FREE SPEECH LAW FOR ON-PREMISE SIGNS

By

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PREFACE FOR THE FOURTH EDITION

This edition of Free Speech Law for On-Premise Signs updates the discussion of free speech issues with citation and discussion of cases decided since the last edition. It also includes discussion of the Supreme Court's latest sign regulation case, City of Austin v. Reagan National Advertising of Austin, which modified the rules for deciding when a sign ordinance is content based, and provided more clarity on how to distinguish the regulation of off-premise and on-premise signs. A footnote in this case elevated the plurality decision in the Metromedia case to a majority decision, a major change.

About the Author

Professor Daniel R. Mandelker is the Stamper Professor of Law Emeritus at Washington University in St. Louis, where he was a leading scholar and teacher of land use law, state and local government 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. It includes a model code for on-premise signs that has been widely followed. His publications also include Billboards, Signs, Free Speech, and the First Amendment, in the Real Estate Trust, and Estate Journal (2020),and Decision Making in Sign Codes: The Prior Restraint Barrier, in the 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 (10th ed. 2020), and State and Local Government in a Federal System (9th ed. 2020).

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. Mandelker received the ABA's State and Local Government Section Daniel J. Curtin Lifetime Achievement Award in 2006.

Professor Mandelker has been a frequent lecturer at national and regional conferences on land use and environmental law. He has 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 nationally on sign ordinance litigation and the drafting of sign codes.

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A Note

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

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TABLE OF CONTENTS

CHAPTER I: AN INTRODUCTORY NOTE 1
§ 1:1. Why This Handbook Was Written 1
§ 1:2. What This Handbook Is About 1
§ 1:3. How to Use This Handbook 2
CHAPTER II: FREE SPEECH LAW PRINCIPLES 3
§ 2:1. Basic Concepts 3
§ 2:2. Federal and State Court Decisions and What They Mean 4
§ 2:3. Commercial and Noncommercial Speech 5
§ 2:3[1]. The Commercial/Noncommercial Distinction 5
§ 2:3[2]. How to Decide When a Sign Message is Commercial or Noncommercial 5
§ 2:3[3]. Must a Sign Ordinance Define Noncommercial and Commercial Speech? .. 8
§ 2:3[4]. Can On-Premise Signs be Limited to Commercial Speech? 8
§ 2:3[5]. Exemptions for Noncommercial Speech in Sign Ordinances 10
§ 2:4. The Neutrality Principle and Content-Based Speech 12
§ 2:4[1]. What This Requirement Means 12
§ 2:4[2]. Reed v. Town of Gilbert 15
§ 2:4[3]. How Courts Have Applied Reed 19
§ 2:4[4]. City of Austin v. Reagan National Advertising of Austin 20
§ 2:4[5]. The "Need to Read" Rule 21
§ 2:5. Speaker-Based Neutrality 27
§ 2:6. Judicial Standards for Regulating Commercial Speech 30
§ 2:6[1]. An Overview 30
§ 2:6[2]. The Central Hudson Case 31
§ 2:6[3]. The Metromedia Case 33
§ 2:6[4]. Taxpayers for Vincent 36
§ 2:6[5]. Applying Central Hudson's "Directly Advance" Criterion 38
§ 2:6[6]. Applying Central Hudson's "More Extensive than is Necessary" Criterion 39
§ 2:7. Time, Place and Manner Regulations 44
§ 2:7[1]. What They Are 44

§ 2:7[2]. As Applied to Advertising Regulations....46
§ 2:8. The Prior Restraint Doctrine....50
§ 2:8[1]. General Principles....50
§ 2:8[2]. The Procedural Standards....50
§ 2:8[3]. The Substantive Standards....53
CHAPTER III: SOME BASIC FREE SPEECH ISSUES CONCERNING ON-PREMISE SIGN REGULATIONS....61
§ 3:1. An Overview....61
§ 3:2. Must There Be Proof That a Restriction on Signs Directly Advances Governmental Interests?....61
§ 3:3. Must a Sign Ordinance Include a Statement of Purpose?....66
§ 3:4. The Federal Highway Beautification Act....68
§ 3:5. Definitions....70
CHAPTER IV. SPECIALIZED ON-PREMISE SIGNS, HOW THEY ARE REGULATED, AND THE FREE SPEECH ISSUES THESE REGULATIONS PRESENT....71
§ 4:1. An Overview....71
§ 4:2. Digital Signs, or Electronic Message Centers (EMCs)....71
§ 4:3. Flags....75
§ 4:4. Freestanding Signs....77
§ 4:5. Murals....79
§ 4:6. Portable and Temporary Signs....82
§ 4:6[1]. In General....82
§ 4:6[2]. Total Prohibitions....82
§ 4:6[3]. Display Time, Size and Height Limitations....85
§ 4:7. Price Signs....86
§ 4:8. Time and Temperature Signs....88
§ 4:9. Window Signs....90
§ 4:10. Wind Signs....90
CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON-PREMISE SIGNS....91
§ 5:1. An Overview....91
§ 5:2. Animation, Flashing Illumination and Changeable Signs....91

§ 5:3. Color 93
§ 5.4. Design Review 95
§ 5:5. Height and Size Limitations 96
§ 5:6. Illumination Through Lighting, Searchlights, and Neon 99
§ 5:7. Numerical Restrictions 101
§ 5.8. Setback Requirements 102

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. Courts will hold a sign ordinance unconstitutional if it does not meet free speech requirements. 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 usually allow but regulate the display of on-premise signs. Local governments can regulate signs without creating constitutional problems through content-neutral sign ordinances that are fair, objective, even-handed and supported by accepted government purposes.

A Supreme Court case decided in 2015[1] adopted more stringent requirements for content neutrality, but local governments can meet these requirements through careful drafting and a recent Supreme Court decision has modified these requirements.[2] The American Planning Association has published a Planning Advisory Service Report, Street Graphics and the Law,[3] 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

The handbook begins Chapter II by discussing Supreme Court cases that decided the basic principles of free speech law. It then discusses the differences between commercial and noncommercial speech, and how noncommercial speech is protected under the free speech clause. The content neutrality requirement is discussed next, and how it affects the constitutionality of

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[1] Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[2] City of Austin v. Reagan National Advertising of Austin, 142 S.Ct. 1464 (2022).

[3] 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.

sign ordinances. The principles that apply to the regulation of commercial speech are discussed next. The chapter concludes with a discussion of time, place, and manner regulations and the prior restraint doctrine.

Chapter III discusses basic free speech issues concerning on-premise sign ordinances. Chapter IV reviews the law that applies to 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 research conducted by the United States Sign Council Foundation, can help decide what regulations to adopt.[4]

§ 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 adopt free speech principles that apply to all laws. Only a few of these cases considered sign ordinances, but all Supreme Court free speech cases may have an effect on their constitutionality. Lower federal court cases that apply the Supreme Court's free speech cases to sign ordinances are the second set. These courts decide a significant number of sign cases, and ambiguities in Supreme Court decisions allow conflicting interpretations of Supreme Court doctrine. Courts of appeals cases are fewer in number but carry more weight. District court decisions have less precedential value because they decided by a single judge. State court free speech decisions that apply the federal constitution are included, as are law review articles.

The text usually discusses one or two important decisions that provide a basis for understanding the topic that is discussed. The footnotes provide more detail through additional citations that support and explain the issues discussed in the text. Contrary decisions are included. Citations are intended to be complete and include unpublished decisions. Using this handbook requires judgment. Free speech law is rarely precise, and judgment is required to decide what law is relevant, and how it should be applied.

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

CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:1. Basic Concepts

Free speech is the dominant constitutional issue in sign regulation.[5] State law dealing with aesthetic and other issues is important, but free speech law overrides state law because sign ordinances must satisfy federal constitutional free speech doctrine. One important doctrine 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 the burden on government to uphold the constitutionality of a sign regulation. How free speech law limits local governments when they enact sign ordinances is a major issue that decides whether or not they are constitutional.

The standard of review courts use when they review the constitutionality of sign ordinances decides what governments can do. Courts uphold economic regulation when there is a rational relationship between the law and the legislative purpose it serves. Aesthetic purposes justify the enactment of sign ordinances, so a court will uphold a sign ordinance under the rational relationship standard of judicial review if it rationally relates 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.[6] This standard of judicial review places some limits on governments, but it is impossible to meet. When a law regulates the content of speech, the Court applies a strict scrutiny standard of judicial review that requires a compelling governmental interest to uphold the constitutionality of a law.[7] A sign ordinance that in includes 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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[5] See Daniel R. Mandelker, Billboards, Signs, Free Speech, and the First Amendment, 55 Real Property, Trust and Estate Law Journal 367 (2020); Karen Zagrodny Consalo, With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise, 46 Stetson L. Rev. 533 (2017).

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

[7] § 2:4[1].

These principles are straightforward. Unfortunately, the courts do not apply them with the clarity and predictability they require. 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 voice on the constitution, but its decisions on free speech are sometimes inconsistent and contain ambiguities that lower courts find difficult to interpret. Decisions do not have full precedential value if they do not gain a majority of the Court. Only a few of the Court's free speech decisions considered sign ordinances, which require special treatment because they are a tangible medium for expressing a message.[8]

Despite ambiguities in Supreme Court free speech law, lower federal courts provide 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 difference between federal district courts and federal courts of appeals in the federal court system. The courts of appeals deserve the most attention because they are appellate courts that hear appeals from single-judge district courts, which are the federal trial courts with original jurisdiction. There are eleven courts of appeals for different geographic circuits, and an additional court of appeals 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 appeals *en banc* sometimes reconsiders panel decisions.

Decisions by a court of appeals having jurisdiction over a state in which a local government is located are controlling. Sometimes there are no court of appeals decisions in a state's circuit on the question at issue, so decisions by courts of appeals in other circuits and by federal district courts must be considered. District courts must follow decisions by the court of appeals in their circuit, if there are any. When there are no court of appeals decisions that apply, a district court judge is free to apply decisions by other courts of appeals or by other district court judges.

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[8] 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.").

State courts apply the federal free speech clause because the federal constitution is enforceable in state courts. They usually apply federal cases faithfully, and have done so in on-premise sign cases. State courts are free to select from federal court of appeals and district court decisions, but federal courts do not have to follow state court decisions on federal constitution issues and seldom cite them. 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

The Supreme Court has explained the difference between commercial and noncommercial speech, and holds 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.[9]

Courts do not allow sign ordinances to treat commercial speech more favorably than noncommercial speech.[10] An example is a sign ordinance that includes more restrictive requirements for the display of noncommercial signs than it does for commercial signs, such as a smaller size requirement or a shorter display period.

§ 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 type of speech. Defining these categories of speech is difficult,[11] and the Supreme Court has admitted that

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[9] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). See § 2:4[4] (discussing whether ordinances making the commercial/noncommercial distinction raise a content neutrality problem).

[10] KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261 (11th Cir. 2006); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).

[11] City of Cincinnati v. Discovery Network, 507 U.S. 410, 419 (1993) (reviewing the cases that defined noncommercial and commercial speech and concluding that "[t]his very case illustrates the difficulty of drawing bright lines that will

"ambiguities may exist at the margins of the category of commercial speech."[12] These ambiguities are evident in a series of examples given by a Supreme Court Justice in one of its decisions.[13] 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 provided some guidance, however. Speech is commercial even though it contains "discussions of important public issues,"[14] and does not lose its commercial character because it "links a product to a current public debate."[15] Speech is not commercial simply because money is spent to advertise it, or because it solicits a purchase.[16] The Court has supplemented this guidance 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."[17] This test, if literally applied, means that most on-premise signs would not contain commercial speech if they contained

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clearly cabin commercial speech in a distinct category.").

[12] 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).

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

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

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

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

[17] 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).

only information about a business. Price and quantity information about a product is commercial.[18]

Bolger v. Youngs Drug Prods. Corp.,[19] explains how these tests apply to intermingled speech. There the Court struck down as an unjustified regulation of commercial speech a federal law that prohibited the mailing of information about contraceptives. 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. 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."[20]

The Supreme Court considered this problem again in Board of Trustees v. Fox,[21] 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 in a student dormitory that included noncommercial topics, such as how to be financially independent and how to run an efficient home. The Court decided that 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."[22] This case indicates that a sign is commercial even though it has commercial and noncommercial messages.[23]

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

[19] 463 U.S. 60 (1983).

[20] Id. at 68.

[21] 492 U.S. 469 (1989).

[22] 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.

[23] See Int'l Outdoor, Inc. v. City of Troy, No. 17-10335, 2017 WL 2831702, at *1 (E.D. Mich. June 30, 2017) (plaintiff's billboards displayed both commercial and noncommercial speech; court held nature of plaintiff's billboards as a whole indicated they were commercial speech because most of the paid advertisements were commercial); PSEG

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

Must a sign ordinance define the distinction between commercial and noncommercial signs? 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 "noncommercial" 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."[24]

Other courts agree with the Fourth Circuit.[25]

§ 2:3[4]. Can On-Premise Signs be Limited to Commercial Speech?

On-premise signs are typically limited to the name of the entity that is displaying the sign, and may also describe the goods or services that are available on the site. Signs that are limited to with this type of commercial message created constitutional problems. A plurality decision of the Supreme Court, now accepted as a majority decision,[26] held that limiting on-premise signs to commercial messages is unconstitutional.[27] Commercial messages connected with a site, it held, were no more valuable than noncommercial messages, and that noncommercial messages located where commercial messages are allowed could not be prohibited because they were not more threatening to traffic safety and the beauty of the city.[28] The cases have followed this holding.[29]

Long Island LLC v. Town of N. Hempstead, 158 F. Supp.3d 149 (E.D.N.Y. 2016) (posted utility warning signs did not serve a commercial purpose in an electricity market).

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

[25] 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).

[26] City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1474 n.5 (2022) (explaining that Parts I-IV, "the relevant portion of the opinion was also joined by a fifth").

[27] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981).

[28] "[T]the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Metromedia, 453 U.S. at 513. The court also noted that "[t]he city does not explain how or why non-commercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city." *Id.* Chief Justice Burger dissented from this holding. *Id.* at 567-568.

[29] E.g., Burkhart Advert., Inc. v. City of Auburn, Ind., 786 F. Supp. 721, 732 (N.D. Ind. 1991); Jackson v. City Council

This problem is easily fixed by an adding a substitution clause to the sign ordinance. Remember that sign ordinances are written so that all signs permitted by the ordinance are allowed. Now assume that the ordinance allows only the display of the name of the entity that is displaying the sign on an on-premise sign. The substitution clause should provide that any sign authorized by the ordinance may display noncommercial messages.[30] An ordinance authorizing on-premise signs to display commercial speech would then be constitutional, because the substitution clause allows the display of noncommercial messages on these signs and all signs. Ordinances authorizing the display of commercial messages if they have a substitution clause have been upheld by the courts.[31]

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of City of Charlottesville, 659 F. Supp. 470, 473 (W.D. Va. 1987), order aff'd in part & vacated in part sub nom. 840 F.2d 10 (4th Cir. 1988) (Table). See also Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham, 352 F. Supp. 2d 297, 306 (N.D.N.Y. 2005) (invalidating ban on portable signs that effectively prohibited non-commercial speech in places where it allowed commercial speech). Compare Roland Digital Media, Inc. v. City of Livingston, No. 2:17-CV-00069, 2018 WL 6788594, at *5 (M.D. Tenn. Dec. 26, 2018) ("onsite exemption applies to both commercial and non-commercial speech"); 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), cert. denied, 552 U.S. 1100 (2008); Wheeler v. Comm'r of Highways, 822 F.2d 586, 590 (6th Cir. 1987) (state highway beautification statute content-neutral because it permitted commercial and noncommercial signs in protected areas if signs related to activity on the premises).

[30] 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." The substitution clause will not apply if the ordinance does not authorize the sign proposed for display. Johnsonville, LLC v. City of Buffalo, No. A21-0957, 2022 WL 1297835, at *2 (Minn. Ct. App. May 2, 2022).

[31] Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 902 (9th Cir. 2007); Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1135 (11th Cir. 2005) (substitution clause mooted constitutional claim); Clear Channel Outdoor, Inc. v. City of L.A., 340 F.3d 810, 815 (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, 811 (9th Cir. 1993) (substitution clause made ordinance content-neutral as it affected noncommercial speech); Georgia Outdoor Advertising, Inc. v. Waynesville, 833 F.2d 43, 46 (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, 1271 (4th Cir. 1986) (same); Adams Outdoor Advertising Limited Partnership v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020); 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 Advert. of Penn, LLC v. Town of Orchard Park, N.Y., No. 01-CV-556A (M), 2008 WL 781865, at *15 (W.D.N.Y. Feb. 25, 2008), vacated in part, aff'd, & remanded, 356 F.3d 365 (2d Cir. 2004); Outdoor Sys. v. City of Lenexa, 67 F. Supp. 2d 1231, 1236 (D. Kan. 1999); Outdoor Sys. Inc. v. City of Atlanta, 885 F. Supp. 1572, 1579 (N.D. Ga. 1995). See City & County of San Francisco v. Eller Outdoor Advertising, 237 Cal. Rptr. 815, 822 (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, 725 (Mich. App. 1986) (accessory 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, 590 (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

§ 2:3[5]. Exemptions for Noncommercial Speech in Sign Ordinances

The exemption problem is one of the most difficult problems in sign regulation. Sign ordinances usually exempt a number of signs from the sign ordinance, and it is common to exempt noncommercial on-premise noncommercial signs, such as government signs, traffic and regulatory signs, flags, seasonal banners, and signs displayed by religious and charitable organizations. Differential treatment of noncommercial signs is unconstitutional.

In Metromedia[32] the supreme court held twelve exemptions[33] in the sign ordinance invalid because they made impermissible distinctions among different types of noncommercial speech, some of which was content-based:

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. [Citing cases] With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public

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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).

[32] Metromedia, 453 U.S. at 513. This was a plurality opinion now recognized by the Court as a majority opinion, but not for that part of the opinion that decided the noncommercial speech issue. City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1474 n.5 (2022) (explaining that Parts I-IV, "the relevant portion of the opinion was also joined by a fifth").

[33] The following signs were exempt: 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.

> debate would be to allow that government control over the search for political truth." [Citing case] [34]

A substantial number of courts have followed this holding, and have held that exemptions that distinguish among noncommercial signs are invalid.[35] Other courts have not followed it and

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[34] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514-515 (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 the Metromedia opinion. The ordinance exempted for sale or for rent signs, but the Supreme Court had 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).

[35] 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, 249 (9th Cir. 1988) (exemptions similar to those invalidated in Metromedia); GEFT Outdoor, L.L.C. v. Monroe Cnty., 2021 WL 5494483, at *9 (S.D. Ind. Nov. 23, 2021) (governmental signs sculptures, fountains, mosaics and design features which do not incorporate advertising or identification, and temporary noncommercial signs); (Int'l Outdoor, Inc. v. City of Troy, No. 17-10335, 2021 WL 2275977, at *1 (E.D. Mich. Apr. 6, 2021) (exceptions including street signs, "temporary signs," and "flags"); Vugo, Inc. v. City of New York, 309 F. Supp.3d 139 (S.D.N.Y. 2018) (invalidating exemption for taxis and share hire liveries from ordinance prohibiting advertising in vehicles); Strict Scrutiny Media, Co. v. City of Reno, 290 F. Supp.3d 1149, 1158 (D. Nev. 2017) (exemptions for on-premise signs); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; exceptions for flags, special events, and civic events); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Fla., No. 8:15-CV-2576-T-30JSS, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (several exemptions including exemptions for government signs); Bee's Auto, Inc. v. City of Clermont, 8 F. Supp. 3d 1369, 1380 (M.D. Fla. 2014) (ordinance identified 18 types of signs exempt from permit requirements, subject only to limitations for that type of sign; majority content based, aff'd, (Case No. 15-10212, 11th Cir., Sept. 3, 2015); Adirondack Advert., LLC v. City of Plattsburgh, N.Y., No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *7 (N.D.N.Y. Sept. 30, 2013) (specified exceptions); Bowden v. Town of Cary, 754 F. Supp. 2d 794 (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).

have upheld sign ordinances that included similar exemptions.[36] Chief Justice Burger's dissent in Metromedia caustically criticized this holding as bizarre. Metromedia did not consider problems raised by the content-based nature of some of these signs, which are discussed in the next section.

§ 2:4. The Neutrality Principle and Content-Based Speech

§ 2:4[1]. What This Requirement Means

Another major free speech principle that courts must follow is that laws cannot be content-based. They must be content neutral, which means they must have a neutral effect on speech. Most on-premise sign ordinances have a neutral effect on speech because they regulate only the way in which signs are displayed, such as the size, number and height of signs. Problems may arise, however, if an on-premise sign ordinance violate the neutrality requirement.[37] Two types of neutrality are required: viewpoint neutrality and content neutrality.[38] A sign ordinance violates viewpoint neutrality if it regulates a point of view.[39] An example is a sign ordinance that prohibits signs that oppose the hunting of whales. A sign ordinance also violates content neutrality if it

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[36] Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 368 (4th Cir. 2012) (15 types of signs exempt); Stott Outdoor Advert. v. Cty. of Monterey, 601 F. Supp. 2d 1143, 1156 (N.D. Cal. 2009) ("no contention or showing that the ordinance improperly restricted noncommercial speech more stringently than commercial speech"); 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); ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 839 (S.D. Cal. 2017) (mural exception applied to artwork that does not contain "copy, advertising symbols, lettering, [or] trademarks," public interest signs); Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (government uses exempted by state law); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 (N.D. Ill. 1990) (holding argument rejected "for reasons stated in the concurring and dissenting opinions" in Metromedia), aff'd on the analysis adopted in the district court, 1993 WL 64838, 989 F.2d 502 (7th Cir. 1993) (Table); Nat'l Advert. Co. v. City of Bridgeton, 626 F. Supp. 837, 838 (E.D. Mo. 1985) (Street Graphics Model Ordinance, noting but not invalidating exemptions); 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); Adams Outdoor Advertising Limited Partnership v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020) (rejecting argument that ordinance systematically disfavored noncommercial speech because nonprofits had fewer resources to spend on communicating noncommercial messages than for-profit counterparts); Pigg v. State Dep't of Highways, 746 P.2d 961, 969 (Colo. 1987) (holding hardship-based exemption for nonconforming tourist-related signs did not unconstitutionally discriminate in favor of tourist-related advertising devices).

