billboards; "To ask the City to justify a size restriction of 120 square feet over, say, 200 square feet or 300 square feet would impose great costs on local governments and at any rate would do little to improve our ability to review the law."); Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) (approving aesthetic interest for ordinance regulating off premise and on premise signs); Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at 12 (S.D. Ind. 2016) (billboards); Timilsina v. West Valley City, 121 F. Supp. 3d 1205, 1216 (D. Utah 2015) (A frame signs); Citizens

Fourth Circuit, for example, rejected as an "unprecedented contention" an argument that evidence was needed to justify on premise sign restrictions.[230] There are a few contrary decisions. [231]

The Supreme Court, in United States v. Edge Broadcasting Co.,[232] decided a related issue. It held that whether a commercial speech regulation directly advances a substantial governmental interest is decided not solely by its application to the speech of the complaining party. There the Court upheld a federal statute that prohibited radio stations in nonlottery states from broadcasting lottery advertising. The lower courts struck down the statute as applied to a specific radio station in a nonlottery state, but that broadcast into a state that allowed lotteries. They held the statute did not directly advance the governmental interest in discouraging lottery participation where it was prohibited, because more than 90 percent of the radio station's audience was in a state that allowed lotteries. The Supreme Court reversed, and held the lower court's as-applied analysis was incorrect under the Central Hudson test. Whether a regulation directly advances a governmental interest, it held, is not answered by considering its application

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for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969-70 (N.D. Cal. 2015) (billboards); Sharona Properties, L.L.C. v. Orange Vill., 92 F. Supp. 3d 672, 683 (N.D. Ohio 2015) (billboards; legislative determination that ordinance advances stated purpose and intent will not be second guessed absent evidence that conclusion is patently false or unreasonable); Adirondack Advert., LLC v. City of Plattsburgh, 2013 WL 5463681, at *5 (N.D.N.Y. 2013) (digital billboards); Clear Channel Outdoor, Inc. v. City of New York, 608 F. Supp. 2d 477, 503 (S.D.N.Y. 2009) (billboards and outdoor commercial advertising), aff'd on other grounds, 594 F.3d 94 (2d Cir. 2010); Outdoor Sys. Inc. v. City of Lenexa, 67 F.Supp.2d 1231, 1238 (D. Kan. 1999) (billboards); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (on premise electronic message sign); Suburban Lodge of America v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060 (Ohio App. 2000) (approving aesthetic interest for ordinance regulating off premise and on premise signs), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002); Lamar Tennessee, LLC v. City of Knoxville, 2016 WL 746503 (Tenn. Ct. App. 2016) (billboards). See also Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 n.2 (9th Cir. 1996) (billboards; clear statement of purpose enough).

[230] Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 n.3 (4th Cir. 2012) (wall sign). The court did not cite Krochalis or any other cases.

[231] Interstate Outdoor Adver. v. Zoning Bd. of Township of Cherry Hill, 672 F. Supp. 2d 675, 678-679 (D.N.J. 2009) ("Metromedia deference is warranted only when the municipality provides the court with a rationalization supported by relevant evidence."); Bell v. Township of Stafford, 541 A.2d 692 (1988) (billboard ban; record almost completely devoid of any evidence concerning what interests are served by ordinance, and extent to which ordinance has advanced those interests). See also, requiring studies to support a ban of for sale signs on cars, Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007); McLean v. City of Alexandria, 106 F. Supp. 3d 736 (E.D. Va. 2015); Burkow v. City of Los Angeles, 119 F.Supp.2d 1076, 1080-1081 (C.D. Cal. 2000) (rejecting claim that mere passing of ordinance is evidence of serious problems). But see Bench Billboard Co. v. City of Toledo, 499 F. App'x 538 (6th Cir. 2012) (holding Pagan does not apply to ordinances regulating billboards).

[232] 509 U.S. 418 (1993).

to a single person or entity. The validity of a regulation depends on the general problem a regulation seeks to correct.

The cases have applied this decision to sign ordinances. A court of appeals, for example, quoted the Edge case and rejected an as-applied attack on an ordinance that regulated off premise and on premise signs.[233] The challenge, the court said, must be to a "broad category of commercial speech," not simply the regulation of the plaintiff's speech.[234] As an Ohio court decided in reaching the same conclusion, "the effect of any particular sign on traffic safety and aesthetics would likely be de minimis."[235] The court did not have to consider it.

§ 3:3. Must a Sign Ordinance Include a Statement of Purpose?

A statement of purpose is a necessary part of a sign ordinance. It should contain an adequate expression of the aesthetics and traffic safety interests the ordinance advances.[236] A statement of purpose also plays an important role in upholding a sign ordinance. Some courts rely on a statement of purpose to hold, without additional proof, that a sign ordinance directly advances its legislative purposes under the third Central Hudson test.[237] If a sign ordinance does not contain a statement of purpose, courts will hold a governmental interest in aesthetics or traffic safety does not support the ordinance, or that this interest is not directly advanced.[238] In

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[233] Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999).

[234] Id. at 1115 n. 18.

[235] Suburban Lodge of America v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060, 1066 (Ohio App. 2000), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002).

[236] See the Statement of Purpose in Street Graphics, supra note 2, at 70. For a case holding a statement of purpose based on earlier version of this report was not an unconstitutional delegation of power see Rodriguez v. Solis, 2 Cal. Rptr.2d 50 (Cal. App. 1991). The case did not discuss free speech issues. The statement of purpose should also state that the ordinance preserves "the right of free speech and expression in the display of signs."

[237] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (billboards; statement of purpose of sign code was "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City;" that is all our review requires to prove a significant interest); Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231, 1238-1239 (D. Kan. 1999) (billboards; following Metromedia and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice).

[238] Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F. 3d 814, 819 (9th Cir. 1996) (no statement to show aesthetics or safety interest; clear statement would have shown governmental interest in aesthetics and traffic safety); National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555, 556 (2d Cir. 1990); International Outdoor, Inc. v. City of Romulus, 2008 WL 4792645 (E.D. Mich. 2008) (cross-references to statutes that had statements of purpose not enough); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D.N.Y. 1991) (following National Advertising;). See also Adams Outdoor Adver. of Atlanta, Inc. v. Fulton County, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) ("[T]his court cannot permit defendant to justify its restriction of protected speech with after the fact

National Advertising Co. v. Town of Babylon,[239] for example, the Second Circuit held it had not found any case where "a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech."

Zoning ordinances may also contain an all-inclusive "health, safety and general welfare" statement of purpose that applies to the entire ordinance. Courts hold a general statement of purpose of this type is not enough to uphold the sign regulations that are part of the zoning ordinance.[240] The Eleventh Circuit, however, held that a general statement of purpose in an ordinance permits a court to examine the record for evidence of a governmental interest that supports the sign regulations.[241] The court also held that a narrow reading of the general statement of purpose in that case, and the "obvious aim" of most of the measures in the sign ordinance, showed that traffic concerns partially supported the regulations.

§ 3:4. The Noncommercial Message Requirement for On Premise Signs

The Metromedia plurality held unconstitutional an ordinance that allowed only commercial messages for on premise signs.[242] It did not allow noncommercial messages. The ordinance authorized on premise signs

> designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed.

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invocations of aesthetics and traffic safety."). Contra, Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009) (such a requirement not implicit in Central Hudson standard).

[239] 900 F.2d 551, 555, 556 (2d Cir. 1990) ("At most, courts have taken judicial notice of a common-sense linkage between a stated governmental interest and a restriction in order to assess whether the third part of the Central Hudson test -- that a restriction directly advance the governmental interest asserted -- has been satisfied.").

[240] National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir. 1990); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D.N.Y. 1991); International Outdoor, Inc. v. City of Romulus, 2008 WL 4792645 (E.D. Mich. 2008).But see People v. Target Adver. Inc., 708 N.Y.S.2d 597 (N.Y. City Crim. Ct. 2000) (relying on general statements of purpose to uphold rule prohibiting operation of vehicles solely for purpose of displaying commercial advertising).

[241] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982) (restrictions on portable signs). But see Tinsley Media, LLC v. Pickens County, 203 Fed. Appx. 268 (11th Cir. 2006) (inquiry into record not allowed when ordinance contained no all-inclusive statement of purpose). Compare Bell v. Township of Stafford, 541 A.2d 692 (N.J. 1988) (record almost completely devoid of evidence to support interests justifying billboard ban).

[242]An ordinance that discriminates against content-based noncommercial speech is subject to strict scrutiny judicial review, which requires a compelling interest to justify the discrimination. See § 2:4[1]. Proving that a compelling interest exists is almost impossible. See Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act).

The plurality held this provision unconstitutionally favored commercial over noncommercial speech. Sign ordinances usually include similar provisions, and courts uniformly follow the Metromedia plurality to hold that an ordinance restricting on premise signs to commercial speech is unconstitutional.[243] This problem is easily fixed by a substitution clause in the sign ordinance that allows noncommercial messages on any sign allowed by the ordinance.[244]

§ 3:5. Exemptions in On Premise Sign Ordinances

Exemptions in sign ordinances present free speech problems, and sign ordinances usually contain a number of exemptions for signs not covered by the ordinance. Many exempted signs are on premise noncommercial signs, such as government signs, traffic and regulatory signs, flags, seasonal banners, and signs displayed by religious and charitable organizations. An exemption is content-based if it identifies the message a sign can have, such as the grand opening of a business.

The Supreme Court's Reed case[245] adopted rules for determining when a sign ordinance is content-based. This case also held that sign ordinances may not apply different restrictions to noncommercial signs than it applies to other signs. Courts since then have held sign ordinances invalid when their exemptions had more restrictive regulations for noncommercial, than for commercial, signs.[246]

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[243] Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (on premise signs "to advertise goods sold, business conducted or services rendered" allowed everywhere; off premise signs that could display noncommercial messages allowed only in restricted zones); Vono v. Lewis, 594 F. Supp. 2d 189 (D.R.I. 2009) (state highway beautification act); Burritt v. N.Y. State Dep't of Transp., 2008 WL 5377752 (N.D.N.Y 2008) (state highway beautification act; allowed display of commercial but not religious messages); Maldonado v. Kempton, 422 F. Supp. 2d 1169 (N.D. Cal. 2006) (lack of substitution class prohibits non-commercial speech where it permits commercial speech); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297, 309 (N.D.N.Y 2005); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, 467 S.E.2d 875 (Ga. 1996); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198 (Ohio 1982); Town of Carmel v. Suburban Outdoor Advertising, Inc., 492 N.Y.S.2d 664 (Sup. Ct. 1985). See also Ackerley Communs. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) (substitution provision gave right to display noncommercial messages on nonconforming signs only to signs that previously carried onsite messages; primary effect of provision gave only commercial speakers option of changing their signs to noncommercial messages); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258 (D. Kan. 1999) (holding invalid ordinance similar to ordinance invalidated in Metromedia). See also Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988) (only allowing noncommercial speech related to activity on premises).

[244] See § 2:3[1].

[245] § 2:4[2].

[246] Geft Outdoor LLC v. Consolidated City of Indianapolis 2016 WL 2941329, at *8 (S.D. Ind. 2016) (noncommercial opinion signs subject to restrictions different from other sign types that also received exemptions); Marin v. Town of Southeast, 136 F. Supp. 3d 548 (S.D.N.Y. 2015) (many signs exempt from restrictions on political

In the earlier Metromedia case, the plurality held that 12 exemptions[247] in the San Diego sign ordinance were invalid because they made impermissible distinctions among different types of content-based, noncommercial speech. The city could "not choose the appropriate subjects for public discourse."[248] The Metromedia plurality opinion is consistent with the Supreme Court's later holding in the Reed decision on content neutrality. A substantial number of courts followed the Metromedia plurality, and held that content-based exemptions of noncommercial signs were invalid.[249] These cases are consistent with Reed. Other courts did not follow the Metromedia

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signs, or subject to less stringent restrictions, including contractor and construction signs, portable business signs, "for sale" signs, holiday decorations, road signs advertising agricultural produce, and others).

