

MEETING AGENDA

THURSDAY, JANUARY 14, 2016 AT 9:00 A.M.
SUN VALLEY PLANNING AND ZONING COMMISSION
TO BE HELD IN SUN VALLEY COUNCIL CHAMBER AT CITY HALL

1. **Call To Order**

The Idaho Code requires that, "...A member or employee of a [Planning and Zoning] Commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action." Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. A knowing violation of this section shall be a misdemeanor.

2. **Public Comment**

Opportunity for the public to talk with the Planning and Zoning Commissioners about general issues and ideas not otherwise agendized below (3 minutes max. each).

3. **Consent Agenda**

A. Draft Minutes from the Planning and Zoning Commission Meeting of November 12, 2015.

4. **New Business**

A. Discussion and possible action on revisions to the City's Sign Regulations (SVMC 9-3F), changing content-based standards to form-based standards.

5. **Continued Business**

6. **Discussion Items**

7. **Adjourn**

Meeting Schedule:

Regular Meeting at 9:00 am on Thursday, February 11, 2016

**Minutes of the Planning and Zoning Commission
November 12, 2015**

The Planning and Zoning Commission of the City of Sun Valley, Blaine County, State of Idaho, met in regular session in the Council Chambers of Sun Valley City Hall on November 12, 2015 at 9:00 a.m.

1. [Call To Order](#)

The meeting was called to order at 9:02 a.m.

Present: Chairman Ken Herich, Commissioner Jake Provonsha, and Commissioner John O'Connor.
Absent: Commissioner Margaret Walker and Commissioner Bill Boeger.
Also Community Development Director Jae Hill, Associate Planner Abby Rivin, City Clerk Alissa
Present: Weber, Doug Clemens, Charles McWilliams.

3. [Consent Agenda](#)

A. [Draft Minutes from the Planning and Zoning Commission Meeting of October 8, 2015.](#)

MOTION

Commissioner John O'Connor moved to approve the minutes from the Planning and Zoning Commission Meeting of October 8, 2015, seconded by Commissioner Jake Provonsha. All in favor, none opposed. The motion carried unanimously.

4. [New Business](#)

A. [Design Review Application No. DR 2015-45: Application by John and Diane Trimper for the approval of a wood post and dowel fence with an attached wire screen for a dog enclosure. Location: 105 Skyline Drive; Lot 7 Dollar Mountain Subdivision.](#)

Chairman Herich introduced the issue and asked Community Development Director Jae Hill to give an overview of the project history. Hill explained the architect came to him for administrative approval of a fence around the perimeter of the home. Hill approved the fence as long as the height did not exceed the maximum 48 inches allowed in the City Code. He stated after the fence was completed the City received complaints from neighbors about the glare from wire on the fence. Hill also measured the fence and realized it reached 57 inches.

Hill explained the Commission could approve the excess height through the design-review process. He also explained the second issue is the metal grating on the fence, which was not part of the approved application. He stated there are similar fences around the City and showed pictures of those. He noted the other fences have a duller grating due to weathering and often have the grating on the interior of the fence. The fence in question has the grating on the exterior.

Chairman Herich noted it was a doweled fence. Commissioner O'Connor asked about the images of the fence, stating in person it does not look as shiny. Hill responded it is worst in the morning and that the applicant brought in samples to show the Commission.

Chairman Herich asked Doug Clemens, representing the applicant, to present. Clemens described the construction of the fence, noting where it fell compared to the property line. He disagreed with Hill's interpretation of the code with regards to the height of the fence, noting that in his experience height is typically measured to the top of the highest rail, not the top of the post. Clemens then described the

process of bulldozing and bringing up the grade on the adjacent property to decrease the height of the fence in comparison to the surrounding property.

Clemens discussed the wire, noting it should dull over time. He stated the owner is planning to plant creeping vegetation along the fence to help mask the wire. He stated the wire was placed on the outside of the fence to assist with that planting process. He contended neighbors would not be able to tell a difference if the wiring was moved to the interior of the fence. Clemens presented samples of the wire to the Commissioners, including both new and weathered samples, and pictures of planting options.

Commissioner O'Connor asked about the total footage of the fence. Charles McWilliams responded it is around 300 feet.

Commissioner Provonsha asked how wiring on the outside of the fence would facilitate planting. Doug Clemens responded it makes it easier for the vegetation to grow, as the wiring is set back from the fence. Commissioner Provonsha stated his belief the fence should be on the interior.

Commissioner Provonsha asked about alternatives, such as an electric fence, to keep in dogs. Clemens responded it is not as effective as the wire fence. Commissioner O'Connor agreed that the wire should be on the inside of the fence and asked how it was attached. Clemens responded it was stapled to the wood dowels. Clemens stated his belief that from afar you would not see a difference if the wire was moved to the inside of the fence.

Chairman Herich opened the public hearing. Hearing no comment, he closed the public hearing. Chairman Herich noted there was a letter from Phil Silber on the topic in the packet.

Commissioner O'Connor stated his opinion that the wire should be moved to the inside for at least some portions of the fence with planting on the interior.

Chairman Herich expressed his dislike of this type of fence and concerns about whether it should be classified as a dog run. He noted a tension between allowing people to use their property and allowing dogs to be outside all day. He stated he did appreciate the applicant's offer to plant along the fence.

Commissioner Provonsha asked about what level of flexibility the Commission had with respect to the posts being taller than allowed in the code. Jae Hill responded that 9-3-G-8 of the City Code allows the Commission to approve a higher fence through the design-review process. Commissioner Provonsha asked whether any of the rails were over the 48-inch limit. Jae Hill responded that in some places the rail was over 48 inches from the ground.

Doug Clemons said the applicant would be willing to take off the top portion of the wiring.

Chairman Herich asked to discuss landscaping. Commissioner O'Connor asked that if the Commission approves the fence, the applicant bring in the plans to the Community Development Department for approval. Jae Hill suggested they add it as a condition of approval.

Doug Clemons asked whether it was necessary to move the wiring if there was landscaping, as the wire will no longer be visible. Commissioner Provonsha stated the wire should be moved out of respect for the neighbors before the planting is mature and the wire is dulled.

MOTION

Commissioner Jake Provonsha moved to approve the wood portion of fence as built with the condition that the wire be placed on the inside of the fence and that a landscaping plan for softening the overall look of the fence be submitted to the Community Development Director for final approval, seconded by Commissioner John O'Connor. All were in favor, none opposed. The motion carried unanimously.

5. Postponed Items

- A. POSTPONED until December 10, 2015 Planning & Zoning Commission Meeting: Plat Amendment Application No. SUBPA 2015-09: Application by Gretchen Wagner for Dan and Stacey Levitan to shift the recorded building envelope due north 50 feet. Location: 118 Paintbrush Road; Sagecreek Subdivision Unit 3 Lot 76 & 1/3 Lot K.

Community Development Director Jae Hill stated the applicant submitted an application to move the building envelope 50 feet and increase the footprint somewhat, but they did not mention the increase in size in the project description. The agenda item was postponed as a result.

- B. Discussion and adoption of the draft Planning & Zoning Commission Regular Meeting Schedule for 2016.

Community Development Director Jae Hill noted the agenda was revised to include approval of a calendar of the 2016 meetings. He discussed the proposed schedule. He noted a conflict for staff for one of the October meetings, so proposed just one meeting that month on the third Thursday. The Commission agreed.

MOTION

Commissioner John O'Connor moved to approve the calendar as amended, seconded by Commissioner Provonsha. All in favor, none opposed. The motion carried.

7. Adjourn

MOTION

Commissioner John O'Connor moved adjourn, seconded by Commissioner Jake Provonsha. All in favor, none opposed. The motion carried unanimously.

The meeting adjourned at 9:58 a.m.

Ken Herich, Chairman

Alissa Weber, City Clerk

MEMORANDUM

To: Planning Commission
From: Jae Hill, AICP, CFM, Community Development Director
Date: 14 Jan 2016
Re: Sign Code Revisions

On June 18, 2015, the Supreme Court of the United States (SCOTUS) issued its ruling and opinion on the case of *Reed vs Town of Gilbert, Arizona* [13-502]. The case centered around the discussion over how signs may be regulated; in the particular case of *Reed*, a church in Arizona contended that their temporary directional signage for their church was treated differently than other types of signs based on its content, and as such, was an infringement on their First Amendment guaranteed freedom of speech.

Although the lower courts sided with the Town of Gilbert, SCOTUS overturned the lower courts' decisions. The short summary of the long opinion of the court is that if you have to read the content of a sign to know how to regulate it, you're treating different forms of speech – political, commercial, ideological, etc. – differently. Therefore calling signs “real estate signs” or “political signs” is putting special restrictions on certain classes of protected speech.

The impact of this decision is that communities can no longer define or regulate signage by its use, content, or message – which is the traditional model used by sign manufacturers like the International Sign Association for decades. Our sign code [*Title 9, Chapter 3, Article F*] is therefore incompatible with the Constitution as interpreted by SCOTUS and we must revise it to be compliant.

The big question, and one that's barely been answered by communities across the country, is *how* do you regulate things like the number of “political signs” when you can't call them “political signs?” After a lot of research – including reading other cities' ordinances and legal opinions by land use attorneys – Staff has decided to use form-based regulations instead of content-based regulations.

For example, instead of saying that someone is allowed “two political signs” on their property, we can regulate all temporary signs by their construction type and materials, without having to read the sign to understand it. Staff's proposal, consistent with the recommendations of leading attorneys, is to simply state that each home in the RS-1 zoning district gets a certain allowable square footage of temporary signage (“temporary” being defined by materials and foundation, not content). By allowing all temporary signs – yard sale, real estate, political, etc. – to be lumped into one category, we get away from regulating content and thereby regulate the aesthetics and traffic safety functions essential in sign regulations.

Part of the difficulty in this, however, is that some signs are *only* identifiable by their function. What else do you call a subdivision entry sign, when the desired function is subdivision entry identification and wayfinding? We're proposing that any land belonging to a homeowners' association be allotted a certain number of monument-style signage per vehicle entry. We're not regulating the content of the speech, consistent with *Reed*: if the homeowners' association wants to use their sign to perform a separate function other than wayfinding, that will have to be their prerogative.

What we, as a city, *can* regulate in a post-*Reed* regulatory environment is:

1. Size
2. Building materials
3. Lighting
4. Moving parts
5. Portability
6. Postings on public property, provided it is even-handed and content-neutral

As such, Staff is proposing several actions to rectify our sign code:

1. Remove references to content based regulations. No more specific regulations for real estate signs or political signs.
2. Define broad classes of signage – such as monument signs, freestanding signs, hanging/projecting signs, temporary signs, etc. – which are based on their style, appearance, and materials instead of their content.
3. Allow certain classes of signage in each of the zoning districts, separately, with specific allotments of sign facing based on number of tenants, linear feet of frontage, etc.
4. Add a clause to restrict privately-owned signs within the public right-of-way and on publicly-owned property unless a finding of approval can be made that there is a compelling public purpose (safety, wayfinding, advertisement of non-discriminatory community-wide events, etc.) in approving such an encroachment.

Finally, Staff has evaluated some 2013 changes to Idaho statutes (SB 1138) and determined the need for additional changes at this time. In several places in our code, including our sign code, there are no strict standards – just pure discretion on the part of the Commission. 67-6535 requires all approvals and denials to be based on “express standards.” How can the city regulate something as abstract as the design and coloration of a sign, mural, or graphic? As such, Staff is also recommending that the city adopt a new coloration scheme that based on clear standards. All new permanent signs in the city, as well as building paint and materials, would conform to this color program. Commonly used in mountain communities is the Munsell color book, which identifies colors by their component parts like hue, value, and chroma. By using colors that are only “earth tones” which have a chroma of four or less as categorized in Munsell, the City can prevent brightly colored signs; any murals or bright signs outside of the parameters would require a variance and Commission approval.

The current content-based sign code has been transposed into a new sign matrix with form-based standards. A few gaps remain in the new table where previous standards didn’t translate directly into the new ones.

CONCLUSION: Staff requests input on the proposed changes from the Commission. If the Commission is fine with the changes as written, they may move approval to the City Council for their adoption in Ordinance form. If the Commission would like to see alternatives, or would like the formal Ordinance prepared, Staff can bring this item back to the Commission at the next meeting of February 11, 2016.

RECOMMENDED ACTIONS: Make changes as necessary and/or direct staff to return with a formal ordinance.

ATTACHMENTS:

1. Changes to Proposed Definitions
2. Proposed Table 9-3F-2
3. Supreme Court Ruling, *Reed vs Town of Gilbert, Arizona*
4. Weinstein and Connolly's analysis of *Reed* and recommendations for post-*Reed* sign regs.
5. Ketchum City Sign Code (for reference)
6. Coloration guidelines from Breckenridge, Colorado

DRAFT

PROPOSED DEFINITIONS:

SIGN, TEMPORARY: Signs which are designed to be non-permanent in nature. Such sign styles which include H-frame, A-frame, base legs, blade signs, and other signs without a permanent foundation and with a support depth of no more than six inches into the soil.

SIGN, H-FRAME: A sign characterized by corrugated plastic or cardboard sign faces with wire or metal prongs or supports. Commonly used for real estate sales, yard sales, political signs, and other temporary events or announcements.

SIGN, A-FRAME: A sign with two faces attached to each other by a hinge at the top. Commonly called "sandwich boards."

SIGN, L-STAKE: A sign with an L-shaped post from which the sign face is suspended. Commonly used for real estate sales and occasionally for property identification.

SIGN, BASE LEGS: A sign typically constructed of a plywood or sheet metal display face affixed to two 4"x4" posts with some sort of "feet" constructed for support at the base of the "legs." Typically used for construction information, subdivision sales information, and other temporary informational signage of a commercial or semi-commercial nature.

SIGN, BLADE: A fabric sign that is supported by a single curved metal support pole.

SIGN, INFLATABLE: Signs of fabric construction which are inflated by a fan and intended to move in such a manner to attract attention. A type of moving sign.

SIGN, INTERNALLY-LIT SEALED-CASE: An internally illuminated sign which achieves the look of channel lettering without relief by shielding the majority of the sign face with a metal (or other opaque) material. Such

SIGN, EXTERNALLY-LIT LIGHT-SHIELDED: Indirectly lit signage wherein a light is projected at the sign face, which reflects a certain amount of luminosity.

LIGHTING TEMPERATURE: Light-emitting diode (LED) or fluorescent lighting should measure between 4500 and 7500 Kelvins, as certified by the manufacturer, for a pleasing, natural appearance.

MATERIALS DISCUSSION:

Freestanding and monument signs and their foundations and support structures shall be constructed with wood, stone, and/or weathered/rusted metal.

Coloration shall be restricted to Munsell...

Illuminated lettering of internally-lit or pan channel signage may not exceed 50% of the sign face.

CURRENT CITY SIGN REGULATIONS TABLE 9-3F-2

Type And Purpose	Size	Height	Number	Lighting	Special Provisions
Directory signs for multi-tenant buildings (to list all tenants within a building and to guide the pedestrian to a tenant within the building)	1 square foot per tenant Freestanding = 25 square feet Projecting/hanging = 15 square feet Wall sign = 25 square feet	8 feet 15 feet and 8 foot clearance 8 feet	1 sign on the primary pedestrianway which the building abuts	Indirect or pan channel	5 square feet may be included in the freestanding joint directory sign for the purpose of identifying the building, in lieu of any other sign for the same purpose
Display boxes (to display current menus, current real estate listings or current entertainment)	5 square feet. An area no longer than 0.5 square foot may be used within the display box to identify the business	6 feet 8 inches	1 per business; cinemas showing more than 1 feature film may apply for additional display boxes	Indirect	
Entrance signs to: 1. Commercial and resort cores, 2. Major subdivision and/or neighborhoods, major condominium and/or apartment complexes	Total area of all sign faces shall not exceed: 70 square feet 16 square feet	10 feet	Limited to a maximum of 1 sign per major vehicular entry providing access. Final decision as to the determination of a major vehicular entry shall be by the commission.	Indirect or pan channel	
Flags, pennants, banners and bunting	State and national flags as prescribed by applicable regulations. Pennants, banners and bunting are subject to planning and zoning administrator approval.	Flagpoles 30 feet; all others minimum clearance of 8 feet over pedestrianways, 15 feet over vehicular ways.	Subject to planning and zoning administrator approval	Indirect	Those referring to community events and/or activities maximum of 14 days; application shall state person responsible for removal. If not removed on specified date, certified notice will be sent to same
Murals and super graphics (to provide for decoration applied to building walls so as to enhance the appearance of the building's character)	Subject to commission approval	Subject to commission approval	Subject to commission approval	Indirect	
Political signs	Maximum allowable is 6 square feet	6 feet	No limit other than maximum of 6 square feet for all sign faces	None	May not be displayed earlier than 60 days prior to the election and shall be removed by the candidate or the property owner within 48 hours after the election
Public information sign (display board or kiosk to locate posters, handouts and cards identifying community activities, special events and personal information)	Subject to commission approval	Subject to commission approval	Subject to commission approval	Indirect	The display board and kiosk types of signs shall be constructed, erected and maintained by the municipal government or with its permission
Residential nameplates (to identify a house, displaying the family name and/or the home name and	3.5 square feet per single-family or duplex structure;	8 feet	1 per dwelling unit	Required in order to assist emergency personnel. Indirect or pan channeled.	1. Joint directory nameplate signs must be kept current;

address)	0.5 square foot per multi-family unit				2. Nameplate signs in RS-2, RM-1 and RM-2 zones shall be restricted to 1 wall mounted sign per living unit in structures having 2 or more living units within its confines. Further, such structures may have 1 exterior wall mounted nameplate directory; provided, however that the individual nameplates of the directory are of a standard design and size.	
Single business signs to identify a business or organization that: 1. Is the sole occupant in a building; or	1 square foot of sign face for each 5 front linear feet of the building for each type listed below: Freestanding: 25 square feet maximum Projecting/hanging: 20 square feet maximum Wall sign: 20 square feet maximum	8 feet 25 feet and 8 foot clearance above pedestrianway and 15 feet above vehicular way 25 feet	1 sign per vehicular street or primary pedestrianway which the business abuts	Indirect or pan channel		
2. For a business or organization which has its own exterior public entrance within a multi-tenant building	1 square foot of sign face for each 5 front linear feet of the business for each type listed below: Freestanding: 20 square feet maximum. Projecting/hanging: 15 square feet maximum Wall sign: 20 square feet maximum	8 feet 25 feet and 8 foot clearance above pedestrianway and 15 feet above vehicular way 25 feet		1 sign per vehicular street or primary pedestrianway which the business abuts	Indirect or pan channel	
3. For a business or organization which fronts on an arcade within or between buildings	1 square foot of sign face for each 5 front linear feet of the business for each type listed below: Freestanding: 10 square feet maximum Projecting/hanging: 10 square feet maximum			1 sign per vehicular street or primary pedestrianway which the business abuts	Indirect or pan channel	

	Wall sign: 15 square feet maximum	8 feet 25 feet and 8 foot clearance above pedestrianway and 15 feet above vehicular way 25 feet			
Signs identifying buildings, and public or semipublic facilities: 1) name of building; 2) public facilities; 3) semipublic facilities	20 square feet maximum for all types listed below: Freestanding Hanging/projecting Wall	8 feet 25 feet and 8 foot clearance above pedestrian and 15 feet above vehicular way 25 feet	1 sign per vehicular street or major pedestrianway which the building or facility abuts with a maximum of 2 signs. Aggregate total of sign faces = 20 square feet maximum.	Indirect or pan channel	A joint directory sign is permitted, subject to the provisions of this article
Temporary sales and site development: To indicate or identify the following: 1. Parcel of improved or unimproved land that is for sale; or 2. Development of any real property currently under construction as evidenced by a valid permit	"For sale" = 3 square feet maximum 40 square feet in RS-2, RM-1, RM-2, SC and CC zones; 32 square feet in RA and RS-1 zones	4 feet	1 sign per vehicular street or major pedestrianway which the parcel or project abuts	None	1. All signs in this article shall be removed by the applicant within 10 days after: a) sale of property, or b) an occupancy permit is issued. 2. "For sale" signs on unimproved property are limited to the following information: "for sale", size of parcel; zoning district, name and phone number of the real estate agency and the real estate agent; the supporting structure for freestanding signs shall have 2 support legs that can be securely affixed to the ground. 3. "For sale" signs on improved property are limited to the following information: "for sale", name and phone number of the real estate agency and the real estate agent; the supporting structure for freestanding signs shall have 2 supporting legs that can be securely affixed to the ground.

		8 feet and wall sign 16 feet maximum			4. Site development signs are limited to 1 sign per approved development; the supporting structure for freestanding signs shall have 2 support legs that can be affixed to the ground.
Traffic control for private property (to promote the safe and expedient flow and parking of traffic on private property)	All vehicular traffic control signs shall not exceed 4 square feet, except multipurpose signs, which shall not exceed 8 square feet. All pedestrian traffic control signs shall not exceed 2 square feet, except for multipurpose signs, which shall not exceed 4 square feet subject to the approval of the commission. Freestanding or wall signs only.	8 feet	Subject to the approval of the commission	Indirect	All signs shall conform to an overall sign program for the entire building or complex. No sign shall contain any advertising, but may identify the owner by name. If a "no parking" sign (as furnished by the city) is used, there may be no other sign for the same purpose; signs such as "private drive", "no trespassing", "beware of dog" are all permitted.
Window signs	15 percent of the total window space not to exceed 10 square feet. "Window space" is the total area of any single window pane or series of window panes separated by a mullion of 12 inches or less.	25 feet	2 signs maximum	Indirect	3 square feet for the display of the name of a business or organization, hours/days of operation, credit card information, and similar general information. The area of the business or organization name shall not exceed 1.5 square feet. This 3 square feet shall not be included in the total allowable window coverage calculation.

TRANSLATED EXISTING CODE INTO NEW STANDARDS

Zoning Districts	Sign Type	Sign Face Area	Maximum Height	Minimum Clearance	Number Allowed	Lighting
CC and SC	Monument	70	10	-	1 per major vehicular access to a subdivision or commercial district	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Freestanding	25	8	-	1 sign per public-facing façade of the building	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Building Mounted	25	15	8	1 square foot of sign per 5 linear feet of frontage, to the maximum allowable area. 1 sign per public-facing façade of the building	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Temporary	3	4	-	???	None
	Hanging/Projecting	15	15	8	1 sign per commercial tenant	Indirect
	Banner	???	???	8	???	Indirect
	Display Boxes	5	-	-	n/a	Indirect, Backlit, Shielded Internally illuminated
	Murals	-	-	-	n/a	Indirect
	Window Signs	-	-	-	15% of the window, 10sf max	Indirect
RS-2, RM-1, and RM-2	Monument	70	10	-	1 per major vehicular access to a subdivision or commercial district	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Freestanding	25	8	-	1 per building or facility	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Building Mounted	25	15	8	1 square foot of sign per 5 linear feet of frontage, to the maximum allowable area. 1 sign per public-facing façade of the building	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Temporary	3	4	-	1 sign per dwelling unit, totalling no more than 3 square feet per sign face	None
	Banner	???	25	15	???	Indirect
OS, PI, and REC	Monument	70	10	-	1 per major vehicular access to a subdivision or commercial district	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Freestanding	25	8	-	1 sign per public-facing façade of the building	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Building Mounted	25	15	8	1 square foot of sign per 5 linear feet of frontage, to the maximum allowable area. 1 sign per public-facing façade of the building	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Temporary	3	4	-	2 signs, totalling no more than 3 square feet per sign face	None
	Banner	???	25	15	???	Indirect
RA and RS-1	Monument	16	10	-	1 per major vehicular access to a subdivision	Pan Channel, Indirect, Backlit, Shielded Internally Illuminated
	Temporary	3	4	-	2 signs, totalling no more than 3 square feet per sign face	None
	Banner	???	25	15	???	Indirect
Right-of-Way (City Encroachment Permit Required)	Monument	70	10	-	1 per major vehicular access to a subdivision or commercial district	None
	Temporary	3	4	-	2 signs, totalling no more than 3 square feet per sign face	None
	Banner	???	25	15	???	Indirect

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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REED ET AL. *v.* TOWN OF GILBERT, ARIZONA, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 13–502. Argued January 12, 2015—Decided June 18, 2015

Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. “Ideological Signs,” defined as signs “communicating a message or ideas” that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. “Political Signs,” defined as signs “designed to influence the outcome of an election,” may be up to 32 square feet and may only be displayed during an election season. “Temporary Directional Signs,” defined as signs directing the public to a church or other “qualifying event,” have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the “qualifying event” and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code’s sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held: The Sign Code’s provisions are content-based regulations of

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speech that do not survive strict scrutiny. Pp. 6–17.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E.g.*, *R. A. V. v. St. Paul*, 505 U. S. 377, 395. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U. S. ___, ___–___. And courts are required to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Id.*, at ___. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be “justified without reference to the content of the regulated speech,” or were adopted by the government “because of disagreement with the message” conveyed. *Ward v. Rock Against Racism*, 491 U. S. 781, 791. Pp. 6–7.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign’s communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. Pp. 7.

(c) None of the Ninth Circuit’s theories for its contrary holding is persuasive. Its conclusion that the Town’s regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. 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. *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit’s conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints

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is a “more blatant” and “egregious form of content discrimination,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829, but “[t]he First Amendment’s hostility to content-based regulation [also] extends . . . to prohibition of public discussion of an entire topic,” *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 530, 537. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code’s categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 658. This same analysis applies to event-based distinctions. Pp. 8–14.

(d) The Sign Code’s content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code’s differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U. S. ___, ___. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code’s distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network, supra*, at 425. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 14–15.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 817. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e.g.*, warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny. Pp. 16–17.

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707 F. 3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF
GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, §4.402 (2005).¹ The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. §4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

¹The Town’s Sign Code is available online at <http://www.gilbertaz.gov/departments/development-service/planning-development/land-development-code> (as visited June 16, 2015, and available in Clerk of Court’s case file).

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I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is “Ideological Sign[s].” This category includes 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.” Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all “zoning districts” without time limits. §4.402(J).

The second category is “Political Sign[s].” This includes any “temporary sign designed to influence the outcome of an election called by a public body.” Glossary 23.² The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and “rights-of-way.” §4.402(I).³ These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

²A “Temporary Sign” is a “sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display.” Glossary 25.

³The Code defines “Right-of-Way” as a “strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities.” *Id.*, at 18.

