FREE SPEECH LAW FOR ON PREMISE SIGNS

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Supplement to Revised Edition 2017

Preface

This supplement reports cases decided and articles published since the 2016 revision. For the most part, recent cases have confirmed trends noted in the revision, especially refusing to extend *Reed* to sign ordinances that apply to commercial speech. When ordinances make content-based distinctions, however, as by treating similar types of signs differently, the courts do not hesitate to apply *Reed* and hold them unconstitutional. Cases striking down exceptions included in state highway beautification acts are also common. Surprisingly, several cases applied the time, place and manner rules to free speech claims against commercial speech regulations, rather than the *Central* Hudson factors. Some issues, such as whether evidence is required to prove an ordinance substantially advances governmental objectives, drew mixed decisions.

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Saint Louis, Missouri
August 15, 2017

CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:3. Commercial and Noncommercial Speech

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

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

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

§ 2:4. Content Neutrality

§ 2:4[1]. What This Requirement Means

See Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017), upholding an ordinance prohibiting signs next to small businesses advertising raffles, and holding *Sorrell* did not overrule *Central Hudson* or hold that intermediate scrutiny does not apply to commercial speech.

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

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

Sarah Adams-Schoen, Reed Applied: The Sign Apocalypse or Another Bump in the Road, Zoning and Planning Law Reports, vol. 39, no. 7 (July/August 2016); James Andrew Howard, Salvaging Commercial Speech Doctrine: Reconciling Reed v. Town of Gilbert with Constitutional Free Speech Tradition, 27 Geo. Mason U. Civ. Rts. L.J. 239 (2017); Kolby P. Marchand, Free Speech and Signage After Reed v. Town of Gilbert: Signs of Change from the

Bayou State, 44 S.U. L. Rev. 181 (2017); Lee Mason, Content Neutrality and Commercial Speech Doctrine After Reed V Town of Gilbert, 84 U. Chi. L. Rev. 955 (2017); Minch Minchin, A Doctrine at Risk: Content Neutrality in A Post-Reed Landscape, 22 Comm. L. & Pol'y 123 (2017); Note, Leah K. Bradley, Lawn Sign Litigation: What Makes a Statute Content-Based for First Amendment purposes? 21 Suffolk J. Trial & App. Advoc. 320-344 (2016); Note, Free Speech Doctrine After Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016). See also 24 A.L.R.7th Art. 6 (2017) (discussing cases applying Reed).

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

The cases continue to hold that Reed does not apply to sign ordinances that regulate commercial speech:

Thomas v. Schroer, 2017 WL 1208672 (W.D. Tenn. Mar. 31, 2017) (striking down state billboard act); Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (upholding ordinance prohibiting signs next to small businesses advertising raffles; good discussion); RCP Publications Inc. v. City of Chicago, 204 F. Supp. 3d 1012 (N.D. Ill. 2016) (sign posted on light pole); Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals, 46 N.Y.S.3d 725 (App. Div. 2017) (billboard prohibition). Justice Thomas's concurring opinion in Matal v. Tam, 137 S. Ct. 1744, 1769 (2017), reaffirming his belief that strict scrutiny is appropriate for regulations of commercial speech, did not obtain agreement from the other Justices.

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

Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (ordinance prohibiting signs next to small businesses advertising raffles differentiates between on-site and off-site advertisements and is directly related to the interests of safety and aesthetics).

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

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

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (upholding ordinance regulating display times for temporary signs); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (motorized billboard ordinances, enforcing officer simply needs to distinguish between signs that are permanent or non-permanent, and larger or smaller than permitted to decide on violation).

Other cases found the need to read a basis for holding a sign ordinance content-based: International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; exceptions for flags, special events, and civic events, *Edenfield* not cited); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017), appeal dismissed sub nom. (Feb. 17, 2017) (exemptions require Town's enforcement officer to evaluate content of sign to determine whether an exemption applies).

§ 2:5. Speaker-Based Neutrality

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

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[3]. The Metromedia Case: Applying the Central Hudson Test to Sign Ordinances

Paramount Media Group, Inc. v. Village of Bellwood, 2017 WL 590281 (N.D. Ill. Feb. 14, 2017), which prohibited billboards except when located on village property, illustrates the application of the *Central Hudson* factors to uphold a sign regulation. The court accepted that the prohibition was properly based on aesthetic concerns, and held that a limited exception for the village did not undermine the ban. There was no objection that the ordinance was narrowly tailored. The regulations permitted a variety of on-site commercial signs, and a reasonable fit existed between the objective of preserving the visual environment, compatibility with adjacent land uses and the means used to accomplish these objectives. Compare Construction & General Laborers' Local Union No. 330 v. Town of Grand Chute, 843 F.3d 745 (7th Cir. 2016) (ordinance prohibited rat and cat inflatable protest signs; case held moot; dissent by Judge Posner rejected aesthetic and safety justifications).

