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Sign Regulations And The First Amendment: Navigating Developments In The Law

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PART I: INTRODUCTION

The First Amendment of the United States Constitution provides "Congress shall make no law…abridging the freedom of speech, or of the press…." Under the Fourteenth Amendment, municipal ordinances are within the scope of this limitation on governmental authority.[1] The First Amendment forbids the government to regulate speech, such as signage, in ways that favor some viewpoints or ideas at the expense of others. A city, however, is not powerless to regulate signage within their jurisdictions and the courts have recognized the constitutionality of sign regulations in a myriad of different factual scenarios. The contours of whether sign regulations will pass constitutional muster or will instead be deemed constitutionally infirm are nuanced and varied and require a detailed understanding of this complex area of law.

Of paramount importance when drafting sign regulations is to first determine the classification of the forum being regulated to earmark the applicable rules for that forum as dictated by First Amendment jurisprudence. Whether the signs being regulated are commercial in nature, such as billboards, versus noncommercial message such as political signs, is also of critical importance in determining the contours of regulations that will pass constitutional muster. This paper examines the jurisprudence of forum classification, the rules for regulating commercial speech (in particular in the context of billboard regulation) and the rules governing the constitutionality of regulations of political signage both on private property and in the public forum.

PART II: FORUM CLASSIFICATION

A. Public Forum Versus Non-Public Forum

The forum doctrine is a system of categorizing places, and then determining the rules according to the category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differs based on the type of forum being regulated.[2] Historically, there have been two main categories of government property when it comes to First Amendment activity – the traditional public forum and the non-public forum.

A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions. In a traditional public forum First Amendment activities generally may not be prohibited, rather, "speakers can be excluded ... only when the exclusion is necessary to serve a compelling state interest and

[1] *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

[2] *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); see also *PMG Int'l Div., L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001).

the exclusion is narrowly drawn to achieve that interest."[3] Thus, in a public forum strict scrutiny applies. Content-based regulations (*i.e.* rules that either allow or exclude speech based on the subject matter being expressed) are deemed presumptively unconstitutional for a public forum and only pass muster if they are the least restrictive means to further a compelling government interest.[4] Content-neutral "time, place and manner" regulations of a public forum are valid if they are narrowly tailored to serve a substantial government interest, and they leave open ample alternative means for communicating the same information.[5]

In contrast to the public forum, a non-public forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. In a non-public forum, the government has more latitude to regulate and may restrict access to the forum, so long as the restrictions are reasonable and are viewpoint neutral (*i.e.* not an effort to suppress expression merely because the public officials oppose the speaker's view).[6]

B. Designated Public Forum Versus Limited Public Forum

The two main categories of government property (public forum and non-public forum) have been expanded to cover circumstances that do not fall neatly into either primary category – namely, the designated public forum and the limited public forum. Both of these forum classifications apply to non-public fora that the government opens to expressive activity but the terms under which the forums operate and the level of review applied by the courts differ significantly. Specifically, a designated public forum is created when the government intentionally opens (or "designates") non-traditional areas for First Amendment activity pursuant to policy or practice.[7] Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university had an express policy of opening the facilities to registered student groups; school board meetings where the state statute provided for open meetings; a municipal auditorium and a city-leased theater where the city dedicated the property to expressive activity; and the interior of a city hall where the city opened the building to display art and did not consistently enforce any restrictions.[8] Regulations for a designated public forum are subject to the same strict scrutiny level of review as a public forum.

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[3] *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

[4] *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

[5] *Cornelius,.* 473 U.S. at 799-800.

[6] *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

[7] *See Cornelius,* 473 U.S. at 800, 803; *Perry*, 460 U.S. at 45-46.

[8] *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

A limited public forum is created when the government opens a non-public forum to First Amendment activity but limits such access to certain groups or topics.[9] Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limited it to certain uses; public school property where policy limits use to only certain groups; and the state's specialty license plate program.[10] A property classified as a limited public forum is subject to the same rules as a non-public forum where the government may restrict speech so long as the restrictions are reasonable and viewpoint neutral.[11] The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so long as the forum remains open it must comply with the requisite standards for its forum classification.[12]

Given the different standard of review for regulations of a designated public forum as compared to a limited public forum, it is critical to correctly classify the forum. In order to determine the proper classification of the forum courts typically examine the terms on which the forum operates.[13] Courts critically examine the actions and policies of cities to determine whether a designated public forum or a limited public forum has been created.[14] The more consistently enforced and selective restrictions are, the more likely the forum will be deemed a limited public forum.[15] By contrast, where restrictions are not enforced or if exceptions are haphazardly permitted, the more likely the forum will be deemed a designated public forum.[16] There is no bright-line test to determine whether the courts will deem a forum a limited public forum or a designated public forum. The cases are varied, fact specific and many times in direct contradiction.

