MUNICIPAL SIGN ORDINANCES IN THE POST-*REED* WORLD: HOW CAN MUNICIPALITIES CONTINUE TO REGULATE SIGNS WITHOUT VIOLATING THE FIRST AMENDMENT?

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Years ago, the United States Supreme Court recognized the distinct place that signs hold for the Free Speech Clause of the First Amendment when it observed that,

> [w]hile signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.[1]

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

The Supreme Court's 2015 decision, *Reed v. Town of Gilbert*,[2] makes a municipality's ability to regulate signs without violating the First Amendment more uncertain. In *Reed*, the Supreme Court indicated that a speech regulation is content based if the law applies to particular speech "because of the topic discussed or the idea or message expressed."[3] A sign regulation deemed "content based," will be constitutional only if it can survive strict scrutiny – a daunting challenge that very few laws survive.[4] Thus, in the aftermath of *Reed*, municipal officials face the question of how to regulate signs to promote legitimate governmental purposes without violating the First Amendment.

This article first seeks to provide answers to this important question by providing a historical context for the *Reed* decision by examining several earlier Supreme Court decisions that considered the constitutionality of sign regulations and the principles it used to determine when these laws violated the Free Speech Clause. Secondly, the article examines several Federal Circuit Court of Appeals and Federal District Court, post-*Reed*, decisions that have interpreted and applied the 2015 opinion to recent challenges to sign regulations.

Third, the article turns its attention to *Reagan National Advertising of Austin v. City of Austin*,[5] a recent case in which the Fifth Circuit Court of Appeals reversed a Federal District Court ruling that the city's billboard regulations were facially content-neutral and constitutional. The Fifth Circuit, applying *Reed*, found the city's regulations content-based and, applying strict scrutiny to the provisions, found them unconstitutional.[6] The Supreme Court decided to review *Reagan National Advertising* and, in reversing the Fifth Circuit, held that the Austin Sign Code's regulation of off-premises signage is facially content neutral despite having to read the signs to determine the applicability of the regulations.[7] The article will conclude by discussing the impact that *Reed* has on a municipality's ability to use its police powers to regulate the presence of signs within its jurisdiction.

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2 Reed v. Town of Gilbert, 576 U.S. 155 (2015).
3 *Id*. at 163-64.
4 *Id.*
5 Reagan Nat'l Advert. v. City of Austin, 972 F.3d 696 (5th Cir. 2020).
6 *Id.* at 710.
7 City of Austin v. Reagan Nat'l Advert., 141 S.Ct. 2849 (2021).

I. SIGN REGULATIONS AND THE SUPREME COURT: A HISTORICAL OVERVIEW

A. *Linmark Associates, Inc. v. Willingboro Township*: Regulating "For Sale" And "Sold" Residential Signs

In the 1970s, the township of Willingboro, New Jersey ("Willingboro") recognized a problem with white homeowners leaving the racially integrated community.[8] In 1974, the Willingboro Town Council enacted an ordinance that banned the placement of "For Sale" and "Sold" signs on private property, except for model homes.[9] Linmark Associates wanted to sell a property it owned in Willingboro and, to attract attention to the property, it desired to place a "For Sale" sign on the lawn.[10] Willingboro's ordinance prohibited the sign. Linmark Associates challenged the municipality's regulation of "For Sale" and "Sold" signs through a declaratory judgment action and the District Court declared the ordinance was unconstitutional.[11] The Third Circuit Court of Appeals reversed the District Court's ruling.[12] The Supreme Court granted certiorari to consider the question of whether the First Amendment permits a municipality to prohibit the posting of "For Sale" and "Sold" signs in order to stem the problem of white flight.[13]

The Supreme Court began its analysis by noting that the Willingboro ordinance at issue prohibited commercial speech and observed that commercial speech was not "wholly outside the protection of the First Amendment."[14] If the ordinance obstructed the "free flow of commercial information," then it could be deemed a First Amendment violation despite the commercial nature of the speech involved.[15] The Supreme Court determined Willingboro did not prohibit all lawn signs or signs of a particular size or shape; rather, the township banned particular types of signs based on their content "because it fears their 'primary' effect that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a 'time, place, or manner' case."[16] As a content-based restriction, the ordinance could be sustained only because of Willingboro's interest in regulating the sign

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8 Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 87-88 (1977).
9 *Id*. at 86.
10 *Id.*
11 *Id.* at 86-87.
12 *Id.*
13 *Id*. at 87.
14 *Linmark Assocs*., 431 U.S. at 91 (quoting Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976)).
15 *Id*. at 92 (quoting *Va. Pharm. Bd*., 425 U.S. at 764).
16 *Id*. at 93-94.

content, and not on any interest it had in regulating the form of the communication.[17]

The Supreme Court recognized the "vital goal" Willingboro's sign ordinance promoted "stable, racially integrated housing."[18] Yet, this laudable purpose could not prevent the prohibition on "For Sale" and "Sold" signs from violating the First Amendment.[19] The Supreme Court noted Willingboro failed to establish that the ordinance was actually needed to achieve the goal of maintaining an integrated community.[20] More importantly, Willingboro's regulation kept its citizens from obtaining information essential to the "vital interest" of deciding "where to live and raise their families."[21] The Supreme Court explained the basic constitutional difficulty with Willingboro's sign ordinance as follows:

> The Council has sought to restrict the free flow of these data [the information communicated by "For Sale" and "Sold"] because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township; they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs with offerors communicating offers to offerees but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."[22]

The township's ordinance represented a "highly paternalistic approach" that deprived community members of the *f*oncommercial information they needed to make informed decisions.[23] The Supreme Court concluded the Willingboro prohibition on "For Sale" and "Sold" signs that impaired "the flow of truthful and legitimate commercial information" were "constitutionally infirm."[24]

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17 *Id*. at 94.
18 *Id.*
19 *Id.* at 97.
20 *Linmark Assocs*., 431 U.S. at 95.
21 *Id*. at 96.
22 *Id*.
23 *Id*. at 97 (quoting *Va. Pharm. Bd*., 425 U.S. at 770).
24 *Id*. at 98.

B. *Metromedia, Inc. v. City of San Diego*: Regulating Billboard Advertising Signs

The Supreme Court characterized the matter before it in *Metromedia, Inc. v. City of San Diego*[25] as involving "the validity of an ordinance of the City of San Diego, imposing substantial prohibitions on the erection of outdoor advertising displays within the city."[26] San Diego sought, through an ordinance prohibiting outdoor advertising display signs, to eliminate distractions to motorists and pedestrians and to enhance the city's appearance.[27] San Diego's ordinance carved out two exceptions to the general prohibition on outdoor advertising billboards: onsite signs and signs that fell within twelve particular categories.[28] The ordinance allowed onsite commercial advertising but prohibited other commercial advertising and noncommercial communications using outdoor billboards.[29] The Appellants sold advertising space on billboards to purchasers who usually used the signs to convey a commercial message, but Appellants' signs also were used to present a broad range of noncommercial political and social messaging.[30]

A California trial court held that San Diego's ordinance was an unconstitutional exercise of the City's police powers that abridged the Appellants' First Amendment rights.[31] The California Supreme Court reversed the trial court, holding the two purposes of the ordinance, public safety and aesthetic considerations with the city's appearance, were legitimate governmental interests and the ordinance was a "proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare."[32] The Appellants asked the United States Supreme Court to review the case, contending the billboard ordinance was facially invalid on First Amendment grounds and "that the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment."[33]

The Supreme Court noted early in its analysis that billboards combine both communicative and noncommunicative aspects and a local government

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25 Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

26 *Id*. at 493.

27 *Id*.

28 *Id*. at 494-95 (1981). The twelve categories exempted from the advertising billboard prohibition included: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. *Id*.

29 *Id*. at 495-96.

30 *Id*. at 496.

31 *Metromedia*, 453 U.S. at 497.

32 *Id*. (quoting Metromedia, Inc. v. San Diego, 610 P.2d 407, 411 (1980)).

