FREE SPEECH LAW FOR ON PREMISE SIGNS

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Preface

For the most part, recent cases have confirmed trends noted in the revision, especially refusing to extend *Reed* to sign ordinances that apply to commercial speech, including a recent Ninth Circuit case. When ordinances make content-based distinctions, however, as by treating similar types of signs differently, the courts do not hesitate to apply *Reed* and hold them unconstitutional. Cases have also struck down exceptions for on premise signs that are included in state highway beautification acts. Several cases applied the time, place and manner rules to free speech claims against commercial speech regulations, rather than the *Central Hudson* factors. Cases on digital signs were mixed.

The 2018 supplement added new sections on lower court cases applying the *Central Hudson* factors, including those considering under inclusiveness claims, and on classifications in on premise sign ordinances. The 2019 supplement includes new cases on the validity of ordinances regulating murals, and cases striking down hardship variance provisions because they allowed too much discretion.

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2019 SUPPEMENT

CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:1. Basic Concepts

See Karen Zagrodny Consalo, With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise, 46 Stetson L. Rev. 533 (2017).

§ 2:3. Commercial and Noncommercial Speech

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

In PSEG Long Island LLC v. Town of N. Hempstead, 158 F. Supp.3d 149 (E.D.N.Y. 2016), the court held invalid a local ordinance requiring a utility company to post signs warning the public of chemically treated utility poles. The court applied Supreme Court precedent to hold the warning signs did not serve a commercial purpose in an electricity market. They concerned only the chemical treatment of the poles, which the company did not make or sell. Strict scrutiny review applied, which the ordinance did not survive because less restrictive means to publicize the warning were available, such as the internet and radio.

In International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017), plaintiff's billboards displayed both commercial and noncommercial speech. The court held the nature of plaintiff's billboards as a whole indicated they were commercial speech because most of the paid advertisements were commercial. See also RCP Publications Inc. v. City of Chicago, 204 F. Supp.3d 1012, 1014 (N.D. Ill. 2016) (on denial of city's motion to dismiss; poster advertising online and in-person premieres of film with possible political content posted on street light pole; court discussed but did not consider whether speech was commercial because parties did not raise issue).

§ 2:3[3]. Noncommercial Speech Exemption [New]

The Ninth Circuit has upheld an exemption in a sign ordinance for noncommercial speech. It rejected an argument that the city had exempted noncommercial signs for reasons unconnected to the city's asserted interests in safety and aesthetics. Contest Promotions, LLC v. City & Cty. of San Francisco, 874 F.3d 597, 602 (9th Cir. 2017) (distinguishing Discovery Network).

§ 2:4. Content Neutrality

§ 2:4[1]. What This Requirement Means

The Ninth Circuit, in remanding a challenge to a statute forbidding payment for retail sign displays, held in an extensive discussion that the *Central Hudson* tests continue to apply to commercial speech after *Sorell*. Retail Digital Network, LLC v. Prieto, 861 F.3d 839, 845 (9th Cir. 2017) (citing four circuits in accord). See also Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (upholding an ordinance prohibiting signs advertising raffles next to small businesses, and holding *Sorrell* did not overrule *Central Hudson* or hold that intermediate scrutiny does not apply to commercial speech).

The reporter citation for Massachusetts Ass'n of Private Career Sch. v. Healey, 2016 WL 308776, at *9 (D. Mass. 2016), cited in footnote 41, is 159 F. Supp.3d 173.