[247] The following signs were exempt in the San Diego ordinance: 1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation. 2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code. 3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage. 4. Commemorative plaques of recognized historical societies and organizations. 5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies. 6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises. 7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located. 8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located. 9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs. 10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs. 11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator. 12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain. Metromedia, at 496.

[248] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981). See § 2:6[3]. The sign ordinance upheld by the Supreme Court in the Vincent case contained some of the same exemptions as those contained in the San Diego ordinance, but the Court did not discuss them. See § 2:6[4].

There are some problems with this holding as applied to the list of exempted signs. The ordinance exempted for sale or for rent signs, for example, but the Supreme Court held earlier that an ordinance prohibiting such signs was unconstitutional. Linmark v. Township of Willingboro, 431 U.S. 85 (1977), discussed in § 2:7[2]. Exemption was a logical response to that decision. The ordinance also exempted temporary political signs, but this exemption was a reasoned response to a court of appeals decision holding that restrictions on political signs were content-based and invalid. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976).

[249] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (numerous exemptions, some content-based); Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. Cal. 1998); Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (official notices and directional and informational signs); Dimitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993) (ordinance limited permit exemptions to governmental flags); National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991); National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.)(1990) (but approving exemption of for sale signs);National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988); Bowden v. Town of Cary, 754 F. Supp. 2d 794

plurality, and upheld sign ordinances that included similar exemptions.[250] These cases are not consistent with Reed.

§ 3:6. The Federal Highway Beautification Act

The Federal Highway Beautification Act has an exemption problem. It prohibits billboards adjacent to the right-of-way along federally aided highways, except in commercial and industrial areas.[251] States must adopt legislation that includes the requirements in the federal law. There are exemptions in the federal law for "(2) signs, displays, and devices advertising the sale or lease of property upon which they are located, [and] (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located."[252] These exemptions raise content-based free speech problems post-Reed similar to those raised by exemptions in sign ordinances.

(E.D.N.C. 2010) (giant flashing Christmas sign exempt though causes as many traffic problems as plaintiff's protest sign); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D.N.Y. 2005) (broad exemption for government signs, but suggested limited exemption for government signs may be constitutional); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297 (N.D.N.Y 2005)(flags, pennants and insignias; exemptions from portable sign prohibition); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (government flags); Savago v. Village of New Paltz, 214 F. Supp. 2d 252 (N.D.N.Y 2002) (exemptions from size requirement); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 775 (N.D. Ohio 2000) (exemptions from pole sign prohibition); Revere Nat'l Corp. v. Prince George's County, 819 F. Supp. 1336 (D. Md. 1993); Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (ideological signs); City of Tipp City v. Dakin, 929 N.E.2d 484 (Ohio Ct. App. 2010); Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988). See also King Enters. v. Thomas Twp., 215 F. Supp. 2d 891(E.D. Mich. 2002); Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000) (ordinance exempted permanent on-site advertising, address signs, identification signs for hotels and non-dwelling buildings, and sale or rental signs without a permit, but required permit for temporary signs in the public interest, or noncommercial signs). For discussion of the pre-Reed cases see Marc Rohr, De Minimis Content Discrimination: The Vexing Matter of Sign-Ordinance Exemptions, 7 Elon L. Rev. 327 (2015).

[250] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (15 types of signs exempt); Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (exemptions fully justified; city need not develop voluminous record to justify such common-sense exemptions); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445-47 (N.D. Ill. 1990) (holding that majority of Justices in Metromedia found the exemptions constitutional), aff'd, 989 F.2d 502 (7th Cir. 1992); City & County of San Francisco v. Eller Outdoor Adver., 237 Cal. Rptr. 815 (Cal. Ct. App. 1987) (exceptions broad enough to include most noncommercial signs); Sackllah Invs. v. Charter Northville, 2011 WL 3476808 (Mich. Ct. App. 2011) (exemptions upheld). See also Messer v. Douglasville, 975 F.2d 1505 (11th Cir. 1992) (upholding exemptions from permit requirement). Contra Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000).

[251] 23 U.S.C. § 131.

[252] 23 U.S.C. § 131(c). For the regulations implementing this section see 23 C.F.R. § 750.105(a). See also § 750.110 (states may prohibit permitted signs).

The cases divided pre-Reed on whether these statutory exemptions were valid. Early state cases accepted the different treatment of off premise and on premise signs, accepted limited exemptions allowed under state law, and accepted state laws allowing commercial and noncommercial messages on premise.[253] More recent federal district court cases held the exemptions for on premise signs unconstitutional. Vono v. Lewis,[254] for example, held that regulations adopted under a state highway beautification act were unconstitutional because they allowed on premise signs to display only commercial messages.[255] This holding followed the Metromedia plurality. The court also held unconstitutional the statutory distinction between off premise and on premise signs.

A federal district court post-Reed[256] invalidated content-based exemptions for on premise signs in the Tennessee highway beautification act similar to those in the federal act. These included an exemption for signs "advertising activities conducted on the property on which they are located," and for other on premise signs, such as signs that advertise "the sale or lease of property on which they are located." It also invalidated the distinction between on premise and off premise signs included in the statute,[257] noting that Reed clearly held that a speech regulation targeted at specific subject matter is content-based.

§ 3:7. Definitions

Sign ordinances contain definitions. It is important to write these definitions so that they are not content-based. An important definition that can create content-based issues is the definition of a sign. A sign ordinance must not define a sign by defining its content. The

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[253] Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987) (state highway beautification statute content-neutral because it permitted commercial and non-commercial signs in protected areas if signs relate to activity on the premises); Pigg v. State Dep't of Highways, 746 P.2d 961 (Colo. 1987) (upholding state statute exempting tourist-related signs to avoid substantial economic hardship, and upholding state regulation construing on premise signs to include ideological signs); State by Spannaus v. Hopf, 323 N.W.2d 746 (Minn. 1982) (distinction between on premise and off premise signs not content-based and recognizes unique nature of the business sign).

[254] 594 F. Supp. 2d 189 (D.R.I. 2009). See also accord Burritt v. N.Y. State Dep't of Transp., 2008 WL 5377752 (N.D.N.Y 2008) (state highway beautification act; allowed display of commercial but not religious messages).

[255] The court suggested that a substitution clause could solve this problem. Vono, 594 F. Supp.2d at 204.

[256] Thomas v. Schroer, 127 F. Supp. 3d 864, 872 (W.D. Tenn. 2015) (and rejecting suggestion in Alito concurrence that the off premise vs. on premise sign distinction is still valid).

[257] See § 2:4[6].

definition of "street graphic" in Street Graphics and the Law, which can also be a definition of "sign," was revised to take account of the Reed case as follows:

> Any structure that has a visual display visible from a public right-of-way and designed to identify, announce, direct, or inform. [258]

A federal district court held a similar definition was content-neutral post-Reed:

> Any object, device, display or structure … that is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, or illumination whether affixed to a building or separate from any building.[259]

The court held that "[t]his expansive definition does not on its face refer to the content of speech, either by singling out a *viewpoint* or a particular *topic* of speech."[260] This ruling, if followed, means the definition of "street graphic" in Street Graphics and the Law is content-neutral.

[258] Street Graphics, supra note 2, at 75.

[259] Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015)

[260] Id. (emphasis in original).

CHAPTER IV. SPECIALIZED TYPES OF ON PREMISE SIGNS, HOW THEY ARE REGULATED, AND THE FREE SPEECH ISSUES THESE REGULATIONS PRESENT

§ 4:1. An Overview

Sign ordinances regulate a wide variety of on premise signs, and some of the unique and specialized types of signs include digital signs, portable signs, time and temperature signs and murals. They present all of the free speech problems the first three chapters reviewed, such as whether an ordinance, or an exemption from an ordinance, is content-based, and whether an ordinance meets either the Central Hudson or time, place and manner tests for commercial speech.

How the courts decide cases that consider sign regulations for specialized signs depends on how they apply these free speech principles, and on how they choose among conflicting rules for deciding free speech questions. If a court treats a sign ordinance as a time, place and manner regulation, for example, it must decide whether ample alternate means of communication are adequate. The courts have answered this question differently, even for the same type of sign.

§ 4.2. Free Speech Questions Raised By Specialized On Premise Signs[261]

§ 4:2[1]. Digital Signs, or Electronic Message Centers (EMCs)

A digital sign, also called an electronic message center, is any sign that uses electronic means within a display area to cause one display to be replaced by another.[262] A municipality may decide to prohibit digital signs entirely, allow them only in some zoning districts, regulate how they display, or adopt a combination of these measures.[263]

Courts have upheld ordinances that prohibit or regulate digital signs. In a pre-Reed case, Naser Jewelers, Inc. v. City of Concord,[264] in deciding on a request for preliminary injunction, the First Circuit held that an ordinance prohibiting the display of EMCs,[265] as applied to prohibit

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[261] See also Barber v. City of Anchorage, 776 P.2d 1035 (Alaska 1989) (upholding ordinance prohibiting above roof signs).

[262] Street Graphics, supra note 2, at 57. See also the definition of “dynamic element.” Id. at 72..

[263] The Street Graphics Model Ordinance regulates dynamic elements for signs. Street Graphics, supra note 2, at 83. See also Chapter 6,

[264] 513 F.3d 27 (1st Cir. 2008). See also Lamar OCI North Corp. v. City of Walker, 803 F. Supp. 2d 707 (W.D. Mich. 2011) (upholding moratorium on digital signs).

[265] The ordinance prohibited all signs that "appear animated or projected," or "are intermittently or intensely

an EMC at a retail store, met the tests for time, place and manner regulations.[266] It was content-neutral, advanced the city's stated goals of advancing traffic safety and community aesthetics, and was narrowly tailored because these interests could not be achieved as effectively without the prohibition.

The court quoted the holding in Metromedia that billboards were a traffic hazard, and held that "EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous."[267] There was evidence the city had considered and rejected alternatives and given reasons for their rejection. Allowing EMCs with conditions, such as a limit on the number of times a message could change during a day, for example, would create steep monitoring costs and other complications.[268] Ample alternate channels of communication were available because the retailer could use static and manually changeable signs, "place advertisements in newspapers and magazines and on television and the internet, distribute flyers, circulate direct mailings, and engage in cross-promotions with other retailers."[269]

The Naser case, which can apply to on premise digital signs, is a generous reading of the requirements for time, place and manner regulations. Other courts upheld similar prohibitions on digital signs pre-Reed.[270] A federal district court upheld a ban on off-premise digital signs post-Reed.[271] It relied on its conclusion that billboards required greater regulation because they were a

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illuminated, or of a traveling, tracing, scrolling, or sequential light type" or "contain or are illuminated by animated or flashing light." Id. at 31.

[266] See § 2:7[1].

[267] Id. at 35. The court adopted the view that studies were not necessary to show that the ban on EMCs supported the city's stated interests. Id.

[268] The court quoted another decision, citing Vincent, which held that if the medium itself is the "evil the city [seeks] to address," then a ban of that medium is narrowly tailored. Id. at 36.

[269] Id. at 36, 37.

[270] La Tour v. City of Fayetteville, 442 F.3d 1094, 1095 (8th Cir. 2006) (upholding ban on any sign that "flashes, blinks, or is animated," though not enforced against time and temperature signs, and as applied to prevent display of electronic sign in office window,); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (applying Central Hudson tests, studies not necessary to show that prohibition met stated interests, prohibition is most effective way to eliminate problems with electronic signs). See also Chapin Furniture Outlet, Inc. v. Town of Chapin, 2006 WL 2711851 (D.S.C. 2006) (prohibition on flashing and scrolling signs upheld as time, place and manner regulation; signs were inconsistent with rural community aesthetic; ordinance later amended to allow EMC signs that did not flash or scroll), vacated and remanded as moot, 252 Fed. Appx. 566 (4th Cir. 2007).