33 *Id*. at 498.

has legitimate interests in controlling the noncommunicative aspects of the medium.[34] Importantly, the regulation of noncommunicative aspects of a medium often impinges on the communicative aspects, making it necessary for courts "to reconcile the government's regulatory interests with the individual's right to expression."[35] The Supreme Court, in weighing these interests, characterized the San Diego ordinance as, "[t]he occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages."[36]

The Supreme Court evaluated the First Amendment implications of the San Diego ordinance for both commercial and noncommercial speech.[37] With regard to commercial speech, the Supreme Court observed that, prior to 1975, purely commercial speech advertisements for goods or services were considered outside the scope of First Amendment protections.[38] This view changed with the 1976 opinion in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, which held speech proposing no more than a commercial transaction had significant First Amendment protection.[39] A governmental entity could not completely suppress communication of truthful information about an entirely lawful commercial activity because it feared the effect the information would have on the disseminators and its recipients.[40]

The Supreme Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, established a four-part test for assessing the validity of governmental restrictions on commercial speech as distinguished from fully protected speech: (1) the First Amendment protected commercial speech only if it concerns lawful activity and is not misleading; and a restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the interest.[41]

Applying the four-part test to the San Diego billboard advertising ordinance, the Supreme Court found no suggestion that the commercial advertising at issue involved unlawful activity or was misleading.[42] Further, the goals the ordinance sought to advance—traffic safety and the appearance

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34 *Id*. at 502.
35 *Id.*
36 *Id*. at 503.
37 *Metromedia*, 453 U.S. at 504.
38 *Id*. at 505 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)).
39 *Va. Pharm. Bd.*, 425 U.S. 748.
40 *Metromedia*, 453 U.S. at 505.
41 *Id*. at 507 (citing Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-566 (1980)).
42 *Metromedia*, 453 U.S. at 507.

of the city—represented substantial governmental interests.[43] The Supreme Court also approved the reach of the ordinance, finding "it has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs."[44] The Supreme Court found the ordinance directly advanced San Diego's interests in traffic safety and the City's appearance.[45] It recognized billboards as representing "real and substantial hazards to traffic safety."[46] The Supreme Court reached a similar conclusion regarding the advancement of San Diego's aesthetic interest, noting that "[i]t is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"[47] San Diego, through the billboard ordinance, acted to minimize the presence of billboards and there was no claim that, in doing so, the city had the intention of suppressing speech and the judgment "is not so unusual as to raise suspicions in itself."[48] The Supreme Court concluded that, insofar as the billboard ordinance regulates commercial speech, it meets constitutional requirements.[49]

Turning to the regulation of noncommercial speech, the Supreme Court found the San Diego billboard ordinance violated the First Amendment.[50] It noted that the ordinance afforded a greater degree of protection to commercial than noncommercial speech:

> There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages related to commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.[51]

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43 *Id*. at 507-508.
44 *Id*. at 508.
45 *Id.*
46 *Id*. at 509.
47 *Id*. at 510.
48 *Metromedia*, 453 U.S. at 510.
49 *Id*. at 512.
50 *Id*. at 512-513.
51 *Id*. at 513.

The San Diego ordinance contained exceptions that permitted certain noncommercial signs—e.g., any piece of property may carry or display religious symbols, commemorative plaques of recognized historical organizations and societies, signs carrying news items or telling the time or temperature, signs erected in the discharge of governmental functions, or temporary political campaign signs.[52] However, other signs carrying noncommercial information that do not fall within one of the ordinance exceptions were banned.[53] The Supreme Court determined the billboard ordinance impermissibly distinguished between types of noncommercial speech based on content and noted that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."[54] The Supreme Court also rejected the city's attempt to characterize its ordinance as a reasonable time, place, and manner restriction because the regulation distinguishes between permissible and impermissible signs at a particular location based on content of a sign.[55] The Supreme Court concluded the San Diego billboard ordinance impermissibly regulated protected noncommercial speech and, therefore, it was facially unconstitutional.[56]

C. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*: Prohibiting Signs On Public Property

In *Taxpayers for Vincent*, the Supreme Court reviewed the constitutionality of a Los Angeles ordinance prohibiting the posting of signs on public property.[57] Specifically, the question posed was whether the city could prohibit the attachment of political signs to utility poles by draping the signs over cross wires supporting the poles and stapling the cardboard at the bottom.[58] The District Court determined the ordinance was constitutional as it promoted the "legitimate and compelling" aesthetic interest of "eliminating clutter and visual blight," and it was a reasonable regulation related to the time, place, and manner of expression.[59] The Ninth Circuit Court of Appeals reversed, concluding that Los Angeles failed to sufficiently show that its aesthetic interests in preventing blight were substantial because the city did not demonstrate that it was engaged in a comprehensive effort to remove

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52 *Id*. at 514.
53 *Id*. at 514.
54 *Metromedia*, 453 U.S. at 515.
55 *Id*. at 515-516.
56 *Id*. at 521.
57 Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 791-792 (1984).
58 *Id*. at 792-793.
59 *Id*. at 795.

other contributions to an unattractive environment in commercial and industrial areas.[60]

The Supreme Court considered the constitutionality of the Los Angeles ordinance as applied to the concrete situation of attaching political signs to municipal utility poles.[61] It began by noting that "[i]t has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest."[62] What the First Amendment forbids is governmental regulation of speech that favors some viewpoints or ideas at the expense of others.[63] The Supreme Court found the Los Angeles ordinance was viewpoint neutral, observing that,

> [f]or there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express.[64]

Given the evenhanded way the ordinance was applied, the issues were whether the ordinance advanced a substantial governmental interest and, if so, were any First Amendment restrictions no greater than necessary to further the interest.[65]

The Supreme Court identified Los Angeles' substantial interest as "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property."[66] This aesthetic concern "constitutes a significant substantive evil within the City's power to prohibit."[67] The Supreme Court turned to the issue of whether the ban on signs on public property was tailored narrowly to serve the City's aesthetic concerns.[68] It found that application of the ordinance to posting political signs on utility poles "responds precisely to the substantive problem which legitimately concerns the City."[69] Thus, the ordinance was appropriately tailored to accomplish the City's interest.[70] Further, since the ordinance was content-neutral, a time, place, and manner justification also could be made.

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60 *Id*.
61 *Id*. at 803.
62 *Id*. at 804.
63 *Taxpayers for Vincent*, 466 U.S. 789.
64 *Id*.
65 *Id*. at 805.
66 *Id*. at 807.
67 *Id*.
68 *Id*. at 808.
69 *Taxpayers for Vincent*, 466 U.S. at 810.
70 *Id*.

The Supreme Court observed that "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."[71] The Los Angeles ordinance did not affect individual freedom to speak and distribute literature in the places where the law prohibited the posting of signs on public property.[72] The Supreme Court compared the Los Angeles ordinance with the San Diego billboard ordinance in *Metromedia, Inc. v. City of San Diego*:

> As is true of billboards, the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the city, including those where appellees posted their signs, and there is no basis in the record in this case upon which to rebut that presumption. These interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas.[73]

Given the content-neutral, impartial administration of the prohibition against the posting of temporary signs on public property, the Supreme Court held that the Los Angeles ordinance, as applied to the signs at issue, did not abridge the appellees' First Amendment free speech rights.[74]

D. *Ward v. Rock Against Racism*: Regulating the Time, Place, or Manner of Protected Speech

In *Ward v. Rock Against Racism*[75], the United States Supreme Court considered a case that did not concern a sign ordinance. But, its examination of content-neutrality and time, place, or manner regulation directly applies to evaluating the constitutionality of municipal control of signs as a protected form of First Amendment speech. The case presented the issue of whether a New York City ordinance regulating the sound amplification of musical events at a park bandstand violated performers' protected free expression rights.[76]

Rock Against Racism ("RAR"), the respondent, was an unincorporated association dedicated to the espousal of antiracist positions.[77] From 1979-1986, RAR sponsored speeches and rock music at a Central Park bandstand, and it provided the sound equipment and sound technician used by the

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71 *Id*. at 812.
72 *Id.*
73 *Id*. at 817.
74 *Id.*
75 Ward v. Rock Against Racism, 491 U.S. 781 (1989).
76 *Id.* at 789-790.
77 *Id*. at 784.

performing music groups.[78] The RAR music performances often resulted in citizen complaints about excessive noise from park users and nearby residents.[79] The City of New York developed guidelines for the use of the bandstand that included the City furnishing high-quality sound equipment and retaining an independent, experienced sound technician for all music performances at the bandstand.[80] RAR challenged the guidelines as a facially invalid violation of First Amendment free speech rights.[81] The District Court determined the guidelines were a valid City time, place, or manner regulation of speech.[82] The Second Circuit Court of Appeals disagreed, finding the City failed to show that the sound amplification guidelines were the least intrusive means of regulating the sound volume at the bandstand.[83] The Supreme Court reviewed the case to clarify the legal standard for governmental regulation of time, place, or manner of protected speech.[84]

The Supreme Court began its analysis by noting New York justified the sound amplification guidelines as limiting and controlling noise.[85] The Supreme Court also observed the bandstand was a public forum for performances in which governmental regulation of expression—in this case, music—was subject to First Amendment protection.[86] However, even in a public forum,

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open amply alternative channels for communication of the information.'[87]

Turning first to content neutrality, the principal inquiry in free speech cases is whether a governmental entity adopts a regulation due to disagreement with conveyed message.[88] The government's purpose for the speech regulation is the controlling consideration.[89] The Supreme Court indicated in this regard that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect

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78 *Id*. at 784-785.
79 *Id*.
80 *Id*. at 787.
81 *Ward*, 491 U.S. at 788.
82 *Id*. at 789.
83 *Id*. at 790.
84 *Id*.
85 *Id*. at 791.
86 *Id*.
87 *Ward*, 491 U.S. 781 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
88 *Id*. at 791.
89 *Id*.

on some speakers or messages but not others."[90] A governmental regulation of expression will be content-neutral if it is justified without reference to the content of the speech.[91] New York's justification for its sound-amplification guidelines was controlling noise levels at bandstand music events in order to retain the character of parts of Central Park and to avoid noise intrusion into residential areas and the park itself.[92] As this purpose had nothing to do with content, the New York guideline satisfied the content neutrality requirement for time, place, or manner regulation.[93]

RAR argued that the sound amplification guideline lacked content neutrality because it placed "unbridled discretion in the hands of city officials charged with enforcing it."[94] Specifically, the sound amplification guideline did not prevent the City from varying the volume and quality of sound based on the content presented by performers.[95] The Supreme Court rejected RAR's content neutrality challenge noting that "[w]hile these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[96] The City's sound amplification guideline must be interpreted to forbid City officials from purposely selecting substandard sound systems or varying the sound quality or volume based on the content of a performance.[97]

The Supreme Court next considered whether the City's sound amplification guideline was narrowly tailored to serve the purpose of controlling noise and sound in Central Park and the surrounding residential areas.[98] The Supreme Court recognized the City had a substantial interest in protecting its citizens from unwelcome noise and maintaining the sufficiency of sound amplification at bandstand musical events.[99] The Second Circuit Court of Appeals found the guideline invalid because the City failed to show the sound amplification regulations were the least intrusive means of regulating the volume.[100] The Supreme Court determined the Second Circuit's standard was too exacting and clearly stated the proper approach to narrowly tailored time, place, or manner regulations:

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90 *Id*. at 792.
91 *Id*.
92 *Id*.
93 *Ward*, 491 U.S. 781.
94 *Id*. at 793.
95 *Id*.
96 *Id*. at 794.
97 *Id*. at 793-796.
98 *Id*. at 796.
99 *Ward*, 491 U.S. 781.
100 *Id*. at 797.

