BEST PRACTICES IN REGULATING TEMPORARY SIGNS

By **Wendy E. Moeller, AICP**

(Updated with *Reed v. Town of Gilbert* Supreme Court Case)

SIGN RESEARCH FOUNDATION™

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INTRODUCTION

Communities seem to have a love-hate relationship with temporary signs. Most understand the need for temporary signs when it comes to things such as business promotion, identifying properties that are for sale or lease, or promoting special events, but they also struggle with the administration and enforcement of temporary signs due to the ever-changing nature of this type of sign. The purpose of this guide is to provide communities with some best practices to use when evaluating and writing temporary-sign regulations that are easier to administer and enforce, while also allowing for the reasonable use of such signage for residents and businesses alike. This guide also includes updated commentary and recommendations related to the June 2015 ruling by the Supreme Court of the United States in the *Reed vs. Town of Gilbert*, Arizona case.

DEVELOPMENT OF THIS GUIDE

This guide was developed with the help of numerous communities and organizations. An initial step in determining this guide's direction involved creating an online survey that sought information on how communities regulate temporary signs, and what issues they face in administering temporary sign regulations. Over the course of a month, representatives from more than 99 communities in 31 states responded to the survey. This information, along with a review of many of the responding communities' ordinances, provided a general understanding of common approaches to regulating temporary signs, as well as new approaches to administration and enforcement. The survey also identified where staff members struggled with temporary signs. For example, each participant was asked to identify the issues they struggle with the most regarding temporary signs (each could choose up to three issues). The 78 respondents to the question reported various issues, all of which are discussed in this guide. The biggest problems identified administration and enforcement of the regulations, as well as addressing new sign types. Only four respondents (5.1%) reported no issues and even then, one of the four still chose addressing new sign types as an issue. See **Figure 1**.

Besides the survey, research for this guide included a review of newspaper articles and public meeting minutes where temporary sign regulations were discussed. This effort sought to identify temporary-sign issues as seen by local businesses and people affected by the regulations. These articles contributed to many of the best practices outlined in this document because often, a controversy with sign regulations triggered a larger discussion among community and business leaders to develop a solution.

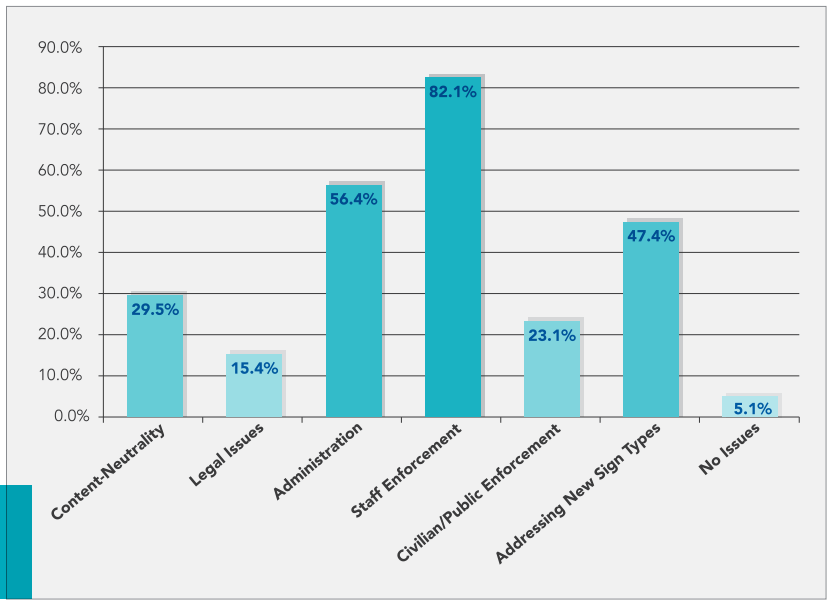


Figure 1: Online responses to questions about issues that communities struggle with in regulating temporary signs?

WHY TEMPORARY SIGNS?

A discussion of how to regulate temporary signs must begin with an understanding of how and why temporary signs are necessary for businesses, residents, and local institutions. Generally speaking, signs are necessary to provide effective wayfinding in our communities. This is evident, because signage is everywhere, but conflict arises when discussing excessive signage or preventing signs that detract from community character. Typically, one "bad" sign can influence overall opinions about signage in general. It is not uncommon that the negative reaction to temporary signs is actually aimed at illegal signs (Figure 2) that are not used by local businesses and/or capitalize on a lack of enforcement. It is often discussions about illegal signs that lead to decisions that prohibit or severely restrict signs. This can, in turn, significantly impact local businesses, and even residents who may want to advertise a garage sale or local events, yet do not want to have to go through the red-tape of permitting.

A vast majority of survey respondents said communities regulated temporary signs for safety and aesthetics, but nearly 50% also stated they regulate temporary signs for business promotion. See Figure 3. In reviewing the ordinances, no clear distinction separated communities that regulate temporary signs for business promotion versus those that do not. The communities that said they regulated for business promotion did not clearly allow more temporary signage and, in some cases, they even had temporary sign regulations more restrictive than the majority of other ordinances. The only connection appears to be that the support of businesses and economic development was a stated purpose to the overall sign regulations. Regardless, there is a clear relationship between temporary sign regulations and the ability of businesses to advertise. There is increasing evidence that demonstrates the value of signage to both businesses and communities, and that this value also applies to the use of temporary signs.

Figure 2: It is often illegal signs, such as the ones above, that cause a negative reaction toward temporary signage, resulting in the creation of excessive regulations.

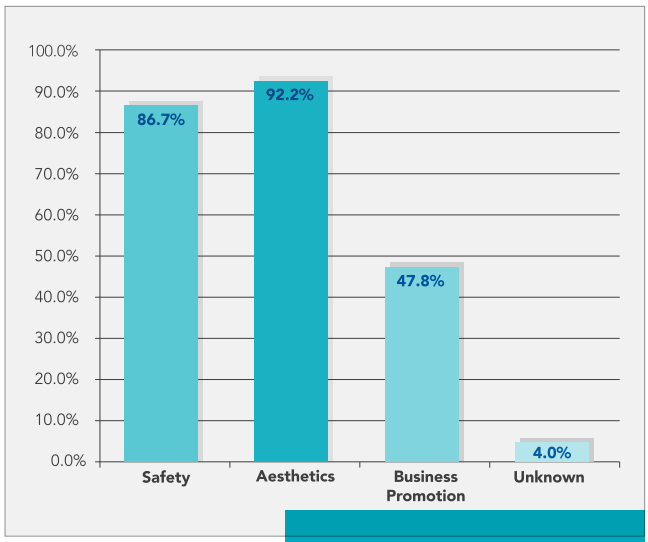


Figure 3: Online response to a question about why communities regulate temporary signs. Communities could check multiple reasons.

In the BrandSpark/Better Homes and Gardens American Shopper Study™, more than 100,000 consumers were surveyed about their household shopping activities, and more than 60.8% reported they have driven by and failed to find a business because the signage was too small or unclear. It also is evident that signage is more vital to a small business than to chains who might have a brand identity and large advertising budgets. In the temporary-sign articles discovered during the research for this guide, small businesses repeatedly noted how existing requirements or proposed restrictions impacted their business. For example, the Town of Newington, Connecticut, recently proposed a ban on temporary signs in all business districts, except in the downtown area, and small-business owners expressed concern. One small-business owner said "Any way I can draw attention to myself is absolutely necessary" and that "I do advertise, but as a small business, you have a small budget." In the 2013 case of *Fears vs. City of Sacramento*, the owners of a local gym challenged a sign regulation that prohibited them from posting a temporary sandwich board sign outside the building to advertise the gym. Although the lawsuit primarily focused on the lack of content-neutrality, the business noted in the court documents that they attracted 5-6 more walk-ins daily when the sign was posted outside. While reasonable sign regulations are important, an amicable balance will allow reasonable advertising and efficient wayfinding that, in turn, will contribute positively to the community character and economy.

USING THIS GUIDE

This guide is not designed or intended to be a model temporary sign code that you can simply cut and paste, as a single element, into a complete sign ordinance. For an effective and defensible set of sign regulations, a community needs to consider numerous variables, including the needs of local businesses, neighborhood character, and legal requirements. These variables cannot be accommodated from a one-size-fits-all model code. Instead, this guide suggests best practices, or things to consider, when updating your sign regulations to address temporary signs. These best practices are divided into two major sections: considerations when evaluating the overall temporary sign regulations, and best practices that apply to individual sign types. This approach allows better evaluation of the optimal regulation of temporary signs based on a community's individual needs.

Just as communities can vary greatly in their goals and character, so can sign regulations. This guide recognizes that, while in the past, sign-related case law has varied state-by-state and court-by-court, the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*, Arizona now applies a more uniform standard of absolute content-neutrality to all temporary signs. Although this guide briefly discusses temporary-sign law, and includes a list of resources to help create a legally defensible set of sign regulations, it does not provide any legal opinions. **Always seek local, legal advice pertaining to local, state, and federal laws while updating your sign regulations.**

[1] Kellaris, James J. (2011), "100,000 Shoppers Can't Be Wrong: Signage Communication Evidence from the BrandSpark International Grocery Shopper Survey." The Science of Signage: Proceedings of the National Signage Research & Education Conference, Sign Research Foundation, Cincinnati, October 12-13, 2011.

[2] Hoffman, Christopher, "Business Group Rallies Again Proposed Ban on Temporary Signs in Newington," Hartford Courant, July 31, 2014.

BEST PRACTICES FOR THE OVERALL REGULATION OF TEMPORARY SIGNS

This project's research identified some essential best practices for developing comprehensive temporary sign regulations, as well as for the regulation of individual sign types. These best practices emerged from the survey, as well as discussions with both planners and sign-industry representatives. This section of the guide addresses overall best practices, administration and enforcement, and addressing new sign types as part of the overall regulation of temporary signs.

GENERAL PRACTICES

1 Make a clear distinction between a temporary sign and a temporary message.

There is a significant gray area when it comes to making a distinction between a temporary sign and a temporary message. A temporary sign is a portable structure that is intended to be used for a brief period of time. A temporary message does not have a structure in and of itself. It is a message that may be changed manually or digitally as part of a permanent sign structure. For example, electronic message centers are permanent signs that display temporary messages at set intervals. Similarly, communities often allow for signage on permanent structures such as light poles (See Figure 4.) or fuel pumps, where there is a permanent support structure for a temporary message. Conversely, in an equal number of examples, as shown in Figure 5, a sign owner may attach a temporary sign to a permanent structure. In these cases, the temporary sign is an independent structure temporarily attached to a permanent structure that was not intended to accommodate the sign and, quite often, communities prohibit this additional signage. Such signage should be regulated as a temporary sign, whereas temporary messages on permanent structures should be regulated as a permanent sign with allowances for temporary message changes.

Figure 4: An example of a temporary message attached to a permanent structure that should be regulated as permanent signage with allowances for temporary messages.

Figure 5: An example of a temporary sign that is attached to a permanent structure and should be regulated as a temporary freestanding sign.

2 Evaluate the regulation of temporary signs as part of an overall review of your sign regulations.

Both permanent and temporary signs are important and have a place in each community, but it is nearly impossible to address them as separate and distinct issues. Communities should always evaluate signage in a comprehensive manner. As part of such comprehensive review, the community can first develop a strong purpose statement and set of objectives. This type of evaluation will also allow the community to identify potential conflicts between the standards and the stated purpose of the regulations. For example, if a community goal is to limit temporary signage, but promoting local businesses is an essential purpose of the regulations, then expanding the permanent sign allowances could be the compromise (e.g., increased permanent signage area or allowance for digital message centers). It is also important to try to eliminate any unintended conflicts between temporary and permanent sign regulations. For example, communities that focus on limiting the size and height of permanent signs due to aesthetics may unintentionally end up allowing much larger temporary signs. For example, Figure 6 illustrates a conflict where a temporary sign has better visibility and legibility than an adjacent permanent sign. Would a larger permanent sign create any more negative impact on aesthetics than the temporary sign? In fact, the larger real-estate sign's better visibility and legibility would likely enhance traffic safety, an important purpose for regulating signage.

When updating your regulations, test how the provisions for permanent and temporary signs would apply to existing development sites as a way of identifying potential conflicts.

Although the *Reed* case was related to a temporary sign, the ruling itself has implications for both temporary and permanent signs. As noted earlier, there were differing opinions on the definition of "content-neutrality" prior to the ruling in the *Reed* case. Thus, the vast majority of regulations reviewed as part of the survey for this report had some level of regulations that were based on content. The most common examples were specific standards or exemptions for real-estate or election signs. In the wake of the *Reed* case, it is important that communities evaluate their sign regulations in a comprehensive manner, for the reasons identified in this section, but also to address any content-based regulations.

Figure 6: Apparent conflicts in regulating temporary and permanent signage can undermine the purpose statement for your sign regulations.

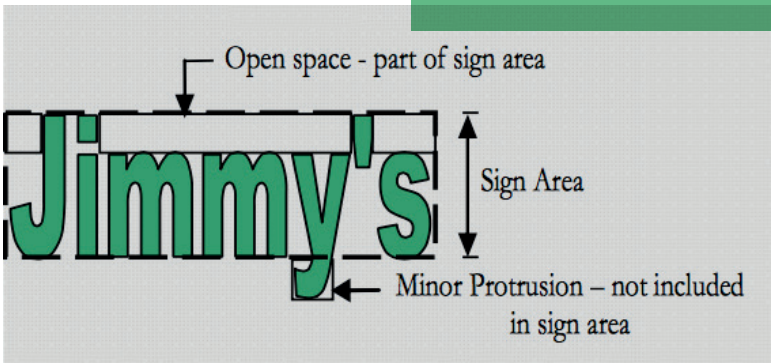
3 Engage all stakeholders in updating your sign regulations.

Too often, a community updates its sign regulations without querying business owners. Using a planning commission or an appointed committee has the tendency to result in heavy influence from residents who may not fully understand the need and/or benefit of temporary signs. Signage impacts both residential and business areas, but the biggest sign controversies stem from situations where businesses believe the local government is being too heavy handed. Prevent this situation by engaging a cross-section of stakeholders, including residents, local business owners and tenants, county board of elections, and members from the chamber of commerce and local sign industry when updating your temporary sign regulations. Such a group can establish the overall goals and priorities for sign regulations and find common ground. Local businesses can explain how proposed regulations can benefit or hurt the local economy through the regulation of both temporary and permanent signs. Local business representation will also help create stronger support for regulations that are easier to enforce and administer.

4 Be practical in sign area calculations.

The method of calculating the total sign area greatly impacts temporary signs and legibility. Tight restrictions can unintentionally prevent unique or creative signage. Measuring freestanding signs is fairly straightforward, due to their defined shape, but regulating window signs, without a defined background, can be more challenging. Some communities are beginning to distinguish between signs with a distinct background and those without. In the latter situation, the measurement should not include open or blank space. Multiple examples of this approach are referenced in the model sign codes listed in the "Additional Reading" section of this guide.

Figure 7: Sign-area calculation from *A Framework for On-Premise Sign Regulations* that illustrates an example of a practical sign-area calculation that allow for more design flexibility and enhanced legibility. A link is available in the **Additional Reading** section.



5 Avoid sign allowances shared between temporary and permanent signs.

Some communities have attempted to simplify allowable sign area by ignoring the differences in temporary and permanent signage and simply allowing "X" amount of signage. However, this can actually create an administrative nightmare because recalculations will be required every time the owner wants to make a change to the temporary or permanent signage. Second, if the total amount of sign area allowed is very restrictive, the permanent signs may be too small in terms of legibility, and any temporary sign may become quasi-permanent to compensate for insufficient advertising options. Such issues are only compounded for multi-tenant buildings. The "total overall sign area" approach may make it necessary to exceed best-practice parameters elsewhere. An alternative is to clearly distinguish the total area allowed for permanent signs separately from the total area allowed for temporary signs.

One approach communities are taking to ensure content-neutrality after the *Reed* decision is to establish a maximum amount of temporary, commercial speech sign area that is allowed year round, in individual zoning districts. This year-round signage is typically restricted to limited types of temporary sign structures (e.g., freestanding/yard signs or banners) with further restrictions to the number, height, and location of the individual sign structure type. The amount and type of signage allowed will vary based on individual zoning districts and the scale, form, and context of development, but is designed to allow for the most common temporary signs found in a community including those types of signs we have tradionally called real-estate signs or business information signs (e.g., open or closed signs). In addition to the temporary signage that is allowed year-round, communities often allow for some additional temporary signage for a specified amount of time, and a specifed number of occurences per year (e.g., up to 14 days, four times a year), based on the allowed sign type. Again, the community needs to specify the type of temporary sign structure allowed which, in these situations, may include an expanded list of allowable sign structures including those that are often less popular such as balloons, air graphics, human signs, or portable message centers. For all types of sign types allowed, the community should include any standards specific to that sign type, including, but not limited to, setbacks, maximum heights, maximum numbers, and seperation distances.

6 Consider allowing temporary signage as an interim-sign option.

Some communities establish special provisions for temporary signs that may be used by new businesses as an interim sign until permanent signage can be installed. For example, the regulations might allow for a temporary banner until a permanent wall sign can be installed. This often happens when there is potential for a change in occupancy (e.g., a multi-tenant building), and the old signage will not be removed until the new signage is ready. Additionally, the temporary-sign option can be used when the permanent sign is destroyed. In such cases, a time limit of 60 days should be sufficient, and the new permanent sign would immediately replace the temporary sign. A few communities even allow temporary signs for new businesses, for a period of up to six months, to allow testing of different signage options before designing the permanent sign. In such cases, the type of temporary sign should be specified with banners and yard signs being the most common examples of temporary signs allowed as an interim option.

Figure 8: This temporary banner is being used as an interim sign until a permanent wall sign can be installed. It is similar in size to the proposed permanent wall sign.

7 Avoid treating all temporary signs the same.

Sign ordinances can often be lengthy documents that lay out the rules for every conceivable type of sign type and/or situation. Typically, permanent signs are the focus of the regulations, with minimal thought given to temporary signs. Many communities subsequently want to simplify temporary-sign regulations by establishing a single time limit that applies to all temporary signs but then only allow for banner signs and freestanding/yard signs. Administratively, this seems wise, but temporary signs serve varied purposes and therefore demand different treatment, based on the type of sign. Communities need to allow all property owners some allowance for temporary signage year-round to accommodate activities such as the sale or lease of land that are often long-term. For year-round signage, it is not unreasonable to strictly limit the types of signs allowed to the most common types of banner or freestanding/yard signs. The problem is that a community needs to consider that there will always be special events or activities that warrant additional signage, but on a restricted time frame. For temporary signs that will only be allowed for limited time periods, consider allowing for an expanded list of sign types to give property owners more options.