[271] Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at 12 (S.D. Ind. 2016).

greater risk to the city's interests in traffic safety and aesthetics.[272] A billboard digital sign ban is valid, even if an ordinance allows limited digital displays for on premise signs.[273]

Municipalities may decide not to ban digital signs entirely, but may allow them in areas where they are appropriate. Courts have upheld these limited bans post-Reed. For example, a California court upheld a ban on digital displays on billboards, with exceptions for digital signs permitted by a legally adopted specific plan, a supplemental use district or an approved development agreement. A Tennessee court upheld, as content-neutral time, place and manner regulation, an ordinance prohibiting EMCs, but permitting them in commercial and industrial districts "as a wall sign, or an integrated part of the total sign surface of a free standing business sign."[274] The ordinance also allowed EMCs approved in a historic overlay district or a downtown design overlay district, in zoning districts with approved design guidelines, as a changeable price sign, and as a nonconforming sign. The court held the city could require higher standards for billboards, the limited ban was narrowly tailored, the plaintiff had viable alternative means of communication, and the ordinance also met the Central Hudson tests.

Municipalities may also allow digital signs with limiting regulations. A pre-Reed Sixth Circuit case upheld a 4000-foot spacing requirement for digital signs on billboards as a content-neutral time, place and manner regulation.[275] The spacing requirement was not reasonably an attempt to censor a message, as it addressed how a billboard is built, not what it says. It was reasonable even though the township could have adopted a lesser limitation. Because of their increased visibility and changing display, digital billboards can have a greater effect on safety and aesthetics than static ones. Ample alternative channels for communication remained open. Although it applied to billboards and not to on premise signs, this decision supports spacing

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[272] "[T]hey are generally larger than on-premises signs and are predominantly located along busy highways and expressways." Detailed reports were not necessary. Id. A ban was a direct, and perhaps the only effective, approach. Id. at *13.

[273] Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at 13 (S.D. Ind. 2016) (including no more than forty percent of an on-premises sign to have digital components, frequency of message changes, sign to go dark if malfunctions).

[274] Lamar Tennessee, LLC v. City of Knoxville, 2016 WL 746503 (Tenn. Ct. App. 2016). The court did not discuss the Reed case.

[275] Hucul Advert., LLC v. Charter Twp. of Gaines, 748 F.3d 273 (6th Cir. 2014).

requirements for on premise pole signs, which are similar to billboards. A federal district court upheld a size restriction pre-Reed.[276]

§4:2[2]. Flags

Sign ordinances often regulate flags. Free speech problems arise when a sign ordinance identifies the content flags can display, such as by only allowing only certain types of flags, such as government flags and prohibiting others. Most courts followed the Metromedia plurality[277] and struck down content-based regulations for flags.

The leading pre-Reed case on flag exemptions is Dimmitt v. City of Clearwater[278], where the Eleventh Circuit held invalid an ordinance exempting government flags, but required a permit for a flag displaying the Greenpeace logo or a union affiliation. "The deleterious effect of graphic communication upon visual aesthetics and traffic safety, substantiated here only by meager evidence in the record, is not a compelling state interest of the sort required to justify content based regulation of noncommercial speech."[279] Neither was the distinction between government and other types of flags narrowly drawn to serve these interests.

A number of courts followed Dimmitt pre-Reed and held content-based exemptions for a limited group of flags unconstitutional.[280] When a flag exemption is only from a permit

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[276] Adirondack Adver., LLC v. City of Plattsburgh, 2013 WL 5463681 (N.D.N.Y. 2013) (applying Central Hudson).

[277] 453 U.S. 490 (1981).

[278] 985 F.2d 1565 (11th Cir. 1993).

[279] Id. at 1570.

[280] Midwest Media Prop., LLC v. Symmes Township, 503 F.3d 456 (6th Cir. 2007) (exemption for federal, state and local flags held content-based; aesthetics and public safety not compelling interests); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (flags and insignia of any government, religious, charitable, fraternal, or other organization; decorative flags or bunting for a celebration, convention, or commemoration of significance to the entire community when authorized by the city council for a prescribed period of time; held content-based and did not advance state interests); National Advertising Co. v. Orange, 861 F.2d 246 (9th Cir. 1988) (flags of national or state government, or not more than three flags of nonprofit religious; charitable or fraternal organizations; selective prohibition of noncommercial speech based on content); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297 (N.D.N.Y. 2005) (exemption of flags, pennants, and insignia of any nation or association of nations, or of any state, city or other political unit, or of any political, charitable, educational, philanthropic, civic, or professional organization, or for campaign, drive, movement or event, but not religious symbols; favors some noncommercial messages over others); XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765, 791 (N.D. Ohio 2003) (flag and emblem of official government body; held content-based); Lamar Adver. Co. v. City of Douglasville, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) (exemption in historic district for flags or banners of the United States or other political subdivisions; held content-based restriction on noncommercial speech); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (flags, emblems, and insignia of all governmental bodies; lack of narrow tailoring and myriad exceptions to favored speakers; safety and aesthetics rationales significantly undercut); Village of Schaumburg v. Jeep Eagle Sales

requirement, however, some courts held it constitutional when it did not discriminate against noncommercial speech.[281]

Central Radio Co. Inc. v. City of Norfolk,[282] held a sign ordinance invalid, post-Reed, that exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems. Relying on Reed, the court held this part of the sign code was a content-based restriction. Applying strict scrutiny, the court did not find a compelling government interest, and held that restrictions were not narrowly tailored because, as in Reed, they were underinclusive.

Flags, like other signs, must comply with valid regulations for their display. In American Legion Post 7 v. City of Durham,[283] the city adopted a flexible size limit for flags, required their display on flagpoles, prohibited more than three flagpoles on a property and more than two flags on a flagpole, established a setback requirement for flagpoles, and made flags with commercial messages subject to separate provisions in the ordinance. The court held these requirements were content-neutral, served a substantial aesthetic interest, and satisfied the tests for time, place and manner regulations. They were narrowly tailored, and an exemption for flags or noncommercial entities would undermine the aesthetic interests the ordinance served. They also left adequate alternate channels for communication open because the ordinance had a relatively liberal set of size limits, and provided a special use permit procedure for obtaining temporary and permanent waivers.[284]

Corp., 676 N.E.2d 200 (Ill. App. Ct. 1996) (exemption of official and corporate flags held unconstitutional content-based regulation of noncommercial speech). Contra, Infinity Outdoor Inc. v. City of New York, 165 F. Supp. 2d 403, 422 (E.D.N.Y. 2001) (allowing civic, philanthropic, educational and religious groups to display a "flag, pennant, or insignia" in any district without restriction).

[281] National Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003) (national flags and flags of political subdivisions; decorative flags, bunting, decorations; symbolic flags, award flags, house flags; exemption from permitting process not an exception to a general ban of noncommercial messages). The court relied on Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), where the ordinance contained exemptions that did not include flags from the permit requirement. Contra Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000) (government flags).

[282] 811 F.3d 625, 633 (4th Cir. 2016).

[283] 239 F.3d 601 (4th Cir. 2001) (ordinance limiting size of American flags that could be displayed did not violate the First Amendment; though burdening speech, the ordinance was content-neutral, advanced the government interest in aesthetics, served that interest, and left open other avenues of expression).

[284] The court distinguished the Supreme Court's holding in the Ladue case on this issue. See § 2:76[2].

§ 4:2[3]. Freestanding Signs

A freestanding sign, sometimes referred to as a “pole sign,” is defined as "[a] sign principally supported by one or more columns, poles, or braces placed in or upon the ground."[285] Pole signs are displayed by on premise businesses. Sign ordinances typically place size and height limits on freestanding signs, and courts uphold these restrictions as reasonable time, place and manner regulations when they are not content-based.[286]

G.K. Ltd. Travel v. City of Lake Oswego[287] is a typical case. The Ninth Circuit upheld pre-Reed a sign code, adopted after careful study, which prohibited the display of plaintiff’s off premise pole sign. The code prohibited the display of all pole signs, but allowed them in general commercial zones “when necessary to provide vision clearance at driveways or intersections and when there is no alternative, visible on-building or monument sign location.” Plaintiffs claimed the ban on pole signs was an unconstitutional ban on a protected medium of speech because pole signs were “a unique form of communication.”

The code was an acceptable time, place and manner regulation. It did not regulate content because it did not distinguish “favored speech from disfavored speech on the basis of the ideas or views expressed.”[288] There were no exceptions based on content. This holding is consistent with Reed. Preservation of the city's aesthetic quality and the protection of travel safety were appropriately the two most prominent justifications for the pole sign restriction. Legislative deliberation and hearings, dynamic contact with businesses and city residents, and reliance on the experience of other cities produced strong evidence for the restriction. The code was narrowly tailored because the height of pole signs can be aesthetically harmful and distracting to travelers, and the pole sign restriction achieved the city’s significant interests in preventing these problems. “The Code permissibly and in a narrowly tailored way limits the prominence of plaintiffs' advertising sign by restricting its length and position.”[289] Ample alternative channels

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[285] Andrew D. Bertucci & Richard B. Crawford, Model On-Premise Sign Code 19 (United States Sign Council, 2011). The Code specifies where to display these signs, and has size and height limits for them. Id. at 35, 37-39.

[286] See § 5:5, discussing height and size limitations.

[287] 436 F.3d 1064 (9th Cir. 2006).

[288] Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994).

[289] G.K. Ltd., at 1074.

of communication were available, as the sign code allowed many other types of signs and did not restrict other forms of communication.

In other cases pre-Reed, the courts upheld restrictions on freestanding signs, as acceptable time, place and manner regulations, that limited their size and height but did not prohibit them entirely.[290] They were narrowly tailored and content-neutral, and left ample alternate channels of communication open because the sign ordinance only limited size and height and was not a complete ban. They allowed some opportunity to display freestanding signs without allowing signs that would distract drivers or create aesthetic problems.[291]

When a sign ordinance has banned freestanding signs by restricting their height,[292] the courts have held the ordinance invalid if it contained content-based exemptions. In one pre-Reed case,[293] the ordinance exempted official public notices, flags, an emblem or insignia of an official government body, holiday decorations, street name signs, and "special signage" approved by the Architectural Review Board as "reasonable considering the intent and regulations" of the ordinance. It was not an acceptable time, place and manner regulation because "[t]he connection between traffic safety and aesthetics and the selective proscription of certain content on pole signs is not obvious."[294] This case is consistent with Reed.

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[290] Sopp Signs, LLC v. City of Buford, 2012 WL 2681417 (N.D. Ga. 2012); (no more than 200 square feet and 20 feet in height); Herson v. City of Richmond, 827 F. Supp. 2d 1088 (N.D. Cal. 2011) (freestanding signs within 660 feet of a freeway or a parkway could not exceed 12 feet in height or 40 square feet in area); Herson v. City of San Carlos, 714 F. Supp. 2d 1018 (N.D. Cal. 2010) (largest pole sign could be 65 feet tall with a total sign area of 1125 square feet, but only on a freeway-oriented parcel with three or more businesses that received permission for a 25 per cent increase in the applicable sign allowance), aff'd on other grounds, 433 Fed. Appx. 569 (9th Cir. 2011). See also § 5:5.

[291] Herson v. City of Richmond, 827 F. Supp. 2d 1088, 1091 (N.D. Cal. 2011).

[292] See G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006) (because of their height, city could reasonably conclude that freestanding signs were aesthetically harmful and distracting to travelers; restrictions on height upheld that prohibited plaintiff's sign). See also Rodriguez v. Solis, 2 Cal. Rptr.2d 50 (Cal. App. 1991) (applying Central Hudson tests to uphold denial of permit for freestanding sign for automobile dealers because it was oriented toward freeway; denial prevented visual blight, and did not require reversal because of right to conduct and advertise business on premise).

[293] XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2003). Accord North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 774 (N.D. Ohio 2000). These ordinances had numerous content-based distinctions.

[294] XXL, 341 F. Supp.2d at 796. Applying strict scrutiny, the court also held the aesthetic and traffic safety interests were not compelling, and that the ordinance was real and substantially overbroad facially.