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The third category is “Temporary Directional Signs Relating to a Qualifying Event.” This includes any “Temporary Sign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’” Glossary 25 (emphasis deleted). A “qualifying event” is 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.” *Ibid.* The Code treats temporary directional signs even less favorably than political signs.⁴ Temporary directional signs may be no larger than six square feet. §4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the “qualifying event” and no more than 1 hour afterward. *Ibid.*

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different loca-

⁴The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as “Religious Assembly Temporary Direction Signs.” App. 75. The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. *Id.*, at 75–76. In 2008, the Town redefined the category as “Temporary Directional Signs Related to a Qualifying Event,” and it expanded the time limit to 12 hours before and 1 hour after the “qualifying event.” *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.*, at 89.

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tions, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F.3d 966, 979 (2009). It reasoned that, even though an enforcement

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officer would have to read the sign to determine what provisions of the Sign Code applied to it, the “kind of cursory examination” that would be necessary for an officer to classify it as a temporary directional sign was “not akin to an officer synthesizing the expressive content of the sign.” *Id.*, at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code’s distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code’s sign categories were content neutral. The court concluded that “the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . are based on objective factors relevant to Gilbert’s creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign.” 707 F. 3d 1057, 1069 (CA9 2013). Relying on this Court’s decision in *Hill v. Colorado*, 530 U. S. 703 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F. 3d, at 1071–1072. As the court explained, “Gilbert 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.” *Ibid.* Accordingly, the court believed that the Code was “content-neutral as that term [has been] defined by the Supreme Court.” *Id.*, at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.*, at 1073–1076.

We granted certiorari, 573 U. S. ____ (2014), and now reverse.

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II

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). 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. *R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118 (1991).

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. *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U. S. ___, ___–___ (2011) (slip op., at 8–9); *Carey v. Brown*, 447 U. S. 455, 462 (1980); *Mosley*, *supra*, at 95. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Sorrell*, *supra*, at ___ (slip op., at 8). 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. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized 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

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the content of the regulated speech,” or that were adopted by the government “because of disagreement with the message [the speech] conveys,” *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town’s Sign Code is content based on its face. It defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” Glossary 25. It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” *Id.*, at 24. 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. *Id.*, at 23. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. 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. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

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C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town “did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,” and its justifications for regulating temporary directional signs were “unrelated to the content of the sign.” 707 F. 3d, at 1071–1072. In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be “justified without reference to the content of the regulated speech.” Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward, supra*, at 791; emphasis deleted).

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. 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. *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429 (1993). We have thus made clear that “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,” and a party opposing the government “need adduce ‘no evidence of an improper censorial motive.’” *Simon & Schuster, supra*, at 117. Although “a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.” *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 642 (1994). In other words, an

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innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose. See, e.g., *Sorrell, supra*, at ____–____ (slip op., at 8–9) (statute was content based “on its face,” and there was also evidence of an impermissible legislative motive); *United States v. Eichman*, 496 U. S. 310, 315 (1990) (“Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted *interest* is related to the suppression of free expression” (internal quotation marks omitted)); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) (“The text of the ordinance is neutral,” and “there is not even a hint of bias or censorship in the City’s enactment or enforcement of this ordinance”); *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (requiring that a facially content-neutral ban on camping must be “justified without reference to the content of the regulated speech”); *United States v. O’Brien*, 391 U. S. 367, 375, 377 (1968) (noting that the statute “on its face deals with conduct having no connection with speech,” but examining whether the “the governmental interest is unrelated to the suppression of free expression”). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The 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

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city-owned music venue, of sound amplification systems not provided by the city. 491 U. S., at 787, and n. 2. In that context, we looked to governmental motive, including whether the government had regulated speech “because of disagreement” with its message, and whether the regulation was “justified without reference to the content of the speech.” *Id.*, at 791. But *Ward’s* framework “applies only if a statute is content neutral.” *Hill*, 530 U. S., at 766 (KENNEDY, J., dissenting). Its rules thus operate “to protect speech,” not “to restrict it.” *Id.*, at 765.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the “abridg[ement] of speech”—rather than merely the motives of those who enacted them. U. S. Const., Amdt. 1. “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.” *Hill, supra*, at 743 (SCALIA, J., dissenting).

For instance, in *NAACP v. Button*, 371 U. S. 415 (1963), the Court encountered a State’s attempt to use a statute prohibiting “improper solicitation” by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.*, at 438. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State’s claim that its interest in the “regulation of professional conduct” rendered the statute consistent with the First Amendment, observing that “it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.” *Id.*, at 438–439. Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church’s

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substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly “rejected the argument that ‘discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’” *Discovery Network*, 507 U. S., at 429. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it “does not mention any idea or viewpoint, let alone single one out for differential treatment.” 587 F. 3d, at 977. It reasoned that, for the purpose of the Code provisions, “[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.” 707 F. 3d, at 1069.

The Town seizes on this reasoning, insisting that “content based” is a term of art that “should be applied flexibly” with the goal of protecting “viewpoints and ideas from government censorship or favoritism.” Brief for Respondents 22. In the Town’s view, a sign regulation that “does not censor or favor particular viewpoints or ideas” cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is “endorsing or suppressing ‘ideas or viewpoints,’” *id.*, at 27, and the provisions for political signs and ideological signs “are neutral as to particular ideas or viewpoints” within those categories. *Id.*, at 37.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of

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content discrimination.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). But it is well established that “[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.” *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra*, at 428. The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code’s distinctions as turning on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.” 707 F. 3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code’s distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up

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signs advertising the Church’s meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code’s distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 340 (2010), we have insisted that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference,” *Turner*, 512 U. S., at 658. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United*, *supra*, at 340–341. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code’s distinctions hinge on “whether and when an event is occurring.” The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is “designed to influence the outcome of an election” (and thus “political”) or merely “communicating a message or ideas for noncommercial purposes” (and thus “ideological”). Glossary 24. That obvious content-based

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inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra*, at 6. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. 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.” *City of Ladue v. Gilleo*, 512 U. S. 43, 60 (1994) (O’Connor, J., concurring).

III

Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, “which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,” *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U. S. ___, ___ (2011) (slip op., at 8) (quoting *Citizens United*, 558 U. S., at 340). Thus, it is the Town’s burden to demonstrate that the Code’s differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tai-

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lored to that end. See *ibid.*

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town’s aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are “no greater an eyesore,” *Discovery Network*, 507 U. S., at 425, 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. The 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.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The 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.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a “law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,” *Republican Party of Minn. v. White*, 536 U. S. 765, 780 (2002), the Sign Code fails strict scrutiny.

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IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an “absolutist” content-neutrality rule would render “virtually all distinctions in sign laws . . . subject to strict scrutiny,” Brief for Respondents 34–35, but that is not the case. Not “all distinctions” are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark*, 468 U. S., at 295.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign’s message: size, building materials, lighting, moving parts, and portability. See, e.g., §4.402(R). 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. See *Taxpayers for Vincent*, 466 U. S., at 817 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, e.g., *Solantic, LLC v. Neptune Beach*, 410 F.3d 1250, 1264–1269 (CA11 2005) (sign categories similar to the town of Gilbert’s were content based and subject to strict scrutiny); *Matthews v. Needham*, 764 F.2d 58, 59–60 (CA1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs “take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *City of Ladue*, 512 U. S., at 48. At the same time, the presence of certain

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signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. 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. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

ALITO, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF
GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE ALITO, with whom JUSTICE KENNEDY and
JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of
further explanation.

As the Court holds, what we have termed “content-
based” laws must satisfy strict scrutiny. Content-based
laws merit this protection because they present, albeit
sometimes in a subtler form, the same dangers as laws
that regulate speech based on viewpoint. Limiting speech
based on its “topic” or “subject” favors those who do not
want to disturb the status quo. Such regulations may
interfere with democratic self-government and the search
for truth. See *Consolidated Edison Co. of N. Y. v. Public
Serv. Comm’n of N. Y.*, 447 U. S. 530, 537 (1980).

As the Court shows, the regulations at issue in this case
are replete with content-based distinctions, and as a result
they must satisfy strict scrutiny. This does not mean,
however, that municipalities are powerless to enact and
enforce reasonable sign regulations. I will not attempt to
provide anything like a comprehensive list, but here are
some 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

ALITO, J., concurring

placed. These rules may distinguish between free-standing signs and those attached to buildings.

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.

Rules imposing time restrictions on signs advertising a one-time event. Rules 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.*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum*, 555 U. S. 460, 467–469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

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.

*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions “must be narrowly tailored to serve the government’s legitimate, content-neutral interests.” *Ward v. Rock Against Racism*, 491 U. S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

BREYER, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 13–502

CLYDE REED, ET AL., PETITIONERS *v.* TOWN OF
GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE BREYER, concurring in the judgment.

I join JUSTICE KAGAN’s separate opinion. Like JUSTICE KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment’s expressive objectives and to the public’s legitimate need for regulation than a simple recitation of categories, such as “content discrimination” and “strict scrutiny,” would permit. In my view, the category “content discrimination” is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic “strict scrutiny” trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995); see also *Boos v. Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all

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speakers. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say”). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic “strict scrutiny” trigger is not to argue against that concept’s use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government’s rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410 (1993). I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because 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

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of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.*, 15 U. S. C. §78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.*, 42 U. S. C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.*, 21 U. S. C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol “Rx only”); of doctor-patient confidentiality, *e.g.*, 38 U. S. C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient’s spouse or sexual partner); of income tax statements, *e.g.*, 26 U. S. C. §6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds \$10,000); of commercial airplane briefings, *e.g.*, 14 CFR §136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.*, N. Y. Gen. Bus. Law Ann. §399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit “‘strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area’”); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court’s many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to “commercial speech.” *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N. Y.*, 447 U. S. 557, 562–563 (1980). But I have great concern that many justifiable instances of “content-based” regulation are noncommercial. And, worse than that, the Court has applied the heightened

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“strict scrutiny” standard even in cases where the less stringent “commercial speech” standard was appropriate. See *Sorrell v. IMS Health Inc.*, 564 U. S. ___, ___ (2011) (BREYER, J., dissenting) (slip op., at ___). The Court has also said that “government speech” escapes First Amendment strictures. See *Rust v. Sullivan*, 500 U. S. 173, 193–194 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.” *R. A. V. v. St. Paul*, 505 U. S. 377, 388 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that “strict scrutiny” normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where “strict scrutiny” should apply in full force.

The better approach 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. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives,

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and whether there are other, less restrictive ways of doing so. See, e.g., *United States v. Alvarez*, 567 U. S. ___, ___–___ (2012) (BREYER, J., concurring in judgment) (slip op., at 1–3); *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit 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.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant “strict scrutiny.” Nonetheless, for the reasons that JUSTICE KAGAN sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment. I consequently concur in the Court’s judgment only.

KAGAN, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

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[June 18, 2015]

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e.g.*, City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as “Blind Pedestrian Crossing” and “Hidden Driveway” can be posted without a permit, even as other permanent signs require one. See, *e.g.*, Code of Athens-Clarke County, Ga., Pt. III, §7–4–7(1) (1993). Elsewhere, historic site markers—for example, “George Washington Slept Here”—are also exempt from general regulations. See, *e.g.*, Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, §4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to “scenic and historical attractions” or advertise free coffee. See 23 U. S. C. §§131(b), (c)(1), (c)(5).

Given the Court’s analysis, many sign ordinances of that kind are now in jeopardy. See *ante*, at 14 (acknowledging

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that “entirely reasonable” sign laws “will sometimes be struck down” under its approach (internal quotation marks omitted). Says the majority: When laws “single[] out specific subject matter,” they are “facially content based”; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante*, at 12, 16–17. And although the majority holds out hope that some sign laws with subject-matter exemptions “might survive” that stringent review, *ante*, at 17, the likelihood is that most will be struck down. After all, it is the “rare case[] in which a speech restriction withstands strict scrutiny.” *Williams-Yulee v. Florida Bar*, 575 U. S. ___, ___ (2015) (slip op., at 9). To clear that high bar, the government must show that a content-based distinction “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 231 (1987). So on the majority’s view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They 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.*

*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.” *Ante*, at 2 (ALITO, J., concurring). But of course it does. On the majority’s view, a law with an exception for such signs “singles out specific subject matter for

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Although the majority insists that applying strict scrutiny to all such ordinances is “essential” to protecting First Amendment freedoms, *ante*, at 14, I find it challenging to understand why that is so. This Court’s decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 573 U. S. ___, ___–___ (2014) (slip op., at 8–9) (internal quotation marks omitted). The second is to ensure that the government has not regulated speech “based on hostility—or favoritism—towards the underlying message expressed.” *R. A. V. v. St. Paul*, 505 U. S. 377, 386 (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over “name and address” signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any “realistic possibility that official suppression of ideas is afoot.” *Davenport v. Washington Ed. Assn.*, 551 U. S. 177, 189 (2007) (quoting *R. A. V.*, 505 U. S., at 390). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It is also the case (except in non-public or limited public forums) when a law restricts “discussion of an entire topic” in public debate. *Consolidated*

differential treatment” and “defin[es] regulated speech by particular subject matter.” *Ante*, at 6, 12 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that “the Code singles out signs bearing a particular message: the time and location of a specific event.” *Ante*, at 14.

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Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 537, 539–540 (1980) (invalidating a limitation on speech about nuclear power). We have stated that “[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating.’” *Id.*, at 537–538 (quoting *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may “suggest[] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.” *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 785 (1978); accord, *ante*, at 1 (ALITO, J., concurring) (limiting all speech on one topic “favors those who do not want to disturb the status quo”). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace”—we insist that the law pass the most demanding constitutional test. *R. A. V.*, 505 U. S., at 387 (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that “entirely reasonable” laws imperiled by strict scrutiny can survive. *Ante*, at 14. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public’s debate of ideas—so when “that risk is inconsequential, . . . strict scrutiny is unwarranted.” *Davenport*, 551 U. S., at 188; see *R. A. V.*, 505 U. S., at 388 (approving certain content-based distinctions when there is “no significant danger of idea or viewpoint discrimination”). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must

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sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We 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.

And indeed we have done just that: 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 *Davenport*, 551 U. S., at 188 (noting that “we have identified numerous situations in which [the] risk” attached to content-based laws is “attenuated”). In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating “historical, cultural, or artistic event[s]” from a generally applicable limit on sidewalk signs. *Id.*, at 792, n. 1 (listing exemptions); see *id.*, at 804–810 (upholding ordinance under intermediate scrutiny). After all, we explained, the law’s enactment and enforcement revealed “not even a hint of bias or censorship.” *Id.*, at 804; see also *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was “designed to prevent crime, protect the city’s retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views”). And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance’s exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.*, at 46–47, and n. 6 (listing exemptions); *id.*, at 53 (noting this assumption). We did not need to, and so did not, decide the

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level-of-scrutiny question because the law’s breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*’s tack here. The Town of Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante*, at 14–15 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs “need to be smaller because they need to guide travelers along a route.” Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to “time, place, or manner” speech regulations. Accordingly, 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.

I suspect this Court and others will regret the majority’s insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” *Ante*, at 14. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no

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one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.



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Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty

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Sign Regulation after *Reed*: Suggestions for Coping with Legal Uncertainty

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Sign Regulation After *Reed*: Suggestions for Coping with Legal Uncertainty

Alan C. Weinstein* and Brian J. Connolly**

Regulating signs in a content neutral manner satisfying First Amendment limitations will be more difficult for local governments following the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert, Arizona*.¹ In *Reed*, all nine Supreme Court justices agreed that the Town of Gilbert's sign code violated the guarantee of freedom of speech in the First Amendment, although the justices arrived at that conclusion in different ways.

As this article will discuss, the opinion in *Reed* focused on the appropriate meaning of content neutrality as a central requirement of the First Amendment with respect to the regulation of noncommercial speech, such as signs. Since the early 1970s, the Supreme Court has required that regulations of speech must avoid any regulation of message or subject matter, under the theory that government control of the content of speech—like government control of viewpoint—equates to government control of ideas. In so holding, the Court has broadly classified content regulation as a suspect form of speech regulation, and has subjected so-called “content based” regulation to heightened judicial scrutiny and its concomitant burden on government defendants.

The *Reed* ruling, which resolves a long-standing split between federal circuit courts of appeal on the meaning of content neutrality, carries significant consequences for the validity of local sign regulations. Indeed, many local codes may become unconstitutional as a result of the

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¹ 576 U.S. ---, 135 S. Ct. 2218 (2015).

case's outcome. Sign litigation can be expensive and risky,² and it is likely to become more frequent after *Reed*.

This article explores the *Reed* decision and its implications for local government sign regulation. Section I reviews the *Reed* case, with an overview of the context of the decision, the procedural history of the case, and the Supreme Court's decision—including the “mechanical” majority opinion and three divergent concurrences. Section II discusses several of the unanswered questions following *Reed*, identifying both doctrinal inconsistencies and practical problems. Finally, Section III provides practical guidance regarding post-*Reed* sign code drafting and enforcement for local governments, their lawyers and planners, who are tasked with the day-to-day regulation of outdoor signage and advertising.

I. *Reed v. Town of Gilbert*: Facts and Court's Rulings

A. Factual background

Reed was the first U.S. Supreme Court case to address local sign regulations since *City of Ladue v. Gilleo*,³ decided in 1994. *Reed* addressed a challenge to Gilbert's sign code, which contained a general requirement that all signs obtain a permit, but exempting several categories of signs from that requirement.⁴ These provisions treated certain categories of exempted signs differently. As with many other sign codes around the United States, Gilbert's sign code recited traffic safety and aesthetics as the reasons for its existence.

Three of the exempted categories were at issue in *Reed*: “political signs,” “ideological signs,” and “temporary directional signs.”⁵ While the town did not *prohibit* any of these categories of speech, each category was treated *differently* by the sign code. The Town's

² Although not resolved as of this writing, the plaintiff in *Reed* had filed a claim for attorney's fees totaling \$1.023 million.

³ 512 U.S. 43 (1994).

⁴ *Reed*, 135 S. Ct. at 2224.

⁵ Gilbert, Ariz. Land Development Code, ch. 1 §§ 4.402(I), 4.402(J) & 4.402(P) (as amended).

regulations of political signs, defined as “temporary sign[s] designed to influence the outcome of an election called by a public body,” allowed such signs to have a sign area of up to 16 square feet on residential property and up to 32 square feet on nonresidential property, and such signs could be displayed beginning up to 60 days before a primary election and ending up to 15 days following a general election.⁶ Political signs were allowed to be placed in public right-of-ways, with any number of signs permitted to be posted.⁷

Temporary directional signs were defined as a “[t]emporary [s]ign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’”⁸ A “qualifying event” was any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.”⁹ Temporary directional signs could not exceed six square feet in sign area, could be placed on private property with the consent of the owner or in the public right-of-way, and no more than four signs could be placed on a single parcel of private property at once. Additionally, temporary directional signs could be displayed for no more than 12 hours before the qualifying event, and no more than one hour after the qualifying event. The date and time of the qualifying event were required to be displayed on each sign.

Finally, “ideological signs” were defined as 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

⁶ *Id.* at 2224. Note that Arizona has a statute that prohibits local governments from removing certain political signs placed in connection with an election. A.R.S. § 16-1019(C). At oral argument in *Reed*, this statute was raised by attorneys for the town as a defense to the town’s facially content based sign code. *Reed v. Town of Gilbert*, No. 13-502, Tr. at 40:19-42:7. While the effect of this statute was hotly debated during the pendency of the case, the authors are of the position that this statute is not violative of the First Amendment, nor does it require localities in Arizona to enact code provisions violative of the First Amendment.

⁷ GILBERT, ARIZ. LAND DEVELOPMENT CODE § 4.402(I) (2014).

⁸ *Id.* at 2225.

⁹ *Id.*

owned or required by a governmental agency.”¹⁰ Ideological signs could be as large as 20 square feet and could be placed in any zoning district without limitations on display time.¹¹

Good News Community Church, of which Clyde Reed is pastor, lacked a permanent church structure and instead rented space in local community facilities, such as schools, for Sunday services. In order to inform passersby of its services and the locations thereof, Good News and Pastor Reed placed temporary signs advertising religious services throughout the community. The signs were typically posted for a period of approximately 24 hours. Because the time of the posting exceeded the time limits provided for temporary directional signs, Gilbert attempted in July 2005 to enforce its sign code against the church’s signs, and town officials removed at least one of the church’s signs. After receiving the advisory notice that it was in violation of the code, the church reduced the number of signs it placed and its signs’ display time, but friction with Gilbert persisted.

B. Court Proceedings

Having failed to reconcile its differences with the town, in March 2008, Reed and the church filed an action in federal district court claiming violations of the Free Speech Clause and Free Exercise clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, as well as related state law violations.¹² Good News’s claims centered on the contention that the town’s sign code was *content based*—that is, the code’s distinctions between political signs, ideological signs, and temporary event signs, as well as some other distinctions,

¹⁰ *Id.* at 2224.

¹¹ The Sign Code was amended twice during the pendency of the *Reed* litigation. When litigation began in 2007, the Code defined the signs at issue as “Religious Assembly Temporary Directional Signs.” The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. In 2008, the Town redefined the category as “Temporary Directional Signs Related to a Qualifying Event,” and it expanded the time limit to 12 hours before and 1 hour after the “qualifying event.” In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Reed*, 135 S. Ct. at 2225, fn. 4, citations omitted.

¹² Only the Free Speech Clause claims were at issue on appeal.

impermissibly discriminated between messages and speakers based on the content of the regulated speech or speaker.

The district court denied the church's motion for a preliminary injunction against enforcement of the sign code. On appeal, the Ninth Circuit Court of Appeals unanimously affirmed,¹³ finding the temporary event sign regulations content neutral as applied. However, the appeals court remanded to the district court on the question of whether the town impermissibly distinguished between forms of noncommercial speech on the basis of content.¹⁴

On remand, the district court granted summary judgment in favor of the town, holding the town's exemptions from permitting content neutral, despite the fact that the code regulated on the basis of message category.¹⁵ The Ninth Circuit again affirmed, this time in a 2-1 decision,¹⁶ with the majority finding the code's distinctions between temporary event signs, political signs, and ideological signs content neutral. In so holding, the Ninth Circuit found that the town "did not adopt its regulation of speech because it disagreed with the message conveyed" and the town's regulatory interests were unrelated to the content of the signs being regulated.¹⁷ Applying intermediate scrutiny to the content neutral exemptions, the majority determined that the exemptions were narrowly-tailored to advance the city's substantial government interests in aesthetics and traffic safety, and found the code left the church with ample alternative avenues of communication.¹⁸

C. Circuit Split

¹³ Reed v. Town of Gilbert, 587 F.3d 966 (9th Cir. 2009) (*Reed I*).

¹⁴ *Id.*

¹⁵ Reed v. Town of Gilbert, 832 F. Supp. 2d 1070 (D. Ariz. 2011).

¹⁶ Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013) (*Reed II*).

¹⁷ *Reed II*, 707 F.3d at 1071-72.

¹⁸ *Id.* at 1074-76.

The *Reed II* majority relied principally on the government’s regulatory *purpose* in determining that the town’s sign regulations were content neutral, specifically rejecting the conclusion that the Gilbert sign code was content based because it discriminated on its face between categories of noncommercial speech.¹⁹ Despite the fact that the sign code expressly created three separate categories for political, ideological, and temporary event signs, and treated each of these categories differently—regulation based on content in the literal sense—the Ninth Circuit’s decision relied on the absence of an invidious, discriminatory governmental purpose in upholding the code.

This decision perpetuated a split between the federal circuit courts of appeal regarding the extent to which government may distinguish between speech and/or signs based on category or function.²⁰ *Reed II* was in line with prior Ninth Circuit decisions²¹ and paralleled similar decisions in other federal circuit courts of appeal, including the Third,²² Fourth,²³ Sixth,²⁴ and

¹⁹ *Id.* at 1071-72.

²⁰ Brian J. Connolly, *Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation*, 2 MICH. J. ENVTL & ADMIN. L. 185, 197 (2012).

²¹ *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006) (finding sign regulation to be content-neutral where it does not favor speech based on the idea expressed); *Desert Outdoor Adver., Inc. v. City of Oakland*, 506 F.3d 798, 803-04 (9th Cir. 2007) (upholding sign code with various arguably content-based exceptions). Earlier decisions of the Ninth Circuit applied a more strict approach to content neutrality, *see, e.g.*, *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996); *Nat’l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988), but these decisions were called into question by later Ninth Circuit cases. This transition is evident in the Ninth Circuit’s 1998 decision of *Foti v. City of Menlo Park*, which found portions of the municipal code in question content based, but applied a purpose-based test for content neutrality. 146 F.3d 629, 636, 638 (9th Cir. 1998).

²² *See, e.g.*, *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1008, 178 L. Ed. 2d 828 (2011) (finding that a consideration of a sign’s content does not by itself make a regulation content-based); *see also*, *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (finding that a regulation may contain content-based exceptions if the content exempted is significantly related to the particular area in which the sign is viewed because it either identifies the property on which the sign sits or is aimed at an audience, such as motorists on a highway, that traverses the area).

²³ *See, e.g.*, *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013) (add parenthetical); *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012) (rejecting claim that code is content-based when it requires a general inquiry into the nature of a display and the relationship to the business on which it is displayed to determine if a display is a “business sign” rather than a “non-business-related mural”).

²⁴ *See, e.g.*, *H.D.V.-GREEKTOWN, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009) (rejecting an “overly narrow” interpretation of content-neutrality and noting that nothing in the record before it indicated that the distinctions between various types of signs reflected a preference for one type of speech over another).

Seventh²⁵ circuits. These courts had all determined that sign codes differentiating among sign types based on broad categories or sign function—*i.e.*, political, real estate, construction, etc.—did not contain the type of content discrimination prohibited by the First Amendment. Under this “functional” or “purposive” approach to content neutrality, a sign code would be held content based only if the local government’s intent was to control content; this approach was highly favorable to government defendants.

Two other circuits, the Eighth²⁶ and Eleventh,²⁷ had previously taken a more strict or “absolutist” approach to content neutrality that demanded that sign regulations should not in any way differentiate among signs based upon the message displayed. Under this approach, if a code enforcement officer was required to read the message displayed on a sign to properly enforce the code, the sign code should be found content based.²⁸ Thus, for example, a sign code that distinguished between political signs and event signs on the basis that the former contains a campaign message and the latter advertises a particular event would be content based and thus subject to strict scrutiny which would likely prove constitutionally fatal.²⁹ The lone dissenting judge in *Reed II* argued, in line with these decisions, that “Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs

²⁵ See, e.g., *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651, 184 L. Ed. 2d 459 (2012) (rejecting notion that a law is content-based merely because a court must look at the content of an oral or written statement to determine if the law applies).

