THE TRUE IMPACT OF *REED V. TOWN OF GILBERT* ON SIGN REGULATION

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I. INTRODUCTION

In 2015, the Supreme Court appeared to issue a crushing blow against local governments with typical and reasonable sign regulations. In *Reed v. Town of Gilbert*,[1] a divided Supreme Court held that the Town of Gilbert's sign code violated the First Amendment because it was "content based" and failed strict scrutiny review as "hopelessly underinclusive."[2] In doing so, the majority resolved a circuit split by adopting a "clear and firm rule governing content neutrality" analysis over a pragmatic and flexible rule.[3] Now, if a law is content based on its face, it must satisfy strict scrutiny, even if it "may seem like a perfectly rational way to regulate signs" and is significantly unlikely to censor speech.[4] *Reed* placed many sign regulations in doubt because, as *Reed* demonstrates, strict scrutiny is an exacting standard that is often insurmountable.[5]

Years later, the dust has settled, and the effect of *Reed*'s holding on government sign regulations is clearer. This Article reveals the true

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1. 135 S. Ct. 2218 (2015).
2. *Id.* at 2227–32.
3. *Id.* at 2231. The "clear and firm" rule was moderated by the concurring opinion authored by Justice Alito.
4. *Id.*
5. *Id.* at 2226–32. Although the Court does point out, "[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny." *Id.* at 2232.

scope of the Court's holding in light of subsequent developments in caselaw. In particular, this Article addresses two issues that naturally flowed from *Reed*, one of which has led to another circuit split.

First, this Article explains that *Reed* did *not* mandate a "need-to-read" test that would effectively render the vast majority of sign regulations content based (and likely to fail strict scrutiny). Even if an enforcement officer must read a sign to determine whether the regulation applies to it, this does not necessarily mean that the regulation is content based on its face. Any contrary reading of *Reed* ignores the underlying facts and Justice Alito's concurring opinion, which is critical to understand the actual reach of the Court's holding.

Second, this Article explains that the commercial speech doctrine remains intact after *Reed*. Therefore, even if a regulation of commercial signage is categorized as content based after *Reed*, local governments need not pass heightened strict scrutiny review to satisfy the First Amendment.

In sum, local governments still maintain considerable authority to enact reasonable sign regulations without violating the First Amendment. A proper understanding of *Reed*'s holding illustrates that the Court did not deliver the damaging blow many originally feared. It was more of a push for local governments to revisit their own sign codes, sharpen their regulatory pencils, and eliminate content-based distinctions among different kinds of noncommercial signage.

To aid in the process, this Article also offers some general guidelines or best practices for sign regulation after *Reed*. Although it is neither possible nor desirable to offer a sign code that can never be challenged, following these generally accepted practices and guidelines can substantially mitigate risk without foregoing important government objectives.

II. THE IMPORTANCE OF CONTENT NEUTRALITY

The First Amendment prohibits the enactment of laws that abridge freedom of speech.[6] The First Amendment is applicable to the states, including their local governments, through the Due Process Clause of the Fourteenth Amendment.[7] In its simplest form, "the First Amendment

6. U.S. CONST. amend. I.
7. Gitlow v. New York, 268 U.S. 652, 666 (1925).

means that government has no power to restrict expression *because of* its message, its ideas, its subject matter, or its content."[8] Thus, to assess whether a regulation of speech violates the First Amendment, the analysis should always begin by determining whether the regulation is "content based" or "content neutral."[9] However, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task."[10]

In general, a law is content based if it restricts a particular type of speech because of the topic discussed or the idea or message expressed.[11] Conversely, a content-neutral law applies to all expression without regard to its substance.[12] For example, "time, place, and manner" restrictions are generally considered to be content neutral because they limit only the way in which information is communicated, rather than the information itself.[13]

The distinction between content-based and content-neutral laws is critical (and likely outcome-determinative) because it dictates the level of scrutiny that the reviewing court must apply.[14] If the court finds that the law is content based, the law is presumptively unconstitutional and subject to strict scrutiny review.[15] To survive strict scrutiny, the government must prove that the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest.[16] In contrast, content-neutral laws are subject to intermediate scrutiny, which asks

8. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added).

9. *Reed*, 135 S. Ct. at 2228.

10. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

11. *Compare* content neutrality as defined in *Reed*, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."), *with* viewpoint neutrality as defined in *Turner*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.").

12. *Turner*, 512 U.S. at 643 ("By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 122 n.* (1991) ("[S]tatutes [are] content neutral where they were intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others.").

13. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 n.8 (1984) ("Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression."). However, a problem can arise based upon how time, place, and manner restrictions are drafted. For example, one can transform an acceptable regulation into one that raises constitutional questions by creating exceptions and using defined terms in such a way that the regulation may be questioned as content based.

14. *Reed*, 135 S. Ct. at 2228.

15. *Id.* at 2226, 2228.

16. *Id.* at 2226.

whether the law is narrowly tailored to serve a substantial government interest.[17]

Although the two standards sound similar, courts are significantly more likely to uphold laws under intermediate, rather than strict, scrutiny.[18] In fact, strict scrutiny is such a high standard that very few laws passed it before *Reed*.[19] As a result, "the pivotal point in the doctrinal structure is the content analysis."[20]

III. REED V. TOWN OF GILBERT

A. Factual and Procedural Background

In *Reed*, the Supreme Court invalidated the Town of Gilbert's ("Town") sign code because it was content based and did not survive strict scrutiny.[21] The Town's sign code generally "prohibit[ed] the display of outdoor signs anywhere within the Town without a permit, but it then exempt[ed] 23 categories of signs from that requirement."[22] The majority specifically discussed three categories of exempt signs:

> (1) *Ideological Signs*: any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency."[23]

17. *Turner*, 512 U.S. at 661–62 (applying intermediate scrutiny to a content-neutral regulation); Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.' In other words, the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'").

18. *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 238 (2012) (stating that "almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny").

19. *See Reed*, 135 S. Ct. at 2236 (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment) ("[I]t is the 'rare case[ ] in which a speech restriction withstands strict scrutiny.'"); *id.* at 2234 (Breyer, J., concurring in the judgment) (stating that applying strict scrutiny "lead[s] to almost certain legal condemnation"). *But see* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding regulation of display of signs and other campaign activity near polling places, a content-based restriction on political speech in a public forum, despite strict scrutiny review, due to the importance and long-established history of regulation to protect voting rights and the integrity of elections).

20. Kendrick, *supra* note 18, at 238.

21. *Reed*, 135 S. Ct. at 2227–32.

22. *Id.* at 2224.

23. *Id.* (citation omitted).