§ 4:2[4]. Murals

Murals are signs or graphics that are painted or placed on walls. A number of cities have programs that allow murals and provide a review process for their display.[295] A free speech problem can arise because a court may hold a definition of "mural" in a sign ordinance content-based and subject to strict scrutiny, which is usually fatal. An example is an ordinance that defines a mural as a "work of art."

The cases considered this issue pre-Reed.[296] In Neighborhood Enters v. City of St. Louis,[297] the city decided a mural painted on the side of a building was an illegal sign and not an exempted "work of art." This definition was content-based because the city had to read the content of a display to decide how to classify it under the ordinance.[298] Strict scrutiny applied, and the court held that traffic safety and aesthetics were not compelling interests that justified the ordinance. Even if they were, the regulation was not narrowly tailored because there was no explanation of why the differential treatment of content in the ordinance advanced those goals.[299] This case is consistent with Reed.

Sign ordinances that regulate murals are also content-based if they distinguish among different types of signs. In a district court case pre-Reed,[300] the court held content-based and

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[295] E.g., Portland, Oregon mural ordinance, available at http://www.portlandonline.com/auditor/index.cfm?c=28169; Ventura, California mural design guidelines, available at http://www.cityofventura.net/files/file/comm-service/Mural%20Design%20Approval%20Guidelines.pdf. For a review of mural programs in several cities, see Mural Art versus Graffiti, Defining Mural Art in the City of Savannah: Case Studies, available at http://www.thempc.org/eagenda/x/smc/2014/November%203,%202011%20Regular%20Meeting%20on%20Thursday,%20November%2003,%202011/754FAE62-AB66-4C9A-95D5-C2895B7192E4.pdf. All or some of these ordinances may be content-based under the Reed decision. For a discussion of Murals pre-Reed see Christina Chloe Orlando, Art or Signage?: The Regulation of Outdoor Murals and the First Amendment, 35 Cardozo L. Rev. 867 (2013).

[296] Wag More Dogs v. Cozart, 680 F.3d 366 (4th Cir. 2012), upheld a content-based mural regulation pre-Reed, but the Fourth Circuit disapproved this case after Reed. Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 633 (4th Cir. 2016). See also See also Eller Media Co. v. Mayor of Baltimore, 784 A.2d 614 (Md. Ct. Spec. App. 2001) (large depiction on side of building of baseball player with icon of retailer erroneously approved as mural in earlier proceeding).

[297] 644 F.3d 728 (8th Cir. 2011).

[298] This is not the majority view. See § 2:4[8].

[299] See accord Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326, 1329 (M.D. Fla. 2009) (marine-themed mural on the exterior wall of a bait and tackle shop; exemption for art work; held content-based because of need to read; strict scrutiny review failed);

[300] North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000). Accord, See also Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782 (Or. Ct. App. 2011) (distinction between painted wall signs and painted wall decorations held unconstitutionally content-based).

unconstitutional an ordinance that allowed murals in commercial districts only if they did not contain a corporate service, product, or image, a restriction that prohibited a substantial amount of commercial speech. The ordinance did not pass strict scrutiny because safety and aesthetic interests were not compelling interests that justified the content-based ordinance, and the court did not see how some content would advance these goals while content that was not allowed would not. Neither was the ordinance narrowly drawn to advance these interests. A mural containing a corporate logo was no more distracting than a mural containing a classic painting.

This case is consistent with the Reed decision. Sign ordinances that include similar content-based regulations are also invalid post-Reed. Relying on Reed, the Fourth Circuit held content-based a sign ordinance that exempted "works of art" that "in no way identif[ied] or specifically relate[d] to a product or service," but that applied to art that referenced a product or service.[301]

Another important question is whether a mural is commercial or noncommercial speech. Courts will uphold a sign ordinance regulating murals if a mural is classified as commercial speech, but will hold an ordinance invalid if a mural is classified as noncommercial speech.[302] Deciding whether a mural is commercial or noncommercial speech is difficult,[303] however, and the decisions are fact-based and hard to distinguish..

A mural may clearly be noncommercial speech. In City of Indio v. Arroyo,[304] the owners of a convenience store had a mural painted on one of their outside walls to depict "aspects of our ethnic Mexican heritage." The city denied the mural a permit and a variance because it exceeded

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[301] Central Radio Co. Inc. v. City of Norfolk, Va., 811 F.3d 625, 633 (4th Cir. 2016).

[302] However, see Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998). The plaintiff challenged a ruling by the city that a mural on the side of a restaurant in an historic district had to be removed. It was a colorful cartoon of imaginary characters, including smiling mountains, flying creatures with impractically small wings and tiny yellow bipeds. A small commercial sign in the middle of the mural occupied 1/25th of its area. The court held the mural was noncommercial, but that color, size and other restrictions affected only the format or manner in which the artwork was displayed. The ruling that the mural was not appropriate for the historic district was a valid application of content-neutral time, place and manner rules from the city's historic preservation ordinance, which controlled the location and manner of expression in a narrowly drawn geographic area.

[303] See § 2:3[2].

[304]191 Cal. Rptr. 565 (Cal. Ct. App. 1983).

the size limit, but the court held the denial invalid because the ordinance was overbroad. "The stifling of artistic expression is a perverse result to claim as a victory for esthetics."[305]

Complete Angler, LLC v. City of Clearwater[306] held a mural noncommercial even though it related to the business that displayed it. The owner of a bait and tackle store had several fishes painted on most of an exterior building wall to bring attention to locally endangered game fish species. "Art work" was exempted from the ordinance unless it was displayed "in conjunction with" a commercial enterprise. This exemption applied. The painting was a local artist's impression of the "natural habitat and waterways" surrounding the shop, and alerted viewers to threats posed to the fish species it displayed. Though the painting might occasionally inspire the purchase of bait and tackle from the shop, it was not commercial speech because it did more than propose commercial transactions.[307]

Other cases reached contrary results on similar facts. In an Ohio case,[308] the city denied a business a permit to paint a mural on one side of its building depicting a mad scientist character. Under the usual tests for commercial speech, the mural was commercial because the owner intended it to attract attention to the business, a refilling station for a known racing fuel or additive. A permit requirement and color and size restrictions in the ordinance were neutral on their face, but many exceptions to these restrictions were content-based, unconstitutional and nonseverable, which made the ordinance unenforceable.[309]

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[305] Id. at 570.

[306] 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

[307] The city's enforcement of the ordinance was content-based, however, because it had to examine the content of the mural when it refused to apply the "art work" exemption. In addition, the city condoned the display of other murals, and a city official admitted a different subject matter for the plaintiff's mural would be acceptable. This content-based enforcement of the code did not withstand strict scrutiny because aesthetic and traffic safety interests were not compelling, and the favorable treatment of certain messages was not narrowly tailored.

[308] City of Tipp City v. Dakin, 929 N.E.2d 484 (2010). The definition of "sign" in the ordinance included signs painted on a building.

[309] See also Catsiff v. McCarty, 274 P.3d 1063 (Wash. Ct. App. 2012). The owner of a toy store and gift shop named the Inland Octopus painted a wall sign depicting an octopus hiding behind a rainbow over the rear entrance of the store, and an octopus hiding behind several buildings with a rainbow above the buildings on the store front. He admitted he did this to convey it was a wonderful experience to come into his store and a wonderful place to buy toys. Because the purpose of the sign was economic, the court characterized it as commercial speech. It upheld size, height and design restrictions on the sign as content-neutral.

§ 4:2[5]. Portable and Temporary Signs

As one court described them, portable signs are "freestanding and not permanently anchored or secured to either a building or the ground. They include but are not limited to 'A' frame signs, commonly called sandwich signs, 'T' frame signs, or any other sign which by its description or nature may be, or is intended to be, moved from one location to another."[310] Portable signs are often unattractive, can distract drivers and cause a traffic safety problem if located close to streets or highways. Local governments have prohibited them,[311] restricted the time allowed for their display and adopted height and size limitations.

Courts apply either the Central Hudson test[312] or the test for time place and manner regulations[313] to portable sign regulations. They have no difficulty holding an ordinance regulating portable signs advances aesthetic and traffic safety interests.[314] As the Fifth Circuit explained in upholding a ban on portable signs in Lindsay v. City of San Antonio, "It is well-established that ... the state may legitimately exercise its police powers to advance the substantial governmental goals of aesthetics and traffic safety."[315] Problems can arise under the third and fourth Central Hudson factors, however, if these interests are not directly advanced, or if the sign ordinance is not narrowly tailored. Content-based exemptions of similar signs can also create difficulties. Courts that apply the rules for time, place and manner regulations must consider whether there are ample alternate methods of communication.

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[310] Marras v. City of Livonia 575 F. Supp. 2d 807, 816 (E.D. Mich. 2008).

[311] See Street Graphics Model Ordnance, supra note 2, § 1.13, at 90.

[312] See section 2:6[2], infra.

[313] See section 2:7[1], infra.

[314] Ballen v. City of Redmond, 466 F.3d 736 (9th. Cir. 2006); Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986); Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Marras v. City of Livonia 575 F. Supp. 2d 807 (E.D. Mich. 2008); Wilson v. City of Louisville, 957 F. Supp. 948 (W.D. Ky. 1997); Bertke v. City of Dayton, 1992 WL 1258520 (S.D. Ohio. 1992); Mobile Sign, Inc. v. Town of Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987); Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985); Signs, Inc. of Florida v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983); All American Sign Rentals, Inc. v. City of Orlando, 592 F. Supp. 85 (M.D. Fla. 1983); Barber v. City of Anchorage, 776 P.2d 1035 (Alaska. 1989); City of Hot Springs v. Carter, 836 S.W.2d 863 (Ark. 1992); Risner v. City of Wyoming, 383 N.W.2d 226 (Mich. App. 1985); State v. DeAngelo, 963 A.2d 1200 (N.J. 2009); Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980); Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005).

[315] 821 F.2d 1103, 1108-09 (5th Cir. 1987).

§ 4:2[5][a]. Total Prohibitions

Portable signs present aesthetic problems, especially when they cluster together. The difficulty is that permanent signs can also present aesthetic problems, so a ban on portable signs may not "directly advance" the aesthetic interests of a community if unattractive permanent signs are allowed to stay or are not improved. Most courts follow the rule that they can accept the legislative judgment on whether an aesthetic interest is directly advanced.[316] A court may also refuse to find a ban on portable signs is narrowly tailored because other means are available to regulate them, such as size limits and limits on the number of signs allowed on premise.

Despite these problems, several courts upheld a ban on portable signs.[317] In Lindsay v. City of San Antonio,[318] the Fifth Circuit rejected a finding by the trial court that the ban would only "imperceptibly" change the community's appearance. This finding was at odds with the principle that "[t]he elimination of all visual blight is not the constitutional prerequisite to an ordinance regulating a type of signage." The city introduced photographs of various portable signs, while the plaintiffs introduced photos showing that other types of signs also caused visual blight, but the court held the balance tipped in favor of a finding that the ordinance furthered the city's aesthetic interest. Deference was owed to the city's aesthetic judgment, which the court had to respect. The court relied on the Vincent case,[319] which upheld a ban on sign posting on utility poles, to hold that the ban on portable signs was narrowly tailored. Portable signs were not a uniquely valuable or important mode of communication, and plaintiffs' ability to communicate

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[316] See § 3:2. In some of the cases upholding a ban on portable signs, the municipality did studies and held public hearings. E.g., Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986), where the court relied on studies done by the county.