²⁶ See, e.g., *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (finding that code exemption for any sign display meeting the definition of a “mural” was impermissibly content-based because “the message conveyed determines whether the speech is subject to the restriction”), citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

²⁷ See, e.g., *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) (finding exemptions from sign code based on content—rather than the time, place, or manner—of the message discriminates against certain types of speech based on content and thus are content-based).

²⁸ For this reason, the strict approach has often been called the “need to read” approach.

²⁹ This mechanical sequence for reviewing speech regulations was clearly identified by Justice O’Connor in her concurrence in *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring), and prior to *Reed*, had been utilized by most courts reviewing challenges to sign regulations.

promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed.”³⁰

The federal appeals courts were not alone in their confusion regarding the meaning of content neutrality as applied in the context of sign codes. Beginning over forty years ago, the Supreme Court began developing two separate lines of cases regarding content neutrality. One approach took a rather simplistic yet strict view of the doctrine, while the other advocated a more functional approach that better accommodated government regulations of speech. The strict approach originated with the Court’s first express announcement of the content neutrality doctrine in *Police Department of Chicago v. Mosley*, decided in 1972, where the Court stated, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³¹ In making that declaration, the Court invalidated a Chicago ordinance which prohibited all picketing in areas near schools, but exempted “peaceful labor picketing” from the general ban.³² Nine years later, in *Metromedia, Inc. v. City of San Diego*, the Court struck down a municipal ordinance that distinguished between forms of noncommercial speech displayed on billboards, and in doing so made similarly sweeping statements regarding content neutrality.³³ And in 1984, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, the Court suggested in dicta that

³⁰ *Reed II*, 707 F.3d at 1080. (Watford, J., dissenting).

³¹ 408 U.S. 92, 95 (1972). The inherent problem with the Chicago ordinance was, for example, that labor advocates could engage in picketing outside of schools while civil rights advocates or Vietnam War protestors could not do so. *Id.*

³² *Id.* at 94.

³³ 453 U.S. 490, 515 (1981) (“With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: ‘To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.’”) (internal citations omitted). The San Diego ordinance in question exempted from the ban, “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 ‘[t]emporary political campaign signs.’” *Id.* at 494-95.

differential treatment of political speech as compared with other types of noncommercial speech could have potentially created content neutrality problems for an otherwise content neutral ordinance banning the posting of private signs on light posts in the public right-of-way.³⁴ These cases all stated or implied that categorization of speech on the basis of even broad subject matter should be condemned under the First Amendment.

The Supreme Court's decisions in *Mosley*, *Metromedia*, and *Taxpayers for Vincent* contrasted with another line of Supreme Court cases focusing on the government's stated purpose for the challenged regulation. *Ward v. Rock Against Racism*,³⁵ decided in 1989, is one of the leading cases adopting this approach. In *Ward*, the Court upheld a requirement that performers using a public bandshell utilize municipal sound amplification equipment and personnel for their performances. The regulation was intended to control noise emanating from the bandshell.³⁶ In finding the regulation content neutral, the Court stated,

“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 of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.”³⁷

The Court's focus on governmental purpose as the determinant of whether a regulation is content neutral is also evident in the line of cases addressing governmental regulation of protest activities near abortion clinics. In *Hill v. Colorado*, the Court upheld a state law which made it

³⁴ 466 U.S. 789, 816 (1984) (noting that a “political speech” exception to a general ban which did not apply equally to other forms of noncommercial speech could be problematic under the content neutrality doctrine).

³⁵ 491 U.S. 781 (1989).

³⁶ *Id.* at 787.

³⁷ *Id.* at 791 (internal citations omitted).

“unlawful within . . . regulated areas for any person to ‘knowingly approach’ within eight feet of another person, without that person's consent, ‘for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. . . .’”³⁸ In so doing, the Court specifically rejected the absolutist approach while noting the proliferation of laws requiring enforcement officials to review communicative content in order to determine the law’s applicability to that content.³⁹ The approach adopted by *Ward* and *Hill*, cited frequently by courts adopting the functional approach advocated in *Reed II*, differs substantially from the approach advocated by *Mosley* and its progeny.

The Court’s most immediate pre-*Reed* statement on content neutrality appeared to continue the *Ward-Hill* purposive approach to content neutrality. In its 2014 ruling in *McCullen v. Coakley*, the Court invalidated a Massachusetts law prohibiting certain expressive activities within a specified distance of a “reproductive health care facility”—abortion clinics were at the center of the law’s purview—but not before a majority of the Court found the law to be content neutral.⁴⁰ While acknowledging that the law in question had a differential effect on speech surrounding abortion clinics, Chief Justice Roberts, writing for the majority, found that “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.”⁴¹ Moreover, the Court repeated the *Ward* test for determining content neutrality, and in finding the Massachusetts law content neutral, relied on the law’s stated intent to advance the interests of public safety, access to health care, and unobstructed use

³⁸ 530 U.S. 703, 707 (2000), citing Colo. Rev. Stat. § 18-9-122(3) (1999). The Colorado statute at issue in *Hill* was emblematic of laws enacted by states and local governments to limit the extent to which protesters could inhibit access to abortion clinics, and; judges have noted the unique political dynamics involved in the abortion clinic cases. *Id.* at 741 (Scalia, J., dissenting).

³⁹ *Id.* at 721, 722 (“[W]e have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.”)

⁴⁰ 134 S. Ct. 2518, 2531 (2014).

⁴¹ *Id.*

of public sidewalks and roads.⁴² The approach to content neutrality set forth in *Coakley* ~~*McCullen*~~ continued the more lenient approach to content neutrality in sign cases that favored local governments and appeared to reject the more plaintiff-friendly strict approach beginning with *Mosley*.

Recognizing this split among the courts of appeals, and perhaps in recognition of the inconsistencies in its own doctrine, the Supreme Court granted *certiorari* review in *Reed*.⁴³ In the Supreme Court's *Reed* decision, all nine justices agreed that the town's sign code was unconstitutional, but differed as to why that was so.

D. Majority Opinion

The *Reed* majority opinion was authored by Justice Clarence Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito and Sotomayor. While not explicitly acknowledging the Circuit split, the Court resolved it in favor of the absolutist “need to read” position: a sign regulation that “on its face” considers the message on a sign to determine how it will be regulated is content based.⁴⁴ As the Court said, the “commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”⁴⁵ Thus, if a sign code makes *any* distinctions based on the message of the speech, the sign code is content based. Further, the majority held that regulations of speech must be both *facially* content neutral and content neutral in their *purpose*. According to the majority, only after determining whether a sign code is neutral on its face should a court inquire as to whether the law is neutral in its justification.

⁴² *Id.* at

⁴³ 573 U.S. ---, 134 S. Ct. 2900, 189 L.Ed.2d 854 (2014).

⁴⁴ *Reed*, 135 S. Ct. at 2227.

⁴⁵ *Id.*

Justice Thomas’s opinion dismissed several theories the *Reed II* majority had offered to justify its viewing the Gilbert code as content neutral. The first theory claimed that a sign regulation is content neutral so long as it was not adopted based on disagreement with the message conveyed and the justification for the regulation was “unrelated to the content of the sign.”⁴⁶ Justice Thomas refuted that theory on the ground that it “skips the crucial first step in the content-neutrality analysis: determining whether the law is content-neutral on its face.” Indeed, the majority opinion expresses concern about the possibility that government officials might explicitly justify regulations or actions in content neutral terms, while still writing such regulations or taking such actions with an underlying censorial motive.⁴⁷ His opinion states: “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 towards the ideas contained’ in the regulated speech.”⁴⁸

Next, the majority addressed the Ninth Circuit’s finding that the Gilbert code was content neutral “because it ‘does not mention any idea or viewpoint, let alone single one out for differential treatment.’”⁴⁹ Justice Thomas dismissed that finding, recognizing that it conflated two distinct First Amendment limits on regulation of speech—government discrimination among viewpoints and government discrimination as to content—and noting that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”⁵⁰

⁴⁶ *Id.*, citing *Reed II*, 707 F.3d at 1071-72.

⁴⁷ *Id.* at 2229 (“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the ‘abridg[ement] of speech’—rather than merely the motives of those who enacted them.”).

⁴⁸ *Id.* at 2228, citing *Discovery Network*, 507 U.S. at 429.

⁴⁹ *Id.* at 2229, quoting *Reed I*, 587 F.3d at 977.

⁵⁰ *Id.* at 2229-30.

Finally, the majority addressed the Ninth Circuit’s statement that the Gilbert code was content neutral because it made distinctions based on “the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.”⁵¹ After noting that this claim was factually incorrect,⁵² Justice Thomas argued that the claim was legally incorrect as well. The problem with “speaker-based” distinctions, in the majority’s view, is that they “are all too often simply a means to control content.”⁵³ Thus, because laws containing a speaker preference may reflect a content preference, they must be subject to strict scrutiny.⁵⁴

In response to the finding that “event-based” distinctions were content neutral—a “novel theory,” according to Justice Thomas—the majority found that “[a] regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.”⁵⁵ Acknowledging that a sign code that made event based distinctions may be “a perfectly rational way to regulate signs,” the majority stated 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

⁵¹ *Id.* at 2230, quoting *Reed II*, 707 F.3d at 1069.

⁵² *Id.* at 2230-31. Justice Thomas noted that the code was not speaker-based because the restrictions for ideological, political and temporary event signs applied equally regardless of who sponsored the signs. He then argued that the code was not “event based” because citizens could not put up a sign on any topic prior to an election, but rather were limited to signs that were judged to have “political” or “ideological” content. Because those provisions were content-based on their face, they could not escape strict scrutiny merely because an event, such as an election, was involved.

⁵³ *Id.* at 2230, quoting *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

⁵⁴ The authors of this article struggled to understand the Court’s statement that “we have insisted that ‘laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference,’” *Reed*, 135 S. Ct. at 2230, quoting *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 658 (1994). It is not clear from the Court’s statement whether the majority believes that *all* speaker-based regulations should be subject to strict scrutiny, or if there is an interim analysis that must occur in order to determine that the “legislature’s speaker preference reflects a content preference.” *Reed*, 135 S. Ct. at 2230. We note that the Court, in *Turner Broadcasting*, stated expressly that not “all speaker-partial laws are presumed invalid,” *Turner*, 512 U.S. at 658, and indeed, the Court in *Turner* rejected an argument that a speaker based law should be subjected to strict scrutiny. Neither *Turner* nor *Reed* provides any useful guidance as to what indicators might be used to determine that the legislature’s speaker preference reflects a content preference. See further analysis below in Section II.F.

⁵⁵ *Id.* at 2231.

down because of their content-based nature.”⁵⁶ This discussion of event based signage concentrated on the Gilbert code’s allowance for signs with political messages only before and during election periods, and the code’s prescribed language for other event based signage;⁵⁷ however, the opinion is not limited to that circumstance. For example, a sign code allowing a temporary sign with the message “Grand Opening” but prohibiting one with any other message (e.g., “Going Out of Business”) could be seen as event based and thus content based.

Having found the challenged provisions of the Gilbert code to be content based, Justice Thomas next addressed whether the town could satisfy strict scrutiny, that is, demonstrating that its distinctions among the various types of signs furthered a compelling governmental interest and was narrowly tailored to achieve that interest. According to the majority, it could not.⁵⁸

The majority opinion concluded by briefly noting that the town’s current code regulates many aspects of signs that have nothing to do with the sign’s message,⁵⁹ and that the town had failed to tailor its regulations to the regulatory interests—traffic safety and aesthetics—identified in the code.⁶⁰ The majority did note, indeed somewhat curiously, that a sign ordinance that was narrowly tailored to allow certain signs that “may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety” well might survive strict scrutiny.⁶¹ The majority opinion did not address whether the town’s asserted governmental interests—traffic

⁵⁶ *Id.* at 2231, quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring).

⁵⁷ *Reed*, 135 S. Ct. at 2231.

⁵⁸ *Reed*, 135 S.Ct. at 2231-32. The town claimed the distinctions served interests in aesthetics and traffic safety. Justice Thomas assumed for the sake of argument that these are compelling interests, but found that the code’s distinctions were underinclusive and thus not narrowly tailored.

⁵⁹ *Id.* at 2232, noting, as examples, regulating “size, building materials, lighting, moving parts and portability.”

⁶⁰ *Id.* at 2231 (“The 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.”).

⁶¹ *Id.* at 2232.

safety and aesthetics—constitute compelling governmental interests for purposes of strict scrutiny analysis.⁶²

Thus, because Gilbert’s sign code differentiated “on its face” between political, ideological, and event signs based on the message of the sign, the code was found content based. Upon making that finding, the majority applied *strict scrutiny*, the most demanding form of constitutional review, requiring the government to show that “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”⁶³ As exemplified by *Reed*, regulations subjected to strict scrutiny rarely survive a court’s review. Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement.

E. **Concurrences**

Three concurring opinions were filed in the case. Justice Samuel Alito filed a concurrence, joined by Justices Kennedy and Sotomayor, in which he agreed with the majority’s ruling, but listed nine forms of sign regulation that he would find content neutral. In two concurring opinions, one by Justice Stephen Breyer and the other by Justice Elena Kagan, three justices concurred in the judgment but disagreed with the majority’s application of strict scrutiny to the Gilbert code.

Justice Alito’s opinion further identified the regulations that, in his view, should be considered content neutral. While disclaiming he was providing “anything like a comprehensive list,” Justice Alito noted “some rules that would not be content based.”⁶⁴ These included:

⁶² *Id.* at 2231.

⁶³ *Id.* at 2231 (citation omitted).

⁶⁴ *Id.* at 2233 (Alito, J., concurring).

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.

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.

Rules imposing time restrictions on signs advertising a one-time event. Rules 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.⁶⁵

Justice Alito further noted that “government entities may also erect their own signs consistent with the principles that allow government speech”⁶⁶ and claimed that “[p]roperly understood, today’s decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”⁶⁷

In his list of acceptable sign regulations, Justice Alito approved of two rules that may conflict with Justice Thomas’s “on its face” language. Alito claimed that rules “distinguishing between on-premises and off-premises signs” and rules “imposing time restrictions on signs

⁶⁵ *Id.*

⁶⁶ *Id.* at 2233, arguing that this included “all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.”

⁶⁷ *Id.* at 2233-34.

advertising a one-time event” would be content neutral.⁶⁸ But rules regarding “signs advertising a one-time event” clearly are facially content based, as Justice Kagan noted in her opinion concurring in the judgment,⁶⁹ and the same claim could be made regarding the distinction between onsite and offsite message commonly seen in local sign codes and state highway advertising laws.⁷⁰ Neither Justice Thomas nor Justice Alito discussed how courts should treat codes that distinguish between commercial and non-commercial signs, a point raised by Justice Breyer in his opinion concurring in the judgment.⁷¹

Justices Breyer and Kagan, while concurring in the judgment, wrote opinions critical of Justice Thomas’s absolute rule about content-neutrality. Justice Breyer argued that because “[t]he First Amendment requires greater judicial sensitivity both to the Amendment’s expressive objectives and to the public’s legitimate need for regulation than a simple recitation of categories, such as ‘content discrimination’ and ‘strict scrutiny’ would permit.”⁷² While acknowledging that strict scrutiny “sometimes makes perfect sense,” he argued that regulations that engage in content discrimination “cannot and should not *always* trigger strict scrutiny.”⁷³ He also expressed concern that courts, forced to apply strict scrutiny “to all sorts of justifiable

⁶⁸ On-site, also called “on-premises,” signage generally refers to signage where the message relates to an activity occurring on the same premises as the sign, whereas off-site or off-premises signage refers to signage advertising an activity not located on a common property with the sign. As we discuss in greater detail *infra* in Section II.C, the onsite-offsite distinction with respect to commercial speech was upheld in *Metromedia v. City of San Diego*, 453 U.S. 490, 511-12 (1981), even though the Court rejected the notion that onsite commercial speech could be permitted to the exclusion of necessarily offsite noncommercial speech. *Id.* at 513. This problem is further illustrated below.

⁶⁹ *Id.* at 2237, fn *. This is, of course, only the case if the code defines event based signage as the Gilbert code did.

⁷⁰ See discussion in Section II C *infra*.

⁷¹ *Id.* at 2235.

⁷² *Id.* at 2234 (Breyer, J., concurring).

⁷³ *Id.* at 2235, emphasis in original. Justice Breyer’s opinion did not acknowledge that its approach—not requiring strict scrutiny for content based laws—conflicts with the broadly-accepted rule that content based laws should be subject to strict scrutiny analysis. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014); *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring) (“The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.”).

government regulations,” might water down the approach in a way that “will weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force.”⁷⁴ In his view, the “better approach 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 the justification.”⁷⁵ Justice Breyer would “use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.”⁷⁶ To illustrate his concern regarding the application of strict scrutiny to *all* content based laws, Justice Breyer lists several laws—federal securities regulations, federal energy consumption labeling requirements, prescription drug labeling, doctor-patient confidentiality laws, and income tax statement disclosure laws—which contain certain elements of content regulation and which might be suspect under the majority’s sweeping statements.⁷⁷

Justice Kagan’s opinion, joined by Justices Breyer and Ginsburg, expressed great concern that the majority’s absolute rule would, as Justice Thomas himself acknowledged, lead to “entirely reasonable” sign laws being struck down.⁷⁸ In her view, there was no need for the majority to discuss strict scrutiny at all because the code provisions at issue did not pass

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2235-36. Justice Breyer explained that answering that question “requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so.” *Id.* at 2236.

⁷⁷ *Id.* at 2235.

⁷⁸ *Id.* at 2236, citing Justice Thomas, at 2231.

“intermediate scrutiny, or even the laugh test.”⁷⁹ More basically, she argues that strict scrutiny of many content based provisions in sign regulations is not needed because such provisions do not implicate the core First Amendment concerns that justify the application of strict scrutiny.⁸⁰ Justices Breyer and Kagan would each have applied intermediate scrutiny, a less demanding constitutional standard that requires the government to demonstrate that a speech regulation is narrowly tailored to achieve a significant (as opposed to compelling) governmental interest⁸¹ and leaves open ample alternative avenues of communication. Both Justices Breyer and Kagan found the Gilbert sign code unconstitutional, however, because its sign categories were not tailored to the code’s stated regulatory purposes. As the majority found, the distinctions between temporary event signs, political signs, and ideological signs did nothing to further the government’s goal of beautifying the community and reducing traffic hazards.

F. Clarifying Elements of the Decision

Reed provides four points of clarification.

First, the decision reaffirmed the principle that content based regulations are subject to strict scrutiny and presumptively unconstitutional. To the chagrin of Justices Breyer and Kagan, the *Reed* majority applied a now-familiar mechanical approach to content neutrality analysis in which the Court first asked the question, “is the law content based?” Answering the first question in the affirmative, the *Reed* Court then proceeded to apply strict scrutiny, asking the

⁷⁹ *Id.* at 2239. There is some support for the argument that the Court’s entire discussion of content neutrality in the *Reed* majority opinion is *dicta*, given that the majority and the concurrences come out in the same place: that the Gilbert code failed the narrow tailoring requirement of both intermediate and strict scrutiny. See *McCutcheon v. Federal Election Comm’n*, 572 U.S. ___, 134 S. Ct. 1434, 1446 (2014). In *McCullen*, Justice Scalia’s concurrence chided the majority opinion, authored by Chief Justice Roberts, for undertaking the content neutrality analysis when the decision ultimately concluded that the Massachusetts law was not narrowly tailored. 134 S. Ct. at 2541-42 (Scalia, J., concurring) (referring to the Court’s discussion of content neutrality as “seven pages of the purest dicta”).

⁸⁰ *Id.* at 2237.

⁸¹ Traffic safety and aesthetics, for example, are significant governmental interests; see, e.g., *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

question, “is the regulation narrowly tailored to a compelling governmental interest?” This mechanical approach, first articulated in Justice O’Connor’s concurring opinion in *Gilleo*,⁸² was carried forward by the majority in *McCullen*,⁸³ and now appears to be the conclusive method for analyzing speech regulations for content neutrality purposes, although questions remain about its application to regulation of offsite signs and adult entertainment businesses.⁸⁴

Second, the majority opinion resolved the prior split between the circuit courts of appeal by requiring *both* facial content neutrality and a neutral purpose for sign regulations, and determined that a regulation’s purpose is irrelevant if the regulation is not neutral on its face. The majority opinion in *Reed* calls into question hundreds of lower court decisions that relied on the Court’s statements in *Ward* and *Hill* in upholding municipal sign regulations that regulated signs according to category or function but which relied upon clearly-articulated content neutral purpose statements and justifications in so doing.⁸⁵ At the same time, the *Reed* decision affirms the lower courts that took the strict or absolutist view of content neutrality and that placed less reliance on governmental purpose in favor of scrutinizing the facial neutrality of sign regulations. Courts are now required to undertake a two-step content neutrality analysis to review speech regulations for both facial neutrality and purposive neutrality.

Third, the Court determined that categorical signs, such as directional signs, real estate signs, construction signs, etc., are content based where they are defined by aspects of the signs’ message. Many local sign codes currently define these signs by reference to the content of the sign. For example, “real estate sign” might be defined as “a sign advertising for sale the property on which the sign is located.” Similarly, local codes have often regulated each of these sign

⁸² 512 U.S. at 59.

⁸³ 134 S. Ct. at 2530.

⁸⁴ See discussion in Sections II C & E *infra*.

⁸⁵ *Cahaly v. Larosa*, --- F.3d ---, 2015 WL 4646922, at *4 (4th Cir. 2015).

types differently, even if the code's stated or implied purpose in doing so was merely a recognition of the different functions of, and thus need for, these types of signs. To the extent local codes define these signs according to the message stated on the face of the sign, *Reed* concludes that such regulations are presumptively unconstitutional. As we discuss below, however, there may be several options for regulating these signs in a content neutral manner.

Fourth, the Court stated that regulations purporting to be "speaker based," that is, the regulation applies to certain speakers but not others, may be found content based and subjected to strict scrutiny. That is, regulations that distinguish between speakers are neither by necessity content neutral, nor are they automatically excused from content neutrality analysis, although they may be permissible. First Amendment doctrine regarding speaker based regulation is incredibly murky, so while the *Reed* majority's statements on the matter may provide some clarification, questions regarding speaker based regulation remain and are discussed further below.

As for unanswered questions following *Reed*, there are many and we explore them in the following section.

II. Remaining Questions After *Reed*

While there are four points of clarification following *Reed*, there are several questions that arise as a result of the decision. As we have authored this article in the immediate aftermath of the decision, our list of questions represents the authors' initial reactions to some of the issues raised by the decision.

A. Regulations of speech by category and function—where do they stand?

One of the most immediate questions following *Reed* is whether regulation of signs by category or function continues to be permissible. Virtually all local sign codes contain some

element of categorical or functional sign regulation that, if rendered unconstitutional by *Reed*, could potentially give rise to constitutional liability.

Take, for example, real estate signs.⁸⁶ As noted above, many local codes define real estate signs by the message on the sign, *i.e.*, “[s]igns that identify or advertise the sale, lease or rental of a particular structure or land area.”⁸⁷ This definition clearly identifies and defines the sign by the message on the face of the sign, in turn requiring a local code enforcement officer to read the message of the sign and to determine that the sign’s message is, first, advertising; second, discussing the property on which it is located; and third, regarding the sale of that particular property. Under the *Reed* majority’s treatment of facially content based laws, such a regulation would be subject to strict scrutiny and presumptively unconstitutional.⁸⁸ Similar problems exist for local code definitions of construction signs (“a sign advertising the project being constructed and stating the name and address of the contractor”),⁸⁹ directional signs (“a sign located within ten feet of a driveway entrance, containing words, arrows, or other symbols directing motorists into the driveway entrance”),⁹⁰ and grand opening signs (“a temporary sign advertising the opening or reopening of a business”),⁹¹ to name a few.

With all of these functional or categorical sign regulations potentially unconstitutional after *Reed*, what is a local government to do? An alternative approach in the case of real estate signs could be to define “real estate sign” as “a temporary sign placed on property which is

⁸⁶ This example assumes, without argument, that real estate signs are noncommercial and that regulation and enforcement of such signs is subject to the content neutrality analysis. This example further assumes that the speaker posting the sign has a First Amendment interest on par with, say, an owner of a sign advocating for an election issue. There is certainly a persuasive argument that any real estate sign is commercial speech, however, real estate signs posted in residential districts are at times treated differently.

⁸⁷ *See, e.g.*, DENVER, COLO., ZONING CODE § 10.10.3.1.G (2015); AMARILLO, TEX., SIGN ORDINANCE § 4-2-2 (2015).

⁸⁸ *Reed*, 135 S. Ct. at 2227.

⁸⁹ *See, e.g.*, SANDOVAL COUNTY, N.M., SIGN ORDINANCE § 5.A (2015).

⁹⁰ *See, e.g.*, WICHITA FALLS, TEX., SIGN REGULATIONS § 6720 (2015).

⁹¹ *See, e.g.*, KINGMAN, ARIZ., SIGN CODE § 25.200 (2015).

actively marketed for sale, as the same may be evidenced by the property’s listing in a multiple listing service.” Such a definition does not contain the same type of content problems that the prior definition had, and appears to define the sign not by the content of the message, but rather by the status of the property, *i.e.*, whether it is actively marketed for sale. Even so, the *Reed* majority might find such a regulation to fail the content neutrality test, since *Reed* expresses concern about code provisions that define speech “by its function or purpose.”⁹² Therefore, the status and constitutionality of sign regulations relating to so-called functional signs is an open question after *Reed*.⁹³ We discuss some of the regulatory issues associated with this problem below.

B. Definitional issues with the term “sign” and related problems

Many sign codes contain provisions that differentiate between what is and what is not a “sign” by reference to the content of the message displayed and/or who is displaying the message. The code then regulates “signs” and non-“signs” differently. The *Reed* decision calls these provisions into question.

A recent Eighth Circuit case, *Neighborhood Enterprises, Inc. v. City of St. Louis*,⁹⁴ exemplifies this issue. The code provision in question defined the term “sign” and then listed numerous exemptions that would not be considered to be a “sign”:

Sign. “Sign” means any object or device or part thereof situated outdoors which is used to advertise, identify, display, direct or attract attention to an object,

⁹² *Reed*, 135 S. Ct. at 2227 (“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. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”).

