BILLBOARDS, SIGNS, FREE SPEECH, AND THE FIRST AMENDMENT

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Author's Synopsis: This Article reviews the competing demands free speech law makes when applied to sign and billboard ordinances. It describes the free speech doctrines that apply, explains ambiguities and conflicts, and makes recommendations for sign regulations that can avoid constitutional problems. The Article first explains how state courts decided the constitutionality of billboard controls before free speech law applied. It then describes the litigation problems municipalities face in sign litigation, and considers the overbreadth and severability doctrines that litigants can use to strike sign ordinances down.

Ordinances that regulate signs typically regulate commercial speech. The Article explains the criteria the Supreme Court adopted for laws that regulate commercial speech, and how the Court liberally applied these criteria in a case upholding an ordinance that prohibited billboards. Lower court cases that applied this case are discussed next. They followed the Supreme Court's approach in billboard cases but sometimes added new requirements.

The Article then describes the free speech time, place, and manner rules that are an alternative to commercial speech doctrine, and how courts apply these rules to sign ordinances. Regulations for digital billboards are discussed next. The Article concludes by discussing the constitutional protections courts provide for noncommercial speech, and the constitutional restrictions they require for signs that regulate content.

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I. INTRODUCTION

In June 2020, Terra Cooper raised money to put up twenty-eight billboard signs reading "Black Lives Matter" throughout the state of Utah, but a day before the electronic billboards went live the signage company pulled the signs because the company received "some complaints."[1] In

[1] Hailey Hendricks, *Black Lives Matter Billboard Spreads Message of Community Support*, ABC4 NEWS, LAYTON, UTAH (Jun. 5, 2020), https://www.abc4.com/news/local-news/black-lives-matter-billboard-spreads-message-of-community-support/?fbclid=IwAR3iPdh0hvPvftAk9gJIwY84qwqmMsiSglDhzy4cn6ViTefUGoDOUxdQgI0 [https://perma.cc/TE5L-STUU]. After Terra Cooper rallied public support for the signs, the signage company eventually relented and allowed them. *See id.* Cooper stated: "I put the words 'Black Lives Matter' on a billboard sign. One sign company originally approved it and then took it down, and then put it back up after public outcry. Another company rejected it, then were convinced to put it up. Two other companies rejected this message

2012, James Fulton of Vidor, Texas put up billboards along highway I-10 accusing local law enforcement of corruption and incompetence concerning their failure to make an arrest in the case of the murder of his daughter, twenty years earlier.[2]

Signs carry messages, demand attention, and can be effective in informing, shaping, and mobilizing public opinion. The constitutional right to free speech protects signage messaging.[3] Local governments regulate signage, however, and sign ordinances decide what, when, and how signage speech may occur. Sign ordinances protect aesthetics and safety, but they also control freedom of expression, and they can have significant effects on property interests and the use of property.[4]

Free speech doctrine mediates government interests in regulating signage, but free speech doctrine in the area of signage is ambiguous and conflicting.[5] It is ambiguous because the principles that decide free speech

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twice." E-mail from Terra Cooper to author (Jun. 10, 2020, 06:50 PM CST) (on file with author).

[2] *See* Page v. Fulton, 30 S.W.3d 61 (Tex. App. 2000) (inspiring an Oscar-winning film, *Three Billboards Outside Ebbing, Missouri*); *see also* Harriet Sokmensver, *Behind the Real-Life Unsolved Murder Case that Inspired Three Billboards Outside Missouri*, PEOPLE (Apr. 17, 2018, 5:42 PM), https://people.com/crime/real-life-three-billboards-inspired-texas-murder-case/ [https://perma.cc/L4R8-24MV].

[3] Free speech rights protect the right of people to contract to erect signs and also protect the right of sign companies to decide which content to include and not to include on their signs.

[4] Sign ordinances have a number of effects on property interests and the use of property. Sign ordinances should be reviewed as part of due diligence in all real estate transactions, including transactions for the sale or leasing of land. Business owners need to know what signs they can display on property they lease or buy. Leases often regulate signs on business premises, but a tenant also must consider the sign ordinance to determine what other restrictions apply. Covenants for common interest communities usually include sign regulations in addition to those restrictions imposed by the sign ordinance. Sign companies need to know what signs they can legally display on properties they lease. Users who want to buy advertising space on off-premise signs need to know what signs are permitted under sign regulations. It is important to remember that sign ordinances, like all public laws, do not appear in the chain of title.

[5] "Supreme Court justices have fundamentally competing perspectives regarding the best approach to constitutional interpretation. The Court has therefore never adopted one authoritative methodology of constitutional interpretation. Rather, the Court uses different methodologies to decide different cases, justices frequently vacillate in their preferred interpretive methods, and many decisions fail to reflect any foundational approach. Within the bounds of legitimate judicial craft, constitutional interpretation—and legal interpretation more generally—is a methodological free-for-all." Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019 (2018). As Chief Justice Roberts put it: "[T]hese standards that apply in the First Amendment just kind of developed

issues are not clearly stated. It is conflicting because the Court has not been consistent in its free speech decisions. Within this indeterminate framework, sign ordinances face constitutional risk[6] from two competing doctrines. They face flexible multi-factor criteria that require an intermediate standard of judicial review when they regulate commercial speech, and they face a bright line test that requires strict scrutiny judicial review when they regulate content-based speech.

This Article reviews these competing free speech law demands[7] as applied to sign and billboard ordinances. It describes the free speech doctrines that apply, explains ambiguities and conflicts, and makes recommendations to avoid constitutional problems. Part II describes how state courts decided constitutional issues presented by billboard controls before free speech law applied. Part III describes risks that overbreadth and severability doctrines create for local government defendants in free speech litigation. Part IV explains the *Central Hudson* criteria the Supreme Court adopted for laws that regulate commercial speech. Part V describes how the Court's *Metromedia* decision applied these criteria to an ordinance that prohibited commercial billboards, while Part VI explains how lower courts have applied *Metromedia.* Part VII describes the time, place, and manner rules the Court adopted for laws affecting free speech, and how the Court has applied these rules to sign ordinances. Part VIII describes free speech issues raised by digital billboards, Part IX addresses constitutional protections for noncommercial speech, and Part X discusses constitutional restrictions on content-based sign ordinances. Part XI concludes.

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over the years as sort of baggage that the First Amendment picked up." Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[6] *See* John M. Baker & Robin M. Wolpert, *The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Municipal Billboard and Sign Regulations*, 58 PLANNING & ENVT'L L., Oct. 2006, at 3 (2006).

[7] This Article does not discuss prior restraint doctrine, which requires prompt and responsive procedures and adequate substantive standards. Although the cases are not clear, it is advisable to provide a decision process in which decisions are made in a reasonable period of time. Substantive standards must be precise. *See* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW AND LITIGATION §§ 4:26–4:30 (2019); DANIEL R. MANDELKER, FREE SPEECH LAW FOR ON PREMISE SIGNS § 2:8[3], at 52 (3d ed. 2020) [hereinafter FREE SPEECH LAW], http://landuselaw.wustl.edu [https://perma.cc/X92D-TYLH]; Daniel R. Mandelker, *Decisionmaking in Sign Codes: The Prior Restraint Barrier*, 31 ZONING AND PLANNING L. REP., Sept. 2008, at 1 (2008) (discussing standing to challenge laws as prior restraints and validity of substantive standards).

II. BILLBOARD REGULATION IN THE STATE COURTS

Billboard intolerance is historic.[8] Billboards have their place,[9] but they can overpower[10] the aesthetic environment and threaten traffic safety. Before they were regulated at the beginning of the twentieth century, billboards overwhelmed rural and urban areas with massive structures that dominated the landscape. Concern about safety issues and an influential movement for aesthetic regulation led to stricter controls. They included sign ordinances that banned billboards,[11] which courts upheld in early cases.[12] Digital billboards with moving, lighted displays created new

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[8] A famous poem by Ogden Nash states: "I think that I shall never see, A billboard lovely as a tree, Indeed, unless the billboards fall, I'll never see a tree at all." Nat'l Advert. Co. v. City of Bridgeton, 626 F. Supp. 837, 840 (E.D. Mo. 1985) (quoting OGDEN NASH, *Song of the Open Road*, in THE OGDEN NASH POCKET BOOK 6 (1944)); Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 429 (Cal. 1980).

[9] There can be a place for billboards in the urban environment, as in urban plazas where a display of billboards is aesthetically appealing. *See* Street Graphics Model Ordnance § 1.11 (authorizing designation of an urban plaza as an Area of Special Character), *in* DANIEL R. MANDELKER, JOHN M. BAKER & RICHARD CRAWFORD, STREET GRAPHICS AND THE LAW 86–88 (Planning Advisory Serv. Rep. 5580, American Planning Ass'n, 4th ed. 2015) [hereinafter STREET GRAPHICS].

[10] Outdoor advertising was an eight-billion-dollar industry in 2019. A. Guttmann, *Outdoor Advertising Revenue in the United States from 2009 to 2019*, STATISTA (Apr. 21, 2020) https://www.statista.com/statistics/253886/annual-outdoor-advertising-revenue-in-the-us/ [https://perma.cc/8Z3K-WMRW]. A billboard is a sign that carries general advertising, which is "the business or enterprise of making a sign display face available to a variety of advertisers." Herson v. City of San Carlos, 714 F. Supp. 2d 1018, 1021 (N.D. Cal. 2010).

[11] Four states prohibit billboards: Alaska, Hawaii, Maine, and Vermont. ALASKA STAT. ANN. § 19.25.090 (West 2019); HAW. REV. STAT. ANN. § 445–112 (West 2015); ME. REV. STAT. ANN. tit. 23, § 1908 (2019); VT. STAT. ANN. tit. 10, § 488 (West 2020) ("No person may erect or maintain outdoor advertising visible to the travelling public except as provided in this chapter."). All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

[12] *See, e.g.*, Murphy, Inc. v. Town of Westport, 40 A.2d 177, 182 (Conn. 1944) (banning outdoor advertising signs, but not on-site signs); Preferred Tires, Inc. v. Village of Hempstead, 19 N.Y.S.2d 374, 375 (Sup. Ct. 1940) (upholding a total billboard ban); St. Louis Gunning Advert. Co. v. City of St. Louis, 137 S.W. 929, 962 (Mo. 1911) (upholding an ordinance that regulated the size, height, and location of billboards, finding that they were a constant menace to public safety and welfare, inartistic and unsightly, though the court made it clear that aesthetic reasons were insufficient to uphold the ordinance). In *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 273 (1919), Justice Holmes upheld an ordinance that imposed size, height, and setback restrictions on billboards and required them to be a certain distance from the ground.

problems. They differ from traditional billboards, which have static displays that can be changed manually but do not move.

Sign ordinances can ban billboards, and state courts usually rejected legal attacks on billboard bans before free speech law applied,[13] with occasional dissent.[14] They accepted aesthetic reasons for prohibiting them, though not always as a complete reason,[15] and some relied on the aesthetic context in which a ban applied.[16] Though studies are not conclusive, they

[13] *See* DANIEL R. MANDELKER & MICHAEL ALLEN WOLFE, LAND USE LAW § 11.07 (LexisNexis Matthew Bender ed., 6th ed. 2015) (updated annually). For an analysis of cases upholding billboard exclusions under traditional constitutional limitations, see Daniel R. Mandelker & Linda Reiman, *The Billboard Ban: Aesthetics Comes of Age*, 31 LAND USE LAW & ZONING DIGEST, no. 11, at 4 (1979). For a discussion of cases upholding controls on the display of signs, such as spacing, height, size, and number of signs under traditional constitutional limitations, see LAND USE LAW § 11.09.

[14] *See* Combined Commc'ns Corp. v. City & Cnty. of Denver, 542 P.2d 79, 83 (Colo. 1975) (holding no authority for total ban).

[15] *See* Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119 (2006) (reviewing the cases and concluding that most state courts accept some form of aesthetic controls). The California Supreme Court upheld a commercial billboard ban in the *Metromedia* case. Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 409 (1980), *rev'd*, 453 U.S. 490 (Cal. 1981). The California Supreme Court reviewed the major state decisions upholding billboard exclusions and an important dictum from the Supreme Court endorsing aesthetic regulation. *See* Berman v. Parker, 348 U.S. 26 (1954). The court in *Berman* relied on aesthetic considerations and the protection of tourism in addition to transportation-related conflicts as a basis for regulation. *See id.* at 32.

[16] *See* Naegele Outdoor Advert. Co. of Minn. v. Vill. of Minnetonka, 162 N.W.2d 206, 209 (Minn. 1968) (upholding prohibition in residential areas); United Advert. Corp. v. Borough of Metuchen, 198 A.2d 447, 450 (N.J. 1964) (stressing that Metuchen was a small and primarily residential community). *Contra*, on the small city issue, *Metromedia*, 610 P.2d at 416.

show that billboards cause driver distraction that may contribute to traffic crashes.[17] All state courts accepted traffic safety justifications.[18]

One of the major legal problems state courts faced when reviewing sign ordinances was the critical distinction between off-premise billboards and on-premise signs. Different treatment reflected the different purposes these signs serve. Sign ordinances usually define billboards as off-premise signs advertising goods and services not available on the premises, a questionable content-based definition.[19] On-premise signs are usually

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[17] *See* Victoria Gitelman et al., *An Examination of Billboard Impacts on Crashes on a Suburban Highway: Comparing Three Periods—Billboards Present, Removed, and Restored*, 20 TRAFFIC INJURY PREVENTION 569, 570 (2019) (discussing an Israeli study of large and conspicuous static billboards; "[N]o unequivocal conclusions can be drawn about the relationship between the placement of advertising billboards and a higher risk of road crashes . . . [but] most behavioral studies support the conclusion that billboards attract the attention of drivers for a substantial proportion of their driving time and that driver distraction is a contributing factor in many crashes"; the study found a significant increase in crashes after billboards were restored); *see also* Oscar Oviedo-Trespalacios et al., *The Impact of Road Advertising Signs on Driver Behaviour and Implications for Road Safety: A Critical Systematic Review*, 122 TRANSP. RES. PART A: POLICY AND PRACTICE 85 (2019), https://www.sciencedirect.com/science/article/pii/S0965856418310632?via%3Dihub [https://perma.cc/D8YP-4XJ6] (concluding most studies remain inconclusive, but there is an emerging trend in the literature suggesting that roadside advertising can increase crash risk, particularly for digital billboards).

[18] *See, e.g.*, *Metromedia*, 610 P.2d at 412; Inhabitants of Boothbay v. Nat'l Advert. Co., 347 A.2d 419, 422 (Me. 1975); Cent. Advert. Co. v. City of Ann Arbor, 201 N.W.2d 365, 370 (Mich. App. 1972), *remanded*, 218 N.W.2d 27 (Mich. 1974); Opinion of the Justices, 169 A.2d 762, 764 (N.H. 1961) ("Signs of all sizes, shapes and colors, designed expressly to divert the attention of the driver and occupants of motor vehicles from the highway to objects away from it, may reasonably be found to increase the danger of accidents, and their regulation along highways falls clearly within the police power."); Ghaster Props., Inc. v. Preston, 200 N.E.2d 328, 337 (Ohio 1964); Markham Advert. Co. v. State, 439 P.2d 248, 258 (Wash. 1968).

[19] *See* Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 702 (5th Cir. 2020) (held content-based). A similar definition was in the sign ordinance considered in the Supreme Court's leading billboard case: "A sign which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed." *Metromedia*, 453 U.S. at 499. The Court did not consider whether the definition was content-based. *See* Southlake Prop. Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1117 (11th Cir. 1997) (similar definition not challenged as free speech violation); Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 732 (N.D. Ind. 1991) (holding ordinance "prohibits all kinds of speech because of what it *says*"). *But see* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020) (refusing to consider content neutrality objection because *Reed* does not apply to commercial speech). Alternate definitions can avoid free speech problems. One alternative defines an off-premise sign as "a sign on premises where a business is not located." Another alternative

defined as signs advertising goods and services available on the premises.[20] On-premise signs may be allowed, while billboards are prohibited.[21]

Different treatment probably arose from differences in sign type. Billboards were originally built on unstable wooden structures that could fall over and cause injury.[22] They can still be built that way but are usually displayed on monopoles made of steel.[23] On-premise signs were usually attached to walls, which created a different aesthetic effect. Today, there are several types of on-premise signs that resemble billboards, including wall signs, projecting signs,[24] and pole or freestanding signs.[25] Both off-premise and on-premise signs can be aesthetically unattractive. Where on-premise signs are permitted while billboards are prohibited, an equal protection issue arises. The overwhelming majority of state courts, however, have held the different treatment of billboards and on-premise

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provides for a sign that displays "general advertising," which "means the business or enterprise of making a sign display face available to a variety of advertisers, whether they be businesses or other establishments." SAN CARLOS, CAL. ZONING ORDINANCE § 18.22.030, https://www.codepublishing.com/CA/SanCarlos/#!/SanCarlos18/SanCarlos1822.html#18.22.030 [https://perma.cc/CB69-MJGK].

[20] For a study of the economic value of on-premise signs to businesses, see SIGNAGE FOUNDATION, INC., THE ECONOMIC VALUE OF ON-PREMISE SIGNAGE (2012), https://signresearch.org/wp-content/uploads/Economic-Value-of-On-Premise-Signage-University-of-Cincinnati-2012-1.pdf [https://perma.cc/3M6N-E4N4].

[21] Scenic America, a national organization dedicated to billboard controls, estimates that at least 1500 cities and communities prohibit new billboards. *Communities Excluding Billboards*, SCENIC AMERICA, https://www.scenic.org/sign-control/tools-for-action/community-prohibition/ [https://perma.cc/QK4N-E8K9].

[22] *See* David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 J.L. & POL. 171, 176–88 (2007). For commentary on the history of billboards, see *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 680 (9th Cir. 2010).

[23] A monopole is a common way to display billboards. See Arkansas Assessment Coordination Department, *Arkansas Billboard Valuation Guid*e 4–10 (2018), https://www.arkansasassessment.com/media/1140/2018-arkansas-billboard-valuation-guide.pdf [https://perma.cc/38FP-8DM7], for examples with illustrations of other display methods and sign types. A monopole structure is defined as "constructed with a tubular steel support (of various circumferences), tubular steel framing, metal catwalk and display panel(s). The foundation is concrete." *Id.* at 4.

[24] *See* STREET GRAPHICS, *supra* note 9, at 51–54 (describing sign types).

[25] The definition is: "A sign principally supported by one or more columns, poles, or braces placed in or upon the ground." UNITED STATES SIGN COUNCIL FOUNDATION, A MODEL SIGN ORDINANCE § 7, at 19 (2018), https://usscfoundation.org/wp-content/uploads/2018/03/USSC-Model-On-Premise-Sign-Code-2018.pdf [https://perma.cc/4CQZ-4DJM]. Some examples of freestanding signs are monument and pylon signs. *See id.* § 8 at 25.

signs constitutional.[26] Free speech law complicates this issue because of the messages these signs convey.

III. FREE SPEECH LITIGATION, OVERBREADTH AND SEVERABILITY

Judicial scrutiny of sign ordinances changed when the Supreme Court held the free speech clause of the First Amendment applied to commercial speech.[27] This decision affects litigation that challenges a sign ordinance.[28] Sign companies must challenge only the sections that apply to them.[29] A facial attack on other sections of an ordinance is generally not possible because a plaintiff does not have standing to litigate issues that affect third parties.[30]

Overbreadth doctrine allows a plaintiff to avoid this standing rule in free speech cases.[31] It can give standing to a plaintiff to challenge sections in the ordinance that affect third parties. [32] The Supreme Court adopted this doctrine to prevent a "chilling" effect on the free speech rights of third

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[26] *See* Metromedia, Inc. v. City of Pasadena, 30 Cal. Rptr. 731, 733 (Cal. Ct. App. 1963); City of Lake Wales v. Lamar Advert. Ass'n of Lakeland, 414 So. 2d 1030, 1031 (Fla. 1982); Donnelly Advert. Corp. of Md. v. City of Baltimore, 370 A.2d 1127, 1134 (Md. 1977); State Dep't of Roads v. Popco, Inc., 528 N.W.2d 281, 284 (Neb. 1995) (upholding distinction between on-premise and off-premise signs required by federal Highway Beautification Act); Summey Outdoor Advert., Inc. v. City of Henderson, 386 S.E.2d 439, 443 (N.C. Ct. App. 1989); Landau Advert. Co. v. Zoning Bd. of Adjustment, 128 A.2d 559, 562 (Pa. 1957). *Contra* Metromedia, Inc. v. City of Des Plaines, 326 N.E.2d 59, 62 (Ill. App. Ct. 1975).