[317] Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986) (prohibition eliminated aesthetic blight); Marras v. City of Livonia, 575 F. Supp. 2d 807 (E.D. Mich. 2008) (ban content-neutral); Bertke v. City of Dayton, 1992 WL 1016523 (S.D. Ohio 1992) (ban content-neutral and narrowly tailored; permanent signs provided an adequate alternate method of communication, especially since fifty percent of a business wall or ground sign could have changeable copy); Rigsby v. Huntsville, 1988 U.S. Dist. LEXIS 1104 (N.D. Ala. 1988) (prohibition directly advances governmental interest, reaches no further than necessary, and allows sufficient alternative modes of communication); Barber v. City of Anchorage, 776 P.2d 1035 (Alaska 1989) (ordinance content-neutral and advances aesthetic interest; alternate means available, can have permanent unlighted sign). See also accord Don’s Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) (one portable sign allowed on a property subject to restrictions). See also, post-Reed, Lone Star Sec. & Video, Inc. v. City of Los Angeles, 2016 WL 3632375 (9th Cir. 2016) (holding ordinances prohibiting non-motorized billboards and advertising on motor vehicles content-neutral, narrowly tailored and allowing alternative means of communication).

[318] 821 F.2d 1103 (5th Cir. 1987).

[319] See § 2:6[4].

effectively was not threatened by ever-increasing restrictions on speech. Alternate means of communication existed.

A federal district court applied the Central Hudson tests post-Reed to uphold an ordinance that prohibited “A” frame signs,[320] and held Reed did not apply because the ordinance regulated commercial speech. The court held the prohibition substantially advanced the city’s aesthetic and traffic safely interests, and that it did not have to produce studies to prove this point. Exceptions from the prohibition did not invalidate it. An exception for the city center recognized its different visual quality and traffic plan. A second exception allowed “A” frame signs only for a short 30-day period after obtaining a business license. These exceptions did not undercut the city’s stated goals.[321]

Neither did the prohibition burden substantially more speech than was necessary. It affected only a “sliver” of speech, and the business had effectively used other means of communication. “A” frame signs posed a special risk to the community. The plaintiff did not suggest less burdensome alternatives. Finally, “A” frame signs did not present the same aesthetic or traffic problems as other types of signs, and the city could treat them differently.[322]

Earlier cases held a prohibition on portable signs invalid by applying the minority rule, that evidence is required to support a prohibition. Another Eleventh Circuit case,[323] for example, held that the "mere incantation of aesthetics as a proper state purpose" did not meet First Amendment requirements. The county "must present some evidence that aesthetic interests are furthered by the statute, and that the statute is narrowly drawn to meet those interests." The county only presented bold statements in affidavits without supporting facts.[324] Recent cases holding that evidence is not necessary to uphold these contentions undercut this decision.[325]

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[320] Timilsina v. West Valley City, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015).

[321] They aligned more closely with the distinction between onsite and offsite advertising approved in Metromedia, the city may have believed “A” frame signs in the city center or the occasional grand opening sign presented more problems, and that the interest in commercial speech was more important in these instances. Id. at 1219.

[322] Compare the ordinance struck down in the Reed case. See § 2:4[2].

[323] Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985). The ordinance had a setback requirement that effectively prohibited portable signs. Accord Signs, Inc. of Florida v. Orange County, 592 F. Supp. 693 (M.D. Fla. 1983).

[324] Dills, 593 F. Supp. at 174 n.5. See also Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006) (rejecting city employee statement not supported by objective facts; portable sign ban held invalid).

[325] See § 3:2.

Some courts have held that exemptions from a portable sign prohibition are fatal. Ballen v. City of Redmond[326] invalidated a portable sign ban the city applied to prohibit signs held by hand on weekdays on a sidewalk in front of a bagel store. The ban was more extensive than necessary because it exempted content-based signs, such as real estate signs, that were just as aesthetically offensive. "The City has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs."[327] This case, and similar cases that invalidated bans on unusual temporary or unusual portable signs,[328] are an application of the "narrow tailoring" doctrine discussed in the Reed decision.[329] They may represent a special judicial concern for this type of sign.

The court in Ballen also held the city could have imposed a less restrictive alternative,[330] such as time, place and manner restrictions on all commercial signs, and could have adopted a ban limited only to hand-held signs. Unlike cases that upheld bans on portable signs, the court held that Metromedia did not control. Portable signs were not like billboards, which are fixed and permanent structures that intrude more on community aesthetics.

§ 4:2[5][b]. Display Time, Size and Height Limitations

Sign ordinances can also limit the length of time portable signs can be displayed during any one year, can limit the period of time during which these signs can be displayed continuously, and can limit their size and height. Courts usually uphold these limitations. An Eleventh Circuit case, for example, upheld height limits and a requirement allowing only one portable sign on a property.[331] It applied a relaxed standard of judicial review, accepted these

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[326] 466 F.3d 736 (9th Cir. 2006).

[327] The court relied on City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), discussed in § 2:6[6].

[328] State v. DeAngelo, 963 A.2d 1200 (N.J. 2009) (ten-foot-tall inflatable rat-shaped balloon on a sidewalk; content-based, strict scrutiny applied because grand opening signs were exempted; a violation of the ordinance depended on the purpose for which a sign was displayed; a balloon was not more harmful to safety or aesthetics than a similar item displayed in a grand opening; the ordinance eliminated all signs without a readily available alternative); Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005) (reinforced, rigid and flat raincoats with messages about store; third and fourth Central Hudson tests failed; "prohibiting persons from wearing signage provides minimal, if any, benefit in aesthetics and safety"; signs prohibited were no more hazardous to traffic or aesthetically offensive than many signs exempted; ban not narrowly tailored).

[329] See § 2:4[2].

[330] On whether the fourth Central Hudson test requires adoption of a less restrictive alternative, see § 2:6[6].

[331] Don's Porta Signs, Inc. v. Clearwater, 829 F.2d 1051 (11th Cir. 1987). See accord Wilson v. City of Louisville, 957 F. Supp. 948 (W.D. Ky. 1997) (size and height limits; hearings held and testimony taken on the ordinance). The

requirements as a partial solution to the city's aesthetic problems, and noted that portable sign regulation was only one part of a comprehensive effort to improve the city's appearance.[332]

Another Eleventh Circuit case[333] summarily upheld a sign ordinance that limited the maximum number of portable signs for a business to one temporary permit every six months for a maximum of sixteen days. The city had expressed an interest in aesthetics[334] and, by allowing a limited number of portable signs, it narrowly tailored these restrictions to meet its purposes because it could have prohibited portable signs as an alternative.[335]

§ 4:2[6]. Price Signs

Sign ordinances may regulate price signs just as they do any other type of on premise sign. Although an ordinance regulating the display of pricing information would appear to be content-based, some ordinances have prohibited the display of prices, allowed the display of prices in some zoning districts but not others, or limited where businesses may display prices on premise. Supreme Court cases holding that prohibitions on price advertising are invalid have influenced judicial decisions on sign ordinances regulating price. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,[336] for example, the Supreme Court held

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court also upheld requirements that limited portable signs to advertising services or products available on the site or noncommercial messages, and that limited their display to the hours of operation of a business, profession, trade or occupation.

[332] The court relied on, Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986), to hold that that the regulation was no more extensive than necessary to accomplish the city's goals. The Harnish case upheld a total ban on portable signs. See § 4:2[5][a].

[333] Messer v. Douglasville, 975 F.2d 1505, 1514 (11th Cir. 1992). Accord Mobile Sign, Inc. v. Brookhaven, 670 F. Supp. 68 (E.D.N.Y. 1987) (six-month time limit, adopting relaxed view of legislative judgment that limited length of display, not necessary to regulate all unattractive media of commercial speech, and limitation did not restrict speech more broadly than necessary). See also City of Hot Springs v. Carter, 836 S.W.2d 863 (Ark. 1992) (rejecting equal protection claim); Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980) (upholding time limits pre-Metromedia).Contra Risner v. Wyoming, 383 N.W.2d 226 (Mich. Ct. App. 1985) (60-day display period; safety hazards could be remedied by other provisions of sign code, time limit does not address them, periodic display more distracting to motorists, aesthetic objections not based on sign appearance).

[334] The court quoted the statement of purpose for the ordinance in a footnote. Messer, 975 F.2d at 1514 n.8.

[335] The court relied on Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986), which upheld a ban on portable signs. It rejected Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982), which invalidated time limits and restricted display options for portable signs because there was no evidence in that case to support the city's aesthetic interest in these restrictions. See also People v. Target Adver. Inc., 708 N.Y.S.2d 597, 602 (N.Y. City Crim. Ct. 2000) (Dills' requirement of additional evidence of intent based only on Supreme Court cases that arose in a completely different context, where a party to litigation attempted to assert existence of a legislative purpose that was unsupported by a court's own reading of the legislative enactment).

[336] 425 U.S. 748 (1976). See also Liquormart v. State of Rhode Island, 517 U.S. 484 (1996) (striking down statute

invalid a statutory ban on the advertising of prescription drugs by pharmacists. The ban effectively prohibited the dissemination of price information about these drugs, which only licensed pharmacists could dispense. The Court rejected an argument that the harmful effects of price advertising on the pharmaceutical profession justified the prohibition:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[337]

Early state cases relied on Virginia Pharmacy to invalidate ordinances that regulated the display of prices on signs. In a Georgia case,[338] the court struck down an ordinance, as applied to a self-service gas station that prohibited businesses from posting price signs. It permitted signs containing the name of a business and the category of products available on the premises, but not prices. The city offered only an aesthetic interest for this distinction, but numbers of prices were not inferior to letters that formed words. Alternate means of communication were more expensive and less likely to reach persons seeking or not seeking this information.

For similar reasons, a group of New York cases struck down ordinances that limited price signs to gasoline pumps at filling stations.[339] Cases in federal district court held ordinances invalid that prohibited price information on signs as content-based that also had many other content-based distinctions.[340]

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that prohibited advertising of liquor prices; plurality decision); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (prohibition on advertising the prices of routine legal services invalidated).

[337] Virginia Pharmacy, 425 U.S. at 770.

[338] H & H Operations, Inc. v. Peachtree City, 283 S.E.2d 867 (Ga. 1981). Accord City of Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (price signs permitted in some zones and prohibited in others).

[339] People v. Mobil Oil Corp., 397 N.E.2d 724 (N.Y. 1979) (county had not demonstrated that place of speech had a detrimental secondary effect on society; far from clear that law did not withhold useful consumer information from the public; serious questions concerning adequacy of available alternates); Zoepy Marie, Inc. v. Town of Greenburgh, 477 N.Y.S.2d 411 (App. Div. 1984) (no triable issues of fact on aesthetic need for regulation, the availability of alternate marketing techniques, or need to control deceptive advertising); People v. Durham, 415 N.Y.S.2d 183 (N.Y. Dist. Ct. 1979) (ordinance content-based and left no ample alternate channel of communication, as shown by drastic reduction in sales when ordinance enforced). See also accord City of Lakewood v. Colfax Unlimited Asso., 634 P.2d 52 (Colo. 1981) (price signs permitted in some zoning districts but not others, along with other content-based distinctions; relationship to safety and aesthetic purposes too attenuated).

[340] XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765 (N.D. Ohio 2004) (restrictions on showing or not showing price were content-based along with other content-based restrictions, and did not logically advance city's goals); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000) (prohibition on showing price, along with other content-based restrictions, held content-based and invalid); Courts held restrictions on the display of price information unconstitutional before the Supreme Court applied the

On the opposite side of the spectrum, an Ohio case was more accepting. It upheld an ordinance that prohibited price signs adjacent to freeways with a speed limit of more than 50 miles an hour, or within 660 feet of the Interstate System, and that prevented a lodging facility from displaying its weekly rates.[341] The court did not consider the content neutrality issue, but deferred to the legislative judgment on the importance of controlling signs along highways. "Like the court in Metromedia, we will not second-guess the city's common-sense conclusion that limiting the text of advertising signs generally reduces visual clutter along the highway and reduces the possibility of traffic accidents."[342] Evidentiary proof was not required, and Metromedia applied even though the sign was on premise rather than a billboard.[343] Supreme Court cases like Virginia Pharmacy and Reed make this decision questionable.