> (2) *Political Signs*: any "temporary sign designed to influence the outcome of an election called by a public body."[24]
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> (3) *Temporary Directional Signs Relating to a Qualifying Event*: any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event,'" which was defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[25]

According to the majority, the Town's sign code treated certain types of signs more favorably than other types.[26] For example, Ideological Signs were permitted to be up to twenty square feet and to be placed in all zoning districts without time limits.[27] Political Signs could be up to sixteen square feet on residential property, thirty-two square feet on other property, and had time limitations.[28] Temporary Directional Signs were permitted to be placed on private property or public rights of way, but could be no larger than six feet, were limited to four per property, and had much stricter time limitations than Political Signs.[29]

In *Reed*, a small displaced church that rented various locations for its services, and its pastor, Clyde Reed, argued that the Town's sign code abridged their freedom of speech in violation of the First and Fourteenth Amendments.[30] The church desired to advertise the time and location of their Sunday church services by using Temporary Directional Signs throughout the Town.[31] However, the Town cited the church (twice) for exceeding the time limitations and for failing to include the date of the event on the signs.[32] When the church was denied an accommodation, the petitioners filed a federal lawsuit seeking to enjoin enforcement of the sign code.[33]

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24. *Id.* (citation omitted).
25. *Id.* at 2225 (citation omitted).
26. *Id.* at 2224–25.
27. *Id.* at 2224.
28. *Id.* Political Signs could only be displayed up to sixty days before a primary election and up to fifteen days following a general election. *Id.* at 2225. The Court failed to take into consideration that the Town was restricted by Arizona state law in its regulation of these signs.
29. *Id.* at 2225. The Town argued that Temporary Directional Signs could only be displayed "no more than [twelve] hours before the 'qualifying event' and no more than [one] hour afterward," because that was the timeframe in which they were relevant in guiding drivers to the advertised events. *Id.*
30. *Id.* at 2225–26.
31. *Id.* at 2225.
32. *Id.*
33. *Id.* at 2225–26.

The Town succeeded in both the district court and the court of appeals before it lost in the U.S. Supreme Court. The district court first denied petitioner's motion for a preliminary injunction, and the Ninth Circuit affirmed.[34] The district court then entered summary judgment in the Town's favor, and the Ninth Circuit again affirmed.[35] The Ninth Circuit held that the Town's sign categories were content neutral and passed intermediate scrutiny.[36] According to the Ninth Circuit, the Town "'did not adopt its regulation of speech because it disagreed with the message conveyed' and its 'interests in regulat[ing] temporary signs are unrelated to the content of the sign.'"[37]

In a 6–3 opinion, the Supreme Court reversed, holding that the Town's sign code was content based and not narrowly tailored to serve a compelling governmental interest.[38] Justice Thomas authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor.[39] Justice Alito separately authored a concurring opinion, which was joined by Justices Kennedy and Sotomayor, representing the views of half of the majority.[40] Justices Breyer, Kagan, and Ginsburg concurred in the judgment, but they fundamentally disagreed with the majority's rationale.[41]

In effect, the decision was 9–0 against the Town because every opinion indicated that the Town's regulations failed to meet the mark. However, the Justices differed on the rationale to such an extent that Justice Thomas' majority opinion and Justice Alito's concurring opinion together form the holding, while Justice Kagan's and Justice Breyer's concurrences are akin to dissents from the rationale of the majority.[42]

B. The Majority Opinion

1. The Town's Sign Code Was Content Based on Its Face.

The majority found that the Town's sign code was content based on its face because the various restrictions that applied to any given sign

34. *Id.* at 2226.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 2227.
39. *Id.* at 2223.
40. *Id.*
41. *Id.* at 2239 (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment).
42. *See infra* pt. III.C–E.

"depend[ed] entirely on the communicative content of the sign."[43] As a result, "an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it."[44] For example, the majority explained:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas.[45]

Previously, the majority acknowledged that laws that define regulated speech by its function or purpose are a more subtle form of content discrimination.[46] Nevertheless, the majority stated that such a facial distinction is "drawn based on the message a speaker conveys, and, therefore, [is] subject to strict scrutiny."[47]

2. Because the Town's Sign Code Was Content Based on Its Face, It Was Subject to Strict Scrutiny.

The majority found that the Ninth Circuit erred by applying intermediate scrutiny because it "skip[ped] the crucial first step in the content-neutrality analysis," which is "determining whether the law is content neutral *on its face*."[48] According to the majority, if a law is content based on its face, the government's purpose for enacting the law is not even relevant.[49] The majority stated 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."[50] The majority reasoned that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future

43. *Reed*, 135 S. Ct. at 2227.
44. *Id.* at 2226.
45. *Id.* at 2227.
46. *See id.* ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.").
47. *Id.*
48. *Id.* at 2228 (emphasis added).
49. *Id.*
50. *Id.* (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

government officials may one day wield such statutes to suppress disfavored speech."[51]

The majority also rejected the Ninth Circuit's more flexible application of the content neutrality analysis. The Ninth Circuit reasoned that the Town's sign code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment," and because, for purposes of applying the sign code, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."[52] However, the *Reed* majority stated that "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[53] According to the majority, government discrimination among viewpoints is merely a "more blatant" and "egregious form of content discrimination."[54]

Additionally, the majority rejected the Ninth Circuit's characterization of the sign code distinctions "as turning on 'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'"[55] The majority stated that even if the sign code were speaker-based or dependent on whether an event was occurring, which it was not, this would not automatically render the distinctions content neutral.[56] The majority explained that "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.'"[57]

3. The Town's Sign Code Did Not Pass Strict Scrutiny.

Having determined that the Town's sign code was content based due to the distinctions that it drew among different kinds of temporary noncommercial speech, the majority then proceeded to determine whether the sign code's distinctions furthered a compelling

51. *Id.* at 2229.
52. *Id.* at 2229.
53. *Id.* at 2230.
54. *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
55. *Id.* at 2230.
56. *Id.* at 2230–31.
57. *Id.* at 2231 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)).

governmental interest and were narrowly tailored to that end. To meet its burden, the Town offered two governmental interests at stake: (1) "preserving the Town's aesthetic appeal;" and (2) "traffic safety."[58] Assuming that these interests would qualify as "compelling" governmental interests, the majority found that the sign code's distinctions nevertheless "fail[ed] as hopelessly underinclusive."[59]

Regarding aesthetics, the majority noted that "temporary directional signs are 'no greater an eyesore' than ideological or political ones," yet "the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones."[60] Similarly, the majority found that the Town did not show that limiting Temporary Directional Signs was necessary to eliminate threats to traffic safety while limiting other types of signs was not.[61] Accordingly, the Town plainly failed to meet its burden to demonstrate that the sign code's distinctions were narrowly tailored to further any compelling government interest.

C. Justice Alito's Concurring Opinion

Justice Alito, along with Justices Sotomayor and Kennedy (together comprising half of the six-Justice majority), joined the majority opinion but added "a few words of further explanation."[62] Justice Alito stated that content-based laws justify the application of strict scrutiny "because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint."[63] Nevertheless, he stated, "[t]his does not mean . . . that municipalities are powerless to enact and enforce reasonable sign regulations."[64] Justice Alito then provided a non-exhaustive list of "rules that would not be content based:"

- Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below;
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings;

58. *Id.* at 2231.
59. *Id.*
60. *Id.* (citation omitted).
61. *Id.* at 2232.
62. *Id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).
63. *Id.*
64. *Id.*

- Rules distinguishing between lighted and unlighted signs;
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
- Rules that distinguish between the placement of signs on private and public property;
- Rules distinguishing between the placement of signs on commercial and residential property;
- Rules distinguishing between on-premises and off-premises signs;
- Rules restricting the total number of signs allowed per mile of roadway; and
- Rules imposing time restrictions on signs advertising a one-time event.[65]

Additionally, Justice Alito stated that "government entities may also erect their own signs consistent with the principles that allow governmental speech."[66] For example, "[t]hey may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots."[67] Thus, when "[p]roperly understood," he concluded, "today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."[68]