[27] *See* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (holding that a newspaper publication on availability of abortions was protected). As the Court later stated, "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. Public Serv. Comm'n, 447 U.S. 557, 561–62 (1980); *see also* Edward J. Sullivan & Alexia Solomou, *Public Regulation of Non-Commercial Speech in the United States and United Kingdom: A Comparison*, 49 URB. LAW. 415, 418–22 (2017) (discussing evolution of commercial speech doctrine in the United States).

[28] *See* New York v. Ferber, 458 U.S. 747, 767 (1982).

[29] *See id.*

[30] *See id.* ("The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others.").

[31] *See* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (plurality opinion).

[32] *See id.*

parties,[33] such as third parties affected by the regulation of political speech.[34] An overbreadth challenge to a sign ordinance is available even though the decision to reject a billboard restricts only commercial speech.[35]

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[33] *Id.* at 584 (describing chilling effect); Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984) (discussing the prevention of the chilling of rights of other parties not before the court); Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977) ("An overbroad statute might serve to chill protected speech."); *see also* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (discussing the "possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute").

[34] *See* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574–76 (1987) (describing resolution of board of airport commissioners banning all "First Amendment activities" within "Central Terminal Area" at airport); *Vill. of Schaumburg*, 444 U.S. at 622 (affirming invalidity of ordinance excluding door-to-door or on-street solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes"); Bigelow v. Virginia, 421 U.S. 809, 815 (1975) (recognizing but not applying doctrine in advertising case); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("[O]verbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct . . . ."); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (affirming right to assembly); Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (loitering and picketing statute; "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."). Overbreadth must be substantial when conduct, not speech, is involved. *Broadrick*, 413 U.S. at 615; *see also* Virginia v. Hicks, 539 U.S. 113, 119–23 (2003) (holding overbreadth does not apply when speech not affected); Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 803–04 (1984) (explaining that overbreadth was basically a challenge to ordinance as applied to plaintiff's activities; prohibition on posting of signs on public property upheld); Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *17 (W.D. Wis., Apr. 7, 2020) (claiming no application of the ordinance would make it overbroad); *see also* Gospel Missions of Am. v. City of Los Angeles, 419 F.3d 1042, 1050–51 (9th Cir. 2005) (discussing how overbreadth doctrine applies to other than free speech issues).

[35] An overbreadth attack was allowed in the Supreme Court case upholding a billboard exclusion. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n.11 (1981) ("We have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others . . . ."); *see also* Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989) (concluding that overbreadth applies if the alleged overbreadth of a commercial speech application assumed to be valid includes its application to noncommercial speech). *But see Bates*, 433 U.S. at 380–81 (holding overbreadth doctrine did not apply in an "ordinary commercial context" in a professional advertising case). *Accord* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978) (lawyer solicitation).

There are limitations, however. Several circuits limit overbreadth attacks by requiring a plaintiff to show constitutional standing to bring the attack,[36] and courts have sometimes held that standing has not been

[36] *See* Maverick Media Grp., Inc. v. Hillsborough Cnty., 528 F.3d 817, 822 (11th Cir. 2008) (holding no injury found under permitted sign provisions of ordinance); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 892 (9th Cir. 2007) (denying off-premise signs, holding plaintiff "cannot leverage its injuries under certain, specific provisions to state an injury under the sign ordinance generally"); Covenant Media of SC, LLC v. City of N. Charleston, 493 F.3d 421, 429 (4th Cir. 2007) ("That Covenant has standing to challenge the timeliness of the City's decision on the December 2004 application does not provide it a passport to explore the constitutionality of every provision of the Sign Regulation."); Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 350 (6th Cir. 2007) (billboard ordinance; "Prime Media's standing with regard to the size and height requirements does not magically carry over to allow it to litigate other independent provisions of the ordinance without a separate showing of an actual injury under those provisions."); Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793, 796–801 (8th Cir. 2006) (billboard applications denied; "Advantage must show injury, causation, and redressability with respect to each provision it challenges as overbroad"). For a review of circuit conflicts on this question in the Eleventh Circuit, see *KH Outdoor v. City of Trussville*, 366 F. Supp. 2d 1141, 1144 n.3 (N.D. Ala. 2005). The overbreadth doctrine is an exemption only to the prudential standing requirement. By classifying the issue as "prudential," the Supreme Court emphasizes the discretionary application of the standard. *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) (holding state compensation remedy prong of ripeness doctrine prudential).

proved.[37] When plaintiffs have proved standing,[38] they have succeeded,[39] but not always,[40] in a facial attack on other sections in a sign ordinance.

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[37] *See, e.g.*, Coastal Outdoor Advert. Grp., LLC v. Twp. of Union, 402 F. App'x 690, 691 (3d Cir. 2010) (describing overbreadth attack as "sign code shakedown;" redressability not shown); Granite State Outdoor Advert., Inc. v. City of Clearwater, 351 F.3d 1112, 1117 (11th Cir. 2003) (showing no injury); Signs for Jesus v. Town of Pembroke, 973 F.3d 93, 100 (1st Cir. 2020) (provisions challenged in overbreadth attack held severable).

[38] *See, e.g.*, *Get Outdoors II, LLC*, 506 F.3d at 893 (holding billboard company had standing because it explicitly challenged the secondary size and height restrictions); Lamar Advert. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 375 (2d Cir. 2004) (holding billboard company had standing because success on the merits would allow it to erect at least some of the signs it intended to build); Kennedy v. Avondale Ests., 414 F. Supp. 2d 1184, 1200 (N.D. Ga. 2005) ("definition of 'sign' is the very heart of the City's ordinance"); Boulder Sign Co. v. Boulder City, 382 F. Supp. 2d 1190, 1195 (D. Nev. 2005) (stating plaintiff not allowed to obtain permit); Covenant Media of Ill., LLC v. City of Des Plaines, 391 F. Supp. 2d 682, 687–88 (N.D. Ill. 2005) (holding injury was shown); Sugarman v. Vill. of Chester, 192 F. Supp. 2d 282, 289 (S.D.N.Y. 2002) (discussing threat of enforcement and negative publicity); *see also* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *5 (W.D. Wis. Apr. 7, 2020) (finding injury redressed if can strike billboard ban in its entirety); Nittany Outdoor Advert., LLC v. Coll. Twp., 22 F. Supp. 3d 392, 409–11 (M.D. Pa. 2014) (discussing conflicting cases on whether a plaintiff has overbreadth standing to challenge an ordinance claimed to have a prior restraint).

[39] *See* Willson v. City of Bel-Nor, 924 F.3d 995, 1002 (8th Cir. 2019) (holding expansive definition of sign, combined with strict sign restrictions, applied to substantial amount of expressive conduct); United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 361 (6th Cir. 1998) (prohibiting controversial bus advertisements because of their message); Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569–71 (11th Cir. 1993) (allowing attack on constitutionality of city ordinance regulating display of signs, flags, and other means of graphic communication); Citizens for Free Speech, LLC v. City of Alameda, 62 F. Supp. 3d 1129, 1134–35 (N.D. Cal. 2014) (noting complaint based on lack of purpose, content-based speech and "unfettered discretion"); XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765, 789 (N.D. Ohio 2004) ("The ordinance's overbreadth reaches considerably more than a tiny fraction of the speech within the reach of the statute."). *Cf.* Peachlum v. City of York, 333 F.3d 429, 438 (3d Cir. 2003) ("Ripeness standards are most relaxed when the First Amendment claim is a facial overbreadth challenge;" prior restraint).

[40] *See* Maldonado v. Morales, 556 F.3d 1037, 1046 (9th Cir. 2009) (holding Outdoor Advertising Act prohibited all billboard advertising except for on-premise advertising; vagueness claim failed); Riel v. City of Bradford, 485 F.3d 736, 754–55 (3d Cir. 2007) (holding that an ordinance that required permits to be obtained to display commercial and noncommercial signs on private property was constitutional because "extensive exemptions allow the city to specifically target the speech it wishes to regulate, while leaving private property owners free to engage in activity at the core of the First Amendment."); Faustin v. City & Cnty. of Denver, 423 F.3d 1192, 1201 (10th Cir. 2005) (holding unwritten policy applying to signs at overpasses did not have any realistic danger of chilling effect on parties not before the court); Nat'l Advert. Co. v. City & Cnty. of

Severability can then become a problem.[41] It occurs when a court holds one or more sections of a sign ordinance unconstitutional, as in an overbreadth attack, and a plaintiff argues that the rest of the ordinance cannot be saved through severance. If a court refuses to sever the rest of the ordinance, a billboard ban will be defeated because the municipality will have a failed law as well as a probable bill for attorneys' fees.[42]

The Supreme Court has adopted guidelines for deciding severability. The Court will not nullify a legislature's work more than necessary, will try to avoid rewriting state law to conform to constitutional requirements, and will hold the "touchstone" of any decision is legislative intent.[43] Federal courts rely on state law to decide whether severability is allowable.[44] There is a presumption of severability.[45] The question is

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Denver, 912 F.2d 405, 411 (10th Cir. 1990) (holding a failure to show that more than a small percentage of conceivable applications did not raise serious definitional questions when an ordinance prohibited off-premise but permitted on-premise signs); King Enter., Inc. v. Thomas Twp., 215 F. Supp. 2d 891, 917 (E.D. Mich. 2002) (holding a regulation did not reach substantial amount of constitutionally protected speech); Timilsina v. W. Valley City, 121 F. Supp. 3d 1205, 1222 (D. Utah 2015) (holding that a prohibition on A-frame signs did not substantially inhibit speech of third parties not before court).

[41] *See* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 739 (2010) (retrieving original approach to partial unconstitutionality and developing proposal for implementing a version of that approach).

[42] A prevailing party can recover attorney's fees in a successful federal court suit based on constitutional claims brought under the Federal Civil Rights Act, 42 U.S.C. § 1983. *See* Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (2018). Attorney's fees cannot usually be recovered in state court litigation.

[43] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329–31 (2006). A "murky constitutional context," or where line-drawing is "inherently complex," may require a far more serious invasion of legislative intent. *Id.* at 330. Free speech issues should qualify as murky and constitutionally suspect.

[44] *See* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 772 (1988); Metromedia v. City of San Diego, 453 U.S. 490, 521 n.26 (1981). Ordinances should contain a protective severability clause. A typical clause provides, "The invalidation of any section, subsection, clause, word, or phrase of this ordinance by any court of competent jurisdiction shall not affect the validity of the remaining portions of the ordinance." Street Graphics Model Ordinance § 1:19, *in* STREET GRAPHICS *supra* note 9, at 95. A legislative preference for severability is not binding but is persuasive. *See, e.g.*, State v. Champe, 373 So. 2d 874, 880 (Fla.1978); *see also* Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782, 792 (Or. Ct. App. 2011) ("readily" finding severability in light of severability clause).

[45] *See* Barr v. Am. Ass'n of Political Consultants, No. 19-631, slip op. at 13–14 (S. Ct. July 6, 2020) (Supreme Court's cases have adopted strong presumption of constitutionality as a workable solution to the severability problem); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683, 686 (1987) (holding that severability clause indicates "that

whether the rest of the ordinance can function independently without the severed sections.[46]

Courts found severability when a section, or sections, of a sign ordinance held unconstitutional were limited and discrete, and did not affect other parts of the ordinance or the ordinance as a whole.[47] In one case the court severed a billboard ban, holding it was not affected by eliminating content-based restrictions.[48] But the California Supreme Court, on remand from the Supreme Court, did not sever a commercial billboard ban in the San Diego sign ordinance because that would have been inconsistent with the original intent and less effective because noncommercial billboards would be unaffected.[49] Courts refused to sever in similar sign ordinance cases when courts held a substantial number of sections unconstitutional that were so interdependent with the remaining

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Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision"). The lack of a severability clause does not raise a presumption against severability. *See id.* at 686.

[46] *See* Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988) (citing *Alaska Airlines, Inc*., 480 U.S. at 683).

[47] *See* Midwest Media Prop., LLC v. Symmes Twp., 503 F.3d 456, 464–65 (6th Cir. 2007) ("The valid size and height restrictions on the one hand and the purportedly unconstitutional off-premises ban and procedural provisions on the other satisfy Ohio's severability requirements."); *Nat'l Advert. Co*., 861 F.2d at 250 (holding ordinance can function effectively if limited to commercial messages, invalidated it only for signs bearing noncommercial messages); Seay Outdoor Advert. v. City of Mary Esther, 397 F.3d 943, 949-951 (11th Cir. 2005) (holding billboard ban not affected by elimination of suspected content regulations); Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320, 1347–50 (11th Cir. 2004) (holding that cutting out problematic parts that exempted certain signs and allowed temporary signs still leaves in place a comprehensive and coherent sign ordinance); Quinly v. City of Prairie Vill., 446 F. Supp. 2d 1233, 1247 (D. Kan. 2006) (holding court can sever prohibition of obscene material, and provisions for removal of political signs and size and stability requirements that were held content-based); Kennedy v. Avondale Ests., 414 F. Supp. 2d 1184, 1220 (N.D. Ga. 2005) (holding court can sever seasonal display exemptions from setback provisions; approved condominium sign, and exemption from enforcement held unconstitutional); Outdoor Sys. v. City of Lenexa, 67 F. Supp. 2d 1231, 1242 (D. Kan. 1999) (holding court can sever requirement for removal of political campaign signs held unconstitutional); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, 467 S.E.2d 875, 885 (Ga. 1996) (holding court can sever restriction on display of noncommercial messages, restriction on display of permanent political signs, time restriction on display of political signs, and ban on immoral signs held unconstitutional).

[48] *See Seay Outdoor Advert., Inc*., 397 F.3d at 949–51.

[49] The court held that severability would also invite constitutional difficulties by requiring a distinction between commercial and noncommercial signs. *Metromedia*, 649 P.2d at 909.

sections they could not function independently.[50] Even a single, but important, unconstitutional section can make severance impossible.[51] Sign ordinances are interconnected with multiple requirements, so a refusal to sever is a real danger to legislatures. This threat means a municipality must be confident that its entire ordinance is constitutional if it wants to enact a billboard ban.

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[50] *See* Nat'l Advert. Co. v. Town of Niagara, 942 F.2d 145, 149 (2d Cir. 1991) (holding eleven provisions swept from ordinance caused it to resemble "gutted building;" ordinance now confusing and unworkable, unfair, incoherent, inequitable, and must be redrafted); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 557–58 (2d Cir. 1990) (holding constitutional and unconstitutional provisions inextricable; ordinance admitted to be comprehensive regulatory scheme regulating many different forms of commercial and noncommercial speech) (1990); Clear Channel Outdoor, Inc. v. Town Bd., 352 F. Supp. 2d 297, 311 (N.D.N.Y 2005) (prohibiting portable signs but allowing certain exemptions held invalid as content-based; regulation of temporary signs and exemption of certain flags, pennants, and insignia invalid as content-based; offending provisions reflect Town's attempt to balance interests in limiting signs with First Amendment rights; remaining ordinance would not reflect regulatory approach); XXL of Ohio, Inc. v. City of Broadview Heights, 341 F. Supp. 2d 765, 804 (N.D. Ohio 2004) (extensive content-based distinctions between commercial and noncommercial speech held invalid; permit system held prior restraint; selective ban on pole signs invalid; unconstitutional classifications according to use types underlies ordinance as a whole); N. Olmsted Chamber of Com. v. City of N. Olmsted, 86 F. Supp. 2d 755, 779 (N.D. Ohio 2000) ("[O]rdinance contains a thicket of content-based distinctions, an impermissible system of prior restraint, and violates equal protection;" severance of unconstitutional portions would fundamentally disrupt statutory scheme as a whole.); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258, 1274 (D. Kan. 1999) (holding unconstitutional restrictions on noncommercial speech, permit requirement to display sign, and provision allowing removal of unattractive signs; ordinance would not have passed without numerous provisions of ordinance held unconstitutional); Revere Nat'l Corp. v. Prince George's Cnty., 819 F. Supp. 1336 (D. Md. 1993) (holding preference for commercial speech unconstitutional; certain categories of noncommercial speech preferred; ordinance underinclusive; vagueness; "problem" sections peppered throughout ordinance; severance of amendment barring construction of new off-premise signs will not eliminate constitutional infirmities; narrow construction not possible; rewriting of ordinance required).

[51] *See* L.D. Mgmt. Co. v. Thomas, No. 3:18-CV-722-JRW, 2020 WL 1978387, at *4 (W.D. Ky. Apr. 24, 2020) (regulation of on-premise signs); Horizon Outdoor, LLC v. City of Indus., 228 F. Supp. 2d 1113, 1129 (C.D. Cal. 2002) (permit scheme invalid; ordinance cannot be severed without a permit scheme); *see also* Thomas v. Schroer, No. 13-CV-02987-JPM-CGC, 2017 WL 6489144, at *16 (W.D. Tenn. Sept. 20, 2017) (regulation of on-premise signs; billboard act not severable), *aff'd sub nom.*, Thomas v. Bright, 937 F.3d 721, 728 (6th Cir. 2019) (decision not challenged on appeal and will not be considered *sua sponte*).

IV. THE *CENTRAL HUDSON* CRITERIA FOR COMMERCIAL SPEECH[52]

Sign ordinances regulate commercial speech. In the leading case on commercial speech, *Central Hudson Gas & Electric Corporation v. Public Service Commission*,[53] the Supreme Court adopted four criteria to decide whether a restriction on commercial speech is constitutional:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading.[54] [2] Next, we ask whether the asserted governmental interest is substantial.[55] If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted,[56] and [4] whether it is not more extensive than is necessary to serve that interest.[57]

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[52] For discussion of commercial speech doctrine, see Troy L. Booher, *Scrutinizing Commercial Speech*, 15 GEO. MASON U. CIV. RTS. L.J. 69 (2004); Earl M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161 (2003); Lee Mason, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 968–73 (2017); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 (2000).

[53] 447 U.S. 557, 566 (1980) (invalidating ban on promotional advertising by a public utility). Justice Blackmun criticized the decision in a concurring opinion: "[T]he test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading [sic], noncoercive commercial speech." *Id.* at 573. The Court has resisted suggestions by some Justices that *Central Hudson* be abandoned. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001); *see also* FREE SPEECH LAW, *supra* note 7, § 2:6[2] at 31.

[54] This criterion has not been a problem in sign cases and is not discussed here.

[55] The Court stated there must be "a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. This criterion is similar to the "direct relation" test adopted by the Supreme Court as a substantive due process rule in the infamous *Lochner* case, where it invalidated a law mandating limited hours of work. Lochner v. New York, 198 U.S. 45, 57 (1905). "The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid . . . ." *Id.*

[56] The Court said, "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.

[57] *Id.* at 566.

In its decision, the Court did not explain what each criterion meant. However, it held that the fourth criterion requires that a law must be "a more limited restriction on commercial speech" and must be "narrowly drawn."[58] This is a "narrow tailoring" requirement[59] typically applied as part of strict scrutiny judicial review.[60] Later cases adopted a sliding scale for the third criterion, which allows more leniency for logical restrictions.[61] The Court has not explained the importance of each criterion,[62] except that the criteria are not "entirely discrete."[63] It has referred to the second criterion as the "penultimate prong,"[64] has called the third criterion critical[65] and has held it raises a "serious question,"[66] and has held the fourth criterion is the "critical inquiry."[67]

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[58] *Id.* at 565.

[59] *E.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 584–86 (2001). The Court struck down a state regulation that prohibited smokeless tobacco and cigar advertising near schools. *See id.* at 570. It held the regulation served a governmental interest, but was not narrowly tailored because it amounted to an almost total ban on this type of advertising in many areas of the state. *See id.* at 573. The Court concluded that "[t]he breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved." *Id.* at 562. For discussion, see Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267 (2003).

[60] Justice Thomas, concurring in part and concurring in the judgment in *Lorillard Tobacco*, held that "even assuming that the regulations advance a compelling state interest, they must be struck down because they are not narrowly tailored." 553 U.S. at 584.

[61] *See* Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 NEW ENG. L. REV. 523, 535–48 (2009) (discussing Supreme Court cases and finding a sliding scale that allows more leniency for logical restrictions).

[62] A failure on any one of the criteria is fatal. *See, e.g.*, *Lorillard Tobacco Co.*, 533 at 527–30.

[63] Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183–84 (1999). "The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Id.*

[64] Edenfield v. Fane, 507 U.S. 761, 770 (1993).

[65] *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 627–29 (1995) (holding valid a prohibition of attorney direct-mail solicitation).

