§ 14-16-3-5 GENERAL SIGN REGULATIONS.

(A) Zoning Permits, Seals of Compliance.

(1) Permit needed. Except for signs specified under divisions (A)(7), (C)(3), (C)(4)(a), (C)(4)(b)1, 2, and 3 of this section, a sign permit is required for the following types of new signs:

(a) All sign faces having an area greater than 40 square feet.

(b) All signs having a height in excess of eight feet.

(c) All illuminated signs.

(d) All signs with moving elements.

(e) All free-standing and projecting on-premise signs.

(f) All portable signs. The permit for a portable sign shall automatically become void when the number of employees of the small business becomes ten or more. Upon request, the business owner shall furnish documentation evidencing the number of employees of the business. Failure to provide such evidence within 48 hours of it being requested shall void the permit.

(g) A permit for a new off-premise sign will be approved only upon removal of an existing off-premise sign, and support structure, of equal or greater sign area. In addition, the new off-premise sign must be located on a property of equivalent or more intensive zoning, e.g., a C-2 off-premise sign removal can be applied to a C-2 or C-3 zone, but not to a C-1 zone.

(h) Changing an existing sign so that it becomes an electronic sign or changing an electronic sign from an electronic message reader board sign to an electronic display panel sign shall require a sign permit for a new sign.

(i) Temporary subdivision identification signs as per division (C)(4)(b)(4).

(2) Permit Applications. The permit application for a new sign shall contain the following:

(a) Signature of the applicant.

(b) The name and address of the sign owner and sign erector.

(c) Drawings showing the design and dimensions of the sign. Standard sign structure drawings may be filed with the Planning Department and referenced in permit applications.

(d) A drawing of the site plan or building facade indicating the proposed location of the sign, and all other existing signs maintained on the premises and regulated by this Zoning Code.

(e) For illuminated signs, a statement declaring the sign's brightness, image change rate and transition time. Electronic sign applications must also declare the type of software used, programming details and specify how the photo cell will operate.

(3) Annual Permit Renewal for Electronic Signs.

(a) A new or renewed sign permit for an electronic sign, as provided for in § 14-16-3-5(A)(2), shall expire one year after the date of issuance and shall be renewed annually.

(b) The City shall notify each owner of an electronic sign of the expiration and renewal requirement and shall provide the owner with an application form. The owner shall complete the application form, sign it and submit an affidavit which states that, in the preceding year, either:

(i) there have been no changes to the electronic sign; or

(ii) there have been changes to the electronic sign. Any changes shall be specified and explained in writing.

(c) The City shall review the application materials and determine compliance with the Zoning Code.

(d) This requirement for the renewal of an electronic sign permit shall apply to all existing electronic signs.

(4) Fees. A sign permit fee shall be charged to cover the cost of enforcement of zoning regulations concerning signs erected after 1975 and for the costs associated with the enforcement of zoning regulations for all electronic signs. The fee for a sign permit shall be:

(a) $.70 per square foot of the largest face of the sign or $70, whichever is more.

(b) $1.45 per square foot of the largest face of the sign or $145, whichever is more, for signs erected without a permit when it has been determined by the Zoning Enforcement Officer that the sign erector had full knowledge of the permit requirements.

(c) For electronic signs, the fee shall be paid annually.

(d) The Planning Director may adopt by regulation an additional fee to cover the costs associated with the inspection and enforcement of electronic signs.

(e) Notwithstanding the above, sign fees and plan check fees shall be waived for signs within the Central Avenue Neon Sign Design Overlay Zone that are approved based upon meeting the "Qualifying Sign Design Criteria".

(5) Seal of Compliance. Any sign for which a permit is required shall bear a seal of compliance. This seal shall be affixed to the sign by the Zoning Enforcement Officer after an inspection has shown that the sign conforms to the provisions of this Zoning Code. For electronic signs the seal shall be effective for a one year period and shall state the permit's date of expiration. A special seal of compliance (or legal nonconformance) shall be placed on legal preexisting signs of types listed in division (A)(1) of this section by the Zoning Enforcement Officer.

(6) Nullification. A sign permit shall become null and void if the work for which the permit was issued has not been completed within a period of six months after the date of the permit. However, a permit for the same work as proposed in a permit that has become null and void may be applied for and no additional fee shall be collected for new application.

(7) Permit Exceptions. The following operations shall not be considered as creating a sign and shall not require a sign permit.

(a) Replacing Copy. The changing of the advertising copy or message, including the interchange of sign facings, on an approved painted or printed sign structure or on a marquee or similar approved sign, provided the size of the sign is not changed.

(b) Maintenance. Painting, cleaning, and other normal maintenance and repair of a sign or sign structure unless a structural change is made.

(c) Upgrade. Improvement or upgrade of a sign, including replacement, provided the size of the sign is not changed.

(B) Restrictions on New Off-Premise Electronic Signs.

(1) Limitation on New Off-Premise Electronic Signs.

(a) No new off-premise electronic sign shall be permitted within the City except as provided in this subsection (B).

(b) The modification of any existing off-premise sign that makes the sign an electronic sign shall constitute a new electronic sign. However, such modification shall not cause an existing off-premise sign located within six hundred sixty feet (1/8 mile) of the nearest edge of the right-of-way of Interstate 25 between the northern and southern boundaries of the City, and within six hundred sixty feet (1/8 mile) of the nearest edge of the right-of-way of Interstate 40 between the eastern and western boundaries of the City, to forfeit its status as a lawful nonconforming sign only with respect to its location along Interstate 25 and Interstate 40.

(c) Any expansion of the area of a sign that operates as an electronic sign shall constitute a new electronic sign with respect to the area of expansion.

(2) Exception for New Off-Premise Electronic Sign.

(a) A new off-premise electronic sign can be permitted if the applicant can demonstrate that existing off-premise signs and support structures containing at least three times the advertising area of the proposed electronic sign will be permanently removed.

(b) The removed signs must be located on property of equivalent or less intense zoning than the location of the proposed off-premise electronic sign.

(c) Off-premise signs that have been previously removed and not replaced may count as removed advertising space for the purpose of permitting a new electronic off-premise sign.

(3) This subsection (B) shall not apply to any electronic sign for which, prior to enactment of this subsection, an application for the sign permit or for a site plan or site plan amendment to allow the sign, has been submitted to the City and is pending.

(4) This subsection (B) shall not apply to the improvement, upgrade, or replacement of an existing electronic sign so long as the advertising space is not increased by such improvement, upgrade, or replacement.

(C) Regulations Applicable to Signs in All Zones.

(1) Prohibited Signs. The following signs are prohibited and shall be removed or brought into conformance in accordance with § 14-16-4-11 of this Zoning Code:

(a) Signs contributing to confusion of traffic control or resembling traffic control lighting; unauthorized signs, signals, markings or devices which purport to be or are imitations of official traffic control devices or railroad signs or signals, or signs which hide or interfere with the effectiveness of any official traffic control devices or any railroad signs or signals.

(b) Unauthorized signs, installed after June 17, 2002, which attempt to control traffic on the public right of way.

(c) Signs, except wall signs, in a clear sight triangle.

(d) The copy on signs which advertise an activity, business, product, or service no longer produced or conducted on the premises upon which the sign is located unless they can meet requirements for a new off-premise sign. Where the owner or lessor of the premises is seeking a new tenant, such signs may remain in place for not more than 30 days from the date of vacancy.

(e) Rotating, pulsating or oscillating beacons of light, including searchlights used for commercial or promotional purposes.

(f) Signs with audible devices.

(g) Free-standing signs with overhead wiring to supply electric power; however, off-premise signs are excluded unless underground power lines supply the site.

(h) Permanent Directory Signs. One permanent sign identifying and giving directions to businesses in an industrial park controlled by the IP or SU-1 zone shall be permitted at each entrance to the industrial park. Illumination shall be in accordance with the restrictions set forth in this section. Such signs' areas shall not exceed 1.5 square feet per business in the industrial park.

(i) Canopy signs, the bottom of which is less than seven feet above grade.

(j) Building-mounted signs which extend above the wall of the building and which do not have sign supports covered in a manner which integrates the sign with the building design. (Angle irons or similar supports shall not be visible from public right-of-way; guy wires or cables may be visible).

(k) Signs with high intensity electronic discharge strobe lights.

(l) Off-premise sign, any part of which is located within six hundred sixty feet of the nearest edge of the right-of-way of Interstate 25 between the northern and southern boundaries of the City, and within six hundred sixty feet of the nearest edge of the right-of-way of Interstate 40 between the eastern and western boundaries of the City.

(2) Prohibited Locations.

(a) No sign shall have its lowest point less than 12 feet above the ground over public right-of-way except those signs specified in Subsections 14-16-3-5(H), 14-16-3-5(I) and 14-16-3-5(K) of this Zoning Code.

(b) No sign facing, except a wall sign or a one-square-foot address sign, shall be between three and eight feet above the gutter line within ten feet of a street public right-of-way line except those signs specified in Subsection 14-16-3-5(H) of this Zoning Code.

(c) No electronic sign shall be allowed within any residential zone, historic zone, historic overlay zone or state or nationally registered historic district.

(d) No electronic sign shall be allowed within 1/8 mile (660 feet) of the outer edge of the right-of-way of the following streets: Alameda Boulevard, Griegos Road, Rio Grande Boulevard, Unser Boulevard, and Tramway Boulevard. In addition, no electronic sign shall be allowed within 1/8 mile (660 feet) of the outer edge of the right-of-way of Segment 3 of Coors Boulevard as mapped in the Coors Corridor Plan, with the addition of the section from St. Josephs Drive to Western Trail and Coors Boulevard south of Central Avenue.

(e) No electronic sign shall be allowed within 1/4 mile (1320 feet) of the boundary of major public open spaces and/or the Petroglyph National Monument.

(f) Subsections (c), (d) and (e) shall not apply to any electronic sign existing prior to the adoption of this subsection if such sign is controlled by Section 42A-1-34 NMSA 1994 and if such sign was an electronic sign prior to such adoption.

(3) Special Political Signs. Special political signs shall be permitted up to a total area of six square feet on each premises in a residential zone and up to 32 square feet for each sign in a nonresidential zone. Special political signs may be erected no earlier than 60 days prior to the election to which the sign pertains; they shall be removed within ten days after that election or after the termination of the candidacy, whichever occurs first.

(4) Signs Permitted in All Zones. Subject to the other provisions of this Zoning Code, the following additional signs shall be permitted on private property in any zone and shall not be counted in determining the number or size of signs permitted:

(a) Construction Signs. One sign shall be permitted for all building contractors, one for all professional firms, and one for all lending institutions on premises under construction, each sign's area not to exceed 32 square feet with not more than a total of three such signs permitted on one premises. Such sign shall be confined to the site of the construction, construction shed, or trailer and shall be removed within 14 days of the beginning of the intended use of the project.

(b) Real Estate Signs.

1. a. One temporary real estate sign located on the property it refers to shall be allowed for each street frontage of a developed premises or undeveloped lot of less than two acres. Signs shall be removed within seven days of sale or complete leasing.

b. In residential zones, the signs shall not exceed four square feet in area including name identification riders. An additional add-on sign area of one-half square foot indicating that the property has been sold or leased is permitted. In nonresidential zones, the signs shall not exceed 16 square feet in area.

2. One temporary real estate sign not exceeding 24 square feet in area and located on the property it refers to shall be allowed for each lot two acres or over. If the lot has multiple frontage, one additional sign not exceeding 24 square feet in area shall be allowed on the property, to be placed facing the additional frontage. Under no circumstances shall more than two sign units be permitted on the lot. Signs shall be removed within seven days of sale or complete leasing.

3. Temporary real estate directional signs not exceeding three square feet in area, three feet in height, and four in number, showing a directional arrow and placed on private property may be permitted on approach routes to an open house.

4. Temporary subdivision identification signs located on the vacant residential property shall be allowed for each subdivision or builder's development as follows:

   a. Number of signs: Two (2) signs for the first ten lots plus one (1) additional sign for each additional, full ten lots, not to exceed six (6) signs total.

   b. Sign face area: Such signs shall not exceed 32 square feet in area.

   c. Height: Sign height shall not exceed four feet above the top of the subdivision wall on the lot where such sign is placed. Signs shall not be placed on the wall of a residential building or an accessory structure. If walls do not exist on the lot where such sign is placed, then the sign height shall not exceed eight feet.

   d. Location: Signs shall not be located in common areas, such as Home Owners Association areas and easements, unless approved by the owner of the common area such as a Home Owners Association, nor in the public right-of-way. There shall be no violation of the clear sight triangle at any street intersection. Signs shall not be allowed where the sign is directly across the street from or adjacent to the lot line of a residential zone.

   e. Timing: Signs shall not be displayed prior to the date of recording of the plat, and shall be removed upon completion of the project.

   f. Permit required: Each sign is eligible for a two-year permit. After that, a yearly permit renewal is required. Fee is as per § 14-16-3-5(A)(4).

   g. Illumination: Signs shall not be illuminated.

5. The height of real estate signs shall not exceed five feet when located in a residential zone.

(c) Signs located inside a building or structure, provided the sign is not so located as to be conspicuously visible and readable, without intentional effort, from outside the building or structure.

(d) Advertising for community or civic events, flags or emblems of civic, philanthropic, educational, or religious organizations, maintained for a temporary period not in excess of one month.

(e) Official national, state, or city flags for any period of time.

(f) Street Banners. Street banners advertising a public entertainment or event, if specifically approved by the Planning Director and the Traffic Engineer and in locations designated, may be displayed 14 days prior to and seven days after the public entertainment or event.

(g) Permanent Identification Signs. One permanent sign setting forth the name of a community, development, center, or other like project shall be permitted if set back in

accordance with the requirements of the zone in which the sign is placed. Illumination shall be in accordance with the restrictions set forth in this Zoning Code. Such signs shall not exceed 20 square feet in area. Additional signs meeting the above definitions may be approved by the Planning Director if he finds the project is large and needs additional signs for reasonable identification.

(h) Civic, Religious, and Quasi-Public Signs - Off-Premise. Off-premise name, directional, and information signs of service clubs, places of worship, civic organizations, and quasi-public uses shall be not more than three square feet in area. Sign height shall not exceed eight feet. In the event that there is a need for more than one such sign at one location, all such signs must be consolidated and confined within a single frame, subject to the review and approval of the Planning Director.

(i) Residential Name and Street Address Signs. A resident's name sign not exceeding one square foot in area per face shall be permitted for each house or town house. Sign height shall not exceed eight feet. Street address signs shall not be limited.

(j) Private Traffic Direction. Signs which are necessary for and function only to direct traffic movement onto, off of, or within a premises shall be allowed without limit as to number: maximum size shall not exceed six square feet. These signs shall not contain commercial advertising and shall not be counted in the number of signs in the other provisions of this Zoning Code. Illumination of these signs shall conform to this Zoning Code, except that standard traffic signal light devices may be used if needed and if approved by the Traffic Engineer. Horizontal directional signs on and flush with paved areas are exempt from the limitations of this division (j).

(k) Historic Signs. A historic sign that is associated with the historic use of a premises is exempt from provisions of the Zoning Code that would otherwise prohibit its display. For the purposes of this section, a historic sign is defined as a sign that is listed or determined to be eligible for listing in the New Mexico Register of Cultural Properties either individually or as a contributing part of a property, or a sign that contributes to the historic character of a designated City Landmark. A historic sign may be relocated on the premises to facilitate its preservation. If the copy or imagery of a historic sign is altered, the alteration shall preserve the historic integrity of the sign, and any new portion added to a historic sign may be considered a new sign for the purpose of determining the number and size of signs permitted."

(D) Regulations Applicable to Signs in or Within 40 Feet of Residential Zones. The additional provisions of this section apply to all signs allowed in a residential zone or within 40 feet of a residential zone. In the case of a nonresidential zone within 40 feet of a residential zone, the more restrictive of these regulations or the regular sign regulations in the nonresidential zone shall apply**.**

(1) No portion of an illuminated sign shall have a luminance greater than 200 footlamberts at night.

(2) Electronic signs shall not exceed an illumination level of 0.3 foot candles above ambient light as measured using a foot candle meter at a preset distance depending on sign area, measured as follows:

Area of Sign sq. ft.	Measurement Distance (ft.)

10	32
15	39
20	45
25	50
30	55
35	59
40	63
45	67
50	71
55	74
60	77
65	81
70	84
75	87
80	89
85	92
90	95
95	97
100	100

For signs with an area in square feet other than those specifically listed in the above table the measurement distance may be calculated with the following formula: Measurement Distance = The Square Root of the following: The Area of Sign Sq. Ft. x 100.

(3) No sign nor part of a sign shall move, flash, or rotate. No sign or any part of any sign shall change its message or picture at a rate more often than once each eight seconds, with the exception of wind devices, the motion of which is not restricted. No sign shall include motion of the message or image. Transition between messages or images on an electronic sign shall not exceed one second and shall not include any visual effects.

(4) No more than one sign per premises shall be illuminated, apart from the general illumination of the premises, between 10:00 p.m. and 7:00 a.m.

(5) No sign shall be on the public right-of- way, except for name and address signs mounted on mailboxes and signs specified in Subsections 14-16-3-5(H) and 14-16-3-5(K) of this Zoning Code.

(6) An apartment premises with five to 24 dwelling units may have wall signs identifying the apartments provided the sign area on any facade does not exceed 12 square feet, and the total wall sign area on any premises does not exceed 30 square feet. No facade shall have more than five words which contain any character equal to or exceeding four inches in height; words consisting of characters all of which are less than four inches high may be used without limit as to number.

(7) An apartment premises with more than 24 dwelling units or a nonresidential premises may have signs identifying the principal uses of the premises, as follows:

(a) Each premises may have no more than one free-standing sign provided, however, that premises with more than 750 feet of public street frontage may have one additional free-standing sign for each 500 feet of additional frontage or fraction thereof.

(b) No free-standing sign shall exceed 16 feet in sign height or 24 square feet per sign face.

(c) Wall signs, provided the sign area on any facade does not exceed 40 square feet and the total wall sign area on any premises does not exceed 100 square feet. No facade shall have more than five words which contain a character equal to or exceeding four inches in height; words consisting of characters all of which are less than four inches high may be used without limit as to number.

(8) No signs shall be erected or maintained on a house, townhouse, mobile home used as a residence, or vacant land, except as permitted in division (B) of this section and § 14-16-2-6(A)(2)(f) (for home occupations) of this Zoning Code.

(9) Premises which are mobile home parks with up to 24 dwellings may have signs identifying the development provided the signs are mounted flush to the perimeter wall or fence and the total sign area does not exceed 30 square feet. There shall be no more than five words which contain any character equal to or exceeding four inches in height; words consisting of characters all of which are less than four inches high may be used without limit as to number.

(10) Premises which are mobile home parks with more than 24 dwellings may have signs identifying the development as follows:

(a) Premises may have one free- standing sign at any location on the site provided, however, that premises with more than 750 feet of public street frontage may have one additional sign for each 500 feet of additional frontage or fraction thereof. Such sign shall not exceed 16 feet in sign height or 24 square feet per sign face.

(b) In addition to signs provided in division (a) above, premises may have signs mounted flush to the perimeter wall or fence if the total of such sign area does not exceed 100 square feet. There shall be no more than five words which contain a character equal to or exceeding four inches in height; words consisting of characters all of which are less than four inches high may be used without limit as to number.

(E) Regulations Applicable to Electronic Signs.

(1) Electronic signs shall include a photo cell to control brightness. Any previously permitted electronic sign shall be turned off from sunset to sunrise until the sign is brought into compliance for brightness.

(2) No electronic sign shall move, flash, or rotate, or change its message or picture at a rate more often than once each eight seconds, with the exception of wind devices, the motion of which is not restricted. No sign or part of a sign shall change its illumination more than once an hour.

(3) No sign shall include motion of the message or image. Transition between messages or images on an electronic sign shall not exceed one second and shall not include any visual effects.

(4) No more than one sign per premises shall be illuminated, apart from the general illumination of the premises, between 10:00 p.m. and 7:00 a.m.; provided however that this provision shall not apply to signs that only display gasoline prices at establishments for retail sales of gasoline, oil, and liquefied petroleum.

(5) Illuminated signs with a 360 degree display are prohibited.

(6) If a premise meets the requirements for a free standing electronic sign, with at least 100 feet of street frontage, then the premise is prohibited from having an electronic sign that is a wall sign or canopy sign. If a premise does not meet the requirements for a free standing sign, that premise shall be permitted one electronic sign that can be a wall sign or canopy sign.

(F) Regulations Applicable to Signs in Nonresidential Zones. The additional provisions of this section apply to all signs not in a residential zone or within 40 feet of a residential zone.

(1) General Illumination.

(a) No light bulb used to indicate time or temperature shall have a rating greater than 40 watts; no reflectors shall be used in connection with such bulbs.

(b) No portion of an illuminated sign, apart from light bulbs used to indicate time or temperature, shall have a luminance greater than 320 footlamberts at night. Electronic signs shall include a photo cell to control brightness. Any previously permitted electronic sign shall be turned off from sunset to sunrise until the sign is brought into compliance on brightness.

(c) Electronic signs shall not exceed an illumination level of 0.3 foot candles above ambient light as measured using a foot candle meter at a preset distance depending on sign area, measured as follows:

Area of Sign sq. ft.	Measurement Distance (ft.)
10	32
15	39
20	45

25	50
30	55
35	59
40	63
45	67
50	71
55	74
60	77
65	81
70	84
75	87
80	89
85	92
90	95
95	97
100	100

For signs with an area in square feet other than those specifically listed in the above table the measurement distance may be calculated with the following formula: Measurement Distance = The Square Root of the following: The Area of Sign Sq. Ft. x 100.

(2) Any illuminated sign, or any illuminated element of any sign, may turn on or off, or change its brightness, provided that:

(a) Change of illumination does not produce any apparent motion of the visual image, including but not limited to illusion of moving objects, moving patterns or bands of light, expanding or contracting shapes, or any similar effect of animation except twinkling. Transition between messages or images on an electronic sign shall not exceed one second and shall not include any visual effects, meaning any transitional images or changes to the message before the new message appears.

(b) There is no continuous or sequential flashing in which more than one-third of the lights are turned on or off at one time.

(c) The sign is not within 200 feet of a residential zone and visible from such zone.

(3) No sign or any part of any sign may move or rotate at a rate more often than once each ten seconds, or change its message or picture at a rate more often than once each eight seconds, with the exception of wind devices, the motion of which is not restricted.

(4) Religious Signs. On-premise signs consisting only of religious symbols of a religious group operating an institution or place of worship may be as high as 15 feet above the roof top of the principal building on the lot, regardless of whether the sign is illuminated.

(G) Joint Sign Premises.

(1) A joint sign premises may be created by the owners of all the abutting premises who wish to cooperate in order to jointly obtain permission for one free-standing or projecting sign on the joint sign premises. Such owners shall sign an appropriate form provided by the Zoning Enforcement Officer.

(2) A joint premises is entitled to a free-standing or projecting on-premise sign as if it were one premise. However, if the owner of one or more cooperating premises which is necessary to make up the required 100 feet of street frontage legally withdraws from such agreement, the free-standing or projecting sign automatically becomes illegally nonconforming and shall be removed within 30 days.

(H) Transit Shelter Sign. Signs which are attached to or part of the structure of a transit shelter as allowed in Section 5-1-3 ROA 1994 and further regulated by this section.

(1) Number. Each transit shelter may only have one transit shelter sign.

(2) Size. Transit shelter sign shall not exceed 24 square feet.

(3) Height. Transit shelter signs shall not exceed 7 feet in height.

(4) Location.

(a) A transit shelter sign may be on the public right-of-way.

(b) A transit shelter sign may be located on private property abutting the right-of-way.

(c) A transit shelter sign may not be placed without the prior approval of the Transit Department.

(5) Illumination shall be in accordance with the restrictions set forth in this Zoning Code.

(6) Prohibited Locations.

(a) A transit shelter sign may not be placed on a transit shelter that faces or abuts a house or townhouse.

(b) A transit shelter sign shall not encroach the clear sight triangle.

(c) A transit shelter sign may not be placed on a transit shelter located along a local street, as classified by the Long Range Roadway System.

(d) A transit shelter sign may not be placed on a transit shelter within 100 feet of a residentially zoned lot located along a collector street, as classified by the Long Range Roadway System.

(e) A transit shelter sign may not be placed on a transit shelter within 50 feet of a dwelling unit located along an arterial street, as classified by the Long Range Roadway System.

(I) Temporary Directional and Identification Signage for New Subdivisions. Signs that are attached to or part of the structure of a temporary signboard and function only to direct traffic to new residential subdivisions and developments as allowed in § 5-1-3 ROA 1994 and further regulated by this section.

(1) Number. Each signboard shall have a City of Albuquerque header and may have a maximum of four directional and identification signs.

(2) Signboard Size. Each signboard shall not exceed 25 square feet in total area, including header and all signs.

(3) Sign Size. Each individual sign on the signboard shall be at least 9.5 inches tall but no greater than 18 inches tall and shall be 60 inches wide. (Between 576 square inches or 4 square feet and 1080 square inches or 7.5 square feet.)

(4) Header Size. Each signboard shall have a City of Albuquerque header, 15 inches tall by 60 inches wide (900 square inches or 6.25 square feet).

(5) Height. Each signboard shall not exceed 5 feet in height.

(6) Width. Each signboard shall not exceed 5 feet in width.

(7) Construction. Each signboard shall be mounted on 4-inch by 6-inch posts that are designed and constructed in accordance with minimum AASHTO Standard Specifications for Structural Supports for Highway Signs, Luminaires and Traffic Signals.

(8) Location.

(a) A signboard may be placed in the public right-of-way, but not within a median or at an intersection, and is subject to approval by the Department of Municipal Development.

(b) A signboard may be located on private property abutting the right-of-way.

(c) Individual sign boards shall be located a minimum of 500 feet from any other sign board.

(9) Artificial illumination is not allowed.

(10) Prohibited Locations.

(a) A signboard may not be placed in a location and/or with an orientation that faces or abuts a house or townhouse.

(b) A signboard shall not encroach the clear sight triangle.

(c) Signboards shall only be placed on streets designated as arterial and collector roadways on the Albuquerque Metropolitan Area Long Range Roadway System Map.

(d) A signboard may not be placed within 100 feet of a residentially zoned lot located along a collector street, as classified by the Long Range Roadway System.

(e) A signboard may not be placed within 50 feet of a dwelling unit located along an arterial street, as classified by the Long Range Roadway System.

(11) Approval and Time Period. Requests to erect a signboard shall require final approval from the Planning Director. Approved requests shall not exceed one year from the date granted. Any time extension thereafter shall not exceed one additional year and must be requested in writing at least 30 days prior to expiration.

(12) Remediation or removal of substandard, out-of-date or improperly maintained signboards shall be in accordance with § 14-16-4-11 of this Zoning Code.

(J) Signs Advertising Alcoholic Beverages.

(1) Signs, free-standing and building-mounted, that advertise alcoholic beverages, including the use of words and images, and are visible from a street, sidewalk, park or a facility that serves minors shall not be located within 300 feet of a facility that serves minors.

(2) The following signs that advertise alcoholic beverages shall be permitted:

(a) Signs located inside a building, even when visible from the outside;

(b) Signs on vehicles;

(c) Signs that serve to identify businesses that sell alcohol by depicting the name, logo or slogan of the business;

(d) Signs that do not refer to a specific brand of alcoholic beverage;

(e) Signs visible from and that face an interstate highway; and

(f) Signs discouraging the use of alcoholic beverages.

(3) For the purposes of this subsection "facilities that serve minors" is defined to mean a pre-elementary, elementary or secondary school, day care center, church or other place of worship, including incidental recreational and educational facilities attended by minors and city owned parks or city owned major public open spaces frequented by minors.

(K) Portable Signs. In any zone, except the Historic Old Town (H-1) Zone, § 14-16-2-25, where retail sales is a permissive use, in addition to any other signs, a small [less than ten employees] retail sales business shall be permitted during the customary business hours of the business to display one portable sign that comports with all of the following requirements:

(1) The portable sign is less than six square feet per side, no more than 2.5 feet wide and displays no more than two sides of lettering or advertising.

(2) The sign shall stand no more than three feet above ground level at its highest point.

(3) The sign shall not be placed so as to block or obstruct vehicular or pedestrian line of sight of an intersection of any two or more streets and the intersection of an alley or driveway to a public street.

(4) The sign shall be freestanding and located in front of the retail business establishment the sign represents.

(5) For sidewalks that comply with § 14-16-3-1(H)(4), a minimum of six feet shall remain clear and unobstructed at all times for pedestrian use. For sidewalks that do not meet the minimum width requirement in § 14-16-3-1(H)(4), a minimum of three feet shall remain clear and unobstructed at all times for pedestrian use.

(6) The sign may be located in the public right-of-way, but not within two feet of the curb, not in the clear path of travel and not in the clear areas adjacent to any street furniture.

(7) The sign shall be removed during non- business hours of the retail business and stored inside the business and away from public view and shall also be removed when weather conditions create potentially hazardous conditions.

(8) Paper signs, balloons, banners and wind-activated devices shall not be used or attached to a sign.

(9) The sign must be constructed of wood, metal or other durable materials in such a manner as to resist movement by high winds.

(10) The sign may consist of a changeable writing board, chalkboard, or surface that accommodates changeable letters.

(11) No sign that requires electricity or any other power source shall be permitted.

(12) Signs shall be constructed in a manner that incorporates a base from which no supports or feet extend which may cause pedestrians to trip. No external cables, brackets, wires or props shall be permitted.

(13) A sign shall be replaced when the sign becomes defaced or tattered in whole or in part, at the determination of the Zoning Enforcement Officer or his/her designee.

(14) No more than one portable sign as described in this sub-section shall be permitted per business. In the case of events such as flea markets, craft fairs or other events where there are several small businesses, portable signs are not allowed except for one portable sign to advertise the event.

('74 Code, §7-14-40E; Am. Ord. 31-1995; Am. Ord. 23-2001; Am. Ord. 39-2001; Am. Ord. 30-2002; Am. Ord. 31-2002; Am. Ord. 43-2005; Am. Ord. 52-2005; Am. Ord. 46-2006; Am. Ord. 6-2009; Am. Ord. 7-2009; Am. Ord. 17-2011; Am. Ord. 31-2011; Am. Ord. 2012-012; Am. Ord. 2013-013)

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SECTION 29 SIGN STANDARDS

-Section Contents-

2901 Intent

To promote the public health, safety and general welfare through reasonable, consistent, and non-discriminatory regulations for the installation and maintenance of signs. This Section is intended to preserve free speech, expression, and content neutrality while balancing the need to regulate the secondary effects of signs, particularly those that may adversely impact scenic views; safety for motorists, bicyclists, and pedestrians; and the interests of the public. These regulations are intended to ensure that signs are not overwhelming; are not a distraction or impediment due to brightness, movement, size, or height; and do not create a hazard.

The County recognizes that signs are a necessary means of visual communication for public convenience and way-finding; and businesses, services, and other activities have the right to identify themselves by using signs that are accessory and incidental to the uses on the premises where the signs are located.

This Section is not intended to regulate government signs.

The County has the authority to regulate signs under the United States Constitution, the State Constitution, and the Statutes of the State of Colorado.

To the extent any provision of the sign standards can be read in a manner that makes such provision legally invalid, such interpretation is unintended and the provision shall be interpreted only in a manner that is legally compliant. If any provision is or becomes legally unenforceable, then such provision shall be deemed stricken and all remaining provisions shall be enforced as if the offensive provision did not exist.

2902 General Requirements

2902.01 All signs located in the unincorporated portion of Douglas County, except those required by this Resolution for the posting of a public notice, shall be required to comply with all applicable requirements for zoning districts in which the sign permit is issued, unless otherwise provided for in this Section.

2902.02 Signs permitted within a Planned Development (PD) District shall be governed by this Section and determined by the zone district to which a planning area and the uses established therein most closely conform, except when a separate development guide has been adopted by the Board that incorporates separate guidelines for signage.

2902.03 Signs otherwise in compliance with this Section may be erected in a public right-of-way only with approval from the public agency that has control over the right-of-way, and shall be exempt from sign permit requirements. Regulation of any sign in the public right-of-way is the responsibility of the public agency that has control over the right-of-way.

2902.04 Signs and sign structures shall be maintained in a state of good repair, and free from deterioration at all times.

2902.05 Unless otherwise provided for in this Section, permanent signs shall be accessory to a permitted use on the same parcel.

2902.06 Illuminated signs shall comply with Section 30, Lighting Standards.

2902.07 A sign permit fee shall be established by the Board.

2902.08 Signs shall not be located within any easement without the written approval of the easement holder.

2903 Exemptions

The following types of signs are exempt from this Section as specified, unless otherwise prohibited in this Section:

2903.01 Official governmental signs including, but not limited to, traffic control signs and devices, directional signs, and temporary public notices.

2903.02 Way-Finding Signs that meet all of the following:

- Do not exceed six (6) square feet in area.
- Shall be permanently installed in a location and manner that does not create a traffic hazard.
- Shall be located on private property and not in any public right-of-way.

2903.03 Signs inside a building, except those placed in or on a window for outdoor advertising, unless they meet the criteria of Section 2903.04.

2903.04 Window Signs that meet all of the following:

- Do not exceed six (6) square feet in area.
- For each business:
  - A maximum of three (3) Window Signs shall be allowed if the building face at the main entrance of the business is equal to or less than 50 lineal feet in length.
  - A maximum of six (6) Window Signs shall be allowed if the building face at the main entrance of the business is greater than 50 lineal feet and equal to or less than 300 lineal feet in length.
  - Six (6) Window Signs plus one (1) additional Window Sign per additional 50 lineal feet in excess of 300 lineal feet of building face at the main entrance of the business shall be allowed.

2903.05 Scoreboards that meet all of the following:

- Are shown on the Site Improvement or Location and Extent Plan Exhibit.
- Are in compliance with Section 30, Lighting Standards, if illuminated.
- Are oriented towards the sports field.

2903.06 Signs interior to a sports field or park structure that meet all of the following:

- Are mounted to an interior wall or fence.
- Are oriented to spectators of the sports field or park.

2903.07 Drive-in or drive-through menu boards that meet all of the following:

- Are shown on the Site Improvement Plan.
- Are oriented specifically for the drive-in or drive-through customer.

2903.08 Historical plaques.

2903.09 Street numbers and addresses.

2903.10 Works of art, wall graphics, or architectural features that do not include a commercial message, company name, trademark, or logo.

2903.11 Vehicular signs that meet all of the following:

- Are permanently mounted or affixed, or magnetically attached to an operable vehicle actively used in a business operation or service.
- Shall not be illuminated.
- Vehicle(s) used as a sign shall be parked in a designated parking space.

2903.12 Private Notification Signs that do not exceed four (4) square feet in area per sign.

2904 Prohibited Signs

It shall be unlawful for any person to:

2904.01 Erect, maintain, or continue the use of any sign not in compliance with this Resolution.

2904.02 Erect, maintain, or continue the use of any Billboard Sign.

2904.03 Erect, maintain, or continue the use of any portable sign which is not permanently affixed to any structure on the site, or permanently mounted

to the ground including, but not limited to, signs on wheels and sidewalk signs.

2904.04 Erect, maintain, or continue the use of any sign mounted, attached or painted on motor vehicles, trailers, or boats when used as additional advertising signs on or near the premises and not actively used in conducting a business or service.

2904.05 Erect, maintain, or continue the use of any sign using revolving beacons or search lights; flashing signs; signs with any type of movement, animation, or the appearance or optical illusion of movement; or with varying light intensity of any part of the sign or sign structure.

2904.06 Erect, maintain, or continue the use of any sign emitting amplified sound, smoke, visible vapor, particles, or odor.

2904.07 Erect, maintain, or continue the use of any sign using a mirror or highly reflective device as part of the sign.

2904.08 Erect, maintain, or continue the use of any sign located in a manner that conflicts with the clear and obvious appearance of, or view of, public devices controlling public traffic and safety.

2904.09 Erect, maintain, or continue the use of any sign that causes a traffic hazard because of glare, focus, or intensity of illumination.

2904.10 Erect, maintain, or continue the use of any sign within a sight distance triangle, as defined in the Douglas County Roadway Design and Construction Standards, unless reviewed and approved by Engineering Services.

2904.11 Erect, maintain, or continue the use of any sign or signal, marking, or device that is not authorized and which purports to be, is an imitation of, or resembles but is not an official traffic control device or railroad sign or signal on or in view of any street or highway.

2904.12 Erect, maintain, or continue the use of any roof-mounted sign, or sign which projects above the highest point of the roof line or fascia of the building.

2904.13 Erect, maintain, or continue the use of any sign attached to a building which projects perpendicular a distance of more than 18 inches from the building.

2904.14 Erect, maintain, or continue the use of any sign attached parallel to the wall of a building, but mounted more than 18 inches from the wall.

2904.15 Erect, maintain, or continue the use of any sign announcing a proposed use or land development prior to approval of the Site Improvement Plan, or approval of the use or land development by the Board.

2904.16 Erect, maintain, or continue the use of any sign on any property without the written permission of the property owner or person in lawful possession of the property.

2904.17 Erect, maintain, or continue the use of any sign attached to live landscape plants as shown on a Site Improvement Plan.

2904.18 Erect, maintain, paint, affix, or continue the use of any sign on or to any other sign unless done with a valid sign permit, or unless specifically exempted from the requirement for a permit under this Section.

2904.19 Erect, maintain, or continue the use of any streamers, fin signs, balloons, inflatable devices, or other similar devices.

2905 Sign Permits

2905.01 Permit Requirements

2905.01.1 A sign permit shall be required from Planning Services for all signs exceeding 6 square feet in area, unless this Section specifies that a permit is not required.

2905.01.2 For signs requiring a permit under Section 2905.01.1, a new sign permit shall be required if the sign area or height of an existing sign is increased, the location of an existing sign is altered, or any changes are made to illumination.

2905.01.3 A sign permit shall expire if the sign is not erected within 180 days of permit issuance. The Director may grant an extension of time for good cause shown upon a written request by the applicant.

2905.02 Permit Application

2905.02.1 All requests for signage shall be accompanied by a sign permit application; a fully dimensioned drawing of the sign; a site plan showing the location, setback, height and sign area of all proposed and existing signage; and landlord or property owner's written approval.

2905.02.2 Applications for sign permits for an Electronic Message Sign shall include the manufacturer's specifications demonstrating compliance with Section 2913.

2905.02.3 Processing a sign permit shall not begin until a complete application has been submitted.

2905.03 Permit Approval

2905.03.1 Planning Services shall make a decision to approve or deny a sign permit application within 10 working days of the date a complete application is received, unless the applicant agrees to an extension not to exceed 30 days.

2905.03.2 Signs located at intersections of roads and driveways, or signs located within a sight distance triangle as defined in the Douglas County Roadway Design and Construction Standards, shall be reviewed and approved by Engineering Services.

2905.03.3 An appeal of Planning Services' decision regarding a sign permit application may be submitted to the Board of Adjustment pursuant to Section 26A of this Resolution.

2905.04 Permit Issuance

2905.04.1 A sign permit shall only be issued once all other required permits have been obtained, such as building and electrical permits.

2905.04.2 The required permit fee shall be paid prior to sign permit issuance.

2905.05 Permit Inspection

All signs requiring a permit shall be subject to an inspection to ensure the sign has been located, constructed, and programmed according to the approved sign permit.

2905.06 Message Substitution

2905.06.1 A First Amendment protected noncommercial message of any type may be substituted, in whole or in part, for the message displayed on any permitted sign. Such substitution of message may be made without any additional approval or permitting by the County. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over noncommercial speech, or favoring of any particular noncommercial message over any other noncommercial message.

2905.06.2 Any on-site commercial message may be substituted, in whole or in part, for any other on-site commercial message displayed on any permitted sign. Such substitution of message may be made without any additional approval or permitting by the County.

2906 Maximum Height of Signs

2906.01 A Freestanding Sign is restricted to a maximum height of 15 feet.

2906.02 Wall, Canopy, and Projecting Signs shall not exceed the height of the building.

2907 Sign Setbacks

The following setbacks shall be required for all Freestanding Signs:

2907.01 No sign shall be placed within 10 feet of any property line.

2907.02 The minimum setback for a sign adjacent to a Federal, State or major County arterial highway shall be a minimum of 75 feet from the lot line adjacent to the highway right-of-way. This distance may be reduced to the setbacks in Table A below, if adequate right-of-way has been dedicated to the State or County for future road widening, and written approval has been obtained from the public agency that has control over the right-of-way.

2907.03 Signs shall be setback in accordance with Table A below, or as required in Section 2907.02 herein.

2907.04 Sign height shall be rounded to the nearest foot. Once height is determined, refer to Table A for the required setback.

Table A

Maximum Height of Sign	Setback
3’	10’
4’	12.5’
5’	15’
6’	17.5’
7’	20’
8’	22.5’
9’	25’
10’	27.5
11’	30’
12’	32.5’
13’	35’
14’	37.5’
15’	40’

2908 Sign Area Measurement

The area of a sign shall be measured as follows:

2908.01 The structure or bracing of a sign shall be omitted from measurement unless such structure or bracing is made part of the message or face of the sign. The area of all faces shall be included in determining the total area of a sign.

2908.02 The area of a sign with backing or a background, material or otherwise, that is part of the overall sign display shall be measured by determining the sum of the areas in each square, rectangle, triangle, portion of a circle, or any combination thereof which creates the smallest single continuous perimeter enclosing the extreme limits of the sign including all frames, backing, background, face plates, nonstructural trim or other component parts not otherwise used for support.

2908.03 The area of a sign without backing or a background, material or otherwise, that is part of the overall sign display shall be measured by determining the sum of the areas of each square, rectangle, triangle, portion of a circle, or any combination thereof which creates the smallest single continuous perimeter enclosing the extreme limits of each word, written representation (including any series of letters), emblems, or figures of similar character including all frames, face plates, nonstructural trim or other component parts not otherwise used for support.

2908.04 The area of any sign having parts both with and without backing shall be measured by determining the total area of all squares, rectangles, triangles, portions of a circle or any combination thereof constituting the smallest single continuous perimeter enclosing the extreme limits of either of the following combinations:

- the display surface or face of the sign including all frames, backing, face plates, nonstructural trim, or
- other component parts not otherwise used.

2909 Wall, Canopy, and Projecting Signs

Wall, Canopy, and Projecting Signs are permitted as follows:

2909.01 Wall Signs in the A-1 and LRR Districts:

- Maximum sign area: Shall not exceed 50 square feet in area.
- Maximum number of signs: One (1) per street frontage.
- Illumination: Not permitted.
- Additional requirements: Shall be allowed on conforming A-1 and LRR parcels only.

2909.02 Wall Signs in the A-1, LRR, RR, ER, SR, MF, and MH Districts for any use requiring a Site Improvement Plan (SIP) or Use by Special Review (USR):

- Maximum sign area: Shall not exceed 50 square feet in area.
- Maximum number of signs: One (1) per street frontage.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements: None.

2909.03 Wall, Canopy, and Projecting Signs in the B, C, LI, and GI Districts; and Sedalia CMTY, D, HC, and MI Districts:

- Maximum sign area and number of signs, single-use buildings:
  - The use is permitted one (1) Wall, Canopy, or Projecting Sign per building face up to 50 square feet in sign area.
  - Sign area may be increased at the rate of one (1) additional square foot per lineal foot of each building face in excess of 50 lineal feet to a maximum of 450 square feet in sign area.
- Maximum sign area and number of signs, multi-use buildings:
  - Each use without a separate exterior entrance is permitted one (1) Wall, Canopy, or Projecting Sign not to exceed 50 square feet in sign area.
  - Each use with a separate exterior entrance is permitted one (1) Wall, Canopy, or Projecting Sign up to 50 square feet in sign area per building face adjacent to the occupied space. Sign area may be increased at the rate of one (1) additional square foot per lineal foot of each building face in excess of 50 lineal feet to a maximum of 450 square feet in sign area. Only that portion of the building face that is occupied by the use shall be used in calculating the permitted sign area.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements:
  - Sign shall be located on the building face adjacent to the space occupied by the use.
  - Building faces shall not be combined to increase allowed sign square footage.
  - Sign shall not extend over windows or architectural features (pilasters, reveals, etc.).
  - Sign shall not have any characters or logos that exceed 10 feet in height.
  - Sign shall not project more than 18 inches from the wall or surface on which it is mounted.

2910 Freestanding Signs

Freestanding Signs are permitted as follows:

2910.01 Freestanding Signs in A-1 and LRR Districts:

- Maximum sign area: A sign up to 50 square feet in area is permitted. On parcels greater than 35 acres, sign area may be increased five (5) additional square feet per each additional 50 acres of land not to exceed 100 square feet in sign area.
- Maximum number of signs: One (1) per street frontage.
- Illumination: Not permitted.
- Additional requirements: Signs shall be permitted on conforming A-1 and LRR parcels only.

2910.02 Freestanding Signs in the A-1, LRR, RR, ER, SR, MF, and MH Districts for any use requiring a Site Improvement Plan (SIP) or Use by Special Review (USR):

- Maximum sign area: Shall not exceed 50 square feet in area.
- Maximum number of signs: One (1) per street frontage.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements: None.

2910.03 Single-Family Residential Development Identification:

- Maximum sign area: Shall not exceed 50 square feet in area.
- Maximum number of signs: Two (2) per entrance, one (1) for each direction of travel.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements: Shall not exceed six (6) feet in height.

2910.04 Freestanding Signs in the B, C, LI, and GI Districts; and Sedalia CMTY, D, HC, and MI Districts:

- Maximum sign area: Shall not exceed 100 square feet in area, at the rate of one (1) square foot in sign area per lineal foot of street frontage.
- Maximum number of signs: One (1) per street frontage per parcel.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements: None.

2911 Directory Signs

Directory Signs within shopping centers or business, commercial, and industrial parks are permitted as follows:

- Maximum sign area: Shall not exceed 75 percent of the permitted Freestanding Sign area permitted under Section 2910.04.
- Maximum number of signs: One (1) per entrance.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements: None.

2912 Temporary Signs

Temporary Signs do not require a sign permit and are allowed as follows:

2912.01 Temporary Signs in the A-1 and LRR Districts:

Informational Signs:

- Maximum sign area:
  - Within a calendar year, from January 1 through August 31 and from November 16 through December 31, two (2) signs shall not exceed 100 square feet in area per sign, at the rate of 50 square feet in area per sign face.
  - Within a calendar year, from September 1 through November 15, four (4) signs shall not exceed 100 square feet in area per sign, at the rate of 50 square feet in area per sign face.
  - Within a calendar year, from January 1 through August 31 and from November 16 through December 31, three (3) signs shall not exceed six (6) square feet in area per sign.
  - Within a calendar year, from September 1 through November 15, the number of signs not exceeding six (6) square feet in area shall not be limited.
- Illumination: Not permitted.
- Additional requirements:
  - Signs are permitted on conforming A-1 and LRR parcels only.
  - Signs on A-1 and LRR parcels less than nine (9) acres in size, refer to Section 2912.02.
  - Signs shall be removed within seven (7) days of the completion of the purpose for which the sign was erected.

2912.02 Temporary Signs in the RR, ER, SR, MF, and MH Districts:

Informational Signs:

- Maximum sign area:
  - Within a calendar year, from January 1 through August 31 and from November 16 through December 31, two (2) signs shall not exceed 64 square feet in area per sign, at the rate of 32 square feet in area per sign face.
  - Within a calendar year, from September 1 through November 15, four (4) signs shall not exceed 64 square feet in area per sign, at the rate of 32 square feet in area per sign face.
  - Within a calendar year, from January 1 through August 31 and from November 16 through December 31, two (2) signs shall not exceed six (6) square feet in area per sign.
  - Within a calendar year, from September 1 through November 15, the number of signs not exceeding six (6) square feet in area shall not be limited.
- Illumination: Not permitted.
- Additional requirements: Signs shall be removed within seven (7) days of the completion of the purpose for which the sign was erected.

2912.03 Temporary Signs in the B, C, LI, and GI Districts; and Sedalia CMTY, D, HC, and MI Districts:

2912.03.1 Informational Signs:

- Maximum sign area: Shall not exceed 200 square feet in area, at the rate of 100 square feet in area per sign face.
- Maximum number of signs: One (1) per street frontage.
- Illumination: Not permitted.
- Additional requirements: Signs shall be removed within seven (7) days of the completion of the purpose for which the sign was erected.

2912.03.2 Banner Signs:

- Maximum sign area: Shall not exceed 32 square feet in area.
- Maximum number of signs: One (1).
- Illumination: Not permitted.
- Additional requirements: Banners shall be permitted only for grand opening events, two (2) weeks before the event and shall be removed within two (2) weeks after the event. Banners shall not be displayed more than 30 days.

2913 Electronic Message Signs *(Amended 7/24/18)*

Electronic Message Signs are permitted as follows:

2913.01 Electronic Message Signs in the A-1, LRR, RR, ER, and SR Districts:

- Signs shall be permitted in place of, or as part of, a Freestanding Sign for any use requiring a Site Improvement Plan (SIP) or Use by Special Review (USR). Refer to Section 2910.02.
- Maximum sign area: Shall not exceed 50 square feet in area, at the rate of 25 square feet per side maximum.
- Maximum number of signs: One per parcel
- Illumination: Permitted. See Section 2902.06.
- Additional requirements:
  - Signs shall be limited to a maximum of three different messages per day.
  - Minimum message hold time: Displayed messages shall not change more frequently than once per 20 seconds in areas with posted speed limits up to 35 mph or once per 10 seconds in areas with posted speed limits greater than 35 mph; and must be one complete message per transition.
  - Signs shall only be in operation between the hours of 7:00 a.m. and 9:00 p.m. Verification of the ability to control the signage lighting shall be required as part of the sign permit application.
  - Transition method: Signs shall contain static messages only, changed only through an instant transition, and shall not have movement, animation, color variation, or the appearance or optical illusion of movement or varying light intensity.
  - Transition duration: The transition time between each message displayed on the sign shall not exceed one-half second.
  - Signs shall be equipped with a sensor or other device that automatically determines the ambient illumination and is programmed to automatically dim according to ambient light conditions. Lighting from the message module shall not exceed 0.3-foot-candles above ambient lighting conditions.
  - All displays shall be equipped to default to black or to automatically shut off if a malfunction occurs.
  - Messages displayed on the module shall only direct attention to a business, product, service, activity, or entertainment that is conducted, sold, or offered on the premise on which the sign is located.
  - The distance between any two Electronic Message Signs shall be a minimum of 1,500 feet measured in a straight line, without regard to intervening structures or objects, from the nearest portion of one sign to another.

2913.02 Electronic Message Signs in residential or non-urban areas of Planned Developments:

- Signs shall be permitted in place of, or as part of, a Freestanding Sign for any use requiring a Site Improvement Plan (SIP), Use by Special Review (USR), or Location & Extent (L&E). Refer to Section 2910.02.
- Maximum sign area: Shall not exceed 50 square feet in area, at the rate of 25 square feet per side maximum.
- Maximum number of signs: One per parcel
- Illumination: Permitted. See Section 2902.06.
- Additional requirements:
  - Signs shall be limited to a maximum of three different messages per day.
  - Minimum message hold time: Displayed messages shall not change more frequently than once per 20 seconds in areas with posted speed limits up to 35 mph or once per 10 seconds in areas with posted speed limits greater than 35 mph; and must be one complete message per transition.
  - All signage lighting shall be turned off within one hour of the end of business and remain turned off until one hour prior to commencement of business. Verification of the ability to control the signage lighting shall be required as part of the sign permit application.
  - Transition method: Signs shall contain static messages only, changed only through an instant transition, and shall not have movement, animation, color variation, or the appearance or optical illusion of movement or varying light intensity.
  - Transition duration: The transition time between each message displayed on the sign shall not exceed one-half second.
  - Signs shall be equipped with a sensor or other device that automatically determines the ambient illumination and is programmed to automatically dim according to ambient light conditions. Lighting from the message module shall not exceed 0.3 foot-candles above ambient lighting conditions.
  - All displays shall be equipped to default to black or to automatically shut off if a malfunction occurs.
  - Messages displayed on the module shall only direct attention to a business, product, service, activity, or entertainment that is conducted, sold, or offered on the premise on which the sign is located.
  - The distance between any two Electronic Message Signs shall be a minimum of 1,500 feet measured in a straight line, without regard to intervening structures or objects, from the nearest portion of one sign to another.

2913.03 Electronic Message Signs in the B, C, LI, and GI Districts for all uses; and Sedalia CMTY, D, HC, and MI Districts for business, commercial, community, and industrial uses:

- Signs shall be permitted in place of, or as part of, a Freestanding Sign. Refer to Section 2910.04.
- Maximum sign area: Shall not exceed 50 percent of the Freestanding Sign area permitted under Section 2910.04.
- Maximum number of signs: One per parcel.
- Illumination: Permitted. See Section 2902.06.
- Additional requirements:
  - Signs shall not be oriented to or adjacent to any federal, state, or major County arterial highway.
  - Minimum message hold time: Displayed messages shall not change more frequently than once per 20 seconds in areas with posted speed limits up to 35 mph or once per 10 seconds in areas with posted speed limits greater than 35 mph; and must be one complete message per transition.
  - Transition method: Signs shall contain static messages only, changed only through an instant transition, and shall not have movement, animation, color variation, or the appearance or optical illusion of movement or varying light intensity.
  - Transition duration: The transition time between each message displayed on the sign shall not exceed one-half second.
  - Signs shall be equipped with a sensor, or other device, that automatically determines the ambient illumination and is programmed to automatically dim according to ambient light conditions. Lighting from the message module shall not exceed 0.3-foot-candles above ambient lighting conditions.
  - All displays shall be equipped to default to black or to automatically shut off if a malfunction occurs.
  - Messages displayed on the module shall only direct attention to a business, product, service, activity, or entertainment that is conducted, sold, or offered on the premise on which the sign is located.
  - The distance between any two Electronic Message Signs shall be a minimum of 1,500 feet measured in a straight line, without regard to intervening structures or objects, from the nearest portion of one sign to another.

2914 Flags

Flags do not require a sign permit and are allowed as follows:

2914.01 Flags in the A-1, LRR, RR, ER, SR, MF, and MH Districts:

- Illumination: Permitted. See Section 3005.17.
- Additional requirements:
  - Shall be accessory to a permitted principal use.
  - Minimum setback shall be the height of the flag pole.
  - Shall be affixed to a flag pole or mounted to a structure.

2914.02 Flags in the B, C, LI, and GI Districts; and Sedalia CMTY, D, HC, and MI Districts:

- Illumination: Permitted. See Section 3005.17.
- Additional requirements:
  - Shall be accessory to a permitted principal use.
  - Pole-mounted flags shall not exceed 35 feet in height.
  - Building-mounted flags shall not exceed the height of the building.
  - Minimum setback shall be the height of the flag pole.
  - Shall be affixed to a flag pole or mounted to a structure.
  - Flag poles shall be depicted on the approved Site Improvement Plan.

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Article 6
Signs and Lighting

6

Division 6-1 Purpose and Application of Article

Sec. 12-6-101 Purpose of Article and Authority for Article

A. **Generally.** The purpose of this Article is to set out regulations for the erection and maintenance of signs while preserving the right of free speech and expression.

B. **Objectives.** The objective of the regulations of this Article is to provide a balanced and fair legal framework for design, construction, and placement of signs that:

1. Promotes the safety of persons and property by ensuring that signs do not create a hazard by:
   a. Collapsing, catching fire, or otherwise decaying;
   b. Confusing or distracting motorists; or
   c. Impairing drivers' ability to see pedestrians, obstacles or other vehicles, or to read traffic signs; and
2. Promotes the efficient communication of messages, and ensures that persons exposed to signs:
   a. Are not overwhelmed by the number of messages presented; and
   b. Are able to exercise freedom of choice to observe or ignore said messages according to the observer's purpose; and
3. Protects the public welfare and enhances the appearance and economic value of the landscape by protecting scenic views and avoiding sign clutter that can compromise the character, quality, and viability of commercial corridors;
4. Ensures that signs are compatible with their surroundings, and prevents the construction of signs that are a nuisance to occupants of adjacent and contiguous property due to brightness, reflectivity, bulk, or height;
5. Promotes the use of signs that are aesthetically pleasing, of appropriate scale, and integrated with the built environment, in order to meet the City's Comprehensive Planning objectives related to the quality and character of development;
6. Enhances property values and business opportunities;
7. Assists in wayfinding; and
8. Provides fair and consistent permitting and enforcement.

C. **Authority.** The City Council finds that:

1. The City has the authority to regulate signs under the United States Constitution, the Constitution of the State of Colorado, and the Home Rule Charter of the City of Centennial;
2. This Article advances important and substantial governmental interests;
3. The regulations set out in this Article are unrelated to the suppression of constitutionally-protected free expression and do not involve the content of protected messages which may be displayed on signs, nor do they involve the viewpoint of individual speakers;
4. The incidental restriction on the freedom of speech is no greater than is essential to the furtherance of the interests protected by this Article; and
5. Certain types of speech are not protected by the First Amendment due to

the harm that they cause to individuals or the community, and speech that is harmful to minors may be prohibited in places that are accessible to minors.

D. **General Findings of Fact.** The City Council finds that:

1. The ability to display signs of reasonable size and dimensions is vital to the health and sustainability of many businesses, and the display of signs with noncommercial messages is a traditional component of the freedom of speech, but the constitutional guarantee of free speech may be limited by appropriate and constrained regulation that is unrelated to the expression itself;
2. The City has an important and substantial interest in preventing sign clutter (which is the proliferation of signs of increasing size and dimensions as a result of competition among property owners for the attention of passing motorists), because sign clutter degrades the character of the community, makes the community a less attractive place for commerce and private investment, and dilutes or obscures messages displayed along the City's streets by creating visual confusion and aesthetic blight;
3. Sign clutter can be prevented by regulations that balance the legitimate needs of individual property owners to convey their commercial and noncommercial messages against the comparable needs of adjacent and nearby property owners and the interest of the community as a whole in providing for a high quality community character;
4. Temporary signs that are not constructed of weather-resistant materials are often damaged or destroyed by wind, rain, and sun, and after such damage or destruction, degrade the aesthetics of the City's streets if they are not removed;
5. The City has an important and substantial interest in keeping its rights-of-way clear of obstructions and litter;
6. The City has an important and substantial interest in protecting the health of its tree canopy, which contributes to the character and value of the community; and
7. The uncontrolled use of off-premises outdoor advertising signs and their location, density, size, shape, motion, illumination and demand for attention can be injurious to the purposes of this Article, and destructive to community character and property values, and that, as such, restrictions on the display of off-premises commercial messages are necessary and desirable.

Sec. 12-6-102 Application of Article

A. **Generally.** Hereinafter, all construction, relocation, enlargement, alteration, and modification of signs within the City shall conform to the requirements of this Article, all State and Federal regulations concerning signs and advertising, and applicable building codes. Generally, signs are approved by issuance of a sign permit. However, there are some signs that do not require a permit. These signs are listed in subsection C., below.

B. **Signs Requiring a Permit.** A sign permit shall be required for all permitted signs exceeding six square feet in area, unless otherwise exempted by subsection C., below. In addition, a sign permit shall be required at any time the sign area is increased, if the increase is allowable within the zone district in which the sign is located. This subsection shall not be interpreted so as to grant permission for prohibited signs with sign areas less than six square feet.

C. **Signs that Do Not Require a Sign Permit.** The following signs do not require a sign permit, but may require a building permit or other related permit (if subject to building or electrical codes). Temporary signs that do not require permits shall still comply with the standards of *Division 6-5*, Temporary Signs, and *Division 6-3*, General Design and Maintenance Standards, or the applicable standards of this subsection.

1. ***Official and Legal Notice.*** Official and legal notice signs that are issued by any court, public body, person, or officer in performance of a public duty, or in giving any legal notice, including signs that are required to be posted to give notice of pending action pursuant to this LDC.
2. ***Signs with De Minimus Area.*** Signs that are affixed to a building or structure (even if wall signs are not permitted in the district or for the use), which do not exceed one square foot in sign area, provided that only one such sign is present on each elevation that is visible from public rights-of-way or neighboring property; and signs that are less than three-fourths of a square foot in area that are affixed to machines, equipment, fences, gates, walls, gasoline pumps, public telephones, or utility cabinets.
3. ***Flags.*** Flags that are not larger than 30 square feet in area that are affixed to permanent flagpoles or flagpoles that are mounted to buildings (either temporary or permanent).
4. ***Decorative Signs.*** Clearly incidental, customary and commonly associated with a holiday, provided that such signs shall be displayed for a period of not more than 60 consecutive days nor more than 60 total days in any one year.
5. ***Carried Signs.*** Signs that are being carried by people (however, such signs are not exempt if they are set down or propped on objects);
6. ***Bumper Stickers.*** Bumper stickers on vehicles;
7. ***Interior Signs.*** Signs that are not visible from residential lots, abutting property or public rights of way;
8. ***Traffic Control Signs.*** Traffic control signs and other signs related to public safety that the City or another jurisdiction installs or requires a developer to install;
9. ***Holiday Decorations.*** Holiday decorations that are displayed for not more than two months per year.

D. **Exemption for Addressing.** The City Council finds that the posting of the addresses of buildings in locations that are visible from the street is necessary for the effective delivery of public safety services, including E-911. The efficient and timely delivery of emergency services is a compelling governmental interest. Accordingly, the City requires that street addresses shall be posted as follows:

1. ***Nonresidential and Mixed-Use Districts.*** In nonresidential districts, street addresses shall be posted at:
   a. All primary building entrances; and
   b. On detached signage if the address on the building is not visible from the street.
2. ***Residential Districts.*** In residential districts, street addresses shall be posted:
   a. On the façade of the building that faces the street from which the address is taken; and
   b. On the mailbox or mailbox support, if the mailbox is detached from the building.

3. ***Exclusion from Sign Area Calculation.*** Because address signs are required, numbers and letters used for addressing are not included in the calculation of sign area if they are not more than 14 inches in height.

E. **Signs Permitted Before Effective Date.** If a permit for a sign has been issued in accordance with all City ordinances in effect prior to the effective date of this Article, and provided that construction is begun within six months of the effective date of this Article and diligently pursued to completion, said sign may be completed in accordance with the approved plans on the basis of which the permit has been issued, subject thereafter, if applicable, to the provisions of this LDC regarding nonconforming signs.

F. **Relationship to Other Regulations.** These Regulations recognize other regulations pertaining to signage (i.e., State of Colorado, Department of Highways, "Rules and Regulations Pertaining to Outdoor Advertising," effective January 1, 1984, and as may be amended). Where any provision of this Article cover the same subject matter as other regulations, the more restrictive regulation shall apply.

Division 6-2 Measurements and Calculations

Sec. 12-6-201 Measurements

A. **Generally.** The regulations of this Article shall be applied using the measurements set out in this Section.

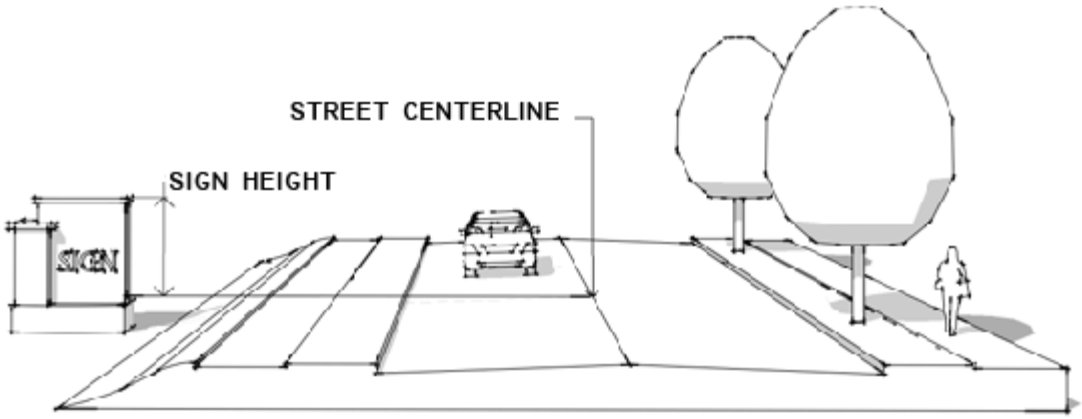
B. **Sign Clearance.** Sign clearance is the distance between the bottom of a sign face or structural element that is not affixed to the ground and the nearest point on the surface under it. See *Figure 12-6-201A*, Measurement of Sign Clearance.

Figure 12-6-201A
Measurement of Sign Clearance

C. **Sign Height.** For detached signs (temporary and permanent), sign height is:

1. Where the natural grade of the ground where the sign is to be located is lower than the street centerline, the vertical distance to the top of the sign face or sign structure, whichever is higher, measured from the elevation of the centerline of the adjacent street. See *Figure 12-6-201B*, Measurement of Sign Height, Sign Base Lower than Street Centerline.

Figure 12-6-201B
Measurement of Sign Height, Sign Base Lower than Street Centerline



2. Where the natural grade of the ground where the sign is to be located is higher than the street centerline, the vertical distance to the top of the sign face or sign structure, whichever is higher, measured from the elevation of the average grade around the base of the sign.

D. **Items of Information.** An item of information is a word, logo, abbreviation, symbol, geometric shape, image, or number with 10 or fewer digits (punctuation of numbers does not increase the number of items of information). See *Figure 12-6-201C*, Items of Information.

Figure 12-6-201C
Items of Information

The sign below has 7 items of information: 4 words + one 10-digit number (with punctuation) + 2 symbols

Sec. 12-6-202 Calculations

A. **Generally.** The calculations required by the regulations of this Article shall be according to the methodologies of this Section.

B. **Sign Area.**

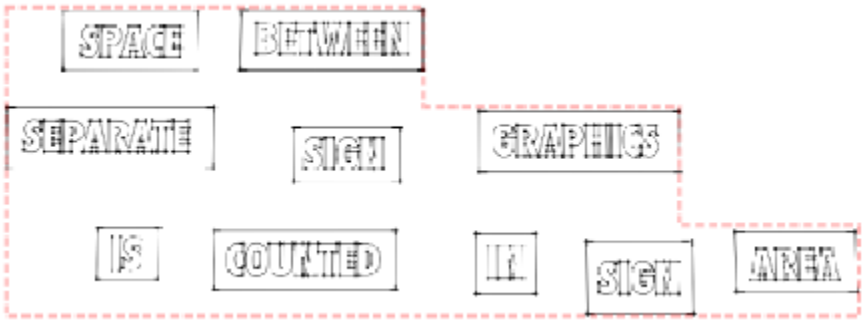
1. ***Generally.*** Sign area is calculated as the area within a continuous perimeter with up to eight straight sides that encloses the limits of text and graphics of a sign, together with any frame or other material or color forming an integral part of the display or used to differentiate the sign's message from the background against which it is placed. The area excludes the structure upon which the sign is placed (unless the structure is an integral part of the display or used to differentiate it), but includes any open space contained within the outer limits of the display

face of a sign, or between any component, panel, strip, or figure of any kind composing the display face, whether this open space is enclosed by a frame or border or not. See *Figure 12-6-202A*, Sign Area, Generally.

Figure 12-6-202A
Sign Area, Generally

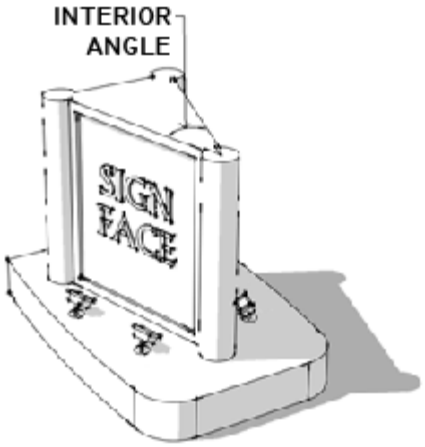
The sign area of the illustrative monument sign below is calculated as the area within the smallest eight-sided polygon that encloses all of the text and graphics and framing of the message and graphics of the sign.

The sign area of the illustrative collection of wall signs below is measured as the area within the smallest eight-sided polygon that encloses all of the text and graphics and framing that differentiates them from the wall.



2. ***Double-Faced Signs.*** For projecting, suspended, or other double-faced signs:
   a. Only one display face is measured if the sign faces are parallel or form an interior angle of less than 45 degrees, provided that the signs are mounted on the same structure. If the faces are of unequal area, then sign area is equal to the area of the larger face.
   b. Both display faces are measured if:
      i. The interior angle is greater than 45 degrees; or
      ii. The sign faces are mounted on different structures.

Figure 12-6-202B
Double-Faced Signs



C. **Signable Area.** Signable area is calculated as follows:

1. ***Wall Signs.*** A two-dimensional area on the façade of a building that describes the largest square, rectangle, or parallelogram which is free of architectural details.
2. ***Window Signs.*** The area of glass within a window frame.
3. ***Other Signs.*** The area of the face of the sign which is designed to be used for text and graphics (the signable area does not include the sign's supporting frame or structure, if any, provided that such frame or structure is not designed to display text or graphics).

D. **Signable Area Ratio.** Signable area ratio is the sign area divided by the signable area. It is expressed as a percentage.

E. **Relationship Between Maximum Sign Area and Maximum Signable Area Ratio.** Where both a maximum sign area and a maximum signable area ratio are set out, the standard that results in the least sign area applies.

Division 6-3 General Design and Maintenance Standards

Sec. 12-6-301 Prohibited Signs and Design Elements

A. **Generally.** This section identifies signs and sign elements that are not allowed anywhere in the City.

B. **Prohibited Signs.**

1. The following signs are prohibited in all areas of the City:
   a. Signs with more than two sign faces.
   b. Signs that are a traffic hazard because they simulate or imitate (in size, color, lettering, or design) any traffic sign or signal.
   c. Animated or moving signs that are visible from public rights-of-way, including any moving, swinging, rotating, flashing, blinking, scintillating, fluctuating, or otherwise animated light (except as allowed in *Section 12-6-305*, Message Centers).
   d. Vehicle signs.

e. Portable Signs, except as specifically permitted in *Division 6-5*, Temporary Signs.

f. Billboards.

2. Other signs may be prohibited in certain districts. See *Division 6-4*, Permanent Signs, and *Division 6-5*, Temporary Signs, for requirements.

C. **Prohibited Design Elements.**

1. The following elements shall not be used as an element of signs or sign structures, whether temporary or permanent:

a. Sound, smoke, or odor emitters.

b. Awnings that are back lit and / or made of plastic.

c. Stacked products (e.g., tires, soft drink cases, bagged soil or mulch).

d. Unfinished wood support structures, except that stake signs may use unfinished stakes.

2. The following elements shall not be used as an element of signs or sign structures, whether temporary or permanent, which are visible from public rights-of-way:

a. Flags, banners, or comparable elements that are designed to move in the wind that are not affixed to permanent flagpoles or flagpoles that are mounted to buildings.

b. Spinning or moving parts.

c. Bare light bulbs, except on holiday displays which are exempted from regulation by *Section 12-6-102*, Application of Article.

d. Flashing lights, except on holiday displays which are exempted from regulation by *Section 12-6-102*, Application of Article.

e. Motor vehicles, unless:

i. The vehicles are functional, used as motor vehicles, and have current registration and tags;

ii. The display of signage is incidental to the motor vehicle use; and

iii. The motor vehicle is properly parked in a marked parking space or is parked behind the principal building.

f. Semi-trailers, shipping containers, or portable storage units, unless:

i. The trailers, containers, or portable storage units are functional, used for their primary storage purpose, and, if subject to registration, have current registration and tags;

ii. The display of signage is incidental to the use for temporary storage, pick-up, or delivery; and

iii. The semi-trailer is parked in a designated loading area or on a construction site at which it is being used for deliveries or storage.

D. **Prohibited Content.**

1. The following content is prohibited without reference to the viewpoint of the individual speaker:

a. Text or graphics of an indecent or immoral nature and harmful to minors;

b. Text or graphics that advertise unlawful activity;

c. Text or graphics that are obscene, fighting words, defamation, incitement to imminent lawless action, or true threats; or

d. Text or graphics that present a clear and present danger due to their potential confusion with traffic control signs or signs that provide public safety information (for example, signs that use the words "Stop," "Yield," "Caution," or "Danger," or comparable words, phrases, symbols, or characters in such a manner as to imply a safety hazard that does not exist).

2. The narrow classifications of content that are prohibited by this subsection are either not protected by the United States or Colorado Constitutions, or are offered limited protection that is outweighed by the substantial governmental interests in protecting the public safety and welfare. It is the intent of the City Council that each paragraph of this subsection (e.g., subsection D.1.a., D.1.b., D.1.c., or D.1.d.) be individually severable in the event that a court of competent jurisdiction were to hold one or more of them to be inconsistent with the United States or Colorado Constitutions.

Sec. 12-6-302 Prohibited Sign Locations

A. **Generally.** Attached signs shall be installed on signable areas of buildings, as defined by *Section 12-6-201*, Measurements. Detached signs shall be set back as required by *Section 12-6-402*, Detached Signs. Signs that are in violation of this Section are subject to immediate removal.

B. **Prohibited Obstructions.** In no event shall a sign, whether temporary or permanent, obstruct:

1. Building ingress or egress, including doors, egress windows, and fire escapes.
2. Features of the building or site that are necessary for public safety, including standpipes and fire hydrants.
3. Sight triangles that are required by *Section 12-11-208*, Sight Triangle Requirements, and the Roadway Design & Construction Standards Manual.
4. Sight distances that are required by the Roadway Design & Construction Standards Manual.

C. **Prohibited Mounts.** No sign, whether temporary or permanent, shall be posted, installed, or mounted on any of the following locations:

1. On trees.
2. On utility poles or light poles, unless:
   a. The sign is a banner that is not more than 24 inches in width and 48 inches in height;
   b. The banner is attached at the top and bottom to brackets that project not more than 30 inches from the light pole;
   c. There is at least eight feet of sign clearance;
   d. If the pole is owned or maintained by a utility company, the utility company has granted permission for the brackets to be mounted on the pole; and
   e. The utility pole or light pole is on the property of the person or entity that posts the banner.
3. On utility cabinets, except signs posted by the utility that are necessary for public

safety or identification of the facility by the utility provider.

D. **Prohibited Locations.** In addition to the setback requirements of this Article, and the other restrictions of this Section, no sign shall be located in any of the following locations:

1. In or over public rights-of-way (which, in addition to streets, may include other elements, such as sidewalks, parkways, retaining walls, utility poles, traffic control devices, medians, and center islands that are within the public right-of-way), except:
   a. Traffic control signs installed by a governmental entity or which are required to be installed by a governmental entity (e.g., permanent traffic control devices such as stop, yield, and speed limit signs, as well as temporary signs related to street construction or repair);
   b. Signs posted by governmental entities that support emergency management, such as wayfinding to disaster relief locations;
   c. Banners posted by the City on utility or light poles according to the standards of subsection C.2., above;
   d. Signs constructed by the City or another governmental or quasi-governmental entity pursuant to terms and conditions set forth in an approved intergovernmental agreement with the City that implement a community identity program recognized by resolution of City Council;
   e. Signs affixed to transit shelters and bus benches as authorized by the provider of the shelter or bench and in accordance with the requirements of this Article;
   f. Memorial marker signs placed by the City if such sign meets the requirements of a City adopted policy governing placement of such signs;
   g. Signs specifically identified in a sign design program approved pursuant to *Division 6* of this Article; and
   h. Signs placed in median islands not owned by the City, provided such signs do not create a hazard to traffic movement as determined by the Director of Public Works or encroach in sight triangles that are required by *Section 12-11-208*, Sight Triangle Requirements, and the Roadway Design & Construction Standards Manual.
2. In locations that have less horizontal or vertical clearance from authorized communication or energized electrical power lines than that prescribed by the laws of the State of Colorado and the regulations duly promulgated by agencies thereof.
3. Within easements for overhead utilities (placement in other utility easement areas is allowed only if approved by the utility service provider and if the other applicable requirements of this LDC are met).

Sec. 12-6-303 Items of Information

No sign face shall contain more than 20 items of information. Items of information are measured as provided in *Section 12-6-201*, Measurements.

Sec. 12-6-304 Illumination of Signs

A. **Generally.** Signs shall be internally illuminated or, if external illumination is used, the source of illumination shall be shielded.

B. **Hours of Illumination.** Signs shall be turned off each day by the later of 10:00 PM or upon closing of the associated land use (signs may be turned back on at 5:00 AM).

C. **Sign Illumination.** Signs shall not exceed the following illumination levels:

Table 12-6-304
Maximum Sign Illumination Standards

Type of Illumination	Distance from Sign to RS, RA, RU, NC, or NI District			Not Visible from RS, RA, RU, NC, or NI District
	Less than 200 ft.	200 ft. to 500 ft.	More than 500 ft.	
Direct, Internal or Backlit	90 foot-lamberts	150 foot-lamberts	250 foot-lamberts	250 foot-lamberts
Indirect or Reflected	10 foot-candles	25 foot-candles	50 foot-candles	50 foot-candles

Sec. 12-6-305 Message Centers

A. **Generally.** Manual and electronic message centers may be used in detached signs and marquee signs to a limited degree, pursuant to the applicable standards of this Section.

