

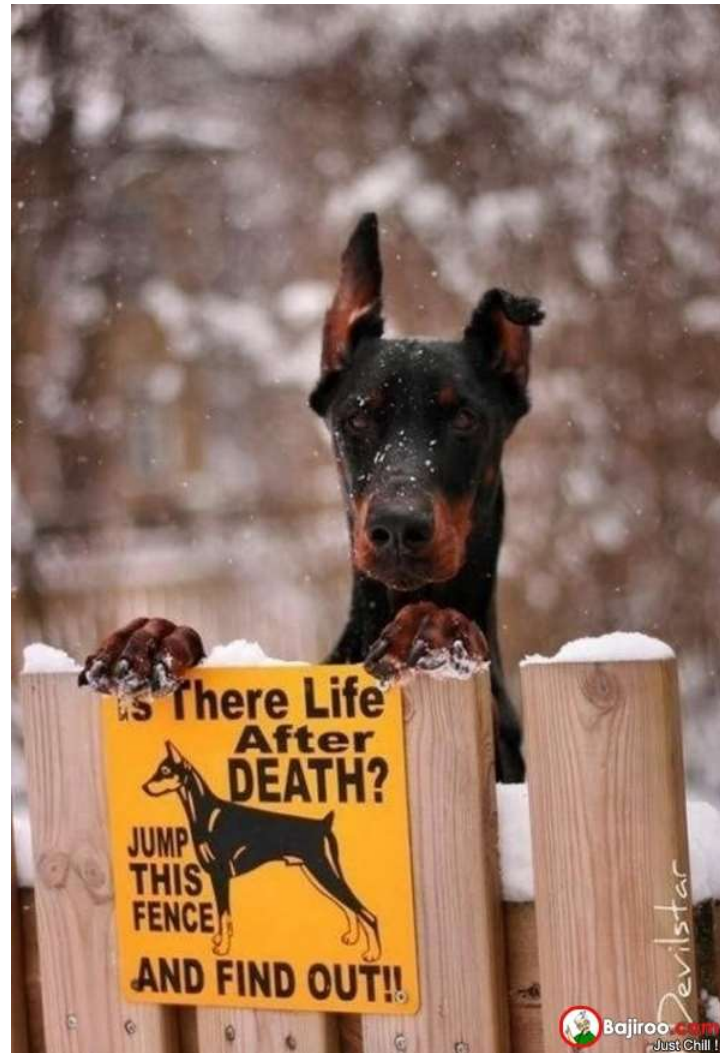


Regulation of Commercial Signs Post Reed

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Sign Regulation: Necessary and annoying.

Essential Cases for Sign Code Update

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Collier v. City of Tacoma, 121 Wn.2d 737 (1993)

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)

Ballen v. City of Redmond, 466 F.3d 736 (2006)

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Ruling: Sign that places limits on directional signs for a church is an unconstitutional restriction on free speech because the regulation is content based and does not survive strict scrutiny.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Facts:

Gilbert has a sign code that prohibits the display of outdoor signs without a permit, with 23 exemptions, three relevant to the Gilbert analysis:

“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,” with the following 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.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Facts:

Good News Community Church, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday.

The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Ruling: Gilbert Exceptions “Content Based”

Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.

Gilbert is content-based because 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.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Content-Based Regulation Subject to Strict Scrutiny:

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 (strict scrutiny).

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.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Gilbert Fails Strict Scrutiny:

Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly **underinclusive**:

Gilbert cannot claim that placing strict limits on temporary directional signs are necessary to beautify the Town when other types of signs create the same problem.

Gilbert has not shown that temporary directional signs pose a greater threat to public safety than ideological or political signs.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

The Forced Open Door Conundrum

First Amendment case law mandates that certain signs be authorized, e.g. ideological signs on private property and campaign signs on public property that qualify as traditional public forums. See, e.g. *Collier v. City of Tacoma*, 121 Wn.2d 737 (1993).

If all signs really have to be content neutral, this means that if a type of sign is required to be authorized in a certain area (such as a campaign sign), then all other signs regardless of content must arguably be allowed as well.

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

Reed Applicable to Commercial Speech?

The open door conundrum could be manageable if *Reed* doesn't apply to commercial speech. If pre-existing commercial speech case law still applies post-*Reed*, commercial speech is only subject to intermediate scrutiny, which makes it easier to regulate on the basis of content.