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that *it need not be the least restrictive or least intrusive means of doing so*. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[101]

The Supreme Court emphasized that so long as the regulatory means used by government to achieve its interest are not substantially broader than necessary, the regulation will not be deemed invalid because a court concludes the governmental interest could be reached by a less restrictive approach on speech.[102]

Finally, the Supreme Court addressed whether alternative means of communication existed.[103] It found the sound-amplification guideline "far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time."[104] According to the Supreme Court, the City's regulation permits expressive activity at the bandstand and exercises no effect on the quantity or content of expression other than the degree of amplification. The record did not show that the remaining channels of expression were inadequate.[105] The Supreme Court, having found New York's sound-amplification guideline was content-neutral and narrowly tailored to serve substantial governmental interests, held the regulation was valid under the First Amendment as a reasonable regulation of the time, place, or manner of expression.[106]

E. *City of Ladue v. Gilleo* and The Constitutionality of An Ordinance Banning Residential Signs

In *City of Ladue v. Gilleo*, the Supreme Court considered the constitutionality of a sign ordinance prohibiting homeowners from displaying any signs on their property with a few exceptions that included "residential identification" signs, "for sale" signs, and signs warning of safety hazards.[107] The City's ordinance also allowed commercial establishments,

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101 *Id*. at 798-799 (quoting United States v. Albertini, 472 U.S. 675 (1985) (emphasis added)).
102 *Id*. at 800.
103 *Id.* at 802.
104 *Id*.
105 *Ward*, 491 U.S. 781.
106 *Id*. at 803.
107 *Gilleo*, 512 U.S. at 45.

churches, and nonprofit organizations to erect signs prohibited at private residences.[108]

The respondent, Margaret Gilleo, in December 1990, placed a sign on her front lawn opposing the war in the Persian Gulf.[109] The sign disappeared, and Gilleo erected another one that was later knocked down.[110] Gilleo reported the incidents to the police, who informed her the signs were prohibited in Ladue.[111] Gilleo sought a variance that the City denied.[112] Gilleo then filed an action against Ladue, its mayor, and city council members alleging the City sign ordinance violated her First Amendment free speech rights.[113]

The District Court issued a preliminary injunction against enforcement of the sign ordinance, and Gilleo then placed a sign in a second-story window of her residence stating, "For Peace in the Gulf."[114] The Ladue city council repealed the enjoined ordinance and enacted a new regulation that banned all signs except those falling within one of ten exemptions which included: residential identification signs no larger than one square foot; signs advertising property for sale, lease, or exchange identifying the owner or agent; signs for churches, religious institutions, and schools; commercial signs in commercially zoned; or industrial zoned districts; and onsite signs advertising gasoline filling stations.[115] The purpose of the sign ordinance was to diminish visual blight and clutter and to alleviate traffic and safety hazards.[116] Gilleo again challenged the City's ordinance and the District Court held it was unconstitutional.[117] The Eighth Circuit Court of Appeals affirmed finding the sign ordinance invalid as a content-based regulation that treated commercial speech more favorably than noncommercial speech and gave some kinds of noncommercial speech preferential treatment over others.[118]

The Supreme Court first noted that the City relied on the promotion of aesthetic values as justification for its sign ordinance.[119] The Supreme Court recalled that the City of San Diego offered such a rationale for regulating outdoor billboard advertising signs in *Metromedia, Inc.*, but the ordinance was found unconstitutional because it discriminated impermissibly on the

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108 *Id*.
109 *Id*.
110 *Id*.
111 *Id*.
112 *Id.* at 45.
113 *Gilleo*, 512 U.S. at 45-46.
114 *Id*. at 46.
115 *Id*. at 46-47.
116 *Id*.
117 *Id*. at 46-47.
118 *Id*.
119 *Gilleo*, 512 U.S. at 49.

basis of content.[120] Later, in *Taxpayers for Vincent*, the Supreme Court upheld an aesthetically justified prohibition on posting signs on public utility poles that did not extend the ban to private property.[121] The City of Ladue argued that its sign ordinance was content-neutral and the aesthetic concerns motivating the regulation justified its comprehensiveness.[122]

The Supreme Court rejected the City of Ladue's argument.[123] It recalled *Linmark*, stating that "[i]n *Linmark* we held that the city's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential 'For Sale' signs."[124] While the sign ordinance in *Linmark* applied only to a form of commercial speech, the Ladue regulation "covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war."[125] Indeed, the City's ordinance foreclosed the entire medium of residential signs, which has "long been an important and distinct medium of expression."[126] According to the Supreme Court, even if a regulation is completely content neutral and free of all viewpoint discrimination, by eliminating an entire common means of speaking, such restrictions can suppress too much speech.[127]

The City of Ladue defended its ban on residential signs as a "mere regulation of the 'time, place, or manner' of speech because residents remain free to convey their desired messages by other means."[128] These alternative modes of communication included hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.[129] The Supreme Court rejected Ladue's argument when observing that displaying a sign at one's residence may convey a message distinct from placing the same sign someplace else or communicating the same message by other means.[130] Further, residential signs represent a cheap and convenient form of communication, "[e]specially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."[131] The Supreme Court also acknowledged that American culture and law have long carved out special respect for individual liberty in the home. Given this liberty, "[m]ost Americans would be understandably dismayed . . . to learn that it was illegal to display from their

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120 *Id*.
121 *Id*. at 50.
122 *Id*. at 51.
123 *Id*. at 56.
124 *Id*. at 54.
125 *Gilleo*, 512 U.S. at 54.
126 *Id*. at 55.
127 *Id*.
128 *Id*. at 56.
129 *Id*.
130 *Id*.
131 *Gilleo*, 512 U.S. at 57.

window an 8- by 11-inch sign expressing their political views."[132] The Ladue ordinance's wholesale ban on residential signs rendered the regulation overly broad and unconstitutional. The Supreme Court concluded that, as currently framed, the City's sign ordinance violated the First Amendment rights of its citizens.[133]

The Supreme Court's reasoning in rejecting the City of Ladue's ban on residential signs focused on the almost total ban on a type of expression—residential signs. In doing so, the Supreme Court chose not to invalidate the sign ordinance on the grounds that it was a content-based discrimination ban on citizens' political speech.[134] In a concurring opinion, Justice O'Connor noted that "[i]t is unusual for us, when faced with a regulation that on its face draws content distinctions, to 'assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination."[135] According to Justice O'Connor, the "normal inquiry" is first to determine whether a regulation is content based or content neutral, and then, following an answer to this first question, apply the proper level of scrutiny.[136] She indicated her preference, with regard to Ladue's prohibition on residential signs, for applying "our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations."[137]

II. *REED V. TOWN OF GILBERT* AND THE SCOPE OF THE SUPREME COURT'S CONTENT-NEUTRALITY/CONTENT-BASED ANALYSIS

In 2015, the United States Supreme Court considered the constitutionality of a municipal sign ordinance that identified different categories of signs based on the information conveyed and then imposed differing restrictions according to the sign type.[138] *Reed v. Town of Gilbert* involved a municipal sign code that prohibited the display of outdoor signs anywhere in the town without a permit, but exempted twenty-three sign categories from the permit requirement.[139] The Supreme Court focused on three of the exemptions: (1) "Ideological Signs" which included signs communicating a message or ideas for noncommercial purposes that are not construction signs, directional signs, temporary directional signs relating to a qualifying event, political signs, garage sale signs, or signs owned or required by a governmental agency; (2) "Political Signs" that included any

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132 *Id.* at 58.
133 *Id.* at 58-59.
134 *Id*. at 53.
135 *Id*. at 59.
136 *Id*.
137 *Gilleo*, 512 U.S. at 60.
138 *Reed*, 576 U.S. 155.
139 *Id.* at 159.

temporary sign designed to influence the outcome of an election called by a public body; and (3) "Temporary Directional Signs Relating to a Qualifying Event" that included any temporary sign intended to direct pedestrians, motorists, or other passersby to an assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar nonprofit organization.[140]