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

Several articles have discussed the *Reed* case and what it means for sign regulation:

Sarah Adams-Schoen, Reed Applied: The Sign Apocalypse or Another Bump in the Road, Zoning and Planning Law Reports, vol. 39, no. 7 (2016); Genevieve Lakier, Reed V Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment, 2016 Sup. Ct. Rev. 233 (2016); James Andrew Howard, Salvaging Commercial Speech Doctrine: Reconciling Reed v. Town of Gilbert with Constitutional Free Speech Tradition, 27 Geo. Mason U. Civ. Rts. L.J. 239 (2017); Kolby P. Marchand, Free Speech and Signage After Reed v. Town of Gilbert: Signs of Change from the Bayou State, 44 S.U. L. Rev. 181 (2017); Lee Mason, Content Neutrality and Commercial Speech Doctrine After Reed V Town of Gilbert, 84 U. Chi. L. Rev. 955 (2017); Minch Minchin, A Doctrine at Risk: Content Neutrality in A Post-Reed Landscape, 22 Comm. L. & Pol'y 123 (2017); Enrique Armijo, Reed v. Town of Gilbert: Relax, Everybody, 58 B.C. L. Rev. 65, 66 (2017); Note, Leah K. Bradley, Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment purposes? 21 Suffolk J. Trial & App. Advoc. 320-344 (2016); Note, Free Speech Doctrine After Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016). See also 24 A.L.R.7th Art. 6 (2017) (discussing cases applying *Reed*).

A recent review of court of appeal decisions applying *Reed* concluded:

> In conclusion, although *Reed* seemingly had the potential to be revolutionary, and perhaps Justice Thomas intended for it to be that way, to date it has neither brought about drastic changes to First Amendment doctrine across the

> circuit courts, nor has it provided broad clarity to how courts should differentiate between content-neutral and content-based laws. While *Reed* has had some impact, more than three years after the decision, content discrimination jurisprudence in the circuit courts still largely remains muddy and incoherent. *Reed*, in fact, may have made what was already a confusing and incoherent area of First Amendment law worse.

Dan V. Kozlowski & Derigan Silver, Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After Reed v. Town of Gilbert, 24 Comm. L. & Pol'y 191, 270 (2019).

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

The cases continue to hold that Reed does not apply to sign ordinances that regulate commercial speech: Roland Digital Media, Inc. v. City of Livingston, 2018 WL 6788594, at *9 (M.D. Tenn. Dec. 26, 2018) (billboard denial); Thomas v. Schroer, 248 F. Supp.2d 848 (W.D. Tenn. 2017) (striking down state billboard act); Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (upholding ordinance prohibiting signs next to small businesses advertising raffles; good discussion); RCP Publications Inc. v. City of Chicago, 204 F. Supp.3d 1012 (N.D. Ill. 2016) (on denial of city's motion to dismiss; sign posted on light pole); Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals, 46 N.Y.S.3d 725 (App. Div. 2017) (billboard prohibition). Justice Thomas's concurring opinion in Matal v. Tam, 137 S. Ct. 1744, 1769 (2017), reaffirming his belief that strict scrutiny is appropriate for regulations of commercial speech, did not obtain agreement from the other Justices.

Contest Promotions, LLC v. City and County of San Francisco, 2015 WL 4571564, at *4 (N.D. Cal. 2015), cited in footnote 66, has been affirmed at 2017 Fed. Appx.. 665 (9th Cir. 2017). The reporter citation is 100 F.Supp.3d 835. The reporter citation for Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015), cited in footnote 64, is 150 F. Supp.3d 910.

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

Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F. Supp. 3d 670, 681 (W.D. Tex. 2019) (ordinance allowed digital faces for on premise not off premise signs; held content-neutral and did not violate Central Hudson tests); Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (ordinance prohibiting signs next to small businesses advertising raffles differentiates between on-site and off-site advertisements and is

directly related to the interests of safety and aesthetics). See also ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 839 (S.D. Cal. 2017) (upholding distinction between off premise and on premise signs). See also § 3:6.

The reporter citation for Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015), cited in footnote 66, is 150 F. Supp.3d 910.

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

Some cases have rejected this reason for holding a sign ordinance content-based:

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir.), cert. denied, 138 S. Ct. 334 (2017) (upholding ordinance regulating display times for temporary signs); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (motorized billboard ordinances; enforcing officer simply needs to distinguish between signs that are permanent or non-permanent or larger or smaller than permitted to decide on violation); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F. Supp. 3d 670, 680 (W.D. Tex. 2019) (upholding ordinance allowing digital faces on on premise but not off premise signs).