Commercial speech is defined as “expression related solely to the economic interests of the speaker and its audience,” or as “speech proposing a commercial transaction.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

If *Reed* was intended to apply to commercial speech, why wasn't it and the years of case law setting an intermediate standard for commercial speech even mentioned in the decision?

“Intermediate Scrutiny” for Commercial Speech

The validity of a restriction on commercial speech depends on the following factors:

- (1) “whether the expression is protected by the First Amendment,” which requires the speech to “concern lawful activity and not be misleading”;
- (2) “whether the asserted governmental interest is substantial”;
- (3) “whether the regulation directly advances the governmental interest asserted”; and
- (4) “whether [the regulation] is not more extensive than is necessary to serve that interest.”

Central Hudson Gas & Electric Corp. v. Public Service Commission,
447 U.S. 557 (1980).

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Ruling: Regulation prohibiting commercial off-premises sign does not violate First Amendment. Regulations limiting commercial speech are not subject to Reed v. Gilbert, which only applies to noncommercial speech.

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Facts:

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

San Francisco prohibits new off-premises signs but allows onsite business signs subject to various rules.

Noncommercial signs are exempt from the rules.

Contest Promotions argues that the distinction between commercial and noncommercial signs violates the First Amendment.

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Based on a prior footnote in another case; *Contest Promotions* court holds intermediate scrutiny still applies to commercial speech:

“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)”

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Applying the Central Hudson Test to Off-Premises Signs:

1. *“whether the expression is protected by the First Amendment,” which requires the speech to “concern lawful activity and not be misleading”;*

Parties agree that speech is lawful and not misleading.

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Applying the Central Hudson Test to Off-Premises Signs:

2. *“whether the asserted governmental interest is substantial”;*

Supreme Court has held that local government interest in safety and aesthetics are substantial.

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Applying the Central Hudson Test to Off-Premises Signs:

3. *“whether the regulation directly advances the governmental interest asserted”*
4. *“whether [the regulation] is not more extensive than is necessary to serve that interest.”*

*“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].’ 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.”*

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Applying the Central Hudson Test to Off-Premises Signs:

Factors 3 and 4: Dealing with “underinclusive”:

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993): Cincinnati ordinance completely prohibited the distribution of commercial handbills on the public right of way using news racks, while leaving unaffected a far greater number of news racks that distributed noncommercial material.

Since number of commercial news racks was “minute” compared to number of noncommercial racks, court found that ordinance 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.

Contest Promotions, LLC v. City and County of San Francisco, 874 F.3d 597 (2017)

Applying the Central Hudson Test to Off-Premises Signs:
Factors 3 and 4: Dealing with “underinclusive”:

Court doesn't find San Francisco Ordinance underinclusive because off-premises signs by themselves were a significant problem as recited in the findings of the ordinance:

“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.”

Ballen v. City of Redmond, 466 F.3d 736 (2006)

Under inclusiveness kills Redmond off-premises restriction on sandwich boards.

Facts:

City of Redmond ordinance banned portable signs. The prohibition includes portable reader boards, signs on trailers, and sandwich boards.

The ban had ten exceptions: (1) banners on the Redmond Way railroad overpass, (2) construction signs, (3) celebration displays, (4) banner displays in the city center neighborhood, (5) major land use action notices, (6) political signs, (7) real estate signs, (8) temporary window signs, (9) signs on kiosks, and (10) temporary uses and secondary uses of schools, churches, or community buildings.

Ballen v. City of Redmond, 466 F.3d 736 (2006)

Under inclusiveness kills Redmond off-premises restriction

Facts:

Ballen, owner of Blazing Bagels, hired an employee to stand on the sidewalk wearing a sign that read: “Fresh Bagels—Now Open.”

The employee directed the attention of passing motorists to Ballen's business premises and informed passing motorists of Ballen's available retail products.

Ballen v. City of Redmond, 466 F.3d 736 (2006)

Back to *Central Hudson* Prongs:

- 1) “whether the expression is protected by the First Amendment,” which requires the speech to “concern lawful activity and not be misleading”;
- 2) “whether the asserted governmental interest is substantial”;
- 3) “whether the regulation directly advances the governmental interest asserted”; and
- 4) “whether [the regulation] is not more extensive than is necessary to serve that interest.”