⁹³ In the case of real estate signs, the problem is even more complicated than for other types of functional signs. Supreme Court precedent holds that local governments may not prohibit property owners from posting real estate signs to advertise property for sale, as doing so constitutes suppression of protected speech. *Linmark Assoc., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 96 (1977). Some other types of functional signs, such as construction signs, grand opening signs, etc., could probably be prohibited without questions as to the constitutionality of such a ban.

⁹⁴ *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), cert. den. 132 S. Ct. 1543 (2012).

person, institution, organization, business product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, motion illumination or projected images. Signs do not include the following:

- a. Flags of nations, states and cities, fraternal, religious and civic organization;
- b. Merchandise, pictures of models of products or services incorporated in a window display;
- c. Time and temperature devices;
- d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
- e. Works of art which in no way identify a product.

If for any reason it cannot be readily determined whether or not an object is a sign, the Community Development Commission shall make such determination.⁹⁵

The city's Board of Adjustment upheld the denial of a sign permit for painted wall art critical of St. Louis's eminent domain practices. The applicant sued, claiming that what the city termed a "sign" was actually a "mural" exempt from the city's sign regulations.⁹⁶ The district court granted summary judgment to the city.⁹⁷ On appeal, the Eighth Circuit noted that objects of the same dimension as the sign—or "mural"—at issue would not be subject to the regulations if they were symbols of certain organizations, and thus the content of the message displayed determined whether the object was or was not regulated as a "sign." The court found that the sign code's definition of "sign" was impermissibly content-based because "the message conveyed determines whether the speech is subject to the restriction."⁹⁸ In applying strict scrutiny, the court stated that the city's asserted interests in traffic safety and aesthetics had never

⁹⁵ *Neighborhood Enterprises, Inc. v. City of St. Louis, Mo.* 2014 WL 5564418, at *1-2 (E.D. Mo. 2014).

⁹⁶ *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d at 733-34; *see Neighborhood Enterprises, Inc. v. City of St. Louis*, 718 F. Supp. 1025 (E.D. Mo. 2010).

⁹⁷ *Id.* at 735.

⁹⁸ *Id.* at 736.

been found compelling,⁹⁹ and ruled that even if these were compelling interests, the code's treatment of exempt and non-exempt “signs” was not narrowly-tailored to the city's asserted goals and thus the provision was unconstitutional.¹⁰⁰

In so ruling, the Eighth Circuit followed the absolutist approach to determining whether a code was content based, in line with what is now required of all courts under *Reed*. In contrast, the ruling in *Wag More Dogs, LLC v. Cozart*,¹⁰¹ a 2012 Fourth Circuit decision following the purposive approach to content neutrality, shows how such rulings cannot stand after the Court's ruling in *Reed*.

Wag More Dogs was a pet daycare business in Arlington, Virginia. After the business relocated to a site opposite a popular dog park, the owner commissioned an artist to paint a 960 square foot artwork on the rear of building that included several of the cartoon dogs featured in the business's logo. Shortly after the artwork was completed, the city cited the owner for violating the sign code by displaying a sign that exceeded the code's size limits.¹⁰² After discussions with the owner, the city offered to allow allowed her to retain the “mural” on condition she added the words “Welcome to Shirlington Park's Community Canine Area” above the artwork. In the city's view, the addition of these words would convert the painting from an impermissible sign into an informational sign not requiring a permit under the sign code. The

⁹⁹ *Id.* at 738; see discussion in Section II G, *infra*.

¹⁰⁰ *Id.* Because the district court had never considered whether the provision was severable, the Eighth Circuit remanded the case to allow the lower court to determine whether the unconstitutional provisions were severable from the remainder of the code. On remand, the district court found the new sign ordinance to be content neutral, *Neighborhood Enterprises, Inc. v. City of St. Louis, Mo.*, 17 F.Supp.3d 907 (E.D. Mo. 2014), but later vacated that finding, determining that the definition of “sign” in the code could not be severed from the balance of the code. *Neighborhood Enterprises, Inc. v. City of St. Louis, Mo.*, 2014 WL 566418 (E.D. Mo. 2014).

¹⁰¹ *Wag More Dogs Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012).

¹⁰² *Id.* at 362-64. The sign code defined the term “sign” as “[a]ny word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors.” It further provided as a general rule that “[a] sign permit shall be obtained from the Zoning Administrator before any sign or advertising is erected, displayed, replaced, or altered so as to change its overall dimensions.”

owner declined the offer and sued, claiming that the code was impermissibly content-based both facially and as-applied.¹⁰³

The Fourth Circuit ruled in favor of the city, rejecting the owner's claim that a sign ordinance differentiating based on the content of a sign must be found content based.¹⁰⁴ The court stressed that the sign code's distinctions were adopted "to regulate land use, not to stymie a particular disfavored message" and, thus, in the court's view "the Sign Ordinance's content neutrality is incandescent."¹⁰⁵

The *Wag More Dogs* approach to content neutrality in defining a sign is, of course, no longer viable after *Reed*. The more crucial point, however, is that the regulatory approach to defining signs seen in both of these cases is no longer viable after *Reed*. The problem with each – and with most sign codes – is not the definition of "sign" *per se*, but rather the various content based exemptions or exceptions from regulations that apply to the non-exempted signs. In both cases, for example, the codes differentiated between signs and murals. More generally, almost all codes require a sign permit to display a permanent sign, *i.e.*, a sign that will be displayed for a lengthy, but indefinite, period, such as a sign on the façade of a commercial building, but exempt from the permit requirement numerous other signs defined by their content, such as "nameplates" on residences or signs advertising a property for sale or rent.

After *Reed*, such content based exceptions would be subject to strict scrutiny. To avoid that, local governments that want to retain such exemptions will need to reformulate them to be content neutral. In many cases, such reformulation is fairly simple: although a "nameplate" sign is content based, allowing the display of a "permanent sign no larger than one square foot placed

¹⁰³ *Id.* at 364.

¹⁰⁴ *Id.* at 366-67.

¹⁰⁵ *Id.* at 368.

on the front of a residential structure, or mounted in the front lawn of a residential property, or ... etc.” is content neutral. We explore this approach further in Section III.E.

C. Continued validity of the on-premises/off-premises distinction

Reed also creates some uncertainty about whether a sign code provision distinguishing between on-site and off-site signs should be considered a content-based regulation. The provision challenged in *Reed* applied only to temporary non-commercial signs. Justice Thomas’s majority opinion did not discuss regulation of on-site versus off-site signs, but that issue was addressed, albeit peremptorily, in Justice Alito’s concurrence.¹⁰⁶ The extent to which the two opinions conflict regarding whether a sign code provision that distinguishes between on-site and off-site signs is unclear.

Historically, judges, lawyers and sign owners have disagreed on whether the distinction between on- and off-site signs discriminates on the basis of content, or if it is simply a content neutral regulation of a sign’s location.¹⁰⁷ On one hand, the distinction turns on the location of a sign—a clearly content neutral method of sign regulation, even after *Reed*.¹⁰⁸ On the other hand, this distinction clearly relies upon the message displayed, for example, by defining an on-site sign as “a sign displaying a message concerning products or services offered for sale, rental, or use on the premises where the sign is located.”¹⁰⁹

With respect to regulations of commercial speech, the Supreme Court conclusively determined in *Metromedia* that the distinction between on- and off-site signs was permissible,

¹⁰⁶ *Reed*, 135 S.Ct. at 2233-34.

¹⁰⁷ *Compare, e.g., Metromedia*, 453 U.S. at 511-12 (upholding on-premises/off-premises distinction as it relates to commercial speech) *with Outdoor Media Dimensions, Inc. v. Dep’t of Transp.*, 132 P.3d 5, 16-17 (Or. 2006) (finding on-premises/off-premises distinction to be content-based under state constitution).

¹⁰⁸ *See, e.g., Contest Promotions, LLC v. City and Cnty. of San Francisco*, 2015 WL 4571564, at *4 (N.D. Cal. 2015) (“The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises.”)

¹⁰⁹ *See, e.g., SAN ANTONIO, TEX., CODE OF ORDINANCES § 28-6* (2015).

subject to certain limitations.¹¹⁰ The on-site/off-site distinction is more complicated, however, relative to noncommercial speech. Since noncommercial signage, such as a political advertisement or religious proclamation, rarely has a locational component, it is almost always off-premises in a literal sense. For example, a restaurant owner who displays a sign reading “Barack Obama for President” is not advertising or otherwise calling attention to any activity on the premises where the sign is located. Thus, a sign code prohibiting all off-site signage would ban a fair amount of noncommercial speech. The Supreme Court recognized this problem in *Metromedia*, and established a rule that the government cannot favor commercial over noncommercial speech through, for example, complete bans on off-premises signage without provision for off-premises noncommercial copy.¹¹¹ Under the holding in *Metromedia*, it follows that the on-premises/off-premises distinction is only available for *commercial* signs, and should be avoided for noncommercial signage.

Under a literal reading of Justice Thomas’s majority opinion, the on-premises/off-premises distinction is probably content based “on its face” because it is the content of the message displayed that determines whether a sign should be classified as on-site or off-site.¹¹² But Justice Alito’s concurring opinion included “[r]ules distinguishing between on-premises and off-premises signs” among a list of “some rules that would not be content-based.”¹¹³ It follows that Justice Alito likely views the on-premises/off-premises distinction as simply regulating signs’ location. All of the foregoing suggests that a challenge to sign code exemptions for non-commercial off-site signs from bans on off-site signs should still be judged by applying the lower

¹¹⁰ *Metromedia*, 453 U.S. at 511-12.

¹¹¹ *Id.* at 513.

¹¹² *Reed*, 135 S. Ct. at 2227.

¹¹³ *Id.* at 2233 (Alito, J., concurring).

level of scrutiny under the *Central Hudson* four-part test¹¹⁴ for regulations of commercial speech, similar to *Metromedia*.¹¹⁵ If we assume without argument that *Reed* addresses only noncommercial sign regulations and has no bearing on regulations of commercial signs—a big assumption that is discussed further below—the on-premises/off-premises distinction remains unaffected by *Reed*.

These suggestions are strongly reinforced by the doctrine that prior Supreme Court decisions should not be overruled by implication. As the Court reaffirmed in *Agostini v. Felton*: “[I]f a precedent of this 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.”¹¹⁶ Thus, despite the fact that Justice Thomas’s “on its face” rule for determining whether a code is content based conflicts with the *Metromedia* court’s ruling that the on-site/off-site distinction should be treated as content neutral (and, as discussed below, may conflict with the commercial/noncommercial distinction), because *Reed* did not expressly overrule *Metromedia*, the latter remains good precedent on that point.

Of course, the above discussion leaves open the question of whether the Court would overturn *Metromedia* if the opportunity arose. If that question were presented to the Court as presently constituted, *i.e.*, the same justices who decided *Reed*, the answer appears to be “no” by at least a 6-3 vote. Justice Alito’s three-justice concurrence found that the on-site/off-site

¹¹⁴ *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, a court determines the constitutionality of a regulation of commercial speech by applying a four-part test: (1) to be protected, the speech (a) must concern lawful activity and (b) must not be false or misleading; if the speech is protected, then the regulation must: (2) serve a substantial governmental interest; (3) directly advance the asserted governmental interest; and (4) be no more extensive than necessary to serve that interest. *Id.*, 447 U.S. at 566.

¹¹⁵ 453 U.S. 490 (1981).

¹¹⁶ 521 U.S. 203, 237 (1997), quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

distinction is not content-based. We then can add Justices Breyer, Ginsburg and Kagan, who concurred in the judgment in *Reed* but rejected the majority’s “on its face” rule,¹¹⁷ as three more anticipated votes for upholding *Metromedia*.

As of this writing, four lower federal courts have decided post-*Reed* cases involving challenges to prohibitions or restrictions applicable to off-premises billboard advertising. Three of these courts, acknowledging *Reed*’s applicability only to noncommercial speech, upheld the challenged restrictions, specifically citing the rules for commercial off-site signage established in *Metromedia*.¹¹⁸ One of these cases specifically observed what we have observed above: “at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny.”¹¹⁹ A fourth case, addressing a challenging to the Tennessee highway advertising act, calls several of that law’s distinctions into question, including the on-site/off-site distinction,¹²⁰ seemingly ignoring Justice Alito’s concurrence as it relates to the on-premises/off-premises distinction. Given the divisions in the lower courts regarding the continuing validity of the on-premises/off-premises distinction, we can only assume that *Reed* has created an open question on this issue that may take years to resolve.

D. Regulation of commercial speech

¹¹⁷ See, e.g., *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 2015 WL 4571564, at *4 (N.D. Cal. 2015) (concluding that “at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny”)

¹¹⁸ *Contest Promotions*, 2015 WL 4571564, at *4 (N.D. Cal. 2015); *Citizens for Free Speech, LLC v. Cnty. of Alameda*, ___ F. Supp. 3d ___, 2015 WL 4365439, at *13 (N.D. Cal. 2015); *Calif. Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. 2015) (“*Reed* does not concern commercial speech, let alone bans on off-site billboards.”)

¹¹⁹ *Contest Promotions*, at *4.

¹²⁰ *Thomas v. Schroer*, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015).

What does *Reed* mean for commercial speech regulation? Technically, *Reed* applies only to noncommercial speech, the regulation of which has historically been subjected to a more exacting standard of review than commercial speech regulations, but some of the references in *Reed* point to cases that reviewed commercial speech regulations. Specifically, *Reed* cites extensively to *Sorrell v. IMS Health*,¹²¹ which some First Amendment observers saw as limiting—if not gutting—the commercial speech doctrine in favor of a uniform approach to reviewing commercial and noncommercial speech regulations.¹²²

Sorrell was a 2011 case involving a challenge by pharmaceutical companies and other individuals to a Vermont law restricting the sale, disclosure or use of pharmacy records to reveal the prescribing practices of individual physicians.¹²³ Vermont claimed that the law safeguarded medical privacy, diminishing the likelihood that “data miners” would compile prescription data for sale to drug manufacturers who would then use it to tailor drug marketing to individual physicians.¹²⁴ Vermont claimed that such targeted marketing strategies would lead to prescription decisions benefiting the drug companies to the detriment of patients and the state.¹²⁵ The plaintiff pharmaceutical manufacturers and individual “data-miners” claimed that speech in aid of pharmaceutical marketing is a form of expression protected by the First Amendment and

¹²¹ 131 S. Ct. 2653 (2011).

¹²² See, e.g., Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1171 (2013) (referring to *Sorrell* as having “marked the most recent step in the gradual elevation of commercial speech from ‘its subordinate position in the scale of First Amendment values’ to its status as a form of expression that routinely enjoys robust protection from the Court.”); Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 553 (2013) (“[B]eneath that illusion of stability [in the commercial speech doctrine] lies tremendous uncertainty. Intense debate continues about how to apply the existing tests, whether they should be discarded, and what would replace them.”).

¹²³ *Id.* at 2660.

¹²⁴ *Id.* at 2661.

¹²⁵ *Id.*

that the challenged law impermissibly prohibited the exercise of their First Amendment right to free expression.¹²⁶

In a 6-3 decision, the Supreme Court found the law in question unconstitutional, with the “line-up” of Justices and their rationales exactly mirroring *Reed*. Justice Kennedy authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito and Sotomayor, the same majority as in *Reed*. Justice Breyer dissented, joined by Justices Ginsburg and Kagan, the same Justices who rejected the majority’s “on its face” rule in *Reed* and concurred only in the judgment. As with *Reed*, the *Sorrell* majority applied a higher degree of judicial scrutiny than the dissenting Justices would have imposed and held the regulation unconstitutional. *Sorrell* differs from *Reed* in that the dissenters in *Sorrell* would have upheld the challenged statute under their lower standard, while the same Justices in *Reed* argued that the sign code was unconstitutional under their lower standard.

Given the parallels between *Sorrell* and *Reed*—and the *Reed* majority’s extensive reliance on the *Sorrell* majority opinion—what effect might these cases have on the Court’s future treatment of commercial sign regulation? We think that two issues are worth consideration. First, the Court’s application of content neutrality review in *Sorrell* seems to upset prior judicial approaches to reviewing commercial speech regulations, and the Court’s reliance on *Sorrell* in the *Reed* opinion may foreshadow an extension of this change into the sign regulation arena. Before *Sorrell*, it was generally accepted that commercial speech regulations were not required to be content neutral.¹²⁷ Without rigorous analysis or discussion, the *Sorrell*

¹²⁶ *Id.* at 2659.

¹²⁷ See, e.g., *Metromedia*, 453 U.S. at 514 (“Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests.”). *But see*, *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F.Supp.2d 755 (N.D. Ohio 2000) (holding

Court rejected Vermont’s arguments that the commercial speech doctrine and *Central Hudson* test should apply to the commercial speech regulation at issue in that case.¹²⁸ *Reed*’s reliance on *Sorrell* may therefore portend a cut-back or overruling of the commercial speech doctrine and *Central Hudson* test with respect to sign regulation, potentially meaning that all regulations of commercial signage would be subjected to content neutrality analysis.¹²⁹

The second implication of *Reed* and *Sorrell* is similarly complex. The majority in *Sorrell* found that the Vermont law “on its face” imposed “content and speaker based restrictions on the sale, disclosure, and use of prescriber-identifying information” that was commercial speech protected under the First Amendment and imposed “heightened” – but not strict – scrutiny.¹³⁰ When these same Justices, in *Reed*, found that the Gilbert code “on its face” had imposed “content- and speaker-based restrictions” on non-commercial signs, they imposed strict scrutiny. Critically, while Justice Thomas’s majority opinion in *Reed* cited *Sorrell* extensively, it never suggested that the strict scrutiny standard, required when a regulation of non-commercial speech “on its face” was content based, was also required when a regulation of commercial speech “on its face” was content based.

That distinction is very telling because Justice Kennedy’s *Sorrell* opinion explicitly noted both that commercial speech raises legitimate concerns that may require content based regulations and that commercial speech can be regulated to a greater extent than non-commercial speech: “It is true that content-based restrictions on protected expression are sometimes

that sign ordinance’s content-based restrictions on truthful, non-misleading commercial speech violated First Amendment).

¹²⁸ *Sorrell*, 131 S. Ct. at 2667-68.

¹²⁹ For an example of a case which has apparently taken this approach, see *Thomas v. Schroer*, ___ F. Supp. 3d ___, 2015 WL 4577084, at *4 (W.D. Tenn. 2015). *Thomas* calls into question Tennessee’s highway advertising act, which prohibits off-premises commercial advertising without a permit and exempts on-premises signage from the permit requirement.

¹³⁰ *Id.* at 2663.

permissible, and that principle applies to commercial speech. Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'¹³¹

In light of the above, it appears that *Reed* does *not* require that content-based regulations of commercial signs, including distinctions between commercial and noncommercial messages, be subject to strict scrutiny. Rather, such regulations at most would be subject to some form of intermediate scrutiny. It may, however, be the case that *Sorrell* and *Reed* require courts to analyze commercial sign regulations for content bias. That said, *Metromedia*'s rule that noncommercial signs must be treated at least as favorably as commercial signs remains valid, so a regulation that prefers commercial to non-commercial signs would be struck-down. In Section III.C.2, we advise on how to avoid inadvertently creating such preferences by adding a "substitution clause" to local sign codes.

E. Regulation of adult businesses

Does the *Reed* majority opinion have any effect on how courts should view regulation of adult entertainment businesses? Such regulations have long been treated as an exception to the way courts normally treat the issue of content-neutrality. Adult entertainment business regulations *distinguish* such businesses from others by looking to the content of their expression, but *regulate* them because of concerns about the so-called "secondary effects" associated with these businesses, such as increases in criminal activity and neighborhood deterioration;¹³² reasons that are unrelated to the content of the expression. This "secondary effects" doctrine¹³³

¹³¹ *Id.* at 2672, citations omitted.

¹³² See generally, Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO A&E L. REV. 565 (2011).

¹³³ See generally, Christopher Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002).

holds that regulations of certain types of speech, such as adult entertainment, are content neutral when they are justified on the grounds that certain types of speech have negative secondary effects on the surrounding community¹³⁴ While the doctrine arguably could be applied in contexts outside of adult entertainment regulation, it has largely been confined to that context and rejected in others.¹³⁵

The secondary effects doctrine is at odds with both the *Reed* majority’s “on its face” rule and the concerns about limiting disfavored messages underlying that rule. On that ground it seems a likely candidate to be revisited in the near future. But we think the likelihood that the Supreme Court would overrule the secondary effects doctrine is diminished based on the Court’s decision in *City of Los Angeles v. Alameda Books, Inc.*¹³⁶

Adult entertainment regulations are content-based “on their face”: such regulations apply “to particular speech because of the topic discussed or the idea or message expressed” and “draws distinctions based on the message a speaker conveys.”¹³⁷ Further, the rationale for the secondary effects doctrine’s treating the distinction between “adult” and “non-adult” expression as content-neutral—that the distinction is *justified* without reference to the content of the regulated speech—was explicitly rejected by the majority opinion in *Reed*. *Reed* clearly states that such an approach “skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to

¹³⁴ See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

¹³⁵ See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (ruling that a Washington, D.C. ordinance barring messages critical of foreign governments within 500 feet of an embassy could not be justified under the secondary effects doctrine because “[t]he emotive impact of speech on its audience is not a ‘secondary effect.’” *But see*, *Defense Distributed v. U.S. Dept. of State*, 2015 WL 4658921 (W.D. Tex. 2015) (analogizing to secondary effects doctrine in upholding a content-based restriction in federal regulations banning the export of certain firearms).

¹³⁶ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

¹³⁷ *Reed*, 135 S. Ct. 2227.

strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained in the regulated speech.’”¹³⁸

Moreover, the secondary effects doctrine contradicts the *Reed* majority’s rationale underlying the “on its face” rule. Explaining why the majority rejected the claim “that a government’s purpose is relevant even when a law is content-based on its face,” Justice Thomas wrote: “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech ‘The vice of content-based legislation . . . is not that it is always used for invidious, thought control purposes, but that it lends itself to use for those purposes.’”¹³⁹

Despite the secondary effects doctrine’s doctrinal vulnerability after *Reed*, the Court’s most recent decision on adult entertainment regulation suggests the Justices may not be eager to revisit the issue. Moreover, the Court’s doctrinal opposition to overruling prior decisions by implication seems to weigh in favor of continued life for the secondary effects doctrine.¹⁴⁰ The Court last considered the appropriate standard of review for a challenge to an adult entertainment regulation in *Alameda Books*.¹⁴¹ Justices Thomas and Scalia joined Justice O’Connor’s plurality opinion criticizing the Ninth Circuit for imposing too high an evidentiary bar for cities seeking merely to address the secondary effects of adult businesses,¹⁴² but Justice Scalia wrote a concurring opinion reiterating his long-standing claim that businesses engaged in “pandering

¹³⁸ *Id.* at 2228, citations omitted.

¹³⁹ *Id.* at 2229, citations omitted.

¹⁴⁰ See discussion at n. 116 *supra*.

¹⁴¹ *Alameda Books*, 535 U.S. 425 (2002). The Court did subsequently consider a challenge to an adult entertainment business licensing scheme in *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), but that decision dealt solely with the issue of the procedures required to provide the “prompt judicial review” of licensing decisions that had been called for in an earlier ruling, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *City of Littleton*, seven Justices agreed that in the context of adult business licensing, the “prompt judicial review” language in *FW/PBS* required a prompt judicial decision, not just an assurance of prompt access to the courts. See generally, BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION, 548-556 (2014 ed.)

¹⁴² *Alameda Books*, 535 U.S. at 436-38.

sex” are not protected under the First Amendment and that communities may not merely regulate them with impunity, but may suppress them entirely.¹⁴³ Given that view, while Justice Thomas’s opinion in *Reed* might portend a vote to overturn the secondary effects doctrine and subject cities to strict scrutiny when they regulate adult businesses, it seems unlikely that Justice Scalia would do so.

Of the remaining Justices in the *Reed* majority, only Justice Kennedy was on the *Alameda Books* Court. He authored a concurring opinion that criticized the plurality’s approach because it skipped a critical inquiry: “how speech will fare under the city’s ordinance.”¹⁴⁴ That criticism suggests that he might also vote to overturn the secondary effects doctrine, but, as we note below, perhaps not.

Justices Ginsburg and Breyer were also on the *Alameda Books* Court and joined Justice Souter’s dissent that expressed concern about the significant risk that courts would uphold adult entertainment business ordinances that effectively regulate speech based on government’s distaste for the viewpoint being expressed.¹⁴⁵ While this concern suggests that Justices Ginsburg and Breyer might vote to overturn the secondary effects doctrine, both joined Justice Kagan’s opinion concurring in the judgment in *Reed*, which specifically approved of the doctrine.¹⁴⁶ Arguably, that suggests they would not vote to overturn.

¹⁴³ *Alameda Books*, 535 U.S. at 443–44 (Scalia, J., concurring) (citing his opinions in *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring), and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 256–61 (1990) (Scalia, J., dissenting in part and concurring in part)). The holding in *FW/PBS* was subsequently modified by *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

¹⁴⁴ *Id.* at 450. In his view, shared by Justice Souter’s dissenting opinion, a “city may not assert that it will reduce secondary effects by reducing speech in the same proportion.” *Id.* at 449. In short, “[t]he rationale of the ordinance must be that it will suppress secondary-effects-and not by suppressing speech. *Id.* at 449-50.

¹⁴⁵ *Id.* at 457 (Souter, J., dissenting). His dissent stated: “Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.” *Id.*

¹⁴⁶ *Reed*, 135 S. Ct. at 2238, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was “designed

Based on the above discussion, we believe that, today, only Justice Thomas is very likely interested in overturning the secondary effects doctrine since the doctrine raises concerns about the risk of censorship identical to those he noted in *Reed*. Chief Justice Roberts and Justice Alito might also vote to overturn, but seem far less likely to do so in light of the doctrinal nuance shown by Chief Justice Roberts in *McCullen* and Justice Alioto in *Reed*. Four Justices would likely not vote to overturn: Justices Ginsburg, Breyer, Kagan and, for the reason noted, Scalia. That leaves Justices Kennedy and Sotomayor who were on the same side in both *Sorrell* and *Reed*. While it is unclear how Justice Sotomayor might vote, if Justice Kennedy voted to overturn the secondary effects doctrine, his concurring opinion in *Alameda Books*, which now sets the evidentiary standard for adult entertainment cases, effectively is nullified. We suspect that he would not want to do that, which means that the Court currently lacks the four votes needed to revisit the secondary effects doctrine.