D. Justice Breyer's Concurring Opinion

Justice Breyer disagreed that content discrimination should *always* trigger strict scrutiny. "That is because virtually all government activities involve speech, many of which involve the regulation of speech. . . . And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[69] He suggested that the majority's

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 2233–34.
69. *Id.* at 2234 (Breyer, J., concurring in the judgment). Justice Breyer provided examples of the typical governmental regulations of speech that could be called into doubt by *Reed*'s over-emphasis on content discrimination, including "governmental regulation of securities," "energy conservation labeling-practices," "prescription drugs," "doctor-patient confidentiality," "income tax statements," "commercial airplane briefings," and "[hand-washing] signs at petting zoos." *Id.* at 2234–35.

solution would "water[] down the force of" strict scrutiny review.[70] "The better approach," Justice Breyer concluded,

> is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.[71]

Justice Breyer conceded that such an approach is more challenging to implement and lacks "the simplicity of a mechanical use of categories."[72] The virtue of his approach is that it "permit[s] the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators."[73] In any event, Justice Breyer found that the Town's sign code did not pass even his lesser standard of review.[74]

E. Justice Kagan's Concurring Opinion

Justice Kagan likewise questioned the majority's rationale for applying strict scrutiny to every content-based law. Justice Kagan noted that "[c]ountless cities and towns across America have adopted [entirely reasonable] ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter" but do not implicate First Amendment concerns.[75] After providing several examples, including the federal Highway Beautification Act, Justice Kagan stated that "many sign ordinances of that kind are now in jeopardy."[76]

Importantly, Justice Kagan would not have addressed the level-of-scrutiny question in the first place. Because the Town's distinctions

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70. *Id.* at 2235. In the five years since *Reed* was decided, Justice Breyer's prediction has proven correct. *See, e.g.*, *In re* Subpoena 2018R00776, 947 F.3d 148, 151 (3d Cir. 2020) (upholding, after strict scrutiny, a prior restraint—a grand jury's nondisclosure order—against a subpoena recipient forbidding it from notifying anyone of the existence of its data request); *In re* Nat'l Sec. Letter, 863 F.3d 1110, 1127 (9th Cir. 2017) (same); Wolfson v. Concannon, 811 F.3d 1176, 1186 (9th Cir. 2016) (en banc) (upholding restrictions on judicial candidate fundraising after applying strict scrutiny).

71. *Reed*, 135 S. Ct. at 2235.

72. *Id.* at 2236.

73. *Id.*

74. *Id.*

75. *Id.* (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment).

76. *Id.*

between directional signs and others did not pass strict scrutiny, intermediate scrutiny, "or even the laugh test," she explained, "there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption."[77]

IV. THE SCOPE OF REED*'S HOLDING*

Reed is remarkable because it both clarifies and obscures content neutrality analysis. On the one hand, *Reed* apparently resolved a circuit split over the appropriate weight to afford a government's regulatory purpose during the analysis.[78] Specifically, as some commentators have suggested, *Reed* clarified that the First Amendment demands content neutrality in both letter *and* spirit, but that spirit is merely a secondary consideration.[79]

Prior to *Reed*, this was not at all clear. In some cases, like in *Reed*, the Court appeared to apply an unforgiving rule against content-based distinctions.[80] However, in other cases, the Court appeared open to the possibility of applying a lesser standard of scrutiny to laws that may be technically content based but were passed in good faith, based on the function or purpose of the sign, and had no real-world potential of restricting protected expression.[81] In *Ward v. Rock Against Racism*,[82] for example, the Court even stated that "[t]he government's purpose is the *controlling* consideration, . . . even if [the law] has an incidental effect on some speakers or messages but not others."[83]

Of course, this apparent discrepancy led to disagreement among the circuits. Some circuits applied a strict test to determine content

77. *Id.* at 2239.

78. *See* Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 573–78 (2015).

79. *Id.* at 586.

80. *See, e.g.*, City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

81. *See Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in the judgment); *id.* at 2238 (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment) ("Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one."); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 431 (1992) (Stevens, J., with White and Blackmun, JJ., concurring in the judgment) ("Whatever the allure of absolute doctrines, it is just too simple to declare expression 'protected' or 'unprotected' or to proclaim a regulation 'content based' or 'content neutral.'").

82. 491 U.S. 781 (1989).

83. *Id.* at 791 (emphasis added).

neutrality, whereas most others took a pragmatic, case-by-case approach.[84] For example, in *Reed*, the Ninth Circuit clearly applied the more pragmatic approach.[85] However, in *Solantic, LLC v. City of Neptune Beach*, the Eleventh Circuit applied the more strict approach.[86]

In *Reed*, the majority squarely rejected a case-by-case approach in favor of a bright-line rule. In this regard, *Reed* clarified the appropriate methodology and weight to afford to a government's regulatory purpose. Now, as Justice Thomas explained, the first step of the content neutrality analysis is always to determine whether the law is content neutral on its face.[87] If the law is not, then the government's purpose is irrelevant, and the law is presumptively unconstitutional and automatically subject to strict scrutiny review. But if the law is content neutral on its face, then the court may also consider the government's regulatory purpose to determine whether the law is, in fact, content neutral. After *Reed*, the absence of an invidious purpose alone is not enough to satisfy the First Amendment, and local governments clearly face more stringent review of any content-based regulation.

On the other hand, the Alito concurrence blurs the picture by, for example, blessing event-based signage that the majority opinion clearly repudiates.[88] *Reed* has also led to much confusion over the first step of the analysis because *Reed* did not overrule any long-standing precedent, such as *Ward*. In particular, reasonable minds now disagree as to the appropriate test to determine whether a law is content neutral on its face and whether the absolutist approach adopted by the *Reed* majority applies in other related contexts. Fortunately, subsequent developments in the law have shed some light on these issues.

A. Is There a "Need-to-Read" Test to Determine Content Neutrality?

Immediately following *Reed*, many local governments shared Justice Kagan's concerns because they had sign codes that included distinctions based upon function or purpose, but that may now be argued to lack sufficient justification and precision to pass strict

84. *Compare* Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011), *and* Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005), *with* Brown v. Town of Cary, 706 F.3d 294, 301 (4th Cir. 2013), Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012), Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380, 389 (3d Cir. 2010), H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622–23 (6th Cir. 2009), *and* Outdoor Advert., Inc. v. City of Oakland, 506 F.3d 798, 803–04 (9th Cir. 2007).

85. *See Reed*, 135 S. Ct. at 2226.

86. 410 F.3d at 1258.

87. *Reed*, 135 S. Ct. at 2228.

88. *Id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

scrutiny. Although these sign codes may be "entirely reasonable" and present no actual threat to protected speech, "an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it."[89] Thus, if that is the test for determining whether a law is content based after *Reed*, most local governments "will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter."[90]

1. No Need-to-Read Test

Notwithstanding some language in *Reed*, the majority of circuits that have considered the issue have declined to adopt or utilize a need-to-read test after *Reed*. In *Recycle for Change v. City of Oakland*,[91] for instance, the Ninth Circuit found a city ordinance regulating unattended donation collection boxes ("UDCBs") to be content neutral on its face, even though "an officer must inspect a UDCB's message to determine whether it is subject to the Ordinance."[92] In that decision, the Ninth Circuit expressly rejected the "'officer must read it' test" because it "cuts too broadly," and, "[i]f applied without common sense, this principle would mean that every sign, except a blank sign, would be content based."[93] Although the Ninth Circuit relied on its decision that was reversed by *Reed*, it stated that the Supreme Court's decision rested on other grounds and "did not adopt, or even discuss, the merits of the

89. *Id.* at 2226 (majority opinion).

