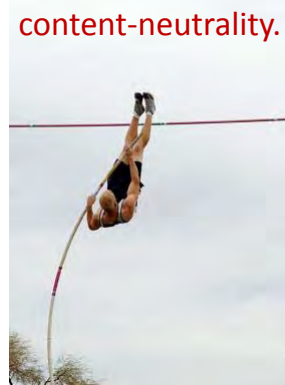


				
		<p><i>Webinar:</i>  <b>SIGN REGULATION IN THE WAKE OF          REED V. TOWN OF GILBERT</b></p> <p>Margaret W. Rosequist – Meyers Nave          Randal R. Morrison – Sabine &amp; Morrison</p>		
				
			February 24, 2016	

## OVERVIEW

- Sign codes must comply with First Amendment requirements.
- A key concept under the First Amendment is content neutrality.
- Whether a sign regulation is content-neutral versus content-based is often determinative of the outcome of a case.

*Reed imposes a tough standard for establishing content-neutrality.*



## KEY TAKEAWAY FROM THE *REED* DECISION



*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

Rigid test for evaluating  
content-neutrality

*“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”*

## THE PARTIES

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Plaintiffs

- Small, cash-strapped church, Good News Community Church
- Pastor, Clyde Reed
- Church does not have a permanent home
- Services held at local elementary schools or other locations near the Town of Gilbert



## THE PARTIES

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Defendant

- Town of Gilbert
- Suburb of Phoenix
- Population over 200,000



## THE TOWN'S SIGN CODE

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Supreme Court considered the Town's comprehensive sign code:



Prohibited the display  
of a sign without a permit



But exempted 23  
categories of signs



## THE EXEMPTIONS AT ISSUE

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- At issue before the Supreme Court were three categories of noncommercial signs:
  - Ideological
  - Political
  - Temporary directional



## THE GOOD NEWS CHURCH SIGNS

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

Church uses temporary directional signs to inform public about its services.

Church members typically post signs early in the day on Saturday and remove them midday on Sunday.



## THE *REED* RULING

The Supreme Court unanimously found that the Town's sign ordinance violated the First Amendment.

The differing standards for different categories of noncommercial speech were content-based distinctions that did not pass constitutional muster.



## JUSTICE THOMAS' OPINION

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Thomas' majority opinion applies a rigid strict-scrutiny analysis to sign ordinances.

*Town's sign ordinance which makes distinctions between political, ideological and temporary directional signs, is content-based on its face.*



## THE TESTS

- With content-based distinction in regulations of a public forum, **strict scrutiny** is applied.
  - Requires that regulations be narrowly tailored to meet a compelling government interest.
  - Content-based distinctions presumptively invalid.
- Compare to **less rigorous** time, place and manner test for a public forum:
  - Restrictions must be narrowly tailored to serve the government's legitimate content-neutral interests and leave open ample alternative means of communication.
- **Most lenient** test for nonpublic/limited public forum:
  - Restrictions need only be reasonable and viewpoint neutral.



## CLASSIFICATION OF THE FORUM



**Traditional public forum** = where people have traditionally been able to express their ideas, e.g. park, public street, sidewalk. See *Cornelius v. NAACP*, 473 U.S. 788 (1985).



**Nonpublic forum** = government property traditionally not open to the free exchange of ideas, e.g. courthouse lobby, prison, military base. See *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

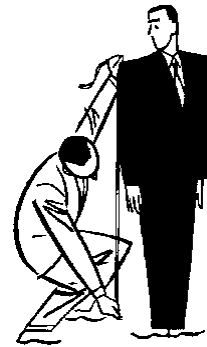
**Designated public forum** = treated like a public forum.

**Limited public forum** = treated like a nonpublic forum. See *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001).



## TOWN'S REGULATIONS FAIL STRICT SCRUTINY

- In *Reed*, having found the regulations to be content-based, the Court found they failed strict scrutiny review.
- The distinctions between the three types of noncommercial signs were **not narrowly tailored** to meet the government's compelling interests.
- By way of contrast, a prohibition on campaign materials near polling places is a rare example of a content-based regulation that meets with strict scrutiny. See *Burson v. Freeman*, 504 U.S. 191 (1992).



## THOMAS' LIST FOR CONTENT NEUTRALITY

*Reed v. Town of Gilbert*, 136 S.Ct. 2218 (2015)

- Restrictions on size, building materials, lighting, moving parts, and portability.
- On public property: Cities may go a long way toward entirely forbidding the posting of signs on public property if it is in an evenhanded and content-neutral way.



## REGULATION OF SIGNS ON PRIVATE PROPERTY

*City of Ladue v. Gilleo*, 512 U.S. 43 (1994)

City prohibited yard signs, including political signs (exempted 10 signs).



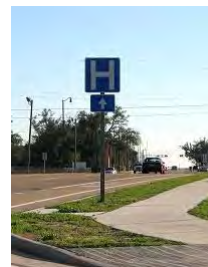
Court found the prohibition unconstitutional as it closed down an entire medium of speech in one's own front yard.