F. What is speaker-based regulation and where does *Reed* leave it?

In making its finding that the Gilbert sign code was content neutral, the Ninth Circuit's opinion in *Reed II* relied in part on the notion that the Gilbert sign code did not impermissibly regulate on the basis of content, but instead validly distinguished between speakers.¹⁴⁷ *Reed II*'s reliance on the constitutionality of speaker based regulation was not the first time the Ninth Circuit had invoked the concept of speaker based regulation to uphold arguably facially content based sign regulations.¹⁴⁸ In *Reed II*, the Ninth Circuit found that the temporary event sign

to prevent crime, protect the city's retail trade, [and] maintain property values ..., not to suppress the expression of unpopular views")

¹⁴⁷ *Reed II*, 707 F.3d at 1077 (“[D]istinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers”).

¹⁴⁸ See, e.g., *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1077 (9th Cir. 2006) (finding that exemptions from sign permitting for public agencies, hospitals and railroad companies did not establish any content preference, but rather simply allow certain speakers the ability to speak without a permit).

regulations were based in part on the party displaying the sign: “Qualifying Event Sign” was defined in a manner that permitted only certain nonprofit organizations and other entities to display such signs.¹⁴⁹ In the Ninth Circuit’s view, such a regulation does not indicate any preference for a particular type of content.

The concept of and legal doctrine associated with speaker based regulation are murky, and *Reed* does disappointingly little to provide clarification in this regard. The Supreme Court majority in *Reed* disagreed both with the Ninth Circuit’s finding that Gilbert’s code provision was even speaker based at all, and with the lower court’s determination that speaker based laws are automatically constitutionally permissible. In rejecting the Ninth Circuit’s statements on speaker based regulation, Justice Thomas wrote, “the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral,” and went on to say that the Court has “insisted that ‘laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.’”¹⁵⁰ Justice Thomas used two examples to explain his point: a law limiting the content of newspapers alone “could not evade strict scrutiny simply because it could be characterized as speaker based” and, similarly, a law regulating the political speech of corporations could not be made content neutral by singling out corporations.¹⁵¹

It is not clear from the majority opinion, however, whether the Court’s intends that *all* speaker based regulations be subject to strict scrutiny. The Court’s statement that a law should be subjected to strict scrutiny when a speaker preference reflects a content preference suggests that an intermediate step might be required to determine whether a speaker based regulation has

¹⁴⁹ *Reed II*, 707 F.3d at 1062.

¹⁵⁰ *Reed*, 135 S. Ct. at 2230, quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658 (1994).

¹⁵¹ *Id.*

an improper legislative purpose or motivation. One of the authors notes that Justice Thomas's statement in *Reed* could simply require an application of strict scrutiny to speaker based regulations, but that the better approach would be to shift the burden to government to demonstrate that its speaker characterization is not based on a speaker preference, an inquiry akin to what happens under the secondary effects analysis. Only when government fails to meet that burden would strict scrutiny apply.

The Supreme Court's prior decisions referencing speaker based regulation provide little meaningful assistance in interpreting *Reed*. *Turner Broadcasting*, which contains the most significant discussion of speaker based regulation, unanimously upheld a 1992 law requiring cable television operators to carry local broadcast stations.¹⁵² The appellants in that case suggested that the law in question was unconstitutional in part because it favored one set of speakers over another, *i.e.*, broadcast programmers over cable programmers.¹⁵³ Justice Kennedy, writing for the majority, rejected the notion that all speaker based regulations must be subject to strict scrutiny,¹⁵⁴ and stated instead that speaker based laws should be strictly scrutinized only when such laws "reflect the Government's preference for the substance of what the favored speakers have to say."¹⁵⁵ As with Justice Thomas's *Reed* opinion, Justice Kennedy's *Turner Broadcasting* opinion contains no guidance as to how a court should determine that a speaker based law is reflective of such an impermissible content preference.

Curiously, Justice O'Connor's concurrence in *Turner Broadcasting*, which was joined by Justices Thomas, Scalia and Ginsburg, might provide more insight into the thinking of some of

¹⁵² *Turner Broad.*, 512 U.S. at 634.

¹⁵³ *Id.* at 657.

¹⁵⁴ *Id.* ("To the extent appellants' argument rests on the view that all regulations distinguishing between speakers warrant strict scrutiny . . . it is mistaken.")

¹⁵⁵ *Id.* at 658.

the current Court with respect to speaker based regulation. Justice O'Connor, while stating expressly that some speaker based laws "need not be subject to strict scrutiny," questioned the *Turner Broadcasting* majority's view that the speaker based law in question did not reflect a content preference.¹⁵⁶ Justice O'Connor found that Congress's justification for the broadcast programmer preference was not neutrally justified, because it referenced a desire for programming diversity, which Justice O'Connor believed implicated content.¹⁵⁷

More recently, a majority of the current Court, in *Citizens United v. Federal Election Commission*, overturned campaign finance laws limiting the political speech of corporations—a well-defined class of speaker—without making a single reference to the notion of speaker based regulation.¹⁵⁸ And *Sorrell*—discussed above with respect to the commercial speech doctrine—makes several disapproving references to speaker based regulation, going to great lengths to describe the doomed law in question as "content- and speaker-based," but fails to engage in any discussion regarding the speaker based nature of the law.¹⁵⁹ Indeed, Justice Breyer's *Sorrell* dissent noted that the Court had not previously imposed strict scrutiny on speaker based laws and the regularity with which regulations of commercial speech are speaker based.¹⁶⁰

The confusion regarding the constitutionality and analysis of speaker based laws exhibited by the Supreme Court has unfortunately extended to lower courts as well. Some of the federal courts of appeals have relied on *Sorrell* to require that *any* speaker based law be subject to strict scrutiny.¹⁶¹ And yet, just ten days after the Supreme Court decided *Reed*, the Eleventh Circuit, in reviewing a Florida law restricting medical professionals from inquiring about

¹⁵⁶ *Id.* at 676

¹⁵⁷ *Id.* at 678.

¹⁵⁸ 558 U.S. 310 (2010).

¹⁵⁹ 131 S. Ct. at 2663, 2666, 2667.

¹⁶⁰ 131 S. Ct. at 2677-78 (Breyer, J., dissenting).

¹⁶¹ See *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1054 (8th Cir. 2014); *U.S. v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012) (finding law speaker-based and subject to heightened scrutiny).

patients' firearm ownership and use, relied upon Supreme Court precedent upholding regulations of speech by professionals and characterized such permissible regulations as speaker based laws.¹⁶²

All of the foregoing should underline the extreme confusion among the courts regarding speaker based laws. The Supreme Court precedent discussed above suggests at the very least that local sign regulations distinguishing between speakers on the basis of the speakers' identity should be content neutral both on their face and in their justification. After *Reed*, it seems near impossible that a court will allow speaker based regulation to be used as a constitutional "escape valve" for facially content based laws. Moreover, if a sign regulation purports to be speaker based, the justification for the regulation should not evidence or imply a governmental preference for the content or message of a particular speaker over another.

Local jurisdictions may be unable to avoid some forms of speaker based sign regulation. For example, most local sign codes distinguish between signs based upon the land use(s) occurring where the sign is located: sign size, height, and type allowances typically vary according to the zoning district where the sign is located. It is arguable that regulation of speech on the basis of land use is a form of speaker based regulation if, say, the owners of manufacturing businesses are allowed more sign area than neighborhood churches. Neither of the authors of this article believe that this type of regulation, whether correctly considered speaker based or not, is impermissible after *Reed*,¹⁶³ yet further drilling-down of sign regulations according to specific land uses may implicate the type of speaker based regulation that the Supreme Court and lower courts dislike. For example, a sign code distinguishing between the

¹⁶² *Wollschlager v. Governor of Fla.*, ___ F.3d ___, 2015 WL 4530452, at *24 (11th Cir. 2015).

¹⁶³ Justice Alito's concurrence approves of the distinction between "placement of signs on commercial and residential property." 135 S. Ct. at 2233 (Alito, J., concurring).

signs displayed on properties in accordance with highly-specific subcategories of land uses—single-family residential, multi-family residential, restaurant, general retail, religious institution, manufacturing and assembly, etc.—may reflect a content preference, or simply a speaker preference that a court finds improper. More problematic sign code provisions are those that differentiate among specific business-types, *i.e.*, “speakers,” as regards allowable signage, such as a code allowing gasoline filling stations to have taller or larger signs with changeable copy, while limiting automobile tire stores to shorter or smaller signs without changeable copy.

With all of the foregoing said, it is patently clear that the concept and constitutionality of speaker based regulation remains unsettled, and local governments are therefore advised to proceed cautiously in this area of sign regulation.

G. Application of strict scrutiny

After *Reed*, if a challenged provision in a sign regulation “on its face” considers the message on a sign to determine how it will be regulated, the regulation is content-based and subject to strict scrutiny.¹⁶⁴ The *Reed* majority emphasized that if a sign regulation is content-based “on its face” it does not matter that government did not intend to restrict speech or to favor some category of speech for benign reasons: “In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral.”¹⁶⁵ Further, a sign regulation that is facially content-neutral, if justified by, or that has a purpose related to, the message on a sign, or that was adopted “because of disagreement with the message the speech conveys,” is also a content-based regulation.¹⁶⁶ Whether content-based “on its face” or content-neutral but justified in relation to content, Justice Thomas specified that the regulation is subject

¹⁶⁴ *Reed*, 135 S.Ct. at 2227.

¹⁶⁵ *Id.* at 2228.

¹⁶⁶ *Id.* at 2227, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

to strict judicial scrutiny: it will be presumed to be unconstitutional and will be invalidated unless the government can prove that the regulation is narrowly-tailored to serve a compelling governmental interest.¹⁶⁷

1. What are compelling interests?

Court rulings prior to *Reed* found that aesthetics and traffic safety, the governmental interests most commonly cited to support sign regulations, are not compelling interests. For example, the Eighth¹⁶⁸ and Eleventh¹⁶⁹ circuits recently reaffirmed that traffic safety and aesthetics are *not* compelling interests; and two federal district court decisions found that while traffic safety and aesthetics are substantial governmental interests, they are not compelling enough to justify content-based restrictions on fully-protected noncommercial speech.¹⁷⁰ But the *Reed* majority opinion calls these rulings into question, at least as regards traffic safety, stating that a sign ordinance that was narrowly tailored to allow certain signs that “may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety” well might survive strict scrutiny.¹⁷¹

An Eleventh Circuit decision supports the notion that traffic safety could be found to be a compelling governmental interest. In *Solantic, LLC v. City of Neptune Beach*,¹⁷² although the court rejected the city’s claim that traffic safety was a compelling governmental interest, it noted:

¹⁶⁷ *Id.* at 2226.

¹⁶⁸ *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 738 (8th Cir. 2011), cert. den. by City of St. Louis v. *Neighborhood Enterprises, Inc.*, 132 S. Ct. 1543 (2012) (ruling that “a municipality’s asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling”).

¹⁶⁹ *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (concluding that a city’s “asserted interests in aesthetics and traffic safety” are not “compelling”).

¹⁷⁰ *Bowden v. Town of Cary*, 754 F. Supp. 2d 794 (E.D. N.C. 2010), *rev’d and remanded on other grounds*, 706 F.3d 294 (4th Cir. 2013); *King Enterprises, Inc. v. Thomas Township*, 215 F. Supp. 2d 891 (E.D. Mich. 2002). *But see*, *City of Sunrise v. D.C.A. Homes, Inc.*, 421 So.2d 1084 (Fla. App. 1982) (ruling that aesthetics, in and of itself, was a “compelling governmental interest” for purposes of determining legality of billboard ordinance).

¹⁷¹ *Reed* at 2222.

¹⁷² 410 F.3d 1250 (11th Cir. 2005)

“We do not foreclose the possibility that traffic safety may in some circumstances constitute a compelling government interest, but [the city] has not even begun to demonstrate that it rises to that level in this case.”¹⁷³ *Solantic* thus stands for the proposition that, with adequate factual support such as traffic impact studies and expert witness testimony, traffic safety could be found to be a compelling governmental interest.¹⁷⁴

Reed, of course, does not alter the lesser standard of review that courts apply in challenges to sign code provisions that are determined to be content-neutral. For example, a content neutral ban on all signs posted on public property will still be subject only to some form of intermediate scrutiny.¹⁷⁵ But intermediate scrutiny still means that a sign regulation loses its presumption of constitutionality, requiring the government to demonstrate that a regulation serves a substantial governmental purpose unrelated to the suppression of speech, is narrowly tailored to achieve that purpose, and leaves ample alternative avenues of communication.¹⁷⁶

Even before *Reed*, numerous sign codes could not meet that lesser burden. For example: a federal court overturned an ordinance that limited the number of portable signs and the maximum time periods they could be used because the city presented no evidence at trial to justify the restrictions;¹⁷⁷ the Ohio Supreme Court struck down a regulation excepting signs on parking lots from a general on-site requirement because government offered no explanation for the exception;¹⁷⁸ and a New Jersey appellate court struck down a restriction on neon lighting

¹⁷³ *Id.* at 1268.

¹⁷⁴ *But see, e.g.,* Nichols Media Group, LLC v. Town of Babylon, 365 F. Supp. 2d 295 (E.D. N.Y. 2005) (rejecting expert testimony on traffic safety as “infected with industry bias”).

¹⁷⁵ *See, e.g.,* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

¹⁷⁶ *See, e.g., id.*

¹⁷⁷ Rhodes v. Gwinnett County, Ga., 557 F. Supp. 30 (N.D. Ga. 1982).

¹⁷⁸ Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St.2d 539, 23 Ohio Op. 3d 462, 433 N.E.2d 198 (1982).

when the local government could not demonstrate how the ban advanced its purported aesthetic goals.¹⁷⁹

The extent of the burden these cases impose upon government is not entirely clear, but it has sometimes been onerous. For example, one federal court refused to consider aesthetics as a justification for regulating portable signs because the city had not included the protection of aesthetics in its recital of purposes.¹⁸⁰ Whether that decision is doctrinally sound is debatable, but it cautions local governments to include in a sign code a purpose statement setting forth the interests underlying the code, as well as offering their justifications in court.

2. What is narrow tailoring?

Although Justice Thomas used the term “narrowly-tailored” in describing the strict scrutiny test,¹⁸¹ that term can be confusing since it is also used in describing the standard for intermediate scrutiny.¹⁸² In *Ward v. Rock Against Racism*,¹⁸³ the Supreme Court explained how the narrow tailoring requirement differs between the two standards:

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.”¹⁸⁴

¹⁷⁹ *State v. Calabria, Gillette Liquors*, 301 N.J. Super. 96, 693 A.2d 949 (Law Div. 1997).

¹⁸⁰ *Dills v. City of Marietta, Ga.*, 674 F.2d 1377 (11th Cir. 1982). *See also* *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228 (E.D. N.Y. 1989), judgment *aff'd in part, rev'd in part*, 900 F.2d 551 (2d Cir. 1990) and *aff'd*, 970 F.2d 895 (2d Cir. 1992) (holding unconstitutional ordinance that contained no statement of purposes and government offered no evidence at hearing or by way of affidavit about purposes); the court stated: “Mere assertions in a memorandum of law, otherwise unsubstantiated in the record, are . . . insufficient.” *National Advertising*, 703 F. Supp. at 235. *Contra*, *Bell v. Stafford Tp.*, 110 N.J. 384, 541 A.2d 692 (1988) (dictum, *citing cases*).

¹⁸¹ “[N]arrowly tailored to serve compelling state interests.” *Reed* at 2226.

¹⁸² “[N]arrowly tailored to serve a significant governmental interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

¹⁸³ 491 U.S. 781 (1989).

¹⁸⁴ *Id.* at 798-99

As the Court made clear in *Ward*, narrow tailoring as applied under strict scrutiny is far more demanding than when applied under intermediate scrutiny, requiring that the regulation be the “least restrictive means” for achieving the compelling governmental interest.

But what must government show to demonstrate that a challenged sign regulation is the “least restrictive means” of achieving its governmental interest? Obviously, it requires that government demonstrate that no alternative regulation will achieve the regulatory objective at issue while imposing a lesser burden on speech.¹⁸⁵ In practice, this means that a plaintiff must make a prima facie showing that a hypothetical alternative regulation is both less restrictive and equally effective as compared with the challenged regulation. The burden then shifts to the government to refute the plaintiff’s claim.¹⁸⁶

3. How strict is strict scrutiny going to be?

Reed dramatically expands the regulatory scenarios in which strict scrutiny now applies. Provisions that the majority of federal Circuits had previously considered to be content-neutral – such as regulation of “categorical” signs – are now subject to strict scrutiny.¹⁸⁷ In Justice Kagan’s words, “Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter.”¹⁸⁸ Because, in Justice Kagan’s view, most of these provisions are entirely reasonable, an unintended consequence of *Reed*’s expansion of strict scrutiny may be its dilution: “The consequence—*unless courts water down strict scrutiny to something unrecognizable*—is that our

¹⁸⁵ See generally, Alan O. Sykes, *The Least Restrictive Means*, 70 U. Chi. L. Rev. 403 (2003)

¹⁸⁶ While this approach has been criticized because it allows the judiciary to second-guess a legislative body without being subject to the realities of the democratic process, see, e.g., Quadres, *Content-Neutral Public Forum Regulations*, 37 Hastings L.J. 439, 473 (1986), such criticism is misplaced because it elevates legitimate “political” concerns over individual rights guaranteed by the First Amendment.

¹⁸⁷ See, e.g., *Cahaly v. Larosa*, ___ F.3d ___, 2015 WL 4646922, at *4 (4th Cir. 2015) (acknowledging that prior circuit precedent regarding facially content based regulation is overruled by *Reed*).

¹⁸⁸ *Reed* at 2236.

communities will find themselves in an unenviable bind: They 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.”¹⁸⁹

Justice Breyer went further, observing that many government activities involve the regulation of speech, and that such regulations “almost always require content discrimination.”¹⁹⁰ He argued, “to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.”¹⁹¹ Echoing Justice Kagan’s concern about the potential dilution of strict scrutiny, Breyer wrote, “I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that ‘strict scrutiny’ normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force.”¹⁹²

While these are legitimate concerns, Justice Kagan’s sense of alarm is likely overstated as regards sign regulation. We think there is a good likelihood that courts will refrain from any significant “dilution” of strict scrutiny as applied to sign regulations, particularly as regards the “least restrictive means” prong. Rather, we think that courts will become more open to finding that traffic safety and pedestrian safety concerns, when supported by technical/scientific studies and competent expert reports, are compelling government interests.¹⁹³ With that said, however, we do not believe it likely that courts will find aesthetic interests compelling, as there is a fair

¹⁸⁹ *Reed* at 2237, emphasis added.

¹⁹⁰ *Reed* at 2234.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2235.

¹⁹³ This prediction is mitigated by the fact that lower courts are frequently loath to find that the requirements of strict scrutiny have been satisfied, however, a 2006 study showed that 22% of cases applying strict scrutiny in the free speech context upheld the government regulation in question. See 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).

amount of circuit precedent rejecting the notion the aesthetics should be deemed a compelling interest.¹⁹⁴ In contrast, because Justice Breyer’s concern extends well beyond sign regulation, it may well sound an appropriate note of caution.

III. Suggestions for Legal and Planning Practice: A Risk Management Approach

While the Supreme Court’s *Reed* decision is still very young and the decision’s complete impact remains to be seen, lawyers, planners, and local government officials can take steps now to minimize legal risk in the wake of the Court’s decision. Even before *Reed*, most local sign codes contained at least some provisions of questionable constitutionality, and the authors acknowledge that developing a 100% content neutral sign code may be impossible for some, or even most, local governments. Further, as Justice Kagan noted, such a code might not function well in addressing legitimate aesthetic and traffic safety concerns. Sign code drafting is an often imprecise exercise, subject to the influences of planning, law, and, perhaps most importantly, local politics. Planners and local government lawyers should therefore view sign regulation with an eye toward risk management. If the local government is willing to tolerate some degree of legal risk, it may be appropriate to take a more aggressive, if less constitutionally-tested approach to sign regulation. Conversely, if the local government is unwilling to accept the risks associated with more rigorous regulation of signs, it would be advisable to adopt a more strictly content neutral—if less aesthetically effective—approach.

In a risk management approach to sign regulation, the local government’s adopted regulations should reflect a balance between the community’s desire to achieve certain

¹⁹⁴ See, e.g., *Solantic*, 410 F.3d at 1267; *Whitton v. City of Gladstone*, 54 F.3d 1400, 1409 (8th Cir. 1995); *Arlington County Repub. Committee v. Arlington County, Va.*, 983 F.2d 587, 594 (4th Cir. 1993).

regulatory objectives and the community's tolerance for legal risk.¹⁹⁵ Regardless of some of the uncertainties that we have presented in this article, *Reed's* outcome increases the level of legal risk associated with many aspects of sign regulation. In keeping with our recommendations, communities are advised to review sign regulations for potential areas of content discrimination and to take precautions against potential sign litigation, but the authors also advise communities to consider (or perhaps reconsider) the level of legal risk that the community is willing to tolerate in order to preserve the aesthetic character of the community and to further the safety interests of community members. In some areas of sign regulation and for some local jurisdictions, preservation of aesthetic character may run counter to minimizing legal risk, and it will be up to planners, lawyers, political leaders, and community members to determine the appropriate balance between the community's desired planning outcomes and the community's risk tolerance.

In all communities, special care should be taken to avoid regulating signs that have minimal impact on the community's established interests in sign regulation. For example, avoiding regulation of signs which are not visible from a public right-of-way, or which are small enough in size so as to have a negligible visual impact is good sign regulation practice and is in keeping with the notion that regulations should only go as far as necessary to further the interests of the regulating body. In the same vein, communities should focus on addressing "problem areas" of sign regulation specific to the community instead of regulating for problems that do not exist. Employing this approach to sign regulation will likely result in the outcomes desired by the community while providing an appropriate level of protection against costly and time-consuming litigation.

¹⁹⁵ CONNOLLY & WYCKOFF, *infra* note 203, at 1-3 – 1-4.

With these observations in mind, this section provides some practical advice for lawyers and planners navigating sign regulation issues in the post-*Reed* world.

A. Review local sign codes *now* for areas of content bias

Because local sign codes frequently contain at least some areas of content bias, in the immediate future, lawyers and planners should undertake a microscopic review of local sign codes to determine where and how the code engages in the types of content discrimination called into question by *Reed*. Local sign codes are often an amalgam of reactionary regulatory provisions that respond to discrete sign regulation problems that have arisen in the community. Furthermore, the most common sense reactions to many sign regulation problems may be the reactions that raise the greatest problems in First Amendment analysis; for example, addressing a proliferation of temporary political signs by imposing strict regulations on such signs could be catastrophic from a liability perspective. Therefore, even sign codes enacted comprehensively can contain elements of content bias that would be invalidated by a court following *Reed*.

Where a municipal attorney or local planner lacks certainty as to whether a particular provision is content neutral, contact a lawyer well-versed in First Amendment issues and sign regulation. Even if a sign code “fix” is not possible in the near term, knowing the sign code’s areas of vulnerability, and coaching permitting and enforcement staff to limit potential problems, can be a crucial step toward protecting a local government from liability.

To guide the process of reviewing local codes for content based provisions, we have created a short list of critical areas to review.

1. Review exceptions to permitting requirements

Exceptions to permitting requirements are common features of sign codes, but these exceptions often raise constitutional problems. The Gilbert sign code at issue in *Reed* mirrored many codes in place throughout the nation; the code had a general requirement that all signs

obtain a permit, with several categories of excepted signs.¹⁹⁶ Exceptions from permitting can be problematic from both a content neutrality and narrow tailoring perspective. On the content neutrality side, local governments should closely review how the excepted signs are defined. For example, are there exceptions to permitting requirements for political signs, election signs, campaign signs, religious signs, real estate signs, construction signs, address signs, governmental flags, or any other types of signs that might be defined by the message(s) displayed on the signs?

On the narrow tailoring side, local governments should consider whether the exceptions to permitting requirements further the asserted purpose for the sign code or are at least sufficiently limited to avoid undercutting the stated purpose. For example, if a code contains the express goal of eliminating sign clutter to improve traffic safety and aesthetics, does allowing “Grand Opening Signs” somehow nullify that aesthetic interest—or nullify the government’s interest in prohibiting myriad other temporary signs? Or if a code allows certain types of unpermitted noncommercial signs to be larger than real estate signs, is the government undermining its general interest in reducing driver distractions (since drivers can be distracted just as easily by political signs as by real estate signs)? Removing content based definitions from exceptions to permitting requirements, and reconsidering whether the exceptions undermine the regulatory purposes of the sign code will assist local governments in mitigating liability going forward.

2. **Reduce or eliminate exceptions and sign categories**

Section III.A.1 instructs lawyers and planners to review exceptions to permitting requirements, thus it follows that the number of permitting exceptions should be reduced wherever possible, while maintaining those permitted exceptions—and their definitions—that are

¹⁹⁶ See, e.g., DENVER, COLO. ZONING CODE § 10.10.3.1 (containing a list of signs not subject to a permit).

necessary to reduce litigation risk or achieve stated goals of the sign code. The same holds true for differentially-treated categories of signs. The Gilbert sign code in *Reed* contained 23 categorical exceptions to the town’s basic permitting requirement. While neither of the authors was present for the enactment of these 23 exceptions, we can assume without any comprehensive investigation that at least some of these exceptions—and the differential treatment between the various categories of exceptions—were not necessary to achieve the code’s stated goals of traffic safety and community aesthetics. It is the authors’ observation from our combined experience in sign regulation that excessive “slicing and dicing” of sign categories frequently leads to more litigation and liability for local governments. Thus, local governments are encouraged to exercise restraint in creating permitting exceptions and avoid multiple categories of permitted exceptions.

The foregoing is not to say, however, that local governments should avoid *all* exceptions to permitting and require permits for all signs. Permitting requirements carry additional constitutional obligations for local governments, most importantly the obligation to avoid unconstitutional prior restraints on speech. For a permitting requirement to avoid such concerns, it should contain adequate procedural safeguards. Such a requirement should provide strict yet brief review timeframes to which the local government must adhere and must not vest unbridled discretion in local government officials, *i.e.*, the code should contain clearly-articulated approval criteria for signs subject to a permit.¹⁹⁷ If a local government opts to require that noncommercial signs be permitted prior to installation, the code should avoid content discrimination in the requirements for permitted noncommercial signs. Precisely because of prior restraint concerns and the sensitivity of noncommercial sign owners to prior restraints, many local governments opt

¹⁹⁷ See, *e.g.*, *Café Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1282 (11th Cir. 2004); *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 485-87 (2d Cir. 2007).

to except certain forms of noncommercial signage from permitting requirements. If the sign code drafters desire to except political signs from a permitting requirement, that exception—and the treatment of the excepted signs in terms of size, height, lighting, etc.—should apply equally to all noncommercial signs, regardless of the message on the sign.