90. *Id.* at 2237 (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment).

91. 856 F.3d 666 (9th Cir. 2017).

92. *Id.* at 670. Importantly, the City of Oakland's UDCB regulation turned on the unattended nature of the boxes, not on whether their sponsors were charitable, a feature that has doomed some other UDCB regulations. *Compare id.* at 673 ("In sum, the Ordinance restricts the boxes themselves, as collection devices for discarded material. Although the function of the boxes requires that they contain a message explaining their function, the Ordinance is indifferent with regard to the nature of that explanation, the inducements provided for donations, or the uses to which the donations will be put. The Ordinance is therefore content neutral to the extent it regulates speech or expressive activity at all."), *with* Planet Aid v. City of St. Johns, 782 F.3d 318, 329–30 (6th Cir. 2015) (striking viewpoint-neutral regulation because it required enforcing officer to evaluate whether the box solicited charitable donations in order to decide whether it was banned, and finding that it was not narrowly tailored because it was underinclusive).

93. *Recycle for Change*, 856 F.3d at 671 (quoting Reed v. Town of Gilbert, 587 F.3d 966, 978 (9th Cir. 2009)).

'officer must read it' test as a proper content-neutrality analysis."[94] Notably, the Supreme Court declined to review that decision.[95]

Similarly, in *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*,[96] the D.C. Circuit upheld a law that allowed a posted sign to remain on a public lamppost for up to 180 days, but required a sign relating to an event to be removed within 30 days after the event, whether the 180-day period had expired or not.[97] The court stated, "the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based."[98] The court specifically distinguished the case from *Reed* because, unlike the Town's sign code, which "made content-based distinctions among different types of issues and events, and even different types of signs relating to the same event," the District of Columbia law treated "*all* event-related signs alike."[99] While this holding seems difficult to reconcile with the far-reaching rhetoric of the majority opinion in *Reed*, the Supreme Court again declined review.[100]

Both *Recycle for Change* and *Act Now* are supported by Justice Alito's concurrence in *Reed*. To "properly underst[and]" the true scope of *Reed*'s holding, it is important to carefully consider the Alito concurrence.[101] Normally, a concurring opinion has no precedential value and is entitled to little or no weight. However, in some circumstances, concurring opinions deserve special significance. For example, the Supreme Court itself has recognized that when it is divided, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[102] Additionally, lower courts will often treat a concurrence as authoritative when the concurring Justice is the "swing" vote for the majority.[103]

94. *Id.* at 671 n.2.
95. Recycle for Change v. City of Oakland, 138 S. Ct. 557, 557 (2017).
96. 846 F.3d 391 (D.C. Cir. 2017).
97. *Id.* at 396.
98. *Id.* at 404.
99. *Id.* at 405 (emphasis added).
100. Muslim Am. Soc'y Freedom Found. v. District of Columbia, 138 S. Ct. 334, 334 (2017).
101. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., with Kennedy and Sotomayor, JJ., concurring).
102. Marks v. United States, 430 U.S. 188, 193 (1977).
103. *See, e.g.*, United Transp. Union v. Long Island R.R. Co., 634 F.2d 19, 24 (2d Cir. 1980); Uzzel v. Friday, 591 F.2d 997, 999 (4th Cir. 1979); United States v. Liddy, 478 F.2d 586, 586 (D.C. Cir. 1972).

In *Reed*, Justice Alito's concurring opinion—joined by Justices Kennedy and Sotomayor—is entitled to great weight, if not authoritative weight, with respect to content-neutrality analysis. Not only were the votes of Justices Alito, Kennedy, and Sotomayor all necessary to reach a majority,[104] but their discussion of content-based laws was also significantly narrower than the majority's.[105] In the majority opinion, it was not necessary for Justice Thomas to describe a need-to-read or function/purpose test because the Town's sign code satisfied the traditional definition of content-based laws.[106] As Justice Thomas explained, the Town's sign code subjected various categories of signs to different restrictions based upon the message communicated by the sign. Indeed, the restrictions in the Town's sign code "depend[ed] entirely" on whether the sign displayed a message directing the public to an event, was designed to influence the outcome of an election, or communicated an ideological message or idea.[107]

In contrast to the majority opinion, Justice Alito's concurring opinion carefully avoids any mention of a need-to-read or function/purpose test. Importantly, Justice Alito's concurring opinion begins by offering the policy rationales that support a bright-line rule for content-based laws triggering strict scrutiny, which is the most salient feature of the majority's holding.[108] Moreover, in that discussion, Justice Alito described content-based laws as "[l]imiting speech based on [their] 'topic' or 'subject,'" which is consistent with the traditional definition of content-based laws.[109]

Justice Alito then clarified that, despite the Court's holding, municipalities are still able to enact and enforce reasonable sign regulations and provided many examples of content-neutral laws.[110] At least two of those examples would regularly fail a need-to-read or function/purpose test: (1) "Rules imposing time restrictions on signs

104. This Article would be remiss not to mention that two members of the majority, including one member of the Alito concurrence—Justice Scalia and Justice Kennedy—are no longer with the Court. It remains to be seen what impact the Justices who replaced them—Justice Gorsuch and Justice Kavanaugh, respectively—will have on this area of First Amendment law.

105. *See generally Reed*, 135 S. Ct. at 2233–34 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

106. *Id.* at 2228 (majority opinion). Content-based laws are traditionally defined as "those [laws] that target speech based on its communicative content." *Id.* at 2226.

107. *Id.* at 2227.

108. *Id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

109. *Id.*

110. *Id.*

advertising a one-time event;" and (2) "Rules distinguishing between on-premises and off-premises signs."[111] Justice Alito explained that "[r]ules of this nature do not discriminate *based on topic or subject* and are akin to rules restricting the times within which oral speech or music is allowed."[112] Again, this description was entirely consistent with the traditional definition of content-based laws.

2. Need-to-Read Test

In contrast, the Sixth Circuit appears to have embraced a need-to-read test. Most recently, in *Thomas v. Bright*,[113] the court struck down Tennessee's Billboard Act because it included an on-premises exception that was deemed content based and therefore failed strict scrutiny.[114] Like the federal Highway Beautification Act, the Tennessee Billboard Act included a general prohibition of all outdoor signage within 660 feet of a public roadway without a state permit.[115] However, unlike the federal Highway Beautification Act, the Tennessee Act included an "on-premises" exception for signs "'advertising activities conducted on the property on which [the sign is] located.'"[116] While Justice Alito's *Reed* concurrence accepts the on-premise/off-premise distinction, the Sixth Circuit found that this distinction was *clearly* a content-based "restriction" (via denial of the exception) because the Tennessee official must read the message written on the sign in order to determine whether it is on-premises or off-premises.[117] To illustrate, the court

111. *Id.*; *see also id.* at 2237 n.* (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment) ("Even in trying (commendably) to limit today's decision, Justice Alito's concurrence highlights its far-reaching effects. According to Justice Alito, the majority does not subject to strict scrutiny regulations of 'signs advertising a one-time event.' But of course it does.") (citation omitted).