Figure 9: Many communities are willing to provide for the possibility of using balloon signs as long as they are not used year-round. These may be a sign type that your community restricts to a certain number of days per year.

Figure 10: Freestanding/yard signs are often allowed year-round to provide for property owners the ability to accommodate routine activities not tied to specific dates, such as when used to advertise the sale or lease of land.

8 Consider the context of a sign's location.

As with permanent signs, the neighborhood and street context will typically drive the types of signs used or desired by businesses. In writing your regulations, consider the different characteristics of your community's residential and business activity areas to define the types and sizes of signs within zoning districts.

- Downtowns and high-density urban areas tend to have more foot traffic, so there is typically more demand for banners and sidewalk signs.

- Suburban or rural areas, or high-traffic streets and highways, typically require larger and taller signage for good visibility, so there tends to be more demand for yard signs, blade signs, and banners that are visible to drivers, rather than pedestrians.

- Many types of temporary signs are prohibited in historic districts, including banners or pennants, but sidewalk signs, window signs, and other types are traditionally allowed.

An increasing number of communities are also using form-based codes that focus on building form and the relationship between public and private areas, as compared to a focus on the use of land. These codes provide an opportunity to also write sign regulations specific to the form of development.

Figure 11: Signs in a downtown or urban setting tend to be smaller in area and height.

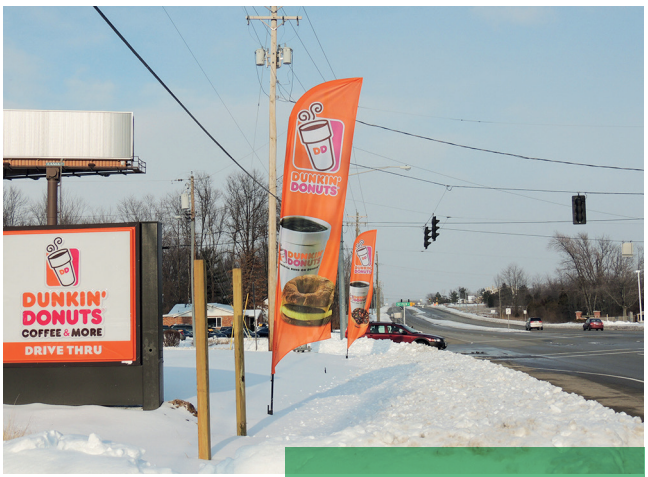


Figure 12: Signs along major highways or more rural settings need to be larger to allow for visibility, such as these blade signs along a four-lane, state highway.

9 Consider allowing off-premise temporary signs.

Many sign regulations prohibit all off-premise signs to prevent billboards, without any exceptions. Temporary signs often advertise off-premise special events or activities, such as local community festivals, recreational opportunities, and even business events, such as farmer's markets. Provided the temporary-sign regulations clearly establish sign area, height, duration, and even the number of signs, off-premise temporary signs should pose no threat. The only caveat is mandating the landowner's approval for off-premise signs. It is also appropriate to establish what types of temporary signs can be on-premise or off-premise.

While the decision in the *Reed* case helped clarify what was once differing opinions about the definition of content-neutrality in the lower courts, it has raised other questions as to whether sign regulations that distinguish between on-premise versus off-premise signs and commercial speech versus noncommercial speech are content-based. Since the ruling in the *Reed* case, several lower courts have heard cases on such questions, and thus far the majority of court decisions favor viewing these distinctions as content neutral based on Supreme Court rulings prior to *Reed*. In updating sign regulations, you should work with legal counsel to consider any potential risks in making these distinctions as well as any rulings within applicable state or federal courts.

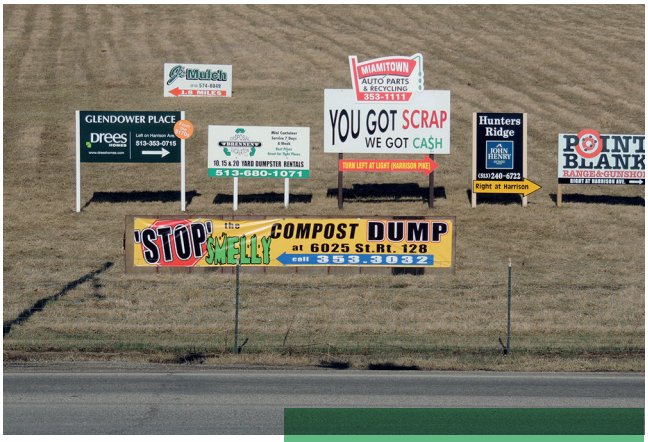


Figure 13: A mixture of off-premise signs that include temporary signs (real estate and pretest signs) as well as permanet signs.

10 Avoid prohibiting all signs in rights-of-way.

In the survey, approximately 73% of the communities stated they do not allow signs in any right-of-way. The other 27% limit them to situations like sidewalk signs or where pre-empted by state law. Most communities want to limit signs in rights-of-way largely for safety and visibility reasons, and because public spaces are not traditionally an appropriate location for private commercial advertising. The problem is that some limited signage in the right-of-way can provide effective marketing and add to the atmosphere, such as along sidewalks in pedestrian-focused areas. While defining a sidewalk sign in a content-neutral manner is simple enough, the *Reed* decision has made it difficult to make exceptions, such as temporary signs in certain right-of-ways rather than others. If your community does want to allow for some limited signage on sidewalks, consider an approach of allowing a temporary sidewalk sign (e.g., A-frame or T-frame sign) on any public sidewalk that has a width sufficient to accommodate the sign and clear passage of pedestrians (e.g., four feet of clearance). Most communities only have sidewalks of this width in more compact areas, such as downtown, so a similar sign would not be allowed where there are narrow sidewalk widths. Be sure to involve the state and county transportation departments and/or engineers in discussions related to signs in the right-of-way. Their departments may be affected, and they may be able to assist in crafting tailored regulations to individual situations.

Figure 14: Most sidewalk signs are located in the right-of-way, so a complete prohibition may limit advertising in more pedestrian focused areas of your jurisdiction where there is sufficient space for the sign and clear passage for pedestrians.

11 Be cautious when limiting the number of temporary signs.

Placing a limit on the total number of temporary signs permitted on any one site can be tricky due to a number of variables. Some courts have found this as potentially limiting to our freedom of speech when regulating noncommercial speech. For commercial signs, the variables include the number of tenants on a property, the types of temporary signs allowed, and the amount and type of permanent signage allowed. If limits are desired, consider putting a cap on individual sign types, with allowances for a temporary, wall-hung banner for each tenant, and limits on the number of freestanding temporary signs on a single property at any one time. Most communities, however, exempt temporary signs on lots for sale or lease, or signs that contain noncommercial speech signs from these types of regulations.

12 Be specific about when illumination of temporary signs is allowed or prohibited.

Communities commonly prohibit the illumination of all temporary signs, but this may minimize the effectiveness of specific types of temporary signs that may otherwise be allowed. For example, many advertising murals, banner signs used for the interim covering of permanent signs, portable message centers, projected-image signs, and light or support pole banners are illuminated either internally or externally. It is important, when considering the types of temporary signs that your community is going to allow, to also determine if it is reasonable to allow some limited illumination, typically based on the type and size of the sign, as well as the length of time the sign will be allowed. In all cases, be clear when illumination is allowed or prohibited, and if allowed, identify any applicable lighting regulations. Additionally, it will be important to cross-reference any building or electrical-code requirements (e.g., requirements for burial of any conduit) that may be applicable.

13 Visibility issues that apply to permanent signs also apply to temporary signs.

An extensive amount of recent research has linked sign visibility and legibility with safety. Some studies have focused on electronic signs, while others have focused on design implications, such as sign location, color contrast, and sign orientation. The same design principles that affect the visibility and legibility of permanent signs also apply to temporary signs. The "Additional Reading" section references several recent studies and model codes that can provide additional guidance on visibility issues.

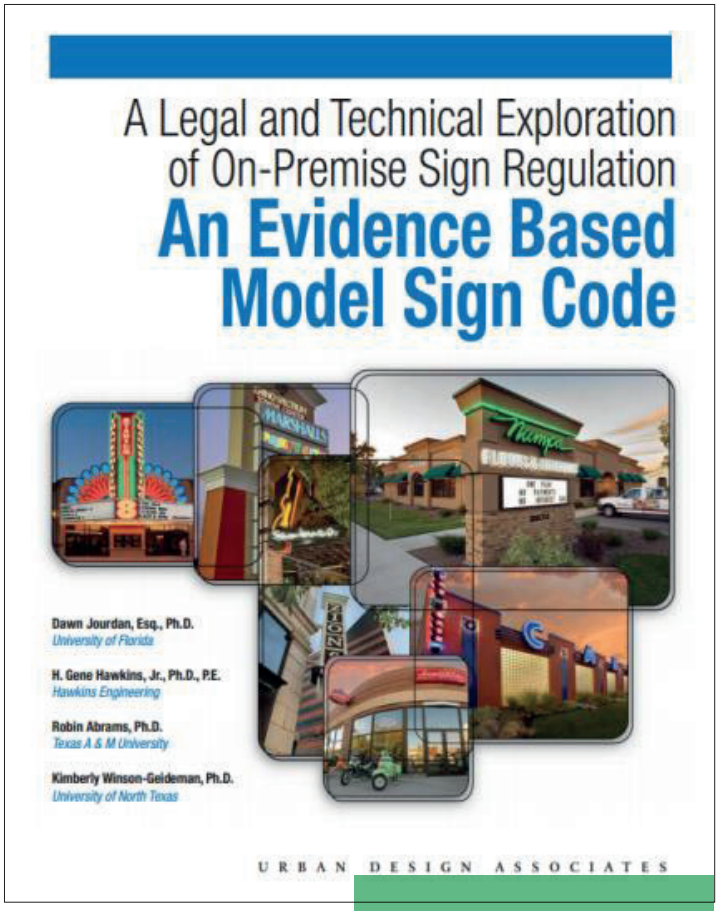


Figure 15: New studies and model codes focus on legal and safety issues related to signage. See links in the **Additional Reading** section.

ADMINISTRATION AND ENFORCEMENT

A majority of communities who responded to the online survey cited major issues with administration and enforcement of temporary-sign regulations. While the regulations establish the rules for temporary signs, many of the following best practices focus on departmental policies and actions outside of the regulations, so your jurisdiction could undertake them without necessarily amending any zoning or other ordinance text.

1 Use technology.

All of us have benefitted from technological advances. The same can be said about zoning administration and enforcement. There are a growing number of communities who are incorporating these types technology in their day-to-day zoning administration activities. The use of technology appears to vary greatly, based on available resources, but the following are a couple of options available to most communities:

- For smaller communities with minimal resources, basic software programs, such as digital-calendar applications or electronic files, can set reminders regarding deadlines for temporary signs. As permit applications come in, staff can establish a reminder that will automatically notify the appropriate enforcement officer of the expiration dates for the signs, especially those that require permit review.
- More communities are utilizing new, Permitting-software options to facilitate obtaining permits, as well as tracking expiration dates and compliance. For example, the City of North Liberty, Iowa, utilizes a web-based, self-permitting system. The system also allows the city to track sign permits and time limits so applicants cannot apply for excessive permits. **Figure 16** is a screen grab from the city's permitting website. Additionally, the city's enforcement officers have iPads with 4G internet access they can utilize while in the field to check compliance with the permitting application. Permit-software applications offer a range of pricing that makes this option available to most communities.

Temporary Sign Permit

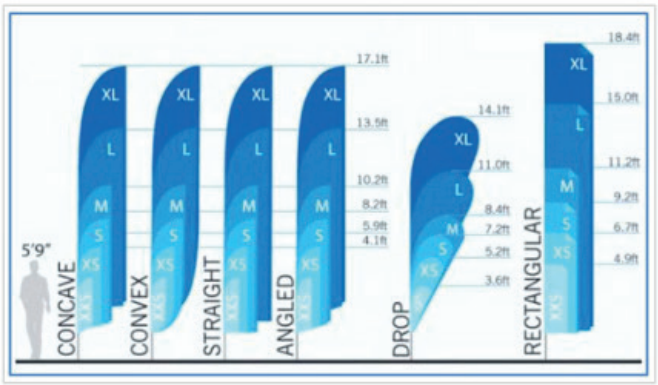
You are here: Home > Temporary Sign Permit

Type of signs permitted

Only the temporary advertising signs specified below are allowed. No other type of signage is allowed.

Permitting and enforcement

In order to expedite permitting for the signs, the City is implementing a web-based self-sign-up permit system for business owners at northlibertyiowa.org/signpermit. A PDF version of this page is available for download. Owners may simply enter information there for the desired sign(s) to self-permit. It is also a resource to track sign usage, and City staff will review the list to make sure all signs in use are on the list. If a business does not have access to the self-sign-up, they may contact Dean Wheatley, Planning Director, at 626-5747 for assistance, or stop by City Hall. Citations will be issued to businesses placing signs that are not permitted.



Cost of permit

At this time there is no fee for the permit.

When signs can be placed

The signs are allowed to be displayed for up to 10 days up to 5 times per 12-month period. Owners can track their usage with the online permitting system.

Where signs can be placed

Signs may only be displayed on private property. Generally, that means behind the sidewalk. Signs placed between the sidewalk and the street will be removed by City staff.

Sign condition

Signs are to be kept in good condition and replaced when damaged or faded.

Figure 16: Image from the North Liberty, Iowa, permitting website.

2 Be clear when a permit is required.

Many communities require sign permits, but also have some limited exceptions for smaller signs or certain sign types. Be clear as to when a sign permit is required. Also be clear that signs that don't need permits are still subject to applicable regulations, such as signs displaying a noncommercial message. Communities should focus on requiring permits for larger signs and exempt smaller signs. Paired with a good enforcement program, exempting certain signs should not create extensive issues and will streamline administration.

3 Constant and consistent enforcement is necessary.

Many communities have extensive regulations, yet they lack the resources for enforcement, so it tends to be random or complaint based. Inconsistent enforcement can lead to a proliferation of illegal temporary signs, as well as a damaging perception. First, always consider what your community can actually enforce when writing the sign regulations. If you only have one enforcement officer, do not write complex regulations that cannot be enforced by a single person. Here, technology can often help. Second, several survey respondents noted they had more successful enforcement when they identified other staff/employees of the jurisdiction who, with proper training, could be an authorized enforcement officer for signage and possibly expand the timeframe (e.g., weekends) when enforcement actions could take place.

Figure 17: Authorizing more than the zoning staff to enforce sign regulations can help minimize illegal temporary signs from popping up over weekends.

4 Consider a sign label program.

Several communities are starting the practice of issuing a sticker, stamp, tag, decal, or some other type of label in lieu of a paper certificate. The label is applied to the sign and includes basic information, such as the applicant's name, permitted sign location, and dates when the sign can be posted. Enforcement is as simple as checking a sign for compliance. Signs without a label, or an expired date, are immediately removed, or other appropriate enforcement actions are taken. The cost of the labels is typically covered by the jurisdiction because it helps simplify enforcement.

Figure 18: The above is an image of a temporary banner sign with a city-issued sticker posted in the corner.

5 Cooperation and education can go a long way.

Public involvement is a best practice when developing sign regulations, but public outreach should continue beyond drafting of regulations. Numerous survey respondents noted success in administering the sign regulations through educational efforts with local business groups and chambers of commerce. Planners proactively work with businesses to identify what types of signs are allowed, and the rules for the individual sign types, while also constantly listening to their feedback. Such efforts appear to reduce enforcement actions and violations. Consider working with your local county board of elections to educate potential candidates about any applicable sign laws at both the state and local level.

6 Maintenance regulations are important.

Temporary signs, logically, are often made with less-durable materials than those used for permanent signs. However, some temporary signs may have longevity due to lack of enforcement or by necessity, such as a sign advertising space for lease. While many owners are diligent about replacing or removing deteriorated signs, basic requirements for sign maintenance should be applied to both permanent and temporary signs.

ADDRESSING NEW SIGN TYPES

Communities often struggle with new temporary-sign types and/or technologies. Many regulations prohibit all unspecified sign types. A better practice is to consider any new sign type or technology in terms of "similar use" language, with a longer-term solution of amending sign regulations to accommodate the new sign.

1 Treat the new sign as a similar use.

"Similar use" provisions in zoning codes provide enforcement officers with some authority to evaluate a new use based on whether it is similar in nature to another use allowed in the zoning code. If the proposed use is similar in scale, intensity, and other characteristics, the enforcement officer can typically permit the new use in accordance with the rules that apply to the similar use. This same concept can be used with temporary signs. For example, the sign in Figure 19 is very similar to a banner, except it is temporarily attached to the wall with a special adhesive instead of the more traditional rope or hooks. It is considered a temporary sign because it can easily be removed when, in this example, all of the apartments are leased. A similar-use provision allows the flexibility to make this type of interpretation, and prevents the need for a text amendment in the short term. A longer-term solution is an amendment to the sign regulations to accommodate the new sign type.

Figure 19: A new type of temporary sign that is completely, yet temporarily, adhered to a brick wall.