[37] 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).

[38] 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).

[39] 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.

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 the high standard of strict scrutiny judicial review applies to content-based regulations of noncommercial speech.[40] Strict scrutiny is demanding judicial review because courts apply a presumption of unconstitutionality to content-based regulations. 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."[41] The Supreme Court has held that the traffic safety and aesthetic interests that usually justify sign ordinances satisfy intermediate scrutiny review,[42] but the courts have not held that aesthetics and traffic safety are compelling interests that satisfy strict scrutiny review.[43] 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.[44] A less-burdensome alternative to the regulation is also required if it is available, and a law must leave open ample alternate means of communication.[45]

Although the Supreme Court had indicated that strict scrutiny did not apply to content-based regulations of commercial speech,[46] it seemed to hold in Sorrell v. IMS Health Inc., that

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

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

[42] § 2:6[3].

[43] Cent. Radio Co. Inc. v. City of Norfolk, 811 F.3d 625, 633–34 (4th Cir. 2016) (distinctions between flags); Knutson v. City of Oklahoma City, 402 F. Supp. 3d 1266, 1275 (W.D. Okla. 2019) (exemptions). See also Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) (exemptions of noncommercial content). Contra Fanning v. City of Shavano Park, Texas, No. SA-18-CV-00803-XR, 2019 WL 7284945, at *10 (W.D. Tex. Dec. 19, 2019) (ordinance allowing banners for one week during year held content based; city of 3000 puts a central focus on its appearance, beauty, and charm).

[44] 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)

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

[46] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 n.6 (1980) ("Two features of commercial speech permit regulation of its content".) See also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("By contrast, regulation of commercial speech based on content is less problematic".); 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).

strict scrutiny applies if commercial speech is content-based.[47] 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, because 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."[48] Moreover, the law's burden was more than incidental and "directed at certain content and ... aimed at particular speakers."[49] 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."[50] It then applied the Central Hudson test to hold the law invalid.

Despite its discussion of the heightened scrutiny standard, the courts have held that Sorrell does not modify Central Hudson's intermediate standard of judicial review.[51] They have not usually applied it to invalidate sign ordinances that regulate commercial speech,[52] though in

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[47] 564 U.S. 552 (2011). *See* Ashutosh Bhagwat, Sorrell v. Ims Health: Details, Detailing, and the Death of Privacy, 36 Vt. L. Rev. 855 (2012); Richard Samp, Sorrell v. Ims Health: Protecting Free Speech or Resurrecting Lochner?, 2011 Cato Sup. Ct. Rev. 129; Tamara R. Piety, "A Necessary Cost of Freedom"? The Incoherence of Sorrell v. Ims, 64 Ala. L. Rev. 1, 2 (2012).

[48] Id. at 564.

[49] Id. at 567.

[50] Id. at 571.

[51] Retail Digital Network, LLC v. Prieto, 861 F.3d 839, 846-848 (9th Cir. 2017) (advertising, citing cases). *Accord* Greater Philadelphia Chamber of Commerce v. City of Philadelphia, 949 F.3d 116, 140 (3d Cir. 2020) (employment discrimination). 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).

[52] Retail Digital Network, LLC v. Prieto, 861 F.3d 839, 841 (9th Cir. 2017) (statute forbidding leasing of advertising space to manufacturers of alcoholic beverages); Wag More Dogs Liab. Corp. v. Cozart, 680 F.3d 359, 366 n.4 (4th Cir. 2012) (mural; "Sorrell did not signal the slightest retrenchment from its earlier content-neutrality jurisprudence."); Vugo, Inc. v. City of Chicago, 273 F. Supp. 3d 910, 916 (N.D. Ill. 2017) (ordinance prohibiting commercial advertising on the interior or exterior of a drivers' vehicles); Contest Promotions, LLC v. City & Cty. of San Francisco, No. 16-CV-06539-SI, 2017 WL 76896, at *5 (N.D. Cal. Jan. 9, 2017) (regulation of off-premise and on-premise signs); 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 billboard regulation). See also Massachusetts Ass'n of Private Career Sch. v. Healey, 159 F. Supp.3d 173 (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.")

some cases they have applied it to invalidate sign ordinances that were content based or directed toward a particular advertising message.[53]

The Supreme Court in City of Austin, Texas v. Reagan Nat'l Advert. of Austin,[54] considered arguments that a sign ordinance was content-based in a case where a sign ordinance regulated billboards. It decided, however, that the case implicated noncommercial speech because the billboards displayed commercial messages, and because the ordinance admitted no exception for noncommercial speech.[55]

§ 2:4[2]. Reed v. Town of Gilbert

Reed v. Town of Gilbert, in an opinion by Justice Thomas, provided important guidance for judicial consideration of content-based sign regulation that strengthened free speech requirements.[56] This section explains the holdings in Reed, which the Supreme Court considered

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[53] Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) (mural ordinance; content based); GJJM Enterprises, LLC v. City of Atl. City, 352 F. Supp. 3d 402, 406 (D.N.J. 2018)) (state statute banning "bring your own beer and wine" (BYOB) advertising held content based); Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, Mass., , 319 (D. Mass. 2012) (ordinance prohibiting outdoor advertising of tobacco products). See McLean v. City of Alexandria, 106 F. Supp. 3d 736, 741 (E.D. Va. 2015) (invalidating ordinance under intermediate scrutiny that prohibited parking vehicle on any city street for purpose of displaying vehicle for sale; strict scrutiny considered by Sorrell not required). See also Marras v. City of Livonia, 575 F. Supp. 2d 807, 817 (E.D. Mich. 2008) (invalidating ordinance prohibiting commercial messages on parked vehicles; ordinance did not advance governmental interests and was not narrowly drawn).

[54] 142 S. Ct. 1464 (2022).

[55] Id. at 1471 n.3.

[56] 576 U.S. 155 (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); Sarah Adams-Schoen, Reed Applied: The Sign Apocalypse or Another Bump in the Road, Zoning and Planning Law Reports, vol. 39, no. 7 (2016); Genevieve Lakier, Reed V Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233 (2016); James Andrew Howard, Salvaging Commercial Speech Doctrine: Reconciling Reed v. Town of Gilbert with Constitutional Free Speech Tradition, 27 Geo. Mason U. Civ. Rts. L.J. 239 (2017); Kolby P. Marchand, Free Speech and Signage After Reed v. Town of Gilbert: Signs of Change from the Bayou State, 44 S.U. L. Rev. 181 (2017); Lee Mason, Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert, 84 U. Chi. L. Rev. 955 (2017); Minch Minchin, A Doctrine at Risk: Content Neutrality in A Post-Reed Landscape, 22 Comm. L. & Pol'y 123 (2017); Enrique Armijo, Reed v. Town of Gilbert: Relax, Everybody, 58 B.C. L. Rev. 65, 66 (2017); Note, Leah K. Bradley, Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment purposes? 21 Suffolk J. Trial & App. Advoc. 320-344 (2016); Dan V. Kozlowski & Derigan Silver, Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert, 24 Comm. L. & Pol'y 191 (2019); David L. Hudson, Jr., The Content-Discrimination Principle and the Impact of Reed v. Town of Gilbert, 70 Case W. Res. L. Rev. 259 (2019); Daniel R. Mandelker, Billboards, Signs, Free Speech, and the First Amendment, 55 Real Prop. Tr. & Est. L.J. 367, 415-430 (2020) (discussing Reed v. Town of Gilbert); Susan L. Trevarthen & Adam M. Hapner, The True Impact of Reed v. Town of Gilbert on Sign Regulation, 49 Stetson L. Rev. 509 (2020).Note, Free Speech Doctrine After Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016). See also 24 A.L.R.7th Art. 6 (2017) (discussing cases applying Reed).

in City of Austin, Texas v. Reagan Nat'l Advert. of Austin,[57]

A sign ordinance required a permit for signs but exempted twenty-three 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. A church, which had no building and met in different temporary locations, frequently placed signs in the public right-of-way indicating when it would hold services. The town cited the church twice for violating the code, partly because the church exceeded the time limits allowed for display. Litigation followed, and the Court held that the different restrictions the ordinance applied to these signs violated the free speech clause.[58]

Reversing the Ninth Circuit Court of Appeals, which upheld the exemptions, the Supreme Court held that courts must determine content neutrality on the face of an ordinance. It explained that because this ordinance was a "paradigmatic example of content-based discrimination,"[59] 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.[60]

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,'"[61] or if they were adopted by the government "because of disagreement with the message [the speech] conveys."[62] The Court eliminated the first rule in Reagan.[63]

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[57] 142 S. Ct. 1464 (2022).

[58] For example, ideological signs could be up to twenty 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, 576 U.S. at 160..

[59] Reed, 576 U.S. at 169.

[60] Id. at 163.

[61] Id. at 159-160.

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

[63] This holding inverted a "purpose-based" rule several circuits had previously adopted that upheld sign ordinances if

The Court in Reed decided the sign code was content-based on its face, as its definition of a sign depended on its communicative content. One example was the code's definition of a political sign as a sign whose message was "designed to influence the outcome of an election." Event signs allowed by the ordinance also were content-based, such as the display political signs before and after an election. 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.[64] Although the Court did not discuss this issue, this holding covers other types of event signs such as a temporary sign with a "grand opening message."

Reed rejected any reasons for holding that a sign ordinance with content was not content-based. The strict scrutiny review required for content-based ordinances apply despite a government's benign motive, a content-neutral reason for the ordinance, 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."[65] Neither was the ordinance content-neutral because it was viewpoint-neutral.[66] The Court also considered whether an ordinance is content-based if it is speaker-based, a topic discussed below.[67]

These rules for deciding when an ordinance is content-based are clearly ambiguous and difficult to apply. Reed adopted additional rules for deciding when a sign ordinance is content-

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they could be justified without reference to content. Wag More Dogs Liab. Corp. v. Cozart, 680 F.3d 359, 368 (4th Cir. 2012) (ordinance imposed size requirements on "business signs" that did not similarly apply to noncommercial signs and exempted fifteen types of signs; ordinance enacted, among other aims, to promote traffic safety and county's aesthetics, interests unrelated to messages displayed); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009) (time limits, lack of standards; "nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another"). A competing test held that laws are content based if they make facial content-based distinctions. Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 906 (9th Cir. 2007) (ordinance may have impermissibly regulated noncommercial speech on basis of content by exempting certain noncommercial off-site signs from the permit requirement); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir.) (exemptions impermissibly discriminate between types of noncommercial speech based on content), *cert.* denied, 498 U.S. 852 (1990). See Genevieve Lakier, Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233, 238-250 (2016).

[64] Reed, 576 U.S. at 171.

[65] Reed, 576 U.S. at 156. The Court interpreted an earlier case to mean that government purpose is relevant only when a law is content-neutral.

[66] Id. at 168. 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).

[67] See § 2:5.

based, and these rules are discussed later as part of the review of the Reagan case.

Having decided the ordinance was content-based, the Court next applied strict scrutiny review. It rejected the aesthetic and traffic safety interests the town asserted. Assuming they were compelling, the Court held the code's distinctions among different types of signs were "hopelessly under-inclusive."[68] The code allowed an unlimited proliferation of the larger ideological signs but strictly limited the number, size, and duration of the smaller directional signs. The Town could not claim that placing strict limits on temporary directional signs was necessary to beautify the town while allowing an unlimited number of other types of signs that created the same problem. Aesthetically, temporary signs were no greater an eyesore than political and ideological 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 the display of temporary directional signs was necessary for traffic safety, but that limiting the display of other types of signs for this reason was unnecessary. The town had "ample content-neutral options available" to deal with safety and aesthetics problems.[69]

Justice Alito, in a concurring opinion,[70] provided some relief from the majority opinion by offering examples of sign regulations that could meet Reed's test for content neutrality. They included rules regulating the size, location and placement of signs, which are regulations commonly applied to on-premise signs. Justice Alito's opinion is concurring, and not controlling.[71]

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[68] Reed, 576 U.S. at 171.

[69] Id. at 173. These included regulating a sign's message: size, building materials, lighting, moving parts, and portability, and regulating signs on public property.

[70] Reed, 576 U.S. at 174 (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.

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

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

§ 2:4[3]. How Courts Have Applied Reed

The cases cited in this section were decided before the Supreme Court's decision in City of Austin v. Reagan National Advertising of Austin, which modified the rules adopted in Reed for content-based sign regulations. Cases decided after Reed but before Reagan struck down content based sign ordinances that applied different requirements to different kinds of commercial speech,[72] sign ordinances that discriminated against noncommercial speech,[73] and content based regulations of speech.[74] Courts approved ordinances that contained different

rule.

[72] Knutson v. City of Oklahoma City, 402 F. Supp. 3d 1266, 1275 (W.D. Okla. 2019) ("Commercial or industrial real estate signs are given more favorable treatment than residential real estate or construction signs");

[73] Knutson v. City of Oklahoma City, 402 F. Supp. 3d 1266, 1275 (W.D. Okla. 2019) (commercial signs given more preferential treatment than residential expressive signs, which are allowed only in residential areas); Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana, 187 F. Supp. 3d 1002, 1013 (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 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).

[74] Boyer v. City of Simi Valley, 978 F.3d 618, 624 (9th Cir. 2020) (exempting certain authorized vehicles from ban on mobile billboard advertising displays held content-based and unconstitutional); Wagner v. City of Garfield Heights, 675 F. App'x 599, 607 (6th Cir. 2017) (noncommercial opinion signs subject to restrictions different from other sign types that also received exemptions); GEFT Outdoor, L.L.C. v. City of Westfield, 491 F. Supp. 3d 387, 406 (S.D. Ind. 2020) (invalidating exemptions based on a sign's communicative content that regulated speech based on a message's function or purpose, such as flags, text or logos on gasoline pumps or ATM machines, and non-permanent, on-premises signs; must determine purpose to decide whether sign is exempt from permit requirement); Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar Park, 387 F. Supp.3d 703, 714 (W.D. Tex. 2019) (content-based regulation imposed on off-premise signs); www.RicardoPacheco.com v. City of Baldwin Park, No. 216CV09167CASGJSX, 2017 WL 2962772, at *8 (C.D. Cal. July 10, 2017) (preferences for special event and business signs speaker-based; additional flag provision for some holidays and additional election sign provision content-based); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; ordinance listed eight examples of temporary signs on basis of content before stating time restriction; exceptions for flags, special events, and civic events); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Fla., No. 8:15-CV-2576-T-30JSS, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (ordinance exempted numerous categories of signs from permit requirement, such as government signs, holiday and seasonal signs, political campaign signs, and warning signs; exterior of restaurant decorated to create "Key West" style atmosphere and showcase owners' sense of humor); Grieve v. Vill. of Perry, No. 15-CV-00365-RJA-JJM, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016), report and recommendation adopted, No. 15-CV-365-A, 2016 WL 4478683 (W.D.N.Y. Aug. 25, 2016) (plaintiff posted protest signs on his property; code allowed display of several types of commercial signs without permit but required permits for display of noncommercial signs). But see Seitz v. East Nottingham Township, 2017 WL 2264637 (E.D. Pa. May 24, 2017) (rejecting argument that ordinance conferred special treatment for signs advertising Christmas trees).

requirements for different types of commercial signs,[75] standards for conditional uses,[76] regulations for temporary signs,[77] and exemptions for government signs.[78] Courts since Reed also struck down sign ordinances because they did not meet the narrow tailoring requirement.[79] The Model Ordinance in Street Graphics and the Law[80] contains definitions and regulations for signs that meet the requirements of Reed.

§ 2:4[4]. City of Austin v. Reagan National Advertising of Austin

In City of Austin v. Reagan National Advertising of Austin,[81] Justice Sotomayor upheld a sign ordinance that treated off-premise and on-premise signs differently based on a definition of off-premise signs that is commonly used but was claimed to be content-based. Off-premise signs included billboards. "[O]ff-premise sign" were distinguished from on-premise signs because they

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[75] Shaw v. City of Bedford, 262 F. Supp.2d 754 (S.D. Ind. 2017) (upholding ordinance limiting display of permanently-affixed signs in residential areas solely to entrances of residential developments, and exempting slightly larger flags from height and setback requirements).

[76] Conteers LLC v. City of Akron, No. 5:20-CV-00542, 2020 WL 5529656, at *9 (N.D. Ohio Sept. 15, 2020) (conditional use standards held content neutral).

[77] Baldwin Park Free Speech Coal. v. City of Baldwin Park, 843 F. App'x 21, 23 (9th Cir. 2021) (temporary sign ordinances held content-neutral and narrowly tailored; interests in traffic safety and aesthetics were significant and not diminished by permit-exempt and special sign rules; ordinance narrowly tailored, requirement that an applicant submit a "drawing or photograph of the proposed temporary sign" to show "[h]eight, [w]idth and [l]anguage" upheld).

[78] Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cty., Virginia, No. 19-1151, 2021 WL 1854750, at *5 (4th Cir. May 10, 2021) (upholding exemption of government signs); Signs for Jesus v. Town of Pembroke, NH, 977 F.3d 93, 104 (1st Cir. 2020) (same, citing cases). Justice Alito, in his concurrence in Reed, explained that "government entities may also erect their own signs consistent with the principles that allow governmental speech" and that "[t]hey may put up all manner of signs to promote safety." Reed, 576 U.S, at 175.

[79] Wagner v. City of Garfield Heights, 675 F. App'x 599, 607 (6th Cir. 2017) (political sign regulation); Cent. Radio Co. Inc. v. City of Norfolk, 811 F.3d 625, 634 (4th Cir. 2016) (exemptions); Knutson v. City of Oklahoma City, 402 F. Supp. 3d 1266, 1275–76 (W.D. Okla. 2019) (different treatment of different kinds of signs); Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana, 187 F. Supp. 3d 1002, 1014–15 (S.D. Ind. 2016) (opinion signs, exempted signs); Contra Fanning v. City of Shavano Park, Texas, No. SA-18-CV-00803-XR, 2019 WL 7284945, at *10 (W.D. Tex. Dec. 19, 2019) ("If the City believes banner signs damage its interest in the aesthetics of its community and excludes such signs for 51 weeks out of the year, then the restriction can hardly be more narrowly drawn."). See also Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1201 (9th Cir. 2016) (mobile advertising ordinances not content based, narrowly drawn).

[80] Street Graphics Model Ordinance, in Street Graphics, supra note 2, at 66. The model ordinance does not define Grand Opening signs, as that definition would be content-based. 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).

[81] 142 S. Ct. 1464 (2022).

were defined to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The ordinance prohibited new off-premise signs but grandfathered existing off-premise signs. A grandfathered sign could not be digitized but on-premise signs could be digitized, which permitted electronically controlled changeable-copy. Reagan National applied for but was refused permission to digitize its grandfathered signs and sued claiming a free speech clause violation. Because the ordinance applied to noncommercial as well as commercial speech, the Court had to consider whether it was content-based.

Justice Sotomayor held that the definition of off-premise signs was not content-based. The Court had always recognized this distinction and it was confirmed by history and practice. She found a regulatory tradition that supported the different treatment of signs "that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite."[82] "Tens of thousands of municipalities nationwide" have analogous distinctions in their sign codes, she added, and the distinction between off-premise and on-premise signs is on-/off-premises distinction is similar to ordinary time, place, or manner restrictions. This decision makes many of the post-Reed content-based decisions questionable.[83]

Justice Sotomayor remanded the case because she held that the first amendment inquiry is not ended even if a law is content neutral. There may be evidence of an impermissible purpose or justification, and a restriction on freedom of speech or expression must be "narrowly tailored to serve a significant governmental interest," one of the requirements for time, place, and manner regulations. They must also leave alternate channels of communication open, a requirement she did not mention. She also did not mention the other rules for content-based speech that she quoted from Reed.

§ 2:4[4][a]. The Need to Read Rule

Justice Sotomayor considered what has been called a "need to read" rule,[84] though she called it a "read-the-sign" rule. This rule holds that a sign ordinance is content-based if an

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[82] She noted that different treatment proliferated with the adoption of the federal Highway Beautification Act of 1965, 23 U.S.C. § 131, which includes it and has been adopted by two-thirds of the states

[83] § 2:4[3].

[84] See § 2:4[6], discussing the need to read test before the Reagan decision.

enforcement officer has to read it to decide whether a sign has content. As an example, assume a sign ordinance authorizes on-premise signs that advertise real estate for sale, lease, or exchange. The question is whether an ordinance is content-based because an enforcement officer has to read a sign to decide whether it has a real estate message. 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, the court held, this principle would mean that every sign, except a blank sign, would be content based.[85]

Justice Sotomayor rejected this rule. She held it was "too extreme" an interpretation of Court precedent, because the definition of an off-premise sign in the Austin sign ordinance required an examination of speech only to draw "neutral, location-based lines," and was agnostic as to content. As she explained, "First Amendment precedent and doctrine have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." Supreme Court precedent supported her decision, she held, because it has rejected the view that "any examination of speech or expression inherently triggers heightened First Amendment concern." The ordinance only requires "reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location.