Ballen Court doesn't address third prong and invalidates restriction under fourth prong

Ballen v. City of Redmond, 466 F.3d 736 (2006)

On the fourth prong, the Ballen Court notes that the prong

“requires that there be a reasonable fit between the restriction and the goal ... and that the challenged regulation include a means narrowly tailored to achieve the desired objective”

The *Ballen* court found the reasonable fit to be lacking due to the “content-based” exceptions:

“The City has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs.”

Ballen v. City of Redmond, 466 F.3d 736 (2006)

Court indicates that exceptions ok if they're reasonably distinguishable, such as **political, traffic and community signs**:

While some of the Ordinance's content-based exceptions are reasonable—political signs are subject to strict scrutiny, construction signs promote traffic and pedestrian safety, banner displays may enhance community aesthetics—others compromise the City's interests. More specifically, ubiquitous real estate signs, which can turn an inviting sidewalk into an obstacle course challenging even the most dextrous hurdler, are an even greater threat to vehicular and pedestrian safety and community aesthetics than the presence of a single employee holding an innocuous sign that reads: “Fresh Bagels—Now Open.”

Ballen v. City of Redmond, 466 F.3d 736 (2006)

Ruling:

“...the Ordinance is not a reasonable fit between the restriction and the goal, and the Ordinance therefore fails Central Hudson's fourth prong.”

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Ruling:

Pole Sign Restrictions along with exceptions constitutional under Hudson intermediate scrutiny.

Caution: Case is Pre-Reed, but arguably still stands up well for commercial speech except maybe for what qualifies as content neutral.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Facts:

GK LTD are the owners of a pole sign used to advertise their travel business in the City of Lake Oswego (“City”).

The pole sign is 42.5 feet in height. It originally was used to advertise Journeys! travel business.

GK LTD purchased the business in 2001 along with the pole sign and proceeded to change the copy of the sign. The pole sign was nonconforming in 2001 as pole signs were generally prohibited at that time. The change in copy resulted in the sign having to be removed.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard:

Content Neutrality:

“The government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech.”

Narrowly Tailored/Ample Alternative Channels:

“In addition to being justified without reference to content, the restrictions must be narrowly tailored to serve a significant governmental interest and ... leave open ample alternative channels for communication of the information.”

(Citations omitted).

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard - Content Neutrality:

If statute on its face describes speech by content then it's content based:

“Our primary concern is determining whether a regulation of speech was adopted out of disagreement with a message sought to be conveyed. The government's purpose is the controlling consideration.” However, we need not engage in a searching inquiry of the legislature's motive to determine the government's purpose. Rather, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.” (citations omitted)

Ruling: Since the City restricts all pole signs across the City's commercial zones without creating exceptions for preferred content, it is content neutral.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard - Significant Governmental Interest:

Purpose clause of Sign Ordinance: *“The City Council finds that to protect the health, safety, property and welfare of the public, to provide the neat, clean, orderly and attractive appearance of the community, to improve the effectiveness of signs, to provide for safe construction, location, erection, and maintenance of signs, to prevent proliferation of signs and sign clutter, and to minimize adverse visual safety factors to travelers on public highways and on private areas open to public travel, it is necessary to regulate [signs]....”*

Ruling: Preservation of aesthetic quality and traffic safety = significant governmental interest. *“Against the backdrop of numerous decisions of the Supreme Court and this court, we do not doubt that Lake Oswego's interests in its appearance and the safety of the public are significant and well established.”*

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard - Significant Governmental Interest:

How much evidence do you need?

Lack of specific evidence on aesthetic and traffic impacts not compelling to court:

Lorillard Tobacco v. Reilly, 533 U.S. 525, 555, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001): “*We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’*”

BUT: Don't forget *Ballen* (Blazing Bagels sandwich boards) and Discovery Networks (news racks) – evidence must be fairly clear that there's a problem and the fix isn't under or overinclusive

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard - Narrowly Tailored:

Ruling: Pole sign restrictions sufficiently narrowly tailored.

“Because of their height, pole signs, as defined by Lake Oswego, can reasonably be perceived by the City to be aesthetically harmful and distracting to travelers.”

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Review Standard - Ample alternative channels for communication of the information.

“...we are cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulation foreclose[s] an entire medium of public expression across the landscape of a particular community or setting.”

Ruling: GK LTD still has other ample channels of communication, such as handbills, radio, television, newspaper or telemarketing. As to signage, GK LTD can do wall signs, monument signs, awning and canopy signs, blade signs and overhanging signs.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Failing to prevail with review standard on pole sign restriction, GK LTD alleges sign code exemptions unconstitutional as content based:

“...in this circuit a regulation of speech is ‘content-based [if] a law enforcement officer must read a sign's message to determine if the sign is regulated.’”