Other cases held that a need to read was the a reason for holding a sign ordinance content-based: International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; exceptions for flags, special events, and civic events, *Edenfield* not cited); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (exemptions required town's enforcement officer to evaluate content of sign to determine whether an exemption applies). See Morris v. City of New Orleans, 2019 WL 2995898, at *8 (E.D. La. July 9, 2019) (applying need to read test).

§ 2:5. Speaker-Based Neutrality

Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017), upheld an ordinance regulating digital signs. It rejected an argument the ordinance was speaker-based because it applied to new speakers but not grandfathered speakers, and to nongovernmental speakers but not governmental speakers. The court rejected this argument because a state statute required protection of all nonconforming uses, and the exemption for land users was also based on state law. Compare www.Ricardopacheco.com v. City of Baldwin Park, 2017 WL 2962772 (C.D. Cal. July 10, 2017) ("serious questions" whether speaker preference for businesses, especially businesses hosting special events, reflects a content preference for commercial speech).

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[7]. Lower Court Cases Applying the Central Hudson Test to Sign Ordinances: In General [New]

Paramount Media Group, Inc. v. Village of Bellwood, 2017 WL 590281 (N.D. Ill. Feb. 14, 2017), which prohibited billboards except when located on village property, illustrates the application of the *Central Hudson* factors to uphold a sign regulation. The court accepted that the prohibition was properly based on aesthetic concerns, and held that a limited exception for the village did not undermine the ban. There was no objection that the ordinance was narrowly tailored. The regulations permitted a variety of on-site commercial signs, and a reasonable fit existed between the objective of preserving the visual environment, compatibility with adjacent land uses and the means used to accomplish these objectives.

See also RCP Publications Inc. v. City of Chicago, 304 F. Supp.3d 729, 734 (N.D. Ill. 2018) (ordinance prohibiting posting of signs with commercial messages on public property does not require heightened scrutiny under *Central Hudson*, and directly advances city's interests in combatting litter, controlling visual clutter, preventing damage to city property, and promoting traffic safety). Compare Vugo, Inc. v. City of New York, 309 F. Supp.3d 139 (S.D.N.Y. 2018), (ordinance prohibiting advertisements in certain vehicles for hires held not narrowly drawn; ordinance could have regulated advertisements through placement, size, or some other manner in which they were presented; Construction & General Laborers' Local Union No. 330 v. Town of Grand Chute, 843 F.3d 745 (7th Cir. 2016) (ordinance prohibited rat and cat inflatable protest signs; case held moot; dissent by Judge Posner rejected aesthetic and safety justifications).

§ 2:6[8]. Lower Court Cases Applying the Central Hudson Test to Sign Ordinances: Underinclusiveness [New]

The third and fourth Central Hudson tests require a regulation to substantially advance the governmental interest not be more extensive than necessary to serve that interest. These last two steps of Central Hudson analysis "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986). Problems arise in applying this test when a sign ordinance is claimed to be underinclusive because it has omitted the regulation of signs it should have included. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999) (striking down federal anti-gambling law because some gambling omitted).

Summarizing Supreme Court cases, the Ninth Circuit concluded that a regulation is underinclusive if the exception "ensures that the [regulation] will fail to achieve [its] end," it does not "materially advance its aim." In addition, "exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance." Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 906 (9th Cir. 2009).

Government, however, does not face an all-or-nothing choice in regulating commercial speech, and the courts have upheld sign ordinances against claims that they were underinclusive. *Metro Lights*, for example, relied on *Metromedia*'s holding that an ordinance prohibiting off site but allowing on site signs was constitutional to uphold an ordinance with a total ban on offsite signs, with an exception for shelters at transit stops among other exceptions. Id. at 908.