[66] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981).

[67] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569 (1980).

The *Central Hudson* criteria received scathing academic criticism.[68] As one critic noted, "[t]he bland, generic quality of these requirements is unconnected to any particular First Amendment theory."[69] The Court's later description of the third criterion confirms this criticism. It held the third criterion is a means-end test when combined with the second criterion.[70] This explanation is puzzling because it echoes substantive due process, which would not seem to have a place in free speech law.[71]

Board of Trustees of the State University of New York v. Fox[72] clarified and weakened the test for the fourth criterion.[73] The Court held that narrow tailoring does not include a least-restrictive-means test.[74] This change weakens a municipality's burden of proof because it does not have to put forward a less restrictive alternative than a billboard ban. Emphasizing the subordinate position of commercial speech in free speech doctrine, *Fox* held this test would impose a "heavy burden" on "[t]he ample scope of

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[68] *See, e.g.*, Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the* Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1628 (1997) ("*Central Hudson* test fails to provide an adequate basis for deciding commercial speech cases."); Jonathan Weinberg, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 729 (1982) (Court "legitimized a degree of regulation of nonmisleading [sic] commercial speech that would be an anathema in any other area of first amendment jurisprudence;" a requirement that regulation be no more extensive than necessary may be impossible to meet; case may lead to ad hoc adjudication).

[69] Post, *supra* note 52, at 42.

[70] *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) ("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.").

[71] "'[T]he touchstone of due process is protection of the individual against arbitrary action of government.'" Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)); *see* Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L.J. 69 (2020) (discussing application of substantive due process principles to abuse in the land use decision process).

[72] 492 U.S. 469 (1989).

[73] *See Fox*, 492 U.S. at 476. A state university adopted a rule, with limited exemptions, which excluded private commercial enterprises from operating on university campuses or facilities.

[74] *See id.* at 476–81. Content-based regulations challenged as a violation of free speech are subject to strict scrutiny and must be the least restrictive means for achieving a compelling state interest. *See, e.g.*, McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 191 (D. Mass. 2015) (panhandling ordinance failed test; other means could be selected).

regulatory authority" the Court had approved.[75] Later Supreme Court cases disagreed with this holding, but have had little following.[76]

Central Hudson did not explain the level of judicial review it intended. The Court has held it intended intermediate scrutiny judicial review.[77] This is a mid-level standard when compared with the three levels of judicial review commonly applied in equal protection cases.[78] A similar intermediate judicial scrutiny in equal protection cases is applied in disability[79] and

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[75] *Fox*, 492 U.S. at 477.

[76] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993) ("numerous and obvious less-burdensome alternatives" are "certainly . . . relevant" to whether a "'fit' between ends and means is reasonable"). The Court did not agree it had disapproved rejection of the less-burdensome-means test in *Fox*. A Westlaw search on December 28, 2019 found only twenty federal district court and state court cases that quoted this statement, some unreported. Chief Justice Rehnquist, dissenting, believed the Court had revived the discredited less-burdensome-means test. *See id.* at 441; Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) ("[W]e have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."). In that case, a prohibition on advertising compound prescriptions was held invalid, but the Court provided examples of alternatives. *See id.* A Westlaw search on December 21, 2019 found only fifteen federal district court and state court cases that quoted this statement, some unreported; *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995) (holding unconstitutional in part a law excluding beer labels from displaying alcohol content because of availability of alternatives "such as directly limiting the alcohol content of beers").

[77] *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of accident; "we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in" *Central Hudson*); *accord* Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp. 3d 173, 189 (D. Mass. 2016) (regulations governing for-profit and occupational schools); N. Olmsted Chamber of Com. v. City of N. Olmsted, 86 F. Supp. 2d 755, 769 (N.D. Ohio 2000) (sign ordinance; "intermediate scrutiny with bite"); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 634 (Cal. App. 2016) (billboard ordinance); Larson v. City & Cnty. of San Francisco, 123 Cal. Rptr. 3d 40, 58 (Cal. App. 2011) (antiharassment provisions of city rent control ordinance). *See Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring) (describing intermediate scrutiny judicial review test).

[78] Strict scrutiny is a more demanding judicial review that requires a compelling governmental interest to support a law. Rational basis review is the least demanding and is applied to economic and social regulation. *See* United States v. Laurent, 861 F. Supp. 2d 71, 98 (E.D.N.Y. 2011) (discussing levels of judicial review).

[79] *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (determining paternity suit to identify natural father of an illegitimate child for purposes of obtaining support must be brought before child is one year old; "[R]estrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.").

gender[80] cases and requires a substantial relationship to an important governmental interest.

Fox elaborated this requirement.[81] It held that *Central Hudson* required only a reasonable "fit" between legislative ends and means.[82] The "fit" must be in proportion to the interest served and "narrowly tailored to achieve the desired objective."[83] The Court insisted this test was "far different" from the rational relationship test and not "overly permissive."[84] It emphasized that a government's goal must be substantial, and the cost carefully calculated and justified by the state.[85] A later Supreme Court case further explained that the *Central Hudson* criteria are "significantly stricter than the rational basis test,"[86] which is applied to legislation.[87]

The standard of judicial review issue is further muddled by the Court's treatment of the third criterion in *Edenfield v. Fane*.[88] There it held this criterion cannot be satisfied by reliance on "speculation and conjecture."[89] A restriction on commercial speech can be upheld only if it is

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[80] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (determining statutes excluding the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen; "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[81] *See* 492 U.S. at 469–70.

[82] *Id.* at 470.

[83] *Id.*

[84] *Id.* at 480.

[85] *See id.* "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* Commentators have argued that *Fox* cut back on judicial review standards for reviewing laws affecting commercial speech. Todd J. Locher, *Comment:* Board of Trustees of the State University of New York v. Fox*: Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335 (1990).

[86] Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) (invalidating regulation providing that compounded drugs that are not advertised are exempted from the drug approval process).

[87] For discussion of the rational relationship test, see Tara A. Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77, 120 (2017) (explaining test and criticizing defense of, and objections to, it).

[88] 507 U.S. 761 (1993) (holding direct solicitation by CPAs to obtain new clients prohibited; regulation invalidated). *Accord* Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (holding statute excluding beer labels from displaying alcoholic content held invalid). Substantive due process does not require similar proof to satisfy its ends-means test.

[89] *Edenfield*, 507 U.S. at 770–71. The Court did not relate this test to the intermediate standard of judicial review that is required.

demonstrated "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[90] Studies had not been submitted to support the regulation the Court considered, nor was it supported by a report or by the literature.[91] Other explanations of the criterion adopted by the Court vary but are similar.[92]

A later Supreme Court case, *City of Cincinnati v. Discovery Network, Inc.*,[93] created additional confusion. It applied the *Fox* reasonable fit rule to strike down an ordinance that excluded news racks from the city that were used to distribute commercial handbills but allowed news racks used to distribute newspapers. It assumed the ordinance banned "core" commercial speech but allowed noncommercial speech.[94] Absent a basis for distinguishing commercial handbills from newspapers that was relevant to the city's interests, the Court refused to accept the "bare assertion" that the low value of commercial speech justified the ban on news racks dispensing commercial handbills.[95] The prohibited news racks were "no greater an eyesore" than the news racks permitted to stay.[96]

Discovery Network arguably heightened judicial scrutiny for commercial speech,[97] but results in the lower courts are mixed. They have

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[90] *Id.* at 771. The party seeking to uphold the restriction has the burden of proof. *See id.* at 770; *see also* FREE SPEECH LAW, *supra* note 7, § 2:6[5] at 37.

[91] *See Edenfield*, 503 U.S. at 771–74.

[92] *See* Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (holding a ban on liquor price advertising must "significantly reduce" alcoholic consumption; plurality opinion); Ibanez v. Fla. Dep't of Bus. & Prof'l Regul., Bd. of Acct., 512 U.S. 136, 143 (1994) (misleading advertising, burden "not slight," *Edenfield* cited). *But see Metromedia*, 453 U.S. at 509 (upholding billboard ban, hesitating to "disagree with the accumulated, common-sense judgments of local lawmakers"; plurality opinion). *See* Hinegardner, *supra* note 61, at 570.

[93] 507 U.S. 410 (1993).

[94] *Id.* at 424.

[95] *Id.* at 428.

[96] *Id.* at 425. The ordinance removed sixty-two news racks, but 1500-2000 remained. *See id.* at 418. The Court did not accept a neutral purpose justification for claiming the regulation was a time, place, and manner regulation. The city had not limited the number of news racks, and "there is no justification for that particular regulation other than the city's naked assertion that commercial speech has "low value." *Id.* at 429. It also held the city had not carefully calculated the costs and benefits of the law because it had not addressed its concerns about news racks by regulating their size, shape, appearance, or number. *See id.* at 417.

[97] *See* Robert T. Cahill, Jr., Cincinnati v. Discovery Network, Inc.*: Towards Heightened Scrutiny for Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225, 227 (1994) (arguing Court "hinted that truthful commercial speech may be entitled to increased

generally rejected *Discovery Network* when they upheld a sign ordinance.[98] Yet other courts have relied on it to strike down an ordinance when it was content-based or failed one of the *Central Hudson* criteria, but this case was not always a dominant factor in these cases.[99]

Central Hudson also addressed the content neutrality issue and held that laws regulating commercial speech do not have to be content neutral. It defended this conclusion in a footnote,[100] arguing that commercial speakers are well situated to evaluate their messages and that commercial speech is a "hardy breed of expression" not susceptible to being crushed

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First Amendment protection"); Andrew L. Howell, Cincinnati v. Discovery Network, Inc.*: What Scrutiny Should Be Applied to Government Regulations on Truthful Commercial Speech?*, 45 MERCER L. REV. 1089, 1095 (1994) (arguing scrutiny was tilted in the direction of strict); Edward J. McAndrew, Cincinnati v. Discovery Network, Inc.*: Elevating the Value of Commercial Speech?*, 43 CATH. U.L. REV. 1247 (1994) (arguing that protection of commercial speech was expanded); Morton J. Horwitz & Stephen L. Carter, *The Supreme Court 1992 Term*: *Leading Cases*, 107 HARV. L. REV. 224, 229 (1993) (arguing Court put teeth back into fourth part of *Central Hudson* test).

[98] *See* Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 108 (2d Cir. 2005) (upholding outdoor commercial advertising); Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 911 (9th Cir. 2009) (distinguishing offsite commercial signage concentrated and controlled at transit stops from uncontrolled, private, offsite commercial signage); RTM Media, LLC v. City of Houston, 584 F.3d 220, 226 (5th Cir. 2009) (billboards); Riel v. City of Bradford, 485 F.3d 736, 753 (3d Cir. 2007) (prohibiting signs in historic district); Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (discussing commercial versus noncommercial distinction); Contest Promotions, LLC v. City & City of San Francisco, No. 16-CV-06539-SI, 2017, WL 76896, at *6 (N.D. Cal. Jan. 9, 2017) (discussing regulation of off-premise and on-premise signs); B & B Coastal Enters., Inc. v. Demers, 276 F. Supp. 2d 155, 166 (D. Me. 2003) (discussing exemptions); Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 421 (E.D.N.Y. 2001) (discussing billboard regulation).

[99] *See* Pagan v. Fruchey, 492 F.3d 766, 778 (6th Cir. 2006) (holding that posting for sale signs on vehicles did not substantially advance regulatory objectives); Ballen v. City of Redmond, 466 F.3d 736, 743 (9th Cir. 2006) (holding exemptions from ordinance prohibiting political signs invalid); Whitton v. City of Gladstone, 54 F.3d 1400, 1404 (8th Cir. 1995) (holding restrictions on political signs content-based); Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) (mural ordinance; probable success showing it was content-based); Vono v. Lewis, 594 F. Supp. 2d 189, 195 (D.R.I. 2009) (upholding state billboard law); Burkow v. City of Los Angeles, 119 F. Supp. 2d 1076, 1081 (C.D. Cal. 2000) (holding ordinance prohibiting for sale signs on cars not narrowly tailored); N. Olmsted Chamber of Com. v. City of N. Olmsted, 86 F. Supp. 2d 755, 770 (N.D. Ohio 2000) (discussing content-based signage; *Discovery Network* provides extra bite); Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 905 (9th Cir. 2008) (applying *Discovery Network*, but upholding ordinance).

[100] *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980).

by overbroad regulation.[101] This issue has returned to the Supreme Court.[102]

V. *METROMEDIA* UPHOLDS A COMMERCIAL BILLBOARD BAN UNDER THE *CENTRAL HUDSON* CRITERIA

In *Metromedia, Inc. v. City of San Diego*,[103] a Supreme Court plurality applied the *Central Hudson* criteria to uphold a commercial billboard ban in the city's sign ordinance. The plurality reached this decision by narrowing *Central Hudson* and treating the criteria as requiring a conclusion only as a matter of law,[104] an approach *Central Hudson* may not have intended.[105] *Metromedia* preceded *Fox* and *Discovery Network*,

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[101] "First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity (citation omitted). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Id.*; *see also* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 385–86 (1979) (criticizing justifications).

[102] *See infra* Part X.

[103] 453 U.S. 490 (1981). For commentary on *Metromedia*, see Randall R. Morrison, SIGN REGULATION IN PROTECTING FREE SPEECH AND EXPRESSION 105, 110–13 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001); Theodore Y. Blumoff, *After* Metromedia*: Sign Controls and the First Amendment*, 28 ST. LOUIS U. L.J. 171 (1984); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 2006 BYU L. REV. 473 (2006); Keith B. Leffler, *The Exclusion of Billboard Advertising: An Economic Analysis of the* Metromedia *Decision*, 1 SUP. CT. ECON. REV. 113 (1982); Kevin M. Moss, Metromedia, Inc. v. City of San Diego*: Municipal Billboard Regulation and the First Amendment*, 23 URB. L. ANN. 361 (1982); Lawrence Gene Sager, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91 (1981).

[104] Narrowing arguably occurred because a plausible interpretation of *Central Hudson* is that compliance with each criterion requires proof, precluding compliance as a matter of law. *Metromedia* implicitly narrowed the case by making legal judgment determinative. One analysis of narrowing defends this approach by arguing that narrowing is permissible to arrive at a correct decision. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1875 ("*Correctness*.—Legitimate narrowing can serve the most basic judicial value of all: the value of getting it right.").

[105] *Compare* Edenfield v. Fane, 507 U.S. 756, 768 (1993) (applying the second criterion: "Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."), *with* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 908 (9th Cir. 2009) (deference shown by *Metromedia* in tension with other Supreme Court cases, but Court has confirmed *Metromedia*). *See* Kayla R. Burns, *Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth*

so it did not have the benefit of changes in the *Central Hudson* criteria that these decisions adopted.

Metromedia was decided on cross-motions for summary judgment,[106] which the trial court granted.[107] This procedure meant there was no trial and no decision on the facts. The California Supreme Court also interpreted the ordinance as a prohibition only of commercial billboards,[108] which limited the decision. There were five opinions by the United States Supreme Court, which then-Justice Rehnquist described as a Tower of Babel.[109] Justice White's opinion[110] for the plurality[111] was joined by four Justices, and all federal circuits except one have accepted the plurality opinion as controlling.[112]

Prongs of the Central Hudson *Test*, 44 LOY. L.A.L. REV. 1579, 1584 (2011) (discussing conflicting circuit decisions on state ban of alcohol advertisements in a college newspaper).

[106] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 497 (1981). The decision was based on the precise issues presented and necessarily decided. *See id.* at 499.

[107] *See* Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 409 (Cal. 1980).

[108] This term was not defined in the ordinance, and the court adopted a "narrow construction" to avoid extending the ordinance to noncommercial signs, which could create a problem of unconstitutional overbreadth. *Id.* at 410 n.2. The court adopted a structural definition based on a state statute it believed would limit the ordinance to signs that were "predominantly for commercial" use. *Id.* The ordinance applied to an "outdoor advertising display," which the court defined as "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." *Id.*

[109] *See Metromedia*, 453 U.S. at 569. Justice Rehnquist, dissenting, called attention to the importance of clear constitutional guidance: "In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.*

[110] Limitations in the White opinion may be attributed to his writing style. "The typical White opinion is terse and conclusory. When law clerks draft an opinion that explains the reasons for the decision, White often edits out the reasoning, leaving simply the conclusion." DAVID C. SAVAGE, TURNING RIGHT 93 (1993).

[111] Justices Stewart, Marshall, and Powell joined Justice White. Justice Brennan concurred in the judgment of the plurality opinion, joined by Justice Blackmun. Justice Stevens concurred in parts I–IV of the plurality opinion and dissented from parts V–VII and the judgment. Chief Justice Burger and Justice Rehnquist filed dissenting opinions; *see also infra* notes 106, 113 and accompanying text.

[112] *See* Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 106 (2d Cir. 2010) (applying *Metromedia*); RTM Media, LLC v. City of Houston, 584 F.3d 220, 223 (5th Cir. 2009) (stating *Metromedia* controls); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814, 820 (6th Cir. 2005) (applying *Metromedia*); Café Erotica of Fla., Inc. v. St. Johns Cnty., 360 F.3d 1274, 1285 (11th Cir. 2004) (applying *Metromedia*); Lavey v. City

Justice White swept away any problems that might have been presented by the *Central Hudson* criteria by approving the billboard ban as a matter of law. His approach is clear in his opening statement that billboards present special problems, as he explained 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. We deal here with the law of billboards."[113]

Justice White found "little controversy" over the first, second, and fourth criteria.[114] It was "far too late" to contend that traffic safety and aesthetics were not substantial goals,[115] a more generous view than some states adopted, and a majority of the Justices in *Metromedia* accepted this explanation.[116] He also rejected a claim that the ordinance was broader than necessary.[117] If billboards are a traffic hazard and unattractive, "then

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of Two Rivers, 171 F.3d 1110, 1114 (7th Cir. 1999) (favorably discussing *Metromedia*); Ackerley Communs. of the Nw. v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997) (rejecting the claim that later cases undermined *Metromedia*); Outdoor Graphics v. City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (favorably citing *Metromedia*); Nat'l Advert. Co. v. City & Cnty. of Denver, 912 F.2d 405, 409 (10th Cir. 1990) (applying *Metromedia*); Ackerley Commc'ns of Mass., Inc. v. City of Somerville, 878 F.2d 513, 516 (1st Cir. 1989) (applying *Metromedia*); Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172, 173 (4th Cir. 1988). *But see* Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 (N.D. Ill. 1990) (relying on dissenting and concurring opinions in *Metromedia* to reject the plurality's holding on noncommercial speech), *aff'd* on the analysis of the district court, 989 F.2d 502 (7th Cir. 1993); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52, 69 (Colo. 1981) (relying on Justice Brennan's opinion to invalidate exemptions); *see also* Rappa v. New Castle Cnty., 18 F.3d 1043 (3d Cir. 1994) (rejecting *Metromedia* and challenging the facial validity of Delaware's statutory scheme banning outdoor advertising and county ordinance excluding exterior signs). *But see* Interstate Outdoor Advert., LP v. Zoning Bd. of Twp. of Mount Laurel, 706 F.3d 527 (3d Cir. 2013) (relying on *Central Hudson* and not citing *Rappa*).

[113] *Metromedia*, 453 U.S. at 501.

[114] *Id.* at 507.

[115] *Id.* at 508–09. The Court cited several cases, including *Berman v. Parker*, 348 U.S. 26, 33 (1954) (recognizing the validity of aesthetic justifications). In a later sign case, a majority of the Court held: "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (quoting *Berman v. Parker*). Justice Brennan, dissenting, did not believe the traffic safety justification was supported: "I would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* that banning billboards directly furthers traffic safety." *Metromedia*, 453 U.S. at 528.

[116] Justice Stevens accepted this justification. *See Metromedia*, 453 U.S. at 552. Chief Justice Burger accepted this and the traffic safety justification. *See id.* at 559–60. Justice Rehnquist believed the "aesthetic justification alone" was sufficient. *Id.* at 570.

[117] *See id.* at 508.

obviously the most direct and perhaps the only effective approach to solving the problems they create is to exclude them."[118]

The third "directly advance" criterion presented "the more serious question,"[119] but Justice White had little difficulty finding compliance as a matter of law.[120] For traffic safety, he held "[w]e likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."[121] He reached a "similar result" with respect to the aesthetic justification:[122] "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"[123]

Because two of the dissenters would have approved the entire ordinance, they are usually counted as approving the commercial billboard ban. This makes a majority of seven.[124] The San Diego ordinance was not a total ban, however, because it was limited to commercial billboards, and the plurality did not consider a total ban.[125]

Justice White then considered a typical provision that allowed on-premise, but not off-premise, signs to display commercial speech.[126] He held this distinction did not make the billboard ban underinclusive by

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[118] *Metromedia*, 453 U.S. at 508. Justice Stevens stated there was no "reason to believe that the overall communications market in San Diego is inadequate." *Id.* at 552–53. This statement seems to refer to one of the time, place, and manner rules. *See infra* Part VII.