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[9] *Hills v. Scottsdale Unified Sch. Dist.,* 329 F.3d 1044, 1049 (9th Cir. 2003).

[10] *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007); *Good News Club v. Milford Center School*, 553 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

[11] *Id.*; *Perry,* 460 U.S. at 46; *United States v. Kokinda*, 497 U.S. 720, 725-27 (1990); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ*., 196 F.3d 958, 965 (9th Cir. 1999); *Riel v. City of Bradford*, 485 F.3d 736, 753-54 (3rd Cir. 2007).

[12] *Perry*, 460 U.S. at 46.

[13] *Hopper*, 241 F.3d at 1074, 1075; *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

[14] *Hopper,* 241 F.3d at 1076.

[15] *Id.* at 1076-78; *Cornelius*, 473 U.S. at 804-05; *See also Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302-04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

[16] *Id.*; *Hills*, 329 F.3d at 1049.

C. Case Study: Signage On Public Transit Vehicles

Many jurisdictions allow advertising on public owned transit vehicles. The cases analyzing the regulations of signage in this forum provide a useful illustration of how the courts apply forum classification in practice and offer useful guidelines for cities wishing to ensure a forum is classified as a limited public forum so as to retain more control over the type of signage allowed in the forum.

The Supreme Court has ruled that advertising space on public transit vehicles is not a public forum,[17] but whether the space will be considered a designated public forum or a limited public forum is a very fact specific inquiry.[18]

In *Children of the Rosary v. City of Phoenix,* the Ninth Circuit found that the advertising space on municipal buses at issue was a nonpublic/limited forum rather than a designated public forum.[19] At issue in *Children of the Rosary* was Phoenix's refusal to post the plaintiffs' noncommercial anti-abortion message on its buses. The Ninth Circuit explained that Phoenix had not created a designated public forum by opening the exterior panels on buses for advertising to the general public as it had specifically limited the forum to commercial advertising. The Ninth Circuit found the case easily distinguishable from cases where bus panels were found to be designated public fora because Phoenix had consistently promulgated and enforced policies restricting advertising on its buses to commercial messages. Given that the bus panels in *Children of the Rosary* were a limited public forum, Phoenix had only to avoid distinctions based on viewpoint and set advertising standards that were objective and reasonable. The Ninth Circuit found that Phoenix's justifications for the limitations on noncommercial speech (namely to minimize the chance of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience) all supported the reasonableness of Phoenix's restrictions. The Ninth Circuit also found that the restrictions were viewpoint neutral and concluded that the city could constitutionally refuse to post the plaintiff's anti-abortion advertisements. Likewise, in *Lehman*, the Supreme Court found that a prohibition against political advertising on public transit vehicles was constitutionally sound as it was viewpoint neutral and reasonable to achieve the city's aims of minimizing chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience.[20]

By way of contrast, in *Christ's Bride Ministries,* the Third Circuit found that advertising space on bus panels was a designated public forum precisely because the government

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[17] *Lehman*, 418 U.S. at 303, 305.

[18] *Children of the Rosary*, 154 F.3d at 976; *Seattle Mideast Awareness Campaign v. King County*, 771 F.Supp.2d 1266 (W.D. Wash. 2011); *Christ's Bride Ministries v. SEPTA*, 148 F.3d 242 *(3rd Cir. 1998*).

[19] *Children of the Rosary*, 154 F.3d at 976-80.

[20] *Lehman*, 418 U.S. at 304.

authority regulating the space had a practice and policy of allowing a broad range of advertisements including noncommercial religious and political messages.[21] The Third Circuit found based on the practice of permitting virtually unlimited access to the bus panels, a designated public forum had been created. The Third Circuit went on to explain that the city's exclusion of the anti-abortion message was a content-based distinction that did not pass constitutional muster under the strict scrutiny test applied to a designated public forum. Thus, the city in the *Christ's Bride Ministries* case could not prohibit the plaintiff from posting its noncommercial anti-abortion messages on bus panels.

The differing outcomes in *Children of the Rosary* and *Lehman* as compared to *Christ's Bride's Ministry* are explained by the different classifications of the forum. The cases illustrate that a wholesale allowance for "noncommercial" speech on public transit vehicles is problematic from the standpoint of maintaining the ability to restrict potentially inflammatory signage on public transit property.

The most prudent approach for municipalities considering signage on transit vehicles is to consider limiting the advertising to commercial messages to maintain the nonpublic forum status of the forum. While allowing commercial advertising and prohibiting noncommercial signs may seem at odds with the general rule that the government may not favor commercial speech over noncommercial speech, where the forum is a nonpublic one (like public transit vehicles) a city as a proprietor may favor commercial messages over noncommercial ones so long as the restrictions are reasonable and viewpoint neutral (by contrast, the government may not favor commercial speech over noncommercial speech in a public forum). Cities should articulate reasonable and objective criteria for their limitations and for assessing the type of advertising allowed on public transit vehicles.