This statement is not quite accurate, because the Supreme Court had split on whether a need to read rule was required.[86] Justice Sotomayor did not discuss these cases. Rejection of the need to read rule means that courts do not have an automatic trigger they can use to turn a sign ordinance into a content-based regulation.

§ 2:4[4][b]. Rules for Content-Based Speech

Justice Sotomayor reinterpreted the rules for content-based speech the Court had adopted in Reed, and distinguished Reed on its facts as "a very different regulatory scheme" that applied "distinct size, placement, and time restrictions" to twenty-three different types of signs, with some signs regulated more restrictively than others. She noted that the Court in Reed "focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain

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[85] 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 & remanded on other grounds, 576 U.S. 155 (2015).

[86] § 2:4[6].

temporary directional messages," and discussed the signs that received either favorable or unfavorable treatment.[87]

Justice Sotomayor emphasized that she did not "nullify" Reed's protections, but she quoted rules from the Reed decision that defined content-based speech in different ways. One of these rules held that the ordinance in Reed was content based because it "singl[ed] out specific subject matter for differential treatment," and because its restrictions were a "prohibition of public discussion of an entire topic." Another rule held that a regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." Another held that the city's distinction, of off-premise signs was content neutral because it did not have a content-based purpose or justification. At another point in her opinion Justice Sotomayor also said that "[a] sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications" for political or other messages.

Reed adopted another rule quoted but not discussed by Justice Sotomayor that turns on facial distinctions and that could have been applied to the off-premise sign definition in Reagan. It holds that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter." The off-premise sign definition in the Austin sign code could have been held content based under the obvious facial distinction rule because it clearly defined the content of a sign.

This rule added that other distinctions "are more subtle, defining regulated speech by its function or purpose," and the sign company argued that the sign code was content based because it defined off-premise signs based on their function or purpose. Justice Sotomayor disagreed. Their argument took the rule too far, as this rule was intended only to address subtler forms of discrimination. It means only that a law cannot escape classification as content based "simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result," though not every function or purpose classification is content based.

These conflicting statements are difficult to reconcile; perhaps all of these rules apply. The quotations selected by Justice Sotomayor suggest alternatively that speech is content-based if a

[87] Justice Sotomayor also discussed Reed's holding that an ordinance does not have to be viewpoint neutral to be unconstitutional. She quoted Reed as holding that By treating some messages differently from other messages, the sign ordinance singled out "specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter." [Citing case]

topic or idea is discussed, if there is targeting or prohibition of discussion, if there is targeting of subject matter for special treatment, or if there is a content-based purpose or justification. Her statement that a "sign's substantive message itself is irrelevant" is puzzling.

§ 2:4[4][c]. Broad or Narrow Reading.

A broad reading would consider the downgrade of the function or purpose rule in *Reed* and the selection of multiple rules for content based speech as a rejection or revision of *Reed* . A narrow reading would limit *Reagan* to its treatment of the off-premise v. on-premise distinction because it concentrated on that distinction, the history and practice that supports it, and the location exception for the off-premise sign definition problem.

The question is how far the location explanation for upholding the off-premise sign definition extends. Regulating location is one of the purposes of every sign ordinance. Take the simple real estate sign. Sign codes usually define these signs as "Signs advertising property for sale." This is message-based content under *Reed*. What if a sign ordinance defined these signs as "Signs located on property offered for sale." This definition should fall within the location exception. What if the definition is changed to allow "Signs advertising and located on property offered for sale." Is this definition within the location exception?

§ 2:4[5]. How the Courts Have Applied City of Austin v. Reagan National Advertising of Austin

The courts have followed Reagan and have held that sign ordinances that prohibited off-premise signs[88] and that banned off-premise digital signs[89] are not content-base, and have held a location-based distinction between off-premises signs and on-premises signs was not content-based.[90]

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[88] Geft Outdoor, LLC v. City of Westfield, 39 F.4th 821, 824 (7th Cir. 2022) (applying rule that speech is content-based only if it "target[s] speech based on its communicative content," or "applies to particular speech because of the topic discussed or the idea or message, and rejecting need to read rule).

[89] Norton Outdoor Advert., Inc. v. Vill. of St. Bernard, No. 1:20-CV-350, 2022 WL 2176339, at *4 (S.D. Ohio June 16, 2022) (holding ban on off-premises variable message billboards content neutral).

[90] Outfront Media, LLC v. City of Grand Rapids, No. 357319, 2022 WL 3329484, at *11 (Mich. Ct. App. Aug. 11, 2022) (holding a location-based distinction between off-premises signs and on-premises signs does not amount to a content-based restriction).

§ 2:4[6]. The "Need to Read" Rule Before Reagan

This section discusses case law that considered the need to read rule before the Supreme Court rejected the rule in Reagan. Cases that applied the rule before Reagan are overruled.

The Supreme Court's record on the need to read rule before Reagan is mixed. It applied the rule in cases that did not consider sign ordinances.[91] These cases considered statutes that prohibited certain types of content, such as statements on "controversial issues of public importance," or that required an official decision based on certain content, such as the type of magazine being regulated. The Court did not explain why it adopted the need to read rule in these cases.

Then, in Hill v. Colorado,[92] the Court upheld a state statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility and rejected the need to read rule. 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 person." The statute did not apply to persons who were not leaf letters 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.[93] It rejected the need to read rule by rejecting an argument that the law was content-based because the

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[91] McCullen v. Coakley, 573 U.S. 464, 479 (2014) (act would be content based if enforcement authorities had to examine content of message to determine whether violation has occurred, but act does not require this); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (must examine content of message to assess costs of security for parade participants to determine fee required by ordinance); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (enforcement authorities must read content of message to decide whether magazine should be taxed); F.C.C. v. League of Women Voters of California, 468 U.S. 364, 383 (1984) (statute forbade any noncommercial educational broadcasting station that receives a grant from the Corporation for Public Broadcasting to "engage in editorializing;" "enforcement authorities must necessarily examine the content of the message" to decide if violation has occurred). In some cases, a court relied on the need to read test in addition to deciding that an ordinance is content based under other criteria. E.g., Neighborhood Enters. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) (and holding that "zoning code's definition of 'sign' is impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction"), cert. denied, 565 U.S. 1197 (2012).

[92] 530 U.S. 703 (2000), noted, 114 Harv. L. Rev. 289 (2000). See also Regan v. Time, Inc., 468 U.S. 641 (1984) (color and size requirements in federal statute regulating currency reproductions did not regulate content because; official did not have to evaluate a message when deciding whether it violated the statute).

[93] See § 2:7.

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."[94] 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.[95]

Lower federal courts vary in their interpretation of the Supreme Court decisions. A substantial number of courts do not apply the need to read requirement,[96] or do not apply it when content neutrality is not an issue.[97]A number of other cases, however, relied on the need to read

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

[95] Id. at 731-732.

[96] Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 409 (D.C. Cir.) (ordinance requiring event-related signs to be removed from public lampposts; not content-based though officials must look at sign to determine if it is event-related, quoting Hill), cert. denied, 138 S.Ct. 334 (2017); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 368 (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," quoting Hill); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (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," quoting Hill); 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 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."), cert. denied, 552 U.S. 1100 (2008); Baldwin Park Free Speech Coal. v. City of Baldwin Park, No. 2:19-CV-09864-CAS-EX, 2020 WL 758786, at *6 (C.D. Cal. Feb. 13, 2020) (quoting Hill); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F. Supp. 3d 670, 680 (W.D. Tex. 2019) (rejecting view that ordinance is content based if viewer must read the sign to decide what rules apply; "Reagan and Lamar urge a rule that would apply strict scrutiny to all regulations for signs with written text"); Kennedy v. Avondale Estates, Ga., 414 F. Supp. 2d 1184, 1198 (N.D. Ga. 2005) (sign regulation that requires regulator to read sign to determine if regulation applies is not automatically content-based); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295, 311 (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); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155, 168 n.16 (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).

[97] Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1200 (9th Cir. 2016) (motorized billboard ordinances not content based; officer must decide only whether vehicle is an excluded "advertising display" with primary purpose to display messages rather than transporting passengers or carrying cargo); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1078 (9th Cir.) (refusing to apply test when ordinance not content based), cert. denied, 549 U.S. 822 (2006); Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295, 311 (E.D.N.Y. 2005) (reading of permit application to determine neutral information to decide type of sign or whether banned as

a sign to decide whether an it was content based,[98] or whether there was an exemption from the ordinance that made the ordinance content-based.[99] 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,[100] or whether a sign was on-premise or off-premise in order to determine whether a fee was due.[101]

§ 2:5. Speaker-Based Neutrality

Speaker-based neutrality is another form of content neutrality. Reed v. Town of Gilbert considered this issue.[102] There the Court decided whether exemptions included in the town's sign 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 said, "'are all too often simply a means to control content.'"[103] It added that "we have

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billboard, or to distinguish real estate and business signs, does not make an ordinance content-based).

[98] 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), cert. denied, 565 U.S. 1197 (2012); GEFT Outdoor, L.L.C. v. City of Westfield, 491 F. Supp. 3d 387, 405 (S.D. Ind. 2020) ("The fact that a government official has to read a sign's message to determine the sign's purpose is enough, under Reed, to subject the law to strict scrutiny even though the sign's location also is involved."); Withers v. Vill. of Airmont, No. 07 CIV. 9674 (SCR), 2010 WL 11712641, at *3 (S.D.N.Y. Apr. 30, 2010) (political signs; village code content-based because it was necessary to look at content of sign to know which provisions apply, even within the category of temporary signs); 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").

[99] Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895 (9th Cir. 2007) (exemptions in ordinance); Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (definition of sign), cert. denied, 565 U.S. 1197 (2012); 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); Int'l Outdoor, Inc. v. City of Troy, No. 17-10335, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (temporary signs and other exemptions); Harp Advert. of Illinois, Inc. v. Vill. of Chicago Ridge, No. 90 C 867, 1992 WL 386481 (N.D. Ill. Mar. 13, 1992) (ordinance content based because it "requires the Village to consider the content of signs to determine whether or not they are exempted from the provisions of the sign code").

[100] 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); Savago v. Vill. of New Paltz, 214 F. Supp. 2d 252, 257 (N.D.N.Y. 2002).

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

[102] 576 U.S. 155 (2015).

[103] Id. at 170, quoting Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'"[104] It is not clear from this statement whether speaker-based speech must be content-based before it is subject to strict scrutiny.

This problem can be important in sign regulation. Sign ordinances usually assign different 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 did not require speaker-based neutrality. The Court in Turner Broadcasting System v. Federal Communications Commission (I),[105] which is cited in Reed, upheld the "must-carry" provisions of a federal statute. It required cable operators to carry a certain number of the broadcast signals according to a statutory formula 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,"[106] which is the 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 the permit process.[107]

Despite these decisions, some lower courts prior to Reed struck down sign regulations because they were speaker-based.[108] One court, for example, held invalid an exemption for signs located on fences or walls surrounding athletic fields and within sports arenas and stadiums, but

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[104] Reed, 576 U.S. at 170, quoting Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 658 (1994).

[105] 512 U.S. 622 (1994).

[106] 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 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.").

[107] 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.").

[108] 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").

not signs on fences and walls located elsewhere.[109] Language in some Supreme Court cases supports these decisions by indicating that speaker-based limitations on speech are content-based.[110] Lower court decisions on this issue post-Reed are mixed.[111]

The Supreme Court considered this issue most recently in Sorrell v. IMS Health, Inc.[112] It 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 partly 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.[113] It did not provide an explanation for this conclusion. The dissent argued it was not unusual for "particular rules" to be speaker-based because they affected only a class of

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[109] Bonita Media Enterprises, LLC v. Collier Cty. Code Enf't Bd., No. 207CV-411-FTM-29DNF, 2008 WL 423449 (M.D. Fla. Feb. 13, 2008).

[110] 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).

[111] Harel Plumbing & Heating, Inc. v. Clark Cnty., No. 219CV00735KJDBNW, 2021 WL 3932252, at *4 (D. Nev. Sept. 2, 2021) (rejecting argument that ordinance was speaker-based because it exempted hotels and recreational facilities from billboard ban); Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (rejecting argument that ordinance was speaker-based because it applied to new speakers but not grandfathered speakers and to nongovernmental speakers but not governmental speakers; state statute required protection of all nonconforming uses, and exemption for land users was based on state law); 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); California Outdoor Equity Partners, LLC v. City of Los Angeles, 145 F. Supp. 3d 921, 929 (C.D. Cal. 2015) (rejecting allegation that ordinance prefers certain speakers over others, such as operators of on-site signs; Reed not cited), with www.RicardoPacheco.com v. City of Baldwin Park, No. 216CV09167CASGJSX, 2017 WL 2962772 (C.D. Cal. July 10, 2017) ("serious questions" whether speaker preference for businesses, especially businesses hosting special events, reflects a content preference for commercial speech). See Citizens for Free Speech, LLC v. Cty. of Alameda, 194 F. Supp. 3d 968, 981 (N.D. Cal. 2016) (applying Reed analysis of speaker-based speech in finding ordinance with exemptions violated equal protection).

[112] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011). Reed cited and quoted from but did not explain the holding in Sorrell. E.g., Reed, 576 U.S. at 153. 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").

[113] Sorrell, 564 U.S. 552, 567.

entities, such as firms subject to an energy regulation that imposed labeling requirements for home appliances.[114]

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[1]. An Overview

This section considers the judicial review standards the Supreme Court has adopted for the review of laws that affect content-neutral commercial speech.[115] Beginning with its Central Hudson decision in 1980, the court has applied an intermediate scrutiny judicial review that is less than strict scrutiny[116] but stronger than the weaker rational basis review courts apply to economic regulation.[117] A year later the Court applied Central Hudson to uphold a San Diego sign ordinance that prohibited commercial billboards.[118] These are the two principal Supreme Court decisions on the regulation of commercial speech.[119] The Reed case left some doubt about the continued validity of these decisions, as the Court in this case did not mention either decision. There was some concern that Reed required all laws, including laws regulating commercial speech to be content neutral, but most sign ordinance cases since Reed have held that the earlier commercial speech cases are not affected by the Reed decision.[120] Cases post-Reed continue to apply the Central

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[114] Sorrell, 564 U.S. 552, 589.

[115] 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).

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

[117] 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.").

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

[119] Daniel R. Mandelker, Billboards, Signs, Free Speech, and the First Amendment, 55 Real Prop. Tr. & Est. L.J. 367, 382-402 (2020) (discussing Central Hudson and Metromedia).

[120] Harel Plumbing & Heating, Inc. v. Clark Cnty., No. 219CV00735KJDBNW, 2021 WL 3932252, at *2 (D. Nev. Sept. 2, 2021); Adams Outdoor Advertising Limited Partnership v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020) (discussing cases); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F. Supp. 3d 670, 681 (W.D. Tex. 2019) ("This Court declines to find that Reed quietly overruled Metromedia and Central Hudson without saying so".); Roland Digital Media, Inc. v. City of Livingston, No. 2:17-CV-00069, 2018 WL 6788594, at *9 (M.D. Tenn. Dec. 26, 2018); Contest Promotions, LLC v. City & Cty. of San Francisco, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) (extensively reviewing Supreme Court cases; "Reed does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the Central Hudson test.), aff'd, 704 F. App'x 665 (9th Cir. 2017), cert. denied, 138 S.Ct. 2574 (2018); RCP Publications Inc. v. City of Chicago, 204 F. Supp. 3d 1012, 1017 (N.D. Ill. 2016) (Reed did not consider this issue); Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (Reed omitted mention of Central Hudson and Metromedia); Citizens

Hudson criteria to sign ordinances regulating commercial speech.[121] There are cases holding contra when the speech is content-based or partly noncommercial.[122]

The Supreme Court has also adopted time, place and manner rules for laws that affect free speech, including sign ordinances.[123] These rules have somewhat different requirements than the Central Hudson test, but the Court has held that the requirements are substantially similar.[124] It has not decided when which one applies, or whether they have to be applied together.

§ 2:6[2]. The Central Hudson Case

The leading case that established the intermediate scrutiny standard of judicial review for commercial speech is Central Hudson Gas & Elec. Corp. v. Public Service Commission.[125] 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 recognized the distinction between commercial and noncommercial speech,

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for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 968 (N.D. Cal. 2015); California Outdoor Equity Partners v. City of Corona, No. CV 15-03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) (Central Hudson not even cited); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 635 (Cal. App. 2016) (applying Central Hudson but not discussing Reed); City of Corona v. AMG Outdoor Advert., Inc., 197 Cal. Rptr. 3d 563, 573 (2016) (Metromedia remains the law of the land); Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals, 46 N.Y.S.3d 725, 730 (N.Y. App. Div. 2017).

Cases that have considered laws other than sign ordinances have been mixed. Lee Mason, Content Neutrality and Commercial Speech Doctrine After Reed V Town of Gilbert, 84 U. Chi. L. Rev. 955, 977-979 (2017).

[121] 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).

[122] Int'l Outdoor, Inc. v. City of Troy, 974 F.3d 690, 702-08 (6th Cir. 2020), (applied Reed to hold intermediate-scrutiny standard for commercial speech applies only to speech regulation that is content-neutral on its face; regulation of commercial speech that is not content-neutral is subject to strict scrutiny under Reed). Accord GEFT Outdoor, L.L.C. v. City of Westfield, 491 F. Supp. 3d 387, 404 (S.D. Ind. 2020) (strict scrutiny applies when ordinance affects both commercial and noncommercial speech).

[123] § 2:7[1].

[124] 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).

[125] 447 U.S. 557 (1980).

accepted the rule that commercial speech requires "lesser protection," and held 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."[126]

The Court adopted four criteria for the judicial review of laws affecting commercial speech that have dominated judicial review:

> 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.[127]

Although a law that fails any one of the four criteria violates the free speech clause, the four criteria are not discrete and are interrelated.[128] The third criterion, when combined with the fourth criterion is an ends/means test that requires an acceptable fit between the regulation and its objective.[129] The Court did not require content neutrality.[130] It reaffirmed the Central Hudson criteria in a recent decision[131] though several Justices urged rejection, and a number of commentators have recommended rejection and reform.[132]

The Court in Central Hudson applied the criteria ad hoc to the Commission's regulation. It found the utility's advertising was protected speech, and held the regulation served substantial

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[126] Id. at 563.

[127] Id. at 566. Numbers are inserted to identify the four criteria.

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

[129] Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986) ("The last two steps of the Central Hudson analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends."). See also Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) (requiring a reasonable fit).

[130] Central Hudson, 447 U.S. at 564 n.6.

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

[132] 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).

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" criterion because the advertising ban directly advanced the state's interest in energy conservation. It partly failed the third criterion because the link between promotional advertising and rate inequity was "highly speculative." The advertising ban failed the "critical" fourth criterion 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.

§ 2:6[3]. The Metromedia Case

One year after Central Hudson, the Supreme Court in Metromedia v. City of San Diego[133] applied the Central Hudson criteria to uphold a San Diego sign ordinance that completely banned commercial billboards.[134] A badly split Court produced a plurality opinion by Justice White, signed by three other Justices, that most federal courts follow in free speech cases involving sign ordinances.[135] The Supreme Court has now held that most of the Metromedia plurality opinion

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[133] Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), noted, 95 Harv. L. Rev. 211 (1981). Justices Stewart, Marshall, and Powell joined Justice White. Justice Brennan concurred in the judgment of the plurality opinion, joined by Justice Blackmun. Justice Stevens concurred in parts I-IV of the plurality opinion and dissented from parts V-VII and the judgment. Chief Justice Burger and Justice Rehnquist filed dissenting opinions. None of these Justices are presently on the Court.

[134] Daniel R. Mandelker, Billboards, Signs, Free Speech, and the First Amendment, 55 Real Prop. Tr. & Est. L.J. 367, 389-393 (2020) (discussing Metromedia).

[135] Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 106 (2d Cir.) (applying Metromedia), cert. denied, 562 U.S. 981 (2010); RTM Media, L.L.C. v. City Of Houston, 584 F.3d 220, 223 (5th Cir. 2009) (Metromedia controls), cert. denied, 558 U.S. 1091 (2009); Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814, 820 (6th Cir. 2005) (applying Metromedia); Café Erotica of Fla., Inc. v. St. Johns Cty., 360 F.3d 1274, 1285 (11th Cir. 2004) (same); Lavey v. City of Two Rivers, 171 F.3d 1110, 1114 (7th Cir. 1999) (favorably discussing Metromedia); Ackerley Communs. of the Northwest v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997) (rejecting claim that later cases undermined Metromedia); Outdoor Graphics v. City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (favorably citing Metromedia); Nat'l Advert. Co. v. City & Cty. of Denver, 912 F.2d 405, 409 (10th Cir. 1990) (applying Metromedia); Ackerley Commc'ns of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 516 (1st Cir. 1989) (applying Metromedia); Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172, 173 (4th Cir. 1988) (same), cert. denied, 513 U.S. 928 (1994). But see Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 (N.D. Ill. 1990) (relying on dissenting and concurring opinions in Metromedia to reject plurality holding on noncommercial speech), aff'd on the analysis of the district court, 1993 WL 64838, 989 F.2d 502 (7th Cir. 1993) (Table); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 69 (Colo. 1981) (relying on Brennan opinion to invalidate exemptions).

should be treated as a majority opinion.[136] The Third Circuit is an exception and rejected the Metromedia plurality for a different judicial review standard.[137]

The San Diego ordinance prohibited signs on a building or other property that displayed goods or services produced or offered elsewhere but allowed signs advertising goods or services available on the premises.[138] This provision effectively prohibited off-premise billboards. Noncommercial advertising, unless within specified exemptions, was prohibited everywhere, and the ordinance contained a number of exemptions for commercial and noncommercial signs.