The Town of Gilbert's ("Gilbert") ordinance treated these three sign categories differently in certain respects.[141] Ideological Signs could be up to twenty square feet in area and could be placed in all zoning districts without any time limits.[142] Political Signs could be up to sixteen square feet on residential property and up to thirty-two square feet on nonresidential property, undeveloped municipal property, and rights-of-way.[143] Political Signs could be displayed up to sixty days prior to a primary election and up to fifteen days following a general election.[144] Temporary Directional Signs could be no larger than six square feet.[145] The ordinance allowed placement of these signs on private property or on a public right-of-way, but no more than four signs could be placed on a single property at any time.[146] Further, Temporary Directional Signs could be displayed no more than twelve hours before a "qualifying event," and no more than one hour afterwards.[147]

The challenge to Gilbert's sign ordinance came from the Good News Community Church and its pastor, who wished to advertise the time and location of their Sunday church services.[148] Lacking a permanent home for its services, the church moved from one location to another in or near Gilbert.[149] To inform the public about its services, the church placed a number of temporary signs around the town that displayed its name along with the time and location of the upcoming service.[150] The signs often were placed in the public right-of-way adjacent to a street.[151] Gilbert's sign code compliance officer cited the church for violating the sign code and confiscated one of the signs.[152] After the church pastor tried unsuccessfully to reach an accommodation with the town, he filed a federal District Court

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140 *Id*. at 159-160.
141 *See id.* at 159-161 (discussing Gilbert's differential treatment of the three sign categories).
142 *Id*. at 159.
143 *Id*. at 160.
144 *Reed*, 576 U.S. at 159-160.
145 *Id*. at 160-161.
146 *Id*. at 161.
147 *Id.* at 160-161.
148 *Id*. at 161.
149 *See id.*
150 *Reed*, 576 U.S. 155.
151 *Id.*
152 *Id.*

complaint alleging Gilbert's sign code violated the First Amendment free speech rights of the church members.[153]

The District Court denied the church's request for a preliminary injunction and the Ninth Circuit Court of Appeals affirmed, holding the Sign Code provisions regulating temporary directional signs did not regulate speech on the basis of content.[154] The Ninth Circuit remanded the case back to the District Court for a determination of whether Gilbert's sign code distinctions for Ideological Signs, Political Signs, and Temporary Directional Signs constituted a content-based regulation of speech.[155] The District Court granted summary judgment in favor of Gilbert and the Ninth Circuit affirmed the ruling, finding the sign code's categories were content neutral.[156] The Ninth Circuit explained its ruling, stating that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and the municipality's "interests in regulat[ing] temporary signs are unrelated to the content of the sign."[157] Based on its conclusion of content neutrality, the Ninth Circuit applied a lower level of scrutiny than strict scrutiny and found the sign code did not violate the First Amendment.[158]

The Supreme Court first referred to content-based laws and the standard such regulations must meet, "Content-based laws—those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[159] The Supreme Court then considered when government regulation of speech is content-based, noting that government regulation of speech should be considered content-based "if a law applies to particular speech because of the topic discussed or the idea or message expressed."[160] The Supreme Court deemed its construal of "content-based" to be a common-sense meaning, requiring a court to consider whether a speech regulation "'on its face' draws distinctions based on the message a speaker conveys."[161] If so, the regulation will be subject to strict scrutiny analysis.[162]

Having established the meaning of "content-based" speech regulations, the Supreme Court applied its definition to Gilbert's sign ordinance and

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153 *Id*. at 162.
154 *See id.* (discussing the District Court and Ninth Circuit's opinions).
155 *Id.* at 162.
156 *Reed*, 576 U.S. at 162.
157 *Id.*
158 *Id.*
159 *Id*. at 163.
160 *Id*.
161 *Id*.
162 *Reed*, 576 U.S. at 164.

concluded it was facially content-based.[163] The Supreme Court noted regarding the ordinance that:

> It defines "Temporary Directional Signs" on the basis of whether a sign conveys a message of directing the public to church or some other "qualifying event." . . . It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election. . . . And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. . . . It then subjects each of these categories to different restrictions.[164]

Gilbert's sign code restrictions were content based because they depend entirely on the communicative message of the sign.[165] More pointedly, "temporary directional signs" are treated differently from "ideological signs" and "political signs;" thus, Gilbert regulations were facially content based.[166]

The nature of the *Reed* court's analysis of content-based speech regulation comes into sharp focus through its consideration of the Ninth Circuit's conclusion that the Gilbert sign code was content-neutral. The Ninth Circuit concluded the sign regulations were content-neutral because the municipality did not adopt the rules based on any disagreement with the conveyed message and Gilbert's justifications for regulating the Temporary Directional Signs were unrelated to sign content.[167] The Supreme Court found the Ninth Circuit's reasoning wanting, "[b]ut this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face."[168] The Ninth Circuit's focus on the intent of a speech regulation ignores the fact that "[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."[169] An innocuous justification for a speech regulation cannot convert a facially content-based law into one that is content-neutral.[170] The Ninth Circuit erred when it failed to consider whether Gilbert's sign ordinance was facially content-neutral before examining its justification or purpose.[171]

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163 *Id*.
164 *Id*. (citations omitted).
165 *Id*.
166 *Id.* at 164.
167 *Id*. at 165.
168 *Reed*, 576 U.S. 155.
169 *Id*.
170 *Id*. at 166.
171 *Id*.

The flaws in the Ninth Circuit's reasoning went further. The Court of Appeals determined the sign code was content neutral because it did not mention any idea or viewpoint or single out any idea or viewpoint for differential treatment.[172] The Supreme Court characterized governmental discrimination based on viewpoint as a "more blatant" and "egregious form of content discrimination," but "[t[he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints but also to prohibition of public discussion of an entire topic."[173] A speech regulation targeted at a specific subject matter is content based even if it does not discriminate among viewpoints within the subject matter.[174] The Supreme Court noted that Ideological Signs received more favorable treatment than Political Signs, which, in turn, received more favorable treatment than Temporary Directional Signs. These distinctions represent "a paradigmatic example of content-based discrimination."[175]

The Ninth Circuit erred when it determined the distinctions Gilbert made between ideological, political, and temporary directional signs were based on the content-neutral elements of who is speaking through a sign and whether and when an event will occur.[176] The fact that a distinction between signs is speaker-based does not necessarily render it content neutral because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[177] Further, the fact that a speech regulation is event-based does not make it content-neutral. In this regard, the Supreme Court emphasized its fundamental point regarding content-based laws, "a speech regulation is content based if the law applies to particular speech *because of the topic discussed or the idea or message expressed*."[178] Applying this principle of content-based analysis to Gilbert's sign code, the Supreme Court stated:

> Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."[179]

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172 *Id*. at 168.
173 *Id*. at 168-169.
174 *Reed*, 576 U.S. 155.
175 *Id*.
176 *Id*.
177 *Id*. at 170 (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).
178 *Id*.
179 *Id*. at 171 (quoting *Gilleo*, 512 U.S. at 60).

Having considered and rejected the Ninth Circuit's arguments finding Gilbert's sign code content-neutral, the Supreme Court found the sign regulations to be content-based restrictions on speech that could be constitutional only if they survived a strict scrutiny analysis.[180] The governmental interests supporting the sign regulations – preserving the municipality's aesthetic appeal and traffic safety – might be compelling, but the Supreme Court determined the differential treatment between ideological, political, and temporary directional signs fell far short of being narrowly tailored to achieve the Town's interests.[181] The Supreme Court observed concerning the aesthetic justification that "[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem."[182] With regard to traffic safety, the Supreme Court explained that "[t]he Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting."[183]

Justice Thomas, writing for the majority, asserted the Supreme Court's approach to content-based and content-neutrality analysis set forth in *Reed* reflected prior First Amendment sign ordinance decisions. The majority opinion, in its critique of the Ninth Circuit's position, stated that "we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose."[184] Justice Thomas then offered a long string cite to Supreme Court opinions to demonstrate the conventionality of his position.[185]

The *Reed* majority opinion also tied its approach to content-based analysis found in precedents that recognize "a separate and additional category of laws that, though facially content-neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"[186] The Supreme Court aligned its approach to content-based

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180 *Reed*, 576 U.S. 155.

181 *See id.* (finding Gilbert's two offered governmental interests in support of the Code fail strict scrutiny analysis).

182 *Id*. at 172.

183 *Id*. at 135.

184 *Id*. at 166.

185 *See id.* (citing the Court's precedent requiring a determination if a law is facially content-neutral prior to the analysis of the law's asserted justification or purpose).