PART III: THE COMMERCIAL SPEECH DOCTRINE

A. Standard of Review: *Central Hudson* Test

Stricter standards are applied to governmental regulation of noncommercial speech than to commercial speech.[22] For instance, municipalities are generally prohibited from imposing content-based regulation on noncommercial speech, however these rules do not apply in the context of commercial speech. Thus, regulations that may be unconstitutional with respect to noncommercial speech may be valid when applied to commercial speech.[23] Accordingly, cities must determine whether the relevant speech is commercial or noncommercial when evaluating the appropriateness of their regulations.

[21] *Christ's Bride Ministries*, 148 F.3d at 250-55.

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

[23] *National Advertising Co. v. Orange*, 861 F.2d 246, 248 (9th Cir. 1988).

While the distinction between what is commercial speech versus noncommercial speech often will be clear, this is not always the case. Indeed, there are times that speech may contain both commercial and noncommercial aspects such as messages about boycotting certain businesses such as Sea World (for concerns over treatment of orcas) or Nike (for concerns over child labor). The courts have articulated three general characteristics to provide guidance in determining whether speech will be deemed commercial in nature: (1) it is an advertisement of some form; (2) it refers to a specific product; and (3) the speaker has an economic motivation for the speech.[24]

If the relevant speech is deemed commercial in nature, the appropriate standard of review, is often referred to as "intermediate scrutiny." This is a relatively modern development in First Amendment jurisprudence as prior to 1975, purely commercial advertisements of services and goods were considered to be outside the protection of the First Amendment.[25] Today it is understood that commercial speech is deserving of some protection under the First Amendment. The seminal case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[26] where the Supreme Court adopted a four-part test to determine the validity of government restrictions on commercial speech:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected speech is valid only if it
> (2) seeks to implement a substantial government interest,
> (3) directly advances that interest, and
> (4) reaches no further than is necessary[27] to accomplish the given objective.[28]

As municipalities consider regulations for commercial speech, they should not only ensure that such comply with the *Central Hudson* test but also analyze how the rules intersect with noncommercial speech rules and fit within the cities' overall regulatory framework.

B. Billboard Regulations

Billboards are a popular means of advertising to the masses. Billboards are generally placed along highways or major traffic arterials to garner the greatest amount of attention for a specific product. Originally billboards were static copy but these days we find advertisements with high impact graphics and bright colors, artfully designed to catch the eye of passers-by.

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[24] *See Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60 (1983).

[25] *Metromedia, Inc.*, 453 U.S. at 505.

[26] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980).

[27] In *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

[28] *Central Hudson*, 447 U.S. at 563-66.

Billboards and other signs are protected by the First Amendment.[29] However, billboards may be regulated and even banned by municipalities pursuant to their police power.[30] Cities are able to implement reasonable zoning ordinances in the interest of public health, safety, aesthetics and maintenance of property values.[31] As articulated by the Supreme Court in *Metromedia, Inc. v. City of San Diego*,[32] municipalities may prohibit all off-site billboards for aesthetic and safety reasons, so long as the city's ordinance complies with the First Amendment. Cities constantly grapple to maintain a fine balance between the legitimate exercise of their police power and the First Amendment.

In *Metromedia*, the Supreme Court applied the *Central Hudson* test and held that San Diego could impose a complete ban on billboards so long as the ban is content neutral. Under the fourth prong of *Central Hudson*, the Supreme Court found that the ordinance was no broader than necessary because "[i]f 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 to solving the problems they create is to prohibit them."[33] The Supreme Court further held that commercial billboards could be banned off-site even if they were permitted on-site.[34]

However, San Diego's regulations also impacted noncommercial speech which the Supreme Court found invalid. Specifically, San Diego's ordinance permitted on-site commercial advertising but banned on-site noncommercial advertising and offered no explanation why one was permitted while the other was not. San Diego did not offer any indication that noncommercial billboards would be more distracting to drivers or would have an adverse impact on the aesthetics of the city. The Supreme Court further held that the city could not conclude that commercial messages are of a greater value than noncommercial messages.[35] Moreover, with respect to noncommercial speech, San Diego could not choose the appropriate subjects for public discourse.[36] San Diego did not ban all billboards and accordingly the Supreme Court rejected San Diego's argument that the ordinance was a reasonable time, place and manner restriction.[37]

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[29] *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005).

[30] *Metromedia,* 453 U.S. at 507-510.