Other courts also rejected underinclusiveness arguments. Contest Promotions, LLC v. City & Cty. of San Francisco, 874 F.3d 597, 603 (9th Cir. 2017) (upholding exemption of on premise and noncommercial signs; commercial signs presented the important regulatory problem); RCP Publications Inc. v. City of Chicago, 304 F. Supp.3d 729, 739 (N.D. Ill. 2018) (upholding ban on posting signs on public property though signs controlled by private entity under contract and noncommercial and non-profit signs were exempt). See also ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 839 (S.D. Cal. 2017) (requirement that all signs must get a permit, and that only signs with on-premises or public interest messages were allowed, held to advance city's aesthetic interests). But see Thomas v. Schroer, 248 F. Supp.3d 868 (W.D. Tenn. 2017) (outdoor advertising act exempting on premise signs held underinclusive).

§ 2:7. Time, Place and Manner Regulations

§ 2:7[3]. Recent Lower Court Cases Applying the Time, Place and Manner Doctrine to the Regulation of Advertising [New]

Several recent cases applied the time, place and manner doctrine to sign ordinances:

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (upholding ordinance regulating display times for temporary signs); Vosse v. The City of New York, Comm'r, 666 Fed. Appx. 11 (2d Cir. 2016), (ordinance banned illuminated signs more than 40 feet above the street curb but excluded non-illuminated, non-commercial signs less than 12 square feet in surface area), cert. denied, 137 S. Ct. 1231 (2017); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (upholding motorized billboard ordinances); Willson v. City of Bel-Nor, Missouri, 298

F. Supp.3d 1213, 1221 (E.D. Mo. 2018) (upholding ordinance allowing only one sign on residential property); Berg v. Vill. of Scarsdale, 2018 WL 740997, at *2 (S.D.N.Y. Feb. 6, 2018) (applying *Ladue* to invalidate ordinance prohibiting political signs on residential property); Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (upholding ordinance regulating digital signs); Pritchard v. Town of New Hartford, 2016 WL 4523986 (N.D.N.Y. Aug. 22, 2016), judgment entered, 2016 WL 4523908 (N.D.N.Y. Aug. 22, 2016) (upholding ban on temporary signs in right-of-way on Town property; ordinance measured and content-neutral within meaning of *Ladue* decision); E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623 (N.J. 2016) (invalidating prohibition on digital signs).

§ 2:8. The Prior Restraint Doctrine

§ 2:8[2]. The Procedural Standards

Adams Outdoor Advert. Ltd. P'ship v. Pennsylvania Dep't of Transportation, 2018 WL 2676429, at *11 (E.D. Pa. June 5, 2018) (outdoor advertising act held content-based and invalid as an unlawful restraint on free speech for failure to include time limits). For the previous decision see Adams Outdoor Advert. Ltd. P'ship v. Pennsylvania Dep't of Transportation, 307 F. Supp.3d 380 (E.D. Pa. 2018) (claim held stated). See also International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (content-based ordinance held invalid for failure to set time limits).

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

Recent cases have invalidated variance provisions. International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017), held that variance standards typically found in most zoning statutes provided unbridled discretion because they were vague and meaningless, and did not contain the “narrow, objective, and definitive” criteria required by Supreme Court cases. Accord Int'l Outdoor, Inc. v. City of Troy, 361 F. Supp. 3d 713, 717 (E.D. Mich. 2019) (“ordinance provides no guidance or limit on the Board's ability to determine whether a variance is ‘not contrary to the public interest or general purpose and intent of this Chapter’; whether it would ‘adversely affect’ properties in the vicinity; or whether the petitioner has demonstrated a sufficient ‘hardship or practical difficulty’ based upon “unusual characteristics” of the property”; Bill Salter Advert., Inc. v. Baldwin Cty., Alabama, 2009 WL 10704418, at *4 (S.D. Ala. Mar. 13, 2009) (and also invalidating ordinance because it provided that variance “may” be granted). See also invalidating ordinance: Morris v. City of New Orleans, 350 F. Supp. 3d 544, 560 (E.D. La.

2018) (“permitting-scheme vests City officials with discretion to grant or deny a permit based on their own ideas of what type of content ‘enhances the quality or character of the surrounding community’”).Compare ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 841 (S.D. Cal. 2017) (city employees had “narrow, objective and definite” standards to enforce ordinance).