4:2[7]. Time and Temperature Signs

A time and temperature sign is a sign that displays information electronically with changing or moving digits. It may or may not be lighted, but is typically illuminated. A time and temperature sign is an electronic or digital sign with specific content. Sign ordinances often allow time and temperature signs as an exemption from a prohibition of flashing, moving or electronic signs. The Metromedia plurality held invalid the exemption of 12 noncommercial signs in the San Diego sign ordinance, some of which were content-based.[344] Time and temperature information is noncommercial, and time and temperature signs were among those exempted by the San Diego ordinance, so courts can follow Metromedia and hold an exemption of time and temperature signs invalid. One group of cases held a time and temperature sign

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free speech clause to commercial speech. See, e.g., Carlin v. City of Palm Springs, 92 Cal. Rptr. 535 (Cal. App. 1971) (distinction between rate and nonrated sign held arbitrary and content-based).

[341] Suburban Lodges of Am., Inc. v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060 (Ohio App. 2000), appeal dismissed, 759 N.E.2d 1260 (Ohio 2002).

[342] Id. at 1067.

[343] The court also held that whether the ordinance advanced the city's aesthetic interest was not to be judged by its effect only on plaintiff's prohibited sign, and that an alternate regulation limiting the size of letters and number of words for each sign would not be as effective and would not be less restrictive. In addition, the prohibition in the ordinance was not undercut because it allowed temporary real estate and construction signs along highways and freeways without limiting the text of such signs, and because it failed to limit the text on signs along other, more visually cluttered streets.

[344] See § 3:5.

exemption content-based and not narrowly tailored when it was one of numerous content-based exemptions that undermined the aesthetic and traffic safety interests the ordinance served.[345]

Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways[346] invalidated an exemption for public service signs such as time and temperature signs in the state's highway beautification act and regulations. The regulation prohibited signs displaying flashing, moving or intermittent lights but exempted those displaying time, date, temperature or weather, limited to one cycle of four displays with a five-second maximum completion time. The Kentucky Supreme Court held statute and regulation were content-based and fatally failed to advance a legitimate governmental interest. The restrictions on the kind of speech allowed on electronic billboards had nothing to do with highway safety or aesthetics. Simple limits on the number of displays allowed, and maximum time limits for displays, would better serve the governmental interest than a content-based prohibition on certain kinds of commercial speech. This case is consistent with Reed.[347]

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[345] Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005); Bonita Media Enters., LLC v. Collier County Code Enforcement Bd., 2008 WL 423449 (M.D. Fla. 2008) (exemption held content-based); King Enters. v. Thomas Twp., 215 F. Supp. 2d 891 (E.D. Mich. 2002) (also held to discriminate against noncommercial speech); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755 (N.D. Ohio 2000).

[346] 928 S.W.2d 344 (Ky. 1996) (also holding the statute and regulation discriminated among different kinds of noncommercial speech).

[347] Compare the principal of three opinions in La Tour v. City of Fayetteville, 442 F.3d 1094 (8th Cir. 2006), holding a failure to enforce a prohibition of animated signs against time-and-temperature signs was content-neutral because the desire to promote traffic safety was not tied to content. This opinion is inconsistent with Reed. Accord, Chapin Furniture Outlet, Inc. v. Town of Chapin, 2006 WL 2711851 (D.S.C. 2006) (exemption of time and temperature signs from ordinance prohibiting flashing signs did not "suggest a preference by the Town for certain messages or discriminate against others based on content"), rev'd and remanded as moot after ordinance amended to remove exemption, 252 Fed. Appx. 566 (4th Cir. 2007); Covenant Media of Ill., L.L.C. v. City of Des Plaines, 2005 WL 2277313 (N.D. Ill. 2005) (exemptions did not regulate with respect to a particular viewpoint or favored cause; other exemptions included).

A concurring opinion in La Tour held that preventing a proliferation of flashing signs was a content-neutral justification for distinguishing between electronic signs, which would likely trigger proliferation, and time-and-temperature signs, which would not. Id. at 1097-1100. There was a dissenting opinion. See also Desert Outdoor Adver., Inc. v. City of Oakland, 506 F.3d 798 (9th Cir. 2007) (upholding severance of time and temperature exemption by district court as unconstitutional, but explaining that exemption did not show that ordinance applied to noncommercial speech); Robert L. Rieke Bldg. Co. v. Overland Park, 657 P.2d 1121 (Kan. 1983) (time and temperature signs properly distinguished from searchlights, because these signs do not create traffic hazards and do not have adverse effects on adjacent property).

§ 4:2[8]. Window Signs

An Arizona court pre-Reed upheld a sign ordinance limiting window signs to 30 percent of the window area.[348] Though there was no formal study, the city received considerable input on the subject of window coverage and aesthetics before enacting the ordinance. The ordinance was narrowly tailored. Thirty percent was a reasonable compromise between a total ban of signage. The code was narrow because it only addressed signs that are inside the pane, and allowed alternative methods of communication, including signs hanging outside of the window sill area. The restriction was a reasonable fit, as "exact justifications for what are essentially subjective judgments are not required."[349]

[348] Salib v. City of Mesa, 133 P.3d 756, 762 (Ariz. Ct. App. 2006)

[349] Id. at 763.

CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON PREMISE SIGNS

§ 5:1. An Overview

Sign ordinances typically contain a number of regulations for the display of on premise signs. Some control the physical characteristics of signs, such as their size, spacing,[350] height and setback. Courts usually uphold this type of regulation because it does not prohibit signs, and because it regulates physical characteristics that may affect aesthetics and traffic safety. Other regulations deal with less tangible elements, such as color, illumination and design review. They may raise a content neutrality problem if, for example, a design review ordinance identifies a particular type of design as a design standard. If color is content, then the regulation of color is content-based. Sign ordinances may also prohibit certain sign elements, such as animation or illumination, but allow the display of the sign without those elements.

The courts apply the Central Hudson and time, place and manner tests when they review regulations for the display of on premise signs. They especially ask whether they are narrowly tailored, and whether adequate alternate methods of communication are available. They usually uphold these regulations, though case authority is limited for some of them. In some cases that upheld a regulation, the special character of the visual environment was an important supporting factor, as in cases upholding bans on certain types of illumination.

§ 5:2. Animation, Flashing, Illumination and Changeable Signs

Signs may have features that change their static character. For example, an animated sign is "[a] sign employing actual motion, the illusion of motion, or light and/or color changes achieved through mechanical, electrical, or electronic means."[351] An illuminated sign[352] can be flashing, which means that it is not "maintained stationary or constant in intensity or color at all times."[353] A changeable sign is "[a] sign with the capability of content change by means of

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[350] See Lamar Advert. of Michigan, Inc. v. City of Utica, 819 F. Supp. 2d 657 (E.D. Mich. 2011) (spacing limitations not narrowly tailored when city could exempt signs on city property). See also § 4:2[1] (digital signs.)

[351] Model On-Premise Sign Code, supra note 319, at 15. The definition also defines different types of animated signs.

[352] See § 5:6.

[353] "Flashing illumination" is "[i]llumination in which the artificial source of light is not maintained stationary or constant in intensity or color at all times when a [sign] is illuminated, including illuminated lighting." Street Graphics, supra note 2, at 82.

manual or remote output."[354] Though these sign features can provide an attractive visual environment in some settings, a municipality may control or prohibit some or all of them, either throughout the municipality or in certain areas. The sign must then display the feature in the specified manner, or eliminate it if prohibited.

Courts upheld prohibitions on animated and flashing signs pre-Reed.[355] Marras v. City of Livonia,[356] for example, held that prohibitions on flashing and "moving" signs[357] were content-neutral. They did not draw distinctions based on the message the sign conveyed, but on how it was presented. They were not regulations of speech, but regulated "what form speech may take."[358]

A district court upheld a ban on changeable copy ground signs for two or more tenants as a measure to reduce the number of distracting signs and visual clutter.[359] A single tenant could

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[354] Model On-Premise Sign Code, supra note 319, at 17. The definition also defines different types of changeable signs.

[355] La Tour v. City of Fayetteville, 442 F.3d 1094 (8th Cir. 2006) (principal opinion; prohibited signs that flash, blink or are animated; content-neutral and narrowly tailored); Marras v. City of Livonia, 575 F. Supp. 2d 807 (E.D. Mich. 2008) (flashing and moving signs prohibited; content-neutral time, place and manner regulation, not a regulation of speech but of form speech takes); Singer Supermarkets, Inc. v. Zoning Bd. of Adjustments, 443 A.2d 1082 (N.J. App. Div. 1982) (ban on flashing signs upheld under Central Hudson tests); Pawtucket CVS, Inc. v. Gannon, 2006 WL 998242 (R.I. Super. Ct. 2006) (same). See Meredith v. City of Lincoln City, 2008 WL 4937809 90988 (D. Or. 2008) (upholding denial of structural change to nonconforming sign for electronic display). See also Hilton v. City of Toledo, 405 N.E.2d 1047 (Ohio 1980) (upholding prohibition on flashing portable signs, free speech issues not considered).

[356] 575 F. Supp. 2d 807 (E.D. Mich. 2008).

[357] Under the ordinance, a "flashing sign" was "intermittently illuminated or reflects light intermittently from either an artificial source or from the sun, or any sign which has movement of any illumination such as intermittent, flashing, or varying intensity, or in which the color is not constant, whether caused by artificial or natural sources." A moving sign "has motion either constantly or at intervals, or . . . gives the impression of movement through intermittent flashing, scintillating, or varying the intensity of illumination whether or not said illumination is reflected from an artificial source or from the sun." Id. at 815-816.

[358] Id.

[359] Rigsby v. City of Huntsville, 1988 U.S. Dist. LEXIS 1104 (N.D. Ala. 1988). See also Harnish v. Manatee County 783 F.2d 1535 (11th Cir. 1986). The court upheld a ban on portable and changeable copy signs. A "changeable copy" sign was defined as "[a]n Integral part of a sign not covering more than 65% of the total sign area and design so as to readily allow the changing of its message by removable letters, panels, posters, etc." The court held that the total ban advanced the government goal of protecting the aesthetic environment of the county, and that the county did not have to adopt less restrictive means to achieve this objective. However, the temporary nature of the changeable copy signs influenced the decision.

have such signs.[360] Content-based distinctions between signs that can and cannot have changeable copy are invalid.[361]

A court of appeals upheld a ban on inflatable signs as applied to a car dealership.[362] The ordinance disallowed “elements which revolve, rotate, whirl, spin or otherwise make use of motion to attract attention,” and banned signs that “contain or consist of flags, banners, posters, pennants, ribbons, streamers, spinners, balloons, and/or any inflatable devices, search light or other similar moving devices.” The court held the ordinance content-neutral and applied the Central Hudson tests. It was narrowly tailored and advanced aesthetic and traffic safety interests, the court noting the need to clean up the appearance of commercial areas through sign controls, and that large, eye-catching inflatable devices could distract drivers' attention from the road and other traffic. It was not more extensive than necessary because the dealership had other means of advertising available.

§ 5:3. Color

Color can be an important element in the design of signs; good design makes good use of color. Sign ordinances may regulate color in several ways. They may specify the colors that signs may use, may limit the number of colors a sign can have, or may provide a design review process in which color is one of the elements that design review considers.

Content neutrality is an issue when sign ordinances include color as a basis for regulation. The Supreme Court considered the content neutrality issue when it upheld a federal statute that required federal currency illustrations to be printed in black and white and at a certain size. The Court held the statute was a content-neutral time, place and manner regulation, because the color and size requirements restricted only the manner in which currency illustrations were presented.[363] Compliance did not prevent the expression of any view, and enforcement did not require the government to evaluate the nature of the message expressed. The color limitation

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[360] But see Outdoor Sys. Inc. v. City of Clawson, 686 N.W.2d 815 (Mich. Ct. App. 2004) (prohibition of readily changeable billboards invalid; signs present same traffic or safety problem whether or not readily changeable).

[361] North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (unclear why "informational sign" may have changeable copy, but sign presenting "issue" to the public may not; content of one type of sign certainly not "safer" or inherently more "aesthetically pleasing" than the other).