2 Consider whether the new sign is a temporary sign or a temporary message.

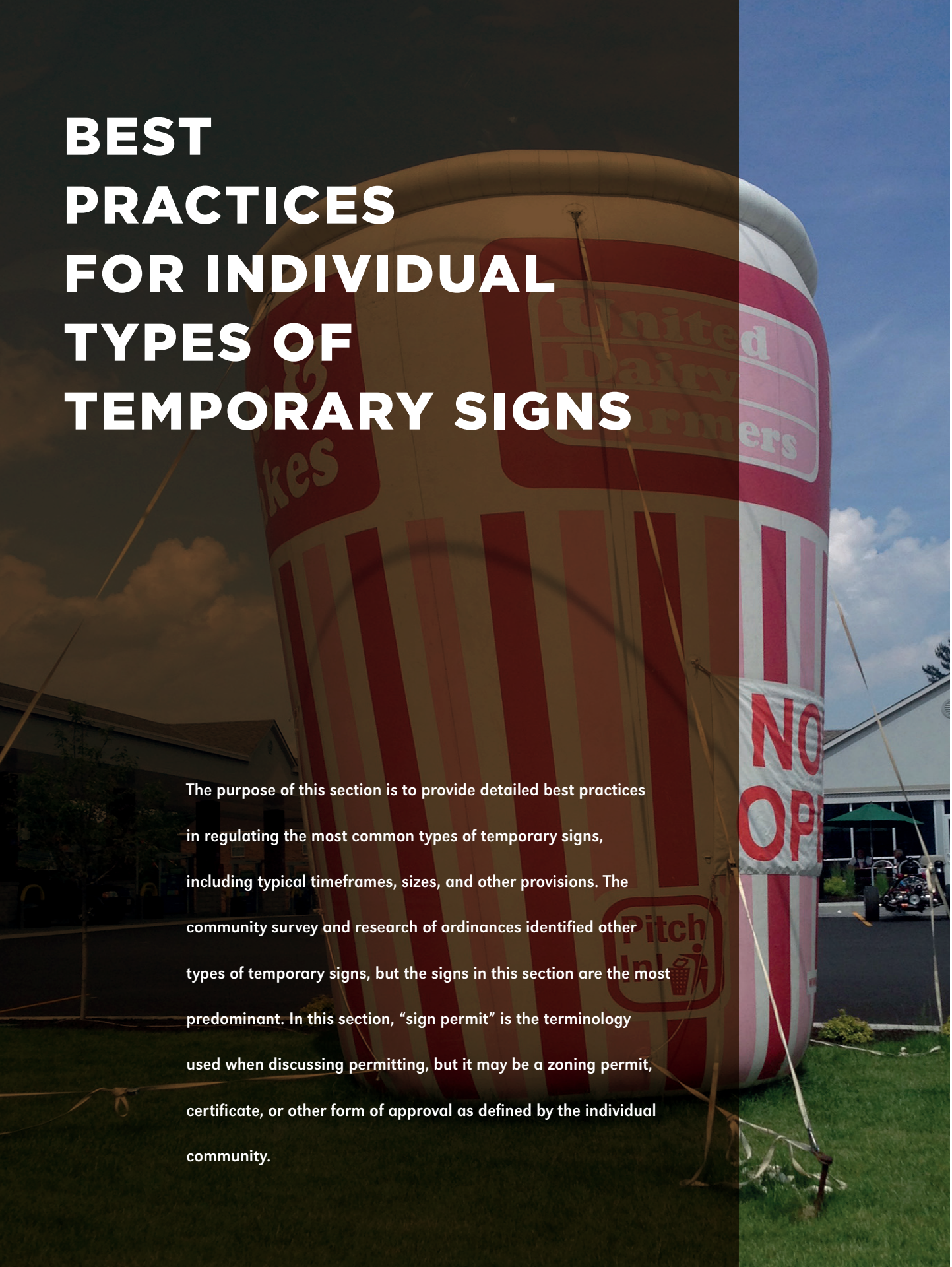
As discussed earlier, the distinction between temporary signs and temporary messages should be a part of any discussion related to addressing new sign types. If it is a permanent structure with a changeable message, the best course of action is to regulate the sign as a permanent sign.

3 Collaboration offers the best approach to regulating new sign types.

Engaging all stakeholders is also a best practice when considering the regulation of new sign types. When considering a text amendment to address new signs, engage the various stakeholders to discuss the purpose of the sign, and any reasonable regulations necessary to address concerns about the sign.

Figure 20: A new type of permanent sign structure where the message, printed on a banner like material, can be changed. Such sign structures should be regulated as a permanent sign.

BEST PRACTICES FOR INDIVIDUAL TYPES OF TEMPORARY SIGNS



The purpose of this section is to provide detailed best practices in regulating the most common types of temporary signs, including typical timeframes, sizes, and other provisions. The community survey and research of ordinances identified other types of temporary signs, but the signs in this section are the most predominant. In this section, “sign permit” is the terminology used when discussing permitting, but it may be a zoning permit, certificate, or other form of approval as defined by the individual community.

ADVERTISING MURALS

Advertising murals, building wraps, or super graphics are some of the largest forms of temporary signs. While some are permanent, such as murals painted on the sides of buildings, temporary versions of these signs are popping up nationwide. Most common in downtowns and high-density urban settings, these signs can be an alternative to a blank or unfinished wall.

- Require a sign permit for the installation of an advertising mural. Communities commonly require a board-level review of advertising murals if the sign is located in a historic or other special district.
- Consider allowing both on-premise and off-premise messages for ease of administration (e.g., to be an on-premise sign would the building in Figure 21 or ease of administration (e.g., to be an on-premise sign would the building in Figure 20 have to contain an Apple Store? What if a tenant sold iTunes cards?). Allowing off-premise messages also allows for advertisement of both business and community interests that still may include commercial speech.
- Consider limiting the location of the signs to unfinished facades or walls devoid of windows and doors.
- Prohibit the obstruction of architectural features, windows, doors, and other points of access.
- Prohibit advertising murals from being located on the building's primary façade.
- Some communities have restrictions that prohibit the location of such signs where they will face parks, historic sites, or other major points of attraction.
- Prohibit the use of changeable-copy, electronic message centers or video displays for temporary advertising murals. Some communities have allowed minimal external illumination, but the majority prohibits any illumination.
- Time limits should be avoided, but basic maintenance standards must include removal/replacement provisions if deterioration is evident with rips, failure of anchoring, fading or discoloration, etc. In light of the overall approach to regulating temporary signs outlined in this document (i.e., a certain amount of signage allowed all year), the size of these signs will likely exceed any sign allowance given for temporary signs. For this reason, if a community wants to allow for these types of signs, whether permanent or temporary, they might want to consider identifying them as a unique type of allowed sign, with applicable standards, outside of any temporary or permanent sign requirements.
- Require that installation and anchoring should be accomplished in a manner that will not pose a risk of harm to any architectural features.

Figure 21: Example of a temporary advertising mural attached to a blank building façade.

BALLOON SIGNS & AIR-ACTIVATED GRAPHICS

Balloon signs or air-activated graphics are often used in conjunction with special events or activities and come in all shapes, sizes, and forms.

- Balloon signs and air-activated graphics are commonly restricted to on-premise signs.
- A sign permit is typically required for balloon signs and air-activated graphics, with the exception of any holiday or similar decorations.
- Require a setback that is equal to or greater than the height of the sign from all rights-of-way, lot lines, and overhead utility lines.
- For safety purposes, any balloon or air-activated graphic should be fastened to the ground or a structure so that it cannot shift more than three feet horizontally under any condition.
- Require compliance with applicable building codes because the signs often have an electrical component.
- Clarify if only balloons with no inherent movement are permitted (Figure 22), or whether there can be movement, such as an air-dancer sign as seen in Figure 23.
- Many communities do not have height limitations on these signs, but where they exist, it is typically between 20 and 35 feet.
- Balloon signs or air-activated graphics are not typically allowed year round and are often restricted to a certain number of days and occurrences per calendar year. The most common timing is for up to 14 days per occurrence, with a limit of one occurrence per calendar year.

Figure 22: A balloon sign that is tethered to the ground.

Figure 23: An air-activated graphic that includes motion.

BANNER SIGNS

Banner signs are one of the most common types of temporary signs allowed by the vast majority of communities. These signs may be mounted on a structure or even staked in the ground in a similar manner as a freestanding sign.

General Regulations

- Banner signs may be an on-premise or off-premise sign.
- A sign permit is often required for banner signs but many communities do not require a permit for smaller banner signs.
- If the banner sign is attached to a building, it should not be displayed above the roof line. Try to avoid limiting banner signs to certain locations on a building façade (e.g., minimum height or setback from edges) because this potentially prohibits logical locations, such as hanging banners from balconies or fencing around enclosed areas.
- Be clear as to where banner signs may be placed (e.g., on a structure, in landscaping, in a buffer yard, etc.).
- Banner signs can easily be attached to buildings, fences, structures, or mounted on stakes in the ground to be freestanding. In the latter case, communities may regulate a banner sign as a permitted freestanding temporary sign as discussed in later sections of this guide.
- Allow individual tenants to use a banner sign, rather than limiting the number of banner signs per property, especially if the banner signs are mounted to a structure. Otherwise, this creates difficulties for multi-tenant buildings.

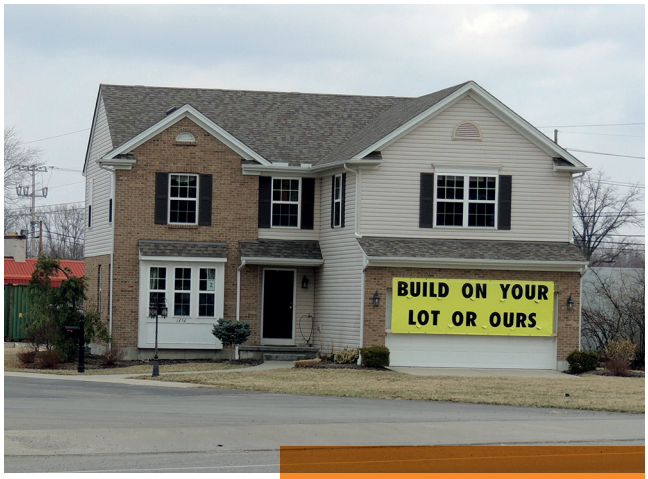


Figure 24: An example of a banner sign attached to a model home.

Figure 25: This banner is used as an interim sign and is designed to full cover the existing permanent sign.

Size

- If a banner sign is permitted as an interim-sign option, allow a banner that can be as large as the allowance for permanent wall signage, or the same size as existing signage, for the building or tenant space. This will allow the owner to cover permanent signage for a previous tenant and/or use signage of a similar size as the permanent sign that will replace the banner.

- Temporary banner signs are typically limited to a maximum area of 32 square feet. If ground mounted, a banner sign should not be mounted so as to be more than four to six feet tall.

- Some communities allow larger banners, equal to the total amount of permanent wall signage allowed for the same business, to keep the regulations simple. A height requirement is usually established for ground-mounted banners, but not for structure-mounted banners. This approach is most beneficial if your community has numerous large-scale developments with long setbacks.

Timing

- For an interim-sign option, allow a banner sign when a business is new, or there is a change in occupancy, and the permanent sign has not been installed. The banner sign should be allowed for at least 60 days or until the permanent signage is installed, whichever is less.

- Banner signs are often a type of temporary sign that might be allowed year-round. It is also a type that communities allow as additional signage but limited to a certain number of days and occurrences per calendar year. For the latter, banner signs are typically allowed for a maximum of 14 to 30 days per occurrence, up to four times per calendar year. With shorter time periods (e.g., 14 days), consider allowing at least two consecutive occurrences to accommodate longer-term needs.

Figure 26: An example of a temporary, ground-mounted banner.

Figure 27: A banner sign is sometimes used in association with temporary uses that can exceed typical temporary-sign time limits.

BLADE SIGNS

Blade signs are a relatively new type of temporary sign. Available in numerous shapes, they are often named accordingly (e.g., feather sign, teardrop flag, rectangle flag, etc.).

General Provisions

- Blade signs are commonly restricted to on-premise signs.
- A sign permit is typically required for blade signs.
- Allow all shapes of blade signs, with a focus on the size standards discussed below.
- Most communities require these signs be set back from rights-of-way, lot lines, and overhead utilities, but there are a number of communities that allow these signs in tree lawns and rights-of-way. In all cases, the signs should be set back from intersections to protect clear visibility. A typical setback equals the height of the sign.
- The signs should be securely anchored into the ground or secured in a portable base designed for such function.
- Allow one sign per 50 feet of street frontage with a maximum of three or four signs per each frontage. This will allow for the reasonable use of such signs while preventing situations such as shown in Figure 28.

Figure 28: A typical, ground-mounted blade sign.

Figure 29: Negative reactions often occur when there is an excessive use of temporary signs, regardless of type.

Size

- Because of the variety of available shapes, blade signs are best regulated by a maximum height and width. The height should be measured from grade and include the full length of the supporting pole. This approach allows design flexibility and lessens the need to calculate sign area based on the actual sign shape.

- Allowing a sign up to 3.5 feet in width (at the widest point) and up to 18 feet in height will accommodate most medium to large-size blade/feather signs.

Timing

- There are two common approaches to allowing blade signs. Some communities treat them like sidewalk signs, where one sign is allowed only during business hours. Other communities treat blade signs like banner signs. In these cases, the signs are only allowed on a limited basis that is typically for 14 to 30 days per occurrence, up to four times per calendar year. With shorter time periods (e.g., 14 days), consider allowing at least two consecutive occurrences to accommodate longer-term needs.

FREESTANDING/YARD SIGNS

Freestanding signs or yard signs are the one type of temporary sign that is almost universally permitted in some form. These signs are used for all most every purpose including commercial and noncommercial speech. The following best practices apply to traditional yard signs, but not signs found on sidewalks, either public or private, which are discussed later in this section.

- Almost every community establishes some setbacks from the right-of-way for freestanding/yard temporary signs, but the setbacks vary tremendously depending on street capacity, street width, and other variables. The majority of required setbacks for these signs range from 5 to 25 feet. These signs also are typically prohibited in close proximity to intersections to maintain safe visibility. Keep in mind that the setbacks should be designed in context with the character of the neighborhood or zoning district, with shorter setbacks appropriate in higher-density neighborhoods.

- In nonresidential districts, many communities allow smaller, residential-scale temporary signs (e.g., maximum of eight square feet and 4 to 6 feet in height) in addition to the larger temporary signs, with a maximum of one additional small sign per business or tenant. This accommodates temporary signage for multi-tenant buildings, especially if your community restricts the number of large temporary signs per property.

- Typically, communities do not require a permit for a temporary sign that is less than 6 to 8 square feet in area, provided the sign complies with any stated requirements (e.g., setbacks, height, etc.).

Figure 30: Signs on larger properties need to be taller and have a larger sign area to allow for clear visibility and legibility.

- The maximum sign area (per face) and maximum height also vary by the intensity of the use and, often street frontage or, in a few communities, based on the street design.

1. In single-family residential districts, the maximum sign area is typically 8 square feet with a maximum height of 4 to 6 feet. Many communities limit temporary yard signs (commercial speech) to one or two signs per yard at any one time. This allows the occupant (or owner) to display signs containing such commonly-used messages as "for sale,", "garage sale," etc., or a message about a community event.

2. For all other zoning districts, one temporary commercial yard sign is allowed under the following size and height requirements:

2.1 For lots with less than 100 feet of frontage, the maximum sign area is typically between 16 and 20 square feet with a maximum height of 6 feet.

2.2 For lots with more than 100 feet of frontage, the maximum sign area is typically between 30 and 36 square feet and a maximum height of 8 feet.

2.3 For lots with more than 500 feet of frontage or with frontage along an interstate or limited-access highway, the maximum sign area is typically between 64 and 72 square feet with a maximum height of 10 feet. Some communities offer the option of utilizing two signs on this frontage, with a total allowance of 64 to 72 square feet.

Timing

Prior to the *Reed* case, many communities specified time limits based on specific, on-premise activities (e.g., special event, property for sale, project under constructions, etc.). The decision in the *Reed* case has made it difficult to make such exceptions and remain content-neutral. For communities that establish provisions for year-round, temporary signage, freestanding/yard signs are often a type of temporary sign that might be allowed year-round. It is also a type that communities allow as additional signage but limited to a certain number of days and occurrences per calendar year. For the freestanding/yard signs, signs are typically allowed for a maximum of 14 to 30 days per occurrence, up to four times per calendar year. With shorter time periods (e.g., 14 days), consider allowing at least two consecutive occurrences to accommodate longer-term needs.

Figure 31: The time limit typically applies to the sign structure rather than the message because sometimes temporary signs also have temporary messages.

Figure 32: Longer time limits should be allowed for signs associated with temporary uses, such as farm markets, that may operate for months.

Noncommercial Speech Signs

More and more communities treat any signage related to a campaign or election, or that contains noncommercial speech, with kid gloves, and generally maintain very limited regulations. The next section contains a discussion about the legal issues related to such signage, but the following are some best practices for communities that continue to regulate these types of signs.

- Most communities do not specify what types of temporary signs may be used, but where it is specified, the most common types allowed are freestanding/yard signs and banners.

- Consult with your local legal counsel on applicable state and case law to your jurisdiction. Your community may also want to consider the use of a substitution clause. Such clauses state that wherever a sign (with commercial speech) is allowed, the message on such sign may be replaced, or substituted, with a noncommercial message.

- Many states have rules and regulations that apply to what is commonly referred to as election signs. In some cases, those signs might be allowed in the right-of-way, regardless of local rules, or in other cases, may only be allowed for a certain number of days before and after the election. Where the state does have special rules, your local community should avoid duplicating those standards in their own ordinances, especially if they are content based, and leave any of the sign administration and enforcement to the state.

- Keep in mind that not all free-speech signs are related to an election, so there has to be protection of freedom of speech and expression year round (e.g., dealing with temporary signs that express opinions beyond the election issues or candidates). Many communities have basic standards for any temporary sign that does not contain a commercial message, which regulate setbacks and heights for visibility and other safety concerns, but are otherwise hands-off on the number and size of the sign.

- Commonly allowed sign areas are usually a maximum of 6 to 8 feet for residential properties and a maximum of 32 square feet for nonresidential properties. Several states have rules that exempt such signage and requirements from zoning and, as such, maximum sign-area requirements will not apply.

Figure 33: This sign has a message that expresses an opinion unrelated to an election and is a form of protected speech.

LIGHT POLE OR SUPPORT POLE BANNERS

Signs on light poles or other support poles are often treated as temporary signs, even though the pole is permanent and might include permanent posts or structural elements that hold a temporary banner or sign. Regardless, this type of signage is commonly used, but not necessarily addressed in most sign regulations. The following best practices are for such signs, regardless of whether your jurisdiction treats them as permanent or temporary signs.

- Require a sign permit for the initial installation of the permanent structure, but allow message changes without an additional permit.
- Prohibit the attachment of any other temporary signs to the structure.
- Allow for a maximum of two temporary banners on each pole.
- Communities often allow anywhere from 12 to 16 square feet of sign area for each pole. If there are two separate messages, that area would be split in two. Some communities also limit the total amount of temporary signs or messages allowed on such structures to prevent signs on all light or support poles.
- Prohibit the posting of any temporary sign or message above the height of the structure.
- If the permanent structure is designed to accommodate a temporary sign or message, allow for the temporary message to be posted year round without limitations on how often the message is changed.
- Prohibit the use of electronic message centers, changeable-copy signs, and internal lighting.