112. *Id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring) (emphasis added).

113. 937 F.3d 721 (6th Cir. 2019).

114. *Id.* at 738. *Compare* Wagner v. City of Garfield Heights, 675 F. App'x 599, 604 (6th Cir. 2017) ("[A] regulatory scheme [that] requires a municipality to examine the content of a sign to determine which ordinance to apply . . . appears to run afoul of *Reed*'s central teaching.") (quotations omitted), *with* Sweet Sage Cafe, LLC v. Town of N. Redington Beach, No. 8:15-CV-2576-T-30JSS, 2017 WL 385756, at *8 (M.D. Fla. Jan. 27, 2017) (finding exemptions from permitting were content based because the town's enforcement officer must evaluate content of sign to determine whether an exemption applies), *and* Int'l Outdoor, Inc. v. City of Troy, No. 17-10335, 2017 WL 2831702, at *3–4 (E.D. Mich. June 30, 2017) (finding exceptions from permitting for flags, special events, political campaign signs, and civic events were content based).

115. *Thomas*, 937 F.3d at 725.

116. *Id.* (citation omitted).

117. *Id.* at 729 ("The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech. Although we discuss this at length, this is neither a close call nor a difficult question. If not for Tennessee's proffered disputes, we would label this 'indisputable.'"). It

stated, "a sign written in a foreign language would have to be translated (and interpreted) before a Tennessee official could determine whether the on-premises exception would apply or the sign violated the Act. There is no way to make those decisions without understanding the content of the message."[118]

Although Tennessee's Billboard Act required an official to read the sign to determine whether the on-premises exception applied, the Act did not subject various categories of signs to different restrictions based solely upon the message communicated by the sign, as in *Reed*. Rather, Tennessee's exception relied on a classic distinction between on-premises and off-premises signs, which was expressly approved by Justice Alito's concurring opinion.[119] By requiring a nexus to the property, the exception did not *discriminate* based upon topic or subject; it regulated by location in a manner permitted by *Reed*.[120]

Interestingly, in *Thomas*, Tennessee argued that a law is content based only if it "depends entirely" on the content of a message.[121] However, the court rejected Tennessee's argument in part because "that language was a factual statement describing the defendant's municipal code, not part of *Reed*'s analysis or holding."[122] The Sixth Circuit's statement is not accurate; the Supreme Court definitely *held* that the Town's sign code was content based because the "restrictions in the Sign Code . . . depend[ed] entirely on the communicative content of the sign."[123] Moreover, the only statement Justice Thomas made regarding a need-to-read test is found in the procedural background section of the opinion, not part of *Reed*'s analysis or holding.[124] Thus, under the Sixth Circuit's own reasoning, that statement was entitled to little weight.[125]

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is interesting to note the inflammatory facts recited in this case and consider what impact they may have had on the outcome. *See infra* text accompanying note 180. First Amendment sign cases are particularly sensitive to bad facts; once a government has demonstrated what might be termed bad faith, the federal courts seem to go out of their way to find problems with the regulation at issue.

118. *Thomas*, 937 F.3d at 730.

119. The court acknowledged Justice Alito's concurring opinion, but nevertheless stated, "[t]here might be many formulations of an on/off-premises distinction that are content-neutral, but the one before us is not one of them." *Id.* at 733.

120. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233–34 (2015) (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

121. *Thomas*, 937 F.3d at 731.

122. *Id.* The court also stated that the law was nonetheless content based, even if it had some content-neutral features. *Id.*

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

124. *Id.* at 2226.

125. *See Thomas*, 937 F.3d at 731.

To be sure, whether an enforcement officer must examine the content of a sign to determine whether a code violation has occurred does appear to be an appropriate analytical factor.[126] If a sign code discriminates based on topic or subject, it will usually be necessary for the enforcement officer to read it in order to determine whether a violation occurred. However, it does not follow that *every* sign code that requires an enforcement officer to examine the content of a sign is content based such that strict scrutiny should apply. There are many sign codes that draw distinctions based upon function, purpose, or location, but that do not restrict expression because of the topic discussed or the idea or message expressed.[127] Thus, at least in this context, such a bright-line rule would lead to extreme results, including the abolition of "countless" sign codes in America.[128]

In sum, both *Recycle for Change* and *Act Now* appear to be correct for rejecting a need-to-read test as a strict rule after *Reed*. *Recycle for Change* is correct that the majority in *Reed* "did not adopt, or even discuss, the merits of the 'officer must read it' test as a proper content-neutrality analysis."[129] In fact, as stated in *Act Now*, half of the *Reed* majority *expressly* approved of laws that would directly collide with any such test.[130] Therefore, *Reed* does not appear to have impacted traditional content-neutrality analysis in this context. When the majority opinion is read in harmony with Justice Alito's concurring opinion, *Reed* held only that *if* a sign regulation is content based on its face, strict scrutiny review applies, regardless of the regulation's purpose.[131] *Reed* did not hold that every sign code is content based if an enforcement officer must read the sign to apply it.

126. *See* McCullen v. Coakley, 573 U.S. 464, 479–81 (2014).

127. *See Reed*, 135 S. Ct. at 2236 (Kagan, J., with Ginsburg and Breyer, JJ., concurring in the judgment).

128. *See id.*

129. Recycle for Change v. City of Oakland, 856 F.3d 666, 671 n.2 (9th Cir. 2017); *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

130. *See* Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 406 (D.C. Cir. 2017) ("Justice Alito's concurring opinion in *Reed* even more squarely rejects the position the organizations advance here that the distinction between event-related and other signs is itself content-based.").

131. *Reed*, 135 S. Ct. at 2228.

B. Are Content-Based Regulations of Commercial Speech Subject to Strict Scrutiny?

Following *Reed*, many local governments were also concerned about their common-sense regulations of commercial signage.[132] For First Amendment purposes, advertising via commercial signage is considered "commercial speech," which is defined as "'speech that does no more than propose a commercial transaction.'"[133] In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*,[134] the Court previously adopted a form of intermediate scrutiny for restrictions on commercial speech.[135] However, some argued that *Reed*'s bright-line rule for content-based laws placed that standard in doubt because Justice Alito's non-exclusive list of reasonable sign regulations did not specifically include regulations distinguishing between commercial and noncommercial speech.[136]

Nevertheless, essentially every court to address this issue has decided that *Reed* had no impact on the commercial speech doctrine.[137] These cases rely on the principle that the Supreme Court does not overrule itself by implication.[138] In other words, if the Supreme Court believed that the *Central Hudson* commercial speech doctrine was no longer good law after *Reed*, it would have said so in *Reed*. Yet, neither the

132. *See* Connolly & Weinstein, *supra* note 78, at 610–11.

133. Harris v. Quinn, 573 U.S. 616, 648 (2014) (quoting United States v. United Foods, Inc., 533 U.S. 405, 409 (2001)).

134. 447 U.S. 557 (1980).

135. *Id.* at 569.

136. *Compare* Sorrell v. IMS Health, Inc., 564 U.S. 552, 573–76 (2011) (also muddying the waters of the commercial speech doctrine), *with* Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 841 (9th Cir. 2017) (en banc) (rejecting the notion that *Sorrell* fundamentally altered the *Central Hudson* analysis).