Metromedia was decided on cross-motions for summary judgment,[139] which the trial court granted.[140] This procedure meant there was no trial and no decision on the facts. The California Supreme Court also interpreted the ordinance as a prohibition only of commercial billboards, which limited the decision.[141]

Justice White swept away any problems that might have been presented by the Central Hudson criteria and approved the billboard ban as a matter of law.[142] Because two of the dissenters

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[136] City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1474 n.5 (2022) (explaining that Parts I-IV, "the relevant portion of the opinion was also joined by a fifth").

[137] 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."). But see Interstate Outdoor Advert., L.P. v. Zoning Bd. of Twp. of Mount Laurel, 706 F.3d 527 (3d Cir. 2013) (relying on Central Hudson and not citing Rappa).

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

[139] Metromedia, 453 U.S. at 497. The decision was based on the precise issues presented and necessarily decided. See id. at 499

[140] Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 409 (Cal. 1980)

[141] This term was not defined in the ordinance, and the court adopted a "narrow construction" to avoid extending the ordinance to noncommercial signs, which could create a problem of unconstitutional overbreadth. Id. at 410 n.2.

[142] For examples of cases where the lower courts applied the Central Hudson criteria to uphold sign ordinances see RCP Publications Inc. v. City of Chicago, 304 F. Supp.3d 729, 734 (N.D. Ill. 2018) (upholding ordinance prohibiting posting of signs with commercial messages on public property does not require heightened scrutiny under Central Hudson and directly advances city's interests in combatting litter, controlling visual clutter, preventing damage to city property, and promoting traffic safety); Paramount Media Group, Inc. v. Village of Bellwood, 2017 WL 590281 (N.D. Ill. Feb. 14, 2017) (upholding ordinance that prohibited billboards except when located on village property; prohibition as properly based on aesthetic concerns; limited exception for village did not undermine ban; no objection to narrow tailoring; ordinance permitted a variety of on-site commercial signs, and a reasonable fit existed between the objective

would have approved the entire ordinance, they are usually counted as approving the commercial billboard ban. This makes a majority of seven. Justice White struck down the on-premise sign limitation to commercial advertising and the exemptions allowed in the ordinance because of their different treatment of noncommercial speech.

Justice White's view of the case is clear in his opening explanation that "[e]ach method of communicating ideas is 'a law unto itself,' and that the law must reflect the 'differing natures, values, abuses and dangers' of each method."[143] He found "little controversy" over the first, second and fourth Central Hudson tests. Commercial advertising was neither unlawful nor misleading, and it was "far too late" to contend that traffic safety and aesthetics were not substantial goals,[144] and a majority of the Justices in Metromedia accepted this explanation.[145]

The billboard ban did not violate the fourth Central Hudson criterion because it was no broader than necessary. "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] The city had not prohibited all billboards, but allowed onsite advertising and exempted some signs.

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 prohibition of billboards was meager, the California Supreme Court had 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

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of preserving the visual environment, compatibility with adjacent land uses and the means used to accomplish these objectives). Compare Vugo, Inc. v. City of New York, 309 F. Supp.3d 139 (S.D.N.Y. 2018), (ordinance prohibiting advertisements in certain vehicles for hires held not narrowly drawn; ordinance could have regulated advertisements through placement, size, or some other manner in which they were presented); Construction & General Laborers' Local Union No. 330 v. Town of Grand Chute, 843 F.3d 745 (7th Cir. 2016) (ordinance prohibited rat and cat inflatable protest signs; case held moot; dissent by Judge Posner rejected aesthetic and safety justifications).

[143] Id. at 500.

[144] Id. at 508–09.

[145] Justice Stevens accepted this justification. Id. at 552. Chief Justice Burger accepted this and the traffic safety justification. Id. at 559–60. Justice Rehnquist believed the "aesthetic justification alone" was sufficient. Id. at 570.

[146] Id. at 508.

many reviewing courts that billboards are real and substantial hazards to traffic safety," citing several cases.[147] "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"[148]

Justice White rejected an argument that the ordinance was underinclusive because it permitted on-premise while prohibiting off-premise advertising. Allowing on-premise while prohibiting off-premise advertising did not detract from the traffic safety and aesthetic purposes of the ordinance.[149] There were three reasons. Prohibiting off-premise advertising related to the traffic safety and aesthetic objectives of the ordinance. 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." The footnote collects cases following Metromedia on this point. [150]

§ 2:6[4]. Taxpayers for Vincent

A few years after Metromedia, in Members of City Council v. Taxpayers for Vincent,[151] a majority of the Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property. A weekly sign report required the removal of 1207 signs from public property, including forty-eight campaign signs posted for Vincent on utility poles. The opinion by Justice Stevens was

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[147] Id. at 509.

[148] Id. at 510

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

[150] Summarizing Supreme Court cases, the Ninth Circuit concluded that a regulation is underinclusive if the exception "ensures that the [regulation] will fail to achieve [its] end," it does not "materially advance its aim." In addition, "exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance." Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 906 (9th Cir. 2009) (ordinance prohibiting off-site but allowing on-site signs with an exception for shelters at transit stops among other exceptions held constitutional). See also Contest Promotions, LLC v. City & Cty. of San Francisco, 874 F.3d 597, 603 (9th Cir. 2017) (upholding exemption of on-premise and noncommercial signs; commercial signs presented the important regulatory problem); RCP Publications Inc. v. City of Chicago, 304 F. Supp.3d 729, 739 (N.D. Ill. 2018) (upholding ban on posting signs on public property though signs controlled by private entity under contract and noncommercial and non-profit signs were exempt); Paramount Media Grp., Inc. v. Vill. of Bellwood, No. 13 C 3994, 2017 WL 590281 (N.D. Ill. Feb. 14, 2017), aff'd on other grounds, 929 F.3d 914 (7th Cir. 2019) (upholding ordinance that prohibited billboards except when located on village property; limited exception for the village did not undermine the ban). See also ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 839 (S.D. Cal. 2017) (requirement that all signs must get a permit, and that only signs with on-premises or public interest messages were allowed, held to advance city's aesthetic interests).

[151] 466 U.S. 789 (1984).

not clear about which Supreme Court rules for free speech he applied. He referenced rules for the review of viewpoint neutral speech adopted by the Court in United States v. O'Brien[152] that are similar to the Central Hudson rules. He also applied the Central Hudson narrow tailoring rule and a rule adopted for time, place, and manner laws that requires adequate alternate modes of communication.[153]

Justice Stevens reaffirmed the holding of a majority of the Justices in Metromedia that the city's aesthetic interest supported a billboard prohibition. The visual assault presented by an accumulation of signs posted on public property was a significant substantive evil within the city could prohibit.[154] The ordinance was narrowly tailored, as "[t]he 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." Prohibiting the signs did no more than was necessary to eliminate the exact source of the evil it sought to remedy.[155]

Alternate channels of communication were available as required by the time, place, and manner rules. 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,"[156] or that the ability to communicate effectively was threatened by ever-increasing restrictions on expression. [157] Justice Steven's reliance on multiple rules is confusing, but the case is an important endorsement of aesthetics and sign prohibitions as acceptable governmental objectives.

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[152] 391 U.S. 367 (1968). The Court first adopted the O'Brien rules for the regulation of symbolic speech. They have not been referenced prominently in any other free speech case that considered a sign ordinance.

[153] § 2:7. 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.

[154] Vincent, 391 U.S. at 807.

[155] Id. at 808.

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

[157] Id. at 812. 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,

§ 2:6[5]. Applying Central Hudson's "Directly Advance" Criterion

Metromedia took a hands-off approach to Central Hudson's third "directly advance" criterion. The plurality adopted a "common sense" rule that did not require studies or reports to justify the commercial billboard ban, and held it was not "speculative" to recognize that billboards were aesthetic harms justified their prohibition everywhere. In Edenfield v. Fane[158] the Supreme Court took a different view. The Court described the third criterion as the "penultimate prong," held the complaining party has the burden to justify a restriction on commercial speech, and held that mere speculation or conjecture does not satisfy this burden. 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."[159] The Court struck down a state board's ban on the solicitation of business clients by certified public accountants, noting it 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 have 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.[160]

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

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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.

[158] 507 U.S. 761 (1993)..

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

[160] 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).

within 1000 feet of a radius of a school or playground,[161] 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 emphasized it did not require empirical data to justify free speech restrictions. Studies and anecdotes could be enough.[162] Lower federal courts have addressed a requirement that compliance with the third criterion must be backed up by studies or reports.[163] The Court then held that the prohibition failed the fourth Central Hudson test.[164]

In later cases, the Court backed away from earlier decisions that applied axiomatic assumptions to find that laws directly advanced a governmental interest. The Court struck down laws that prohibited or regulated advertising for "vice" products and activities, such as beer and casino gambling. 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. The lack of a majority for this decision weakens it as precedent. Lower federal courts have addressed a requirement that compliance with the third criterion must be backed up by studies or reports.[165]

§ 2:6[6]. Applying Central Hudson's "More Extensive than is Necessary" Criterion

The fourth Central Hudson criterion requires courts to consider whether a regulation is "more extensive than is necessary to serve" a governmental interest. This is a reasonable fit tailoring test,[166] which the Supreme Court has called the "critical inquiry,"[167] and which complements the third "substantially advance" test. The fourth criterion required a consideration

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

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

[163] § 3:2.

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

[165] § 3:2.

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

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

of alternatives, but it was not clear whether a least restrictive alternative[168] must be selected instead of an alternative put forward by a municipality. As an example, if a municipality decides to prohibit digital billboards a claim could be made the prohibition is not narrowly tailored because rules for the safe display of digital billboards are an alternative.

The Court liberally applied the fourth criterion shortly after Central Hudson in the Metromedia case.[169] There it deferentially upheld a ban on billboards, and dealt curtly with an argument that the billboard ban was more extensive than necessary by deferring to the city's legislative judgment.

A case decided a few years later, Posadas de Puerto Rico Associates v. Tourism Co.,[170] 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 criterion, rejecting a government-sponsored advertising campaign to discourage gambling by residents as a less-burdensome means. It was "up to the legislature" to decide whether this less-burdensome means would be effective.[171]

An explanatory interpretation of the fourth Central Hudson criterion came a few years later in Board of Trustees of the State University of New York v. Fox.[172] 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 clarified the need to consider alternatives by holding the university did not have to select a less-burdensome means.[173] It also called the fourth criterion an ends and

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

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

[170] 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.

[171] 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).

[172] 492 U.S. 469 (1989). 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.").

[173] The Court commented "The ample scope of regulatory authority ... [over commercial speech] would be illusory if

means test, and adopted a deferential "reasonableness" standard of judicial review:[174]

> 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.[175]

The Court nevertheless emphasized that it required "the government goal to be substantial, and the cost to be carefully calculated."[176] Government has the burden of proof.

A few years later, however, in City of Cincinnati v. Discovery Network,[177] the Court applied the fourth Central Hudson criterion to strike down an ordinance that prohibited news racks that distributed commercial handbills on public property, but did not prohibit newspapers. For purposes of the decision, the Court assumed the ordinance prohibited commercial, but allowed noncommercial, speech.[178] This distinction, the Court held, bore no relationship to the interests the city asserted. The city's interest in aesthetics was not served because the news racks containing commercial handbills were no more unattractive than news racks 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 news racks as the means chosen to serve those interests."[179] In addition, the regulation was content-based because its basis was the difference in

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it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." Id. at 477.

[174] But 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) (arguing Fox cut back on judicial review standards for reviewing laws affecting commercial speech).

[175] Id. at 480.

[176] Id.

[177] 507 U.S. 410 (1993). See 107 Harv. L. Rev. 224 (1993).

[178] 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 news racks." Id.

[179] Id. at 416.

content between ordinary newspapers and commercial speech.[180]

A footnote[181] distinguished the Metromedia decision because the ordinance in that case treated two types of commercial speech differently by banning outdoor but permitting on site commercial advertising.[182] 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, which is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[183] 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.

Discovery Network has had a mixed response in the lower courts. They rejected the decision when they upheld a sign ordinance.[184] They relied on it to strike down a sign ordinance when it was content based or failed one of the Central Hudson criteria, but it was not always a dominant factor.[185]

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[180] Another criterion 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.

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

[182] See § 2:6[3], supra.

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

[184] Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 108 (2d Cir.) (outdoor commercial advertising), cert. denied, 562 U.S. 981 (2010); Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 911 (9th Cir.) (distinguishing" offsite commercial signage concentrated and controlled at transit stops and uncontrolled, private, offsite commercial signage), cert. denied, 558 U.S. 1091 (2009); RTM Media, L.L.C. v. City Of Houston, 584 F.3d 220, 226 (5th Cir. 2009) (billboards), cert. denied, 558 U.S. 1091 (2009); Riel v. City of Bradford, 485 F.3d 736, 753 (3d Cir. 2007) (signs excluded in historic district); Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (commercial v. noncommercial distinction); Contest Promotions, LLC v. City & Cty. of San Francisco, No. 16-CV-06539-SI, 2017 WL 76896, at *6 (N.D. Cal. Jan. 9, 2017) (regulation of off-premise and on-premise signs); B & B Coastal Enterprises, Inc. v. Demers, 276 F. Supp. 2d 155, 166 (D. Me. 2003) (exemptions); Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 421 (E.D.N.Y. 2001) (billboard regulation).

[185] Pagan v. Fruchey, 492 F.3d 766, 778 (6th Cir.) (holding that posting for sale signs on vehicles; did not substantially advance regulatory objectives), cert. denied, 552 U.S. 1062 (2007); Ballen v. City of Redmond, 466 F.3d 736, 743 (9th Cir. 2006) (exemptions from ordinance prohibiting political signs); Whitton v. City of Gladstone, Mo., 54 F.3d 1400, 1404 (8th Cir. 1995) (holding restrictions on political signs content-based); Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) (mural ordinance; probable success showing it was content based); Vono v. Lewis, 594 F. Supp. 2d 189, 195 (D.R.I. 2009) (state billboard law); Burkow v. City of Los Angeles, 119 F. Supp. 2d 1076, 1081 (C.D. Cal. 2000) (holding ordinance prohibiting for sale signs on cars not narrowly tailored); N. Olmsted Chamber of Commerce v. City of N. Olmsted, 86 F. Supp. 2d 755, 770 (N.D. Ohio 2000) (content-based signage;

Later Supreme Court cases either struck down or upheld commercial speech regulations under the fourth Central Hudson criterion, but did not always consider the less-burdensome means requirement nor did they clarify how the Fox and Discovery Network decisions applied it.[186] One of these cases is an important advertising case discussed earlier, Lorillard Tobacco Co. v. Reilly.[187] The Court struck down Massachusetts regulations that prohibited 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."[188] To the extent that studies identified advertising and promotional practices that appealed to youth, "tailoring would involve targeting those practices while permitting others."[189] The regulations made no such distinction. They failed the fourth Central Hudson criterion because they impinged unduly on the ability to propose a commercial transaction, and the opportunity of an adult listener to obtain

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Discovery Network provides extra bite). See also Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 905 (9th Cir.) (applying Discovery Network but upholding ordinance), cert. denied, 558 U.S. 1091 (2009).

[186] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993) (citing Fox but not Discovery Network and upholding federal statute that prohibited broadcasting stations from advertising state-run lotteries in a state that did not run a lottery; "reasonable fit" satisfied 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) (striking down federal statute that prohibited disclosure of alcohol content of beer on labels or in advertising and holding 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).

[187] 533 U.S. 525, 561-566 (2001). Following Lorillard: N.A. of Tobacco Outlets v. City of Worcester, 851 F. Supp.2d 311 (D. Mass. 2012) (city ordinance prohibiting outdoor advertising of tobacco products). 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).

[188] Id. at 564.

[189] Id.

information about products.

The Court did not discuss the Metromedia case, which upheld a ban on commercial billboards in San Diego under the fourth Central Hudson criterion. 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 held that 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 could have held 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 criterion has been mixed. Discovery Network modified the generous interpretation adopted in Fox, but the Court in later decisions did not reconcile the tension between the two cases and did not always 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 that less-burdensome means were required 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 examination of free speech principles that does not produce a bright line rule.

§ 2:7. Time, Place, and Manner Regulations

§ 2:7[1]. What They Are

Long before the Supreme Court adopted the four criteria for reviewing laws regulating commercial speech in Central Hudson, it adopted rules for laws it called time, place, and manner regulations that affected free speech.[190] They had their origin in early licensing cases, where the Court upheld content-neutral regulations in the public forum, such as regulations for licensing the time, place, and manner of parades on public streets.[191] Courts also uphold time, place, and manner

[190] Daniel R. Mandelker, Billboards, Signs, Free Speech, and the First Amendment, 55 Real Prop. Tr. & Est. L.J. 367, 402-406 (2020) (discussing time, place, and manner regulations); R. George Wright, Time, Place, and Manner Restrictions on Speech, 40 N. Ill. U. L. Rev. 265, 266 (2020).

[191] 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).

regulations that apply outside public forums and apply the time, place, and manner regulations to sign ordinances.[192] The rules for time, place, and manner regulations are similar to but add to the Central Hudson tests for commercial speech.

Ward v. Rock Against Racism[193] 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 were a public forum, where the government's right to regulate free speech is 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 (1) the restrictions "are justified without reference to the content of the regulated speech, (2) that they are narrowly tailored to serve a significant governmental interest, and (3) that they leave open ample alternative channels for communication of the information."[194]

The Court required content neutrality in City of Cincinnati v. Discovery Network An ordinance prohibited commercial handbills in news racks 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.

The narrow tailoring requirement is similar to the fourth Central Hudson "more extensive than is necessary" criterion. In language echoing that criterion, 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

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[192] *E.g.*, New S. Media Grp., LLC v. City of Huntsville, No. 5:20-CV-2050-LCB, 2021 WL 5822133, at *14 (N.D. Ala. Oct. 1, 2021) (size, height, setback, square footage, and other time, place, and manner restrictions on signs supported substantial interest in promoting the "public health, safety, morals, convenience, order, prosperity, and general welfare of the city).

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

[194] Id. at 791, citing cases. Numbering has been added to the quotation. The Court in Reed inverted the first rule by holding that laws that cannot be "justified without reference to the content of the regulated speech" are content-based. Reed, 502 U.S. at 164.

promotes a substantial government interest that would be achieved less effectively absent the regulation."[195] The adoption of a less-burdensome-alternative is not required. "[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 speech.'"[196]

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 criteria. Ample alternative channels exist if there are other adequate means for communicating the expressive conduct whose communication is affected by the regulation. This rule is concerned with the speaker's ability to communicate, not with governments' ability to regulate.

Differences between the Central Hudson criteria and the time, place, and manner rules suggest they require different results,[197] but the Court has held they are "substantially similar."[198] Differences remain, and the Court has not explained when which set of rules should apply or whether they should be used together. It has applied both sets of rules at the same time without indicating whether it is necessary to apply both.[199]

§ 2:7[2]. As Applied to Sign Regulations

The Supreme Court has considered the time, place, and manner rules in four cases where

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[195] Ward, 491 U.S. at 799, quoting United States v. Albertini, 472 U.S. 675 (1985). 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.

[196] Ward, 491 U.S. at 797, quoting United States v. Albertini, 472 U.S. 675, 689 (1985). The dissenting Justices disagreed with this holding.

[197] For an early article explaining these differences, see Elisabeth Alden Longworthy, Time, Place, or Manner Restrictions on Commercial Speech, 52 Geo. Wash. L. Rev. 127 (1983).

[198] Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 477 (1989). See also 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). See E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 146 A.3d 623, 641 (N.J. 2016) (discussing both tests and deciding that time, place, and manner rules applied).

[199] *E.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (invalidating city ordinance excluding news racks with commercial handbills).

ordinances prohibited the display of signs. These cases reached different results and provided inconsistent guidance on when the Court will uphold a prohibition.

In the first case, Linmark v. Township of Willingboro,[200] 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 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.[201]

Time, place, and manner issues appeared next in the Metromedia case,[202] where a plurality upheld a ban on commercial billboards but struck down exemptions that favored some noncommercial signs over others. Its discussion of the city's time, place, and manner defense appears in that part of the opinion dealing with the exemptions, 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.[203] This is a puzzling statement, because the Court had upheld the ban on billboards under the Central Hudson criteria, and later upheld a ban on posting signs on public property as a time, place, and manner regulation. Neither was the ordinance a time, place, and manner regulation because it could not be assumed that "alternative channels" were available, as the parties stipulated just the opposite:

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[200] 431 U.S. 85 (1977).

[201] 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 criterion, 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.

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

[203] 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).

"Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[204] Finally, the plurality held the distinctions made in the ordinance were content-based, an apparent reference to the special treatment given to some noncommercial signs.

The Court has applied time, place, and manner rules in other cases where a sign ordinance prohibited signs. It upheld an ordinance prohibiting signs on public property in Taxpayers for Vincent v. City of Los Angeles.[205] The ordinance was narrowly tailored as "[t]he 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."[206]

Alternative 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."[207] 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."[208]

Ten years after Vincent the Court in City of Ladue v. Gilleo[209] did not accept a time, place,

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[204] *Id*. at 516, citing the Joint Stipulation of Facts.