B. **Electronic Message Centers.** Electronic message centers may be incorporated into signage as follows:

1. ***Design Requirements.***

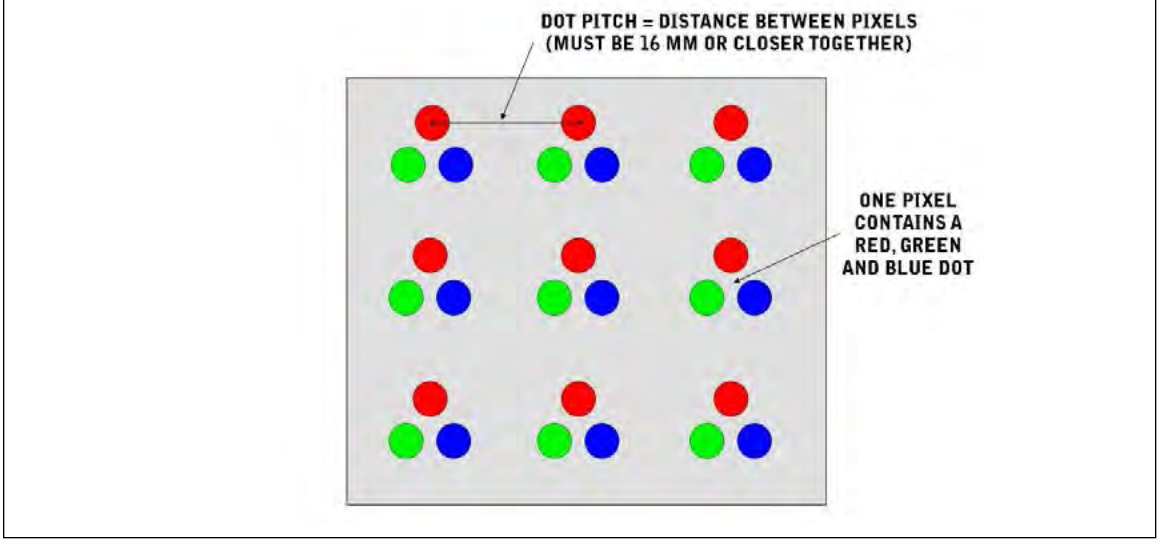
   a. Electronic message centers are only permitted on monument signs or marquee signs which enclose the electronic message center component on all sides with a finish of brick, stone, stucco, powder coated (or comparably finished) metal, or the surface of the sign face. The enclosure shall extend not less than six (6) inches from the electronic message center in all directions.

   b. Electronic message centers shall make up not more than fifty (50%) percent of the sign area of a monument sign or seventy five (75%) percent of the sign area of a marquee sign. The balance of the sign area shall utilize permanent, dimensional letters or symbols.

   c. No sign structure that includes a cabinet, box, or manual changeable copy sign may also include an electronic message center. See *Figure 12-6-305A*, Electronic Message Center Design Requirements.

   d. All electronic message center display components shall be full color with a minimum pitch resolution of 16 mm spacing or better (i.e. 10 mm, 12 mm, etc.)

Figure 12-6-305A
Electronic Message Center Resolution Requirements



2. ***Operational Requirements.*** Electronic message centers:
   a. Shall contain static messages only;
   b. Shall display messages for a period of not less than eight (8) seconds (multiple electronic message centers, if used on the same sign, shall be synchronized to change messages at the same time);
   c. Shall not use transitions or frame effects between messages; and
   d. Shall conform to the Illumination Standards as set forth in Subsection B.3 below.

Figure 12-6-305B
Electronic Message Center Design Requirements

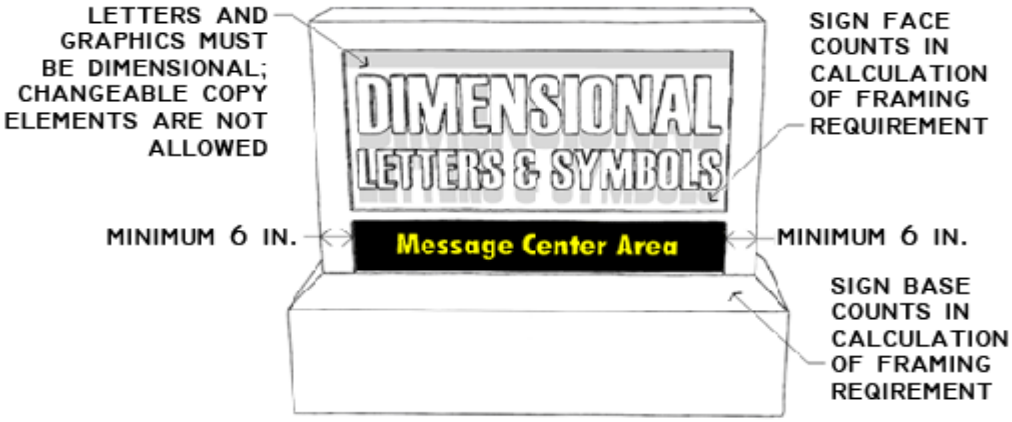
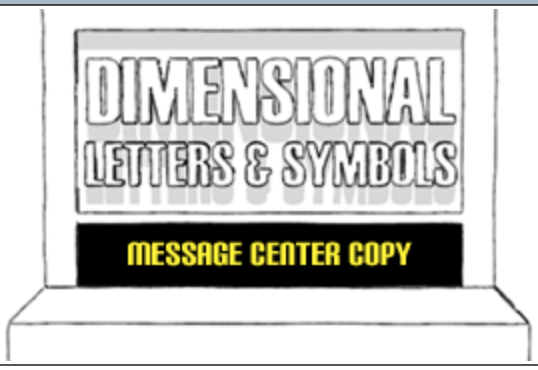


Figure 12-6-305B
Illustrative Electronic Message Center Operations

Note: This figure is animated in the version of the LDC that is published electronically. The animation shows the requirements of subsection B.2. at eight second intervals.



3. **Illumination Standards.** The illumination standards set forth in this subsection B.3. shall apply to all electronic message center signs, including multi-tenant electronic message centers.

   a. ***Measurement Criteria.*** The illuminance of an electronic message center shall be measured with an illuminance meter set to measure foot-candles accurate to at least two (2) decimals. Illuminance shall be measured with the electronic message center off, and again with the electronic message center displaying a white image for a full color-capable electronic message center, or a solid message for a single-color electronic message center. Measurements shall be taken after sunset with the site fully illuminated by installed site lighting. All measurements shall be taken perpendicular to the face of the electronic message center at the distance determined by the total square footage of the electronic message center as set forth below:

      For multi-tenant electronic message center signs:

      Large Sign: 98 feet

      Medium Sign: 73 feet for Symmetrical and Asymmetrical sign types; 84 feet for horizontal sign type

      Small Sign: 49 feet for Symmetrical and Asymmetrical sign type; 57 feet for horizontal sign type

      Other Sign Sizes: Measurement Distance = √ (Area of Sign (in sq. ft.) x 100)

   b. ***Electronic Message Center Illumination Limits.*** The difference between the off and solid-message measurements using the EMC Measurement Criteria shall not exceed 0.3 foot-candles on either side of the sign. If there is a difference in measurement of illumination levels on either side of the sign, the side of the sign facing residentially zoned properties shall take precedent.

   c. ***Dimming Capabilities.*** All electronic message centers shall be equipped with a sensor or other device that automatically determines the ambient illumination and programmed to automatically dim according to ambient light conditions, or that can be adjusted to comply with the 0.3 foot-candle measurements.

C. **Multi-tenant Electronic Message Centers.** Multi-tenant electronic message centers are intended to provide an opportunity for unified, multi-tenant developments to advertise on-site businesses through uniform sign designs subject to the requirements set forth in this subsection C. Developments that do not meet the criteria set forth in this subsection C are permitted to display electronic message center signs in accordance with subsection

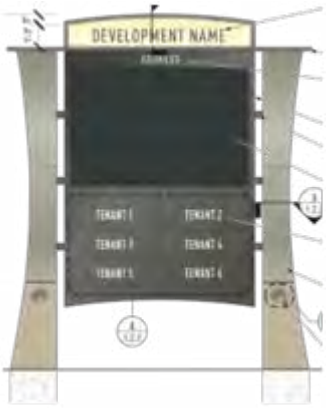
1. ***Development Eligibility Requirements.*** Multi-tenant electronic message centers are permitted in mixed use or non-residential developments that meet all of the following criteria:
   a. Unified mixed use or non-residential development that meets the minimum floor area requirements as specified in Table 12-6-305A, whether existing or proposed through an approved site plan, and contains at least ten (10) existing or proposed tenants, storefronts, or businesses.
   b. The development must be located in the AC, CG, or UC zone districts.
   c. Through the sign permit application, the development must identify tenants, storefronts, and businesses eligible for signage on the multi-tenant electronic message center sign.
2. ***Sign Design, Location, and Requirements.*** A mixed use or non-residential development that meets all of the criteria of subsection C.1, above, may display multi-tenant electronic message centers on signs that meet all of the following criteria:
   a. The sign shall conform to the sign prototypes and criteria set forth in *Table 12-6-305A*. The sign shall be designed and constructed in conformance with the specifications, materials, colors, and dimensions as set forth in the design criteria document titled "Multi Tenant Monument Signs Template", incorporated herein by reference and copies of which are on file with the Community Development Department.
   b. A maximum of one (1) large sized multi-tenant electronic message center sign may be displayed per eligible development meeting the criteria in subsection C.1, except that a maximum of two (2) large sized multi-tenant electronic message center signs may be displayed if the total square footage of existing floor area for the development exceeds 400,000 square feet and is adjacent to I-25.
   c. A maximum of one (1) medium sized multi-tenant electronic message center sign may be displayed per eligible development meeting the criteria in subsection C.1.
   d. All electronic message center display components shall be full color with a pitch resolution of no greater than 16 mm spacing (e.g. 12 mm, 10 mm are acceptable).
   e. The sign must meet the minimum setback requirements set forth in *Table 12-6-305A*.
   f. The sign must be located adjacent to the rights-of-way specified in *Table 12-6-305A* under "Eligible ROW Frontage."
3. ***Operational Requirements.*** Multi-tenant electronic message centers:
   a. Shall contain static messages only;
   b. Shall display messages for a period of not less than eight (8) seconds;

c. Shall not use transitions or frame effects between messages;

d. Shall meet the illumination standards set forth in subsection B.3.; and

e. No more than four (4) separate images on the electronic message center display shall be displayed at any given time.

Table 12-6-305A
Multi-tenant EMC Requirements

Sign Prototype	Symmetrical			Asymmetrical			Horizontal	
								
Sign Size	Large	Medium	Small	Large	Medium	Small	Medium	Small
Maximum Sign Height	25 feet	18 feet	12 feet	25 feet	18 feet	12 feet	14 feet	10 feet
Maximum EMC Component Size	8' x 12'	6' x 9'	4' x 6'	8' x 12'	6' x 9'	4' x 6'	6' x 12'	4' x 8'
Minimum Total Floor Area	200,000 sq. ft.	75,000 sq. ft.	15,000 sq. ft.	200,000 sq. ft.	75,000 sq. ft.	15,000 sq. ft.	75,000 sq. ft.	15,000 sq. ft.
Eligible ROW Frontage	I-25; Major Arterial abutting I-25; or State Highway 83	University Blvd, Smoky Hill Road, Arapahoe Road, County Line Road	Arterial or Collector Road connecting to an Arterial	I-25; Major Arterial abutting I-25; or State Highway 83	University Blvd, Smoky Hill Road Arapahoe Road County Line Road	Arterial or Collector Road connecting to an Arterial	University Blvd, Smoky Hill Road, Arapahoe Road, County Line Road	Arterial or Collector Road connecting to an Arterial
Required Setback from Residentially Zoned Properties	500 feet	250 feet	100 feet	500 feet	250 feet	100 feet	250 feet	100 feet
Required Setback from Other Property Lines	10 feet	10 feet	10 feet	10 feet	10 feet	10 feet	10 feet	10 feet

D. **Manual Changeable Copy Message Centers.** Manual changeable copy signs may be incorporated into signage as follows:

1. Manual changeable copy message centers are only permitted on monument signs or marquee signs which enclose the message center component on all sides with a finish of brick, stone, stucco, powder coated or comparably finished metal, or sign face that extends not less than six inches from the message center in all directions. Gaps between the message center and the finish are permitted to accommodate locks and hinges for a cover for the changeable copy area, but only to the extent necessary for such locks and hinges to operate.
2. Manual changeable copy message centers, including their frames, shall make up not more than 50 percent of the sign area. The balance of the sign area shall utilize permanently affixed letters or symbols. See *Figure 12-6-305C*, Manual Changeable Copy Centers.
3. Manual changeable copy message centers shall not be internally lit unless:
   a. They use opaque inserts with translucent letters, numbers, or symbols (see *Figure 12-6-305D*, Changeable Copy Inserts);
   b. Blank opaque inserts that are the same color as the opaque portions of the letters, numbers, and symbols are used over all areas of the sign where copy is not present; and
   c. The opaque portion of the letters, numbers, and symbols is the same color.

Figure 12-6-305C
Manual Changeable Copy Centers

The manual changeable copy message center (outlined in dashed blue line) may occupy not more than 50 percent of the sign area (outlined in dashed red line).

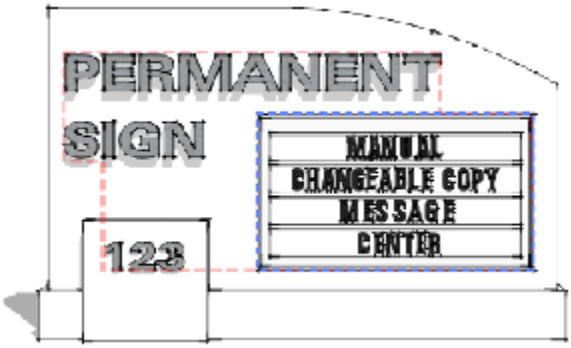


Figure 12-6-305D
Changeable Copy Inserts

Changeable copy message centers may be internally lit if they use opaque inserts with translucent letters, numbers, or symbols (see A below), but shall not be internally lit if they use clear or translucent inserts with opaque or translucent letters, numbers, or symbols (see B below).

Sec. 12-6-306 Sign Maintenance

A. **Generally.** Signs and sign structures of all types (attached, detached, and temporary) shall be maintained as provided in this Section.

B. **Message.** Signs shall display messages. Signs that do not display a message for a period of more than 30 days are abandoned. See Section 12-12-301, Termination, Restoration, and Removal.

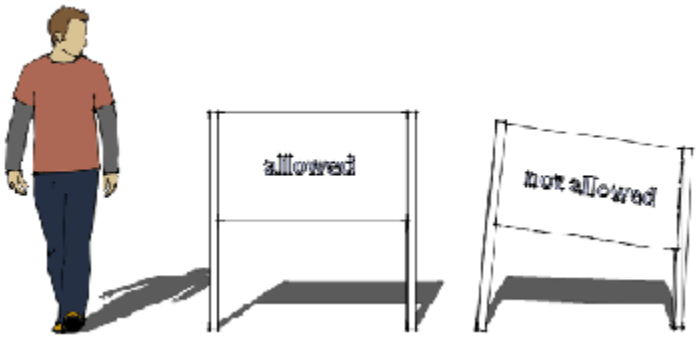
C. **Paint and Finishes.** Paint and other finishes shall be maintained in good condition. Peeling finishes shall be repaired. Signs with running colors shall be repainted, repaired, or removed if the running colors were not a part of the original design.

D. **Mineral Deposits and Stains.** Mineral deposits and stains shall be promptly removed.

E. **Corrosion and Rust.** Permanent signs and sign structures shall be finished and maintained to prevent corrosion and rust. A patina on copper elements is not considered rust.

F. **Level Position.** Signs that are designed to be level, whether temporary or permanent, shall be installed and maintained in a level position. See *Figure 12-6-306*, Level Position.

Figure 12-6-306
Level Position



Division 6-4 Permanent Signs

Sec. 12-6-401 Attached Signs

A. **Generally.** There are many forms of attached signs. This section sets out which forms of attached signs are allowed in each zoning district and the standards that apply to them. Attached signs that are not listed in a table are not allowed as-of-right in any of the districts set out in the Table.

B. **Residential and Agriculture Districts.**

1. The standards of *Table 12-6-401A*, Permissible Attached Sign Types in Residential and Agriculture Districts, apply to multifamily and nonresidential uses in the districts that are set out in the table.
2. Attached signs are not allowed for home occupations, except for required address signs.

Table 12-6-401A Permissible Attached Sign Types in Residential and Agriculture Districts						
District	**AG**	**RA**	**RU**	**RS**	**NC**	**NI**
Wall Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per façade	1 per building	1 per building	1 per building		
Maximum Sign Area	35 sf.	35 sf.	30 sf.	25 sf.		
Maximum Signable Area Ratio	50%	60%	60%	40%		
Other Limitations	Not allowed if fascia or parapet sign is used.			--		
Fascia Sign or Parapet Sign	Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	1 per façade	1 per building	1 per building	--	--	--
Maximum Sign Area	20 sf.	35 sf.	35 sf.	--	--	--
Maximum Signable Area Ratio	75%	60%	60%	--	--	--
Other Limitations	In cases where a tenant has two structures, one of which is accessory, whether attached or not, only one of the structures will be permitted fascia signage when both face the same adjacent public right-of-way.			--	--	--

C. **Nonresidential Districts.** The standards of *Table 12-6-401B*, Permissible Attached Sign Types in Nonresidential / Mixed-Use Districts, apply in the districts that are set out in the table.

Table 12-6-401B Permissible Attached Sign Types in Nonresidential / Mixed-Use Districts							
District	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Wall Sign - Primary	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per façade	1 per façade	1 per façade	1 per façade	1 per façade	1 per façade	1 per façade
Maximum Sign Area	Aggregate (total) sign area of 1 sf. per linear ft of façade width	Aggregate (total) sign area of 0.5 sf. per linear ft of façade width	Aggregate (total) sign area of 1 sf. per linear ft of façade width	Aggregate (total) sign area of 0.5 sf. per linear ft of façade width	Aggregate (total) sign area of 0.5 sf. per linear ft of façade width	Aggregate (total) sign area of 0.5 sf. per linear ft of façade width	Aggregate (total) sign area of 0.5 sf. per linear ft of façade width
Maximum Signable Area Ratio	85%	50%	85%	50%	50%	50%	50%

Table 12-6-401B Permissible Attached Sign Types in Nonresidential / Mixed-Use Districts							
District	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Other Limitations	No primary wall sign shall exceed 200 square feet. In cases where a tenant has two structures, one of which is accessory, whether attached or not, only one of the structures will be permitted primary wall signage when both face the same adjacent public right-of-way.						
Wall Sign - Secondary	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per primary building entrance (In addition to wall signage)						
Maximum Sign Area	35 sf.	35 sf.	50 sf.	40 sf.	50 sf.	35 sf.	35 sf.
Maximum Signable Area Ratio	20%	20%	20%	20%	20%	20%	20%
Other Allowances	If a building is located on a through lot and is set back from the rear right-of-way less than 30 feet, then one additional sign per primary building entrance is permitted for display on the rear façade of the building, provided that no façade includes more signs than the total number of primary building entrances.						
Window Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Minimum Window Transparency	50%	80%	50%	80%	50%	80%	80%
Other Limitations	-	See neon signs, below		-	-	-	-
Awning Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per awning						
Maximum Sign Area	5 sf.						
Maximum Signable Area Ratio	90% of valence for copy and graphics on valence; 50% of other areas for copy and graphics on other areas						
Marquee Sign	Not Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	-	1 per building		-			
Maximum Sign Area	-	20 sf. per face, up to 3 faces		-			
Other Limitations	-	Not allowed on façades that face residential uses in a different zoning district; not allowed on buildings that are less than 12,000 sf. of floor area; counts as a fascia or parapet sign		-			

Table 12-6-401B Permissible Attached Sign Types in Nonresidential / Mixed-Use Districts							
District	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Blade Sign or Shingle	Not Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	-	1 per primary building entrance		-			
Maximum Sign Area	-	8 sf.		-			
Minimum Clearance	-	8 ft.		-			
Maximum Height	-	12 ft.		-			
Other Limitations	-	Allowed under awnings or arcades on front façades only		-			
Neon Sign	Not Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	-	1 per window		-			
Maximum Sign Area	-	6 sf.		-			
Other Limitations	-	Sign area of neon sign hung in window counts as opaque in measurement of window transparency; Neon signs must be turned off when the use closes each day		-			
Roof Sign	Not Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	-	1 per building		-			
Maximum Sign Area	-	0.6 sf. per linear ft. of façade width		-			

Table 12-6-401B Permissible Attached Sign Types in Nonresidential / Mixed-Use Districts							
District	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Other Limitations	-	Allowed only on buildings that meet all of the following criteria: (1) the building existed as of the effective date; (2) the fascia is less than 1 ft. wide; (3) there is less than 25 sf. of signable area; (4) the sign is mounted on a sloped roof system; (5) the sign does not extend higher than two feet below the peak of the roof; and (6) the sign is not illuminated. Shall not be located on building elevations adjacent to residential zoned property; Shall not be visible from residences located within one-half mile of the building.		-			

Sec. 12-6-402 Detached Signs

A. **Generally.** There are many forms of detached signs. This section sets out which forms of detached signs are allowed in each zoning district, and the size and height standards that apply to them.

B. **Required Setbacks.** All detached signs shall be set back at least 10 feet from all property lines. This standard may be waived if:

1. The sign is proposed to be affixed to an existing retaining wall that is closer than 10 feet to the property line (but not across it); or
2. The waiver would lower the elevation of the base of the sign by more than three feet and:
   a. The sign will be set back at least one foot from any sidewalk;
   b. The sign will not encroach on any utility easement;
   c. The sign will not obstruct a required sight distance (see Roadway Design & Construction Standards Manual); and
   d. There is at least five feet of landscaped parkway between the edge of pavement and the property line; or
3. The sign is a bus stop or transit shelter sign.
4. The sign is used to identify a residential subdivision or development and:

a. The sign will be set back at least one foot from any sidewalk;

b. The sign will not encroach on any utility easement;

c. The sign will not obstruct a required sight distance (see Roadway Design & Construction Standards Manual); and

d. The sign will not be located within the sight triangle (see *Section 12-11-208*, Sight Triangle Requirements, and the Roadway Design & Construction Standards Manual).

Table 12-6-402A
Permissible Detached Sign Types, Agricultural and Residential Districts

District	AG	RS	RA	RU	NC	NI
Monument Sign, Residential	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Maximum Number of Signs	2 signs per subdivision or development access, located on commonly owned open space					
Maximum Sign Area	32 sf.					
Maximum Sign Height	5 ft. or anywhere on retaining wall, if present					
Maximum Signable Area Ratio	60%					
Monument Sign, Nonresidential	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Maximum Number of Signs	1 sign per nonresidential parcel					
Maximum Sign Area	32 sf.	12 sf.				
Maximum Sign Height	6 ft.	4 ft.				
Maximum Signable Area Ratio	60%					
Kiosk Sign	Not Allowed	Not Allowed	TND Only	TND Only	Not Allowed	Not Allowed
Sign Location and Spacing	-		In Neighborhood Center Subdistricts only; set back at least 10 feet from vehicular use areas; and spaced 150 feet apart unless there is no line of sight between the signs		-	
Maximum Sign Area	-		9 sf.		-	
Maximum Sign Height	-		6 ft.		-	
Bus Stop and Transit Shelter Bench Signs	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	Signs may be incorporated into transit shelter designs.					
Maximum Sign Area	Signs shall be integrated into the transit shelter or its benches. Transit shelters and benches shall be sized according to their principal function, and not for the display of signage.					

Table 12-6-402B
Permissible Detached Sign Types, Nonresidential and Mixed-Use Districts

District	AC	UC	CG	BP	I	ED	OSR
Monument Sign, Residential	Not Allowed	Not Allowed	Not Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed
Maximum Number of Signs	-			1 per parcel proposed for residential development	-		
Maximum Sign Area	-			20 sf.	-		
Maximum Sign Height	-			6 ft.	-		
Maximum Signable Area Ratio	-			70%	-		
Monument Sign, Nonresidential	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Maximum Number of Signs	2 signs per ingress or egress to district		1 per street frontage +1 per ingress or egress				
Maximum Sign Area	48 sf.		One sign per frontage up to 48 sf. All others up to 10 sf.				
Maximum Sign Height	10 ft.		One sign per frontage up to 10 ft. All others up to 5 ft.				
Maximum Signable Area Ratio	70%		80%				
Multi-tenant Electronic Message Centers	Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Design Criteria	Per Section *12-6-305(C)*			-	-	-	-
Kiosk Sign	Allowed	Allowed	Allowed	Allowed	Not Allowed	Allowed	Allowed
Sign Location and Spacing	Set back 10 feet from any vehicular use area; within two feet of a sidewalk; and spaced 150 feet apart unless there is no line of sight between signs				-	Spaced at least 300 feet apart, and set back at least 10 feet from vehicular use areas	
Maximum Sign Area	12 sf.	12 sf.	12 sf.	12 sf.	-	12 sf.	12 sf.
Maximum Sign Height	10 ft.	10 ft.	10 ft.	10 ft.	-	10 ft.	10 ft.
Bus Stop and Transit Shelter Bench Signs	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	Signs may be incorporated into transit shelter designs.						
Maximum Sign Area	Signs shall be integrated into the transit shelter or its benches. Transit shelters and benches shall be sized according to their principal function, and not for the display of signage.						

Table 12-6-402B Permissible Detached Sign Types, Nonresidential and Mixed-Use Districts							
District	**AC**	**UC**	**CG**	**BP**	**I**	**ED**	**OSR**
Directional Signs, Nonresidential	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Maximum Number of Signs	1 per ingress or egress						
Sign Location and Spacing	No Spacing or setback requirement; must leave at least 4 feet of sidewalk width for pedestrian use; must be located outside of principal pedestrian travel path.						
Maximum Sign Area	10 sf.						
Maximum Sign Height	5 ft.						

C. **Exceptions and Special Provisions.**

1. ***Residential Model Homes.*** In addition to the signage that is permitted by *Table 12-6-402A*, Permissible Detached Sign Types, Agricultural and Residential Districts, and *Table 12-6-402B*, Permissible Detached Sign Types, Nonresidential and Mixed-Use Districts, one monument sign is permitted per model home within an approved subdivision; provided that the surface area of the sign does not exceed 16 square feet, and the height does not exceed five feet. Such signage shall not be required to meet minimum setback requirements of the zone district in which it is located with respect to minor streets that are internal to the subdivision, but shall not obstruct sight triangles.
2. ***Signs for Full Service Hospitals.*** One monument sign located immediately adjacent to each public street frontage, but not to exceed four signs, is allowed. Each sign may be up to 16 feet in height, up to 150 square feet in sign area, and may contain up to 30 items of information. For the purposes of this regulation, a full service hospital (including a medical center) is a hospital that provides overnight and extended in-patient care and 24-hour emergency room services.
3. ***Freeway Oriented Commercial Retail and Mixed Use Developments.***
   a. The City Council finds that large retail developments that are adjacent to I-25 have unique needs for communicating their messages due to the high rate of speed of Interstate highway traffic, and the elevation of the Interstate compared to abutting properties. The regulations of subsection B.3.b., below apply to development that meets all of the following criteria:
      i. Unified commercial retail developments of more than 100,000 square feet of floor area, or mixed-used developments that contain more than 70,000 square feet of commercial retail floor area and more than 250,000 square feet of total floor area;
      ii. A minimum area of the parcel proposed for development of 10 acres; and
      iii. The parcel proposed for development directly abuts the I-25 right-of-way.
   b. Development that meets all of the criteria of subsection B.3.a., above, may display a monument sign that is subject to the following standards:
      i. Maximum sign height: 32 feet.
      ii. Alternative points of measurement: The point of measurement for sign

height is either the centerline of I-25 or the top of the light rail line, whichever is higher.

iii. Maximum sign area: 150 square feet.

iv. Setbacks and location: The sign shall be located in the yard that abuts I-25, and shall be set back at least 10 feet from all property lines.

v. Minimum spacing from other freeway oriented signs: 300 feet.

vi. The sign must be compatible with surrounding architecture in general appearance and materials.

vii. The sign shall also include landscaping in the form of shrubs, decorative grasses, perennials, or other ornamental materials around the base of the structure that are maintained by a subsurface irrigation system.

viii. The sign permitted by this subsection is in addition to the signs that are permitted by *Table 12-6-402B*, Permissible Detached Sign Types, Nonresidential and Mixed-Use Districts.

4. ***Off-Premises Signage for Large Commercial Retail and Mixed-Use Development.***

a. The City Council finds that large retail developments that are not located on property with frontage on a major arterial have unique needs for communicating their messages due to decreased visibility and the high volumes of traffic that seek the use. The regulations of subsection B.4.b., below, apply to development that meets all of the following criteria:

i. Unified commercial retail developments of more than 100,000 square feet of floor area;

ii. A minimum area of the parcel proposed for development of 10 acres; and

iii. A location without frontage on a major arterial, but not more than 3/4 mile distant from a major arterial.

b. Development that meets all of the criteria of subsection B.4.a., above, may display up to two off-premises monument signs, provided that each sign meets all of the following criteria:

i. The sign must be located within 3/4 mile from the parcel proposed for development;

ii. The sign must be located along a major arterial street;

iii. The minimum distance between off-premises signs permitted by this Section is at least 300 feet;

iv. The sign must be compatible with surrounding architecture in general appearance and materials;

v. The sign shall also include landscaping in the form of shrubs, decorative grasses, perennials, or other ornamental materials around the base of the structure that are maintained by a subsurface irrigation system; and

vi. The sign permitted by this subsection is in addition to the on-premises signs that are permitted by *Table 12-6-402B*, Permissible Detached Sign Types, Nonresidential and Mixed-Use Districts.

Division 6-5 Temporary Signs

Sec. 12-6-501 General Standards for Freestanding Temporary Signs

A. **Generally.** There are many forms of temporary signs. This section sets out which forms of temporary signs are allowed in each zoning district, and the size and height standards that apply to them. Sign types that are not listed in *Table 12-6-501A*, Permissible Freestanding Temporary Sign Types, Agricultural and Residential Zoning Districts, or *Table 12-6-501B*, Permissible Freestanding Temporary Sign Types, Nonresidential and Mixed-Use Zoning Districts, are not permitted as freestanding signs.

B. **Setbacks.** All temporary signs shall be set back at least five feet from all property lines, except as provided in *Section 12-6-502*, Prevention of Visual Clutter in Principal Corridors. Temporary signs that are not visible from public rights-of-way or abutting property are not restricted by this Section.

Table 12-6-501A
Permissible Freestanding Temporary Sign Types, Agricultural and Residential Zoning Districts

District	AG	RS	RA	RU	NC	NI
Yard Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	No maximum; provided minimum size and height restrictions met					
Maximum Sign Area (per sign / total)	6 sf. / 36 sf.	6 sf. / 24 sf.				
Maximum Sign Height	5 ft.	4 ft.				
Swing Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per frontage	1 per lot				
Maximum Sign Area	5 sf. (including up to 2 riders)					
Maximum Sign Height	6 ft.					
Sidewalk Sign	Not Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	-					
Maximum Sign Area (per sign / total)	-					
Other Requirements	-					
Site Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per frontage					
Maximum Sign Area	12 sf.					
Maximum Sign Height	5 ft.					
Other Requirements	Not allowed on parcels with existing residential uses					

Table 12-6-501B Permissible Freestanding Temporary Sign Types, Nonresidential and Mixed-Use Zoning Districts							
District	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Yard Sign	Not Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed	Allowed	Allowed
Number of Signs Allowed	-					2 per ingress / egress to the parcel proposed for development	
Maximum Sign Area (per sign / total)	-					6 sf. / 6 sf. x the number of signs allowed based on ingress and egress points	
Maximum Sign Height	-					4 ft.	
Sidewalk Sign	Allowed	Allowed	Allowed	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Number of Signs Allowed	1 per ground floor tenant bay			-			
Maximum Sign Area (per sign / total)	8 sf.			-			
Other Requirements	Must leave at least 4 feet of sidewalk width for pedestrian use; must be located outside of principal pedestrian travel path; not allowed on sidewalks in arterial or collector rights-of-way			-			
Site Sign	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Number of Signs Allowed	1 per frontage						
Maximum Sign Area	32 sf.						
Maximum Sign Height	8 ft.						
Other Requirements	Must be set back at least five feet from all property lines; Site signs are exempt from the setback requirements of *12-6-502(B)*, Prevention of Visual Clutter in Principal Corridors.						

C. **Exceptions and Special Provisions.**

1. ***Off Premise Directional Signs.*** The City Council finds that due to the configuration of streets and the patterns of traffic in the City of Centennial, there is a need to enhance wayfinding to emergency services and real estate developments. As such, temporary off-premises wayfinding signage is permitted for a period of not more than one year if it meets the criteria of *Table 12-6-501A*, Permissible Freestanding Temporary Sign Types, Agricultural and Residential Zoning Districts,

or *Table 12-6-501B*, Permissible Freestanding Temporary Sign Types, Nonresidential and Mixed-Use Zoning Districts, and it is demonstrated that:

a. The signs are located on private property with permission of the landowner;

b. The signs are located along an arterial frontage;

c. The signs are located in compliance with *Section 12-6-502*, Prevention of Visual Clutter in Principal Corridors; and

d. The signs are separated by a distance of at least 300 feet.

Sec. 12-6-502 Prevention of Visual Clutter in Principal Corridors

A. **Generally.** The City Council finds that the proliferation of temporary signage along the principal corridors of the City causes visual clutter that is detrimental to the character of the community, and tends to be distracting to motorists. The City Council also finds that the application of this Section does not restrict the ample alternative ways that residents and business owners may communicate their messages.

B. **Corridor Setback Requirement.**

1. No temporary sign shall be placed within the right-of-way (as provided in *Section 12-6-302*, Prohibited Sign Locations), or within 30 feet of the edge of pavement (whichever creates a greater setback from the edge of pavement), along the following street corridors: E. Orchard Road; E. Arapahoe Road; E. Dry Creek Road; E. County Line Road; S. Broadway; S. University Boulevard; S. Colorado Boulevard; S. Holly Street; S. Quebec Street; S. Yosemite Street; S. Havana Street; S. Dayton Street; S. Peoria Street; E. Easter Avenue (East of S. Havana Street); S. Clinton Street; S. Potomac Street; S. Jordan Road; S. Parker Road; E. Smoky Hill Road; S. Himalaya Street; E. Broncos Parkway; S. Chester Street; S. Fraser Street; S. Buckley Road; S. Tower Road; S. Liverpool Street; S. Picadilly Street; and S. Reservoir Road.

2. The setback requirement of this Section shall not apply in the following circumstances:

   a. Where the front yard of any lot that is used or zoned for single-family residential purposes abuts any right-of-way identified in subsection (1) above.

   b. Where an intervening private fence, wall, or other structure clearly delineates the boundary of private property outside of the prescribed public right-of-way, in which case the required setback shall include only the area up to and including the outside surface of such private fence, wall, or other structure.

   c. To information signs posted on private property by a school, homeowner, or civic association, special district organized under Title 32 of the Colorado Revised Statutes, or other public entity for the sole purpose of advertising events and meetings to constituents, provided such signage, on its face, is clearly marked with date of posting, name of entity posting sign, and statement that sign is posted with permission of property owner and provided such signage is removed within forty-eight (48) hours of the conclusion of the event or meeting.

Sec. 12-6-503 Standards for Attached Temporary Signs

A. **Generally.** Attached temporary signs are permitted subject to the standards of this Section, for a duration as set out in *Section 12-6-504*, Duration of Temporary Signs.

B. **Banners.** Banners are permitted in the CG, AC, UC, BP, ED, and OSR districts, provided that:

1. There is only one banner per tenant per principal building;
2. The banner is attached to the principal building, and complies with the standards of *Section 12-6-302*, Prohibited Sign Locations.
3. The sign area on the banner is not larger than the sign area allowed for a wall sign on the building upon which the banner is attached.

C. **Sock Signs and Temporary Wall Signs.** Sock signs and temporary wall signs are permitted in CG, AC, UC, BP, and I districts, and may be installed upon issuance of a building permit for a permanent sign, and may remain in place for not more than 30 days. Such signs shall have a sign area that is not more than 15 percent larger than that which is permitted for the permanent sign for which the permit application was filed.

D. **Window Signs.** Temporary window signs are allowed in all locations where permanent window signs are allowed, provided that the transparency standards of *Section 12-6-401*, Attached Signs, are met.

Sec. 12-6-504 Duration of Temporary Signs

A. **Generally.** The purpose of temporary signs is to display messages for a temporary duration. Temporary signs shall not be used as a subterfuge to circumvent the regulations that apply to permanent signs or to add permanent signage to a parcel proposed for development in addition to that which is permitted by *Division 6-4*, Permanent Signs.

B. **Duration of Display.**

1. In general, temporary signs shall be removed as of the earlier of the date that:
   a. A commercial message is obsolete and has become misleading or off-premises (e.g., a "for lease" or "for sale" sign in front of a building that is fully occupied);
   b. The sign falls into disrepair (see *Section 12-6-306*, Sign Maintenance); or
   c. The number of days set out in *Table 12-6-504A*, Duration of Detached Temporary Signs, or *Table 12-6-504B*, Duration of Attached Temporary Signs, expires.

Table 12-6-504A
Duration of Detached Temporary Signs

District	AG	RS	RA	RU	NC	NI	CG	AC	UC	BP	I	ED	OSR
Yard Sign													
Paper or cardboard sign face	Signs must be removed within 24 hours of placement; signs may be placed not more than 90 days per year						-					Must be removed within 24 hours of placement; signs may be placed not more than 14 days per year	
Laminated paper; plastic lined polyethylene bags and comparable materials	Signs may be placed for not more than 90 days per year						-					Signs may be placed for not more than 90 days per year	
Wood, corrugated plastic, metal, or vinyl sign face	Signs may be placed for not more than 120 days per year						-					Signs may be posted for not more than 120 days per year	
Swing Sign													
Wood, corrugated plastic, or metal sign face and finished wood or metal structure	Signs may be placed for not more than 9 months per year						-						
Sidewalk Sign													
All sidewalk signs	-						Must be removed from sidewalk at close of business			-			
Site Sign													
Vinyl sign face	Signs may be placed for not more than 30 days per year						Signs may be placed for not more than 30 days per year						
Corrugated plastic sign face	Signs may be placed for not more than 6 months per year						Signs may be placed for not more than 6 months per year						
Plywood sign face	Signs may be placed for not more than 10 months per year						Signs may be placed for not more than 10 months per year						

Table 12-6-504A Duration of Detached Temporary Signs													
District	**AG**	**RS**	**RA**	**RU**	**NC**	**NI**	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Metal; Plywood with bonded aluminum sign face	Signs may be placed for not more than 10 months per year OR 14 months per 2 year period						Signs may be placed for not more than 10 months per year OR 16 months per 2 year period						

Table 12-6-504B Duration of Attached Temporary Signs													
District	**AG**	**RS**	**RA**	**RU**	**NC**	**NI**	**CG**	**AC**	**UC**	**BP**	**I**	**ED**	**OSR**
Banners													
Cloth, canvas, or comparable material	-						Signs must be removed within 14 days of placement; signs may be placed not more than 30 days per year					Must be removed within 24 hours of placement; signs may be placed not more than 14 days per year	
Vinyl or comparable material	-						Signs may be placed not more than 30 days per year					Signs may be placed not more than 90 days per year	
Sock Signs													
Vinyl or comparable material	-						Signs may be placed after sign permit for permanent sign is issued, and for a period of not more than 30 days thereafter					-	
Temporary Wall or Fascia Signs													
All materials	-						Signs may be placed after sign permit for permanent sign is issued, and for a period of not more than 30 days thereafter						
Window Signs													
Inside window (all materials)	-						Not Limited						
Outside window (all materials)	-						Signs must be removed not more than 15 days after placement						

2. For signs posted in accordance with Section 12-14-311, Public Notice, the sign shall be removed within five days after the date of the noticed hearing or event.

C. Administrative Interpretations. The City Council finds that materials technology is a rapidly evolving field of study, and that materials for signage that are not listed in *Table 12-6-504A*, Duration of Detached Temporary Signs or *Table 12-6-504B*, Duration

of Attached Temporary Signs, may be introduced into the market. When an unlisted material is proposed, the Director shall determine to which class of materials the new material is comparable, based on the new material's appearance, durability, and colorfastness. No sign displays shall be longer in duration than the longest permitted display in *Table 12-6-504A*, Duration of Detached Temporary Signs or *Table 12-6-504B*, Duration of Attached Temporary Signs regardless of the material.

Division 6-6 Sign Design Program

Sec. 12-6-601 Sign Design Program Alternative

A. **Generally.**

1. ***Purpose.*** The requirements of Division 1 to Division 5 ensure that signs that meet certain minimum standards that are consistent with the character and quality of development in Centennial may be quickly approved and displayed. For some development, alternative standards may contribute to the aesthetic qualities of the development. Approval of a sign design program pursuant to the standards of this Division allows for unified presentation of signage throughout a parcel proposed for development, flexibility to provide for unique environments, and pre-approval of designs and design elements to make subsequent applications for sign permits more efficient. To this end, a sign design program alternative is created.
2. ***Approval Criteria.*** The Planning and Zoning Commission may approve a sign design program if it results in a substantially improved, comprehensive, and unified proposal compared to what is allowed through strict compliance with the sign regulations of this Article. The Director shall review all sign types (e.g., freestanding, attached, window, etc.) for the parcel proposed for development, to determine the degree of compliance with this Article, and shall report to the Planning and Zoning Commission with regard to the degree of deviation from these standards that is sought by the applicant. The degree of deviation sought by the applicant shall be measured against the degree of compliance with the standards of this Division.
3. ***Conditions of Approval.*** The Planning and Zoning Commission may impose reasonable conditions on the sign design program that are not related to the content of the signs or the viewpoints of the sign users, in order to ensure continuing compliance with the standards of this Division and approved sign design programs.

B. **Contents of Sign Design Program.** A sign design program shall set forth a master plan for signage for an entire parcel proposed for development. For example, shopping center sign design programs shall include all tenants and lots; and office or industrial parks shall include all types of signs for wayfinding and tenants or uses within the development. Sign design programs shall set out:

1. Sign dimensions and approximate locations;
2. Materials and colors;
3. Proposed illumination, including illumination levels;
4. Maximum numbers of items of information per sign face;
5. A design theme with illustrative examples of each sign type and the proposed general locations of each sign type; and

6. A demonstration that the sign design program will improve the aesthetics of the development and will not have an adverse impact on the use, enjoyment, or value of property in adjacent or nearby residential districts.

C. **Effect of Approval.** Upon approval of a sign design program, issuance of a sign permit shall be based on compliance with the standards set out in the sign design program for the parcel proposed for development.

Sec. 12-6-602 Flexibility Criteria

A. **Generally.** Signage which is proposed as part of a sign design program may deviate from the standards of this Article in terms of the types and numbers of signs allowed, the maximum sign area, the maximum signable area ratio, and materials and illumination standards (including electronic message centers), subject to compliance with a sign design program that is approved according to the flexibility criteria set out in this Section.

B. **Prohibited Signs and Sign Elements.** Prohibited signs and sign elements are not eligible for inclusion in a sign design program unless specifically indicated in this Article.

C. **Modification of Sign Setbacks.** Setbacks for detached signs may deviate from the requirements of this Article if it is demonstrated that there is no impact on public safety or utility easements, and all other requirements for approval of a sign design program are met.

D. **Architectural Theme.**

1. All signs shall be architecturally integrated into or complimentary to the design of the buildings and character of the site, and shall use similar and coordinated design features, materials, and colors. The sign design program shall establish an integrated architectural vocabulary and cohesive theme for the parcel proposed for development.

2. The design, character, location, and/or materials of all freestanding and attached signs proposed in a sign design program shall be demonstrably more attractive than signs otherwise permitted on the parcel proposed for development under the minimum standards of this Article.

E. **Lighting.** Lighting standards shall not deviate from the standards of this Article, except as part of a sign design program for a parcel proposed for development in a UC or AC district, in locations where the lighting:

1. Cannot be seen from outside of the parcel proposed for development;

2. Does not create a sky glow under normal conditions; and

3. Does not shine into windows of residential units located within the district.

F. **Height, Area, Number and Location of signs.**

1. The height, area, number and location of signs permitted through the sign design program shall be determined by the Planning and Zoning Commission based on the following criteria:

a. The overall size of the parcel proposed for development and the scale of the use or uses located or anticipated to be located there (larger land areas and scales of use tend to favor larger signs and / or more signs);

b. Relationship between the building setback and sign location (additional

signage may be appropriate for buildings with less visibility, particularly where buffering is providing an aesthetic and / or environmental benefit to the City);

c. Frontage (larger frontages may justify more or larger signs, particularly if the size of the frontage tends to prevent sign clutter from multiple adjacent parcels);

d. Access and visibility to the site;

e. Intended traffic circulation pattern and the need for wayfinding;

f. Hierarchy of signage;

g. Relationship between the site and adjacent uses;

h. The desired function of the site (e.g., an urban center or activity center would tend to include signage that is more urban and more dynamic in character than a strip shopping center); and

i. Consistency with the objectives and design policies of the Comprehensive Plan and any applicable sub-area plans.

2. Additionally, the maximum permitted sign area shall be based on the following formula when evaluated against the above criteria:

a. The maximum area permitted for attached signage shall range from one percent up to a maximum of six percent of the building façade to which the sign is to be attached.

b. The maximum total permitted area of all freestanding signs on a parcel proposed for development shall not exceed 10 percent more than the total sign area that would otherwise be permitted by *Section 12-6-402*, Detached Signs.

G. **Community Character.** The signage proposed in a sign design program shall not have an adverse impact on the community character of the district in which the parcel proposed for development is located, or of the City of Centennial.

H. **Property Values.** The signage proposed in a sign design program will not have an adverse impact on the value of property in the immediate vicinity of the parcel proposed for development.

I. **Elimination of Nonconforming Signs.** If there are existing signs on-site, they shall be brought into conformance with the standards of the approved sign design program.

Division 6-7 Exterior Lighting Standards

Sec. 12-6-701 Intent and Scope

A. **Generally.** It is the purpose of this Division to define practical and effective measures by which the obtrusive aspects of excessive and/or careless outdoor light usage can be minimized, while preserving safety, security, and nighttime use and enjoyment of property. These measures will help to curtail the degradation of the nighttime visual environment by encouraging lighting practices that direct appropriate amounts of light where needed, decrease the waste of energy associated with exterior lighting, help reduce glare associated with the use of poorly shielded or inappropriately aimed lighting fixtures, and reduce the contribution to light pollution from exterior lighting.

ARTICLE VII. - SIGNS[7]

DIVISION 1. - GENERALLY

Sec. 18-700. - Title.

This article shall be known and cited as the Sign Code of the City of Thornton.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-701. - Authority.

The city council finds and declares that:

(1) The city has the authority to regulate signs under the United States Constitution, the Constitution and Statutes of the State of Colorado, and the Charter of the City of Thornton;

(2) This article advances important and substantial government interests;

(3) The purpose of this article is to provide the minimum control of signs necessary to promote the health, safety, and general welfare of the citizens of Thornton;

(4) This article is not intended to regulate government signs;

(5) Any incidental restriction on the freedom of speech is no greater than is essential to the furtherance of the interests protected by this article;

(6) Certain types of speech are not protected by the First Amendment due to the harm that they cause to individuals or the community, and speech that is harmful to minors may be prohibited in places that are accessible to minors; and

(7) The city does not intend to regulate any sign content or message in any manner not permitted by law, and the provisions of this article should be interpreted to achieve that result.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-702. - Purpose.

(a) *Generally.* The purpose of this article is to set out regulations for the erection and maintenance of signs while preserving the right of free speech and expression.

(b) *Objectives.* The objective of the regulations in this article is to provide a balanced and fair legal framework for the design, construction and placement of signs that:

(1) Promotes the safety of persons and property by ensuring that signs do not create a hazard by:

a. Collapsing, catching fire, or otherwise decaying;

b. Confusing or distracting vehicle, bicycle or pedestrian traffic; or

c. Impairing drivers' ability to see pedestrians, bicyclists, obstacles or other vehicles, or to read traffic signs;

(2) Promotes the efficient communication of messages, and ensures that persons exposed to signs:

a. Are not overwhelmed by the number of messages presented; and

b. Are able to exercise freedom of choice to observe or ignore said messages;

(3) Protects the public welfare and enhances the appearance and economic value of the landscape by protecting scenic views and avoiding sign clutter that can compromise the character, quality, and viability of commercial corridors;

(4) Ensures that signs are compatible with their surroundings, and prevents the construction of signs that are a nuisance to occupants of adjacent and contiguous property due to brightness, reflectivity, bulk, movement, or height;

(5) Promotes the use of signs that are aesthetically pleasing, of appropriate scale, and integrated with the built environment through architecture, landscaping and other features, in order to meet the city's objectives related to the quality and character of development as identified in the Comprehensive Plan;

(6) Enhances property values and business opportunities;

(7) Assists in way-finding; and

(8) Provides fair and consistent permitting and enforcement.

(c) *General findings of fact.* The city council finds and declares that:

(1) Signs of reasonable size and dimensions are a useful means of visual display for the convenience of the public and for the efficient communications of commercial and noncommercial speech;

(2) Signs are vital to the health and sustainability of many businesses, and the display of signs with noncommercial messages is a traditional forum of speech, but the constitutional guarantee of free speech may be limited by appropriate and constrained regulation that is unrelated to the message itself;

(3) The city has an important and substantial interest in protecting the public from signs which obscure the vision of motorists or interfere with official traffic control devices because the orderly movement of traffic contributes to the public health and safety;

(4) The city has an important and substantial interest in preventing sign clutter because sign clutter degrades the character of the community, makes the community a less attractive place for commerce and private investment, and dilutes or obscures messages by creating visual confusion and aesthetic blight;

(5) A reasonable balance between the interests of visual signage and the interest of the city to secure for its citizens the opportunity to enjoy pleasant and attractive surroundings protected from visual discord and clutter that may result from unrestricted proliferation and placement of signs contributes to the general welfare;

(6) Regulations that balance the legitimate needs of individual property owners to convey their commercial and noncommercial messages against the comparable needs of adjacent and nearby property owners and the interest of the community as a whole are necessary to preserve and enhance the aesthetic quality of life in the community;

(7) The uncontrolled use of off-premises outdoor advertising signs and their location, density, size, shape, motion, illumination and demand for attention can be injurious to the purposes of this article, and destructive to community character and property values, and that, as such, restrictions on the display of off-premises commercial messages are necessary and desirable;

(8) Signs that are not properly maintained or repaired degrade the aesthetics of the community; and

(9) Reasonable regulations are necessary to conserve the character and economic value of property and neighborhoods.

(Code 1975, § 58-5.101; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.101), 4-22-96; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-703. - Applicability.

(a) This article applies to signs on private property and does not abrogate, override, limit, modify or nullify any easements, covenants, leases or other existing private agreements that are more restrictive than this article.

(b) This article does not regulate signs that are displayed on public streets, public alleyways, public sidewalks, public rights-of-way, public trail tracts, public trail easements, public parks and other public spaces. Those matters are regulated in Article I of Chapter 70 of this Code.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-704. - General provisions.

(a) *Compliance required.* All construction, relocation, enlargement, alteration, and modification of signs within the city shall conform to the requirements of this article, all state and federal regulations concerning signs and advertising, and the building code adopted in Chapter 10 of this Code.

(b) *Responsibility for compliance.* The responsibility for compliance with this chapter rests jointly and severally upon the sign owner, the sign operator (if different from the sign owner), all parties holding the present right of possession and control of the property whereon a sign is located, mounted or installed, and the legal owner of the lot or parcel, even if the sign was mounted, installed, erected or displayed without the consent of the owner and/or parties holding the legal right to immediate possession and control.

(c) *Violations.* When a sign is displayed in violation of this article or chapter, or in violation of other applicable laws, rules, regulations, or policies regarding signs, each day the sign is displayed is a separate violation.

(d) *Interpretations.* The director shall interpret this article as the need for interpretation arises, including for application to specific issues and proposed signs. Such interpretations may be appealed in accordance with the procedures in Section 18-34.

(e) *Message neutrality.* It is the city's policy and intent to regulate signs in a manner consistent with the United States and Colorado Constitutions and all applicable law, and which is content-neutral as to protected speech.

(f) *Message substitution.*

(1) A protected commercial or noncommercial message of any type may be substituted, in whole or in part, for the message displayed on any sign for which the sign structure or mounting device is legal without consideration of message content. Such substitution of message may be made without any additional approval, permitting, registration or notice to the city. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over noncommercial speech, or favoring of any particular noncommercial message over any other noncommercial message.

(2) This message substitution provision does not:

a. Create a right to increase the total amount of signage on a parcel, lot or land use;

b. Affect the requirement that a sign structure or mounting device be properly permitted;

c. Allow a change in the physical structure of a sign, its mounting device, or the technology used to present the message; or

d. Authorize the substitution of an off-site commercial message in place of an on-site commercial message or in place of a noncommercial message.

(g) *Discretionary approvals.*

(1) Whenever any sign permit, variance, specific use permit, temporary use permit, large development signage plan, or other sign-related decision is made by any exercise of official discretion, such discretion shall be limited to the noncommunicative aspects of the sign, the architectural similarity of the proposed sign with other structures or signs in the surrounding area, and other factors listed in this article and in the Development Code.

(2) When discretion is authorized, it may be exercised regarding the following factors, as applicable:

a. Construction materials and details of structural design;

b. The number and spacing of signs in the area;

c. The sign's display area, height, and location in relation to its proposed use;

d. The sign's relationship with other nearby signs, other elements of street and site furniture and adjacent structures;

e. Form, proportion, and scale;

f. Potential effect of the proposed sign on driver, bicyclist and pedestrian safety;

g. Potential blocking of view, in whole or in part, of a structure or façade or public view of historical, cultural or architectural significance; and

h. Potential obstruction of views of users of adjacent buildings to side yards, front yards, open space, or parks.

(3) Discretion may not be exercised as to the message content of the sign.

(h) *Prospective regulation.*

(1) This article applies to signs that may be proposed or erected in the future. It also applies to existing signs that are not legal under prior law.

(2) All existing legal signs may continue in use, but any change must comply with this article. Any nonconforming sign for a business shall be immediately brought into conformance with this article or removed if any one of the following conditions occurs:

a. When the sign becomes damaged to the extent of 50 percent or more of its total replacement value, regardless of the cause of the damage;

b. When the sign becomes an imminent danger to public health or safety;

c. When there is a request to obtain a building permit to alter, enlarge, expand, or increase the structural support of the sign or any part of the sign;

d. When there is a request to obtain a building permit to make improvements to the facade of a building on a property on which a nonconforming sign is located; or

e. If the use or activity that the sign refers to has been discontinued or the property on which an on-site sign is located has been vacant for a period of six months or more.

(3) Any sign in existence on the effective date of this article which does not conform to its provisions, but for which the board has previously granted a variance, shall be considered a legal nonconforming sign.

(4) In the event the regulations contained in this article are amended, any temporary sign that is not in compliance with the new regulations shall be removed immediately. Nonconforming temporary signs are not permitted.

(i) *Noncommunicative aspects.* All applicable regulations concerning the noncommunicative aspects of signs, as defined in Article XI, stand enforceable independently of any permit or approval process.

(j) *Owner's consent.* No sign may be placed on private property without the consent of the legal owner of the property and all persons holding the present right of possession and control of signage. The city may require evidence of consent when enforcing the requirements of this article.

(k) *Signs accessory to main use.* Unless otherwise provided in this article, permanent structure signs shall be accessory to another main use on the same parcel.

(l) *Materials.* Materials selected for signs shall be durable and capable of withstanding weathering, with reasonable maintenance, over the life of the sign.

(m) *Zoning.*

(1) Any sign located in the zoning districts of Planned Development (PD) District, Preservation Revitalization (P/R) District (residential and/or commercial) or Mineral Conservation (MC) District, unless otherwise specified in the ordinance creating the district, shall be erected in accordance with the requirements for the categorical zoning districts of this chapter, based upon the use of the site that the sign is located on, as determined by the director or designee.

(2) In any zoning district where both residential and nonresidential land uses are allowed, the sign-related rights and responsibilities applicable to any particular parcel or land use shall be determined as follows:

a. Residential uses shall be treated as if they were located in the lowest intensity zone where a use of that type would be allowed as a matter of right; and

b. Nonresidential uses shall be treated as if they were located in the lowest intensity zone where that particular use would be allowed, either as a matter of right or subject to a specific use permit or a temporary use permit.

(n) *Maintenance and alterations.*

(1) It shall be unlawful to fail to maintain or keep in good repair any sign, including without limitation the repairing of glass, plastic, or other sign face material which is missing, broken, damaged, or deteriorated and the repairing of any pole, frame, support or similar structure which is broken, damaged, or deteriorated.

(2) A permit is not required when only the sign face or copy is changed and the resulting sign complies with the requirements of this article.

(3) A permit is required for structural alteration or enlargement of the sign area.

(4) The maintenance, renovation, or repair of a sign without the alteration of noncommunicative aspects shall not require a new sign permit, but may require a building permit under the building code of the city.

(5) Whenever the use of a sign frame or sign supporting structure, has been discontinued for a period of six months or more, such sign, sign frame, or sign supporting structure shall be removed immediately.

(Code 1975, § 58-5.201; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.204), 4-22-96; Ord. No. 2716, § 3, 9-24-02; Ord. No. 2815, § 52, 2-24-04; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-705. - Exemptions from the provisions of the sign code.

The following types of long-term and temporary sign devices are exempted from the provisions of this article, except as specified:

(1) Official governmental signs, including but not limited to traffic control signs and devices, informational signs, temporary public notices, banners, flags, light pole banners, and any other signs required by law.

(2) Signs that:

a. Are installed in a location or manner which do not create a traffic hazard; and

b. Are located on private property and not in any public rights-of-way; and

c. Do not exceed four square feet per sign face; and

d. Do not cumulatively exceed 40 square feet per zone lot; and

e. Are not prohibited or illegal signs as provided in Section 18-706 or otherwise regulated herein.

(3) Signs painted on or placed in a window.

(4) Flags that meet the following standards and that maintain a minimum seven foot clearance between the lowest point of the flag and grade level:

a. On zone lots smaller than 10,000 square feet, one flag no larger than 15 square feet is permitted.

b. On zone lots between 10,000 and 100,000 square feet, flags shall be no larger than 50 square feet, and a maximum of two flags per zone lot is permitted.

c. On zone lots larger than 100,000 square feet, flags shall be no larger than 100 square feet, and a maximum of three flags per zone lot is permitted.

d. The maximum height of a flagpole for all flags is 35 feet or the height of the building, whichever is less.

(5) Vehicular signs:

a. Shall be permitted if they:

1. Contain no flashing or moving elements;

2. Are permanently mounted or affixed, or magnetically attached, to the vehicle;

3. Do not project beyond the surface of the vehicle on which they are attached a distance in excess of six inches;

4. Are attached to an operable vehicle;

5. Are parked in a designated parking space, when available, when parked and visible from the public rights-of-way.

b. Shall not be used to increase the total permitted sign area or number of signs either on-site or off-site for a business as provided in this article except as provided for in Division 7 of this article. Vehicular signs parked within 25 feet of an arterial or collector street shall count against the total sign area allowance for the property unless there is no other location on the property where the vehicle can be parked.

(6) Any sign on or constructed in association with a bus shelter or bus bench that is specifically allowed by a written contract with the city.

(7) Temporary decorations of any type, number, area, height, location, illumination, or animation that are located on buildings or structures so as not to conflict with or obstruct traffic regulatory devices.

(8) Private persons dressed in costume or displaying signs expressing messages that are within the protection of the First Amendment, subject to the following:

a. The signs must be held by or attended by one or more persons;

b. Signs shall not be inflatable or air-activated;

c. In order to serve the city's interests in traffic flow and safety, persons and signs shall not:

1. Visually or physically obstruct, impede or block the flow of traffic or pedestrians on streets, sidewalks or trails;

2. Be located on a public street median or round-a-bout;

3. Conduct sales, transfer product, or collect monies of any kind; and

4. Obstruct or impede scheduled activities.

(9) Any signs required to be erected by city, state, or federal law.

(10) Any signs not legible or intended to be read from the right-of-way or private streets.

(Code 1975, § 58-5.103; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.103), 4-22-96; Ord. No. 2639, § 2, 9-25-00; Ord. No. 2716, § 2, 9-24-02; Ord. No. 2969, § 4, 11-14-06; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-706. - Prohibited and illegal signs.

It shall be unlawful for any person to:

(1) Erect, maintain, or continue the use of any sign with an image or message which is not within the protection of the Colorado Constitution and the First Amendment to the U.S. Constitution because of the harm that they cause to minors, or to individuals or to the community.

(2) Erect, maintain, or continue the use of any sign that is not specifically permitted or exempted from this article, or is an animated sign, roof sign, building wrap sign, or searchlight.

(3) Erect, maintain, or continue the use of any sign in, over, or extending into any public rights-of-way, or to paint or affix any sign on or to any object within any public rights-of-way, except as permitted in this article or in Chapter 70 of this Code.

(4) Erect, maintain, or continue the use of any sign within a visibility triangle as defined in Section 18-567 unless otherwise exempted by this article.

(5) Erect, maintain, or continue the use of any sign that causes a traffic hazard because of glare, focus or intensity of illumination.

(6) Erect, maintain, or continue the use of any sign that blocks a doorway or opening which is required for entrance to or exit from any building, structure, parking lot or driveway by the International Building Code adopted in Section 10-151, the International Fire Code adopted in Section 10-160, or any development permit.

(7) Erect, maintain, or continue the use of any sign on any fence, or paint or affix any sign on, or to, a fence set back five feet or less from the city's rights-of-way, except as specifically permitted by this article.

(8) Erect, maintain, or continue the use of any sign on any property without the written permission of the property owner or person in lawful possession of the property.

(9) Erect, maintain, or continue the use of any sign or signal, marking or device that is not authorized and which purports to be, is an imitation of, or resembles but is not an official traffic control device or railroad sign or signal, within 10 feet of the edge of any street.

(10) Erect, maintain, or continue the use of any sign that hides from view or interferes with the visibility of any official traffic control device or railroad sign or signal.

(11) Erect, maintain, or continue the use of any sign attached to landscaping elements or other natural objects.

(12) Erect, maintain, paint, affix or continue the use of any sign on or to any other sign unless done with a valid sign permit or unless exempted from the requirement for a permit under this article.

(Code 1975, § 58-5.202; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.104), 4-22-96; Ord. No. 2716, § 4, 9-24-02; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3213, § 1, 10-9-12; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-707. - Enforcement.

(a) *Authority.*

(1) The city shall have the authority to enforce provisions of this article. In addition to any other remedies provided in this section, a summons and complaint may be filed in the municipal court to any person for which probable cause exists concerning the violations of this article.

(2) The city shall have the authority in emergency situations to place barriers in or about any sign which is dangerous or constitutes a hazard and when the city has attempted to serve notice as required in this section, but has been unable to do so or when such sign constitutes an immediate danger to the public. In such instances, notice after the placement of barriers shall suffice and the owner of the sign shall be responsible for reimbursement to the city for expenses incurred.

(3) The city shall have the authority to move or remove any sign to facilitate public safety officials in dealing with any public emergency.

(4) In addition to the enforcement remedies before the municipal court as set out in this section, the city shall have the authority to bring an action before any court of competent jurisdiction to secure equitable relief and secure damages for costs incurred by the city in securing compliance with this article.

(b) *Procedures.*

(1) Prior to abatement of a violation of this article, the police department or the city development department shall provide notice to the responsible party of the property, as described in Section 18-704(b), upon which the sign is placed that:

a. No sign permit has been issued; or

b. The sign device has been determined to be dangerous or constitutes a hazard; or

c. Is prohibited; or

d. Is in violation of a specific provision of this article; and

e. The sign shall be removed, repaired, or brought into compliance within a reasonable, specified length of time.

(2) Notice of intent to abate any violation of this article shall be pursuant to the requirements specified in Section 18-4(e).

(3) In lieu of or concurrent with subsection (b)(1) above, a summons and complaint may be issued to the responsible party of any property within the city, as described in Section 18-704(b), that is in violation of any provision of this article.

(4) The city may decide not to enforce the provisions as they relate to a sign erected or installed before the first of January 2018 if it determines that such enforcement may create liability for the city based on any decision of a court of competent jurisdiction, including but not limited to the U.S. Supreme Court's decision in Reed v Town of Gilbert (576 U.S. _____ (2015). This

subsection (b)(4) shall be automatically repealed on January 1, 2018 unless otherwise amended by the city council.

(Code 1975, § 58-5.303; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.301), 4-22-96; Ord. No. 2655, § 11, 2-12-01; Ord. No. 2969, § 3, 11-14-06, eff. 1-1-07; Ord. No. 3065, § 3, 8-12-08; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-708. - Severability.

If any clause, sentence, paragraph, section or part of this article shall be determined by any court of competent jurisdiction to be invalid, such determination shall not affect, impair, or invalidate the remainder of this article but shall be confined in its operation to the clause, sentence, paragraph, section or part directly involved in the controversy for which the court's determination was made. Without affecting this general statement, each portion of these sign regulations is specifically severable, and the invalidity of any regulation in that portion shall not affect the validity or enforceability of other regulations in that portion. If any portion of this article is determined to be invalid, the remaining portions of this article shall be interpreted and applied to achieve as nearly as possible the result that would have been achieved if part of the article had not been determined to be invalid.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Secs. 18.709—18-714. - Reserved.

DIVISION 2. - ADMINISTRATION

Sec. 18-715. - Sign permits.

(a) *Permit required.* It shall be unlawful for any person to erect, maintain or continue the use of any sign regulated by this article without first obtaining a sign permit from the department, unless this article specifies that a permit is not required or the sign is specifically exempted in Section 18-705.

(b) *Permit application.*

(1) An application for a sign permit shall be filed with the director in accordance with Section 18-31.

(2) In addition to the requirements of Section 18-31, the application shall include clear and complete graphic and written information adequate to show compliance with all applicable requirements of this article and any other applicable regulations of the city. At a minimum, the application shall include all requirements listed in the current sign permit application checklist.

(c) *Permit approval.*

(1) Sign permit applications shall be for review and action by the director. The director may take one of three actions:

a. Approval as submitted, if the application complies with all requirements of this article;

b. Approval with conditions which if followed will bring the application into compliance with all requirements of this article; or

c. Denial, if the application does not meet the requirements of this article.

(2) The director shall make a decision within 45 days after receiving a complete application for a sign permit.

(3) The actions of the director may be appealed to the board as provided in Section 18-718. If appealed, the board shall hear the appeal within 45 days after receiving a complete application for appeal.

(4) The requirement for a permit shall be deemed met upon specific agreement between the owner and the city to erect, maintain or continue the use of any sign.

(d) *Inspection requirements.*

(1) All signs for which a permit is required may be subject to the following inspections:

a. Footing inspection on all freestanding signs.

b. Electrical inspections on all illuminated signs or electronic signs.

c. An inspection of braces, anchors, supports and connections.

d. Site inspection to ensure that the sign has been constructed and located according to the approved application and valid sign permit.

(2) Every sign shall comply with the building code adopted in Chapter 10 of this Code.

(Code 1975, § 58-5.301; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.301), 4-22-96; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-716. - Large developments.

(a) Large developments shall submit a signage plan so the city may ensure that the signs on the site are similar in noncommunicative aspects with the main buildings and other signs.

(b) For provisions of this chapter, a large development shall be any development project on a site that contains four acres or more that is located in the CR, RC, BP, CC, OI, EC, MU, TOD, EB, ES, EO, ETD, or I zone districts that either:

(1) Contains four or more contiguous tenant spaces in any one building on a zone lot; or

(2) Contains two or more main buildings on contiguous (disregarding intervening streets or alleys) lots, or the same lot, that share parking facilities and accesses.

(c) The owner(s) of adjacent projects that were separately developed may request designation by the director as a large development if:

(1) The combined site meets the criteria in subsection (b) above; and

(2) The properties have access to internally connecting driveways.

(d) The owner(s) shall submit to the director a large development signage plan containing the following:

(1) An accurate plot plan of the site, at such scale as the director may reasonably require;

(2) Location of buildings, parking lots, driveways, and landscaped areas on the site;

(3) Computation of the maximum total sign area, the maximum area for each individual sign, the height of each sign and the number of attached and freestanding signs included in the plan under this article based on the following:

a. The maximum sign area, maximum number of signs, maximum height, minimum setback, illumination, and additional requirements for attached signs shall be in accordance with Division 3 of this article;

b. The maximum sign area, maximum number of signs, maximum height, minimum setback, illumination, and additional requirements for freestanding signs shall be in accordance with Division 4 of this article;

c. All freestanding signs shall be monument signs;

d. One additional monument sign may be erected per street frontage.

e. Pad sites with no street frontage may have signage included in an off-site monument sign in accordance with subsection (d)(3)d above or on a monument sign erected off-site but within the large development boundaries if the owner of the property where the monument sign is to be located provides notarized written authorization; and

f. One electronic sign is permitted for large developments adjacent to I-25 or E-470 or an arterial or collector street in accordance with the regulations in Section 18-750.

(4) An accurate indication on the plot plan of the proposed location of each present and future sign of any type, whether requiring a permit or not, except those signs exempted from this article under Section 18-705.

(5) The following design standards shall be used to ensure aesthetic consistency among all signs on a site for a large development and shall be reflected in the signage plan.

a. Wall signs on the same main building shall be placed in a common configuration sign area that is consistent with other signs;

b. All wall signs on the same main building shall be similar in their noncommunicative aspects;

c. Each monument sign shall be located within a planted landscape area, which is of a shape and design that will provide ground definition to the sign and is similar in noncommunicative aspects with the surrounding area;

d. All monument signs shall be designed using materials, colors and design details that are complementary to the main building structure(s) in the large development.

(e) Compliance with the large development signage plan shall be in accordance with the approved sign permit.

(Ord. No. 2183, § 1, 8-10-92; Ord. No. 2279, §§ 142, 143, 145, 8-9-93; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3213, § 2, 10-9-12; Ord. No. 3300, § 1, 5-27-14; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-717. - Interpretations for sign area.

Sign area shall be measured for all types of signs as follows:

(1) *Signs with backing.* Signs with backing shall include, but not be limited to, cabinet signs or signs that are outlined or framed. The area of a cabinet sign or a sign enclosed by a box, outlined or framed, shall be measured by determining the smallest possible area of any rectilinear geometric shape that utilizes eight or fewer lines that join each other at right angles that enclose the extreme limits of the display surface or face of the sign; including all frames, backing, face plates, nonstructural trim or other component parts not otherwise used for support.

(2) *Signs without backing.* If the sign is composed of individual letters or symbols that are mounted against a surface that has not been painted, textured or otherwise altered to provide a distinctive background for the sign copy, the area of the sign shall be measured by determining the area of the smallest possible area of a rectilinear geometric shape that utilizes eight or fewer lines that join each other at right angles that enclose the extreme limits of each message. See Figures 717.1 to 717.5.

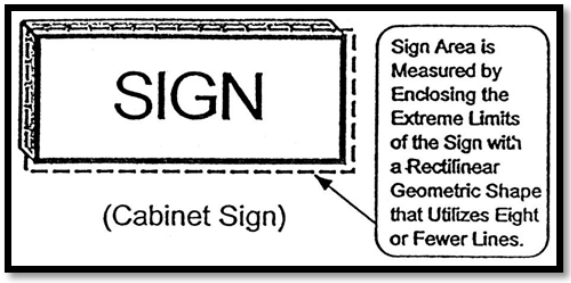


Figure 717.1

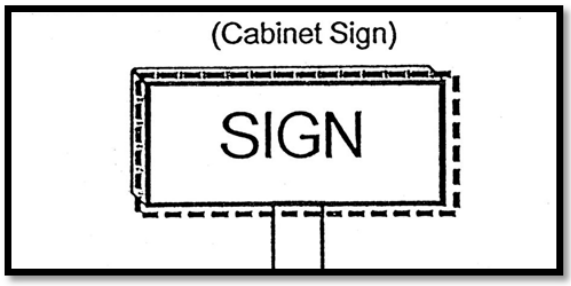


Figure 717.2

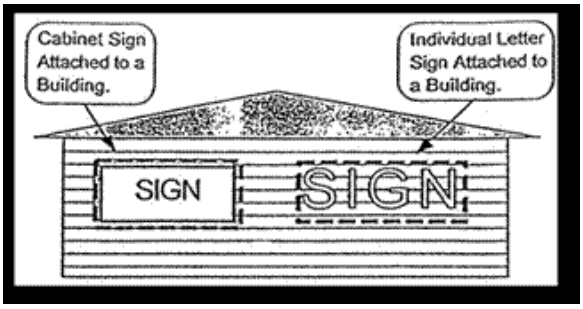


Figure 717.3

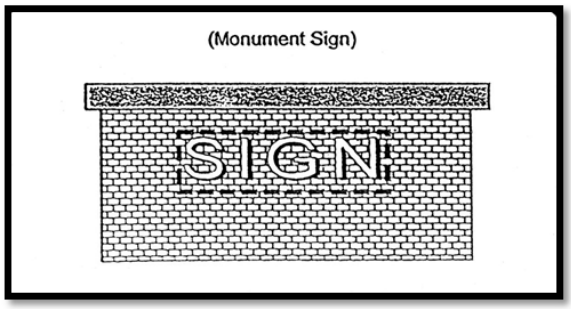


Figure 717.4

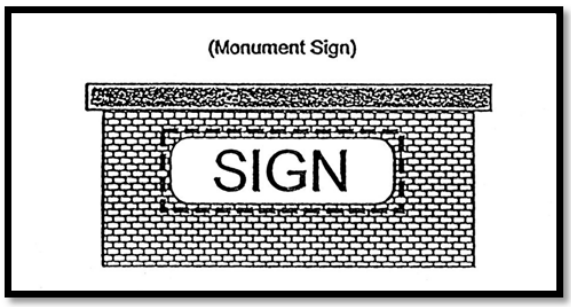


Figure 717.5

(3) *Multi-faced signs.* Sign area for signs which have two parallel sign faces assembled in such a way that the faces cannot be viewed from any one point at the same time shall be calculated using only the larger of the two sign faces. Sign area for signs which have multiple sign faces not being parallel, which can be viewed from any one point at the same time, such a v-shaped, triangles or cubes, shall be calculated using the total of all faces.

(4) *Other forms.*

a. When a sign is spherical, free form, sculptural and/or other nonplanar form, the sign area is measured as the sum of the area of the four vertical sides of the smallest polyhedron that will encompass the sign structure. See Figure 717.6.

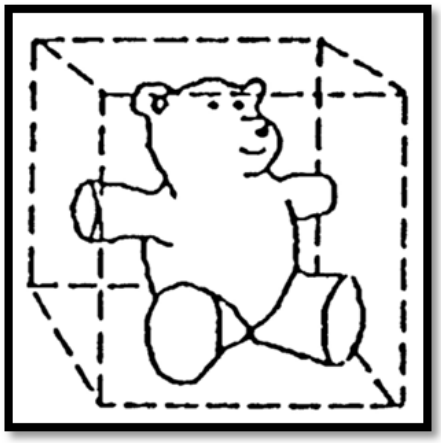


Figure 717.6

b. Works of art, wall graphics, and architectural features shall be interpreted to constitute a sign, and the area shall be included in the calculation for determining the allowable sign area unless the applicant obtains any required approval from the Thornton Arts, Sciences and Humanities Council (TASHCO) pursuant to Division 7 of this article, or is exempted from the requirements of that division.

(5) *Exceptions.*

a. An illuminated canopy, awning, or architectural feature of a building is not considered a distinctive background for the purposes of measuring the sign area.

b. A decorative neon band or other outdoor building illumination which does not identify or convey information is not considered in the calculation of sign area.

(Code 1975, § 58-5.102; Ord. No. 2183, § 1, 8-10-92; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-718. - Appeals, variances and adjustments.

(a) *Appeals.*

(1) Appeals from a decision of the director or designee are available by the submission of a written request, on a form supplied by the department, to the board. The request shall specify the basis for the appeal. The board may overturn a decision of the director for two reasons:

a. The board finds the director erred in the interpretation of the applicable regulation as provided in this article; or

b. The board finds a variance is in order due to an extraordinary hardship not induced by the appellant.

(2) The board shall make its determination only on the merits of each appeal brought before it.

(3) The board shall make a decision on the appeal within 45 days after receiving a complete application for appeal.

(4) Applications for a hearing for a variance or appeal before the board shall be processed in accordance with the rules, regulations and procedures governing actions of the board and contained in Section 18-34.

(b) *Variances.*

(1) In considering a variance to the sign regulations in this article, the board shall consider the following noncommunicative aspects of the proposed sign with and without the variance in making its determinations:

a. Whether the physical conditions are such that strict compliance with these regulations will create extreme, continuing, and undue hardship or harm.

b. Whether physical conditions are such that strict compliance with these regulations will unreasonably restrict the effectiveness of a sign and the absence of alternative means and locations available which would be in compliance with this article.

c. Whether the variance, if granted, will adversely affect an adjacent property or neighborhood.

d. Whether the variance, if granted, will comply with the overall intent of this article to secure the public health, safety, and welfare of the citizens of the city.

e. Whether the variance, if granted, is limited to the extent absolutely necessary to afford relief.

(2) Any variance granted by the board shall not be subject to any assignment or other permanent or temporary transfer by the variance recipient and shall terminate and become null and void upon discontinuance of the use or activity underlying the variance when granted.

(3) The board shall, in order to best satisfy the review criteria and standards set forth in subsection (b)(1) of this section, have the discretion to limit the time of the variance granted, subject the matter to periodic review, or impose other terms and conditions on the granting of the variance.

(c) *Appeals to the director for minor adjustments.*

(1) Applicants may seek approval from the director to allow for minor adjustments from the sign code on a form supplied by the department for this purpose in response to unanticipated sign location issues or unusual physical site conditions, which may cause the need for some minor adjustments to be made to the allowable sign area or sign height. The director may authorize minor adjustments to the sign code that do one of the following:

a. Allow for sign heights to be increased up to a maximum of two feet in height; or

b. Allow the maximum sign face area or sign dimensions of an individual sign to be increased up to a maximum of ten percent of the area or dimension otherwise provided; or

c. Allow the sign to encroach into a required property line setback up to a maximum of 20 percent of the required setback if such encroachment will not create a threat to public health or safety; or

d. Allow the sign to be located closer to another sign by reducing a required separation distance between the signs by up to 20 percent if such reduction will not create a threat to the public health or safety.

(2) The director shall consider the criteria in Section 18-704(g) regarding discretionary approvals when making a decision.

(3) The director shall make a written decision within ten days of the request being made to the department.

(4) Appeals from the decision of the director are to be made to the board within ten days of the receipt of the letter concerning the action taken on the request.

(Code 1975, § 58-5.302; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2416, § 1 (58-5.302), 4-22-96; Ord. No. 2716, § 5, 9-24-02; Ord. No. 2815, § 53, 2-24-04; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Secs. 18-719—18-724. - Reserved.

Sec. 18-725. - Permitted signs chart.

This chart summarizes the types of signs allowed by zoning district. Additional criteria are included in the referenced sections, elsewhere in this article, and in the design standards in Article V of the Development Code.