186 *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791).

analysis with its decision in *Ward v. Rock Against Racism*, criticizing both the Ninth Circuit's and the United States' understanding of *Ward*[187]

> [t]he Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.[188]

Despite the Supreme Court's efforts to normalize its manner of conducting content-based analysis, the *Reed* decision established a distinctive direction, as recognized by the following commentary:

> The majority's articulation of the standard for deeming a regulation content based is notable for two main reasons. First, it divorces the content regulation from its intended purpose of ferreting out impermissible government motive. Even where government motive is completely benign, the court affirmed that content-based regulations are nonetheless suspect and should be subjected to strict scrutiny. 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" could be read to include any regulation that even incidentally distinguishes between activities or industries.[189]

Justice Alito, concurring, recognized the practical complications of *Reed's* approach to content-based analysis for municipalities using their police powers to regulate signs within their jurisdictions and offered an initial list of signs that could pass constitutional muster post-*Reed*.[190] Justice Breyer, concurring, voiced his reservations about the scope of *Reed*, observing that ". . . virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory 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."[191] The Justices' concerns for the practical effects of *Reed* on local governmental operations can be observed in a number of subsequent Circuit Court of Appeals and District Court decisions.

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187 The United States filed an *amicus curiae* brief in *Reed* in support of the town of Gilbert.

188 *Reed*, 576 U.S. at 166-167 (emphasis in original).

189 Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1986 (2016).

190 *Reed*, 576 U.S. at 174-175.

191 *Id*. at 177.

III. FEDERAL COURT'S INTERPRETATIONS AND APPLICATIONS OF *REED'S* CONTENT-BASED ANALYSIS

A Westlaw search in February 2022 shows that since being issued in June of 2015, *Reed v. Town of Gilbert* has been cited by 4,997 different authorities. Of these nearly 5000 citations, almost 1,000 are cases citing to *Reed*. Of these cases, the following are a sampling of cases from the federal Circuit and District Court levels that give a more detailed analysis of *Reed*.

A. Federal Circuit Courts of Appeal and *Reed*

1. Norton v. City of Springfield

The Seventh Circuit examined *Reed* in *Norton v. City of Springfield*.[192] *Norton* was reheard by the Seventh Circuit in light of the *Reed* decision. In *Norton*, the issue was the City of Springfield's ("Springfield") anti-panhandling ordinance that defined panhandling as "an oral request for an immediate donation of money. Signs requesting money [were] allowed; so [were] oral pleas to send money later."[193] Upon the first hearing, the Seventh Circuit "classified the ordinance as one regulating by subject matter rather than content or viewpoint."[194] The Seventh Circuit cited *Reed* stating, "regulation of speech is content based if a law applies to particular speech because of the topic discussed *or* the idea or message expressed."[195] Springfield, like the Town of Gilbert, Arizona, argued that its ordinance was neutrally written in regard to viewpoints and ideas.[196] Yet as *Norton* reminds us, "[t]he majority in *Reed* found that insufficient: '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.'"[197] In further analyzing *Reed*, the Seventh Circuit found "[t]he majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."[198]

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192 Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015).
193 *Id.* at 412.
194 *Id.*
195 *Id.* (quoting *Reed*, 576 U.S. 155).
196 *Id.* at 412.
197 *Id.* (quoting *Reed*, 576 U.S. at 166).
198 *Norton*, 806 F.3d 411.

2. Wagner v. City of Garfield Heights

The Sixth Circuit examined *Reed* in their 2017 decision in *Wagner v. City of Garfield Heights*.[199] The plaintiff in *Wagner* challenged a municipal ordinance that limited 'political' signs to a six-square-foot limit by having a sixteen-square-foot political sign on his home's lawn.[200] During the initial hearing, the Sixth Circuit found the ordinance to have survived intermediate scrutiny, only to later rehear the case in light of *Reed*.[201] Yet, in applying *Reed*, the Sixth Circuit found the ordinance in question to be unconstitutional as related to political residential signs.[202] Under the original ordinance, the City of Garfield Heights permitted "residences to place 'temporary signs' measuring less than twelve square feet in surface area on their lawns. . . [but] only one 'for-sale, sold, for-rent, leasing, open house, religious, holiday or personal sign' not exceeding six square feet is permitted on a given lot in single-family residential districts."[203] The Sixth Circuit found that the ordinance as written "applies explicitly and exclusively to political signs. . . and *Reed* commands that it be subject to strict scrutiny."[204] As a result, the Court found the ordinance to be like the one at issue in *Reed* as "hopelessly under inclusive."[205]

3. Willson v. City of Bel-Nor

The Eighth Circuit examined *Reed* with their 2019 decision in *Willson v. City of Bel-Nor*.[206] In *Willson,* the plaintiff had three signs in front of his residence in Bel-Nor, violating a city ordinance that permitted "'each improved parcel' of private property 'to post one stake-mounted and self-supporting freestanding sign.'"[207] The city ordinance further provides "[n]ot more than one (1) flag."[208] There the Court cited *Reed* noting, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[209] The ordinance in question defined a "sign" to be "[a]ny poster, object, devise [sic], or display, situated outdoors, which is used to advertise,

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199 Wagner v. City of Garfield Heights, 675 F.App'x 599 (6th Cir. 2017).
200 *Id.* at 600.
201 *Id.* at 600.
202 *Id.* at 607.
203 *Id.* at 601.
204 *Id.* at 607.
205 *Wagner*, 675 F.App'x at 607.
206 Willson v. City of Bel-Nor, 924 F.3d 995 (8th Cir. 2019).
207 *Id.*
208 *Id.* at 999.
209 *Id.* (quoting *Reed*, 576 U.S. at 162).

identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, idea, belief or location by any means, including but not limited to words, letters, figures, designs, symbols, colors, logos, fixtures, cartoons or images[;]" and "flags" to be "[to include] any fabric or bunting containing distinctive colors, patterns or symbols used as a symbol of a government or institution."[210] Due to these definitions, a content-based inquiry would be needed to determine whether the item in question is a flag or sign and whether it would be prohibited by the ordinance. As such, following *Reed*, the Court found that this ordinance would need to satisfy strict scrutiny.[211] The City's proffered justification of the ordinance to be traffic safety and aesthetics due to a concern about distracted driving; yet citing existing case law, the Court found that "Bel-Nor has not proved the required nexus [between the regulation and the interest. Thus, the ordinance] is not narrowly tailored to achieve a compelling government interest.[212]

4. Boyer v. City of Simi Valley

Reed was examined by the Ninth Circuit in 2020 with *Boyer v. City of Simi Valley*.[213] There, the plaintiff challenged a prohibition on "mobile billboards on public property unless they qualify as authorized emergency or construction-related vehicles."[214] This authorized vehicle exemption caused the Court to "struggle to identify a justification for allowing speech only for authorized emergency and construction, repair, or maintenance vehicles that does not rely on content, and the City offers none."[215] Looking at the text of the ordinance, the Court "infer[red] that the City believed it was 'reasonable and necessary' to exempt authorized vehicles from displaying billboards on public property to 'protect the health, safety, and welfare' of the community."[216] Yet, despite these laudable intentions, the ordinance created a content-based distinction and was subject to strict scrutiny.[217] In citing *Reed*, the Court wrote:

> [e]ven 'perfectly rational' sign ordinances must yield to the 'clear and firm rule governing content neutrality [that] is an essential means of protecting the freedom of speech.' . . .That firm rule mandates strict scrutiny review

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210 *Id.* at 1000.
211 *Id.* at 1001.
212 *Willson*, 924 F.3d at 1002.
213 Boyer v. City of Simi Valley, 978 F.3d 618 (9th Cir. 2020).
214 *Id.* at 620.
215 *Id.* at 622.
216 *Id.* at 623.
217 *Id.*

> whenever an ordinance allows some messages, but not others, based on content—no matter how sensible the distinction may be.[218]

B. Federal District Courts and *Reed*

1. www.RicardoPachero.com v. City of Baldwin Park

At the District Court level, *Reed* was examined by the United States District Court for the Central District of California with *www.RicardoPacheco.com v. City of Baldwin Park*, where a lawsuit was filed challenging a municipal ordinance that requiring individuals to have a permit whenever displaying "a sign within the City, unless the sign was expressly exempted by [the ordinance;]. . . [a permit exemption was] political signs on private property, but only for those signs related to elections and only for the '45 days prior to [an] election' and no later than '14 days following the election.'"[219]

Four individuals posted signs associated with www.Ricardo Pacheco.com, a group vocal about their belief of the alleged corruption of a City councilman, and received code violations for displaying signs without a permit.[220] The violations included signs posted on residential and commercial property during November 2016.[221] The following April, the City of Baldwin Park amended its sign ordinance, which still required individuals to obtain a permit yet created two general categories of residential and non-residential signs.[222] The amended ordinance gave preferential treatment to new businesses as well as businesses that were promoting special events, which, according to *Reed*, does not necessarily render a regulation content-neutral.[223] Finding that the Baldwin Park had not made an attempt to satisfy strict scrutiny with regard to the provisions, the court concluded that "plaintiffs are likely to succeed in demonstrating that the Business Provisions impose speaker-based restrictions that are content-based, and that the provisions are not narrowly tailored to satisfy compelling or even substantial government interests."[224] Baldwin Park's amended ordinance also included provisions to allow for additional flags on residential properties for three days before and after Memorial Day, Independence Day, and Veterans Day; and an election provision that permitted the display of up to five additional signs

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218 *Id.* (quoting *Reed*, 576 U.S. at 171).

219 www.RicardoPacheco.com v. City of Baldwin Park, No. 2:16–cv–09167–CAS(GJSx), 2017 WL 2962772 (C.D. Cal. July, 10, 2017).