§ 2:7. Time, Place and Manner Regulations

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

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

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (upholding ordinance regulating display times for temporary signs); Vosse v. City of New York, 2016 WL 6037372 (2d Cir. Oct. 14, 2016) (ordinance banned illuminated signs more than 40 feet above the street curb but excluded non-illuminated, non-commercial signs less than 12 square feet in surface area); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (upholding motorized billboard ordinances); Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (upholding ordinance regulating digital signs); Pritchard v. Town of New Hartford, 2016 WL 4523986 (N.D.N.Y. Aug. 22, 2016), judgment entered, 2016 WL 4523908 (N.D.N.Y. Aug. 22, 2016) (upholding ban on temporary signs in right-of-way on Town property; ordinance measured and content-neutral within meaning of *Ladue* decision); E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623 (N.J. 2016) (invalidating prohibition on digital signs).

§ 2:8. The Prior Restraint Doctrine

§ 2:8[2]. The Procedural Standards

International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017), held a content-based ordinance invalid for failure to set time limits.

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

Contrary to most cases, International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017), held that variance standards typically found in most zoning statutes gave unbridled discretion because they were vague and meaningless and did not contain the "narrow, objective, and definitive" criteria required by Supreme Court cases

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

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

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

Other courts took a contrary position. Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 408 (D.C. Cir. 2017) (upholding ordinance regulating display times for temporary signs; District not required to submit studies, statistics or other empirical evidence to defend event-related distinction as narrowly tailored to serve its substantial aesthetic interest; aesthetic judgment plausible, not novel; *Edenfield* not cited); Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (ordinances prohibiting motorized billboards ordinances; time, place and manner rules applied to find narrow tailoring based on *Metromedia* approval of billboard prohibition); Palmer v. City of Missoula, 2017 WL 1277460 (D. Mont. Apr. 4, 2017) (upholding ordinance prohibiting wind signs, citing *Metromedia*).

§ 3:5. Exemptions in On Premise Sign Ordinances

See also International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; exceptions for flags, special events, and civic events held invalid). Courts have upheld sign ordinances exempting government uses. Signs for Jesus v. Town of Pembroke, 230 F. Supp.3d 49 (D.N.H. 2017) (government uses exempted by state law). But see Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017), appeal dismissed sub nom. (Feb. 17, 2017) (exemptions held invalid, including exemptions for government signs).

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

Reed held content-based and invalid an ordinance that applied different requirements to similar noncommercial signs. Several recent cases followed *Reed*, and held on premise sign ordinance classifications content-based and invalid that applied different requirements to similar signs:

Wagner v. City of Garfield Heights, 675 Fed. Appx. 599 (6th Cir. 2017) (on remand after *Reed*; political signs subject to fewer restrictions than for-sale signs, sold signs, open house, for-rent, and leasing signs, and signs of a religious, holiday, personal or political nature); www.Ricardopacheko.com v. City of Baldwin Park, 2017 WL 2962772 (C.D. Cal. July 10, 2017) (preliminary injunction; preferences for special event and business signs speaker-based, additional flag provision for some holidays and additional election sign provision content-based); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (variance from billboard regulations; ordinance listed eight examples of temporary signs on basis of content before stating time restriction; exceptions for flags, special events, and civic events); Sweet Sage Cafe, LLC v. Town of N. Redington Beach, Florida, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017), appeal dismissed sub nom. (Feb. 17, 2017) (exempted numerous categories of signs from permit requirement, like government signs, holiday and seasonal signs, political campaign signs, and warning signs; exterior of restaurant decorated to create "Key West" style atmosphere and showcase owners' sense of humor); Grieve v. Village of Perry, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016) (plaintiff posted protest signs on his property; code allowed display of several types of commercial signs without permit but required permits for display of noncommercial signs). See also Seitz v. East Nottingham Township, 2017 WL 2264637 (E.D. Pa. May 24, 2017) (rejecting argument that ordinance conferred special treatment for signs advertising Christmas trees).

Courts may approve different requirements for commercial signs. Shaw v. City of Bedford, 2017 WL 2880117 (S.D. Ind. July 6, 2017) (upholding ordinance limiting display of permanently-affixed signs in residential areas solely to entrances of residential developments, and permitting slightly larger flags exempt from height and setback requirements).