[119] *Metromedia*, 453 U.S. at 508.

[120] *See id.* at 508–11. The plurality noted the California Supreme Court held as a matter of law that an ordinance that eliminates billboards "reasonably relates to traffic safety." *Id.* at 508. Chief Justice Burger agreed. *See id.* at 560–61.

[121] *Id.* at 509. The plurality held that a different view would trespass "on one of the most intensely local and specialized of all municipal problems," which sounds like rational basis review. *Id.* It added, "[t]here is nothing here to suggest that these judgments are unreasonable." *Id.* It cited a number of cases in a footnote.

[122] *Id.* at 510. The plurality held that aesthetic purposes had to be carefully scrutinized to see if they had an improper purpose, but there was no claim that the city had an ulterior motive in the suppression of speech. The Court held later in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986), that proof of motive is not essential to a free speech violation.

[123] *Metromedia*, 453 U.S. at 510.

[124] *See* Action Outdoor Advert. J.V., LLC v. Town of Shalimar, 377 F. Supp. 2d 1178, 1189 (N.D. Fla. 2005). The plurality did not consider the constitutionality of a total ban.

[125] *See Metromedia*, 453 U.S. at 515 n.20.

[126] *See id.* at 510–11.

undermining the city's interest in protecting its aesthetic character,[127] and rejected an argument that allowing on-premise signs was unjustified, denigrated the city's interest in traffic safety and beauty, and defeated its own case.[128] He concluded, as a matter of law, that billboards, with their "periodically changing content," presented a more acute problem than on-premise signs.[129] The city, he held, could "reasonably conclude" that a business has a stronger interest in identifying and advertising its business than in advertising businesses elsewhere, and the ordinance reflected the city's decision that its interest in on-premise advertising was stronger than its interest in traffic safety and aesthetics.[130]

A comparable tolerance is clear in Justice White's treatment of the fourth *Central Hudson* criterion. He disposed of it quickly, holding that if the city has a "sufficient basis" for believing that billboards are traffic hazards and unattractive, "then obviously the most direct and perhaps the only effective approach" is to exclude them.[131] This holding merges the fourth criterion with the second.

VI. *CENTRAL HUDSON* IN THE LOWER COURTS IN BILLBOARD CASES

This part discusses lower court cases, decided before the Court's 2015 decision on content-based sign regulation,[132] that applied the *Central Hudson* criteria to billboard bans. They usually upheld billboard bans by applying the weakened version of the criteria adopted in *Metromedia*, but

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[127] *See id.* Justice Stevens' dissent explicitly joined the plurality on this issue. *See id.* at 541. It can be assumed that Chief Justice Burger and Justice Rehnquist agreed because they would have held the ordinance constitutional; *see also* RTM Media, LLC v. City of Houston, 584 F.3d 220, 223–27 (5th Cir. 2009) (holding that a city can prohibit commercial billboards while allowing noncommercial signs).

[128] *See id.* at 511–12. The Court did not consider whether this distinction was content-based. *See infra* Part X.

[129] *Id.* The plurality apparently assumed that signs on billboards change frequently, which is correct, and that on-premise signs never change, which is incorrect. Businesses change, and signs change. In addition, on-premise signs can have changing digital copy.

[130] *Id.* at 512. This holding sounds more like rational basis than intermediate scrutiny judicial review. The plurality had held that "the [exclusion] of offsite advertising is directly related to the stated objectives of traffic safety and esthetics," and it requires deference to the city to hold that allowing on-premise signs does not undermine that objective. *Id.* at 511.

[131] *Id.* at 508.

[132] *See* Reed v. Town of Gilbert, 229 U.S. 155 (2015), discussed *infra* Part X.

some considered new requirements added by later Supreme Court cases, such as *Edenfield*.

A. The Second *Central Hudson* Criterion

The second *Central Hudson* criterion requires that "the asserted governmental interest is substantial." In *Metromedia*, the plurality held as a matter of law that aesthetics and traffic safety are substantial governmental interests that support a billboard ban.[133] Though they held that the burden of proof lies with municipalities,[134] a number of courts followed the plurality's

[133] *See id.* at 508–12.

[134] *See, e.g.*, Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996); Harp Advert. of Ill., Inc. v. Vill. of Chi. Ridge, No. 90 C 867, 1992 WL 386481, at *10 (N.D. Ill. Mar. 13, 1992).

holding to uphold total[135] or limited[136] billboard bans, or held that aesthetics alone is enough to justify a ban.[137]

Some courts went further and considered whether an ordinance had a statement of purpose, though Supreme Court decisions had not adopted this requirement. All ordinances should have a statement of purpose (examples are available in model sign ordinances)[138] and the statement

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[135] *See* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 904–08 (9th Cir. 2009) (banning off-premise advertising with transit stops exempted; "It is well-established that traffic safety and aesthetics constitute substantial government interests."); Nat'l Advert. Co. v. City & Cnty. of Denver, 912 F.2d 405, 409 (10th Cir. 1990) (banning off-premise commercial sign within 660 feet of freeways; "The governmental interests asserted, preserving aesthetic values and traffic safety, are clearly 'substantial' within the meaning of the second part."); Ga. Outdoor Advert., Inc. v. City of Waynesville, 833 F.2d 43, 46 (4th Cir. 1987) (relying on *Metromedia*); Action Outdoor Advert. J.V., LLC v. Town of Shalimar, 377 F. Supp. 2d 1178, 1190 (N.D. Fla. 2005) ("following *Metromedia* courts in the Eleventh Circuit have uniformly found the promotion of safety or aesthetics to constitute substantial government interests"); Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D.N.Y. 2005) (citing *Metromedia*); Outdoor Sys., Inc. v. City of Lenexa, 67 F. Supp. 2d 1231, 1239 (D. Kan. 1999) ("In the case of billboards, both the Supreme Court and the Tenth Circuit have accepted legislative judgment that [excluding] billboards promotes traffic safety and the aesthetics of the surrounding area"; recent Supreme Court cases do not cast doubt on this view); Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 727 (N.D. Ind. 1991) (citing other Supreme Court cases).

[136] *See* Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 414 (E.D.N.Y. 2001) (advertising signs allowed, subject to regulation of size and other qualities, in some commercial districts and all manufacturing districts if not within two hundred feet of an arterial highway, public park, or at a distance in linear feet equal to or greater than their size in square feet; court recognized "well-established, undisputed traffic safety and aesthetic concerns that the Supreme Court found sufficient in *Metromedia*"); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447–48 (N.D. Ill. 1990) (recognizing size restriction on billboards; "[I]t is eminently reasonable for the City to determine that small signs do not pose the same traffic safety risks or aesthetic concerns as do large billboards."), *aff'd* on the analysis adopted in the district court, 989 F.2d 502 (7th Cir. 1993) (Table); City & Cnty. of San Francisco v. Eller Outdoor Advert., 237 Cal. Rptr. 815, 824–25 (Cal. Ct. App. 1987) (upholding exclusion of all offsite advertising in special sign district; "San Francisco's indisputable interests in reducing traffic hazards and beautifying a vital area of the City clearly justify a content-neutral ban on offsite signs and billboards.").

[137] Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172, 174 (4th Cir. 1988) (holding evidence regarding traffic safety far from conclusive, but "aesthetics alone" justifies regulation in commercial and industrial areas); *Ga. Outdoor Advert., Inc.*, 833 F.2d at 46 (citing *Taxpayers for Vincent*).

[138] *See, e.g.*, Street Graphics Model Ordinance § 1.01, *in* STREET GRAPHICS, *supra* note 9, at 70. (1) To promote the free flow of traffic and protect pedestrians and motorists from injury and property damage caused by, or which may be fully or partially attributable to cluttered, distracting, or illegible signage. (2) To promote the use of signs which are

should state it is the intent of the ordinance to authorize signs that are "able to preserve the right of free speech and expression."[139] When they considered the issue, courts either upheld a billboard ban by relying on a statement of purpose,[140] or went further and held a statement of purpose on aesthetics and traffic safety is necessary.[141] Careful drafting should always include a statement of purpose.

Studies are a related issue. In *Edenfield,* the Court required studies to show compliance with the third criterion, but has not considered this issue under the second criterion. Nevertheless, some lower courts held they could not assume substantial governmental interests under the second criterion unless positive evidence supported those interests.[142] They were not willing to take judicial notice and rejected after-the-fact or extrinsic

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aesthetically pleasing, of appropriate scale, and integrated with surrounding buildings and landscape, in order to meet the community's expressed desire for quality development (alternate statement on traffic safety, aesthetics, and design). *See* Carlson's Chrysler v. City of Concord, 938 A.2d 69, 71 (N.H. 2007).

[139] Street Graphics Model Ordinance § 1.01(6), *in* STREET GRAPHICS, *supra* note 9, at 70 (discussing alternate statement on traffic safety, aesthetics, and design).

[140] *See* Southlake Prop. Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1116 (11th Cir. 1997) (relying on "Statement of Findings" to uphold ordinance; total ban on commercial signs); Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) ("Code clearly states its purpose.").

[141] *See* Tinsley Media, LLC v. Pickens Cnty., 203 F. App'x 268, 273–74 (11th Cir. 2006); Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 555 (2d Cir. 1990); Dills v. City of Marietta, 674 F.2d 1377, 1381 (11th Cir. 1982), (discussing portable sign exclusion); Adams Outdoor Advert. of Atlanta, Inc. v. Fulton Cnty., 738 F. Supp. 1431, 1433 (N.D. Ga. 1990); Int'l Outdoor, Inc. v. City of Romulus, No. 07-15125, 2008 WL 4792645, at *7 (E.D. Mich. Oct. 29, 2008) (holding that consensus of decisions is that court cannot possibly conduct the *Central Hudson* examination if it has before it no statement or evidence of a governmental purpose).

[142] *See Desert Outdoor Advert., Inc*., 103 F.3d at 819 (holding city provided no evidence); Lockridge v. City of Oldsmar, 475 F. Supp. 2d 1240, 1255 (M.D. Fla. 2007); *Adams Outdoor Advert. of Atlanta, Inc.*, 738 F. Supp. at 1433 (holding interests legitimate but court cannot assume, in the absence of positive evidence, that county actually sought to advance them by restricting constitutionally protected speech); Bell v. Stafford Twp., 541 A.2d 692, 699–700 (N.J. 1988) (holding total municipal ban not limited to commercial speech); *see also* Deperno v. Town of Verona, No. 6:10-CV-450 NAM/GHL, 2011 WL 4499293, at *9 (N.D.N.Y. Sept. 27, 2011) (holding review required to decide whether sign may cause hazardous or unsafe conditions and to ensure quality of life and character of area; no indication that town officials considered these interests).

justifications, such as statements in other ordinances or statutes.[143] It is not clear what kind of studies are required. Affidavits from a mayor, planning commission, and others were accepted in one case.[144]

B. The Third *Central Hudson* Criterion[145]

The third *Central Hudson* criterion requires that a law must "directly advance" the governmental interests that are relied on to support the ordinance. Most courts have followed *Metromedia*'s holding[146] that "common-sense" legislative judgment about billboard problems is enough to satisfy this criterion.[147] *Edenfield*'s requirement that studies are

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[143] *See Tinsley Media*, 203 F. App'x at 273–74 (holding that court will not examine record); *Nat'l Advert. Co*, 900 F.2d at 555 (rejecting preambles and statements elsewhere in ordinances; will not take judicial notice); *Adams Outdoor Advert. of Atlanta, Inc.*, 738 F. Supp. at 1433 (holding after the fact invocations not allowed; will not take judicial notice); Int'l Outdoor, Inc. v. City of Romulus, No. 07-15125, 2008 WL 4792645, at *8 (E.D. Mich. Oct. 29, 2008) (rejecting reference to other statutes and broad statements of purpose in zoning ordinance, and statements in related ordinances in other jurisdictions).

[144] *See* Harp Advert. of Ill., Inc. v. Vill. of Chicago Ridge, No. 90-C-867, 1992 WL 386481, at *9 (N.D. Ill. Mar. 13, 1992) (holding affidavits and letters from mayor, planning commission and others supported village justifications); *see also* Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 308 (E.D.N.Y. 2005) (rejecting studies that attempted to discredit governmental justifications and holding that aesthetic and traffic safety goals unequivocally satisfy second criterion, citing *Metromedia*).

[145] There is a division in the lower courts on what the third criterion means. *See* Hinegardner, *supra* note 61, at 548–54 (discussing splits in the circuits).

[146] *See infra* Part VI.C.

[147] Interstate Outdoor Advert., LP v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 530 (3d Cir. 2013) ("Moreover, given the language of *Metromedia*, we are not willing to conclude that there is a genuine issue of material fact as to whether the ordinance sufficiently advances the substantial interest of traffic safety."); Granite State Outdoor Advert., Inc. v. Cobb Cnty., 193 F. App'x 900, 904–05 (11th Cir. 2006); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814, 823 (6th Cir. 2005) ("[B]illboard regulations, whatever other strengths and weaknesses they may have, advance a police power interest in curbing community blight and in promoting traffic safety."); Ackerley Commc'ns of Nw. Inc. v. Krochalis, 108 F.3d 1095, 1097–99 (9th Cir. 1997); Bill Salter Advert., Inc. v. City of Brewton, 486 F. Supp. 2d 1314 (S.D. Ala. 2007) ("no serious question"); Citizens for Free Speech, LLC v. City of Alameda, 114 F. Supp. 3d 952, 969–70 (N.D. Cal. 2015); Action Outdoor Advert. J.V., LLC v. Town of Shalimar, 377 F. Supp. 2d 1178, 1181 (N.D. Fla. 2005); *Harp Advert. of Ill., Inc.*, 1992 WL 386481, at *10–13; Outdoor Systems, Inc. v. City of Lenexa, 67 F. Supp.2d 1231, 1238–39 (D. Kan. 1999) (following *Metromedia* and accepting legislative findings that ordinance promoted governmental interests in traffic safety and aesthetics; expert opinions or other evidence not needed where common sense will logically suffice); Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) (discussing digital billboards); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A (M),

necessary received attention, but a leading Ninth Circuit case held that a factual trial and "detailed proof" are not necessary.[148] Other courts agreed that detailed studies and reports are not required.[149]

Some courts rejected a billboard ban when studies were not provided.[150] What studies are required is not clear. The Supreme Court, in

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2008 WL 781865, at *24–25 (W.D.N.Y. Feb. 25, 2008); *City of Nichols Media Grp., LLC*, 365 F. Supp. 2d at 309; Sharona Props., LLC v. Orange Vill., 92 F. Supp. 3d 672, 683 (N.D. Ohio 2015); Suburban Lodges of Am., Inc. v. Columbus Graphics Comm., 761 N.E.2d 1060, 1066 (Ohio App. 2000) (denying request for a variance from zoning ordinances that limited text for on-premise, freeway-oriented signs to business' name, address, and product or service); *see also* Riel v. City of Bradford, 485 F.3d 736, 753 (3d Cir. 2007) (upholding prohibition of commercial signs in historic district; they "tend to be erected for longer periods of time and tend to be larger and more elaborate in design"); Long Island Bd. of Realtors, Inc. v. Vill. of Massapequa Park, 277 F.3d 622, 627 (2d Cir. 2002) (discussing residential signs); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (7th Cir. 1993) ("This decision is directly related to safety and aesthetic goals; it is eminently reasonable for the City to determine that small signs do not pose the same traffic safety risks or aesthetic concerns as do large billboards.).

[148] *Ackerley Commc'ns of Nw. Inc*., 108 F.3d at 1097–99 (rejecting arguments that *Metromedia* is distinguishable because it came up on stipulated facts, and that later Supreme Court cases qualified it); *see also* United States v. Edge Broad. Co., 509 U.S. 418, 427 (1993) (lacking the ability to answer the directly advanced inquiry "whether the governmental interest is directly advanced as applied to a single person or entity," must consider "the matter of the regulation's general application to others"); *accord* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 904 (9th Cir. 2009) ("[W]e must look at whether the City's ban advances its interest in its general application, not specifically with respect to Metro Lights;" sign ordinance); *Suburban Lodges of Am., Inc*., 761 N.E.2d at 1066.

[149] *See* Signs for Jesus v. Town of Pembroke , 977 F.3d 93, 106 (1st Cir. 2020) (well established that aesthetic concerns are significant governmental interests); Luce v. Town of Campbell, 872 F.3d 512, 515–17 (7th Cir. 2017) (holding record evidence is not necessary to support a time, place, and manner restriction); Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 35 (1st Cir. 2008) (following *Ackerley*); Corona v. AMG Outdoor Advert., Inc., No. E068313, 2019 WL 643474, at *10 (Cal. Ct. App. Feb. 15, 2019) ("City did not have the burden of adducing traffic safety studies or similar evidence."); View Outdoor Advert., LLC v. Town of Schererville Bd. of Zoning Appeals, 86 F. Supp. 3d 891, 895 (N.D. Ind. 2015) (following *Ackerley*); Mont. Media, Inc. v. Flathead Cnty., 63 P.3d 1129, 1127 (Mont. 2003) (upholding size and location restrictions on billboards; followed *Metromedia*); Carlson's Chrysler v. City of Concord, 938 A.2d 69, 74–75 (N.H. 2007) (following *Metromedia*; city need not provide detailed proof); *Adirondack Advert., LLC*, 2013 WL 5463681, at *4 (following *Metromedia*); Clear Channel Outdoor, Inc. v. City of New York, 608 F. Supp.2d 477, 503 (S.D.N.Y.2009); Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 417 (E.D.N.Y. 2001).

[150] *See* L.D. Mgmt. Co. v. Thomas, No. 3:18-CV-722-JRW, 2020 WL 1978387, at *3 (W.D. Ky. Apr. 24, 2020) (concluding that no evidence on aesthetic interference or traffic safety was provided); Interstate Outdoor Advert. v. Zoning Bd. of Cherry Hill, 672 F. Supp.

one sign case, relied on studies and anecdotes and did not require empirical evidence,[151] and it has held that municipalities can rely on a variety of studies and "simple common sense."[152] Lower courts have relied on studies, reports, transcripts, depositions, or testimony to support a billboard ban.[153] Some courts required a statement of purpose.[154]

Underinclusivity is another problem.[155] Lower courts have followed the *Metromedia* holding that the billboard ban was not underinclusive

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2d 675, 678–79 (D.N.J. 2009) ("*Metromedia* deference is warranted only when the municipality provides the court with a rationalization supported by relevant evidence . . . ."); Bell v. Twp. of Stafford, 541 A.2d 692 (1988) ("[T]he record is almost completely devoid of any evidence concerning what interests . . . are served by the ordinance and the extent to which the ordinance has advanced those interests.").

[151] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (applying *Edenfield*, Court held studies supported restriction on smokeless tobacco and cigar advertising within 1000 feet of school or playground; studies and anecdotes could be enough, empirical data not required).

[152] Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) ("surfeit of information" not required; can rely on studies from different locales, history, consensus and "simple common sense").

[153] *See* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *15 (W.D. Wis. Apr. 7, 2020) (relying on expert testimony to support a billboard ban); Citizens for Free Speech, LLC v. City of Alameda, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (relying on the evidence presented, the ordinance services the county's purpose for the billboard ban); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A(M), 2008 WL 781865, at *25 (W.D.N.Y. Feb. 25, 2008) (relying on evidence of a public hearing, position papers, and studies of various groups); *Infinity Outdoor, Inc.*, 165 F. Supp. 2d at 417 (relying on evidence of a city planning commission report); Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 725 (N.D. Ind. 1991) (relying on evidence of transcripts of city council meetings, depositions, and testimony at trial; difficult to show how worse off aesthetic aspects of town would be if billboards were allowed because total ban existed for at least fifteen years, but "common sense" that billboard exclusion would mitigate or at least not exacerbate sign clutter and promote aesthetics). *Compare* Harnish v. Manatee Cnty, 783 F.2d 1535, 1538 (11th Cir. 1986) (upholding prohibition of portable signs enacted following public hearings and workshops), *with* GEFT Outdoor LLC v. Consol. City of Indianapolis & Cnty. of Marion, 187 F. Supp. 3d 1002, 1019 (S.D. Ind. 2016) ("[O]ff-premise signs (billboards) are subject to greater regulation because they are generally larger . . . [and] pose a greater risk to the [c]ity's interest in safety and aesthetics.").