Table 725.1 Permitted signs table

Legend: P = Permitted N = Sign type not permit	Agricultural	Residential Estate	Single-Family Detached	Single-Family Attached	Multifamily	Manufactured Home	Eastlake Residential	Neighborhood Service	Community Retail	Regional Commercial	Business Park	City Center	Office/Institutional	Employment Center	Mixed Use	Transit Oriented Development	Eastlake Business	Eastlake Service	Eastlake Office	Eastlake TOD	Industrial

ted																					
Sign Type	Residential Districts							Nonresidential Districts													
Attached signs—See Division 3																					
Canopy sign	P	N	N	N	N	N	N	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-730 and 18-731.																				
Cylinder sign	N	N	N	N	N	N	N	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-730 and 18-732.																				
Projecting sign	N	N	N	N	N	N	N	P	P	P	N	P	N	P	P	P	P	P	P	P	N
	Additional provisions. See Sec. 18-730 and 18-733.																				
Under-canopy sign	N	N	N	N	N	N	N	P	P	P	N	P	N	N	P	P	P	P	P	P	N
	Additional provisions. See Sec. 18-730 and 18-734.																				
Wall sig	P	N	N	N	N	N	N	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-730 and 18-735.																				

n																					
Freestanding signs—See Division 4																					
Billboard sign	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	P
	Additional provisions. See Sec. 18-740 and 18-741.																				
Light pole banner	P	N	N	N	N	N	N	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-740 and 18-742.																				
Monument sign	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Secs. 18-740 and 18-743.																				
Pole sign	P	N	N	N	N	N	N	P	P	P	P	P	P	P	P	N	N	N	N	N	P
	Additional provisions. See Secs. 18-740 and 18-744.																				
Electronic signs—See Division 5																					
Electronic Sign	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-750.																				
Temporary signs—See Division 6																					

Special event sign	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-760.																				
Temporary sign	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P
	Additional provisions. See Sec. 18-761.																				

(Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3213, § 3, 10-9-12; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Secs. 18-726—18-729. - Reserved.

DIVISION 3. - ATTACHED SIGNS

Sec. 18-730. - General requirements.

The following standards shall apply to all attached signs in those zone districts where that type of attached signs is permitted pursuant to Section 18-725. These provisions shall not be interpreted to permit any attached sign in a zone district where it is not permitted by Section 18-725.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-731. - Canopy sign.

Table 18-731.1 Canopy Signs			
	Residential Zone Districts		**Nonresidential Zone Districts**
	Other	Agriculture	

Maximum Number of Signs Allowed	None	Any number as long as the total square feet of all signs does not exceed 60 square feet.
Maximum Sign Area	N/A	60 square feet.
Maximum Sign Height	N/A	Controlled by the canopy structure
Minimum Setback	N/A	Controlled by the canopy structure.
Illumination	N/A	Concealed illumination or neon.

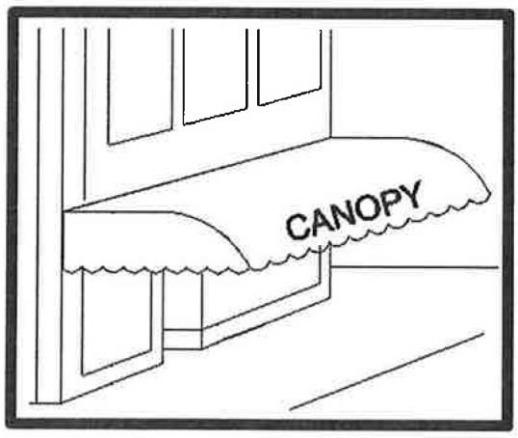


Figure 731.1

(Ord. No. 2716, § 6, 9-24-02; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17

Sec. 18-732. - Cylinder sign.

Table 18-732.1 Cylinder Signs		
	Residential Zone Districts	**Nonresidential Zone Districts**
Maximum Number of Signs Allowed	None	One

Maximum Sign Area	N/A	12 square feet
Maximum Sign Height	N/A	10 feet
Minimum Setback	N/A	Controlled by the wall on which the sign is attached.
Illumination	N/A	Concealed illumination.

(a) *Additional requirements.*

(1) The outside edge of the sign shall project no more than 15 inches from the wall.

(2) A cylinder sign may rotate on its axis but shall not exceed 50 revolutions per minute.

Figure 732.1

(Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-733. - Projecting sign.

Table 18-733.1 Projecting Signs		
	Residential Zone Districts	**Nonresidential Zone Districts**
Maximum Number of Signs Allowed	None	One per building user or tenant

Maximum Sign Area	N/A	Total for all projecting signs = 50% of permitted sign area for wall signs Total for all projecting signs and wall signs combined = 100% of permitted sign area for wall signs
Maximum Sign Height	N/A	Maximum height of first floor elevation
Minimum Sign Height	N/A	Minimum 7 foot clearance above grade required
Minimum Setback	N/A	Controlled by the wall on which the sign is attached
Illumination	N/A	Concealed illumination or neon

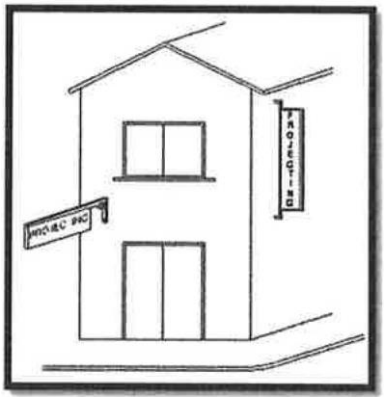


Figure 733.1

(Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-734. - Under-canopy sign.

Table 18-734.1 Under-Canopy Signs		
	Residential Zone Districts	**Nonresidential Zone Districts**
Number of Signs Allowed	None	2 per building user or tenant
Maximum Sign Area	N/A	4 square feet

Maximum Sign Height	N/A	Controlled by the canopy structure
Minimum Sign Clearance	N/A	7 feet from bottom edge of sign
Minimum Setback	N/A	Controlled by the canopy structure
Illumination	N/A	Concealed illumination

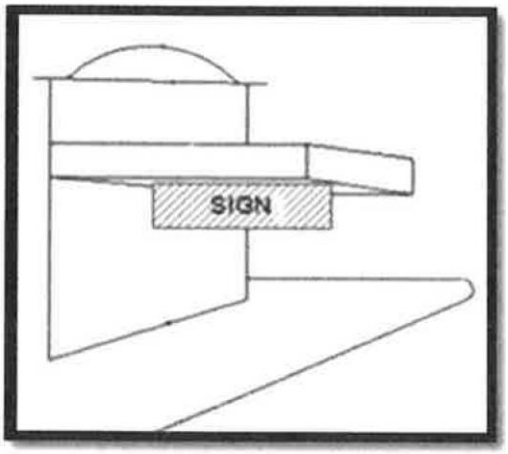


Figure 734.1

(Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-735. - Wall sign.

Table 18-735.1 Wall Signs			
Residential Zone Districts		Nonresidential Zone Districts	
	Including Agriculture		
		Low-Rise (1 - 3 stories)	High-Rise (4 or more stories)
Number of Signs Allowed	None	No limit	First floor = No Limit Above first floor = 2 (no

<table>
<tr><td></td><td></td><td></td><td colspan="2">more than 1 on an elevation)</td></tr>
<tr><td rowspan="7">Maximum Sign Area</td><td rowspan="7">N/A</td><td rowspan="6">Greater of 60 sq. ft. or 8% of area of largest elevation of the main building(s) on a zone lot.</td><td>4 - 5 stories</td><td>300</td></tr>
<tr><td>6 stories</td><td>325</td></tr>
<tr><td>7 stories</td><td>350</td></tr>
<tr><td>8-10 stories</td><td>400</td></tr>
<tr><td>11-14 stories</td><td>575</td></tr>
<tr><td>15+ stories</td><td>550</td></tr>
<tr><td colspan="3">Subject to:
Maximum on one elevation = 1,000 sq. ft.
Maximum on all elevations = 2,000 sq. ft.
These maximum limits shall not apply to large development projects with at least 300,000 square feet of retail space on a single lot that is at least 50 acres and has frontage on I-25 or E-470.
Total area of all wall signs and projecting signs combined shall not exceed maximum area for wall signs</td></tr>
<tr><td>Maximum Sign Height</td><td>N/A</td><td colspan="3">Controlled by wall on which sign is attached</td></tr>
<tr><td>Minimum Sign Clearance</td><td>N/A</td><td colspan="3">N/A</td></tr>
<tr><td>Minimum Setback</td><td>N/A</td><td colspan="3">Controlled by wall on which sign is attached</td></tr>
<tr><td>Illumination</td><td>N/A</td><td colspan="3">Concealed illumination or neon is permitted. Direct illumination is allowed if it does not increase the light level at the boundary of any adjacent residentially zoned property, ignoring any intervening streets, by more than one foot-candle.</td></tr>
</table>

(a) *Additional requirements.*

(1) Wall signs can be placed on any elevation of a building three stories or less in height as long as the signs do not illuminate a residential area.

(2) For purposes of this provision, a property shall be considered adjacent to or have frontage on the street or highway even if it is separated from the roadway by a publicly owned tract or a tract with a public easement that is restricted from development based on its use, topography, or physical characteristics.

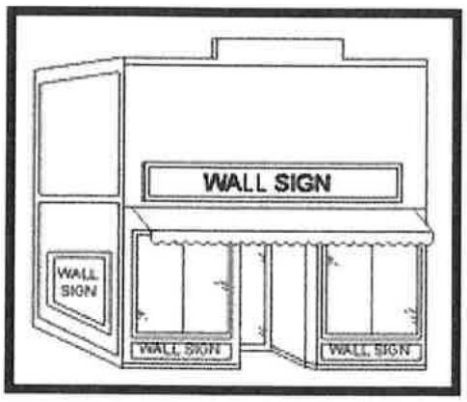


Figure 735.1

(Code 1975, § 58-5.203; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2279, §§ 151—155, 8-9-93; Ord. No. 2416, § 1 (58-5.201), 4-22-96; Ord. No. 2716, § 6, 9-24-02; Ord. No. 3065, § 4, 8-12-08; Ord. No. 3115, § 54, 10-13-09; Ord. No. 3132, § 80, 5-11-10; Ord. No. 3144, § 49, 9-14-10; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17; Ord. No. 3470, § 1, 5-22-18)

Secs. 18-736—18-739. - Reserved.

DIVISION 4. - FREESTANDING SIGNS

Sec. 18-740. - General requirements.

The following standards shall apply to all freestanding signs in those zone districts where that type of freestanding signs is permitted pursuant to Section 18-725. These provisions shall not be interpreted to permit any freestanding sign in a zone district where it is not permitted by Section 18-725.

(1) *Minimum setback.*

a. One foot for every foot in height of the sign, or 25 feet, whichever is less. Signs located in an entry island shall have a setback of 25 feet from the flow line of the street.

b. No freestanding sign shall have less than a five-foot setback, as measured to the leading edge of the sign.

(2) *Illumination.* Concealed illumination or neon.

(3) *Bonus signage.*

a. Zone lots in the CR, RC, BP, CC, EC, OI, MU and I zoning districts with more than 400 lineal feet of street frontage may have one additional freestanding sign per 400-foot increment. One of the zone lot's additional freestanding signs may have a maximum sign area of 200 square feet. The size of the remaining signs shall be controlled by the criteria in Sections 18-740, 18-743, and 18-744.

b. In the ETD and TOD zoning districts, zone lots with more than 300 lineal feet of street frontage may have one additional freestanding sign per 300-foot increment. One of the zone lot's additional freestanding signs may have a maximum sign area of 100 square feet. The size of the remaining signs shall be controlled by the criteria in Sections 18-740, 18-743, and 18-744.

c. Large developments (as defined in Section 18-716(b)) may combine the individual lot street frontages adjacent to I-25 or E-470 for the purpose of calculating bonus signage.

1. Large developments with more than 400 lineal feet of street frontage adjacent to I-25 or E-470 may have one additional freestanding sign per 400-foot increment. One of the additional signs may have a maximum sign area of 200 square feet. The size of the remaining signs shall be controlled by the criteria in Sections 18-740, 18-743, and 18-744.

2. Frontages on other streets shall not be included in this calculation.

3. Other bonus signage shall be calculated based on the criteria in subsection (3)a or (3)b above. The street frontage adjacent to I-25 or E-470 shall not be included in that calculation.

d. Large developments with a primary entrance drive located within 1,000 feet of the center of an interchange with I-25 or E-470 may combine the street frontage of individual lots adjacent to the roadway intersecting I-25 or E-470 for the purpose of calculating bonus signage.

1. Large developments with more than 400 lineal feet of street frontage along the roadway intersecting I-25 or E-470 may have one additional freestanding sign per 400-foot increment. One of the additional signs may have a maximum sign area of 200 square feet. The size of the remaining signs shall be controlled by the criteria in Sections 18-740, 18-743, and 18-744.

2. Frontages on other streets shall not be included in this calculation.

3. The sign area calculated under this provision shall be the maximum signage allowed adjacent to the roadway intersecting I-25 or E-470.

4. Other bonus signage shall be calculated based on the criteria in subsection (3)a or (3)b above. The street frontage adjacent to the roadway intersecting I-25 or E-470 shall not be included in that calculation.

e. Large developments with at least 300,000 square feet of retail space on a single lot which is at least 50 acres and that has frontage on I-25 or E-470 may have:

1. 40 percent additional bonus signage area for the signs adjacent to I-25 or E-470; and

2. 40 percent additional height for one freestanding sign adjacent to I-25 or E-470.

f. For purposes of this provision, a property shall be considered adjacent to or have frontage on the street or highway even if it is separated from the roadway by a publicly owned tract or a tract with a public easement that is restricted from development based on its use, topography, or physical characteristics.

(4) *Multiple signs.* If two or more freestanding signs are constructed on one zone lot they shall be:

a. Similar in noncommunicative aspects, including construction, design, and material; and

b. Separated by at least 250 feet.

(Ord. No. 2183, § 1, 8-10-92; Ord. No. 2279, §§ 141, 144, 146—150, 8-9-93; Ord. No. 3115, § 54, 10-13-09; Ord. No. 3132, § 80, 5-11-10; Ord. No. 3144, § 49, 9-14-10; Ord. No. 3165, § 1, 4-

12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3213, § 4, 10-9-12; Ord. No. 3439, § 1(Exh. A), 6-13-17; Ord. No. 3470, § 2, 5-22-18)

Sec. 18-741. - Billboard sign.

Table 18-741.1 Billboard Signs		
	Residential Zone Districts	**Nonresidential Zone Districts**
Number of Signs Allowed	None	Any number as long as they are located at least 600 feet from any other permitted sign and at least 1,000 feet from any other billboard sign
Maximum Sign Area	N/A	300 square feet
Maximum Sign Height	N/A	25 feet; lowest point of any sign located within 1,000 feet of intersecting public rights-of-way shall be at least 8 feet above ground
Minimum Setback	N/A	25 feet, and at least 300 feet from intersecting rights-of-way.
Illumination	N/A	Concealed illumination or neon.

(a) *Additional requirements.*

(1) Billboard signs shall be off-site freestanding signs; attached billboard signs are not permitted.

(2) A billboard sign is permitted only on undeveloped property and shall be removed when development or redevelopment of the property begins.

(3) Billboards located on undeveloped or developed property shall be removed when any redevelopment begins that requires a development permit.

(4) A billboard sign may not have more than two structural supports.

(Code 1975, § 58-5.203; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2716, § 6, 9-24-02; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-742. - Light pole banner.

Table 18-742.1 Light Pole Banners			
	Residential Zone Districts		Nonresidential Zone Districts
	Other	Agriculture	
Number of Signs Allowed	None	Two light pole banners may be erected on any nonresidential zone lot that has at least 100 lineal feet of street frontage. Zone lots which have more than 100 lineal feet of street frontage may have two additional banners per 100-foot increment. No more than 2 light pole banners may be attached to one light pole.	
Maximum Sign Area	N/A	15 square feet	
Maximum Sign Height	N/A	Must be attached below the light arm.	
Minimum Clearance	N/A	Seven feet from bottom arm supporting the banner. [1]	
Minimum Setback	N/A	No minimum; light pole banners shall only be placed on light poles located on private property. [2]	
Illumination	N/A	Only by existing light source on the light pole where the light pole banner is attached.	

[1] The minimum clearance below a light pole banner may be less than seven feet if the applicant can demonstrate to the satisfaction of the director that the location of the light pole banner will not impede or block the regular flow of vehicle, bicycle or pedestrian traffic.

[2] Light pole banners may project onto the public rights-of-way by no more than 30 inches and shall not impede or block the flow of vehicle, bicycle, or pedestrian traffic on streets, sidewalks or trails.

(a) *Additional requirements.*

(1) Light pole banners shall be designed, manufactured and installed specifically for use on light poles.

a. Light pole banners shall be made of fabric that can withstand all weather conditions to prevent fading and tearing.

b. Banners shall be mounted tautly and at a minimum shall have top and bottom support arms so that no part of the banner is flapping.

(2) Light pole banners shall be maintained in accordance with Section 18-704(n).

(3) A new sign permit is required if an approved light pole banner is replaced by a new light pole banner that varies in dimensions or placement to the original approval.

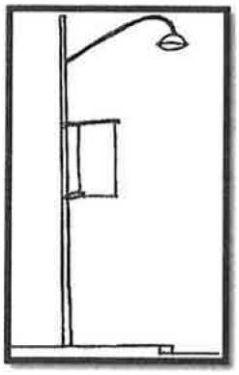


Figure 742.1

(Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-743. - Monument sign.

Table 18-743.1 Monument Signs

	Residential Zone Districts	EB, ES, and EO Zone Districts	ETD Zone District	A, NS, CR, MU, OI, and TOD Zone Districts	RC, BP, CC, EC, and I Zone Districts
Number of Signs Allowed	Two	General: One per zone lot street frontage longer than 90 linear feet, plus additional signs subject to Section 18-740(4). Large developments: General standard above applies, plus one additional sign per main building [1]			
Maximum Sign Area for signs legible from the public right-of-way	42 square feet	40 square feet	60 square feet	60 square feet [2][3]	100 square feet [2][3]
Maximum Sign Height	6 feet	8 feet	8 feet [4]	30 feet or the height of the building, whichever is less [4]	

Notes:

[1] Provided that (a) the large development has internal roadways with a dedicated public access easement, (b) the additional

sign is located adjacent to the internal roadway, (c) the additional sign does not exceed 8 feet in height or 40 square feet in area, and (d) complies with all other requirements of this article.

[2] For nonresidential lots or large developments adjacent to I-25 or E-470, the bonus signage authorized by Section 18-740(3)a. or 18-740(3)c. may be consolidated into one monument sign. The consolidated sign shall be located on the side of the property adjacent to I-25 or E-470.

[3] For nonresidential lots or large developments with a primary entrance drive located within 1,000 feet of the center of an interchange with I-25 or E-470, the bonus signage authorized by Section 18-740(3)a. or 18-740(3)d. may be consolidated into one monument sign. The consolidated sign shall be located on the side of the property adjacent to the roadway that intersects with I-25 or E-470.

[4] For nonresidential lots or large developments adjacent to I-25 or E-470 that have consolidated sign area pursuant to note [1] above, the maximum sign height for the consolidated sign is 50 feet.

(a) *Additional requirements.*

(1) Signs in residential districts should be located within a planted landscape area which is of a shape and design that will provide ground definition to the sign and is similar in noncommunicative aspects with the surrounding area.

(Code 1975, § 58-5.203; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2279, §§ 151—155, 8-9-93; Ord. Ord. No. 2416, § 1 (58-5.201), 4-22-96; Ord. No. 2716, § 6, 9-24-02; Ord. No. 3065, § 4, 8-12-08; Ord. No. 3115, § 54, 10-13-09; Ord. No. 3132, § 80, 5-11-10; Ord. No. 3144, § 49, 9-14-10; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3213, § 5, 10-9-12; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-744. - Pole sign.

Table 18-744.1 Pole Signs

	Residential Zone Districts		**NS, CR, CC, MU, and OI Nonresidential Zone Districts**	**RC, BP, EC, and I Nonresidential Zone Districts**
	Other	Agriculture		
Number of Signs	None	One per zone lot containing at least 90 linear feet of street frontage.		

Allowed			
Maximum Sign Area	N/A	40 square feet	80 square feet
Maximum Sign Height	N/A	30 feet or the height of the building, whichever is less.	

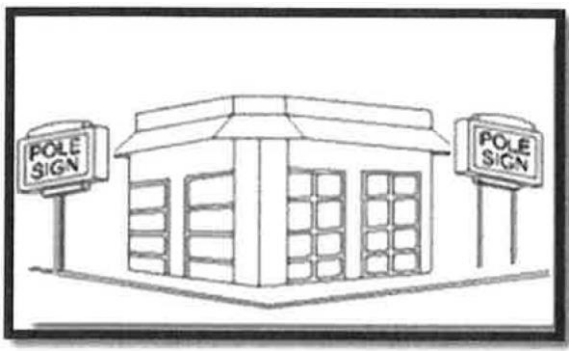


Figure 744.1

(Ord. No. 2716, § 6, 9-24-02; Ord. No. 3115, § 54, 10-13-09; Ord. No. 3132, § 80, 5-11-10; Ord. No. 3144, § 49, 9-14-10; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Secs. 18-745—18-749. - Reserved.

DIVISION 5. - ELECTRONIC SIGNS

Sec. 18-750. - Electronic signs.

Table 18-750.1 Electronic signs	
	All Zone Districts
Number of Signs Allowed	One electronic sign per zone lot and one additional electronic sign per large development.
Maximum Sign Area	50 percent of the total allowed monument sign area; or 30 square feet for wall signs.

Maximum Sign Height	Wall signs shall comply with Sections 18-730 and 18-735. Monument signs shall comply with Sections 18-740 and 18-743.
Minimum Setback	Wall signs shall comply with Sections 18-730 and 18-735. Monument signs shall comply with Sections 18-740 and 18-743.
Illumination	Electronic signs shall have automatic dimmer software or solar sensors to control brightness for nighttime viewing. The intensity of the light source shall not produce glare, the effect of which constitutes a traffic hazard or is otherwise detrimental to the public health, safety or welfare. Lighting from the message module shall not exceed 300 NITs (candelas per square meter) between dusk and dawn as measured from the sign's face. Applications for sign permits containing an electronic display shall include the manufacturer's specifications and NIT (candela per square meter) rating. City officials shall have the right to enter the property and view the programmed specifications of the sign to determine compliance with this provision. Other portions of the sign shall comply with the requirements of Section 18-735 or Division 4 of this article, whichever is applicable.
Minimum message hold time	The displayed message shall not change more frequently than once per five seconds.
Transition method and duration	The sign shall contain static messages only, changed only through dissolve or fade transitions, but which shall otherwise not have movement, or the appearance or optical illusion of movement or varying light intensity, of any part of the sign structure, design or pictorial segment of the sign. The transition time between each message displayed on the sign shall be less than one second.

(a) *Additional requirements.*

(1) Electronic signs shall be accessory structures, except as permitted for large developments in Section 18-716.

(2) Electronic signs are not allowed as pole signs or billboards.

(3) In residential zones, electronic signs are only permitted on zone lots that are one acre or larger.

(4) In the Neighborhood Service, Eastlake Business, Eastlake Service, Eastlake Office, and Eastlake TOD zones, electronic signs are permitted on zone lots that are one acre or larger.

(5) In nonresidential zones, electronic signs are permitted for lots or large developments that are adjacent to I-25 or E-470 or an arterial or collector street. For purposes of this provision, a property shall be considered adjacent to the street or highway even if it is separated from the roadway by a publicly owned tract or a tract with a public easement that is restricted from development based on its use, topography, or physical characteristics.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-751—18-759. - Reserved.

DIVISION 6. - TEMPORARY SIGNS

Sec. 18-760. - Special event sign.

<table>
<tr><th colspan="4">Table 18-760.1 Special Event Signs—Permit Required</th></tr>
<tr><td></td><td>Residential Zone Districts</td><td colspan="2">Nonresidential Zone Districts</td></tr>
<tr><td>Number of Signs Allowed</td><td>4 sign permits per calendar year, each not exceeding 15 consecutive days</td><td colspan="2">6 sign permits per calendar year, each not exceeding 15 consecutive days</td></tr>
<tr><td>Maximum Sign Area</td><td colspan="3"></td></tr>
<tr><td rowspan="4">Freestanding and Banners</td><td rowspan="4">60 square feet</td><td>Floor Area of Use Conducting Event</td><td>Maximum Signage</td></tr>
<tr><td>Less than 25,000 square feet</td><td>60 square feet</td></tr>
<tr><td>25,000 square feet or larger but less than 100,000 square feet</td><td>150 square feet</td></tr>
<tr><td>100,000 square feet or larger</td><td>400 square feet</td></tr>
<tr><td>Small Balloons</td><td>Unlimited</td><td colspan="2">Unlimited</td></tr>
<tr><td>Large Balloons, Inflatable Device, pendant strands and Air Dancers</td><td>One large balloon or inflatable device</td><td colspan="2">One large balloon; one inflatable device; one air dancer; and 50 linear feet of pendant strands</td></tr>
<tr><td>Maximum Sign Height</td><td colspan="3"></td></tr>
<tr><td>Banners</td><td colspan="3">Controlled by structure or surface the sign is attached to</td></tr>
</table>

Freestanding Signs and Feather Flags	20 feet
Small Balloons	No maximum
Large Balloons, Inflatable Device, Pendant Strands, and Air Dancers	50 feet
Minimum Setback	
Banners, freestanding signs, and feather flags	10 feet
Large Balloons, Inflatable Device, Pendant Strands and Air Dancers	Equal to the height of the balloon, inflatable device, pendant strands, or air dancer
Illumination	None

(a) *Additional requirements.*

(1) A special event sign permit is required.

(2) Special event permit signs are in addition to other temporary signs permitted on the property.

(3) Banners.

a. Banners shall be securely fastened to a building or other permanent structure located on private property.

b. Banners may be attached to a tent or other temporary structure for which a temporary use permit has-been approved.

(4) The placement of special event signs shall not impede vehicle, bicycle, or pedestrian traffic at any time.

(Code 1975, § 58-5.203; Ord. No. 2183, § 1, 8-10-92; Ord. No. 2716, § 6, 9-24-02; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-761. - Temporary sign.

Table 761.1 Temporary Signs — No Permit Required

	Residential Zones		**Nonresidential Zones**	
	Less than one acre	**One acre or larger**	**NS, MU, OI, EC, EB, ES, EO, ETD**	**CR, RC, BP, CC, TOD, I**
Number of signs allowed	Any number as long as the total square feet of all signs does not exceed the maximum sign area for that zone district or per building user or tenant, as applicable.			
Maximum sign area per zone lot				
Developed	72 square feet	100 square feet	Less than 25,000 square feet of floor area: 60 square feet per building user or tenant	
			25,000-100,000 square feet of floor area: 105 square feet per building user or tenant	
			100,000 square feet of floor area or larger: 230 square feet per building user or tenant	
Undeveloped	120 square feet	120 square feet	150 square feet	250 square feet
Maximum sign height	6 feet	10 feet	10 feet	20 feet
	Banner height controlled by the structure that the banner is affixed to			
Display duration				
Developed	One sign may be displayed for up to 180 days			
	Remainder of signs may not exceed 30 days of display			
Undeveloped	No limit			
Minimum setback	5 feet or the height of the sign, whichever is larger, and 25 feet from intersecting rights-of-way			
Illumination	Concealed illumination for swing signs only, and the level of illumination shall not exceed five foot-candles when measured five feet from the sign.			

(a) *Additional requirements.*

(1) Temporary signs may be freestanding signs, banners or feather flags. All other types of temporary signage require a special event sign permit issued in accordance with Section 18-760 of the Code.

(2) In large developments, the temporary signs authorized by this section may be displayed on any lot within the large development with the written approval of the property owner or owner's representative. In all other cases, the temporary signs shall be located on the lot with which it is associated.

(3) Banners shall be securely attached to a building or other permanent structure located on private property.

(4) Banners may be attached to a tent or other temporary structure for which a temporary use permit has been approved.

(5) All other signs, including feather flags, shall be securely fastened to the ground to prevent them from falling over or being blown over in the wind.

(6) Signs, banners or feather flags that fall or blow into the public rights-of-way shall be removed in accordance with the provisions of Chapter 70 of the Code.

(Ord. No. 2716, § 6, 9-24-02; Ord. No. 2969, § 5, 11-14-06, eff. 1-1-07; Ord. No. 3165, § 1, 4-12-11; Ord. No. 3168, § 1(Exh. A), 6-28-11; Ord. No. 3318, § 1, 12-16-14; Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-762—18-769. - Reserved.

DIVISION 7. - OTHER DISPLAYS ON WALLS, STRUCTURES, OR SITES

Sec. 18-770. - General provisions.

(a) Except as stated in subsection (b) below, this Division 7 applies to all displays on walls, or structures that:

(1) Are not exempt from the requirements of this article under Section 18-705;

(2) Are not prohibited signs under Section 18-706;

(3) Do not qualify as attached signs under Division 3, freestanding signs under Division 4, or temporary signs under Division 6; and

(4) Exceed the height, size, duration, or another physical standard in this article.

(b) This section does not apply to any city-sponsored sign, work of art, or wall graphics that are located:

(1) On city property; or

(2) On public utility boxes, meters, or panels where such placement is allowed by a written contract with the city and/or public utility company.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-771. - Special review required.

(a) Applications for approval of a display under this Division 7 shall be reviewed by the Thornton Arts, Sciences, and Humanities Council (TASHCO) pursuant to the review criteria in Section 18-772.

(b) A decision on the application shall be made within 45 days after the city's receipt of a complete application. Any appeal of the decision shall be heard and resolved as set forth in Section 18-718(a) (Appeals).

(c) An approved special display expands the number, size, and duration of signs otherwise permitted on the property. Any approval of a special display shall not affect the ability of the applicant to erect or maintain any other signs on the property permitted by this article and the approved display shall not be included in calculations to determine the total sign area or number of authorized signs.

(d) An approval under this Division 7 runs with the property unless otherwise specified by TASHCO in the approval document and all conditions and limitations related to the approval shall be binding on future owners and users of the property.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-772. - Review criteria.

The TASHCO may approve an application for a special display if it finds that the proposed display:

(1) Is a form of speech or expression protected by the First Amendment to the U.S. Constitution and/or the Colorado Constitution;

(2) Will be created, constructed, erected, or displayed in a way that is visually distinct from other permitted signs on the property;

(3) If located on public property, will activate or enhance a public space or streetscape;

(4) Does not exceed the dimensions of any surface upon which it is mounted;

(5) Will be treated to address vandalism and exposure to sun;

(6) Will not require extensive or repeated maintenance, or the applicant has provided adequate assurance (including financial assurance) that maintenance and repairs will be timely performed;

(7) Does not create a threat to public health or safety or to vehicular, bicycle, or pedestrian traffic safety;

(8) Does not create noise, sound, light, reflection, glare, shading, flickering, vibration, or odor impacts on nearby properties; and

(9) Does not impair the performance of required city functions on or around the property.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-773. - Maintenance required.

The maintenance standards in Section 18-704 apply to all special displays approved under this Division 7.

(Ord. No. 3439, § 1(Exh. A), 6-13-17)

Sec. 18-774—18-799. - Reserved.

846 F.3d 391
United States Court of Appeals,
District of Columbia Circuit.

ACT NOW TO STOP WAR AND END RACISM COALITION AND MUSLIM AMERICAN SOCIETY FREEDOM FOUNDATION, Appellees,
v.
DISTRICT OF COLUMBIA, Appellant.

No. 12-7139
|
Consolidated with 12-7140
|
Argued March 24, 2016
|
Decided January 24, 2017
|
Rehearing En Banc Denied March 24, 2017

Synopsis

Background: Advocacy groups sought declaratory and injunctive relief from District of Columbia's allegedly unconstitutional municipal regulations governing display of posters in public spaces. The United States District Court for the District of Columbia, Henry H. Kennedy, J., 570 F.Supp.2d 72, granted District's motion to dismiss complaint and advocacy groups appealed. The Court of Appeals, Williams, Senior Circuit Judge, 589 F.3d 433, reversed and remanded. On remand, the District Court, Royce C. Lamberth, Chief Judge, 798 F.Supp.2d 134, granted motion in part and denied it in part. Advocacy group that was still party to action moved for order protecting it against responding to unauthorized discovery demands propounded by District of Columbia in disobedience of discovery. The District Court, Lamberth, Chief Judge, 286 F.R.D. 117, granted motion, finding that District violated scheduling order without substantial justification, and awarding plaintiff reasonable costs, and 286 F.R.D. 145, granted in part advocacy group's request for attorney fees. District amended law, with most recent version treating signs relating to "event" differently from "non-event" signs when determining how long signs could remain posted. Parties cross-moved for summary judgment. The District Court, Lamberth, Chief Judge, granted advocacy group's motion in part and denied District's motion. Parties cross-appealed.

Holdings: The Court of Appeals, Pillard, Circuit Judge, held that:

[1] group had standing to challenge regulations;

[2] regulations were a content-neutral time, place, and manner restrictions that were sufficiently tailored to a significant governmental interest in avoiding clutter, and thus comported with the First Amendment;

[3] regulations were not impermissibly vague, in violation of Due Process Clause;

[4] failure to allege the existence of a District policy or practice that was the moving force of enforcement actions was fatal to group's § 1983 First Amendment retaliation claim;

[5] regulations did not impose system of "strict liability" in violation of due process; enforcement in violation of advocacy group's rights under Due Process Clause; and

[6] sanctions based on District's purported violation of scheduling order were not warranted.

Affirmed in part, vacated in part, reversed in part, and remanded.

West Headnotes (33)

[1] Constitutional Law
Government property in general

Constitutional Law
Due Process

Advocacy group had standing to bring action alleging District of Columbia municipal regulations governing displays of posters in public places violated due process and free speech, notwithstanding District's claim that group had ceased operating; affidavit

from member of group, which stated that throughout the period of litigation there had always been two or more members participating in the management of the group's affairs or in the development of its policies and activities, sufficed as an authoritative statement of group's continued existence as an unincorporated nonprofit association under District of Columbia law, and threat of enforcement against group was not imagined or wholly speculative, given District's energetic issuance of multiple citations against a similar advocacy group. U.S. Const. Amends. 1, 5; D.C. Code § 29-1102(5).

Cases that cite this headnote

[2] Federal Courts

Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

For a federal court to exercise jurisdiction, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.

Cases that cite this headnote

[3] Federal Courts

Rights and interests at stake

Even where litigation poses a live controversy when filed, Court of Appeals must dismiss a case as moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.

Cases that cite this headnote

[4] Federal Civil Procedure

In general;injury or interest

Party invoking Court of Appeals' jurisdiction, bears the burden of establishing its standing, a burden that is correlative to the burden to establish the substantive elements of its claims.

Cases that cite this headnote

[5] Federal Courts

Standing

Court of Appeals reviews a defendant's standing claim de novo.

Cases that cite this headnote

[6] Federal Courts

Summary judgment

Court of Appeals views the evidence and inferences from the denial of summary judgment the light most favorable to the nonmoving party.

Cases that cite this headnote

[7] Constitutional Law

Freedom of Speech, Expression, and Press

Standing to challenge laws burdening expressive rights may require only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[8] Constitutional Law

Utility Poles

District of Columbia

Public buildings, parks, and other public places and property

District of Columbia's regulation of the public's use of city lampposts as convenient places to post signs was a content-neutral time, place, and manner restriction that was sufficiently tailored to a significant governmental interest in avoiding clutter, and thus comported with the First Amendment; regulations did not target the "communicative content" of the signs, but, rather, uniformly restricted the duration that event notices could remain physically affixed to public lampposts,

regulations' clutter-minimizing rationale did not depend on the content of a sign's message, District's aesthetic judgment, in support of regulation requirement that event-related signs be removed within 30 days of event, that a sign for an event that had passed would contribute to visual clutter was utterly plausible and not novel, and regulations left open ample alternative channels of communication. U.S. Const. Amend. 1; D.C. Mun. Regs. tit. 24, § 108.6.

1 Cases that cite this headnote

[9] **Constitutional Law**
Utility Poles

Once it allows members of the public to post signs on its lampposts, the government lacks the power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[10] **Constitutional Law**
Content-neutral Regulations or Restrictions

Constitutional Law
Content-based Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny;compelling interest test

Constitutional Law
Signs

Content-based laws, which are 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; the government may, however, impose content-neutral limitations on the duration and manner in which the public uses government property for expressive conduct like sign-posting. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Existence of other channels of expression

Content-neutral time, place, and manner regulations are acceptable under the First Amendment, so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] **Federal Courts**
Summary judgment

Court of Appeals reviews de novo a district court's grant of summary judgment.

Cases that cite this headnote

[13] **Constitutional Law**
Protests and Demonstrations in General

Constitutional Law
Picketing

Laws banning picketing, and injunctions aimed at demonstrating that do not bar other types of expressive conduct are not rendered content-based merely because, at a general level, the character of the expressive activity must be taken into account to discern whether the law applies. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[14] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Existence of other channels of expression

Constitutional Law
Justification for exclusion or limitation

Constitutional Law
Justification for exclusion or limitation

A basic principle of the First Amendment that even protected speech is not equally permissible in all places and at all times permits the government to impose reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication; such standards apply whether the regulated speech occurs in a traditional public forum or on public property that the government has designated for the public's use as a forum for speech and other expressive conduct. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[15] **Constitutional Law**
Freedom of speech, expression, and press
Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

It is the government's burden to show that a content-neutral regulation serves a substantial governmental purpose and is tailored to that purpose. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
Exercise of police power;relationship to governmental interest or public welfare

Municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression. U.S. Const. Amend. 1.

Cases that cite this headnote

[17] **Constitutional Law**
Viewpoint or idea discrimination
Constitutional Law
Content-based Regulations or Restrictions

Where the basis for distinguishing between types of communicative conduct consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. U.S. Const. Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**
Certainty and definiteness;vagueness

A law may be vague in violation of the Due Process Clause for either of two reasons: first, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, or, second, it may authorize and even encourage arbitrary and discriminatory enforcement. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[19] **Constitutional Law**
Due Process

A party whose own expressive activity is clearly proscribed cannot challenge a law's vagueness under the Due Process Clause as it might apply to facts not before the court. U.S. Const. Amend. 5.

Cases that cite this headnote

[20] **Constitutional Law**
Speech, press, assembly, and petition

Self-censorship is immune to an as-applied vagueness challenge under the Due Process Clause, for it derives from the individual's own actions, not an abuse of government power; it is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence, that constitutes the danger to freedom of discussion, and thus only a facial challenge can effectively test the statute. U.S. Const. Amend. 5.

Cases that cite this headnote

[21] **Constitutional Law**
Control and use in general
District of Columbia

Public buildings, parks, and other public places and property

District of Columbia regulations on posting of signs on lampposts, which explicitly recognized enforcement officer's authority to refer to "all circumstances" to determine whether a sign was event-related were not impermissibly vague, in violation of Due Process Clause; regulations provided criteria for defining an "event-related" lamppost sign, by specifying that the post-event time limitation applied to signs announcing an event or series of events of the type that occur at a specified time and place. U.S. Const. Amend. 5; D.C. Mun. Regs. tit. 24, §§ 108.6, 108.13.

Cases that cite this headnote

[22] Constitutional Law

Overbreadth

Success of a facial due process vagueness challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion unlawfully, but whether there is anything in the ordinance preventing him from doing so. U.S. Const. Amend. 5.

Cases that cite this headnote

[23] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

Advocacy group's failure to allege the existence of a policy or practice by the District of Columbia that was the moving force of the 99 enforcement actions brought against it for violation of municipal regulations governing display of posters in public spaces was fatal to its § 1983 First Amendment retaliation claim against District. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[24] Civil Rights

Nature and elements of civil actions

Section 1983 gives a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[25] Civil Rights

Liability of Municipalities and Other Governmental Bodies

Civil Rights

States and territories and their agencies and instrumentalities, in general

Both states and cities can be sued under § 1983, and for that purpose the District of Columbia is treated as a city. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[26] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

The District of Columbia may be liable under § 1983, but only to the extent permitted under *Monell*; in other words, only if based on action that implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or for harm visited pursuant to governmental custom even though such custom has not received formal approval. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[27] Civil Rights

Acts of officers and employees in general; vicarious liability and respondeat superior in general

Under *Monell*, a municipality cannot be held liable solely because it employs a tortfeasor; in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[28] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

The touchstone of a § 1983 claim against a municipality is that official policy is responsible for a deprivation of rights protected by the Constitution; that is, the alleged policy or custom must have caused the violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[29] Constitutional Law

Control and use in general

District of Columbia

Public buildings, parks, and other public places and property

District of Columbia regulations governing display of posters in public spaces did not impose system of "strict liability" enforcement in violation of advocacy group's rights under Due Process Clause, precluding groups' § 1983 claim; on its face, regulation did not impose liability on anyone other than the person who affixed the sign to the lamppost, and a person was liable under the regulation only if that person was responsible for the unlawfully posted sign because for example, the directed or encouraged the posting or his or her employee or agent posted it. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983; D.C. Mun. Regs. tit. 24, § 108.1.

Cases that cite this headnote

[30] Criminal Law

Acts prohibited by statute

Strict liability in criminal statutes burdening speech is generally disfavored.

Cases that cite this headnote

[31] Federal Civil Procedure

Pretrial Order

Scheduling order that authorized advocacy group to take discovery in action challenging District of Columbia regulations governing display of posters in public spaces, but was silent as to District, was ambiguous, and thus sanctions requiring District to pay group's reasonable costs and attorney fees, based on District's purported violation of scheduling order, were not warranted. Fed. R. Civ. P. 16(f).

Cases that cite this headnote

[32] Federal Courts

Discovery sanctions

Court of Appeals reviews the district court's award of discovery sanctions for an abuse of discretion.

Cases that cite this headnote

[33] Federal Civil Procedure

Pretrial Order

A court may award sanctions for violation of scheduling order only where a party violates an unambiguous order. Fed. R. Civ. P. 16(f).

Cases that cite this headnote

West Codenotes

Negative Treatment Reconsidered
D.C. Mun. Regs. tit. 24, §§ 108.6, 108.11, 108.13

***395** Appeals from the United States District Court for the District of Columbia, (No. 1:07-cv-01495)

Attorneys and Law Firms

Carl J. Schifferle, Assistant Attorney General, Office of the Attorney General for ***396** the District of Columbia, argued the cause for appellant/cross-appellee. With him on the briefs were Karl A. Racine, Attorney General, Todd S. Kim, Solicitor General, and Loren L. AliKhan, Deputy Solicitor General.

Mara E. Verheyden-Hilliard argued the cause for appellees/cross-appellants. With her on the briefs were Carl L. Messineo and Andrea Costello.

Before: Rogers and Pillard, Circuit Judges, and Sentelle, Senior Circuit Judge.

Opinion

Pillard, Circuit Judge:

Like many municipalities around the country, the District of Columbia regulates the manner in which members of the public may post signs on the District's lampposts. District of Columbia law allows a posted sign to remain on a public lamppost for up to 180 days. But a sign relating to an event must be removed within 30 days after the event, whether the 180-day period has expired or not. Thus, the District's rule may in some cases give less favorable treatment to signs that relate to an event than to signs that do not.

Two nonprofit organizations, the Act Now to Stop War and End Racism Coalition (ANSWER) and the Muslim American Society Freedom Foundation (MASF) (together, the organizations), challenge the District's sign-posting rule. MASF brings a pre-enforcement challenge to the rule as unconstitutional on its face in violation of the First Amendment and due process. MASF first argues that the distinction between event-related and other signs is content based yet cannot meet strict First Amendment scrutiny and that, even if the rule is not content based, it fails the intermediate scrutiny applicable to content-neutral time, place, and manner restrictions. Second, MASF contends that the regulation delegates an impermissible degree of enforcement discretion to the District's inspectors in violation of due process. It further challenges what it contends is strict liability on the originators of posters for any violation of the sign-posting rule, which MASF argues also contravenes its speech and due process rights. ANSWER, unlike MASF, was cited by the District for violations of the regulation. ANSWER seeks damages under section 1983, contending that it did not in fact violate the regulation and that citations were unconstitutional retaliation against it for its postering.

The district court granted summary judgment to MASF, invalidating the regulation's treatment of event-related posters on both First Amendment and due process grounds, but rejecting MASF's strict-liability objection. The court also sanctioned the District for seeking discovery in the face of an order granting limited discovery to plaintiffs. The district court granted summary judgment to the District on ANSWER's section 1983 damages claim for lack of a showing of a policy, custom, or practice of retaliatory enforcement, as required by *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The District and the organizations cross-appealed.

We conclude that the regulation does not impose a content-based distinction because it regulates how long people may maintain event-related signs on public lampposts, not the content of the signs' messages. The "event-related" category is not itself content based. Under the intermediate First Amendment scrutiny that is therefore applicable, the rule is a reasonable time, place, and manner restriction. It is narrowly tailored to further a well-established, admittedly significant governmental interest in avoiding visual clutter. The regulation's definition of event-based signs also guides officials' enforcement discretion ***397** sufficiently to avoid facial invalidation on due process grounds. Accordingly, we reverse the grant of summary judgment in MASF's favor and remand for the district court to enter summary judgment for the District.

On the organizations' cross-appeal, we affirm the district court's dismissal of ANSWER's section 1983 damages claim that the District retaliated against it in violation of the First Amendment, and MASF's claim that the District's regulation imposes a system of strict liability the First Amendment does not allow. Finally, because discovery is presumptively available to all parties pursuant to the Federal Rules of Civil Procedure in the absence of a court order to the contrary, we vacate the district court's imposition of discovery sanctions against the District for seeking discovery without leave of court.

I. Background

The District of Columbia began its regulation of signs on public lampposts with an outright prohibition in 1902. D.C. Police Regulations, Art. XII, § 2 (1902). The District partially relaxed that ban in 1958 to allow for the posting of signs on lampposts only with the permission of the District's Commissioners. D.C. Police Regulations, Art. 20 § 2 (1958). After the District's Corporation Counsel advised that the regulation might be constitutionally infirm for lack of clearly articulated standards, *see* Letter from Louis P. Robbins, Acting

Corporation Counsel, to James W. Hill, Director, Dep't of Licenses, Investigations, and Inspections (October 12, 1978) (Gov't Add. 13) [hereinafter Robbins Letter], the District revised the regulation to add specific criteria to limit enforcing officers' discretion, *see* Street Sign Regulation Amendment Act of 1979, D.C. Law 3-50, 26 D.C. Reg. 2733 (1979); *see also* Crime Prevention Sign Posting Act of 1980, D.C. Law 3-148, 27 D.C. Reg. 4884. Following the revisions, signs "not relate[d] to the sale of goods" could be affixed to lampposts for up to 60 days; election signs for District of Columbia candidates for public office were exempt from that overall limit but had to be taken down within 30 days after the election; and signs intended to aid neighborhood crime prevention were exempted from the time limits. *See* D.C. MUN. REGS. tit. 24 § 108.4–108.6 (1980). Commercial signs could not be affixed to public lampposts at all. *See id.* § 108.4. The revised rule also articulated specific requirements for the manner in which signs could be posted on a lamppost "or appurtenances of a lamppost" to "minimiz[e] the need to repair lamp posts defaced by signs attached by adhesives or other permanent methods and the need to remove abandoned or improperly secured signs from lamp posts, the sidewalks and the streets." Robbins Letter at 2; *see* D.C. MUN. REGS. tit. 24, § 108.8–108.9 (1980). During the pendency of this case, the District twice further amended its lamppost rules, as described below.

In the meantime, ANSWER, a "grassroots civil rights organization" that works to end war and oppose racism, Affidavit of Brian Becker ¶ 2 (Mar. 14, 2008), J.A. at 32, had posted signs advertising rallies in the District, including events in September 2007 and March 2010. MASF, an unincorporated nonprofit association that conducts "civil and human rights advocacy with a focus on empowering the Muslim American community," Affidavit of Imam Mahdi Bray (Oct. 26, 2013) ¶ 6, Organizations' Add. 2, has in the past and intends in the future to post signs that combine general messages of advocacy and references to specific events, *see id.* at 6–8. MASF "has sought to engage in postering to the same extent as is afforded others, including those favored within the District of Columbia municipal regulation system." *Id.* at 9. ***398** The District of Columbia has not cited MASF, but in 2007 the District issued multiple citations against ANSWER under the then-current lamppost rule.

ANSWER and MASF sued the District, seeking a declaratory judgment that the District of Columbia's lamppost rule violates their First Amendment and due process rights, and an injunction barring its enforcement. First Amended Complaint, *Act Now To Stop War & End Racism Coal. v. District of Columbia* (*ANSWER I*), 570 F.Supp.2d 72 (D.D.C. 2008). The district court dismissed both ANSWER's and MASF's claims for lack of standing, and in abstention from pending local administrative enforcement proceedings. *ANSWER I*, 570 F.Supp.2d at 75-78. The organizations appealed.

This court reversed in part and remanded. *Act Now to Stop War & End Racism Coal. v. District of Columbia* (*ANSWER II*), 589 F.3d 433, 434 (D.C. Cir. 2009). The court held that MASF had standing based on "a credible statement of intent to engage in violative conduct," and had shown sufficient likelihood of enforcement against it because its allegations raised "somewhat more than the 'conventional background expectation that the government will enforce the law.' " *Id.* at 435 (quoting *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005)). At the motion to dismiss stage, the court reasoned, an affidavit from MASF's director stating an intention to violate the regulation sufficed to establish standing. *Id.* at 436. As to ANSWER, the court found that the district court had correctly abstained under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), to the extent that charges against ANSWER for violations of the challenged regulation remained pending in the District of Columbia's administrative process. *ANSWER II*, 589 F.3d at 436.

While MASF and ANSWER's appeal was pending before this court, the District of Columbia Department of Transportation amended the lamppost regulation. The 2010 final rule made one distinction relevant to the plaintiffs' claims: Signs "not related to a specific event" could be posted for up to 60 days while signs "related to a specific event" could be posted at any time beforehand, but had to be removed within 30 days after the event. 57 D.C. Reg. 528 (January 8, 2010) (amending D.C. MUN. REGS. tit. 24, §§ 108.5 & 108.6). Thus, in theory, event-related signs could be posted for months or years before the event they announced and for an additional 30 days thereafter, while signs that were not event related could be posted for a maximum of 60 days.

On remand, ANSWER voluntarily dismissed its claims for prospective relief. *See* Stipulation of Dismissal, *Act Now To Stop War & End Racism Coal. v.*

District of Columbia (*ANSWER III*), 798 F.Supp.2d 134 (D.D.C. 2011). MASF, the only party still challenging the constitutionality of the District's regulation going forward, amended its complaint in light of the revised rule, adding an as-applied challenge to the "event-related" distinction as content based. *See* Supplemental Pleading ¶¶ 16-17, *ANSWER III*, 798 F.Supp.2d 134). Because neither the earlier nor the revised regulation had been enforced against MASF, the district court dismissed MASF's as-applied challenge, leaving only its facial challenges under the First Amendment and the Due Process Clause. *ANSWER III*, 798 F.Supp.2d at 143. Those claims, the court held, could proceed to discovery. *Id.* at 150–51.

Meanwhile, in its supplemental pleading after remand, ANSWER alleged that the District had "attacked" it with ninety-nine enforcement actions in March and April 2010 in retaliation for the content of its ***399** postering activity. The court dismissed that claim, holding that ANSWER had failed adequately to allege that the claimed retaliation resulted from a municipal custom or practice. *ANSWER III*, 798 F.Supp.2d at 154–55. The court also dismissed MASF's claim that the regulation imposes a system of "strict liability" in violation of the First Amendment. *Id.* at 153.

In 2012, the District revised the regulation once more, yielding the version now before us. *See* 59 D.C. Reg. 273 (Jan. 20, 2012). Section 108 currently provides that any sign—including those announcing events—may be affixed to a publicly owned lamppost for a maximum of 180 days, but that signs relating to specific events must be removed within 30 days after the event. D.C. MUN. REGS. tit. 24, §§ 108.5, 108.6. The regulation also continues to restrict the method of affixing signs on public lampposts: All signs must be "affixed securely to avoid being torn or disengaged by normal weather conditions," *id.* § 108.8, but cannot "be affixed by adhesives that prevent their complete removal from the fixture, or that do damage to the fixture," *id.* § 108.9. Signs may not be posted on "any tree in public space," *id.* § 108.2, and no more than three copies of any sign may be posted on either side of the street on a given block, *id.* § 108.10. The 2012 revision also added subsection 108.13, which defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector." *See* 59 D.C. Reg. 273 (codified at D.C. MUN. REGS. tit. 24, § 108.13).

After discovery—which we discuss in Part II.E., *infra*, in connection with the sanctions order—the District and MASF cross-moved for summary judgment. The court granted summary judgment to MASF, reasoning that even if the regulation does not distinguish on the basis of content, subsections 108.5 and 108.6 nevertheless fail intermediate scrutiny under the First Amendment for want of admissible evidence showing how the regulation advances the city's content-neutral purposes. *Act Now to Stop War & End Racism Coal. v. District of Columbia* (*ANSWER IV*), 905 F.Supp.2d 317, 340–41 (D.D.C. 2012). It also held that subsection 108.13 was an impermissible delegation of enforcement discretion in violation of the Due Process Clause. *Id.* at 332. The court sanctioned the District for seeking discovery in violation of the court's scheduling order. *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 286 F.R.D. 117 (D.D.C. 2012). The District and the organizations cross-appealed.

We held these appeals in abeyance pending the Supreme Court's resolution of *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), *see* Order, *Act Now to Stop War & End Racism Coal. v. District of Columbia*, No. 12-7139 (D.C. Cir. August 20, 2014), and, once *Reed* was decided, requested supplemental briefing addressing its applicability here.

II. Analysis

We begin by addressing the District's contention that MASF lacks standing to sue. Finding standing, we proceed to MASF's First Amendment and due process facial challenges. As to both, we find MASF's challenges fall short, and accordingly reverse the district court's grant of summary judgment in its favor. We affirm the court's dismissal of ANSWER's section 1983 claim for damages and MASF's claim that the District's rule imposes strict liability in violation of the First Amendment. Finally, we vacate the discovery sanctions again the District.

***400** A. MASF Has Standing to Challenge the District's Lamppost Regulation

[1] The District argues that MASF ceased operating in 2011, so has "lost standing" during the pendency of its suit. Gov't Br. at 19. Even if MASF exists, the District asserts, it has failed to establish that the regulation causes it to suffer injury in fact. We disagree: An affidavit from MASF's Imam Bray attests that MASF continues to exist as an unincorporated nonprofit association, and the District's submissions raise no real question on that point.

[2] **[3]** **1.** ***Evidence Shows MASF Exists.*** For a federal court to exercise jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (plaintiff must support standing "with the manner and degree of evidence required at the successive stages of the litigation"). Thus, "[e]ven where litigation poses a live controversy when filed, we must dismiss a case as moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 199 (D.C. Cir. 2011) (alteration in original) (internal quotation marks omitted). The District contends that this case has become moot because MASF no longer exists, thus eliminating it as a party whose rights could be affected.

[4] **[5]** **[6]** MASF, as the party invoking our jurisdiction, "bears the burden of establishing" its standing, *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, a burden that is "correlative to the burden" to establish the substantive elements of its claims, *Sierra Club v. E.P.A.*, 292 F.3d 895, 900 (D.C. Cir. 2002). Even though the District did not challenge MASF's existence when it moved for summary judgment because it learned of the evidence that it believes calls MASF's existence into question only after noticing its appeal, we consider MASF's standing *de novo*, as we would had it been challenged at the procedural stage to which the case had progressed in the district court. *Scenic America, Inc. v. Anthony Foxx*, 836 F.3d 42, 49–50 (D.C. Cir. 2016). Accordingly, on appeal from denial of summary judgment in MASF's favor, there must be no material dispute about the facts that support its standing. We view the evidence and inferences therefrom in the light most favorable to the District as the nonmoving party on MASF's cross-motion for summary judgment. *See Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 761 (D.C. Cir. 2002).

Imam Bray's affidavit suffices as an authoritative statement of MASF's continued existence as an unincorporated nonprofit association under District of Columbia law. An "unincorporated nonprofit association" is "an unincorporated organization, consisting of 2 or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes." D.C. Code § 29–1102(5) (2016). Such a nonprofit is "a legal entity distinct from its members and managers" and has "perpetual duration" unless otherwise provided. *Id.* § 29-1105(a), (b). To operate as an unincorporated nonprofit association an organization need not be registered with the District, *see id.* § 29–1102(5), and it has the capacity on a member or manager's initiative to sue in its own name, *id.* § 29-1109.

In his affidavit, Imam Bray attested that, "[t]hroughout the period of litigation, there have always been two or more persons ***401** (*i.e.* 'members' as that term is used in the District's Uniform Unincorporated Nonprofit Association Act) who have participated in the management of the affairs of MASF or in the development of the policies and activities of MASF." Bray Affidavit ¶ 4, Organizations' Add. 2. The District has no evidence that the organization in fact lacks "2 or more members," D.C. Code § 29–1102(5), who have joined together for a "common, nonprofit purpose," *id.* namely "to engage in civil and human rights advocacy with a focus on empowering the Muslim American community," Bray Affidavit ¶ 6, Organizations' Add. 2.

The District challenges MASF's existence based on an online newspaper report and a record from the District of Columbia Department of Consumer and Regulatory Affairs. While this appeal was pending, the District learned of an online *Muslim Link* article reporting that MASF "announced its closure on June 17, 2011." Gov't Add. 40. The *Link* cited a statement from someone identifying himself as a MASF member that the organization did not have "the resources that would allow [continuing] advocacy and organizing work." *Id.* (alterations in original). In the online "comments" section of the document as printed and filed by the District, however, a member of the Muslim American Society's Board of Trustees, Mazan Mokhtar, explained

that the "reports of MAS Freedom's closing are greatly exaggerated." Gov't Add. 42. Imam Bray's declarations attest to MASF's continued existence. Bray Affidavit ¶¶ 10-29, Organizations' Add. 3-9. The conclusory and ambiguous *Link* document, unaccompanied by a declaration of the quoted individual or anyone else attesting to personal knowledge of the putative closing, fails to call into question MASF's continued existence.

The District also points to a record from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) stating that an entity referred to as "MASF, Inc.," had its incorporation status "revoked." *See* Gov't Br. Add. 44. MASF, however, avers that it is not the organization described in that DCRA record. MASF's complaint does not refer to the organization as "MASF, Inc.," *see* First Amended Complaint at 5, *ANSWER I*, 570 F.Supp.2d 72, (No. 07-1495), nor is it so described in the corporate disclosure statement to this court, *see* Corporate Disclosure Statement, Docketed February 28, 2013. For further confirmation, MASF points to Imam Bray's sworn affidavit attesting that MASF has never been incorporated. *See* Bray Affidavit, Organizations' Add. 2-3. Imam Bray explains that he "was involved with the formation and abandonment of that short-lived separate corporation. Those papers were filed with the intent to create a 501(c)(4) corporation that would engage in activities coinciding with the 2008 Presidential election. However, the project was abandoned. The incorporation papers were, essentially, a false start." *Id.* at 3. Thus, the District has not raised a material factual dispute as to whether the organization whose incorporation is listed as "revoked" is the party before us.

Neither of the District's submissions suffices to call into question MASF's continued existence.

2. ***MASF Has Established its Injury*****.** The District also contends that, even if MASF exists, the lamppost regulation causes it no injury.

[7] MASF brings a pre-enforcement challenge to the regulation before it has faced any punishment. As we explained when this case was previously before us, "standing to challenge laws burdening expressive rights" may require "only 'a credible statement by the plaintiff of intent to commit violative acts and a conventional ***402** background expectation that the government will enforce the law.' " *ANSWER II*, 589 F.3d at 435 (quoting *Seegars v. Gonzales,* 396 F.3d 1248, 1253 (D.C. Cir. 2005)). Here, MASF encounters "somewhat more than the 'conventional background expectation that the government will enforce the law.' " *Id.* (quoting *Seegars*, 396 F.3d at 1253). Given the District's energetic issuance of multiple citations against ANSWER, the threat of enforcement against MASF is not "imagined or wholly speculative," *Seegars*, 396 F.3d at 1252, nor is there reason to think "the challenged law is rarely if ever enforced," *id.*

The District now argues that the 2012 amendment of the lamppost regulation during the pendency of this case has eliminated the risk of harm that MASF identified. The District says that MASF has "never asserted an intent to poster in violation of the regulations invalidated on summary judgment"—*i.e.*, the current rule, as promulgated in 2012. Gov't Br. at 27. MASF's only claimed injury, the District contends, stems from the disfavored status afforded to signs *not* related to an event under the superseded 2010 Regulation—a disadvantage the current regulation eliminates.

The 2010 rule favored signs related to an event but, in eliminating that leeway, the 2012 version could be viewed to have swung too far in the other direction so as to disfavor event-related signs. *See* 59 D.C. Reg. 273 (2012). Under the 2010 rule, signs "not related to a specific event" could be posted for up to 60 days; the rule did not specify how far in advance signs "related to a specific event" might be posted, so long as they were removed within 30 days of the event. 57 D.C. Reg. 528 (Jan. 8, 2010). Thus, the 2010 rule on its face allowed event-related signs to remain on lampposts for months or years leading up to an event, while it restricted total posting time for signs not related to an event. Under the current rule as amended in 2012, however, no sign—whether or not related to an event—may remain affixed to a public lamppost for more than 180 days. D.C. MUN. REGS. tit. 24, § 108.5 (2012). Signs relating to a specific event must, as before, be removed within 30 days after the event. *Id.* § 108.6. The current rule thus treats event-related signs, in some circumstances, less favorably than signs unrelated to any event: Assuming an event-related sign is posted fewer than 150 days before the event, the requirement that it be removed within 30 days after the event means it may not be displayed for the full 180-day period it would otherwise enjoy under the regulation if it were unrelated to an event.

The District notes that MASF filed its amended complaint on the heels of the 2010 rule, and contends that the Complaint expressed only MASF's intent to violate the then-comparatively-restrictive 60-day limit that the 2010 rule imposed on signs not related to an event. But MASF's intent is not so narrowly circumscribed: It intends to "engage in postering to the same extent as is afforded others." Bray Affidavit ¶ 32, Organizations' Add. 9. The organization has reasserted, since the rule revision in 2012, that it plans to post signs that would "violate the challenged regulations, specifically keeping them affixed for 180 days despite the regulations requiring any poster that is 'related to a specific event' to be removed 30 days post-event." *Id.* ¶ 35. MASF also intends to post signs that contain both information related to events and information of continuing relevance and expresses uncertainty as to whether such signs are subject to the 30-day post-event limitation. *See id.* ¶ 37. The District's arguments that MASF lacks standing therefore fail.

***403 B. The District's Rule Does Not Violate the First Amendment**

[8] **[9]** The District's regulation of the public's use of city lampposts as convenient places to post signs is a content-neutral time, place, and manner restriction that is sufficiently tailored to a significant governmental interest in avoiding clutter to comport with the First Amendment. As the district court held, "the District's lampposts are a textbook example of a limited or designated public forum." *ANSWER III*, 798 F.Supp.2d at 145. The District might have chosen not to make its lampposts available as a place for the people to put up their signs. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814–15, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). But once it allows members of the public to post signs on its lampposts, the government lacks the "power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

[10] **[11]** The level of constitutional scrutiny is determinative here. MASF contends that the lamppost rule is content-based so subject to strict scrutiny under *Reed v. Town of Gilbert*, whereas the District of Columbia says the rule is a content-neutral time, place, and manner restriction quite different from the content-based sign-posting regulations struck down in *Reed*. "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." *Reed,* 135 S.Ct. at 2226. Government may, however, impose content-neutral limitations on the duration and manner in which the public uses government property for expressive conduct like sign-posting. " '[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

[12] We review *de novo* the district court's grant of summary judgment to the organizations on their First Amendment claim. *Hodge v. Talkin*, 799 F.3d 1145, 1155 (D.C. Cir. 2015).

1. *The Rule Is Content Neutral.* The District of Columbia's lamppost rule makes a content-neutral distinction between event-related signs and those not related to an event. The District requires that, whatever their content or viewpoint, event-related signs be removed within thirty days after the event to prevent them from accumulating as visual clutter. That rule is not a "regulation of speech," but "a regulation of the places where some speech may occur." *Hill v. Colorado*, 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). It does not target the "communicative content" of those signs, such as by distinguishing among various events by topic, *see Reed*, 135 S.Ct. at 2226–27, but uniformly restricts the duration that event notices may remain physically affixed to public lampposts. The rule's clutter-minimizing rationale does not depend on the content of a sign's message. *See Hill*, 530 U.S. at 723, 120 S.Ct. 2480; *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Content distinctions are of special concern under the First Amendment because they pose the risk that government is favoring particular viewpoints or subjects. But a broad-based, general distinction between event-based signs and other signs poses no such risk. It instead simply reflects the commonsense understanding ***404** that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter. The promulgation and function of the District of Columbia's wholly viewpoint neutral lamppost rule reveals "not even a hint of bias or

censorship." *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118.

[13] The fact that District officials may look at what a poster says to determine whether it is "event-related" does not render the District's lamppost rule content-based. The "event-related" definition is just as content neutral as was Colorado's "free zone" sustained in *Hill*, which prevented persons approaching patients on the sidewalk outside abortion clinics to come closer than eight feet to engage "in 'oral protest, education, or counseling' rather than pure social or random conversation." 530 U.S. at 721, 120 S.Ct. 2480. The Court in *Hill* acknowledged that "the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute," but noted that such "cursory examination" did not render the statute facially content based. *Id.* at 720, 722, 120 S.Ct. 2480. So, too, laws banning "picketing," and injunctions aimed at "demonstrating" that do not bar other types of expressive conduct are not rendered content based merely because, at a general level, the character of the expressive activity must be taken into account to discern whether the law applies. *See id.* at 722–23 & n.30, 120 S.Ct. 2480 (citing *Schenck v. Pro–Choice Network of Western New York*, 519 U.S. 357, 366–67 n.3, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 759, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); *United States v. Grace*, 461 U.S. 171, 181 n.10, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983); *Police Dept. of Chicago v. Mosley*, 408 U.S. at 98, 92 S.Ct. 2286). So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based.

MASF contends that *Reed* requires us to apply strict scrutiny because "[t]he regulation singles out specific subject matter—that deemed 'related to a specific event'—for differential treatment," and that, per *Reed*, there is no "exception from the content-neutrality requirement for event-based laws." Cross-Appellants' Supp. Br. at 6 (quoting *Reed*, 135 S.Ct. at 2231). But *Reed* does not view a bare distinction between event-related and other signs as itself content-based. The aspect of the Sign Code invalidated in *Reed* that the Court held to be content-based was its further distinctions among signs—including among event-related signs—based on their subject matter.

The Town of Gilbert's complex Sign Code exempted twenty-three categories of signs—based on their content—from the town's general ban on posting outdoor signs, and made additional content distinctions among the categories of exempted signs, including several content distinctions among event-related signs. 135 S.Ct. at 2224–25. In particular, the Sign Code gave different amounts of leeway to event-related signs depending on whether the event was, for example, political, commercial, construction-related, "special-event," or religious or charitable. Political signs, including any "temporary sign designed to influence the outcome of an election called by a public body," *id.* (quoting Gilbert, Ariz., Land Development Code (Sign Code or Code), Glossary of General Terms, at 23 (2005)), enjoyed relatively generous time limits; they could be posted for up to sixty ***405** days before a primary election, and, if the candidate to which they referred advanced to the general election, they could remain posted until fifteen days following the general election, *id.* at 2225. Signs relating to Temporary Uses and Special Events could be posted up to 24 hours in advance and remain posted through the day of the event, whereas Garage Sale signs and Bazaar signs could remain posted only until the "end of the sale." Gilbert, Ariz., Land Development Code, Art. 4.402(K), (O), (Y). The Gilbert Sign Code permitted builders to post weekend directional signs "no earlier than 4:00 p.m. on Friday of each week" and had to remove them "no later than 8:00 a.m. on the following Monday." *Id.* Art. 4.405(B)(2)(f).

The Town of Gilbert's Sign Code gave least favorable treatment to the kind of sign that the petitioner church in *Reed* sought to use: "Temporary Directional Signs Relating to a Qualifying Event." 135 S.Ct. at 2225. Such a sign, defined as one that directed people to any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization," could only be displayed for twelve hours before the event, and had to be removed within an hour after the event. *Id.* The Sign Code thus afforded more leeway to electioneering signs and even signs relating to specified Temporary Uses such as farmers' markets or fireworks displays than to signs for morning church services, which for the most part could not go up until after dark in winter,

and had to be removed the next morning before coffee and doughnuts were fully digested.

The rule the organizations here challenge, in contrast, distinguishes only between signs that are event-related and signs that are not. That distinction is not itself content-based under *Reed*. The organizations assert that *Reed* held that the "event-based" category is necessarily content-based because it "singles out specific subject matter—that deemed 'related to a specific event'—for differential treatment." Appellee Supp. Br. at 6. But *Reed* did not so hold. The passage the organizations invoke was directed at the notion the court of appeals had advanced that an otherwise "obvious content-based inquiry," such as the distinction between "political" and "ideological" signs relating to an upcoming election, would be somehow rendered content-neutral and thereby "evade strict scrutiny review simply because an event (*i.e.* an election) is involved." *Reed*, 135 S.Ct. at 2231.

Indeed, *Reed* makes clear that a municipality may continue to treat event-related signs differently from nonevent-related signs by means of time, place, and manner restrictions, as long as it does not distinguish among types of event based on content. What *Reed* held constitutionally suspect was the way in which the Town of Gilbert's Sign Code made content-based distinctions among different types of issues and events, and even different types of signs relating to the same event. *See Reed*, 135 S Ct. at 2227. Unlike the content-based treatment of event-related signs invalidated in *Reed*, District of Columbia law treats all event-related signs alike and is thus content neutral.

The Court in *Reed* emphasized that differences in time limits depending on the "communicative content" of the signs was what subjected the Town of Gilbert Sign Code to strict scrutiny. *See id.* at 2227. Because Gilbert's Sign Code treated "the Church's signs inviting people to attend its worship services ... differently from signs conveying other types of ideas," it was content-based regulation. *Id.* The Court emphasized that the Sign Code's distinctions did not merely "hinge on 'whether ***406** and when an event is occurring,' " and did not just "permit citizens to post signs on any topic whatsoever within a set period leading up to an election." *Id.* at 2231. Rather, the Code impermissibly required town officials to examine each sign to determine whether, for example, it was "designed to influence the outcome of the election" and so must come down within fifteen days thereafter, or more generally "ideological," in which case no time limit applied. *Id.* at 2231.

Justice Alito's concurring opinion in *Reed* even more squarely rejects the position the organizations advance here that the distinction between event-related and other signs is itself content-based. Writing for three of the six justices in the majority, Justice Alito specifies that a regulation "imposing time restrictions on signs advertising a one-time event" does not by token of the "event-related" category as such amount to a content-based distinction. *Id.* at 2233 (Alito, J., concurring). Rules treating event-related signs as a group differently based on their time-limited 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." *Id.* That is, such rules are time, place, or manner restrictions, constitutionally permissible if they are narrowly tailored to serve a significant governmental interest. The three justices who concurred in *Reed* also clearly would not strictly scrutinize the rule we face here. *See id.* at 2236 (Breyer, J., concurring in the judgment) (concluding that even the regulation at issue there "does not warrant 'strict scrutiny' "); *id.* at 2236–38 (Kagan, J., joined by Ginsburg and Breyer, JJ., concurring in the judgment) ("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.").

All four of the opinions in *Reed* confirm that the District of Columbia's lamppost rule is not a content-based regulation of speech. The District's rule governs the time event-related signs may remain on public lampposts after the event has passed because obsolete signs cause a particular aesthetic harm; the rule makes no distinctions among event-related signs based on their particular communicative content. *Reed*'s definition of content-based regulation does not sweep in rules like the District's that merely distinguish between all signs related to events and all non-event-related signs. It is therefore not subject to the strict scrutiny applicable to content-based regulation of speech, but must only meet the lesser constitutional scrutiny applicable to content-neutral rules affecting speech.

Accordingly, we proceed to consider the validity of the regulation under the standard applicable to content-neutral regulation of speech.

2. *The Regulation Withstands Intermediate Scrutiny.* Even if the regulation is content neutral, MASF argues, it nevertheless violates the First Amendment. The district court granted partial summary judgment to MASF on the ground that the regulation could not pass muster under the intermediate scrutiny applicable to content-neutral regulation of speech.

[14] **[15]** A basic principle of the First Amendment—that "[e]ven protected speech is not equally permissible in all places and at all times," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)—permits the government ***407** to impose "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)); *see Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 298 n.8, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Those same standards apply whether the regulated speech occurs in a traditional public forum—*i.e.* streets and parks—or on public property that the government has designated for the public's use as a forum for speech and other expressive conduct, such as the lampposts in this case. *Perry Educ. Ass'n*, 460 U.S. at 45–46, 103 S.Ct. 948. It is the District of Columbia's burden to show that its regulation serves a substantial governmental purpose and is tailored to that purpose. *See McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2540, 189 L.Ed.2d 502 (2014); *Edwards v. District of Columbia*, 755 F.3d 996, 1002–03 (D.C. Cir. 2014). We conclude that it meets that burden here.

[16] The District's interest is plainly significant. "[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806, 104 S.Ct. 2118; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (finding no "substantial doubt" that the governmental objective of furthering "the appearance of the city" is a "substantial governmental goal[ ]"); *Mahoney v. Doe*, 642 F.3d 1112, 1118 (D.C. Cir. 2011). The district court accepted that the prevention of clutter and litter is a substantial interest, *see ANSWER IV*, 905 F.Supp.2d at 334 n.4, and MASF does not challenge that conclusion here, *see* Organizations' Br. 44.

Instead, MASF argues that the District of Columbia has failed to show that its regulation actually serves that interest. But the event-related distinction in the District's regulation turns on the very non-speech feature of that activity that makes it proscribable in the first place—that is, the visual blight of superannuated event signs. The District distinguishes event-related from non-event-related signs based on its "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806, 104 S.Ct. 2118. The District's reasoning is straightforward: All signs have both communicative value and aesthetic costs. Leading up to an event, the communicative value of a sign related to that event outweighs the aesthetic harm that sign causes. But after the event, the communicative value of the sign is greatly diminished. The sign then becomes, from the District's perspective, little more than visual clutter. *See* Robbins Letter at 2. There is also greater risk that an event-related sign will be abandoned after the event it announces, and not maintained like a sign with continuing relevance. Failure to remove such a sign is itself a manifestation of neglect.

[17] As the Supreme Court has explained, where the basis for distinguishing between types of communicative conduct "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. City of St. Paul*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Such is the case here. That is not to say that an event-related sign loses all communicative value after the event has occurred. A viewer might have some interest, for example, in ***408** knowing what kinds of events had taken place (or been advertised) in the neighborhood in the past, even though she had missed the event itself. That an event-related sign might have some residual continuing relevance, however, does not bar the District from determining, in a content-neutral, across-the-board manner, that the visual clutter outweighs any such interest.

The district court held that the District, "by submitting no evidence whatsoever" of the relationship between its admittedly substantial interest and the challenged regulation, had failed to meet its burden on summary judgment. *ANSWER IV*, 905 F.Supp.2d at 344. The District responds that it has sought, since it first established criteria for permitting the public to post signs on District lampposts, to protect "legitimate governmental interests in caring for city lampposts and neighborhood aesthetics while contemporaneously affording citizens ample opportunity to exercise their First Amendment rights." D.C. Council, Report on Bill 3-179, at 3 (Sept. 26, 1979). The District was not required in these circumstances to submit studies, statistics or other empirical evidence in order to defend the event-related distinction as a narrowly tailored means to serve its substantial aesthetic interest. That relationship is less a matter to be established by empirical evidence than it is the result of a straightforward line of reasoning: "A poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event" or a non-event-related sign. *ANSWER III*, 798 F.Supp.2d at 148. As the Supreme Court has observed, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

The District's aesthetic judgment that an event-related sign for an event that has passed contributes to visual clutter is utterly plausible and not novel. *See Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009) (explaining that because "a value judgment based on the common sense of the people's representatives" is not like a justification based on "economic analysis that [is] susceptible to empirical evidence," such a common-sense judgment need not be supported by an evidentiary showing); *see also Blount v. S.E.C.*, 61 F.3d 938, 944–45 (D.C. Cir. 1995) (holding that there is no need to show evidence of any specific quid pro quo to support the regulation against First Amendment challenge because the dynamic to which regulation responded was "self-evident[ ]"). The justification for the rule's requirement that event-related signs be removed within thirty days of the event is just the sort of common-sense judgment for which empirical data is likely to be both unavailable and unnecessary.

The District has also shown that its lamppost rule leaves open ample alternative channels of communication. The rule does not limit anyone's ability to say in multiple ways and for unlimited duration the very same thing she or he seeks to announce on lamppost posters. People may hand out leaflets or speak to passers-by with the same message, or put that message on bumper stickers. They may circulate or march wearing or holding the very same signs, post or erect the same signs on private property with the owners' permission, and post messages on various electronic and physical billboards, publications, or pages to communicate about their events. Nothing in the challenged rule prevents anyone from using such channels for as long as they like, even after their event ***409** has taken place. The challenged rule merely limits event-related posters from continuing to occupy the limited space on publicly owned lampposts more than thirty days after the relevant event has passed.

There are admitted advantages to postering: It is a relatively inexpensive method for an organization to broadcast its message; it can be targeted to a particular neighborhood; and it requires less time commitment than leafletting or a direct-advocacy campaign. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 812, 104 S.Ct. 2118. But the District's regulation does not foreclose affixing posters to public lampposts as a channel of communication; it merely imposes reasonable limits on the duration that a poster may be left up after the event has passed. Moreover, as the Supreme Court explained in upholding a complete ban on the posting of signs on publicly owned lampposts, even a full ban does

> not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means.

Id. at 812, 104 S.Ct. 2118 (citation and footnote omitted); *see also id.* n.30.

The District's regulation amounts to a reasonable time, place, and manner restriction. Given the nature and

plausibility of the District's justification for requiring event-related signs to be removed within thirty days of the event, there was no need for the District to introduce evidence demonstrating the relationship between that justification and the regulation.