[205] 466 U.S. 789 (1984). This case was decided five years before the Court restated the time, place, and manner rules in Ward v. Rock Against Racism. An analysis of free speech issues in Vincent is mixed. See Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 650-651 (1991). See also, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), decided six weeks later.

[206] Taxpayers for Vincent, 466 U.S. at 808. 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.

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

[208] Id. n.30.

[209] 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

and manner justification for an ordinance that prohibited a political sign on the lawn of a home opposing the Persian Gulf war. The ordinance allowed the display in residential areas of residence identification signs, for sale signs, and signs warning of safety hazards, and commercial establishments, churches, and nonprofit private organizations could display signs not allowed in residential areas. Ladue claimed residents could convey their messages by other means, such as hand-held signs, speeches and banners. The Court disagreed, holding that "[r]esidential signs are an unusually cheap and convenient form of communication,"[210] 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 Ladue case, unless the display of political signs on residential property, is more protected under free speech law than posting political signs on public property. The sign displayed in the Ladue case was an opinion sign, while the sign displayed in the Vincent case was a political campaign sign, but this difference did not seem to influence the Court.

for Free Speech, 14 St. Louis U. Pub. L. Rev. 439 (1995) (attorney for plaintiff).

[210] 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.

§ 2:8. The Prior Restraint Doctrine

§ 2:8[1]. General Principles

Prior restraints[211]are the most serious and least tolerable restrictions on free speech rights.[212] A prior restraint occurs when a law like a sign ordinance includes a discretionary procedure for the review of an application for a permit application or other government prerequisite that requires the exercise of free expression.[213] An application for a sign permit or sign variance and design review procedures[214] in a sign ordinance are examples. A discretionary review procedure in a sign ordinance is invalid as a prior restraint unless it contains required procedural and substantive standards.[215] Procedural standards prevent delays in decision making. Substantive standards prevent arbitrary decisions. The burden to show that procedural and substantive standards are adequate is a heavy one.[216]

§ 2:8[2]. The Procedural Standards

The leading Supreme Court case on procedural standards is Freedman v. Maryland,[217] which held invalid a statute that required a state board of censor to approve movies before they

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[211] 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).

[212] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Some courts 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.").

[213] The prior restraint doctrine does not apply to legislative decisions. An exception is when a legislature reserves decision making authority to itself. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 688 (9th Cir. 2010). Compare Lacroix v. Town of Fort Myers Beach, No.. 2:20-CV-992-SPC-NPM, 2021 WL 1087217, at *4 (M.D. Fla. Mar. 22, 2021) (ordinance prohibiting portable signs did not raise prior restraint problem). See GEFT Outdoor, L.L.C. v. City of Westfield, 491 F. Supp. 3d 387, 408 (S.D. Ind. 2020) (requiring permit for all signs but exempting content based signs from permit requirement held an impermissible prior restraint, decision questionable under Supreme Court's Reagan decision).

[214] Street Graphics, supra note 2, at 87 (discussing design review); Id. § 1.12, at 88 (authorizing Program for Graphics, which includes design review).

[215] 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.

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

[217] 380 U.S. 51(1965).

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.[218] These standards are called the "Freedman Standards," after the case that adopted them.

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[219] considered the Freedman Standards as applied to a conditional use permit 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 and found a weaker inference that censorship is 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 which the status quo is maintained, and that there must be prompt judicial review. A later Supreme Court decision[220] 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.[221]

A later case, Thomas v. Chicago Park District,[222] created an exemption from the Freedman Standards that may apply to content-neutral sign and other 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 that "Freedman is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place,

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

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

[220] 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.

[221] 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).

[222] 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).

and manner regulation of the use of a public forum."[223] 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 FW/PBS, where it had applied two of the Freedman Standards because it "involved a licensing scheme that 'targeted businesses purveying sexually explicit speech.'"[224] Like the licensing scheme in Thomas, sign ordinances that are content-neutral should be considered a traditional exercise of authority exempt from the Freedman Standards because they do not involve censorship.[225]

The rejection of the Freedman Standards in the Thomas case should include rejection of the 28-day time limit requirement in the ordinance, but the case created confusion because the Court did not discuss it.[226] This omission makes it unclear whether the Court's mention of the time limit means a time limit is required, even in content-neutral laws. 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.[227] 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,

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

[224] 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).

[225] 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 apply the rules for these regulations to the permit ordinance.

[226] Id. at 318.

[227] 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 ordinances: 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 apply only 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).

place and manner regulations do not have to meet the Freedman Standards.[228]

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 it is difficult to decide whether a court will 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.[229] A court may also find a sign ordinance invalid if the Freedman standards are not met.[230]

§ 2:8[3]. The Substantive Standards

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 Supreme Court held in the Thomas case,[231] "[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. As 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."[232]

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

[229] Adams Outdoor Advert. Ltd. P'ship by Adams Outdoor GP, LLC v. Pennsylvania Dep't of Transportation, 930 F.3d 199, 208 (3d Cir. 2019) (outdoor advertising act); Citizens for Free Speech, LLC v. County of Alameda, 62 F. Supp. 3d 1129, 1142 (N.D. Cal. 2014) (no time limits for discretionary decisions); 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).

[230] GEFT Outdoor, L.L.C. v. Monroe Cnty., No. 119CV01257JRSMPB, 2021 WL 5494483, at *10 (S.D. Ind. Nov. 23, 2021) (standards did not require that a permit or variance be issued within a reasonable period of time, no prompt judicial review).

[231] Thomas, 534 U.S. at 323. The Court has also pointed out that the absence of precise standards makes it impossible to distinguish between "a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988). See Heffron v. Intl. Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (uncontrolled discretion may suppress a particular point of view). See Pan Am. v. Municipality of San Juan, Puerto Rico, No. CV 18-1017 (PAD), 2018 WL 6503215, at *9 (D.P.R. Dec. 10, 2018) (reviewing cases).

[232] Shuttlesworth v. City of 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."

A sign ordinance that does not contain any standards for decision making is clearly an invalid prior restraint,[233] as is an ordinance that does not have adequate standards for permits.[234] Conversely, a sign ordinance that contains objective and precise standards for decision making, such as size, height, location, area, and setback standards is not a prior restraint. An exception,[235] enforcement provision,[236] or a permit requirement[237] are examples.

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[233] 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); Morris v. City of New Orleans, 350 F. Supp. 3d 544, 560 (E.D. La. 2018) ("permitting-scheme vests City officials with discretion to grant or deny a permit based on their own ideas of what type of content 'enhances the quality or character of the surrounding community'"); 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); Withers v. Vill. of Airmont, No. 07 CIV. 9674 (SCR), 2010 WL 11712641, at *5 (S.D.N.Y. Apr. 30, 2010) (holding "[a]n ordinance regulating signs can be struck down as unconstitutional if it does not provide any standards to guide local officials in their decision to grant or deny sign permits"); 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 89,1 915 (E.D. Mich. 2002) (sign permit; no time limits or procedures for judicial review); Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000) (temporary permits for signs in the public interest); Pica v. Sarno, 907 F. Supp. 795 (D.N.J. 1995) (zoning variance, no standards provided).

[234] Selah All. for Equal. v. City of Selah, No. 1:20-CV-3228-RMP, 2021 WL 5286582, at *6 (E.D. Wash. June 30, 2021) (building official was under no mandate to (1) grant permit applications, (2) issue a decision, (3) process permit applications in a timely manner, or (4) explain why a permit was denied).

[235] Lamar Tennessee, LLC v. City of Knoxville, No. E201402055COAR3CV, 2016 WL 746503, at *17 (Tenn. Ct. App. Feb. 25, 2016) (specific criteria and guidelines guided decisions on whether to make exceptions to ordinance).

[236] ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 841 (S.D. Cal. 2017) (city employees had "narrow, objective and definite" standards to enforce ordinance).

[237] Baldwin Park Free Speech Coal. v. City of Baldwin Park, 843 F. App'x 21, 22 (9th Cir. 2021) (discretion not overly broad; temporary permit "shall be granted when the City Planner finds the proposed sign to be in conformance with all applicable provisions of th[e] chapter, the Sign Design Guidelines and other applicable regulations;" standards and requirements clearly delineated; ability to "apply conditions of approval to ensure compliance" did not confer unbridled discretion since these conditions were imposed "only to achieve [the] specified purpose [ ]" of compliance); 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; maximum square footage requirement and time limit for portable and banner signs; 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

Standards that are not as precise present more difficult prior restraint problems. Variances are an example.[238] State zoning statutes authorize variances for "unnecessary hardship" or "practical difficulties."[239] State courts hold that these standards are not a delegation of power,[240] and some courts have found these standards precise 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.[241] 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 variance standards.[242] Other courts invalidated standards typically available for zoning variances.[243] Some ordinances use "general welfare" or similar vague

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objective standards for park permit).

[238] 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 states that the variance may vary not more than 25 percent from code requirements. Street Graphics, § 1.15, at 91. Use variances are not authorized.

[239] "Practical difficulties" variances are available for dimensional requirements, such as height and setback requirements. A "hardship" variance can also be granted for a use variance. Daniel R. Mandelker & Michael Allen Wolfe, Land Use Law § 6.39 (6th ed. LexisNexis Matthew Bender, 2015, updated annually).

[240] Id., § 6.03; Daniel R. Mandelker, Delegation of Power and Function in Zoning Administration, 1963 Wash. U.L.Q. 60.

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

[242] Rzadkowolski v. Metamora Twp., No. 14-12480, 2016 WL 3230535, at *3 (E.D. Mich. June 13, 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, No. 325469, 2016 WL 1682799, at *5 (Mich. Ct. App. Apr. 26, 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).

[243] Int'l Outdoor, Inc. v. City of Troy, Michigan, 974 F.3d 690, 698 (6th Cir. 2020) (multiple vague and undefined criteria, such as "public interest," "general purpose and intent of this Chapter," "adversely affect[ing]," "hardship," and "practical difficulty"); Bill Salter Advert., Inc. v. Baldwin Cty., Alabama, No. CV 08-0559-KD-C, 2009 WL 10704418, at *4 (S.D. Ala. Mar. 13, 2009) ("standards" not objective, contain discretionary terms such as "exceptional narrowness," "exceptional topographic conditions," and "an adequate supply of light," Board to determine if applicant

standards as the basis for granting zoning variances, and courts have held them unconstitutional as a prior restraint.[244] In a case where a district court had not considered a claim of unbridled discretion in the standards for a variance, it was required on remand consider this argument because the constitutionality of the variance provision affected the constitutionality of the entire ordinance.[245]

Prior restraint problems are also presented by historic district ordinances. These ordinances typically include a procedure for a "certificate of appropriateness" that an historic commission can issue if it decides that a proposed development or modification of an existing structure is compatible with the character of the district. A certificate may also be required for a sign, or a modification of a sign.

This standard raises a prior restraint problem. It may not be an issue because an historic district's historic character provides an acceptable reference point that validates a compatibility standard. A court of appeals, 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.[246] A district

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is attempting to assert an entitlement to a variance for legitimate reasons or for "convenience" or "economic loss;" ordinance provided that variance "may" be granted).

[244] GEFT Outdoor, L.L.C. v. Monroe Cnty., 2021 WL 5494483, at *12 (S.D. Ind. Nov. 23, 2021) ("injurious to the public health, safety, and general welfare"; whether the surrounding property would be "affected in a substantially adverse manner"; whether a denial of a variance would cause "unnecessary hardship"; and whether a variance would "interfere substantially with the Comprehensive Plan); (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")..

[245] Geft Outdoor, LLC v. City of Westfield, 39 F.4th 821 (7th Cir. 2022).

[246] 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, No.

court, however, reached a contrary conclusion in a sign permit case and held a similar but less complete set of standards invalid.[247]

More difficult prior restraint problems created by decision making procedures occur in sign ordinances that apply outside historic districts but contain similar compatibility standards. Sign ordinances that authorize conditional uses are an example.[248] The cases that considered these ordinances are difficult to classify because ordinances vary, but some courts held them invalid when standards were stated in general terms without additional detail. In Desert Outdoor Advertising v. City of Moreno Valley,[249] for example, all off-site signs required a conditional use 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 was a prior restraint because it conferred unbridled discretion since it placed "no limits" on the decision to deny a permit. Though courts in cases not involving free speech issues have upheld similar standards,[250] the Moreno case indicates that generally stated standards of this type are an invalid prior restraint under the free speech clause. Cases in accord with Moreno Valley are cited in the footnote.[251]

E201402055COAR3CV, 2016 WL 746503, at *1 (Tenn. Ct. App. Feb. 25, 2016) (historic district standards clearly set forth).

[247] 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").

[248] 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).

[249] 103 F.3d 814 (9th Cir. 1996).

[250] Land Use Law, supra note 205, at § 6.03.

[251] See also accord

GEFT Outdoor, L.L.C. v. Monroe Cnty., No. 119CV01257JRSMPB, 2021 WL 5494483, at *11 (S.D. Ind. Nov. 23, 2021) (applicable standards required findings, among others, that the proposed use be "harmonious with and in accordance with the general objectives of the City's Comprehensive Plan," "harmonious and appropriate in appearance," and not be "disturbing to existing or future neighboring uses); Conteers LLC v. City of Akron, No. 5:20-CV-00542, 2020 WL 5529656, at *11 (N.D. Ohio Sept. 15, 2020) (conditional use must "be harmonious with and in accordance with the general objectives of the City's Comprehensive Plan," and "be 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 will not change the essential character of the same area," and "not be hazardous or disturbing to existing or future neighboring uses;" and "not result in the destruction, loss, or damage of a natural, scenic, or historic

The Fourth Circuit, however, upheld a similar compatibility standard for exemptions from a sign ordinance,[252] and courts upheld similar standards when an ordinance provided more detailed direction and content. In G.K. Ltd. Travel v. City of Lake Oswego,[253] for example, the Ninth Circuit upheld standards for a sign permit that required signs to be "compatible with other nearby

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feature of major importance"); 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, No. 11-13887, 2012 WL 3759306, at *6 (E.D. Mich. Aug. 29, 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) (sign's relationship to overall appearance of subject property as well as surrounding community; compatible design, simplicity and sign effectiveness). See, generally, Land Use Law, supra note 205, at §§ 6.50-6.56,

[252] 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).

[253] 436 F.3d 1064, 1082 (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 provided 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 CBS Outdoor, Inc. v. City of Kentwood, No. 1:09-CV-1016, 2010 WL 3942842, at *2 (W.D. Mich. Oct. 6, 2010) (holding standards invalid for special land use applications providing that 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 special 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 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").

signs, other elements of street and site furniture and with adjacent structures." Guidelines for making the compatibility decision, stated 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." The ordinance, the court held, provided a "limited and objective set of criteria" more specific than the standard it held invalid in Moreno. A requirement that reasons must be stated for approvals or denials, a fourteen-day processing period for decisions, and the availability of an appeal to the city council also supported the constitutionality of the ordinance.[254]

A design review process for signs also presents prior restraint problems. A sign ordinance may authorize a design review board to review sign designs and may include design standards the board must consider. A Model Ordinance in Street Graphics and the Law provides design standards for a design review process for Programs for Graphics, which is "a written and visual statement that provides for the creative design of street graphics."[255] The reviewing board or commission must consider design and architectural quality when reviewing a Program for Graphics for approval,[256] and the Model Ordinance includes criteria to consider "[w]hen deciding whether a Program for Graphics meets the design criteria." The GK case suggests that courts will uphold design review standards like these because they are sufficiently detailed and precise.

Thematic design standards can be constitutional. A district court case upheld an ordinance for a tourist destination city in Washington State that adopted a Bavarian theme for its commercial districts.[257] The theme prohibited any sign in the commercial districts that was "not compatible in design, lettering style, and color with the Old World Bavarian-Alpine theme." A Design Review Board (DRB) was authorized to review applications for sign permits to decide whether a sign complied with the policies and design guidelines that applied, with a primary focus on the Bavarian Theme. Although the criteria for compliance with the Bavarian theme were elastic and required

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[254] An ordinance is valid even though it provides that the decision making 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, 362 (4th Cir. 2012).

[255] Street Graphics § 1.12, supra note 2, at 88.

[256] The criteria include compatibility standards and also state that a sign must "[b]e of unique design, and exhibit a high degree of thoughtfulness, imagination, inventiveness, and spirit." Id.

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

the exercise of reasonable discretion by the DRB, the court held that 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, 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 interpretation or seek administrative and judicial review of DRB decisions.

The previous discussion highlights a problem that sign design review presents 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 include objective content-neutral time, place, and manner regulations, then design review may require special consideration. Can a local sign ordinance give a design review process a power over aesthetics and sign character that a local zoning department could not exercise under a zoning ordinance, such a subjective power over a sign's color, shape, size, and similar criteria? Finally, what the courts have not done to date is to consider the validity of a design review process when aesthetic standards and rules conflict with traffic safety standards related to on-premise signs

CHAPTER III: SOME BASIC FREE SPEECH ISSUES CONCERNING ON-PREMISE SIGN REGULATIONS

§ 3:1. An Overview

This chapter considers basic free speech issues concerning on-premise sign regulations.[258] One issue is whether a municipality must introduce evidence to show that a sign ordinance directly advances its aesthetic and traffic safety objectives in order to satisfy the third Central Hudson criterion. Whether a sign ordinance must have a statement of purpose is another problem. The chapter also discusses how the courts consider noncommercial speech and exemptions in sign ordinances. It concludes by discussing free speech issues raised by the regulation of on-premise signs under the Federal Highway Beautification Act and sign definitions.

§ 3:2. Must There Be Proof That a Restriction on Signs Directly Advances Governmental Interests?

The third Central Hudson criterion states that a law regulating commercial speech should directly advance its governmental objectives. In Metromedia[259] a plurality of the Supreme Court adopted a "common sense" approach to this issue that did not require studies or reports to show compliance with this criterion. The Supreme Court confirmed this rule in a sign case.[260]

A later Supreme Court case, Edenfield v. Fane,[261] modified this rule in a case that held invalid a state regulation that prohibited direct solicitation by certified public accountants to obtain new clients. The Court held the third criterion cannot be satisfied by reliance on "speculation and conjecture."[262] A court can uphold a restriction on commercial speech only if it is demonstrated "that the harms it recites are real and that its restriction will in fact alleviate them to a material

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[258] A model on-premise sign ordinance is included in Street Graphics and the Law, Street Graphics Model Ordinance, in Street Graphics, supra note 2, ch. 8, at 68..

[259] See § 2:6[3].

[260] 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).

[261] 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.

[262] Id. at 770-771.

degree."[263] The state had not been submitted studies to support the regulation, nor was it supported by a report or by the literature.[264] Other explanations of the third criterion adopted by the Supreme Court vary but are similar.[265]

Most courts follow the Metromedia plurality and hold in billboard cases that "common-sense" legislative judgment about billboard problems is enough to satisfy the third criterion.[266] Courts have adopted the same view when reviewing ordinances that regulate on-premise sign. The

[263] Id. at 771. The party seeking to uphold the restriction has the burden of proof. Id. at 770..

[264] Id. at 771-774.

[265] Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (plurality; ban on liquor price advertising held invalid, must "significantly reduce" acholic consumption); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 143 (1994) (misleading advertising, burden "not slight," Edenfield cited). But see Metromedia, 453 U.S. at 509 (plurality, upholding billboard ban, hesitating to "disagree with the accumulated, common-sense judgments of local lawmakers").

[266] Interstate Outdoor Advert., L.P. v. Zoning Bd. of Twp. of Mount Laurel, 706 F.3d 527, 530 (3d Cir. 2013) ("Moreover, given the language of Metromedia, we are not willing to conclude that there is a genuine issue of material fact as to whether the ordinance sufficiently advances the substantial interest of traffic safety."); Outdoor Advert., Inc. v. Cobb Cty., 193 F. App'x 900, 904–05 (11th Cir. 2006); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814, 823 (6th Cir. 2005) ("billboard regulations, whatever other strengths and weaknesses they may have, advance a police power interest in curbing community blight and in promoting traffic safety"); Norton Outdoor Advert., Inc. v. Vill. of St. Bernard, No. 1:20-CV-350, 2022 WL 2176339, at *12 (S.D. Ohio June 16, 2022) (not "required to conduct independent studies or put forth some other evidence of the relationship"); Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015); Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015); Sharona Properties, L.L.C. v. Orange Vill., 92 F. Supp. 3d 672, 683 (N.D. Ohio 2015); Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) (digital billboards); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A (M), 2008 WL 781865, at *24 (W.D.N.Y. Feb. 25, 2008); Bill Salter Advert., Inc. v. City of Brewton, 486 F. Supp. 2d 1314 (S.D. Ala. 2007) ("no serious question"); Action Outdoor Advert. JV, L.L.C. v. Town of Shalimar, 377 F. Supp. 2d 1178, 1181 (N.D. Fla. 2005); Nichols Media Grp., LLC. v. Town of Babylon, 365 F. Supp. 2d 295, 309 (E.D.N.Y. 2005); 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); Harp Advert. of Illinois, Inc. v. Vill. of Chicago Ridge, No. 90 C 867, 1992 WL 386481, at *10 (N.D. Ill. Mar. 13, 1992); Suburban Lodges of Am., Inc. v. Columbus Graphics Comm., 761 N.E.2d 1060, 1066 (Ohio App. 2000) (denial of request for a variance from zoning ordinances that limited text on on-premises, freeway-oriented signs to business' name, address, and product or service).