[154] *See* Paramount Contractors & Devs., Inc. v. City of Los Angeles, 516 F. App'x 614, 617 (9th Cir. 2013) (supergraphics); Prime Media, Inc. v. City of Brentwood, 398 F.3d 814, 823 (6th Cir. 2005); Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 n.2 (9th Cir. 1996) (providing that a clear statement of purpose can be enough evidence to support a billboard ban).

[155] *See* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 904 (9th Cir. 2009) ("Another consideration in the direct advancement inquiry is 'underinclusivity' . . . ."). *See*

because the ordinance prohibited billboards but allowed on-premise signs.[156] This problem also occurs when a sign ordinance includes exemptions. Supreme Court decisions hold that exemptions from a billboard prohibition, such as allowing billboards in some areas but not others, or exempting similar signs, such as public bus stop signs, can make a law underinclusive by destroying its credibility.[157] A Ninth Circuit case explained that a sign ordinance is underinclusive if an exemption ensures that a regulation will fail to achieve its objective, and that "exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance."[158] This problem has not been a serious impediment in sign ordinances; the cases have held that exemptions in sign ordinances do not create underinclusivity.[159] However, underinclusivity can occur when a municipality approves billboards or other types of signs for

City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 807 n.25 (1984) (rejecting argument by Justice Brennan that city must prove that it undertook a comprehensive and coordinated effort to remove other elements of visual clutter).

[156] *See* Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 816 (9th Cir. 2003) ("The Supreme Court, the Ninth Circuit, and many other courts have held that the on-site/off-site distinction is not an impermissible content-based regulation."); *Infinity Outdoor, Inc.*, 165 F. Supp. 2d at 416; *Taxpayers for Vincent*, 466 U.S. at 811 ("[V]alidity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property.").

[157] *See, e.g.*, Ladue v. Gilleo, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place.").

[158] *Metro Lights, LLC*, 551 F.3d at 906; *see also* World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 685 (9th Cir. 2010) ("[E]xceptions . . . must be considered holistically, not in isolation.").

[159] *See World Wide Rush, LLC*, 606 F.3d at 685 (concluding the exceptions removed blighted and dangerous conditions downtown and improved traffic flow on the boulevard); Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 106–07 (2d Cir. 2010) (providing an exemption for government property permitting coordinated advertising on street furniture); *Metro Lights, LLC*, 551 F.3d at 911 (holding exemption for private advertising at public transit stops "arrests the uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter . . . ."); Paradigm Media Grp. v. City of Irving, 65 F. App'x 509 (5th Cir. 2003) (holding that a billboard ban that provides an exception for a sports facility is constitutional); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993) (providing some exemptions for off-premise signs under the billboard ban); *see also* Cal. Outdoor Equity Partners, LLC v. City of Los Angeles, 145 F. Supp. 3d 921, 929–30 (C.D. Cal. 2015) (dismissing First Amendment claim based on many exemptions to billboard ordinance).

one company while continuing to exclude billboards for other companies, a strategy that might be adopted to avoid litigation.[160]

C. The Fourth *Central Hudson* Criterion

The fourth *Central Hudson* criterion requires that the regulation is "not more extensive than is necessary" to serve the governmental interest asserted, which has not been a problem. Several cases adopted the *Metromedia* holding that it is satisfied as a matter of law because the most direct and effective approach to solving the billboard problem is to prohibit them. [161] A few cases did not rely on *Metromedia*, but upheld a municipality's rejection of alternatives that would have been narrower than a billboard ban.[162] Courts also rejected narrow tailoring objections when a municipality adopted a partial ban by limiting billboards to certain areas, adopted different requirements for different types of billboards, such as digital signs, or allowed billboards on public property but prohibited them elsewhere.[163] The *Fox* decision has also been influential. Courts have

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[160] *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 194 (1999) (holding that the selective prohibition against broadcast advertising for private casinos and not Indian tribal casinos is a violation of the First Amendment; "[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."). *But see* View Outdoor Advert., LLC v. Town of Schererville Bd. of Zoning Appeals, 86 F. Supp. 3d 891, 896 (N.D. Ind. 2015) (granting of past variance to competitor was not relevant on appeal).

[161] *See* Interstate Outdoor Advert., LP v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 534 (3d Cir. 2013); Granite State Outdoor Advert., Inc. v. Cobb Cnty, 193 F. App'x 900, 904–05 (11th Cir. 2006); Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988) ("The City may prohibit such billboards entirely in the interest of traffic safety and aesthetics."); *View Outdoor Advert., LLC*, 86 F. Supp. 3d at 895–96 (upholding the complete billboard ban; "the mere presence of plausible alternatives doesn't render an ordinance unconstitutional"); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A(M), 2008 WL 781865, at *12 (W.D.N.Y. Feb. 25, 2008); Bill Salter Advert., Inc. v. City of Brewton, 486 F. Supp. 2d 1314, 1333 (S.D. Ala. 2007); Hawk Media, Inc. v. City of Pompano Beach, No. 04-60403-CIV, 2006 WL 8432129, at *10 (S.D. Fla. Sept. 27, 2006).

[162] *See* Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 105 (2d Cir. 2010) (upholding ban on billboards near arterial highways in manufacturing and commercial districts; city rejected alternative size and spacing regulations; not court's role to second guess city's urban planning decisions); Riel v. City of Bradford, 485 F.3d 736, 753 (3d Cir. 2007) (allowing temporary and on-premise commercial signs without a permit; billboards burdened have least amount of First Amendment protection).

[163] *See* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 912 (9th Cir. 2009) (holding ordinance guarded against over-regulation rather than under-regulation; if a complete ban is narrowly tailored, then a partial ban is, too); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993) (allowing exemption for on-premise and some

followed it to hold a municipality does not have to select the least restrictive alternative to satisfy the fourth criterion.[164]

VII. TIME, PLACE, AND MANNER RULES[165]

The time, place, and manner rules are a competing judicial test for laws, such as sign ordinances, that affect free speech. They substantially preceded *Central Hudson*, are not limited to commercial speech, and originated in licensing cases discussing licensing parades.[166] *Ward v. Rock Against Racism*,[167] which upheld noise restrictions on public concerts, summarized the rules:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] the restrictions "are justified without reference to the

off-premise signs); Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 (LEK/CRH), 2013 WL 5463681, at *6 (N.D.N.Y. Sept. 30, 2013) (digital signs smaller than nondigital signs); *Lamar Advert. of Penn, LLC*, 2008 WL 781865, at *12 (onsite advertising and some other specially exempted signs allowed); Harp Advert. of Ill., Inc. v. Vill. of Chicago Ridge, No. 90-C-867, 1992 WL 386481, at *10 (N.D. Ill. Mar. 13, 1992) (some types of signs exempted); Mont. Media, Inc. v. Flathead Cnty., 63 P.3d 1129, 1133 (Mont. 2003) (off-premise signs permitted in commercial and industrial zones subject to size and setback restrictions and permit may be required). *Cf.* Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 724 (N.D. Ind. 1991) (narrow tailoring not found; members of plan commission and city council admitted that regulations for on-premise signs would be enough for off-premise billboards; ordinance partly addressed safety concerns; evidence suggested off-premise signs could be allowed on some roadways without jeopardizing city's legitimate concerns about safety and aesthetics).

[164] *See Adirondack Advert., LLC*, 2013 WL 5463681, at *6; Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 309–10 (E.D.N.Y. 2005) ("So long as there is a reasonable fit between the means chosen and the ends identified, the regulation meets the fourth prong of this test."); Infinity Outdoor, Inc. v. City of New York, 165 F. Supp. 2d 403, 419–20 (E.D.N.Y. 2001) (holding existence of numerous and obvious less restrictive means is relevant to reasonableness of fit between means and ends, but city is not required to choose least restrictive means); *see also* Action Outdoor Advert. J.V., LLC v. Town of Shalimar, 377 F. Supp. 2d 1178, 1192 (N.D. Fla. 2005) (no evidence of less restrictive means).

[165] See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1259–71 (1995), for criticism of these rules.

[166] *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (licensing upheld). For discussion of this history, see Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 636–45 (1991).

[167] 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 293 (1984)).

> content of the regulated speech, [2] that they are narrowly tailored[168] to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information."[169]

These rules are similar but add significantly to the *Central Hudson* criteria. The "ample alternative channels" rule adds a new concern. It is concerned about the speaker, while the *Central Hudson* rule is concerned about the regulator. *Ward* offered some explanation. Narrow tailoring is satisfied if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[170] There is no requirement to consider a less-speech-restrictive alternative.[171] Unlike *Central Hudson*, and without explanation, the Court required content neutrality.[172]

Differences between the *Central Hudson* criteria and the time, place, and manner rules suggest they should require different results,[173] but the Court holds they are "substantially similar."[174] Differences remain, and the

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[168] *Central Hudson* did not explicitly require narrow tailoring.

[169] *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

[170] *Id.* at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[171] *See id.* at 800. The Court cautioned that the "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. It added that "'the validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Id.* at 800 (quoting *Albertini*, 472 U.S. at 689 (1985)).

[172] In explaining the content neutrality requirement, the Court held that "[t]he government's purpose is the controlling consideration." *See id.* at 751. *Cf.* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (abandoning that rule). For discussion of *Reed*, see *infra* Part X.

[173] For an early article explaining these differences, see Elisabeth Alden Langworthy, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127 (1983).

[174] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (holding tests substantially similar (citing *Fox*, 492 U.S. at 478)); United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993) ("[T]he validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context . . . ."); S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (holding tests substantially similar); E & J Equities, LLC v. Bd. of Adjustment of Franklin, 146 A.3d 623, 641 (N.J. 2016) (discussing both tests and deciding that time, place, and manner rules should apply).

Court has not explained when either set of rules should apply or whether they should be used altogether. The Court has applied both sets of rules at the same time without indicating whether it is necessary to apply both.[175]

In several cases where an ordinance prohibited billboards or other signs, the Court has applied the time, place, and manner rules with mixed results. *Metromedia*[176] upheld a commercial billboard ban under the *Central Hudson* criteria, but decided it could not uphold it under the time, place, and manner rules.[177] The ordinance did not ban billboard advertising as an unacceptable "manner" of communicating information or ideas, but permitted various kinds of signs, specifically signs that were banned everywhere and at all times.[178] It is not clear why a billboard ban was constitutional under *Central Hudson* but not under the time, place, and manner rules. The Court then held it could not be assumed that "alternative channels" were available, for the parties stipulated just the opposite: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[179]

A few years after *Metromedia*, the Court[180] upheld a ban on posting political posters on public property in a majority opinion.[181] This was not "a uniquely valuable or important mode of communication,"[182] and the visual assault of an accumulation of signs was "a significant substantive evil within the City's power to prohibit."[183] Adequate alternative means of expression were available.[184] Solicitude for the relative cost of available alternatives "has practical boundaries."[185]

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[175] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993) (invalidating city ordinance prohibiting newsracks with commercial handbills).

[176] 453 U.S. 490, 515–16 (1981).

[177] *See id.* at 516.

[178] *Id.*

[179] *Id.* (citing the parties' Joint Stipulation of Facts).

[180] *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 830 (1984).

[181] *See id.* There is some confusion in the opinion. It is not clear why Justice Stevens relied on the time, place, and manner rule. He also relied on a set of rules from *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which are similar to the *Central Hudson* rules. *See id.* at 804–05. He cited *Central Hudson* but did not discuss the criteria it adopted. *See id.*

[182] *Id.* at 813.

[183] *Id.* at 807.

[184] *See id.* at 815.

[185] *Id.* at 812 n.30.

Despite this warning, the Court delivered mixed results in other sign cases. It struck down as overbroad an ordinance that prohibited a political sign on the lawn of a home but allowed other types of signs in and outside residential areas.[186] It rejected an argument that residents could sufficiently convey messages by other means, such as hand-held signs, speeches, and banners.[187] Residential signs were unusually cheap, convenient, and distinct.[188] It is difficult to see why alternate modes of expression were adequate in the sign posting case but not in the residential sign case, unless the display of signs on residential property is more protected under free speech law than advertising on public property.

Time, place, and manner rules have not been a problem despite the divided Supreme Court decisions. Lower court decisions upheld more typical sign regulations,[189] and upheld billboard bans by finding alternate

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[186] *See* Ladue v. Gilleo, 512 U.S. 43, 54 (1994). See Stephanie L. Bunting, Note, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in* Ladue v. Gilleo, 20 HARV. ENVTL. L. REV. 473 (1996), for discussion of *Ladue*. For discussion by the lawyers, see Jordan B. Cherrick, *Do Communities Have the Right to Protect Homeowners from Sign Pollution?: The Supreme Court Says No in* Ladue v. Gilleo, 14 ST. LOUIS U. PUB. L. REV. 399 (1995) (attorney for city); Gerald P. Greiman, *Ladue v. Gilleo: Free Speech for Signs, A Good Sign for Free Speech*, 14 ST. LOUIS U. PUB. L. REV. 439 (1995) (attorney for plaintiff).

[187] *See Ladue*, 512 U.S. at 56.

[188] *See id.* at 57. *Compare* Pritchard v. Town of New Hartford, No. 6:14-CV-1477, 2016 WL 4523986 (N.D.N.Y. Aug. 22, 2016), *judgment entered*, 2016 WL 4523908 (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), *with* Berg v. Vill. of Scarsdale, 2018 WL 740997 at *2 (S.D.N.Y. Feb. 6, 2018) (applying *Ladue* to invalidate ordinance prohibiting political signs on residential property). A similar case struck down an ordinance prohibiting real estate "For Sale" and "Sold" signs to prevent what was perceived as white homeowner flight from a racially integrated community. *See* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977). Ample alternative channels of communication were not open because "newspaper advertising and listing with real estate agents involve more cost and less autonomy than 'For Sale' signs [and] are less likely to reach persons not deliberately seeking sales information." *Id.* at 93 (citations omitted). These alternatives were far from satisfactory. *See id.*

[189] *See* 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; left open ample alternative channels of communication); Vosse v. City of New York, 666 Fed. App'x. 11, 13 (2d Cir. 2016) (upholding ordinance banning illuminated signs more than forty feet above the street curb but allowing non-illuminated, noncommercial signs less than twelve square feet in surface area; narrowly tailored to serve significant interest); Lone Star Sec. & Video Inc. v. City of Los Angeles, 827 F.3d 1192, 1197 (9th Cir. 2016) (upholding motorized billboard ordinances; narrowly tailored, ample alternatives). *But see* E & J Equities, LLC v. Bd. of

channels of communication available.[190] They also upheld aesthetic and traffic safety justifications.[191]

VIII. DIGITAL BILLBOARDS

New effects from billboards emerged with the introduction of digital signage.[192] They create more disagreeable aesthetic effects than static billboards: they are brighter and change frequently, and thus create more traffic safety risks.[193]

Adjustment of Franklin, 146 A.3d 623, 644 (N.J. 2016) (invalidating prohibition on digital signs).

[190] *See* Interstate Outdoor Advert., LP v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 535 (3d Cir. 2013) (holding the advertiser need not target driver audience on interstate highway; "Potential alternative channels of communication include on-premise signs, internet advertising, direct mail, radio, newspapers, television, advertising circulars, advertising flyers, commercial vehicle sign advertising, and public transportation advertising"; *Central Hudson* referenced); Outdoor Sys., Inc. v. City of Mesa 997 F.2d 604, 612 (9th Cir. 1993) ("Not only are alternative channels for communication unimpaired, but the channel at issue here—outdoor signs—remains available, albeit in a regulated form"; no factual basis to indicate alternative means of communication not available); *see also* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 106–08 (1st Cir. 2020) (upholding partial ban on digital signs, alternative channels available). Some cases struck down billboard bans. *E.g.*, Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 733 (N.D. Ind. 1991) (holding access through regional and national newspaper, radio, and television involved substantially "more cost and less autonomy" and would reach a significant number of uninterested non-local persons; noncommercial speech would be affected); Bell v. Stafford Twp., 541 A.2d 692, 699 (N.J. 1988) ("[N]o adequate showing that the ordinance left open alternative means of communication . . . .").

[191] *See* Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447–48 (N.D. Ill. 1990) (providing that signs may not be placed near limited access highways; "The City could reasonably conclude that limited access highways should be treated differently for aesthetic purposes than other areas of the City."), *aff'd* on the analysis adopted in the district court, 989 F.2d 502 (7th Cir. 1993) (Table); City & Cnty. of San Francisco v. Eller Outdoor Advert., 237 Cal. Rptr. 815, 824 (Cal. Ct. App. 1987) (upholding ordinance excluding all off-premise advertising in special district).

[192] *See* STREET GRAPHICS, *supra* note 9, at 57. Digital billboards are also called Electronic Variable Message Signs (EMCSs) or Electronic Message Signs (EMCs). *See* Street Graphics Model Ordinance § 1.03 *in* STREET GRAPHICS, *supra* note 9, at 72 (defining "dynamic element"); SCENIC AMERICA, BILLBOARDS IN THE DIGITAL AGE (2007), https://www.scenic.org/wp-content/uploads/2019/09/unsafe_and_unsightly.pdf [https://perma.cc/FA4P-J4VD]; ULTRA VISION INT'L, HOW DO DIGITAL BILLBOARDS WORK FROM SETUP TO SOFTWARE, https://www.ultravisioninternational.com/blog/2017/01/06/general-info/how-do-digital-billboards-work-from-setup-to-software/ [https://perma.cc/HTC6-VU8W].

[193] See JERRY WACHTEL, COMPENDIUM OF RECENT RESEARCH STUDIES ON DISTRACTION FROM COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS)

Municipalities have responded with total bans or less restrictive regulations.[194] Courts have usually applied standard free speech law to uphold these ordinances.[195] The leading First Circuit case applied time, place, and manner rules to uphold an ordinance prohibiting the display of electronic message centers as applied to a retail store.[196] The court held the ordinance was content-neutral, advanced the city's stated goals of advancing traffic safety and community aesthetics, was narrowly tailored because those interests could not be achieved as effectively without the ban, and

(2018), https://www.scenic.org/wp-content/uploads/2019/09/billboard-safety-study-compendium-updated-february-2018.pdf [https://perma.cc/H5B5-5M3Z], for a comprehensive review of studies concluding that outdoor advertising distracts driver attention. *See also* Oviedo-Trespalacios et al., *supra* note 17 (noting the "emerging trend" that roadside advertising, especially digital billboards, can increase crash risk); John S. Decker et al., *The Impact of Billboards on Driver Visual Behavior: A Systematic Literature Review*, 16 TRAFFIC INJ. PREV. 234 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4411179/ [https://perma.cc/8M8D-AUXB] (surveying various literature reviews finding that both electronic and passive billboards can create distractive effects); Tania Dukic et al., *Effects of Electronic Billboards on Driver Distraction*, 14 TRAFFIC INJ. PREV. 469 (2013), https://www.ncbi.nlm.nih.gov/pubmed/23682577 [https://perma.cc/6G2M-YMCK] (finding digital billboards have more of an effect than static billboards but not clear whether they are a traffic hazard); *see also* FEDERAL HIGHWAY ADMIN., RESEARCH REVIEW OF POTENTIAL SAFETY EFFECTS OF ELECTRONIC BILLBOARDS ON DRIVER ATTENTION AND DISTRACTIONS (2001), https://pdfs.semanticscholar.org/0249/2df0d4fb0e7d1dfea668c19266cd2b229dd1.pdf [https://perma.cc/FR72-LBVZ] (digital billboards may be associated with a higher crash rate under certain conditions); JERRY WACHTEL, A CRITICAL COMPREHENSIVE REVIEW OF TWO STUDIES RECENTLY RELEASED BY THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA (Maryland State Highway Admin., 2007), https://pdfs.semanticscholar.org/566b/4b8a5a7f3ea24b6fa215d1a0aecf8b1c8ef7.pdf [https://perma.cc/Q92K-VNDW] (digital billboard studies); *see also* Jerry Wachtel, *Digital Billboards, Distracted Drivers*, PLANNING, Mar. 2011, at 25–27.

[194] *See* Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27, 36 (1st Cir. 2008).