C. MASF's Vagueness Challenge Fails

[18] MASF presents a further facial challenge to the lamppost regulation on the ground that it is unconstitutionally vague. A law may be vague in violation of the Due Process Clause for either of two reasons: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *see F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234 (2012). MASF made both types of arguments to support its vagueness claim, but in granting summary judgment to MASF the district court addressed only the discriminatory-enforcement theory, holding that the definition of "event" in section 108.13 of the regulation delegates impermissible enforcement discretion to the District's inspectors. *ANSWER IV*, 905 F.Supp.2d at 348. The court found it unnecessary to decide whether section 108.13 also fails to give constitutionally adequate notice of what amounts to an event-related sign, *see id.* and on appeal MASF does not press a notice theory of vagueness. We therefore consider only whether section 108.13 delegates impermissibly unbridled enforcement discretion.

[19] First, we address a potential threshold obstacle. The District contends that a facial vagueness challenge is foreclosed by the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). Under *Humanitarian Law Project*, a party whose own expressive activity is clearly proscribed cannot challenge a law's vagueness as it might apply to facts not before the court. *Id.* at 20. *Humanitarian Law Project* ***410** addressed "only whether the statute 'provide[s] a person of ordinary intelligence fair notice of what is prohibited,' " 561 U.S. at 20, 130 S.Ct. 2705 (quoting *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)), observing that "Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government." *Id.* We are aware of no decision that has applied *Humanitarian Law Project* to bar a facial challenge like MASF's that a law is so vague as to subject the challenger itself to standardless enforcement discretion. *See Fox*, 132 S.Ct. at 2317–18 (assuming facial vagueness challenges remain available when based on an enforcement-discretion theory).

[20] Indeed, it is not apparent how the *Humanitarian Law Project* rule—barring a person to whom a legal provision clearly applies from challenging its facial failure to give sufficient notice to others, *see* 561 U.S. at 20, 130 S.Ct. 2705—could apply to a claim that a law is so vague as to fail to guide the government's enforcement discretion. At least in a pre-enforcement posture, such a claim is by its nature facial. "Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Therefore, "only a facial challenge can effectively test the statute." *City of Lakewood*, 486 U.S. at 758, 108 S.Ct. 2138; *see also Morales*, 527 U.S. at 52, 119 S.Ct. 1849 (holding that vagueness that "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests" is subject to facial challenge).

Whereas *Humanitarian Law Project* determined that the law's applicability to the particular plaintiff was clear, a court faced with an arbitrary-enforcement theory has no way to discern in advance whether the exercise of unbridled enforcement discretion will spare the plaintiff's constitutionally protected expression from prosecution. *Cf., e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (describing as "irrelevant" the uncodified criteria actually applied to the challenger's case by officials allegedly imbued with undue enforcement discretion). And once enforcement discretion has been exercised to punish constitutionally protected expression and the speaker defends on that ground, the vagueness defect escapes review. We thus proceed on the assumption that a facial, pre-enforcement vagueness challenge of the kind MASF presents here is consistent with *Humanitarian Law Project*. *Cf. Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997,

138 L.Ed.2d 391 1997 (noting that lower courts should not conclude that cases overrule precedent by implication).

On the merits of MASF's claim that section 108.13 is void for vagueness, we begin with the "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A statute authorizes an impermissible degree of enforcement discretion—and is therefore void for vagueness—where it fails to "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " ***411** *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (quoting *Grayned*, 408 U.S. at 108, 92 S.Ct. 2294). "When speech is involved," the Supreme Court has cautioned, "rigorous adherence" to the requirement of a reasonable degree of clarity "is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 132 S.Ct. at 2317.

Section 108.13 sets reasonably clear guidelines for law enforcement officers to determine whether a sign is event related, and therefore is not unconstitutionally vague. The regulation defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector." D.C. MUN. REGS. tit. 24, § 108.13. Section 108.13 does not give enforcement officials so little guidance as to permit them to "act in an arbitrary or discriminatory way." *Fox*, 132 S.Ct. at 2317. In any system that relies on the administration of laws of general applicability in many different circumstances, some degree of ambiguity is all but inevitable. And, indeed, there is some evidence in this record that section 108.13 is susceptible of inconsistent application. "What renders a statute vague," however, "is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306, 128 S.Ct. 1830. Here, the fact targeted by the "event-related" limitation is clear: To relate to an "event," a sign must relate to "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." That is not a vague standard.

[21] Those laws that courts have held to be constitutionally infirm for vagueness gave significantly less guidance to enforcement agents than does 108.13's definition of an event-related sign. In *Kolender*, for example, a statute requiring a suspect to present "credible and reliable" identification gave police impermissibly open-ended enforcement discretion. *Kolender v. Lawson*, 461 U.S. 352, 358-60, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). That statute "contain[ed] no standard for determining" how to meet the highly subjective "credible and reliable" requirement. *Id.* at 358, 103 S.Ct. 1855. In *Niemotko v. Maryland*, too, no standard or guideline whatsoever cabined the Park Commissioner's and the City Council's discretion whether to grant a permit to hold a demonstration in the city park; officers were empowered to rely on nothing more than their own inclinations regarding each permit request. 340 U.S. 268, 271–72, 71 S.Ct. 325, 95 L.Ed. 267 (1951); *see also, e.g.*, *Armstrong v. D.C. Pub. Library*, 154 F.Supp.2d 67, 81-82 (D.D.C. 2001) (striking for vagueness a regulation prohibiting "objectionable" appearance in a library). The District of Columbia's criteria for defining an "event-related" lamppost sign, in contrast, adequately specify that the post-event time limitation applies to signs announcing an event or series of events of the type that occur at a specified time and place.

MASF sees impermissible leeway in section 108.13's explicit recognition of the enforcement officer's authority to refer to "all circumstances" to determine whether a poster is event related. *See* D.C. MUN. REGS. tit. 24, § 108.13. In particular, section 108.13 directs enforcement officers to consider not only the poster itself, but to use their common sense and background knowledge to determine whether, in context, a poster in fact relates to "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." Thus, the event-relatedness of even a terse sign announcing a renowned local athletic event, a seasonal charity event, or ***412** a candidate for election could be determined to be event related in part based on circumstances apart from the poster itself. Nothing about such an inquiry renders the law vague. To the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply. *See* D.C. MUN. REGS. tit. 24, § 108.13. So long as their inferences are reasonable, however, the rule's open-endedness about the evidence that may be used to meet that standard does not convert its otherwise clear limitation into an impermissibly vague one.

MASF highlights deposition testimony from the District's inspectors that, it argues, shows the unconstrained discretion section 108.13 affords the police inspectors. Inspectors confirmed that they had some leeway to assess event-relatedness, *see ANSWER IV*, 905 F.Supp.2d at 347 & n.10, and were not unanimous as to whether a 2012 poster stating simply "GRAHAM!" pertained to the reelection campaign of City Council member Jim Graham and so was event-related. MASF also highlights testimony of Inspectors who had difficulty deciding the time limitation applicable to posters listing multiple events with different dates. But the most that evidence shows is that section 108.13 might be misapplied in certain cases. It does not show that section 108.13 lacks criteria to cabin enforcement discretion.

[22] As the Supreme Court explained in the analogous context of a facial First Amendment challenge to a licensing scheme, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion [unlawfully], but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cty.*, 505 U.S. at 133 n.10, 112 S.Ct. 2395. The District's regulation guards against the unlawful exercise of discretion by delimiting what qualifies as an event: "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." D.C. MUN. REGS. tit. 24, § 108.13. Ostensible vagueness about "whether the incriminating fact ... has been proved" is not vagueness at all. *Williams*, 553 U.S. at 306, 128 S.Ct. 1830. We accordingly hold that section 108.13 is not void for vagueness.

D. The District Court Correctly Dismissed the Organizations' Other Claims

We next consider the organizations' cross-appeal. They appeal from the district court's 2011 dismissal of ANSWER's claim that the District retaliated against it in violation of the First Amendment by citing as violations posters that were lawful under the regulation. *ANSWER III*, 798 F.Supp.2d at 153–55. They also appeal the court's dismissal of MASF's claim that the District's regulation imposes a system of "strict liability" in violation of the First Amendment. *Id.* at 152–53. We review *de novo* the district court's decision under Rule 12(b)(6) to dismiss those claims, *see English v. District of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013), and we affirm.

[23] **1. *ANSWER Fails to State a § 1983 Claim.*** In its complaint, ANSWER alleged that the District's issuance of ninety-nine notices of violation against it had been "in bad faith and for the purpose of harassment." Supplemental Complaint ¶¶ 42-43, *ANSWER III*, 798 F.Supp.2d 134. The district court found that ANSWER had plausibly pled a constitutional violation, but dismissed the complaint for failure to allege that a custom or policy of the District had caused that violation. *ANSWER III*, 798 F.Supp.2d at 154–55.

***413** **[24]** **[25]** **[26]** **[27]** **[28]** Section 1983 "give[s] a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Both states and cities can be sued under section 1983, *Monell*, 436 U.S. at 663, 690, 98 S.Ct. 2018, and for that purpose the District of Columbia is treated as a city, *Jones v. Horne*, 634 F.3d 588, 600 (D.C. Cir. 2011). The District may be liable under section 1983, but only to the extent permitted under *Monell—i.e.*, only based on action that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or for harm "visited pursuant to governmental 'custom' even though such custom has not received formal approval." *Monell*, 436 U.S. at 690–91, 98 S.Ct. 2018. Under *Monell*, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691, 98 S.Ct. 2018. The "touchstone of" a section 1983 claim against a municipality is that "official policy is responsible for a deprivation of rights protected by the Constitution." *Id.* at 690, 98 S.Ct. 2018. That is, the alleged policy or custom must have "caused the violation." *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004).

ANSWER has not alleged that a custom or policy lay behind the notices of violation the District issued to it. On appeal, ANSWER argues that "the 99 enforcement actions were sufficiently pervasive and numerous to constitute a custom." Organizations' Br. 67. A section 1983 plaintiff may establish causation in several ways, but ANSWER has not contended that any District custom

or policy was "the moving force of the constitutional violation." *Jones*, 634 F.3d at 601. Nor has ANSWER sought to show causation based on a failure to train or "deliberate indifference." *See Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). It makes no case that a policymaker knowingly ignored the alleged pattern of retaliatory enforcement. *See Jones*, 634 F.3d at 601. ANSWER does not even identify by name or title any policy maker who knew of the enforcement actions the District took against it. The closest ANSWER comes to claiming a role for a policymaking official is its discussion of the District's Department of Public Works' General Counsel's voluntary dismissal of the enforcement actions against ANSWER. But at most that shows a policymaker's involvement in curbing allegedly unconstitutional enforcement.

The district court was correct, then, to dismiss ANSWER's claims because the organization "never coherently allege[d] the existence of a broader municipal custom or practice that explains the issuance of those tickets" citing ANSWER for violating the sign posting rule. *ANSWER III*, 798 F.Supp.2d at 154.

[29] **[30]** ***2. The Regulation Does Not Impose "Strict Liability."*** MASF contends that the District's regulation imposes a "strict liability" regime in violation of the First Amendment. Strict liability in criminal statutes burdening speech is "generally disfavored." *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008). But we need not decide whether the imposition of civil fines on a strict-liability basis would be constitutional here because, as we construe the regulation, it does not impose strict liability.

Section 108.1 says, "No person shall affix a sign, advertisement, or poster to any public lamppost or appurtenances of a ***414** lamppost, except as provided in accordance with this section." D.C. MUN. REGS. tit. 24, § 108.1. MASF asserts in its complaint that the District "imposes strict liability for violation of these regulations upon persons or groups whose name or address is identified in a poster even if the person/group did not produce the poster." First Am. Compl. ¶ 25, *ANSWER I*, 570 F.Supp.2d 72; *see id.* ¶¶ 25-32. By "strict liability," MASF seems to mean something closer to "vicarious liability"—that is, holding one party liable for the actions of another. *See generally* Liability, Black's Law Dictionary (10th ed. 2014).

Section 108.1 by its terms provides that no person may "affix" an offending sign to a lamppost. On its face, therefore, section 108.1 does not impose liability on anyone other than the person who "affixes" the sign to the lamppost. The District in defending the rule assures us that it makes "a person liable only if that person is responsible for the unlawfully posted sign because, for example, he or she directed or encouraged the posting or his or her employee or agent posted it." Gov't Reply Br. at 39.

MASF invokes *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), in which the Supreme Court held that a municipal ordinance imposing liability on the distributors of pamphlets for the litter left by the recipients of the pamphlets was unnecessarily burdensome on the speech rights of the pamphleteers. *Id.* at 162, 60 S.Ct. 146. The *Schneider* Court held that imposing liability on the distributor of the pamphlets could not be justified by the cities' interest in preventing litter because the cities had an obvious alternative method to prevent litter: They could impose liability on "those who actually throw papers on the streets." *Id.*

But MASF gives us no reason to think that an organization would be held liable under section 108.1 if it did not "affix" a sign, but rather had its sign affixed by someone else acting without its authority who then failed timely to remove it. Nor has MASF raised a material question of fact as to whether the District has enforced the regulation to impose the type of strict or vicarious liability of which the *Schneider* Court disapproved. In light of the District of Columbia's binding assurances and the lack of record evidence to the contrary, we do not read section 108.1 to impose strict or vicarious liability, and so affirm the district court's decision to dismiss MASF's strict-liability claim.

E. Discovery Sanctions are Vacated

[31] **[32]** Finally, we address the discovery sanctions the district court imposed against the District of Columbia under Federal Rule of Civil Procedure 16(f). We review the district court's award of sanctions for an abuse of discretion, *see Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 689 (D.C. Cir. 1987), and vacate it.

[33] Rule 16(f)(2) gives courts a tool to enforce compliance with its scheduling orders. That rule directs that a court, "[i]nstead of or in addition to any other

sanction, ... must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2). But a court may award sanctions under Rule 16(f) only where a party violates an unambiguous order. *See Ashlodge, Ltd. v. Hauser*, 163 F.3d 681, 684 (2d Cir. 1998), *overruled on other grounds, as stated in New Pac. Overseas Grp. (U.S.A.) Inc. v. Excal Int'l Dev. Corp.*, 252 F.3d 667, 669 (2d Cir. 2001) ("To sustain sanctions under Rule 16(f), an order must be unambiguous ***415** ...."); *cf. United States v. Day*, 524 F.3d 1361, 1372 (D.C. Cir. 2008). The order that the District allegedly violated here was ambiguous.

The court's scheduling order authorized MASF to take discovery but was silent as to the District. Before the court issued the order, the District and MASF had submitted a joint status report. The joint report explained that the District believed discovery was "unnecessary here, as the remaining facial vagueness challenge presents a purely legal question." J.A. at 97. MASF, however, proposed that the court allow it to propound ten interrogatories, ten requests for production, fifteen requests for admission, and allow it to take six depositions. In response to MASF's suggestion, the District suggested the court allow MASF ten interrogatories, five requests for production, and one deposition. Neither party addressed the scope of District's anticipated discovery in the event that the court imposed discovery constraints on MASF.

MASF and the District each submitted a proposed scheduling order: The District's order contemplated that "each party may not propound more than ten (10) interrogatories (including sub-parts) and five (5) requests for production of documents, and may not take more than one (1) deposition." J.A. at 103. That is, the District's proposed order tracked the limited discovery it had suggested in the Joint Status Report, contemplating that the limits would apply equally to both parties. MASF's proposed order suggested less restrictive limits on its own discovery, and did not specify whether or to what extent the District's discovery would be restricted. With some stylistic modifications, the court adopted MASF's proposed order, stating that "plaintiff is authorized to propound not more than" the specified numbers of interrogatories, requests for production, requests for admission, and deposition notices; the order made no mention of any discovery restriction on the District of Columbia.

The District sent eleven interrogatories and three requests for production to MASF and ANSWER. After plaintiffs' counsel objected, the District withdrew six of its interrogatories but insisted on its right to conduct discovery. MASF then moved for a protective order and sanctions. The court granted the motion.

We acknowledge the district courts' prerogative to sanction parties for noncompliance with their orders, but we must vacate the sanctions here because the underlying order was ambiguous as to whether it limited the District's discovery rights. It expressly lowered the default caps in the Federal Rules of Civil Procedure only as to the plaintiffs. The order referred more generally to the earliest date on which "discovery requests may be served" and when "the parties" should file their dispositive motions. J.A. at 105. In context, the order could reasonably be read (a) to leave the District's discovery rights as specified in the Federal Rules, (b) to implicitly subject it to the same lower caps the court applied to plaintiffs, or (c) to permit limited discovery to the plaintiffs while by negative implication barring any discovery whatsoever by the District.

In the context of the dueling proposed orders—one equally limiting both parties and the other, which the court accepted, speaking only to plaintiffs—the court's order could reasonably be read to constrain only the plaintiffs. Such one-sided treatment seems sensible enough given that the District, which as defendant did not bear the burden of proof, was unlikely to need extensive discovery in any event. That same reasoning might, alternatively, support reading the order as setting limits equally applicable to both parties, given ***416** that the District had urged the court to proceed without any discovery and presumably was willing to work within any constraints it could persuade the court to impose. Alternatively, framed as it was affirmatively to "authorize" the plaintiffs, and only plaintiffs, to take the specified discovery, and issuing against the backdrop of the District's initial argument against any discovery for either party, the order might be read—as the court evidently intended—to preclude the District from taking any discovery.

There are, however, strong background principles that cut against the district court's intended reading. Under Rule 26, a party may take discovery "regarding any

nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Critically, a party has that prerogative without the order of a court. A court order may "otherwise limit[ ]" a party's discovery right, but a court's affirmative permission is not a prerequisite to the taking of discovery. *Id.* Given the general discovery authorizations in the Federal Rules of Civil Procedure, which are not contingent on court orders granting permission, the district court's scheduling order was ambiguous. Sanctions for the District's service of discovery requests were therefore unwarranted, and are vacated.

* * *

For the foregoing reasons, we reverse the district court's grant of summary judgment to MASF on its facial First Amendment and due process challenges to the District of Columbia's regulation and remand for the district court to enter summary judgment for the District. We affirm the court's decision to dismiss ANSWER's claim for damages and MASF's claim alleging an impermissible strict liability regime. Finally, we vacate the court's award of sanctions.

So ordered.

All Citations

846 F.3d 391, 96 Fed.R.Serv.3d 749

321 F.Supp.3d 526
United States District Court, E.D. Pennsylvania.

ADAMS OUTDOOR ADVERTISING LIMITED PARTNERSHIP, Plaintiff,
v.
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION; [1] and Leslie S. Richards, Defendants.

No. 5:17–cv–01253
|
Filed 06/05/2018

Synopsis

Background: Applicant, which sought permit to construct billboard near highway interchange, brought action against the Pennsylvania Department of Transportation and its Secretary, challenging facial and applied constitutionality of Pennsylvania Outdoor Advertising Control Act's prohibition against structures within 500 feet of interchanges or safety rest areas, asserting violations of the First and Fourteenth Amendment rights of free speech and freedom of expression, as well as violations of due process and equal protection. The United States District Court for the Eastern District of Pennsylvania, Joseph F. Leeson, Jr., J., 307 F.Supp.3d 380, granted Secretary's motion to dismiss with respect to applicant's vagueness challenge to the Act. Applicant moved for reconsideration of the dismissal of its vagueness challenge, and parties filed cross-motions for summary judgment.

Holdings: The District Court, Leeson, Jr., J., held that:

[1] exemptions for "official" and "on premises" signs did not apply to Act's interchange prohibition provision;

[2] Act's interchange prohibition provision did not violate the First Amendment;

[3] applicant lacked Article III standing to challenge constitutionality of Act's exemptions;

[4] Act's permit requirement was unconstitutional because it failed to specify time limits for granting or denying permit applications;

[5] Act's permit requirement was severable from remaining provisions of Act;

[6] Secretary would be enjoined from enforcing permit requirement until Department established internal time limits for deciding permit applications; and

[7] applicant's as-applied challenge to Act based on Department's delay in acting on his application was moot.

Ordered accordingly.

West Headnotes (26)

[1] Federal Civil Procedure
Error by court

Federal Civil Procedure
Further evidence or argument

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.

Cases that cite this headnote

[2] Federal Civil Procedure
Grounds and Factors

A judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Cases that cite this headnote

[3] Federal Civil Procedure
Further evidence or argument

It is improper on a motion for reconsideration to ask the court to rethink what it had already thought through, rightly or wrongly.

Cases that cite this headnote

[4] Federal Civil Procedure

Extraordinary remedy;motion not favored

Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.

Cases that cite this headnote

[5] Federal Courts

Constitutional rights, civil rights, and discrimination in general

Federal Courts

Zoning and land use

In determining that provision of Pennsylvania's Outdoor Advertising Control Act prohibiting the erection of structures within 500 feet of highway interchanges or safety rest areas was not unconstitutionally vague, district court's reliance on Pennsylvania Commonwealth Court's opinion in *George Wash. Motor Lodge Co. v. Commonwealth, Dep't of Transp.*, 118 Pa.Cmwlth. 552, was warranted, even if Pennsylvania Department of Transportation determined in proposed report that the case was not controlling; court was not bound by Department's interpretation of case law, and, in any event, Department no longer followed the reasoning in the report. 36 Pa. Stat. Ann. § 2718.105(c)(2)(i).

Cases that cite this headnote

[6] Constitutional Law

Statutes in general

The mere disagreement with an agency's interpretation of a statute, or its changed interpretations over the years, does not state a constitutional vagueness claim.

Cases that cite this headnote

[7] Federal Civil Procedure

Grounds and Objections

A plaintiff is not entitled to conduct discovery where a complaint is deficient under the rule governing general pleading standards. Fed. R. Civ. P. 8.

Cases that cite this headnote

[8] Constitutional Law

Content-neutral Regulations or Restrictions

Constitutional Law

Content-based Regulations or Restrictions

In determining whether a law violates the First Amendment, the first step is to determine whether the statute is content-based or content-neutral. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Highways

Billboards and highway beautification in general

District court would defer to Pennsylvania Department of Transportation's determination that exemptions in Pennsylvania's Outdoor Advertising Control Act concerning "official" and "on premises" signs did not apply to provision of Act prohibiting the erection of structures within 500 feet of interchanges or safety rest areas; Department's determination was consistent with the purposes of the Act, as an on-premises sign could be equally distracting to a motorist as an off-premise sign, especially at an interchange. 36 Pa. Stat. Ann. § 2718.105(c)(2)(iv).

Cases that cite this headnote

[10] Highways

Billboards and highway beautification in general

Exemptions listed in provision of Pennsylvania's Outdoor Advertising Control Act, which prohibited outdoor advertising devices from being erected or maintained within 660 feet of the nearest edge of the right-of-way if any part of the advertising or informative contents was visible from the main-traveled way of an interstate or primary highway, did not apply to separate provision of Act prohibiting the erection of structures within 500 feet of highway interchanges or safety rest areas; provision containing exemptions was wholly unrelated to the interchange prohibition provision. 36 Pa. Stat. Ann. §§ 2718.104, 2718.105(c)(2)(i).

Cases that cite this headnote

[11] Constitutional Law

Advertising

Highways

Billboards and highway beautification in general

Provision of Pennsylvania's Outdoor Advertising Control Act prohibiting the erection of structures within 500 feet of highway interchanges or safety rest areas was a content-neutral restriction of speech under the First Amendment; provision applied to all structures regardless of the speaker or of the views expressed, there was no evidence that Pennsylvania Department of Transportation or its Secretary attempted to express certain viewpoints by enforcing the provision uneven-handedly, and legislature enacted the Act due to public safety concerns, not to regulate certain types of speech. U.S. Const. Amend. 1; 36 Pa. Stat. Ann. § 2718.105(c)(2)(i).

Cases that cite this headnote

[12] Constitutional Law

Narrow tailoring requirement; relationship to governmental interest

Constitutional Law

Existence of other channels of expression

If a statute restricting speech is "content-neutral," meaning that it is justified without reference to the content of the regulated speech, the statute does not violate the First Amendment if the State shows that the regulation is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the information. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] Constitutional Law

Bans or moratoria

Highways

Billboards and highway beautification in general

Provision of Pennsylvania's Outdoor Advertising Control Act, which prohibited the erection of structures within 500 feet of highway interchanges or safety rest areas, was narrowly tailored to serve a significant governmental interest and left open ample alternative channels for communication of information and, thus, did not violate the First Amendment; Pennsylvania's interest in protecting safety of motorists by reducing distractions at interchanges was significant, applying restriction to both sides of divided highway was still narrowly tailored because billboard on opposite side of highway could be equally distracting as one on same side, and provision allowed structures farther away from interchanges and rest areas and other types of media. U.S. Const. Amend. 1; 36 Pa. Stat. Ann. § 2718.105(c)(2)(i).

Cases that cite this headnote

[14] States

Police power

States may legitimately exercise their police powers to advance esthetic values.

Cases that cite this headnote

[15] Federal Civil Procedure

In general;injury or interest

Federal Civil Procedure

Causation;redressability

The irreducible constitutional minimum of standing consists of three elements: the plaintiff must have (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[16] **Federal Civil Procedure**

In general;injury or interest

The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the elements of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[17] **Constitutional Law**

Zoning and land use

Zoning and Planning

Permits, certificates, and approvals

Applicant, whose application for permit to construct billboard was denied by Pennsylvania Department of Transportation because proposed sign location was within 500 feet of highway interchange, lacked Article III standing to challenge constitutionality of exemptions in Pennsylvania's Outdoor Advertising Control Act; application would have been denied regardless of constitutionality of the exemptions, and even if proposed sign did not violate Act's prohibition on erecting structures near interchanges, the exemptions were inapplicable because applicant dealt exclusively with constructing or selling space on off-premise signs to advertisers, while the exemptions were for on-premises signs and other types of signs that applicant did not deal with. U.S. Const. art. 3, § 2, cl. 1; 36 Pa. Stat. Ann. §§ 2718.104, 2718.105(c)(2)(i), 2718.105(c)(2)(iv).

Cases that cite this headnote

[18] **Constitutional Law**

Advertising

Highways

Billboards and highway beautification in general

Pennsylvania's Outdoor Advertising Control Act, which prohibited the erection of structures within 500 feet of highway interchanges or safety rest areas, was a content-based statute, and thus Act's permit requirement violated the First Amendment by failing to specify a time limit for Pennsylvania Department of Transportation to grant or deny a permit application; Act contained exemptions for official signs and directional signs. U.S. Const. Amend. 1; 36 Pa. Stat. Ann. §§ 2718.104, 2718.105(c)(2)(iv), 2718.107.

Cases that cite this headnote

[19] **Constitutional Law**

Time limits for grant or denial

Under the First Amendment, a content-based permitting statute must include strict time limits leading to a speedy administrative decision. U.S. Const. Amend. 1.

Cases that cite this headnote

[20] **Statutes**

Effect of Partial Invalidity;Severability

Once a court determines that a portion of a statute is unconstitutional, it must determine if the unconstitutional portion is severable before invalidating an entire statute.

Cases that cite this headnote

[21] **Statutes**

Government property, facilities, and funds

Pennsylvania's Outdoor Advertising Control Act's permit requirement, which violated the First Amendment because it failed to specify

a time limit for the grant or denial of a permit application, was severable from the remaining provisions of the Act; penalties set forth in the Act were not de minimis and would encourage parties not to violate the Act, allowing the Act to achieve its purpose. U.S. Const. Amend. 1; 36 Pa. Stat. Ann. §§ 2718.107, 2718.111, 2718.114.

Cases that cite this headnote

[22] Civil Rights

Injunction

Secretary of Pennsylvania Department of Transportation would be enjoined from enforcing Pennsylvania's Outdoor Advertising Control Act's permit requirement, which violated the First Amendment because it failed to specify a time limit for the grant or denial of a permit application, until Department internally provided for strict time limits for deciding permit applications within a specified and reasonable time period. U.S. Const. Amend. 1; 36 Pa. Stat. Ann. §§ 2718.106, 2718.107.

Cases that cite this headnote

[23] Federal Courts

Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

A mootness inquiry asks whether a claimant's standing continues throughout the litigation.

Cases that cite this headnote

[24] Federal Courts

Rights and interests at stake

Federal Courts

Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

A case is “moot” when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

Cases that cite this headnote

[25] Federal Courts

Mootness

Because the court's ability to grant effective relief lies at the heart of the mootness doctrine, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.

Cases that cite this headnote

[26] Civil Rights

Injunction

Declaratory Judgment

Statutes Relating to Particular Subjects

As-applied First Amendment challenge to Pennsylvania's Outdoor Advertising Control Act, which was asserted by applicant for permit to construct billboard based on Pennsylvania Department of Transportation's one-year delay in acting on applicant's application, was moot; Department denied applicant's application after it initiated lawsuit, applicant did not seek damages, injunctive relief would no longer redress applicant's alleged injury, and declaratory relief would amount to no more than an advisory opinion regarding wrongfulness of past conduct. U.S.C.A. Const. Amend. 1; 36 Pa. Stat. Ann. § 2718.107.

Cases that cite this headnote

West Codenotes

Held Unconstitutional

36 Pa. Stat. Ann. § 2718.107

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OPINION

Plaintiff's Motion for Reconsideration, ECF No. 27—Denied

Plaintiff's Motion for Summary Judgment, ECF No. 30—Granted in part, Denied in part

Defendant's Motion for Summary Judgment, ECF No. 31—Granted in part, Denied in part

Joseph F. Leeson, Jr., United States District Judge

I. INTRODUCTION

Plaintiff Adams Outdoor Advertising Limited Partnership ("Adams"), whose Amended Complaint focused on the Interchange Prohibition,[2] challenges the constitutionality of Pennsylvania's Outdoor Advertising Control Act of 1971, 36 P.S. §§ 2718.101–2718.115 (the "Act"). *See also* Pa. Code §§ 445.1–445.9. On February 9, 2018, this Court dismissed Adams's vagueness challenge regarding the 500–feet spacing requirement in the Interchange Prohibition, as well as Adams's substantive due process and equal protection claims.[3] The claims that survived the Motion to Dismiss are Adams's claim that the Interchange Prohibition fails First Amendment scrutiny, the facial challenge to the Act under the First Amendment based on the absence of any time limits for PennDOT to act on applications for sign permits, and Adams's as-applied challenge under the First Amendment based on the one-year delay before PennDOT decided its permit application. Adams has filed a Motion for Reconsideration asking this Court to reconsider its ruling dismissing Adams's vagueness challenge. The parties have also filed cross-motions for summary judgment.

For the reasons set forth below, because Adams does not cite any justification for reconsideration of the decision on the Motion to Dismiss, the Motion for Reconsideration is denied.

Summary judgment is granted in Adams's favor based on the lack of time limits in the Act, and the permit requirement in 36 P.S. § 2718.107 is declared unconstitutional. The need for the existence of time limits in government issuance or denial of permit applications is based on the decision of the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Summary judgment as to Adams's constitutional challenge to the Interchange Prohibition and the exemptions in §§ 2718.104 and § 2718.105(c)(2)(iv) is granted in Richards's favor.

Adams's as-applied challenge to the Act based on the one-year delay before its application was decided is now moot.

II. UNDISPUTED FACTS[4]

The Act was passed in 1971 to "control the erection and maintenance of outdoor ***531** advertising devices in areas adjacent to the interstate and primary systems." 36 P.S. § 2718.102. The purpose of the Act is to "assur[e] the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the national policy to protect the public investment in the interstate and primary systems; to promote the welfare, convenience and recreational value of public travel; and to preserve natural beauty." *Id.* The Secretary of PennDOT is tasked with enforcing the Act and promulgating rules and regulations governing outdoor advertising devices. 36 P.S. §§ 2718.106–2718.107. The current Secretary of PennDOT is Defendant Leslie S. Richards.

Section 105(c)(2) of the Act contains restrictions, which must be "strictly adhere[d] to" by the secretary, on the spacing of outdoor advertising signs. 36 P.S. § 2718.105(a), (c)(2). For sign structures "outside the boundaries of cities of all classes and boroughs, no structure may be erected adjacent to or within five hundred feet of an interchange or safety rest area, measured along the interstate or limited access primary from the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way." 36 P.S. § 2718.105(c)(2)(i) ("Interchange Prohibition"). Since 1997, PennDOT has interpreted and applied the 500–feet spacing restriction in the Interchange Prohibition to both sides of a divided highway, meaning that a structure across from an interchange would be considered nonconforming if within 500 feet of the

interchange. *See* Am. Compl. Ex. B, ECF No. 10 ("1997 Strike–Off Letter"). The Section further provides that "for purposes of determining spacing requirements," "[o]fficial [5] and 'on premise' signs, [6] as defined in section 131(c) of Title 23, United States Code, shall not be counted nor shall measurements be made from them." 36 P.S. § 2718.105(c)(2)(iv).

Adams "is in the business of off-premise signs commonly referred to as billboards, ... [and] of selling the space on those off-premise signs to advertisers." Lois Arciszewski [7] Dep. 20:6–8, 24–21:1, ECF No. 31–3. "An off-premise sign by definition advertises a product or service that's not located on the land parcel where the sign structure is located." *Id.* at 20:15–18. The advertisements could be of commercial or non-commercial messages. *Id.* 21:2–13. At times, Adams constructs billboards but may also hire contractors to construct the billboards. *Id.* at 22:2–10.

***532** On March 8, 2016, Adams submitted to PennDOT an application to construct an off-premise sign on the east bound side of State Route 22 in Hanover Township, Northampton County, Pennsylvania. Arciszewski Dep. Ex. 3. On the west bound side of Route 22, across from the proposed sign location, is an interchange. *Id.* at 58:17–20. The proposed sign would be within 500 feet of the interchange on the opposite side of Route 22. *Id.* at 58:13–20. Adams acknowledges that the location of its proposed sign would be nonconforming with the Act, as interpreted by the 1997 Strike–Off Letter. *Id.* at 61:8–23.

Adams had acknowledged the nonconforming nature of its sign in July 2014, but contacted PennDOT in early 2015, prior to filing the application, to discuss the proposed sign. *Id.* at 62:10–69:4. In March 2015, PennDOT advised Adams that the proposed location would not be permitted. *Id.* at 64:19–65:6. Nevertheless, Adams continued to engage in discussions with PennDOT, which maintained its position that the sign location was nonconforming. *Id.* at 65:3–69:5. Adams threatened to file legal action, sending PennDOT a draft of the complaint later filed in the instant action, but then submitted the permit application to PennDOT on March 8, 2016. *Id.*

On May 9, 2016, PennDOT sent a letter to the Chief of Surveys requesting a survey of the proposed sign location. *See* Stephen R. Kovatis Dec. Ex. B, ECF No. 31–14. On May 15, 2016, PennDOT conducted a site visit, with both PennDOT and Adams representatives present. *Id.* at 55:9–57:8. The next communication between PennDOT and Adams was on February 3, 2017, when Adams sent an e-mail to PennDOT inquiring into the status of the application. *Id.* at 62:3–21. On February 6, 2017, PennDOT requested additional information related to the application, which Adams promptly provided. *Id.* at 75:16–23. The survey was completed on March 6, 2017, and the final drawing was completed on April 24, 2017. The same day, April 24, 2017, PennDOT officially denied the application because the proposed sign would be located within 500 feet of an interchange in violation of the Interchange Prohibition. Arciszewski Dep. at Ex. 4.

Adams timely filed an administrative appeal of the denial. *Id.* at 76:8–24. Shortly thereafter, Adams requested a stay of the administrative proceedings due to the pendency of the instant action, which was initiated on March 20, 2017. Kovatis Dec. Ex. C; ECF No. 1.

III. STANDARDS OF REVIEW

A. Motion for Reconsideration

[1] [2] [3] [4] "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). "Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion ...; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe by Lou–Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). "It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through —rightly or wrongly." *Glendon Energy Co. v. Borough of Glendon*, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993) (internal quotations omitted). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." ***533** *Continental Casualty Co. v. Diversified Indus.*, 884 F.Supp. 937, 943 (E.D. Pa. 1995).

B. Motion for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed fact is "material" if proof of its existence or nonexistence might affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 257, 106 S.Ct. 2505.

The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once such a showing has been made, the non-moving party must go beyond the pleadings with affidavits, depositions, answers to interrogatories or the like in order to demonstrate specific material facts which give rise to a genuine issue. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (stating that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). The party opposing the motion must produce evidence to show the existence of every element essential to its case, which it bears the burden of proving at trial, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The court must consider the evidence in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

IV. ANALYSIS

After a decision on the Motion to Dismiss was entered, Adams filed a Motion for Reconsideration, asking this Court to reconsider its decision dismissing the constitutional vagueness challenge to the Act. Shortly after this Motion was ripe for consideration, the parties completed discovery. They have since filed cross-motions for summary judgment.

In its Motion for Summary Judgment, Adams argues that it is entitled to summary judgment because: (1) the Act is a content-based restriction on speech that violates Adams's First Amendment rights, as applied through the Fourteenth Amendment, because the restrictions contained in the Interchange Prohibition do not further a compelling governmental interest and are not narrowly tailored; (2) the Act, on its face, violates the First Amendment because it does not contain any deadlines for PennDOT to grant or deny sign permits; and (3) the Act, as-applied, violates the First Amendment because PennDOT's delay of over a year to respond to its permit application was unreasonable.

In its Motion for Summary Judgment, Richards contends: (1) Adams lacks standing to pursue a challenge to the on-premise sign exemption and the official sign exemption because Adams engages exclusively in the construction of off-premise signs and has suffered no constitutional injury from either of these exemptions; (2) the exemptions do not change the content-neutrality of the Act, and the Act satisfies constitutional scrutiny; (3) there is no constitutional requirement that the Act, as a content-neutral regulation, provide a time limit for PennDOT to decide permit applications; ***534** and (4) Adams's as-applied challenge is moot because PennDOT has acted on its permit application and this Court cannot issue an injunction ordering PennDOT to take action that it has already taken.

A. There is no basis to reconsider this Court's decision dismissing Adams's vagueness challenge, and the Motion for Reconsideration is denied.

In the Motion for Reconsideration, Adams does not assert that there was an intervening change in the controlling law, nor does it cite to any new evidence that was not available at the time of the opinion on the Motion to Dismiss. Rather, Adams simply disagrees with this Court's decision to dismiss the constitutional vagueness challenge to the Act, and alleges that manifest injustice will result if reconsideration is not granted. *But see Glendon Energy Co.*, 836 F.Supp. at 1122 (holding that it is not proper "on a motion for reconsideration to ask the Court to rethink what [it] had already thought through—rightly or wrongly"). Adams argues that this Court erred in relying on the Pennsylvania Commonwealth Court's opinion in *George Wash. Motor Lodge Co. v. Commonwealth, Dep't of Transp.*, 118 Pa.Cmwlth. 552, 545 A.2d 493, 494 (1988), because PennDOT determined in a Proposed Report in 1989 that the case was not controlling. Adams also disagrees with this Court's reliance on *Kegerreis Outdoor Adver. Co. v. DOT*, 157 A.3d 1033, 1039 (Pa. Commw. Ct. 2017), asserting that the case decided the meaning of the term "interchange" under the Act, not the meaning of "main-traveled way" as it applies to a "divided highway."

[5] After review, this Court concludes that Adams's arguments do not show any need to correct a clear error of law or fact, or that manifest injustice will result if reconsideration is not granted. First, as to this Court's reliance on *George Wash. Motor Lodge Co.*, that case sets forth the current [8] holding of the Pennsylvania Commonwealth Court regarding the constitutionality of PennDOT's interpretation of the Interchange Prohibition as applying to structures on both sides of the highway. [9] *See George Wash. Motor Lodge Co.*, 545 A.2d at 554–59 (holding that PennDOT's interpretation of the Interchange Prohibition as requiring the measurement of the distance between a sign and any intersection to be determined "no matter where the location," whether on the same side or both sides of the main-traveled way, "was not erroneous"). Reliance thereupon was therefore proper. Furthermore, this Court is not bound by PennDOT's interpretation of case law and, in light of the 1997 strike-off letter, not even PennDOT currently follows its reasoning in the 1989 Proposed Report.

Second, Adams's suggestion that this Court's reference to *Kegerreis Outdoor Adver. Co.* was in error is also without support. This Court made one reference in its opinion to this case, as a "see also" citation to support its determination that the Commonwealth Court's construction of the Act in *George Wash. Motor Lodge Co.* removed any constitutional vagueness. *See* Opn. 15. In *Kegerreis Outdoor Adver. Co.*, although the court was deciding whether the ramps at issue were "interchanges," the court reasoned that "the language of the 'Interchange Prohibition' itself provides ***535** guidance wherein it discusses the measurement of 500 feet ...." *Kegerreis Outdoor Adver. Co.*, 157 A.3d at 1040 (citing *George Washington Motor Lodge Co.*, 545 A.2d at 495). The court summarized the holding in *George Wash. Motor Lodge Co.* as: "rejecting applicant's interpretation of the 500 feet requirement in the 'Interchange Prohibition' as only applying to the side of the roadway from where the sign is visible and accepting DOT's interpretation of this requirement as applying to any and all exits or entrances from the sign." *Id.* It is clear from this quotation that even though the court in *Kegerreis Outdoor Adver. Co.* was not addressing whether the Interchange Prohibition applies to ramps on both sides of a divided highway, the opinion in *George Wash. Motor Lodge Co.*, which did decide this specific issue, remains good law, which was the sole purpose of this Court's "see also" reference to *Kegerreis Outdoor Adver. Co.*

[6] **[7]** Finally, Adams repeats its argument that the Act is unconstitutionally vague because PennDOT changed interpretations over the years and PennDOT's current interpretation is "in direct conflict with the plain meaning of the text of the statute." Adams's Mot. Reconsider. ¶ 9, ECF No. 27. Adams does not offer any new evidence to show that PennDOT's enforcement was arbitrary; rather, it merely seeks leave to conduct discovery to satisfy its claim. *Id.* at ¶ 13. But, a plaintiff is not entitled to conduct discovery where a "complaint is deficient under Rule 8." *Ashcroft v. Iqbal*, 556 U.S. 662, 686, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Mann v. Brenner*, 375 F. App'x 232, 239–40 (3d Cir. 2010) ("A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, and therefore may be decided on its face without extensive factual development."). Moreover, this argument is moot because discovery is now complete. It is clear that Adams disagrees with PennDOT's current interpretation of the Act, but asserting an unsupported constitutional claim in the United States District Court is not the proper means to seek redress. *See* 67 Pa. Code § 491.3; *Harbor Adver., Inc. v. DOT*, 6 A.3d 31, 32 (Pa. Commw. Ct. 2010) (considering the petitioner's challenge to PennDOT's regulatory interpretation in a petition for review). Furthermore, the mere disagreement with an agency's interpretation of an Act, or its changed interpretations over the years, does not state a vagueness claim. *See Mannix v. Phillips*, 619 F.3d 187, 200–01 (2d Cir. 2010) (determining that a change in the interpretation of a statute does not mean that the statute is necessarily unconstitutionally vague). For the reasons set forth in the Opinion on the Motion to Dismiss, this Court concluded that Adams failed to show that the Interchange Prohibition either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) authorizes or even encourages arbitrary and discriminatory enforce. *See Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Adams has not offered any reason to reconsider this determination.

The Motion for Reconsideration is denied.

B. Summary judgment is entered in favor of Richards as to Adams's claim that the Interchange Prohibition is an unconstitutional restraint on free speech. [10]

As previously mentioned, Adams's claim that the Interchange Prohibition is unconstitutional ***536** because it restricts free speech in violation of the First Amendment survived the motion to dismiss stage. Although this Court previously concluded that the Interchange Prohibition is not unconstitutionally vague, it has not decided whether the regulation satisfies constitutional scrutiny. *See* Opn. 11–18.

[8] In determining whether a law violates the First Amendment, the first step is to determine whether the statute is content-based or content-neutral. *See Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1053 (3d Cir. 1994). Adams argues that the Act is content-based in light of the allegedly content-based exemptions for official signs and on-premise signs contained in 36 P.S. §§ 2718.104 and 2718.105(c)(2)(iv). Richards asserts, however, that Adams lacks standing to challenge these exemptions and, regardless, that both the exemptions and the Act are content-neutral.

For the reasons discussed below, this Court finds that these exemptions do not apply to the Interchange Prohibition; and the Interchange Prohibition is a content-neutral regulation that passes constitutional scrutiny.

1. The exemptions in 36 P.S. §§ 2718.104 and 2718.105(c)(2)(iv) do not apply to the Interchange Prohibition.

The regulation containing the Interchange Prohibition, 36 P.S. § 2718.105(c)(2)(i), provides in total:

> Along the interstate system and limited access highways on the primary system, no two sign structures shall be spaced less than five hundred feet apart; and *outside the boundaries of cities of all classes and boroughs, no structure may be erected adjacent to or within five hundred feet of an interchange or safety rest area, measured along the interstate or limited access primary from the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.*

36 P.S. § 2718.105(c)(2)(i) (emphasis added). The italicized portion quoted above is the Interchange Prohibition. Subsection (c)(2) of § 2718.105 also contains the following exemption: "[o]fficial and 'on premise' signs, as defined in section 131(c) of Title 23, United States Code, shall not be counted nor shall measurements be made from them for purposes of determining spacing requirements." 36 P.S. § 2718.105(c)(2)(iv).

[9] Based on the limited information before the Court at the motion to dismiss stage, this Court believed that the exemptions for official and on-premise signs in § 2718.105(c)(2)(iv) applied to the Interchange Prohibition. However, at that time, this Court was unaware that PennDOT had interpreted the exemptions in § 2718.105(c)(2)(iv) as pertaining only to the requirement that "no two sign structures shall be spaced less than five hundred feet apart," (the first part of 36 P.S. § 2718.105(c)(2)(i)), and having nothing to do with the Interchange Prohibition. Now, at this stage of the proceedings, the Court has determined that PennDOT's interpretation, which means that there are no exceptions to the Interchange Prohibition, is consistent with the purposes of the Act because an on-premise sign may be as equally distracting to a motorist as an off-premise sign, especially at an interchange. *See Kegerreis*, 157 A.3d at 1038 ("The obvious purpose of [the Interchange P]rohibition is to protect the safety of the traveling public by reducing distractions to the operators of motor vehicles at significant decision points."); *Martin Media v. Dep't of Transp.*, 700 A.2d 563, 567 (Pa. Commw. 1997) (explaining the need to regulate signs "at the exits from high-speed highways where vehicles are in the process of ***537** maneuvering to change directions while reducing speed, so that the distraction such signs would create for the exiting operator would be greatly reduced or diminished, if not eliminated"), *appeal denied*, 555 Pa. 736, 725 A.2d 184 (1998).

Significantly, PennDOT's interpretation that the exemptions in § 2718.105(c)(2)(iv) do not apply to the Interchange Prohibition is not new. In 1988, the Pennsylvania Commonwealth Court determined that PennDOT's interpretation is a viable alternative. *See George Wash. Motor Lodge Co.*, 545 A.2d at 496 (holding that there is "nothing plainly erroneous" about PennDOT's interpretation of § 2718.105(c)(2)(iv) as applying only to the requirement that signs be spaced 500 feet apart from one another, and not to the intersection regulation). Because this Court agrees and therefore gives PennDOT's interpretation controlling weight, *see*

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that where a statute is ambiguous with respect to a specific issue, the court shall give controlling weight to an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute"), this Court concludes that the exemptions in § 2718.105(c)(2)(iv) do not apply to the Interchange Prohibition and do not support Adams's constitutional attack. [11]

[10] The exemptions in 36 P.S. § 2718.104 also do not apply to the Interchange Prohibition. Section 2718.104 lists nine categories of signs that are exempted from the restriction that no outdoor advertising device may be "erected or maintained ... within six hundred sixty feet of the nearest edge of the right-of-way if any part of the advertising or informative contents is visible from the main-traveled way of an interstate or primary highway." The exempted sign categories include official signs, directional signs, and on-premise signs. [12] However, this section of the Act is wholly unrelated to the Interchange Prohibition. The exemptions contained therein therefore do not apply to the Interchange Prohibition and do not support Adams's constitutional attack.

2. The Interchange Prohibition is a valid, content-neutral restriction of speech.

[11] Considering that the exemptions in § 2718.104 and § 2718.105(c)(2)(iv) do not apply to the Interchange Prohibition, [13] this Court finds that the Interchange Prohibition is content-neutral on its face. *See* ***538** *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 2228, 192 L.Ed.2d 236 (2015) (explaining that "the crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face"). The restriction that a sign not be erected within 500 feet of an interchange applies to all structures regardless of the speaker or of the views expressed. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (finding that the sign ordinance "is neutral—indeed it is silent—concerning any speaker's point of view"). There is no evidence that Richards or PennDOT has attempted to suppress certain viewpoints by enforcing the Interchange Prohibition uneven-handedly. [14] *See id.* (finding that there was "not even a hint of bias or censorship" in the city's enactment or enforcement of the ordinance regulating signs and that the ordinance was applied "in an evenhanded manner"). Also, there is no evidence that the Pennsylvania legislature enacted the Act to regulate certain types of speech because of disagreement with what the message conveys. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("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."). Rather, the stated purpose of the Act is to "assur[e] the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the national policy to protect the public investment in the interstate and primary systems; to promote the welfare, convenience and recreational value of public travel; and to preserve natural beauty." 36 P.S. § 2718.102. The purpose of the Interchange Prohibition "is to protect the safety of the traveling public by reducing distractions to the operators of motor vehicles at significant decision points." *Kegerreis*, 157 A.3d at 1038. These justifications have nothing to do with the sign's content, and the Interchange Prohibition therefore "satisfies the requirement that time, place, or manner regulations be content neutral." *See Ward*, 491 U.S. at 791, 109 S.Ct. 2746 ("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.").

[12] If a statute is content-neutral, meaning that it is "justified without reference to the content of the regulated speech," the State need only show that the regulation is "narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." [15] ***539** *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). The Interchange Prohibition satisfies this test.

[13] **[14]** The Commonwealth's interest in protecting the safety of motorists by reducing distractions at interchanges is significant. [16] *See City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (recognizing that billboards "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)

(holding that "billboards are real and substantial hazards to traffic safety"). Further, this Court concludes that restricting the erection of billboards within 500 feet of an interchange or safety rest area is narrowly tailored to advance this interest. *See Taxpayers for Vincent*, 466 U.S. at 808, 104 S.Ct. 2118 (concluding that by prohibiting the posting of signs on public property, "the City did no more than eliminate the exact source of the evil it sought to remedy:" visual clutter). Applying this restriction to both sides of a divided highway is also narrowly tailored because a billboard on the opposite side of a highway may be as equally distracting to a motorist as a billboard on the same side of the highway. *See Metromedia, Inc.*, 453 U.S. at 493, 511, 101 S.Ct. 2882 (holding that "the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics" and the ordinance, which imposed substantial prohibitions on the erection of outdoor advertising displays within the city, was not "broader than is necessary to meet its interests"). [17] Finally, the Interchange Prohibition leaves ample alternative channels for communication, such as sign structures at least 501 feet away from an interchange or safety rest area and other types of media. *See Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mount Laurel*, 706 F.3d 527, 535 (3d Cir. 2013) (concluding that the mere fact that billboards may not be erected on a particular section of the interstate does not mean that adequate alternative means of communication do not exist, such as "on-premise signs, internet advertising, direct mail, radio, newspapers, television, sign advertising, and public transportation advertising").

The Interchange Prohibition is therefore constitutional. [18]

540 C. *Adams does not have standing* [19] *to challenge the constitutionality of the exemptions in 36 P.S. § 2718.104 or in 36 P.S. § 2718.105(c)(2)(iv).

[15] **[16]** The Constitution of the United States limits the jurisdiction of federal courts to live "cases" and "controversies." *See United States v. Salerno*, 481 U.S. 739, 758, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The " 'irreducible constitutional minimum' of standing consists of three elements:" the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). [20] "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.*

[17] Based on the undisputed fact that Adams's permit application was denied because the proposed sign did not satisfy the spacing requirements in the Interchange Prohibition, and having determined that the Interchange Prohibition is constitutional, this Court concludes that Adams lacks standing to challenge the exemptions in 36 P.S. § 2718.104 and in 36 P.S. § 2718.105(c)(2)(iv). *See Get Outdoors II, Ltd. Liab. Co.*, 506 F.3d at 893 (explaining that "because standing is addressed on a claim by claim basis, an unfavorable decision on the merits of one claim may well defeat standing on another claim if it defeats the plaintiff's ability to seek redress"). Adams fails to satisfy any of the standing requirements.

First, because Adams's permit application would be denied regardless of the constitutionality of the exemptions (as his proposed sign location is within 500 feet of an interchange), he did not suffer an injury-in-fact, nor is his injury (the denial of his permit application) traceable to the challenged exemptions. *See Mercer Outdoor Adver. v. City of Hermitage*, 605 F. App'x 130, 132 (3d Cir. 2015) (holding that because billboard permits would not have been issued to the plaintiff sign company even if the challenged section of the zoning ordinance was found to be unconstitutional, the sign company failed to show either injury-in-fact or that its injury was traceable to the actions of the city), *cert. denied* —— U.S. ——, 136 S.Ct. 169, 193 L.Ed.2d 124 (2015). Moreover, even if Adams's proposed sign did not violate the Interchange Prohibition, the exemptions are inapplicable because Adams deals exclusively with constructing and/or selling space on off-premise signs to advertisers, but the exemptions are for on-premise signs and other ***541** types of signs that Adams does not deal with. Adams therefore suffered no injury as a result of these exemptions. *See id.*; *Spokeo, Inc.*, 136 S.Ct. at 1548 (explaining that the injury must be particular, in that "it 'must affect the plaintiff in a personal and individual way,' " and it must be concrete, in that "it must actually exist" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992))).

Next, because Adams's application would be denied even if the exemptions are declared unconstitutional, [21] a favorable ruling would not redress the injury Adams

suffered. *See Mercer Outdoor Adver.*, 605 F. App'x at 132 (finding that the sign company lacked standing to raise a First Amendment challenge to a section of the city's zoning ordinance, under which permits to erect billboards would be denied, because even if this section was held to be unconstitutional, permits still would not be issued because the billboards did not meet the requirements of a different section of the zoning ordinance); *Coastal Outdoor Adver. Grp., L.L.C. v. Twp. of Union*, 402 F. App'x 690, 691–92 (3d Cir. 2010) (holding that the plaintiff "did not demonstrate redressability because unchallenged restrictions, including those on the height and size of the signs, would prohibit their erection even if we were to invalidate the provision banning billboards"); *Nittany Outdoor Adver., LLC v. Coll. Twp.*, 22 F.Supp.3d 392, 404–05 (M.D. Pa. 2014) (finding that the plaintiff lacked standing to attack the statute's ban on off-premises signs because other restrictions in the statute prevented the plaintiff from obtaining a sign permit, rendering the attack on the statute's ban on off-premises signs unredressable (citing *Get Outdoors II, Ltd. Liab. Co. v. City of San Diego*, 506 F.3d 886, 894 (9th Cir. 2007) (finding no need to address the plaintiff's claim regarding the off-site ban because the statute's size and height restrictions are constitutional and validly prohibit the construction of the proposed billboards)).

Adams therefore lacks standing to challenge the exemptions. [22]

D. Summary judgment is entered in favor of Adams as to its claim that the permit section of the Act is facially unconstitutional based on the lack of time limits for granting or denying permit applications, and the permit requirement is declared unconstitutional.

Adams also raises a facial attack to the Act under the First Amendment based on the absence of any deadlines in the permit requirement to grant or deny applications.

***542** The need for time limits in granting or denial of permit applications is based on the decision of the United States Supreme Court in *Freedman*. The Court held that to avoid constitutional infirmity, a process requiring the submission of a film to a censor must include procedural safeguards to obviate the danger of censorship. *See Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Three procedural safeguards were identified: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227–28, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (discussing *Freedman*). In *FW/PBS*, the Court held that the "core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *Id.* at 228, 110 S.Ct. 596. The Court explained that the need for the licensor to "make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained" is "essential." *Id.* Subsequently, in *Thomas*, the Court clarified that the procedural requirements set forth in *Freedman* do not apply to content-neutral permit requirements that regulate speech in a public forum. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (rejecting the petitioners' contention that the municipal ordinance must specify a deadline for judicial review of a challenge to a permit denial because the permit-scheme was content-neutral). *See also Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 435 (4th Cir. 2007) (concluding that the plaintiff's facial challenge to the sign regulation failed because the regulation was content neutral and "did not need time limitations on decisionmaking to be constitutional").

1. The Act is content based, which requires it to include strict time limits for granting or denying permit applications, and due to the absence of time limits, the permit requirement is unconstitutional.

It is undisputed that the permit requirement in the Act does not contain any deadlines for applications to be acted upon. *See* 36 P.S. § 2718.107. [23] Additionally, Richards has not cited to any rules or regulations enacted by PennDOT that impose time restrictions. [24] It is therefore necessary to determine whether the Act, and not merely the Interchange Prohibition, is content neutral or content based. [25] This Court must decide whether the exemptions for official signs and on-premise signs contained ***543** in 36 P.S. §§ 2718.104 [26] and 2718.105(c)(2)(iv) render the Act content-based.

In *Rappa*,[27] the Third Circuit Court of Appeals considered the constitutionality of a state statute regulating outdoor advertising, which included "a series of often overlapping exceptions," including exceptions for directional signs, official signs, and on-premise signs. *Rappa*, 18 F.3d at 1051. The court discussed the two tests, previously described herein, used to evaluate a statute regulating speech, based on whether the statute is content-based or content-neutral. *Id.* at 1053–54. The court also adopted an intermediate level of scrutiny test that applies when "there is a significant relationship between the content of particular speech and a specific location," and allows the State to exempt such speech from a general ban so long as the exemption was not intended to censor certain viewpoints. *See Rappa*, 18 F.3d at 1065 (explaining and adopting the test proposed by the concurrence in *Metromedia, Inc.*, 453 U.S. 490, 101 S.Ct. 2882).[28] In adopting this test, the court explained that "[s]ome signs are more important than others not because of a determination that they are generally more important than other signs, but because they are more related to the particular location than are other signs." *See Rappa*, 18 F.3d at 1054. The court applied intermediate scrutiny to the exceptions for directional signs and official signs, and held that the exception for on-premise signs "is not a content-based exception at all." *See id.* at 1066–67.[29]

[18] As previously explained, "the crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *See Reed*, 135 S.Ct. at 2228. A court must make this determination "before turning to the law's justification or purpose." *Id.* In conducting this first step, *Rappa* held that both official signs and directional signs are content-based on their face. *See Rappa*, 18 F.3d at 1054 (stating that the statute "indisputably distinguishes between, and allows the posting of certain signs, (for example, 'for sale' signs and directional signs,) based on the subject matter the signs convey" and "[u]nder a literal understanding of 'content based' that fact makes the statute content-based"). Accordingly, because 36 P.S. § 2718.104 and 36 P.S. § 2718.105(c)(2)(iv) include exemptions for official signs and/or directional signs, the Act is content based.

[19] As a content-based statute, the Act must include "strict time limits leading ***544** to a speedy administrative decision." *See City of Littleton v. Z. J. Gifts D–4, L.L.C.*, 541 U.S. 774, 779, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004). The Act undisputedly does not. Therefore, the Act's permit requirement in § 2718.107 is unconstitutional for failing to specify a time limit on PennDOT to grant or deny a permit application. *See Nittany Outdoor Adver., LLC*, 22 F.Supp.3d at 416 (holding that the Township's sign ordinance was "unconstitutional for failing to specify a limitation on the time within which the Township will grant or deny a sign permit application").

2. The permit requirement in 36 P.S. § 2718.107 is severed from the Act; however, this will not prevent enforcement of all of the remaining provisions of the Act.

[20] Once a court determines that a portion of a statute is unconstitutional, it must determine if the unconstitutional portion is severable before invalidating an entire statute. *See Regan*, 468 U.S. at 652–53, 104 S.Ct. 3262 (holding that the "presumption is in favor of severability"); 1 Pa. C.S. § 1925 ("The provisions of every statute shall be severable."). The Act at issue here includes a severability provision. Section 2718.114 states: "[t]he provisions of this act shall be severable. If any provision of this act is found by a court of record to be unconstitutional and void, the remaining provisions of the act shall, nevertheless, remain valid ...." 36 P.S. § 2718.114.

[21] Severability "is about paring away unconstitutional parts of statutes, not rewriting them;" therefore, this Court must invalidate the entire permit requirement in § 2718.107. *See Nittany Outdoor Adver., LLC*, 22 F.Supp.3d at 417. In deciding that the permit requirement is severable from the remainder of the Act, this Court considers that the restrictions and other regulations may continue to be enforced. *See Nittany Outdoor Adver., LLC v. Coll. Twp.*, No. 4:12-cv-00672, 2014 WL 12740630 at *4, 2014 U.S. Dist. LEXIS 99300 at *15 (M.D. Pa. July 22, 2014) (finding that "the major work of laws is achieved by their in terrorem effect, not actual enforcement[, which] supports the Court's original conclusion: '[T]he Ordinance's permit scheme and after-the-fact enforcement regime are separable, and ... there is no reason to think the Township, forced to abandon its permit requirement, would have written its Ordinance to abandon sign regulation entirely.' " (quoting *Nittany Outdoor Adver., LLC*, 22 F.Supp.3d at 418)).

The penalties set forth in the Act are not de minimis and will encourage parties not to violate the Act,[30] allowing the Act to achieve its purpose and supporting severability.

3. Richards is enjoined from enforcing the permit requirement until it provides for internal time limits on permitting decisions.

[22] Although this Court has found that the permit requirement in § 2718.107 is unconstitutional because it does not provide for strict time limits, this does not mean that the permit requirement cannot be potentially reinstated. Section 2718.106 of the Act provides:

> The secretary is authorized to promulgate rules and regulations governing ***545** outdoor advertising devices and such rules and regulations shall contain the criteria set forth under section 5 of this act and shall contain the permit provisions set forth under section 7 of this act. Regulations relating to outdoor advertising devices permitted under clauses (1) through (3) of section 4 shall be no more restrictive than the national standards pertaining to such outdoor advertising devices.

36 P.S. § 2718.106. *See also Chevron, U.S.A., Inc.*, 467 U.S. at 843–44, 104 S.Ct. 2778 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Accordingly, if PennDOT internally provides for "strict time limits" for deciding permit applications "within a specified and reasonable time period,"[31] the permit regulation may then be enforced. *See Fla. Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F.Supp.2d 1358, 1369–70 (M.D. Fla. 2001) (enjoining the City from enforcing the permit requirement in a local ordinance "until such time as the City provides for internal time limits on permitting decisions in a manner not inconsistent with this Order," which determined that the ordinance violated the First Amendment for not including time limits as required by Freedman).

E. Adams's as-applied challenge to the Act based on the one-year delay before the permit application was decided is moot.

[23] **[24]** **[25]** Like standing, mootness requires that the issues presented are "live," and that the parties have an interest in the litigation. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395–96, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). "A mootness inquiry asks whether a claimant's standing continues throughout the litigation." *Policastro v. Kontogiannis*, 262 F. App'x 429, 433 (3d Cir. 2008). A "case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Because the "court's ability to grant effective relief lies at the heart of the mootness doctrine, ... if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot." *Policastro*, 262 F. App'x at 433 (quoting *Donovan ex rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 216 (3d Cir. 2003)).

[26] It is undisputed that PennDOT denied Adams's permit application after the initiation of this suit. Importantly, Adams does not seek damages; rather, its claim is limited to injunctive and declaratory relief. But, injunctive relief is not available as it would no longer redress Adams's alleged injury, and "declaratory relief would amount to no more than an advisory opinion regarding the 'wrongfulness' of past conduct." *See Policastro*, 262 F. App'x at 433–34 (explaining that a federal court does not have the power to render advisory opinions). Accordingly, Adams's as-applied challenge to the Act based on the one-year delay before PennDOT acted on its application is denied as moot.

V. CONCLUSION

Adams does not assert that there was an intervening change in the controlling law, ***546** nor does it cite to any new evidence that was not available at the time of the Opinion deciding the Motion to Dismiss, nor does Adams show there is any need to correct a clear error of law or fact or to prevent manifest injustice. Rather, Adams merely disagrees with this Court's prior decision dismissing his vagueness challenge, which is not a basis for reconsideration. The Motion for Reconsideration is therefore denied.

The Interchange Prohibition, which applies to all structures, is a content-neutral regulation of speech that is narrowly tailored to the Commonwealth's interests in protecting motorists and promoting traffic safety, and leaves open alternative channels of communication. Because Adams's permit application was denied because the proposed sign did not conform to the Interchange Prohibition, Adams suffered no injury as a result of exemptions in 36 P.S. § 2718.104 and § 2718.105(c)(2)(iv), nor would the injury he suffered from the denial of his application be redressed by a favorable decision. He therefore lacks standing to challenge the constitutionality of the exemptions.

The Act, as a whole, is a content-based statute and must include strict time limits for approving or denying permit applications. Because the permit requirement does not include such time limits, it is unconstitutional and is severed from the remainder of the Act. Adams's as-applied challenge to the Act based on the one-year delay before its application was decided is moot because injunctive and declaratory relief are no longer available, and Adams does not have a damages claim.

A separate order follows.

All Citations

321 F.Supp.3d 526

Footnotes

1 The Pennsylvania Department of Transportation ("PennDOT") was terminated as a Defendant on August 4, 2017.

2 *See* 36 P.S. § 2718.105(c)(2)(i).

3 Adams's substantive due process as-applied challenge and equal protection claim were dismissed without prejudice as premature.

4 The material facts in this case are largely undisputed and are taken directly from the parties' Statements of Undisputed Material Facts. *See* Richards's Stmt Facts, ECF No. 31–2; Adams's Resp., ECF No. 34 (objecting only to the legal arguments in paragraphs 15 to 18 of Richards's Statement of Undisputed Material Facts, to the facts alleged in paragraphs 23, 47, and 48 as contrary to the witness's deposition testimony, and to paragraphs 49 and 50 as incomplete).

5 "Official signs" are defined as including "signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law." 23 U.S.C. § 131(c). *See also* 23 C.F.R. 750.105(a) (defining official signs as "[d]irectional or other official signs or notices erected and maintained by public officers or agencies pursuant to and in accordance with direction or authorization contained in State or Federal law, for the purpose of carrying out an official duty or responsibility").

6 On-premise signs are "signs, displays, and devices advertising the sale or lease of property upon which they are located." 23 U.S.C. § 131(c). *See also* 23 C.F.R. 750.105(a) (defining "on-premise signs" as "[s]igns not prohibited by State law which are consistent with the applicable provisions of this section and § 750.108 and which advertise the sale or lease of, or activities being conducted upon, the real property where the signs are located").

7 Lois Arciszewski is a Real Estate Manager for Adams. Arciszewski Dep. 7:10–14.

8 *See, e.g. Kegerreis Outdoor Adver. Co.*, 157 A.3d at 1040; *Joyce Outdoor Adver., LLC v. DOT*, 49 A.3d 518, 526 (Pa. Commw. Ct. 2012).

9 The language of the Interchange Prohibition that was at issue in *George Wash. Motor Lodge Co.* is identical to the language in the current version of the statute.

10 Adams's facial and as-applied challenges to the Act based on the lack of time limits are addressed in separate sections below.

11 Adams benefitted from the fact that this Court did not make this determination at the motion to dismiss stage because it allowed Adams's claims to survive pre-discovery dismissal. *See* Opn. 11 ("Reading the facts in the light most favorable to Adams and considering only the pleadings at the motion to dismiss stage, this Court concludes that Adams has sufficiently stated a First Amendment challenge to the Interchange Prohibition to proceed to discovery.").

12 Although the regulation does not specifically mention "on-premise signs," it exempts "[o]utdoor advertising devices advertising the sale or lease of the real property upon which they are located," *see* 36 P.S. § 2718.104(1)(ii), which falls into the definition of an on-premise sign, *see* 23 C.F.R. 750.105(a) (defining "on-premise signs" as "[s]igns ... which advertise the sale or lease of ... the real property where the signs are located").

13 *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.").

14 Although Adams complains that PennDOT has changed its interpretation over the years as to whether the Interchange Prohibition restricts structures only on the same or on both sides of the highway, there is no evidence that it has applied the restriction differently to any applicants since 1997. Also, there has been no suggestion that PennDOT changed its interpretation in order to suppress speech, and this Court previously concluded that the changed interpretation was neither arbitrary nor capricious. *See* Opn. 13 (concluding that "PennDOT explained that the reason it changed its interpretation was based on two superseding Pennsylvania court opinions" and that "[t]his action was therefore not arbitrary or capricious").

15 A statute that is content-based, on the other hand, is subject to the "most exacting scrutiny" and the State is required "to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

16 In addition to the Commonwealth's interest in motorist safety, "[i]t is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Taxpayers for Vincent*, 466 U.S. at 805, 104 S.Ct. 2118 (concluding that the ordinance, which prohibited the posting of signs on public property, curtailed no more speech than was necessary to accomplish its purpose to advance esthetic values). "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.' " *Metromedia, Inc.*, 453 U.S. at 510, 101 S.Ct. 2882.

17 The Court nevertheless struck down the city's ban because of its regulation of only off-premise signs, a distinction that is not at issue in the instant action.

18 Notably, the Interchange Prohibition is not nearly as restrictive as other sign ordinances that have withstood constitutional attack. *See, e.g., Taxpayers for Vincent*, 466 U.S. at 808, 104 S.Ct. 2118 (finding a total prohibition of the posting of signs on public property to be constitutional); *Interstate Outdoor Adver., L.P.*, 706 F.3d at 534 (upholding a township-wide ban on billboards).

19 Adams's standing to challenge the Act with respect to the absence of time deadlines and alleged unconstitutional delay is not at issue, *see Taxpayers for Vincent*, 466 U.S. at 796–98, 104 S.Ct. 2118 (explaining that there is an exception to the general standing requirements for a facial attack to a statute based on its overbreadth), and Adams's arguments on these grounds in opposition to the standing challenge are misplaced, *see Covenant Media of S.C., LLC*, 493 F.3d at 429 (holding that the plaintiff's standing to challenge the timeliness of the City's decision on its application to construct a billboard "does not provide it a passport to explore the constitutionality of every provision of the Sign Regulation").

20 *See also Free Speech Coal., Inc. v. AG United States*, 825 F.3d 149, 165–66 (3d Cir. 2016) ("Standing to seek injunctive relief requires a plaintiff to show (1) 'that he is under threat of suffering 'injury in fact' that is concrete and particularized'; (2) 'the threat must be actual and imminent, not conjectural or hypothetical'; (3) 'it must be fairly traceable to the challenged action of the defendant'; and (4) 'it must be likely that a favorable judicial decision will prevent or redress the injury.' (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)).

21 The only relief Adams seeks is declaratory and injunctive relief, as the claim for monetary relief was previously dismissed with the agreement of Adams. *See* Opn. 6–7.

22 In reaching this decision, this Court has also considered both the constitutional avoidance doctrine and the severability of the Act. *See Regan v. Time, Inc.*, 468 U.S. 641, 652–53, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (directing a federal court to act cautiously when reviewing the constitutionality of a legislative Act, to "refrain from invalidating more of the statute than is necessary," and to determine if the unconstitutional portion of the Act is severable before invalidating an entire statute, as the "presumption is in favor of severability"); *United States v. Raines*, 362 U.S. 17, 20–21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (explaining why a district court, mindful of the constitutional avoidance doctrine, should not consider the constitutionality of a statute in applications not before it); 36 P.S. § 2718.114 ("The provisions of this act shall be severable. If any provision of this act is found by a court of record to be unconstitutional and void, the remaining provisions of the act shall, nevertheless, remain valid ....").

23 36 P.S. § 2718.107 (requiring an annual permit "for each outdoor advertising device regulated by this act").

24 In the Opinion denying the Motion to Dismiss this claim, this Court commented that no judicial determination was being made as to whether the Act is in fact unconstitutional because "PennDOT may have enacted additional regulations and provided specific guidance, which when read in conjunction with the Act, would not offend the constitution." Opn. 18.

25 Unlike a challenge to the constitutionality of a statute's exemptions, which requires the court to decide whether each exemption (as opposed to the regulation itself) is content based or content neutral, and to determine whether each

exemption satisfies constitutional scrutiny, *see Rappa v. New Castle Cnty.*, 18 F.3d at 1066–69 (considering the exceptions in each subchapter of the sign code separately), a facial challenge to a statute for not including time limits in a permit scheme requires the court to look at the statute as a whole, *see Thomas*, 534 U.S. at 320–22, 122 S.Ct. 775 (considering whether any of the grounds for denying a permit was content based).

26 Section 2718.104 also contains an exemption for directional signs. *See* 36 P.S. § 2718.104(viii).

27 *Rappa v. New Castle Cnty.*, 18 F.3d 1043 (3d Cir. 1994).

28 Under this test, the State must "show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal." *Rappa*, 18 F.3d at 1065.

29 In the Opinion deciding the Motion to Dismiss, this Court questioned whether *Rappa*'s holding, that an exception for on-premise signs is not content based, remains good law in light of the subsequent decision by the United States Supreme Court in *Reed*. *See Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (finding that the sign code's exemption for temporary directional signs was subject to strict scrutiny). However, it was unnecessary to make such a determination at that time, as it is now, because the exceptions for official signs and directional signs are content based on their face.

30 *See* 36 P.S. § 2718.111 ("Any person who shall erect or cause or allow to be erected or maintained any advertising device in violation of this act, shall, upon summary conviction thereof, be sentenced to pay a fine of five hundred dollars ($ 500) to be paid into the Highway Beautification Fund, and in default of the payment thereof, shall undergo imprisonment for thirty days. Each day a device is maintained in violation of this act after conviction shall constitute a separate offense.").

31 *See City of Littleton*, 541 U.S. at 779, 124 S.Ct. 2219 (requiring "strict time limits leading to a speedy administrative decision"); *FW/PBS, Inc.*, 493 U.S. at 228, 110 S.Ct. 596 (1990) (explaining that the licensor must "make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained").

226 N.J. 549
Supreme Court of New Jersey.

E & J EQUITIES, LLC, a New Jersey limited liability company, Plaintiff-Appellant,
v.
BOARD OF ADJUSTMENT OF THE TOWNSHIP OF FRANKLIN, Defendant,
and
Township of Franklin, Defendant-Respondent.

A-40 Sept.Term 2014
|
Argued March 1, 2016
|
Decided September 15, 2016

Synopsis

Synopsis

Background: Company seeking to install digital billboard brought action against township and its zoning board of adjustment, alleging that township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, contravened the free speech provisions of the United States Constitution and the New Jersey Constitution. After bench trial, the Superior Court, Law Division, Somerset County, Peter A. Buchsbaum, J.S.C., 2013 WL 197732, declared the ordinance invalid. Township appealed. The Superior Court, Appellate Division, Espinosa, J.A.D., 437 N.J.Super. 490, 100 A.3d 539, reversed. Company's petition for certification was granted.

Holdings: The Supreme Court, Cuff, P.J.A.D., Temporarily Assigned, held that:

[1] time, place, and manner standard governed Supreme Court's review of township ordinance, and

[2] township ordinance violated free speech provisions of the United States Constitution and the New Jersey Constitution.

Reversed.

West Headnotes (31)

[1] Municipal Corporations
Billboards, signs, and other structures or devices for advertising purposes

Governments may regulate the physical characteristics of signs.

Cases that cite this headnote

[2] Highways
Billboards and highway beautification in general

If a billboard is adjacent to the interstate highway system, it is subject to the Highway Beautification Act. 23 U.S.C.A. § 131(b).

Cases that cite this headnote

[3] Constitutional Law
Freedom of Speech, Expression, and Press

The New Jersey Constitution guarantees a broad affirmative right to free speech. N.J. Const. art. 1, par. 6.

Cases that cite this headnote

[4] Constitutional Law
Relation between state and federal rights

Because the New Jersey Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Supreme Court's analysis of a free speech claim. U.S. Const. Amend. 1; N.J. Const. art. 1, par. 6.

Cases that cite this headnote

[5] Constitutional Law
Freedom of Speech, Expression, and Press

Different types of speech are afforded different levels of protection, and some forms of expression are beyond the scope of the First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[6] Constitutional Law
Strict or exacting scrutiny;compelling interest test

If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest. U.S. Const. Amend. 1.

Cases that cite this headnote

[7] Constitutional Law
Political speech, beliefs, or activity in general

Laws that burden political speech are subject to strict scrutiny. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] Constitutional Law
What is "commercial speech"

The First Amendment protects commercial speech from unwarranted governmental regulation; commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Constitutional Law
Difference in protection given to other speech

Commercial speech is granted less protection than other constitutionally-guaranteed expression; instead, commercial speech is afforded a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. U.S. Const. Amend. 1.

Cases that cite this headnote

[10] Constitutional Law
What is "commercial speech"

Most commonly, “commercial speech” has been defined as expression related solely to the economic interests of the speaker and its audience, or speech proposing a commercial transaction. U.S. Const. Amend. 1.

Cases that cite this headnote

[11] Constitutional Law
Commercial Speech in General

Constitutional Law
Reasonableness;relationship to governmental interest

The First Amendment protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] Constitutional Law
Commercial Speech in General

The effect of a restriction on commercial speech, which is challenged under the First Amendment, has to be evaluated in the context of the entire regulatory scheme, rather than in isolation. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] Constitutional Law
Time, Place, or Manner Restrictions

Laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Content-neutral Regulations or Restrictions

The threshold inquiry in a free speech challenge of a law regulating the time, place, or manner of speech is whether the regulation of expressive activity is content neutral. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
Content-neutral Regulations or Restrictions

Government regulation of expressive activity is "content neutral" so long as it is justified without reference to the content of the regulated speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
Governmental disagreement with message conveyed

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. U.S. Const. Amend. 1.

Cases that cite this headnote

[17] **Constitutional Law**
Content-neutral Regulations or Restrictions

When courts assess content neutrality of a regulation restricting speech, the government's purpose is the controlling consideration. U.S. Const. Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**
Content-neutral Regulations or Restrictions

Constitutional Law
Difference in protection given to other speech

Constitutional Law
Difference in protection for commercial signs

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; by contrast, when a regulation favors commercial over non-commercial speech and, more importantly, where a violation of the ordinance is based on the purpose for which the sign is displayed, that regulation is content-based. U.S. Const. Amend. 1.

Cases that cite this headnote

[19] **Constitutional Law**
Time, Place, or Manner Restrictions

Under the second part of the time, place, and manner standard used for laws regulating the time, place, or manner of speech, courts assess the government's asserted interests as well as the fit between the interests served and the means used. U.S. Const. Amend. 1.

Cases that cite this headnote

[20] **Constitutional Law**
Narrow tailoring

A regulation restricting speech is "narrowly tailored" if it promotes a substantial government interest that would be achieved less effectively absent the regulation. U.S. Const. Amend. 1.