See also Riel v. City of Bradford, 485 F.3d 736, 753 (3d Cir. 2007) (upholding prohibition of commercial signs in historic district and that they "tend to be erected for longer periods of time and tend to be larger and more elaborate in design"); Long Island Bd. of Realtors, Inc. v. Inc. Vill. of Massapequa Park, 277 F.3d 622, 627 (2d Cir. 2002) (residential signs); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447 (N.D. Ill. 1990), aff'd, 989 F.2d 502 (7th Cir. 1993) ("This decision is directly related to safety and aesthetic goals; it is eminently reasonable for the City to determine that small signs do not pose the same traffic safety risks or aesthetic concerns as do large billboards.").

Fourth Circuit rejected as an "unprecedented contention" an argument that evidence was needed to justify on-premise sign restrictions.[267]

Ackerley Communications of the Northwest v. Krochalis[268] illustrates these cases. The Ninth Circuit upheld a Seattle ordinance that enacted restrictions on billboards and that included a statement of purpose expressing its interest in aesthetics and traffic safety. Both parties offered evidence on whether the ordinance had met its announced goal, that billboards must be regulated because they can be traffic hazards, contribute to visual blight, and reduce property values. The district court held a trial was unnecessary on whether the ordinance met the Central Hudson criteria, 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[269] 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, was a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests."[270]

A few cases followed Edenfield and rejected a billboard ban when studies were not provided.[271] What studies are required is not clear. In one sign case the Supreme Court relied on

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[267] Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 n.3 (4th Cir. 2012) (wall sign; no cases cited).

[268] 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).

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

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

[271] 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."); L.D. Mgmt. Co. v. Thomas, No. 3:18-CV-722-JRW, 2020 WL 1978387, at *3 (W.D. Ky.

studies and anecdotes and did not require empirical evidence,[272] and it has held that municipalities can rely on a variety of studies and "simple common sense."[273] Lower courts have relied on studies, reports, transcripts, depositions, or testimony.[274]

Although Edenfield did not consider whether studies are necessary to show compliance with the second Central Hudson criterion that requires a legitimate governmental objective, some courts held they could not assume compliance unless positive evidence was supplied by the local government.[275] They did not take judicial notice on the compliance issue and rejected after-the-fact or extrinsic justifications, such as statements in other ordinances or statutes.[276] It is not clear

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Apr. 24, 2020) (no evidence on aesthetic interference or traffic safety); 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).

[272] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying *Edenfield*, Court held studies supported restriction on smokeless tobacco and cigar advertising within 1000 feet of school or playground; studies and anecdotes could be enough, empirical data not required).

[273] Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (upholding Florida Bar rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident; "surfeit of information" not required, can rely on studies from different locales, history, consensus and "simple common sense").

[274] Adams Outdoor Advert. Ltd. P'ship v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *15 (W.D. Wis. Apr. 7, 2020) (expert report); Citizens for Free Speech, LLC v. Cty. of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (billboard ban, court relied on evidence presented); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A (M), 2008 WL 781865, at *24–25 (W.D.N.Y. Feb. 25, 2008) (public hearing, position papers and studies of various groups); Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 417 (E.D.N.Y. 2001) (city planning commission report); Burkhart Advert., Inc. v. City of Auburn, Ind., 786 F. Supp. 721, 725 (N.D. Ind. 1991) (transcripts of City Council meetings and depositions and testimony at trial; difficult to show how worse off aesthetic aspects of town would be if billboards were allowed, because total ban existed for at least fifteen years, but "common sense" that billboard exclusion would mitigate or at least not exacerbate sign clutter and promote aesthetics). Compare Harnish v. Manatee Cty, 783 F.2d 1535 (11th Cir. 1986) (upholding prohibition of portable signs and noting that public hearings and workshops were held). See also Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, 187 F. Supp. 3d 1002, 1018 (S.D. Ind. 2016) (billboards subject to greater regulation because larger and more of a risk to city's interest in traffic safety and aesthetics).

[275] Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (holding city provided no evidence), cert. denied, 522 U.S. 912 (1997); Adams Outdoor Advert. of Atlanta, Inc. v. Fulton Cty, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) (holding interests legitimate but court cannot assume, in the absence of positive evidence, that county actually sought to advance them by restricting constitutionally protected speech); Bell v. Stafford Twp., 541 A.2d 692, 699 (N.J. 1988) (total municipal ban not limited to commercial speech). See also Deperno v. Town of Verona, No. 6:10-CV-450 NAM/GHL, 2011 WL 4499293, at *9 (N.D.N.Y. Sept. 27, 2011) (holding review required to decide whether sign may cause hazardous or unsafe conditions and to ensure quality of life and character of area; no indication that town officials considered these interests).

[276] Tinsley Media, LLC v. Pickens Cty., 203 F. App'x 268, 273–74 (11th Cir. 2006) (will not examine record); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir.) (rejecting preambles and statements elsewhere in ordinances; will not take judicial notice), cert. denied, 498 U.S. 852 (1990); Int'l Outdoor, Inc. v. City of Romulus, No. 07-15125, 2008 WL 4792645, at *8 (E.D. Mich. Oct. 29, 2008) (rejecting reference to other statutes and broad statements of purpose in zoning ordinance, and statements in related ordinances in other jurisdictions); Adams Outdoor

what kind of studies are required. Affidavits from a mayor, planning commission and others were accepted in one case.[277]

In United States v. Edge Broadcasting Co.,[278] the Supreme Court decided a related issue. It held that whether a commercial speech regulation directly advanced a substantial governmental interest is not decided solely by its application to the speech of the complaining party. The Court upheld a federal statute that prohibited radio stations in nonlottery states from broadcasting lottery advertising. 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 the lower court's as-applied analysis as incorrect under the Central Hudson criteria. Whether a statute directly advances a governmental interest is not answered by considering its application to a single person or entity. The Court held. Its validity depends on the general problem a law seeks to correct.

The cases have applied this decision to sign ordinances. A court of appeals, quoting Edge, rejected an as-applied attack on an ordinance that regulated off-premise and on-premise signs.[279] The challenge, the court said, must be to a "broad category of commercial speech," not simply the plaintiff's speech.[280] 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."[281] The court did not have to consider it.

Advert. of Atlanta, Inc. v. Fulton Cty., 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) (holding after the fact invocations not allowed; will not take judicial notice).

[277] Harp Advert. of Illinois, Inc. v. Vill. of Chicago Ridge, No. 90 C 867, 1992 WL 386481, at *9 (N.D. Ill. Mar. 13, 1992) (holding affidavits and letters from mayor, planning commission and others supported village justifications). See also Nichols Media Grp., LLC. v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D.N.Y. 2005) (rejecting studies that attempted to discredit governmental justifications and holding aesthetic and traffic safety goals unequivocally satisfied second criterion, citing Metromedia).

[278] 509 U.S. 418 (1993).

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

[280] Id. at 1115 n. 18.

[281] 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).

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

A statement of purpose is a necessary part of a sign ordinance.[282] It should adequately express the aesthetics and traffic safety interests the ordinance advances. A statement of purpose also plays an important role in upholding a sign ordinance. Some courts relied on a statement of purpose to hold, without additional proof, that a sign ordinance directly advanced its legislative purposes under the second Central Hudson criterion.[283] If a sign ordinance does not contain a statement of purpose, some courts hold a sign ordinance is not supported by a governmental interest in aesthetics or traffic safety.[284] They were not willing to take judicial notice of the legislative purposes for the ordinance and rejected after-the-fact or extrinsic justifications, such as

[282] See the Statement of Purpose in the Model Ordinance in Street Graphics § 1.01, 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."

[283] 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); Southlake Prop. Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1116 (11th Cir. 1997) (total ban on commercial signs; relying on "Statement of Findings" to uphold ordinance), cert. denied, 525 U.S. 820 (1998); Adirondack Advert., LLC v. City of Plattsburgh, N.Y., No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) ("Code clearly states its purpose"); 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).

[284] 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); Lockridge v. City of Oldsmar, |475 F.Supp.2d 1240 (M.D. Fla. 2007); 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 invocations of aesthetics and traffic safety."); Bell v. Stafford Twp., 541 A.2d 692, 699 (N.J. 1988) ("the record is almost completely devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests"). Contra, Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009) (such a requirement is not implicit in Central Hudson standard).

statements in other ordinances or statutes.[285] In National Advertising Co. v. Town of Babylon,[286] 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." It is not clear what kind of studies are required. One court accepted affidavits from a mayor, planning commission, and others in one case.[287]

Zoning ordinances may also contain an all-inclusive "health, safety and general welfare" statement of purpose that applies to the entire ordinance. Some courts have held that a general statement of purpose of this type is not enough to uphold sign regulations that are part of a zoning ordinance.[288] 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.[289] 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.

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[285] Tinsley Media, LLC v. Pickens Cty., 203 F. App'x 268, 273–74 (11th Cir. 2006) (will not examine record); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir.) (rejecting preambles and statements elsewhere in ordinances; will not take judicial notice), cert. denied, 498 U.S. 852 (1990); Int'l Outdoor, Inc. v. City of Romulus, No. 07-15125, 2008 WL 4792645, at *8 (E.D. Mich. Oct. 29, 2008) (rejecting reference to other statutes and broad statements of purpose in zoning ordinance, and statements in related ordinances in other jurisdictions); Adams Outdoor Advert. of Atlanta, Inc. v. Fulton Cty., 738 F. Supp. 1431, 1433 (N.D. Ga. 1990) (holding after the fact invocations not allowed; will not take judicial notice).

[286] 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.").

[287] Harp Advert. of Illinois, Inc. v. Vill. of Chicago Ridge, No. 90 C 867, 1992 WL 386481, at *9 (N.D. Ill. Mar. 13, 1992) (holding affidavits and letters from mayor, planning commission and others supported village justifications). See also Nichols Media Grp., LLC. v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D.N.Y. 2005) (rejecting studies that attempted to discredit governmental justifications and holding that aesthetic and traffic safety goals unequivocally satisfy second criterion, citing Metromedia).

[288] National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir. 1990) (statements contained in other parts of code); Abel v. Town of Orangetown, 759 F. Supp. 161, 166 (S.D.N.Y. 1991) (statement in preamble); Int'l Outdoor, Inc. v. City of Romulus, No. 07-1512. See also 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).

[289] Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982) (restrictions on portable signs). See also 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)

§ 3:4. The Federal Highway Beautification Act

The federal Highway Beautification Act requires the adoption of state legislation[290] that includes a ban on billboards, and exemptions that distinguish between on-premise and off-premise signs similar to the distinction upheld in in City of Austin v. Reagan National Advertising of Austin.[291] States that do not comply with the federal statute lose a share of their federal highway funds, but this authority is seldom exercised by the federal agency.

The federal billboard ban requires states to prohibit billboards in urban areas within 660 feet of the right-of-way of federal interstate and primary highways.[292] In rural areas state laws must prohibit visibility from the highway. The law authorizes an exemption for the display of billboards in commercial and industrial areas under agreements between the states and the federal Secretary of Transportation. The federal statute contemplated the removal of nonconforming billboards, but this program failed because necessary federal funding was not appropriated. Some state statutes allow more restrictive local regulation of billboards,[293] and some courts have held that a state statute does not preempt stricter local regulations.[294] The statutes usually require permits[295] that must contain adequate procedural and substantive requirements to avoid being a prior restraint.[296]

The federal law requires state statutes to exempt

> "(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

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[290] For an overview of a typical state statute, *see* Outdoor Media Dimensions, Inc. v. Dep't of Transp., 132 P.3d 5, 8-9 (Or. 2006).

[291] 142 S. Ct. 1464 (2022); § 2:4[4].

[292] 23 U.S.C. § 131. See Craig J. Albert, Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification, 48 U. Kan. L. Rev. 463 (2000).

[293] C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. 2000) (upholding law)

[294] Lamar OCI S. Corp. v. Stanly Cty. Zoning Bd. of Adjustment, 650 S.E.2d 37 (N.C. App.2007), aff'd & appeal held improvidently allowed, 669 S.E.2d 322 (N.C. 2008).

[295] StreetMediaGroup, LLC v. Stockinger, No. 1:20-CV-03602-RBJ, 2021 WL 5770231, at *4 (D. Colo. Dec. 6, 2021) (upholding statute as not content-based when it contains permit requirement that requires permits for signs erected in exchange for compensation without reference to the content of the signs; held narrowly tailored and leaving open ample alternative channels for communication).

[296] *Id.*, holding that statute did not have permit approval criteria, but agency rules delineated nine reasons for which the agency must deny an advertising permit and five reasons for which they may. These reasons are "narrow, objective, and definite standards" that properly guide the permitting authority. *See* §5:8 (discussing prior restraint).

> may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located."[297]

This exemption creates a distinction between on-premise and off-premise signs because it allows on-premise signs to display activities on the premises but not billboards that are prohibited adjacent to highways. The Supreme Court in Reagan approved this distinction because it used the exemption in the Highway Beautification Act to show that it was longstanding practice. It explained that "[o]n-/off-premises distinctions … proliferated following the enactment of the Highway Beautification Act of 1965," and that "[u]nder the Act, approximately two-thirds of States have implemented similar on-/off-premises distinctions."[298]

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 in the state highway beautification statutes, accepted limited exemptions allowed under state law, and accepted state laws allowing commercial and noncommercial messages on-premise.[299] Courts post-Reed held that exemptions like these in state highway beautification were content based[300] and rejected aesthetics and traffic safety as compelling interests.[301] The Supreme Court's decision in Reagan overruled these cases. The exemption of government signs under a state statute has also been

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[297] 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).

[298] Reagan, 142 S.Ct., at 1469.

[299] 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) (holding distinction between on-premise and off-premise signs not content-based and recognizing unique nature of the business sign).

[300] Thomas v. Bright, 937 F.3d 721, 729 (6th Cir. 2019) (holding Act is underinclusive and not narrowly tailored); Auspro Enterprises, LP v. Texas Dep't of Transp., 506 S.W.3d 688, 701 (Tex. App. 2016) (same; invalidating several exemptions in Texas law for signs relating to a public election, a natural wonder or scenic or historic attraction, the sale or lease of property, and activities conducted on the property on which it is located; rest of act severable); Outdoor Media Dimensions, Inc. v. Dep't of Transp., 132 P.3d 5, 18 (Or. 2006) (same). See L.D. Mgmt. Co. v. Gray, 988 F.3d 836 (6th Cir. 2021) (regulations held content-based restrictions on speech because act differentiated between billboards advertising off-site activities and those advertising on-site activities). See also Adams Outdoor Advert. Ltd. P'ship v. Pennsylvania Dep't of Transportation, 930 F.3d 199 (3rd Cir. 2019) (invalidating exemption for on-premise signs for signs advertising sale or lease of property; applying different Third Circuit rules). See Emily Jessup, When "Free Coffee" Violates the First Amendment: The Federal Highway Beautification Act After Reed v. Town of Gilbert, 16 First Amend. L. Rev. 73 (2017).

[301] L.D. Mgmt. Co. v. Gray, 988 F.3d 836, 839 (6th Cir. 2021); Thomas v. Bright, 937 F.3d 721, 733 (6th Cir. 2019).

upheld, and the court held that the statute left open ample alternative channels of communication.[302]

§ 3:5. Definitions

Definitions in a sign ordinance cannot be a prior restraint[303] or content based. The definition of a sign can create content-based issues. A sign ordinance must not define a sign by defining its content. The definition of "street graphic" in the Model Ordinance in Street Graphics and the Law, which can also be the definition of a "sign," is content neutral:

> Any structure that has a visual display visible from a public right-of-way and designed to identify, announce, direct, or inform. [304]
> A federal district court held a similar definition 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.[305]

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."[306]

Signs defined in the Model Ordinance are defined by their structural characteristics and location, not by their content. A Ground Sign, for example, is defined as follows:

> A street graphic supported by one or more uprights, posts, or bases placed upon or affixed in the ground and not attached to any part of a building.[307]

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[302] Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cnty., Virginia, 854 F. App'x 521, 526 (4th Cir. 2021)

[303] Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 108 (1st Cir. 2020) ("including but not limited language" in sign definition held not prior restraint).

[304] Street Graphics § 1.03, supra note 2, at 75.

[305] Peterson v. Vill. of Downers Grove, 150 F. Supp. 3d 910, 919-920 (N.D. Ill. 2015), aff'd sub nom. On other grounds Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, Illinois, 939 F.3d 859 (7th Cir. 2019).

[306] Id. (emphasis in original).

[307] Street Graphics § 1.03, supra note 2, at 72.

CHAPTER IV. SPECIALIZED TYPES OF ON-PREMISE SIGNS AND THE FREE SPEECH ISSUES THESE SIGNS PRESENT

§ 4:1. An Overview

Sign ordinances regulate a wide variety of on-premise signs, including digital signs, portable signs, time and temperature signs, and murals.[308] Courts usually uphold regulations for the various types of signs, but each of these signs presents different free speech problems for the courts to decide, and courts have been sensitive to content neutrality and other issues.

§ 4.2. 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.[309] A municipality may decide to prohibit digital signs entirely, allow them only in some zoning districts, regulate how they can be displayed, or adopt a combination of these measures. Courts have usually upheld these ordinances. Studies show that digital signs create more disagreeable aesthetic effects than static signs: they are brighter and change frequently, and thus create more traffic safety risks than static signs.[310]

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[308] This chapter does not discuss roof signs. The Street Graphics Model Ordnance does not allow above roof signs. See Barber v. City of Anchorage, 776 P.2d 1035 (Alaska 1989) (upholding ordinance prohibiting above roof signs).

[309] Street Graphics, supra note 2, at 57. The Street Graphics Model Ordinance defines "dynamic elements" for signs. Model Ordinance § 1.02 in Street Graphics, supra note 2, at 72. See also Chapter 6. For discussion of illumination for digital signs see Daniel M. Isaacs & Michael A. Valenza, A Market Approach to Billboard Light, 46 Real Est. L.J. 6 (2017) (includes discussion of nuisance actions).

[310] See Jerry Wachtel, Compendium of Recent Research Studies on Distraction from Commercial Electronic Variable Message Signs (2018), https://www.scenic.org/wp-content/uploads/2019/09/billboard-safety-study-comp endium-updated-february-2018.pdf [https://perma.cc/H5B5-5M3Z], for a comprehensive review of studies concluding that outdoor advertising distracts driver attention. For additional studies that consider this problem see also Oscar Oviedo-Trespalacios et al., The Impact of Road Advertising Signs on Driver Behaviour and Implications for Road Safety: A Critical Systematic Review, 122 Transp. Res. Part A: Policy and Practice 85 (2019), https://www.sciencedirect.com/science/article/pii/S0965856418310632?via% 3Dihub (concluding most studies remain inconclusive, but there is an emerging trend in the literature suggesting that roadside advertising can increase crash risk, particularly for digital billboards).; John S. Decker et al., The Impact of Billboards on Driver Visual Behavior: A Systematic Literature Review, 16 Traffic Inj. Prev. 234 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4411179/ [https://perma.cc/8M8D-AUXB] (surveying various literature reviews finding that both electronic and passive billboards can create distractive effects); Tania Dukic et al., Effects of Electronic Billboards on Driver Distraction, 14 Traffic Inj. Prev. 469 (2013), https://www.ncbi.nlm.nih.gov/pubmed/23682577 [https://perma.cc/6G2M-YMCK] (finding digital billboards have more of an effect than static billboards but not clear whether they are a traffic hazard); see also Federal Highway Admin. Research Review of Potential Safety Effects of Electronic Billboards on Driver Attention and Distractions (2001),https://pdfs.semanticscholar.org/0249/2df0d4fb0e7d1dfea668c19266cd2b229dd1.pdf https://perma.cc/FR72-LBVZ] (digital billboards may be associated with a higher crash rate under certain conditions). See also Jerry Wachtel, Digital Billboards, Distracted Drivers, Planning, Mar. 2011, at 25–27.

In a leading pre-Reed case, Naser Jewelers, Inc. v. City of Concord,[311] when deciding on a motion for a preliminary injunction, the First Circuit held an ordinance prohibiting the display of EMCs,[312] as applied to prohibit an EMC at a retail store, met the tests for time, place, and manner regulations.[313] 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 are a traffic hazard, and held that "EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous."[314] The court applied the alternate channels of communication requirement generously. There was evidence the city considered and rejected alternatives and gave reasons for their rejection. Allowing EMCs with conditions, such as a limit on the number of times a message could change during a day would create steep monitoring costs and other complications.[315] 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

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[311] 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).

[312] The ordinance prohibited all signs that "appear animated or projected," or "are intermittently or intensely illuminated, or of a traveling, tracing, scrolling, or sequential light type" or "contain or are illuminated by animated or flashing light." Id. at 31.

[313] See § 2:7[1].

[314] 517 F.3d, 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.

[315] 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.

in cross-promotions with other retailers."[316] Other cases upheld digital billboard bans pre-Reed under the Central Hudson criteria[317] and post-Reed.[318]

Not all ordinances are total bans. The courts have upheld spacing requirements post Reed.[319] The justification for spacing requirements was explained in a pre-Reed Sixth Circuit case upholding a 4000-foot spacing requirement for digital signs on billboards as a content-neutral time, place, and manner regulation.[320] 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, the court held, digital billboards can have a greater effect on safety and aesthetics than static ones. Ample alternative channels for communication remained open.

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[316] Id. at 36, 37.