[31] *Outdoor Graphics v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996).

[32] *Metromedia,* 453 U.S. at 512.

[33] *Id.* at 508.

[34] *Id.*

[35] *Id.* at 513.

[36] *Id.* at 515.

[37] *Id.* at 515-16.

Metromedia supports a city's ability to adopt regulations prohibiting off-site commercial signs. The case also highlights the importance of evaluating commercial speech regulations in the context of the entire regulatory framework to ensure that commercial speech is not being favored over noncommercial speech in the public forum or on private property (although as noted earlier such favoritism is allowed in a non-public/limited forum). Because challenges to billboard ordinances usually lead to expensive federal litigation, it is wise for municipalities to include extensive findings and specific references to case law in support of their regulations. A city's findings should state the governmental interest to be served through the regulation, and provide enough information about the need within the city to show there is a strong correlation between that interest and the regulation. A city should exercise its judgment on how best to solve the billboard issue and explain why the final alternative was selected amongst competing interests. Some cities also choose to include a substitution clause provision in their regulations to avoid the problems that may arise from favoring commercial speech over noncommercial speech (although as noted above in a non-public or limited public forum favoring commercial speech can pass constitutional muster such is not the case for billboard regulations impacting public forum or private property). A substitution clause provides that a noncommercial message of any type may be substituted for any commercial message which is otherwise allowable.

C. Case Study: Exceptions To Overall Bans On Billboards

As noted above, the courts have found that cities may ban all billboards and that such is justified by community interests in safety and aesthetics.[38] However, many jurisdictions while implementing an overall ban on billboards also seek to provide certain exceptions to the overall ban. It is the constitutionality of these exceptions that have generated a significant amount of litigation in recent years.

The courts have validated exceptions to overall bans under certain circumstances explaining that a city is entitled to take a graduated response to the proliferation of billboards including "exercising its classically legislative function of creating exceptions to sign bans . . . so long as those judgments are reasonable in light of the City's interests."[39] For the exceptions to be deemed reasonable and pass the *Central Hudson* test, they cannot undermine or counteract the interests (namely safety and aesthetics) that the government used to support its overall ban.[40]

In examining (and upholding) exceptions to Los Angeles' ban on billboards, the Ninth Circuit in *World Wide Rush v. City of Los Angeles* explained that the exceptions passed constitutional muster because the city was able to demonstrate a link between the basis for

[38] *Id.* at 507-08, 510*; Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984); *Naser Jewelers, Inc. v. City of Concord,* 513 F.3d 27 (2008).

[39] *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 744 (9th Cir. 2011); *see RTM Media v. City of Houston*, 584 F.3d 220 (5th Cir. 2009).

[40] *Metro Lights, LLC v. City of Los Angeles,* 551 F.3d 898, 911-12 (9th Cir. 2009).

the exceptions and the asserted goal of aesthetics and safety which were used to support the overall ban.[41] The Ninth Circuit overturned the district court's determination that Los Angeles' exception to its freeway facing sign ban was unconstitutional.[42] The exceptions at issue allowed freeway facing billboards near the Staples Center and in a newly created special use district ("SUD"). Los Angeles' code specifically noted that the stated purpose of its ban on billboards was to promote public safety and welfare by providing reasonable protection to the visual environment and by ensuring that billboards do not interfere with traffic safety or otherwise endanger public safety. Los Angeles asserted that the nature of the Staples Center's use, coupled with its location in the center of a highly urbanized area, required billboards that could effectively communicate event-related information. Likewise, the SUD that acted as an exception to the sign ban was created as part of a project to renovate Santa Monica Boulevard to improve traffic flow. The targeted corridor had sixteen billboards, the outright elimination of which might have triggered an obligation by Los Angeles to compensate the owners. Thus, Los Angeles and the billboard owners agreed that four sign faces could be relocated to a newly created SUD which allowed new billboards facing the freeway but also resulted in an overall decrease in the number of billboards.

While the district court in *World Wide Rush* found the Staples Center and SUD exceptions to the sign ban undermined Los Angeles' stated interest in safety, the Ninth Circuit took a more nuanced approach. The Ninth Circuit explained that the critical question is whether the City denigrates its interest in safety and beauty and defeats its own case by permitting freeway facing billboards. The Ninth Circuit then went on to find that the exceptions were made for the express purpose of advancing those very interests and thus were constitutional. Specifically, the billboards at the Staples Center were an important element of a project to remove blight and dangerous conditions from downtown Los Angeles. Moreover, the Ninth Circuit explained that Los Angeles could reasonably conclude that the benefits of redeveloping an otherwise blighted area outweighed the harm of additional freeway facing billboards. Similarly, the newly created SUD was an outgrowth of Los Angeles' efforts to improve traffic flow and thereby safety and also resulted in a net reduction of billboards. The Ninth Circuit found that Los Angeles submitted a convincing rationale that was consistent with its asserted government interest and thus the exceptions to the ban were constitutional. The Ninth Circuit, found that Los Angeles' decision to permit some freeway facing billboards at the Staples Center and the SUD "did not break the link" between the Freeway Facing Sign Ban and the city's objectives in traffic safety and aesthetics."