Cases that cite this headnote

[21] **Constitutional Law**
Narrow tailoring

A regulation restricting speech is not invalid simply because there is some imaginable alternative that might be less burdensome on speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[22] Constitutional Law
Narrow tailoring

A restriction may not burden substantially more speech than is necessary to further the government's legitimate interests; government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. U.S. Const. Amend. 1.

Cases that cite this headnote

[23] Constitutional Law
Signs

Constitutional Law
Billboards

One avenue of attack on a billboard or sign regulation is that the ordinance restricts too little speech because its exemptions discriminate on the basis of the signs' messages; the other is that the measure simply prohibits too much protected speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[24] Constitutional Law
Commercial Speech in General

Constitutional Law
Reasonableness;relationship to governmental interest

The test used for regulation of commercial speech is a four-prong inquiry: first, whether the restricted expression enjoys constitutional protection; second, whether the state has asserted a substantial interest to be achieved by the restrictions; third, whether the restriction directly advances the governmental interest asserted; and fourth, whether the restriction is no more extensive than necessary to serve that interest. U.S. Const. Amend. 1.

Cases that cite this headnote

[25] Constitutional Law
Signs

A restriction on the content of signage may contravene the First Amendment guarantee of free speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[26] Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Existence of other channels of expression

Under the intermediate scrutiny standard, if a restriction on speech is content neutral, the ordinance is constitutionally permissible if it is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication; an ordinance is narrowly tailored if it does not burden substantially more speech than necessary to further the government's legitimate interests. U.S. Const. Amend. 1.

Cases that cite this headnote

[27] Constitutional Law
Signs

Constitutional Law
Billboards

An ordinance or statute regulating signs, including billboards of any form, and affecting commercial as well as noncommercial speech should be examined under the First Amendment in accordance with the time, place, and manner standard. U.S. Const. Amend. 1.

Cases that cite this headnote

[28] Constitutional Law
Bans or moratoria

Time, place, and manner standard governed Supreme Court's review of township ordinance that prohibited digital billboards in action brought by company, seeking to install digital billboard, to challenge the ordinance

under the free speech provisions of the United States and New Jersey Constitutions, where company advocated form of advertising not limited to commercial messages, prohibition of digital billboards did not bar all outdoor, off-premises advertising, and signs, other than digital billboards, were permitted. U.S. Const. Amend. 1; N.J. Const. art. 1, par. 6.

Cases that cite this headnote

[29] Constitutional Law
Billboards

Under the time, place, and manner standard, although a township's ordinance regulating billboards carries a presumption of validity, when faced with a constitutional challenge to its legislation, the township must demonstrate that the prohibition of digital billboards is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed. U.S. Const. Amend. 1.

Cases that cite this headnote

[30] Constitutional Law
Bans or moratoria

Towns
Governmental powers in general

Zoning and Planning
Signs and billboards

Township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, violated free speech provisions of the United States and New Jersey Constitutions; although township identified substantial government interests, which included aesthetics and safety of motorists, it did not identify how three static billboards were more aesthetically palatable than single digital billboard, and motor vehicle accident statistics, standing alone, did not lead to conclusion that installation of digital billboard in township would exacerbate the accident rate. U.S. Const. Amend. 1; N.J. Const. art. 1, par. 6.

Cases that cite this headnote

[31] Constitutional Law
Bans or moratoria

Towns
Governmental powers in general

Zoning and Planning
Signs and billboards

Township ordinance, which permitted billboards to be installed in zoning district proximate to interstate highway but prohibited digital billboards anywhere in the township, was content neutral, as required for the ordinance to be upheld under free speech provisions of United States and New Jersey Constitutions; ban on digital billboards addressed manner of communication, not its content. U.S. Const. Amend. 1; N.J. Const. art. 1, par. 6.

1 Cases that cite this headnote

****626** On certification to the Superior Court, Appellate Division, whose opinion is reported at 437 *N.J. Super.* 490, 100 *A.*3d 539 (App.Div.2014).

Attorneys and Law Firms

Francis P. Linnus argued the cause for appellant (Mr. Linnus, attorney; Benjamin T. Wetzel, on the briefs).

Louis N. Rainone argued the cause for respondent (DeCotiis, Fitzpatrick & Cole, attorneys; Mr. Rainone, Jason D. Attwood, and Victoria A. Flynn, on the briefs).

Ronald K. Chen argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Edward L. Barocas, Legal Director and Rutgers Constitutional Rights Clinic Center for Law & Justice, attorneys; Mr. Chen, Mr. Barocas, Jeanne M. LoCicero, Alexander R. Shalom, and Andrew Gimigliano, of counsel and on the brief).

Opinion

JUDGE CUFF (temporarily assigned) delivered the opinion of the Court.

***556** In 2010, the Township of Franklin (the Township) adopted an ordinance revising its regulation of signs, including billboards. The ordinance permits billboards, subject to multiple conditions, in a zoning district proximate to an interstate highway but expressly prohibits digital billboards anywhere in the municipality.

A company seeking to install a digital billboard challenged the constitutionality ****627** of the ordinance. The Law Division declared unconstitutional that portion of the ordinance barring digital billboards. The trial court viewed the Township's treatment of such devices as a total ban on a mode of communication. In a reported opinion, the Appellate Division reversed. Applying the *Central Hudson*[1] commercial speech standard and the *Clark/Ward*[2] time, place, and manner standard to content-neutral regulations affecting speech, the appellate panel determined that the ban on digital billboards passed constitutional muster.

We acknowledge that aesthetics and public safety are generally considered to be substantial governmental interests, particularly in the context of regulations affecting billboards. Nevertheless, billboards generally or specific types of billboards are a medium of communication, and any regulation of that medium may not transgress ***557** the United States Constitution or the Constitution of this State. Thus, simply invoking aesthetics and public safety to ban a type of sign, without more, does not carry the day.

Here, the Township, citing aesthetic and public safety concerns, permitted billboards to be installed in a single zoning district proximate to a heavily travelled interstate highway but prohibited digital billboards in the same zone. The Township did so on the basis of information gathered by its Director of Planning, Planning Board, and a Land Use Committee of the municipal governing body. Nevertheless, the record provides scant support for several propositions that informed the Township's decision and no support for the decision that the aesthetics of three billboards are more palatable than the aesthetics of a single digital billboard. Although we do not consider the digital billboard ban equivalent to a total ban on a medium of communication, it is a form of communication that is subject to the protection of the First Amendment. To that end, the record must support, to some degree, the interests that the municipality seeks to protect or advance. The record fails to support this restriction. We therefore declare that the 2010 ban on digital billboards is unconstitutional and reverse the judgment of the Appellate Division.

I.

The Township is the second-largest municipality in Somerset County, covering forty-seven square miles. Sixty-two thousand persons reside in the Township. A former planner for the Township described it "as a mosaic of various development patterns."

Some sections of the Township are rural, and some sections contain historic villages. A road that passes through the Township has been designated a national scenic byway. Other portions of the Township are highly developed. Interstate Route 287 (I-287), a highway that carries over 100,000 cars and trucks daily, passes through the Township. The I-287 corridor is bordered by an M-2 ***558** Light Manufacturing zoning district (hereinafter the M-2 zone),[3] which ****628** permits various industrial and corporate uses. The Township has aggressively sought to preserve farmland and open space. To that end, it has preserved thirty-four percent of the real property in the Township.

In 2008, the Township commenced a review of its ordinance governing signs and billboards. The Township did so at the suggestion of its insurance company, which noticed some inconsistencies in the existing ordinance. At the time, billboards were permitted in the Township's General Business zoning district as a conditional use. The ordinance, however, failed to define a billboard and did not identify any conditions for approval of an application to construct a billboard. The Township also prohibited signs with electronic script or electronic bulletin boards.

Upon notice to the public, the Township Council and the Planning Board commenced a two-year review of the Township's sign ordinance. During the course of the review, the Planning Board conducted a survey of existing billboards[4] and identified potentially acceptable

locations for billboards on two highways in the Township —State Highway 27 and I-287.

The discussions of the Planning Board were followed closely by plaintiff E & J Equities, LLC (E & J), which owns property along I-287 in the M-2 zone. E & J made a presentation to the Planning Board about the features and benefits of digital billboards, and it submitted a proposed ordinance prepared by its attorney as well as other material prepared by a professional engineer and planner it retained. The ordinance proposed by E & J permitted billboards ***559** with changing imagery and the use of LED or equivalent technology.

In January 2009, the Director of Planning forwarded a memorandum to the Planning Board identifying potentially acceptable billboard locations and suggesting billboard bulk and design requirements. The Director of Planning recommended limiting billboards to the M-2 and General Business zoning districts, and prohibiting signs that moved or gave the illusion of movement, rotated, or produced noise or smoke. The Director of Planning also recommended that neither signs nor billboards should display videos or other changing imagery. The Director of Planning also suggested standards for illumination of any billboards and a ban on words or symbols, such as "STOP" or "DANGER," that might be interpreted by a passerby as a command issued by a public authority.

On April 7, 2009, the Planning Board forwarded a draft ordinance to the Township Council. The accompanying memorandum from the Planning Board outlined the process it had employed and advised that it "determined that permitting billboards along I-287 would be the most prudent means of addressing potential First Amendment claims on the part of billboard companies." The memorandum also stated that the draft ordinance "was carefully crafted to minimize impact to the character of Franklin, particularly to the residential properties on the north side of I-287." Finally, the Planning Board reported that it had decided to recommend barring "LED billboards" because "the Board felt that it did not have enough information or sufficient expertise to craft ordinance language to appropriately address LED billboards."

****629** Notably, the Planning Board suggested that the question whether such LED billboards would be appropriate was best addressed by an application by a billboard company before the Zoning Board of Adjustment. Later, in defense of the ordinance adopted by the Township Council, the Director of Planning added that the Planning Board and the Land Use Committee of the Township Council ***560** believed that the Planning Board made its recommendation and the Township Council adopted the new billboard ordinance because "there was no conclusive source or documentation that digital billboards were safe, or some literature that the Board or Committee could depend on to come up with reasonable standards."

In September 2009, E & J submitted an application to the Zoning Board of Adjustment for a variance to construct and install a digital billboard on its property parallel to I-287. E & J's property is located in the M-2 zone. The area immediately south of the zone consists of several shopping centers, large supermarkets, banks, several large drug stores, and senior housing projects. The closest residential neighborhood to the proposed billboard is 500 feet across the highway. A heavily vegetated buffer separates the homes from the highway.

At the time the Planning Board and Township Council were considering amendments to the sign ordinance, and the Zoning Board of Adjustment was considering E & J's application for a use variance, a number of studies investigating the relationship between digital billboards and traffic safety were published. The Director of Planning acknowledged that he was familiar with those studies, and stated that he had concluded there was a lack of "conclusive guidance on the issue." Two of those studies, one from Rochester, Minnesota, and the other from Cuyahoga County (including Cleveland), Ohio, were submitted by E & J in support of its variance application before the Board of Adjustment. Each study opined that "digital billboards in [city or county] have no statistically significant relationship with the occurrence of accidents."

The methodology used in those studies was sharply criticized in a report issued in April 2009 prepared by Jerry Wachtel (the Wachtel Report) commissioned by the Association of State Highway and Transportation Officials. The Wachtel Report concluded that "the issue of the role of [digital billboards] in traffic safety is extremely complex," that the rapidly changing digital billboard ***561** technology complicates the task of assessing risk, and that the absence of uniform criteria for assessing the relationship between billboards and traffic safety

has hampered local officials' ability to assess the traffic safety risk of digital billboards. Nevertheless, the Wachtel Report determined that the plethora of studies reviewed supported the conclusion that

> [t]he research underway by [the Federal Highway Administration as of April 2009] may begin to provide specific, directed answers to assist those officials in their work. In the interim, those governmental agencies and toll road operators, faced with the need to make such decisions now have, in our opinion, a sufficient and sound basis for [reviewing applications for digital billboards].

Both E & J's planner and the Director of Planning acknowledged familiarity with the Wachtel Report during consideration of the 2010 ordinance.

Since 1996, the New Jersey Department of Transportation (NJDOT) has permitted off-premises digital billboards or multiple message signs on the interstate highway system. 28 *N.J.R.* 4742(a) (Nov. 4, 1996). Such signs are governed by regulations that establish minimum distance requirements between a digital billboard and an ****630** official variable message board, *N.J.A.C.* 16:41C–11.1(a)(6);[5] bar illumination by intermittent or moving light, *N.J.A.C.* 16:41C–11.1(a)(4); and establish the minimum time a message must remain fixed before a new message can be displayed, *N.J.A.C.* 16:41C–11.1(a)(3). Under those regulations, a neighboring municipality, South Plainfield, permitted installation of a digital billboard along a portion of I-287 traversing that borough.

On May 3, 2010, the Township Council adopted Ordinance 3875-10. Franklin Twp., N.J., Ordinance 3875-10 (2010) (the Ordinance). The stated purpose of the Ordinance is "to balance the need to control and regulate billboards, promote and preserve the scenic beauty and character of the Township, provide for the safety and convenience of the public, and to recognize certain Constitutional ***562** rights relative to outdoor advertising." The Ordinance permits static billboards in the M-2 zone. *Id.* § 112-114.1. The Ordinance added Section 53.1 to Chapter 112 of the Township Code. *Id.* § 112-53.1. The challenged section of the Ordinance provides, in relevant part:

> No billboard or billboard display area or portion thereof shall rotate, move, produce noise or smoke, give the illusion of movement, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any billboard or portion thereof have any electronic, digital, tri-vision or other animated characteristics resulting in an automatically changing depiction.
>
> [*Id.* § 112-53.1(C)(3).][6]

Allowing for the minimum spacing of 1000 feet between permitted billboards, *N.J.A.C.* 16:41C–8.1(d)(3), three static billboards can be erected in the Township. Allowing for the minimum spacing of 3000 feet between digital billboards, *N.J.A.C.* 16:41C–11.1(a)(5), only one digital billboard can be erected in the Township.

Following adoption of the Ordinance, the Zoning Board of Adjustment voted four to three in favor of E & J's application. The effect of the vote is a statutory denial of the use variance for a digital billboard because *N.J.S.A.* 40:55D–70(d)(3) requires five members to vote in favor of a variance application.

To date, traffic safety remains a concern at the location of the proposed digital billboard. According to motor vehicle accident statistics cited by the Township, the portion of I-287 on which E & J proposed to install a digital billboard had 181 crashes in 2010 and 176 crashes in 2011, making it the portion of I-287 with the greatest number of crashes in 2010 and the second-greatest number of crashes in 2011. N.J. Dep't of Transp., *Summary of Crash Rates on State and Interstate Highways in Route and* ***563** *Milepost Order for 2011* 183 (June 21, 2012), http://www.state.nj.us/transportation/refdata/accident/11/route11.pdf (*2011 Crash Rates*) (stating that, between mileposts 10.48 and 12.30 on I-287, there were 176 crashes in 2011); N.J. Dep't of Transp., *Summary of Crash Rates on State and Interstate Highways in Route and Milepost Order for 2010* 187 (Nov. 17, 2011), http://www.state.nj.us/transportation/refdata/accident/10/route10.pdf ****631** (*2010 Crash Rates*) (stating that, between mileposts 10.48 and 12.30 on I-287, there were 181 crashes in 2010). Notably, however, the segment of I-287 in South Plainfield, where a digital billboard has been located for several years, experienced only 70 crashes in 2010 and 48 in 2011. *See 2011 Crash Rates*, *supra*; *2010 Crash Rates*, *supra*.

II.

A.

E & J filed a complaint in lieu of prerogative writs against the Township's Zoning Board of Adjustment and the Township. E & J challenged the constitutionality of the section of the Ordinance prohibiting digital billboards, alleging that it contravened the First Amendment of the United States Constitution and Article I, paragraph 6 of the New Jersey Constitution. At trial, E & J and the Township presented witnesses who testified about the technical details of digital billboards, the economic benefits of digital billboards, the types of messages that can be displayed on them, and the impact on traffic safety of such devices. The parties also presented evidence about the legislative process, the purposes of the Ordinance, and the alternative means to communicate certain messages.

The trial court determined that "the Township has failed to meet the First Amendment intermediate scrutiny standard required for commercial speech restrictions." In doing so, the trial court determined that the Ordinance banned an entire medium of speech and burdened commercial speech. Applying the intermediate scrutiny standard, the trial court determined that the Township ***564** failed to establish that the total ban on digital or electronic billboards served a legitimate government interest and that the Ordinance was not narrowly drawn to advance that interest.

In particular, the trial court found that "one digital billboard, by itself, was not likely to have any more of an impact on [T]ownship aesthetics than a static billboard." The trial court also found that the Township failed to demonstrate that the complete ban of this medium of expression advanced its stated interest in traffic safety. The trial court accepted as credible the traffic safety studies submitted by E & J which uniformly found no correlation between the installation of digital billboards and any increase in traffic accidents, and characterized the Township's justification as supported by nothing more than speculation. Having found that the Township's ban on digital billboards was more expansive than necessary to advance the identified governmental interests, the trial court declared the Ordinance invalid.

B.

On appeal, the Appellate Division reversed the trial court and found that the Ordinance "passe[d] constitutional muster." *E & J Equities, LLC v. Bd. of Adjustment of Franklin*, 437 *N.J.Super.* 490, 496, 100 *A.*3d 539 (App.Div.2014). The Appellate Division agreed that "a time, place, and manner review" was appropriate, and criticized the trial court's reliance on *Bell v. Township of Stafford*, 110 *N.J.* 384, 541 *A.*2d 692 (1988). *E & J Equities*, *supra*, 437 *N.J. Super.* at 496, 506, 100 *A.*3d 539. Such reliance, the panel found, "required the Township to meet standards not required in the review of content-neutral time, place and manner restrictions." *Id.* at 504, 100 *A.*3d 539.

The panel also determined that the *Central Hudson* test "governs the review of restrictions on commercial speech that are *not* content-neutral." *Id.* at 507, 100 *A.*3d 539. The Appellate Division noted that ****632** "somewhat wider leeway" was afforded to content-neutral regulations. *Id.* at 508, 100 *A.*3d 539 (quoting *McCullen v. Coakley*, —— *U.S.* ——, ——, 134 *S.Ct.* 2518, 2529, 189 *L.Ed.*2d 502, 514 (2014)).

***565** The panel stated that "the standard governing the regulation of commercial speech that is not content-neutral and the standard applicable to time, place, and manner restrictions, are often 'closely intertwined.' " *Ibid.* The appellate panel proceeded to analyze the Ordinance de novo under the *Clark/Ward* standard. *Id.* at 509–19, 100 *A.*3d 539. Concluding that the restriction imposed by the Ordinance is content neutral, *id.* at 509–10, 100 *A.*3d 539, the panel stated that "[i]t is universally recognized that [the] government has a legitimate, even substantial, interest in preserving the aesthetics of its community and in promoting traffic safety," *id.* at 512, 100 *A.*3d 539. The panel determined that the Township's stated reasons, as well as the need for further studies on the impact of such billboards, "provides a rational, objective basis for the Township's decision to refrain from adopting a regulation of them." *Id.* at 514, 100 *A.*3d 539. The panel also recognized that "a regulation need not be 'the least restrictive means' to satisfy the requirement that a content-neutral restriction on time, place, and manner [of speech] be 'narrowly tailored.' " *Id.* at 515, 100 *A.*3d 539. The Appellate Division concluded that the concerns triggered by the new form of outdoor advertising was

reasonable and no broader than necessary "to eliminate [the] heightened intrusive quality" of digital billboards. *Id.* at 518, 100 *A*.3d 539. Lastly, the Appellate Division determined that the Township has adequate alternatives for communicating certain messages that can be displayed on a digital billboard, particularly emergency messages. *Id.* at 519, 100 *A*.3d 539. The panel cited the NJDOT signs located along I-287 and other measures, such as reverse 9-1-1 calls and emails, used in the Township. *Ibid.*

We granted E & J's petition for certification. 220 *N.J.* 574, 108 *A*.3d 634 (2015). We also permitted the American Civil Liberties Union of New Jersey (ACLU-NJ) to appear as amicus curiae.

III.

E & J contends that the ban on digital billboards restricts commercial and noncommercial speech. It therefore maintains that ***566** the Court should apply the strict scrutiny standard to the noncommercial speech ban and the intermediate scrutiny standard to the commercial speech restrictions. E & J contends that the Township has not met its burden under either standard because the Township failed to demonstrate that the stated reasons for the ban—maintaining the aesthetic character of the Township and traffic safety—are significant and substantial interests.

The Township contends that the digital billboard ban represents a valid exercise of government authority. It maintains that the intermediate scrutiny standards outlined in *Central Hudson* and *Clark/Ward* are the appropriate standards. The Township argues that the digital billboard ban is content neutral and that it demonstrated that its aesthetic and traffic concerns are real and reasonable and provide an objective and rational basis for the restriction.

Amicus ACLU-NJ contends that the Appellate Division judgment should be reversed. ACLU-NJ maintains that the Township bore the burden of establishing that the digital billboard ban advances a substantial government interest and is no more expansive than necessary. ACLU-NJ contends that the Township has neither established the existence of an actual threat to safety attributable to a single digital billboard nor narrowly tailored its ****633** Ordinance. Furthermore, amicus argues that the Township's reliance on advancing its interest in aesthetics is unsupported and does not justify a complete ban on the distinct form of communication represented by digital billboards. Finally, ACLU-NJ argues that the Township failed to establish a reasonable factual basis that alternative means of communication are available to reach the intended audience.

IV.

We commence our scrutiny of the Ordinance with review of the regulatory process governing billboards.

***567** **[1]** Billboards of any kind are subject to considerable regulation. Regulations on billboards are justified 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. It is common ground that governments may regulate the physical characteristics of signs[.]" *City of Ladue v. Gilleo*, 512 *U.S.* 43, 48, 114 *S.Ct.* 2038, 2041, 129 *L.Ed.*2d 36, 42–43 (1994). Further, some scholars have suggested that while "[t]raditional billboards have been debated for decades, ... digital technology has significantly raised the stakes." Susan C. Sharpe, *"Between Beauty and Beer Signs": Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of 1965*, 64 *Rutgers L. Rev.* 515, 517 (2012) (arguing that digital billboards "command far more profits," "attract far more attention," and "are far more intrusive to communities" than traditional billboards).

[2] If a billboard is adjacent to the interstate highway system, it is subject to the Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified as amended in scattered sections of 23 *U.S.C.A.*). That statute requires states to take "effective control of the erection and maintenance" of outdoor advertising signs located within 660 feet of that system. 23 *U.S.C.A.* § 131(b). Outdoor advertising signs are permitted in areas adjacent to those systems which are zoned industrial or commercial, with "size, lighting and spacing, consistent with customary use ... to be determined by agreement between the several states and the Secretary [of Transportation]." 23 *U.S.C.A.* § 131(d). When a local zoning authority "has made a determination of customary use," that determination controls within the locality. *Ibid.*

In accordance with those provisions, the Legislature established state controls of roadside advertising in areas adjacent to the federal interstate system and authorized the Commissioner of Transportation to enter into agreements with the United States Secretary of Transportation. *N.J.S.A.* 27:5–5 to -26. Pursuant to *N.J.S.A.* 27:5–11(a), municipalities continue to control local land ***568** use, but, in the event of conflict, state regulations prevail to the extent necessary to permit the state to carry out its declared policy or to permit the state to comply with its agreement with the United States Department of Transportation. *See also N.J.A.C.* 16:41C–6.3(e)(2). NJDOT had issued a permit for a digital billboard to E & J subject to local zoning.

V.

A.

[3] The First Amendment to the United States Constitution states, "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. Const.* amend. I. Similarly, "[t]he New Jersey Constitution guarantees ****634** a broad affirmative right to free speech[.]" *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 *N.J.* 71, 78, 103 *A.*3d 249 (2014) (citing *N.J. Const.* art. I, ¶ 6).

[4] "Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Court's analysis." *Twp. of Pennsauken v. Schad*, 160 *N.J.* 156, 176, 733 *A.*2d 1159 (1999) (citing *Hamilton Amusement Ctr. v. Verniero*, 156 *N.J.* 254, 264–65, 716 *A.*2d 1137 (1998)). The few exceptions where the State Constitution provides greater protection are not at issue here. *See, e.g.*, *Dublirer*, *supra*, 220 *N.J.* at 71, 103 *A.*3d 249 (state action); *W.J.A. v. D.A.*, 210 *N.J.* 229, 242, 43 *A.*3d 1148 (2012) (defamation).

[5] **[6]** **[7]** Different types of speech are afforded different levels of protection, and some forms of expression are beyond the scope of the First Amendment. *See Snyder v. Phelps*, 562 *U.S.* 443, 452, 131 *S.Ct.* 1207, 1215, 179 *L.Ed.*2d 172, 181 (2011); *R.A.V. v. St. Paul*, 505 *U.S.* 377, 382–83, 112 *S.Ct.* 2538, 2542–43, 120 *L.Ed.*2d 305, 317 (1992). "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government ***569** interest." *United States v. Playboy Entm't Grp.*, 529 *U.S.* 803, 813, 120 *S.Ct.* 1878, 1886, 146 *L.Ed.*2d 865, 879 (2000) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 *U.S.* 115, 126, 109 *S.Ct.* 2829, 2836, 106 *L.Ed.*2d 93, 105 (1989)). Similarly, "[l]aws that burden political speech are 'subject to strict scrutiny[.]' " *Citizens United v. FEC*, 558 *U.S.* 310, 340, 130 *S.Ct.* 876, 898, 175 *L.Ed.*2d 753, 782 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 *U.S.* 449, 464, 127 *S.Ct.* 2652, 2664, 168 *L.Ed.*2d 329, 343 (2007)); *see also Schad*, *supra*, 160 *N.J.* at 177, 733 *A.*2d 1159.

[8] "The First Amendment ... protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 *U.S.* 557, 561–62, 100 *S.Ct.* 2343, 2349, 65 *L.Ed.*2d 341, 348 (1980) (internal citation omitted).

[9] "Commercial speech, however, is granted less protection than other constitutionally-guaranteed expression." *Schad*, *supra*, 160 *N.J.* at 175, 733 *A.*2d 1159 (citing *Barry v. Arrow Pontiac, Inc.*, 100 *N.J.* 57, 72, 494 *A.*2d 804 (1985)); *see also Cent. Hudson*, *supra*, 447 *U.S.* at 563, 100 *S.Ct.* at 2350, 65 *L.Ed.*2d at 348–49. Instead, "commercial speech [is afforded] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Metromedia, Inc. v. City of San Diego*, 453 *U.S.* 490, 506, 101 *S.Ct.* 2882, 2892, 69 *L.Ed.*2d 800, 814 (1981) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 *U.S.* 447, 456, 98 *S.Ct.* 1912, 1918, 56 *L.Ed.*2d 444, 453 (1978)).

[10] Most commonly, commercial speech has been defined as "expression related solely to the economic interests of the speaker and its audience[,]" or "speech proposing a commercial transaction[.]" *Cent. Hudson*, *supra*, 447 *U.S.* at 561–62, 100 *S.Ct.* at 2349, 65 *L.Ed.*2d at 348 (citations omitted).

***570** **[11]** **[12]** "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its

regulation." *Id.* at 563, 100 *S.Ct.* at 2350, 65 *L.Ed.*2d at 349. To balance these factors, the United States Supreme Court created a four-part test for commercial speech:

> ****635** At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> [*Id.* at 566, 100 *S.Ct.* at 2351, 65 *L.Ed.*2d at 351.]

"[T]he effect of the challenged restriction on commercial speech ha[s] to be evaluated in the context of the entire regulatory scheme, rather than in isolation[.]" *Greater New Orleans Broad. Ass'n v. United States*, 527 *U.S.* 173, 192, 119 *S.Ct.* 1923, 1934, 144 *L.Ed.*2d 161, 180 (1999).

[13] "[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Assocs. v. Twp. of Willingboro*, 431 *U.S.* 85, 93, 97 *S.Ct.* 1614, 1618, 52 *L.Ed.*2d 155, 162 (1977). The United States Supreme Court has consistently held that

> [e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.
>
> [*Clark*, *supra*, 468 *U.S.* at 293, 104 *S.Ct.* at 3069, 82 *L.Ed.*2d at 227 (citations omitted).]

See also id. at 308, 104 *S.Ct.* at 3076, 82 *L.Ed.*2d at 236 (Marshall, J., dissenting); *Ward*, *supra*, 491 *U.S.* at 791, 109 *S.Ct.* at 2753, 105 *L.Ed.*2d at 675 (quoting *Clark*, *supra*, 468 *U.S.* at 293, 104 *S.Ct.* at 3069, 82 *L.Ed.*2d at 227).

[14] **[15]** The threshold inquiry is whether the regulation of expressive activity is content neutral. *See* ***571** *Ward*, *supra*, 491 *U.S.* at 791, 109 *S.Ct.* at 2753–54, 82 *L.Ed.*2d at 675. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " *Id.* at 791, 109 *S.Ct.* at 2754, 105 *L.Ed.*2d at 675 (quoting *Clark*, *supra*, 468 *U.S.* at 293, 104 *S.Ct.* at 3069, 82 *L.Ed.*2d at 227); *see also Linmark*, *supra*, 431 *U.S.* at 94, 97 *S.Ct.* at 1619, 52 *L.Ed.*2d at 163 (holding that ordinance which banned "for sale" signs could not be time, place, or manner restriction because it only prohibited certain types of signs, "based on their content"); *State v. DeAngelo*, 197 *N.J.* 478, 487, 963 *A.*2d 1200 (2009) (holding that laws are "content-based" if they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" and "content-neutral" if they "confer benefits or impose burdens on speech without reference to the ideas or views expressed[.]" (quoting *Turner Broad. Sys. v. FCC*, 512 *U.S.* 622, 642, 114 *S.Ct.* 2445, 2459, 129 *L.Ed.*2d 497, 517 (1994))).

[16] **[17]** **[18]** "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." *Ward*, *supra*, 491 *U.S.* at 791, 109 *S.Ct.* at 2754, 105 *L.Ed.*2d at 675 (citing *Clark*, *supra*, 468 *U.S.* at 295, 104 *S.Ct.* at 3070, 82 *L.Ed.*2d at 228). When courts assess content neutrality, "[t]he ****636** 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." *Ibid.* By contrast, when a regulation "favors commercial over non-commercial speech and, more importantly, [where] a violation of the ordinance is based on the purpose for which the sign is displayed, ... [that regulation] is content-based." *DeAngelo*, *supra*, 197 *N.J.* at 488, 963 *A.*2d 1200.

[19] **[20]** **[21]** **[22]** Under the second part of the time, place, and manner test, courts assess the government's asserted interests as well as the fit between the interests served and the means used. The Supreme Court has noted that "the validity of the regulation ***572** depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, *supra*, 491 *U.S.* at 801, 109 *S.Ct.* at 2759, 105 *L.Ed.*2d at 682. A regulation is narrowly tailored if it "promotes

a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799, 109 *S.Ct.* at 2757–58, 105 *L.Ed.*2d at 680 (quoting *United States v. Albertini*, 472 *U.S.* 675, 689, 105 *S.Ct.* 2897, 2906, 86 *L.Ed.*2d 536, 548 (1985)). Moreover, a regulation is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 797, 109 *S.Ct.* at 2757, 105 *L.Ed.*2d at 679 (citation omitted). On the other hand, a restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799, 109 *S.Ct.* at 2758, 105 *L.Ed.*2d at 681.

When speech is restricted, there must be alternative means of communicating the message, although there is some disagreement as to what are qualified alternative channels. In *Linmark*, *supra*, the United States Supreme Court held that "[t]he alternatives ... are far from satisfactory" when "[t]he options to which sellers realistically are relegated ... involve more cost and less autonomy[,] ... are less likely to reach persons not deliberately seeking sales information, and may be less effective media for communicating the message[.]" 431 *U.S.* at 93, 97 *S.Ct.* at 1618, 52 *L.Ed.*2d at 162 (internal citations omitted). Similarly, in *Metromedia*, *supra*, the Court accepted the parties' stipulations that alternative channels were inadequate. 453 *U.S.* at 516, 101 *S.Ct.* at 2897, 69 *L.Ed.*2d at 820.

Some federal appellate courts, however, have found that "[t]he First Amendment does not guarantee a right to the most cost-effective means of [speech.]" *Naser Jewelers, Inc. v. City of Concord*, 513 *F.*3d 27, 37 (1st Cir.2008) (second alteration in original) (quoting ***573** *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 *F.*3d 175, 193 (1st Cir.1996)). The Third Circuit found that "maximizing ... profit is not the animating concern of the First Amendment. The fact that restrictions prohibit a form of speech attractive to plaintiff does not mean that no reasonable alternative channels of communication are available." *Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mt. Laurel*, 706 *F.*3d 527, 535 (3d Cir.2013) (alteration in original) (quoting *Naser Jewelers*, *supra*, 513 *F.*3d at 37).

The United States Supreme Court has observed that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." ****637** *Metromedia*, *supra*, 453 *U.S.* at 501, 101 *S.Ct.* at 2889, 69 *L.Ed.*2d at 810–11 (quoting *Kovacs v. Cooper*, 336 *U.S.* 77, 97, 69 *S.Ct.* 448, 459, 93 *L.Ed.* 513, 528 (1949)). Billboards are no exception. Despite their ubiquity along main highways in this country and their use to communicate a wide variety of messages, "the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to ... regulation.' " *Id.* at 502, 101 *S.Ct.* at 2889–90, 69 *L.Ed.*2d at 811 (alteration in original) (citation omitted).

[23] First Amendment jurisprudence regarding the regulation of billboards and signs falls roughly into two categories: those regulations that prohibit billboards or signs of any kind and those that impose conditions on the size and mode of communication. Two analytically distinct grounds have emerged to challenge billboard or sign regulation. One avenue of attack is that the ordinance "restricts too little speech because its exemptions discriminate on the basis of the signs' messages." *Ladue*, *supra*, 512 *U.S.* at 51, 114 *S.Ct.* at 2043, 129 *L.Ed.*2d at 44. The other is that the measure "simply prohibit[s] too much protected speech." *Ibid.*

B.

We turn to *Metromedia*, the seminal case on the regulation of billboards, to discuss the constitutional principles governing regulations of billboards. *Metromedia*, *supra*, addressed a city ordinance ***574** which permitted onsite commercial advertising but prohibited other fixed-structure signs, including billboards, unless a sign fell within one of several enumerated exceptions. 453 *U.S.* at 495–96, 101 *S.Ct.* at 2886, 69 *L.Ed.*2d at 807. The ordinance created exceptions for onsite signs and signs in twelve exempted categories, *id.* at 494, 101 *S.Ct.* at 2885–86, 69 *L.Ed.*2d at 806–07, "but other commercial advertising and noncommercial communications using fixed-structure signs [were] everywhere forbidden unless permitted by one of the specified exceptions," *id.* at 496, 101 *S.Ct.* at 2886, 69 *L.Ed.*2d at 807. Several outdoor advertising companies challenged the ordinance. *Ibid.*

[24] In its analysis, the plurality "consider[ed] separately the effect of the ordinance on commercial and noncommercial speech." *Id.* at 505, 101 *S.Ct.* at 2891, 69 *L.Ed.*2d at 813. With regard to commercial speech, the

plurality applied the four-prong *Central Hudson* test and found that the ordinance was constitutional. *Id.* at 507, 101 *S.Ct.* at 2892, 69 *L.Ed.*2d at 815.[7] The *Metromedia* plurality found that prongs one, two, and four of the *Central Hudson* test were uncontroversial. *Ibid.* Notably, the plurality held that traffic safety and aesthetics, the only purposes identified by the ordinance, are "substantial government goals." *Id.* at 507–08, 101 *S.Ct.* at 2892, 69 *L.Ed.*2d at 815. The plurality also stated that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Id.* at 508, 101 *S.Ct.* at 2893, 69 *L.Ed.*2d at 815.

The Court then considered the "more serious question" of whether the ordinance directly advances the government's inter ****638 *575** ests, and thereby satisfies the third prong of the *Central Hudson* test. *Ibid.* The plurality answered in the affirmative, finding that the ordinance advanced the government's interests in traffic safety and aesthetics. Justice White, writing for the plurality, noted the California Supreme Court's finding that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," and stated, "[w]e likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 508–09, 101 *S.Ct.* at 2893, 69 *L.Ed.*2d at 815–16 (first alteration in original) (internal citation omitted).

Additionally, the plurality did not find that the city's interest was undermined by underinclusiveness because the ordinance permitted onsite advertising and other exempted signs. *Id.* at 510–11, 101 *S.Ct.* at 2894, 69 *L.Ed.*2d at 817. "[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. ... [T]he city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." *Id.* at 511, 101 *S.Ct.* at 2894, 69 *L.Ed.*2d at 817. Thus, the plurality held that "insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*[.]" *Id.* at 512, 101 *S.Ct.* at 2895, 69 *L.Ed.*2d at 818.

Because the total ban of offsite billboards included both commercial and noncommercial speech, however, the plurality found that the ordinance was unconstitutional on its face as to the noncommercial speech banned by the ordinance. *Id.* at 521, 101 *S.Ct.* at 2899, 69 *L.Ed.*2d at 823. The plurality held that "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." ***576** *Id.* at 513, 101 *S.Ct.* at 2895, 69 *L.Ed.*2d at 818. Additionally, the plurality found that the ordinance was not "appropriately characterized as a reasonable 'time, place, and manner' restriction" because the ordinance distinguished between signs based on content. *Id.* at 515–17, 101 *S.Ct.* at 2896–97, 69 *L.Ed.*2d at 820.

Justice Brennan wrote separately. Because he approached the ordinance as a total ban on a distinctive medium, Justice Brennan would have applied the Supreme Court's tests that were "developed to analyze content-neutral prohibitions of particular media of communication." *Id.* at 526–27, 101 *S.Ct.* at 2902, 69 *L.Ed.*2d at 826–27 (Brennan, J., concurring) (citing *Schad v. Mt. Ephraim*, 452 *U.S.* 61, 101 *S.Ct.* 2176, 68 *L.Ed.*2d 671 (1981), in which "Court assessed 'the substantiality of the governmental interest asserted' and 'whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment' "). Under such a test, Justice Brennan found the ordinance invalid. *Id.* at 528, 101 *S.Ct.* at 2903, 69 *L.Ed.*2d at 827. Justice Brennan found that the city's sole asserted interest, aesthetics in its "commercial and industrial areas," was insufficient. *Id.* at 530, 101 *S.Ct.* at 2904, 69 *L.Ed.*2d at 829.

Justice Stevens dissented in part. He agreed with the plurality that San Diego could constitutionally distinguish between onsite and offsite commercial signs. *Id.* at 541, 101 *S.Ct.* at 2909–10, 69 *L.Ed.*2d at 836 (Stevens, J., dissenting in part). However, Justice Stevens would have held that as long as it was impartial, the city could ****639** "entirely ban one medium of communication." *Id.* at 542, 553, 101 *S.Ct.* at 2910, 2916, 69 *L.Ed.*2d at 836, 843. Justice Stevens did not believe that the content-neutral exceptions affected the analysis and would have upheld the ordinance. *Id.* at 542, 101 *S.Ct.* at 2910, 69

*L.Ed.*2d at 836. Both Chief Justice Burger and then-Justice Rehnquist, in separate dissents, lamented the use of the federal court's power to address a traditionally local concern, worthy of deference. *See id.* at 556, 101 *S.Ct.* at 2917, 69 *L.Ed.*2d at 845 (Burger, C.J., dissenting); *id.* at 570, 101 *S.Ct.* at 2925, 69 *L.Ed.*2d at 854–55 (Rehnquist, J., dissenting).

***577** In *Bell*, *supra*, this Court applied *Metromedia* and its prior sign jurisprudence to invalidate a municipal ordinance prohibiting "[b]illboards, signboards and off-premises advertising signs and devices[.]" 110 *N.J.* at 387, 541 *A.*2d 692 (first alteration in original). Characterizing the ban as a drastic and direct encroachment of constitutionally protected freedom of speech and expression, the Court assigned to the municipality a "particularly strenuous" burden to overcome the constitutional challenge. *Id.* at 395–96, 541 *A.*2d 692 (citations omitted). Noting that the municipality failed to identify any government objective furthered by the ban or to provide any facts to support the ban, the Court found that the municipality could not demonstrate that the ban was the least-restrictive means to achieve the government interest. *Id.* at 396–97, 541 *A.*2d 692. Moreover, the Court found that the municipality failed to make any showing of alternate means of communicating the messages that would have been displayed in the prohibited signage. *Id.* at 397, 541 *A.*2d 692. The Court therefore declared the complete ban on off-premises advertising unconstitutional. *Id.* at 398, 541 *A.*2d 692.

[25] *Metromedia* and *Bell* represent instances in which a municipal ban foreclosing an entire form of media has been held to contravene the First Amendment. A restriction on the content of signage also may contravene the First Amendment guarantee of free speech. *Linmark*, *supra*, 431 *U.S.* 85, 97 *S.Ct.* 1614, 52 *L.Ed.*2d 155, and *Ladue*, *supra*, 512 *U.S.* 43, 114 *S.Ct.* 2038, 129 *L.Ed.*2d 36, respectively, represent instances in which a regulation of speech that is underinclusive of permitted messages or the combination of a general speech restriction accompanied by multiple exemptions to that ban may yield an unconstitutional selection of permissible messages.

Linmark, *supra*, illustrates a regulation restricting too little speech. 431 *U.S.* 85, 97 *S.Ct.* 1614, 52 *L.Ed.*2d 155. There, an ordinance generally permitted signs for commercial and noncommercial purposes but expressly prohibited signs announcing that a house was "For Sale" or "Sold." ***578** *Id.* at 86, 97 *S.Ct.* at 1615, 52 *L.Ed.*2d at 157-58. The ostensible purpose of the ordinance—to promote stable, racially integrated neighborhoods—ran afoul of First Amendment guarantees because it prevented communication of specific and truthful information. *Id.* at 96–97, 97 *S.Ct.* at 1620, 52 *L.Ed.*2d at 164.

Ladue, *supra*, illustrates a signage regulation that prohibits too much protected speech. There, the city adopted an ordinance prohibiting homeowners from displaying any signs on their homes with the exception of "For Sale" or "Sold" signs, signs identifying the house, and signs warning of a dangerous condition on the property. 512 *U.S.* at 45, 114 *S.Ct.* at 2040, 129 *L.Ed.*2d at 41. The terms of the ordinance therefore prohibited a homeowner from placing a two-foot by three-foot sign on her lawn declaring her opposition to war in the Persian Gulf and a smaller sign ****640** in a second-story window stating "For Peace in the Gulf." *Id.* at 45–47, 114 *S.Ct.* at 2040–41, 129 *L.Ed.*2d at 41–42.

The Supreme Court observed that the combination of a general speech restriction with multiple exemptions permits the government to select messages it deems permissible. *Id.* at 51, 114 *S.Ct.* at 2043–44, 129 *L.Ed.*2d at 45. The Supreme Court recognized that the stated purpose of eliminating visual clutter is a valid public purpose, but found that the ordinance "almost completely foreclosed a venerable means of communication that is both unique and important, ...[and] has totally foreclosed that medium to political, religious, or personal messages." *Id.* at 54, 114 *S.Ct.* at 2045, 129 *L.Ed.*2d at 46–47. The Supreme Court therefore declared the municipal ban on virtually all residential signs violative of the First Amendment. *Id.* at 58, 114 *S.Ct.* at 2045, 129 *L.Ed.*2d at 49.

C.

Metromedia, *Linmark*, and *Ladue* addressed billboards and signs that may be placed on a lawn or in the window of a house. The billboards at issue in *Metromedia*, *supra*, were static billboards displaying a single message for a fixed period of time as long as a month or more before a new message was affixed to the ***579** surface of the billboard. 453 *U.S.* at 496, 101 *S.Ct.* at 2886, 69 *L.Ed.*2d at 807. Since the *Metromedia* decision, new methods of displaying messages, such as electronic messaging centers, have developed, and various governmental

units have reacted to their introduction by commercial and noncommercial users. Electronic messaging centers display electronically changeable messages. The text may change frequently by the use of scrolling text or substituting a series of different messages on the screen. Opinions addressing municipal regulations of such signage inform our evaluation of regulations governing digital billboards because such devices are similar to digital billboards in virtually all respects other than size.

[26] In *Naser Jewelers*, *supra*, the Court of Appeals held that an ordinance prohibiting all electronic messaging centers was constitutional. 513 *F.*3d at 30. In reaching that conclusion, the court determined that the ban was content neutral, and applied to commercial and noncommercial entities. *Id.* at 30–31. Determining that the *Central Hudson* test applied to restrictions involving solely commercial speech, *id.* at 33, the Court of Appeals invoked the *Clark/Ward* intermediate scrutiny standard. Under this test, if the restriction is content neutral, the ordinance is constitutionally permissible "if it is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication. An ordinance is narrowly tailored if it does not burden substantially more speech than necessary to further the government's legitimate interests[.]" *Id.* at 30. Moreover, the court held that the ordinance "need not be the least restrictive means to serve those interests." *Ibid.*

Notably, the panel did not consider the ban on electronic message centers as a ban on an entire medium of communication. *Id.* at 36. The panel also emphasized that billboards and other signs were permitted, and that they constituted an alternative means of communication. *Ibid.* The court also underscored the principle that "[t]he maximizing of profit is not the animating concern of the First Amendment." *Id.* at 37. The court therefore ***580** held that the ban on electronic messaging centers was constitutional. *Ibid.*; *see also La Tour v. City of Fayetteville*, 442 *F.*3d 1094, 1096–97 (8th Cir.2006) (applying *Clark/Ward* standard to hold as constitutional ban on electronic message boards displaying anything ****641** other than time, date, and temperature); *Carlson's Chrysler v. City of Concord*, 156 N.H. 399, 938 *A.*2d 69, 72–74 (2007) (applying *Central Hudson* standard to hold total ban of electronic message boards constitutional; concurring justice would apply *Clark/Ward* standard).

VI.

We commence our analysis with the question of whether the *Central Hudson* commercial speech standard or the *Clark/Ward* time, place, and manner standard governs our review of the Ordinance. We acknowledge that applying either standard often produces the same conclusion; yet judicial scrutiny of the constitutionality of government regulation of speech deserves precision. In recent years, several courts have sought to clarify those instances when the *Central Hudson* standard or the *Clark/Ward* standard governs. *See Naser Jewelers*, *supra*, 513 *F.*3d at 30 (employing *Clark/Ward* standard to review challenge to ordinance prohibiting all electronic messaging centers); *Carlson's Chrysler*, *supra*, 938 *A.*2d at 74 (Duggan, J., concurring) (declaring *Central Hudson* governs only when regulation restricts only commercial speech).

[27] We conclude that an ordinance or statute regulating signs, including billboards of any form, and affecting commercial as well as noncommercial speech should be examined in accordance with the *Clark/Ward* time, place, and manner standard. *Central Hudson*, *supra*, addressed purely commercial speech. 447 *U.S.* at 561, 100 *S.Ct.* at 2349, 65 *L.Ed.*2d at 348. There, a state utility commission adopted a regulation imposing a total ban on electric utilities from all advertising promoting the use of electricity. *Id.* at 558, 100 *S.Ct.* at 2347, 65 *L.Ed.*2d at 346. The standard fashioned to evaluate the constitutionality of the ban concerned solely commercial entities and the message they sought to disseminate. ***581** *Id.* at 566, 100 *S.Ct.* at 2351, 65 *L.Ed.*2d at 351. The standard also addressed a total ban of a particular message. *See id.* at 571–72, 100 *S.Ct.* at 2354, 65 *L.Ed.*2d at 354–55.

The *Clark/Ward* standard, however, is generally applicable to content-neutral regulations restricting or regulating expression by those seeking to advance commercial ventures or broad noncommercial interests. In many instances, the government action does not impose a complete ban on a particular speaker or mode of expression. For example, in *Ward*, *supra*, the City of New York adopted a regulation to address complaints of poor sound quality at events staged at an open-air theater in Central Park and complaints of excessive noise by those in other areas of the park and nearby residents. 491 *U.S.* at 784–88, 109 *S.Ct.* at 2750–52, 105 *L.Ed.*2d at 670-72. The regulation required those using the open-air theater to

comply with noise standards and directed those using the sound system to employ designated sound engineers. *Id.* at 787, 109 *S.Ct.* at 2751, 105 *L.Ed.*2d at 672. Noting that the sound-level regulation was content neutral and did not prohibit the expression of ideas, the Court departed from the *Central Hudson* commercial speech standard and used a time, place, and manner standard to evaluate the constitutionality of the regulations. *Id.* at 802, 109 *S.Ct.* at 2760, 105 *L.Ed.*2d at 683.

[28] We conclude that this appeal is best addressed using the *Clark/Ward* standard. Here, E & J explained to the Planning Board the variety of commercial and noncommercial messages that digital billboards could convey. E & J took pains to compare the flexibility and versatility of a digital billboard to the single message static billboard. E & J also emphasized the ability of a digital billboard to rapidly respond ****642** to the need to broadcast emergency messages and the cost-effectiveness of this form of advertising to advance the interests and special needs of nonprofit groups in the Township. In other words, E & J advocated a form of advertising not limited to commercial messages.

Moreover, the prohibition of digital billboards adopted by the Township does not bar all outdoor, off-premises advertising. Signs, ***582** other than billboards, are permitted, albeit with certain conditions, in the Township, and static billboards are permitted in the M-2 zone along I-287. In fact, three static billboards can be erected within the M-2 zone. We therefore conclude that the *Clark/Ward* standard is the appropriate standard to evaluate the Ordinance at the center of this appeal.

[29] Under that standard, although the Ordinance carries a presumption of validity, *Bell*, *supra*, 110 *N.J.* at 394, 541 *A.*2d 692, when faced with a constitutional challenge to its legislation, the Township must demonstrate that the prohibition of digital billboards is content neutral, that it is narrowly tailored to serve a recognized and identified government interest, and that reasonable alternative channels of communication exist to disseminate the information sought to be distributed, *Ward*, *supra*, 491 *U.S.* at 791, 109 *S.Ct.* at 2757–58, 105 *L.Ed.*2d at 675; *Clark*, *supra*, 468 *U.S.* at 293, 104 *S.Ct.* at 3069, 82 *L.Ed.*2d at 227. In assessing whether an ordinance is narrowly tailored, the inquiry is whether it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, *supra*, 491 *U.S.* at 799, 109 *S.Ct.* at 2758, 105 *L.Ed.*2d at 680 (quoting *Albertini*, *supra*, 472 *U.S.* at 689, 105 *S.Ct.* at 2906, 86 *L.Ed.*2d at 548). A restriction on speech may not substantially burden more speech than necessary to further the government interest, but identification of another alternative that might be less restrictive of speech to achieve the desired end does not render the ordinance invalid. *Id.* at 798–99, 109 *S.Ct.* at 2757–58, 105 *L.Ed.*2d at 680–81.

[30] **[31]** Here, there can be little, if any, debate that the Ordinance is content neutral. Unlike the ordinance addressed in *DeAngelo*, *supra*, which permitted a temporary sign to announce the opening of a store, but barred a union from displaying a rat balloon at the site of a business employing non-union labor, 197 *N.J.* at 481–82, 963 *A.*2d 1200, the Township ban of digital billboards addresses a manner of communication, not its content. *See Renton v. Playtime Theatres, Inc.*, 475 *U.S.* 41, 47–48, 106 *S.Ct.* 925, 928–29, 89 *L.Ed.*2d 29, 37–38 (1986) (declaring regulation ***583** content neutral because it serves purposes unrelated to content of expression); *Naser Jewelers*, *supra*, 513 *F.*3d at 32 (declaring municipal ban of electronic message boards content neutral because ordinance banned category of communication, not message).

E & J urges that the Township has suppressed an entire mode of communication. That is simply not the case. All manner of signs are permitted as well as static billboards. Furthermore, other than frustrating E & J's attempt to maximize profit by utilizing a different form of billboard, there is no suggestion that the Township had an ulterior motive antithetical to free expression.

E & J also argues that the stated reasons have not been amply supported by the Township. It focuses on the studies it submitted and the existence of digital billboards in places proximate to the Township along the I-287 corridor and along other heavily travelled highways. It contends this information belies the interests invoked by the Township.

****643** The government interests identified by the Township—aesthetics and the safety of motorists travelling on I-287—have long been recognized as legitimate and substantial government interests, particularly related to billboards. *Metromedia*, *supra*, 453 *U.S.* at 507–08, 101 *S.Ct.* at 2892–93, 69 *L.Ed.*2d at

815. Yet, when a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial. In other words, there must be a modicum of support for the invoked government interest.

To be sure, the record demonstrates that the Township has labored to preserve the bucolic character of sections of the municipality and to minimize the impact on a residential neighborhood across the highway. The Township Council also cited safety concerns. The Township, however, permits industrial and corporate development and has directed that static billboards may be erected in the M-2 zone. In fact, three static billboards can be erected along I-287 in the M-2 zone. The record provides no basis to discern how three static billboards are more aesthetically palatable than a single digital billboard.

***584** Clearly, the action by the governing body was informed by the work of the Planning Board and the advice of the Township Planner. That official informed the governing body that there was an absence of research upon which he could recommend standards to address those concerns. Yet, the record reveals the existence of a considerable body of literature discussing the impact, or lack thereof, of digital billboards on traffic safety and standards that can be applied to such devices to enhance traffic safety and mitigate aesthetic concerns. A respected report concluded its exhaustive review of the impact of such devices stating that ample information existed to make informed decisions about such devices. In addition, NJDOT had promulgated regulations governing off-premises digital billboards. *See N.J.A.C.* 16:41C-11.1. Moreover, a digital billboard had been erected along I-287 in a neighboring municipality. It appears that standards were available to the Township to inform its decision-making.

Finally, motor vehicle accident statistics do not prove either party's argument regarding the danger of digital billboards. To be sure, the Township has experienced more than twice the number of motor vehicle accidents along I-287 than the neighboring town, but the numbers standing alone do not lead inexorably to the conclusion that the installation of a single digital billboard in the Township will exacerbate the accident rate. The accident rate in the Township may be attributable to many other factors such as weather, road design or road maintenance. The record is also bereft of any examination of the safety impact of the installation of three static billboards. In short, bare numbers do not carry the public safety debate.

We recognize that the Township was not required to adopt the least restrictive means to further its interests. Rather, an ordinance is considered to be narrowly tailored "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, *supra*, 491 *U.S.* at 799, 109 *S.Ct.* at 2758, 105 *L.Ed.*2d at 680 (alteration in original) (quoting ***585** *Albertini*, *supra*, 472 *U.S.* at 689, 105 *S.Ct.* at 2906, 86 *L.Ed.*2d at 548). Here, however, in the face of a record founded only on unsupported suppositions, fears, and concerns, we need not address whether the course taken by the governing body is reasonable under all of the circumstances.

We do not suggest that no municipal restriction on off-premises digital billboards or multiple message centers can pass constitutional muster. Contrary to E & J and amicus, we do not consider the ****644** ban adopted by the Township a complete ban on a form of communication but rather a restriction on a subset of off-premises signage. A more robust factual record in support of the cited government interests deemed substantial may satisfy the *Clark*/*Ward* standard. By the same token, the information accumulated over the last six years concerning the aesthetic and safety impacts of such devices may assuage the governing body's concerns.

In sum, we do not quarrel with the proposition that aesthetics and public safety are substantial government interests, particularly when the medium of expression is an outdoor, off-premises advertising device. *See Metromedia, supra*, 453 *U.S.* at 507–08, 101 *S.Ct.* at 2892–93, 69 *L.Ed.*2d at 815. On the other hand, a governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge. In the end, the record provides no explanation of the qualitative differences between three static billboards and a single digital billboard. The record also belies the assertion that no standards existed to address aesthetic and public safety concerns. This absence requires us to declare § 112-53.1(C)(3) of Ordinance 3875 unconstitutional.

VII.

The judgment of the Appellate Division is reversed.

CHIEF JUSTICE RABNER, JUSTICES PATTERSON, FERNANDEZ-VINA and SOLOMON, join in JUDGE CUFF's opinion. JUSTICES LaVECCHIA and ALBIN did not participate.

All Citations

226 N.J. 549, 146 A.3d 623

Footnotes

1 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 *U.S.* 557, 100 *S.Ct.* 2343, 65 *L.Ed.* 2d 341 (1980).

2 *Ward v. Rock Against Racism*, 491 *U.S.* 781, 109 *S.Ct.* 2746, 105 *L.Ed.*2d 661 (1989); *Clark v. Cmty. for Creative Non–Violence*, 468 *U.S.* 288, 104 *S.Ct.* 3065, 82 *L.Ed.* 2d 221 (1984).

3 The M-2 zone permits the following uses: manufacturing, fabrication and assembly of various products including light machinery, wood and paper products and metal furniture, bottling of food and beverages, food processing, manufacturing of liquors, laboratories, industrial parks, warehouses, general office buildings, administrative and dispatch services, hotels, indoor recreational uses, child care centers, and personal storage facilities. Franklin Twp., N.J., Code ch. 112, Schedule 1 (2015).

4 Three existed at the time, but none were located in the M-2 zone.

5 Until March 2, 2015, the regulations governing off-premises digital billboards were codified at *N.J.A.C.* 16:41C–8.8.

6 The Ordinance also amended Section 112-109J, of Chapter 112, Land Development, Article XII, Sign Regulations, Section 112-109, Prohibited Signs, to make it consistent with the Ordinance. The new provision states: “No sign or portion thereof shall rotate, move, produce noise or smoke, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any sign or portion thereof have any electronic, digital, tri-vision or other animated characteristics.”

7 The *Central Hudson* test is a four-prong inquiry: first, whether the restricted expression enjoys constitutional protection; second, whether the state has asserted a substantial interest to be achieved by the restrictions; third, whether the restriction “directly advances the governmental interest asserted”; and fourth, whether the restriction is no more extensive than necessary to serve that interest. *Cent. Hudson*, *supra*, 447 *U.S.* at 566, 102 *S.Ct.* at 2351, 65 *L.Ed.*2d at 351.

135 S.Ct. 2218
Supreme Court of the United States

Clyde REED, et al., Petitioners
v.
TOWN OF GILBERT, ARIZONA, et al.

No. 13–502.
|
Argued Jan. 12, 2015.
|
Decided June 18, 2015.

Synopsis

Background: Church and pastor seeking to place temporary signs announcing services filed suit claiming that town's sign ordinance, restricting size, duration, and location of temporary directional signs violated the right to free speech. The United States District Court for the District of Arizona, Susan R. Bolton, J., denied church's motion for preliminary injunction barring enforcement of ordinance. Church appealed. The United States Court of Appeals for the Ninth Circuit, M. Margaret McKeown, Circuit Judge, 587 F.3d 966, affirmed in part and remanded in part.On remand, the District Court, Bolton, J., 832 F.Supp.2d 1070, granted town summary judgment. Church and pastor appealed. The Court of Appeals, Callahan, Circuit Judge, 707 F.3d 1057, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] sign code was subject to strict scrutiny, and

[2] sign code violated free speech guarantees.

Reversed and remanded.

Justice Alito filed concurring opinion in which Justices Kennedy and Sotomayor joined.

Justice Breyer filed opinion concurring in the judgment.

Justice Kagan filed opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

West Headnotes (21)

[1] Constitutional Law
Viewpoint or idea discrimination

Constitutional Law
Content-Based Regulations or Restrictions

Under the First Amendment, 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. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[2] Constitutional Law
Content-Based Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny;compelling interest test

Content-based laws, that is, 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. U.S.C.A. Const.Amend. 1.

101 Cases that cite this headnote

[3] Constitutional Law
Content-Based Regulations or Restrictions

Government regulation of speech is "content based," and thus presumptively unconstitutional, if a law applies to particular speech because of the topic discussed or the idea or message expressed, and 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. U.S.C.A. Const.Amend. 1.

153 Cases that cite this headnote

[4] **Constitutional Law**
Strict or exacting scrutiny;compelling interest test

Constitutional Law
Strict or exacting scrutiny;compelling interest test

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, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

19 Cases that cite this headnote

[5] **Constitutional Law**
Governmental disagreement with message conveyed

Constitutional Law
Strict or exacting scrutiny;compelling interest test

Laws that, though facially content neutral, cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys, like those laws that are content based on their face, must satisfy strict scrutiny. U.S.C.A. Const.Amend. 1.

90 Cases that cite this headnote

[6] **Constitutional Law**
Temporary signs

Town's sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, was content based on its face, and thus was subject to strict scrutiny in free speech challenge by church seeking to place temporary signs announcing its services; any innocent motives on part of town did not eliminate danger of censorship, sign code singled out specific subject matter for differential treatment even if it did not target viewpoints within that subject matter, and sign code singled out signs bearing a particular message, i.e., the time and location of a particular event. U.S.C.A. Const.Amend. 1.

18 Cases that cite this headnote

[7] **Constitutional Law**
Content-Neutral Regulations or Restrictions

The crucial first step in the content-neutrality analysis in a free speech challenge is determining whether the law is content neutral on its face. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[8] **Constitutional Law**
Strict or exacting scrutiny;compelling interest test

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. U.S.C.A. Const.Amend. 1.

30 Cases that cite this headnote

[9] **Constitutional Law**
Freedom of Speech, Expression, and Press

Constitutional Law
Censorship

Illicit legislative intent is not the sine qua non of a violation of the First Amendment's free speech guarantee, and a party opposing the government need adduce no evidence of an improper censorial motive. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[10] Constitutional Law
Strict or exacting scrutiny;compelling interest test

Although a content-based purpose may be sufficient in certain circumstances to show that a regulation of speech is content based and thus subject to strict scrutiny, it is not necessary. U.S.C.A. Const.Amend. 1.

44 Cases that cite this headnote

[11] Constitutional Law
Strict or exacting scrutiny;compelling interest test

An innocuous justification cannot transform a facially content-based law regulating speech into one that is content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

97 Cases that cite this headnote

[12] Constitutional Law
Content-Neutral Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny;compelling interest test

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 in a free speech challenge. U.S.C.A. Const.Amend. 1.

33 Cases that cite this headnote

[13] Constitutional Law
Content-Based Regulations or Restrictions

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 content discrimination, but the 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. U.S.C.A. Const.Amend. 1.

39 Cases that cite this headnote

[14] Constitutional Law
Strict or exacting scrutiny;compelling interest test

A speech regulation targeted at specific subject matter is content based, and thus subject to strict scrutiny, even if it does not discriminate among viewpoints within that subject matter. U.S.C.A. Const.Amend. 1.

37 Cases that cite this headnote

[15] Constitutional Law
Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is speaker based does not automatically render the distinction content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[16] Constitutional Law
Strict or exacting scrutiny;compelling interest test

Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[17] Constitutional Law

Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is event based does not render it content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[18] Constitutional Law

Strict or exacting scrutiny;compelling interest test

Strict scrutiny requires the Government to prove that a restriction on speech furthers a compelling interest and is narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

55 Cases that cite this headnote

[19] Constitutional Law

Temporary signs

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Town's content-based sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, did not survive strict scrutiny, and thus violated free speech guarantees; even if town had compelling government interests in preserving town's aesthetic appeal and traffic safety, sign code's distinctions were underinclusive, and thus were not narrowly tailored to achieve that end, in that temporary directional signs were no greater an eyesore than ideological or political ones, and there was no reason to believe that directional signs posed a greater threat to safety than ideological or political signs. U.S.C.A. Const.Amend. 1.

18 Cases that cite this headnote

[20] Constitutional Law

Freedom of Speech, Expression, and Press

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. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[21] Constitutional Law

Strict or exacting scrutiny;compelling interest test

Constitutional Law

Content-Neutral Regulations or Restrictions

Constitutional Law

Strict or exacting scrutiny;compelling interest test

Not all speech-related distinctions are subject to strict scrutiny, only content-based ones are; laws that are content neutral are instead subject to lesser scrutiny. U.S.C.A. Const.Amend. 1.

38 Cases that cite this headnote

***2221** *Syllabus* [*]

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 ***2222** 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 speech that do not survive strict scrutiny. Pp. 2226 – 2233.

(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, 112 S.Ct. 2538, 120 L.Ed.2d 305. 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. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544. 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 ——, 131 S.Ct., at 2664. 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, 109 S.Ct. 2746, 105 L.Ed.2d 661. Pp. 2226 – 2227.

(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. P. 2227.

(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, 113 S.Ct. 1505, 123 L.Ed.2d 99. 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 ***2223** regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700, 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, 100 S.Ct. 2326, 65 L.Ed.2d 319. 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, 114 S.Ct. 2445, 129 L.Ed.2d 497. This same analysis applies to event-based distinctions. Pp. 2227 – 2231.

(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. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664. 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, 113 S.Ct. 1505. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 2231 – 2232.

(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, 104 S.Ct. 2118, 80 L.Ed.2d 772. 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. 2232 – 2233.

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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Opinion

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.

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." ***2225** § 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.*

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 locations, 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 ***2226** 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 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 (C.A.9 2013). Relying on this Court's decision in *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (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. ——, 134 S.Ct. 2900, 189 L.Ed.2d 854 (2014), and now reverse.

II

A

[1] **[2]** 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, 92 S.Ct. 2286, 33 L.Ed.2d 212 (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, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

***2227** **[3]** **[4]** 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. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra,* at 95, 92 S.Ct. 2286. 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 ——, 131 S.Ct., at 2664. 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.

[5] 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 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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

[6] 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.

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. ***2228** 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, 109 S.Ct. 2746; emphasis deleted).

[7] [8] [9] [10] [11] 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, 113 S.Ct. 1505, 123 L.Ed.2d 99 (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, 112 S.Ct. 501. 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, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

[12] 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 —— – ——, 131 S.Ct., at 2663–2664 (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, 110 S.Ct. 2404, 110 L.Ed.2d 287 (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, 104 S.Ct. 2118, 80 L.Ed.2d 772 (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, 104 S.Ct. 3065, 82 L.Ed.2d 221 (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, 88 S.Ct. 1673, 20 L.Ed.2d 672 (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 city-owned music venue, of sound amplification systems not provided by the city. 491 U.S., at 787, and n. 2, 109 S.Ct. 2746. In that context, we looked to ***2229** 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, 109 S.Ct. 2746. But *Ward* 's framework "applies only if a statute is content neutral." *Hill,* 530 U.S., at 766, 120 S.Ct. 2480 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.,* at 765, 120 S.Ct. 2480.

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, 120 S.Ct. 2480 (SCALIA, J., dissenting).

For instance, in *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (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, 83 S.Ct. 328. 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, 83 S.Ct. 328. Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church's 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, 113 S.Ct. 1505. 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.

[13] This analysis conflates two distinct but related limitations that the First ***2230** 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 content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (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, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

[14] 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, 113 S.Ct. 1505. 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 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.

[15] **[16]** 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, 130 S.Ct. 876, 175 L.Ed.2d 753 (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, 114 S.Ct. 2445. 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, 130 S.Ct. 876. Characterizing a distinction ***2231** 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 inquiry does not evade strict scrutiny review simply because an event (*i.e.,* an election) is involved.

[17] 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 2226 – 2227. 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, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (O'Connor, J., concurring).

III

[18] **[19]** 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. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664 (2011) (quoting *Citizens United,* 558 U.S., at 340, 130 S.Ct. 876). 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 tailored 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, 113 S.Ct. 1505, 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.

***2232** 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.

[20] 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, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), the Sign Code fails strict scrutiny.

IV

[21] 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, 104 S.Ct. 3065.

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, 104 S.Ct. 2118 (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 (C.A.11 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 (C.A.1 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, 114 S.Ct. 2038. At the same time, the presence of certain 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.

* * *

***2233** We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

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, 100 S.Ct. 2326, 65 L.Ed.2d 319 (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 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, 129 S.Ct. 1125, 172 L.Ed.2d 853 (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 ***2234** safety and serves legitimate esthetic objectives.

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, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Boos v. Barry,* 485 U.S. 312, 318–319, 108 S.Ct. 1157, 99 L.Ed.2d 333 (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 speakers. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (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, 113 S.Ct. 1505, 123 L.Ed.2d 99 (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 of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve ***2235** content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.,* 15 U.S.C. § 78*l* (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, 100 S.Ct. 2343, 65 L.Ed.2d 341 (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 "strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell v. IMS Health Inc.,* 564 U.S. ——, ——, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust v. Sullivan,* 500 U.S. 173, 193–194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (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, 112 S.Ct. 2538, 120 L.Ed.2d 305 (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 ***2236** 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, and whether there are other, less restrictive ways of doing so. See, *e.g., United States v. Alvarez,* 567 U.S. ——, —— – ——, 132 S.Ct. 2537, 2551–2553, 183 L.Ed.2d 574 (2012) (BREYER, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 400–403, 120 S.Ct. 897, 145 L.Ed.2d 886 (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.

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 2231 (acknowledging 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 2230, 2232 – 2233. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, *ante,* at 2232 – 2233, 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. ——, ——, 135 S.Ct. 1656, 1666, ——L.Ed.2d —— (2015). 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.* ***2237** *v. Ragland,* 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (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. *

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, *ante,* at 2231, 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. ——, —— – ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014) (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, 112 S.Ct. 2538, 120 L.Ed.2d 305 (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, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007) (quoting *R.A.V.,* 505 U.S., at 390, 112 S.Ct. 2538). 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, 115 S.Ct. 2510, 132 L.Ed.2d 700 (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 Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 539–540, 100 S.Ct. 2326, 65 L.Ed.2d 319 (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, 100 S.Ct. 2326 (quoting *Police Dept. of* ***2238** *Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (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, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); accord, *ante,* at 2233 (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, 112 S.Ct. 2538 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (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 2231.

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, 127 S.Ct. 2372; see *R.A.V.,* 505 U.S., at 388, 112 S.Ct. 2538 (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 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, 127 S.Ct. 2372 (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, 104 S.Ct. 2118, 80 L.Ed.2d 772 (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, 104 S.Ct. 2118 (listing exemptions); see *id.,* at 804–810, 104 S.Ct. 2118 (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, 104 S.Ct. 2118; see also *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (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, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address ***2239** signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.,* at 46–47, and n. 6, 114 S.Ct. 2038 (listing exemptions); *id.,* at 53, 114 S.Ct. 2038 (noting this assumption). We did not need to, and so did not, decide the 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 2231 – 2232 (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 2231. 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 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.

All Citations

135 S.Ct. 2218, 192 L.Ed.2d 236, 83 USLW 4444, 15 Cal. Daily Op. Serv. 6239, 2015 Daily Journal D.A.R. 6831, 25 Fla. L. Weekly Fed. S 383

Footnotes

* 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, 26 S.Ct. 282, 50 L.Ed. 499.

1 The 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).

2 A "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.

3 The 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.

4 The 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.

* 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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

* 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 2233 (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 differential treatment" and "defin[es] regulated speech by particular subject matter." *Ante,* at 2227, 2230 (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 2231.

874 F.3d 597
United States Court of Appeals,
Ninth Circuit.

CONTEST PROMOTIONS, LLC, Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee.

No. 17-15909
|
Argued and Submitted July 12, 2017—San Francisco, California
|
Filed August 16, 2017
|
Amended October 23, 2017

Synopsis

Background: Advertiser that rented right to post signs on premises of third-party businesses brought § 1983 action against city and county, alleging section of city planning code, which prohibited new billboards but allowed onsite business signs relating to activities undertaken on premises, violated First Amendment. The United States District Court for the Northern District of California, No. 3:16-cv-06539-SI, Susan Illston, Senior District Judge, 2017 WL 1493277, dismissed. Advertiser appealed.

[Holding:] The Court of Appeals, Graber, Circuit Judge, held that section of city planning code did not violate First Amendment.

Affirmed.

West Headnotes (7)

[1] Constitutional Law
Commercial Speech in General

Restrictions on commercial speech are subject to intermediate scrutiny under *Central Hudson*. U.S. Const. Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Reasonableness;relationship to governmental interest

For purposes of intermediate scrutiny under *Central Hudson* for restrictions on commercial speech, court undertakes its analysis in four steps: first, the speech must concern lawful activity and not be misleading; second, court asks whether the asserted governmental interest is substantial, and then, if both inquiries yield positive answers, court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Reasonableness;relationship to governmental interest

The last two steps of the *Central Hudson* analysis for restrictions on commercial speech, whether regulation directly advances governmental interest asserted and whether it is not more extensive than is necessary to serve that interest, basically involve a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[4] Constitutional Law
Reasonableness;relationship to governmental interest

The fourth step of *Central Hudson* analysis for restrictions on commercial speech, whether regulation is not more extensive than is necessary to serve governmental interest asserted, guards against over-regulation rather than under-regulation. U.S. Const. Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Reasonableness;relationship to governmental interest

The fourth step of *Central Hudson* analysis for restrictions on commercial speech, whether regulation is not more extensive than is necessary to serve governmental interest asserted, does not require that the regulation be the least-restrictive means to accomplish the government's goal; rather, what is required is a reasonable fit between the ends and the means, a fit that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective. U.S. Const. Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Off-premises signs

Constitutional Law
Bans or moratoria

Zoning and Planning
Signs and billboards

Section of city planning code, which prohibited new billboards but allowed onsite business signs relating to activities undertaken on premises, did not violate First Amendment; section of planning code was not impermissibly under-inclusive, increased size and number of general advertising signs were creating public safety hazard, signs contributed to blight and visual clutter as well as commercialization of public spaces, and choice to regulate commercial signs but not noncommercial signs had substantial effect on government interests in safety and aesthetics. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[7] **Constitutional Law**
Intermediate scrutiny

A law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny.

Cases that cite this headnote

***598** Appeal from the United States District Court for the Northern District of California, Susan Illston, Senior District Judge, Presiding, D.C. No. 3:16-cv-06539-SI

Attorneys and Law Firms

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James M. Emery (argued) and Victoria Wong, Deputy City Attorneys; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendant-Appellee.

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Consuelo B. Marshall,* District Judge.

ORDER AND AMENDED OPINION

GRABER, Circuit Judge:

ORDER

The opinion filed on August 16, 2017, and published at 867 F.3d 1171, is amended by the opinion filed concurrently with this order, as follows:

***599** On slip opinion page 14, footnote 4, delete the last sentence: "For the reasons given by the district court, *see Contest Promotions, LLC v. City of San Francisco*, No. 16-cv-06539-SI, 2017 WL 1493277, at *5 (N.D. Cal. Apr. 26, 2017) (order), we affirm the dismissal of that claim as well." Substitute the following for the deleted sentence: "This claim is moot because no penalties ever were assessed."

With this amendment, the panel has voted to deny Appellant's petition for rehearing. Judges Graber and Friedland have voted to deny Appellant's petition

for rehearing en banc, and Judge Marshall has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing and rehearing en banc is **DENIED**. No further petitions for rehearing and rehearing en banc may be filed.

OPINION

Plaintiff Contest Promotions, LLC, rents advertising space from businesses in cities around the country, including San Francisco, and places third-party advertising signs in that space, framed by text inviting passersby to enter the business and win a prize related to the sign. Through its Planning Code, San Francisco prohibits new billboards but allows onsite business signs subject to various rules. Noncommercial signs are exempt from the rules. In this, the latest of several challenges that Plaintiff has mounted to San Francisco's sign-related regulations, Plaintiff argues that the distinction between commercial and noncommercial signs violates the First Amendment. The district court dismissed the complaint. Reviewing the order of dismissal de novo, *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017), we affirm.

BACKGROUND

Like other local governments, the City and County of San Francisco, Defendant here, uses its Planning Code to regulate outdoor advertising, including billboards. The purposes of Planning Code Article 6, which contains the advertising rules, include "promot[ing] the aesthetic and environmental values of San Francisco," "protect[ing] public investment in and the character and dignity of public buildings, streets, and open spaces," "protect[ing] the distinctive appearance of San Francisco," and "reduc[ing] hazards to motorists, bicyclists, and pedestrians." S.F., Cal., Planning Code ("Planning Code") § 601.

The Planning Code draws two distinctions that are relevant here. First, the Planning Code distinguishes between "general advertising signs" and "business signs." A general advertising sign is

> [a] Sign, legally erected prior to the effective date of Section 611 of this Code, which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises* upon which the Sign is located, or to which it is affixed, and which is sold, offered or conducted on such premises only incidentally if at all.

Id. § 602 (emphasis added). By contrast, a business sign is defined in part as

> [a] Sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted *on the premises* upon which such Sign is located, or to which it is affixed.

Id. (emphasis added). In other words, general advertising signs, like traditional billboards, refer primarily to offsite activities, ***600** whereas business signs refer to the activities undertaken on the same premises as the sign. The Code decrees that "[n]o new general advertising signs shall be permitted at any location within the City as of March 5, 2002." *Id.* § 611(a). By contrast, business signs are permitted, subject to other limitations related to neighborhood and development type.

Second, the Planning Code distinguishes between commercial and noncommercial signs. The latter are exempted from Article 6 altogether. *See* Planning Code § 603(a) (explaining that "[n]othing in this Article 6 shall apply to ... Noncommercial Signs"). [1] Article 6 does not define "noncommercial" except by reference to a non-exhaustive list that includes "[o]fficial public notices," "[g]overnmental signs," "[t]emporary display posters," "[f]lags, emblems, insignia, and posters of any nation or political subdivision," and "[h]ouse numbers." *Id.*

Plaintiff is an advertiser that rents the right to post signs on the premises of third-party businesses. Taking the allegations in the complaint as true, Plaintiff's

signs advertise contests in which passing customers can participate by going inside the business and filling out a form. Plaintiff alleges that the signs depict prizes that customers may win in Plaintiff's contests. No party disputes that Plaintiff's signs are "commercial" under Article 6. In September and October of 2016, and in January of 2017, Defendant issued several Notices of Enforcement, accusing Plaintiff's signs of violating various requirements of Article 6.

Although the San Francisco Charter sets forth an administrative process for challenging the denial of permits for signs, *see* S.F., Cal., Charter § 4.106(b), Plaintiff did not avail itself of that process. Instead, Plaintiff responded by filing suit under 42 U.S.C. § 1983 alleging, inter alia, that Article 6 of the Planning Code violates the First Amendment by exempting noncommercial signs from its regulatory ambit. [2] Plaintiff moved for a preliminary injunction, which the district court denied. Plaintiff then filed the operative first amended complaint, and Defendant moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The district court granted Defendant's motion and entered a judgment of dismissal, and Plaintiff timely appeals.