Contest Promotions, LLC v. City and County of San Francisco, 100 F. Supp.3d 835, 844 (N.D. Cal. 2015), cited at footnote 204, was affirmed at 2017 Fed. Appx.. 665 (9th Cir. 2017).

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

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

The third *Central Hudson* factor, that requires a sign regulation to directly advance its aesthetic and safety purposes, is a critical litigation step and often litigated. Some cases applied the rule in Edenfield v. Fane, 507 U.S. 761 (1993), see § 2:6[5], to reject sign ordinances when the municipality to did not provide evidentiary proof that the ordinance directly advanced its purposes. RCP Publications Inc. v. City of Chicago, 204 F. Supp.3d 1012 (N.D. Ill. 2016) (on denial of city's motion to dismiss; ordinance prohibited signs on light poles; city has offered nothing on whether the ordinance "will in fact alleviate [litter] to a material degree;" remanded to develop record); E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623 (N.J. 2016) (applying same rule but not citing *Edenfield*).

Most other courts have taken a contrary position. Luce v. Town of Campbell, Wisconsin, 872 F.3d 512, 515 (7th Cir. 2017) (extensive discussion holding record evidence is not necessary to support a time, place and manner restriction), cert. denied, 138 S. Ct. 1699 (2018); Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 408 (D.C. Cir. 2017) (upholding ordinance regulating display times for temporary signs; District not required to submit studies, statistics or other empirical evidence to defend event-related distinction as narrowly tailored to serve its substantial aesthetic interest; aesthetic judgment plausible, not novel; *Edenfield* not cited); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (ordinances prohibiting motorized billboards ordinances; time, place and manner rules applied to find narrow tailoring based on *Metromedia* approval of billboard prohibition); Vugo, Inc. v. City of New York, 309 F. Supp.3d 139 (S.D.N.Y. 2018) (Supreme Court has permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales, empirical data not necessary; city provided survey data); (Willson v. City of Bel-Nor, Missouri, 298 F. Supp.3d 1213, 1220 (E.D. Mo. 2018) (municipality need not gather factual evidence or conduct studies establishing a link between the secondary effects at issue and signs); (Palmer v. City of Missoula, 2017 WL 1277460 (D. Mont. Apr. 4, 2017) (upholding ordinance prohibiting wind signs, citing *Metromedia*).

§ 3:5. Exemptions in On Premise Sign Ordinances

For exemptions held invalid see Vugo, Inc. v. City of New York, 309 F. Supp.3d 139 (S.D.N.Y. 2018) (invalidating exemption of taxis and share hire liveries from ordinance prohibiting advertising in vehicles); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; exceptions for flags, special events, and civic events held invalid); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (several including exemptions for government signs). See also Strict Scrutiny Media, Co. v. City of Reno, 290 F. Supp.3d 1149, 1158 (D. Nev. 2017) (allowing claim against exemptions for on premise signs to proceed).

For cases upholding exemptions see ArchitectureArt, LLC v. City of San Diego, 231 F. Supp.3d 828, 839 (S.D. Cal. 2017) (mural exception applied to artwork that does not contain "copy, advertising symbols, lettering, [or] trademarks," public interest signs); Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (government uses exempted by state law).

§ 3:5[a]. Classifications in On Premise Sign Ordinances [New]

Reed held content-based and invalid an ordinance that applied different requirements to similar noncommercial signs. Several recent cases followed *Reed*, and held ordinances invalid that had content-based classifications with different requirements for similar signs:

Wagner v. City of Garfield Heights, 675 Fed. Appx. 599 (6th Cir. 2017) (on remand after *Reed*; political signs subject to fewer restrictions than for-sale signs and sold signs; open house, for-rent, and leasing signs; and signs of a religious, holiday, personal or political nature); www.Ricardopacheko.com v. City of Baldwin Park, 2017 WL 2962772 (C.D. Cal. July 10, 2017) (preliminary injunction; preferences for special event and business signs speaker-based; additional flag provision for some holidays and additional election sign provision content-based); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; ordinance listed eight examples of temporary signs on basis of content before stating time restriction; exceptions for flags, special events, and civic events); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (exempted numerous categories of signs from permit requirement, such as government signs, holiday and seasonal signs, political campaign signs, and warning signs; exterior of restaurant decorated to create "Key West" style atmosphere and showcase owners' sense of humor); Grieve v. Village of Perry, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016) (plaintiff posted

protest signs on his property; code allowed display of several types of commercial signs without permit but required permits for display of noncommercial signs). See also Seitz v. East Nottingham Township, 2017 WL 2264637 (E.D. Pa. May 24, 2017) (rejecting argument that ordinance conferred special treatment for signs advertising Christmas trees).

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

§ 3:6. The Federal Highway Beautification Act

Recent cases continue to hold that exemptions for on premise signs and other exemptions in these statutes violate the free speech clause. In Auspro Enterprises, LP v. Texas Dep't of Transp., 506 S.W.3d 688 (Tex. App. 2016), the court invalidated several exemptions in the Texas law for signs relating to a public election, a natural wonder or scenic or historic attraction, the sale or lease of property, and activities conducted on the property on which it is located. The court reviewed the impact of the *Reed* case on the statute, and concluded that "[l]ike the Town of Gilbert's sign ordinance, the Texas Act and the related Department rules restrict speech in different ways based on the communicative content of the sign." These provisions were content-based, and the state did not attempt to defend them under strict scrutiny review. The court declined to follow an early Texas Supreme Court decision upholding the statute and these exemptions.

After an earlier decision granted plaintiff a temporary injunction, and after a jury trial found for the state, Thomas v. Schroer, 248 F. Supp.3d 868 (W.D. Tenn. 2017), struck down the state's billboard act in a detailed decision. The court held the act was subject to strict scrutiny because it was a content-based regulation implicating noncommercial speech. Justice Alito's concurrence in *Reed* that accepted the off premise v. on premise distinction did not apply because it applies only to this distinction when it is content-neutral.

The court rejected several specific state interests offered in defense of the law, held that traffic and aesthetic "concepts" were not compelling and held they were unrelated to a distinction between signs with on-premises-related content as compared with other messages. The act was not narrowly tailored and was underinclusive, as on premise signs permitted by the act could be ugly. Some least restrictive means suggested by the plaintiff could be effective. For the earlier decision

see Thomas v. Schroer, 127 F. Supp.3d 864 (W.D. Tenn. 2015), discussed in this section in the book.

Adams Outdoor Advert. Ltd. P'ship v. Pennsylvania Dep't of Transportation, 930 F.3d 199 (3rd Cir. 2019 struck down exemptions for on premise signs included in its highway beautification act. It applied rules it adopted for on premise signs in Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), that require intermediate scrutiny. An exemption for on premise for sale or for lease signs must be "substantially related to advancing an important state interest that is at least as important as the interests advanced by the [overall prohibition], ... no broader than necessary to advance the special goal, and ... narrowly drawn so as to impinge as little as possible on the overall goal." 18 F.3d at 1065. The Secretary of Transportation did not present evidence that met this standard.

An exemption for on-premise signs concerning activities on the property must be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." 18 F.3d at 1067 and n.42. Again, the Secretary did not present evidence that met this standard. The result in *Adams Outdoor* is limited to the Third Circuit, which has a distinctive set of rules for this problem.

§ 3:7. Definitions

Courts will strike down definitions if they are vague, which is a violation of substantive due process. To sustain a vagueness challenge, a plaintiff must show the law "fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." Sherman v. Koch, 623 F.3d 501, 519 (7th Cir. 2010).