Likewise, in *RTM v. Houston,* the Fifth Circuit also validated exceptions to billboard bans where the exceptions furthered the government's aesthetic interest which was the basis for

[41] *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676 (9th Cir. 2010); *Vanguard Outdoor*, 648 F.3d at 744.

[42] *World Wide Rush*, 606 F.3d at 681-82.

the overall regulatory provisions.[43] Specifically, at issue in the *RTM* case was a ban on new billboards displaying offsite commercial messages. Excluded from this ban were noncommercial signs which the regulations defined as a structure that is used exclusively and at all times for messages that do not constitute commercial advertising. The Fifth Circuit found the regulations were valid explaining that the evidence showed that the regulations were effective at gradually reducing the number of billboards in the city (as the majority of billboards were commercial in nature) and thus the ban (even with the limited exception) enhanced the city's interest in aesthetics.

Similarly, in *Clear Channel Outdoor v. City of New York*, the Second Circuit found that New York City's outdoor advertising regulations were constitutional.[44] The sign companies argued that loopholes and inconsistencies in the regulations prevented the regulations from advancing a substantial government interest rendering them invalid under the First Amendment. In finding otherwise, the Second Circuit explained that despite the exceptions to the ban on offsite advertising, the regulatory scheme advanced New Your City's interests in traffic safety and aesthetics. Likewise, the Second Circuit explained that distinctions in the regulations between permissible and impermissible locations for outdoor commercial advertising were meaningful and did not defeat the purpose of the regulatory scheme.

As the above-discussed cases illustrate, courts have signaled that content-neutral exceptions to billboard bans may be constitutionally valid but the exceptions must maintain a link with the overall purpose of the ban in order to pass constitutional muster. Recently, in the face of tight fiscal times, municipalities have been looking to billboards as a potential revenue generating platform (potentially through revenue sharing agreements with billboard companies). Such ventures pose concerns that the necessary link to a city's interest in safety and aesthetics, which is used to support an overall billboard ban, will be broken. For instance, some cities have considered the constitutionality of forming new freeway overlay zones that would be exempt from a city-wide ban on billboards. Billboards could then be erected in such a zone pursuant to an agreement with billboard companies for revenue sharing. It is unclear, however, how offsite billboards in a freeway overlay zone would improve aesthetics and safety, the government interest used to support the overall ban. Rather, a city's real interest in the exception to the ban is the revenues that would be generated by the proposed revenue sharing agreements.

There are also legal concerns as to the validity of potential revenue sharing agreements themselves. Some California cities have contemplated using statutory development agreements although it is unclear that signage alone qualifies for such an agreement. Other jurisdictions have considered incorporating an operating agreement provision as an element of the regulations whereby a company is required to enter into an operating agreement over which the city has broad discretion to impose terms before being granted a

[43] *RTM*, 584 F.3d at 227-28.

[44] *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 106-107, 110 (2nd Cir. 2010).

billboard permit. This raises First Amendment concerns under the prior restraint doctrine which requires that a permitting regime "avoid placing unbridled discretion in the hands of government officials."[45] As the primary purpose of the operating agreement requirement is to provide the city with an opportunity to negotiate for revenue sharing, it is unlikely that the decision-maker's discretion can sufficiently be cabined to pass constitutional muster while also meeting the goal of providing flexibility to negotiate for revenues. Either of these scenarios (a development agreement or an operating agreement) for revenue sharing pose significant legal risks.

It is unclear how the courts will decide to reconcile the objectives of aesthetics and safety supporting an overall billboard ban with exceptions to bans where the primary government interest supporting the exception is the generation of revenues. There is a high risk that exceptions to billboard bans justified by a revenue generating objectives will result in litigation and a significant risk they will be deemed unconstitutional.

PART IV: POLITICAL SIGNS

A. Time, Place and Manner Restrictions

Signs promoting a political viewpoint, belief, position, or opinion are a fundamental form of expression protected by the First Amendment and are entitled to the highest form of protection.[46] But, political signs also pose unique problems that are subject to a city's police powers. Political signs take up space, they may obstruct views, they distract motorists, they take up land which may be used for another purpose, and they may present aesthetic concerns such as "visual clutter." Just like the government may regulate audible expression such as noise,[47] the government may regulate the physical characteristics and locations of political signs under the time, place and manner doctrine.[48]

The time, place and manner doctrine applies to both public forum property (where the government acts as the owner of property) and to cases where the government is acting as the regulator of private property.[49] To pass constitutional muster, time, place and manner restrictions: (1) must be narrowly tailored to serve a significant government interest; (2) must not be based on the content of the message; (3) must leave open ample alternatives

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[45] *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 904-905 (9th Cir. 2007.)