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

for the 45 days before and 14 days after an election.[225] The Court found that both provisions under *Reed* were likely content-based regulations of speech and neither survived strict scrutiny.[226]

2. ArchitectureArt, LLC v. City of San Diego

The United States District Court for the Southern District of California analyzed *Reed* in their 2017 decision in *ArchitectureArt, LLC v. City of San Diego*.[227] At issue was a San Diego ordinance that exempted murals from a permit requirement for "signs on City-controlled property. . . [which] may contain 'on-premises or public interest messages only.'"[228] There, the court cited *Reed* in its analysis of commercial speech.[229] The district court mentioned the concurrence from Justice Alito in *Reed* and the "concern that the majority opinion would be used to invalidate all sign ordinances that contain exemptions for helpful signs."[230] The Court then examined the stated purpose of the ordinance at issue in San Diego and found its stated purpose was "to optimize communication while protecting the aesthetic character of the [c]ity" and that the requirements of *Central Hudson* were met.[231] Additionally, in examining the on-premises and off-premises distinction in the ordinance, the Court found the ordinance to be a constitutional limitation on commercial speech because "the distinction drawn in the sign ordinance between 'on-premises' and 'off-premises messages does not run afoul of *Reed*.[232] As discussed in the concurring opinion, this distinction is not content-based and, therefore, is still permissible.[233]

3. GEFT Outdoor, LLC v. City of Westfield

The United States District Court for the Southern District of Indiana examined *Reed* in their 2020 decision in *GEFT Outdoor, LLC. v. City of Westfield*.[234] At issue was an ordinance that prohibited off-premises signs.[235] This case is notable because the court agreed with the Fifth Circuit's decision in *Reagan*, finding that "it is not appropriate to parse speech and regulations, especially in light of the fact that the [ordinances at issue] affect both

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225 *www.RicardoPacheco.com*, No. 2:16–cv–09167–CAS(GJSx) (C.D. Cal. July 10, 2017).
226 *Id.*
227 ArchitectureArt, LLC v. City of San Diego, 231 F.Supp.3d 828 (S.D. Cal. 2017).
228 *Id.* at 835.
229 *Id.* at 838-840 (discussing the issue of commercial speech).
230 *Id.* at 839.
231 *Id.*
232 *Id.*
233 *ArchitectureArt*, 231 F.Supp.3d 828 (quoting *Reed*, 576 U.S. at 174).
234 GEFT Outdoor, LLC. v. City of Westfield, 491 F.Supp.3d 387 (S.D. Ind. 2020).
235 *Id.* at 392.

commercial and non-commercial speech . . . Therefore, the Court concludes that strict scrutiny applies pursuant to the standard established in *Reed* if [the ordinances] are content-based regulations."[236] The court found the on-premises and off-premises distinction on signs to be content-based because "a government official [having] to read a sign's message to determine the sign's purpose is enough, under *Reed*, to subject the law to strict scrutiny even though the sign's location also is involved."[237] The court next examined Justice Alito's concurring opinion in *Reed* and cited the decision in *Reagan* that

> '[r]ead in harmony with the majority, Justice Alito's concurrence enumerates an 'on-premises/off-premises' distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor' . . . [and t]his Court agrees with the analysis in *Reagan* and *Thomas* that Justice Alito's example in a concurring opinion does not help [the municipality] with its content-based definition of an off-premises sign.[238]

As a result, the Court found the ordinance to be a content-based regulation and "that content-based regulations cannot pass strict scrutiny for aesthetics and public safety."[239]

4. March v. Mills

Another outcome of *Reed* has been the attempt of litigants to tie its reasoning to areas of First Amendment speech jurisprudence other than analysis of municipal sign ordinances. In *March v. Mills*, an anti-abortion pastor challenged a noise provision of the Maine Civil Rights Act ("MCRA") that restricted making noise "with the intent '[t]o interfere with the safe and effective delivery of [health services].'"[240] The United States District Court for the District of Maine found that "*Reed* makes clear that 'an innocuous justification cannot transform a facially content-based law into one that is content neutral.'[241] The legislature's justification for enacting the MCRA is irrelevant because the Noise Provision is content-based on its face."[242] This

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236 *Id.* at 404.
237 *Id.* at 405.
238 *Id.* at 406 (citing Thomas v. Bright, 937 F.3d 721, 732-33 (6th Cir. 2019)).
239 *Id.* at 407.
240 March v. Mills, No. 2:15–cv–515–NT, 2016 WL 2993168 (D. Me. May 23, 2016), *rev'd*, 867 F.3d 46 (1st Cir. 2017).
241 *Id.* (quoting *Reed*, 576 U.S. at 166).
242 *Id.*

judgment was later reversed by the United States Court of Appeals for the First Circuit.[243] The First Circuit wrote:

> *Reed* held that the sign ordinance at issue in that case was content based only because the ordinance's applicability 'depend[ed] entirely on the communicative content' of a given sign. . . [and] *Reed* does not suggest that a provision is content based merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent.[244]

5. Silberberg v. Board of Elections of New York

Under *Silberberg v. Board of Elections of New York*, a New York election law prohibited voters from photographing themselves and their completed ballot and posting the image on social media (otherwise known as 'ballot selfies').[245] There the United States District Court for the Southern District of New York found this regulation to be one that "regulates speech based on its content, as it 'applies to particular speech because of the topic discussed or the idea or message expressed.'"[246] Despite this, the Court notes the concurring opinions of Justice Alito and Justice Kagan and stated that "[t]hough cognizant of the ambiguity that remains in the wake of *Reed* regarding how broadly or narrowly courts must interpret the subject matters between which a government speech restriction distinguishes, the Court conclude[d] that the statute restricts speech on the basis of its content."[247] Despite this, the court found that a traditional forum analysis was instead applicable here in part because the focus of *Reed* was instead a municipal sign ordinance.[248] The Court found that both polling sites and ballots to be non-public fora and not subject to strict scrutiny; further, the Court found the statute at hand to be viewpoint neutral and "reasonable measure to combat vote buying and voter coercion."[249]

C. Illinois Federal District Courts and *Reed*

1. Peterson v. Village of Downers Grove

The United States District Court for the Northern District of Illinois, Eastern Division, cited *Reed* in their 2015 decision in *Peterson v. Village of*

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243 March v. Mills, 867 F.3d 46 (1st Cir. 2017).
244 *Id.* at 60-61.
245 Silberberg v. Bd. of Elections of New York, 272 F.Supp.3d 454 (S.D. New York 2017).
246 *Id.* at 474 (quoting *Reed*, 576 U.S. at 155).
247 *Id.* at 475.
248 *Id.*
249 *Id.* at 475-78.

Downers Grove.[250] In *Peterson*, the Village of Downers Grove's ("Village") sign ordinance included "restriction[s] on painted wall signs, on signs that do not face a roadway or drivable right-of-way, and on the total sign area and number of wall signs permitted on a single lot."[251] With regard to the painted wall signs restriction, the court found that the Village's restriction was content-neutral as applied to all municipal signs, no matter their messaging or content of the sign.[252] With regard to the Village's restrictions on total sign area and numbers of permitted wall signs, the court ruled that these restrictions were applied to commercial speech and subject to intermediate scrutiny.[253] In their discussion, the court noted that "[*Reed's*] reach is not yet clear. Although *Reed* broadly states that content-based restrictions must be subject to strict scrutiny . . . it remains to be seen whether strict scrutiny applies to *all* content-based distinctions."[254] The court further found that "the majority never specifically addressed commercial speech in *Reed* . . . [and] absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny. . . binding."[255]

2. Vugo, Inc. v. City of Chicago

The same District Court heard a challenge to a Chicago ordinance prohibiting "commercial advertising on the interior or exterior of 'transportation network vehicles,' i.e., vehicles driven by independent contractors for companies such as Uber and Lyft."[256] The plaintiffs in the matter argued that *Reed* subjected the ordinance to strict scrutiny despite "the Court's ongoing adherence to *Central Hudson*'s intermediate scrutiny standard."[257] The court noted that the "Plaintiffs seize[d] on isolated statements . . . that laws regulating speech based on its 'function or purpose' are content-based. . . to argue that *any* governmental restraint on commercial speech, unless directed to misleading speech or to speech concerning an unlawful activity, is *per se* content based and thus subject to strict scrutiny."[258] Despite this, the Court concluded the ordinance be analyzed under intermediate scrutiny and the *Central Hudson* test because "[n]o court

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250 Peterson v. Village of Downers Grove, 150 F.Supp.3d 910 (N.D. Ill. 2015).
251 *Id.* at 914.
252 *Id.* at 919.
253 *Id.* at 926-27.
254 *Id.* at 927.
255 *Id.* at 927-28.
256 Vugo, Inc. v. City of Chicago, 273 F.Supp.3d 910, 911 (N.D. Ill. 2017).
257 *Id.* at 915.
258 *Id.* at 916.

has interpreted *Reed* . . . so broadly . . . and the [*Reed* decision] do[es] not suggest that the Court intended such a sweeping shift in the law."[259]