Figure 34: Permanent light pole with temporary sign components.

PEOPLE SIGNS

People signs, an increasingly popular form of signage, may also be referred to as human signs, sign spinners, or mascot signs. Communities are struggling to establish the best way to regulate people signs because some are concerned about encroaching on First Amendment rights, while others still feel it is signage. Even more legal issues arise when the person is dressed in costume and may or may not be holding a sign. These are all part of the legal discussion that needs to take place when considering regulations for these types of signs.

- As with all political/noncommercial speech issues, it is best to work with legal counsel when considering regulations.
- Where people signs are allowed, most of the communities maintain minimal regulations including:
  - Prohibiting the person from obstructing sidewalks or standing in the right-of-way;
  - Requiring that the signage be related to a business or activity that is on the same premises as where the person is located; and
  - Where there is a sign-area calculation, the sign area is typically measured by the actual message or sign the person is holding (e.g., would not apply to someone that is dressed in costume). Most communities allow for a maximum sign area equal to a small banner or freestanding sign.
- Some communities require a permit while others do not, as long as they meet all the established requirements.
- Numerous communities are establishing a maximum number of one person sign per property.
- Communities typically limit the timing for person signs to the same timing allowed for temporary banners or large freestanding signs. As listed in previous discussions, this time limit is usually a maximum of 14 to 30 days per occurrence, up to four times per calendar year, with the ability to use at least two of the occurrences consecutively.
- Prohibit the use of animations or any type of lighting, as well as the use of bullhorns or amplified sounds.
- Prohibit the use of mannequins to display a sign.

People signs are likely to be something that will be challenged in court more often in the near future because there has not been any clear determination about whether or not they are a sign. There are already a number of court decisions across the U.S. that have involved what is defined in this report as a people sign, with varied results.

Figure 35: People signs, or sign spinners, are becoming a more prevalent form of temporary signage.

PORTABLE MESSAGE CENTER SIGNS

Portable message centers are temporary sign structures that historically have had manual changeable copy. Modern versions of this sign now contain electronic message centers, which are essentially the same as permanent electronic message centers, but are attached to a trailer or vehicle.

- These signs traditionally require a sign permit.
- Some communities require a portable message center sign to be an on-premise sign, but, at the same time, they are often used in advertising for off-premise events and activities. As such, it is important to be cautious with prohibiting off-premise signs if it would be acceptable to use a portable signage for community events, etc.
- These signs traditionally have some type of changeable copy, whether manual or electronic. Electronic versions are often used by businesses to test out a digital sign before installing a permanent electronic message center. They are also commonly used for festivals, fairs, concerts, sporting events, and other large events.
- Any electronic message center should comply with your local regulations related to electronic messages, including message hold times, transition times, and brightness. The most common message hold time is 8 seconds (with many communities below that time), with transition times being less than one second, and nighttime brightness levels at 0.3 footcandles above ambient lighting.
- The sign may be attached to a trailer chassis or other vehicle or may simply be portable, as shown in Figure 36. In all cases, the sign must be anchored securely to the ground.
- A maximum sign area of 32 square feet will accommodate a typical portable message center sign with changeable copy. Some communities are allowing as much as 48 square feet if there is a digital signage component. The maximum height should be six feet.
- Only one sign is usually allowed on an individual property at any one time, typically for a maximum of oft 14 to 30 days, one time per calendar year.

Figure 36: Examples of portable message centers.

Image Credit: Daktronics.

Figure 37: Various examples of digital, portable message centers that are mounted on a chassis in a truck bed.

PROJECTED-IMAGE SIGNS

Laser light or projected-image signs are another new sign type that is increasingly used in advertising. These signs use technology to project an image, logo, or other graphic on buildings, structures, sidewalks, or other surfaces. The image itself has no physical structure but it still can be considered a sign.

- A sign permit is typically required for projected-image signs with the exception of any holiday or similar decorations.
- Setbacks are not necessary for this type of sign because the sign requires the existence of another structure where the image will be projected. Any setbacks should be applied to the structure where the sign will be visible. It may be necessary to establish a setback for the projector system if located near a right-of-way (e.g., prohibition in any visibility triangles near intersections).
- Require compliance with applicable building codes as the signs will have an electrical component.
- It is possible to project multiple images that can change in a manner similar to an electronic message center. As such, the sign should comply with your local regulations related to electronic messages, including message hold times, transition times, and brightness. The most common message hold time is 8 seconds, with transition times being less than one second.

Image Credit: This image was originally posted to Flickr by **Eric Ishii Eckhardt** at http://flickr.com/photos/48986833@N00/68900990 (licensed under the terms of the cc-by-2.0).

Figure 38: Projected signage at the Walker Art Center in Minneapolis, MN.

- Prohibit the projection of images onto any buildings that contain a residential use or otherwise project light into dwelling spaces.

- The maximum sign area should be calculated based on the projected-image size. Consider allowing a projected-image sign to be the same size as allowed for temporary banner signs or permanent wall signs in the applicable district.

- Require that the projector be located in a manner where it will not obstruct pedestrian movement. Some communities require that the projector be screened from view either by locating it against another structure or within a landscaping area. In these cases, the image may be visible, but the source of the image is not.

- If the projector is to be mounted in a manner that will project an image on the sidewalk or ground, require that the projector be securely mounted to a structure and that it comply with any applicable building or safety ordinances. The projector should also be mounted with at least eight feet of clearance between the ground and the projector so pedestrians may walk under the projector.

- This type of sign is becoming increasingly popular for use as temporary advertising and is often used by bars, restaurants, and entertainment venues on weekends. As such, it is important to consider enforcement capabilities when allowing such signs.

Figure 39: Projected-image signage in the façade of a building.

SIDEWALK SIGNS

Sidewalk signs take multiple forms, including sandwich or A-frame signs, or even a freestanding sign that is secured to some form of portable base (sometimes referred to as a T-frame sign). For a long time, these types of signs were prohibited due to a commonly found prohibition of all signs in the right-of-way, but a growing number of communities now allow them in both public rights-of-way or on private sidewalks (i.e., walkways along buildings). The following are best practices relevant to any form of sidewalk sign.

- Allow for both A-frame and T-frame signs. Both cover roughly the same ground space, and the T-frame can be more stable, depending on the construction.

- While sidewalk signs are typically regulated as temporary signs, they are usually seen as a component of the permanent sign package because they are typically allowed to be displayed during business hours, 365 days a year. The best approach is to require the signs be stored when the business is closed, and avoid any limitations on the number of days the sign is allowed per year.

- Allow for sidewalk signs in any right-of-way provided that the sign is placed on the sidewalk pavement and that there remains sufficient clearance, of at least four feet, to allow for clear passage of pedestrians. Keep in mind that you might have to clarify your right-of-way rules for the allowance of sidewalk signs.

- Allow one sign per business or tenant. Requiring the sign to be situated directly outside the individual business space, or within 5 to 10 feet of the entrance, will prevent the stacking of signs, such as those illustrated in Figure 41.

- Prohibit sidewalks signs from being located in any landscaping or streetscape areas.

- Be clear on whether illumination is allowed. Most communities prohibit any external or internal illumination, which should not be an issue if the sign is to be removed when the business is closed.

Figure 40: An A-frame or sandwich board sign.

Figure 41: A T-frame sign.

- Many of these sign types are utilized in historic or other special districts that require some level of board or special administrative review (e.g., certificate of appropriateness), but for other areas, many communities allow these types of signs in certain areas without a permit, provided they comply with all the standards.

- The most prevalent size regulation for a sidewalk sign is a maximum of 6 square feet per sign face (two feet wide by three feet high) regardless of the type of sidewalk sign. Some communities allow as much as 8 or 12 square feet, provided the sign does not exceed three feet in width.

- For safety reasons, sidewalks signs should be located so as to not obstruct pedestrian movement and maintain a minimum width of four feet of clearance (standard width of a residential sidewalk). Some communities require more clearance, depending on local and state rules.

- Sidewalk signs should also not obstruct pedestrian or handicap accessibility to buildings, emergency exits, transit stops, or parking spaces.

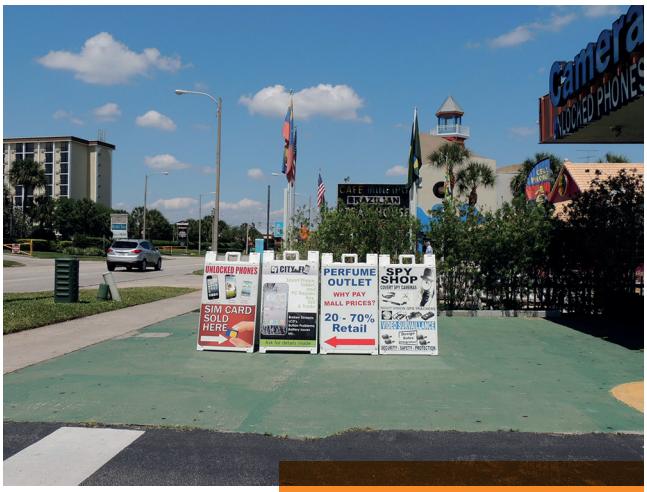


Figure 42: The stacking of multiple sidewalk signs can be avoided without taking away the benefit of additional signage.

Figure 43: Improper placement of a sidewalk sign.

Figure 44: Proper placement of a sidewalk sign.

VEHICLE SIGNS & WRAPS

Vehicle wraps have made it easier for businesses to advertise with company cars and vehicles. This has spawned new questions and enforcement issues as it relates to vehicle signs. While not always treated as temporary signs, communities are starting to address them in sign regulations, where the focus of standards is on the parking or location of the subject rather than the size of the sign.

- Avoid requiring a permit for this type of sign. It only creates problems with administration in situations where a business expands its fleets, changes signs, or switches out vehicles.

- Avoid establishing different standards for vehicles that have different amounts of sign area on the car. Again, this increases the number of administrative and enforcement problems. For example, avoid requiring that vehicles with "x" amount of signage, park in designated areas or be set back from certain roads.

- Consider exempting the following types of vehicles with signs to address a number of situations where vehicle signage is appropriate:

  - Legal, mobile food trucks or mobile businesses that do not have a brick and mortar store or office;

  - Vehicles associated with a contractor or service provider where, during non-business hours, the vehicle is either parked in an industrial zoning district or in designated parking areas of the main store or office;

  - Signs on vehicles that are for sale or lease and are parked legally in a parking space;

  - Signs on vehicles that are regularly used for businesses (e.g., delivery vehicles) unless used in a manner otherwise prohibited in the vehicle-sign regulations;

  - Signs that are actively used for business and/or personal transportation; or

  - Any signage on a vehicle that is required by state or federal law.

- Prohibit the parking of vehicles with signs under the following situations where the vehicles are being used for the sole purpose of creating additional signage for the business:
  - The vehicle is not mobile (See Figure 46) and remains on site for more than one day.
  - The vehicle is parked on a vacant property (land or structure) for more than six hours.
  - The vehicle is parked for more than eight hours on the property so as to be visible in a similar manner (e.g., location, setback, etc.) as any permanent sign and is not regularly used for business activities.
- Keep in mind that if the subject vehicle is parked or stored illegally to begin with, regardless of the presence of a sign, the enforcement should be about the vehicle and not the sign.

Image Credit: SM.

Figure 45: Example of a sign wrap on a delivery truck used regularly during the operation of a business.

Figure 46: An empty semi-trailer is being used as signage for a construction-debris dump. The vehicle is being illegally uses as a buffer.

Figure 47: An example of a vehicle sign used primarily as a stationary identification or advertisement sign.

WINDOW SIGNS

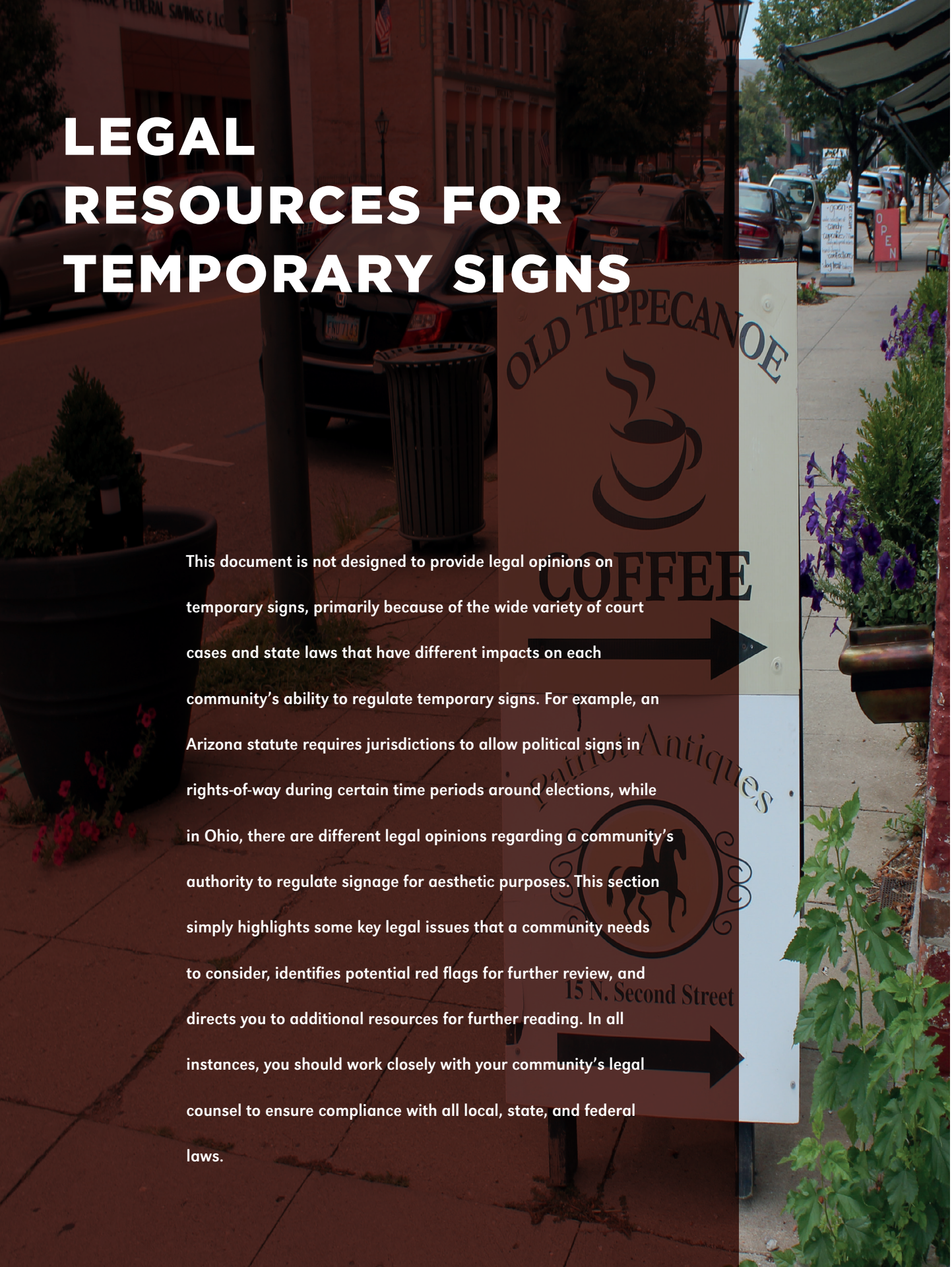
Window signs can be considered permanent or temporary, depending on application. For example, many restaurants use temporary peel-and-stick signs in their windows to advertise new products or sales. These signs are easy to remove and replace, whereas a permanent window sign is typically painted directly on the window or is a sign that is permanently mounted to be visible through the window. Reasonable regulations of these signs include

- Prohibit window signs on residential windows.
- Most communities do not require a permit for any type of window signage, provided it complies with any established requirements. Exceptions include window signs in historic districts or a district with special design requirements.
- When establishing regulations for window signs, discuss whether the concern is about the amount of the window that is covered, the number of signs visible, or if the message is permanent or temporary. Some communities distinguish between permanent and temporary window signs, but if the overall concern is the total coverage, such distinctions are irrelevant.
- If your local police or fire departments are concerned about visibility in the event of an emergency, you can require temporary window signs to be mounted on the outside of the window with tabs or similar methods for quick removal. This typically only applies in areas where 100% window coverage is possible (e.g., restaurants).
- While some communities place a maximum square footage on window signs, a better practice is to allow a range of 50% to 75% of any single window area to be covered by signage. This will allow for reasonable visibility into the building, something often desired and/or required by police and fire departments. At the same time, it provides some flexibility in advertising for businesses by using window space to promote goods and sales.
- Limiting the number of signs within each window space to as many as two or three signs may prevent the placement of numerous signs as illustrated in **Figure 48**. This may be a necessary requirement if your community allows a higher percentage of window coverage.
- For historic or special districts, it is common to restrict window signs to permanent to maintain the character of the area. If temporary window signs are allowed, the percentage of window coverage is typically reduced to between 20% and 25%

Figure 48: This is an example of temporary window signs that cover less than 50% of the windows.

Figure 49: This is an example of temporary window signage that most communities want to prohibit.

LEGAL RESOURCES FOR TEMPORARY SIGNS



This document is not designed to provide legal opinions on temporary signs, primarily because of the wide variety of court cases and state laws that have different impacts on each community's ability to regulate temporary signs. For example, an Arizona statute requires jurisdictions to allow political signs in rights-of-way during certain time periods around elections, while in Ohio, there are different legal opinions regarding a community's authority to regulate signage for aesthetic purposes. This section simply highlights some key legal issues that a community needs to consider, identifies potential red flags for further review, and directs you to additional resources for further reading. In all instances, you should work closely with your community's legal counsel to ensure compliance with all local, state, and federal laws.

Content-Neutrality.

Content-neutrality impacts regulation of all signs, not just temporary signs, and quite often it becomes a question of interpretation. Just over 55% of the survey participants believe they have content-neutral regulations. Among those who said "no," some did recognize they regulate real-estate and political signs differently than other types of temporary signs. Like many legal issues, it is not as straight forward as one would think, and much of the question is related to interpretation of case law that applies to individual jurisdictions.