[362] PHN Motors, LLC v. Medina Twp., 498 Fed. App'x 540 (6th Cir. 2012).

[363] Regan v. Time, Inc., 468 U.S. 641, 655-656 (1984). Regulation of color may create problems under the Lanham Act, if color is part of a trademark. See Street Graphics, supra note 2, at 99.

served a compelling governmental interest in preventing counterfeiting. It made it more difficult for counterfeiters to gain access to negatives they could alter and use for counterfeiting purposes.[364]

Cases that considered color regulations in sign ordinances relied on this case, and held that sign ordinances can regulate color as a content-neutral time, place and manner regulation. In City of Tipp City v. Dakin,[365] an Ohio court upheld a sign ordinance that allowed no more than five colors for most signs. Though this requirement was invalid because it included content-based exemptions, the color limitation was content-neutral:

> In limiting signs to five colors, Tipp City is not seeking to suppress the content of a message. Instead, it is restricting only the manner in which the appellants' mural may be displayed.... The fact that Tipp City's color limit may have an incidental impact on an artist "who aspires to use allegedly lurid colors to express himself" does not make the five-color limit impermissibly content based. [citing case] To the contrary, if uniformly applied, a five-color limit would be a time, place, and manner restriction justified by aesthetic and safety concerns.[366]

A federal district court upheld, as a time, place and manner regulation, an historic district ordinance that required the review of exterior structural alterations in order to maintain harmony in style, form, color.[367] The review board applied these criteria to deny a permit for the display of a mural on the wall of a restaurant. Color, size, and other restrictions were valid and affected only the format or manner in which the mural could be displayed. Review under the ordinance did not stifle, suppress or interfere with the content or message of protected speech. It was directed only to reviewing a proposed alteration's mode of delivery of speech to decide whether it complied with specified regulatory criteria. This case involved an historic district ordinance, and control of color is more easily supported in historic district areas and areas of special character, where it can be an important element of the contextual setting. Design review is a similar example, and courts upheld design review ordinances where color was a factor.[368]

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[364] At the time, only one negative and plate were required for black-and-white printing, but color printing required multiple negatives and plates. This greater number of color negatives and plates increased a counterfeiter's access to them, and allowed him to use them more easily for counterfeiting purposes under the guise of a legitimate project.

[365] 929 N.E.2d 484 (Ohio Ct. App. 2010).

[366] Id. at 502.

[367] Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).

[368] See Demarest v. City of Leavenworth, 876 F. Supp.2d 1186 (E.D. Wash. 2012), in which the court upheld a

Narrow tailoring is an issue in the regulation of color, though a court may hold it is not a problem because an ordinance that controls for color limits only that single sign element. In a related case, the Eleventh Circuit held an ordinance that limited news rack colors to beige and brown was a valid time, place and manner regulation.[369] Uniform color and size of lettering requirements were narrowly tailored to achieve the city's interest in reducing visibility and minimizing visual blight. They did not completely ban news racks from public rights-of-way or prohibit the sale and distribution of newspapers, and publishers could display their name or logo in a color they selected. Courts can use the same reasoning to uphold a sign ordinance that controls for color.

§ 5.4. Design Review

Sign ordinances may require design review,[370] which can present a content neutrality problem if it requires a design that has an identifiable character, or if it authorizes review of sign content. This problem arose in Lusk v. Village of Cold Spring,[371] which authorized design based on factors such as "[t]he general design, character and appropriateness to the property of the proposed alteration" and the "[v]isual compatibility with surrounding properties, including proportion of the property's front facade."[372] Although admitting the standards would be unconstitutional if applied to allow the review of a sign's content, the court concluded they would be "constitutional when applied to general principles of architecture and design, even

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design review program for signs in which color was a factor. See also § 5:4, discussing design review, and § 2:8[3], discussing the validity of design review standards.

[369] Gold Coast Publications v. Corrigan, 42 F.3d 1336 (11th Cir. 1994). See also Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (upholding as a time, place and manner regulation an ordinance requiring uniform color requirements for newsstands).

[370] Section 2:8[3] discusses the prior restraint problem presented by standards adopted for design review programs.

[371] 475 F.3d 480 (2d Cir. 2007).

[372] The standards in full provided that the "alteration of designated property shall be compatible with its historic character, and with exterior features of neighboring properties." In applying the compatibility principle, the Review Board was to consider "(a) The general design, character and appropriateness to the property of the proposed alteration or new construction; (b) The scale of proposed alteration or new construction in relation to the property itself, surrounding properties, and the neighborhood; (c) Texture and materials, and their relation to similar features of the properties in the neighborhood; (d) Visual compatibility with surrounding properties, including proportion of the property's front facade, proportion and arrangement of windows and other openings within the facade and roof shape; and (e) The importance of architectural or other features to the historic significance of the property." Id. at 494.

though its specific application to the content of any signage would not be."[373] Other cases held that design standards based on physical or architectural elements did not present a content neutrality problem.[374]

§ 5:5. Height and Size Limitations

Sign ordinances usually limit the height and size of on-premise signs.[375] These limits may differ depending on the type of sign and its location, or depending on the distance a sign is set back from a road or property line. Ordinances may set absolute size limits that vary by location for different types of signs, or provide a maximum square footage allowance for wall signs based on the ratio of the sign area to street frontage or wall area. Height limits apply to freestanding signs.[376] Courts have little difficulty upholding size[377] and height[378] limits under the Central

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[373] Id. at 496.

[374] Demarest v. City of Leavenworth 876 F. Supp.2d 1186 (E.D. Wash. 2012), upheld a design review program that prohibited any sign within commercial districts that was "not compatible in design, lettering style, and color with the Old World Bavarian-Alpine theme." The court held the Bavarian theme requirement was viewpoint- and content-neutral. It did not make "[a]nything non-Bavarian ... a disfavored message suppressed by the regulations," and the city enforced design review by regulating physical attributes, such as size, shape, number, placement, font, and colors. A court could hold the Bavarian theme requirement is content-based after Reed. The court in Demarest also held that the aesthetics, tourism, traffic/pedestrian safety, and economic vitality interests advanced by the code were substantial, that the Bavarian theme was not an artificial made-up asset, and that the different treatment of signs in the ordinance did not violate the Central Hudson tests.

See also Catsiff v. McCarty, 274 P.3d 1063 (Wash. Ct. App. 2012) (holding downtown design standards were content-neutral and regulated size and placement). The standards provided:

> Wall signs must be either painted upon the wall, mounted flat against the building, or erected against and parallel to the wall not extending out more than twelve inches therefrom. Wall signs shall be located no higher than thirty feet above grade … . The maximum combined area of all wall signs per street frontage shall not exceed twenty-five percent of the wall area. No combination of sign areas of any kind shall exceed one hundred fifty square feet per street frontage.

Id. at 1067-1068. The court held these standards were a reasonable fit, and that the city had a legitimate regulatory interest in adopting them. The legislative history showed the wall sign size and height restrictions were adopted as part of a comprehensive plan to address aesthetics and traffic control.

[375] Limitations on size are usually included with limitations on height, and courts often consider both limitations together.

[376] See § 4:2[6], discussing freestanding signs.

[377] Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012) (60 square feet or one square foot per linear foot of frontage limit); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (specified limits on ground signs); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005) (regulation narrowly tailored); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) (onsite signs limited in size and number according to location of property); Sopp Signs, LLC v. City of Buford, 2012 WL 2681417 (N.D. Ga. 2012) (200 square feet); Herson v. City of Richmond, 827 F. Supp. 2d 1088 (N.D. Cal. 2011) (freestanding signs within 660 feet of a freeway or a parkway could not exceed 12 feet in height or 40 square feet in area), aff'd, 631 Fed. Appx. 472 (9th

Hudson test or as time, place and manner regulations. They are not content-based and advance legitimate interests in aesthetics and traffic safety.[379] They leave adequate alternate means of communication open because they are not a complete ban.[380] One case upheld ground sign size limits the ordinance calibrated with the width and speed of adjacent streets.[381]

Marathon Outdoor, LLC v. Vesconti[382] is typical. The court upheld a New York City ordinance limiting signs within 15 feet of a street to less than 30 feet in height. It was narrowly

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Cir. 2016); Herson v. City of San Carlos, 714 F. Supp. 2d 1018, 1026 (N.D. Cal. 2010) (pole signs no larger than 1125 square feet), aff'd on other grounds, 433 Fed. Appx. 569 (9th Cir. 2011); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1446 (N.D. Ill. 1990) (ground signs, 480 square feet), aff'd, 989 F.2d 502 (7th Cir. 1993); Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983) (75 square feet); Kyrch v. Town of Burr Ridge, 444 N.E.2d 229, 232-33 (Ill. App. Ct. 1982) (120 square foot size limit on ground signs); State v. Spano, 966 N.E.2d 908, 914 (Ohio. Ct. App. 2011) (special event signs limited to 32 square feet); Village of Ottawa Hills v. Afjeh, 2006 WL 1449819 (Ohio Ct. App. 2004) (ten square feet limit adopted based on research and consultation; may be visual distraction that could impact traffic safety and aesthetics); Catsiff v. McCarthy, 274 P.3d 1063, 1067 (Wash. Ct. App. 2012) (wall signs in central business district limited to 25 percent of wall area). See also Kolbe v. Baltimore County, 730 F. Supp. 2d 478 (D. Md. 2010) (upholding eight square foot size limit on temporary signs). But see Lamar Advert. of Michigan, Inc. v. City of Utica, 819 F. Supp. 2d 657 (E.D. Mich. 2011) (size limits not narrowly tailored when city could exempt signs on city property).

[378] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 893-894 (9th Cir. 2007) (pole height of signs in multiple areas limited to 20 or 30 feet); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005) (regulation narrowly tailored); Sopp Signs, LLC v. City of Buford, 2012 WL 2681417 (N.D. Ga. July 5, 2012) (20 feet); Herson v. City of Richmond, 827 F. Supp. 2d 1088 (N.D. Cal. 2011) (freestanding signs within 660 feet of a freeway or a parkway could not exceed 12 feet in height or 40 square feet in area), aff'd, 631 Fed. Appx. 472 (9th Cir. 2016); Herson v. City of San Carlos, 714 F. Supp. 2d 1018, 1026 (N.D. Ca. 2010) (pole signs no taller than 65 feet), aff'd on other grounds 433 Fed. Appx. 569 (9th Cir. 2011); Marathon Outdoor, LLC v. Vesconti, 107 F. Supp. 2d 355, 366-367 (S.D.N.Y. 2000) (signs within 15 feet of a street must be less than 30 feet in height); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1446-1447 (N.D. Ill. 1990) (ground signs no more than 35 feet high), aff'd, 989 F.2d 502 (7th Cir. 1993); Kyrch v. Burr Ridge, 444 N.E.2d 229, 232-233 (Ill. App. Ct. 1982) (16 foot height limit on ground signs); Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 962 A.2d 404, 421-423 (Md. 2008) (six foot height limit on signs); Catsiff v. McCarthy, 274 P.3d 1063, 1067-1069 (Wash. Ct. App. 2012) (wall signs in business district no more than 30 feet above grade). See also accord, Parrack v. Town of Estes Park, 628 P.2d 1014 (Colo. 1981) (signs that project from a structure must be more than nine feet above grade).

[379] Some of these cases noted that the ordinance contained a preamble or statement of purpose, e.g., Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983); Catsiff v. McCarthy, 274 P.3d 1063, 1068 (Wash. Ct. App. 2012) (purpose section adequate though does not mention aesthetics or traffic safety; reference to "visual clutter" sufficient). See § 3:3.

[380] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (specified limits on ground signs). See also Donrey Communications Co. v. Fayetteville, 660 S.W.2d 900, 903 (Ark. 1983) (75 square foot limit; valid even though prevented use of standard poster and required poster that was 50 percent more expensive).

[381] Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007) (specified limits on ground signs). This method of calculation is explained in a study done by the United States Sign Council and published in Street Graphics, supra note 2, Chapter 4.