[317] 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" that was not enforced against time and temperature signs, as applied to prevent display of electronic sign in office window; ban on flashing and scrolling signs held content neutral; signs inconsistent with rural community aesthetic; ordinance later amended to allow signs that did not flash or scroll); Adirondack Adver., LLC v. City of Plattsburgh, No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) (criteria met, studies not necessary); Chapin Furniture Outlet, Inc. v. Town of Chapin, No. C/A 3:05 1398 MBS, 2006 WL 2711851 (D.S.C. Sept. 20, 2006) (holding criteria met); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (zoning ordinance prohibiting all outdoor electronic advertising signs displaying commercial speech; studies not necessary to show that prohibition met stated interests, prohibition was most effective way to eliminate problems with electronic signs).

[318] Norton Outdoor Advert., Inc. v. Vill. of St. Bernard, No. 1:20-CV-350, 2022 WL 2176339, at *12 (S.D. Ohio June 16, 2022) (ban on off-premises variable message billboards); Adams Outdoor Advertising Limited Partnership v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *14 (W.D. Wis. Apr. 7, 2020) (digital images prohibited on all signs).

[319] Hucul Advert., LLC v. Charter Twp. of Gaines, 748 F.3d 273, 280 (6th Cir. 2014) (upholding 4000 foot spacing requirement for “digital billboards, which change constantly, and may very well present greater safety concerns (and perhaps greater aesthetic ones) than do static billboards—digital billboards may be animated, and they may be brighter and more distracting than static ones”).

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

Courts have upheld other regulations, such as ordinances that limited digital signs to some areas of the municipality,[321] size restriction,[322] requirements for location, types of sign, hours of operation,[323] and rules limiting existing nonconforming billboards to static signs, rather than allowing them to become electronic billboards.[324] A Tennessee decision illustrates these cases. The court upheld as a 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."[325] The ordinance also allowed EMCs approved in an 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 ordinance met the time, place, and manner rules and the Central Hudson criteria.

Digital billboards can be displayed safely by measures such as limiting nighttime sign luminance, regulating dwell time, prohibiting message sequencing and video or animation displays, avoiding areas where distraction may occur, and requiring minimum standards of

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[321] Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 105 (1st Cir. 2020) (upholding ordinance restricting electronic signs to a commercial district; ordinance narrowly tailored to serve a significant governmental interest and not overinclusive or underinclusive); Signs for Jesus v. Town of Pembroke, 230 F. Supp. 3d 49, 60-62 (D.N.H. 2017) (intermediate scrutiny; exemption for limited areas abutting commercial district did not make ordinance underinclusive, ordinance advanced traffic safety interest and aesthetic interest of small town, studies not needed, ordinance narrowly tailored, alternate channels open); Lamar Tennessee, LLC v. City of Knoxville, No. E201402055COAR3CV, 2016 WL 746503, at *15 (Tenn. Ct. App. Feb. 25, 2016) (upholding as content-neutral time place, and manner regulation an ordinance prohibiting digital signs 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, as 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"; ordinance met Central Hudson criteria). Compare E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623, 652-644 (N.J. 2016) (township permitted static billboards in a single zoning district adjacent to heavily travelled interstate highway but prohibited digital billboards in same zone; record provided no explanation of qualitative differences between three static billboards and a single digital billboard in that area and belied assertion that no standards existed to address aesthetic and public safety concerns). See also Adirondack Advert., LLC v. City of Plattsburgh, N.Y., No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681 (N.D.N.Y. Sept. 30, 2013) (upholding ordinance providing that digital signs cannot display messages about goods or services not sold and delivered or provided on the premises where sign is located but may display messages about public emergencies and public events).

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

[323] Outfront Media, LLC v. City of Grand Rapids, No. 357319, 2022 WL 3329484, at *11 (Mich. Ct. App. Aug. 11, 2022).

[324] Id.

[325] Lamar Tennessee, LLC v. City of Knoxville, 2016 WL 746503 at *14 (Tenn. Ct. App. 2016) (Reed case not discussed)..

legibility and readability. A district court upheld a sign ordinance that allowed no more than forty percent of an on-premise sign to have digital components, regulated the frequency of message changes, and required a sign to go dark if it malfunctioned.[326]

The District of Columbia Court of Appeal upheld a guidance for digital signs published by the Federal Highway Administration.[327]

§ 4:3. Flags

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

The leading pre-Reed case is Dimmitt v. City of Clearwater,[328] where the Eleventh Circuit held invalid an ordinance exempting government flags but requiring a permit for a flag displaying the Greenpeace logo or a union affiliation. The court held "[t]he 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."[329] 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.[330]

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[326] Geft Outdoor LLC v. Consolidated City of Indianapolis, 2016 WL 2941329, at 13 (S.D. Ind. 2016)..

[327] Scenic America, Inc. v. United States Dep't of Transp., 836 F.3d 42 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 2 (2017).

[328] 985 F.2d 1565 (11th Cir. 1993).

[329] Id. at 1570.

[330] 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); 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); North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (flags,

Central Radio Co. Inc. v. City of Norfolk,[331] held a sign ordinance invalid post-Reed that exempted governmental or religious flags and emblems from an ordinance but applied it 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 to justify the distinctions and held the restrictions were not narrowly tailored because, as in Reed, they were underinclusive.[332] The courts are divided on whether an exemption from a permit requirement is content based.[333]

Courts have upheld regulations for the display of flags that are not content based. In a pre-Reed case, American Legion Post 7 v. City of Durham,[334] 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. The court held that 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

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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 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).

[331] 811 F.3d 625, 633 (4th Cir. 2016).

[332] See also Int'l Outdoor, Inc. v. City of Troy, No. 17-10335, 2017 WL 2831702, at *1 (E.D. Mich. June 30, 2017) (exemptions for flags and other temporary signs held invalid).

[333] Compare National Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349. 1375 (S.D. Fla. 2003) (exemption from permitting process not an exception to a general ban of noncommercial messages,), dismissed as moot, 402 F.3d 1329 (11th Cir. 2005), with Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322 (S.D.N.Y. 2000) (holding ordinance exempting government flags and other signs from permit requirement unconstitutional as discrimination against noncommercial speech).

[334] 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).

permanent waivers.[335] A post-Reed case upheld an ordinance for residential districts that allowed flags to be slightly larger and exempt from height and setback requirements.[336]

Flags are always a sensitive subject in sign regulation. They can be displayed on poles, and a municipality may want to ban pole signs but provide an opportunity for displaying flags by exempting flags from the pole sign prohibition. This exemption may create a free speech problem. In Geft Outdoor, LLC v. City of Westfield,[337] the city banned pole signs but exempted flags from the pole sign ban. The district court held the pole sign ban content-neutral, but that an exception for certain flag poles destroyed the narrow tailoring necessary to promote the city's interests in community aesthetics and safety. The Seventh Circuit remanded this decision to the district court for intermediate scrutiny review, but doubted its holding because intermediate scrutiny is "not an overly demanding standard," and "[a]ll the City must show is that its pole sign ban furthers its stated interests without burdening substantially more speech than necessary." The Seventh Circuit had a "difficult time" seeing how the flag pole exception made the pole sign ban unconstitutional, because the pole sign ban still furthered the city's interests in reducing visual clutter.

4:4. 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."[338] 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.[339]

G.K. Ltd. Travel v. City of Lake Oswego[340] is a typical pre-Reed case. The Ninth Circuit upheld pre-Reed a sign code, adopted after careful study, which prohibited the display of plaintiff's

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

[336] Shaw v. City of Bedford, 262 F. Supp.3d 754 (S.D. Ind. 2017).

[337] 39 F.4th 821 (7th Cir. 2022).

[338] Andrew D. Bertucci & Richard B. Crawford, Model On-Premise Sign Code § 7, at 19 (United States Sign Council Foundation, 2016), https://usscfoundation.org/wp-content/uploads/2018/03/USSC-Model-On-Premise-Sign-Code-2018.pdf. The Code specifies where to display these signs, and has size and height limits for them. Id. at 35, 37-39.

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

[340] 436 F.3d 1064 (9th Cir. 2006).

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."[341] There were no exceptions based on content. 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."[342] Ample alternative channels 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 sign ordinances with restrictions on freestanding signs as acceptable time, place and manner regulations that limited size and height but did not prohibit them entirely.[343] The ordinances were narrowly tailored and content-neutral, and left ample alternate channels of communication open because they only limited size and height and

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

[342] G.K. Ltd., 436 F.3d at 1074.

[343] Sopp Signs, LLC v. City Of Buford, Ga., No. 1:11-CV-2498-TWT, 2012 WL 2681417 (N.D. Ga. July 6, 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.

were not a complete ban. They allowed some opportunity to display freestanding signs without allowing signs that would distract drivers or create aesthetic problems.[344]

The courts have held an ordinance invalid if it contained content-based exemptions when it banned freestanding signs by restricting their height,[345] In one pre-Reed case,[346] 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. The ordinance 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."[347] An exemption for flags may be acceptable.[348]

§ 4:5. Murals

Murals are signs or graphics that are painted or placed on walls or other structures[349] and are protected as free speech by the First Amendment.[350] A number of cities have programs that allow murals and provide a review process for their display.[351]

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

[345] 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; upholding restrictions on height 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).

[346] 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.

[347] 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 really and substantially overbroad facially.

[348] § 4:3.

[349] See Brian J. Connolly, Reed, Rembrandt, and Wright: Free Speech Considerations in Zoning Regulation of Art and Architecture, Zoning and Planning Law Reports Vol. 41, No. 11 (2018).

[350] Complete Angler, LLC v. City of Clearwater, Fla., 607 F. Supp. 2d 1326, 1332 (M.D. Fla. 2009).

[351] E.g., Los Angeles Murals Program, https://culturela.org/murals/; Portland, Oregon mural ordinance, http://www.portlandonline.com/auditor/index.cfm?c=28169; San Buenaventura, California mural design guidelines, https://www.cityofventura.ca.gov/DocumentCenter/View/12124/Mural-Design-Guidelines?bidId=. 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). See also the San Buenaventura murals packet,

If the definition of a "mural" is content-based the regulations adopted for murals will be subject to strict scrutiny, which is usually fatal. Ordinances sometimes define a mural as a "work of art," and there is no clear decision on whether this definition is facially content based.[352] Content neutral definitions are possible.[353]

Murals are either commercial or noncommercial. Deciding when a mural is commercial or noncommercial can be challenging. Complete Angler, LLC v. City of Clearwater[354] 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. The court held the painting was an art work. It 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.

Other cases reached contrary results on similar facts. In an Ohio case,[355] 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 not severable, which made the ordinance unenforceable.[356]

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https://www.cityofventura.ca.gov/DocumentCenter/View/19206/Public-Art-Mural-Application-Packet?bidId=.

[352] Neighborhood Enters. v. City of St. Louis, 644 F.3d 728 (8th Cir. 2011) (invalidating but not discussing exemptions for art work and other content based exemptions), cert. denied, 565 U.S. 1197 (2012); Complete Angler, LLC v. City of Clearwater, Fla., 607 F. Supp. 2d 1326, 1335 n.13 (M.D. Fla. 2009) (facial challenge not addressed). 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).

[353] Mural: A sign that is not an integral part of the architecture or color scheme of the structure.

[354] 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

[355] City of Tipp City v. Dakin, 929 N.E.2d 484 (Ohio App. 2010).

[356] 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

A mural ordinance is facially unconstitutional if it allows noncommercial[357] but not commercial murals.[358] It can also be unconstitutional as applied if it is applied to content based speech in a discriminatory manner,[359] or if it is applied to prohibit a noncommercial sign.[360] A district court case pre-Reed[361] illustrates these problems. The court held content-based and 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 it, and the court could not see how content that was allowed 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.

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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.

[357] In 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, and 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.

[358] Morris v. City of New Orleans, 399 F. Supp. 3d 624, 636 (E.D. La. 2019); Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019). See also Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326, 1333 (M.D. Fla. 2009) (refusing to issue permit for mural because it was commercial).

[359] Complete Angler, LLC v. City of Clearwater, Fla., 607 F. Supp. 2d 1326, 1333 (M.D. Fla. 2009). The city's enforcement of the ordinance was content-based because it had to examine the content of the mural when it refused to apply an "art work" exemption in the ordinance. The city also condoned the display of other murals, and a city official admitted a different subject matter for the plaintiff's mural would be acceptable. The 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.

[360] City of Indio v. Arroyo 191 Cal. Rptr. 565 (Cal. Ct. App. 1983). 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 the size limit allowed by the ordinance, but the court held the denials invalid because the ordinance was overbroad as applied to noncommercial speech. "The stifling of artistic expression is a perverse result to claim as a victory for esthetics." Id. at 570.

[361] 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).

A post-Reed case reached the same conclusion. 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.[362]

§ 4:6. Portable and Temporary Signs

§ 4:6[1]. In General

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."[363] Portable signs are often unattractive, can distract drivers and can cause a traffic safety problem if located close to streets or highways. Local governments have prohibited them,[364] restricted the times allowed for their display, and adopted height and size limitations.

Courts apply either the Central Hudson criteria[365] or the time place and manner rules[366] to portable sign regulations and have upheld reasonable regulations.[367] though some courts have not found problems that justify the regulation of portable signs.

§ 4:6[2]. Total Prohibition

The cases on total prohibitions are mixed because the courts are not always convinced that a total ban on portable signs is justified. Harnish v. Manatee County,[368] is an early Eleventh Circuit case applying the Central Hudson criteria to uphold the governmental interest in prohibiting

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

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

[364] See Street Graphics Model Ordnance, supra note 2, § 1.13, at 90 (prohibiting portable signs)

[365] See section 2:6[2].

[366] See section 2:7[1].

[367] Baldwin Park Free Speech Coal. v. City of Baldwin Park, 843 F. App'x 21, 23 (9th Cir. 2021) (temporary sign ordinances held content-neutral and narrowly tailored, interests in traffic safety and aesthetics were significant and not diminished by permit-exemption and special sign rules; ordinance narrowly tailored; ample alternatives existed; requirement that an applicant submit a "drawing or photograph of the proposed temporary sign" to show "[h]eight, [w]idth and [l]anguage" upheld).

[368] 783 F.2d 1535 (11th Cir. 1986)..

portable and temporary signs. The county did studies and held public hearings before adopting the ordinance.[369] Other Eleventh Circuit cases upheld total prohibitions,[370] but a later Eleventh Circuit case struck down a total ban on portable signs and distinguished earlier Eleventh Circuit cases as upholding bans that were more narrowly drawn.[371]

A number of cases upheld bans on portable signs as content neutral time, place, and manner regulations.[372] Lindsay v. City of San Antonio[373] illustrates these cases. The Fifth Circuit upheld a ban on portable signs and that it would advance the city's aesthetic interest even though the trial court found the ban would only "imperceptibly" change the community's appearance because the number of portable signs was small. 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."[374] Conflicting visual evidence was introduced on whether portable signs are

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[369] An early Eleventh Circuit case, Dills v. Cobb County, 593 F. Supp. 170 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985), held that the "mere incantation of aesthetics as a proper state purpose" did not meet First Amendment requirements. It held that he 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. Dills, 593 F. Supp. at 174 n.5. The ordinance had a setback requirement that effectively prohibited portable signs. Accord Signs, Inc. of Florida v. Orange County, 592 F. Supp. 693, 696 (M.D. Fla. 1983). See also Ballen v. City of Redmond, 466 F.3d 736, 742 (9th Cir. 2006) (rejecting city employee statement not supported by objective facts; portable sign ban held invalid).

[370] Messer v. City of Douglasville, 975 F.2d 1505, 1513 (11th Cir. 1992); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 (11th Cir. 1987).

[371] LaCroix v. Town of Fort Myers Beach, Fla., 38 F.4th 941, 950 (11th Cir. 2022). The court believed that the ordinance foreclosed an important medium of expression.

[372] Marras v. City of Livonia, 575 F. Supp. 2d 807, 816 (E.D. Mich. 2008) (upholding as content neutral time, place, and manner regulation); Bertke v. City of Dayton, No. C-3-86-555, 1992 WL 1258520 at *5 (S.D. Ohio Jan. 2, 1992) (holding ban content-neutral and narrowly tailored; permanent signs provided 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, at *10 (N.D. Ala. 1988) (holding prohibition directly advanced governmental interest, reached no further than necessary, and allowed sufficient alternative modes of communication); Barber v. City of Anchorage, 776 P.2d 1035. 1036 (Alaska 1989) (holding ordinance content-neutral and advanced aesthetic interest; alternate means available, can have permanent unlighted sign). See accord Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 (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, 827 F.3d 1192, 1198 (9th Cir. 2016) (holding ordinances prohibiting non-motorized billboards and advertising on motor vehicles content-neutral and narrowly tailored and alternate means of communication allowed); Morales v. City of S. Padre Island, No. CV B-10-76, 2011 WL 13182954, at *7 (S.D. Tex. June 17, 2011) (upholding ordinance allowing window signs but prohibiting portable signs).

[373] 821 F.2d 1103 (5th Cir. 1987).

[374] Id. at 1109, citing Vincent, 466 U.S. at 811. Accord, Morales v. City of S. Padre Island, No. CV B-10-76, 2011 WL 13182954, at *6 (S.D. Tex. June 17, 2011) (and holding ban no broader than necessary and exemptions not content

aesthetically offensive, but deference was owed to the city's aesthetic judgment, which the court had to respect. The Court relied on Metromedia and Vincent to hold the ban on portable signs narrowly tailored because the city eliminated the exact source of evil it sought to remedy. Portable signs are not a uniquely valuable or important mode of communication, and plaintiffs' ability to communicate effectively was not threatened by ever-increasing restrictions on speech. Ample alternate means of communication were available.

A federal district court applied the Central Hudson criteria post-Reed to uphold an ordinance that prohibited "A" frame signs, which are temporary signs.[375] The court held the prohibition substantially advanced the city's aesthetic and traffic safety interests, and that it did not have to produce studies to prove this point. "A" frame signs posed a special risk to the community, "A" frame signs did not present the same aesthetic or traffic problems as other types of signs, and the city could treat them differently. Exceptions from the prohibition did not invalidate it because they did not undercut the city's stated goals.[376] An exception for the city center recognized its different visual quality and traffic plan. A second exception allowed "A" frame signs for only a short 30-day period after obtaining a business license. Neither did the prohibition burden substantially more speech than was necessary. It affected only a "sliver" of speech, and the affected business had effectively used other means of communication. The plaintiff did not suggest less burdensome alternatives.

Courts have been hostile to other forms of portability. Ballen v. City of Redmond[377] struck down a portable sign ban the city applied to prohibit signs held by hand on weekdays on a sidewalk in front of a bagel store because it violated the fourth "more extensive than necessary" Central Hudson criterion. The ordinance exempted ten types of signs the court held content based. Relying

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based).

[375] Timilsina v. West Valley City, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) (holding Reed did not apply because ordinance regulated commercial speech).

[376] 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.

[377] 466 F.3d 736 (9th Cir. 2006). Later cases distinguished Ballen. E.g., World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 686 (9th Cir. 2010) (government created distinction between permissible and prohibited forms of commercial speech that undermined government's asserted interests in regulation as a whole).

on the Supreme Court's Discovery Network[378] decision, which struck down an ordinance that discriminated against commercial speech, the court held that "[t]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."[379] Courts have struck down prohibitions on similar unusual temporary signs for similar reasons.[380]

§ 4:6[3]. Display, Size and Height Limitations

Sign ordinances can limit the length of time a portable sign can be displayed during any one year, the period of time during which a portable sign can be displayed continuously, its size and height, and the number of portable signs allows on a property. Courts usually uphold these limitations. An Eleventh Circuit case upheld height limits and a requirement that allowed only one portable sign on a property.[381] It applied a relaxed standard of judicial review, accepted these 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.[382]

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[378] Discovery Network is discussed in § 2:6[6].

[379] Id. at 743. The court also held that Metromedia did not apply. The court also held that "[a]s in Discovery Network, the City's use of a content-based ban rather than a valid time, place, or manner restriction indicates that the City has not carefully calculated the costs and benefits associated with the burden on speech imposed by its discriminatory, content-based prohibition." Id. The court held the availability of narrower alternatives is a criterion to consider under the fourth criterion. Id. Metromedia did not apply because the ordinance failed Central Hudson's fourth prong. Id. at 744.

[380] State v. DeAngelo, 963 A.2d 1200 (N.J. 2009) (ten-foot-tall inflatable rat-shaped balloon on a sidewalk; held content-based, strict scrutiny applied because grand opening signs were exempted; ordinance did not fairly advance any compelling governmental interests; violation of ordinance depended on 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; ordinance overly broad, virtually eliminated all signs with few exceptions, no 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). Compare Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute, 915 F.3d 1120, 1121 (7th Cir. 2019) (ordinance prohibiting inflatable signs in public right-of-way systematically enforced).

[381] 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 ordinance; 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).

[382] 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].

Another Eleventh Circuit case[383] 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[384] and, by allowing a limited number of portable signs, it narrowly tailored these restrictions to meet its purposes because it could have decided to prohibit portable signs as an alternative.[385] An ordinance is content-based, however, if some signs are allowed to be larger than other signs based on content.[386]

Some courts have struck down regulations limiting the display of portable signs.[387]

§ 4:7. Price Signs

Sign ordinances can prohibit the display of prices, allow the display of prices in some zoning districts but not others, or limit where businesses may display prices on-premise, but these restrictions raise content neutrality issues. Supreme Court cases holding that prohibiting price advertising is invalid have influenced decisions on sign ordinances that regulate price. In Virginia

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[383] 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 decided to limit length of display, not necessary to regulate all unattractive media of commercial speech, 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. City of Wyoming, 383 N.W.2d 226 (Mich. Ct. App. 1985) (60-day display period per year; ordnance failed to sufficiently advance governmental interests asserted or reached further than necessary to accomplish those objectives; safety hazards could be remedied by other provisions of sign code, time limit did not address them).