137. *See, e.g.*, Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017) ("*Reed* did not relate to commercial speech, or mandatory disclosures as a part of commercial speech, and therefore did not have occasion to consider those doctrines."), *cert. denied sub nom.* Nationwide Biweekly Admin., Inc. v. Hubanks, 138 S. Ct. 1698 (2018); Cal. Outdoor Equity Partners v. City of Corona, CV 15-03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) (stating that *Reed* "does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it. *Metromedia* . . . and its progeny remain good law").

138. *See* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989) ("If a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

majority nor Justice Alito even mentioned the commercial speech doctrine, and the facts of *Reed* are limited to noncommercial signage.[139]

These decisions are further supported by two Supreme Court cases decided after *Reed*: *Matal v. Tam*[140] and *Nat'l Inst. of Family & Life Advocates v. Becerra*.[141] In those cases, the Supreme Court expressly acknowledged the continued viability of the commercial speech doctrine.[142] Furthermore, in *Matal*, Justice Thomas authored a concurring opinion that specifically advocated for strict scrutiny to apply to commercial speech regulations that discriminate based upon viewpoint; however, no other justice agreed with his position.[143] Thus, after *Matal* and *Becerra*, there can be no dispute that intermediate scrutiny still applies to regulations of commercial speech and signage, even if those regulations are arguably content based.

V. GENERAL GUIDELINES FOR SIGN REGULATION

In the aftermath of *Reed*, it is all the more important for municipal governments to periodically address their sign codes' compliance with the First Amendment.[144] In doing so, many lawyers and planners look for existing laws that they can copy or cling to as an example of what is defensible. This is a natural response considering the complexity of the jurisprudence and the financial risk of litigation,[145] which increased after *Reed*.

Nevertheless, the propriety and defensibility of sign regulations vary drastically based on the nature of the jurisdiction and its policy

139. For the same reason, both the Eleventh and Seventh Circuits have concluded that *Reed* did not affect the "secondary effects" doctrine, which permits regulations that are content based on their face to be treated as if they were content neutral and, thus, subject to intermediate scrutiny, when they are intended to curb adverse secondary effects caused by sexually oriented expression. *See* Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 703 F. App'x 929, 935 (11th Cir. 2017); BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015).

140. 137 S. Ct. 1744 (2017).

141. 138 S. Ct. 2361 (2018).

142. *See id.* at 2372 ("[O]ur precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"); *Matal*, 137 S. Ct. at 1763 ("Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed 'government-program' doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in [*Central Hudson*].").

143. *See Matal*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

144. Thomas v. Bright, 937 F.3d 721, 737–38 (6th Cir. 2019) ("[I]n the wake of *Reed*, state legislatures and municipal governments have begun to preemptively cure their signage regulations to satisfy the First Amendment.").

145. *See* 42 U.S.C. § 1988(b) (2018) (authorizing prevailing party attorney's fees for certain civil rights litigation).

goals. A regulation that is perfect for one setting could be very damaging and lead to successful challenges in another. Unfortunately, there is no "one size fits all" for sign regulations, and such an approach would leave a lot on the table in terms of achieving important governmental objectives. However, there are some general guidelines and best practices that can be tailored by jurisdiction.

A. Avoid Unnecessary Content-Based Distinctions

If there is one clear lesson from *Reed*, it is that governments should strive to avoid content-based distinctions in all noncommercial sign regulations. If the regulation is arguably content based, then it may be subject to strict scrutiny.[146] And if the regulation is subject to strict scrutiny, it is likely to fail regardless of the benign motives of the government and its minimal impact on protected speech.[147] In practice, this means that local governments should no longer utilize different sign categories for temporary noncommercial signs, such as "political" signs.[148] These distinctions subject various categories of noncommercial signs to different restrictions based upon the message communicated by the sign, which is clearly forbidden by *Reed*.

Nevertheless, content-based distinctions that are essential to traffic safety may still be maintained, even subject to strict scrutiny review. In fact, even Justice Thomas agrees that "[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny."[149] Consider, for example, an address or directory sign, which may be the difference between an ambulance finding a stroke or heart attack victim in time.

146. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227–31 (2015); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) ("Where government regulates protected speech on the basis of the substance of what is expressed, such regulation is considered content-based and is usually subject to strict scrutiny.").

147. Winkler, *supra* note 146, at 815 (finding that, in cases involving freedom of speech, government regulations have a twenty-two percent strict scrutiny survival rate).

148. *See, e.g.*, Wagner v. City of Garfield Heights, 675 F. App'x 599, 600, 607 (6th Cir. 2017) (invalidating six-square-foot limit for "political" lawn signs established by municipal ordinance as content based and "hopelessly underinclusive"); Clark v. City of Williamsburg, 388 F. Supp. 3d 1346, 1358–62 (D. Kan. 2019), *appeal filed*, Oct. 23, 2019 (invalidating code that treated political signs differently than other signs).

149. *Reed*, 135 S. Ct. at 2232.

Saving a life would certainly seem to qualify as a compelling governmental interest.

B. Avoid Unnecessary Exceptions

Local governments should also strive to avoid general prohibitions watered down by exceptions. This has been a sound principle of sign-regulation drafting since at least 1981, when San Diego's exceptions to prohibitions led to the partial invalidation of its sign regulations in *Metromedia, Inc. v. City of San Diego*,[150] because exceptions "diminish the credibility of the government's rationale for restricting speech in the first place."[151] Additionally, exceptions help challengers to articulate content-based distinctions, as evidenced in *Thomas*.[152]

Ironically, the unforgiving approach taken by the majority in *Reed* may steer local governments toward restricting more protected speech than necessary, which is antithetical to the intent of the First Amendment. In general, "the First Amendment prefers a chisel to a sledgehammer."[153] However, after *Reed*, more generic prohibitions without *any* exceptions are significantly more likely to pass constitutional muster than those with exceptions providing for more speech. For example, a rule banning *all* of a particular sign type is as much on solid ground after *Reed* as one allowing that sign type without restriction. In contrast, a rule with exceptions and nuances must be carefully drafted and may be much more likely to face a challenge, even if the exceptions were intended to promote free speech.

C. Regulation of Commercial Advertising Is Subject to Intermediate Scrutiny

As explained previously, it is generally accepted that *Reed* did not disturb the commercial speech doctrine.[154] Thus, local governments are still free to regulate commercial signs, provided the regulations can pass

150. 453 U.S. 490, 521 (1981).

151. City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994).

152. *See, e.g.*, Willson v. City of Bel-Nor, 924 F.3d 995, 1000 (8th Cir. 2019) (finding municipal sign ordinance, which prohibited any property owner from having more than one "sign" on his property, but which exempted "flags," to be content based as defined); Int'l Outdoor, Inc. v. City of Troy, 17-10335, 2017 WL 2831702, at *4 (E.D. Mich. June 30, 2017) (variance from billboard regulations; content-based examples of temporary signs with exceptions for flags, special events, and civic events); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, 8:15-CV-2576-T-30JSS, 2017 WL 385756, at *8 (M.D. Fla. Jan. 27, 2017) (content-based exemptions from permits).