The U.S. Supreme Court, in its 2015 ruling in *Reed v. Town of Gilbert*, Arizona, made it clear that for a sign regulation to be considered content-neutral, you should not have to read the sign to determine what type of sign it is, or how to regulate the sign. Because of *Reed*, real-estate, political and construction signs, etc. are now considered content-based signs because you define them by their content. Content-neutral sign regulations define signs based on their size, height, structure, placement, material, shape, or other characteristics, not content. This document focuses on the content-neutral, sign type definitions, such as banner signs, blade signs, sidewalk signs, etc. While it is true that before *Reed* a few court cases allowed the regulation of a limited number of content-based signs, such as real estate or political signs, but those decisions have now been effectively overturned by the *Reed* decision and should no longer be considered good law. The best approach for any jurisdiction, in light of the *Reed* decision, is to eliminate all content-based language from your sign regulations, with the only exceptions being signs that must be defined by content in order to achieve a compelling governmental interest.

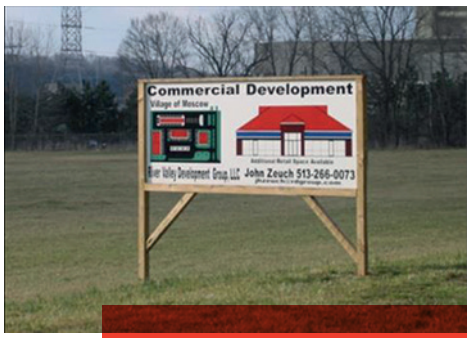


Figure 50: This sign would be classified as a real estate or construction sign in content-based regulations. A content-neutral approach would be to classify it as a temporary yard sign.

On-Premise versus Off-Premise Signs.

The *Reed* decision has left uncertain the legality of regulations that consider the content of signs to determine if the sign is an on-premise sign or an off-premise sign. This has always been important for permanent signage because of a general concern about allowing billboard signs, which are traditionally off-premise signs. With temporary signs, this distinction may be less important, as discussed earlier, and may only be applicable when addressing larger temporary signs, such as balloon signs.

The Substitution Clause

As mentioned in the introduction, there is still a question of whether communities have the ability to regulate signs based on whether they contain commercial or noncommercial speech. Regardless of this question, communities should always consider including a substitution clause in their sign regulations that would allow for a sign owner to replace any commercial message on a sign, with a noncommercial message.

Figure 51: These two temporary signs advertise a local community event (sign on left) and a public service announcement (sign on right) unrelated to the property and would typically be considered off-premise signs.

ADDITIONAL READING

The following is a list of additional reading and resources that provide discussions about legal issues related to signage, as well as other best practices for regulating signage as outlined in this guide.

Context-Sensitive Signage Design (Chapter 6 – Legal Issues in the Regulation of On-Premise Signs)

Marya Morris, Mark L. Hinshaw, Douglas Mace, and Alan Weinstein. Context Sensitive Signage Design. (American Planning Association, 2001)

https://www.planning.org/research/signs/pdf/chapter6.pdf

An Evidence Based Model Sign Code

Dawn Jourdan, Esq., Ph.D., H. Gene Hawkins, Jr. Ph.D., P.E., Robin Abrams, Ph.D., and Kimberly Winson-Geideman, Ph.D. An Evidence Based Model Sign Code. (Urban Design Associates, 2009)

http://www.dcp.ufl.edu/files/8c71fa03-9cbf-4af2-9.pdf

A Framework for On-Premise Sign Regulations

Alan Weinstein and David Hartt. A Framework for On-Premise Sign Regulations. (Sign Research Foundation, 2009)

http://www.signresearch.org/wp-content/uploads/A-Framework-for-On-Premise-Sign-Regulation.pdf

The Signage Sourcebook: A Signage Handbook

U.S. Small Business Administration. The Signage Sourcebook: A Signage Handbook. (U.S. Small Business Administration, 2003)

Not available online but available for purchase at various outlets.

Street Graphics and the Law

Daniel R. Mandelker, John M. Baker, and Richard Crawford. Street Graphics and the Law. (APA Planning Advisory Service, 2015)

Not available online but available for purchase at www.planning.org and other outlets.

United States Sign Council On-Premise Sign Code

Andres D. Bertucci and Richard B. Crawford, Esq. United States Sign Council Model On-Premise Sign Code. (United States Sign Council, 2011)

http://www.usscfoundation.org/USSCModelOn-PremiseSignCode.pdf

In addition to the above documents, the **International Sign Association** has produced a series of videos on issues related to sign area, sign height calculations, and sign visibility. These videos can be found online at **http://www.signs.org/Resources/ISAVideos.aspx**.

GLOSSARY

An important part of any sign regulations is a solid set of definitions for the various sign types and terms used in the regulations. This is especially true when the regulations prohibit all types of signs unless specifically listed and/or defined. In those instances, the definitions are the primary method of determining what types of signs are allowed or prohibited. The following is a glossary of terms commonly used in the regulation of temporary signs.

Advertising Mural

A large-scale temporary or permanent sign that covers all or a major portion of a multi-story blank or unfinished wall, building, or structure.

A-Frame Sign (a.k.a., Sandwich Board Sign or Sidewalk Sign)

A freestanding sign which is ordinarily in the shape of an "A" or some variation thereof, which is readily moveable, and is not permanently attached to the ground or any structure. See also the definition of T-frame signs.

Air-Activated Graphic

A sign, all or any part of, which is designed to be moved by action of forced air so as to make the sign appear to be animated or otherwise have motion.

Balloon Sign (a.k.a., Inflatable Device)

A sign that is an air inflated object, which may be of various shapes, made of flexible fabric, resting on the ground or a structure, and equipped with a portable blower motor that provides a constant flow of air into the device. Balloon signs are restrained, attached or held in place by a cord, rope, cable, or similar method. See also the definition for air-activated graphics.

Banner Sign

A temporary sign composed of cloth, canvas, plastic, fabric or similar lightweight, non-rigid material that can be mounted to a structure with cord, rope, cable, or a similar method or that may be supported by stakes in the ground.

Blade Sign (a.k.a., Feather Sign, Teardrop Sign, and Flag Sign)

A temporary sign that is constructed of cloth, canvas, plastic fabric or similar lightweight, non-rigid material and that is supported by a single vertical pole mounted into the ground or on a portable structure.

Commercial Message

Any sign wording, logo or other representation that, directly or indirectly, names, advertises or calls attention to a business, product, service or other commercial activity.

Freestanding/Yard Sign

Any permanent or temporary sign placed on the ground or attached to a supporting structure, posts, or poles, that is not attached to any building.

Light Pole Banner (a.k.a., Support Pole Banner)

A temporary banner or sign that is designed to be attached to a permanent light pole or other pole structure, and where the temporary sign element can be changed without modifying the permanent structure.

Noncommercial Message

Any sign wording, logo, or other representation that is not defined as a commercial message.

On-Premise Sign

A sign that advertises or otherwise directs attention to a product sold, service provided, or activity that occurs on the same parcel where the sign is located.

Off-Premise Sign

A sign that advertises or otherwise directs attention to a product sold, service provided, or an activity that occurs on a different parcel than where the sign is located.

Pennant

A triangular or irregular piece of fabric or other material, whether or not containing a message of any kind, commonly attached in strings or strands, or supported on small poles intended to flap in the wind.

People Sign (a.k.a., Human Mascot, Sign Spinner, and Human Sign)

A person attired or decorated with commercial insignia, images, costumes, masks, or other symbols that display commercial messages with the purpose of drawing attention to or advertising for an on-premise activity. Such person may or may not be holding a sign.

Portable Message Center Sign

A sign not permanently affixed to the ground, building, or other structure, which may be moved from place to place, including, but not limited to, signs designed to be transported by means of wheels. Such signs may include changeable copy.

Projected-Image Sign

A sign which involves an image projected on the face of a wall, structure, sidewalk, or other surface, from a distant electronic device, such that the image does not originate from the plane of the wall, structure, sidewalk, or other surface.

Sign

Any object, device, display or structure or part thereof situated outdoors or adjacent to the interior of a window or doorway, which 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, pictures, logos, figures, designs, symbols, fixtures, colors, illumination or projected images.

Snipe Sign

A temporary sign illegally tacked, nailed, posted, pasted, glued, or otherwise attached to trees, poles, stakes, fences, or other objects.

Temporary Sign

Portable signs or any sign not permanently embedded in the ground, or not permanently affixed to a building or sign structure, which is permanently embedded in the ground, are considered temporary signs.

T-Frame Sign

A freestanding sign which is ordinarily in the shape of an upside down “T” or some variation thereof, which is readily moveable, and is not permanently attached to the ground or any structure. See also the definition for A-frame signs.

Vehicle Sign

Any sign permanently or temporarily attached to or placed on a vehicle or trailer in any manner so that the sign is used primarily as a stationary identification or advertisement sign.

Window Sign

Any sign viewable through and/or affixed in any manner to a window or exterior glass door such that it is intended to be viewable from the exterior including, but not limited to, window paintings and signs located inside a building but visible primarily from the outside of the building.

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All images provided by Wendy Moeller unless otherwise noted.

www.signresearch.org

NOTE

FREE SPEECH DOCTRINE AFTER *REED v. TOWN OF GILBERT*

After Justice Scalia's death, it seems everything is up for grabs: gun rights, reproductive rights, voting rights, environmental protection, labor unions, campaign finance. In every major area where the late Justice provided a crucial fifth vote, a new Justice may shift the Supreme Court majority and, in turn, the law for decades to come.

But perhaps not everything has changed. Specifically, not five, but six Justices have supported the Court's invocation of the First Amendment's protection of free speech to strike down commercial regulation,[1] meaning that even without Justice Scalia, the commercialization of the First Amendment may continue apace.[2]

This Note focuses on understanding the doctrinal implications of *Reed v. Town of Gilbert*,[3] the Court's most recent invocation of the First Amendment's expansive deregulatory potential. In *Reed*, by articulating a broad standard for deeming a regulation to be content based, a six-Justice majority risked subjecting numerous reasonable regulations to strict scrutiny when faced with a First Amendment challenge.[4] In its immediate wake, many feared that *Reed* had quietly reshaped free speech doctrine in the image of economic libertarianism.[5]

This Note maps the synapse between cases and doctrine in attempting to understand the extent of *Reed*'s reach and its potential impact on First Amendment doctrine. It argues that no, *Reed* is not a free speech test for all seasons.[6] Rather than applying to all free speech cases, *Reed* only applies to certain regulations of noncommercial speech and can be distinguished up, down, and sideways in other

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[1] *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667, 2672 (2011) (invalidating commercial regulation on First Amendment grounds in a majority opinion by Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor).

[2] *Cf.* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 248–65 (2015); Amanda Shanor, The New *Lochner* (Sept. 2, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652762 [http://perma.cc/S7YZ-D8JV].

[3] 135 S. Ct. 2218 (2015).

[4] *See infra* section I.B, pp. 1984–87. The six-Justice majority in *Reed* was identical to that in *Sorrell*, 131 S. Ct. 2653, suggesting that Justice Sotomayor might become an unexpected swing vote in future free speech cases.

[5] *See* Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html.

[6] *Cf.* Staughton Lynd, Comment, Brandenburg v. Ohio*: A Speech Test For All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

contexts.[7] *Reed* does not displace existing commercial speech doctrine, nor does it apply to general regulations of economic conduct. By analyzing numerous cases decided in the aftermath of *Reed*, this Note argues that lower courts have (for the most part) already begun the process of narrowing *Reed* from below.[8]

As a result, *Reed* may have an unexpected impact on the structure of First Amendment doctrine. Rather than cementing the centrality of the division between content-based and content-neutral regulations, *Reed* may have instead diminished the distinction's importance.[9] By elevating a simple rule of content analysis above its underlying purpose of ferreting out impermissible government regulation of speech, *Reed* exposed the flaws of strict content analysis as an organizing principle for free speech doctrine. Lower courts can best protect core First Amendment values, and might encourage the Supreme Court to do the same, by refusing to let the content-based tail wag the First Amendment dog.

I. *REED* AND THE CONTENT DISTINCTION

A. A Capsule Summary of Free Speech Doctrine

Current First Amendment free speech doctrine is, in a word, doctrinal. It aggressively subdivides the known world into endless categories and describes distinctive rules and tests to evaluate the constitutionality of regulations that fall within those categories.[10]

The core division at the heart of current free speech doctrine separates regulations that are content based from those that are content neutral.[11] Regulations that distinguish speech on the basis of its con-

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[7] *See infra* Part II, pp. 1987–98.

[8] *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699607 [http://perma.cc/9XAM-HUJ4].

[9] *See infra* Part III, pp. 1998–2002.

[10] *See, e.g.*, Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803 (2004) ("[D]issatisfaction has arisen because current First Amendment doctrine relies heavily on categorical analysis. The categorical distinctions that the Court has previously established . . . are too rigid to adequately explain the complexity of First Amendment law."); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) ("The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.").

[11] Content analysis, of course, does not apply in First Amendment challenges to all regulations of speech. Some narrowly defined categories of content-based speech, most notably obscenity, are outside the First Amendment's protection wholesale. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–75 (2004) (discussing the boundaries of the First Amendment's coverage). Neither does content analysis, under current doctrine, necessarily demand strict scrutiny in

tent are subject to strict scrutiny, whereas those that are neutral with respect to the content of the regulated speech are evaluated under a less searching, intermediate scrutiny standard of review.[12] As Professor Leslie Kendrick puts it: "Given that almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny, the pivotal point in the doctrinal structure is the content analysis."[13]

The content distinction is intended, many scholars argue, to guide courts in identifying regulations "improperly motivated . . . by hostility to targeted speech."[14] While there may be other justifications for the content distinction, "it is difficult to formulate it in a way that is not concerned with *why* the government is regulating."[15] Independent of the legislature's subjective intent, the content distinction serves to identify objectively heightened risk that the government's actions violated the First Amendment. The content distinction thus provides courts with a ready guide for a first-order determination of whether the regulation of the speech in question risks impermissible government intervention in the marketplace of ideas.

In practice, however, the content distinction is quite messy and only roughly tracks the division between permissible and impermissible regulation.[16] As a first cut of possible speech regulations, requiring all content-based regulations to be subjected to strict scrutiny results in problems of both over- and underinclusion. Overinclusion in that certain content-based regulations pose no risk of official interference with the channels of democracy or the search for truth. And underinclusion in that content-neutral regulations of the time, place, and manner of expression still have the potential to "devastate expressive content."[17]

As a result of the awkward fit between the content distinction and the real-world contours of desirable speech regulation, courts have developed a series of categorical exceptions, reducing the level of scrutiny for certain types of content-based regulations of speech — such as regulations of commercial speech.[18] Some scholars, Justice Breyer chief

challenges to regulation of speech by certain actors, including students, prisoners, and government employees, or to speech by the state itself. *See generally* LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE 121–53 (2014).

12 Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).

13 *Id.* at 238.

14 Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 362 (1997) (arguing that, though this is the justification for the distinction, it is an insufficient one).

15 Kendrick, *supra* note 12, at 248.

16 *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that First Amendment law's unstated objective is identifying improper governmental motives).

17 John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1181 (2015).

18 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

among them, have advocated for replacing the current structure of rigid tiers of scrutiny and fixed categorical exceptions with a case-by-case ad hoc balancing approach.[19]

In addition to the clunkyness of the content distinction itself, there is also the practical problem of how to decide which regulations fall on which side of the line. How are courts to define the difference between regulations that are content based and those that are content neutral? It has been hard to say.[20] But in *Reed*, a majority of the Supreme Court seemed to adopt a clear statement of the distinction that broadly deems regulations to be content based.

B. Reed v. Town of Gilbert

In *Reed*, the Supreme Court invalidated the Sign Code[21] enacted by the Town of Gilbert, Arizona, as a content-based regulation of speech.[22] The Sign Code singled out different types of signs for special treatment, specifying requirements for their size and the locations and times at which they could be displayed.[23] A small church challenged the Sign Code as a violation of freedom of speech under the First Amendment.[24]

Writing for the Court, Justice Thomas held that the Sign Code's distinctions among different types of signs were content based and did not satisfy strict scrutiny.[25] In finding the Sign Code to be content

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[19] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551–53 (2012) (Breyer, J., concurring in the judgment). In opting for a categorical approach, we end up facing similar questions: what is the process by which the relevant categories are determined and defined, and at what level of generality? *See* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 116–19, 122 (2012).

[20] *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1353 (2006).

[21] TOWN OF GILBERT, ARIZ., LAND DEVELOPMENT CODE (Sign Code) ch. 1, § 4.402 (2005) .

[22] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015).

[23] Specifically, the Sign Code distinguished between "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs." *Id.* at 2224–25 (alterations in original). Ideological signs were treated most favorably under the Sign Code; they were permitted "to be up to 20 square feet in area and to be placed in all 'zoning districts' without time limits." *Id.* at 2224 (quoting Sign Code § 4.402(J)). Political signs were allowed to be "up to 16 square feet on residential property and up to 32 square feet" elsewhere, and were allowed to "be displayed up to 60 days before a primary election and up to 15 days following a general election." *Id.* at 2224–25. Temporary directional signs were not to be "larger than six square feet," were permitted to "be placed on private property or on a public right-of-way" so long as "no more than four signs [were] placed on a single property at any time," and could "be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward." *Id.* at 2225 (internal citations omitted) (quoting Sign Code § 4.402(P)).

[24] *Id.* at 2225–26.

[25] *Id.* at 2231–32. *Reed* is a rare occasion on which Chief Justice Roberts assigned the majority opinion in a salient case to Justice Thomas. *See* Richard J. Lazarus, *Back to "Business" at the*

based, the Court announced a broad new standard. It held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[26] "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[27] Facially content-based regulations are automatically "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[28] Even where a regulation does not address content on its face, it will be considered content based if it cannot be "justified without reference to the content of the regulated speech."[29] The majority in *Reed* held that the Town of Gilbert's Sign Code was content based on its face and thus subject to strict scrutiny, which it failed — epically.[30]

Attempting to mitigate the apparent breadth of the majority's holding, Justice Alito, concurring,[31] listed a number of different regulations that he believed would still be content neutral under *Reed*'s new rule.[32] Justice Alito's concurrence, however, did not offer a theoretical basis for distinguishing its protected categories from the reach of the majority's standard.[33]

Three Justices flatly disagreed with the majority's reasoning. Justice Kagan, joined by Justices Ginsburg and Breyer, admitted that the Sign Code did not pass First Amendment muster but criticized the breadth of the Court's holding, arguing that strict scrutiny should be applied to content-based regulations of speech only where there is a

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Supreme Court: The "Administrative Side" of Chief Justice Roberts, 129 HARV. L. REV. F. 33, 58–59, 60 n.161 (2015).

[26] *Reed*, 135 S. Ct. at 2227.