§ 3:6. The Federal Highway Beautification Act

Recent cases continue to hold that provisions for on premise signs and exemptions in these statutes violate the free speech clause. In Auspro Enterprises, LP v. Texas Dep't of Transp., 506 S.W.3d 688 (Tex. App. 2016), the court invalidated several exemptions in the Texas law for signs

relating to a public election, a natural wonder or scenic or historic attraction, the sale or lease of property, and activities conducted on the property on which it is located. The court reviewed the impact of the *Reed* case on the statute, and concluded that "[l]ike the Town of Gilbert's sign ordinance, the Texas Act and the related Department rules restrict speech in different ways based on the communicative content of the sign." These provisions were content-based, and the state did not attempt to defend them under strict scrutiny review. The court declined to follow an early Texas Supreme Court upholding the statute.

After an earlier decision granted plaintiff a temporary injunction, and after a jury trial found for the state, Thomas v. Schroer, 2017 WL 1208672 (W.D. Tenn. Mar. 31, 2017), struck down the state's billboard act in a detailed decision. The court held the act was subject to strict scrutiny because it was a content-based regulation implicating noncommercial speech. It rejected Justice Alito's endorsement of the off premise v. on premise distinction in *Reed* because his endorsement was defined, not by a sign's content, but by physical location or other content-neutral factors. The court dismissed several specific state interests, and held that traffic and aesthetic "concepts" were not compelling and unrelated to a distinction between signs with on-premises-related content as compared with other messages. The act was not narrowly tailored and was underinclusive, as on premise signs permitted by the act could be ugly. Some least restrictive means suggested by the plaintiff could be effective. For the earlier decision see Thomas v. Schroer, 127 F. Supp.3d 864 (W.D. Tenn. 2015), discussed in this section.

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

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

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

Lone Star Security and Video Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016) (upheld ordinances limiting motorized and prohibiting non-motorized billboards; content-neutral because they addressed sign-bearing vehicles subject to regulation based only on their size and mobility); Contest Promotions, LLC v. City & Cty. of San Francisco, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017) (upholding ordinance prohibiting signs next to small businesses advertising raffles, went no farther than necessary); RCP Publications Inc. v. City of Chicago, 204 F. Supp. 3d 1012 (N.D. Ill. 2016) (city offered nothing on whether ordinance prohibiting posting of signs on light

poles "will in fact alleviate [litter] to a material degree;" remanded to develop record); Grieve v. Village of Perry, 2016 WL 4491713 (W.D.N.Y. Aug. 3, 2016) (invalidating content-based ordinance regulating protest signs on property; different requirements for noncommercial signs). See also Missouri Broadcasters Ass'n v. Lacy, 846 F.3d 295 (8th Cir. 2017) (state statute and regulations regulating liquor advertising did not directly advance substantial interests and were more extensive than necessary under *Central Hudson* factors).

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

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

A state case reached a contrary conclusion. E&J Equities, LLC v. Board of Adjustment of the Twp. of Franklin, 146 A.3d 623 (N.J. 2016), applied time, place and manner rules to invalidate an ordinance that permitted three billboards in a zoning district adjacent to an interstate highway but prohibited digital billboards. Though not citing *Edenfield*, § 2:6[5], the court held the record was "founded only on unsupported suppositions, fears, and concerns," and provided "scant support for several propositions that informed the Township's decision and no support for the decision that the aesthetics of three billboards are more palatable than the aesthetics of a single digital billboard." A government "must do more than simply invoke government interests that have been recognized over time as substantial." Studies were available reporting on the safety effects of digital billboards, but the court held they did not support the ordinance. The case was decided after but did not cite the *Reed* decision, disapproved the *Naser* decision, and may have been influenced by an earlier New Jersey case invalidating a sign ordinance that prohibited billboards and a state rule allowing digital billboards on interstate highways. For discussion of the New Jersey cases, see 305-APR N.J. Law. 78 Andrew T. Fede, Sign and Billboard Law Hijacking the First Amendment

or Balancing Freedom of Expression and Government Control?, N.J. Law., April 2017, at 78, 305-APR N.J. Law (Westlaw citation).

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

§ 4:2[2] Flags

Shaw v. City of Bedford, 2017 WL 2880117 (S.D. Ind. July 6, 2017) (upholding ordinance for residential districts allowing flags to be slightly larger and exempt from height and setback requirements); International Outdoor, Inc. v. City of Troy, 2017 WL 2831702 (E.D. Mich. June 30, 2017) (exceptions for flags and other temporary signs held invalid).

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

§ 4:2[5][a]. Total Prohibitions

Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) upheld an ordinance, as applied to sign posting on public lamp posts, that allowed longer display times for event-related signs than for signs that were not event-related. It did not target "communicative content, but uniformly restricted display times under the commonsense understanding that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter." Justice Alito indicated, in his concurring opinion in *Reed*, that this type of ordinance was content-neutral. This case suggests that *Reed* does not necessarily invalidate ordinances regulating event signs.

§ 4:2[9]. Wind Signs [New Section]

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

CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON PREMISE SIGNS

§ 5:5. Height and Size Limitations

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