Court noted that content-neutral, time, place and manner regulations of yard signs may be valid.

## THOMAS' LIST FOR STRICT SCRUTINY

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Signs needed to protect the safety of pedestrians, drivers, and passengers, although content-based, may pass strict scrutiny:
  - Warning signs
  - Signs marking hazards
  - Signs directing traffic
  - Street numbers associated with private homes





## ALITO'S LIST

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

Justice Alito penned a concurrence to provide a (non-comprehensive) list of the rules that would not be considered content-based, including:



- Rules regulating size;
- Rules regulating locations (e.g. freestanding v. attached to buildings);
- Rules distinguishing between lighted and unlighted; and
- Rules distinguishing between fixed messages and electronic messages that change.

## ALITO'S LIST CONTINUED

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

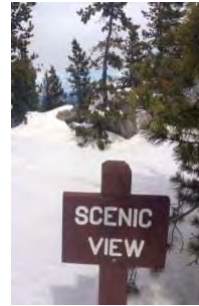
- Rules that distinguish between:
  - Placement of signs on private and public property;
  - Placement of signs on commercial and residential property;
  - Placement of signs on-premises and off-premises signs;
  - Rules restricting the total number of signs allowed per mile of roadway; and
  - Rules imposing time restrictions on signs advertising a one-time event.



## ALITO'S LIST CONTINUED

*Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)

- Government signs
  - Consistent with the principles that allow government speech.
  - E.g. government may put up all manner of signs to promote safety, directional signs and signs pointing out historical sites and scenic spots.



## EVENT AND SPEAKER BASED EXEMPTIONS

*G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006)

- Court upheld an exemption from the sign permit process for temporary signs in residential zones that go up within a specified time period and are triggered by the occurrence of an enumerated event such as an election or the sale or lease or rental of property, as a content-neutral event-based exemption.
- Court also found that the exemptions for certain speakers, namely public agencies, hospitals and railroad companies, to be constitutional speaker based exemptions.



## COMMERCIAL SPEECH

*Metromedia v. City of San Diego*, 453 U.S. 490 (1981)

- During oral argument counsel for *Reed* specifically noted that under the Court's jurisprudence, commercial speech can be treated differently (i.e. less favorably) than noncommercial speech.

Indeed, *Metromedia* provides that commercial speech cannot be favored over noncommercial speech.

Many cities address this by including substitution clauses in their sign codes, e.g. noncommercial message of any type may be substituted for any duly allowed commercial message.

## COMMERCIAL SPEECH

*Central Hudson v. Public Service*, 447 U.S. 557 (1980)

- The *Central Hudson* Court explained that while commercial speech was afforded lesser protection than other forms of expression, courts will consider a four-part test for determining the validity of restrictions on commercial speech.

*Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011)

- The Ninth Circuit (and sister Circuits) have found that *Sorrell* modifies *Central Hudson* by requiring "heightened judicial scrutiny" for content-based or speaker-based commercial speech regulations. See *Retail Digital Network v. Applesmith*, 810 F.3d 638 (9th Cir. 2016).

## COMMERCIAL SPEECH

- *Central Hudson* Test As Modified By *Sorrell*:
  - ✓ Non-misleading commercial speech that concerns lawful activity is afforded protection. A restriction on otherwise protected commercial speech must;
  - ✓ Seek to implement a substantial government interest;
  - ✓ Directly advance the government interest. Intermediate scrutiny standard for content-neutral regulations and heightened scrutiny (short of strict scrutiny) for content-based or speaker-based regulations; and
  - ✓ Reach no further than necessary to accomplish the given objective. Intermediate scrutiny for content-neutral regulations and heightened scrutiny (short of least-restrictive-means standard) for content-based and speaker-based regulations.

## COMMERCIAL SPEECH

- The *Reed* opinion is as significant for its silence as it is for its actual holding.



Thomas' opinion does not mention or refer to commercial speech. The key commercial speech cases of *Metromedia* and *Central Hudson* have not been explicitly overruled by *Reed*.

## COMMERCIAL SPEECH

- The district courts in the Ninth Circuit have explained that *Reed* is inapposite in commercial speech cases and does not disturb the commercial speech framework set forth by *Metromedia* and *Central Hudson*.

See *Contest Promotions v. City and County of San Francisco*, 2015 WL 4571564 (N.D. Cal. 2015); see also *California Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346 (C.D. Cal. 2015); *Citizens for Free Speech v. County of Alameda*, 2015 WL 4365439 (N.D. Cal. 2015); *CTIA v. City of Berkeley*, 2015 WL 5569072 (N.D. Cal. 2015).



## COMMERCIAL SPEECH

- These post-*Reed* decisions have explained that the distinction between onsite/offsite signage is concerned with the location of the sign relative to the product and does not distinguish based on subject matter.
- They have also found that a general exemption for noncommercial speech from an offsite ban does not render the regulation unconstitutional.



## COMMERCIAL SPEECH

- Examining the concurrences in *Reed*, it appears likely that at least six Justices would also uphold the onsite/offsite and commercial/noncommercial distinctions.