3. **Remove “problem” definitions such as “political signs,” “religious signs,” “event signs,” “real estate signs,” and “holiday lights”**

To avoid post-*Reed* liability associated with certain types of noncommercial speech, local governments should remove or reconsider potentially problematic categories and definitions in sign codes. Some of these problem definitions include “political signs,” “religious signs,” “event signs,” “real estate signs,” and “holiday lights.” These categories are problematic for two reasons. First, when used in local sign codes, these categories typically rely upon the subject matter or message of the sign itself to define the category, which is presumptively unconstitutional after *Reed*, thus giving rise to potential liability for the government.¹⁹⁸ The second reason is that, in most cases, these categories relate to core First Amendment-protected speech, with concomitant heightened public sensitivity that can easily lead to litigation. Whereas many commercial business owners are disinclined to spend time and money litigating over sign regulations, individuals and not-for-profit organizations, many of whom are represented by *pro bono* legal counsel in First Amendment cases, are inclined to spend time and money to preserve core First Amendment rights.¹⁹⁹ *Reed* is a perfect example: the litigation lasted eight years, and Pastor Reed and Good News were represented by *pro bono* legal counsel.

¹⁹⁸ *Reed*, 135 S. Ct. at 2227.

¹⁹⁹ Because first amendment challenges to sign codes are normally brought under the federal Civil Rights Act, 42 U.S.C. § 1983, which allows for the award of attorneys’ fees under 42 U.S.C. § 1988, *pro bono* – and other -- counsel may be very interested in representing plaintiffs in these challenges. *See, e.g.*, *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1026 (N.D. Ohio 1997) (awarding \$308,825.70 in attorneys’ fees and costs in sign code case). Adjusting for inflation, that award is equal to \$457,225.60 in current dollars.

In some cases, the problem areas can be regulated with sign code definitions that do not directly control or restrict the content of the sign in question. As discussed above, a potentially content neutral definition of “real estate sign” could be “a temporary sign posted on property that is actively marketed for sale.” Such a definition does not address the content of the sign, but rather deals with the status of the property and location of the sign. Thus, a for-sale property could theoretically be posted with a “Save the Whales” sign under this definition, but it is likely that the economic motives of the seller would dictate otherwise. While this approach lowers legal risk, it does not eliminate it. If such a provision were challenged, a plaintiff might successfully claim that the purpose for the facially content-neutral definition was to allow for the display of real estate signs, which would then subject the provision to strict scrutiny. Similarly, if the definition of “event sign” is “a temporary sign displayed within 500 feet of property on which a one-time event is held, and which sign may be displayed for up to five days before and one day after such event,” the “event sign” could read “Smoke Grass,” but the event proponent’s interest in promoting the event would likely win the day.

In other cases, some of the problem sign types should simply be avoided. For example, it is nearly impossible to define “political sign” or “religious sign” in a manner that does not create serious content bias issues. If a community has concerns regarding proliferation of these sign types, the problem is best addressed with regulations applicable to all noncommercial signs. As *Reed* espouses, it is not within the purview of local government to pick and choose the subject matter or message of noncommercial speech, or to favor certain types of noncommercial speech over others. To the extent local political leaders are concerned about proliferations of political or religious signs, lawyers and planners should endeavor to educate political leaders about the risks associated with sign regulations of this nature.

B. **Avoid strict enforcement of content based distinctions and moratoria**

Local governments are also well-advised to suspend enforcement of code provisions—particularly regulation of temporary signs—that are called into question by *Reed*. Obviously, however, *all* sign code *structural* and *locational* provisions directly related to public safety should continue to be enforced. In a case decided shortly before *Reed*, a federal court upheld an Oregon county’s decision to cease enforcement of content based provisions in the county code and to instead review applications for temporary sign permits under the remaining, content neutral provisions of the code.²⁰⁰ This decision provides a superb road map for a jurisdiction considering how it might administer, in the near term, a content based local sign code.

Some local governments may believe that a prudent response to *Reed* is to enact a moratorium on the issuance of sign permits during the pendency of code revisions. That approach is problematic. Moratoria, if challenged, would in most circumstances constitute an unconstitutional prior restraint on expression.²⁰¹ Courts strongly disfavor moratoria on issuing *any* sign permits or, worse yet, displaying any new signs. In contrast, a moratorium of short duration – certainly no more than 30 days – that is narrowly tailored to address only the issues raised by *Reed* might possibly be upheld, however, the authors do not recommend this approach.

C. **Ensure that sign codes contain the three “basic” sign code requirements**

While the authors understand the complexity inherent in sign regulation following *Reed*, there are three easy steps that lawyers and planners can take now to reduce legal risk associated with sign code litigation. These are discussed in this Section.

²⁰⁰ *Icon Groupe, LLC v. Washington Cnty.* 2015 WL 3397170, at *8 (D. Or. 2015).

²⁰¹ *See, e.g., Schneider v. City of Ramsey*, 800 F.Supp. 815 (D.Miinn. 1992), *aff’d sub nom. Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994) (invalidating, as prior restraint, moratorium passed to allow city time to draft zoning regulations for adult uses); *Howard v. City of Jacksonville*, 109 F. Supp. 2d 1360 (M.D. Fla. 2000) (finding a moratorium on the issuance of permits for adult entertainment businesses invalid as an unconstitutional prior restraint on expression).

1. Purpose statement

All sign codes must have a strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.²⁰² After all, the first prong of both the intermediate scrutiny and strict scrutiny tests focuses on whether the government has established a “significant” (intermediate) or “compelling” (strict) regulatory interest.

In *Metromedia*, the Supreme Court upheld both traffic safety and community aesthetics as significant governmental interests sufficient to satisfy the intermediate scrutiny examination. Since that time, it has been standard practice for local governments to articulate traffic safety and aesthetics as regulatory interests supporting sign regulations. Although these are certainly the most-recited regulatory interests in local sign codes, and the ones most routinely acknowledged by courts as meeting the intermediate scrutiny test’s requirement of a significant governmental interest, other regulatory interests may suffice as well. Other regulatory interests articulated in local sign codes include blight prevention, economic development, design creativity, prevention of clutter, protection of property values, encouragement of free speech, and scenic view protection.²⁰³

2. Substitution clause

The second sign code “must-have” is frequently called a “substitution clause.” A substitution clause is designed to avoid the problem identified in Section II.C above:

²⁰² In *Desert Outdoor Advertising v. City of Moreno Valley*, the Ninth Circuit struck down a local sign ordinance simply on the grounds that it failed to articulate a regulatory purpose. 103 F.3d 814, 819 (9th Cir. 1996). A local government’s articulation of a regulatory purpose provides an evidentiary basis for the first prong of the intermediate and strict scrutiny tests.

²⁰³ BRIAN J. CONNOLLY & MARK A. WYCKOFF, *MICHIGAN SIGN GUIDEBOOK: THE LOCAL PLANNING AND REGULATION OF SIGNS*, 12-3, 13-3 (2011), available at <http://scenicmichigan.org/sign-regulation-guidebook>.

unconstitutional, content based preferences for commercial speech over noncommercial speech resulting from bans or limitations on off-premises signage, or generous allowances for certain commercial signs. A very simple statement, the substitution clause expressly allows noncommercial copy to replace the message on any permitted or exempt sign.²⁰⁴ For example, where a sign code allows onsite signs for, say, big-box retailers to be larger than other signs allowed in the community, the message substitution clause allows the big box retailer to replace the onsite sign with a noncommercial message advocating a political position or supporting a particular cause, avoiding the constitutional problem that would otherwise arise if a commercial sign were permitted to the exclusion of a noncommercial sign.²⁰⁵

3. Severability clause

Severability clauses are added to sign regulations—and statutory provisions more broadly—to uphold the balance of a code in the event a court finds a particular provision invalid.²⁰⁶ In the context of sign regulations, severability clauses have always been extremely important and are even more so after *Reed*.²⁰⁷ Facial challenges to sign codes are more common than facial challenges to zoning codes or other local regulations. Severability clauses hedge against the possibility that a court will rule that a sign code is invalid in its entirety rather than merely invalidating one or more provisions. Without a severability clause, an invalidated sign

²⁰⁴ See, e.g., DANIEL R. MANDELKER WITH ANDREW BERTUCCI & WILLIAM EWALD, PLANNING ADVISORY SERV. REP. NO. 527, STREET GRAPHICS AND THE LAW 51 (Am. Plan. Ass'n rev. ed. 2004).

²⁰⁵ The authors note that many of the problems of the Gilbert sign code at issue in *Reed* would have been resolved with a strong substitution clause, although it is questionable whether such a clause would have achieved the town's pre-*Reed* regulatory objectives.

²⁰⁶ See, e.g., BOERNE, TEX., SIGN ORDINANCE § 18 (“If any portion of this ordinance or any section or subdivision thereof be declared unconstitutional or in violation of the general laws of the state, such declaration shall not affect the remainder of this ordinance which shall remain in full force and effect.”); CITY OF FARMINGTON, MICH. ZONING ORDINANCE § 35-233 (“This chapter and the various components, articles, sections, subsections, sentences and phrases are hereby declared to be severable. If any court of competent jurisdiction shall declare any part of this chapter to be unconstitutional or invalid, such ruling shall not affect any other provision of this chapter not specifically included in said ruling.”).

²⁰⁷ Even if the sign code is contained within the zoning code, the authors strongly recommend a separate severability clause be placed in the sign code.

code could result in a regulatory vacuum without sign regulations, forcing local governments to either allow all signs—an aesthetic anarchy from which recovery would be difficult—or to adopt roughshod regulations or moratoria that could cause additional constitutional problems. For these reasons, adopting a severability clause into the sign code is an important protective step for local governments to take.

D. Apply an empirical approach to justify sign regulations, where possible

As discussed above in Section III.C.1, sign codes require justification with purpose statements. Recitations of regulatory purposes should be supported by some form of empirical study or data. Short, glib statements regarding regulatory purposes do not reflect any degree of thoughtfulness regarding sign regulations, and they leave a local government without evidentiary support for its stated purposes in the event of litigation. To that end, local governments should consider employing at least some study and analysis in preparing regulatory purpose statements. Two approaches are discussed below. Using a comprehensive planning process to identify aesthetic concerns generated by signage, or employing traffic safety analysis can assist in purpose statement preparation.

1. Traffic safety studies

While many local sign codes recite traffic safety as a central purpose for sign regulation, very few substantiate the conclusion that a proliferation of signs—or certain types of signs—has actually caused traffic safety concerns in the community. Indeed, some lawyers and sign industry advocates have questioned whether signs—particularly in a world of smart phones, navigation systems, and other driver distractions—contribute at all to driver distraction and traffic incidents. Local governments are therefore advised to conduct studies, or at least consult studies prepared by national experts, to more carefully determine the safety concerns associated

with outdoor signage.²⁰⁸ Local government fire and safety personnel may also be helpful in documenting, even if only anecdotally, their concerns about traffic safety issues associated with too much or too little signage. For example, employing traffic safety study data or documentation provided by fire and safety personnel to determine the appropriate location, height, size, brightness, etc. of signage along major thoroughfares provides a local government with the type of evidence required to craft sign regulations that respond to stated traffic safety concerns, as well as the evidentiary support necessary to defend a sign code in the event of litigation.

Evidence-based sign regulation is a growing area of study, and complete coverage of this issue is tangential to the subject of this article. Readers are advised to consult the resources in the footnotes to learn more about this trend.

2. **Comprehensive planning**

Comprehensive planning is another source of empirical study that can be used to justify and defend sign codes. Signs are not often the focus of comprehensive planning, however, the visual impact of signs on communities and corridors weighs in favor of including sign issues in communities' land use planning processes. To the extent signs are addressed in a local comprehensive plan, the plan can help to identify and direct sign regulation toward the most pressing sign issues in the community. Moreover, a good comprehensive plan containing robust analysis of sign issues in the community provides good evidentiary support in sign code litigation.

²⁰⁸ See, e.g., FEDERAL HIGHWAY ADMIN., THE EFFECTS OF COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS) ON DRIVER ATTENTION AND DISTRACTION: AN UPDATE, PUBLICATION NO. FHWA-HRT-09-018 (Feb. 2009), available at: http://www.fhwa.dot.gov/real_estate/cevms.pdf. See also DAWN JOURDAN ET AL., AN EVIDENCE BASED MODEL SIGN CODE (2011), available at <http://www.dcp.ufl.edu/files/8c71fa03-9cbf-4af2-9.pdf>.

E. **Regulation of sign function in a content neutral world: construction signs, real estate signs, wayfinding signs, political/ideological signs, etc.**

Perhaps the most vexing post-*Reed* problem faced by local jurisdictions is how to continue to regulate signs according to function or category without becoming crosswise with a district court judge. For some communities, it may be possible to avoid functional sign regulation altogether through uniform regulations of temporary signs—regardless of message. For other jurisdictions, however, that may not be possible for various planning or political reasons.

Reed condemns all facial distinctions between messages, including those that “are more subtle, defining regulated speech by its function or purpose.”²⁰⁹ Therefore, as a starting point, local governments must avoid defining functional sign types according to the language or message that appears on the face of the sign. By now, it should be clear that establishing distinct rules for political, religious, or ideological signs is virtually impossible without engaging in content regulation. A local government that maintains regulations specific to these sign types risks treating forms of noncommercial messages differently, which may precipitate a sign code challenge. As much as some local politicians may wish to see regulation of political signs, specialized political sign regulations are simply barred after *Reed*.

This is not to say, however, that local governments cannot regulate signs according to structural, temporal, or other time, place, and manner-type distinctions. For example, local governments may still regulate permanent signs differently from temporary signs in a content neutral manner. These signs are easily distinguished based on structural characteristics—permanent signs are permanently affixed to the ground, a wall, or some other device, while temporary signs are not. Permanent and temporary signs may also be made of different

²⁰⁹ *Reed*, 135 S. Ct. at 2227.

materials; permanent signs are frequently made of stone, metal or wood, while temporary signs are predominantly made of plastic or cardboard. Local governments may also regulate display time for temporary signs. It is not unconstitutional for a local government to say, for example, that a temporary sign may be placed for a maximum of 90 days at a time. Moreover, sign regulations may continue to place size limits and numerical limits on total amount of signage per property.

It is therefore not inconceivable to think that a local government could regulate political, ideological and other forms of noncommercial signage as follows: “Notwithstanding any other provision of this code, each parcel of real property shall be allowed, without a permit, an additional thirty two (32) square feet of temporary noncommercial signage, not to exceed four (4) signs at any one time, for a period not to exceed ninety (90) days per calendar year.” This provision would allow non-permitted temporary noncommercial signage, but restrict that signage to certain size and number requirements, and to a certain display time. Moreover, this code provision is content neutral, as it does not limit or restrict what the sign might say—except that it must be noncommercial.

While the authors believe that the foregoing code provision would likely satisfy *Reed*, we also recognize that it may be difficult to enforce and that it may not accomplish all of the objectives of the local government. Another approach, albeit one with greater risk exposure, is to define signs according to the activities occurring where the sign is located. For example, a content neutral definition of a “construction sign” might be “a temporary sign placed within a parcel of property upon which construction activities of any type are being actively performed.” The code could contain definitions similar to this one for real estate signs. “Grand opening signs” could be defined as “a temporary sign placed within a parcel of property, not to exceed

thirty two (32) square feet, and which may be displayed for a period not to exceed ninety (90) days following the sale, lease, or other conveyance of the parcel or any interest therein.” Event-based signs could fall under a regulation that defines an “event sign” as “a sign not to exceed twelve (12) square feet that is placed no more than two (2) weeks prior to and no more than two (2) days following a registered event,” and which requires a registration of events with the permitting jurisdiction.

Assuming the code provided a category for general temporary noncommercial signage, these code provisions would be more likely to satisfy *Reed* than a code that articulates definitions based solely on the message of signs. We note, however, that the aforementioned provisions have not been tested in courts, and even *Reed* may call into the question the validity of such regulations under the rationale that these regulations exhibit subtle content bias. Even so, to the extent local governments desire to regulate signs according to function, the authors advise against such regulation, as any type of functional or categorical regulation *will* lead to increased risk exposure for the local government.

F. Permitting and enforcement

As with other areas of regulation, in addition to being informed by the local government’s tolerance for risk management, sign regulations should also be based upon the local government’s appetite for and ability to enforce the regulations. Enforcement of sign regulations is rarely an easy task, and improper enforcement of sign regulations can lead to serious trouble.²¹⁰ Local governments should therefore consider the enforcement of sign regulations before and during the drafting process, rather than after adoption of the regulations.

²¹⁰ Selective enforcement claims arising in the enforcement of speech regulations may give rise to liability for local governments. *See, e.g., LaTrieste Restaurant and Cabaret, Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994).

The authors have noted that the availability of online registration systems may greatly ease enforcement headaches of local governments. For example, it may be possible for a local government to require any person displaying a temporary sign to register the sign with the local government on its website. Such an online registration system would not act as a bar to an individual's right to display a temporary sign, and would provide the local government with a registry of the properties at which signs are posted, which would in turn allow for better enforcement of size, height, and time restrictions on signs. In such a scenario, the local government could cite property owners with unregistered signs.

With the advent of digital technology, there is significant room for creativity in enforcing sign regulations, so long as the local government is not using such enforcement mechanisms to subvert First Amendment obligations.

IV. Conclusion

Reed is likely to precipitate a significant shift in courts' treatment of sign codes under a First Amendment challenge. Local governments thus would be wise to undertake sign code reviews and, if necessary, revise now to ensure that the code does not contain any of the content based distinctions that created problems for Gilbert. Where necessary, local governments should consult resources—including planners and lawyers knowledgeable in First Amendment issues—to be certain that sign codes do not carry more risk than the local government desires to bear.

Portions of this article are adapted with permission from Brian J. Connolly, U.S. Supreme Court Reiterates First Amendment Requires Content Neutral Sign Regulations, 33 PLAN. & ZONING NEWS 2 (Jul. 2015).

CITY OF KETCHUM, SIGN REGULATIONS

Chapter 17.127 SIGNAGE

SECTION:

17.127.010: PURPOSE AND INTENT

17.127.020: APPLICABILITY

17.127.030: APPLICATION AND PROCEDURE:

17.127.040: GENERAL

17.127.050: PERMENANT SIGN SPECIFICATIONS BY TYPE

17.127.060: TEMPORARY SIGN SPECIFICATIONS BY TYPE

17.127.070: EXISTING CONFORMING, NONCONFORMING, ILLEGAL AND ALLOWABLE SIGNS

17.127.080: VIOLATIONS AND ENFORCEMENT

17.127.010: PURPOSE AND INTENT:

Purpose and Intent: Regulations addressing the number, location, size and placement of signs, symbols, markings, and other advertising devices are necessary and intended to maintain the attractiveness and orderliness of Ketchum, to protect the city's appearance, and to protect the public safety. As a historic mountain resort community with a significant tourist economy, the visual quality and character inherent in and around the city is enhanced by the application of sign regulations that produce a deliberate, clean appearance while providing flexibility and creativity of design.

The sign regulations have been developed to:

- A. Enhance the attractiveness and economic well-being of the city as a place to live, vacation and conduct business,
- B. Enable the clear identification of places of business and residences,
- C. Allow for flexibility and creativity in the communication of information necessary for the conduct of commerce,
- D. Encourage signs that are designed with consideration of their surroundings, including building materials, architectural style and scale of development,
- E. Protect the public health, safety and welfare of persons in the community,
- F. Reduce hazardous situations, confusion and visual clutter caused by proliferation, improper placement or illumination, and/or bulk of signs which compete for the attention of pedestrian and vehicular traffic, and
- G. Facilitate pedestrian orientation of commercial core zoning district, retail subdistrict by maintaining the function of public sidewalks by reducing obstructions.

17.127.020: Applicability:

- A. General: Signs shall be allowed within the city according to the regulations contained in this section. It shall be unlawful to erect or otherwise display a sign, including, but not limited to, symbols, markings and other advertising devices, without complying with the applicable terms and provisions of this section.
- B. Sign Permit Required: Prior to erecting, constructing, placement, relocation, alteration, and/or modification of any permanent or temporary sign or banner, a sign permit shall be obtained from

the city except as exempted in subsection B4 of this section. Such application for sign permit shall be subject to standards, procedures, and other requirements of this section.

- C. Interest On The Premises: Regardless of any provisions of this section, signs in any district shall identify or advertise only interest conducted on the premises.

- D. Permit Exemptions: The following signs are exempt from permit requirements of this subsection but shall conform to specifications and definitions of chapter 17.08 of this title as noted:
 - 1. Signs erected by a government or public agency approved through resolution in the public right of way, including, but not limited to, posting or display of an official notice by a public agency, advertising on public transit vehicles, and public utility signs for directional, warning or information purposes;
 - 2. Signs and notices required by a public agency to be posted on private property according to local and state code;
 - 3. Any sign inside a building not visible from the exterior of the building;
 - 4. Signs, business names or logos affixed to the body or window of licensed, registered vehicles that are used for normal day to day operations of businesses, regardless of whether the businesses are located within Ketchum, except as prohibited under subsection B5f of this section;
 - 5. Merchandise displayed in windows that does not involve copy;
 - 6. Signs not to exceed six (6) square feet, maximum of two (2) sides for residential zoning and uses;
 - 7. Campaign signs located on private property pertaining to a specific election displayed not earlier than forty five (45) days prior to the election and removed within five (5) days after the election;
 - 8. Holiday decorations that are noncommercial signs or other materials temporarily displayed on traditionally accepted, civic, patriotic and/or religious holidays, provided such decorations are maintained in safe conditions, do not constitute a fire hazard, and that the decorations comply with [chapter 17.132](#), "Dark Skies", of this title. LED lighting may be utilized;
 - 9. Incidental signs;
 - 10. Real estate signs in conformance with specifications contained in subsections F5a and F5b of this section;
 - 11. Yard sale signs, community organization sponsored and private residential, limited to posting twenty four (24) hours in advance and removed the following day;
 - 12. One gas filled light tube (neon or facsimile) per business, provided it does not exceed four (4) square feet and it is displayed from the inside of the building;
 - 13. Other interior signs, visible from the exterior of the building, not to exceed four (4) square feet.

- E. Prohibited Signs: The following signs shall be prohibited in all zoning districts:
 - 1. Signs located within any public street, right of way, or other public property, except as allowed in this title.
 - 2. Signs with intermittent or flashing illumination, animated or moving signs and video/television/computer displays visible from any public street, right of way or other public property.
 - 3. Any sign located so as to conflict with the clear visibility of public devices controlling public traffic or to impair the safety of a moving vehicle by distracting the vision of the driver.

4. Roof signs, except historic signs or replicas of historic signs as allowed in this title.
5. Signs with a translucent plastic or other translucent material background which are internally lit or backlit.
6. Signs placed in or affixed to vehicles and/or trailers that are parked so as to be visible from a public right of way where the apparent purpose is to sell said vehicle, advertise a product, service or activity or direct people to a business or activity.
7. Signs emitting sound.
8. Any inflatable object used for promotional or sign purposes.
9. LED lighting in conjunction with signage when the source is visible, except when used with holiday decorations.
10. Beacons.

17.127.030: APPLICATION AND PROCEDURE:

The following shall apply to all signs proposed in all zoning districts:

A. General Sign Permit:

1. Application: A completed sign permit application on a form furnished by the city and applicable fee(s) set by resolution of the Ketchum city council together with technical information published and updated from time to time by the city shall be filed by the applicant with the city.
2. Procedure: The city may request modifications to or additional information for any sign application for purposes of achieving compliance with the sign code regulations. The city shall approve, approve with conditions, or deny the sign permit application within thirty (30) days of receipt of all requested information and notify the applicant in writing.

B. Master Signage Plan For New Construction:

1. Application: A complete master signage plan that may include a building identification sign shall be submitted at the time of design review application for any new construction for all hotels, commercial, industrial, multi-family residential and mixed use projects. A master signage plan shall include, but not be limited to, directional, tenant, advisory, and technical information published and updated from time to time by the city and shall show how the plan is integrated with the architecture of the building. Materials required for design review are more specifically listed in [chapter 17.96 of this title](#).
2. Procedure: The Commission shall consider and decide on the master signage plan together with the application for design review of the building.
3. Individual Tenant Sign Permits Required: Following approval of a master signage plan, separate sign permits shall be required for all new signs prior to installation following the application and procedure contained in subsection C1, "General Sign Permit", of this section.

C. Existing Multi-Unit/Tenant And Private Institutional And Other Commercial Buildings:

1. Application: Existing multi-tenant buildings (2 or more businesses or residences) and institutional and other commercial buildings shall submit a master signage plan when any tenant applies for new signage, except when new signage remains consistent with existing signage for the building.
2. Procedure: Master signage plans for existing buildings shall be considered and decided administratively by the city.

3. New Businesses In Existing Buildings: A new business in a multi-tenant building must comply with a previously approved sign plan, unless a new sign plan for all tenants is submitted and approved.

D. Historic Sign Replicas and Preservation Of Landmark Signs:

1. Application: Applications shall be made according to subsection C1a of this section.
2. Procedure: Applications shall be considered and decided by the Ketchum city council utilizing the presumption that "historic" is considered to be fifty (50) years or older. However, applications for historic sign replicas and landmark signs shall be found to meet the definition contained in subsection G of this section.
3. Sign Area: Sign area for historic sign replicas and landmark signs shall not count toward total signage limitations.

17.127.040: GENERAL:

The following shall apply to all signs proposed in all zoning districts:

A. Safety:

1. All signs shall be structurally sound and maintained in accordance with all applicable provisions of the international building code edition currently adopted by the city.
2. Signs shall not be located in a manner that interferes with pedestrian or vehicular travel or poses a hazard to pedestrians or vehicles.