[382] 107 F. Supp. 2d 355, 366-367 (S.D.N.Y. 2000). See also Vosse v. The City of New York, 144 F. Supp. 3d 627 (S.D.N.Y. 2015) (prohibition on illuminated signs more than 40 feet above curb level upheld as time, place and manner regulation; advanced aesthetic interest; narrowly tailored, excludes non-illuminated, non-commercial signs

tailored, promoted public safety and aesthetics, and did not foreclose alternate channels of communication because it only regulated maximum height. Signs were not banned entirely, but were required only to meet certain structural guidelines that promoted the government's interests in health, safety, general welfare and aesthetics. It was "common ground that governments may regulate the physical characteristics of signs."[383] A federal district court[384] upheld size limits post-Reed.

Careful study and public participation can help show that an ordinance meets narrow tailoring requirements because there is a reasonable fit between legislative ends and means. As a Washington court noted:

> The legislative history shows the city carefully considered its sign size and height restrictions. Its sign code was a product of its stated policy of "working with downtown businessmen to develop a workable sign code specifically for the downtown area." A building improvement guide was commissioned that recommended a "sign should not dominate; its shape and proportions should fit your building just as a window or door fits." It suggested that "[s]ome types of signs are *not* appropriate, including … oversized signs … applied over the upper facade." The city used those considerations when choosing its sign size and height limitation in 1991, and it continues to rely on them. The city's consideration of such issues demonstrates reasonable legislative balancing based on local study and experience, which satisfies any calibration duty.[385]

Courts uphold height and size limits on billboards more easily because billboards are adjacent to streets and highways, where they present aesthetic and traffic safety problems.[386]

§ 5:6. Illumination Through Lighting, Searchlights, and Neon

The United States Sign Council's Model On-Premise Sign Code defines an illuminated sign as "[a] sign characterized by the use of artificial light, either projecting through its surface(s) [Internally or trans-illuminated]; or reflecting off its surface(s) [Externally illuminated]."[387] A

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less than 12 square feet in surface area; reasonable for the City to prohibit all illuminated signs above a certain height; alternative channels ample).

[383] Quoting City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

[384] Peterson v. Village of Downers Grove, 2015 WL 8780560 (N.D. Ill. 2015) (court relied on aesthetic interest; traffic interest not substantially advanced).

[385] Catsiff v. McCarthy, 274 P.3d 1063, 1068 (Wash. Ct. App. 2012) (wall signs in central business district limited to 25 percent of wall area and no more than 30 feet above grade).

[386] E.g., Get Outdoors II, LLC v. City of El Cajon, 403 Fed. Appx. 284 (9th. Cir. 2010) (300 square foot limit and 35 foot height limit); King Enters. V. Thomas Twp., 215 F. Supp. 2d 891, 909 (E.D. Mich. 2002) (billboards limited to 200 square feet in area and 30 feet in height).

[387] Model On-Premise Sign Code, supra note 319, at 20.

municipality may prohibit sign illumination, either throughout the community or in certain areas, if they believe it is inconsistent with the visual environment. However, illumination is necessary for on premise signage, otherwise the sign will not be visible when it is dark and cannot be read. Standards developed by the United States Sign Council[388] provide a basis for regulation that allows illumination appropriate for the nighttime environment.

Restrictions on illumination can raise free speech problems because they regulate the color[389] or brightness of a sign. A court must be willing to accept a legislative decision that a regulation of brightness and color advances aesthetic, traffic safety or some other governmental interest. Only a few cases considered free speech issues. The ordinances upheld in these cases usually regulated, rather than prohibited, illumination in a way found acceptable by the court. For example, a federal district court post-Reed upheld a ban on displaying illuminated signs more than 40 feet above the street curb as a valid time, place and manner regulation.[390] The ordinance excluded non-illuminated, non-commercial signs less than 12 square feet in surface area. The court held the ordinance was narrowly tailored, as it was reasonable for the city to prohibit all illuminated signs above a certain height; that it advanced the city's aesthetic interest; and that there were ample alternate channels of communication.

State cases have also upheld ordinances found to contain acceptable regulations, and in some cases, the distinctive character of the protected visual environment was a factor. Community character was an important factor in Asselin v. Town of Conway.[391] The New Hampshire Supreme Court summarily upheld an ordinance that banned internal but allowed external illumination in an important tourist town in the White Mountain National Forest. The ban on internally lit signs was "merely a content-neutral restriction on one of the myriad ways in which outdoor messages may be conveyed at night."[392] Externally lit signs were an available and less expensive alternative. In rejecting substantive due process objections, the court agreed with the trial court that unregulated use of nighttime lighting would negatively affect "the natural

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[388] Street Graphics, supra note 2, at 45.

[389] See § 5:3.

[390] Vosse v. The City of New York, 144 F. Supp.3d 627 (S.D.N.Y. 2015).

[391] 628 A.2d 247 (N.H. 1993).

[392] Id. at 251.

appeal and general atmosphere of the area." An expert witness testified that internally illuminated signs appear as "disconnected squares of light" at dusk and at night, while externally lit signs soften the impact of signs in darkness.

In another state case in which environmental issues were important, Eller Media Co. v. City of Tucson,[393] the court summarily rejected a free speech objection to an ordinance that required top-mounted rather than bottom-mounted lights on billboards. This requirement was intended to reduce light emissions into the night sky that might unreasonably interfere with astronomical observations. The city claimed that top-mounted lights emitted fewer rays into the night sky because their rays shine downward on at least one surface before radiating upward. The regulation did not affect communicative speech because it did not affect the advertising message displayed on the billboards.

Sign ordinances may limit the use of searchlights. Their operation may not affect communicative speech, but a Kansas case assumed they did and upheld an ordinance under which the city authorized searchlights as a special use for no more the ten days.[394] This limitation met the Central Hudson tests. High-powered searchlights visible for a distance of 30 to 40 miles, and used for promotional purposes, obviously attracted the attention of persons not on the premises. The city made a reasonable judgment that the regulation promoted traffic safety and improved the city's aesthetic appearance. A lesser regulation would not serve those interests, and the limitation was no more extensive than necessary.

Neon lighting can be an attractive feature for signs in some locations, but a municipality may decide it does not want it, either throughout the community or in certain areas. There are conflicting views on whether a ban on neon signs violates free speech principles. An Indiana court applied the Central Hudson tests to uphold a ban on neon signs in a small tourist town,[395] whose ordinance cited the town's unique scenic and architectural characteristics and public safety concerns as reasons for its adoption. The ban was no more extensive than necessary. It was neither prudent nor effective to limit neon signs to a particular area, and no type of neon lighting would be less distracting or less inconsistent with the town's aesthetic image. Reasonable

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[393] 7 P.3d 136 (Ariz. Ct. App. 2000).

[394] Robert L. Rieke Bldg. Co. v. City of Overland Park, 657 P.2d 1121 (Kan. 1983).

[395] Wallace v. Brown County Area Plan Comm’n, 689 N.E.2d 491 (Ind. Ct. App. 1998).

alternatives were available, such as ground-lighted signs that would not contrast with the community's aesthetic character.

A New Jersey trial court took a contrary view, struck down a ban on neon signs a township adopted to avoid a "highway commercial" appearance, and suggested that adequate regulation could handle the neon sign problem.[396] The ban was content-neutral, and alternate methods of lighting were available, but the evidence did not show that neon lighting contributed to objectionable appearance. Alternatively, regulating the degree of illumination, the amount of light used, the direction of light, the times to use the light, or the number of interior neon lights permitted would allow neon lighting to meet the township's aesthetic standard. It was not clear that eliminating neon would have any impact on the undesirable "highway commercial" look.

§ 5:7. Numerical Restrictions

Sign ordinances may limit the number of signs on a property, assign numerical limits for signs on walls or facades, or provide a numerical ratio for signs based on street frontage or facade. Courts usually uphold numerical limits by applying either the Central Hudson or time, place and manner regulation tests.[397]

The cases recognize that numerical limits on signs balance the need to provide information with aesthetic and traffic safety interests. A federal district court in B & B Coastal Enterprises, Inc. v. Demers[398] applied the Central Hudson tests to uphold a sign ordinance that allowed one sign for each pump and for other product sold by gasoline stations. The town had decided to make important consumer information known, but properly limited the display of information in accord with its other interests. These aesthetic and safety interests were substantial, and “limiting the number of signs per lot materially advances the common-sense

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[396] State v. Calabria, Gillette Liquors, 693 A.2d 949 (N.J. L. Div. 1997).

[397] B & B Coastal Enterprises, Inc. v. Demers, 276 F. Supp. 2d 155 (D. Me. 2003) (one sign for each pump and for other product sold by gasoline stations, met Central Hudson tests); Bender v. City of Saint Ann, 816 F. Supp. 1372 (E.D. Mo. 1993) (one wall sign per business, corner lots may have one on each street fronting wall, met Central Hudson tests), aff’d on other grounds, 36 F.3d 57 (8th Cir. 1994); Williams v. City & County of Denver, 622 P.2d 542 (Colo. 1981) (three sign limit per street front, plus one additional sign for each 100 feet of street frontage in excess of 200 feet, upheld as valid time, place and manner restriction); Township of Pennsauken v. Schad, 733 A.2d 1159 (N.J. 1999) (limit of two business signs in C-1 district and four in C-2 district, met Central Hudson and time, place and manner tests); Singer Supermarkets, Inc. v. Zoning Bd. Of Adjustment, 443 A.2d 1082 (N.J. App. 1982) (only one sign allowed on the front façade of a business, met Central Hudson tests); Temple Baptist Church v. City of Albuquerque, 646 P.2d 565 (N.M. 1982) (unspecified but limited to the minimum number of signs necessary for identification purposes, upheld as valid time, place and manner regulation).

[398] 276 F. Supp. 2d 155 (D. Me. 2003).

judgments of the local lawmakers that an excessive number of signs may pose a hazard to traffic safety and detracts from the visual attractiveness of this tourist-town."[399] By controlling the size and appearance of signs rather than prohibiting them entirely, the town used less restrictive means for meeting safety and aesthetic concerns.[400] A federal district court upheld numerical limits post-Reed.[401]

§ 5.8. Setback Requirements

Sign ordinances usually require on premise signs to set back a specified distance from a property line or street. Courts uphold setback requirements as valid time, place and manner regulations.[402] An Ohio case[403] is typical. It upheld an ordinance requiring special event signs to be more than five feet from the property or street line. The regulation was content-neutral because it was not directed at suppressing any particular type of speech. It did not prevent the plaintiff from advertising or selling cars at his dealership, but merely restricted the size and placement of signs for special events. It was a reasonable time, place and manner regulation because "[t]he government has an interest in controlling the size and placement of special event signs for reasons of both safety and aesthetics."[404]

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[399] Id. at 165.

[400] In Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982), the court struck down a sign ordinance that allowed "[o]ne business or institution identification sign on the premises of the permitted business or institution." The county did not offer any evidence that it adopted this provision because of a concern with traffic or safety. Even if it did, there was no limit on the size of signs, so any single sign was permitted no matter how large or how offensive or distracting. The ordinance also prohibited additional signs no matter how attractive or inconspicuous.

[401] Peterson v. Village of Downers Grove, 2015 WL 8780560 (N.D. Ill. 2015) (court relied on aesthetic interest; traffic interest not substantially advanced).

[402] King Enters. V. Thomas Twp., 215 F. Supp. 2d 891 (E.D. Mich. 2002) (various setback requirements); Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900 (Ark. 1983) (setback requirements for freestanding signs); State v. Spano, 966 N.E.2d 908, 914 (Ohio. Ct. App. 2011) (special event signs must be more than five feet from the street line). See also Marathon Outdoor, LLC v. Vesconti, 107 F. Supp. 2d 355, 366 (S.D.N.Y. 2000) (signs within 15 feet of the street must be less than 30 feet in height).

[403] State v. Spano, 966 N.E.2d 908 (Ohio Ct. App. 2011).

[404] Id. at 914.

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