[195] *See id.*

[196] *See id.*

that ample alternate means of communication were available.[197] Other cases upheld digital billboard bans under the *Central Hudson* criteria.[198]

Municipalities that do not want to prohibit digital billboards can allow them so they can operate consonant with traffic safety,[199] and courts uphold ordinances that regulate how signs can safely display digital

[197] *See id.* at 35 (holding that digital billboards "provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous"). The court held that allowing digital signs with conditions, such as a limit on the number of times a message could change during a day, would create steep monitoring costs and other complications. *See id.* at 36. There was evidence the city considered and rejected alternatives and gave reasons for their rejection. Ample alternate channels of communication were available because the retailer could use static and manually changeable signs, "place advertisements in newspapers and magazines and on television and the internet, distribute flyers, circulate direct mailings, and engage in cross-promotions with other retailers." *Id.* at 36–37. *Accord* Lamar Tenn., LLC v. City of Knoxville, No. E2014-02055-COA-R3-CV, 2016 WL 746503, at *13 (Tenn. Ct. App. Feb. 25, 2016) (upholding ban on digital displays with exceptions for nonconforming uses and in downtown areas when approved by city and other exceptions; applying time, place, and manner rules and also applying *Central Hudson* criteria).

[198] *See* Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 (LEK/CRH), 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) (criteria met; studies not necessary); Chapin Furniture Outlet, Inc. v. Town of Chapin, No. C/A-3:05-1398-MBS, 2006 WL 2711851 (D.S.C. Sept. 20, 2006) (criteria met); La Tour v. City of Fayetteville, 442 F.3d 1094, 1095 (8th Cir. 2006) (upholding ban on any sign that "flashes, blinks, or is animated" that was not enforced against time and temperature signs, and as applied to prevent display of electronic sign in office window; prohibition of flashing and scrolling signs held content neutral; signs were inconsistent with rural community aesthetic; ordinance later amended to allow signs that did not flash or scroll); Carlson's Chrysler v. City of Concord, 938 A.2d 69 (N.H. 2007) (holding a zoning ordinance prohibiting all outdoor electronic advertising signs displaying commercial speech; studies not necessary to show that prohibition met stated interests, prohibition was most effective way to eliminate problems with electronic signs).

[199] "It is possible to operate a digital billboard consonant with traffic safety by adhering to these five principles: (1) limiting nighttime sign luminance to 100 nits (candela per meter squared) in rural areas and 150 in urban settings as measured by a luminance meter, not by illuminance; (2) lengthening the dwell time such that, for the given prevailing speed and sight distance, no motorist is likely to see more than one message change during approach; (3) prohibiting any and all message sequencing and video or animation displays; (4) ensuring that billboards are not located in or near areas where the task demands on drivers are high (e.g. exits or entrances, freeway merges, complex interchanges, sharp curves); and (5) requiring minimum standards of legibility and readability given sight distance and prevailing speed." E-mail from Jerry Wachter, Veridian Group, to author (April 30, 2020, 19:03 CST) (on file with author).

content.[200] They have also upheld spacing requirements,[201] ordinances that limited digital signs to some areas of a municipality,[202] and ordinances that prohibited[203] or limited[204] digital displays.

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[200] *See* GEFT Outdoor LLC v. Consol. City of Indianapolis & Cnty. of Marion, 187 F. Supp. 3d 1002, 1020 (S.D. Ind. 2016) (holding a narrow exemption to the digital ban that allows no more than forty percent of an on-premise sign to have digital components, regulates frequency of message changes, and requires a sign to go dark if malfunctions occur).

[201] *See* Hucul Advert., LLC v. Charter Twp. of Gaines, 748 F.3d 273, 280 (6th Cir. 2014) (upholding 4000-foot spacing requirement for "digital billboards, which change constantly, and may very well present greater safety concerns (and perhaps greater aesthetic ones) than static billboards—digital billboards may be animated, and they may be brighter and more distracting than static ones").

[202] *See* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 105–07 (1st Cir. 2020) (upholding restriction of digital and other signs to C1 commercial district as not favoring commercial speech and as time, place, and manner regulation; "preserv[ing] the existing neighborhood characteristics and aesthetics, including the rural and natural look of [Pembroke]" accepted as well-established aesthetic concern, not overinclusive or underinclusive, alternate channels of communication available). *Compare* Lamar Tenn., LLC v. City of Knoxville, No. E2014-02055-COA-R3-CV, 2016 WL 746503, at *15 (Tenn. Ct. App. Feb. 25, 2016) (upholding as a valid time, place, and manner regulation an ordinance that prohibited digital signs but permitted them in commercial and industrial districts "as a wall sign, or an integrated part of the total sign surface of a free standing business sign," as approved in a historic overlay district or a downtown design overlay district, in zoning districts with approved design guidelines, and as a changeable price sign, and as a nonconforming sign; ordinance also met *Central Hudson* criteria), *with* E & J Equities, LLC v. Bd. of Adjustment of Franklin, 146 A.3d 623, 642–44 (N.J. 2016) (permitting static billboards in a single zoning district adjacent to heavily travelled interstate highway, but prohibited digital billboards in the same zone; record provided no explanation of qualitative differences between three static billboards and a single digital billboard in that area and belied assertion that no standards existed to address aesthetic and public safety concerns).

[203] *See* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *14 (W.D. Wis. Apr. 7, 2020) (prohibiting digital images on all signs; applying time, place, and manner rules).

[204] *See* Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 (LEK/CRH), 2013 WL 5463681, at *1 (N.D.N.Y. Sept. 30, 2013) (limiting digital signs from displaying messages about goods or services not sold and delivered or provided on the premises where sign is located, but signs may display messages about public emergencies and public events).

IX. NONCOMMERCIAL SPEECH AND THE EXEMPTION PROBLEM

Sign ordinances that affect noncommercial speech[205] present more challenging problems. The Supreme Court has always rejected discrimination against noncommercial speech,[206] and a sign ordinance is unconstitutional if it prohibits or discriminates against noncommercial speech.[207] This is a categorical rule distinguishable from the criteria adopted in the *Central Hudson* criteria.

The problem arises in sign ordinances when they include exemptions, which is typical. The *Metromedia* ordinance exemptions permitted "religious symbols, commemorative plaques of recognized historical societies and organizations, signs carrying news items or telling the time or temperature, signs erected in discharge of any governmental function, or temporary political campaign signs."[208] It did not permit any other noncommercial or ideological signs.[209] Some of these signs were content-

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[205] Courts must decide whether an ordinance applies to noncommercial speech. *Compare* Maldonado v. Kempton, 422 F. Supp. 2d 1169, 1170 (N.D. Cal. 2006) (interpreting California Outdoor Advertising Act as applying to noncommercial speech), w*ith* Desert Outdoor Advert., Inc. v. City of Oakland, 506 F.3d 798, 804 (9th Cir. 2007) (holding time and temperature exemption not enough to show that ordinance applied to noncommercial speech), *and* Sharona Props., LLC v. Orange Vill., 92 F. Supp. 3d 672, 680–81 (N.D. Ohio 2015) (holding billboard prohibition with typical definition of off-premise sign did not apply to noncommercial speech), *and* Cottage Grove v. Ott, 395 N.W.2d 111, 114 (Minn. Ct. App. 1986) (holding prohibition of off-premise advertising signs limited to commercial speech did not reach noncommercial speech). *See generally* National Advert. Co. v. City & Cnty. of Denver, 912 F.2d 405, 408–11 (10th Cir. 1990) (upholding distinction in ordinance between commercial and noncommercial signs). In the Eleventh Circuit, a prohibition of off-premise billboards does not affect noncommercial speech because the court holds that all noncommercial speech is on-premise. *See* Southlake Prop. Assoc., Ltd. v. City of Morrow, 112 F.3d 1114, 1119 (11th Cir.1997); Bill Salter Advert., Inc. v. City of Brewton, 486 F. Supp. 2d 1314, 1330–31 (S.D. Ala. 2007) (discussing cases).

[206] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). The Court has indicated that distinctions among different types of commercial speech are acceptable. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 n.20 (1993) (discussing *Metromedia* and holding that offsite-onsite distinction discussed in that case "involved disparate treatment of two types of commercial speech"). Exemptions can also create an argument that a sign ordinance does not comply with the third *Central Hudson* criterion because the exemptions are underinclusive. *See supra* Part VI.B.

[207] *See* Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 906 (9th Cir. 2007) (broad prohibition reached "beyond off-site commercial copy to preclude posting of many noncommercial messages").

[208] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981).

[209] *See id.*

based but some were not, and the Court did not consider the content neutrality issue.[210]

The plurality held the exemptions discriminated against non-commercial speech:[211] "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."[212] Some lower courts followed *Metromedia* and held an ordinance may not distinguish among different noncommercial speech exemptions,[213] but some rejected the plurality and held that exemptions in sign ordinances do not create free speech problems.[214] These cases did not consider the

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[210] *See infra* Part X, for discussion of the content neutrality issue.

[211] One of the exemptions authorized on-premise for sale or for lease signs. The Court struck down an ordinance that prohibited these signs. *See supra* note 156.

[212] *Metromedia*, 453 U.S. at 515. Justice Stevens dissented from this holding. *See id.* at 553–55. So did Chief Justice Burger. *See id.* at 564–65.

[213] *See, e.g.*, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1259–260 (11th Cir. 2005) (listing numerous exemptions, some content-based); Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819–20 (9th Cir. 1996) (restricting certain noncommercial signs); Nat'l Advert. Co. v. Town of Niagara, 942 F.2d 145, 147 (2d Cir. 1991); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir.) (disagreeing with *Metromedia* by upholding exemption for real estate signs as required by *Linmark*); Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988) (exemptions similar to those invalidated in *Metromedia*); Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 LEK/CRH, 2013 WL 5463681, at *7 (N.D.N.Y. Sept. 30, 2013) (specifying exceptions).

[214] *See* Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 368 (4th Cir. 2012) (exempting fifteen types of signs); Stott Outdoor Advert. v. Cnty. of Monterey, 601 F. Supp. 2d 1143, 1156 (N.D. Cal. 2009) ("[N]o contention or showing that the ordinance improperly restricts noncommercial speech more stringently than commercial speech."); Lavey v. City of Two Rivers, 171 F.3d 1110, 1116 (7th Cir. 1999) (justifying exemptions; city need not develop voluminous record to justify common-sense exemptions); Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1445 (N.D. Ill. 1990) (holding argument rejected "for reasons stated in the concurring and dissenting opinions" in *Metromedia*), *aff'd* on the analysis adopted in the district court, 989 F.2d 502 (7th Cir. 1993) (Table); Nat'l Advert. Co. v. City of Bridgeton, 626 F. Supp. 837, 838–40 (E.D. Mo. 1985) (considering Street Graphics Model Ordinance and noting but not invalidating exemptions); *see also* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-JDP, 2020 WL 1689705, at *13 (W.D. Wis. Apr. 7, 2020) (rejecting argument that "ordinance systematically disfavored noncommercial speech because nonprofits ha[d] fewer resources to spend on communicating noncommercial messages than for-profit counterparts"); Pigg v. State Dep't of Highways, 746 P.2d 961, 969 (Colo. 1987) (holding hardship-based exemption for nonconforming tourist-related signs did not unconstitutionally discriminate in favor of tourist-related advertising devices).

content neutrality issue. Chief Justice Burger's dissent caustically criticized the *Metromedia* holding as bizarre.[215]

Good drafting[216] can overcome this problem. Free speech problems can be avoided because they do not have to be based on noncommercial content. One example of a content neutral exemption is "A [sign] that is posted by a governmental unit."[217] Exemptions are overused, and they are often a substitute for a requirement that can deal with a signage problem directly.

Though the *Metromedia* plurality did not discuss the content neutrality problem raised by the exemptions in the San Diego ordinance, courts have held ordinances authorizing noncommercial messages unconstitutional if they are content-based.[218] Neither did the plurality consider whether an ordinance can distinguish between commercial and noncommercial speech, but this distinction is unconstitutional.[219] An example is an

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[215] *See Metromedia*, 453 U.S. at 564–66. Chief Justice Burger described the holding as "a bizarre twist of logic" that was "insensitive to the needs of the modern urban dweller and devoid of valid constitutional foundations," and argued there was a "fatal flaw" in the plurality's logic. *Id.* He concluded that "[t]he plurality today trivializes genuine First Amendment values." *Id.*

[216] See Susan L. Trevarthen, *Best Practices in First Amendment Land Use Regulations*, 61 PLANNING & ENVT'L L. June 2009, 3 (2009), for a discussion of drafting issues.

[217] Street Graphics Model Ordinance § 1.14(1), *in* STREET GRAPHICS, *supra* note 9, at 91. Noncommercial speech problems can occur when sign ordinances provide different requirements for different types of noncommercial temporary signs, such as signs advertising a named event or the name of the noncommercial sponsoring organization. *See id.* An ordinance can avoid this problem by defining a temporary sign as "a [sign] intended to be displayed for a transitory or temporary period." *Id.* § 1.03 at 75. Content neutral conditions can be included, such as "a temporary sign displayed within 500 feet of property on which a one-time event is held, and which sign may be displayed for up to five days before and one day after such event." Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW 569, 615 (2015).

[218] *See infra* Part X.

[219] *See* Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 906 (9th Cir. 2007) (holding ordinance defining off-premise signs as signs that "advertise or inform in any manner businesses, services, goods, persons, or events at some location other than that upon which the sign is located" invalid because definition excluded noncommercial speech); KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1264–65 (11th Cir. 2006) (allowing commercial billboards but not allowing noncommercial billboards near interstate highways); Cafe Erotica of Fla., Inc. v. St. Johns Cnty., 360 F.3d 1274, 1292 (11th Cir. 2004) (allowing commercial billboards to be displayed more prominently); Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (restricting display of noncommercial as compared with commercial signs). *Compare* Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 612 (9th Cir. 1993) (applying time, place, and manner

ordinance that allows commercial but not noncommercial billboards near interstate highways.[220]

Noncommercial speech problems are also created by an ordinance that prohibits billboards but allows on-premise signs that advertise goods and services available on the premises. The plurality in *Metromedia* struck down a section in the San Diego ordinance that had this provision.[221] It held that commercial messages connected with a site were no more valuable than noncommercial messages, and that noncommercial messages located where commercial messages are allowed are not more threatening to traffic safety and the beauty of the city.[222] The cases have followed this holding.[223]

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rules to reject as speculative an argument that ordinance was content-based because it could decrease the number of noncommercial signs), *with* Major Media of the Se., Inc. v. City of Raleigh, 792 F.2d 1269, 1273 (4th Cir. 1986) (rejecting argument that ordinance was content-based because owners would not allow signs on their property that contained noncommercial copy).

[220] *See* KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1264–65 (11th Cir. 2006).

[221] *See* 453 U.S. 490, 513 (1981). *See supra* notes 19–26 and accompanying text, for state court treatment of the off-premise versus on-premise sign distinction.

[222] "[T]he 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." *Metromedia*, 453 U.S. at 513. The court also noted that "[t]he city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city." *Id.* Chief Justice Burger dissented from this holding. *See id.* at 567–68; *see also* Granite State Outdoor Advert., Inc. v. Cobb Cnty., 193 F. App'x 900, 904 (11th Cir. 2006) (holding the expression of commercial speech is more restricted than noncommercial speech when off-premise signs are defined as signs with a commercial message); Revere Nat'l. Corp. v. Prince George's Cnty., 819 F. Supp. 1336, 1342 (D. Md. 1993) (prohibiting signs with noncommercial speech but allowing signs containing commercial copy held invalid). *Contra* City & Cnty. of San Francisco v. Eller Outdoor Advert., 237 Cal. Rptr. 815, 825 (Ct. App. 1987) (allowing commercial and noncommercial signs on-premise).

[223] *See, e.g.*, Burkhart Advert., Inc. v. City of Auburn, Ind., 786 F. Supp. 721, 732 (N.D. Ind. 1991); Jackson v. City Council of Charlottesville, 659 F. Supp. 470, 473 (W.D. Va. 1987), *order aff'd in part, vacated in part sub nom.* 840 F.2d 10 (4th Cir. 1988) (Table); *see also* Clear Channel Outdoor, Inc. v. Town Bd. of Windham, 352 F. Supp. 2d 297, 306 (N.D.N.Y. 2005) (invalidating ban on portable signs that effectively prohibited non-commercial speech in places where it allowed commercial speech); *cf.* Roland Digit. Media, Inc. v. City of Livingston, No. 2:17-CV-00069, 2018 WL 6788594, at *5 (M.D. Tenn. Dec. 26, 2018) ("[O]nsite exception applies to both commercial and noncommercial speech . . . ."); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (4th Cir. 2007) (holding off-premise/on-premise distinction was not dependent on whether sign contained commercial or noncommercial advertising); Wheeler v. Comm'r of

This problem can also be avoided by good drafting; an ordinance should not restrict the messages on-premise signs can display. Another option is a "substitution clause" that permits the display of a noncommercial message on any sign where a commercial message can be displayed.[224] If an ordinance allows on-premise signs to advertise only goods and services available on the premises, for example, a substitution clause would cure this problem because it would allow noncommercial messages on on-premise signs.[225] Almost all courts have held this clause cures any constitutional difficulties that otherwise would be created.[226]

Highways, 822 F.2d 586, 590 (6th Cir. 1987) (holding state highway beautification statute was content-neutral because it permitted commercial and noncommercial signs in protected areas if signs related to activity on the premise).

[224] A typical substitution clause reads: "Any [sign] authorized to be displayed by this ordinance may contain a noncommercial message." STREET GRAPHICS, *supra* note 9, at 71.

[225] *See* Connolly & Weinstein, *supra* note 217, at 617. Another option is a definition of on-premise signs that does not restrict content.

[226] *See, e.g.*, Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 902 (9th Cir. 2007); Nat'l Advert. Co. v. City of Miami, 402 F.3d 1329, 1335 (11th Cir. 2005) (substitution clause mooted constitutional claim); Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 815 (9th Cir. 2003) (holding ordinances neutral concerning noncommercial speech because a substitution clause guaranteed that political and other noncommercial messages were not limited by type of sign-structure); Valley Outdoor, Inc. v. Cnty. of Riverside, 337 F.3d 1111, 1113 (9th Cir. 2003); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611 (9th Cir. 1993) (holding substitution clause made the ordinance content-neutral because it affected noncommercial speech); Ga. Outdoor Advert., Inc. v. City of Waynesville, 833 F.2d 43, 46 n.7 (4th Cir. 1987) ("Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy."); Major Media of the Se., Inc. v. City of Raleigh, 792 F.2d 1269, 1271 (4th Cir. 1986); Adams Outdoor Advert. LP v. City of Madison, No. 17-C-576-JDP, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020); Citizens for Free Speech, LLC v. Cnty. of Alameda, 62 F. Supp. 3d 1129, 1139 (N.D. Cal. 2014); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A(m), 2008 WL 781865 at *15 (W.D.N.Y. Feb. 25, 2008), *vacated in part, aff'd in part, and remanded*, 356 F.3d 365 (2d Cir. 2004); Outdoor Sys., Inc. v. City of Lenexa, 67 F. Supp. 2d 1231, 1236 (D. Kan. 1999); Outdoor Sys. Inc. v. City of Atlanta, 885 F. Supp. 1572, 1579 (N.D. Ga. 1995); City & Cnty. of San Francisco v. Eller Outdoor Advert., 192 Cal. App. 3d 643, 656 (1987) ("ordinance does not draw any distinction between so-called 'commercial' and 'noncommercial' advertising"); Nat'l Advert. Co. v. Babylon, 703 F. Supp. 228, 240 (E.D.N.Y. 1988) (recommending adoption of a substitution clause to protect the constitutionality of sign ordinance). *Contra* Adirondack Advert., LLC v. City of Plattsburgh, No. 8:12-CV-1684 (LEK/CRH), 2013 WL 5463681, at *4 (N.D.N.Y. Sept. 30, 2013) (ordinance did not include a substitution clause); Maldonado v. Kempton, 422 F. Supp. 2d 1169, 1175 (N.D. Cal. 2006); Beaulieu v. City of Alabaster, 454 F.3d 1219, 1233 (11th Cir. 2006) (holding substitution clause did not cure ordinance when political signs were not treated equally).

X. CONTENT BASED SIGNAGE

Ordinances that regulate sign content are another challenge. An ordinance that authorizes signs about a specific event, such as a charity drive, is an example. Content-based ordinances require strict scrutiny judicial review, and a municipality must justify it with a narrowly tailored compelling governmental interest.[227] A less-burdensome alternative is also required.[228] Strict scrutiny can be dangerous, because it is strict in theory but often fatal in fact.[229] These are also categorical rules.

A. Cases Pre-*Reed*

Reed v. Town of Gilbert,[230] a 2015 Supreme Court decision, is the leading case on content-based sign ordinances. It changed the law. Prior to *Reed*, the Supreme Court adopted two different tests to decide whether a law is content-based.[231] This situation created considerable confusion.[232] One test held that laws are content-based if they make facial content-based distinctions. [233] Courts applied this test to hold sign ordinances unconstitutional when they had facial content-based requirements for

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[227] *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

[228] *See* United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000).

