SIGN LAW 101

Planners Academy
League of California Cities
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FRAMING THE ISSUE

* Signs Are Legally Protected as "Free Speech" (1st Am) and "Liberty of Speech" (state constitutions)

* Structures take up space, distract drivers

* Govt's may regulate the physical characteristics (absent censorial purpose)

[*Ladue v. Gilleo*, 512 US 43 (1994) (Stevens)]

WHY HAVE SIGN RULES?

- Define "Sign" -- is Dino within the definition?

Onsite where?

Protected or Not?

- Some content is not protected – *i.e.*, obscenity, defamation, fighting words, threats against life of president, VP.
- Flag desecration is protected. *Texas v. Johnson* (1989)
- Commercial speech has been protected since the 1970s, but at a lower level
  - Real Estate signs cannot be banned. *Linmark v. Willingboro*, 431 US 85 (1977)
  - State law on real estate signs:

US SUPREME COURT
LATEST SIGN CASE

(Pastor Clyde) REED v. GILBERT AZ (Phoenix area)

June 18, 2015

Sign categories defined by message type / content
Different rules for various categories of “noncommercial speech”

- Nonpolitical, non-ideological, non-commercial events: 6 sf.
- Max duration: 12 hours before, until 1 hour after event

- Political temporary signs: 32 sq. ft. (in nonresidential zones)
- Maximum display time: 60 days before and 15 days after elections

REED at U.S. SUPREME COURT




All nine justices agreed that the Ninth Circuit should not have ruled in the Town's favor, but disagreed as to rationale.

Four opinions:

- Majority (Thomas, joined by Scalia, Roberts, & Alito group)
- One Concurrence (Alito, joined by Sotomayor and Kennedy: 3 of the 6 justices in the majority)
- Two Concurrences in the judgment only (Justice Stephen Breyer for himself; ["KGB group" --Kagan, joined by Ginsburg & Breyer)]

Reed v Gilbert AZ – US Supreme 2015
Majority Opinion: Thomas

- If a sign regulation, on its face, is content-based, then its purpose or gov't intent -- do not matter.
- If content neutral, then court can consider TPM (time, place, manner) factors such as size, location, free-standing or attached, lighting, fixed or changing images, placement (public/private; commercial/residential; on or off premise, number per mile), time restrictions for one-time events.
- Govt can have its own signs. [See: *Pleasant Grove v. Summum*, 129 S.Ct. 1125 (2005) – Commandments monument in city park. No obligation to allow equal display privilege to competing Seven Aphorisms monument.]

Reed v. Gilbert, Lead Opinion by Thomas

- The Gilbert law is content based, so *strict scrutiny* applies.
- That means the law must
  - be *necessary* to further a *compelling* government interest; and
  - be *narrowly tailored* to achieve it

Lead Opinion: Thomas

- The Gilbert regulation is under-inclusive and thus not narrowly tailored enough; it fails satisfy strict scrutiny.
  - Strict size and durational limits on temporary directional signs
  - Much less limited rules for political and ideological signs

Alito Concurrence (Alito, Sotomayor and Kennedy)

- "**<u>Properly understood</u>**, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."
- Rules that *would not be* content-based:
  - Government signs to promote safety, directionals and signs pointing out historic sites and scenic spots.
- No other justices disagreed with Alito

Alito Concurrence (Alito, Sotomayor and Kennedy)

Alito okay with "Rules distinguishing between **on-premises and off-premises signs**" (store signs vs. billboards)

https://www.quora.com/What-is-the-best-billboard-ever-created

Alito Concurrence (Alito, Sotomayor and Kennedy)

- Sign rules based on lighting, change of message, location (public or private property, zoning district, other locational), size are permissible
- "Rules restricting the total **number of signs** per mile of roadway"

- Not listed as permissible distinctions:
  - Commercial vs. non-commercial
  - Temporary vs. permanent
  - Private directionals and identification signs
  - Regulating by land use instead of zoning

Breyer Opinion

- Content categories should be used as **rules of thumb** rather than triggers for invalidation
- All kinds of government activities involve regulation of speech with content discrimination. If that triggers strict scrutiny, the court has written "a **recipe for judicial management of ordinary government regulatory activity**."