DISCUSSION

A. *Level of Scrutiny*

[1] Our First Amendment analysis begins by determining the level of scrutiny that applies to the Planning Code's ***601** Article 6. Because noncommercial signs are exempted from its regulatory framework, Article 6 is a regulation of commercial speech. Restrictions on commercial speech are subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), and *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), Plaintiff argues that review more searching than *Central Hudson*'s intermediate scrutiny standard should govern our analysis of Defendant's billboard laws. But we recently held that "*Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply." *Retail Dig. Network, LLC v. Prieto ("RDN")*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc).

In *RDN*, we rejected the plaintiff's argument that a liquor advertising rule "imposed a content- or speaker-based burden" and therefore merited "heightened scrutiny." *Id.* at 847. We held that the speaker- or content-based nature of a regulation merely meant that such a regulation "implicates the First Amendment, which requires scrutiny greater than rational basis review." *Id.* (citing *Sorrell*, 564 U.S. at 567, 131 S.Ct. 2653). In those situations, the proper level of scrutiny was the longstanding commercial speech doctrine, which calls for intermediate review. *Id.* at 848.

We have likewise rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("[A]lthough laws that restrict only commercial speech are content based, such restrictions need only withstand intermediate scrutiny." (citing *Reed* and *Central Hudson*)). We thus reject Plaintiff's argument that review more searching than intermediate scrutiny applies here.

[2] Under that standard, we undertake our analysis in four steps. First, the speech "must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. Second, "we ask whether the asserted governmental interest is substantial." *Id.* Then, "[i]f both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

B. *Central Hudson Analysis*

"Applying the *Central Hudson* test in the context of billboard regulations is not new for the Supreme Court or us." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993). At the first step, neither party disputes that, as alleged, Plaintiff's advertisements concern lawful, non-misleading activity. And at the second step, the Supreme Court and this court have long held—and today, we reaffirm—that a locality's asserted interests in safety and aesthetics, *see* Planning Code § 601 (describing the purpose of Defendant's sign controls), are substantial. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality) (explaining that there was no "substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals"); *accord Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2009)

(noting that "[i]t is well-established that traffic safety and aesthetics constitute substantial government interests"); *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) (noting that "both the Supreme Court and our circuit have endorsed these rationales as substantial governmental interests" ***602**); *Ackerley Commc'ns of Nw. Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) (reaffirming that "a city's interest in avoiding visual clutter suffices to justify a prohibition of billboards"); *Nat'l Advert. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (same). We therefore proceed to the last two steps of *Central Hudson*.

[3] **[4]** **[5]** "The last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." [3] *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (internal quotation marks omitted). The third *Central Hudson* step asks whether "the restriction ... directly advance[s] the state interest involved." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 821 (9th Cir. 2013) (internal quotation marks omitted). In considering that question, "we must look at whether the City's ban advances its interest in its general application, not specifically with respect to [the defendant]." *Metro Lights*, 551 F.3d at 904. The regulation also must not be underinclusive, such that it " 'undermine [s] and counteract[s]' the interest the government claims it adopted the law to further." *Id.* at 905 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)). The fourth step "guards against over-regulation rather than under-regulation." *Id.* at 911. It "does not require that the regulation be the least-restrictive means to accomplish the government's goal. Rather, what is required is a reasonable fit between the ends and the means, a fit 'that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.' " *Outdoor Sys.*, 997 F.2d at 610 (alteration omitted) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

[6] Relying on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), Plaintiff argues that Article 6 falters at the last two steps of the *Central Hudson* analysis because it exempts noncommercial signs for reasons unconnected to Defendant's asserted interests in safety and aesthetics. We disagree for two reasons.

First, *Discovery Network* is materially distinguishable. There, the Supreme Court considered a First Amendment challenge to a city's ordinance that "completely prohibit[ed] the distribution of commercial handbills on the public right of way" using newsracks, while leaving unaffected a far greater number of newsracks that distributed noncommercial material. *Id.* at 414, 113 S.Ct. 1505. In particular, the record showed that "the number of newsracks dispensing commercial handbills was 'minute' compared with the total number (1,500–2,000) on the public right of way." *Id.* The Court held that the ordinance's distinction between commercial and noncommercial speech "b[ore] no relationship *whatsoever* to the particular interests that the city has asserted," making the ordinance "an impermissible means of responding to" the city's "admittedly legitimate interests" in safety and aesthetics. *Id.* at 424, 113 S.Ct. 1505; *see also id.* at 428, 113 S.Ct. 1505 (concluding that "the distinction [the city] has drawn has absolutely ***603** no bearing on the interests it has asserted").

The Court's conclusion rested in significant part on the details of the record before it and on the empirically poor connection between the ordinance and the asserted problem. For example, the Court noted that, "[w]hile there was some testimony in the District Court that commercial publications are distinct from noncommercial publications in their capacity to proliferate, the evidence of such was exceedingly weak," *id.* at 425, 113 S.Ct. 1505, and that if the "aggregate number of newsracks on its streets" was the real concern, then "newspapers are arguably the greater culprit because of their superior number," *id.* at 426, 113 S.Ct. 1505. Thus, "the fact that the regulation 'provide[d] only the most limited incremental support for the interest asserted,'—that it achieved only a 'marginal degree of protection,' for that interest—supported [the Court's] holding that the prohibition was invalid." *Id.* at 427, 113 S.Ct. 1505 (first alteration in original) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983)). As the Court emphasized: "Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record [the city] has failed to make such a showing." *Id.* at 428, 113 S.Ct. 1505.

Unlike in *Discovery Network*, Article 6 is not impermissibly under-inclusive. The text of Article 6 explains why such a rule is necessary. It explains that, when the ordinance was adopted, the "increased size and number of general advertising signs" in particular were "creating a public safety hazard," that such signs "contribute to blight and visual clutter as well as the commercialization of public spaces," that there was a "proliferation" of such signs in "open spaces all over the City," and that there was "currently an ample supply of general advertising signs within the City." Planning Code § 611(f). These are statements of legislative purpose specific to commercial signs. In contrast to a ban on commercial sidewalk newsracks affecting only a tiny fraction of the overall number of newsracks, Defendant's choice to regulate commercial signs (but not noncommercial signs) has a substantial effect on its interests in safety and aesthetics. Accordingly, Article 6 is not constitutionally underinclusive. Its exceptions ensure that the regulation will achieve its end, and the distinctions that it makes among different kinds of speech relate empirically to the interests that the government seeks to advance. *Metro Lights*, 551 F.3d at 906.

Outdoor Systems is not to the contrary. Defendant relies on that case to argue that Defendant impermissibly "discriminate[s] against commercial speech solely on the ground that it deserves less protection than noncommercial speech." 997 F.2d at 610. As explained above, that is not the reason for the distinction drawn by Article 6, which focuses instead on the unique risks to Defendant's interests that commercial signs pose. Plaintiff also contends that, unlike the billboard regulations that survived intermediate scrutiny in *Outdoor Systems*, the ones at issue here are not neutral as between commercial and noncommercial speech. But neither were the regulations that we approved in *Outdoor Systems*. As we observed—in a factual recitation that is admittedly in some tension with other analysis in the opinion—Mesa's regulations "contain[ed] a provision that except[ed] all noncommercial signs from the Code's definition of offsite signs." *Id.* at 608–09.

[7] ***604** More generally, a second principle supports our conclusion. It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny. The Supreme Court long ago rejected the notion "that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (noting that "[a] comparable argument was categorically rejected in *Metromedia*"). Instead, for example, "the validity of the [a]esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property." *Id.* at 811, 104 S.Ct. 2118. And in *Metromedia*, the Supreme Court noted with approval that the city "ha[d] gone no further than necessary in seeking to meet its ends," when it declined to ban all billboards and instead "allow[ed] onsite advertising and some other specifically exempted signs." 453 U.S. at 508, 101 S.Ct. 2882.

We therefore hold that the distinctions drawn in Article 6 between commercial and noncommercial speech directly advance Defendant's substantial interests. We find no constitutional infirmity in the ordinance's failure to regulate every sign that it might have reached, had Defendant (or its voters) instead enacted another law that exhausted the full breadth of its legal authority.

CONCLUSION

The distinction drawn between commercial and noncommercial signs in Article 6 of the Planning Code survives intermediate scrutiny under *Central Hudson*. Accordingly, we affirm the dismissal of Plaintiff's First Amendment claims. [4]

AFFIRMED.

All Citations

874 F.3d 597, 17 Cal. Daily Op. Serv. 10,248

Footnotes

* The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

1 An earlier version of the sign ordinance exempted a long list of types of noncommercial signs without categorically exempting them all. In response to state and federal court decisions that interpreted the ordinance to exempt all noncommercial signs in order to preserve its constitutionality, *see Metro Fuel LLC v. City of San Francisco*, No. C 07-6067 PJH, 2011 WL 900318, at *9 (N.D. Cal. Mar. 15, 2011) (so holding); *City of San Francisco v. Eller Outdoor Advert.*, 192 Cal.App.3d 643, 237 Cal.Rptr. 815, 828 (1987) (same), Defendant recently amended the ordinance to formally exempt noncommercial signs, full-stop. *See* Enactment No. 218-16, File No. 160553, San Francisco Board of Supervisors, eff. Dec. 10, 2016 (exempting all noncommercial signs from Article 6).

2 This is one of several actions that Plaintiff has filed against Defendant, challenging various aspects of its billboard regulations. In a separate memorandum disposition, we affirm the dismissal of an earlier-filed suit raising different First Amendment issues under the Planning Code. And in a second memorandum disposition, also filed this date, we dismiss as moot Plaintiff's appeal from the denial of its motion for a preliminary injunction in this case.

3 As we have observed before, "[i]t has not always been clear how this basic inquiry differs with respect to the last two steps of the *Central Hudson* analysis, and indeed the Supreme Court has observed that the steps of the analysis are 'not entirely discrete.' " *Metro Lights*, 551 F.3d at 904 (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999)).

4 Plaintiff also argues that the district court erred by refusing to enjoin the accrual of penalties while this litigation is pending, in violation of the due process principle set forth in *Ex Parte Young*, 209 U.S. 123, 147–48, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This claim is moot because no penalties ever were assessed.

290 F.Supp.3d 1149
United States District Court, D. Nevada.

STRICT SCRUTINY MEDIA, CO., a Nevada Corporation; Independent Order of Odd Fellows Reno Lodge # 14/Mountain View Cemetery, a Nevada non-profit corporation, Plaintiffs,
v.
The CITY OF RENO, a municipal corporation, Defendant.

Case No. 3:16–cv–00734–MMD–WGC
|
Signed 11/15/2017

Synopsis

Background: Owner of billboards and lessor of properties where billboards were built brought action against city alleging that city's land development ordinances governing exceptions from permitting process for on-premises signs and restrictions on permanent off-premises advertising displays violated their due process, equal protection, and free speech rights. Owner and lessor moved for preliminary injunction, and city moved to dismiss.

Holdings: The District Court, Miranda M. Du, J., held that:

[1] owner had standing to challenge ban on building of new, permanent off-premises signs;

[2] lessor had standing to challenge exceptions to permit requirements for on-premises signs;

[3] owner stated First Amendment free speech claim against city in connection with ban;

[4] lessor stated First Amendment free speech claim against city in connection with exceptions;

[5] plaintiffs failed to state First Amendment free speech claim against city challenging entirety of city's land development ordinances as "vague and prolix";

[6] dismissal of claims concerning city's prior process for obtaining permits for freeway signs as well as city's total ban on freeway signs without leave to amend was warranted; and

[7] plaintiffs were not entitled to preliminary injunction prohibiting city from assessing fines against lessor.

Plaintiffs' motion denied; city's motion granted in part and denied in part.

West Headnotes (10)

[1] **Constitutional Law**
Freedom of Speech, Expression, and Press

Constitutional Law
Due Process

Constitutional Law
Equal Protection

Owner of billboards had standing to bring due process, equal protection, and free speech challenges to city's ban on building of new, permanent off-premises signs that displayed commercial speech, since owner was purportedly injured by outright ban because owner's only use of billboards was for permanent off-premises advertising displays for businesses other than its own. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[2] **Constitutional Law**
Licenses

Constitutional Law
Licenses

Constitutional Law
Licenses

Lessor of properties where billboards were built had standing to bring due process, equal protection, and free speech challenges to city's exceptions to permit requirements for on-premises permanent signs, since lessor was purportedly injured insofar as it was required to acquire permit to display billboard signs

advertising its own businesses on its own properties. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[3] United States

Standing

Federal courts are required sua sponte to examine jurisdictional issues such as standing. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[4] Federal Civil Procedure

In general;injury or interest

The party invoking federal jurisdiction bears the burden of establishing standing. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[5] Federal Civil Procedure

In general;injury or interest

The party invoking standing must show that it has standing for each type of relief sought. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[6] Constitutional Law

Bans or moratoria

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Owner of billboards built on leased property stated First Amendment free speech claim against city in connection with ban on building of new, permanent off-premises advertising displays, where owner alleged that ban regulated commercial speech, and that temporary off-premises advertising displays for special events were allowed building permits. U.S. Const. Amend. 1.

Cases that cite this headnote

[7] Constitutional Law

Billboards

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Lessor of properties where billboards were built stated First Amendment free speech claim against city in connection with exceptions to permit requirements for on-premises signs, where lessor alleged that it was required to acquire permit to display billboard signs advertising its own businesses on its own properties, but that there was lack of permit requirements for certain temporary on-premises signs, specifically real estate, campaign, and garage sale signs. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] Constitutional Law

Particular claims

Owner of billboards and lessor of properties where billboards were built failed to state First Amendment free speech claim against city challenging entirety of city's land development ordinances as "vague and prolix," where plaintiffs did not relate any factual allegations to any specific "vague and prolix" ordinance provisions regulating signs. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Federal Civil Procedure

Pleading over

Due process, equal protection, and free speech claims by owner of billboards and lessor of properties where billboards were built that concerned city's prior process for obtaining permits for freeway signs as well as city's total ban on freeway signs were outside scope of prior order granting plaintiffs leave to file second amended complaint, and, thus, dismissal of claims without leave to amend was warranted; first amended complaint did not contain any allegations concerning freeway signs, rather allegations focused on city's ban on building of new,

permanent off-premises advertising displays and exceptions to permit requirements for on-premises signs, and plaintiffs had not been granted leave to add allegations or claims concerning permitting process for, or ban on, freeway signs. U.S. Const. Amends. 1, 14; Fed. R. Civ. P. 41(b).

Cases that cite this headnote

[10] Zoning and Planning

Interim relief;preliminary injunction

Owner of billboards and lessor of properties where billboards were built were not entitled to preliminary injunction prohibiting city from assessing fines against lessor for purported violations of zoning ordinances by displaying billboard signs advertising its own businesses on its own properties; plaintiffs did not have likelihood of success on merits of their claim that city could not enforce repealed ordinance governing process for obtaining permits for freeway signs against them, given that such claim was outside scope of prior order granting plaintiffs leave to file second amended complaint and thereby dismissed without leave to amend.

Cases that cite this headnote

Attorneys and Law Firms

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Chandeni K. Sendall, Jonathan David Shipman, Reno City Attorney's Office, Reno, NV, for Defendant.

ORDER

MIRANDA M. DU, UNITED STATES DISTRICT JUDGE

I. SUMMARY

Pending before the Court is Defendant City of Reno's Motion to Dismiss Second Amended Complaint ("MTD") (ECF No. 40) and Plaintiffs' Motion for Preliminary Injunction ("PI Motion") (ECF No. 47). The Court has reviewed the responses (ECF Nos. 42, 49) and replies (ECF Nos. 44, 50) relating to these two motions. For the following reasons, the MTD is granted in part and denied in part and the PI Motion is denied.

II. BACKGROUND

A. Procedural History

Strict Scrutiny Media, Co. ("SSM") filed its original complaint on December 17, 2016, against the City of Reno ("the City"). (ECF No. 1.) SSM then filed its First Amended Complaint ("FAC") on January 30, 2017, in which SSM added an additional plaintiff, Independent Order of Odd Fellows Reno Lodge #14/Mountain View Cemetery ("Oddfellows"). (ECF No. 17.) The FAC appeared to challenge the constitutionality of two specific provisions of Reno's municipal law concerning signs: Reno's Land Development Code §§ 18.16.203 (Exempted On–Premises Permanent Signs) and 18.16.902 (Restrictions on Permanent Off–Premises Advertising Displays). The City then moved to dismiss Plaintiffs' FAC on February 13, 2017 ***1152** (ECF No. 20), which this Court granted on April 18, 2017, but with leave for Plaintiff to file an amended complaint consistent with the Court's order (ECF No. 38). That order stated that the Court was "unclear on whether amendment would be futile as to Plaintiffs' First Amendment challenges to §§ 18.16.902 and 18.16.203 of the City's Land Development Code" and that it was unclear as to whether Plaintiffs may be able to allege a claim under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), as to the City's prohibition on the building of new off-premises permanent signs that display commercial speech. (ECF No. 38 at 8; *Id.* at 5 n.8.)

On April 18, 2017, Plaintiffs filed a Second Amended Complaint ("SAC"). (ECF No. 39.)

B. Relevant Facts

The following facts are taken from Plaintiffs' SAC. (ECF No. 39.)

SSM is a publishing company that was established to lease private property to build billboard structures, maintain those structures, advertise its own messages on structures, and sell or sublease these structures to other advertising companies at fair market value. (ECF No. 39 at ¶ 7.) SSM publishes both commercial speech as well as "all other varieties of lawful speech." (*Id.*)

SSM hired Jeff Herson [1] to secure and oversee construction of these structures in the City, specifically six leases on six parcels and four leases on a seventh parcel. (*Id.* at ¶¶ 8–9.) One of the properties Herson secured was for property located at 1300 Stardust Street in Reno, Nevada ("Stardust Property"). (*Id.* at ¶ 10(a).) This property is owned by Oddfellows. (*Id.*) SSM is the sole owner of the billboard structure on the Stardust Property (*Id.* at ¶ 10(j).) On or about October 3, 2016, Oddfellows applied for a building permit to construct a pole style billboard with a 240 square foot face and a height of 25 feet. (*Id.* at ¶ 10(b).) The permit was issued on October 5, 2016. (*Id.* at ¶ 10(c).) Sign Crafters, a licensed general contractor, began construction of the billboard, building the footing and erecting the pole. (*Id.* at ¶ 10(d).) However, on December 8, 2016, the City issued a Stop Work Notice, stating that the reason for the notice was "violation of [Reno Municipal Code] Section or Clause: RMC 18.16." (*Id.* at ¶ 10(f).) Sign Crafters then refused to finish the project, but SSM allowed the face structure to be attached to the already erected pole and become permanent. (*Id.* at ¶¶ 10(g) & (h).) The structure has an 8 foot by 30 foot face capable of displaying messages on both side. (*Id.* at ¶ 10(i).) The billboard has the following message, "BANQUET HALL AVAILABLE" to advertise the availability of the banquet hall of Oddfellows. (*Id.* at ¶ 10(k).) SSM is not charging Oddfellows a fee to display this message, but SSM values the billboard's fair market rental rate at $6,000 per side (or $12,000 total). (*Id.* at ¶¶ 10(m) & (n).)

Herson also secured another lease on behalf of SSM at 435 Stoker Avenue in Reno, Nevada ("Stoker Property"). (*Id.* at ¶ 11(a).) Oddfellows also owns the Stoker Property. (*Id.*) Plaintiffs had not applied for a permit to build a billboard on the Stoker Property, yet Plaintiffs had a permanent monopole billboard constructed that has a face of 12 feet by 36 feet and ***1153** that is 25 feet in height. (*Id.* at ¶ 11(d).) SSM is the sole owner of the billboard. (*Id.* at ¶ 11(e).) Currently, the message on the face of the structure states "MOUNTAIN VIEW CEMETERY" and advertises the location of the cemetery operated by Oddfellows which is on the same site as the sign. (*Id.* at ¶ 11(f).) SSM is not charging a fee to present this message, but the monthly fair market rental rate is supposedly $6,000. (*Id.* at ¶¶ 11(h) & (i).)

Herson secured a third lease on behalf of SSM that is also located at the Stoker Property. (*Id.* at ¶ 12(a).) Plaintiffs similarly did not apply for a permit to build a second structure at the Stoker Property. (*Id.* at ¶ 12(b).) The structure is a permanent monopole sign with a face that is 12 feet by 36 feet and a height of 25 feet. (*Id.* at ¶ 12(d).) SSM is the sole owner of the structure. (*Id.* at ¶ 12(e).) There has never been and is currently not a message on the face of this structure, but the monthly fair market rental rate to third parties is purportedly $6,000. (*Id.* at ¶¶ 12(f) & (g).)

Herson secured eight additional leases on various properties, but SSM has not erected any structures on these properties. (*Id.* at ¶ 13; *see also id.* at ¶ 14(d).) SSM states that it planned to build digital billboards at these properties at a supposed fair market monthly rental value of $160,000. (*Id.* at ¶¶ 14(a) & (c).)

After initiation of this lawsuit, on or about December 30, 2016, the City sent Oddfellows a Notice of Violation alleging that the sign located at the Stardust Property violated Reno Administrative Law Code § 14.16.040 and Reno Land Development Code § 18.22.201(a). (*Id.* at ¶¶ 16(a)(i) & (a)(ii).) Specifically, Oddfellows had violated § 14.16.040 because the building permit for the Stardust Property sign was issued to Sign Crafters, yet Sign Crafters was no longer a contractor as of December 8, 2016, making the building permit no longer valid. (*See id.* at ¶ 16.) The corrective action identified in the Notice of Violation was to apply for a site plan review, which was required because the sign was within 100 feet of a "freeway right-of-way." [2] (*Id.* at ¶ 16(b).) If and once the plan was approved, the Notice of Violation indicated that a licensed sign contractor would need to obtain a building permit for the sign. (*Id.*)

Similarly, on or about December 30, 2016, Oddfellows received a Notice of Violation as to one of the Stoker Property signs. (*Id.* at ¶ 17(a).) The Notice indicated that the sign was built without a valid permit and that the sign was also within 100 feet of a freeway, requiring it to go through a site plan review. (*Id.* at ¶ 17(b).) SSM

also planned its future billboards, for which it has leased property, to be within 100 feet of a freeway, with faces oriented towards a freeway and visible from a freeway. [3] (*Id.* at ¶ 19(b).)

III. LEGAL STANDARD GOVERNING DISMISSAL

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." ***1154** Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Rule 8 notice pleading standard requires Plaintiff to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (internal quotation marks and citation omitted). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. When determining the sufficiency of a claim, "[w]e accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party[; however, this tenet does not apply to] ... legal conclusions ... cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (citation and internal quotation marks omitted). Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (internal quotation marks omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pleaded factual allegations in the complaint; however, legal conclusions are not entitled to an assumption of truth. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678, 129 S.Ct. 1937. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679, 129 S.Ct. 1937. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678, 129 S.Ct. 1937. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679, 129 S.Ct. 1937 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. A complaint must contain either direct or inferential allegations concerning "all the material elements necessary to sustain recovery under *some* viable legal theory." *Id.* at 562, 127 S.Ct. 1955 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

IV. MOTION TO DISMISS

The City argues that Plaintiffs' SAC should be dismissed with prejudice pursuant to the law of the case doctrine and Federal Rules of Civil Procedure 8, 12(b)(6), and 41(b). The Court agrees with the City that Plaintiffs' SAC contains claims outside those permitted by the Court's prior order and added without leave of Court. After extensive time spent untangling the SAC's claims and legal bases for them, the Court finds that certain claims may go forward. *See* discussion *infra* Sec. IV(b). The Court begins its analysis by addressing Plaintiffs' standing.

A. Standing

[1] **[2]** The City points out that by grouping SSM and Oddfellows together for ***1155** all their claims, it is unclear whether the factual allegations in the SAC support Plaintiffs' standing. (*See* ECF No. 44 at 2.) The Court agrees and finds that each Plaintiff has standing to bring only certain types of claims.

[3] **[4]** **[5]** "Federal courts are required sua sponte to examine jurisdictional issues such as standing." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (internal quotation marks, alteration, and citation omitted). "Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.' " *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). "To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and

particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Moreover, the party invoking standing must show that it has standing for each type of relief sought. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

The Court construes the allegations in the SAC as alleging two sets of claims: those which challenge the total ban on the building of new permanent off-premises advertising displays and those which challenge the exemptions to permit requirements for certain temporary or permanent on-premises signs. Reno's Municipal Code differentiates between on-premises signs that advertise a business and off-premises advertising displays (commonly referred to as "billboards"). Reno's Municipal Code defines an "off-premises advertising display" as:

> Any arrangement of material, words, symbols or any other display erected, constructed, carved, painted, shaped or otherwise created for the purpose of advertising or promoting the commercial interests of any person, persons, firm, corporation or other entity, located in view of the general public, which is not principally sold, available or otherwise provided on the premises on which the display is located. An off-premises advertising display includes its structure.

Land Development Code § 18.24.203.4570(23). By contrast, Reno's Municipal Code defines "on-premises sign" as:

> Any arrangement of material, words, symbols or any other display erected, constructed, carved, painted, shaped or otherwise created for the purpose of advertising or promoting the commercial interests of any person, persons, firm, corporation or other entity, located in view of the general public, which is principally sold, available or otherwise provided on the premises on which the display is located.

Land Development Code § 18.24.203.4570(28).

Based on these definitions and the facts as alleged in the SAC, the Court can reasonably infer that Oddfellows applied for a permit to build a sign on the Stardust Property under the auspices that the sign's purpose was to advertise for their business—as an on-premises sign—yet SSM leased property from Oddfellows to build the sign and therefore owns this sign. (*See* ECF No. 39 at ¶¶ 7, 16(a); *see* ***1156** *also id.* at 54–58 (Exh. C).) The Court is also able to reasonably infer from the allegations in the SAC that SSM now intends to lease advertising space on the Stardust Property sign, the two Stoker Property signs, and the future billboards it has leased space for to other companies, but under the current municipal code SSM is prohibited from doing so. (*See* ECF No. 39 at ¶¶ 10(j) & (o), 11(e), (c) & (j), 12(c), (d) & (h), 13, 14(e).) Thus, SSM's purported use of the currently existing and future signs are for permanent off-premises advertising displays; therefore, SSM is purportedly injured by the City's outright ban on the building of these displays. *See* Land Development Code § 18.16.902. By contrast, Oddfellows is purportedly injured insofar as it was required to acquire a permit to display any sign advertising its business on the Stardust or Stoker properties.

Therefore, the Court finds that SSM has standing to bring claims challenging the outright ban on building of new, permanent off-premises advertising displays and Oddfellows has standing to bring claims challenging exceptions to the permit requirements for on-premises signs.

B. Claims Permitted to Go Forward

Plaintiffs' third claim for relief includes a count the Court will permit to proceed. As stated in the SAC, this claim incorporates eight counts: violation of due process; violation of equal protection; violation of free speech and due process clauses (unbridled discretion); violation of

free speech and press (vague and prolix); violation of free speech and press (content-based law); violation of free speech and press (practical ban); violation of free speech and press and due process (vague distinction); and violation of free speech and press (*Central Hudson*). The Court finds that there are essentially three purported violations—due process, equal protection, and free speech—and that the various parentheticals raise various legal theories as opposed to distinct claims for relief under 42 U.S.C. § 1983. The Court finds that the count consistent with the Court's previous order and that may proceed alleges only First Amendment violations of free speech.

1. Third Claim for Relief-Count 5

[6] Count 5 alleges that certain provisions of the Reno Municipal Code contain unconstitutional content- and speaker-based exemptions. As the City notes, this count includes almost four pages of case law citations and quotes (*see* ECF No. 40 at 14), making the actual claim for relief difficult for the Court to parse. However, it appears that Plaintiffs are challenging five provisions of law as being unconstitutionally content- or speaker-based: (1) the former version of Reno's Land Development Code § 18.16.203 exemption from permit or application requirements and exclusion from aggregate area computations for on-premises permanent signage of "official traffic-control sign, signals or devices, street-name signs, public utility signs, railroad signs, or signs for hospital or emergency services"; (2) special event exemptions for temporary off-premises advertising displays promoting a specified event, Land Dev. Code § 18.16.911; (3) temporary real estate sale, lease, or rental signs, Land Dev. Code § 18.16.502(2)(a)(2); (4) temporary campaign signs of a certain size that may be erected no more than 90 days prior to an election and removed within 5 days following the election, Land Dev. Code § 18.16.502(2)(a)(1); and (5) temporary garage sale signs of a certain size that may be erected no earlier than sunrise and removed by sunset on any date the sign is erected, Land Dev. Code § 18.16.502(2)(a)(3).

Because the first provision challenged is no longer in existence, it appears that Plaintiffs' claim as to section 18.16.203 is ***1157** moot.[4] Moreover, while Plaintiffs seek declaratory relief for this count, their additional request for damages ensues from the recent ban on freeway signs or the prohibition on construction of new, off-premises advertising displays[5] and not from a content-based distinction related to on-premises signs. (*See* ECF No. 39 at 27 (seeking declaratory relief as well as lost revenue for the existing and unbuilt billboards, which Plaintiffs state at paragraph 19 were planned to be freeway signs).) However, the Court finds that Plaintiffs state a colorable claim regarding the four other provisions concerning temporary signs. Specifically, the challenge that temporary off-premises advertising displays for special events are allowed building permits and that certain content and speakers are exempted from certain requirements for on-premises signs. (ECF No. 39 at 21.)

Accepting the allegations in the SAC as true, SSM has sufficiently demonstrated that it owns the signs on the Stardust Property and Stoker Property and, therefore, that it has standing to challenge section 18.16.911 which allows holders of a special event permit to apply for and be granted a building permit to erect a temporary off-premises advertising display promoting the special event.[6] (*See*, *e.g.*, ECF No. 39 at 5 ("Under the lease, Strict Scrutiny is the sole owner of the billboard structure").) However, it appears that SSM is highlighting this provision to challenge the total ban on building of permanent off-premises advertising displays, as both provisions concern the regulation of commercial speech and do not appear to differentiate between different types of commercial speech. In fact, by highlighting an exception to the building of new off-premises advertising displays, SSM appears to challenge the outright ban on such displays that are permanent as an unconstitutionally underinclusive restriction on commercial speech under *Central Hudson. See World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 682–83 (9th Cir. 2010).

[7] Plaintiffs also appeared to raise a content- or speaker-based challenge to the permitting process in their FAC (*see* ECF No. 17 at 8 ("certain speakers are exempt entirely from requirements of the Sign Code")), which manifests in the SAC as content-based challenges to the lack of permit requirements for certain temporary on-premises signs (specifically real estate, ***1158** campaign, and garage sale signs). Case law also supports Oddfellows' standing to challenge these content-based restrictions on temporary on-premises signs that are exempted from certain requirements. *See G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006) (sign owner challenged particular exemptions from the permitting

process based on content or viewpoint as facially unconstitutional).

Therefore, Plaintiffs' First Amendment claims that challenge (1) the ban on the construction of new, permanent off-premises advertising under *Central Hudson* and (2) the exceptions to permit and application requirements for temporary on-premises signs on the basis that they are content- or speaker-based restrictions on free speech may proceed.

2. Third Claim for Relief–Count 6

In count 6, Plaintiffs challenge the City's ban on the construction of new, permanent off-premises advertising displays. (ECF No. 39 at 24.) Currently, the two signs advertising Oddfellows business are on-premises, but SSM has alleged that it intends to sell advertising space to other companies for the three signs on Oddfellows' properties, which ostensibly would transform the signs into off-premises advertising displays. (ECF No. 39 at 5–7.) Because the City does not grant permits to build new structures for permanent off-premises signs that contain commercial speech, SSM's proposed actions are not permitted. Therefore, based on the facts as alleged the Court is able to reasonably infer a colorable First Amendment claim challenging the prohibition on construction of permanent off-site advertising displays or billboards under *Central Hudson.* However, because this count is duplicative of count 5, the Court dismisses this claim.

3. Third Claim for Relief–Count 7

In count 7, Plaintiffs appear to challenge Land Development Code section 18.16.995, which permits noncommercial speech wherever commercial speech is permitted. (ECF No. 39 at ¶ 77.) Therefore, on-premises signs may include either commercial or non-commercial speech, but the building of new permanent off-premises signs that contain solely commercial speech is prohibited.

To the extent that Plaintiffs attempt to argue there is a vague distinction between non-commercial and commercial speech because an "on-site commercial billboard" may display "off-site non-commercial speech," this misuses the term billboard and misunderstands the Municipal Code's distinction between on-premises and off-premises signs. Billboards are clearly defined by the Reno Municipal Code as "off-premises advertising displays." *See* Land Development Code §§ 18.24.203.4570(9) & (23). Therefore, billboards contain only commercial speech. Moreover, an on-premises sign may contain either commercial or non-commercial speech, but to deem non-commercial speech as either "on-site" or "off-site" is a categorical mistake. The distinction between on-premises and off-premises has meaning only in the context of commercial speech to distinguish between services sold on site and those sold elsewhere. *See* Land Development Code § 18.24.203.4570(28) (stating that an on-premises sign is created to promote the commercial interests that are "principally sold, available, or otherwise provided on the premises on which the display is located"). In fact, Land Development Code section 18.16 includes two provisions detailing that non-commercial speech is permitted wherever commercial speech is, regardless of whether the sign is considered on-premises or off-premises. §§ 18.16.850 & 18.16.995. [7]

***1159** Instead, the Court construes this claim as challenging the ban on construction of new off-premises advertising displays. Because like the Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 495–96, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the City permits the building of new permanent on-site commercial advertising but does not permit the building of new permanent off-site commercial advertising, Plaintiffs may challenge this distinction under the parameters of *Central Hudson.* However, because this count is duplicative of count 5, the Court dismisses this claim.

4. Third Claim for Relief–Count 8

The Court finds that count 8, which claims that the City's "prohibition on off-site commercial speech cannot pass the test articulated in *Central Hudson*" amounts to a legal argument that falls under counts 5, 6 and 7 of Plaintiffs' SAC. Thus, SSM may proceed on a claim to challenge that ban under the framework of *Central Hudson.* However, because this count is duplicative of count 5, the Court dismisses this claim.

C. Claims Dismissed With Prejudice

1. Third Claim for Relief–Count 4

[8] In count 4, Plaintiffs appear to be challenging the entirety of Reno's Land Development Code Section 18.16 as "vague and prolix." (ECF No. 39 at 20 ("The Reno Municipal Code's prolix regulation of signs is incomprehensible to people of normal intelligence.") However, the Court finds Plaintiffs' claim itself vague. While the majority of Plaintiffs' SAC is premised on the previously existing permit process to build freeway signs and the City's subsequent ban on freeway signs, count 4 alleges that the entire section regarding the regulation of signs in Reno's Municipal Code is prolix and vague while also making mention of the section's "overly complicated definitions" with "numerous cross-references to other sections of the Code." (ECF No. 39 at 20.) Thus, it is unclear to the Court how certain factual allegations in the SAC relate to specific "vague and prolix" provisions in the Reno Municipal Code's regulation on signs.

Count 4 of Plaintiffs' third claim for relief is therefore dismissed with prejudice.

D. Claims Dismiss without Prejudice but Without Leave to Amend

[9] For the first time in the SAC, Plaintiffs bring allegations concerning the unconstitutionality of the prior process for obtaining permits for freeway signs as well as the recent and total ban on freeway signs within the City of Reno. However, the FAC did not contain any allegations concerning freeway signs, and the Court did not give Plaintiffs leave to add allegations or claims concerning the permitting process for freeways signs or the recent ban on freeways signs that was enacted on April 26, 2017. Therefore, any claims related to these allegations are dismissed without prejudice but without leave to amend. [8]

1. First Claim for Relief

To the extent that Plaintiffs challenge the prohibition on all freeway signs within the City and ask this Court to declare that SSM's existing billboards are "grandfathered" (ECF No. 39 at 12–14), this is a new claim relating to facts occurring after ***1160** initiation of this lawsuit and that do not arise from the purported claims in the FAC. Plaintiffs also state that the repeal of the site plan review requirement for freeway signs makes the basis for the City's permit denials moot (ECF No. 39 at 15); however, the repeal occurred after the initiation of this lawsuit and neither the original complaint [9] nor the FAC identify the "permit denials" [10] being based as failure to meet the requirements for freeway signs. Moreover, because SSM admits that the billboards it plans to build would be constructed within 100 feet of a freeway, with faces oriented towards a freeway and visible from a freeway, in violation of the new prohibition, it is asking the Court to weigh in on a claim it was not permitted to add and that arises from facts occurring after initiation of this lawsuit.

This claim is therefore dismissed.

2. Second Claim for Relief

Plaintiffs' second claim for relief in the SAC contends that the City is estopped from disputing that Plaintiffs are entitled to build the unbuilt billboards planned for construction within 100 feet of the freeway, with faces oriented towards a freeway and visible from a freeway. (ECF No. 39 at 15.) Beyond the fact that this is not an affirmative or legally cognizable claim for relief, it ensues from the repeal of the site plan review requirement and prohibition of all freeway signs within the City. Therefore, the claim is dismissed.

This claim is therefore dismissed.

3. Third Claim for Relief–Count 1

Count 1 conflates two separate issues. The first is that Oddfellows' permit was allegedly denied without due process of law and that Defendant has "arbitrarily and capriciously issued the Stop Work Notice and Notice of Violations." (ECF No. 39 at 16.) The second is that the City has refused to "grandfather" the current billboards.

It is unclear from the allegations in the SAC that Oddfellows' permit has been denied. Moreover, the SAC clearly provides the stated bases for the City's issuance of the Stop Work Notice and Notice of Violations, which pertain to challenges to the prior site plan review requirement and current ban on freeway signs. Finally,

any contentions that the current billboards should be "grandfathered" relate to the repeal on freeway signs, which this Court will not address.

The Court therefore dismisses this claim.

4. Third Claim for Relief–Count 2

In count 2, Plaintiffs contend that the City violated their right to equal protection by "arbitrarily, maliciously, and dishonestly" issuing the Stop Work Notice and Notice of Violations to chill Plaintiffs from building billboards "while at the same time scheming to repeal and replace the highly suspect ordinance with a prohibition ... to deny Plaintiffs of valuable property rights." (ECF No. 39 at 16.) They also state that "hospitals, governments, and other favored speakers who use signs in Reno may use signs to speak on any subject, but Strict Scrutiny is denied that right and thereby denied equal protection ***1161** of the laws." (*Id.* at 17.) The Court noted in its previous order that Plaintiffs had failed to allege sufficient facts to bring an equal protection claim and that it was "unconvinced that facts purporting content-based discrimination under the First Amendment amount to an Equal Protection Clause claim under the Fourteenth Amendment." (ECF No. 38 at 7–8.) Moreover, this claim appears to relate to the ban on freeway signs, which this Court did not give Plaintiffs leave to challenge in its previous order.

Therefore, Count 2 is dismissed.

5. Third Claim for Relief–Count 3

In count 3, Plaintiffs challenge the site plan review that was required for the building of freeway signs as well as the City's alternative process to build a freeway sign by obtaining a special use permit on the basis that both schemes allow for unbridled discretion. (ECF No. 39 at 17–19.) This claim again stems from facts not mentioned in the original complaint or FAC. Therefore, the Court dismisses count 3.

V. MOTION FOR PRELIMINARY INJUNCTION

[10] Plaintiffs move for a preliminary injunction requesting that "during the pendency of this action [the City be enjoined] from assessing ongoing fines against Strict Scrutiny[11] for purported violations of zoning ordinances by displaying signs." (ECF No. 47 at 2.) More specifically, they argue that the Notice of Violation for the Stardust Property sign continues to accrue fines and penalties despite the Notice of Violation being based on the now repealed Reno Land Development Code § 18.16.401. (*Id.*; *See* ECF No. 47–1 at 2.) However, as noted in the previous section, Plaintiffs did not allege that section 18.16.401 was unconstitutional in its FAC and therefore were not permitted leave of court to file their SAC with allegations concerning that provision. Rather, Plaintiffs were permitted leave of court to present sufficient facts concerning claims challenging the prohibition on building new permanent off-premises advertising displays and the exemptions from the permitting process for on-premises signs in Reno's Land Development Code.

Plaintiffs also utilize an incorrect standard in their argument for a preliminary injunction, relying on the two-prong test found in *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003), despite the correct standard being governed by the four-factor test established in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), or the alternative "sliding scale" approach utilized in the Ninth Circuit. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (an injunction may issue under the "sliding scale" approach if there are serious questions going to the merits and the balance of hardships tips sharply in the plaintiff's favor, although the plaintiff must still show a likelihood of irreparable injury and that an injunction is in the public interest).[12] Moreover, the PI Motion's ***1162** section regarding likelihood of success on the merits—which is a factor in both *Brown* and *Winter*—does not address the merits of any of the claims in the SAC. Rather, the PI Motion is based on arguments concerning the constitutionality of penalties accruing during a First Amendment challenge and the purported revocation of Oddfellows' permit. (ECF No. 47–1 at 7–14.) To the extent Plaintiffs' likelihood of success on the merits argument may be based on their contention that the City cannot enforce now repealed section 18.16.401 against them (ECF No. 50 at 3 ("Strict Scrutiny has established a likelihood of success on the merits that the citations and accruing fines are improper")), this claim appears to stem from the first count of the SAC's third claim for relief (*see* ECF No. 50 at 7–8), which was not permitted by the Court's prior

order granting leave to amend and which this Court has dismissed in this order without leave to amend.

For these reasons, the PI Motion is denied.

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the parties Motion.

It is therefore ordered that Defendant City of Reno's Motion to Dismiss (ECF No. 40) is granted in part and denied in part. The Motion is denied with respect to count 5 in the third claim for relief and is granted as to the remaining claims. SSM's claim challenging the constitutionality of the ban on construction of new, permanent off-premises advertising displays (third claim for relief, count 5), *see* Land Development Code § 18.16.902, and Oddfellows' claim challenging the constitutionality of exceptions to the Municipal Code's requirements for on-premises signs (third claim for relief, count 5), *see* Land Development Code §§ 18.16.203 and 18.16.502, are permitted to proceed.

It is further ordered that Plaintiffs' Motion for Preliminary Injunction (ECF No. 47) is denied without prejudice.

All Citations

290 F.Supp.3d 1149

Footnotes

1 Despite the SAC's assertion that Herson is a “citizen provocateur” (*see* ECF No. 39 at 3–4), Herson is not a party to this lawsuit. *See City of Houston v. Hill*, 482 U.S. 451, 459 n.7, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (finding that Hill had standing to challenge a city ordinance given his record of arrest under the ordinance and his adopted role as a citizen provocateur).

2 The Court refers to signs “within 100 feet of the right-of-way of a freeway that exceed 20 square feet and have faces which are visible from the travel lanes of the freeway” as “freeway signs.” *See* Land Development Code § 18.16.401, *repealed by* Ord. No. 6429, § 5 (adopted April 26, 2017).

3 For the first time in the SAC, SSM states that the currently constructed signs and unbuilt signs are intended to be freeway signs. As a result, Plaintiffs bring a challenge relating to the previous requirement that certain on-premises permanent signs go through a site plan review, which was repealed in April 2017, and the constitutionality of the new prohibition on freeway signs, which was enacted at the same time as the repeal. (ECF No. 39 at ¶¶ 23, 25–26.)

4 The City points out in its MTD that “Plaintiffs fail to address the specific directive provided by [the] Court in granting Plaintiffs leave to amend their FAC to include specific allegations as to how Plaintiff SSM is impacted by the former exemption provided under Land Development Code section 18.16.203 to some businesses and further, how such exemption ‘injures SSM given that it does not claim to own any property and the provision applies to on-premises permanent signs.’ ” (ECF No. 40 at 15 (citing ECF No. 38 at 5–6).) The Court finds that the SAC alleges sufficient facts to include a claim challenging speaker-based exceptions to the permit or application requirements of the current version of section 18.16.203, which Plaintiffs attempted to do in the SAC regarding address plates and flags. (*See* ECF No. 39 at ¶¶ 65(a) &(b).) Importantly, only Oddfellows has standing to bring this claim given that they were required to obtain a permit to place a permanent on-premises sign on their property.

5 Only Oddfellows has standing to seek declaratory relief related to exemptions for certain on-premises signs. By contrast, damages would be granted to SSM for loss of revenue from unused billboards.

6 It is worth noting that there are seven requirements that a special event permit holder must meet in order to obtain a building permit, none of which deal with the content of the commercial speech or the speaker. Although special events may inevitably be limited to certain types of businesses, the speakers all appear to be promoting commercial speech. Therefore, the provision on its face appears to be a content-neutral exception.

7 In addition, Plaintiffs include a paragraph entitled “requiring bureaucrats to make the commercial versus noncommercial distinction renders the ordinance unconstitutionally vague.” However, City bureaucrats aren't making the distinction per se; rather, commercial speech is defined by the City as “[s]peech which proposes a commercial transaction and no more *or* expression related solely to the economic interests of the speaker and its audience.” Land Development Code § 18.16.850(a) (emphasis added).

8 If Plaintiffs wish to challenge the total ban on freeway signs within the City, they may initiate a new action.

9 The original complaint simply stated that "prior to constructing and displaying the existing signs, [SSM] sought approval from Reno to display the existing signs" and "Reno explained to [SSM] that the existing signs were not permitted under the Code, and that construction of the existing signs violated the Code." (ECF No. 1 at 3.) The original complaint only makes mention of the desire to construct a permanent on-premises sign with political speech and the ban on new off-premises advertising displays. (*Id.* at 3, 5.)

10 According to Plaintiffs, Oddfellows applied for only one permit that was in fact granted for the Stardust Property.

11 Despite the SAC's contention that the permit was taken out by Oddfellows on behalf of Oddfellows and SSM, it appears that Oddfellows is the party accruing fines and penalties. (ECF No. 39 at ¶ 10.b, 16; *see also* ECF No. 47–6 (permit issued to Oddfellows); ECF No. 47–9 (Notice of Violation sent to Oddfellows).) Therefore, it is not clear that SSM has standing to bring this motion.

12 If Plaintiffs choose to file another motion for preliminary injunction, they need to utilize the correct legal standard and make clear upon which claim they base their argument for likelihood of success on the merits. It is not for the Court to sift through Plaintiffs' claims to determine which claims serve as the basis of any request for preliminary injunctive relief. Accordingly, failure to properly present arguments under the correct legal standard will result in summary denial of another motion for preliminary injunction.

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2017 WL 6059921
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

IMAGE MEDIA ADVERTISING, INC., Plaintiff,
v.
CITY OF CHICAGO, Judy Frydland, Commissioner of the Department of Buildings for the City of Chicago, and Patricia Scudiero, Zoning Administrator for the City of Chicago, Defendants.

17 C 4513
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Signed 12/07/2017

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MEMORANDUM OPINION AND ORDER

Gary Feinerman, United States District Judge

***1** Image Media Advertising, Inc. brought this suit under 42 U.S.C. § 1983 and Illinois law against the City of Chicago and its Building Commissioner and Zoning Administrator (collectively, the "City"), alleging that the denial of Image Media's permit applications for four oversized billboards (called "signs" in municipal parlance) violated the First, Fifth and Fourteenth Amendments and the Contracts Clause of the United States Constitution and their analogs in the Illinois Constitution. Doc. 1. The City moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint. Doc. 26. The motion is granted in part and denied in part.

Background

On a Rule 12(b)(6) motion, the court must accept the complaint's well-pleaded factual allegations, with all reasonable inferences drawn in Image Media's favor, but not its legal conclusions. *See Smoke Shop, LLC v. United States*, 761 F.3d 779, 785 (7th Cir. 2014). The court must also consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Image Media's brief opposing dismissal, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1020 (7th Cir. 2013) (internal quotation marks omitted). The facts are set forth as favorably to Image Media as those materials permit. *See Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680, 682 (7th Cir. 2014). In setting forth those facts at the pleading stage, the court does not vouch for their accuracy. *See Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 384 (7th Cir. 2010).

Image Media owns and operates billboards in the Chicago area. Doc. 1 at ¶ 1. No later than 2014, Image Media began to make preparations to construct billboards, each exceeding 100 square feet, at four locations in Chicago. *Id.* at ¶¶ 19, 47; Docs. 1-2, 1-5, 1-6, 1-10.

Applicants wishing to "maintain, erect, [or] install" certain billboards in Chicago must receive a permit from the City's Building Commissioner. Chicago Municipal Code ("MCC") § 13-20-550. An applicant for a sign exceeding 100 square feet or 24 feet in height, however, must obtain both a "normal [sign] permit" from the Building Commissioner and a "city council order approving [the] sign." MCC § 13-20-680. Moreover, before applying to the Building Commissioner, an applicant must "submit a duplicate of [its] application to the alderman of the ward in which the sign [was] to be located" and "submit to the city clerk an order for the approval or disapproval of the sign for introduction at the next regular meeting of the city council." *Ibid.* At the time Image Media submitted that applications at issue in this suit, the City had a "longstanding practice of deferring to the alderman of the ward in which a sign [was] proposed with respect to the approval of sign permit applications." Doc. 1 at ¶ 16.

The Municipal Code provides that the Building Commissioner "shall issue a permit for a sign [that exceeds 100 square feet or 24 feet in height] unless" the City Council issues an "order disapproving the application" or the sign "for which the application is submitted is not or will not be in compliance with any provision of this chapter [Chapter 13-20, which sets forth, among other things, requirements for billboards]." MCC § 13-20-680.

The Code further provides that "[t]he provisions of the Comprehensive Zoning Ordinances shall regulate the type and size and the permissibility of signs and their supporting structures." MCC § 13-20-660. While "the building commissioner may not take final action on [an] application until the city council issues or is deemed to issue an order to recommend approval or disapproval of the application," she "must take final action on the application no later than 75 days after the order for the sign permit was submitted to the city clerk." MCC § 13-20-680.

***2** Prior to commencing the application process for its four oversized billboards, Image Media entered into a lease agreement with Meade Electric Company to operate a billboard at 5401 West Harrison Street and an "Outdoor Advertising Sign Lease Agreement" with an unidentified non-party to operate a billboard at 3200 South Archer Avenue. Doc. 1 at ¶¶ 19, 40. Consistent with MCC § 13-20-680, Image Media submitted permit applications to the aldermen of the wards in which those properties are located and also submitted proposed approval ordinances to the City Council. *Id.* at ¶¶ 20, 41. In addition, Image Media submitted permit applications to the alderman of the ward encompassing two other properties on which it planned to install oversized billboards, 2100 North Elston Avenue and 2160 North Elston Avenue, and also submitted proposed approval ordinances to the City Council. *Id.* at ¶ 28.

All four proposed ordinances received aldermanic approval, and all four were passed by the City Council. *Id.* at ¶¶ 21-24, 29-31, 42-44. The ordinances stated, in relevant part:

> Be it Ordained by the City Council of the City of Chicago:
>
> SECTION 1. That the Commissioner of Buildings is hereby authorized and directed to issue a sign permit ... for the erection of a sign/signboard over 24 feet in height and/or over 100 square feet (in area of one face) at [the designated location] ...
>
> Notwithstanding any provisions of Title 17 of the Municipal Code of the City of Chicago (the Chicago Zoning Ordinance) to the contrary, the Commissioner of Buildings is hereby directed and authorized to issue a sign permit to the address referenced within this ordinance.

Id. at ¶ 48; *see* Docs. 1-2, 1-5, 1-6, 1-10. The Chair of the City Council's Committee on Zoning, Landmarks & Building Standards then informed the Building Commissioner that ordinances approving permits for the four properties had been enacted. Doc. 1 at ¶¶ 24, 31, 44.

In reliance on its anticipated receipt of the permits, Image Media took certain actions and made certain expenditures. For the Harrison property, Image Media entered into a "First Amendment to Lease Agreement" with Meade Electric, which required Image Media to pay $10,000 to extend its lease payment commencement date, and which specified that if construction of a new billboard did not commence by April 1, 2017, Image Media would forfeit that money and Meade Electric would have "the right to cancel the lease unless Image Media began lease payments." *Id.* at ¶ 25. For the Archer property, Image Media's expenditures included "various fees and expenses to prepare for the erection of the sign." *Id.* at ¶ 45. And for the Elson properties, Image Media entered into a Purchase Agreement with Elston Development and Elston Signs to purchase two existing signs, the property on which they were located, and a "New Billboard Easement Area" permitting it to erect its oversized billboards. *Id.* at ¶ 32. The Purchase Agreement had an initial purchase price of $2 million, which Image Media paid on January 25, 2017. *Id.* at ¶ 36.

In late 2016, the Zoning Administrator informed Image Media that its applications were denied due to "other zoning ordinance restriction." *Id.* at ¶ 51. The Zoning Administrator advised Image Media that if it wished to appeal, it would have to request " 'official' letters of denial from the Zoning Administrator." *Id.* at ¶ 51. The Zoning Administrator never provided official letters, and the Building Commissioner, who "must take final action on [a sign permit application] ... no later than 75 days after [a City Council] order for the sign permit [is] submitted to the city clerk," MCC § 13-20-680, failed to take action on Image Media's applications before the 75-day clock expired. Doc. 1 at ¶ 51.

On or around April 19, 2017, the City Council ratified an amendment to MCC § 13-20-680. *Id.* at ¶ 54. The Amendment states:

> No member of the City Council or other municipal officer shall introduce, and no Committee of

> the City Council shall consider or recommend, any ordinance or order that is contrary in any way to any of the requirements of this section or Title 17 of the Code [the Chicago Zoning Ordinance]. No member of the City Council shall propose, and no Committee of the City Council shall consider, any amendment to an ordinance which, if passed, would render the ordinance contrary to any of the requirements of this section or Title 17 of the Code. No member of the City Council may recommend action on, and no Committee of the City Council shall consider, any ordinance or order that authorizes the approval of a sign that does not comply with all applicable provisions of this section, Title 17 of the Code, and all other applicable Code provisions governing the construction and maintenance of outdoor signs, signboards, and structures.

***3** *Id.* at ¶ 55; Doc. 1-13. The practical effect of the Amendment is to bar the City Council from passing ordinances for oversized billboards that do not comply with all requirements of the newly amended § 13-20-680 and of the Chicago Zoning Ordinance. That is, the Amendment bars the City Council from passing ordinances like Image Media's that directed the Building Commissioner to issue permits "[n]otwithstanding any provisions of ... the Chicago Zoning Ordinance." The Amendment also "repealed in their entirety" twenty ordinances, including the four Image Media ordinances referenced above, as well as "any other ordinance or order, authorizing a sign for which a permit has not issued, in contravention of [the Chicago Zoning Ordinance]." Doc. 1-13 at 3-4.

The Building Commissioner then issued Notices of Sign Permit Denial for all four of Image Media's applications. Doc. 1 at ¶ 57. The Notices stated, in relevant part:

> The sign permit application was reviewed by the Zoning Administrator and was denied on November 22, 2016 because the proposed sign is not allowed under the Chicago Zoning Ordinance. Section 13-20-660 of the MCC provides that the Zoning Ordinance shall regulate the type, size and the permissibility of signs and their supporting structures....
>
> Further, the sign permit application is not approved because the proposed sign does not have a city council order authorizing the sign as required under Section 13-20-680 of the MCC. Although [Image Media's ordinances were] passed [in Fall 2016] ... [those ordinances are] no longer in effect. On April 19, 2017, Ordinance number O2017-3215 [the Amendment] was passed which repealed [those ordinances].

Doc. 1-14 at 1, 3, 5, 7.

Discussion

Image Media alleges that the City violated the United States Constitution's Takings Clause, Due Process Clause, Equal Protection Clause, First Amendment, and Contracts Clause, as well as their analogs in the Illinois Constitution. The City argues that analysis under both constitutions is the same for purposes of this case, Doc. 31 at 11 n.1, 18 n.6, 20 n.7, 22 n.10, 25 n.11, and Image Media does not disagree, thereby forfeiting on this motion any argument that the Illinois Constitution provides any greater rights as to its claims than does the United States Constitution. *See Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 825 (7th Cir. 2015) ("[A] party generally forfeits an argument or issue not raised in response to a motion to dismiss.").

I. Takings Clause

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not 'be taken for public use, without just compensation.' " *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). Image Media alleges that the City violated the Takings Clause by depriving it without just compensation of its "leasehold, ownership and easement interests in the four properties and two existing signs," its "vested property rights to erect and operate the signs," and the sign permits themselves. Doc. 1 at ¶ 62; Doc. 39 at 10. The parties dispute both whether Image Media has asserted the kind of property interests compensable under the Takings Clause and, if so, whether that property actually has been taken.

A. Whether Image Media Has Sufficiently Alleged Protected Property Interests

Whether a plaintiff has a constitutionally protected private property interest under the Takings Clause turns on "existing rules or understandings that stem from an independent source such as state law." *Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 459 (7th Cir. 2002). Image Media submits that it has three such interests: (1) a property right arising from its "status as owner and lessee of the four properties" where it wishes to erect the oversized billboards, as well as its ownership of "existing signs and rights to billboard easements"; (2) a property right in the sign permits themselves; and (3) a property right created by "virtue of [Image Media's] change in position, expenditures and incurrence of obligations" in anticipation of receiving the permits. Doc. 39 at 10-14. The City concedes that the first of those interests is protected under the Takings Clause. Doc. 31 at 14. However, the City contends that Image Media lacks a protected property interest for Takings Clause purposes in the sign permits themselves and that the investments Image Media made in anticipation of receiving the permits do not give rise to a compensable property right. *Id.* at 12-14. The City is correct.

***4** As to the sign permits themselves, Image Media relies heavily on decisions where the plaintiff successfully asserted that a permit or license was protected property under the Due Process Clause. Doc. 39 at 10-12. True enough, those decisions hold that permits and licenses can constitute protected property interests for due process purposes. *See*, *e.g.*, *Barry v. Barchi*, 443 U.S. 55, 64 (1979) ("As a threshold matter, therefore, it is clear that Barchi had a property interest in his license sufficient to invoke the protection of the Due Process Clause."); *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 870 (7th Cir. 2009) ("Once granted, an Illinois liquor license is a form of property within the meaning of the due process clause."); *Polenz v. Parrott*, 883 F.2d 551, 555 (7th Cir. 1989) (addressing whether a liquor license or occupancy permit constituted a property interest for due process purposes); *Reed v. Vill. of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983) (holding the plaintiffs' interest in the renewal of a liquor license to be a property right for due process purposes), *overruled on other grounds by Brunson v. Murray*, 843 F.3d 698 (7th Cir. 2016); *3883 Conn. LLC v. D.C.*, 336 F.3d 1068, 1073 (D.C. Cir. 2003) (holding that the plaintiff had a "property interest in the continued effect of ... [certain] permits" for due process purposes); *Martell v. Mauzy*, 511 F. Supp. 729, 738-39 (N.D. Ill. 1981) (holding that the plaintiffs had a protected property interest in an operating permit for due process purposes).

Those decisions do not win the day for Image Media, however, for " '[p]roperty' as used in [the Takings] clause is defined much more narrowly than in the due process clauses." *Pittman v. Chi. Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995); *see Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cnty.*, 57 F.3d 505, 513 (7th Cir. 1995) ("The Due Process Clause ... recognizes a wider range of interests as property than does the Takings Clause."). Courts addressing the matter generally hold that permits and licenses may be property under the Due Process Clause but not under the Takings Clause. *See Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1197 (10th Cir. 1999) ("[T]he fact that a grazing permit is not 'property' under the Takings Clause does not prevent the same permit (or its terms and conditions) from constituting 'property' under the Fifth Amendment Due Process Clause."), *abrogated on other grounds by Onyx Props. LLC v. Bd. of Comm'rs of Elbert Cnty.*, 838 F.3d 1039 (10th Cir. 2016); *Am. Pelagic Fishing Co., L.P. v. United States*, 49 Fed. Cl. 36, 46 (2001) ("Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferrable."), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004); *Jesso v. Podgorski*, 2010 WL 5157361, at *4 (N.D. Ill. Dec. 14, 2010) ("Plaintiffs have offered no authority, and the Court has found none, to support Plaintiffs' argument that their liquor license is considered private property within the meaning of the Takings Clause of the Fifth Amendment."). And even though some decisions might be read to hold otherwise with respect to permits or licenses that have already been granted, *see Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981), the court is aware of no decision holding that the plaintiff has a protected property interest for takings purposes in a permit or license that has not yet issued. *See Scott v. Greenville Cnty.*, 716 F.2d 1409, 1421-22 (4th Cir. 1983) ("Although we view Scott as having held an entitlement to permit issuance which was sufficiently a 'species of property' to require constitutional protection [under the Due Process Clause], the permit, until it is at least actually in hand, is not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'takings' doctrine.").

With two exceptions, the cases cited by Image Media do not suggest that even the *revocation* of a license or permit already possessed by the plaintiff could ground a takings claim. The first, *Boonstra v. City of Chicago*, 574 N.E.2d 689 (Ill. App. 1991), addressed the impact of an ordinance retroactively revoking the assignability of taxicab licenses. In holding that the plaintiff had a property interest for takings purposes in the assignability of a taxicab license, *Boonstra* explained that "for more than 20 years, the City of Chicago ... fostered and participated in the assignment of the taxicab licenses," rendering them "more than just mere personal permits granted by a governmental body to a person to pursue some occupation or to carry on some business," but rather imbuing them in "a functional sense" with "the essence of property in that they were securely and durably owned and marketable." *Id.* at 694-95. *Boonstra* thus involved a situation where the plaintiff "already [had] an assignable property interest in taxicab licenses" and then was precluded "from being able to assign th[at] interest." *Id.* at 695. The second case, *Pittsfield Development, LLC v. City of Chicago*, 2017 WL 5891223 (N.D. Ill. Nov. 28, 2017), which held that the plaintiff had a protected property interest in a permit that was "effectively revoke[ed]" three months later, likewise addressed a situation where the plaintiff's "valid Permit had issued." *Id.* at *1-2, *8. Here, by contrast, Image Media never received its permits, and thus it had no protected property interest in them for takings purposes, even under *Boonstra* and *Pittsfield*.

***5** Nor does Image Media have a protected property interest for Takings Clause purposes by virtue of the investments it made in the expectation of receiving the permits. As noted, the existence of a protected property interest is determined by state law, and this is what the Supreme Court of Illinois has to say about the property rights that arise due to investments made in reliance on the expectation of receiving a permit:

> [W]here there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use of the premises for the purposes originally authorized, irrespective of subsequent zoning or a chance in zoning classification.

People ex rel. Skokie Town House Builders, Inc. v. Vill. of Morton Grove, 157 N.E.2d 33, 37 (Ill. 1959). The City argues that even if Image Media acquired a "vested property right" due to its expenditures in anticipation of receiving the sign permits, that right "does not give rise to a property interest compensable as a taking[ ]." Doc. 31 at 13. Image Media responds that it "makes no sense either as a matter of logic or the English language" that the "vested property right" recognized in *Skokie Town House Builders* could be "somehow different from—and lesser than—a 'property interest' compensable as a taking." Doc. 39 at 13.

Again, the City is correct. Illinois precedent reveals the "vested property right" doctrine to have a narrow scope. When first embracing the doctrine in *Fifteen Fifty North State Bldg. Corp. v. City of Chicago*, 155 N.E.2d 97 (Ill. 1958), the Supreme Court of Illinois explained:

> The general rule in Illinois concerning the retroactive effect of zoning ordinances is stated in *Deer Park Civic Ass'n v. City of Chicago*, 106 N.E.2d 823 (Ill. App. 1952), ... where the court held that any substantial change in position, expenditures, or incurrence of obligations occurring under a building permit or in reliance upon the probability of its issuance is sufficient to *create a right in the permittee and entitles him to complete the construction and use the premises for the purposes originally authorized* irrespective of a subsequent zoning or change in zoning classification.

Id. at 101 (emphasis added); *see also 1350 Lake Shore Assocs. v. Healey*, 861 N.E.2d 944, 950 (Ill. 2008) (noting that the Supreme Court of Illinois adopted the vested rights doctrine in *Fifteen Fifty North State*).

As *Fifteen Fifty North State* describes the doctrine, the right possessed by an individual with a vested interest is the right to "complete the construction and use of the premises for the purposes originally authorized."

155 N.E.2d at 101; *accord Skokie Town House Builders*, 157 N.E.2d at 37. Consistent with this understanding, every "vested property" case cited by Image Media, and every case of which the court otherwise is aware, identifies a "writ of mandamus"—an order permitting property owner to proceed with construction or use—as the appropriate remedy for interference with the vested property right. *See Pioneer Trust & Sav. Bank v. Cook Cnty.*, 377 N.E.2d 21, 22, 27 (Ill. 1978) (holding that the plaintiff had a vested property right in a zoning classification, and affirming the trial court's mandamus order requiring the county to issue a zoning certificate and building permit); *Skokie Town House Builders*, 157 N.E.2d at 37-38 (holding that the plaintiff had a vested property right in a zoning ordinance, "which would entitle it to complete the construction of [certain] town houses," and affirming trial court's mandamus order to that effect); *Cribbin v. City of Chicago*, 893 N.E. 2d 1016, 1020 (Ill. App. 2008) (affirming the trial court's holding that the plaintiffs had a vested right in a zoning classification and its mandamus order requiring the City to issue building permits based on that classification after the plaintiffs' property was rezoned); *O'Connell Home Builders, Inc. v. City of Chicago*, 425 N.E.2d 1339, 1344 (Ill. App. 1981) (affirming the trial court's mandamus order, reasoning that a "right was created in the plaintiffs to use the subject property for the purposes authorized by the zoning ordinance [due to its substantial investments] that existed at the time [its] permit application was submitted to the department of buildings of the city of Chicago," notwithstanding a subsequent zoning ordinance prohibiting construction of the plaintiffs' proposed building); *Sgro v. Howarth*, 203 N.E.2d 173, 177 (Ill. App. 1964) ("It appears to be now well established in this state that where there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance such party has a vested property right and he may complete the construction and use of the premises for the purposes originally authorized irrespective of subsequent zoning or a change in zoning classification."). None of Image Media's cases, however, suggest that a plaintiff could premise a takings claim on such a vested property right. This stands to reason, as a takings claim is intended to compensate with money an individual whose property rights are impacted by government action, while the "vested property right" doctrine provides injunctive relief actually allowing the plaintiff to use the property as he or she wishes, overriding the government's effort to halt such use. As such, any vested property right that Image Media acquired in reliance on its receipt of the sign permits does not give rise to a constitutionally protected property right for the purposes of the Takings Clause.

B. Whether Image Media's Property Has Been Taken by the City

***6** Image Media alleges not a physical taking, but a regulatory taking of its leasehold, ownership, and easement interests in the four properties. The Supreme Court has set forth "two guidelines ... for determining when government regulation is so onerous that it constitutes a taking." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). "First, with certain qualifications ... a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors [articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)], including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Ibid.* (internal quotation marks and citations omitted). The first is called a "total regulatory taking," *Lingle*, 544 U.S. at 538, while the second is called a "partial regulatory taking," *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013).

The City argues that Image Media's regulatory takings claim fails because its complaint does not describe the economic impact that the City's actions had on its property interests. Doc. 31 at 15-17. That argument is incorrect, as facts alleged in the complaint and in Image Media's brief opposing dismissal—which the court may properly consider on a Rule 12(b)(6) motion, *see Phillips*, 714 F.3d at 1020—give rise to a permissible inference that Image Media suffered some form of economic harm, up to and including the deprivation of all beneficial uses of the properties. For example, Image Media alleges that its lease agreement for the Harrison property allows only for the erection and operation of a billboard; that there is "nothing" for which the Archer property can "be used" if it "cannot be used for a sign"; and that "absolutely no economic benefit ... can be derived" from the New Billboard Easement Area at the Elston

properties "if no signs are allowed." Doc. 39 at 14-15; *see* Doc. 1 at ¶¶ 19, 32-35, 40. These alleged facts suffice to establish not only that Image Media suffered economic harm due to the City's actions, but that at least some of its property interests have been rendered essentially worthless. Because Image Media has alleged the deprivation of all economically beneficial use of at least some of its properties, it has stated a "total regulatory takings" claim. *See Lingle*, 544 U.S. at 538 ("[T]he government must pay just compensation for ... [a] 'total regulatory takings' " where a regulation "completely deprive[s] an owner of *all* economically beneficial use of her property") (internal quotation marks omitted); *Muscarello v. Winnebago Cnty. Bd.*, 702 F.3d 909, 913 (7th Cir. 2012) (noting that "the enforcement of a regulation that renders the property essentially worthless to its owner" constitutes a taking).

The City next argues that Image Media has failed to adequately plead a partial regulatory takings claim because the denial of Image Media's permits did not involve a "physical invasion or appropriation of property" and because the highly regulated nature of the "business of selling advertising on outdoor signs" should have led Image Media to "reasonably expect a regulation to interfere with its investment." Doc. 31 at 16-17. The City may ultimately prevail on this argument once an evidentiary record is developed, but dismissal is inappropriate at this stage due to the significant economic harms alleged by Image Media, which at the pleadings stage reasonably could tip the *Penn Central* analysis in its favor.

Accordingly, Image Media may proceed with a regulatory takings claim due to the impact of the City's actions on its property interests at the four properties.

II. Due Process Clause

The complaint alleges, in a count labeled "Substantive Due Process," that the City "acted in an arbitrary and capricious manner not rationally related to any legitimate government interest" in these four ways: (1) the Zoning Administrator's unofficial denial of Image Media's sign permits after the City Council enacted the four sign permit ordinances; (2) the Building Commissioner's failure to take final action on Image Media's permit applications within the time required by MCC § 13-20-680; (3) the City Council's repeal via the Amendment of Image Media's four ordinances; and (4) the Building Commissioner's denial of Image Media's permit applications based on the Amendment. Doc. 1 at ¶¶ 66-69. The City's motion addresses only the third action and, by implication, the fourth. Doc. 31 at 18-20. Even if the City's reply brief could be generously read to address the first and second actions, Doc. 50 at 8, arguments raised for the first time in a reply brief are forfeited. *See Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009) ("[T]he district court is entitled to find that an argument raised for the first time in a reply brief is forfeited."); *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 389 (7th Cir. 2003) ("Because Volvo raised the applicability of the Maine statute in its reply brief, the district court was entitled to find that Volvo waived the issue."). Accordingly, Image Media's substantive due process claim arising from the first and second actions survive dismissal, and the court will address only the third (and, by implication, the fourth): the City Council's passage of the Amendment.

***7** "[S]ubstantive due process is not a blanket protection against unjustifiable interferences with property" and does not "confer on federal courts a license to act as zoning boards of appeals." *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008). Rather, substantive due process is "a modest limitation that prohibits government action only when it is random and irrational." *Id.* at 1000-01; *see also Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (noting that substantive due process "is very limited and protects plaintiffs only against arbitrary government action that shocks the conscience") (internal quotation marks omitted).

The City argues that the Amendment, far from being arbitrary or irrational, was designed to "ensure compliance with the City's zoning laws" by ending the City Council's practice of providing exemptions from the Municipal Code's zoning rules on a case-by-case basis driven by a single alderman. Doc. 31 at 19-20. That purpose is set forth in the Amendment's preamble, which notes that "[s]everal recent City Council ordinances have been phrased to direct the Commissioner of Buildings to issue a permit even where the particular sign violated the Municipal Code's applicable standards"; that "[s]uch a practice undermines the integrity and cohesiveness of the City of Chicago's building and zoning code," which relies on "cohesive sensible categories as well as general restrictions on the placement, size, and use of structures in order to promote public health, safety

and welfare"; that "[a] central goal of the zoning ordinance is the maintenance of orderly and compatible land use development patterns upon which residents and businesses can rely"; and that "[a]mending Section 13-20-680 to restrict City Council actions that allow signs to override the City of Chicago's zoning and building code would allow for a consistent process and a standard that promotes public health, safety, and welfare." Doc. 1-13 at 3.

That seems rational enough, but Image Media asserts that the "rational basis [inquiry] involves questions of fact that are inappropriate for a motion to dismiss." Doc. 39 at 18. That argument fails. "The Seventh Circuit has often affirmed the dismissal of complaints [that allege arbitrary actions in the context of a substantive due process claim] for a failure to state a claim." *Reimer v. Shelby Cnty.*, 2007 WL 3224148, at *2 (C.D. Ill. Oct. 29, 2007); *see*, *e.g.*, *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 488 (7th Cir. 2014); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990). Dismissal is appropriate here, as the Amendment itself sets forth in its preamble an eminently rational justification for its passage: The City Council recognized that by approving oversized billboards, at a single alderman's insistence, that violated otherwise applicable zoning restrictions, it had undermined the zoning law's integrity, and the Council decided to address the problem by ending that practice and repealing sign approval ordinances that had been enacted under the prior regime. That rationale—bringing order to chaos by reining in the power of individual aldermen to effectively override generally applicable limits on oversized billboards—more than satisfies rational basis review. *See Pro-Eco, Inc.*, 57 F.3d at 514 (holding that an ordinance barring construction of a landfill after the plaintiff purchased land with the intent of opening a landfill did not violate substantive due process because the ordinance was intended to prevent the risk of serious environmental damage and to protect "the public health, safety, or welfare of the citizens of Jay County"); *C-Energy-Glenmore Wind Farm No. 1, LLC*, 769 F.3d at 488 (holding that the "decision to delay action on CEnergy's building permit requests" to develop a windfarm was not arbitrary because "popular opposition to a proposed land development plan is a rational and legitimate reason for a legislature to delay making a decision").

***8** This result would hold even if the court doubted that the preamble truthfully set forth the Amendment's actual purpose, as "governmental action passes [the substantive due process] rational basis test if a sound reason may be hypothesized" for the action. *Pro-Eco, Inc.*, 57 F.3d at 514. Here, the City has, at the very least, hypothesized a legitimate rationale for the Amendment—bringing uniformity and order to what had been a disorderly and decentralized oversized billboard permitting regime. That rationale is the quintessence of soundness and rationality. *See Greater Chi. Combine & Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005) (holding that an ordinance barring the "keeping of pigeons" did not violate the substantive due process rights of an organization that raised and bred homing pigeons where the city asserted that the "pigeon prohibition" was intended to "limit[ ] interference with neighbors' enjoyment of their property" and to address "public health concerns," which the court found to be "at least hypothetically rational justifications for banning pigeons in residential areas").

To sum up, Image Media's substantive due process claim is dismissed insofar as it stems from the Amendment's passage, but (due to the City's forfeiture) it otherwise may proceed.

III. Equal Protection Clause

The complaint alleges that the City "arbitrarily denied Image Media's permits" in violation of the Equal Protection Clause. Doc. 1 at ¶¶ 79-84. The parties agree that Image Media's equal protection claim is a "class-of-one" claim. Doc. 31 at 25; Doc. 39 at 24. Unlike a traditional equal protection claim, which alleges that the plaintiffs "have been arbitrarily classified as members of an identifiable group," a class-of-one claim "asserts that an individual has been irrationally singled out, without regard for any group affiliation, for discriminatory treatment." *United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008) (internal quotation marks omitted). To "state a class-of-one equal protection claim, an individual must allege that he was intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Swanson v. City of Chetek*, 719 F.3d 780, 783 (7th Cir. 2013) (internal quotation marks omitted).

The City argues that Image Media has not identified a "similarly situated" entity that received better treatment. Doc. 31 at 26. Although "[w]hether a comparator is

similarly situated is usually a question for the fact-finder ... dismissal at the pleading stage [is] appropriate" if the plaintiff fails "to allege facts tending to show that it was similarly situated to any of the comparators." *LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010). Simply "saying the magic words ['similarly situated'] is not enough: [a plaintiff] must offer further factual enhancement" to forestall dismissal. *Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 775 (7th Cir. 2013) (internal quotation marks omitted).

Image Media has not cleared this hurdle. The complaint alleges that on December 9, 2014 and April 18, 2012, the City issued permits to "similarly situated sign operators" based on "similar City Council ordinance[s]." Doc. 1 at ¶¶ 82-84. Those two permits were issued years before Image Media applied for its permits; more significantly, Image Media nowhere suggests that the signs authorized by those two permits failed to otherwise comply with the City's zoning requirements—a potentially crucial distinction given that the Zoning Administrator and Building Commissioner identified Image Media's signs' failure to comply with zoning law as a basis for denying its permit applications. Doc. 1-14 at 1, 3, 5, 7; *see* Doc. 1 at ¶ 57. Because Image Media has failed to adequately identify a similarly situated comparator, its class-of-one equal protection claim fails. *See LaBella Winnetka, Inc.*, 628 F.3d at 942 (holding that the plaintiff, which was denied the right to partition off a portion of its restaurant after a fire and to reopen the undamaged area, was not "similarly situated" for purposes of a class-of-one claim to a comparator that was allowed to remain open for business while a "portion of the restaurant was partitioned-off for building repairs," reasoning that the complaint did not specify the nature of the comparator's repairs and that "[t]he extent of the work to be done behind a partition certainly is material to the determination of whether such a partition is feasible").

IV. First Amendment

***9** The complaint alleges that the Amendment is facially invalid under the First Amendment because it "contains an overbroad ban on the political speech of [Image Media] and all other actual and potential sign owners and elected officials by prohibiting City Council members and other municipal officers from introducing, recommending or proposing laws based on the content of the laws," and also because it "restrict[s] City Council Members and other municipal officers from even *considering* ordinances that would amend the current zoning restrictions on signs," thereby "interfer[ing] with Image Media's right to petition City Council Members for redress." Doc. 1 at ¶ 74. The First Amendment claim, then, seeks to vindicate the rights not only of Image Media and other billboard applicants, but also of City Council members.

Image Media cannot proceed with the claim insofar as it rests on the alleged violation of the free speech rights of City Council members. True enough, in the "First Amendment overbreadth area, courts have taken a more liberal approach ... to the ability of one private party to assert the rights of another party." *United States v. Holm*, 326 F.3d 872, 875 (7th Cir. 2003). But that approach typically is taken "only where the court is convinced that the party whose rights are most clearly implicated may not be in a position to assert those rights effectively." *Ibid.*; *see also Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000). There is no such danger here. Members of the City Council—the very individuals who passed the Amendment—have the unfettered ability to challenge it in court if they believe it infringes their free speech rights; better yet, they can vote to alter or repeal the Amendment. It follows that Image Media cannot pursue its overbreadth challenge based on the City Council members' free speech rights. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 191 n.5 (2007) ("Nor is it clear that the 'strong medicine' of the overbreadth doctrine is even available to challenge a statute ... [where it] may be argued that the only other targets of the statute's narrow prohibition ... are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.' ").