[229] Professor Gerald Gunther coined the phrase. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1987) (quoting Gunther).

[230] 576 U.S. 155 (2015).

[231] *See* Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 238–50 (2016).

[232] *See, e.g.*, Mason, *supra* note 52, at 962–64 ("[T]he Court has been markedly less consistent in articulating the test for determining content neutrality."); Post, *supra* note 165, at 1265 ("Whatever the ultimate merits of a First Amendment focus on content neutrality, the Court's doctrinal elaboration of [it] has been haphazard, internally incoherent, and for these reasons inconsistent with any possible principled concern for content neutrality.").

[233] *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 197 (1992) (invalidating law prohibiting election-related speech near polling places; "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign."); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (invalidating state law prohibiting convicted felons from profiting from stories of their crimes; "[S]tatute plainly imposes a financial disincentive only on speech of a particular content").

noncommercial speech.[234] In one case, for example, the court held an exemption for temporary political and event signs was content-based and decided not to sever the rest of the ordinance.[235]

The other test adopted by the Supreme Court was a purpose-based test based on the rules for time, place, and manner regulations. It found laws content neutral if "justified without reference to the content of the regulated speech."[236] This test provided an opportunity for content-based ordinances. For example, a municipality could adopt different size, number, and display requirements for a grand opening sign than for an event sign. The ordinance would be content neutral because it was justified without reference to speech by a need for different requirements for different signs. Some circuits applied the purpose-based test and approved content-based sign ordinances when justified without reference to speech.[237]

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[234] *See* Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 906 (9th Cir. 2007) ("Old Ordinance may also have impermissibly regulated noncommercial speech on the basis of content, by exempting certain noncommercial off-site signs from the permit requirement . . . ."); Desert Outdoor Advert., Inc. v. City of Moreno Valley, 103 F.3d 814, 820 (9th Cir. 1996) (including content of noncommercial off-site structures and signs); Nat'l Advert. Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir. 1990) (noting an exemption for temporary political signs and event signs); Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988) ("[W]hether offsite noncommercial signs are exempted or prohibited turns on whether or not they convey messages approved by the ordinance."); Lamar Advert. of Penn, LLC v. Town of Orchard Park, No. 01-CV-556A (M), 2008 WL 781865, at *15 (W.D.N.Y. Feb. 25, 2008) (including durational, placement, and size distinctions between free expression, election, service organization, and temporary signs); *see also* Ballen v. City of Redmond, 466 F.3d 736, 743 (9th Cir. 2006) (noting exemptions from ordinance prohibiting political signs); Burkhart Advert., Inc. v. City of Auburn, 786 F. Supp. 721, 725 (N.D. Ind. 1991) (explaining that on-premise sign must be limited to activity on premises, not other content). *Contra* Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 912 (9th Cir. 2009) (noting an exemption for public transit facilities); Paradigm Media Grp. v. City of Irving, 65 F. App'x 509 (5th Cir. 2003) ("A requirement that a facility advertise itself is not a regulation of content as such; it is a land use classification.").

[235] *See Nat'l Advert. Co.*, 900 F.2d at 557.

[236] Ward v. Rock Against Racism, 491 U.S. 781, 981 (1989); *see, e.g.*, Wheeler v. Comm'r of Highways, 822 F.2d 586, 587 (6th Cir. 1987) (citing the state highway beautification act, relying on secondary effects), *overruled by* Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019) (relying on *Reed*).

[237] *See, e.g.*, Reed v. Town of Gilbert, 707 F.3d 1057, 1071 (9th Cir. 2013) (providing different requirements for different types of signs), *rev'd and remanded*, 576 U.S. 155 (2015); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 368 (4th Cir. 2012) (noting size requirements on "business signs" that did not similarly apply to noncommercial signs and fifteen types of signs exempted; ordinance enacted to, among other aims, promote traffic

More confusion was created by a Supreme Court case, *Sorrell v. IMS Health Inc.*,[238] which was decided before *Reed*, in which the Court suggested that a regulation of commercial speech had to be content neutral.[239] This case has had a limited effect, as courts have held it does not change *Central Hudson*'s intermediate judicial scrutiny standard.[240] Neither have plaintiffs usually been successful in applying *Sorrell* to sign ordinances that regulate commercial speech,[241] though courts in some

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safety and county's aesthetics, interests unrelated to messages displayed); H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609, 622 (6th Cir. 2009) (highlighting time limits and lack of standards; "There is . . . nothing in the record to indicate that the distinctions among the various types of signs reflect a meaningful preference for one type of speech over another."). *Compare* Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 737 (8th Cir. 2011) (concerning a mural; applying purpose rule but deciding it had not been met), *with* Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005) (noting the justification not narrowly drawn even assuming its adequacy). For discussion of the circuit split, see Connolly & Weinstein, *supra* note 217, at 573–74; Rappa v. New Castle Cnty., 18 F.3d 1043, 1047 (3d Cir. 1994) (adopting circuit-limited context-sensitive rule for content-based exemptions and considering whether there was disagreement with the message conveyed).

[238] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011); Oleg Shik, *The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives* Sorrell v. IMS Health, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561, 564 (2015) ("[U]ntil the Court sets forth a clear standard of analysis for its 'heightened judicial scrutiny' language, traditional intermediate-tier review will prevail."); Hunter B. Thomson, *Whither* Central Hudson*? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 171 (2013) (noting the Court introduced a "new layer of protection and further pinched already-narrow space between first amendment protection accorded commercial and noncommercial speech," and describing Second Circuit case as most faithful to *Reed*); Kate Maternowski, *The Commercial Speech Doctrine Barely Survives* Sorrell, 38 J.C. & U.L. 629, 631 (2012) (seeking to explain the significance of *Sorrell* and evaluating its effect on the future of the commercial speech doctrine); Tamara R. Piety, *A Necessary Cost of Freedom - The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 53 (2012) (arguing that *Sorrell* is a dangerous decision).

[239] The Court held invalid a state law that restricted the sale, disclosure, or use of pharmacy records that revealed prescribing practices by physicians. *Sorrell*, 564 U.S. at 557. It held the law was content-based, and that "heightened scrutiny" applied but left the details unsettled. *See id.* It then confused the application of content-based rules on commercial speech by holding the law was also invalid under intermediate scrutiny review as required by *Central Hudson*. *See id.* at 583. This holding attracted criticism from other Justices. *See id.* at 585 (Breyer, J. dissenting) (arguing that a heightened strict scrutiny standard would "undermine legitimate legislative objectives").

[240] *See* Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 846–48 (9th Cir. 2017) (citing advertising cases). *Accord* Greater Philadelphia Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 140 (3d Cir. 2020) (noting employment discrimination).

[241] *See Prieto*, 861 F.3d at 841 (noting statute forbidding leasing of advertising space to manufacturers of alcoholic beverages). *Accord Wag More Dogs, LLC*, 680 F.3d at 366

cases applied it to strike down sign ordinances that were content-based or directed toward a particular advertising message.[242]

B. The *Reed* Decision[243]

The Court in *Reed* tried to clarify the law on content-based regulation.[244] A sign ordinance exempted twenty-three noncommercial

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n.4 (involving a mural; "*Sorrell* did not signal the slightest retrenchment from its earlier content-neutrality jurisprudence."); *see also* Vugo, Inc. v. City of Chicago, 273 F. Supp. 3d 910, 916 (N.D. Ill. 2017) (noting ordinance prohibiting commercial advertising on the interior or exterior of a drivers' vehicle); Contest Promotions, LLC v. City & Cnty. of San Francisco, No. 16-CV-06539-SI, 2017 WL 76896, at *5 (N.D. Cal. Jan. 9, 2017) (depicting regulation of off-premise and on-premise signs), *aff'd*, 704 F. App'x 665, 667 n.1 (9th Cir. 2017); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr.3d 620, 629 (Cal. App. 2016) (explaining *Sorrell* and noting it does not apply to billboard regulation); Mass. Ass'n of Private Career Sch. v. Healey, 159 F. Supp.3d 173, 191 (D. Mass. 2016) (discussing regulations intended to prevent unfair and deceptive practices in recruiting and enrollment of students at for-profit schools; "*Sorrell* does not stand for the proposition that strict scrutiny applies to all commercial-speech restrictions, especially regulations that have neutral justifications, such as consumer protection.").

[242] *See* Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) (regarding mural ordinance; probable success showing it was content-based); GJJM Enter., LLC v. City of Atlanta, 352 F. Supp. 3d 402, 406 (D.N.J. 2018) (holding state statute banning "bring your own beer and wine" advertising content-based); Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 319 (D. Mass. 2012) (highlighting an ordinance prohibiting outdoor advertising of tobacco products); *see also* McLean v. City of Alexandria, 106 F. Supp. 3d 736, 741 (E.D. Va. 2015) (invalidating under intermediate scrutiny review, an ordinance prohibiting parking a vehicle on any city street for the purpose of displaying the vehicle for sale; strict scrutiny considered by *Sorrell* not required).

[243] *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015). The Court in *Reed* also discussed speaker-based neutrality, holding that strict scrutiny is required for laws favoring some speakers over others when the legislature's preference reflects a content preference. *See id.* at 169. Supreme Court cases had been mixed on this issue, FREE SPEECH LAW § 2:5, *supra* note 7, at 23, but *Sorrell v. IMS Health Inc*., 564 U.S. 552 (2011), held a law providing that information identifying prescribers of medical prescriptions could not be disclosed, sold, or marketed was invalid, partly because it imposed a burden based on "the identity of the speaker," and was "aimed at particular speakers." *Id.* at 567. One court post-*Reed* held a sign ordinance invalid as speaker-based, *www.RicardoPacheco.com v. City of Baldwin Park*, No. 2:16-cv-09167-CAS(GJ-Sx), 2017 WL 2962772, at *6 (C.D. Cal. July 10, 2017) (Business Provisions of ordinance preferred new businesses and businesses promoting a special event to other entities.).

[244] *See* Connolly & Weinstein, *supra* note 217, at 570–88 (describing case and issues presented)**;** Lakier, *supra* note 231, at 250–63 (describing virtues and vices of *Reed*); Mason, *supra* note 52 (considering potential evisceration of commercial speech doctrine); Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1986–87 (2016) (suggesting how *Reed* can be distinguished). See *Outdoor Media Dimensions*,

signs from a general permit requirement, but the Court considered only ideological signs, political signs, and temporary directional signs relating to a qualifying event.[245] Each sign category had different requirements.[246] The ordinance may have been excessively fragmented, but there was no evidence it was maliciously directed at any type of speech. Justice Thomas decided that content neutrality must be decided by examining the face of the ordinance.[247] He held that the ordinance was a "paradigmatic example of content-based discrimination," and that the commonsense meaning of content-based regulation requires courts to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys: "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."[248]

Inc. v. Department of Transportation, 132 P.3d 5 (Or. 2006), for a state case adopting stricter free speech standards in a billboard case. See *Lamar Central Outdoor, LLC v. City of Los Angeles*, 199 Cal. Rptr. 3d 620, 633 (Cal. App. 2016), for a California case rejecting *Outdoor Media*.

[245] *See Reed*, 576 U.S. at 159; Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (applying *Reed* when holding notice requirement for licensed crisis pregnancy clinics was a content-based regulation of speech).

[246] *See Reed*, 576 U.S. at 155. Requirements differed in the size of the signs allowed and in the time limits allowed. *See id.* These are typical limits on size and time of display, but some seemed arbitrary. Differences in requirements for different signs can accomplish different advertising objectives. The author was a consultant to a county that adopted a sign ordinance that made numerous distinctions among signs. It produced sign displays that were attractive and won a national award, but differences in requirements attracted a lawsuit that declared the ordinance unconstitutional as a violation of free speech.

[247] *See id.* at 165.

[248] *Id.* at 163. Viewpoint discrimination also triggers strict scrutiny. *See id.* at 169. The concurring opinions suggested less drastic tests for content neutrality. *See id* at 174. Justice Kagan argued that strict scrutiny should apply only when there is a "realistic possibility that official suppression of ideas is afoot." *Id.* at 182. Justice Alito concurred and provided a list of signs he thought would be constitutional under the majority opinion: "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-premise and off-premise 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

Laws based on a message are "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."[249]

Facial content neutrality is not enough to save an ordinance. A facially neutral ordinance is content-based if it was adopted by the government "'because of disagreement with the message [the speech] conveys,'" or if it "cannot be 'justified without reference to the content of the regulated speech.'"[250] This last holding is a sharp turnaround from the previous understanding of the "without reference to the content" rule, which had upheld a purpose-based test as a basis for deciding content-based questions.[251] Justices who concurred in the *Reed* decision argued it would endanger the constitutionality of sign ordinances.[252]

C. How *Reed* Has Been Applied to Sign Ordinances in the Lower Courts

Reed creates problems for billboard bans. It does not discuss whether the decision applies to commercial speech nor does it cite any of the earlier decisions that dealt with commercial speech, such as *Central Hudson* and *Metromedia.* These omissions cast doubt on the earlier commercial speech cases, and may imply that the *Reed* rules on content neutrality apply to ordinances that affect commercial speech, such as billboard bans.

Lower court decisions in cases that did not consider sign ordinances are mixed on whether *Central Hudson* and *Metromedia* still apply post-

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or music is allowed." *Id*. at 174–75. However, despite Alito's suggestion, rules "imposing time restrictions on signs advertising a one-time event" are content-based under the majority opinion. *Id*. at 175.

[249] *Id.* at 165 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[250] *Id.* at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[251] Lakier, *supra* note 231, at 276–77; *see also* Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 87–92 (2017) (agreeing with this change); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 703 (5th Cir. 2020) (holding that *Reed* has rejected the purpose-based test).

[252] "Given the Court's analysis, many sign ordinances of that kind are now in jeopardy." *Reed*, 576 U.S. at 180 (Kagan, J., concurring). Justice Breyer argued against a content discrimination approach that would automatically "write a recipe for judicial management of ordinary government regulatory activity." *Id.* at 177. *But see Free Speech Doctrine*, *supra* note 244, at 1986–87 (suggesting that *Reed* can be distinguished up, down, and sideways; down by holding a regulation covers conduct other than speech, sideways by pushing *Reed* aside and preserving the *Central Hudson* standard, and up by finding a regulation content neutral or diluting strict scrutiny).

Reed,[253] but sign ordinance cases adopted a narrowing interpretation of *Reed*[254] by holding, almost without exception, that these cases are still good law so that strict scrutiny review does not apply to laws affecting commercial speech.[255] This interpretation has allowed courts post-*Reed* to

[253] *See* Mason, *supra* note 52, at 977–79. The Supreme Court applied the *Central Hudson* criteria in a trademark case. Matal v. Tam, 137 S. Ct. 1744, 1764–65 (2017).

[254] *Reed* is narrowed because one plausible interpretation is that the Court meant to discard these decisions. Lower court narrowing of Supreme Court precedent raises problems because lower courts are bound by Supreme Court decisions. Ambiguity in a Supreme Court decision, as arguably occurred in *Reed*, may justify lower court narrowing. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 960 (2016) ("Another reason to narrow from below is to resist the disruptive effect of broadly written Supreme Court decisions without provoking the Court's review;" discarding *Central Hudson* and *Metromedia* because of *Reed* would be disruptive).

[255] *See* Adams Outdoor Advert. LP v. City of Madison, No. 17-CV-576-jdp, 2020 WL 1689705, at *12 (W.D. Wis. Apr. 7, 2020); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 377 F. Supp. 3d 670, 681 (W.D. Tex. 2019) ("This Court declines to find that *Reed* quietly overruled *Metromedia* and *Central Hudson* without saying so."), *rev'd on other grounds*, 972 F.3d 696 (5th Cir. 2020); Roland Digit. Media, Inc. v. City of Livingston, No. 2:17-CV-00069, 2018 WL 6788594, at *9 (M.D. Tenn. Dec. 26, 2018); RCP Publ'n Inc. v. City of Chicago, 204 F. Supp. 3d 1012, 1017 (N.D. Ill. 2016) (*Reed* did not consider this issue); GEFT Outdoor LLC v. Consol. City of Indianapolis, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (*Reed* omitted mention of *Central Hudson* and *Metromedia*); Contest Promotions, LLC v. City & Cnty. of San Francisco, No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) ("*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."), *aff'd*, 704 F. App'x 665 (9th Cir. 2017); Citizens for Free Speech, LLC v. Cnty. of Alameda, 114 F. Supp. 3d 952, 968 (N.D. Cal. 2015); Cal. Outdoor Equity Partners v. City of Corona, No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) (*Central Hudson* not cited by *Reed*); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 625 (Cal. Ct. App. 2016) (applying *Central Hudson* but not discussing *Reed*); City of Corona v. AMG Outdoor Advert., Inc., 197 Cal. Rptr. 3d 563, 573 (Cal. Ct. App. 2016) ("*Metromedia* remains the law of the land"); Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals, 46 N.Y.S.3d 725, 730 (N.Y. App. Div. 2017). *Contra* Int'l Outdoor, Inc. v. City of Troy, 974 F.3d 690, 702–08 (6th Cir. 2020).

uphold ordinances that regulate[256] or prohibit[257] billboards and that have applied time, place, and manner rules to uphold a variety of other sign regulations.[258]

Problems remain under *Reed* and are created by ordinances that allow on-premise signs that advertise only goods and services available on the

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[256] *See Adams Outdoor*, 2020 WL 1689705, at *15–16 (relying on expert report and *Metromedia* for third criterion and *Metromedia* for fourth criterion compliance; billboard regulation); Baldwin Park Free Speech Coal. v. City of Baldwin Park, No. 2:19-CV-09864-CAS-Ex, 2020 WL 758786, at *5–6 (C.D. Cal. Feb. 13, 2020) (upholding ordinance applying size and height limits to combination of temporary or permanent signs, flags, and pennants; authorizing permit to place an additional nonconforming temporary sign on property; requiring applicant to submit copy of proposed temporary sign, and requiring durational limits on temporary signs); Roland Digit. Media, Inc. v. City of Livingston, 2018 WL 6788594, at *7 (M.D. Tenn. Dec. 26, 2018) (permitting size limitation); www.RicardoPacheco.com v. City of Baldwin Park, No. 2:16-cv-09167-CAS(GJSx), 2017 WL 2962772, at *9 (C.D. Cal. July 10, 2017) (discussing size limitation); Contest Promotions, LLC v. City & Cnty. of San Francisco, No. 16-cv-06539-SI, 2017 WL 76896, at *6 (N.D. Cal. Jan. 9, 2017) (posting signs on or adjacent to small businesses); *RCP Publ'ns Inc*., 204 F. Supp. 3d at 1017 (posting of poster on public property); *Lamar Cent. Outdoor, LLC*, 199 Cal. Rptr. 3d at 629 ("Neither *Reed* nor *Sorrell* supports the notion that sign ordinances may no longer distinguish between commercial and noncommercial speech . . . ."); *GEFT Outdoor LLC*, 187 F. Supp. 3d at 1018 (restricting digital content on signs and distinguishing between off-premise and on-premise signs; court relied on *Metromedia*); *see also* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1199–1202 (9th Cir. 2016) (discussing motorized billboard ordinance that regulated how "advertising signs" may be attached to motor vehicles on city streets, and holding the word "advertising" refers to the activity of displaying a message to the public, not any particular content that may be displayed).

[257] *See Adams Outdoor*, 2020 WL 1689705, at *12 (prohibiting billboards in part of city); *Citizens for Free Speech, LLC*, 114 F. Supp. 3d at 968 (determining prohibition); City of Corona v. AMG Outdoor Advert., Inc., No. E068313, 2019 WL 643474, at *7 (Cal. Ct. App. Feb. 15, 2019) (upholding prohibition); *AMG Outdoor Advert., Inc*., 197 Cal. Rptr. 3d at 572 (2016) (upholding prohibition); *Expressview Dev., Inc*., 46 N.Y.S.3d at 730 (upholding prohibition, denial of use variance).