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

[385] 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) (upholding city traffic rule that barred operation of vehicles solely for purpose of displaying commercial advertising; regulation advanced government's interest in controlling traffic; ban on advertising-only vehicles lessened amount of potential traffic on city streets; regulation not more extensive than necessary, exceptions support rule; Dills rejected.).

[386] Johnsonville, LLC v. City of Buffalo, No. A21-0957, 2022 WL 1297835, at *4 (Minn. Ct. App. May 2, 2022) (holiday signs allowed to be larger than flags; strict scrutiny applied, but city failed to satisfy strict scrutiny review).

[387] All American Sign Rentals, Inc. v. City of Orlando, 592 F. Supp. 85, 88 (M.D. Fla. 1983) (holding ordinance regulating portable trailer signs by requiring signs to be set back 400 feet and limiting usage to 45 days on premises followed by 75 days off premises unconstitutional because it singled out portable signs for restriction under the pretext of safety and aesthetics when similar restrictions were not placed on other signs); Risner v. City of Wyoming, 383 N.W.2d 226, 229 (Mich. App. 1985) (invalidating ordinance limiting display of temporary display signs to 60 days per year violates first amendment; aesthetic concerns, traffic obstruction, poor anchoring and electrical hazards do not justify this limitation; periodic change would make distraction worse).

State Bd. of Pharmacy v. Virginia Citizens Consumer Council,[388] for example, the Supreme Court held invalid a statutory ban on the advertising of prescription drugs by pharmacists. The ban effectively prohibited the dissemination of price information about the 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.[389]

Early state cases relied on Virginia Pharmacy to invalidate ordinances that regulated the display of prices on signs. In a Georgia case,[390] the court struck down an ordinance, as applied to a self-service gas station, which 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 an aesthetic justification for this distinction, but the court held that price numbers 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.[391] Cases in federal district courts held ordinances invalid

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[388] 425 U.S. 748 (1976). See also Liquormart v. State of Rhode Island, 517 U.S. 484 (1996) (plurality; striking down statute that prohibited advertising of liquor prices; plurality decision); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (invalidating prohibition on advertising the prices of routine legal services).

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

[390] 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).

[391] 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 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, 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).

as content-based that prohibited price information on signs but that also had many other content-based distinctions.[392]

An Ohio case was more accepting. It upheld an ordinance that prohibited price signs adjacent to freeways with a speed limit of more than fifty miles an hour, within 660 feet of the Interstate System, and that prevented a lodging facility from displaying its weekly rates.[393] 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."[394] Evidentiary proof was not required, and Metromedia applied even though the sign was an on-premise sign rather than a billboard.[395]

4:8. Time and Temperature Signs

A time and temperature sign is a noncommercial electronic or digital sign with specific content. It displays this information electronically with changing or moving digits, may or may not be lighted, but is typically illuminated. Sign ordinances often exempt these signs from a ban on flashing, moving or electronic signs.

An exemption for noncommercial signs in the San Diego sign ordinance was held unconstitutional in Metromedia.[396] Time and temperature signs were among the exempted signs,

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[392] 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 held 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 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).

[393] Suburban Lodges of Am., Inc. v. City of Columbus Graphics Comm'n, 761 N.E.2d 1060 (Ohio App. 2000).

[394] Id. at 1067.

[395] 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. The prohibition in the ordinance also 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.

[396] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981). See § 3:5.

so courts can follow Metromedia and hold an exemption of time and temperature signs unconstitutional. One group of cases adopted this view and held time and temperature sign exemptions in sign ordinances content-based and not narrowly tailored when they were one of numerous content-based exemptions that undermined the aesthetic and traffic safety interests an ordinance served.[397]

An exemption for public service signs such as time and temperature signs in the state's highway beautification act and regulations was held unconstitutional in Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways.[398] The regulation prohibited signs displaying flashing, moving or intermittent lights but exempted signs displaying time, date, temperature or weather, limited to one cycle of four displays with a five-second maximum completion time. The regulation was unconstitutional because "[w]hen the regulation prohibits commercial speech but allows time, date, temperature or weather information to be displayed, the regulations become substantially broader than necessary to protect the governmental interest of highway safety."[399] They were also content based because "[t]here is no reasonable relation between the mere content of the message itself and the safety of the driving public."[400]

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[397] 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).

[398] 928 S.W.2d 344 (Ky. 1996) (also holding the statute and regulation discriminated among different kinds of noncommercial speech).

[399] Id. at 348.

[400] Id. at 350. 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. Accord, Chapin Furniture Outlet, Inc. v. Town of Chapin, No. C/A 3:05 1398 MBS, 2006 WL 2711851, (D.S.C. Sept. 20, 2006), vacated & remanded as moot, 252 F. App'x 566 (4th Cir. 2007) (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 Illinois, L.L.C. v. City of Des Plaines, Ill., No. 04 C 8130, 2005 WL 2277313 (N.D. Ill. Sept. 15, 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 trigger proliferation. 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 time and temperature signs do not create traffic

§ 4:9. Window Signs

Sign ordinances often limit the area of a window that can be used for window signs. Courts have upheld this type of restriction. An Arizona court pre-Reed upheld a sign ordinance limiting window signs to 30 percent of the window area.[401] Although there was no formal study, the city received considerable input on the subject of window coverage and aesthetics before enacting the ordinance. Thirty percent was a reasonable compromise between a total ban of signage and limited ban. The ordinance was narrowly tailored. because it only addressed signs that were inside the pane, and allowed alternative methods of communication, including signs hanging outside the window sill area. The restriction was a reasonable fit, as "exact justifications for what are essentially subjective judgments are not required."[402]

§ 4.10. Wind Signs

In Palmer v. City of Missoula,[403] a post-Reed case, a federal district court upheld an ordinance prohibiting wind signs in a case in which an automobile dealer attached balloons to his vehicles. The court held the ordinance was not content based. It applied the Central Hudson criteria to hold that traffic and safety interests were substantially advanced, that the ordinance contained a statement of purpose, that formal studies were not necessary, and that the ordinance was no more extensive than necessary. "By applying the prohibition only to signs that wave in the wind, the ordinance targets precisely those advertisements that are most likely to distract and annoy drivers and passersby."[404]

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hazards and do not have adverse effects on adjacent property).

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

[402] Id. at 763.

[403] Palmer v. City of Missoula, Montana, No. CV-16-54-M-DLC, 2017 WL 1277460 (D. Mont. Apr. 4, 2017) (D. Mont. Apr. 4, 2017).

[404] Id. at * 3.

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.[405] Some control the physical characteristics of signs, such as their size, spacing,[406] height and setback. Courts usually uphold this type of regulation because it does not prohibit signs but regulates physical characteristics that may affect aesthetics and traffic safety. Other regulations deal with less tangible elements, such as color and illumination.

Courts apply the Central Hudson criteria and the time, place and manner rules 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. In some cases that upheld a display regulation, the special character of the visual environment was an important 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. An animated sign is an 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."[407] Illumination is another example. Illumination is “A source of any artificial or reflected light.”[408] A changeable sign is another. A changeable sign is "[a] sign with the capability of content change by means of manual or remote output."[409] Although these sign features can provide an attractive visual environment in some settings, a municipality may want to control or prohibit some or all of them, either throughout the municipality or in certain areas. Signs must then display the designated feature in the manner specified or eliminate it if prohibited.

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[405] See Luce v. Town of Campbell, Wisconsin, 872 F.3d 512, 517 (7th Cir. 2017) (challenge to ban on signs within 100 feet of end of overpass structure remanded for trial), cert. denied, 138 S. Ct. 1699 (2018).

[406] 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 (digital signs.)

[407] Model On-Premise Sign Code § 7, supra note 296, at 15. The definition also defines different types of animated signs.

[408] Street Graphics Model Ordinance § 1.03, in Street Graphics, supra note 2, at 72.

[409] Model On-Premise Sign Code § 7, supra note 296, at 17. The definition also defines different types of changeable signs.

Courts upheld prohibitions on animated and flashing signs pre-Reed.[410] In Marras v. City of Livonia[411] a district court held that prohibitions on flashing and "moving" signs[412] were content-neutral because they did not draw distinctions based on the message the sign conveyed but on how it was presented. They did not regulate speech but regulated "what form speech may take."[413] Another 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.[414] Content-based distinctions between signs that can and cannot have changeable copy are invalid.[415]

A court of appeals applied the Central Hudson criteria to uphold a ban on inflatable signs that was applied to a car dealership as content neutral.[416] The ordinance disallowed “elements which revolve, rotate, whirl, spin or otherwise make use of motion to attract attention,” and banned

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[410] 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) (upholding ban on flashing signs under Central Hudson criteria); Pawtucket CVS, Inc. v. Gannon, No. PC 05-0965, 2006 WL 998242 (R.I. Super. Apr. 14, 2006) (same); Meredith v. City of Lincoln City, No. CIV. 03-6385-AA, 2008 WL 4937809 (D. Or. Nov. 6, 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).

[411] 575 F. Supp. 2d 807 (E.D. Mich. 2008).

[412] Under the ordinance, a "flashing sign" was defined as a sign that is "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 was defined as a sign that "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.

[413] Id.

[414] 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. The temporary nature of the changeable copy signs influenced the decision.

[415] 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 have changeable copy; content of one type of sign certainly not "safer" or inherently more "aesthetically pleasing" than the other).

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

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 ban was narrowly tailored and advanced aesthetic and traffic safety interests. The court recognized 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. The ban 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 can regulate color in several ways. They may specify the colors that signs may use, limit the number of colors a sign can have, or 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 in a certain size. It 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.[417] They did not prevent the expression of any views, and enforcement did not require the government to evaluate the nature of the message expressed. The color limitation served a compelling governmental interest in preventing counterfeiting because it made it more difficult for counterfeiters to gain access to negatives they could alter and use for counterfeiting purposes.[418]

Cases that considered color regulation in sign ordinances have relied on this case, and have held that regulating color is a content-neutral time, place and manner regulation. In City of Tipp City v. Dakin,[419] for example, an Ohio court upheld color limitations in a sign ordinance that allowed no more than five colors for most signs:

> 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

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[417] 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.

[418] At the time, only one negative and plate were required for black-and-white printing, but color printing required multiple negatives and plates. The 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.

[419] 929 N.E.2d 484 (Ohio Ct. App. 2010).

> 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.[420]

A federal district court upheld, as a time, place and manner regulation, an historic district ordinance that required the Board of Architectural Review to review exterior structural alterations in order to consider the "general design, scale of buildings, arrangement, texture, materials and color of the structure in question, and the relation of such elements to similar features of structures in the immediate surroundings."[421] The Board applied these criteria to reject a permit for the display of a mural on the wall of a restaurant. The court held that color, size, and other restrictions were valid and affected only the format or manner in which a 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 at 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, and control of color is more easily supported in historic districts where it can be an important element of an historic setting. Another district court upheld a design review program to implement an Old World Bavarian–Alpine theme for its commercial area where color was one of the design criteria.[422]

Narrow tailoring is an issue in the regulation of color, although a court may hold it is not a problem because an ordinance that controls for color limits only this design element. In a related case, the Eleventh Circuit held an ordinance that limited news rack colors to beige and brown was narrowly tailored as a valid time, place and manner regulation.[423] 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

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[420] Id. at 502.

[421] 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).

[422] Demarest v. City of Leavenworth, 876 F. Supp.2d 1186 (E.D. Wash. 2012). See also § 5:4, discussing design review, and § 2:8[3], discussing the constitutionality of design review standards.

[423] 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).

nor prohibit the sale and distribution of newspapers, and publishers could display their name or logo in any color they selected.

§ 5.4. Design Review

Sign ordinances may require design review,[424] which can present a content neutrality problem if it requires a design that has identifiable content, or if it authorizes the review of sign content. Pre-Reed cases upheld ordinances that had design review standards. In Lusk v. Village of Cold Spring,[425] the ordinance required a Certificate of Appropriateness for alterations of historic properties in an historic district based on a review that considered criteria 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."[426] The village refused to issue a certificate for a sign on an historic building.

The court held the ordinance was a prior restraint on speech because it did not include time limits for decisions on whether to issue certificates but did not invalidate the ordinance standards. Although admitting that the standards would be unconstitutional if applied to allow the review of a sign's content, the court concluded that they would be "constitutional when applied to general principles of architecture and design, even though its specific application to the content of any signage would not be."[427] It held that "We therefore read Chapter 64 to apply to architecture and design only and thus interpret it not to authorize the Review Board to review, approve, or disapprove of the content of any proposed or existing signage."[428] The historic context of the historic district helped support the constitutionality of the standards in this ordinance.

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[424] Section 2:8[3] discusses the prior restraint problem presented by standards included in design review ordinances and by the requirement that discretionary procedures like design review should contain time limits.

[425] 475 F.3d 480 (2d Cir. 2007).

[426] 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.

[427] Id. at 496.

[428] Id.

Demarest v. City of Leavenworth[429] 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-neutral 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. Other cases have also held that design standards based on physical or architectural elements did not present a content neutrality problem.[430]

§ 5:5. Height and Size Limitations

Sign ordinances usually limit the height and size of on-premise signs.[431] 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.

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[429] 876 F. Supp.2d 1186 (E.D. Wash. 2012). The court 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 criteria.

[430] See 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.

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

Courts had little difficulty pre-Reed upholding size[432] and height[433] limits under the Central Hudson criteria or as time, place and manner rules. They held they were not content-based and advanced legitimate interests in aesthetics and traffic safety.[434] They also held they left adequate

[432] 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, Ga., No. 1:11-CV-2498-TWT, 2012 WL 2681417 (N.D. Ga. July 6, 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 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 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).

[433] 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, Ga., No. 1:11-CV-2498-TWT, 2012 WL 2681417 (N.D. Ga. July 6, 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).

[434] 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 did not mention aesthetics or traffic safety; reference to "visual clutter" sufficient). See § 3:3.

alternate means of communication open because they were not a complete ban.[435] One case upheld ground sign size limits the ordinance calibrated with the width and speed of adjacent streets.[436]

Marathon Outdoor, LLC v. Vesconti[437] is a typical case pre-Reed. The court upheld a New York City ordinance limiting signs within fifteen feet of a street to less than 30 feet in height. It was narrowly 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."[438] Courts have upheld size limits post-Reed.[439]

Careful study and public participation can help show that an ordinance meets narrow tailoring requirements by showing a reasonable fit between legislative ends and means. As a Washington court noted:[440]

> 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

[435] 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).

[436] 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 Foundation and published in Street Graphics, supra note 2, Chapter 4.

[437] 107 F. Supp. 2d 355, 366-367 (S.D.N.Y. 2000). See also Vosse v. The City of New York, Comm'r, 666 F. App'x 11, 13 (2d Cir. 2016) (upholding prohibition of illuminated signs more than 40 feet above curb level upheld as time, place and manner regulation; prohibition advanced aesthetic interest and was narrowly tailored; alternative channels available), cert. denied, 137 S. Ct. 1231 (2017).

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

[439] Baldwin Park Free Speech Coalition v. City of Baldwin Park, No. 2:19-CV-09864-CAS-EX, 2021 WL 4846059, at *7 (C.D. Cal. Oct. 18, 2021); Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, Illinois, 939 F.3d 859, 862 (7th Cir. 2019) ("A limit on the size and presentation of signs is a standard time, place, and manner rule, a form of aesthetic zoning."), cert. denied, 140 S. Ct. 1266 (2020); Shaw v. City of Bedford, 262 F. Supp. 3d 754 (S.D. Ind. 2017) (upholding differential size limitations on signs in residential districts as narrowly tailored; flags 60 square feet, temporary signs 36 square feet, permanent residential development entrance signs up to 102 square feet depending on size of development); www.RicardoPacheco.com v. City of Baldwin Park, No. 216CV09167CASGJSX, 2017 WL 2962772 (C.D. Cal. July 10, 2017) (upholding differential size limitations on residential signs as time place and manner regulations; flags or pennants 18 square feet, permanent signs 12 square feet, for temporary window signs nine square feet, and other temporary signs 10 square feet).

[440] 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).

> 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.

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.[441]

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

The United States Sign Council Foundation'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]."[442] A municipality can prohibit sign illumination throughout the community or in certain areas if they believe it is inconsistent with the visual environment.[443] Illumination is necessary for on-premise signage, however. Otherwise a sign will not be visible when it is dark and cannot be read. Standards developed by the United States Sign Council Foundation[444] provide a basis for regulations that allow illumination appropriate for the nighttime environment.

Restrictions on illumination can raise free speech problems because they regulate the color[445] 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. Ordinances upheld by the courts usually regulate rather than prohibit illumination. For example, a court of appeals post-Reed upheld a ban on displaying illuminated signs more than

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[441] 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).

[442] Model On-Premise Sign Code § 7, supra note 296, at 20.

[443] See, generally, Annotation, Validity and Construction of Zoning Regulations Relating to Illuminated Signs, 30 A.L.R.5th 549 (1995).

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

[445] See § 5:3.

forty feet above the street curb as a valid time, place and manner regulation.[446] The ordinance excluded non-illuminated, noncommercial signs less than 12 square feet in surface area. The court held the ordinance was narrowly tailored because it was reasonable for the city to prohibit all illuminated signs above a certain height, because it advanced the city's aesthetic interests, and because there were ample alternate channels of communication.

In some cases when courts have upheld illumination regulations the distinctive character of the protected visual environment has been a factor. Community character was an important factor in Asselin v. Town of Conway.[447] 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."[448] Externally lit signs and less expensive alternatives were available. Also rejecting substantive due process objections, the court held that the unregulated use of nighttime lighting would negatively affect "the natural 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.[449]

In another state case in which environmental issues were important, Eller Media Co. v. City of Tucson,[450] 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 shined downward on at least one surface before radiating upward. The

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[446] Vosse v. The City of New York, Comm'r, 666 F. App'x 11, 13 (2d Cir. 2016), cert. denied, 137 S. Ct. 1231 (1917).

[447] 628 A.2d 247 (N.H. 1993).

[448] Id. at 251.

[449] Compare Church of the Open Door v Zoning Board of Appeals Town of Clinton, 1993 Conn. Super. LEXIS 1069 (Conn. Super. 1993 (upholding zoning regulations prohibiting use of illuminated signs other than indirectly illuminated signs as applied to sign on church property; also holding freedom of speech or religion not violated).

[450] 7 P.3d 136 (Ariz. Ct. App. 2000).

court held the regulation did not affect communicative speech because it did not affect the advertising message displayed on the billboards.

A Kansas case assumed they affected communicative speech but upheld under the Central Hudson criteria an ordinance that authorized searchlights as a special use for no more the ten days.[451] It held that 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 had 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 wants to limit neon lighting, either throughout the community or in certain areas. The cases conflict on whether a neon sign ban violates free speech principles. An Indiana court applied the Central Hudson criteria to uphold a ban on neon signs in a small tourist town,[452] where the ordinance cited the town's unique scenic and architectural characteristics and public safety concerns as reasons for its adoption. The court held 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 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.[453]

§ 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.

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

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

[453] State v. Calabria, Gillette Liquors, 693 A.2d 949 (N.J. L. Div. 1997) (record devoid of evidence, facts or analysis why the mere existence of neon is offensive to aesthetic goal; no evidence that there are unusual problems in the use of neon that cannot otherwise be regulated as other forms of lighting such as degree of illumination, amount of light used within a given space or size of structure, direction of the light; times when the light may be used, or number of lights used on the interior of the store; "There is no evidence that neon is, in and of itself, inconsistent with careful design or tasteful presentation of advertisements, the general goal of aesthetic restrictions.").

Courts usually uphold numerical limits by applying either the Central Hudson criteria or time, place and manner regulation rules.[454]

The cases recognize that numerical limits on signs balance the need to provide information with the need to protect aesthetic and traffic safety interests. A federal district court in B & B Coastal Enterprises, Inc. v. Demers,[455] for example, applied the Central Hudson criteria to uphold a sign ordinance that allowed one sign for each pump and one sign for other products sold by gasoline stations. The court held that the town had decided to make important consumer information known but had properly limited the display of information in accord with its other interests. It held that these aesthetic and safety interests were substantial, and that "limiting the number of signs per lot materially advances the common-sense 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."[456] 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.[457]

§ 5.8. Setback Requirements

Sign ordinances usually require on-premise signs to be set back a specified distance from a property line or street. Courts uphold setback requirements as valid time, place, and manner

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[454] Baldwin Park Free Speech Coalition v. City of Baldwin Park, No. 2:19-CV-09864-CAS-EX, 2021 WL 4846059, at *7 (C.D. Cal. Oct. 18, 2021); 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, Central Hudson criteria met); Bender v. City of Saint Ann, 816 F. Supp. 1372 (E.D. Mo. 1993) (one wall sign per business, corner lots could have one on each street fronting wall, Central Hudson criteria met), 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 criteria and time, place and manner rules); Singer Supermarkets, Inc. v. Zoning Bd. Of Adjustment, 443 A.2d 1082 (N.J. App. 1982) (only one sign allowed on front façade of a business, Central Hudson criteria met); 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).

[455] 276 F. Supp. 2d 155 (D. Me. 2003).

[456] Id. at 165.

[457] 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 had,, there was no limit on the size of signs, so any single sign was permitted no matter how large or how offensive or distracting it was. The ordinance also prohibited additional signs no matter how attractive or inconspicuous they were.

regulations.[458] An Ohio case[459] is typical. It upheld an ordinance requiring special event signs to be more than five feet from a 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."[460]

[458] 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 street must be less than 30 feet in height).

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

[460] Id. at 914.