RCP Publications Inc. v. City of Chicago, 304 F. Supp.3d 729, 742 (N.D. Ill. 2018), held a sign ordinance was impermissibly vague because it prohibited the posting of "commercial advertising material" on public property but did not define that term. The failure to define this key term made it difficult to distinguish between commercial and noncommercial messages, as in this case where the sign advertised an essentially political event -- the showing of a film with a political message -- that involved payment of money through a modest fee for admission. The court noted conflicts in the city's definition of this term, and a history of interpretation and enforcement of the ordinance that underscored its vague character. It was not enough that signs with clearly commercial messages were obviously subject to the ban, and it was not "needless bloat" to require

a definition of a key term in the ordinance.. The court also disagreed with the city's contention that “commercial advertising material” had a “common-sense meaning,” because the facts required to prove that a sign came within the ordinance were themselves unclear. See also Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018) (invalidating statute prohibiting wearing a “political badge, political button, or other political insignia” in polling places for not defining the term “political”).

The reporter citation for Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015), cited in footnote 259, is 150 F. Supp.3d 910.

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

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

The courts have considered free speech problems raised by ordinances for specialized signs that are not discussed in this section. Some of these signs were on premise:

Ordinances upheld: Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (ordinances limiting motorized billboards and prohibiting non-motorized billboards held content-neutral; they addressed sign-bearing vehicles regulated only because of their size and mobility); Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (upholding ordinance prohibiting signs next to small businesses advertising raffles as narrowly tailored),

Ordinances invalidated or questioned: RCP Publications Inc. v. City of Chicago, 204 F. Supp.3d 1012 (N.D. Ill. 2016) (on denial of city's motion to dismiss; city offered nothing on whether ordinance prohibiting posting of signs on light poles "will in fact alleviate [litter] to a material degree;" remanded to develop record); Grieve v. Village of Perry, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016) (invalidating content-based ordinance regulating protest signs on property; had different requirements for noncommercial signs). See also Missouri Broadcasters Ass'n v. Lacy, 846 F.3d 295 (8th Cir. 2017) (state statute and regulations regulating liquor advertising did not directly advance substantial interests and were more extensive than necessary under *Central Hudson* factors).

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

Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017), followed its First Circuit decision in *Naser* and upheld a ban on Electronic Changing Signs in all districts except the Commercial District, and in limited parts of other districts abutting the Commercial District. Applying time, place and manner rules, the court held the ban directly advanced weighty aesthetic interests, which other types of development in the district did not diminish. Empirical studies were not needed to prove the potential hazard of digital signs, which was supported by the record and precedent. The ordinance was narrowly tailored and, citing *Vincent*, eliminated the exact source of

the evil. A lessened aesthetic interest properly supported the allowance of digital signs in the commercial district to advance a strong countervailing interest in economic development.

A state case reached a contrary conclusion. E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623 (N.J. 2016), applied time, place and manner rules to invalidate an ordinance that permitted three billboards in a zoning district adjacent to an interstate highway but prohibited digital billboards. Though not citing *Edenfield*, § 2:6[5], the court held the record was "founded only on unsupported suppositions, fears, and concerns," and provided "scant support for several propositions that informed the Township's decision and no support for the decision that the aesthetics of three billboards are more palatable than the aesthetics of a single digital billboard." A government "must do more than simply invoke government interests that have been recognized over time as substantial." Studies were available reporting on the safety effects of digital billboards, but the court held they did not support the ordinance.

This case was decided after but did not cite the *Reed* decision, disapproved the *Naser* decision, and may have been influenced by an earlier New Jersey case invalidating a sign ordinance that prohibited billboards and a state rule allowing digital billboards on interstate highways. For discussion of the New Jersey cases, see 305-APR N.J. Law. 78 Andrew T. Fede, Sign and Billboard Law Hijacking the First Amendment or Balancing Freedom of Expression and Government Control?, N.J. Law., April 2017, at 78, 305-APR N.J. Law (Westlaw citation).

The District of Columbia Court of Appeal has upheld the FHWA guidance for digital signs. Scenic America, Inc. v. United States Dep't of Transp., 836 F.3d 42 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 2 (2017). For discussion of illumination for digital signs see Daniel M. Isaacs & Michael A. Valenza, A Market Approach to Billboard Light, 46 Real Est. L.J. 6 (2017) (includes discussion of nuisance actions).