[46] *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346 (1995).

[47] *See Kovacs v. Cooper*, 336 U.S. 77 (1949); *see also Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[48] *See generally Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981); *Members of City Council of Los Angeles,* 466 U.S. at 806; *City of Ladue v. Gilleo,* 512 U.S. 43 (1994).

[49] *Members of City Council of Los Angeles*, 466 U.S. at 806.

for communication; and (4) must not delegate overly broad discretion to a government official.[50]

In drafting regulations governing political speech, cities should first consider the forum at issue and whether the property being regulated is private or public. As the time, place and manner doctrine, mandates content-neutrality, cities should make every effort to ensure that regulations impacting political signage are not content-based. This can be made difficult as the courts are not at all clear or consistent as to what constitutes an impermissible content-based distinction. Cities should evaluate the case law in their jurisdiction and evaluate the interplay of regulations impacting political speech within the context of their overall regulatory framework.

B. Political Signs On Private Property

The posting of political signs on private residential property was squarely examined and discussed by the Supreme Court in *City of Ladue v. Gilleo*.[51] In this case, Margaret P. Gilleo placed an antiwar sign in the front yard of her home with the printed words "'Say No to War in the Persian Gulf, Call Congress Now.'"[52] The sign disappeared and Gilleo put up another one which was knocked to the ground.[53] She called the police and was informed that such yard signs were prohibited under the City of Ladue's sign ordinance which banned all residential signs except those falling within one of ten exemptions, political signs not being one of the exemptions. Gilleo filed an action against the City alleging the sign ordinance violated her First Amendment right to free speech.[54] The District Court issued a preliminary injunction against enforcement of the ordinance and Gilleo subsequently placed an 8.5-inches by 11-inches sign in the second story window of her home stating "'For Peace in Gulf.'"[55]

The Supreme Court found the City of Ladue's ordinance unconstitutional, reasoning that the City's aesthetic interests, while valid, must be considered against the effects of the ban which summarily foreclosed an entire medium of expression: namely, prohibiting a property owner from freely expressing an opinion in his or her own front yard.[56] The Court did emphasize that although Ladue's ban on almost all residential signs violated the First Amendment, cities were not powerless to address the ills associated with residential

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[50] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

[51] *City of Ladue,* 512 U.S. 43 (1994).

[52] *Id*. at 45.

[53] *Id*.

[54] *Id.* at 45-46.

[55] *Id.* at 46.

[56] *Id.* at 54-57.

signs.[57] Unfortunately, the Court gave little, if any, guidance about what types of regulations are acceptable, focusing instead on the strong incentives of individual property owners' self-interest in keeping their property values up which diminishes the danger of the limitless proliferation of residential signs creating visual clutter.[58]

The *Ladue* decision permits the placement of political signs on private residential property. However, the Court did not foreclose the government's authority to impose reasonable content-neutral regulations on the size, shape, location, and other aspects of political signs, so long as the regulations do not unconstitutionally impinge upon a homeowner's First Amendment rights.

Although a total ban on political signs in the front yard is unconstitutional,[59] a city may consider regulating the non-communicative aspects of political signs such as the size, shape, location, and duration.[60] The challenging and perplexing area of regulation for a city is when the regulation of the non-communicative aspects of signs impinges on communicative aspects. The government's regulatory interests must be balanced against the individual's right to expression.[61] If the regulation is content-based, for example targeting signs regarding upcoming elections, then the regulation must be necessary to serve a compelling government interest and narrowly drawn to achieve that end. If, on the other hand, the regulation is content-neutral, for example regulating the size, location, and duration of all signs placed in the front yard, then it must serve a substantial government interest and be narrowly tailored to further this interest, leaving open ample alternative means for communicating the desired message.

Unfortunately what emerges from the case law for regulations pertaining to the physical attributes of signs is anything but clear; rather, judicial precedence is fact driven and, offers at best, subtle guidance to a city seeking to implement regulations which will withstand a constitutional challenge.

C. Political Signs On Public Property

As the rules governing a public forum are different from those governing a non-public or limited public forum, it is necessary for any city to determine the relevant forum in which political signage is being regulated. For example, if posting a political sign will be on a billboard in a park, then the relevant forum is the billboard and not the park. Similarly, if posting a political sign will be on a lamp post on a public sidewalk, then the relevant forum is the lamp post and not the public sidewalk.