153. Pesci v. Budz, 935 F.3d 1159, 1173–74 (11th Cir. 2019) (prisoner speech context).

154. *See supra* pt. IV.B.

intermediate scrutiny. The substantial governmental interests recognized as justifications for regulating commercial signs are most often traffic safety and aesthetics.[155]

It is also perfectly clear that local sign regulations may not subject noncommercial speech to greater regulatory burdens than similar commercial speech.[156] For this reason, local governments should be careful to avoid regulating commercial speech more strictly than noncommercial speech, especially if doing so would diminish the credibility of (or even undermine) the government's regulatory rationale.[157]

D. Include a Substitution Clause

For decades, courts have upheld the concept of a substitution clause as a way to protect against inadvertent favoring of commercial speech over noncommercial speech, or invidious distinctions among different types of noncommercial speech.[158] Regardless of the specifics of each sign code, these clauses enable a business owner who would be allowed to erect or maintain an onsite commercial sign to instead erect or

155. 83 AM. JUR. 2d *Zoning and Planning* § 66 (2013).

156. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425–26 (1993) (invalidating city ban on the distribution of commercial material via a small number of commercial newsracks, while allowing a substantially larger number of noncommercial newsracks to remain in the public right-of-way). As the Court emphasized:

> Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record [the city] has failed to make such a showing.

Id. at 428.

157. Grieve v. Village of Perry, 15-CV-00365-RJA-JJM, 2016 WL 4491713, at *3–4 (W.D.N.Y. Aug. 3, 2016), *report and recommendation adopted*, 15-CV-365-A, 2016 WL 4478683 (W.D.N.Y. Aug. 25, 2016) (invalidating code that allowed for display of several types of commercial signs without a permit but required permits for display of noncommercial signs). *But see* Contest Promotions, LLC v. City & Cty. of S.F., 874 F.3d 597, 602–03 (9th Cir. 2017) (rejecting a *Discovery Network* argument that the city had exempted noncommercial signs for reasons unconnected to the city's asserted interests in safety and aesthetics based on prevalence of commercial signs and other distinguishing findings).

158. *See, e.g.*, Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 902 (9th Cir. 2007); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 615 (9th Cir. 1993); Major Media of the S.E., Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986); Outdoor Media Grp., Inc. v. City of Beaumont, 702 F. Supp. 2d 1147, 1151 (C.D. Cal. 2010); Maldonado v. Kempton, 422 F. Supp. 2d 1169, 1175 (N.D. Cal. 2006); Get Outdoors II, LLC v. City of Chula Vista, 407 F. Supp. 2d 1172, 1179 (S.D. Cal. 2005); Get Outdoors II, LLC v. City of Lemon Grove, 378 F. Supp. 2d 1232, 1239 (S.D. Cal. 2005); Covenant Media of Cal., LLC v. City of Huntington Park, 377 F. Supp. 2d 828, 842 n.37 (C.D. Cal. 2005).

maintain a similar sign that contains a noncommercial message, or allow a property owner who posts a noncommercial sign to substitute a different noncommercial message without regulatory consequence.[159]

E. Regulation or Prohibition of Off-Premise (Billboard) Signs Is Permissible[160]

In *Metromedia, Inc. v. City of San Diego*,[161] seven justices previously concluded that municipalities could prohibit off-premise billboards, and most indicated that municipalities could do so without also banning on-premise commercial signs.[162] In *Reed*, Justice Alito expressly approved of rules distinguishing between on- and off-premises signs.[163] If Justice Alito's opinion is given the weight it deserves, then many municipal billboard bans are safe after *Reed*, perhaps even if they contain a limited exception for government property.[164] That said, many 1960s-era state outdoor advertising acts, with their content-based exceptions for coffee advertisements and other deficiencies, have been challenged post-*Reed*, and some have partially or totally fallen.[165]

To date, the standout (though isolated) case is *Thomas*, discussed above. However, *Thomas* has limited applicability, at least in the Eleventh Circuit. In *Thomas*, the court resolved an as-applied challenge to a restriction of *non*commercial speech.[166] This fact pattern would not

159. *See, e.g.*, *Outdoor Sys., Inc.*, 997 F.2d at 611.

160. While this Article endorses certain categories of regulation as permissible, care should be taken in drafting to avoid inadvertently introducing content-based distinctions to such regulations via definitions or exceptions. *See supra* pt. V.A–B.

161. 453 U.S. 490 (1981).

162. *Id.* at 512 (plurality); *id.* at 521 (Brennan, J., with Blackmun, J., concurring in the judgment); *id.* at 540 (Stevens, J., dissenting in part).

163. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

164. *See, e.g.*, Paramount Media Grp., Inc. v. Village of Bellwood, 13 C 3994, 2017 WL 590281, at *7, *9 (N.D. Ill. Feb. 14, 2017) (exception from billboard ban for those on village property upheld under *Central Hudson*).

165. *See* Auspro Enterprises, LP v. Tex. Dep't of Transp., 506 S.W.3d 688, 703, 707 (Tex. App. 2016) (on rehearing, leaving the Texas Highway Beautification Act's regulation of off-premises signage in place because "our decision here is necessarily limited to government regulation of noncommercial speech;" prior opinion treated on-premise exemption as content based under *Reed*'s framework; striking content-based exceptions); Adams Outdoor Advert. Ltd. P'ship v. Pa. Dep't of Transp., 321 F. Supp. 3d 526, 546 (E.D. Pa. 2018) (outdoor advertising act held content based and invalid as an unlawful restraint on free speech for its failure to include time limits).

166. Thomas v. Bright, 937 F.3d 721, 726 (6th Cir. 2019).

> Finally, we would be remiss if we did not acknowledge that, by all indications, the Act was intended to, and routinely does, apply to only commercial speech, namely, advertising. But in this case, Tennessee applied the Act to restrict speech conveying an idea: "non-

have arisen in the Eleventh Circuit because *all* noncommercial signs are deemed to be onsite as a matter of law.[167]

F. Regulation by Zoning District Is Permissible

In *Reed*, Justice Alito expressly approved of rules distinguishing between the placement of signs on commercial and residential property, and so did the majority opinion.[168] However, to pass intermediate scrutiny, local governments should ensure that differentiation by zoning district is based on substantial governmental interests in aesthetics and traffic safety.

Additionally, because *Reed* did not expressly overrule any of the Court's prior decisions, local governments must generally allow commercial real estate signs on residential property.[169] Moreover, while it is no longer permissible to adopt regulations specific to political signs, the regulatory scheme must provide for such signage even in the most restrictive single-family-zoning district.[170]

G. Prohibition of Private Signs on Public Property Is Permissible

In *Reed*, both the majority and Justice Alito approved of rules that distinguish between the placement of signs on private and public property.[171] Indeed, control over the use of government property is an exercise of proprietary, rather than regulatory, power.[172] Of course, any

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commercial speech" that was not advertising nor commercial in any way, but might be labeled "patriotic speech."

Id. "Patriotic speech" is, of course, a highly problematic and viewpoint-based construct for analyzing noncommercial speech. Messages criticizing the government are every bit as protected as noncommercial speech as messages celebrating it.

167. Southlake Prop. Assoc., Ltd. v. City of Morrow, 112 F.3d 1114, 1118–19 (11th Cir. 1997) (finding noncommercial speech is always onsite because "[a]n idea, unlike a product, may be viewed as located wherever the idea is expressed, *i.e.*, wherever the speaker is located . . . [or] wherever the speaker places it"). *Southlake* deems the "speaker" always to be the property owner, because the owner's permission or forbearance is necessary for the sign to remain in place on the property.