§ 4:2[2]. Flags

Compare Shaw v. City of Bedford, 262 F. Supp.3d 754 (S.D. Ind. 2017) (upholding ordinance for residential districts allowing flags to be slightly larger and exempt from height and setback requirements), with International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (exemptions for flags and other temporary signs held invalid).

§ 4:2[4]. Murals

Courts continue to be concerned about how murals are defined and regulated. Morris v. City of New Orleans, 2019 WL 2995898, at *9 (E.D. La. July 9, 2019), held a Murals ordinance

unconstitutional because it distinguished between commercial and non-commercial artwork. The court could not see how this distinction served any substantial governmental interest, such as traffic safety or community aesthetics. Accord Kersten v. City of Mandan, 2019 WL 2212381, at *4 (D.N.D. May 22, 2019). See also Morris v. City of New Orleans, 350 F. Supp. 3d 544, 556 (E.D. La. 2018) (rejecting city's motion to dismiss; review process for murals held content-based). For discussion see Brian J. Connolly, Reed, Rembrandt, and Wright: Free Speech Considerations in Zoning Regulation of Art and Architecture, Zoning and Planning Law Reports Vol. 41, No. 11 (2018).

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

§ 4:2[5][a]. Total Prohibitions

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir.), cert. denied, 138 S. Ct. 334 (2017), upheld an ordinance, as applied to posting signs on public lamp posts, that required event-related signs to be removed within thirty days after the event to prevent them from accumulating as visual clutter. It did not target "communicative content, but uniformly restricted display times under the commonsense understanding that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter." The court noted Justice Alito's concurrence in *Reed* suggesting that this type of ordinance is content-neutral. See also Morales v. City of S. Padre Island, No. CV B-10-76, 2011 WL 13182954, at *9 (S.D. Tex. June 17, 2011) (upholding ban on portable signs).

§ 4:2[8].Window Signs

Morales v. City of S. Padre Island, No. CV B-10-76, 2011 WL 13182954, at *9 (S.D. Tex. June 17, 2011) (upholding ordinance limiting size and quantity of window signs).

§ 4:2[9]. Wind Signs [New]

Palmer v. City of Missoula, 2017 WL 1277460 (D. Mont. Apr. 4, 2017), upheld an ordinance prohibiting wind signs in a case in which an automobile dealer attached balloons to his vehicles. The court applied the *Central Hudson* factors, held traffic and safety interests were substantially advanced, that the ordinance was no more extensive than necessary and that alternate channels of communication were open.

CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON PREMISE SIGNS

§ 5.1. An Overview

See Luce v. Town of Campbell, Wisconsin, 872 F.3d 512, 517 (7th Cir. 2017) (challenge to ban on signs within 100 feet of end of overpass structure remanded for trial), cert. denied, 138 S. Ct. 1699 (2018); GJJM Enterprises, LLC v. City of Atl. City, 352 F. Supp. 3d 402, 405 (D.N.J. 2018) (state statutory ban prohibited club from advertising that patroms could bring their own beer or wine; held invalid as content-based).

§ 5:5. Height and Size Limitations

Shaw v. City of Bedford, 2017 WL 2880117 (S.D. Ind. July 6, 2017) (upholding differential size limitations on signs in residential districts as narrowly tailored; flags 60 square feet, temporary signs 36 square feet, permanent residential development entrance signs up to 102 square feet depending on size of development); www.Ricardopacheco.com v. City of Baldwin Park, 2017 WL 2962772 (C.D. Cal. July 10, 2017) (upholding differential size limitations on residential signs as time place and manner regulations; flags or pennants 18 square feet, permanent signs 12 square feet, for temporary window signs nine square feet, and other temporary signs 10 square feet).

The reporter citation for Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015), cited in footnote 384, is 150 F. Supp.3d 910.

§ 5.8. Setback Requirements

The reporter citation for Peterson v. Village of Downers Grove, 2015 WL 8780560, at *5 (N.D. Ill. 2015), cited in footnote 401, is 150 F. Supp.3d 910.