The First Amendment claim fares no better in asserting the rights of Image Media and other billboard applicants to petition the government to redress their grievances. "The Petition Clause of the First Amendment ... is an assurance of a particular freedom of expression ... [and] is designed to guarantee that persons may communicate their will through direct petitions to the legislature and government officials." *Wright v. DeArmond*, 977 F.2d 339, 345-46 (7th Cir. 1992) (internal quotation marks omitted). Significantly, the clause provides "merely a right to petition the appropriate government entity," not a right to have the government "grant the petition, no matter how meritorious it is." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1006-07 (7th Cir. 2000).

The Amendment does not prohibit Image Media from petitioning City Council members for permits that do not comply with the Zoning Code; rather, it simply affects such a petition's likely effectiveness. Moreover, Image Media may petition the City Council to amend the Zoning Code or repeal the Amendment. It follows that the Amendment does not violate Image Media's rights under the Petition Clause. *See Smith v. Ark. State Highway Empl., Local 1315*, 441 U.S. 463, 465 (1979) ("The public employee surely can ... speak freely and petition openly.... But the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond."); *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 634-635 (7th Cir. 2014) (holding that a law prohibiting government employees from engaging in collective bargaining with their general employees did not violate the Petition Clause because "general employees remain[ed] free to associate ... and their unions remain[ed] free to speak; municipal employers [we]re simply not allowed to listen").

V. Contracts Clause

***10** The complaint alleges that Image Media "had existing contracts concerning the erection and operation" of the four oversized billboards—namely, its contracts to lease property at the Harrison and Archer properties and to purchase two signs, the property on which those signs would be located, and a New Billboard Easement Area at the Elston properties—and that "[t]he Amendment operates as a substantial and unreasonable impairment of those existing contractual relationships in violation of the Contracts Clause [ ]...." Doc. 1 at ¶¶ 76-77 (citing *id.* at ¶¶ 25-26, 32-38, 40-45). Contracts Clause challenges are governed by "a two-step analysis, asking first whether a change in state law has substantially impaired a contractual relationship, and second whether the impairment is reasonable and necessary for a legitimate public purpose." *Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs.*, ——F.3d ——, 2017 WL 5988226, at *4 (7th Cir. Dec. 4, 2017); *see also Chi. Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 736 (7th Cir. 1987).

To satisfy the first step, the plaintiff must "show (1) that there is a contractual relationship, (2) that a change in law has impaired that relationship, and (3) that the impairment is substantial." *Gary Jet Center, Inc. v. AFCO AvPORTS Mgmt. LLC*, 868 F.3d 718, 721 (7th Cir. 2017) (internal quotation marks omitted). The City argues that Image Media cannot clear this hurdle because it has not adequately alleged that the Amendment impaired any of its contractual relationships. Doc. 31 at 23-24. For much the same reasons given above in discussing the regulatory takings claim, Image Media has adequately alleged that it entered into contracts in anticipation of receiving the sign permits and that the Amendment economically impacted those relationships.

The City argues in the alternative that any impairment of those contractual relationships was not substantial. When determining whether an impairment is substantial, the central issue is "whether the impairment disrupts reasonable contractual expectations." *Elliott*, 2017 WL 5988226, at *6. The Seventh Circuit has "br[oken] this inquiry into two questions," with the first being whether "the impaired [contractual] term [was] a 'central undertaking' of the bargain such that it 'substantially induced' [the impacted party] to enter [its] contracts." *Ibid.* Based on the allegations in Image Media's complaint and brief, the answer to this question is yes. Image Media has plausibly alleged that it entered into various contracts largely or solely in order to install the four oversized billboards, and that the Amendment precluded it from doing so.

The second question pertaining to whether an impairment is substantial asks whether "the change in law [was] foreseeable, meaning [whether] the risk of change was reflected in the original contract." *Ibid.* When examining that question, the court "must consider whether the industry in which the complaining party is engaged has been regulated in the past, because a history of regulation bears on the parties' expectations at the time of contracting." *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 873 (N.D. Ill. 2000); *see Elliott*, 2017 WL 5988226, at *7 (noting that the Supreme Court has "found that a change in law was foreseeable" where there was a "history of extensive and intrusive regulation in the affected industry"). A "history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause." *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998). That said, where the challenged regulation "was in the direct path of the plausible (though of course not inevitable) evolution of [municipal policy]" and "constituted only a small and predictable step along that path," there likely was no substantial impairment. *Ibid.*; *see Chi. Bd. of Realtors*, 819 F.2d at 735-36 (noting that the "level of scrutiny given [a] law [under the Contracts

Clause] varies inversely in accordance with the degree of prior regulation in a particular field of activity"); *Peoria Tazewell Pathology Grp., S.C. v. Messmore*, 2011 WL 4498937, at *6 (N.D. Ill. Sept. 23, 2011) (holding that where the challenged law "merely took ... one step further by providing for mandatory arbitration," any impairment to contractual relationships was not substantial because the law represented "incremental legislation in the heavily regulated insurance industry"). The "retroactive application" of a law to impair existing contract rights may bear on the question whether a change in the law was foreseeable. *Elliott*, 2017 WL 5988226, at *7.

***11** The City argues that the elimination of its practice of granting individual exemptions from the Zoning Code for oversized billboards constitutes just a "small and predictable step" forward in its practice of regulating outdoor advertisement signs. Given the detailed and restrictive regulatory regime governing billboards, the City is correct, and there accordingly was no substantial impairment of Image Media's contractual relationships for Contracts Clause purposes. *See Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 42 (1st Cir. 2005) (holding that where the State had implemented a law "dictat [ing] the price of warranty repairs," an amendment that "required that [a motor vehicle] manufacturer, rather than the dealer or the consumer, absorb the true cost of those repairs" was a "foreseeable addition," thereby defeating a claim that the amendment "substantially impair[ed]" the plaintiff automobile manufacturers' contractual relationships); *see also Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 438-39 (8th Cir. 2007) (reasoning that because gambling in Iowa was permissible "only if authorized by a specific statutory exception" and thus existed "at the sufferance of the Legislature," and because state authority to regulate gambling is well-established, gambling constituted a heavily regulated industry for the purposes of analysis under the Contracts Clause).

In so holding, the court recognizes *Elliott*'s suggestion that a law's retroactive effect could render the law unforeseeable in certain circumstances. Specifically, *Elliott* held that the application of layoff provisions to already-tenured teachers was unforeseeable because it worked a "change in the fundamental trade-off of job security for money" for teachers who had "built their entire careers relying on" tenure. 2017 WL 5988226, at *7. Nonetheless, the Seventh Circuit took care to distinguish the tenure situation from a law upheld by the Supreme Court in which "new price controls on natural gas" were held not to disrupt a "supplier's reasonable expectations." *Ibid.* (citing *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983)). The Amendment is far more akin to a law altering price controls than the law diminishing the decades-old rights of tenured teachers in layoffs in *Elliott*.

In any event, even if the Amendment substantially impaired Image Media's contractual relationships, its claim would founder at the second step of the Contracts Clause analysis because the Amendment was "reasonable and necessary to meet an important social problem." *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 885 n.4 (7th Cir. 2012) (internal quotation marks omitted); *see Elliott*, 2017 WL 5988226, at *8 ("[N]ot even all substantial impairments of contracts are unconstitutional. If the impairment is both reasonable and necessary for an important public purpose, then the law does not violate the Contract[s] Clause."). Where, as here, "the state or its agent is not a party to the contract impaired by the challenged law, the court's scrutiny [of whether the government entity had a significant and legitimate purpose for the law] is relaxed." *Chi. Bd. of Realtors, Inc.*, 819 F.2d at 737. In such situations, "the court must defer to the legislators' judgment and ask whether they 'rationally could have believed [the ordinance] would lead to improved public health and welfare.' " *Mo. Pet Breeders Ass'n v. Cnty. of Cook*, 106 F. Supp. 3d 908, 924-25 (N.D. Ill. 2015) (quoting *Chi. Bd. of Realtors, Inc.*, 819 F.2d at 737). As explained above when discussing Image Media's substantive due process claim, the City has advanced a rational—indeed, compelling—basis for concluding that the Amendment advances the public welfare, thus satisfying the second part of the Contracts Clause analysis. *See Chi. Bd. of Realtors, Inc.*, 819 F.2d at 734, 737 (holding that the plaintiff landlords did not show a reasonable probability of success on their Contracts Clause claim where the challenged ordinance required them to "maintain dwelling units in compliance with all applicable municipal code provisions" and provided various rules governing the landlord-tenant relationship, reasoning that the ordinance represented a "rational allocation of rights and responsibilities between landlords and tenants" that the "city rationally could have believed would lead to improved public health and welfare").

***12** For these reasons, Image Media's Contracts Clause claim is dismissed.

VI. Miscellaneous Issues

A separate count of the complaint seeks under Illinois law a writ of mandamus directing the City to issue the four permits to Image Media. Doc. 1 at ¶¶ 85-93. The City seeks dismissal of this count on the ground that Image Media's request for mandamus relief fails to comply with Illinois precedent. Doc. 31 at 27-28. There is no need to resolve this issue on the pleadings given that the mandamus count seeks equitable relief from the court and also that litigating the count likely will entail no discovery beyond the discovery otherwise arising from the surviving takings and due process claims. The City may renew its arguments against mandamus relief if and when Image Media actually moves the court for such relief.

The City argues that the Building Commissioner (Judy Frydland) and the Zoning Administrator (Patricia Scudiero) should be dismissed because they have been named only in their official capacities, rendering any claims against them duplicative of Image Media's claims against the City. *See Walker v. Sheahan,* 526 F.3d 973, 977 (7th Cir. 2008) ("Actions against individual defendants in their official capacities are treated as suits brought against the government entity itself."). As Image Media notes, however, the complaint sues the pair in their individual capacities as well and alleges that they "caused or participated in [some of the] alleged constitutional deprivation[s]." *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). Frydland and Scudiero will remain in the case.

Conclusion

The City's motion to dismiss is granted in part and denied in part. Image Media's takings claim arising from the sign permits themselves and from the "vested property rights" doctrine, substantive due process claim arising from the Amendment's passage, equal protection claim, First Amendment claim, and Contracts Clause claim are dismissed. The dismissal is without prejudice. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519 (7th Cir. 2015) ("Ordinarily, ... a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed."). In all other respects, the City's motion is denied. If Image Media wishes to replead the dismissed claims, it may file an amended complaint by January 10, 2018. If Image Media does not amend its complaint, the City's answer, Doc. 34, shall stand as to the surviving portions of the complaint. If Image Media amends its complaint, the City shall respond to the amended complaint by January 31, 2018.

All Citations

Slip Copy, 2017 WL 6059921

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298 F.Supp.3d 1213
United States District Court,
E.D. Missouri, Eastern Division.

Lawrence WILLSON, Plaintiff,
v.
CITY OF BEL–NOR, MISSOURI, Defendant.

Case No. 4:18–CV–0003 RLW
|
Signed March 29, 2018

Synopsis

Background: Citizen brought action against city, alleging city ordinance regulating yard signs violated First Amendment. Citizen moved for preliminary injunction.

[Holding:] The District Court, Ronnie L. White, J., held that preliminary injunction enjoining enforcement of ordinance was not warranted.

Motion denied.

West Headnotes (15)

[1] Injunction
Grounds in general;multiple factors

To determine whether to issue a preliminary injunction, court must consider: (1) the threat of irreparable harm to the movant, (2) the balance between that harm and the injury that granting the injunction will inflict on the other interested parties, (3) the probability the movant will succeed on the merits, and (4) whether the injunction is in the public interest; no single factor is determinative, but rather, the likelihood of success must be examined in the context of the relative injuries to the parties and the public.

Cases that cite this headnote

[2] Civil Rights
Preliminary Injunction

When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction, irreparable harm, balance of harms, and public interest, are generally deemed to have been satisfied. U.S. Const. Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Viewpoint or idea discrimination

Constitutional Law
Content-based Regulations or Restrictions

Under Free Speech 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. U.S. Const. Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Signs

Signs are a form of expression protected by the Free Speech Clause, but pose distinctive problems that are subject to municipalities' police powers. U.S. Const. Amend. 1.

Cases that cite this headnote

[5] Constitutional Law
Signs

Constitutional Law
Noise and Sound Amplification

Governments may regulate the physical characteristics of signs under First Amendment, just as they can, within reasonable bounds and absent censorial

purpose, regulate audible expression in its capacity as noise. U.S. Const. Amend. 1.

Cases that cite this headnote

[6] Constitutional Law

Absolute nature of right

The First Amendment does not guarantee the right to communicate one's view at all times and places or in any manner that may be desired. U.S. Const. Amend. 1.

Cases that cite this headnote

[7] Constitutional Law

Viewpoint or idea discrimination

Constitutional Law

Content-neutral Regulations or Restrictions

A restriction on speech is not content-neutral simply by virtue of being viewpoint neutral. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] Constitutional Law

Content-neutral Regulations or Restrictions

A motivation of eliminating secondary effects unrelated to the content of an ordinance restricting speech may render that ordinance content-neutral. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Constitutional Law

Narrow tailoring requirement; relationship to governmental interest

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 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. U.S. Const. Amend. 1.

Cases that cite this headnote

[10] Constitutional Law

Time, Place, or Manner Restrictions

If the means chosen are not substantially broader than necessary to achieve the government's legitimate interest, the time, place, or manner regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-restrictive alternative. U.S. Const. Amend. 1.

Cases that cite this headnote

[11] Civil Rights

Preliminary Injunction

Preliminary injunction against enforcement of city ordinance regulating yard signs was not warranted, in citizen's action against city for violation of First Amendment; citizen failed to show likelihood of success on merits of claim that ordinance violated First Amendment, esthetics and traffic safety were significant governmental interests, there was no indication that other modes of communication were inadequate for expression of speech, citizen's three signs remained standing, there was no indication of any consequences, and citizen was not in danger of losing any First Amendment freedoms during pendency of action. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] Constitutional Law

Exercise of police power;relationship to governmental interest or public welfare

In order to justify ordinance that restricts speech, a municipality may rely upon any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest, which may

simply include common sense. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] Constitutional Law
Freedom of Speech, Expression, and Press

Under the overbreadth doctrine, the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] Constitutional Law
Overbreadth in General

Constitutional Law
Substantial impact, necessity of

The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge; rather, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties for it to be facially challenged on overbreadth grounds. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] Civil Rights
Preliminary Injunction

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, for purposes of preliminary injunction. U.S. Const. Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***1215** Anthony E. Rothert, Jessie M. Steffan, American Civil Liberties Union of Missouri Foundation, St. Louis, MO, Gillian R. Wilcox, American Civil Liberties Union of Missouri, Kansas City, MO, for Plaintiff.

Aaron I. Mandel, Jeffrey J. Brinker, Brinker and Doyen LLP, St. Louis, MO, for Defendant.

MEMORANDUM AND ORDER

RONNIE L. WHITE, UNITED STATES DISTRICT JUDGE

The motion of Lawrence Willson (Plaintiff) for a preliminary injunction enjoining the City of Bel–Nor, Missouri (Bel–Nor) came before the Court for a hearing on March 23, 2018. Plaintiff and William Hook, the mayor pro tem of Bel–Nor, testified. Various documents and photographs were admitted into evidence. The Court now finds and concludes as follows.

Findings of Fact

1. Plaintiff is, and at all times relevant has been, a resident of Bel–Nor and owner of a single-family residence.

2. There are three signs in his front yard. They are freestanding and stake-mounted, and read: “Black Lives Matter”; “Clinton Kaine”; and “Jason Kander U.S. Senate.” The “Black Lives Matter” sign has been there since the unrest in Ferguson. The other two signs have been there since the 2016 election. Plaintiff believes these signs have a political message and wishes to continue displaying all three.

3. Plaintiff received a written warning about his signs in June 2017 for a violation of Bel–Nor Code § 400.270.

4. In September 2017, Bel–Nor enacted Ordinance No. 983, repealing in full § 400.270. Ordinance 983, enacted after a public hearing and codified as § 400.120(E), reads, in relevant part:

WHEREAS, the City of Bel–Nor wishes to regulate signs within the City in a manner that does not infringe

upon the rights granted by the First Amendment to the Constitution of the United States of America, but that promotes the public safety, health and general welfare of the City and its citizenry, and

WHEREAS, the City is cognizant of the limitations upon the regulation of signs ***1216** recognized by the Courts, but the City has the power and obligation to its citizens to ensure that signs are not placed and/or maintained in a manner that is harmful to the health, safety and welfare of the City and its citizenry, ...

BE IT ORDAINED ... AS FOLLOWS:

Sign Regulations

1. *Definitions*. For purposes of this Section, the following terms shall mean:

> *Sign:* Any poster, object, devise, or display, situated outdoors, which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, idea, belief or location by any means, including but not limited to words, letters, figures, designs, symbols, colors, logos, fixtures, cartoons or images.
>
> ....
>
> (e) Moving signs, including any material that flutters, undulates, swings, rotates or otherwise moves.
>
> ....

2. *Permitted Signs on Private Property*. Each improved parcel is allowed to post one stake-mounted self-supporting freestanding sign with no more than two sign faces which are directly back-to-back of one another in the exterior portions of the property as long as the sign meets the following requirements:

> ....
>
> (f) No sign shall be affixed to any building, fence, tree, gas light, lamp post, garage, basketball hoop or any structure or improvement.
>
> (g) No sign shall be displayed from the interior of any window.

3. *Prohibitions*. The following materials, appurtenances and types of signs are prohibited:

> (a) The use of balloons, streamers, banners or similar objects as part of or attached to a sign.

5. *Flags*. The term "flag" shall include any fabric or bunting containing distinctive colors, patterns or symbols used as a symbol of a government or institution. For purposes of this Section, flags shall not be considered "signs."

Not more than one (1) flag is hereby permitted on each improved parcel within the zoning district .... Within five (5) days prior to and three (3) days following a national holiday such as Independence Day, Memorial Day, Labor Day or Veterans Day, there shall be no limitation on the number of flags displayed on any parcel of land within the City.

5. Plaintiff's three signs are "signs" as defined in § 400.120(E).

6. Plaintiff received an information and summons in December 2017 charging him with violating Ordinance 983 by displaying his three signs. The information also advised him that the violation was punishable upon conviction under § 100.080 of the Municipal Code. Section 100.80(A)(1) provides for fines not exceeding $1,000.00 or imprisonment not exceeding 90 days, or by both such fine and imprisonment, but in any case wherein the penalty for an offense is fixed by any Statute, the same penalty shall apply." Section 100.80(A)(2) provides that "each and every day any violation of this Code or any ordinance ... shall constitute a separate offense." The summons listed a court date of January 3, 2018. It also read, in relevant part: "If you fail to appear, a WARRANT may be issued for your arrest."

7. Section 479.350 of the Missouri Revised Statutes prohibits incarceration for an ordinance violation. Section 479.353 prohibits ***1217** the imposition of a fine in excess of $250 for the first violation.

8. Plaintiff testified he is afraid he is may be subject to a fine and incarceration for violating § 400.120(E). Until the hearing, no one had explained to him state statutes prevented him from being incarcerated for violating a

municipal ordinance or limited the amount of fines he could be assessed.

9. As of the date of the hearing, Plaintiff's three signs remain in his lawn.

10. Plaintiff and his wife have a sign taped to the inside of their glass front door. It reads, in relevant part: "IN CASE OF AN EMERGENCY PLEASE RESCUE OUR PETS!" This sign has been there for years.

11. They also have a garden flag reading "Irish for a Day."

12. Plaintiff has not been cited for either the garden flag or the front-door sign.

13. A neighbor of Plaintiff has a sign in his yard supporting a candidate for mayor in an upcoming municipal election and also has a fabric pennant with a stylized "B"—the first letter of his last name—by his front door.

14. Another neighbor has a sign reading "Proud Union Home" in his front yard and a security system sign by the front door.

15. Bel–Nor is a city of approximately 1,500 residents and is 1.4 square miles. It is 95% residential. Included in the remaining 5% are an elementary school and a Catholic girls' school, Incarnate Word. Students at the elementary school arrive by bus or private vehicle. The 400 students at Incarnate Word are either driven or drive to the school.

16. On the north, Bel–Nor abuts the University of Missouri at St. Louis. The students are commuters.

17. The homes in Bel–Nor are well-maintained, primarily two-story brick homes, and usually sit on a 50–foot lot. The streets are usually 26 feet wide. When vehicles are parked on both sides of the street, two cars cannot pass.

18. Concern with public safety and a desire to comply with the Supreme Court's First Amendment rulings led to the enactment of Ordinance 983. The narrow streets, the amount of school-related traffic, and a concern about drivers being distracted by signs are all safety-related considerations. Bel–Nor did not rely on any traffic studies in enacting Ordinance 983.

19. There was no testimony about what had occurred at Plaintiff's January 3, 2018 court date.

Conclusions of Law

[1] [2] "To determine whether to issue a preliminary injunction, [this Court] must consider: (1) the threat of irreparable harm to the movant; (2) the balance between that harm and the injury that granting the injunction will inflict on the other interested parties; (3) the probability the movant will succeed on the merits; and (4) whether the injunction is in the public interest." *Powell v. Noble*, 798 F.3d 690, 697 (8th Cir. 2015) (citing *Dataphase Sys, Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). "[N]o single factor is determinative"; rather, the likelihood of success "must be examined in the context of the relative injuries to the parties and the public." *Dataphase*, 640 F.2d at 113. " 'When[, however,] a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.' " *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (quoting *Phelps–Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (per curiam)).

***1218 [3] [4] [5] [6]** Likelihood of Success. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.' " *Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) (quoting 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.' " *Id.* (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). "[S]igns are a form of expression protected by the Free Speech Clause," but "pose distinctive problems that are subject to municipalities' police powers." *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). "[S]igns take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *Id.* "[G]overnments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise." *Id.* "[T]he First Amendment does not

guarantee 'the right to communicate one's view at all times and places or in any manner that may be desired.' " *Hensel v. City of Little Falls, Minn.*, 992 F.Supp.2d 916, 922 (D. Minn. 2014) (quoting *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)).

[7] To determine whether Ordinance 983 [1] is within appropriate bounds and without inappropriate purpose, the Court first determines whether it is content-based or content-neutral and, if the former, applies strict scrutiny and, if the latter, applies intermediate scrutiny. *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1403 (8th Cir. 1995). *Accord Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011). A restriction on speech is not content-neutral simply by virtue of being viewpoint neutral. *Id.* "The Supreme Court has held that a restriction on speech is content-based when the message conveyed determines whether the speech is subject to the restriction," *Whitton*, 54 F.3d at 1403–04 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)), regardless of the municipality's motive, *Reed*, 135 S.Ct. at 2228. A party opposing an ordinance's sign restrictions "need adduce no evidence of an improper censorial purpose." *Id.* (interim quotations omitted). Rather, Bel–Nor bears the burden of establishing that Ordinance 983 is lawful. *Hensel*, 992 F.Supp.2d at 923.

Plaintiff argues Ordinance 983 is content-based "because it distinguishes certain flags based on what they symbolize and some, but not others, from the restriction on signs." (PL's Mem at 7, ECF No. 4.) And, Bel–Nor's "[v]ague recitations of welfare interests" do not survive strict scrutiny. (*Id.*)

At issue are the three signs Plaintiff wishes to keep in his yard. No one sign takes preference over another in terms of Plaintiff's use of it to express his opinion; no one sign takes preference over another in terms of Bel–Nor considering it to be in violation of its ordinance. *Cf. Gilleo*, 512 U.S. at 52–53, 114 S.Ct. 2038 (finding ordinance ***1219** banning all residential signs except those that fit within ten exemptions was not content-neutral because it reflected municipality's judgment that some signs were too vital to be banned, regardless of the aesthetic concerns that were cited as the ordinance's purpose); *Hensel*, 992 F.Supp.2d at 923 ("The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys.") (interim quotations omitted). Plaintiff wants to keep all three. Bel–Nor permits him to keep only one, although on the one stake he can have two sign faces back-to-back. There is nothing to indicate Plaintiff cannot now have an "Obama Biden" and/or a "Romney Ryan" sign in his yard, if it was affixed to the one freestanding stake permitted under the Ordinance. Duration or timing is not a consideration. *Cf. Whitton*, 54 F.3d at 1403 (finding ordinance placing durational limits only on political signs to be content-based). Nor is there any evidence indicating a distinction in the ordinance or enforcement thereof between commercial and noncommercial messages. Again, the issue is one of numbers only. [2]

[8] The preamble of Ordinance 983 explains its enactment was motivated by concerns with the public safety and general welfare of Bel–Nor's citizens. Hook described the concern about traffic safety and distracted drivers arising from a combination of narrow residential streets used by drivers to and from two schools and one university. A motivation of "eliminating secondary effects ... unrelated to the content" of an ordinance restricting speech may render that ordinance content-neutral. *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1220 (8th Cir. 1997) (interim quotations omitted).

Plaintiff argues Ordinance 983 is content-based because it classifies and regulates flags as signs and then allows some flags more latitude in terms of duration and number depending on what the flags symbolize. In his complaint and declaration, Plaintiff focuses on his three signs. He wishes to continue displaying *these* signs. In his testimony, he did not describe any thwarted desire to have a flag in his yard or express any trepidation he might be issued a summons for the "Irish for a Day" flag in his yard. There is no evidence that the any exemption for flags affected Plaintiff in any adverse way. *Cf. Advantage Media, LLC v. City of Hopkins*, 379 F.Supp.2d 1030, 1036 (D. Minn. 2005) (plaintiffs had traditional standing to challenge sign ordinance because they submitted evidence that they had refrained from posting signs for fear the ordinance would be enforced against them). In *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Supreme Court noted that there was but one exception —an overbreadth challenge, see pages 11 to 12, infra

—to "the general rule that constitutional adjudication requires a review of the application of [an ordinance] to the conduct of the party before the Court." *See also Neighborhood Enters.*, 644 F.3d at 734–35 (reaching as "inescapable threshold question" whether ***1220** plaintiff had standing to challenge application of sign ordinance).

For the foregoing reasons, in the context of the pending motion for a preliminary injunction, the Court finds Ordinance 983 to be content-neutral, not content-based.

[9] **[10]** "[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 it need not be the least restrictive or least intrusive means of doing so. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "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." *Id.* at 799, 109 S.Ct. 2746 (alteration in original) (interim quotations omitted). If "the means chosen are not substantially broader than necessary to achieve the government's legitimate interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-restrictive alternative." *Id.* at 800, 109 S.Ct. 2746. *Accord Excalibur Group*, 116 F.3d at 1221.

[11] **[12]** Esthetics and traffic safety "are significant governmental interests." *La Tour v. City of Fayetteville, Ark.*, 442 F.3d 1094, 1097 (8th Cir. 2006). *See also Hensel*, 992 F.Supp.2d at 925 ("It cannot seriously be disputed that the ills (allegedly) sought to be cured by the ordinance—visual clutter, diminished property values, and traffic hazards—are significant governmental interests."); *Kennedy*, 414 F.Supp.2d at 1207 ("Certainly, limiting the number, size, and height of signs serves the desired ends of aesthetic harmony and public safety. Yards that are less littered with signs will look neater than yards that are more cluttered."). Hook testified, without contradiction, about the well-maintained character of the houses in Bel–Nor and about the City's traffic concerns. He also testified that Bel–Nor did not rely on any traffic studies when enacting Ordinance 983. In *Hensel*, the court rejected the plaintiff's argument that before it can enact an ordinance regulating yard signs, a municipality must gather factual evidence or conduct studies establishing a link between the secondary effects at issue and signs. *Id.* at 927. "Rather, a municipality 'may rely upon *any evidence* that is *reasonably believed* to be relevant for demonstrating a connection between speech and a substantial, independent government interest,' which may simply include 'common sense.' " *Id.* (quoting *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438–39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002)) (emphasis in original). *See Luce v. Town of Campbell, Wis.*, 872 F.3d 512, 516–17 (7th Cir. 2017) (citing Supreme Court cases in which Justices affirmed government's rationale for regulation affecting citizen's First Amendment rights based on their own assessments or beliefs without requiring empirical studies). Plaintiff does not dispute that the use of the narrow residential streets in Bel–Nor by students driving or being driven to and from three schools is relevant to Bel–Nor's concern about distracted drivers. *See Excalibur Group*, 116 F.3d at 1222 (affirming city's sign ordinance even though "reasonable people might quibble about the extent to which the regulations serve the city's significant interests or about whether a better solution might be available").

Nor does Plaintiff suggest what number of signs would allow him to exercise his First Amendment rights and also accommodate Bel–Nor's interests in the safety of its residents and its streets. *See Kennedy*, 414 F.Supp.2d at 1207 ("If, then, one can envision a proper ordinance restricting the number of signs, that means there must be a limitation on the number of signs that ***1221** would be a constitutionally acceptable restriction."). He wishes to keep his three signs; Hook testified Bel–Nor never considered allowing two signs. Bel–Nor need not, however, employ the least restrictive means of serving its interests. *Id.* at 928–29. "[A] perfect fit between residents' First Amendment rights (on one hand) and [Bel–Nor's] interests in traffic safety, property values, and aesthetics (on the other hand) is not required." *Id.* at 928 (citing *Ward*, 491 U.S. at 798–99, 109 S.Ct. 2746).

Plaintiff's three signs are each one-faced. He could have a sign with two faces, or, with no allegation that his messages are time-sensitive, could alternate signs. *See Hill v. Colorado*, 530 U.S. 703, 726, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is

not the least restrict or least intrusive means of serving the statutory goal.").

Plaintiff argues that the ordinance "criminalize[s] such expression[s]" as a Post–It note on the front door. (Pl. Mem. at 10.) This argument is belied by the record. Ordinance 983 prohibits signs being displayed in *windows*. Plaintiff testified he has had a sign in his front door for years. He has not been fined for such sign, nor has he expressed any fear that he will be.

Plaintiff also argues that Ordinance 983 is overbroad because it prohibits "expression visible outside a person's home in virtually all recorded forms." *See Gilleo*, 512 U.S. at 55, 114 S.Ct. 2038 ("prohibitions foreclosing entire medium of expression" can violate First Amendment by violating too much speech).

[13] **[14]** Under the overbreadth doctrine, "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Taxpayers for Vincent*, 466 U.S. at 798, 104 S.Ct. 2118. *Accord Advantage Media, LLC v. City of Hopkins*, 379 F.Supp.2d 1030, 1037 (D. Minn. 2005) ("[T]he overbreadth doctrine provides an exception to the general principle that a party may only assert their own rights and not the claims of third parties not before the court."). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800, 104 S.Ct. 2118. Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties ... for it to be facially challenged on overbreadth grounds." *Id.* at 801, 104 S.Ct. 2118.

Plaintiff has failed to establish that such a danger exists. As noted in *Taxpayers for Vincent*, 466 U.S. at 810, 104 S.Ct. 2118, a government's interests in regulating signs address the medium itself. There has been no showing that other modes of communication are inadequate for the expression of speech by Bel–Nor's residents.

[15] Threat of Irreparable Harm. "It is well-established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Powell*, 798 F.3d at 702 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). Plaintiff's three signs remain standing. And, although he had a court date on January 3, 2018, there is no evidence of any consequences, including imposition of a fine, as a result of any proceedings on that date.

Plaintiff testified about his fear of incarceration should he not comply with Ordinance 983. Missouri law prohibits such. The sentence about a warrant being issued ***1222** for his arrest is in reference to a failure to appear for court, not to his signs.

Balance Between Harm and Injury; Public Interests. Because the record now before the Court does not indicate that Plaintiff is in danger of losing any First Amendment freedoms during the pendency of this action, the considerations of balance between harm and injury and of the public interests do not favor granting Plaintiff's motion for a preliminary injunction.

Accordingly, based on foregoing findings and conclusions,

IT IS HEREBY ORDERED that the motion of Lawrence Willson for a preliminary injunction is DENIED [ECF No. 3]

All Citations

298 F.Supp.3d 1213

Footnotes

1 Plaintiff was cited in 2017 for violating Bel–Nor's previous sign ordinance, § 400.270. (*See* Pl. Ex. 1, ECF No. 24–1.) This ordinance included specific regulations for political signs and prohibitions against signs indicating residential premises were for sale, lease, or rent; the ordinance has been repealed. There is no allegation that Plaintiff was ever fined or imprisoned or suffered any other adverse consequence due to the repealed ordinance.

2 Ordinance 983 restricts the size, height, and proximity to the property boundary and right-of-way line. These restrictions are not challenged by Plaintiff. *See Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 819 (6th Cir. 2005) (ordinance placing size and height restrictions on billboards did not violate First Amendment; restrictions had no censorial

purpose; were viewpoint- and content-neutral; and regulated only non-expressive components of billboards); *Kennedy v. Avondale Estates, Ga.*, 414 F.Supp.2d 1184, 1208 (N.D. Ga. 2005) (finding ordinance's size and height restrictions on signs were not unconstitutional).

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304 F.Supp.3d 729
United States District Court,
N.D. Illinois, Eastern Division.

RCP PUBLICATIONS INC., Plaintiff,
v.
CITY OF CHICAGO, Defendant.

Case No. 15 C 11398
|
Signed 03/31/2018

Synopsis

Background: Non-profit corporation that published materials relating to political, economic, and social issues, and which was fined for violating city ordinance prohibiting the posting of commercial advertising material, brought putative class action against city, alleging that the ordinance was an unconstitutional restriction on speech and void for vagueness. After denial of city's motion to dismiss, 204 F.Supp.3d 1012, the parties moved for summary judgment.

Holdings: The District Court, Matthew F. Kennelly, J., held that:

[1] testimony of city's expert witness in the study of "human factors" was not excludable as not helpful to a factfinder;

[2] testimony of city's expert witness in advertising and communication was not excludable as not be helpful to a factfinder;

[3] sign ordinance was a permissible regulation of commercial speech; but

[4] ordinance was unconstitutionally vague.

Plaintiff's motion granted.

West Headnotes (17)

[1] Evidence

Matters involving scientific or other special knowledge in general

Evidence

Necessity and sufficiency

Rule governing admission of testimony by expert witnesses requires a district court to determine (1) whether the expert would testify to valid scientific knowledge, and (2) whether that testimony would assist the trier of fact with a fact at issue. Fed. R. Evid. 702.

Cases that cite this headnote

[2] Evidence

Matters involving scientific or other special knowledge in general

Testimony of city's expert witness in the study of "human factors," which was the study of how products, tasks, and environments could be made to meet needs of human users in a system, was not excludable on the alleged basis that the testimony would not be helpful to a factfinder in action alleging free speech and vagueness challenges to city's sign ordinance prohibiting the posting of commercial advertising material on city property, where city asserted an interest in reducing adverse traffic safety effects of signs posted to city property, evidence showed commercial signs made up the largest proportion of posted signs, and plaintiff argued that signs did not distract drivers. U.S. Const. Amend. 1; Fed. R. Evid. 702.

Cases that cite this headnote

[3] Evidence

Matters involving scientific or other special knowledge in general

Testimony of city's expert witness in advertising and communication describing the potential effects of removing or revising city sign ordinance was not excludable on the alleged basis that the testimony would not be helpful to a factfinder in action alleging free speech and vagueness challenges to city's sign ordinance prohibiting the posting of commercial advertising material on city

property, where city argued that signs posted to its property burdened its interests in traffic safety and that enforcement of the ordinance had reduced the adverse effects of commercial signs on traffic safety, and plaintiff argued that signs did not distract drivers. U.S. Const. Amend. 1; Fed. R. Evid. 702.

Cases that cite this headnote

[4] Constitutional Law

Reasonableness;relationship to governmental interest

The last two steps under *Central Hudson*'s four-step test for determining whether a regulation of commercial speech meets the First Amendment requirements, namely whether the regulation directly advances the governmental interest asserted and whether the regulation is not more extensive than is necessary to serve that interest, basically involve a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends. U.S. Const. Amend.1.

Cases that cite this headnote

[5] Constitutional Law

Difference in protection for commercial signs

A heightened level of scrutiny did not apply to First Amendment challenge to city's regulation of commercial speech via its sign ordinance prohibiting posting of commercial advertisements on city property, where the ordinance did not completely ban commercial speech and the ordinance did not single out any particular commercial advertising messages for prohibition. U.S. Const. Amends. 1.

Cases that cite this headnote

[6] Constitutional Law

Commercial Speech in General

Heightened scrutiny for a free speech challenge to regulation on commercial speech applies when a governmental entity imposes a total ban on certain types of commercial speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[7] Constitutional Law

Reasonableness;relationship to governmental interest

The *Central Hudson* intermediate scrutiny for a First Amendment challenge to regulation of commercial speech requires a governmental entity regulating the speech to establish that the regulation directly advances the interests the government has asserted to support the regulation. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] Constitutional Law

Difference in protection for commercial signs

Municipal Corporations

Public safety and welfare

Sign ordinance prohibiting the posting of commercial advertising material to city property was a permissible regulation of commercial speech under the First Amendment, even if the ordinance did not also ban noncommercial speech; the ordinance advanced its asserted and legitimate interests in reducing litter, promoting traffic safety, reducing damage to city property, and advancing aesthetics by banning all commercial signs, which were the type of signs that imposed the greatest adverse impact on those interests, and the city's prohibition on the single largest source of the sign problem was a solution that reasonably fit the problems the city identified. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Constitutional Law

Reasonableness;relationship to governmental interest

An ordinance that provides only ineffective or remote support for the government's

purpose may not be upheld under *Central Hudson*'s test of intermediate scrutiny for a First Amendment challenge to regulation of commercial speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[10] Constitutional Law

Reasonableness;relationship to governmental interest

A government entity is not required to employ the least restrictive means conceivable to advance its interests in regulating commercial speech, but it must demonstrate a fit that is not necessarily perfect, but reasonable. U.S. Const. Amend. 1.

Cases that cite this headnote

[11] Constitutional Law

Due Process

A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law under due process clause as applied to the conduct of others. U.S. Const. Amend. 14.

Cases that cite this headnote

[12] Constitutional Law

Due Process

Non-profit corporation that was cited by city for violating sign ordinance prohibiting posting of commercial advertising material, in connection with non-profit's advertising of a film exhorting political change, had standing for a due process vagueness challenge to ordinance, since the ordinance did not clearly proscribe non-profit's conduct. U.S. Const. Amend. 14.

Cases that cite this headnote

[13] Constitutional Law

Certainty and definiteness;vagueness

The due process clause does not require perfect clarity and precise guidance in statutory enactments. U.S. Const. Amend. 14.

Cases that cite this headnote

[14] Constitutional Law

Certainty and definiteness;vagueness

To sustain a due process vagueness challenge, a plaintiff must show the law fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner. U.S. Const. Amend. 14.

Cases that cite this headnote

[15] Constitutional Law

Certainty and definiteness;vagueness

The degree of vagueness that the due process clause tolerates partly depends in part on the nature of the enactment. U.S. Const. Amend. 14.

Cases that cite this headnote

[16] Constitutional Law

Certainty and definiteness;vagueness

When First Amendment rights are at stake, rigorous adherence to the vagueness standards of due process is required. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

[17] Constitutional Law

Control and use in general

Municipal Corporations

Public safety and welfare

Sign ordinance that prohibited the posting of commercial advertisements on city property but that did not define the term "commercial advertising material" was unconstitutionally vague under due process clause, even if some conduct clearly fell under definition of commercial advertising material, where parties who wished to communicate a political message through a ticketed event, had

no guidance on whether their sign would violate the ordinance, and enforcing officials were enabled to make wholly subjective and arbitrary decisions, which raised the possibility that signs promoting unpopular causes or events could draw a citation, while others could escape sanction. U.S. Const. Amends. 1, 14.

Cases that cite this headnote

Attorneys and Law Firms

***731** Adele D. Nicholas, Law Office of Adele D. Nicholas, Mark G. Weinberg, Attorney at Law, Chicago, IL, for Plaintiff.

William Macy Aguiar, Ellen Wight McLaughlin, Thomas P. McNulty, City of Chicago Department of Law Constitutional Law and Commercial Litigation, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Employees of the City of Chicago issued RCP Publications Inc. a ticket for a sign advertising a movie screening that was ***732** affixed to a city-owned streetlight pole. Posting "commercial advertising material" to City property is a violation of section 10–8–320 of the Chicago Municipal Code. RCP contends that section 10–8–320 is an unconstitutional restriction on speech, void for vagueness, and overbroad. Both RCP and the City of Chicago have moved for summary judgment. RCP has also moved to exclude the City's expert witnesses.

Background

RCP publishes and distributes a variety of pamphlets, movies, books, posters, and other materials containing political messages. It also operates a website that makes books, newspapers, and DVDs available for purchase. In July 2014, a poster that promoted a film, "Revolution and Religion: The Fight for Emancipation and the Role of Religion" was affixed to a streetlight pole. [1] RCP made the advertised film available for download or purchase on its website and sold tickets for a screening of the film. The parties dispute whether RCP sponsored the screening. On July 14, 2015, RCP received notice that a poster attached to a City streetlight pole may have violated section 10–8–320 of the Chicago Municipal Code, which the Court will refer to as the sign ordinance. The sign ordinance states:

> No person shall distribute or cause others to distribute, as defined in Section 10–8–325, commercial advertising material by means of posting, sticking, stamping, tacking, painting or otherwise fixing any sign, notice, placard, bill, card, poster, advertisement or other device calculated to attract the attention of the public, to or upon any sidewalk, crosswalk, curb or curbstone, flagstone or any other portion or part of any public way, lamppost, electric light, traffic light, telegraph, telephone or trolley line pole, hydrant, shade tree or tree-box, or upon the piers, columns, trusses, girders, railings, gates or parts of any public bridge or viaduct, or upon any pole box or fixture of the police and fire communications system, except such as may be required by the laws of the state and the ordinances of the city, or on any bus shelter, except that the city may allow the posting of decorative banners in accordance with Section 10–8–340 below.

Chi. Mun. Code § 10–8–320(a) (for ease of reference, the Court will refer generally to the extensive list of municipal property cited in the ordinance as "City property"). The sign ordinance does not define "commercial advertising material." Before the Chicago City Council amended the ordinance in 2007, the ordinance's ban on signs was not limited to "commercial advertising material."

At a hearing on October 15, 2015, an Administrative Law Judge (ALJ) found that RCP owned the offending poster. At a subsequent hearing, the ALJ held that RCP was liable for violating section 10–8–320(a) on the ground that the poster contained a commercial message. RCP had the

option to appeal the ALJ's decision, but it did not do so. Since receiving the citation, RCP has continued to publish its materials, which include posters, and it has not tried to warn others not to post its materials.

RCP alleges that the sign ordinance's regulation of speech violates the First Amendment. In September 2016, the Court denied the City's motion to dismiss RCP's complaint. *RCP Publ'ns, Inc. v. City of Chicago*, 204 F.Supp.3d 1012 (N.D. Ill. 2016). In January 2017, RCP filed an amended complaint on behalf of a putative class. In May 2017, the Court certified, without objection by the City, a plaintiff ***733** class consisting of "all persons who have been ticketed since December 21, 2013, under Municipal Code of Chicago § 10–8–320."

Discussion

Both sides have moved for summary judgment. The City supports its motion with reports from expert witnesses. The Court first reviews RCP's motion to exclude the City's expert witnesses and then considers the parties' motions for summary judgment.

I. Motion to exclude

[1] Federal Rule of Evidence 702 governs the admission of opinion testimony by expert witnesses. Rule 702 requires a district court "to determine (1) whether the expert would testify to valid scientific knowledge, and (2) whether that testimony would assist the trier of fact with a fact at issue." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) (citation omitted). RCP argues that the City's expert witnesses, Michael Kuzel and Sam Karow, should be excluded on the ground that neither offers testimony that would be helpful to a factfinder.

A. Michael Kuzel

[2] Kuzel is an expert in the study of "human factors," which is the study of how products, tasks, and environments may be created to meet the needs of human users in a system. D.E. 69, Pl.'s Ex. 18 at 1 (Kuzel Expert Rep.). Kuzel describes how advertisements are intended to capture the attention of persons who perceive them and therefore have an effect on those passing by the advertisement. *Id.* at 5. He opines that (1) posted signs can distract drivers, "leading to decrements in performance and erratic behaviors," (2) the placement and number of signs may make it more difficult for drivers to detect hazards, and (3) the sign ordinance is "an appropriate response" to the hazards that advertising in the public way creates. *Id.* at 9.

RCP's primary contention is that Kuzel's testimony is not relevant, because it concerns the traffic safety effects of all signs, not just the commercial signs affected by the sign ordinance. That does not make Kuzel's testimony irrelevant. The City has asserted an interest in reducing the adverse traffic safety effects of signs posted to City property, and there is evidence that commercial signs make up the largest proportion of such signs. Moreover, Kuzel also states that "[a]dvertisements have also been found to attract significantly more glances than other road signs," which indicates that, at least in certain instances, he has compared the effects of different types of signs. *Id.* at 5.

The Court also overrules RCP's other arguments for excluding Kuzel's opinions. RCP contends that Kuzel's testimony is irrelevant because it assumes that the alternative to the sign ordinance is unregulated posting on City property, rather than a newly-drafted ordinance with different sorts of restrictions, for example, on the number of postings. In addition, RCP argues that Kuzel's testimony should be excluded because it does not adequately take into consideration the facts of this litigation. These are not grounds to exclude Kuzel's testimony. Neither argument suggests that Kuzel's opinions are unhelpful, even if those opinions might not, in and of themselves, establish the validity of the sign ordinance. His opinions indisputably bear on the question of whether the ordinance advances the City's asserted interest in traffic safety.

Finally, RCP contends that a factfinder does not need expert testimony to understand that drivers may be distracted by posted signs. This argument, however, is undercut by arguments RCP has advanced in its briefs. RCP argues that "the City ***734** has not offered a single instance of a posting (commercial or otherwise) on City property causing an accident or incident supporting the City's claim that [the ban] is necessary... to advance traffic safety." Pl.'s Reply in Supp. of Mot. for Summ. J. at 9. Kuzel's testimony, therefore, is helpful and properly admissible, for it provides information that bears on a point that RCP itself calls into question.

B. Sam Karow

[3] RCP also contends that Sam Karow, the City's second expert witness, should be excluded. Karow is an expert in advertising and communications. D.E. 69, Pl.'s Ex. 19 at 2 (Karow Expert Rep.). His report describes how commercial advertisers wish to reach many viewers with their ads, how outdoor signs constitute a cheap and effective means of reaching views, and how "[r]evising or removing" the ordinance would produce an increase in the number of signs posted to City property. Karow opines that, because of the popularity, ease, and effectiveness of outdoor signs as advertising techniques, *id.* at 5–6, lifting the ordinance would produce a "massive proliferation" of posted signs on City property. *Id.* at 14.

RCP contends that Karow's testimony should be excluded because it is assumes that, if the sign ordinance is found unconstitutional, the City would be unable to replace the ordinance with some other constitutionally appropriate restriction. RCP also argues that whether the sign ordinance ensures fewer commercial signs is irrelevant in determining the constitutionality of the current ordinance. The Court disagrees. The City's argument is that signs posted to City property burden its interests and that, by enforcing the sign ordinance, it has reduced the adverse effects of commercial signs, the single largest source of posted signs. Given this contention, Karow's expert testimony that the ordinance prevents a "massive proliferation" of signs is relevant to assessing the City's assertion that the ordinance assists in minimizing the adverse impact of commercial signs. *See also Smith*, 215 F.3d at 721 ("[U]nder Rule 702, expert testimony need only be relevant to *an* issue in the case; it need not relate directly to the ultimate issue.").

For these reasons, the Court denies RCP's request to bar the City's expert witnesses.

II. Motions for summary judgment

The Court next turns to the parties' motions for summary judgment. The City contends that the sign ordinance is a permissible regulation of commercial speech. RCP argues the opposite and also contends that the sign ordinance is impermissibly vague and unconstitutionally overbroad. RCP asserts facial and as-applied challenges.

A. Regulation of commercial speech

1. The applicable standard

[4] The City argues that the sign ordinance is a valid regulation of commercial speech, which is afforded "a lesser protection" under the First Amendment than "other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 562–63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The Supreme Court has established a four-step analysis for determining whether a regulation of commercial speech meets the First Amendment's requirements:

- whether the expression is protected by the First Amendment; at a minimum, it must concern lawful activity and not be misleading;
- whether the government's interest is substantial;
- ***735** whether the regulation "directly advances the governmental interest asserted"; and
- whether the regulation "is not more extensive than is necessary to serve that interest."

Id. at 566, 100 S.Ct. 2343. The parties dispute the application of the *Central Hudson* standard—specifically the last two steps—and each side's arguments on these points are intertwined to some extent. The Supreme Court anticipated this: "[t]he last two steps of *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

RCP contends that the *Central Hudson* inquiry must be applied with "special care," consistent with the Supreme Court's admonition that "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy" must be reviewed with "special care." *Cent. Hudson*, 447 U.S. at 566 n.9, 100 S.Ct. 2343. Along the same lines, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the Supreme Court concluded that there was "far less reason to depart from the rigorous review that the First Amendment generally demands" when government "entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process"

or when government "attempts to single out certain messages for suppression." *Id.* at 501, 116 S.Ct. 1495.

[5] The sign ordinance, however, is not the type of restriction that triggers the enhanced level of scrutiny referenced in these cases. Specifically, the ordinance does not single out certain types of messages for restriction, and it is not a "complete ban on commercial speech." *Id.* The restriction at issue in *44 Liquormart* was a statute that prohibited "advertising in any manner whatsoever the price of any alcoholic beverage offered for sale in the [s]tate." *44 Liquormart*, 517 U.S. at 490, 116 S.Ct. 1495. In considering this statute, the Court noted that its commercial-speech cases had consistently recognized "the dangers that attend governmental attempts to single out certain messages for suppression" and failed to leave open satisfactory alternative channels of communication. *See id.* at 501–02, 116 S.Ct. 1495. For instance, in *Linmark Associates, Inc. v. Willingboro Township*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), the Supreme Court struck down a prohibition on real estate "For Sale" signs as a near-total ban on real estate advertising, given the inadequacy of alternative channels to advertise real estate that were available at the time. Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the Court struck down what it characterized as the Virginia legislature's attempt to "completely suppress" prescription drug price advertisements in any form. *Id.* at 771, 773, 96 S.Ct. 1817.

[6] In short, the heightened scrutiny referenced in *44 Liquormart* and *Central Hudson* applies when a governmental entity imposes a "total ban" on certain types of commercial speech: alcohol prices in *44 Liquormart*, pharmacy prices in *Virginia Board*, and real estate prices in *Linmark*. Where there are alternative channels of communication available, as in *Florida Bar*, the Supreme Court does not require heightened scrutiny. For example, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), the Court upheld a Florida statute restricting attorneys from mailing solicitations to victims ***736** of accidents or disasters for thirty days after the catastrophic event, as there were "ample alternative channels" for lawyers to engage in commercial speech not affected by the mailing restriction. *Id.* at 620, 633, 115 S.Ct. 2371. The Court did not apply any form of enhanced scrutiny even though such mailings were banned in their entirety during the thirty-day period. The City of Chicago's sign ordinance does not single out any particular commercial advertising messages for prohibition. And any business or person wishing to advertise a product or service may do so through innumerable channels of communication other than bills posted on City property. The Court concludes that there is no basis to impose any higher degree of scrutiny than what *Central Hudson* itself requires in this case.

2. The City's asserted interests

[7] As indicated earlier, *Central Hudson* requires a governmental entity regulating commercial speech to establish that the regulation directly advances the interests the government has asserted to support the regulation. The City has identified a number of interests that it contends the sign ordinance advances: combatting litter, controlling visual clutter, preventing damage to City property, and promoting traffic safety. Def.'s LR 56.1 Stmt. ¶ 36–57. RCP does not dispute that signs can become litter, Pl.'s Resp. to Def.'s LR 56.1 Stmt. ¶¶ 36–38; that they produce visual clutter, *id.* ¶ 40; that the removal of signs can damage City property, *id.* ¶¶ 45–48; or that signs can obstruct sight lines and obscure traffic signs, affecting traffic safety. *Id.* ¶¶ 43–44. To be clear, the City does not argue that non-commercial signs do not impact these interests; rather, it argues that commercial signs have a significantly greater impact, because such signs constitute the overwhelming majority of signs posted on City property.

To support its contention, the City presents testimony from two witnesses. First is Cole Stallard, a deputy commissioner with the Department of Streets and Sanitation. D.E. 61, Def.'s Ex. 1 at 8 (Stallard Dep.). Stallard testified that the majority of signs posted to City property are commercial. *Id.* at 110, 117. Similarly, Linda Delgado, another employee at the Department of Streets and Sanitation, testified that "about 95 percent" of the signage removed from City property by the Department is commercial. D.E. 61, Def.'s Ex. 2 at 87, 95 (Delgado Dep.). RCP does not present any evidence contradicting these contentions. The City's evidence supports the findings of the Chicago City Council, which found when it adopted the sign ordinance that "[t]he distribution of commercial handbills...is the cause of a substantial, often overwhelming, amount of litter[.]" Def.'s Resp. to Pl.'s

LR. 56.1 Stmt. ¶ 14. Thus the City argues that, for each of its asserted interests, "[c]ommercial advertising presents much more significant problems for the City than other types of posted bills because of its sheer volume." Def.'s Mem. in Supp. of Mot. for Summ. J. at 5. In sum, the City's evidence, which is unrebutted, is sufficient to establish that commercial signage burdens the City's asserted interests to a much greater extent than noncommercial materials.

RCP argues that Delgado's testimony is unpersuasive; it contends that she does not have a good understanding of what constitutes "commercial advertising material" within the meaning of the sign ordinance. This argument is not compelling, as Delgado's description of how she distinguishes commercial signs from noncommercial signs does not suggest that she has included many noncommercial or arguably noncommercial signs in her statement that 95 percent of all signs posted are commercial. D.E. 61, Def.'s Ex. 2 at 87 (Delgado Dep.) (defines a sign as commercial ***737** if it is "advertising something, again, a business, an event, exchange of money, a service"). [2] Moreover, the City has also offered Stallard's deposition testimony, which confirms Delgado's statements. D.E. 61, Def.'s Ex. 1 at 11 (Stallard Dep.). It is true, as RCP points out, that the City has not collected data or commissioned a study comparing the burdens imposed by commercial and noncommercial signs. But the law does not require this. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Supreme Court, in reviewing a billboard ordinance under *Central Hudson*, "hesitate[d] to disagree with the accumulated, common-sense judgment[ ] of local lawmakers" as to the burdens that billboards imposed on the community, especially where there was "nothing ...to suggest that these judgments are unreasonable." *Id.* at 509, 101 S.Ct. 2882. The Court upheld the City of San Diego's restriction on billboards, even though it was justified by less than the rigorous analysis that RCP seeks of the City of Chicago. *Id.* [3] In this case, as in *Metromedia*, RCP has offered nothing suggesting that the City Council's judgment about the relative proportion of commercial and non-commercial signs is unreasonable, particularly in light of the deposition testimony the City has proffered.

The evidence that the City has proffered to support the sign ordinance distinguishes this case from *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), a case on which RCP relies. In *Discovery Network*, the Supreme Court struck down a Cincinnati ordinance that banned commercial newsracks and only commercial newsracks, even though commercial newsracks constituted just 62 of the approximately 2,000 newsracks in Cincinnati. *Id.* at 417, 113 S.Ct. 1505. Cincinnati officials justified their regulation of commercial newsracks by their ugly appearance. *Id.* at 425, 113 S.Ct. 1505. Yet, as the Court noted, commercial and noncommercial newsracks were equally unattractive. *Id.* The Court concluded that banning commercial newsracks but not noncommercial newsracks "bears no relationship whatsoever to the particular interests that the city has asserted." *Id.* at 424, 113 S.Ct. 1505. Rather, the Court concluded, lurking in the regulation was the city's judgment that commercial speech had a lower value than other forms of speech. *Id.* at 418–19, 113 S.Ct. 1505 ("The major premise supporting the city's argument is the proposition that commercial speech has only a low value."). But the Court also noted that it was not deciding "whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing." *Id.* at 428, 113 S.Ct. 1505.

Unlike the Cincinnati ordinance in *Discovery Network*, which failed to draw any link between the commercial aspect of the newsracks being regulated and the interests that Cincinnati asserted, the sign ordinance is supported by a link between the ***738** commercial character of the signs being regulated and the City's interests. The unrebutted evidence the City has offered indicates that the overwhelming majority of the burdens to the City's asserted interests caused by posted signs are imposed by commercial signs. Unlike the defendant in *Discovery Network*, the City has introduced evidence showing that the commercial character of signs posted to City property has a direct and significant impact on the interests that the City asserted to support the sign ordinance. Thus the Court finds unpersuasive RCP's contention that the City seeks to constrain "commercial messages (as a class)...as a way to address *a problem unrelated to commerce*." Pl.'s Mot. for Summ. J. at 22 (emphasis added).

RCP also argues that the City's evidence does not change the fact that commercial and noncommercial signs ultimately present the same issues: a commercial sign does not impose any burdens beyond those that a

noncommercial sign imposes. That is not entirely correct: one of the City's expert witnesses has offered some evidence that advertisements are more distracting to those in traffic than other types of signs. D.E. 69, Pl.'s Ex. 18 at 5 (Kuzel Expert Rep.). But the central thrust of the City's justification for the sign ordinance is that there are far more commercial signs posted to the City's property than noncommercial signs, even though commercial signs are already unlawful under the sign ordinance (suggesting the disparity would be even worse absent the ban). The Court sees no basis to reject the proposition that the far greater volume of commercial signs justifies the City's decision to focus its regulation on that type of sign.

[8] In sum, the City has sufficiently established that its ban on posting commercial signs on City property directly advances its asserted and legitimate interests in reducing litter, promoting traffic safety, reducing damage to City property, and advancing aesthetics, by banning all commercial signs, the type of signs that imposes the greatest adverse impact on these interests.

3. RCP's underinclusiveness argument

[9] RCP argues that by limiting its prohibition of signs to commercial signs posted on City property, the City has adopted an underinclusive ordinance that, for this reason, does not directly advance its asserted interests. An ordinance that "provides only ineffective or remote support for the government's purpose" may not be upheld under *Central Hudson*. *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (quoting *Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343). *See also, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place.").

For example, in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 190, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) the Court struck down a federal law that banned the advertising of commercial casino gambling. The interest asserted to support the advertising ban was limiting demand for gambling, particularly on the part of compulsive gamblers. *Id.* at 189, 119 S.Ct. 1923. The law, however, permitted advertising by government-operated, nonprofit, tribal, and "ancillary" commercial casinos. *Id.* The Court concluded that the law was "so pierced by exemptions and inconsistencies" that "there was little chance that the speech restriction could have directly and ***739** materially advanced its aim." *Id.* at 190, 193, 119 S.Ct. 1923. Similarly, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), the defendant contended that a federal prohibition on advertising alcohol content on beer labels unlawfully restricted the speech rights of brewers. *Id.* at 478–79, 115 S.Ct. 1585. The government argued that the ban was needed to suppress the threat of "strength wars" between brewers, in which each brewer increased alcohol content relative to others as a way of attracting customers. *Id.* at 479, 115 S.Ct. 1585. But as the brewers pointed out, most states permitted brewers to disclose the alcohol content of their beers in advertisements, even if they were barred from including it on beer labels. *Id.* at 488, 115 S.Ct. 1585. And manufacturers were permitted to characterize some beers as "malt liquor," an indication of a higher alcohol content. *Id.* at 489, 115 S.Ct. 1585. The Court concluded that these exemptions rendered the restriction so underinclusive as to defeat its purpose. *Id.* at 488–89, 115 S.Ct. 1585.

The law does not, however, impose upon government an all-or-nothing choice in regulating commercial speech. The Supreme Court and other federal courts have recognized that a statute regulating commercial speech may contain exceptions to a general ban without rendering the statute underinclusive. In *Metromedia*, the Supreme Court upheld a city ordinance that permitted billboards engaged in onsite advertising (i.e., describing the commercial activities conducted at the premises on which the billboard was located), but not those engaged in offsite advertising (describing the commercial activities of another location). *Metromedia, Inc.*, 453 U.S. at 510–11, 101 S.Ct. 2882. The Court concluded that the differential treatment was not unconstitutional even though the ban permitted many billboards, as the ban on offsite advertising still advanced the City's interests in traffic safety and aesthetics. *Id.* at 511, 101 S.Ct. 2882. The Court also noted that the city reasonably could believe offsite advertising, due to periodically changing content, could impose a greater burden upon the City's interests than onsite advertising. *Id.*

Likewise, in *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), the Ninth Circuit upheld a city ordinance that restricted offsite commercial advertising signs, but not onsite commercial or noncommercial signs. *Id.* at 902, 909. Faced with an underinclusiveness challenge, the court reasoned that the exceptions did not undermine the interests that the sign ordinance was intended to advance, as the ordinance still reduced the overall clutter created by signs. *Id.* at 910. The court also noted that the City of Los Angeles found that offsite advertising posed "a more acute problem" than other types of advertising, because offsite advertising featured content that periodically changed. *Id.* The Ninth Circuit also distinguished the ordinance from the law at issue in *Greater New Orleans*. Whereas the ban on commercial casino advertisements at issue in *Greater New Orleans* was so underinclusive that gamblers "would simply redirect their business to Indian casinos instead of private casinos," the sign ordinance advanced the City of Los Angeles's interests by reducing the overall number of billboards. *Id.* at 911. *See also Contest Promotions, LLC v. City & County of San Francisco*, 874 F.3d 597, 603 (9th Cir. 2017) (concluding that a sign ordinance was not fatally underinclusive, when "the distinctions that it makes among different kinds of speech relate empirically to the interests that the government seeks to advance.")

First, RCP argues in a footnote that the sign ordinance is underinclusive because it does not address advertisements posted under the City's contract with JCDecaux. ***740** Pl.'s Mot. for Summ. J. at 16 n.2. The City entered into a contract with an advertising entity, JCDecaux, to permit certain advertising on City-owned "street furniture," such as bus stops, train stations, and other publicly-owned surfaces. D.E. 69, Pl.'s Ex. 20 at CITY001461 ("Coordinated Street Furniture Program Agreement"). Under the contract, JCDecaux "agreed to be responsible for the design, fabrication, installation, maintenance, operation, removal, and dismantlement of various pieces of street furniture...at no cost to the City." *Id.* Thus the agreement with JCDecaux does not adversely impact many of the City's asserted interests: litter, visual clutter, and damage to City property are all mitigated under this arrangement. Moreover, similar regulatory schemes —banning commercial signs but excepting commercial signs posted in accordance with a contract between the City and an advertiser—have been upheld. *Metromedia,* 453 U.S. at 509, 101 S.Ct. 2882; *Metro Lights*, 551 F.3d at 909. The exception for the JCDecaux advertisements does not render the sign ordinance so underinclusive that it fails to advance the City's interests.

RCP also argues that the City's failure to ban noncommercial signs renders the sign ordinance fatally underinclusive. RCP contends that political signage, one type of noncommercial signage, produces the same problems that commercial signs do but are left unregulated by the sign ordinance. This, in the Court's view, is essentially a variation on the argument about commercial versus non-commercial signs that the Court rejected in the previous section. In any event, the short answer to RCP's argument is that the law does not leave the City with a binary choice of banning all signs or banning none. So long as the choices the City makes regarding which types of signs to regulate are not otherwise constitutionally infirm, *cf. Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (exceptions for some types of political content but not others likely would not pass muster), it does not have to eliminate the entire perceived ill all at once. Here the City has chosen to target commercial signs, the type of signs that it reasonably believed imposed the lion's share of the adverse impact on its asserted interests. In any event, as the City contends, political signs typically are put up only during election seasons, so they do not constitute as great a burden as types of signs that are posted year-round.

RCP also argues that signs posted by non-profits, which it contends are also noncommercial signs, pose as great or greater a problem as commercial signs, because non-profits experience all the same incentives that commercial entities face but have less resources to channel into paid advertising. RCP concludes that for this reason, signs posted by non-profits pose a greater problem than commercial signs in terms of impact on the City's asserted interest. But this argument is speculative; RCP does not support it with evidence, and it otherwise lacks foundation in the record.

In sum, the Court overrules RCP's underinclusiveness argument. As discussed earlier, the City has introduced evidence showing that most posted signs are commercial in character. This evidence is sufficient to establish that the sign ordinance directly advances the legitimate governmental interests that the City asserts. As far as the limitation to commercial advertisements is concerned, the sign ordinance is more like the regulations upheld in

Metromedia, *Metro Lights*, and *Contest Promotions* than those struck down in *Greater New Orleans* and *Rubin*. *See also United States v. Edge Broad. Co.*, 509 U.S. 418, 429, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) ("We [have] made clear...that our commercial speech cases require a fit between ***741** the restriction and the government interest that is not necessarily perfect, but reasonable.").

4. The availability of lesser restrictions

[10] RCP argues that the sign ordinance also fails because there are a number of other ways that the City could have advanced its asserted interests without banning commercial signs, such as restrictions in certain locations, restrictions on the total number of postings, or restrictions on how a posting may be affixed to City property. First, it is not clear that these less-restrictive means would adequately advance the City's interests in reducing clutter and promoting traffic safety, which likely are implicated by the addition of any signs, no matter how or where these signs are posted. Second, even if there were another means of restricting signs, RCP misstates the burden facing the City. "The [City] is not required to employ the least restrictive means conceivable, but it must demonstrate...a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans*, 527 U.S. at 188, 119 S.Ct. 1923. The City's prohibition on the single largest source of the sign problem is a solution that reasonably fits the problems the City has identified.

Finally, RCP argues that a parade of horribles will follow from a decision upholding the City's restriction on commercial signs. Specifically, RCP contends that if the blanket prohibition on commercial signs is upheld, nothing will stop the City from barring commercial speakers from "leafletting, engaging in door-to-door solicitation, or using of sound trucks...effectively eliminating underinclusiveness challenges to prohibitions of commercial speech." Pl.'s Mot. for Summ. J. at 24. The short answer to this is that the availability of alternative forms of communication is, as the Court has discussed, a meaningful element in the analysis of the propriety of restrictions on commercial speech. And under *Central Hudson*, a governmental entity may regulate non-misleading commercial speech only if there is a "fit between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, 478 U.S. at 341, 106 S.Ct. 2968. In the present case, the City has presented uncontroverted evidence that shows that the volume of commercial signage affects the City's asserted interests in a way that noncommercial signage does not. Any other restriction that the City might choose to impose in the future likewise will have to pass muster under *Central Hudson* and other applicable decisional law.

5. Conclusion

In sum, the Court concludes that the City's sign ordinance comports with *Central Hudson* as a permissible regulation of commercial speech. The ordinance directly advances the City's interests, its exemption of noncommercial signs does not render it underinclusive, and it is not more extensive than is necessary to serve the City's asserted interests.

B. Vagueness

Next, RCP asserts that the sign ordinance is void for vagueness due to its failure to define its key term, "commercial advertising material." Before addressing the merits of RCP's argument, the Court must address whether RCP has standing to assert a vagueness challenge.

1. Standing

[11] **[12]** The City argues that RCP lacks standing to bring a vagueness challenge. Under *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010), "[a] plaintiff who engages in some conduct that is clearly ***742** proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 18–19, 130 S.Ct. 2705. RCP correctly contends, however, that the sign ordinance does not "clearly proscribe" its conduct. RCP, a non-profit organization, advertised a film that exhorts revolutionary political change. Even though there was an admission fee, it would be difficult to say that its posters *clearly* constituted "commercial advertising material." RCP is in a similar position to the plaintiff who asserted a vagueness challenge in *Buzdum v. Village of Germantown*, No. 06-C-159, 2007 WL 3012971 (E.D. Wis. Oct. 12, 2007). The court in that case concluded the plaintiff had standing to challenge terms in an ordinance regulating "sexually

oriented businesses" because the plaintiff, an individual who occasionally attempted to present nude or semi-nude dancing in his tavern, could reasonably doubt his conduct was covered by the ordinance. *Id.* at *18–19. RCP has similarly engaged in conduct reasonably viewed as on the margins of the coverage of the sign ordinance, the opposite of conduct that was "clearly proscribed." As a result, RCP possesses standing to bring a vagueness challenge.

2. Merits

Even though the Court has determined that the First Amendment does not prohibit the City from distinguishing between commercial and non-commercial speech in regulating signs on City property, that does not insulate the sign ordinance from scrutiny on other grounds. RCP also challenges the ordinance's ban on posting "commercial advertising material" on the ground that this term, which the ordinance does not define, is unconstitutionally vague.

[13] **[14]** **[15]** **[16]** The Due Process Clause does not require "perfect clarity and precise guidance" in statutory enactments. *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). To sustain a vagueness challenge, a plaintiff must show the law "fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *Sherman v. Koch*, 623 F.3d 501, 519 (7th Cir. 2010). And the degree of vagueness that the Constitution tolerates partly depends in part on the nature of the enactment; for example, more vagueness is typically tolerated in a statute that imposes civil as opposed to criminal penalties. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *see also Sherman*, 623 F.3d at 519. When, however, First Amendment rights are at stake as they are in this case, "rigorous adherence" to the standards of due process is required. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012).

RCP argues that the sign ordinance is impermissibly vague because it leaves the term "commercial advertising material" undefined. This is particularly problematic, RCP argues, for persons or organizations wanting to post signs that arguably involve both commercial and noncommercial messages. That is the situation with RCP's sign. It advertised an essentially political event (the showing of a film with a political message) that involved payment of money (a modest fee for admission). It is also easy to come up with other situations in which a person or organization wanting to post a sign would find it quite difficult to know which side of the line it was on. For instance, a political candidate who posts a sign featuring a link to her campaign website conceivably could run afoul of the sign ordinance—if, say, the website offered items for sale—but how would she know for sure? And a business that wanted to ***743** post signs supporting a Fourth of July celebration, a gay pride event, or an anti-gun control rally and identify its business and address on the sign would have an equally difficult time determining whether City officials would consider its sign to be a "commercial advertising material."

[17] Significant evidence supporting RCP's vagueness claim comes from the City itself. In its responses to RCP's interrogatories, the City said that it defines "commercial advertising material" as "printed material that offers goods or services in exchange for money or other forms of remuneration; that reference, describe, or promote goods or services that may be so offered; or that reference, describe, or promote businesses or other enterprises that offer such goods or services." Def.'s Resp. to Pl.'s LR 56.1 Stmt. ¶ 34. But the City's designated Rule 30(b)(6) witness regarding enforcement of the sign ordinance by the Department of Transportation testified that it prohibits *any* posting affixed to City property, irrespective of what the sign says. *Id.* ¶ 35. And Cole Stallard, a deputy commissioner of the City's Department of Streets and Sanitation, testified during his deposition that a poster distributed by RCP with information about its political philosophy, invited people to joint its mailing list, and offered a way to make donations would be a "commercial advertisement." *Id.* ¶ 73. He also stated that the poster for which RCP was ticketed would have been a "commercial advertisement" and prohibited even if it just promoted free online viewing of RCP's film and did not list a ticket price for a live showing, because the poster refers to "Revolution Books," which "seems to be an entity that sells books." *Id.* ¶ 61, 63. These definitions may all overlap, but they also have fundamental inconsistencies.

A reasonable person likely would not believe that an exchange of money is contemplated is enough to make a message "commercial advertising material" under a

law that does not define that term. What about, for example, a flyer posted by an educational institution promoting an event with a presentation by a political figure for which a modest admission fee (say $5) is charged? To cite another example, the local Federal Bar Association chapter periodically invites members —particularly younger members—to have lunch with a federal judge in small groups, and charges $10 to partially defray the cost of lunch. These events, from the FBA's perspective, serve an educational purpose; most reasonable people would not consider this to be commercial activity. How would a reasonable person determine whether a flyer promoting such an event, posted on a light pole on Plymouth Court, right outside of The John Marshall Law School, would constitute prohibited "commercial advertising material"? Or what if the flyer referenced the event but made no express reference to the price for lunch and just referenced the FBA chapter's website? A reasonable person would have no way of knowing whether such flyers constituted commercial advertising material under the ordinance, which does not define that term, the key term in the ordinance. Under the definition cited by the City in its interrogatory answer and at least some of the alternative definitions that City representatives offered, these flyers potentially would be prohibited.

The Court concludes that for these reasons and others, the ordinance's failure to define "commercial advertising material" renders the ordinance unconstitutionally vague, given the impact on activity protected under the First Amendment. Parties like RCP, who wish to communicate a political message through a ticketed event, have no guidance on whether their sign will violate the ordinance. Likewise, enforcing officials are enabled to make wholly ***744** subjective and arbitrary decisions—raising the possibility that signs promoting unpopular causes or events may draw a citation, while others will escape sanction. The absence of a definition of this key term is fatal to the ordinance.

In *International Society for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978), the Seventh Circuit affirmed a district court's decision to overturn as unconstitutionally vague regulations enforced in Chicago's airports. *Id.* at 269. In relevant part, the regulations stated that "[n]o person except concessionaires and other lessees as permitted by contract with the City of Chicago shall sell anything for commercial purposes." *Id.* at 273. The plaintiff, "a religious organization that requires its members to disseminate and sell its tracts and solicit contributions in public areas," challenged the regulation on vagueness grounds. *Id.* at 267. The plaintiff contended that the regulation was too vague to resolve whether their practice of selling religious tracts was "commercial" in character. *Id.* at 269–70. The Seventh Circuit held that "the provisions are not drafted in a manner sufficiently precise to avoid the possibility of improper application by officials....[The challenged regulation] could be viewed as prohibiting the sale of a religious tract for 'commercial purposes' either by the one wishing to sell or by the official charged with enforcement." *Id.* at 270.

The sign ordinance suffers from the same problems as the airport regulations at issue in the *Krishna Consciousness* case. RCP, a political advocacy organization, is no more able to determine which signs promoting its activities and events constitute "commercial advertising material" under the sign ordinance than the religious organization in *Krishna Consciousness* was able to determine if it was engaged in a "commercial purpose" in selling its religious materials. *Id.* at 270. Moreover, enforcing officials lack any criteria of the type needed to structure decision-making, which makes arbitrary or discriminatory enforcement more likely. "[I]n some contexts, the failure to define the distinction between commercial and noncommercial speech might result in an impermissible delegation of authority." *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1116 (7th Cir. 1999). Businesses sometimes engage in noncommercial conduct, like promoting a particular group or policy, and noncommercial entities sometimes engage in arguably commercial conduct, like selling tickets to a political film. The sign ordinance provides no guidance to aid enforcement officials in determining where the line between a violation and non-violation is drawn, leaving it to officials to rely on "wholly subjective" judgments in enforcing the ordinance. *See United States v. Williams*, 553 U.S. 285, 306, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

The fact that some types of signs *clearly* constitute commercial advertising and thus are obviously subject to the ban is not determinative. The Supreme Court's cases in this area "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, —— U.S. ——, 135

S.Ct. 2551, 2561, 192 L.Ed.2d 569 (2015). For example, a statute barring "unjust or unreasonable" grocery prices is impermissibly vague, even if charging $1,000 for a pound of sugar plainly would be unreasonable, and a statute prohibiting "annoying" conduct on sidewalks is likewise impermissibly vague, even if spitting on someone clearly would be annoying conduct. *Id.* For this reason, the Court disagrees with the City's contention that the sign ordinance is not vague because there are clear examples of "commercial advertising material," such as signs advertising ***745** oven repair, insurance, car washes, or tax preparation. Def.'s Mem. in Supp. of Mot. for Summ. J. at 19. Even if there are instances in which the meaning of "commercial advertising material" can be clearly understood, this does not eliminate the fact that there are significant gaps in which individuals wanting to post signs and enforcing officials are left to make subjective judgments regarding compliance.

The City's history of interpretation and enforcement of the ordinance underscores the vague character of the sign ordinance. As indicated earlier, RCP points to deposition testimony from several City employees who provided conflicting accounts of what constitutes "commercial advertising material." A deputy commissioner with the Department of Transportation and tasked with enforcing the sign ordinance testified that a sign containing a website address in which goods and services are offered for sale would be restricted by the sign ordinance. Def.'s Resp. to Pl.'s LR 56.1 Stmt. ¶ 37. Another official stated that an advertisement for a CD release would be commercial, because, unless it said the CD was free, the advertisement is commercial. *Id.* ¶ 41. Likewise, the City's enforcement history, including the ticket issued to RCP, lends support to RCP's position, for it shows that individuals and officers must confront cases in which their attempts to interpret the statute are unmoored from any guidance or criteria. Def.'s LR 56.1 Reply Stmt. ¶ 81. The City argues that its enforcement history is analogous to inconsistent enforcement evidence regarding a District of Columbia ordinance, which the D.C. Circuit discounted in upholding the ordinance in *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017). But *Act Now* is distinguishable. The D.C. Circuit discounted the significance of the enforcement record in that case because the law in question contained a clear definition that cabined the discretion of law enforcement personnel. *Id.* at 411. The present ordinance has nothing of the kind. Similarly, the failure to adequately train the City employees who enforce the sign ordinance is more significant in the absence of a definition of "commercial advertising material."

The Court also disagrees with the City's contention that "commercial advertising material" has a "common-sense meaning," because the facts required to prove a sign fits within the ordinance are themselves unclear. *Williams*, 553 U.S. at 306, 128 S.Ct. 1830 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). The City, while responding to RCP's motion for summary judgment, states that a sign only falls within the sign ordinance if it "include[s] commercial speech; *i.e.*, promote a business or offer goods and services for sale." Def.'s Reply in Supp. of Mot. for Summ. J. at 12. But is that really the fact to be proven? The City also states that a sign falls within the sign ordinance if it "reference[s]" a business—a fact that could apply to far more signs. Def.'s LR 56.1 Reply Stmt. ¶ 34. Under the definitions that the City has put forward, a sign that says "Boycott Amazon.com" would run afoul of the ordinance under one definition, but not another. *See also Fox Television*, 567 U.S. at 254, 132 S.Ct. 2307 (the FCC's shifting indecency standards meant that the government failed to provide broadcasters with the notice sufficient for a "person of ordinary intelligence"). There is no commonly understood common-sense meaning of "commercial advertising material," as the alternative definitions offered by the City and its personnel make clear.

***746** The Court also rejects the City's contention that it should not be required to add what it calls "needless bloat" by affixing definitions to each term used in the municipal code. "Commercial advertising material" is the sign ordinance's central term, the primary point on which determination of a violation hinges. The City cites to *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), to assert that due process does not require "impossible standards of clarity." But the Supreme Court went on to say, in the same sentence, that the law at issue did not pose "a case where further precision in the statutory language is either impossible or impractical." *Id.* at 361, 103 S.Ct. 1855. The same is true here.