B. Computations:

1. Sign Area: Sign area shall be measured as the area contained within the smallest polygonal shape that will enclose both the copy and the background. Sign copy mounted as individual letters or graphics against any part of a building or structure that does not have a distinct background, shall be measured as the sum of the smallest rectangle or square that will enclose each word and graphic. Where a sign consists of more than one face, section or module, all areas shall be totaled.
2. Sign Height For Freestanding And Sandwich Board/Portable Board Signs: The height of a sign shall include the frame, if any, and be computed as the distance from the base including feet of the sign, except as provided herein, at normal grade to the top of the highest attached component of the sign. Normal grade shall be the lower of either existing grade or the newly established grade after construction, exclusive of any filling, berming, mounding, or excavating. When the normal grade cannot be reasonably determined, the elevation of the nearest point of the crown of a public street or the grade of the land at the principal entrance to the principal structure on the lot, whichever is lower, shall be used as normal grade.

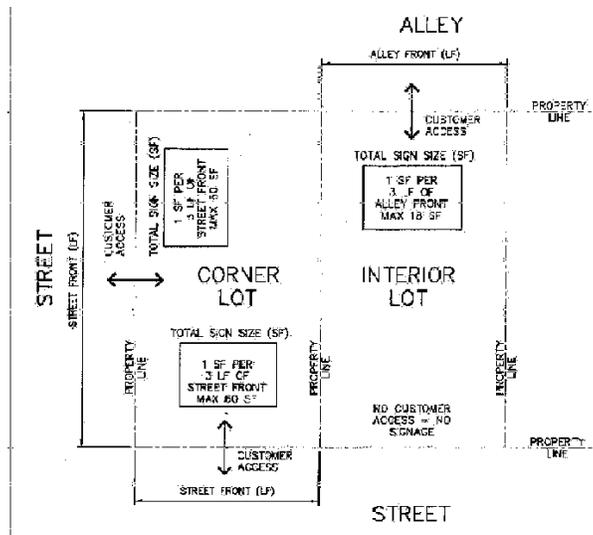
C. Size Permitted By Use: All uses are entitled to display signs on each street or alley frontage to which the business or residence has direct access, provided the following maximum total sign area is not exceeded:

1. For single-family residences the total area of all signs shall not exceed six (6) square feet.
2. For multi-family subdivisions (including residential condominium and townhouse subdivisions), the total area of all signs shall not exceed eighteen (18) square feet.
3. For all other permitted commercial and mixed uses the total combined area of all signs on each building street frontage shall be based on the building's linear street frontage. Each

building street frontage with direct customer access is permitted one square foot of signage for every three feet (3') of linear street frontage, not to exceed a total of sixty (60) square feet. Each street frontage with direct customer access is considered separately.

- a. Each individual permitted commercial and mixed use is limited to two (2) signs that are parallel to the street frontage with direct customer access and one sign that is perpendicular to the street frontage with direct access.
- b. Where building(s) have no street frontage and direct customer access is from an alley, the building is permitted one square foot of signage for every three feet (3') of linear alley frontage, not to exceed eighteen (18) square feet; and each individual permitted commercial and mixed use is allowed one sign parallel to the alley frontage with direct access and one sign that is perpendicular to the alley with direct access.

COMMERCIAL AND MIXED USE SIGN SIZE



D. Sign Lighting Regulations: The following shall apply to all signs proposed in all zoning districts:

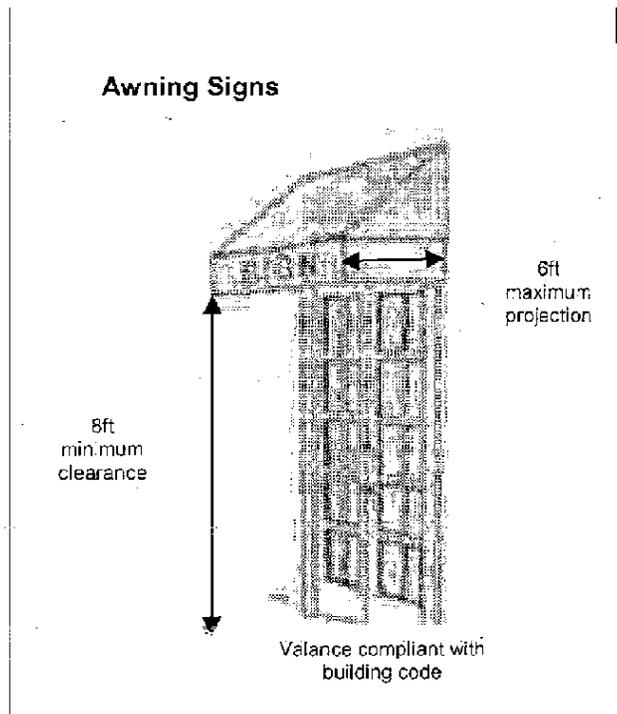
1. External illumination of signs shall conform to [chapter 17.132](#), "Dark Skies", of this title and be designed, located, shielded and directed in such a manner that the light source is fixed and is not directly visible from any adjacent public right of way, surrounding property, or motorist's vision.
2. Internal lighting or backlighting shall be limited to letters or logos provided the sign background and other sign elements are not so lit. The amount of light generated from the lighting on letters or logos are encouraged to conform to [chapter 17.132](#), "Dark Skies", of this title.
3. Gas filled light tube (neon or facsimile) signs with tubes exposed to view of any size may be utilized inside the premises provided they are not visible from any public right of way, street, surrounding property or motorist's vision except as allowed by subsection B4I of this section, permit exemptions. One gas filled light tube (neon or facsimile) per business, provided it does not exceed four (4) square feet and it is displayed from the inside of the building.

- 4. LED lighting may be utilized provided the light source is recessed and not directly visible from any adjacent public right of way, surrounding property, or motorist's vision.
- E. Signs Overhanging Public Rights Of Way: All signs, awnings, and marquees allowed to overhang a public right of way shall be subject to building code compliance, release of city liability, maintenance, safety, removal upon demand of the city, and other conditions at the time of permit issuance and prior to installation. The sign permit shall constitute an agreement between the applicant and the city concerning the public right of way.

17.127.050: PERMANENT SIGN SPECIFICATIONS BY TYPE:

The following categories of permanent signs shall comply with the applicable specifications and shall be counted toward the total permissible signage specified in subsection C of this section.

- A. Awning Or Marquee Sign (Requires Sign Permit):



1. Signs are encouraged to be on the valance or front face of the awning.
2. All awning signage shall be calculated into the total signage allowed per business or service.
3. Lettering for awning and marquee signs shall not exceed a height of eight inches (8").
4. The height and width of the awning or marquee copy shall be limited to eighty percent (80%) of the area of that face of the awning or marquee.
5. Awnings on any level of a building may only contain signage regarding the business or service located on that level.
6. The following techniques may be used to illuminate awning and marquee signs:
 - a. External lighting for awning signs.

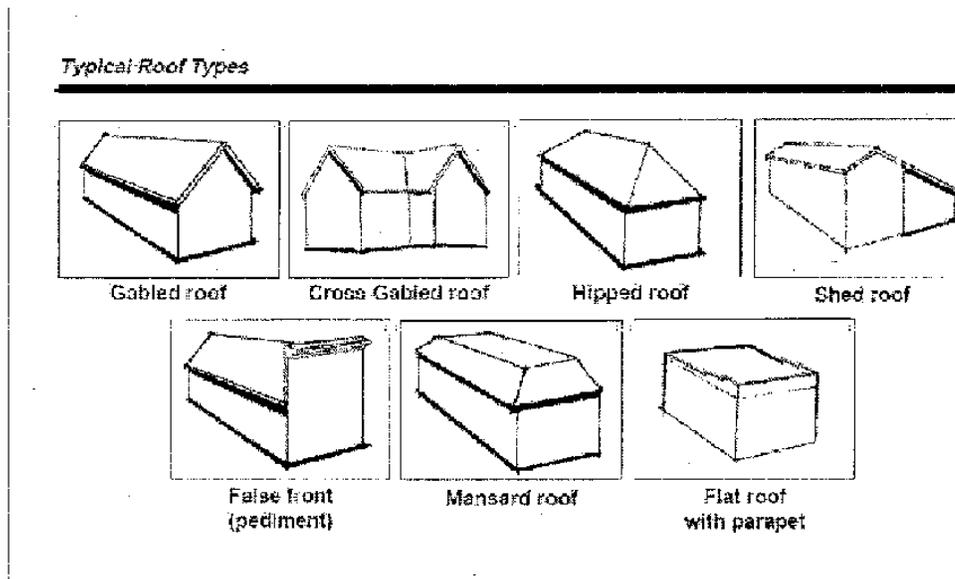
- b. External lighting or backlighting behind individually mounted letters for marquee signs. Internally illuminated box signs are prohibited on marquees.

AWNING AND MARQUEE SIGN SUMMARY

Maximum Area Of Copy	Maximum Letter Height	Clearance To Grade
80 percent of area of face	8 inches or 80 percent of height of valance, whichever is less	8 feet minimum

B. Wall Signs (Requires Sign Permit):

1. Any building facade shall not have a wall sign more than forty percent (40%) of the unbroken facade area.
2. No part of the sign may extend higher than the lowest portion of a flat roof, the top of a parapet wall, the vertical portion of a mansard roof, the eaves line or fascia and rake fascia of a gable, gambrel, or hipped roof.

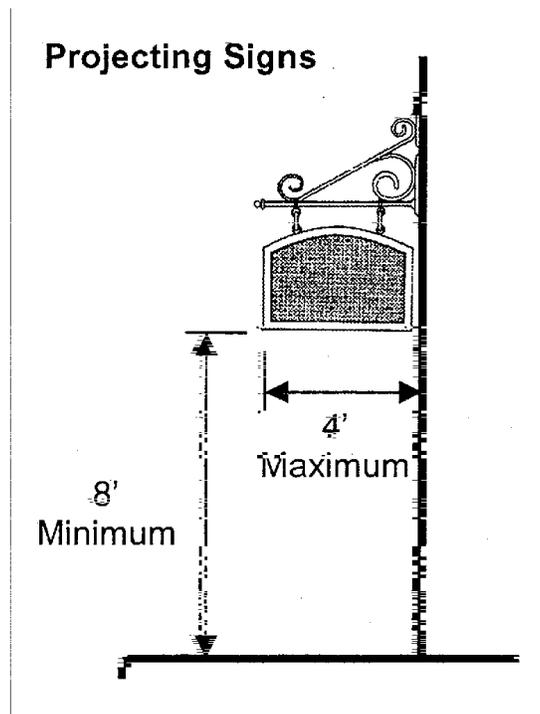


1. Wall signs may be mounted or painted on the gable wall as long as the top of the sign does not extend above any part of the fascia or above the second floor of the building. In the case a gable element is combined with a flat roof, the wall sign mounted on the gable wall may not extend above the lowest portion of the flat roof or top of the parapet wall.

C. Window Signs (Requires Sign Permit):

1. Window signs shall not occupy more than twenty five percent (25%) of the total area of a single window surface on a window or door. A "single window surface" is defined as an area of glass that is separated by mullions or frames.
2. Window signs on the second story may only contain signage regarding the business or service located on that story.
3. Any sign located inside a building within three feet (3') of an exterior window shall be counted as a window sign. All video displays visible from an exterior window are prohibited per subsection B5b of this section.

D. Projecting Signs (Requires Sign Permit):



1. Projecting signs shall not extend more than four feet (4') from the building.
2. Projecting signs that hang from the bottom of or underneath a balcony, colonnade or arcade shall not exceed a width of four feet (4') and shall be centered within the balcony, colonnade or arcade.
3. The lowest point of a projecting sign that hangs over a sidewalk, plaza, or pedestrian walkway shall be at least eight feet (8') above the grade of the sidewalk, plaza, or pedestrian walkway for all new buildings. Existing buildings where eight feet (8') above the grade of the sidewalk is not possible, seven feet (7') may be approved by the city.
4. On multi-story buildings, the top of a projecting sign shall be located below the windows on the second floor of the building.
5. Only one projecting sign shall be allowed per storefront entrance.
6. The maximum profile, or thickness, of a projecting sign shall be six inches (6").

7. No part of the sign may extend higher than the lowest portion of a flat roof, the top of a parapet wall, the vertical portion of a mansard roof, the eaves line or fascia and rake fascia of a gable, gambrel, or hipped roof.
8. Sign copy may change without additional permitting provided the dimensions remain the same as originally applied for and permitted; and shall not be considered a temporary sign or a "changeable copy sign".

PROJECTING SIGN SUMMARY

Maximum Area	Maximum Height	Clearance Minimum	Projection Maximum
Determined by height, clearance and projection parameters	The top of projecting signs shall be located below the windows on the second floor of the building	8 feet	4 feet
Maximum projecting length - 4 feet			
Maximum profile, or thickness - 6 inches			

E. Directory Sign (Requires Sign Permit):

1. The total sign area for each directory sign shall not exceed ten (10) square feet, unless approved as part of design review permit for the building.
2. One directory sign per shared or lobby entrance is permitted.
3. One directory sign per exterior access to upper floors is permitted when there is no lobby or interior shared entrance.

F. Freestanding Signs (Requires Sign Permit):

1. Freestanding signs of the dimensions allowed in this subsection may be located within the front or side yard of a property. A twenty five foot (25') clear zone shall be maintained between any portion of the sign and any street corner, street intersection, curb cut or driveway. The twenty five foot (25') clear zone shall be measured to the nearest edge of the driving surface of the street corner, street intersection, curb cut or driveway.
2. Freestanding signs that meet the dimensions allowed in subsection E4, "Projecting Signs", of this section, may project over the public right of way provided the maximum encroachment is twelve (12) square feet on each of two (2) sides.
3. The maximum total sign area for all freestanding and monument signs on any one lot shall not exceed one-half ($1/2$) square foot of sign area for each linear front footage of the principal building, existing or under construction with an approved and valid building permit, but not to exceed twenty (20) square feet on each side and shall be included in total sign area allowed.

4. Maximum height shall be twelve feet (12') measured from normal grade to highest attached component of the sign; except for single-family residential uses, maximum height shall be five feet (5').
5. Maximum width shall be six feet (6').
6. Either one freestanding or one monument sign is permitted per building street frontage.
7. If the freestanding sign serves multiple tenants, then the name of the building or the development and the major tenants within the building or development may be provided on the sign.
8. The area surrounding a freestanding or monument sign shall be landscaped.

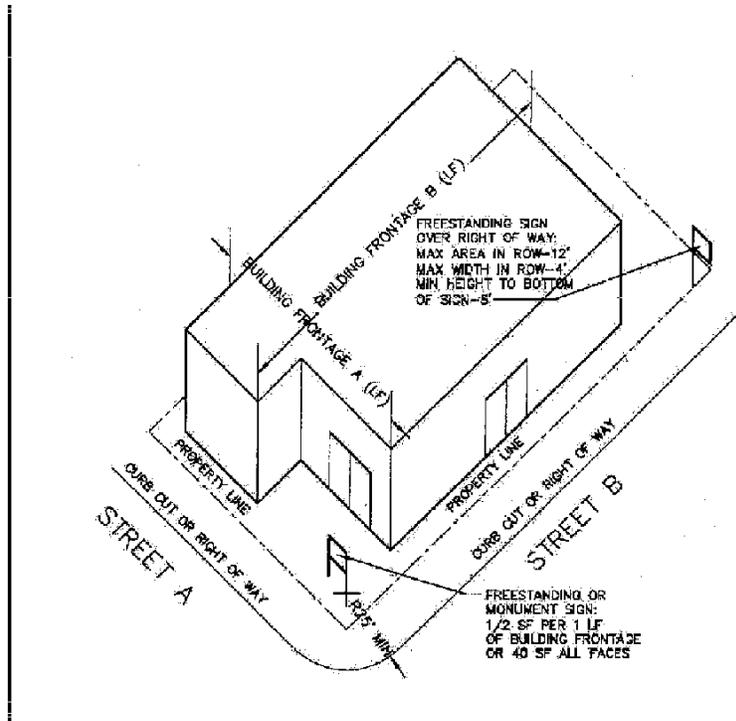
FREESTANDING SIGN SUMMARY

Maximum Area	Maximum Height	Setback	Location
$\frac{1}{2}$ square foot sign area per 1 foot linear front footage of principal building maximum of 40 square feet all faces (freestanding and monument total)	12 feet - commercial uses 5 feet - single residential uses	None required	Clear zone of 25 feet within both sides of a street corner

G. Monument Signs (Requires Sign Permit):

1. Monument signs may be located within the front or side yard of a property near driveway and pedestrian entrances. A twenty five foot (25') clear zone shall be maintained between any portion of the sign and any street corner, street intersection, curb cut or driveway. The twenty five foot (25') clear zone shall be measured to the nearest edge of the driving surface of the street corner, street intersection, curb cut or driveway.
2. The maximum total sign area for all freestanding and monument signs on any one lot shall not exceed one-half ($\frac{1}{2}$) square foot of sign area for each linear front footage of the principal building, existing or under construction with an approved and valid building permit, but not to twenty (20) square feet on each side and shall be included in total sign area allowed.
3. Maximum height shall be eight feet (8') including the base measured from finished grade to the highest portion of the monument; except for single-family residential uses, maximum height shall be five feet (5').
4. Maximum width shall be six feet (6').
5. Either one freestanding or one monument sign is permitted per building street frontage.

FREESTANDING AND MONUMENT SIGNS



6. f. If the monument sign serves multiple tenants, then the name of the building or the development and the major tenants within the building or development may be provided on the sign.
7. g. Monument signs shall have a character and style that is consistent with the building.
8. h. The area surrounding a monument sign shall be landscaped.

MONUMENT SIGN SUMMARY

Maximum Area	Maximum Height	Setback	Location
1/2 square foot sign area per 1 foot linear front footage of principal building maximum of 40 square feet all faces (freestanding and monument total)	8 feet - commercial uses 5 feet - single residential uses	None required	Clear zone of 25 feet within both sides of a street corner

17.127.060: TEMPORARY SIGN SPECIFICATIONS BY TYPE:

The following categories of temporary signs shall comply with the applicable specifications and shall not be counted toward the total permissible signage specified in subsection D3 of this section, except as required below:

A. Sandwich Board And Portable Board Signs (Requires Sign Permit):

1. One sign per business with maximum six (6) square feet signable area per side, and limited to two (2) sides.
2. Maximum sign area of two feet (2') in width by three feet (3') in height, excluding feet. Feet shall not exceed twelve inches (12") in height.
3. Area shall not be included in total signage allowed per use.
4. May be located within the public right of way, outside of paved roadways.
5. Placement allows for a minimum five foot (5') free and clear zone where setback area is required for pedestrian travel.
6. May be made of wood or metal. No vinyl signs with wire frames allowed.
7. Must be maintained to the standards of a permanent sign.
8. Signs must be removed outside of business hours.
9. Must be located within the frontage of the subject property and proximate to the entrance to the business or the building, if businesses are accessed from within the building.
10. The department of community and economic development will develop a methodology for indicating which signs have permit approval.

SANDWICH BOARD AND
PORTABLE BOARD SIGN SUMMARY

Maximum Area	Maximum Height	Setback	Location
6 square feet per side, 2 sides maximum	3 feet, excluding feet	None	On private property or ROW, outside paved roads 5 feet free/clear where needed for pedestrian travel Within frontage of subject property and proximate to entrance

B. Temporary Signs And Banner Signs (Requires Sign Permit): Temporary signs and banner signs:

1. Shall not be counted toward the total size of permissible signage specified in subsection D3 of this section.
2. Maximum thirty (30) square feet. No more than two (2) temporary signs or banners shall be allowed per business at any one time.
3. Maximum height shall be the second story of the building the sign is displayed on.
4. Minimum clearance of eight feet (8') to the bottom of the sign from finished grade.
5. Displayed on private property for a maximum of forty five (45) days in a calendar year, maximum of fourteen (14) consecutive days at one time, and no more than four (4) times in a calendar year.
6. Located on private property and shall not encroach into any public right of way.

TEMPORARY SIGNS AND BANNERS SUMMARY

Maximum Area	Maximum Height	Minimum Clearance	Duration	Location
30 square feet	Second story	8 feet	Maximum 45 days total, maximum 14 consecutive days, maximum 4 times per calendar year	Private property

7. For single season businesses, one temporary sign or banner sign shall be allowed in addition to signage allowed for the building in which it is located, provided it does not exceed eighteen (18) square feet, is located on private property, and is displayed only during the season of operation.

C. Temporary Signs And Banner Signs Within Or Across Public Rights Of Way (Requires Sign Permit): Signs and banners within or across public rights of way not permanently mounted and intended to be displayed for a limited amount of time to advertise an event, shall comply with the following specifications and application permit requirements and technical information published by the office of the city clerk:

1. Advertising a special civic event recognized as important to the city in general.
2. First come, first served, however city has discretion to decide in best interests of city which banner(s) are to be given priority when multiple applications are made for same time period.
3. Additional fee to cover installation and removal by city personnel.
4. Size and other specifications shall conform to specifications issued and as may be modified from time to time by the city.
5. Approval by city clerk's office.

D. Construction Site Sign (Requires Sign Permit):

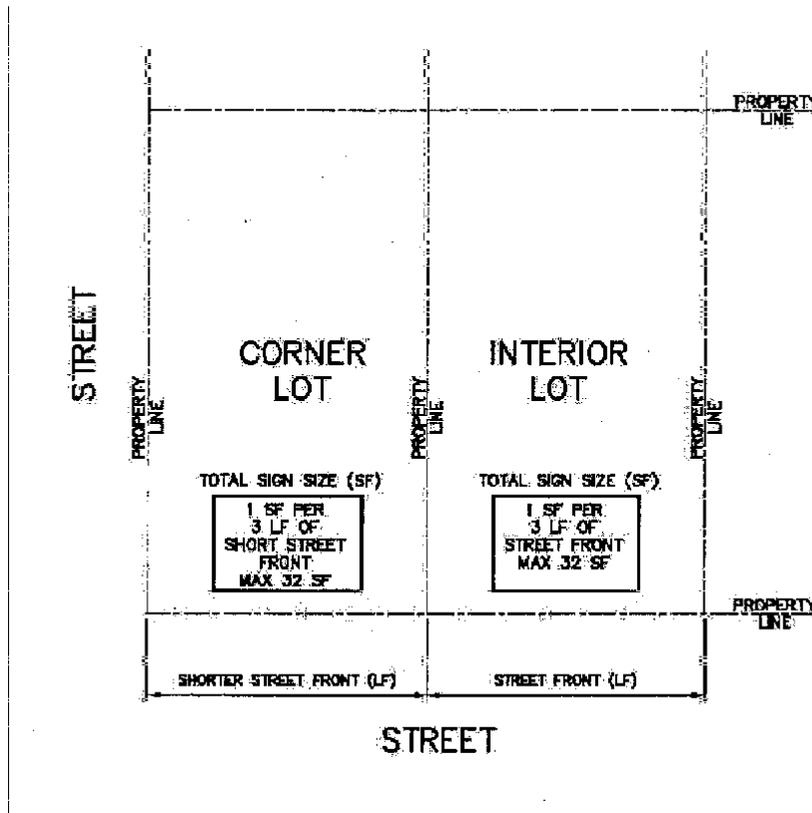
1. Limited to one freestanding or wall sign along one street frontage located on private property.
2. Maximum total sign area shall not exceed one-third ($\frac{1}{3}$) square foot of sign area for each linear foot of the street frontage of the lot(s) or the shorter street frontage on corner lots or a maximum of thirty two (32) square feet, whichever is less.
3. May be illuminated per requirements of subsection D4, "Sign Lighting Regulations", of this section, provided all wiring and conduit is installed in a permanent, nonvisible fashion.
4. Graphic design may be painted on construction barricade (in addition to construction sign area) provided it does not identify or advertise a person, product, service or business.
5. Display no sooner than receipt of a valid building permit for the project, unless it is the same sign as the development opportunity sign. (See subsection F5c of this section, real estate development opportunity sign.)
6. Removed either upon issuance of certificate of occupancy, or on such date the building permit is no longer valid, except if it continues to serve as a real estate for sale sign. In this case, it would take the place of the real estate for sale sign below and would be subject to subsections F4a through F4e of this section.
7. Resale units will be allowed to have a standard real estate sales sign (subsection F5 of this section) in or on their unit.

E. Real Estate Signs:

1. Real estate for sale, rent, lease or sold signs (exempt from sign permit):
 - a. Limited to one unlit sign per unit; building; and parcel of land for sale, rent or lease.
 - b. Does not exceed twelve (12) square feet total, allowing a maximum of two (2) sides, with each side not to exceed six (6) square feet of signage, in any residential or recreational zoning district (limited residential (LR), limited residential - one acre (LR-1), limited residential - two acre (LR-2), general residential - low density (GR-L), general residential - high density (GR-H), mobile home (MH), short term occupancy - .4 acre (STO-.4), short term occupancy - one acre (STO-1), short term occupancy - two acre (STO-2), recreation use (RU) and agricultural and forestry (AF)).
 - c. Does not exceed twenty (20) square feet total, allowing ten (10) square feet on each of two (2) sides maximum, in any commercial, industrial or mixed use district (tourist (T), tourist - 3000 (T-3000), tourist - 4000 (T-4000), community core (CC), light industrial-1 (LI-1), light industrial-2 (LI-2), and light industrial-3 (LI-3)) or land subdivision for sale. For multi-unit projects, resale of individual units must follow the regulations of subsection F5a(2) of this section.
 - d. Removed within ten (10) days of sale, rent or lease.
2. Real estate open house sign (exempt from sign permit):
 - a. Limited to one unlit sign per site per event per street frontage on site.
 - b. May be sandwich or portable board type in compliance with specifications in subsections F1a through F1e of this section or temporary banner type in compliance with specifications in subsections F2a, F2b, F2c, and F2e of this section.
 - c. Display limited to the day that the open house is staffed. Open house events must be of limited duration and shall not operate continuously.
 - d. Three (3) vehicular directional, off premises, way finding signs per open house in the form of sandwich or portable board pursuant to subsections F1a through F1e of this section are permitted in all zoning districts. All such signs must be located within one-fourth ($\frac{1}{4}$) mile of the open house event and may be located within public rights of way, provided they are not located on pavement or within any improved pedestrian or bicycle way.
3. Real estate development opportunity sign (requires sign permit):
 - a. Limited to one freestanding or wall sign along one street frontage located on private property.
 - b. Maximum total sign area shall not exceed one-third ($\frac{1}{3}$) square foot of sign area for each linear foot of the street frontage of the lot(s) or the shorter street frontage on corner lots or a maximum of thirty two (32) square feet, whichever is less.
 - c. May be illuminated per requirements of subsection D4, "Sign Lighting Regulations", of this section, provided all wiring and conduit is installed in a permanent, nonvisible fashion.
 - d. Displayed not more than two (2) consecutive years, or as otherwise specified in approved permit and may be renewed upon application to the city.
 - e. Removed upon issuance of a valid building permit, except if it continues to serve as a construction site sign. In this case, it would take the place of the construction site sign above and would be subject to subsections F4a through F4e of this section, construction signs.