[27] *Id.* (quoting Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011)).

[28] *Id.* at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[29] *Id.* at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). The Court also affirmed that a regulation is content based if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (alteration in original) (quoting *Ward*, 491 U.S. at 791).

[30] *Id.* at 2231–32. Justice Kagan, concurring in the judgment, argued that the Town's defense of the Sign Code "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Id.* at 2239 (Kagan, J., concurring in the judgment).

[31] Justice Alito was joined by Justices Kennedy and Sotomayor.

[32] *See Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

[33] At least two of Justice Alito's exceptions — the seventh, involving the on-premises/off-premises distinction, and the ninth, dealing with signs advertising one-time events — seem irreconcilable with the broad rule asserted by the majority. A lower court has already found a regulation distinguishing between on-premises and off-premises signs to be content based. *See infra* notes 79–83 and accompanying text. And Justice Kagan noted the dissonance between the one-time event exception and the facts of *Reed* itself. *See Reed*, 135 S. Ct. at 2237 n.* (Kagan, J., concurring in the judgment).

"realistic possibility that official suppression of ideas is afoot."[34] The majority would require courts to "strike down . . . democratically enacted local laws even though no one — certainly not the majority — has ever explained why the vindication of First Amendment values requires that result."[35] In a separate opinion, Justice Breyer argued against a rigid approach requiring strict scrutiny for content-based regulations, as "[r]egulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[36]

The majority's articulation of the standard for deeming a regulation content based is notable for two main reasons. First, it divorces the content distinction from its intended purpose of ferreting out impermissible government motive.[37] Even where government motive is completely benign, the Court affirmed that content-based regulations are nonetheless suspect and should be subjected to strict scrutiny.[38] Second, it defines the category of content-based regulations in language sufficiently broad to cover nearly all regulations. Finding a regulation to be content based whenever it cannot be "justified without reference to the content of the regulated speech"[39] could be read to include any regulation that even incidentally distinguishes between activities or industries.

After *Reed*, commentators echoed Justice Breyer's concerns and cautioned that the majority and its formalist, absolutist approach to content neutrality had transformed First Amendment doctrine, with effects reaching far beyond the case's immediate context.[40] Crafty litigants immediately made First Amendment arguments challenging all sorts of government regulation under *Reed*: other municipal sign

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[34] *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

[35] *Id.* at 2239.

[36] *Id.* at 2234 (Breyer, J., concurring in the judgment). As early as oral argument, Justice Breyer recognized that a broad test for deeming regulations to be content based could imperil wide swaths of reasonable government regulation. *See* Transcript of Oral Argument at 21, *Reed*, 135 S. Ct. 2218 (2015) (No. 13-502) ("[T]he entire U.S. Code is filled with content distinctions. All of crime is filled with content distinctions. All of regulation has content distinctions."); *see also, e.g.*, Schauer, *supra* note 11, at 1778–84 (describing securities regulation, antitrust law, labor law, and numerous other legal regimes as content-based regulations of speech). Justice Breyer would have invalidated the Sign Code in *Reed* under an ad hoc balancing test. *See Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring in the judgment).

[37] *See, e.g.*, Kagan, *supra* note 16, at 450–56.

[38] This requirement of strict scrutiny for any and all content-based regulations of speech seems to conflict with an earlier decision refusing to apply strict scrutiny in a challenge to a municipal sign law with an exception for commemorative markers and address numbers. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 n.1, 804–10 (1984).

[39] *Reed*, 135 S. Ct. at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[40] *See* Liptak, *supra* note 5.

codes,[41] antipanhandling regulations,[42] commercial speech regulations,[43] and regulations of general commercial conduct.[44]

But, as the next Part argues, despite numerous post-*Reed* challenges to diverse government regulations, lower courts have generally resisted *Reed*'s deregulatory potential.

II. READING *REED*: DIMENSIONS OF DISTINCTION

If interpreted at full breadth, *Reed* could provide a grant for transforming First Amendment doctrine and limiting government power to enforce reasonable regulations. Its broad test for what counts as a content-based regulation of speech risks destabilizing vast swaths of the regulatory state by requiring more regulations to stand up to strict scrutiny when faced with a First Amendment challenge.

But it need not be this way. *Reed* itself does not necessitate such a broad interpretation. *Reed* can be distinguished up, down, and sideways. Down, by deeming a regulation to cover conduct rather than speech, thereby subjecting it to rational basis review. Sideways, by pushing *Reed* aside in evaluating challenges to regulations of commercial speech — and preserving the *Central Hudson*[45] standard of intermediate scrutiny. And up, by finding the regulation to be content neutral or by diluting the standard of strict scrutiny.[46] This Part addresses each of these dimensions of distinction in turn.[47] It marshals lower-court decisions addressing *Reed*[48] to suggest that lower courts' interpretations of *Reed* have narrowed the case's reach in a manner consistent with the majority opinion's text.

A. Distinguishing Reed *Down: The Speech/Conduct Divide*

Seeing in *Reed* a valuable ally in the fight against regulation, creative First Amendment advocates have challenged general economic regulations as impermissible content-based restrictions on speech. *Reed* thus risks becoming the strongest and shiniest arrow in the quiver of

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[41] *See infra* p. 1993.

[42] *See infra* pp. 1994–95.

[43] *See infra* section II.B, pp. 1990–92.

[44] *See infra* section II.A, pp. 1987–90.

[45] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

[46] This last move, diluting strict scrutiny, is the most dangerous. *See infra* section II.C, pp. 1992–98.

[47] The order in which these dimensions are considered (down then sideways then up) provides, perhaps, a best-practice approach for a court considering a First Amendment challenge after *Reed*: First, determine whether the regulation addresses conduct rather than speech. If it covers speech, determine whether the regulation addresses commercial speech. Only when the answer to the first two questions is decisively "no" should courts confront content analysis under *Reed*.

[48] In just its first six months, *Reed* was cited in fifty-six cases, including ten decisions by eight different federal Courts of Appeals.

those seeking to Lochnerize the First Amendment.[49] But unlike regulations of speech, which at least raise the specter of government censorship and thus risk impinging protected First Amendment values, general regulations of economic behavior do not and should not raise First Amendment concerns.[50]

On its face, *Reed* should not apply to regulations of conduct. *Reed* did not address a regulation of conduct, nor does the text of the majority opinion suggest that it should apply to such regulations. In *Reed*, the Town of Gilbert's Sign Code distinguished between different types of signs — a canonical First Amendment medium — on the basis of the language they contained.[51] The speech/conduct distinction was not at issue in *Reed*, and while the decision might be interpreted to reflect increasing skepticism from the Court over regulations of *speech*, it says nothing about extending the First Amendment to cover regulations of *conduct*.

Two conflicting cases interpreting *Reed* from the Second and Eleventh Circuits illustrate the importance of the threshold determination of whether a regulation governs speech or conduct. The cases address First Amendment challenges to state laws prohibiting merchants from charging higher prices to customers paying with credit cards than to those paying with cash. These two cases illuminate *Reed*'s potential reach and also how courts have distinguished the decision down by refusing to apply it to regulations of conduct with only tenuous connections to speech.

In *Expressions Hair Design v. Schneiderman*,[52] the Second Circuit held that *Reed* did not apply in a challenge to New York's antisurcharge regulation, as it was a regulation of conduct, not speech.[53] The court noted explicitly that *Reed* did not impact the threshold *speech v. conduct* determination, as it only applied to regulations of speech[54] and that the law at issue only addressed whether a merchant could charge customers more for using credit cards.[55] The court treated the law as a regulation of prices, and in particular the relationship between prices, rather than as a regulation of the seller's

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[49] It is not clear to what degree strength or shine are attractive qualities in an arrow, but one hopes the point is sufficiently sharp.

[50] Bracketing, for our purposes, expressive conduct, where a communicative function is implicated by particular conduct. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); *see also* Texas v. Johnson, 491 U.S. 397 (1989).

[51] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224–25 (2015).

[52] 808 F.3d 118 (2d Cir. 2015).

[53] *Id.* at 132, 134–35.

[54] *Id.* at 132 (deeming content analysis, as exemplified by *Reed*, "of no relevance whatsoever with respect to the threshold question whether the restriction at issue regulates speech or, instead, conduct").

[55] *See id.* at 131–32.

speech in describing its prices. Judge Livingston explained: "Plaintiffs' chief error . . . is their bewildering persistence in equating the actual imposition of a credit-card surcharge . . . with the words that speakers of English have chosen to describe that pricing scheme (i.e., the term 'credit-card surcharge')."[56] Distinguishing between the regulatory burden itself and its relationship to the speech allegedly infringed helps illuminate the distinction between conduct and speech.

In *Dana's Railroad Supply v. Florida*,[57] the Eleventh Circuit reached a contrary conclusion, treating a similar regulation as a restriction on speech and finding that the regulation did not satisfy heightened scrutiny.[58] The Eleventh Circuit focused on the fact that the challenged Florida statute prohibited the imposition of a *surcharge* on customers paying by credit card while permitting a *discount* for those paying by cash.[59] The court argued that the distinction drawn by the regulation was purely semantic, making it a regulation of speech rather than conduct, and suggested that the regulation was "muddled by less savory notes of plain old-fashioned speech suppression."[60] However, in doing so, the court disregarded the fact that the actual regulation prohibited treating different customers differently based on their choice of payment method; it did not restrict vendors from describing any particular price as either a "surcharge" or a "discount."[61] The Eleventh Circuit's elision repeats what Judge Livingston described as the plaintiff's chief error in the analogous Second Circuit case — that is, equating a substantive regulatory impact with the words people choose to describe it.

On the surface, the conflict between the Second and Eleventh Circuits is not about the interpretation of *Reed* at all, but rather about the contours of the speech/conduct distinction. But on closer inspection, the two cases illustrate that after *Reed*, deeming a regulation to cover speech increases the likelihood that it will be subjected to strict scrutiny (and most likely invalidated) under *Reed*'s broadened standard. Thanks to *Reed*, the pre-game has become the game. Courts seeking to preserve the regulatory status quo where it does not raise genuine

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[56] *Id.*

[57] 807 F.3d 1235 (11th Cir. 2015).

[58] *See id.* at 1246. The Eleventh Circuit left open the possibility that the statute in question might be given more leeway as a regulation on commercial speech, finding no need to decide the category question as the court believed that the law did not satisfy any heightened level of scrutiny. *Id.* This move, leaving undecided the appropriate level of First Amendment scrutiny where it would not change the result, is one practiced by the Court itself. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).

[59] *Dana's R.R. Supply*, 807 F.3d at 1247–48.

[60] *Id.* at 1247.

[61] *Id.* at 1245–46.

First Amendment concerns may find a ready escape hatch in the speech/conduct distinction.

Indeed, the Second Circuit is not alone in finding reasonable police-power regulations to be outside of *Reed*'s reach. In a number of early post-*Reed* challenges, other courts have similarly distinguished *Reed* down, finding a challenged regulation to cover conduct rather than speech and thereby avoiding a dispositive determination of whether *Reed* might require strict scrutiny.[62]

B. Distinguishing Reed *Sideways: Commercial Speech*

Even where a regulation addresses speech rather than conduct, *Reed* probably does not apply if the challenged regulation addresses only commercial speech. Historically, because of the strained relationship between commercial speech and the core values underpinning First Amendment protection, courts have subjected regulations of commercial speech to a standard of intermediate scrutiny rather than the oft-insurmountable barrier of strict scrutiny.[63]

Some have worried that *Reed* supplanted existing commercial speech doctrine.[64] But *Reed*'s new rule for determining when a regulation is content based does not apply to the commercial speech context. First, the Supreme Court has already told us that regulations of commercial speech are content based but are categorically deserving of weakened scrutiny, so *Reed*'s new test for whether a regulation is con-

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[62] Though these cases do not rely on *Reed* in the predicate *conduct v. speech* determination, as *Reed* itself did not address this question, the decision's shadow looms large: If the cases had treated the regulation as covering speech rather than conduct then *Reed* likely would have required the courts to apply strict scrutiny, or at the very least required wading into the interpretive uncertainty about what *Reed* does require. For example, the Ninth Circuit rejected First Amendment arguments brought by franchisors against Seattle's minimum wage ordinance, instead treating the ordinance as an economic regulation that did not trigger any form of heightened scrutiny. Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389, 409 (9th Cir. 2015) (upholding a lower court's refusal to grant a preliminary injunction). And the Southern District of New York, in a challenge brought by a religious congregation seeking to build a rabbinical college, held that building the college was not itself speech entitled to First Amendment protection, even though it might "*enable* [such] speech." Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, No. 07-CV-6304(KMK), 2015 WL 5729783, at *51 (S.D.N.Y. Sept. 29, 2015); *see id.* at *1. Similarly, the North Carolina Supreme Court upheld as a regulation of conduct a criminal statute banning registered sex offenders from using commercial social networking websites accessible to minors. State v. Packingham, 777 S.E.2d 738, 741, 744 (N.C. 2015). The court there, however, noted that if the regulation were to govern speech, it would nonetheless be deemed content neutral under *Reed*. *Id.* at 745.

[63] *See generally* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153 (2012).

[64] And with good reason, as Justice Thomas, who wrote for the Court in *Reed*, has elsewhere expressed his skepticism about weakened scrutiny for regulations of commercial speech. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

tent based is not relevant.[65] Second, *Reed* itself provided no indication that it intended to upset this area of settled doctrine. *Reed* never considered regulations of commercial speech explicitly, as the challenged categories in the Town of Gilbert's Sign Code involved noncommercial expression,[66] nor did it address *Central Hudson* or the Court's other commercial speech precedents. Lower courts can take the Supreme Court at its word (or rather, its silence) by distinguishing *Reed* sideways and continuing to evaluate challenges to regulations of commercial speech under intermediate scrutiny.

And that's precisely what most lower courts considering challenges to commercial speech regulations after *Reed* have done. In one case, a federal district court found *Reed* inapposite in a challenge to an ordinance imposing requirements on negotiations between landlords and tenants.[67] Stating that *Reed* "does not concern commercial speech,"[68] the court considered the ordinance as a regulation on commercial speech and concluded that it satisfied intermediate scrutiny under *Central Hudson*.[69] Similarly, another federal district court upheld under *Central Hudson* a statute prohibiting healthcare providers from soliciting people involved in motor vehicle accidents, finding that "[b]ecause the [statute] constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."[70] Even in contexts closely analogous to the facts of *Reed*, as in challenges to regulation of commercial signs and billboards, multiple courts have found *Reed* to be entirely immaterial and have instead applied intermediate scrutiny under *Central Hudson*.[71] Perhaps the strongest statement about *Reed*'s inapplicability in the commercial speech context comes from the Northern District of California: "The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, and nothing in

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[65] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

[66] *See supra* note 23 and accompanying text.

[67] *See* S.F. Apartment Ass'n v. City & County of San Francisco, No. 15-cv-01545-PJH, 2015 WL 6747489, at *6–7 (N.D. Cal. Nov. 5, 2015).

[68] *Id.* at *7.

[69] *Id.* at *6, *9.

[70] Chiropractors United for Research & Educ., LLC v. Conway, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015).

[71] *See* Cal. Outdoor Equity Partners v. City of Corona, No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech . . . . The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it."); *see also* Peterson v. Village of Downers Grove, No. 14C9851, 2015 WL 8780560, at *10 (N.D. Ill. Dec. 14, 2015); Timilsina v. West Valley City, No. 2:14-cv-00046-DN-EJF, 2015 WL 4635453, at *7 (D. Utah Aug. 3, 2015); Contest Promotions, LLC v. City & County of San Francisco, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).

its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."[72]

A more troubling application of the commercial/noncommercial distinction after *Reed* came in the trademark context. In *In re Tam*,[73] the Federal Circuit struck down as content based a section of the Lanham Act allowing the Patent and Trademark Office to deny registration to a disparaging mark.[74] In doing so, the court tripped over itself to separate the commercial and expressive aspects of trademark registration — a distinction contested hotly in a dissent.[75] *In re Tam*, while confirming the vitality of intermediate scrutiny for commercial speech after *Reed*, also suggests that courts must avoid classifying commercial speech as noncommercial given the enhanced likelihood that regulation of the latter is now vulnerable to strict scrutiny.[76]

C. Distinguishing Reed *Up (or Not at All): Noncommercial Speech*

Reed's impact will be most strongly felt in challenges to regulations closely analogous to the facts of *Reed* itself: regulations of noncommercial speech. *Reed* will likely require future courts to analyze such regulations as content based and subject to strict scrutiny. Since the Court's decision, most cases with fact patterns closely analogous to *Reed*'s — challenges to other sign codes or regulations of noncommercial person-to-person communication — have resulted in invalidation of the challenged regulation. However, there remain two paths to distinguishing *Reed* up: First, and more problematically, by deeming a regulation content based under *Reed* but finding that it satisfies strict scrutiny. Second, by finding regulations to be content neutral, notwithstanding the feared post-*Reed* squeeze-out of the zone of content-neutral regulations.

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[72] CTIA-The Wireless Ass'n v. City of Berkeley, No. C-15-2529 EMC, 2015 WL 5569072, at *10 (N.D. Cal. Sept. 21, 2015) (citation omitted) (rejecting a First Amendment challenge to an ordinance requiring cell-phone retailers to provide notice to customers regarding radiofrequency emissions).

[73] 808 F.3d 1321 (Fed. Cir. 2015) (en banc).

[74] *Id.* at 1334–36.

[75] *See id.* at 1337–39; *id.* at 1376 (Reyna, J., dissenting). The Federal Circuit's willingness to treat trademark registration as a hybrid act of commercial and noncommercial speech seems an unprecedented and dangerous way to erode commercial speech doctrine by transforming the relevant unit of analysis. *See id.* at 1377 ("[T]he Supreme Court has routinely held that various examples of speech 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.'" (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983))).

[76] Similarly, in *Rosemond v. Markham*, No. 13-42-GFVT, 2015 WL 5769091 (E.D. Ky. Sept. 30, 2015), the court relied on *Reed* to find a regulation of professional conduct to be content based as applied to a nonprofessional, *id.* at *7. However, the court in that case nonetheless retained a strong commercial/noncommercial distinction, maintaining that the regulation would likely have had to satisfy only intermediate scrutiny if it were to be treated as commercial speech. *See id.* at *10.