## COMMERCIAL SPEECH (CALIFORNIA)

### *Lamar Outdoor Advertising v. City of Los Angeles*

- In California, billboard regulation hit a snag when a trial court held that Los Angeles' ban on offsite signs with an exemption for noncommercial signs was content-based and unconstitutional under the California constitution.





## COMMERCIAL SPEECH (CALIFORNIA)

### *Lamar v. City of Los Angeles*

- Trial court's ruling in *Lamar* is not binding. It is on appeal to the 2nd Appellate District. The League filed an *amicus* brief in support of Los Angeles. Oral argument February 24, 2016.
- 4th Appellate District recently upheld onsite/offsite distinction with an exemption for noncommercial speech under California Constitution.



## THE FUTURE OF BILLBOARD REGULATION

Left to stand, the trial court's ruling in *Lamar* will be at odds with the recently published decision by the 4th Appellate District in *City of Corona v. AMG Outdoor Advertising* and could impede the ability of cities to effectively regulate billboards.



## DEFINING THE TERM “SIGN”

- What falls within the definition of a sign?
- Cities should review the definition portion of sign codes for content-based distinctions.
- Many sign codes provide different rules for different defined types of signs. This will be problematic if the definitions themselves are content-based, e.g. “community identification signs,” “business signs” or “vehicle sale signs.”



## DISCRETION

*Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996); *Lamar Corporation v. City of Twin Falls*, 133 Idaho 36 (1999)

- Standards for granting (or denying) a sign permit must have narrow, objective, and definite standards to guide the permitting authority.
- Allowing discretion presents risks but is not inherently unconstitutional.

## APPLICATION

### Complete Ban

E.g., ordinance prohibiting posting signs on sidewalks, crosswalks, street lamp posts, hydrants, trees, railroad trestles, electric light or power or telephone wires or poles. See *Members of LA City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).



- ✓ Content-neutral prohibition in public right-of-way
- ✓ Consider narrow tailoring
- ✓ Limit exceptions

## APPLICATION

### Political Signs

- ✗ Exemptions for political signs.
- ✓ Exemption for noncommercial signs.
- ✓ Consider the property at issue.
  - ✓ Prohibition in public rights-of-way.
- ✗ Prohibition on residential property.



## APPLICATION

### Real Estate Signs

- ✗ Content-based exemption for real estate signs.
- ✓ Event based exception can be considered.
- ✓ Exception for a limited number of signs of a certain size or number.
- ✓ Consider the forum.



## APPLICATION

### Film locational/directional signs

- ✗ Exemption for film signs.
- ✗ Speaker based exemption.
- ✓ Event based exemption.
- ✓ Link exemption to film permit.



## APPLICATION

### Traffic/Directional Signs

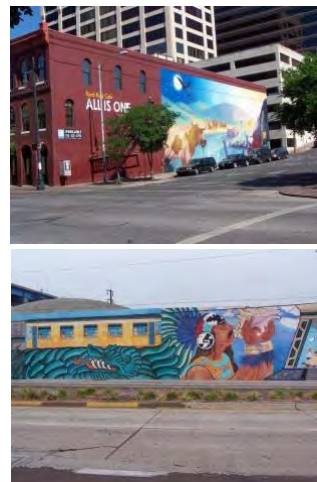
- ✓ Exemption for government signs.
- ✓ Content based exemption where supported by compelling government interest.
- ✗ Exception for all directional signs.



## APPLICATION

**Murals** (signs painted onto the surface of a building or flat surface attached to the side of a building)

- ✓ Evaluate whether to exclude from sign regulations -- policy decision.
- ✓ Allow noncommercial murals (with caution).
- ✗ Allow only murals promoting a city's culture or heritage.



## APPLICATION

### Sign Structures

- ✓ Height, size, material limitations.
- ✓ Do not provide exemptions based on content.



## TIPS FOR REVISING SIGN CODES POST REED

- ✓ Regulate size, durational limits and materials.
- ✓ Consider distinguishing between commercial and residential property.
- ✓ Consider distinguishing between private property and public property.
- ✓ Consider (with caution) event based distinctions.
- ✓ Consider (with caution) speaker based distinctions (e.g. government speech).



## TIPS FOR REVISING SIGN CODES POST *REED*

- ✓ Consider prohibiting signs in the public right-of-way.
- ✓ Provide only a limited number of exemptions to an overall ban.
- ✓ Remove all content based distinctions except:
  - Warning signs, signs directing traffic or address signs that are supported by a compelling government interest.

## TIPS FOR REVISING SIGN CODES POST *REED*

- ✓ Remove rules favoring one type of noncommercial speech over other types.
- ✓ Remove rules favoring commercial speech over noncommercial speech.
- ✓ Consider a message substitution clause.
- ✓ Evaluate for content neutrality.
- ✓ Consider the forum.
- ✓ Consider the level of scrutiny.
- ✓ Draft detailed findings.

## SIGN REGULATIONS

This presentation is intended for teaching purposes and does not constitute legal advice.