[258] *See* Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C., 846 F.3d 391, 407–09 (D.C. Cir. 2017) (posting signs on public property prohibited; narrowly tailored to serve a significant government interest and ample alternative channels of communication open); *Lone Star Sec. & Video, Inc*., 827 F.3d at 1200–02 (discussing motorized billboard regulations); *Baldwin Park Free Speech Coal.*, 2020 WL 758786, at *7 (holding signs not banned in their entirety but limited to size, height, and combined coverage; additional nonconforming signs may be allowed); *Roland Digit. Media, Inc.*, 2018 WL 6788594, at *6 (ordinance distinguished off-premise and on-premise signs and did not contain content-based infirmities addressed in *Metromedia*); *GEFT Outdoor LLC*, 187 F. Supp. 3d at 1017 (S.D. Ind. 2016); *Lamar Cent. Outdoor, LLC*, 199 Cal. Rptr. 3d at 629 ("Neither *Reed* nor *Sorrell* supports the notion that sign ordinances may no longer distinguish . . . between on-site and off-site signs.").

premises.[259] This type of provision and a similar statutory provision in the federal Highway Beautification Act present a content neutrality problem.[260] The Act applies to federally-aided highways and prohibits the display of billboards adjacent to these highways except in commercial and industrial areas.[261] States must adopt legislation that includes the federal statutory requirements.[262] A problem is created by a section in the federal statute requiring state legislation to include an exemption for "signs, displays, and devices advertising the sale or lease of property" and "activities" on property on which they are located.[263] Courts post-*Reed* held this provision and similar provisions in state highway beautification

[259] *Metromedia* held this type of provision unconstitutional because it did not allow on-premise signs to display noncommercial speech. *See supra* notes 222–224 and accompanying text.

[260] The federal Highway Beautification Act, adopted in 1965, requires states to prohibit billboards within 660 feet of the right-of-way of federal interstate and primary highways. *See* 23 U.S.C. § 131 (2018). In rural areas, billboards must not be visible from the highway. *See id.* The Act exempts on-premise signs. *See id.* It also authorizes an exemption for commercial and industrial areas under agreements between the states and the federal Secretary of Transportation, which has encouraged the display of billboards in urban areas. *See id.* The federal statute contemplated the removal of nonconforming billboards, but this program failed. *See* Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463 (2000). States that do not comply with the federal statute face the loss of federal highway funds, but this authority is seldom exercised. *See id.* Some state statutes allow more restrictive local regulation of billboards. *See* C.C. Dillon Co. v. City of Eureka, 12 S.W. 3d 322 (Mo. 2000) (upholding law). Some courts have held the state statute does not preempt stricter local regulations. *See* Lamar OCI S. Corp. v. Stanly Cnty. Zoning Bd. of Adjustment, 650 S.E.2d 37 (N.C. Ct. App. 2007), *aff'd and appeal held improvidently granted*, 669 S.E.2d 322 (N.C. 2008).

[261] *See* 23 U.S.C. § 131.

[262] See *Outdoor Media Dimensions, Inc. v. Dep't of Transp*., 132 P.3d 5, 8–9 (Or. 2006), for an overview of a typical state statute.

[263] 23 U.S.C. § 131(c).

laws content-based [264] and rejected aesthetics and traffic safety as compelling interests.[265]

Recommendations that can prevent discrimination against non-commercial speech apply here.[266] Federal and state highway beautification statutes and sign ordinances should not restrict the messages on-premise signs can display and should contain a substitution clause; neither is it necessary to make content-based distinctions between off-premise and on-premise signs. A statute or ordinance can provide content neutral requirements, such as size and height requirements, that apply to signs located anywhere, and that are tailored to handle problems presented by off-premise and on-premise signs where they will be located.[267]

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[264] *See* Thomas v. Bright, 937 F.3d 721, 729 (6th Cir. 2019) (discussing state law; signs advertising activity on premises); Adams Outdoor Advert. LP v. Pa. Dep't of Transp., 930 F.3d 199, 207 (3d Cir. 2019) (discussing state law; exemption for on-premise signs advertising sale or lease of property; applying different Third Circuit rules); Auspro Enters. v. Tex. Dep't of Transp., 506 S.W.3d 688, 697 (Tex. App. 2016) (invalidating several exemptions in 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; rest of act severable). See *Outdoor Media Dimensions, Inc*., 132 P.3d at 18, for a state case holding a similar provision for on-premise signs content-based. *See also* L.D. Mgmt. Co. v. Thomas, No. 3:18-CV-722-JRW, 2020 WL 1978387, at *2 (W.D. Ky. Apr. 24, 2020) (invalidating regulations under state billboard act; regulations requiring permit and requiring billboard to be securely affixed to ground and not mobile would not apply if billboard referred to activities on land where billboard sits); Emily Jessup, *When "Free Coffee" Violates the First Amendment: The Federal Highway Beautification Act After* Reed v. Town of Gilbert, 16 FIRST AMEND. L. REV. 73 (2017); Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 705 (5th Cir. 2020) (holding similar local ordinance unconstitutional). *But see* Contest Promotions, LLC v. City & Cnty. of San Francisco, 704 F. App'x 665, 667 (9th Cir. 2017) (upholding ordinance authorizing business signs to direct attention to the "primary busi-ness . . . conducted on the premises" because *Reed* does not apply to commercial speech).

[265] *See Reagan Nat'l Advert. of Austin, Inc*., 972 F.3d at 710 (to "protect the aesthetic value of the City and to protect public safety"); *Thomas*, 937 F.3d at 733 (holding Act is underinclusive and not narrowly tailored); *Auspro Enters*., 506 S.W.3d at 701.

[266] *See supra* notes 34–36 and accompanying text.

[267] The Street Graphics Model Ordinance takes this approach and does not define the terms "off-premise" or "on-premise." Street Graphics Model Ordinance § 1.03, *in* STREET GRAPHICS, *supra* note 9, at 71 (providing definitions). An example that is not content-based would be an ordinance that regulates signs on "business premises" by enacting size, height, setback, and other requirements that are appropriate to the premise where the sign will be displayed. For example, an ordinance can vary the size and height of on-premise ground signs depending on the speed of adjacent traffic and the width of the adjacent street. *See* STREET GRAPHICS, *supra* note 9, at 25–48 (discussing this method); Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 894 (9th Cir. 2007) (recognizing use of this method in sign ordinance).

Other sign ordinance decisions post-*Reed*[268] are consistent with pre-*Reed* decisions and have not expanded the risk of a successful content-based attack. Courts struck down content-based ordinances that made distinctions between different kinds of speech,[269] content-based regulations of signs,[270] content-based exemptions,[271] and content-based restrictions on event signs.[272] Once a court holds a sign ordinance content-

[268] Courts that applied *Reed* in cases that did not consider sign ordinances are inconsistent and have not provided the clarity that *Reed* promised. Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191, 193 (2019) (explaining that *Reed* has been consequential but did not clarify free speech law, circuits have largely read it narrowly, circuits unclear on what makes a law content-based on its face and cannot agree on when a government's purpose invalidates an otherwise content-neutral law).

[269] *See* Knutson v. City of Oklahoma City, 402 F. Supp. 3d 1266, 1275 (W.D. Okla. 2019) ("Commercial or industrial real estate signs are given more favorable treatment than residential real estate or construction signs."); Kersten v. City of Mandan, 389 F. Supp. 3d 640, 646 (D.N.D. 2019) ("Mandan prohibits all murals which convey a commercial message while allowing other murals whose messages are not commercial.").

[270] *See* Wagner v. City of Garfield Heights, 675 F. App'x 599, 607 (6th Cir. 2017) (ordinance applied "explicitly and exclusively to political signs"); www.RicardoPacheco.com v. City of Baldwin Park, No. 2:16-cv--09167-CAS(GJSx), 2017 WL 2962772, at *8 (C.D. Cal. July 10, 2017) (additional signs around election days). *But see* Adams Outdoor Advert. LP v. Pa. Dep't. of Transp., 930 F.3d 199, 206 (3d Cir. 2019) (approving exemption of official speech).

[271] *See* Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 633 (4th Cir. 2016) (holding code exempted governmental or religious flags and emblems but applied to private and secular flags and emblems and exempted "'works of art' that 'in no way identif[ied] or specifically relate[d] to a product or service,' but it applied to art that referenced a product or service"); GEFT Outdoor LLC v. Consol. City of Indianapolis & Cnty. of Marion, 187 F. Supp. 3d 1002, 1014 (S.D. Ind. 2016) ("noncommercial opinion signs" defined as whether a sign "expresses an opinion or point of view, such as, a political, religious, or other ideological sentiment or support or opposition to a candidate or proposition for a public election;" different from other exempted sign types, including "'real estate signs' and 'temporary signs for grand openings and city-recognized special events'").

[272] *See www.RicardoPacheco.com*, 2017 WL 2962772, at *7 (noting additional flag may be displayed for three days before and after Memorial Day, Independence Day, and Veterans Day); *see also* Fanning v. City of Shavano Park, No. SA-18-CV-00803-XR, 2019 WL 7284945, at *9 (W.D. Tex. Dec. 19, 2019) (justifying restriction of banners to one week in year before annual holiday depending on message expressed).

based, it does not usually find compelling interests in aesthetic or traffic safety,[273] or that the ordinance was narrowly tailored.[274]

These difficulties can also be avoided by good drafting. Distinctions can be made among different kinds of ordinances based on location, physical characteristics, time limits, or other factors that are not content-based and that achieve the purposes of the ordinance.[275] Requirements for event signs are an example. The Court of Appeals for the District of Columbia upheld as content neutral an ordinance that required all event-related signs to be removed within thirty days after the event to prevent visual clutter.[276] As the court pointed out, *Reed* did not view the "bare distinction" between event-related and other signs as content-based.[277]

D. The "Need to Read" Test

The *Reed* decision did not discuss another test some courts use to decide whether a law is content-based.[278] This test, often called a "need to read" test, holds a sign ordinance is content-based if an enforcement authority has to read the sign to decide whether it has prohibited content. As an example, assume a sign ordinance authorizes on-premise signs that

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[273] *See Cent. Radio Co*., 811 F.3d at 633–34 (noting distinctions between flags); *Knutson*, 402 F. Supp. 3d at 1275 (discussing exemptions); *see also* Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) (noting exemptions for noncommercial content). *Contra Fanning*, 2019 WL 7284945, at *10 (upholding ordinance allowing banners for one week during year held content-based; city of 3000 puts a central focus on its appearance, beauty, and charm).

[274] *See* Wagner v. City of Garfield Heights, 675 F. App'x 599, 607 (6th Cir. 2017) (noting political sign regulation); *Cent. Radio Co*., 811 F.3d at 634 (noting exemptions); *Knutson*, 402 F. Supp. 3d at 1275–76 (discussing different treatment of different kinds of signs); *GEFT Outdoor LLC*, 187 F. Supp. 3d at 1014–15 (holding no explanation for differing regulations for opinion signs as compared with window and other signs that demonstrated narrow tailoring in furtherance of compelling interests in aesthetics and traffic safety); *Contra Fanning*, 2019 WL 7284945, at *10 ("If the City believes banner signs damage its interest in the aesthetics of its community and excludes such signs for 51 weeks out of the year, then the restriction can hardly be more narrowly drawn."); *see also* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1201 (9th Cir. 2016) (determining mobile advertising ordinances not content-based; narrowly drawn).

[275] *See generally* Connolly & Weinstein, *supra* note 217, at 614–15 (suggesting content-neutral definitions of event signs, for sale signs, and similar signs).

[276] *See* Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C., 846 F.3d 391, 403 (D.C. Cir. 2017) (holding lamppost rule makes a content-neutral distinction between event-related signs and those not related to an event).

[277] *Id.* at 404. An option for temporary signs is to apply the same requirements to all temporary signs.

[278] *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

advertise real estate for sale, lease, or exchange. The question is whether an ordinance is content-based because an enforcement authority has to read a sign to decide whether it has content.

How this test originated is not clear. Content neutrality is decided facially, and reading a sign does not affect that decision. It also is not clear whether the need to read test is a standalone test for deciding when an ordinance is content-based, or whether it only supplements other tests. In some cases, a court relied on the need to read test in addition to deciding that an ordinance was content-based under other criteria.[279]

Supreme Court cases are mixed. The Court has applied the need to read test in cases that did not consider sign ordinances.[280] They considered statutes that prohibited certain types of content, such as statements on "controversial issues of public importance," or that required an official decision based on content, such as the type of magazine being regulated. The Court did not explain why it adopted the test.

Without citing cases that applied the test, the Court rejected its application to a statute that made it unlawful, within 100 feet of any health facility entrance, for any person to "knowingly approach" another person within eight feet without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[281] The Court held it was common to examine the content of a communication to determine a

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[279] *See, e.g.*, Neighborhood Enters. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) (holding that whether the definition of "sign" is content-based depends on message conveyed).

[280] *See* McCullen v. Coakley, 573 U.S. 464, 479 (2014) (holding act would be content-based if enforcement authorities had to examine content of message to determine whether violation has occurred, but act does not require this); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding content of message must be examined to assess costs of security for parade participants to determine fee required by ordinance); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (holding enforcement authorities must read content of message to decide whether magazine should be taxed); F.C.C. v. League of Women Voters of California, 468 U.S. 364, 383 (1984) (holding statute forbade any noncommercial educational broadcasting station that receives a grant from the Corporation for Public Broadcasting to "engage in editorializing," and "enforcement authorities must necessarily examine the content of the message" to decide if violation has occurred).

[281] Hill v. Colorado, 530 U.S. 703, 707 (2000), *discussed in The Supreme Court 1999 Term, Leading Cases*, 114 HARV. L. REV. 289 (2000); *see also* Regan v. Time, Inc., 468 U.S. 641, 655–56 (1984) (holding color and size requirements in federal statute regulating currency reproductions did not regulate content because official did not have to evaluate a message when deciding whether it violated the statute).

speaker's purpose, and not improper to look at a written or oral statement's content to decide "whether a rule of law applies to a course of conduct."[282]

Lower court cases are mixed. Several rejected the need to read test when deciding whether a sign ordinance was content-based,[283] or did not apply it when content neutrality was not an issue.[284] As the Court of

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[282] *Hill*, 530 U.S. at 721. The Court added "it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling'" in violation of the statute "rather than pure social or random conversation." *Id.* "'Cursory examination'" of content "to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.* at 722.

[283] *See* Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 409 (D.C. Cir. 2017) (noting ordinance requiring event-related signs to be removed from public lampposts; not content-based though officials must look at sign to determine if it is event-related); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 368 (4th Cir. 2012) ("That Arlington officials must superficially evaluate a sign's content to determine the extent of applicable restrictions is not an augur of constitutional doom . . . ," quoting *Hill*); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 434 (4th Cir. 2007) ("To the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content based.") (quoting *Hill*, 530 U.S. at 721); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1079 (9th Cir. 2006) ("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."); La Tour v. City of Fayetteville, 442 F.3d 1094, 1096 (8th Cir. 2004) ("It takes some analysis to determine if a sign is 'political,' but one can tell at a glance whether a sign is displaying the time or temperature."); Baldwin Park Free Speech Coal. v. City of Baldwin Park, No. 2:19-CV-09864-CAS-EX, 2020 WL 758786, at *6 (C.D. Cal. Feb. 13, 2020) (quoting *Hill*, 530 U.S. at 722); Kennedy v. Avondale Ests., 414 F. Supp. 2d 1184, 1198 (N.D. Ga. 2005) (sign regulation that requires regulator to read sign to determine if regulation applies is not automatically content-based); Nichols Media Grp., LLC v. Town of Babylon, 365 F. Supp. 2d 295, 311 (E.D.N.Y. 2005) (reading to determine neutral information to decide type of sign or whether banned as billboard, or to distinguish real estate and business signs, does not make an ordinance content-based); B & B Coastal Enters. v. Demers, 276 F. Supp. 2d 155, 168 n.16 (D. Me. 2003) (deciding whether a sign is an identification or advertising sign); *accord* Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012) (eavesdropping statute).

[284] *See* Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1200 (9th Cir. 2016) (holding motorized billboard ordinances not content-based; officer must decide only whether vehicle is an excluded "advertising display" with primary purpose to display messages rather than transporting passengers or carrying cargo); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1078 (9th Cir. 2006) (refusing to apply test when ordinance not content-based); *Nichols Media Grp, LLC*, 365 F. Supp. 2d at 311 (reading of permit application to determine neutral information to decide type of sign or whether

Appeals for the District of Columbia explained, when upholding an ordinance regulating event signs: "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."[285] Other courts applied the need to read test to decide whether a sign was content based.[286] In most of these cases, there was little explanation of why the test was used except for citations to supporting Supreme Court and lower court cases.

The need to read test is not an acceptable measure for deciding whether a sign is content-based. If an ordinance authorizes content, the enforcement authority must always read a sign to decide if content is included. If an ordinance does not authorize content, the enforcement authority must still read a sign to decide if content is improperly included. All sign ordinances will be content-based if the need to read requirement is applied. As one court held, "[i]f applied without common sense, this

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banned as billboard, or to distinguish real estate and business signs, does not make an ordinance content-based).

[285] Act Now to Stop War & End Racism, 846 F.3d at 404.

[286] *See* Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 703 (5th Cir. 2020) (deciding whether a sign if on-premise or off-premise is not a cursory inquiry; rejecting cursory exception to *Reed*); Neighborhood Enters. v. City of St. Louis, 644 F.3d 728, 736 (8th Cir. 2011) (holding ordinance content-based because must look at content of sign to determine whether particular object qualifies as a "sign" subject to regulation, or a "non-sign" exempt from regulation); Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 906 (9th Cir. 2007) (noting exemptions in ordinance); Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir. 1998) (holding exemptions for "open house" real estate signs and safety, traffic, and public informational signs were content-based); Desert Outdoor Advert. v. City of Moreno Valley, 103 F.3d 814, 820 (9th Cir. 1996) (discussing certain off-site noncommercial signs); Nat'l Advert. Co. v. City of Orange, 861 F.2d 246, 249 (9th Cir. 1988) (discussing exemption of noncommercial messages); Vono v. Lewis, 594 F. Supp. 2d 189, 200 (D.R.I. 2009) (discussing off-premise/on-premise distinction); Advantage Media, LLC v. City of Hopkins, 379 F. Supp. 2d 1030, 1040 (D. Minn. 2005) (discussing size and height requirements); Clear Channel Outdoor, Inc. v. Town Bd. of Windham, 352 F. Supp. 2d 297, 308 (N.D.N.Y 2005) (discussing size and duration requirements); Savago v. Vill. of New Paltz, 214 F. Supp. 2d 252, 257 (N.D.N.Y. 2002) (discussing size and duration requirements); Outdoor Sys. v. City of Merriam, 67 F. Supp. 2d 1258, 1264 (D. Kan. 1999) ("[T]he city must evaluate the content of the sign to determine whether it is allowed . . . ."); Harp Advert. of Ill., Inc. v. Vill. of Chicago Ridge, No. 90 C 867, 1992 WL 386481, at *8 (N.D. Ill. Mar. 13, 1992) (ordinance is content-based because it "requires the Village to consider the content of signs to determine whether or not they are exempted from the provisions of the sign code").

principle would mean that every sign, except a blank sign, would be content based."[287]

XI. CONCLUSION

Municipalities that want to protect their sign ordinances from constitutional attack face a bewildering set of ambiguous and conflicting rules with demanding free speech requirements. Though not always fatal, free speech doctrine is risky. Risk varies. Billboard bans that affect commercial speech fare reasonably well. The *Central Hudson* criteria raised the level of judicial review and might have been troublesome, but the *Metromedia* plurality narrowed the way in which they applied. Many lower courts followed *Metromedia*, but some considered new requirements from later Supreme Court cases, such as requiring studies to show compliance with the third "directly advance" criterion. This and other requirements, such as a statement of purpose requirement, are not difficult to meet. Risk is present because circuit court direction may be mixed or unclear, and a district court judge may decide that compliance with the criteria has not been proved.

Free speech rules for noncommercial and content-based speech also present problems. Many sign ordinances violate these rules. Ordinance revision can avoid constitutional rejection, but there is risk. Time, place, and manner rules create problems if a court decides to apply them and concludes that alternate channels of communication are not available, as this decision may be damaging. Overbreadth doctrine creates risk because it can lead to a successful facial attack on an ordinance, and a court may refuse to sever the parts that remain. Content neutrality problems will be present if a court decides to apply the need read doctrine.

Free speech law creates a complicated challenge for local governments. They must strike a balance in sign ordinances that can protect the aesthetic environment and improve traffic safety while also protecting the special claims of free speech.

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[287] Reed v. Town of Gilbert, 587 F.3d 966, 978 (9th Cir. 2009), *aff'd*, 707 F.3d 1057, 1063 (9th Cir. 2013), *rev'd & remanded on other grounds*, 576 U.S. 155 (2015). The court also stated, "This case also highlights the absurdity of construing the 'officer must read it' test as a bellwether of content." *Id.*