REED DOES NOT MENTION *METROMEDIA*

- *Metromedia v. San Diego* (1981) (98 pages!)
- "The Law of Billboards"
- 1. City may ban billboards (off-site signs)
  2. Gov't cannot favor commercial speech over non-commercial
  3. Gov't cannot favor particular types / categories of non-commercial
- California statutory law on billboards: B&P 5405 *et seq.*

Commercial Speech

- **Commercial speech** doctrine – *Central Hudson Gas & Elec. Co. v. Pub. Svc. Comm'n of NY*, 447 US 557 (1980) intermediate scrutiny. 1) Legal product or service? 2) Substantial gov't interest; 3) Directly advance that interest?; 4) reasonable fit.
- ***Metromedia:*** no favoring of commercial speech over noncommercial***.*** *Avoid this problem with message substitution.*
  - **Noncommercial** speech should **always be considered as the onsite speech** of the property owner, so that offsite sign bans do not affect noncommercial speech – *Metromedia*; *Southlake v. City of Morrow, Ga*., 112 F.3d 1114 (11th Cir. 1997)
- **Treating real estate signs differently from other commercial signs in residential zoning districts** – *Linmark Assoc., Inc. v. Twp. of Willingboro,* 431 U.S. 85, 96 (1977) Town could not ban on-site residential real estate signs. Not mentioned in Reed.

http://affordablesignfactory.com/our-signs/real-estate-signs/

Commercial Speech Unchanged

- *Lamar Central Outdoor, LLC v. City of Los Angeles*, (Cal. App. Mar. 10, 2016). Longstanding litigation over LA's billboard ban resolved. **Offsite and commercial distinctions upheld**. Rejecting Oregon approach under similar California Constitution: ["Every person may freely speak, write and publish his or her sentiments on all subjects, …"].

COMMERCIAL OR "NON COMMERCIAL" SPEECH?

Most courts: benefit of doubt = non commercial speech (higher level protection)

On-Site/Off-site Distinction

- *Contest Promotions LLC v. City & Cnty. of San Francisco,* 2015 WL 4571564, at *4 (N.D. Cal. 2015) (concluding that "**at least six Justices continue to believe that regulations that distinguish between on-site and offsite signs are not content-based, and therefore do not trigger strict scrutiny**")

Commercial Speech Intact: Signs

- *Citizens for Free Speech, LLC v. Cnty. Of Alameda*, 114 F.Supp.3d 952, 2015 WL 4365439, at *13 (N.D. Cal. 2015) (*Reed* does not alter the analysis for laws regulating off-site commercial speech;)
- *Calif. Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards. … *Metromedia*, 453 U.S. at 511-14, and its progeny remain good law; the City's sign ban is therefore not patently unconstitutional.")
- Lone Star

Pre-*Reed* Issues Still a Problem

- **"Political Sign" Rules –** found in most sign codes; often problematic.
- **Right way:** *G.K. Limited v. Lake Oswego OR*, 436 F.3d 1064 (9th Cir. 2006) (increase in total sign area during defined pre-election period; not limited to "politicals;" valid.)
- See: *Freeman v. Burson*, 112 S.Ct. 1846 (state law banning politicking and vote advocacy within 100 feet of polls on election day; valid as preventing voter fraud and intimidation, narrowly tailored.)

PRIVATE PARTY SIGNS ON CITY PROPERTY

City allowed off-site commercial advertising only on city-owned transit stops. Valid.

Metro Lights v. Los Angeles, 551 F.3d 898

HBA – Highway Beautification Act

*Main idea: Along federally funded highways, new billboards may be installed only in areas that are **already developed** with traditional commercial and industrial land uses. No new billboards in wide-open, undeveloped areas.

*HBA is federal law that is enforced by states, at the risk of partial loss of federal highway funds.

* Key case: *United Outdoor v. Business, Transportation Etc.,* 44 Cal.3d 242 (1988).