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[57] *Id*. at 58.

[58] *Id*.

[59] *See Id.* at 56-58.

[60] *See Metromedia,* 453 U.S. at 502.

[61] *See Id*.

Thus, in *Members of the City Council v. Taxpayers for Vincent*,[62] the Supreme Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property.[63] The ordinance was challenged by a City Council candidate who posted campaign signs on utility poles which were subsequently removed by City workers.[64] "Taxpayers for Vincent" argued the utility poles were a public forum or should be treated as a public forum because they were located on public sidewalks.[65] The Court concluded that utility poles are a non-public forum, and that the government could prohibit the posting of signs to preserve physical and aesthetic values.[66] The Court rejected the claim that the public property was a public forum because of the absence of "a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks" and simply because property is owned by the government does not mean that all access shall be granted to whoever wishes to express their opinions.[67]

D. Durational Limits

Contemporary courts have frequently held that durational limits on political campaign signs to be content-based and to be unconstitutional because the local government has failed to show a compelling interest to justify the durational limits.[68] The courts have distinguished between pre-election durational limits and post-election durational limits.

For example, an ordinance which prohibits residential property owners from placing political signs on their property more than 30 days before an election amounts to an impermissible content-based restriction.[69] In some residential neighborhoods, a property owner may be

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[62] *Members of the City Council of Los Angeles,* 466 U.S. 789 (1984).

[63] *Id.* at 817.

[64] *Id.* at 792-93.

[65] *Id.* at 813.

[66] *Id.* at 805.

[67] *Id.* at 814. In *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

[68] *See e.g., Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995); *Knoeffler v. Town of Mamakating*, 87 F. Supp.2d 322 (S.D.N.Y. 2000); *Curry v. Prince George's County,* 33 F. Supp.2d 447 (D.Md. 1999); *Dimas v. City of Warren*, 939 F. Supp. 554 (E.D. Mich. 1996); *Antioch v. Candidates' Outdoor Graphic Service*, 557 F.Supp. 52 (N.D.Cal. 1982); *Orazio v. North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977); *City of Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A.*, 733 N.E.2d 1152 (2000); *Collier v. City of Tacoma*, 121 Wn.2d 737 (1993); *Lakewood v. Colfax Unlimited Asso., Inc*., 634 P.2d 52 (Colo. 1981); *Maguire v. American Canyon*, 2007 WL 1875974 (N.D.Cal. 2007); *Christensen v. Wheaton*, 2000 WL 204225 (N.D.Ill. 2000). A handful of courts have upheld durational limits on political signs. *See e.g., Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972); *Huntington v. Estate of Schwartz*, 313 N.Y. S.2d 918 (N.Y. Dist. Ct. 1970).

[69] *See Whitton*, 54 F.3d at 1404-09.

able to express support for a community organization or high school sports team year-round, but under an ordinance regulating a political sign made of the same material, with the same dimensions and colors, and displayed in the same location, the political sign cannot be displayed, thus the ordinance is inherently content-based.[70]

Similarly, an ordinance limiting signs advertising political events or viewpoints for 10 days before the event was found to be content-based.[71] The Court determined that other signs advertising events of a temporary nature—such as yard sales, town festivities, or athletic events—could presumably be posted at any time within 30 days before the actual event.[72] An ordinance prohibiting the posting of political signs more than 60 days before an election was also struck down on the basis that it failed to adequately provide for free speech rights.[73] The court struck down a municipal ordinance which banned the posting of temporary political signs everywhere in the city for all but a 60-day period before an election, viewing the ordinance as a general "ban" on political speech which was temporarily suspended 60 days prior to an election.[74] An ordinance allowing one noncommercial opinion sign to be posted year round and additional campaign signs or noncommercial opinion signs during the election season was upheld by a Minnesota state court.[75]

While pre-election restrictions are generally found to be unconstitutional, post-election removal requirements on political signs for an election have been upheld. For example, in *McCormack v. Township of Clinton* the New Jersey court found that a pre-election posting requirement that political signs be displayed not more than 10 days prior to any election and post-election posting requirement that signs be removed no later than three days after the election was unconstitutional.[76] The *McCormack* court indicated that the City's interests in safety and aesthetics could be adequately served by a provision removing all temporary signs, including political signs, within 10 days after termination of the special event.[77] Likewise, in *Collier v. City of Tacoma*, the Washington Supreme Court rejected a 60-day pre-election restriction on the posting of campaign signs, finding that Tacoma failed to prove its interests in aesthetics and traffic safety are sufficiently compelling to justify the restrictions imposed on restrictions to political expression.[78] But, the Court did not find

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[70] *Id.*

[71] *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1323-24 (D.N.J. 1994).

[72] *Id*.