IV. *REAGAN NATIONAL ADVERTISING OF AUSTIN V. CITY OF AUSTIN*

In *Reagan National Advertising of Austin v. City of Austin*, two billboard operating companies, Reagan National Advertising of Austin and Lamar Advantage Outdoor, filed a state court declaratory judgment action alleging that the City of Austin's ("City") sign code violated their First Amendment rights.[260] Both sign companies filed permits to digitize their existing billboards.[261] The permits were denied because the City's sign code ("Code") did not allow the digitization of off-premises signs.[262] The complaint alleged that the Code's distinction between on-premises and off-premises signs was content-based and thus subject to a strict scrutiny analysis.[263] The Code defined an "off-premises sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site."[264] The Code treated all off-premises signs as non-conforming.[265] On-premises signs were allowed to be digitized, while off-premises signs were not.[266]

The district court ruled that the Code was content neutral and satisfied an intermediate scrutiny analysis.[267] On appeal, the Fifth Circuit set out to address three substantive issues: (1) whether the Code's distinction between on-premises and off-premises signs is content-based; (2) whether the Code is a regulation of commercial speech and therefore only subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*;[268] and (3) whether the municipality's interests in aesthetics and traffic safety are compelling enough to survive strict scrutiny.[269]

The Fifth Circuit found that the Code was content-based and thus subject to strict scrutiny.[270] The court cited *Reed* for the proposition that "a distinction defining regulated speech by its function or purpose is drawn

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259 *Id*.
260 *Reagan Nat'l Advert*., 972 F.3d 696.
261 *Id*.
262 *Id*.
263 *Id*. at 699.
264 *Id*. at 703.
265 *Id*. at 703.
266 *Reagan Nat'l Advert.*, 972 F.3d 696.
267 *Id*. at 710.
268 *See Central Hudson*, 447 U.S. at 561.
269 *See Reagan Nat'l Advert*., 972 F.3d at 701-10 (analyzing the three substantive issues).
270 *Id*. at 702.

based on the message the speaker conveys and is thus facially content based and subject to strict scrutiny."[271] The Fifth Circuit stated, "federal courts have recognized that *Reed* constituted a *drastic change* in First Amendment jurisprudence."[272] The Fifth Circuit then took an inventory of its pre-*Reed* cases to review its previous assessment of content neutrality. Citing its holding in *Asgeirsson v. Abbott*,[273] the court stated that its pre-*Reed* case law ascribed to an incorrect understanding of the test for content neutrality given in *Ward v. Rock against Racism*.[274] *Ward* held: "The principal inquiry in determining content neutrality, in speech cases generally and in time place or manner cases in particular, is whether the government has adopted a regulation or speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration."[275] The Court found that *Reed* held that the government's purpose is irrelevant. It thus abrogated its holding in *Asgeirsson*.[276]

The Fifth Circuit refused to read Justice Alito's concurrence in *Reed* as supporting the type of off-premises on-premises distinction found in the Code, which was not defined by the sign's content but by the sign's physical location.[277] The court further stated that "to determine whether a sign is an on-premises or an off-premises sign, one must read the sign; thus, the restriction relies on the content of the message."[278] The court rejected the argument that the sign code official only had to do a cursory review analysis of the sign; thus, content neutrality still applied.[279]

The City of Austin argued that because the Code did not regulate a viewpoint or message, it could not be content based.[280] This was rejected as well by the Fifth Circuit, holding that a sign need not discriminate against a specific viewpoint to be content based.[281] The court stated in a very basic application of *Reed*: "To determine whether a sign is off-premises and therefore unable to be digitized, government officials must read it. This is an obvious content-based inquiry, and it does not evade strict scrutiny."[282] The Fifth Circuit applied a broad reading of *Reed* which presents dangers for municipalities and sign codes that regulate signs in a seemingly reasonable way under prior Supreme Court precedent.[283] This was despite Justice

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271 *Id*.
272 *Id*. (citing Free Speech Coal, Inc. v Att'y Gen. U.S. 825 F.3d 149, 160 (3d Cir 2016)).
273 Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012).
274 *Ward*, 491 U.S. at 791.
275 *Id*.
276 *Asgeirsson*, 696 F.3d 454.
277 *Reagan Nat'l Advert.*, 972 F.3d at 704.
278 *Id*.
279 *Id*.
280 *Id*. at 706.
281 *Id*. at 707.
282 *Id*.
283 *Reagan Nat'l Advert.*, 972 F.3d at 704.

Breyer's cautioning in *Reed* that the majority opinion "cannot avoid the application of strict scrutiny to all sorts of justifiable governmental regulations."[284]

After determining that the Code's regulation of off-premises signs was content-based, the Fifth Circuit examined the question of whether the sign code, as it related to off-premises signage, was merely regulating commercial speech and thus only subject to the less stringent intermediate scrutiny test under *Central Hudson*.[285] The court rejected the application of intermediate scrutiny because the sign code regulated signs bearing commercial and non-commercial messages without distinction.[286]

Applying strict scrutiny, the Fifth Circuit looked at whether the restriction furthered a compelling interest and was narrowly tailored to achieve that interest.[287] The court found that the City's stated justifications in regulating off-premises signs in order to protect the aesthetic value of the City and to promote public safety were unsubstantiated.[288] The court rejected these justifications on the grounds that there was no evidence presented in the record that off-premises signs have any more of a deleterious effect than on-premises signs.[289]

Multiple cases decided before *Reed* have found that despite having to read a sign or examine the nature of the expression to determine the applicability of the regulation, content neutrality can be found.[290] In *City Council v. Taxpayers for Vincent*, the United States Supreme Court found content neutrality existed despite the government having to read the sign to determine if it could be posted on public property.[291] In *Police Department of Chicago v. Mosley*, the Court held that in order for a speech to be content-based, it must regulate specific subjects or topics.[292] Simply regulating when, where or how a message is presented is not a content-based restriction.[293]

Justice Alito, in his concurrence in *Reed*, stated that for a law to be content based, it must regulate based on viewpoint or subject matter, not simply function or purpose.[294] To explain that municipalities are not powerless to regulate signs without facing a strict scrutiny analysis, Justice

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284 *Reed*, 576 U.S. at 178.

285 *See Central Hudson*, 447 U.S. at 563-66.

286 *Reagan Nat'l Advert.*, 972 F.3d at 708.

287 *Id*.

288 *Id*.

289 *Id*. at 710.

290 *See Taxpayers for Vincent*, 466 U.S. 789; *see also* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

291 *Taxpayers for Vincent*, 466 U.S. 789.

292 *Mosley*, 408 U.S. at 92.

293 *Id*. at 98.

294 *See Reed*, 576 U.S. at 174 (Alito, J., concurring) ("Content-based laws merit [strict scrutiny] protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulated speech based on viewpoint.").

Alito, in his concurrence, provided that the following sign rules should not be considered content-based:

1. Rules regulating the size of signs;
2. Rules regulating the locations of signs which may distinguish between free-standing signs and those attached to buildings;
3. Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
4. Rules that distinguish between the placement of signs on commercial and residential property;
5. Rules that distinguish between the placement of signs on private and public property;
6. Rules that distinguish between on-premises and off-premises signs;
7. Rules that restrict the total number of signs allowed per mile of roadway; and
8. Rules imposing time restrictions on signs advertising a one-time event.[295]

Justice Alito opined that *Reed* allows municipalities to continue to regulate signage in a way that "fully protects public safety and serves legitimate aesthetic objectives."[296] Justice Kagan, in her concurring opinion in *Reed*, also expressed a belief that the application of the majority holding in *Reed* will result in most signs being struck down as failing strict scrutiny, and municipalities will be resigned to the resulting clutter.[297] Justice Kagan stated, "[w]e can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.[298] Justice Kagan further stated that the Court has identified numerous situations in which the risk attached to content-based laws is attenuated, including *Members of City Council of Los Angeles v. Taxpayers for Vincent*,[299] in which the court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural or artistic events from a generally applicable limit on sidewalk signs."[300]

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295 *See id.* at 174-175.

296 *Id.* at 174.

297 *Id*. at 181.

298 *Id*. at 183.

299 *See Taxpayers for Vincent*, 466 U.S. at 799 ("… [T]he Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule . . . to decide whether the overbreadth exception is applicable in a particular case, [the Court has] weighted the likelihood that the statute's very existence [] inhibit[s] free speech.")

300 *Reed*, 576 U.S at 174 (quoting *Taxpayers for Vincent*, 466 U.S. 789).