CONSTRUCTION AND REAL ESTATE

DEVELOPMENT OPPORTUNITY SIGNS



- 4. On site sales office (requires sign permit):
 - a. Regulations: For single building or development where an on site sales office exists, signage is allowed provided the size complies with regulations contained herein, including, but not limited to, area of permanent signage permitted for the total building or development, and any size limitations of temporary signs.
 - b. Event Signage: For large scale open house or auction events, "announcement" signage is subject to the regulations of subsection F2 of this section, temporary signs and banners.

17.127.070: EXISTING CONFORMING, NONCONFORMING, ILLEGAL AND ALLOWABLE SIGNS:

- A. Existing Conforming Signs: Existing conforming signs with a valid sign permit on file with the city of Ketchum may be replaced in its exact form (same graphics, symbols or copy, color, material, size, etc.) or relocated, as is, by amending the existing sign permit, without paying an additional application fee and shall not be subject to the provisions of this section.
- B. Legally Nonconforming Signs: Any sign conforming to the prior sign regulations which is not in conformance with this section:
 - 1. May not be replaced, except with an approved permit for new conforming sign;
 - 2. May not be changed in text or logo (except changeable copy signs);
 - 3. May not be expanded, moved or relocated; and

- 4. Shall be removed if there is a change in occupancy on the premises.
- C. Illegal Signs: Any sign that did not comply with sign regulations in existence at the time the sign was erected is an illegal sign and shall be removed on or before January 1, 2013.
- D. Allowable Sign Types: Sign types not specifically allowable as set forth within this section are prohibited.

17.127.080: VIOLATIONS AND ENFORCEMENT:

- A. Violations: A violation of this section shall be a misdemeanor punishable by a fine of not more than three hundred dollars (\$300.00), or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment. Each day the violation is not satisfied shall be considered a separate offense.

Temporary signs may be confiscated by the city, if they are not in compliance with this section. The owner of the sign may retrieve the sign from the planning and zoning division with payment of a fine of thirty dollars (\$30.00) for the first offense and sixty dollars (\$60.00) for each subsequent offense.

- B. Responsibility For Good Repair: It shall be the responsibility of the business and/or property owner to keep signs in a good state of repair at all times. Nonconforming signs may be repaired and maintained provided the repairs are for the sole purpose of maintaining the sign to its original condition and does not increase the degree of nonconformity.
- C. Unsafe Signs: Any sign which has been determined to be unsafe by the building official and/or the planning and zoning department or which has been constructed, erected or maintained in violation of this section, must be repaired, made safe, made in conformance with this section, or removed within ten (10) working days after receipt of certified notice from the city. Failure to respond to remedy the violation is unlawful and the business and/or property owner will be guilty of a misdemeanor. The city reserves the right to remove and seize any sign should it not be in conformance with this section after the final certified notice date.
- D. Interpretation: The Commission has the authority and duty to interpret the provisions of this section at the request of the Administrator or when a written appeal from a decision of the Administrator is filed.

17.127.090: APPEALS:

Appeals of a decision by the Administrator or Commission shall be filed in compliance with chapter 17.144 of this title.

From the Town of Breckenridge, Colorado – Development Code

9-1-19-5A: POLICY 5 (ABSOLUTE) ARCHITECTURAL COMPATIBILITY:

A. Color Choices:

(1) General - Painting: Color choices for all buildings within the town limits shall be made from those allowed within the range delineated according to the Munsell color notation system from the "Munsell Book Of Color" on display in the planning office.

The Munsell system of color notation is broken into three (3) categories: hue, chroma and value. Chroma is the only characteristic with a set limit, which is as follows:

Body color is limited to a maximum chroma of 4 (except that if yellow or red is used, body color is limited to a maximum chroma of 6, trim color is limited to a maximum chroma of 8 and accent color is limited to a maximum chroma of 10). Trim color is limited to a maximum chroma of 6. Accent color is limited to a maximum chroma of 8.

The number of colors used on one structure is limited to three (3); this does not include specifically appropriate additional colors as listed in the architectural color placement list in the design guidelines for such elements as window sashes, porch floors, ceiling half timbers, or roof coverings.

If three (3) colors are used, the color that covers the most building area is the body, the color covering the second most building area is the trim, and the color covering the least building area is the accent color.

If two (2) colors are used, the color covering the lesser area is the trim color for purposes of regulating of maximum chroma.

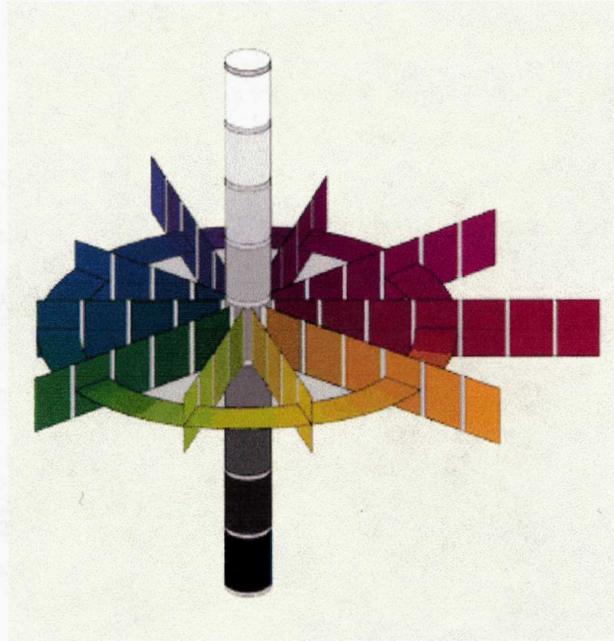
If a different value or chroma of the same hue is used, this is considered a separate color.

All exterior elements of a building that are metal, such as flues, flashings, etc., shall be painted a flat, dark color or one that is a compatible color with the building and not be left nor allowed to become bare metal. The color choices shall be as determined between the staff and applicant. Exceptions to this policy may occur such as for copper roofs, etc., which do not require painting. (Ord. 9, Series 1990)



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The Color of Soil



The first impression we have when looking at bare earth or soil is of color. Bright colors especially, catch our eye. Geographers are familiar with Red Desert soils in California, Arizona, and Nevada ([Arizona State Soil](#)); and Gray Desert soils in Idaho, Utah, and Nevada ([Nevada State Soil](#)). We have the White Sands in New Mexico, Green Sands along the Atlantic Coast, and Redbeds in Texas and Oklahoma ([Oklahoma State Soil](#)). The Red River between Oklahoma and Texas carries red sediment downstream, particularly in times of flood. The Yellow River (Hwang Ho) in China carries yellow sediment. Surface soils in the Great Plains and Corn Belt are darkened and enriched by organic matter.

Earth materials found in such locations as those mentioned above were used as coloring agents early in the development of most human cultures. As earth material was fashioned into utilitarian vessels, artistic colors inevitably were incorporated into them. Indigenous North American cultures used contrasting earth colors as body paints, and modern American culture uses colored earth in cosmetics and ceramics and as pigments for paints.

Munsell Color System

Red, brown, yellow, yellowish-red, grayish-brown, and pale red are all good descriptive colors of soil, but not very exact. Just as paint stores have pages of color chips, soil scientists use a book of color chips that follow the Munsell System of Color Notation (www.munsell.com). The Munsell System allows for direct comparison of soils anywhere in the world. The system has three components: hue (a specific color), value (lightness and darkness), and chroma (color intensity) that are arranged in books of color chips. Soil is held next to the chips to find a visual match and assigned the corresponding Munsell notation. For example, a brown soil may be noted as: hue value/chroma (10YR 5/3). With a soil color book with Munsell notations, a science student or teacher can visually connect soil colors with natural environments of the area, and students can learn to read and record the color, scientifically. Soil color by Munsell notation is one of many standard methods used to describe soils for soil survey. Munsell color

notations can be used to define an archeological site or to make comparisons in a criminal investigation. Even carpet manufacturers use Munsell soil colors to match carpet colors to local soils so that the carpet will not show the dirt (soil) tracked into the house.

Soil Composition and Color

Soil color and other properties including texture, structure, and consistence are used to distinguish and identify soil horizons (layers) and to group soils according to the soil classification system called *Soil Taxonomy*. Color development and distribution of color within a soil profile are part of weathering. As rocks containing iron or manganese weather, the elements oxidize. Iron forms small crystals with a yellow or red color, organic matter decomposes into black humus, and manganese forms black mineral deposits. These pigments paint the soil ([Michigan State Soil](#)). Color is also affected by the environment: aerobic environments produce sweeping vistas of uniform or subtly changing color, and anaerobic (lacking oxygen), wet environments disrupt color flow with complex, often intriguing patterns and points of accent. With depth below the soil surface, colors usually become lighter, yellower, or redder.

Interpreting Soil Color

Color can be used as a clue to mineral content of a soil. Iron minerals, by far, provide the most and the greatest variety of pigments in earth and soil (see the following table).

Properties of Minerals

Mineral	Formula	Size	Munsell	Color
goethite	FeOOH	(1-2 μ m)	10YR 8/6	yellow
goethite	FeOOH	(~0.2 μ m)	7.5YR 5/6	strong brown
hematite	Fe ₂ O ₃	(~0.4 μ m)	5R 3/6	red
hematite	Fe ₂ O ₃	(~0.1 μ m)	10R 4/8	red
lepidocrocite	FeOOH	(~0.5 μ m)	5YR 6/8	reddish-yellow
lepidocrocite	FeOOH	(~0.1 μ m)	2.5YR 4/6	red
ferrihydrite	Fe (OH) ₃		2.5YR 3/6	dark red
glauconite	K(Si _x Al _{4-x})(Al,Fe,Mg) O ₁₀ (OH) ₂		5Y 5/1	dark gray
iron sulfide	FeS		10YR 2/1	black
pyrite	FeS ₂		10YR 2/1	black (metallic)
jarosite	K Fe ₃ (OH) ₆ (SO ₄) ₂		5Y 6/4	pale yellow
todorokite	MnO ₄		10YR 2/1	black
humus			10YR 2/1	black
calcite	CaCO ₃		10YR 8/2	white
dolomite	CaMg (CO ₃) ₂		10YR 8/2	white
gypsum	CaSO ₄ · 2H ₂ O		10YR 8/3	very pale brown

Relatively large crystals of goethite give the ubiquitous yellow pigment of aerobic soils. Smaller goethite crystals produce shades of brown. Hematite (Greek for blood-like) adds rich red tints. Large hematite crystals give a purplish-red color to geologic sediments that, in a soil, may be inherited from the geologic parent material. In general, goethite soil colors occur more frequently in temperate climates, and hematite colors are more prevalent in hot deserts and tropical climates.

Color - or lack of color - can also tell us something about the environment. Anaerobic environments occur when a soil has a high water table or water settles above an impermeable layer. In many soils, the water table rises in the rainy season. When standing water covers soil, any oxygen in the water is used rapidly, and then the aerobic bacteria go dormant. Anaerobic bacteria use ferric iron (Fe³⁺) in goethite and hematite as an electron acceptor in their metabolism. In the process, iron is reduced to colorless, water-soluble ferrous iron (Fe²⁺), which is returned to the soil. Other anaerobic bacteria use Mn⁴⁺ as an electron acceptor, which is reduced to colorless, soluble Mn²⁺. The loss of pigment leaves gray colors of the underlying mineral. If water stays high for long periods, the entire zone turns gray.

When the water table edges down in the dry season, oxygen reenters. Soluble iron oxidizes into characteristic orange colored mottles of lepidocrocite (same formula as goethite but different crystal structure) on cracks in the soil. If the soil aerates rapidly, bright red mottles of ferrihydrite form in pores and on cracks. Usually ferrihydrite is not stable and, in time, alters to lepidocrocite.

Along seacoasts, tide waters saturate soils twice daily, bringing soluble sulfate anions. Anaerobic bacteria use the sulfate as an electron acceptor and release sulfide (S²⁻) which combines with ferrous iron to precipitate black iron sulfide. A little hydrochloric acid (HCl) dropped on this black pigment quickly produces a rotten egg odor of hydrogen sulfide (H₂S) gas. Soils that release H₂S gas are called sulfidic soils. With time, iron sulfide alters to pyrite (FeS₂) and imparts a metallic bluish color. If sulfidic soils are drained and aerated, they quickly become very acid (pH 2.5 to 3.5), and a distinctive pale yellow pigment of jarosite forms. This is the mark of an acid sulfate soil that is quite corrosive and grows few plants.

Galuconitic green sands form in shallow ocean water near a coast. They become part of soils that form after sea level drops. White colors of uncoated calcite, dolomite, and gypsum are common in geologic materials and soils in arid climates. A little carbonate dissolves in water, moves downward, and precipitates in soft white bodies or harder nodules. It also accumulates in root pores as lacy, dendritic (tree-branch) patterns.

Influence of Organic Matter on Soil Color

Soil has living organisms and dead organic matter, which decomposes into black humus. In grassland (prairie) soils the dark color permeates through the surface layers bringing with it nutrients and high fertility ([Kansas State Soil](#)). Deeper in the soil, the organic pigment coats surfaces of soil, making them darker than the color inside. Humus color decreases with depth and iron pigments become more apparent. In forested areas, organic matter (leaves, needles, pine cones, dead animals) accumulates on top of the soil. Water-soluble carbon moves down through the soil and scavenges bits of humus and iron

that accumulate below in black, humic bands over reddish iron bands. Often, a white layer, mostly quartz occurs between organic matter on the surface where pigments were removed ([Wisconsin State Soil](#)).

Organic matter plays an indirect, but crucial role in the removal of iron and manganese pigments in wet soils. All bacteria, including those that reduce iron and manganese, must have a food source. Therefore, anaerobic bacteria thrive in concentrations of organic matter, particularly in dead roots. Here, concentrations of gray mottles develop.

Soil color is a study of various chemical processes acting on soil. These processes include the weathering of geologic material, the chemistry of oxidation-reduction actions upon the various minerals of soil, especially iron and manganese, and the biochemistry of the decomposition of organic matter. Other aspects of Earth science such as climate, physical geography, and geology all influence the rates and conditions under which these chemical reactions occur.

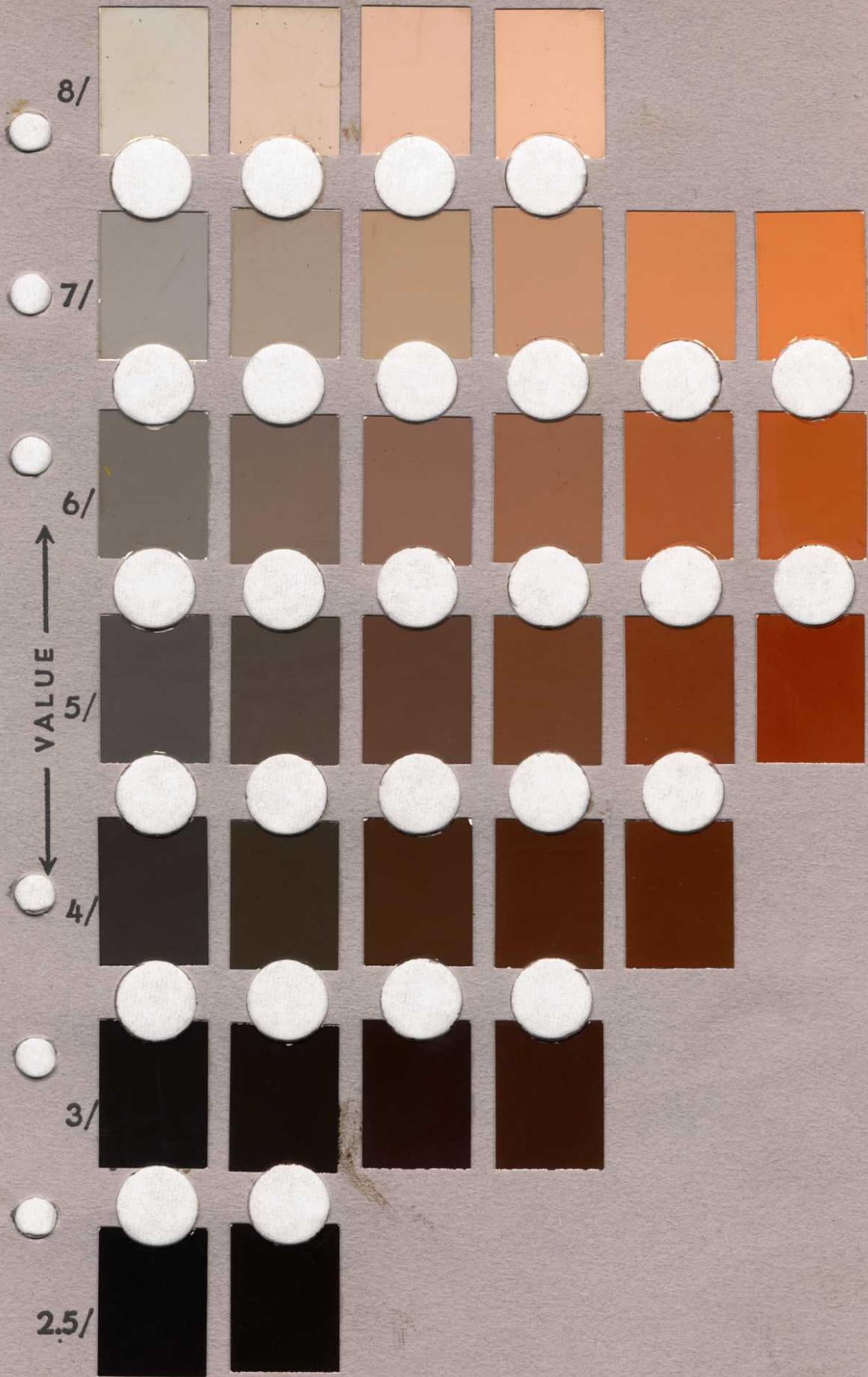
Soil adds beauty to our landscapes. These colors blend with vegetation, sky, and water. For art students and others who may be interested in creating a natural look to their artwork, try to incorporate finely ground colored soils as pigments into your work.

Adapted from: Lynn, W.C. and Pearson, M.J., The Color of Soil, The Science Teacher, May 2000.

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MUNSELL® SOIL COLOR CHART

5YR



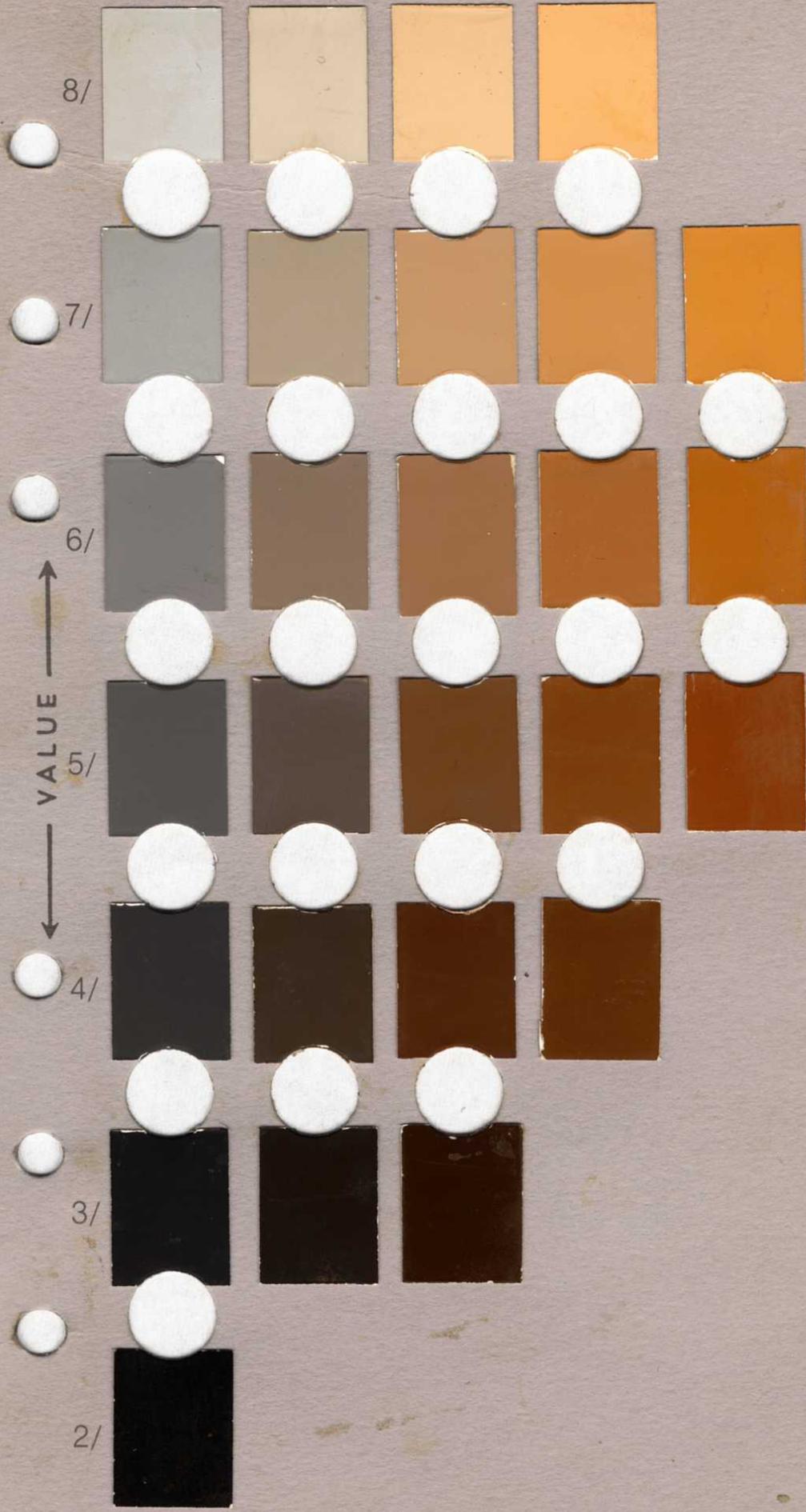
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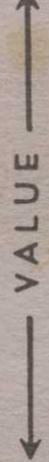
← CHROMA →

MUNSELL® SOIL COLOR CHART

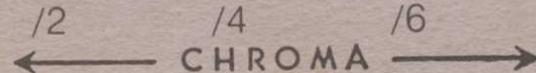
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VALUE

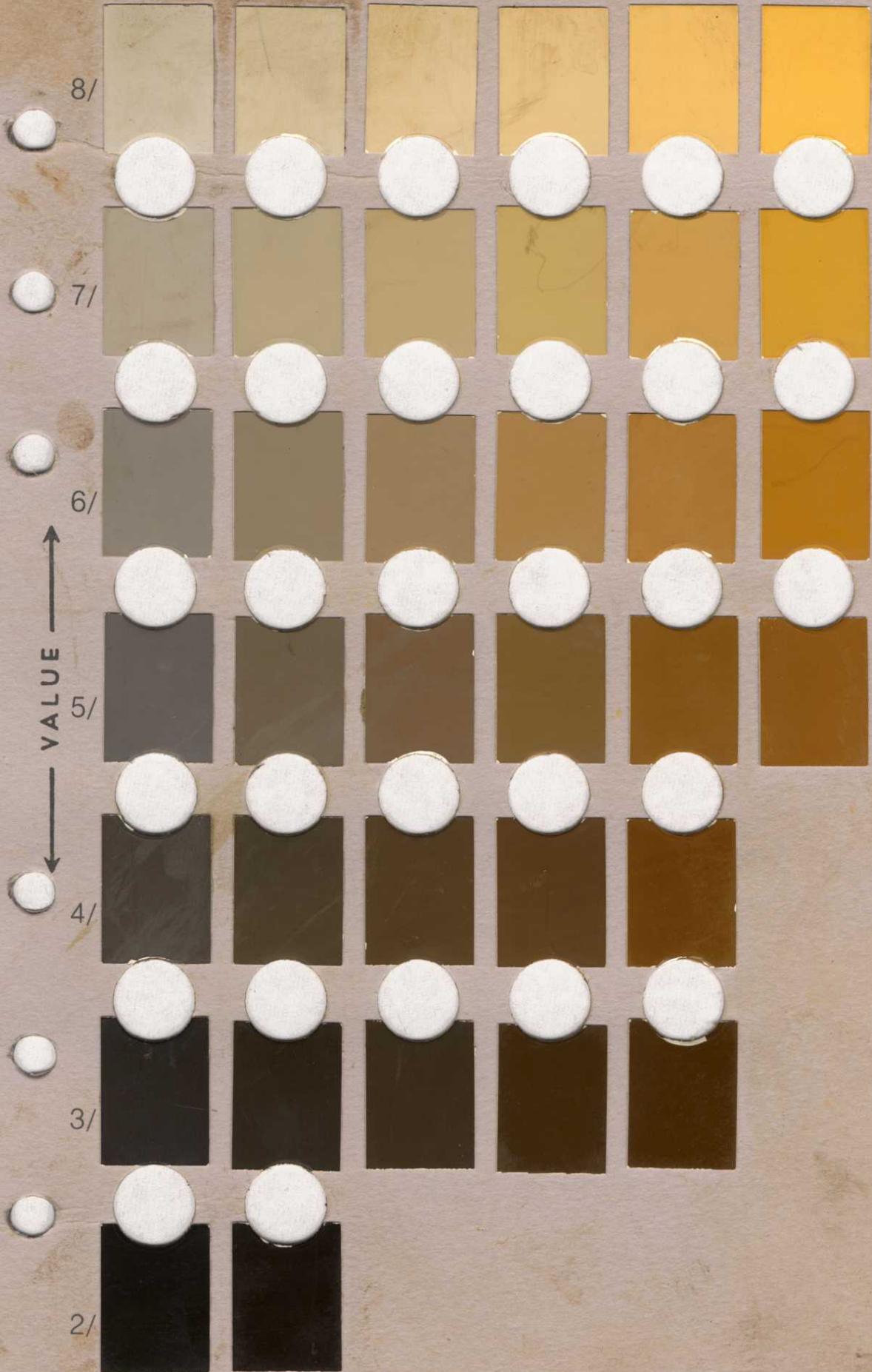


CHROMA



MUNSELL® SOIL COLOR CHART

10YR



/1

/2

/3

/4

/6

/8

CHROMA