Most directly, lower courts post *Reed* have found sign regulations that treat different types of noncommercial communication differently to be content based and have invalidated them under strict scrutiny.[77] Courts have even signaled receptivity to *Reed* challenges to sign ordinances where they have not been raised.[78]

At the extreme, one lower court even interpreted *Reed* so broadly as to run afoul of a clear limitation imposed by Justice Alito's concurrence. In *Thomas v. Schroer*,[79] the District Court for the Western District of Tennessee found that a sign code distinguishing between off-premises and on-premises signs was content based,[80] even though Justice Alito described the off-premises/on-premises distinction as content neutral.[81] This decision — though perhaps an outlier[82] — illustrates the inconsistency between the *Reed* majority's far-ranging reasoning and Justice Alito's attempt to identify exceptions.[83]

Such reasoning also imperils the federal Highway Beautification Act,[84] which conditions the grant of a state's federal highway funds on

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[77] *See, e.g.*, Cent. Radio Co. v. City of Norfolk, No. 13-1996, 13-1997, 2016 WL 360775, at *4–8 (4th Cir. Jan. 29, 2016); Marin v. Town of Southeast, No. 14-CV-2094 (KMK), 2015 WL 5732061, at *13–17 (S.D.N.Y. Sept. 30, 2015).

[78] For example, a state court in Oregon, though "not presented with any First Amendment issues," nonetheless noted that "as of the close of the 2014 term of the United States Supreme Court, it is fairly clear that the [county sign code is] vulnerable to invalidation . . . under the First Amendment." State *ex rel* Icon Groupe, LLC v. Washington County, 359 P.3d 269, 275 n.7 (Or. Ct. App. 2015).

[79] 116 F. Supp. 3d 869 (W.D. Tenn. 2015).

[80] *Id.* at 876 ("Similar to the sign code exemptions in *Reed*, . . . [t]he only way to determine whether a sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the 'activities conducted on the property on which they are located.' Consequently, under the *Reed* test, the on-premise exemption is facially content-based." (quoting Billboard Regulation and Control Act of 1972, TENN. CODE ANN. § 54-21-104 (2012))).

[81] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring).

[82] *See* Contest Promotions, LLC v. City & County of San Francisco, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) ("[A]t least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based . . . ."). Regulations distinguishing between on-premises and off-premises signs should probably be treated as content-neutral regulations of place as the very same sign is treated differently only because of the location in which it is placed. *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981) (plurality opinion).

[83] The same district court said as much in a later opinion: "Justice Alito's concurrence in *Reed* is inapposite to the instant analysis. Not only is the concurrence not binding precedent, but the concurrence fails to provide any analytical background as to why an on-premise exemption would be content neutral. The concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction . . . ." Thomas v. Schroer, No. 2:13-cv-02987-JPM-cgc, 2015 WL 5231911, at *5 (W.D. Tenn. Sept. 8, 2015). In yet another opinion, the court made clear in the qualified immunity context that this broad interpretation of *Reed* ought to be "clearly established going forward." Thomas v. Schroer, No. 2:13-CV-02987-JPM, 2015 WL 5797599, at *15 (W.D. Tenn. Oct. 2, 2015).

[84] Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (codified at 23 U.S.C. § 131 (2012)).

the state's regulation of outdoor signs near highways.[85] The federal government filed an amicus brief in *Reed* expressing its concern for the future of the Act.[86] Though no court has yet squarely considered a First Amendment challenge to the Highway Beautification Act's sign regulations under *Reed*, such a challenge now seems inevitable.[87]

Additionally, courts have generally deemed regulations governing noncommercial person-to-person communications to be content based under *Reed*.[88] For example, multiple courts have invalidated antipanhandling regulations under *Reed*.[89] Even broader second-generation antipanhandling ordinances drafted in the wake of *Reed* that attempt to satisfy its expanded standard are beginning to face

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[85] *See id.*

[86] *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 1, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502), 2014 WL 4726504, at *1. The federal government argued against strict scrutiny for the Sign Code, *id.* at 24–27, asserting that the Highway Beautification Act would survive intermediate scrutiny (even while the Sign Code would not), *id.* at 8, but not discussing whether the Highway Beautification Act would pass muster under strict scrutiny. Given the specificity of exceptions to the Highway Beautification Act — like its exception for signs advertising free coffee, 23 U.S.C. § 131(c)(5) — which certainly "appl[y] to particular speech because of the topic discussed or the idea or message expressed," *Reed*, 135 S. Ct. at 2227, it is likely that a First Amendment challenge to the Highway Beautification Act would merit strict scrutiny, and succeed under *Reed*.

[87] Justice Kagan noted in *Reed* that the majority's reasoning puts the Act "in jeopardy." *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring in the judgment). Indeed, the District Court for the Western District of Tennessee all but invited just such a challenge. *See Thomas*, 2015 WL 5231911, at *7.

[88] In general, regulations that target political speech, which lies at the heart of First Amendment protection, are (and probably ought to be) especially difficult to sustain after *Reed*. Several early post-*Reed* cases have confirmed this intuition. *See* Cahaly v. Larosa, 796 F.3d 399, 405–06 (4th Cir. 2015) (striking down a statute prohibiting political robocalls as content based under *Reed*); Rideout v. Gardner, No. 14-cv-489-PB, 2015 WL 4743731, at *9, *15 (D.N.H. Aug. 11, 2015) (striking down as content based a statute prohibiting voters from taking and disclosing pictures of completed election ballots); *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1251–52, 1251 n.10 (Mass. 2015) (striking down a statute criminalizing certain false statements about political candidates, relying primarily on the Massachusetts Declaration of Rights but noting that *Reed* "casts additional doubt on the Commonwealth's position," *id.* at 1251 n.10).

[89] *See, e.g.*, Thayer v. City of Worcester, No. 13-40057-TSH, 2015 WL 6872450, at *1, *11–12 (D. Mass. Nov. 9, 2015) (invalidating as content based an ordinance making it "unlawful for any person to beg, panhandle or solicit in an aggressive manner," *id.* at *1 (quoting WORCESTER, MASS., REVISED ORDINANCES OF 2008, ch. 9, § 16(d) (2008))); *see also, e.g.*, Norton v. City of Springfield, 806 F.3d 411, 412–13 (7th Cir. 2015); McLaughlin v. City of Lowell, No. 14-10270-DPW, 2015 WL 6453144, at *4, *12 (D. Mass. Oct. 23, 2015); Browne v. City of Grand Junction, No. 14-cv-00809-CMA-KLM, 2015 WL 5728755, at *9–11 (D. Colo. Sept. 30, 2015). *But see* Watkins v. City of Arlington, No. 4:14-cv-381-O, 2015 WL 4755523, at *7 (N.D. Tex. Aug. 12, 2015) (finding that an ordinance that regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral). *See generally* Anthony Lauriello, Note, Reed v. Town of Gilbert *and the Death of Panhandling Regulation*, 116 COLUM. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666679 [http://perma.cc/73ZQ-25E6] (arguing that after *Reed*, virtually no panhandling regulations can withstand First Amendment scrutiny).

successful First Amendment challenges.[90] Similar challenges have been successfully mounted against ordinances prohibiting solicitation in a pedestrian-only historic district,[91] prohibiting solicitation of day labor,[92] and requiring a license for door-to-door solicitation.[93]

These cases nicely illustrate how content analysis unmoored from context places regulators in a bind. Rather than limiting the amount of protected speech subject to government regulation, *Reed* requires legislatures to regulate all speech in order to regulate any speech.[94]

One path to distinguishing *Reed* up is for courts to find that a challenged regulation is content based but nonetheless satisfies strict scrutiny. However, this approach risks weakening the protection of speech at the heart of the First Amendment by offering a version of strict scrutiny that is strict in name only.[95] A panel of the Eleventh Circuit followed this path in the so-called "Docs vs. Glocks" challenge to a law limiting doctors' ability to ask about and record patients' firearm

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[90] In an early post-*Reed* case, the Seventh Circuit reversed a previous decision and held that the City of Springfield's ordinance prohibiting oral requests for money was content based and thus subject to strict scrutiny. *Compare Norton*, 806 F.3d at 412–13 (finding the regulation content based), *with* Norton v. City of Springfield, 768 F.3d 713, 717–18 (7th Cir. 2014) (finding the regulation content neutral). After the Seventh Circuit's ruling, the City recrafted the antipanhandling ordinance. Norton v. City of Springfield, No. 15-3276, 2015 WL 8023461, at *1 (C.D. Ill. Dec. 4, 2015). The revised statute closely mirrored the Colorado statute providing for floating buffer zones around individuals visiting abortion clinics upheld by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 707 (2000). *But cf.* McCullen v. Coakley, 134 S. Ct. 2518, 2545 (2014) (Scalia, J., concurring in the judgment) (concluding that *Hill* ought to be overruled).

The revised Springfield ordinance was again challenged as content based under *Reed*. *See Norton*, 2015 WL 8023461, at *1. The district court denied the City's motion to dismiss, finding that unlike the statute in *Hill*, the revised Springfield ordinance "allows solicitations . . . unless the speaker is making a vocal appeal for an immediate donation. Because the Springfield ordinance prohibits this type of speech in the designated area while allowing other types, the Court must conclude it is content-based." *Id.* at *2.

[91] FF Cosmetics FL Inc. v. City of Miami Beach, No. 14-cv-22072-KING, 2015 WL 5145548 (S.D. Fla. Aug. 31, 2015).

[92] Centro de la Comunidad Hispana v. Town of Oyster Bay, No. 10-CV-2262 (DRH), 2015 WL 5178147 (E.D.N.Y. Sept. 3, 2015).

[93] Working America, Inc. v. City of Bloomington, No. 14-1758 ADM/SER, 2015 WL 6756089 (D. Minn. Nov. 4, 2015).

[94] Though to the extent that antipanhandling ordinances have the effect of criminalizing homelessness and poverty, legislators might consider reallocating resources away from speech regulation in any form and toward more constructive and inclusive programs for alleviating the root causes of financial and social marginalization. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE 20–21, https://www.nlchp.org/documents/No_Safe_Place [http://perma.cc/JKV5-6XW6]. *See generally* MATTHEW DESMOND, EVICTED (2016).

[95] *See Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment) ("I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force.").

ownership,[96] but the decision has been vacated pending rehearing en banc.[97]

Finally, while *Reed* expanded the zone of content-based regulations, it did not totally eliminate the possibility that some carefully crafted regulations may yet be deemed content neutral. At least six Justices — the three who concurred in the judgment (Justices Kagan, Breyer, and Ginsburg) along with Justice Alito and the two who joined his concurring opinion (Justices Kennedy and Sotomayor) — are open to finding reasonable sign regulations to be content neutral, even if the reasoning of the *Reed* majority opinion might suggest otherwise.[98]

Following *Reed*, a handful of lower courts have found regulations of speech to be content neutral and have thus evaluated them under intermediate scrutiny.[99] In a case that had been GVR-ed (granted, vacated, and remanded) by the Supreme Court after *Reed*, the Ninth Circuit affirmed that restrictions on the height and size of signs were

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[96] *See* Wollschlaeger v. Governor of Fla., No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015), *reh'g en banc granted*, No. 12-14009 (11th Cir. Feb. 3, 2016). The court found that under *Reed*, the regulation was content based as "it applies to speech based on the 'topic discussed.'" *Id.* at *19 (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015)). However, the court found that the statute nonetheless satisfied strict scrutiny. *Id.* at *24–31. The court considered, but did not decide, whether the law ought to be subjected to less rigorous scrutiny as a regulation on professional speech, while also noting that "[b]roadly reading the Supreme Court's recent *Reed* decision may suggest that any and all content-based regulations, including commercial and professional speech, are now subject to strict scrutiny." *Id.* at *24.

[97] Not only does this case illustrate the risk of a weakened strict scrutiny standard, it also shows the huge danger of letting Second Amendment culture trump First Amendment protections. *See* Eugene Volokh, *Can Florida Restrict Doctors' Speech to Patients About Guns?*, WASH. POST: VOLOKH CONSPIRACY (Feb. 4, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/can-florida-restrict-doctors-speech-to-patients-about-guns [http://perma.cc/7FFB-4DXJ].

[98] *Compare Reed*, 135 S. Ct. at 2233 (Alito, J., concurring), *and id.* at 2238–39 (Kagan, J., concurring in the judgment), *with id.* at 2227–28 (majority opinion). While counting to five may be the best way to predict the results of a future Supreme Court challenge, in the interim, lower courts are bound by the opinion of the Court.

[99] Early evidence also suggests that the secondary effects doctrine — another categorical carveout from unitary application of content analysis — also survived *Reed*. The secondary effects doctrine allows "intermediate rather than strict scrutiny" for zoning ordinances that are facially content based (especially so after *Reed*) but are "designed to decrease secondary effects and not speech." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). The doctrine is a contested exception to content analysis that has largely been limited to the context of sexually explicit speech. *See* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 730 (2001). The Seventh Circuit, in a challenge brought by the would-be proprietors of an adult-entertainment venue to a zoning ordinance prohibiting new "sexually oriented businesses" from operating within 750 feet of a residence, rejected the possibility that *Reed* "upend[ed] established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment." BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (citing City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (plurality opinion)).

content neutral.[100] Another court deemed a ban on painted wall signs to be content neutral.[101] The First Circuit held that an ordinance prohibiting standing, sitting, staying, driving, or parking on median traffic strips was content neutral because it "does not take aim at — or give special favor to — any type of messages conveyed in such a place because of what the message says."[102] Similarly, the District Court for the Northern District of Texas found a regulation that prohibited all pedestrians from soliciting, selling, or distributing materials to occupants of cars stopped at traffic lights to be content neutral.[103] And in the Northern District of Illinois, an ordinance prohibiting peddling on public sidewalks adjacent to a stadium was deemed content neutral.[104] In two other examples involving firearm regulations, courts have deemed the regulations in question to be content neutral,[105] in one case by apparently ignoring *Reed*'s rule for determining whether a regulation is content based.[106] These cases suggest that though *Reed* increased the likelihood that a regulation will be deemed content based,

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[100] *See* Herson v. City of Richmond, No. 11–18028, 2016 WL 284430, at *1 n.1 (9th Cir. Jan. 22, 2016).

[101] Peterson v. Village of Downers Grove, No. 14C9851, 2015 WL 8780560, at *5 (N.D. Ill. Dec. 14, 2015).

[102] Cutting v. City of Portland, 802 F.3d 79, 85 (1st Cir. 2015). The court nonetheless invalidated the ordinance as an impermissible regulation of speech in a public forum. *See id.* at 83, 92.

[103] Watkins v. City of Arlington, No. 4:14-cv-381-O, 2015 WL 4755523, at *7 (N.D. Tex. Aug. 12, 2015). The decision, however, did not give much consideration to *Reed*, citing it only in its description of the plaintiffs' position and not relying on it in its analysis. *Id.* at *5. Given that the ordinance covered solicitation, it would have been difficult to distinguish *Reed* down (claiming the ordinance regulated only conduct); and since it covered both commercial and noncommercial solicitation — the plaintiffs were advocating for gun rights — it would also have been difficult to distinguish *Reed* sideways. *Id.* at *1.

[104] Left Field Media LLC v. City of Chicago, No. 15C3115, 2015 WL 5881604, at *6 (N.D. Ill. Oct. 5, 2015).

[105] In one case, a district court rejected a challenge brought by a nonprofit that designed 3D-printed firearms to a law restricting disclosure of "technical data" relating to "defense articles." Defense Distributed v. U.S. Dep't of State, No. 1-15-CV-372 RP, 2015 WL 4658921, at *1 (W.D. Tex. Aug. 4, 2015) (quoting 22 C.F.R. § 120.6 (2015)). In the other case, a Texas state court considered and rejected a First Amendment challenge to a law prohibiting an individual from carrying a handgun in a vehicle at any time the individual displays an identifying gang sign or symbol. The court, mentioning *Reed* only in passing, found the regulation to be content neutral and held that "[a]lthough the content of the sign or symbol might need to be examined to determine whether it is identifying, such an examination does not violate the First Amendment." *Ex parte* Flores, No. 14-14-00663-CR, 2015 WL 6948828, at *3 n.2 (Tex. App. Nov. 10, 2015); *see also id.* at *3.

[106] In *Defense Distributed*, the court relied on a pre-*Reed* decision from the Fifth Circuit holding that "[a] regulation is not content-based . . . merely because the applicability of the regulation depends on the content of the speech." 2015 WL 4658921, at *7 (quoting Asgeirsson v. Abbott, 696 F.3d 454, 459 (5th Cir. 2012)). This line of reasoning seems to conflict directly with *Reed*'s assertion that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

it did not entirely eliminate the possibility that legislators and regulators may yet craft satisfactory content-neutral regulations.

III. *REED*'S IMPACT ON FIRST AMENDMENT DOCTRINAL ARCHITECTURE

At the level of doctrinal architecture, rather than revolutionizing free speech doctrine, *Reed* has instead been absorbed into the doctrine's fragmentary status quo. By further exposing the warts of content analysis as an organizing heuristic, *Reed* may have pushed courts to develop new ways to avoid the strict scrutiny it seems to demand. This Part claims that this may be a desirable outcome, and advocates against courts treating *Reed* as a warrant for deregulation through First Amendment litigation.

The content distinction has traditionally been seen as a proxy for identifying impermissible government restrictions on speech. But in *Reed*, the majority disavowed the connection between enhanced scrutiny for content-based regulations and concern for impermissible government suppression of speech. Where the application of a law "depend[s] entirely on the communicative content" of covered speech, it will be deemed content based and subject to strict scrutiny.[107] This approach gave no heed to the possibility of purely benign government motives and the absence of any indication of state suppression of protected speech.[108] That is, *Reed* goes far beyond just affecting viewpoint-based regulations of speech — like a regulation that treats pro-life and pro-choice signs differently. Such regulations ought to be invalidated for impairing the ability of a particular perspective to compete in the marketplace of ideas. *Reed* also mandates equal treatment for positions that don't compete against each other in any meaningful way — say, a regulation that treats signs backing a pro-life position differently from signs advertising free coffee.[109]

After *Reed*, any law that draws content-based distinctions may be suspect, including numerous regulations that are entirely unproblematic from the perspective of concern for suppression of democracy-enhancing speech. Whether or not the content distinction was an effective proxy for identifying impermissible regulations of speech in the first place (and most believe that it was not[110]), courts might no longer

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107 *Reed*, 135 S. Ct. at 2227.

108 *See id.* at 2228.

109 *Cf.* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 139 (1981) ("When distinctions are drawn between commercial and political speech, or . . . other forms of expression, it makes little sense to criticize the distinctions solely because different forms of speech are receiving unequal treatment." (citations omitted)).