V. *THE HOLDING OF THE SUPREME COURT IN CITY OF AUSTIN V. REAGAN NATIONAL ADVERTISING*

On April 21, 2022, the United States Supreme Court in *City of Austin v. Reagan National Advertising* overturned the decision by the Fifth Circuit Court of Appeals, holding that the City of Austin, Texas did not violate the Free Speech clause of the First Amendment in its restrictions of digital billboards.[301] Justice Sotomayor delivered the opinion of Court joined by Chief Justice Roberts and Justices Breyer, Kagan and Kavanaugh.[302] The Court reviewed the history of off-premises sign regulation stating that American jurisdictions have regulated outdoor advertising for well over a century.[303] The Court held that the regulations in this country have long distinguished between off-premises signage promoting ideas, products or services elsewhere and those that promote products located onsite.[304] The Court further stated that on/off premises distinctions like those in the Austin city code ("Code") have "proliferated following the enactment of the Highway Beautification Act of 1965, ("Act").[305] Through the Act, states receiving federal highway funding were directed to regulate outdoor signs in proximity to federal highways by limiting off-premises signs.[306] Under the Act approximately two-thirds of States have implemented on/off premises distinctions and tens of thousands of municipalities have followed suit by incorporating on/off premises distinctions into their sign codes similar to the City of Austin.[307] The Court noted that the definition of an off-premises sign in the Austin Code was "a sign advertising a business, person, activity, goods, products or services not located on the site where the sign is installed or that directs persons to any location not on that site."[308] The Court pointed out that the definition of an off-premises sign in the Austin Code is analogous to the definition found in the federal Highway Beautification Act.[309]

The crux of the Court's holding is that a rule that a regulation cannot be content neutral if it requires reading the sign at issue is too extreme an interpretation of prior Court precedent.[310] The sign companies argued before the Court that the Fifth Circuit correctly held that because the application of the regulation depends on the topic reflected on the sign (i.e. whether the product or service is provided on the same premises as the sign), the

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301 *Reagan Nat'l Advert.*, 142 S. Ct. 1464.
302 *Id.* at 1466.
303 *Id.* at 1469.
304 *See id.* at 1469 (citing Packer Corp. v. Utah, 285 U.S. 105, 107 (1932)).
305 23 U.S.C. § 131.
306 23 U.S.C. § 131(b).
307 *Reagan Nat'l Advert.*, 142 S. Ct. at 1469.
308 *Id.* at 1469; AUSTIN, TEX., CITY CODE § 25-10-3(11) (2016).
309 *Reagan Nat'l Advert.*, 142 S. Ct. at 1469.
310 *Id.* at 1474.

regulation is content-based.[311] Counsel for the sign companies stated that because the regulation of off-premises signs is based on the communicative content of the sign, the regulation must be content based.[312] The sign companies further argued that in addition to prohibiting regulation based on subjects or viewpoints, *Reed* also prohibited regulation based on function or purpose.[313] Because the Austin sign code's regulation at issue depended on the location of the sign, which is gleaned from content, the sign companies took the position that it is content based.[314] Simply stated, a law is content based if it requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation occurred.[315]

The Supreme Court was faced with deciding whether *Reed* created a "need to read test" to define content neutrality.[316] In *Reed*, the court held that the Town of Gilbert's sign code violated the First Amendment by drawing content-based distinctions between temporary, political and ideological signs.[317] Before the Supreme Court in *Reagan National* was the question of whether *Reed* held that a regulation is content-based if it defines regulated speech by its function or purpose rather than simply its specific topic or viewpoint.[318] The City of Austin's sign code regulated off-premises signage differently than on-premises signage.[319]

The Court distinguished the Austin sign code from the sign regulations at issue in Reed. The Court stated, "[u]nlike the regulations at issue in *Reed*, the Austin Code requires an examination of speech only in service of drawing neutral, location-based lines."[320] It does not depend on content.[321] The Town of Gilbert's sign code at issue in *Reed*, on the other hand, singled out specific subject matter for differential treatment. The Gilbert code gave the most favorable treatment to ideological signs. It offered less favorable treatment to political signs and most heavily regulated temporary directional signs. The *Reed* Court reasoned that because the regulatory scheme targeted specific subject matter, it was content based. The Austin sign code, on the other hand, does not single out any topic or subject matter for differential treatment.[322] Because the message on the sign matters only to the extent that it informs the

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311 *Id*.
312 *Id*.
313 *Id*.
314 *Id*.
315 McCullen v. Coakley, 573 U.S. 464, 479 (2014).
316 *Reagan Nat'l Advert.*, 142 S. Ct. 1464.
317 *Id*.
318 *Id*.
319 *Id*.
320 *Id*. at 1471.
321 *Id*.
322 *Reagan Nat'l Advert.*, 142 S. Ct. at 1472.

sign's relative location, the on/off premises distinction in the Austin Sign Code is similar to ordinary time place or manner restrictions.[323]

The *Reagan National Advertising* Court noted that First Amendment jurisprudence may require some evaluation of speech yet still remain content neutral.[324] The Court cited First Amendment solicitation cases which hold that the regulation of the time, place and manner of solicitation, which is protected under the First Amendment, is lawful even though you have to read or hear the speech first. The regulation of solicitation survives First Amendment scrutiny provided such regulation does not discriminate based on the topic, subject matter or viewpoint.[325]

Reed itself held that it is regulations that discriminate based on the "topic discussed or the idea or message expressed that are content based."[326] The Court flatly rejected Reagan National's argument that all function and purpose-based regulations are content-based by stating that such a reading of *Reed* would contravene numerous precedents, including cases addressing off-premises signs, which *Reed* did not intend to do.[327] In briefly addressing the dissent authored by Justice Thomas and joined by Justices Gorsuch and Barrett, the Court stated:

> Contrary to its accusations, we do not nullify *Reed's* protections . . . Nor do we cast doubt on any of our precedents recognizing examples of topic or subject-matter discrimination as content based. We merely apply those precedents to reach the "commonsense" result that a location-based and content-agnostic on/off premises distinction does not, on its face, single out specific subject matter for differential treatment.[328]

The Court further responded to the dissent in holding that the dissenting opinion would render over a half century of off-premises sign regulation by tens of thousands of jurisdictions as constitutionally invalid despite the Court having countenanced such regulation over those years.[329]

Despite the Court finding the City of Austin's off-premises sign regulations to be facially content-neutral, the Court noted that if there is evidence of an impermissible purpose or justification behind a facially content-neutral regulation, such a restriction may be deemed to be content-based.[330] Further, the Code's restrictions must survive intermediate scrutiny, which requires the restriction to be narrowly tailored to serve a significant

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323 *Id.* at 1473.
324 *Id.* at 1473.
325 Heffron v. Intl. Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981).
326 *Reed*, 576 U.S at 171.
327 *Reagan Nat'l Advert.*, 142 S. Ct. at 1472.
328 *Id.* at 1475.
329 *Id.*
330 *Id.* at 1475 (citing *Reed*, 576 U.S. at 164).

governmental interest.[331] The Court reversed the holding of the Fifth Circuit and remanded the case for further review.[332]

VI. POST-*REED* AND POST-*REAGAN NATIONAL* SIGN REGULATION BY LOCAL GOVERNMENTS

Since *Reed*, local governments have attempted to modify sign regulations to meet the perceived "need to read test."[333] Prior to *Reed*, the U.S. Supreme Court and other courts considered the intent of sign regulations and only struck down regulations for being content based when they were adopted to prevent speech with which the government disagreed."[334] Because the "need to read test" subjects many reasonable regulations to strict scrutiny, post-*Reed* sign codes have begun to regulate non-commercial signs using time, place and manner restrictions such as:

> -Location, such as commercial vs. residential locations or zoning districts;
> -Size and height;
> -Type of structure;
> -Use of materials;
> -Maximum number;
> -Lighted vs. unlighted signage;
> -Fixed message signs vs. signs with changing messages;
> -Moving parts; and
> -Portability.[335]

Rather than regulating based on the need to read a sign's message, *Reed*-compliant sign codes regulate based on the type of sign such as: signs erected by the city; flags; signs being carried by people; window signs; site signs; yard signs; and banners.[336] Despite the holding in *Reagan National*, communities should still stay away from labeling signs such as real estate signs, construction signs, or political signs. Thus, while more challenging to limit signage and thus effectively prevent sign clutter, local governments can still regulate signs with a narrower, more content-neutral focus.[337]

The Supreme Court's decision in *Reagan National Advertising* helps clarify *Reed* and lighten the burden of its holding on local governments across the country in their attempt to regulate signage to preserve the aesthetics of a community and to promote public safety. In concurring

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331 *Id.* at 1475-1476 (citing *Ward*, 491 U.S. at 791).

332 *Id.* at 1476.

333 *Reed*, 576 U.S at 171.

334 *Id.*

335 *Id.*

336 *Id.*

337 Gerald E. Dahl, et al., *New Rules for Your Sign Code*, CML (2015), https://www.cml.org/docs/default-source/uploadedfiles/issues/planning/signs-reed-article.pdf?sfvrsn=1eada221_0.

opinions to the majority holding in *Reed*, Justices Kagan, Breyer, Ginsburg, Alito, Kennedy and Sotomayor all indicated that they were open to finding reasonable sign regulations to be content neutral.[338] Justice Kagan, in her concurring opinion in *Reed*, also expressed a belief that the application of the majority holding in *Reed* will result in most signs being struck down as failing strict scrutiny, and municipalities will be resigned to the "resulting clutter."[339] The Court can use its holding in *Reagan National Advertising* to cement Justice Alito's proposed analysis of content-neutral sign regulations into its First Amendment jurisprudence.

Based on the Court's holding in *Reagan National Advertising*, local governments across the country can regulate signs based on their function or purpose, such as off-premises vs. on-premises signs. Preserving the aesthetics of communities by preventing sign clutter will become a more manageable task.

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338 *See Reed*, 576 U.S. at 174, 186 (Alito, J., concurring; Kagan, J., concurring).

339 *Id.* at 181.