Court assesses several “suspect” content based categories of sign regulation:

- 1) Permit exemption for public signs, hospital or emergency signs, legal notices, railroad signs and danger signs.
- 2) Permit exemption from temporary signs, including campaign signs.
- 3) Nonconforming signs grandfathered against subsequent sign code amendments, except when sign copy changed.
- 4) Design review for clarity and readability.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Content Based: Permit Exemptions for public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs

Ruling: The exemptions are “speaker based” and thus found to not qualify as content based.

“[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say) [L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.”

BUT Reed can be read as being more strict on speaker based laws. Further but, if the regulation isn't content neutral, can then use intermediate scrutiny for commercial speech instead of strict.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Content Based – Temporary Signs.

Ruling: Temporary sign exemption not content based because it imposes only temporal and size restrictions on temporary signs.

Lake Oswego achieves content neutrality for real estate signs: A homeowner may put up, without any restriction as to content, “[o]ne temporary sign not exceeding six square feet provided the sign is removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling.” LOC § 47.08.300(B)(1)(b).

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Content Based – Grandfather Clause

Court – Actually, if the City has to read a sign to ascertain applicability, that by itself doesn't make the regulation content based -
- *“...enforcement officials having to read a sign is persuasive evidence of such a purpose but may not always be dispositive.”*

Ruling: *“A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's regulations, is not content based”*

In reaching the ruling above, what appeared to be most compelling to the court was that the grandfather provision wasn't indicative of any intent or practice to regulate expression of ideas.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Content Based – Design review for clarity and readability.

Ruling: Since design review is limited to legibility as opposed to intelligibility, the sign is not content based since legibility review does not enable the City to regulate the substance of a message.

Practical Application

Alito Concurring Opinion in *Reed* – What’s ok:

Rules regulating the size of signs.

Rules regulating the locations in which signs may be placed.

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.

Practical Applications

Thomas Plurality Opinion – what’s ok:

“Ample” Content-Neutral Options for safety and aesthetics:

- Can regulate size, building materials, lighting, moving parts, and portability.
- “May” be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner.
- An ordinance narrowly tailored to protect the safety of pedestrians, drivers, and passengers—*e.g.*, warning signs marking hazards on private property or signs directing traffic “well might” survive strict scrutiny. *[This is the court’s wording – I would say that most traffic and other public safety signs will easily meet strict scrutiny and survive First Amendment challenge!]*

Practical Application

Political Signs allowed wherever Commercial Signs Allowed:

To prevent excluding noncommercial speech from being regulated on the basis of content, should have clause authorizing noncommercial speech wherever commercial speech is authorized:

Example Regulation:

Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations that apply to such signs.

Free Speech Law for On Premise Signs, Daniel Mandelker, FN 197

BUT, what about government and community signs, such as holiday banner and event signs and community club signs (eagles, elks, rotary)

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Practical Applications:

The *Collier v. Tacoma* Dilemma: Campaign signs have to be authorized in right of way, but under Reed then have to authorize all other signs maintain content neutrality unless distinctions survive strict scrutiny.

BUT; *Contest Promotions* holds that Reed doesn't apply strict scrutiny to commercial signs, so can arguably justify excluding commercial signs from right of way using "common sense" – type evidence of *Lake Oswego*.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

One *Collier* Solution:

1. Since can distinguish between commercial and noncommercial speech, exclude commercial speech from right of way (**But**: keep in mind distinction must pass intermediate scrutiny)
2. Since have to allow campaign signs in right of way up until reasonable time after election, authorize all noncommercial signs in right of way up until x days after each November election.;
3. Adopt strict size and material requirements for the temporary signs.
4. Require that the signs be new every time they are reinstalled so that you don't have people taking the signs x days after the election and then reinstalling them x + 1 days after the election from the next election.

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)

Lake Oswego Real Estate Sign Content Neutrality:

“[o]ne temporary sign not exceeding six square feet provided the sign is removed within fifteen days from the sale, lease or rental of the property or within seven days of completion of any construction or remodeling.” LOC § 47.08.300(B)(1)(b).

G.K. LTD Travel v. City of Lake Oswego. 436 F.3d 1064 (2006)