Finally, the Court is not persuaded by the City's reliance upon *Minority Television Project Inc. v. FCC*, No. C-06-02699EDL, 2007 WL 4570293 (N.D. Cal. Dec. 21, 2007). *Minority Television Project* addressed whether the term "promote" was vague, *id.* at *11, which is not germane to the issues before the Court. The case also resolved a motion to dismiss, not a motion for summary judgment. *Id.* at *12. The case does not provide persuasive guidance for the Court on the question presented here.

For these reasons, the Court concludes that the sign ordinance is impermissibly vague insofar as it depends on a finding that a sign is "commercial advertising material," due to the absence of a definition of that critical term.

C. Overbreadth

Because the Court has concluded that the sign ordinance is impermissibly vague, it need not address RCP's overbreadth challenge. *See Kolender*, 461 U.S. at 359 n.8, 103 S.Ct. 1855 (noting the overlap between vagueness and overbreadth, particularly in the First Amendment context).

Conclusion

For the foregoing reasons, the Court grants plaintiff's motion for summary judgment [dkt. no. 66], finding that the absence of a definition of the term "commercial advertising material" in Chicago Municipal Code § 10–8–320 renders that provision unconstitutionally vague. The Court denies defendant's motion for summary judgment[dkt. no. 59]. The Court denies RCP's motion to exclude the City's expert witnesses [dkt. no. 56]. Counsel are to draft an appropriate judgment embodying the Court's conclusions and are to present an agreed proposed form of judgment, or alternative proposed forms if they are unable to agree, by no later than April 4, 2018. The case is set for a status hearing on April 5, 2018 at 9:30 a.m.

All Citations

304 F.Supp.3d 729

Footnotes

1 RCP does not dispute that the poster at issue was based upon a version that RCP made available on its website. Pl.'s Resp. to Def.'s LR 56.1 Stmt. ¶¶ 23–24.

2 This in no way contradicts the Court's later discussion regarding the vagueness of the sign ordinance. *See Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 2561, 192 L.Ed.2d 569 (2015) (law may be impermissibly vague even if one can identify instances in which the law is clearly implicated).

3 Moreover, as Delgado's testimony indicates, doing a study of the type sought by RCP could be prohibitively disruptive to the City's everyday efforts to keep the city clean. D.E. 61, Def.'s Ex. 2 at 95 (Delgado Dep.) ("I know that it would be impossible for me to do it, as a ward superintendent, to document how many signs I take down, just for the sheer volume.").

872 F.3d 512
United States Court of Appeals,
Seventh Circuit.

Gregory LUCE and Nicholas Newman, Plaintiffs-Appellants,
v.
TOWN OF CAMPBELL, WISCONSIN, and Tim Kelemen, Defendants-Appellees.

No. 15-2627
|
Argued January 19, 2016
|
Decided September 22, 2017
|
Rehearing and Rehearing En Banc Denied November 21, 2017

Synopsis

Background: Protesters brought § 1983 action against town and police chief, alleging that ordinance banning signs from highway overpass violated the First Amendment. The United States District Court for the Western District of Wisconsin, No. 14-cv-046-wmc, William M. Conley, J., 113 F.Supp.3d 1002, granted town's motion for summary judgment, and, 116 F.Supp.3d 915, granted police chief's motion for summary judgment. Protesters appealed.

Holdings: The Court of Appeals, Easterbrook, Circuit Judge, held that:

[1] police chief did not act under color of state law;

[2] ordinance did not require empirical support in order to be sustained; but

[3] genuine issue of material fact existed as to whether portion of ordinance banning all signs, regardless of size, within 100 feet of highway overpass served significant governmental interest.

Affirmed in part, vacated in part, and remanded.

West Headnotes (5)

[1] Civil Rights
Police or peace officers;prisons

Town police chief did not act under color of state law when he posted protester's name and e-mail address on website and made comments accusing protester of failing to pay taxes, and thus § 1983 did not provide remedy for police chief's misconduct; although police chief took some of those actions while on duty and with an office computer, all of facts he gathered and disclosed about protester were publicly available online, and defamation was not among police chief's duties. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[2] Civil Rights
Officers and public employees, in general

A public employee's acts occur under color of state law, as required for § 1983 liability, when they relate to official duties. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[3] Constitutional Law
Streets and highways

Highways
Billboards and highway beautification in general

Town's ordinance banning signs from highway overpass did not require empirical support in order to be sustained on protester's First Amendment challenge, as it was obvious that presence of overhead signs and banners would cause some drivers to slow down, increasing likelihood of collisions. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[4] Federal Civil Procedure

Civil rights cases in general

Genuine issue of material fact existed as to whether portion of town ordinance banning all signs, regardless of size, within 100 feet of highway overpass served significant governmental interest, precluding summary judgment on protester's First Amendment challenge. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[5] Constitutional Law

Time, Place, or Manner Restrictions

Time, place, and manner restrictions on speech must serve a significant governmental interest and be no more extensive than necessary. U.S. Const. Amend. 1.

1 Cases that cite this headnote

***513** Appeal from the United States District Court for the Western District of Wisconsin. No. 14-cv-046-wmc—William M. Conley, *Judge*.

Attorneys and Law Firms

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Tim Kelemen, Pro se.

Before Easterbrook, Rovner, and Sykes, Circuit Judges.

Opinion

Easterbrook, Circuit Judge.

Interstate 90 runs through the Town of Campbell, Wisconsin. The speed limit on I-90 in the Town is 65 miles per hour. Two streets and one pedestrian overpass cross the highway within the Town. A traffic survey in 2008 found that between 23,000 and 29,000 trucks and cars pass through the Town on I-90 every day.

Gregory Luce and Nicholas Newman, two members of the local Tea Party, decided that the pedestrian overpass would be a good place to draw attention to their views. The group's placement of banners bearing messages such as "HONK TO IMPEACH OBAMA" led the Town's legislature to enact an ordinance forbidding all signs, flags, and banners (other than traffic-control information) on any of the three overpasses, or within 100 feet of the end of these structures. The ordinance is content- ***514** neutral; it does not matter what message any privately placed sign bears. *Reed v. Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). The ordinance is a time, place, and manner limit, permitting messages to be conveyed anywhere else in Campbell. But in this suit under 42 U.S.C. § 1983 Luce and Newman contend that the First Amendment (applied to the states by the Fourteenth) permits them to carry or place banners and signs *everywhere* in the Town. The district court disagreed with that contention and granted summary judgment to the Town. See 113 F.Supp.3d 1002 (W.D. Wis. 2015). The court also dismissed a claim against Tim Kelemen, formerly the Town's chief of police. 116 F.Supp.3d 915 (W.D. Wis. 2015). We start with the plaintiffs' claim against Kelemen, because his conduct may affect how to understand the genesis and enforcement of the ordinance.

When the Town's police force began to hand out citations and escort demonstrators off the pedestrian overpass, they responded by making video recordings and posting them on a website. Kelemen did not take kindly to these videos, especially because one of them showed people being removed for unfurling a large American flag. Viewers started complaining that the police were mistreating the Tea Party. Kelemen then decided to act as a vigilante—as he said in discovery, "It's just like, you know, you want to mess with us ... we'll mess with you." Kelemen decided to "mess with" Luce by posting his name and email address on websites catering to gay men and consumers of pornography. That caused embarrassment to Luce and led to unwanted email and other attention. Kelemen also posted comments on the local newspaper's website accusing Luce of failing to pay his property taxes and other debts and asserting that his car was about to be repossessed. Kelemen tried to hide his role—he signed the comments "Bill O'Reilly"—but his identity eventually came out, and Luce sued on a constitutional theory (that Kelemen was penalizing both the Tea Party's speech on the bridge and its videos), plus state tort law.

Kelemen disgraced himself. When what he had done became known, he resigned as police chief. He was prosecuted for violating Wis. Stat. § 947.0125(2)(e) (unlawful use of a computerized communication system), pleaded no contest, and received a diversionary disposition. The district court held, however, that Kelemen had not violated Luce's rights under the First Amendment, and it relinquished supplemental jurisdiction over the state-law claims.

[1] The court concluded that Kelemen was not engaged in state action when "messing with" Luce and that the First Amendment therefore did not apply (for it deals only with governmental conduct). Acting as a vigilante is not part of a police officer's job. Kelemen did some of the dirty work while on duty and used an office computer for some posts. But he did not use official information or privileged access to information. All of the facts he gathered and disclosed about Luce, such as his physical and email addresses, were available to the general public. Anyone else could have done exactly what Kelemen did. And that's why the district judge thought that he was acting in a private capacity, off on a lark and a frolic as some cases say, rather than as a police officer. The judge held that remedies under state law are the right response to Kelemen's misconduct.

[2] A public employee's acts occur under color of state law when they relate to official duties. See, e.g., *Gibson v. Chicago*, 910 F.2d 1510, 1516 (7th Cir. 1990); *Hughes v. Meyer*, 880 F.2d 967, 971–72 (7th Cir. 1989). Defamation was not among ***515** Kelemen's duties. What he did was not even a misguided effort to perform an official function. His activities could be called "related" to official duties in the sense that they were designed to injure a person who criticized Kelemen's implementation of the Town's ordinance, but the same could be said about the misconduct at issue in *Honaker v. Smith*, 256 F.3d 477 (7th Cir. 2001). There we held that a fire chief was not acting under color of state law when he burned down the house of a disgruntled citizen whom the chief had come to regard as a pest. Arson is not among a fire chief's duties, just as defamation is not among a police chief's. So we agree with the district court that state law, not § 1983, provides the appropriate remedy for Kelemen's misconduct. See also, e.g., *Latuszkin v. Chicago*, 250 F.3d 502, 505–06 (7th Cir. 2001); *Pickrel v. Springfield*, 45 F.3d 1115, 1118–19 (7th Cir. 1995).

[3] Kelemen's behavior bears on this federal suit, however, by undermining his credibility. Much of the information presented to the Town's legislature, and to the district court, about the reason for the ordinance's enactment came from Kelemen. He told the legislature, and the judge, that the Tea Party's banners caused drivers to pull off the road to take photographs, produced complaints from drivers about slow and snarled traffic, and so on. Given Kelemen's misconduct, it is not possible (when acting on a motion for summary judgment) to accept his statements as truthful, even though there was no directly opposing evidence.

This gives plaintiffs an opening. They recognize that Campbell's ordinance is similar to one that was enacted by the City of Madison, Wisconsin, and sustained against constitutional challenge in *Ovadal v. Madison*, 469 F.3d 625 (7th Cir. 2006) (holding that the adoption of an ordinance like Campbell's made a constitutional challenge moot by implementing a nondiscriminatory system). See also *Ovadal v. Madison*, 416 F.3d 531, 536 (7th Cir. 2005) (remarking that constitutional problems in Madison's initial approach to the subject could be solved if the City "prohibited not just Ovadal's, but all protests and all signs on all Beltline overpasses"). But they insist that all time, place, and manner regulations require empirical support and contend that without Kelemen's evidence the Town's ordinance has none.

Plaintiffs offered some evidence of their own, in the form of a report from traffic engineer Paul Dorothy. He reached two principal conclusions: first, that 23,000 cars a day is light traffic, compared with the highway's design limit; second, that the presentation of signs and banners on overpasses is unlikely to cause "long traffic back-ups", contrary to Kelemen's submission. (Kelemen subjectively rated Campbell's portion of I-90 as unusually hazardous; Dorothy's report shows that this assertion lacks empirical support.) For its part, the Town offered some evidence independent of Kelemen's observation. Officer Casper testified that he observed a car that had pulled off the road to take pictures of signs on the overpass. The record contains a photograph of one car pulled over, with occupants taking pictures. The Town did not conduct a formal safety evaluation, however.

The paucity of evidence from anyone other than Kelemen leads us to ask whether record evidence supporting time, place, and manner restrictions is always essential.

Plaintiffs say yes, relying on decisions such as *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). *McCullen* dealt with ***516** speech about abortion and *Renton* with the location of sexually oriented businesses. The jurisdictions that enacted those restrictions contended that those topics required distinctive regulations, and the Justices wanted some proof.

After *Reed v. Gilbert* a powerful reason is needed whenever a law classifies by speech's content. See also, e.g., *Norton v. Springfield*, 806 F.3d 411 (7th Cir. 2015). Whether or not the sorts of rules at issue in *McCullen* and *Renton* amount to content discrimination, as *Reed* understood that phrase, the Court found each classification sufficiently problematic to require an extra degree of support. But the Justices have never suggested that empirical support is required for *all* time, place, and manner limits.

Consider, for example, a limit on loud speech or music. The Supreme Court dealt with such limits in *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), and *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Each time the Court sustained the regulation without requiring record evidence about how high decibel levels affect people subjected to noise. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), the Court rejected a challenge to the Park Service's ban on sleeping in Park Service units (such as the Mall) in Washington, D.C., because the ban did not distinguish by the message anyone proposed to convey. The Justices thought that the regulation likely reduced congestion and "wear and tear on park properties" (*id.* at 299, 104 S.Ct. 3065) but relied on their own assessment rather than proof in the record. A dissenting opinion criticized the Court for not demanding proof, see *id.* at 311, 104 S.Ct. 3065 (Marshall, J., dissenting), but the majority was unmoved. And it is easy to collect other decisions sustaining time, place, and manner regulations on the basis of the Justices' nonempirical assessments. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (ban on solicitation on Post Office grounds); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (ban on literature dissemination outside designated areas of a state fair).

Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), offers another illustration. San Diego forbade many billboards near its highways. A majority of Justices believed that a ban would be proper, given the ability of billboards to distract drivers (and the fact that many billboards are aesthetic disasters); they did not require proof of this effect in the record. See *id.* at 508–12, 101 S.Ct. 2882 (opinion of White, J., joined by Stewart, Marshall & Powell, JJ.) (the Court "hesitate[s] to disagree with the accumulated, common-sense judgments of local lawmakers" and a ban would be valid for safety and aesthetic reasons), 541, 101 S.Ct. 2882 (Stevens, J., agreeing with this conclusion but dissenting for other reasons), 559–61, 101 S.Ct. 2882 (Burger, C.J., agreeing with this conclusion but dissenting on other grounds), 569–70, 101 S.Ct. 2882 (Rehnquist, J., agreeing with the views expressed by Chief Justice Burger and Justice Stevens). A plurality of the Court found the particular statute unconstitutional because it allowed some billboards while forbidding others, discriminating by content and subject matter. But seven Justices deemed the rationale for an across-the-board ban adequate, despite the paucity of record evidence.

The cases we have been discussing do not excuse the absence of a good reason for regulating; *every* time, place, and manner regulation requires that. So if a law were to forbid the use of a megaphone ***517** near Times Square at noon on a weekday, a court would insist that the city or state have some evidence to overcome the common understanding that the din there (and then) is already so great that a megaphone may be needed for speech to be heard at all; but a limit on megaphones during concerts in Central Park requires no such empirical justification, because the potential benefits of the rule can be appreciated without one.

A regulation of the sort the Town has adopted rests on a belief that overhead signs and banners will cause at least some drivers to slow down in order to read what the banners say, and perhaps to react to them (say, by blowing the car's horn in response to "HONK TO IMPEACH OBAMA"). Stopping to take a picture is just an extreme version of slowing down. Reading an overhead banner requires some of each driver's attention, and diverting attention—whether to banners or to cell phones and texting—increases the risk of accidents. This effect is well established for cell phones and texting and is the basis for

legislation by many jurisdictions, uncontested in court as far as we are aware, though talking and texting are speech.

It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it. When one car slows suddenly, another may hit it unless the drivers of the following cars are alert—and, alas, not all drivers are alert all the time.

Advertising signs well off a freeway don't have the same effect. But novel signs directly overhead will affect some drivers who do not slow for billboards or hotel logos. And one common finding of empirical research is that when cars travel at different speeds—as when some slow down and others don't—the risk of accidents rises. A report issued by the Federal Highway Administration summarized this way: "There is evidence that crash risk is lowest near the average speed of traffic and increases for vehicles traveling much faster or slower than average.... When the consequences of crashes are taken into account, the risk of being involved in an injury crash is lowest for vehicles that travel near the median speed[.]" *Synthesis of Safety Research Related to Speed and Speed Management* (July 1998), available at https://www.fhwa.dot.gov/publications/research/safety/98154/speed.cfm. The report cites many sources for this conclusion. Plaintiffs' expert did not consider this source of risk; Dorothy's report principally addresses the likelihood that signs will lead to traffic jams. But collisions, not traffic jams, are the principal risk when cars move at different speeds.

The assessment in the agency's report has been subject to criticism, but it also has been supported by new data. Compare Kara M. Kockleman & Jianming Ma, *Freeway Speeds and Speed Variations Preceding Crashes, Within and Across Lanes*, 46 J. Transportation Research Forum 43 (Spring 2007) (not finding evidence that speed variations increase crashes), with Mohammed Quddus, *Exploring the Relationship between Average Speed, Speed Variation, and Accident Rates Using Spatial Statistical Models and GIS*, 5 J. Transportation Safety & Security 27 (2013) (finding such evidence). We do not try to resolve this controversy. It is enough to say that a state or local legislature that attempts to reduce the incidence of sudden braking on a superhighway cannot be thought to be acting irrationally or trying to suppress speech for no good reason.

[4] This is enough to support the district court's rejection of plaintiffs' challenge to the no-signs-on-overpasses rule. But it does not speak to the 100-foot addition, ***518** which the Town has not even *tried* to justify, despite the fact that one plaintiff has filed an affidavit stating that he wants to demonstrate off the overpass but within the 100-foot limit and has refrained from doing so only because of the threat of prosecution.

The ordinance forbids a small "For Sale" sign on the front lawn of any house near the ends of the overpasses. (The par-ties tell us that two homes are within the 100-foot limits.) It bans every political sign on a home's lawn, every balloon emblazoned "Happy Birthday" for a party in the back yard, every "Merry Christmas" banner draped over the front door in December, and every "Open" sign in the door of any shop near an overpass. These prohibitions apply whether or not the sign is large enough to attract drivers' attention.

[5] Time, place, and manner restrictions must serve a "significant governmental interest" and be no more extensive than necessary. See, e.g., *Community for Creative Non-Violence*, 468 U.S. at 293, 104 S.Ct. 3065. It is hard to see why signs off the highway, and too small to cause drivers to react, should be banned. Cf. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (ban on handbills distributed through newsracks was not justified); *Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (ban on signs on front lawns was not justified). Perhaps the Town has some justification for the 100-foot rule, but unless it produces one the district court should ensure that political demonstrations and other speech that does not jeopardize safety can proceed.

The judgment of the district court is affirmed, except to the extent that it rejects plaintiffs' challenge to the 100-foot buffer zone. With respect to that issue the judgment is vacated, and the case is remanded for further proceedings.

All Citations

872 F.3d 512

675 Fed.Appx. 599
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals,
Sixth Circuit.

Frank WAGNER, Plaintiff-Appellee,
v.
CITY OF GARFIELD HEIGHTS, Ohio;
William Wervey, Defendants-Appellants.

No. 13-3474
|
Filed January 13, 2017

Synopsis

Background: Resident of Ohio city challenged ordinance limiting the size of signs, political and otherwise, that residents could place on their lawns. The United States District Court for the Northern District of Ohio, Solomon Oliver, Jr., J., 2011 WL 5037206, partially granted resident's motion for temporary restraining order (TRO) and later found that city's restriction on resident's political speech was content-based regulation which violated the First Amendment under strict scrutiny. The Court of Appeals, 577 Fed.Appx. 488, reversed. Upon granting certiorari, the Supreme Court, 135 S.Ct. 2888, vacated judgment of Court of Appeals and remanded.

Holdings: The Court of Appeals held that:

[1] fact that resident's political sign would be prohibited under other ordinance did not deprive him of Article III standing to challenge city's enforcement of its political-sign ordinance;

[2] ordinance would be subject to strict scrutiny; and

[3] ordinance was not narrowly tailored to achieve city's asserted interests of aesthetic appeal and traffic safety.

Affirmed.

West Headnotes (3)

[1] Constitutional Law
Zoning and land use

Fact that resident's political sign, measuring 16 square feet, would be prohibited under city ordinance placing 12-square-foot limit on all signs in residential areas did not deprive resident of Article III standing to bring free speech challenge of city's enforcement of its political-sign ordinance, which prohibited political signs bigger than six square feet; city sent letter to resident threatening legal action based only on political sign ordinance, and resident did not request order permitting posting of his 16-square foot sign, but rather sought injunction against city's enforcement of political-sign ordinance. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

1 Cases that cite this headnote

[2] Constitutional Law
Signs

City's sign ordinance, which prohibited political signs larger than six square feet, applied explicitly and exclusive to particular speech because of topic discussed, and thus ordinance would be subject to strict scrutiny in resident's First Amendment free speech challenge. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Signs

Election Law
Independent communications;express advocacy

City's sign ordinance, which prohibited political signs larger than six square feet, was not narrowly tailored to achieve city's asserted interests of aesthetic appeal and traffic safety, and thus ordinance violated First Amendment's protection of free speech

under strict scrutiny; city permitted non-political signs to be up to 12 square feet. U.S. Const. Amend. 1.

1 Cases that cite this headnote

***600** ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.

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Robert Andrew Hager, Martin John Pangrace, Chad Richard Rothschild, Daniel James Rudary, Brennan, Manna & Diamond, Akron, OH, for Defendants-Appellants

BEFORE: BOGGS, NORRIS, and WHITE, Circuit Judges.

Opinion

PER CURIAM.

In September 2011, Frank Wagner placed a sixteen-square-foot street-facing political sign on the lawn of his Garfield Heights, Ohio, home. Wagner promptly received a letter from the City of Garfield Heights, informing him that his sign exceeded a six-square-foot limit for "political" lawn signs established by municipal ordinance and raising the prospect of legal action against him. Wagner responded by filing suit in federal court. Wagner alleged a First Amendment violation and sought to enjoin Garfield Heights from enforcing its allegedly unconstitutional ordinance. The district court enjoined Garfield Heights from enforcing that particular section, but did not grant any other relief. We reversed, holding that Garfield Heights's limitation on the size of political signs survived the intermediate scrutiny applicable to content-neutral regulations. Soon after our ruling, however, the Supreme Court issued a decision in *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), and vacated our judgment in light of its opinion. On remand, Wagner argues that this new authority requires us to subject Garfield Heights's sign restrictions to strict scrutiny. We hold that it is subject to strict scrutiny—a stringent standard that Garfield Heights cannot meet—and affirm the decision of the district court to award Wagner an injunction.

***601** I

A

The City of Garfield Heights is a largely residential suburb of Cleveland, Ohio. Just as many such municipalities throughout the nation, Garfield Heights seeks to ensure that its neighborhoods are "aesthetically harmonious" and endeavors to promote the safety of "the motoring public [and] pedestrians." Garfield Heights, Ohio, Code § 1140.01(c)–(d). To this end, the City has enacted Garfield Heights Codified Ordinances Chapter 1140, a comprehensive code of regulations that governs whether, when, and for how long its residents, businesses, and visitors may post signs. These regulations generally prohibit signs in residential areas. *Id.* § 1140.361. But given that Garfield Heights acknowledges "the rights of [its] residents" to "speak freely," *id.* § 1140.01, Sections 1140.04(f) and 1140.361 of the Codified Ordinances allow residents to place "temporary signs" measuring less than twelve square feet in surface area on their lawns. *See id.* §§ 1140.04(f), 1140.361. [1] For example, Chapter 1140 would seem to allow a resident to erect a temporary lawn sign of up to twelve square feet advertising a lemonade stand, an Avon party, or the opening of an in-home daycare. *See id.* §§ 1140.04(f), 1140.361.

But "for-sale signs, sold signs, open house, for-rent, and leasing signs, and signs of a religious, holiday, personal or political nature" are subject to additional, more restrictive rules. *Id.* § 1140.361. Under Section 1140.361, only one "for-sale, sold, for-rent, leasing, open house, religious, holiday or personal sign" not exceeding six square feet is permitted on a given lot in single-family residential districts. *Ibid.* Section 1140.362 extends this six-square-foot limit to political signs and goes even further by providing that the limitation applies to all political signs throughout Garfield Heights, including those in commercial and industrial districts. *Id.* § 1140.362. By contrast, "religious," "holiday," "personal," and other non-political temporary signs in commercial and industrial districts can generally be as large as twelve square feet in sign area without a permit, *id.* § 1140.04(f),

and up to thirty-two square feet with a permit, *id.* § 1140.37(e).

Despite being subject to more restrictive size constraints in non-residential areas, in residential areas, political signs are subject to fewer overall restrictions than "for-sale, sold, for-rent, leasing, open house, religious, holiday [and] personal" signs. Whereas residents must remove these other signs within forty-eight hours after the signs "fulfil[l] [their] purpose," *id.* § 1140.361, residents may leave political signs up for up to seventy-two hours after an election, *id.* § 1140.99. Additionally, despite some language in the City's ordinances to the contrary, *see id.* § 1140.29(a), Garfield Heights maintains that whereas residents may post only one "for sale, sold, for-rent, leasing, open house, religious, holiday or personal" sign on their property, they may erect as many political lawn signs as they want until they run up against a regulation that restricts ***602** the "total sign face area of all temporary signs on a lot" to 0.675 square feet per foot of frontage. *See* Appellants' Br. 9 (citing Garfield Heights, Ohio, Code § 1140.362); *see also* Garfield Heights, Ohio, Code §§ 1140.361, 1140.04(f), 1140.37(e), 1140.27(a). Thus, a Garfield Heights resident with fifty feet of frontage could presumably post any number of political lawn signs so long as their total sign face area does not exceed 33.75 square feet. *See* Garfield Heights, Ohio, Code §§ 1140.361, 1140.04(f), 1140.37(e), 1140.27(a).

B

Frank Wagner is a Garfield Heights, Ohio, resident who opposed former councilwoman Tracy Mahoney's position on traffic cameras in Garfield Heights, as well as her plan to introduce a municipal tax on waste disposal. In September 2011, Wagner's opposition to Mahoney's politics apparently spurred him to place a sixteen-square-foot sign on his lawn opposing Mahoney's reelection bid. Wagner's sign read: "*You do the math*[:] Traffic Camera[s] + Rubbish Tax = Mahoney Baloney." An apparently unamused Mahoney learned about Wagner's sign and called Mayor Vic Collova and Building Commissioner William Wervey to complain. Mayor Collova, who had also fielded a complaint about Wagner's sign from another area resident, drove by Wagner's house and concluded that the sign "was obviously larger in size than the" six-square-foot size restriction applicable to political yard signs set forth in Section 1140.362 of the Garfield Heights Codified Ordinances. *See* Garfield Heights, Ohio, Code § 1140.362. Wervey followed up by visiting Wagner's house two days later, but upon seeing that Wagner had taken his sign down, advised Mayor Collova that Wagner was in compliance with the City's sign regulations.

Later that week, however, Mahoney contacted Mayor Collova again to let him know that Wagner had put the sign back up. This time, Mahoney "specifically requested" that Garfield Heights enforce Section 1140.362, the City's six-square-foot limit to political signs, against Wagner. Mayor Collova agreed and instructed Wervey to send Wagner a letter requesting that he comply with the City's sign regulations. Wervey then drafted and sent a letter asking Wagner to "remove the sign in your front yard or reduce [its] size to conform" to Section 1140.362. The letter nowhere mentioned the generally applicable twelve-square-foot limit set forth in Sections 1140.04(f) and 1140.361. The letter concluded with a warning, informing Wagner that if his political sign was not removed by September 23, 2011, the City of Garfield Heights would "have no choice but to proceed with legal action in" state court, where Wagner would face up to $1,000 in fines for each day of noncompliance with Section 1140.362. *See* Garfield Heights, Ohio, Code § 1140.99.

C

Upon receiving and reading the letter, Wagner filed an action against Wervey and Garfield Heights in federal court, seeking a declaratory judgment that, whether facially or as applied to him, Section 1140.362—the ordinance governing the size of political signs—was an impermissible content-based restriction on speech that violated the United States and Ohio Constitutions. Wagner also sought to enjoin Wervey and Garfield Heights from enforcing the ordinance. The defendants responded by filing a counterclaim for a declaratory judgment that Garfield Heights's ordinances regulating political signs were constitutional. After taking discovery, both sides moved for summary judgment on their respective claims.

***603** The district court entertained Wagner's facial challenge and ruled in his favor. The court began by identifying the various ways in which Garfield Heights's ordinances distinguish between "political" and other yard signs and concluded that because Section 1140.362

"singles out political signs for different treatment than all other signs," that part of the Codified Ordinances is a content-based restriction on speech subject to strict scrutiny. The district court then determined that because neither of the governmental interests that Wervey and Garfield Heights advanced in defense of the ordinances —namely, aesthetics and traffic safety—were compelling, and because the statute was in any event not narrowly tailored to achieve either of those goals, Section 1140.362 violates the protections for freedom of speech set forth in the First Amendment to the federal Constitution. The court determined that Section 1140.362 was severable from the remainder of Chapter 1140's regulations and permanently enjoined Garfield Heights from enforcing it.

The defendants appealed and we reversed. *See Wagner v. City of Garfield Heights*, 577 Fed.Appx. 488, 500 (6th Cir. 2014). We held that although the district court was correct that "the City must determine whether a sign is political or not" before determining how to regulate, the district court erred by applying an "absolutist" test for content-based discrimination. *Id.* at 493. Citing our earlier decision in *H.D.V.–Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009), we explained that "context matter[s] when a court assesses content neutrality." *Id.* at 495. Relying on the parties' representations—which omitted any reference to the understanding that Chapter 1140 would allow some temporary residential yard signs, such as those that advertise on-site commercial activity, to extend up to twelve square feet in area—we observed that in the context of Garfield Heights's residential districts, "political signs are subject to no greater restrictions than are non-political signs," and "non-political [signs]" are actually "subject to more restrictive regulation" than political signs. *Id.* at 496. Because this context did not suggest that Garfield Heights had singled out political signs in an effort to suppress political speech, we applied intermediate scrutiny and upheld the six-square-foot size restriction on political signs as an acceptable way of accomplishing the City's legitimate aesthetic and traffic-safety goals. *Id.* at 498–500.

Wagner filed a petition for a writ of certiorari in the Supreme Court. While Wagner's petition was pending, the Supreme Court issued a decision in *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). In *Reed*, an Arizona pastor challenged a local sign regulation that effectively prevented his church from posting temporary signs directing people to church services. *Id.* at 2225–26. The pastor argued that because the relevant regulations treated signs intended to direct people to "religious, charitable, community service, educational or other similar non-profit" events less favorably than other signs, such as "political signs" and "ideological signs," the regulation was a content-based restriction on speech and strict scrutiny thus applied. *Id.* at 2224–25. Even though the context did not suggest that the municipality intended to suppress speech related to non-profit events, *see Reed v. Town of Gilbert*, 707 F.3d 1057, 1069–72 (9th Cir. 2013), the Supreme Court agreed with the pastor, explaining that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," ***604** *Reed*, 135 S.Ct. at 2228 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)).

In light of its holding in *Reed*, the Supreme Court granted Wagner's petition, vacated our judgment, and remanded Wagner's action to us for further consideration. *See Wagner v. City of Garfield Heights*, —— U.S. ——, 135 S. Ct. 2888, 2888, 192 L.Ed.2d 918 (2015) (mem.).

II

A

It appears that our embrace of a context-dependent inquiry into the content neutrality of Section 1140.362 may be inconsistent with *Reed*. In particular, our holding that the fact that a regulatory scheme requires a municipality to "examine the content of a sign to determine which ordinance to apply 'should merely be seen as indicative, not determinative, of whether a government has regulated for reasons related to content' " appears to run afoul of *Reed*'s central teaching. *Wagner*, 577 Fed.Appx. at 494 (quoting *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013)); *see Reed*, 135 S. Ct. at 2228. Accordingly, in light of the Supreme Court's remand, we asked the defendants and Wagner to submit briefs concerning the impact of *Reed* on our previous decision in *Wagner*.

The defendants responded by arguing that Wagner lacks standing to litigate this case because we cannot redress the injury that he asserts. *See* Appellants' July 31, 2015,

Letter Br. 9–12; Appellants' Oct. 15, 2015, Letter Br. 3–4. Wagner, for his part, argues that the distinction between political and other signs in the City's ordinances means that the law is subject to strict scrutiny and must be invalidated for the reasons given by the district court. Appellee's July 31, 2015, Letter Br. 2–12. We evaluate each of these arguments de novo. *See Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009); *Ne. Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997).

B

Because "[s]tanding is the 'threshold question in every federal case,' " *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001) (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999)), we begin with the defendants' contention that Wagner lacks standing, and that we thus lack jurisdiction in this dispute. It is well established that federal courts have the power to adjudicate only "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. That jurisdictional limitation requires this court to ensure that the parties before it have "standing," which is loosely defined as a sufficiently strong "personal stake in the outcome" of a particular controversy to "justify exercise of the court's remedial powers on [a litigant's] behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

A plaintiff establishes Article III standing by demonstrating (1) that he has "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical,' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)); (2) that a causal link exists "between the injury and the conduct complained of," *ibid.*, that is, the injury can fairly be trace "to the challenged action of the defendant," ***605** *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); and (3) that it is " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,' " *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (quoting *Simon*, 426 U.S. at 38, 43, 96 S.Ct. 1917). A plaintiff must establish all three components to satisfy the standing requirement, *ibid.*, which applies with equal force to plaintiffs making First Amendment overbreadth challenges, *see Fieger*, 553 F.3d at 961. In this case, the defendants argue that Wagner cannot establish the third standing component of "redressability." Appellants' July 31, 2015, Letter Br. 9; Appellants' Oct. 15, 2015, Letter Br. 3–4.

C

[1] The defendants argue that Wagner lacks standing because his sign, measuring sixteen square feet, would be prohibited under a *different* ordinance even if the challenged political-sign ordinance was struck down as unconstitutional. [2] We need not evaluate the applicability of this separate ordinance, raised only after years of contentious litigation we might add, because even if it would otherwise prohibit Wagner's sign, it has no bearing on his entitlement to the injunctive relief he seeks. Wagner did not request an order permitting the posting of his sixteen-square-foot sign. Rather, faced with a letter from Garfield Heights threatening legal action based on the political-sign ordinance in Section 1140.362—and only that ordinance—Wagner sought an injunction against the enforcement of that specific provision. The district court, in turn, did not order that Wagner's sign be permitted, just that Garfield Heights be prohibited "from enforcing Section 1140.362 of the Ordinance." This injury—the threatened enforcement of Section 1140.362—is what Wagner seeks to redress, and it remains unaffected by the ability of Garfield Heights to employ a different ordinance to achieve its desired outcome.

The Court's decision in *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) is illustrative on this point. *Larson* involved a challenge to a Minnesota statute that set registration and reporting requirements for charities soliciting funds from the public, and also imposed restrictions on the organizations' expenditures. *Id.* at 230–31. As originally enacted, all "religious organizations" were exempt. *Ibid.* In 1978, however, the state revised the statute to limit the exemption to religious organizations that received more than half of their total contributions from their members. *Id.* at 231–32. Shortly thereafter, state officials notified Holy Spirit Association for the Unification of World Christianity (the Church) that it would have to register because it did not satisfy the fifty-percent rule for exemptions. *Ibid.* The church

and several of its members sued, alleging, *inter alia*, that the fifty-percent rule "constituted an abridgment of their First Amendment rights of expression and free exercise of religion." *Id.* at 232–34. The defendants contended there was no standing, arguing that the Church would still be subject to the registration and reporting requirements, irrespective of the challenged fifty-percent rule, because the Church had not shown it was a religious organization within ***606** the meaning of the exemption. *Id.* at 235. The Court disagreed, explaining that:

> [t]his litigation began after the State attempted to compel the Church to register and report under the Act *solely on the authority of [the] fifty per cent rule.* If that rule is declared unconstitutional, as appellees have requested, then the Church cannot be required to register and report under the Act *by virtue of that rule*. Since that rule was the sole basis for the State's attempt to compel registration that gave rise to the present suit, a discrete injury of which appellees complain will indeed be completely redressed by a favorable decision of this Court.

Id. at 242–43 (emphasis added). The attempted use of the rule "as the State's instrument of compulsion necessarily g[ave] [the Church] standing to challenge the constitutional validity of the rule." *Id.* at 241.

Here, as in *Larson*, Wagner engaged in activity he alleges is protected by the First Amendment, and government officials sought to curtail that activity. Just as in *Larson*, the government officials could have acted pursuant to two separate statutory provisions: Sections 1140.361 plus 1140.04 (the twelve-square-foot limit on all signs in residential areas) or Section 1140.362 (the six-square-foot limit on political signs). Garfield Heights chose the latter, and specifically highlighted that provision as the sole basis for its threatened legal action against Wagner. Thus, as in *Larson*, the attempted use of Section 1140.362 "as the State's instrument of compulsion necessarily gives [Wagner] standing to challenge the constitutional validity of the rule." *Ibid.* Wagner "may indeed" be barred from erecting his sixteen-square-foot sign by Sections 1140.04(f) and 1140.361, but that fact "does not deprive this [c]ourt of jurisdiction to hear the present case." *Id.* at 242.

Our opinion in *Midwest Media Prop., L.L.C. v. Symmes Twp.*, 503 F.3d 456 (6th Cir. 2007), relied upon by the defendants in their letter brief, is inapposite. That case dealt with the denial of permit applications, *id.* at 459–60, not an injunction against an enforcement action. There, the plaintiff sought damages and an injunction requiring the township to permit them to erect the proposed signs. *Ibid.* Both of those remedies were contingent upon the theory that the permit denial itself was the injury. Thus, the fact that the township could have used an alternative provision to deny the requested permits properly deprived the plaintiff of standing, as the court could not redress the plaintiff's injury even if the challenged provision was unconstitutional. Here, however, Wagner does not seek an injunction to permit his sign, but an injunction against the enforcement of the specific provision Garfield Heights sought to use to prohibit his sign. Unlike the injury alleged in *Midwest Media*, Wagner's injury is unaffected by the availability of alternative mechanisms of enforcement. Thus, we conclude that Wagner has a redressable injury that gives rise to standing in this case, and we may proceed to the merits of his claim.

III

[2] On the merits, our task is fairly simple: does *Reed* require us to apply strict scrutiny, and, if so, can the Garfield Heights regulation survive this heightened standard of review. *Reed* explains that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227 (citation omitted). Thus, whether the regulation involves "defining regulated speech by particular subject matter ... ***607** [or] by its function or purpose" is ultimately irrelevant. *Ibid.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Ibid.* The Garfield Heights regulation in this case, Section 1140.362, applies explicitly and exclusively to political signs. Thus it "applies to particular speech because of the topic discussed," and *Reed* commands that it be subject to strict scrutiny. *Ibid.* On remand, the defendants do not contest this point. *See* Appellants' July 31, 2015 Letter Br. at 12.

[3] They do argue, however, that the disputed regulation can nonetheless survive strict scrutiny. *Id.* at 12–14. This

"requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. Garfield Heights contends that Section 1140.362, just as the contested regulation in *Reed*, advances compelling government interests of aesthetic appeal and traffic safety. We will follow the Court's example in *Reed* and assume without deciding that these interests are sufficiently compelling. *See Reed*, 135 S. Ct. at 2231.

Even so, Section 1140.362 succumbs to strict scrutiny for the same reason as the contested regulation in *Reed*: it is "hopelessly underinclusive." *Ibid.* In *Reed*, the Court noted that the town placed "strict limits on temporary directional signs ... while at the same time allowing unlimited numbers of other types of signs that [diminish aesthetic appeal]." *Ibid.* Here, Garfield Heights expressly limits political signs to six square feet, but permits other kinds of temporary signs to be twice that size. *See supra* Part I.A. They offer no rationale for why political signs, as opposed to a signs advertising local businesses, mar the city's aesthetic appeal in such a way as to merit an arbitrarily smaller size restriction. The appellants' reference to the analysis in our vacated opinion, *see* Appellants' July 31, 2015 Letter Br. at 13, is unavailing. The fact that we concluded that Section 1140.362 could survive the tailoring requirement associated with intermediate scrutiny has no bearing on our tailoring analysis on remand because, as we noted then, "[i]ntermediate scrutiny's tailoring requirement differs importantly from the more rigorous tailoring mandated by strict scrutiny." *Wagner*, 577 Fed.Appx. at 498. Garfield Heights "similarly has not shown that limiting temporary [political] signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not." *Reed*, 135 S. Ct. at 2232. Because Section 1140.362 is not narrowly tailored to further the city's interest in promoting aesthetic appeal and traffic safety, it thus fails strict scrutiny.

IV

For the foregoing reasons, we hold that the ordinance is unconstitutional as it relates to political residential signs. We thus AFFIRM the judgment of the district court and uphold the injunction against Garfield Heights prohibiting the city from enforcing Section 1140.362.

All Citations

675 Fed.Appx. 599

Footnotes

1 We note that two different versions of Section 1140.361 appear in the record. (Compare R. 5, PgID 33, 73 ("No signs shall be permitted in any residence district ... except the signs exempted from the permit requirements of this chapter by Section 1140.04.") (emphasis added), with R. 7, PgID 133; R. 49-2, PgID 1463 ("No signs shall be permitted in any residence district ... except the signs exempted from the permit requirements of this chapter by Section 1140.03(g).") (emphasis added).) Since there is, in fact, no Section 1140.03(g), and since the parties seem to agree that the former version is the correct version, we accept that this is so.

2 The defendants point to language in Section 1140.361, which exempts from prohibition any category of signs listed in Section 1140.04. That section, in turn, explicitly mentions "[t]emporary signs measuring *less than* twelve (12) square feet in sign face area, provided that such signs otherwise comply with" several requirements not immediately relevant here. Garfield Heights, Ohio, Code § 1140.04 (emphasis added). Because Wagner's sign exceeds twelve square feet, the defendants argue, this provision would prohibit his sign regardless of the political-sign ordinance.

666 Fed.Appx. 11
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Brigitte VOSSE, Plaintiff–Appellant,
v.
THE CITY OF NEW YORK, COMMISSIONER ROBERT D. LIMANDRI, of the New York City Department of Buildings, Defendants–Appellees.

No. 15-4052-cv
|
October 14, 2016

Synopsis

Background: Condominium resident, who was fined $800 for affixing an illuminated peace symbol to the window frame of her unit, brought action against the city and commissioner of city department of buildings, alleging that city zoning ordinance prohibiting the display of illuminated signs more than 40 feet above curb level violated her First Amendment rights. The United States District Court for the Southern District of New York, Rakoff, J., 2013 WL 6197164, granted defendants' motion for summary judgment. Resident appealed. The Court of Appeals, 594 Fed.Appx. 52, affirmed in part and remanded in part. On remand, the District Court, 144 F.Supp.3d 627, found the ordinance a valid time, place, and manner restriction. Resident appealed.

Holdings: The Court of Appeals held that:

[1] city ordinance was narrowly tailored to serve city's legitimate interest in maintaining an aesthetically pleasing cityscape and preserving neighborhood character, and

[2] city ordinance left open ample alternative channels for communication.

Affirmed.

West Headnotes (2)

[1] Constitutional Law
Size or height restrictions

Zoning and Planning
Signs and billboards

City ordinance that prohibited the display of illuminated signs more than 40 feet above curb level was narrowly tailored to serve city's legitimate interest in maintaining an aesthetically pleasing cityscape and preserving neighborhood character, and thus the ordinance did not violate Free Speech rights of a resident who was fined $800 for affixing an illuminated peace symbol to the window frame of her unit, even if the ordinance exempted civic organizations from the general non-illumination requirement. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[2] Constitutional Law
Size or height restrictions

Zoning and Planning
Signs and billboards

City ordinance that prohibited the display of illuminated signs more than 40 feet above curb level left open ample alternative channels for communication, and thus the ordinance did not violate Free Speech rights of a resident who was fined $800 for affixing an illuminated peace symbol to the window frame of her unit, where the ordinance did not prohibit non-illuminated, non-commercial signs with a

total surface area of less than 12 square feet, even above 40 feet. U.S. Const. Amend. 1.

1 Cases that cite this headnote

Appeal from a November 19, 2015 judgment of the United States District Court ***12** for the Southern District of New York (Rakoff, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR PLAINTIFF–APPELLANT: TIMOTHY COLLINS, Collins, Dobkin & Miller LLP, New York, New York (Gideon Oliver, Of Counsel, on the brief).

FOR DEFENDANTS–APPELLEES: ELIZABETH S. NATRELLA, Assistant Corporation Counsel (Richard Dearing, Pamela Seider Dolgow, Of Counsel, on the brief), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, New York.

PRESENT: Gerard E. Lynch, Christopher F. Droney, Circuit Judges, Christina Reiss, Chief District Judge. *

SUMMARY ORDER

Plaintiff–Appellant Brigitte Vosse appeals from the judgment of the district court dismissing her complaint and upholding New York City's pertinent zoning regulations regarding the placement of illuminated signs as a constitutional time, place, or manner restriction on speech. We assume the parties' familiarity with the underlying facts, the procedural history of this case, and issues on appeal.

Vosse brought suit against the City of New York and the Commissioner of the New York City Department of Buildings, alleging that her right to free speech was violated when she was fined, pursuant to the City's Zoning Resolution, for affixing an illuminated peace symbol to the exterior frame of a seventeenth-floor window in her condominium unit on the Upper West Side of Manhattan. Following adjudication of cross-motions for summary judgment and dismissal by the district court, this court held that Vosse lacks standing to challenge the relevant regulations as content-based, but remanded to the district court to address whether the zoning regulations "constituted an unduly restrictive time, place, [or] manner restriction on speech." *Vosse v. City of New York*, 594 Fed.Appx. 52, 53 (2d Cir. 2015). On remand, the district court rejected Vosse's argument that, even if the regulations are considered content-neutral, they still do not pass constitutional muster based on the manner of restriction. *Vosse v. City of New York*, 144 F.Supp.3d 627 (S.D.N.Y. 2015).

We review *de novo* the district court's ruling in favor of defendants, as the procedural posture of the case following remand remained at summary judgment. *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103 (2d Cir. 2010). Because this case raises a claim under the First Amendment, we have "an obligation to make an independent examination of the whole record." *Id.* (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)) (internal quotation marks omitted). We affirm for substantially the same reasons stated in the district court's memorandum order.

A content-neutral restriction on speech is consistent with the First Amendment if it: (1) is narrowly tailored to serve a significant government interest, and (2) leaves open ample alternative channels for communication. *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014) (citing ***13** *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). The district court correctly concluded that the City's regulations governing illuminated signs satisfy both of these prongs.

1. Narrowly Tailored to Serve Significant Interest

[1] Vosse makes two principal arguments regarding the first prong of the time, place, or manner analysis. First, she contends that the City's interests in "maintaining an aesthetically pleasing cityscape and preserving neighborhood character" are insufficient and unsupported by the record. Appellant's Br. 26. However, it is well settled that these interests are legitimate government objectives. *See Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 491 (2d Cir. 2007) (agreeing that "preservation of aesthetic values" is "a legitimate

government interest"). Moreover, Vosse herself has acknowledged that the City may validly pursue these interests through its zoning regulations, *see* J.A. 74, and she points to no material issues of disputed fact on this point.

Second, Vosse argues that the district court's narrow tailoring analysis was flawed because it misinterpreted the regulations as categorically prohibiting illuminated signs more than 40 feet above curb level. Vosse contends that the exemption for flags, banners, or pennants located on community-facility lots has the effect of allowing certain illuminated signs above the 40–feet cut-off. Even accepting this interpretation, Vosse has failed to show why the regulations fail the narrow tailoring test. Her arguments on this point either re-litigate her content-based claim regarding differential treatment for exempted speakers—which is explicitly not at issue in this appeal—or disregard clear precedent that narrow tailoring in this context does not require a restriction on speech to be the "least restrictive or least intrusive" means of advancing the government's interests, *Ward*, 491 U.S. at 798–800, 109 S.Ct. 2746; *see also McCullen*, 134 S.Ct. at 2535.

Furthermore, a statute or ordinance "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams Yulee v. Florida Bar*, —— U.S. ——, 135 S.Ct. 1656, 1668, 191 L.Ed.2d 570 (2015). The Supreme Court has upheld laws "that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* If Vosse is correct that the ordinance exempts civic organizations from the general non-illumination requirement, that would show that the city could regulate *more* speech to further its aesthetic goals, but not that the ordinance was so underinclusive as to violate the First Amendment. The district court therefore correctly decided that the relevant provisions of the Zoning Resolution are narrowly tailored to serve a significant governmental interest.

2. Ample Alternative Channels

[2] As for the requirement that the regulations leave open ample alternative channels for communication, Vosse primarily argues that the Zoning Resolution fails on this prong under the reasoning of *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). In *City of Ladue*, the Supreme Court held unconstitutional an ordinance that prohibited all signs that did not fall within a narrow list of exemptions, concluding that the ordinance "almost completely foreclosed a venerable means of communication." *Id.* at 46–47, 54, 114 S.Ct. 2038. Vosse's reliance on this precedent is misplaced, however, as the restriction there amounted to a "ban on almost all residential signs." *Id.* at 58, 114 S.Ct. 2038. Here, the height restriction in the Zoning Resolution does not ***14** prohibit non-illuminated, non-commercial signs with a total surface area of less than 12 square feet, even above 40 feet. The parties therefore agree that Vosse is free to display the same sign in her window, as long as it is not illuminated. Although Vosse argues that an unilluminated sign would be harder for passers-by to see at night, the First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *see also City of Ladue*, 512 U.S. at 58 n.17, 114 S.Ct. 2038 ("Nor do we hold that every kind of sign must be permitted in residential areas."); *Ward*, 491 U.S. at 802, 109 S.Ct. 2746 ("That the [restriction on speech] may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."). Thus, the district court correctly concluded that restrictions on illuminated signs in the Zoning Resolution leave open ample alternative channels for Vosse to communicate her message.

3. Conclusion

We have considered Vosse's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

666 Fed.Appx. 11

Footnotes

* Chief Judge Christina Reiss, United States District Court for the District of Vermont, sitting by designation.

End of Document

827 F.3d 1192
United States Court of Appeals,
Ninth Circuit.

LONE STAR SECURITY AND VIDEO, INC., a California corporation, Plaintiff–Appellant,
v.
CITY OF LOS ANGELES; City of Santa Clarita; City of Rancho Cucamonga; City of Loma Linda, Defendants–Appellees.
Sami Ammari, an individual, Plaintiff–Appellant,
v.
City of Los Angeles, Defendant–Appellee.

No. 14-55014, No. 14-55050
|
Argued and Submitted March 11, 2016 Pasadena, California
|
Filed July 7, 2016

Synopsis

Background: Owners of mobile advertising billboards brought actions alleging that municipal ordinances for four cities, prohibiting the parking of mobile advertising billboards on public streets, violated free speech, due process, and privileges or immunities protections in federal and California Constitutions. After consolidating actions, the United States District Court for the Central District of California, Otis D. Wright II, J., 989 F.Supp.2d 981 and 988 F.Supp.2d 1139, granted summary judgment to cities. Billboard owners appealed.

Holdings: The Court of Appeals, Murguia, Circuit Judge, held that:

[1] ordinances were content neutral;

[2] ordinances were narrowly tailored to cities' significant interests in eliminating visual blight and promoting safe and convenient flow of traffic; and

[3] ordinances left open ample alternative communication channels.

Affirmed.

John B. Owens, Circuit Judge, filed concurring opinion.

West Headnotes (15)

[1] Constitutional Law
Freedom of Speech, Expression, and Press

First Amendment, as applied to the states through the Fourteenth Amendment, prohibits state and local governments from enacting laws abridging the freedom of speech. U.S. Const. Amend. 1; U.S. Const. Amend. 14.

Cases that cite this headnote

[2] Constitutional Law
Freedom of speech, expression, and press

Constitutional Law
Content-Based Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny;compelling interest test

Certain types of speech regulations are presumptively invalid under the First Amendment, including laws that target speech based on its communicative content, and these kinds of regulations are strictly scrutinized and will be upheld only if they are narrowly tailored to serve compelling state interests. U.S. Const. Amend. 1.

5 Cases that cite this headnote

[3] Constitutional Law
Freedom of speech, expression, and press

Constitutional Law
Justification for exclusion or limitation

Laws affecting speech in traditional public fora like sidewalks and city streets are presumptively invalid under the First Amendment, although the government may impose reasonable time, place, and manner restrictions on speech in traditional public fora so long as the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. U.S. Const. Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Freedom of speech, expression, and press

Cities bear the burden of proving the constitutionality of ordinances regulating speech protected by the First Amendment. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[5] Constitutional Law
Overbreadth

Constitutional Law
Prohibition of substantial amount of speech

On facial challenge to municipal ordinances regulating speech protected by the First Amendment, court will strike down the regulations if they are unconstitutional in every conceivable application or if they seek to prohibit such a broad range of protected conduct that they are unconstitutionally overbroad. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[6] Automobiles
Creation and definition of offenses; constitutional and statutory provisions

Constitutional Law
Signs

Constitutional Law
Off-premises billboards

Municipal Corporations
Billboards, signs, and other structures or devices for advertising purposes

City ordinances that limited advertising signs that could be affixed to motor vehicles, and prohibited non-motorized mobile advertising billboards on public streets, were content neutral, and thus permissible under First Amendment if they were narrowly tailored and left open ample alternative communication channels; ordinances' regulation of "advertising" signs was directed to activity of displaying message to public, not particular content that might be displayed, and there was no suggestion that ordinances applied differently to political endorsements than to commercial speech, for example. U.S. Const. Amend. 1; Cal. Veh. Code §§ 395.5, 21100(m), 21100(p)(2, 3), 22651(v).

Cases that cite this headnote

[7] Constitutional Law
Content-Based Regulations or Restrictions

Regulation of speech protected by the First Amendment is content based if, on its face, it draws distinctions based on the message a speaker conveys, such as a regulation that defines regulated speech by a particular subject matter or that discriminates between viewpoints. U.S. Const. Amend. 1.

5 Cases that cite this headnote

[8] Constitutional Law
Commercial Speech in General

Laws that restrict only "commercial speech," or speech that does no more than propose a commercial transaction, are content based, but such restrictions need only withstand intermediate First Amendment scrutiny. U.S. Const. Amend. 1.

9 Cases that cite this headnote

[9] Constitutional Law

Facial challenges;facial invalidity

In evaluating a facial First Amendment challenge to speech-regulating ordinance, court must consider the municipality's authoritative constructions of the ordinance, including its own implementation and interpretation of it. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[10] Federal Courts

Inferior courts

Federal court will follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[11] Constitutional Law

Narrow tailoring requirement; relationship to governmental interest

Content-neutral time-place-and-manner regulation of First Amendment speech is "narrowly tailored" if it promotes a substantial government interest that would be achieved less effectively absent the regulation, and the fact that the government's interest could be adequately served by some less-speech-restrictive alternative will not invalidate an otherwise restriction so long as the means chosen are not substantially broader than necessary. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] Constitutional Law

Off-premises billboards

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Content-neutral city ordinances that prohibited non-motorized mobile advertising billboards on public streets were narrowly tailored to cities' significant interests in eliminating visual blight and promoting safe and convenient flow of traffic, and thus ordinances were permissible under First Amendment if they left open ample alternative communication channels; cities believed mobile billboards detracted from cities' aesthetics, billboards reduced on-street parking, were likely to impair pedestrians' and drivers' visibility, and posed safety risk to motorists who were forced to veer around them, and cities' goals would be achieved less effectively absent prohibition because billboards could be moved in and out of jurisdiction with ease. U.S. Const. Amend. 1; Cal. Veh. Code §§ 395.5, 21100(m), 21100(p)(2), 22651(v).

Cases that cite this headnote

[13] Automobiles

Creation and definition of offenses; constitutional and statutory provisions

Constitutional Law

Off-premises billboards

Constitutional Law

Size or height restrictions

Content-neutral city ordinances that limited motorized mobile billboards were narrowly tailored to cities' significant interests in eliminating visual blight and promoting safe and convenient flow of traffic, and thus ordinances, which prohibited non-permanently affixed advertising signs and permanently affixed signs that were larger than vehicle's dimensions, were permissible under First Amendment if they left open ample alternative communication channels; cities believed mobile billboards detracted from cities' aesthetics, temporary signs posed danger to pedestrians and motor vehicles because of risk they would come detached, and signs larger than vehicles were more likely to obstruct traffic and impede drivers' field of vision. U.S. Const. Amend. 1; Cal. Veh. Code § 21100(p)(2).

Cases that cite this headnote

[14] Constitutional Law

Absolute nature of right

Constitutional Law

Existence of other channels of expression

First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired, but a content-neutral narrowly tailored time-place-and-manner restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] **Automobiles**

Creation and definition of offenses; constitutional and statutory provisions

Constitutional Law

Signs

Constitutional Law

Off-premises billboards

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Content-neutral narrowly tailored city ordinances, which limited advertising signs that could be affixed to motor vehicles and prohibited non-motorized mobile advertising billboards on public streets, left open ample alternative communication channels, and thus ordinances were permissible under First Amendment; messages could be disseminated through myriad other channels, such as stationary billboards, bus benches, flyers, newspapers, or handbills, or by painting signs on vehicles or attaching decals or bumper stickers. U.S. Const. Amend. 1; Cal. Veh. Code §§ 395.5, 21100(m), 21100(p)(2, 3), 22651(v).

Cases that cite this headnote

***1195** Appeal from the United States District Court for the Central District of California, Otis D. Wright II, District Judge, Presiding, D.C. No. 2:11–cv–02113–ODW–MRW, D.C. No. 2:12–cv–04644–ODW–MRW

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Before: Stephen Reinhardt, Mary H. Murguia, and John B. Owens, Circuit Judges.

Concurrence by Judge Owens

OPINION

MURGUIA, Circuit Judge:

These consolidated appeals concern the constitutionality of five city ordinances that regulate mobile billboards. One of the ordinances limits the type of sign that may be affixed to motor vehicles parked or left standing on public streets; the other ordinances prohibit non-motorized, "mobile billboard advertising displays" within city limits. Appellants, who have been subject to enforcement under the ordinances, brought suit against the municipalities arguing that the mobile billboard laws impermissibly restrict their freedom of speech in violation of the First Amendment. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the district court's grant of summary judgment in favor of the municipalities. We hold that the ordinances withstand First Amendment scrutiny as content-neutral, reasonable, time, place, and

manner restrictions on speech. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1019 (9th Cir. 2009). We affirm.

BACKGROUND

Between 2010 and 2012, the California Legislature enacted a series of amendments to the Vehicle Code empowering local municipalities to regulate mobile billboards, which the Legislature found to blight city streets, endanger residents, and ***1196** reduce available on-street parking.[1] *See* Assemb. B. 2756, 2009–2010 Reg. Sess. (Cal. 2010); *see also* Assemb. B. 1298, 2011–2012 Reg. Sess. (Cal. 2011); Assemb. B. 2291, 2011–2012 Reg. Sess. (Cal. 2012). The new sections of the Vehicle Code authorized cities to adopt laws penalizing the parking of portable, non-motorized, wheeled vehicles that carry signs and are "for the primary purpose of advertising"—known as "mobile billboard advertising displays." *See* Cal. Veh. Code §§ 395.5, 21100(m), 22651(v). The enabling legislation also allowed cities to regulate motor vehicles bearing "advertising signs" that are not "permanently affixed" and that "extend beyond the overall length, width, or height of the vehicle." *See id.* § 21100(p)(2). Under the Vehicle Code, an advertising sign is "permanently affixed" if it is "[p]ainted directly on the body of a motor vehicle" or "[a]pplied as a decal." *Id.* § 21100(p)(3). In sum, these code sections authorized cities to regulate two types of mobile billboard advertising: advertisements affixed to portable, *non-motorized*, wheeled vehicles ("non-motorized mobile billboards"), and advertisements attached to *motorized* vehicles ("motorized mobile billboards").

In response, the cities of Los Angeles, Santa Clarita, Rancho Cucamonga, and Loma Linda passed virtually identical ordinances banning one or both types of mobile billboards and permitting public officials to exact civil penalties and impound vehicles sporting signs that violate the ordinances. The cities' ordinances mirror and explicitly reference the California Legislature's amendments to the Vehicle Code. For example, section 87.54 of the Los Angeles Municipal Code (the "motorized mobile billboard ordinance") provides, in pertinent part:

> A motor vehicle may contain advertising signs that are painted directly upon or are permanently affixed to the body of, an integral part of, or fixture of a motor vehicle for permanent decoration, identification, or display and that do not extend beyond the overall length, width, or height of the vehicle. Advertising signs that are painted directly upon or permanently affixed to a motor vehicle shall not be painted directly upon or permanently affixed in such a manner as to make the motor vehicle unsafe to be driven, moved, parked or left standing on any public street or public lands in the City. Motor vehicles that pose a safety hazard shall be impounded pursuant to [the] California Vehicle Code ....

L.A. Mun. Code § 87.54 (2012). The other four ordinances (the "non-motorized mobile billboard ordinances") make it unlawful to park a "mobile billboard advertising display" on any public street within city limits. *See* L.A. Mun. Code § 87.53 (2013); Loma Linda Mun. Code § 10.36.070 (2011); Rancho Cucamonga Mun. Code § 10.52.080 (2011); Santa Clarita Mun. Code § 12.84 (2011). The non-motorized mobile billboard ordinances all incorporate the definition of "mobile billboard advertising display" codified at California Vehicle Code section 395.5: "advertising display[s]" that are attached to non-motorized vehicles, carry a sign or billboard, and are "for the primary purpose of advertising."

Appellants Lone Star Security & Video, Inc. and Sami Ammari own mobile billboards that are subject to the cities' bans. Lone Star Security operates a fleet of ***1197** standalone trailers that were specially constructed to display signs or banners, which Lone Star Security uses to advertise its burglary alarm services as well as other products and political causes. Ammari promotes his Los Angeles-based businesses by bolting signs to motor vehicles that he parks on city streets. After the ordinances took effect, Lone Star Security and Ammari brought suit alleging that the mobile billboard bans are facially invalid because they abridge the freedom of speech guaranteed by the First Amendment. Lone Star Security specifically challenges the cities' prohibition on *non-motorized* mobile billboard advertising displays, whereas Ammari's case concerns the constitutionality of Los Angeles's regulation of mobile billboards on parked, *motorized* vehicles.

Lone Star Security was last before this court in 2013, when a panel affirmed the district court's denial of a preliminary injunction blocking the cities from enforcing the non-motorized mobile billboard ordinances. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 520 Fed.Appx. 505 (9th Cir.2013). Upon remand, the district court consolidated Lone Star Security's case with Ammari's, who had filed his complaint shortly before Lone Star Security's first appeal. On cross-motions for summary judgment, the district court concluded that the mobile billboard bans were content-neutral, reasonable, time, place, and manner restrictions on speech that did not violate the First Amendment. Accordingly, the court entered judgment in favor of the cities and against Lone Star Security and Ammari. These appeals followed.

DISCUSSION

[1] **[2]** **[3]** The First Amendment, as applied to the states through the Fourteenth Amendment, prohibits state and local governments from enacting laws "abridging the freedom of speech." *Reed v. Town of Gilbert*, ——U.S. ——, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) (quoting U.S. Const. amend. I). Certain types of speech regulations are presumptively invalid, including laws that "target speech based on its communicative content". *Id.* These kinds of regulations are strictly scrutinized and will be upheld only if "they are narrowly tailored to serve compelling state interests." *Id.* Laws affecting speech in traditional public fora like sidewalks and city streets are also presumptively invalid, *Long Beach Area*, 574 F.3d at 1020–22, 1024, although the government may impose reasonable time, place, and manner restrictions on speech in traditional public fora so long as the restrictions are content neutral, are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

[4] **[5]** The cities bear the burden of proving the constitutionality of the ordinances at issue. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Because Appellants raise facial challenges to the municipal ordinances, we will strike down the mobile billboard regulations if they are "unconstitutional in every conceivable application," or if they "seek[ ] to prohibit such a broad range of protected conduct that [they are] unconstitutionally overbroad." *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The parties have stipulated to the facts in this case, so "the only question we must determine is whether the district court correctly applied the ***1198** law." *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 746 (9th Cir. 2003) (citation omitted).

I. Content Neutrality

[6] The parties concede that all of the ordinances at issue bear upon interests that the First Amendment protects. Thus, we consider first whether the regulations are content neutral or content based. [2] *See Reed*, 135 S.Ct. at 2226–27.

[7] A regulation is content based if, "on its face," it "draws distinctions based on the message a speaker conveys." *Id.* at 2227. A regulation that defines regulated speech by a particular subject matter or that discriminates between viewpoints is plainly content based. *Id.* at 2227, 2230. For example, the Supreme Court recently held that an ordinance that imposed more stringent restrictions on signs directing the public to a church meeting than on "political" signs was content based. *See id.* at 2232. In addition, an ostensibly viewpoint-neutral law is content based if it was "adopted by the government because of disagreement with the message the speech conveys." *Id.* at 2227 (internal quotation marks and alterations omitted).

[8] By its terms, the motorized billboard ordinance regulates the way in which "advertising signs" may be affixed to motor vehicles on city streets. The non-motorized billboard ordinances likewise apply to "mobile billboard advertising displays" within the meaning of California Vehicle Code section 395.5, which includes as part of the definition that the vehicle be "for the primary purpose of advertising." Neither the California Vehicle Code nor the mobile billboard ordinances define "advertising," however, and Appellants insist that the ordinances are content based because they distinguish between billboards that "advertise" and all other signs, such as those that do not advertise. Appellants' argument,

in essence, is that the only signs that "advertise" are those that propose a commercial transaction. [3]

We disagree that the word "advertising" renders the challenged regulations ***1199** content based on their face. In the context of mobile billboard regulations, the California Court of Appeal has already recognized that the word "advertising" refers to the activity of displaying a message to the public, not to any particular content that may be displayed. In *Showing Animals Respect & Kindness v. City of West Hollywood*, the California Court of Appeal rejected a constitutional challenge to a nearly identical municipal ban on mobile billboard advertising displays after finding that the ordinance was content neutral. [4] *See* 166 Cal.App.4th 815, 819–20, 83 Cal.Rptr.3d 134, 137–38 (2008). The plaintiff in that case was a non-profit organization that used mobile billboards—accompanied with loudspeaker announcements—to protest animal cruelty. The California Court of Appeal concluded that West Hollywood's "advertising" ban was content neutral because it did not differentiate between categories of speech:

> The term "advertise" is not limited to calling the public's attention to a product or a business. The definition of "advertise" is more general: "to make something known to[;] ... to make publicly and generally known[;] ... to announce publicly *esp[ecially] by a printed notice or a broadcast* ...." (Merrian [*sic*]–Webster's Collegiate Dict. (10th ed., 1995) p. 18; italics added.) Thus, although the subject of the matter brought to notice may be commercial, it is not necessarily so. Messages endorsing a political candidate, a social cause or a religious belief would also fall within the term "advertise."

Id. at 819–20, 83 Cal.Rptr.3d at 138. The California Court of Appeal further noted that the ordinance defined "mobile billboard advertising" as "any vehicle or wheeled conveyance which carries, conveys, pulls, or transports any sign or billboard," and reasoned that these active verbs demonstrated that "the ordinance [was] concerned with the speaker's acts, not the content of the speech." *Id.* at 823, 83 Cal.Rptr.3d at 140–41.

[9] **[10]** In evaluating a facial challenge we "must consider the [municipality's] authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *see also Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir. 1989) (holding that we defer to a state court's interpretation of its own laws unless that interpretation is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation"). We will "follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently." *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) (quoting *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)). The definition of "advertising" that the California Court of Appeal articulated in *Showing Animals Respect* is neither untenable nor an obvious subterfuge to avoid federal review. *See* 166 Cal.App.4th at 819–20, 83 Cal.Rptr.3d at 138 (holding that the term ***1200** "advertising" applies to both commercial and noncommercial speech). Therefore, absent convincing evidence that the California Supreme Court would construe the term "advertise" in this situation differently, we cannot depart from the construction of the California Court of Appeal; neither Appellant offers such evidence. Accordingly, we hold that the mobile billboard bans regulate the manner—not the content—of affected speech. The ordinances address only the types of sign-bearing vehicles subject to regulation, and discriminate against prohibited billboards on the basis of their size and mobility alone, and are thus content neutral. Even a regulated vehicle bearing a blank sign could conceivably violate the ordinances.

The Supreme Court's recent decision in *Reed* does not alter our conclusion. [5] Unlike *Reed*, the mobile billboard ordinances do not single out a specific subject matter for differential treatment, nor is any kind of mobile billboard exempted from regulation based on its content. There has been no suggestion that the ordinances apply differently to Lone Star Security's political endorsements than to its commercial promotional campaigns, for example. Rather, an officer seeking to enforce the non-motorized billboard ordinances must decide only whether an offending vehicle constitutes a prohibited "advertising display" because its primary purpose is to display messages, as opposed to transporting passengers or carrying cargo. *Cf. S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (holding that a county ordinance that prohibited canvassing on public streets and sidewalks within the Las Vegas resort district was content based, for First Amendment purposes, because any officer seeking to enforce the ordinance would need to examine the contents

of a leaflet to determine whether the ordinance prohibited its distribution). In the case of the motorized billboard ordinance, an enforcing officer would simply need to distinguish between signs that are permanent or non-permanent, and larger or smaller than the vehicles to which the signs are affixed to determine whether the vehicle violates the ordinance. *See id.* Therefore, the district court appropriately found the ordinances to be content neutral.

II. Narrowly Tailored to a Significant Government Interest

The parties do not dispute that the cities' stated interests in traffic control, public safety, and aesthetics are sufficiently weighty to justify content-neutral, time, place, or manner restrictions on speech, nor could they. The Supreme Court and this Court have repeatedly confirmed that local governments may exercise their police powers to advance these goals by prohibiting intrusive or unsightly forms of expression. *See Taxpayers for Vincent*, 466 U.S. at 808, 104 S.Ct. 2118; *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1072–73 (9th Cir. 2006). Instead, we focus on whether the mobile billboard regulations are narrowly tailored to the cities' interests.

[11] A speech regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citation omitted). The fact that "the government's interest could be adequately served by some less-speech-restrictive alternative" will not invalidate an otherwise ***1201** reasonable time, place, or manner restriction "[s]o long as the means chosen are not substantially broader than necessary." *Id.* at 800, 109 S.Ct. 2746.

[12] None of the ordinances in this case are "substantially broader than necessary" to accomplish the cities' goals of eliminating visual blight and promoting the safe and convenient flow of traffic. Controlling case law compels our conclusion that the cities' interest in aesthetics alone justifies the ordinances. *See Taxpayers for Vincent*, 466 U.S. at 808, 104 S.Ct. 2118 (holding that a total restriction on a certain type of visual advertising is narrowly tailored because, by banning the type of signs that the city determined to constitute "visual clutter and blight," the city "did no more than eliminate the exact source of the evil it sought to remedy"). Under this binding precedent, it is therefore enough that the Appellees believed that the advertising displays prohibited by the mobile billboard regulations detract from the cities' overall appearance; the outright ban directly serves this stated interest.

Further, by removing from city streets vehicles that have no purpose other than advertising, the mobile billboard regulations are narrowly tailored to the cities' interests in parking control and reducing traffic hazards. Because the utility of mobile billboards stems from owners' ability to park them for periods of hours or days at a time, they reduce available on-street parking. Non-motorized mobile billboards are also likely to impair pedestrians' and drivers' visibility and pose a safety risk to motorists who are forced to veer around them into the next lane of traffic to bypass them. And, they may roll onto the roadway after being parked.

[13] In addition, the motorized billboard ordinance serves Los Angeles's asserted interest in public safety by prohibiting non-permanently affixed signs and permanently affixed signs that are larger than the dimensions of a vehicle. Temporary signs, by their nature, are impermanent and thus pose a greater danger to pedestrians and motor vehicles because of the risk that they will come detached.[6] Signs larger than the dimensions of the vehicle are also more likely to obstruct traffic and impede drivers' field of vision. For instance, some of Ammari's billboards blocked the side and rear windows of his vans, reducing the operator's ability to see passing cars, pedestrians, or other roadside hazards.

The cities' goals would be achieved less effectively absent the challenged regulations. *See Ward*, 491 U.S. at 799, 109 S.Ct. 2746. Mobile billboards are difficult to control precisely because they can be moved in and out of a jurisdiction with ease. As the Supreme Court has noted, if a municipality "has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

III. Alternatives

[14] Lastly, to satisfy the First Amendment, a time, place, and manner regulation must "leave open ample alternative channels for communication." *Clark*, 468 U.S. at 293, 104 S.Ct. 3065. "[T]he First Amendment does not guarantee the right to communicate one's views at all ***1202** times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). However, "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Taxpayers for Vincent*, 466 U.S. at 812, 104 S.Ct. 2118.

[15] The mobile billboard ordinances leave open adequate alternative opportunities for advertising. The challenged regulations foreclose only one form of expression—mobile billboards—by placing limited restrictions on the types of vehicles to which mobile billboards may be affixed (vehicles whose primary purpose is something other than advertising), and the manner in which billboard advertisements can be displayed on a motor vehicle (in a permanent fashion and no larger than the dimensions of the vehicle). Appellants are free to disseminate their messages through myriad other channels, such as stationary billboards, bus benches, flyers, newspapers, or handbills. Appellants may also paint signs on vehicles and attach decals or bumper stickers. Although mobile billboards are a unique mode of communication, nothing in the record suggests that Appellants' overall "ability to communicate effectively is threatened." *Taxpayers for Vincent*, 466 U.S. at 812, 104 S.Ct. 2118. Therefore, given the ample alternative modes of advertising available in the Appellee cities, we will not invalidate the mobile billboard bans merely because they restrict Appellants' preferred method of communication. *Id.*; *G.K. Ltd. Travel*, 436 F.3d at 1074. The remaining alternatives for expressive conduct are sufficient to vindicate Appellants' First Amendment interests.

Because the mobile billboard ordinances are content neutral, narrowly tailored to serve the governments' significant aesthetic and safety interests, and leave open ample alternative channels of communication, the judgment of the district court is **AFFIRMED**.

OWENS, Circuit Judge, concurring:

I concur in the majority's opinion, as it faithfully follows the current controlling case law. I write separately because, in my view, the Supreme Court should take a second look at an important aspect of *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

This case is about ugly signs on vehicles, and no doubt I would not want these vehicles and their signs parked in front of my house. But under the ordinances at issue, a car with equally ugly decals—including a decal of a vehicle with an ugly sign—would not "go to jail," but instead treat my curb like the upper left corner of a Monopoly board.

If "aesthetics" are to play a part in speech restriction, then such aesthetics should apply equally, decal or sign. Yet under *Taxpayers for Vincent*, the Court rejected the very point that I now make. *See* 466 U.S. at 810–12, 104 S.Ct. 2118 (rejecting the Ninth Circuit's holding that "a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located"). I think our court was right then, and the Supreme Court should reconsider this portion of *Taxpayers for Vincent*. As it currently stands, politicians can use *Taxpayers for Vincent* and its beholderish "aesthetics" to covertly ensure homogeneous thinking and political discourse. That is a dimension we should avoid. *See The Twilight Zone: Eye of the Beholder* (CBS television broadcast Nov. 11, 1960).

All Citations

827 F.3d 1192, 16 Cal. Daily Op. Serv. 7251, 2016 Daily Journal D.A.R. 6843

Footnotes

1 Under California law, a vehicle can be removed and impounded only when that action is expressly authorized by the California Vehicle Code. Cal. Veh. Code § 22650 ("It is unlawful for any peace officer ... to remove any unattended vehicle from a highway to a garage or to any other place, except as provided in this code. ..."). Before 2010, impounding a legally parked vehicle because it was a mobile billboard was not authorized by the California Vehicle Code, and thus exceeded local governments' authority.

2 In affirming the denial of a preliminary injunction to Lone Star Security, a panel of this court found that the non-motorized mobile billboard ordinances are content neutral. The panel relied on our holding in *Reed v. Town of Gilbert* ("*Reed I* "), 587 F.3d 966 (9th Cir. 2009), which concluded that a sign regulation restricting the size, duration, and location of directional signs was content neutral. *Id.* at 977; *accord Reed v. Town of Gilbert* ("*Reed II* "), 707 F.3d 1057, 1069–70 (9th Cir. 2013). That holding, however, was later overruled by the Supreme Court. *See Reed*, 135 S.Ct. at 2232. Therefore, we revisit the content neutrality of the mobile billboard bans in light of the Supreme Court's decision in *Reed*. *See United States v. Bad Marriage*, 439 F.3d 534, 540 (9th Cir. 2006) (explaining that the law of the case need not be followed when "intervening controlling authority makes reconsideration appropriate" (citation omitted)).

3 Appellants have not directly challenged the mobile billboard laws on the grounds that they unduly restrict "commercial speech" in the constitutional sense—in fact, Lone Star Security objects that the ordinances affect his ability to convey political messages regarding local elected officials or ballot proposals using mobile billboards. Nevertheless, Appellants appear to overwhelmingly conflate "advertising" speech with "commercial speech," which refers to speech that "does 'no more than propose a commercial transaction.' " *See Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 598 (9th Cir. 2010). But, although laws that restrict only commercial speech are content based, *see Reed III*, 135 S.Ct. at 2232, such restrictions need only withstand intermediate scrutiny. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (requiring that laws affecting commercial speech seek to implement a substantial governmental interest, directly advance that interest, and reach no further than necessary to accomplish the given objective).

4 West Hollywood Municipal Code section 11.44.020 states: "It is unlawful for any person to conduct, or cause to be conducted, any mobile billboard advertising upon any street, or other public place within the city in which the public has the right of travel. ... Mobile billboard advertising includes any vehicle, or wheeled conveyance which carries, conveys, pulls, or transports any sign or billboard for the primary purpose of advertising." However, the ordinance exempted from the prohibition the following: "[a]ny vehicle which displays an advertisement or business identification of its owner, so long as such vehicle is engaged in the usual business or regular work of the owner, and not used merely, mainly or primarily to display advertisements," as well as buses and taxicabs. *Id.*

5 In *Reed*, Justice Alito, joined by Justices Kennedy and Sotomayor, wrote separately to opine that rules regulating the "size of signs" or "the locations in which signs may be placed," including rules that "distinguish between free-standing signs and those attached to buildings" would not be content based. 135 S.Ct. at 2233 (Alito, J., concurring).

6 The City of Los Angeles offered another rationale for § 87.54—that temporary signs pose a safety risk when the vehicle is "driven during high wind conditions." As § 87.54 is a parking ordinance, driving-related safety risks are not sufficiently narrowly tailored to justify the speech restrictions imposed by the regulation.

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