110 *See, e.g.*, McDonald, *supra* note 20, at 1430 (describing how the content-based approach has "caused the Court to develop and employ often inconsistent, unprincipled, or ad hoc rules to allow

have the flexibility to treat its invocation as anything other than outcome determinative. This is especially troubling given that strict scrutiny review of every local regulation will both cripple the ability of local governments to run smoothly[111] and expend limited judicial resources on active antidemocratic deregulation.[112]

With *Reed*, the Court risked imposing a unitary standard of strict scrutiny for nearly all regulations of speech — and regulations of conduct that litigants could convince a court to treat as regulations of speech.[113] In doing so, the Court elevated its concern for rule-bound doctrine over sensitivity to facts on the ground and the purposes underlying enhanced First Amendment protection.[114] Using *Reed* to extend the full protection of the First Amendment to challenge regulation of commercial speech or, even more drastically, general economic regulation, would result in a wholesale restructuring of well-settled free speech doctrine without any accompanying justification.[115]

This doctrinal devolution is concerning given the likely beneficiaries of expanded free speech protection. The modern First Amendment has two faces: it is (too rarely) a great shield protecting civil rights and "free[ing] men from the bondage of irrational fears"[116] and (too often) a gilded sword advancing moneyed interests against reasonable government regulation.[117] By divorcing content from context and not differentiating between civil and economic rights, a content-blind approach to First Amendment protection further increases the cost and difficulty of regulation without any corresponding reduction of impermissible government suppression of protected speech. To be clear, a narrow interpretation of *Reed* protects the First Amendment where underlying policy justifies its application, but prevents its weaponization as a libertarian lance against reasonable regulation.

The *Reed* decision thus brings to the surface the underlying problems with the content distinction as a governing superstructure for free

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it to reach common sense results in many cases where those results would otherwise be elusive under current doctrine").

111 *See Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment).

112 *See id.* at 2239.

113 *See supra* p. 1989.

114 In this sense, the interpretive tension over content analysis mirrors the conflict over the Equal Protection Clause of the Fourteenth Amendment between those who would interpret the clause to be color blind and those who believe that the clause embodies an antisubordination ideal. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *see also* Kendrick, *supra* note 12, at 286–96.

115 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

116 Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

117 *See, e.g.*, Coates, *supra* note 2, at 224; Shanor, *supra* note 2 (manuscript at 20–28).

speech doctrine.[118] As a threshold matter, if the Court is concerned with government officials using content-based regulations as a vehicle for ideologically discriminatory treatment,[119] that discriminatory treatment should be challenged outright; it should not be assumed that it flows necessarily from reasonable line-drawing in statutory text. And to the extent that a concern for equality motivates the shift to a liberal identification of content-based regulations,[120] the Court's all-or-nothing approach to regulation — requiring the state to regulate *everything* in order to regulate *anything* — treads even more harshly on competing First Amendment values.[121]

Mercifully, then, *Reed* is not the end of the story. As discussed above, lower courts have resisted *Reed*'s potential to require a unitary standard of strict scrutiny and upend settled First Amendment doctrine. To the extent that lower court reception of *Reed* is beginning to define a doctrinal equilibrium, *Reed*'s impact has been narrow.

Lower court cases have shown that adopting a narrow interpretation of *Reed* may prove difficult in certain areas. In challenges to sign codes and antipanhandling regulations, for example, courts have generally found *Reed* to apply and have struck down many such regulations.[122] But for other challenges brought under *Reed* to broader police power regulations, *Reed* seems to be readily distinguishable up, down, and sideways. Up, by finding that *Reed* applies, but nonetheless deeming the regulation content neutral, or else applying a diluted strict-scrutiny analysis.[123] Down, by finding that the challenged law regulates not speech, but instead conduct, and thus subjecting it to rationality review.[124] And sideways, by finding that preexisting doctrine continues to allow weakened First Amendment review in certain predetermined doctrinal categories, like commercial speech.[125]

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[118] *See* Ashutosh Bhagwat, Reed v. Town of Gilbert*: Signs of (Dis)Content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015) (describing "developing (albeit subterranean) discomfort" with enhanced scrutiny for content-based regulations in the context of the lower court decisions in *Reed*). In a very recent piece, Professor Bhagwat argues that the "all-speech-is-equal principle" implicit in strict content analysis is in "deep tension" with the premise that "the primary purpose of the First Amendment is to advance democratic self-governance"; he argues that "it is time to rethink our hostility to all content regulation, and consider whether a more nuanced approach is required." Ashutosh Avinash Bhagwat, In Defense of Content Regulation (manuscript at 3) (Feb. 10, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730936 [http://perma.cc/BX62-AL2C].

[119] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015).

[120] *See, e.g.*, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

[121] Not to mention the possibility of overbreadth. *See* Redish, *supra* note 109, at 135–38.

[122] There, where regulations specifically treat certain communications differently on the basis of their content, *Reed*'s command to apply strict scrutiny is harder to avoid.

[123] *But see supra* pp. 1995–96.

[124] Renewed focus on the relatively ill-defined conduct/speech distinction could limit the need to consider challenges to such regulations under *Reed*'s strict scrutiny. *See supra* pp. 1987–90.

[125] *See supra* note 71; p. 1991.

These limits can also guide legislators and regulators seeking to draft statutes and regulations that will be protected from First Amendment challenges in *Reed*'s wake. First, regulations that can be characterized as governing conduct rather than speech ought to say as much explicitly. Second, regulations of speech that can be focused only on commercial speech will likely be protected as outside *Reed*'s reach. Finally, where noncommercial speech must be regulated, legislators should attempt to do so without reference to the content of the regulated speech, perhaps taking Justice Alito's concurrence in *Reed* as a starting point.[126]

Reed thus appears to have further fragmented First Amendment doctrine, not unified it. Doctrinal pathology in First Amendment law may necessitate the preservation of a hyper-categorical approach, rather than the adoption of ad hoc balancing throughout. But by interpreting *Reed* narrowly, lower courts can better align First Amendment doctrine with the values it is meant to protect.

This divergence between *Reed*'s apparent doctrine and lower-court dispositions in turn complicates the values of stability and predictability that are meant to justify a rigid, categorical approach in the first place.[127] While pushing toward a unitary standard of strict scrutiny ought to simplify the doctrine, resistance from the lower courts seems to suggest that *Reed* has instead induced more doctrinal gymnastics in order to stick the same landing.

This resistance will likely frustrate Court-focused doctrinalists. But given that it is consistent with *Reed*'s language (if not its deregulatory spirit), it may be a feature rather than a bug of our judicial system. Narrowing from below helps "domesticate potentially transformative rulings" and also "mitigate[s] the risk that bad facts or one-offs make permanently bad law."[128] Where lower courts find Supreme Court doctrine out of step with equity or common sense, narrow interpretation helps resist disruptive results and signals to the Court that it ought to revisit the issue.[129] When the Court does revisit *Reed*, it might recognize the degree to which the First Amendment has been

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[126] Though unlike the commercial speech workaround, which required *narrowing* the realm of regulated activity in order to satisfy First Amendment scrutiny, the solution for regulating noncommercial speech requires *broadening* proposed regulations to ensure that they include all such speech regardless of its content. *See generally* Alan C. Weinstein & Brian J. Connolly, Sign Regulation After *Reed*: Suggestions for Coping with Legal Uncertainty (manuscript at 49–64) (Sept. 14, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660404 [http://perma.cc/4CV7-UJTW] (providing more specific guidance for local governments).

[127] *Cf.* Kendrick, *supra* note 12, at 234 (justifying rule-bound First Amendment doctrine on the basis of its predictability).

[128] Re, *supra* note 8 (manuscript at 49).

[129] Professor Re suggests that this happened in the Second Amendment context after *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See* Re, *supra* note 8 (manuscript at 50–52).

captured by the logic and lobby of economic libertarianism, and might consider whether it is desirable for the judiciary to be in the business of policing politically accountable regulation of commercial activity.

For First Amendment doctrine, *Reed* may have the perverse effect of diminishing the centrality of the content distinction. It may instead enhance the fact sensitivity of courts considering First Amendment challenges. By making clear the folly of elevating the content distinction over legitimate concerns about government suppression of speech for which it is meant to be a proxy, *Reed* may have sown the seeds of its own demise. Rather than erecting a doctrinal master concept, *Reed* may have reduced the category of content-based regulations to a mere collection of similar fact patterns, with little claim to legitimacy as a general analytic tool. It profits the Court nothing to give its soul for the whole world . . . but to deem more regulations content based?[130]

[130] *See* ROBERT BOLT, A MAN FOR ALL SEASONS 158 (Vintage Int'l 1990) (1960); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1960 (2015) (Roberts, C.J., dissenting); *Mark* 8:36.

Municipal Sign Ordinances after *Reed v. Town of Gilbert*

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes *any* distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding 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.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (<10 sq. ft., < 48 inches in height, and <six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign <36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.

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JUNE 10, 2016 PAW BOOT CAMP

***Reed v. Town of Gilbert* - Content Based Sign Codes**

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). United States Supreme Court ruled that sign code provisions that rely upon the communicative content of the sign are content based on their face and are subject to strict scrutiny. Strict scrutiny requires the government to prove that the restriction furthers compelling interest and is narrowly tailored to achieve that interest.

I. Facts.

This case centers around the City of Gilbert, Arizona's sign code, which prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here.

- "Ideological Signs," defined as signs "communicating a message or ideas for noncommercial purposes" that do not fit into other Sign Code categories, may be up to 20 square feet and have no placement or time restrictions.
- "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season.
- "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, held Sunday church services at various temporary locations in and near the Gilbert. In order to identify the location for the current week's service, the Church posted temporary signs early each Saturday bearing the Church name and the time and location for the next day's service. The Church left the signs up from Saturday until around midday Sunday, the day of the service. The Church left the signs up for longer than 1 hour after the event and was cited for exceeding the time limits prescribed for "temporary directional signs." The Church filed suit claiming that the Code abridged their freedom of speech.

The District Court denied the Church's motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

II. Applicable Law and Analysis.

Justice Thomas delivered the opinion of the court and was joined by Justices Roberts, Scalia, Alito, and Sotomayor. Justice Alito wrote a concurring opinion to which Kennedy and Sotomayor joined. Additionally, Justice Kagan filed an opinion concurring in the judgment only, which was joined by Justices Ginsburg and Breyer. Finally, Justice Breyer filed an opinion concurring in the judgment only as well.

Justice Thomas began his opinion by discussing the concept of content based regulation of speech. Thomas embraced the "commonsense meaning of the phrase 'content based'" which, he explained, required the Court to consider whether a regulation of speech "on its face" draws distinctions based on the message the speaker provides. If the regulation of speech is content based on its face, then it is subject to strict scrutiny.

Justice Thomas then applied this rule to the sign regulations in effect in Gilbert. The sign code defined "temporary directional signs" on the basis of whether the sign conveys the message of directing people to a qualified event. "Political signs" were defined as those with a message designed to influence the outcome of an election. Finally, "ideological signs' are those that communicate a message or idea for non-commercial purposes that do not fit into the other code categories. "The restrictions in the sign code that apply to any given sign thus depend entirely on the communicative content of the sign... On its face, the sign code is a content-based regulation of speech." Consequently, the sign code was subject to strict scrutiny. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."

Justice Thomas next reinforced that the First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

Finally, Justice Thomas discussed how laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. A law limiting the content of speakers cannot evade strict scrutiny simply because it could not be characterized as speaker based.

In conclusion, "because the town's sign code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." In applying this test to the government interests stated by Gilbert (aesthetic appeal and traffic safety) Justice Thomas quickly held that the City failed to meet its burden to prove that the sign code was narrowly tailored and to further a compelling government interest.

Justice Alito wrote a concurring opinion which Justices Kennedy and Sotomayor joined. Justice Alito confirms Justice Thomas' analysis and states, "as the court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny." However, Justice Alito then proceeded to outline a series of rules that he believes would not be content based. His list was only endorsed by three justices and does not amount to law.

Justice Stephen Breyer also wrote a concurring opinion, in which he argued that content-based discrimination should be considered a "rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation". Justice Breyer conceded that content-based regulations sometimes reveal weaknesses in the government's rationale for limiting speech, and that content-based regulations interfere with the "free marketplace of idea[s]". However, he also argued that "virtually all government activities involve speech", and many involve content-based regulations on speech. Therefore, he concluded that a rule triggering strict scrutiny for all cases involving content-based restrictions would be a "recipe for judicial management of ordinary government regulatory activity".

Justice Kagan's opinion concurring in the judgment, was joined by Justice Ruth Bader Ginsburg and Justice Stephen Breyer, cautioned that the Court may soon become "a veritable Supreme Board of Sign Review". She argued that the majority's opinion would jeopardize too many "entirely reasonable" existing sign ordinances across the country. In light of the court's opinion, Justice Kagan suggested that municipalities will now be forced to choose between repealing "exemptions that allow for helpful signs on streets and sidewalks" and lifting "sign restrictions altogether and resign[ing] themselves to the resulting clutter". Instead of applying strict scrutiny in every case, Justice Kagan claimed that strict scrutiny is only appropriate when there is a "realistic possibility that official suppression of ideas is afoot".

III. Collateral Damage.

Included here are summaries of three cases where courts applied *Reed* to non-sign code regulations. Using *Reed*, the regulations in each of these cases were found to be content-based and subject to heightened scrutiny. While these are district court decisions and a Seventh Circuit

Court of Appeals decision (Persuasive at best), they provide key insight into the potential breadth of the *Reed* decision.

***Rideout v. Gardner*, 2015 WL 4743731, at 1 (D.N.H. Aug. 11, 2015).**

In this case, New Hampshire adopted a regulation that makes it unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted. Three voters, who were under investigation because they posted images of their ballots on social media sites, challenged the law on First Amendment grounds.

After outlining the *Reed* holding in detail, the court analyzed the New Hampshire law to determine whether it was content-based.

> "In the present case, as in *Reed*, the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only digital or photographic images that are barred by RSA 659:35 are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballots may be shared with others without restriction... **In short, the law is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter.** Accordingly, like the sign code at issue in Reed, the law under review here is subject to strict scrutiny even though it does not discriminate based on viewpoint and regardless of whether the legislature acted with good intentions when it adopted the law." (Emphasis added.)

After determining that the law is "plainly a content-based restriction on speech," the court proceeded to analyze the law under strict scrutiny. The court found that the law failed strict scrutiny. The details of that analysis are not included here. However, it is important to note that the interests put forward by the state were quickly dispatched by the court because they were anecdotal and speculative.

Why this case matters - First, the court quickly and easily applied the *Reed* holding to a non-sign code regulation. This means that other regulations that impact "speech" may be subject to strict scrutiny if they require regulators to examine the content of the speech to determine whether it includes impermissible subject matter. In order to apply *Reed* to this case the court did not have to make any great leap - the *Reed* holding was easily applied. Second, unless the government's interests are well defined and adequately supported, they will likely not satisfy strict scrutiny. Strict scrutiny is often fatal. For any regulation that may be susceptible to strict scrutiny, the municipality should take the necessary time to fully and completely create a record supporting the stated interests behind the regulation.

***Norton v. City of Springfield, Ill.*, 2015 WL 4714073, at 1 (7th Cir. Aug. 7, 2015).**

This case involved an anti-panhandling law and was decided by the Seventh Circuit Court of Appeals on a petition for rehearing. The petition for rehearing was filed shortly before the *Reed* decision was set to be released, so the court deferred its consideration of the petition for re-hearing until *Reed* was decided.

In its original decision, the Seventh Circuit held that "[t]he Court has classified two kinds of regulations as content-based. One is regulation that restricts speech because of the ideas it conveys. The other is regulation that restricts speech because the government disapproves of its message. It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination." On rehearing the court acknowledge that "we classified the ordinance as one regulating by subject matter rather than content or viewpoint." What is missing from the Seventh Circuit's analysis is the type of content-based regulation analysis that the *Reed* court relied upon - regulations that are content-based on their face.

On re-hearing the court applied the *Reed* holding to the anti-panhandling regulation and found it to be content-based on its face and subject to strict scrutiny. Because the city did not contend that the ordinance was justified (the city essentially hung its hat on the classification stage and did not argue justification) the law failed strict scrutiny.

Why this case matters - First, this is a Seventh Circuit Court of Appeals case, as opposed to a district court case, that applies the *Reed* holding to a non-sign code regulation. Second, the succinct nature of the opinion shows that the court had very little hesitation in applying *Reed* outside of the sign code context. In fact, the parties in that case agreed that the regulation stands or falls on the answer to the question whether the regulation is a form of content discrimination. It was *Reed* that provided the answer to that question.

***Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 2015 WL 5178147, at 2 (E.D.N.Y. Sept. 3, 2015).**

This case relates to an ordinance passed by the Town of Oyster Bay that limited the ability of day laborers to solicit work on certain streets. There were numerous issues before the court including plaintiff's First Amendment challenge. The court found that the conduct at issue is commercial speech and subject to the four prong test set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980). The court then acknowledged that *Sorrell v. IMS Health Inc.*, —— U.S. ——, 131 S.Ct. 2653 (2011), couched *Central Hudson's* fourth prong for restrictions on commercial speech that are content-based as requiring that "the [government] must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest." 131 S.Ct. at 2667–68. In other words, if the restriction on commercial speech is content-based, rather than showing that it furthers the asserted government interest, it must directly advance a substantial

interest. Even within the context of commercial speech, if the restriction on speech is content-based, the regulation is subject to heightened scrutiny.

The court recited the *Reed* holding and held that "on its face, the Ordinance is content-based. It is addressed to only one type of speech, viz. the roadside solicitation of employment and does not address other types of roadside solicitation or nonsolicitation speech." Using *Reed,* the court held that the restriction on commercial speech must withstand a heightened level of scrutiny. The court then went on to analyze the regulation pursuant to the *Central Hudson* and *Sorrell* factors and found that it failed the narrowly tailored prong.

Why this case matters - The trend continues - again a court relies on *Reed* when analyzing a regulation of speech that is not within a sign code. And, for the first time *Reed* is applied to commercial speech. Because of *Reed*, it now may be more likely that regulation of commercial speech will be found to be content-based. While such a finding does not mean that the commercial speech will be subject to strict scrutiny, it does mean that those regulations will be subject to heightened scrutiny. It is apparent that even commercial speech may be impacted by *Reed*.