168. *Reed*, 135 S. Ct at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

169. *See* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94–97 (1977).

170. *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

171. *See Reed*, 135 S. Ct at 2232 ("And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."); *id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring) (approving "[r]ules that distinguish between the placement of signs on private and public property").

172. *Proprietary Power Law & Legal Definition*, USLEGAL, https://definitions.uslegal.com/p/proprietary-power/ (last visited Apr. 6, 2020).

such regulations should apply "in an evenhanded, content-neutral manner."[173] Local governments may not use their proprietary power to retaliate or discriminate against a person's First Amendment rights or other fundamental rights.[174]

It has long been a best practice for the government to prohibit *all* private speech of any kind to be placed on public property, including on the right-of-way.[175] Otherwise, if anything is allowed, then arguably everything is allowed (including the most vile hate speech imaginable) via substitution.[176]

H. Regulation by Illumination, Size, and Form Is Permissible

In *Reed*, both the majority and Justice Alito approved of "[r]ules regulating the size of signs," "[r]ules distinguishing between lighted and unlighted signs," and "[r]ules distinguishing between signs with fixed messages and electronic signs with messages that change," as do many highway beautification acts.[177] Therefore, there is no dispute that these types of distinctions are generally content neutral.

I. Governmental Interests Should Be Clearly Established

Whether a sign regulation is content based or content neutral, it must be narrowly tailored to serve the government's legitimate interests.[178] Furthermore, even content-neutral laws may be subject to strict scrutiny if they cannot be "justified without reference to the content of the regulated speech," or if they were adopted by the government "because of disagreement with the message [the speech]

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173. *Reed*, 135 S. Ct at 2232.

174. *See* Hartman v. Moore, 547 U.S. 250, 256 (2006) (stating how "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out").

175. *See* Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 814–15 (1984).

176. *Compare* RCP Publications Inc. v. City of Chicago, 304 F. Supp. 3d 729, 736, 738 (N.D. Ill. 2018) (ordinance prohibiting posting of signs with commercial messages on public property does not require heightened scrutiny under *Central Hudson* and directly advances city's interests in "combatting litter, controlling visual clutter, preventing damage to City property, and promoting traffic safety"), *with* Clark v. City of Williamsburg, 388 F. Supp. 3d 1346, 1357–62 (D. Kan. 2019) (code banning only *political* signs in right-of-way and, while neutrally subjecting all private signs in the right-of-way to removal, failing to specifically ban private signs in right-of-way was held to be a First Amendment violation).

177. *Reed*, 135 S. Ct at 2232 (stating that distinctions based upon size, building materials, lighting, moving parts, and portability "have nothing to do with a sign's message"); *id.* at 2233 (Alito, J., with Kennedy and Sotomayor, JJ., concurring).

178. *See id.* at 2226 (majority opinion); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

conveys."[179] Thus, for every sign regulation, it is important to articulate the substantial or compelling governmental interests it seeks to advance—and to avoid creating record evidence, such as emails and letters, that could be used to suggest a contrary, suspect purpose.[180] The most common regulatory interests articulated in sign codes include traffic safety, aesthetics, "blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection."[181] In most cases, these generally boil down to traffic safety or aesthetics.

Traditionally, courts recognize a government's interest in public aesthetics as only "substantial," rather than "compelling."[182] However, in Florida, the state's interest in preserving aesthetics is codified in the Florida Constitution.[183] Therefore, in Florida, it is prudent for the government to reference not only its interest in public aesthetics, but also its interest in complying with its constitutional obligations.[184]

To date, the circuit courts have not construed *Reed* to require the creation of original record evidence to establish that the government interest justifies the regulation.[185] Nevertheless, extensive legislative findings based upon local comprehensive and master plans (and upon

179. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

180. In parallel state litigation, the trial court in *Thomas* granted a temporary restraining order based in part upon emails that supported a finding of selective and vindictive enforcement. Thomas v. Bright, 937 F.3d 721, 726 (6th Cir. 2019).

> The state trial court found "substantial evidence of selective and vindictive enforcement against [Thomas]," including emails from TDOT employees working in concert with a competitor of Thomas's to "defeat" him, and unsolicited emails sent from TDOT employees to advertisers on Thomas's other billboards suggesting that his billboards were illegal and that associating with Thomas would reflect "negatively" on them.

Id. (citation omitted).

181. Connolly & Weinstein, *supra* note 78, at 617.

182. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981).

183. *See* FLA. CONST. art. II, § 7(a) ("It shall be the policy of the state to conserve and protect its natural resources *and scenic beauty*.") (emphasis added).

184. *See Thomas*, 937 F.3d at 734 ("It is undoubtedly true that a State's interest in complying with its constitutional obligations is compelling.").

185. *See, e.g.*, Luce v. Town of Campbell, 872 F.3d 512, 515–17 (7th Cir. 2017) (extensive discussion holding record evidence is not necessary to support a time, place, and manner restriction), *cert. denied*, 138 S. Ct. 1699 (2018); Act Now to Stop War v. District of Columbia, 846 F.3d 391, 408 (D.C. Cir. 2017) ("The justification for the rule's requirement that event-related signs be removed within thirty days of the event is just the sort of common-sense judgment for which empirical data is likely to be both unavailable and unnecessary.").

relevant caselaw) are highly recommended. Affidavits of city experts could also be helpful.

J. Include a Severance Clause

If all else fails, the existence of a severance clause may mean the difference between a provision or the entire code being stricken. In *Thomas*, for example, the trial court found that the on-premises exception was not severable because the "Act [did] not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech," which ultimately led to the invalidation of the entire Act.[186] The court stated that "it is for the Tennessee State Legislature—and not this [c]ourt—to clarify the Legislature's intent regarding the Billboard Act in the wake of *Reed*."[187]

In Florida, such a clause is likewise necessary to demonstrate legislative intent, although the courts will usually determine on their own whether to give effect to it. If they find the language is too inextricably intertwined, they may still refuse to sever.

VI. CONCLUSION

Reed fundamentally altered the legal landscape governing sign regulation in America by requiring all content-based laws to survive strict scrutiny review, regardless of the government's good-faith motives and the regulation's minimal impact on protected speech. However, when the opinion is "properly understood," local governments still maintain considerable authority to promote legitimate government interests through reasonable sign regulations.[188] *Reed* did not hold that every sign code is content based if an enforcement officer must read the sign to apply it. And *Reed* did not overrule the commercial speech doctrine (or other similar doctrines) that applies lesser scrutiny to specific content-based laws. Thus, by following established guidelines

186. *See Thomas*, 937 F.3d at 729, 733, 738 ("Because the on-premises exception is not severable from the Billboard Act, we must consider the Act as a whole and analyze both Tennessee's interests and precisely how Tennessee has tailored the Act to achieve those interests.").

187. *Id.* at 729 (quoting Thomas v. Schroer, No. 13-cv-02987-JPM-cgc, 2017 WL 6489144, at *5 (W.D. Tenn. Sept. 20, 2017)).

188. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015) ("Our decision today will not prevent governments from enacting effective sign laws."); *id.* at 2233–34 (Alito, J., with Kennedy and Sotomayor, JJ., concurring) ("Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.").

and best practices that conform to *Reed*, a government can still protect and control its local landscape without violating the First Amendment.