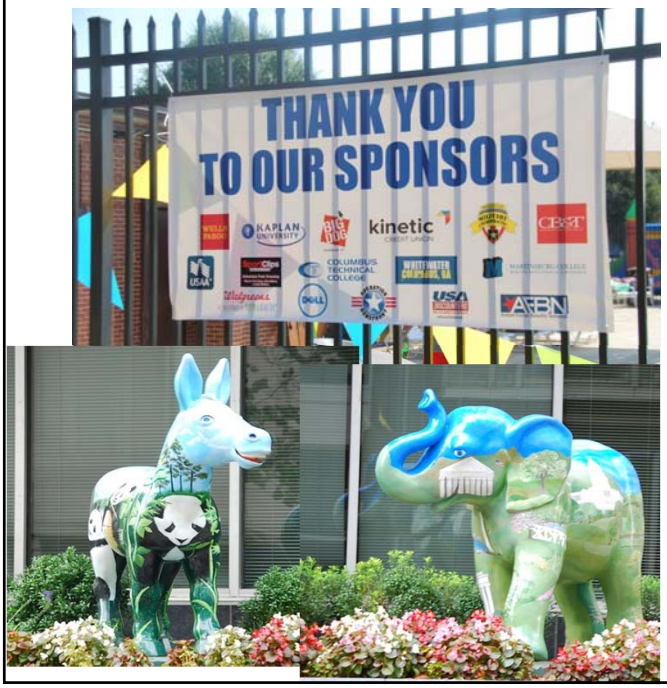
http://inrix.com/tag/billboard/

- SIGN PERMITS
- Beware "unbridled discretion"
- Ideal: simple "check off" boxes
- *Desert Outdoor v. Moreno* Valley, 103 F.3d 814 (9th 1996) – excessive, mostly subjective criteria – unconstitutional
- Contrast: *Lamar Adv. v. City of Twin Falls ID*, 133 Idaho 36 (ID Supreme): discretion factors spelled out in detail; valid; sufficient guidance for First Amendment

Yard Signs

- *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). The Court has said that the First Amendment operates with "special resonance when the government seeks to constrain a person's ability to speak" in the home. City could not enforce rule that in effect banned resident's Iraq War protest sign in her front yard, while allowing many other sign types.
- *Frisby v. Schultz*, 108 S.Ct. 2495 (2011) – city ordinance banning "focused picketing" of private home (abortion doctor) was valid as protecting residential privacy. Protestors had other opportunities to express their message.
- *Wagner v. Garfield Heights*, (6th Cir. 2014). Upholding limit on size of yard signs, which allowed more political signs than other kinds of signs, under intermediate scrutiny. Cert granted, opinion vacated, case remanded for further consideration in light of *Reed*.
- "Real Estate For Sale" signs cannot be banned.

Government Speech



- *Summum v. Pleasant Grove*, 555 US 460 (2009) (Commandments monument in city park became gov't speech upon acceptance of donation; no duty to allow similar sign from dissenting group).
- Compare:
- *PETA v. Gittens*, 414 F.3d 23, 28–29 (D.C. Cir. 2005) (political animals public art program was government speech, one entry was properly rejected as not "light and whimsical" as required by program policy, announced in advance.) Compare: *Hopper v. Pasco*, 241 F.3d 1067 (acceptability rules not pre-announced.) Also: *Van Orden v. Perry*, 125 S.Ct. 2845 (2005) Passive Commandments monument had religious and historical importance; no Establishment violation.

Take Home Lessons

Study *Reed v. Gilbert* and then review the local sign code.

- Time to update the sign code? Patch job or complete revision?
- Use administrative guides, charts and tables – "user friendly"

- Take challenges seriously. Is compromise possible? Policy impact, precedent, and potential for facial challenge. Make a clean and complete record to assistant defense counsel in event of litigation.

- **Careful drafting! Avoid rules particular to "Political Signs."** See: GK Ltd. v. Lake Oswego OR**,** 436 F.3d 1064 (9th 2006) (allowable signage increased in pre-election period, but not limited to political messages.)
- Defer to preemptive content-based regulations (state law, HBA) rather than including as your own regulation, so you don't have to defend it.

MESSAGE SUBSTITUTION

Should be in every sign code!

Can be crucial in sign litigation.

Allow owner of any legal sign to substitute noncommercial message (relig/ politics, *etc.*) in place of any other legal message, in whole or in part. *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir.)

Get Outdoors v. City of Lemon Grove, 378 F.Supp.2d 1232 2005) *Maldonado v. Kempton*, 422 F.Supp.2d 1169, 1175 (ND Cal.)

Questions and Comments

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