[73] *Collier*, 854 P.2d at 1057.

[74] *Antioch*, 557 F. Supp. at 61.

[75] *Brayton v. City of New Brighton*, 519 N.W.2d 243, 248 (Minn. Ct. App. 1994).

[76] *McCormack*, 872 F. Supp. at 1323, 1324.

[77] *Id.* at 1326-27.

[78] *Collier*, 854 P.2d at 1057-58.

unconstitutional a provision of the ordinance requiring removal of political signs seven days after the date of the election .[79] The court held that pre-election political speech interests that may outweigh a municipality's regulatory interests are not present following the event and may be outweighed by a municipality's demonstrated interests in aesthetics and traffic safety.[80]

One approach which cities may consider taking for imposing durational requirements on political campaign signs related to an upcoming election is to design the durational requirements around a special event, in general, and to focus the durational limits on the post-event period only. For example, the city could draft an ordinance requiring all temporary signs publicizing a special event to be removed no later than ten days after the special event. The ordinance would define a "special event" as any event, activity, or circumstance of an entity which is not part of its normal daily activities and which occurs uninterrupted for a continuous period of time, not to exceed ten days.

E. Permits, Registration, and Fees

Rules which impose special permits, registration requirements, and removal fees on political signs posted by a property owner in a residential area are not generally validated. For example, in *Baldwin v. Redwood City*[81], the City required filing an application, paying a $1.00 inspection fee, and depositing a $5.00 removal charge, for each sign.[82] The requirement was found unconstitutional on several grounds. First, a permit was required for each sign (thus in the scope of a political campaign this would impose an unnecessary burden which inhibits traditional means of communication) was unnecessarily burdensome, and contained elements of arbitrariness.[83] Second, the application form and information solicited was the same information required for a sign of a more permanent nature, much of the information required—such as plot plans and attachment specifications—was irrelevant to temporary signs.[84] Although the Court acknowledged that the permit requirements imposed in Redwood City were burdensome during a political campaign when time and money is of the essence, they went on to suggest that any permit requirement applied to temporary signs is unconstitutional because no substantial interest is served by requiring the City to be notified that signs are going to be erected.[85]

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[79] *Id.*

[80] *Id.* at 1058-59.

[81] *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976).

[82] *Id.* at 1370-71.

[83] *Id.* at 1372.

[84] *Id.*

[85] *Id.*; *Baldwin*, 540 F.2d at 1372 f. 32.

More recently, however, a Federal District court in New York upheld a permit requirement that applied to all temporary signs, including political signs.[86] Here, plaintiff, a candidate for public office, filed suit against a number of towns and cities in Orange County, New York alleging that the ordinances regulating political signs were unconstitutional. In turn, the court analyzed several challenged sign ordinances for the respective towns and cities. One ordinance provided that all temporary signs, including those conveying a political message must receive a permit before posting and must pay a permit fee.[87] The court concluded that the permit requirements were "a reasonable time, manner and place restriction narrowly tailored to support Greenwood Lake's significant government interests in aesthetics and public safety."[88] However, the court found that the City did not provide sufficient safeguards to ensure a permit determination is made expeditiously, thus rendering the entire sign ordinance unconstitutional.[89] With respect to the permit fee, the court concluded that it was a reasonable content-neutral restriction on speech narrowly tailored to further a significant government interest.[90]

Another city ordinance analyzed in the same court opinion imposed permit requirements on all temporary political signs, but did not require permit requirements on all other temporary signs.[91] The court struck down this ordinance as unconstitutional. Similarly, a third ordinance uniformly required permit and accompanying permit fees for all signs; however, a few categories of signs were exempt from the fees and application requirements.[92] Political signs were not one of the categories of signs which were exempt and the court concluded the ordinance was unconstitutional.[93]

The Third Circuit recently upheld a sign ordinance exempting all temporary signs posted in a historic district from obtaining a permit and paying a fee prior to posting the sign.[94] The Third Circuit also upheld another provision in the ordinance requiring that all permanent signs, regardless of their nature, obtain a permit.

The Ninth Circuit also upheld exemptions of certain signs from a permit requirement, one of which was an exception for temporary signs in residential zones for signs ninety days prior to an election and an exemption for temporary signs prior to the sale, lease or rental of

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[86] *See Sugarman v. Vill. of Chester*, 192 F.Supp.2d 282 (S.D.N.Y. 2002).

[87] *Id.* at 293.

[88] *Id.*.

[89] *Id.* at 296.

[90] *Id.* at 294.

[91] *Id.* at 297-98.

[92] *Id.* at 299.

[93] *Id.*

[94] *Riel*, 485 F.3d at 753-54.

property.[95] The Ninth Circuit acknowledged that the city clearly anticipated that the signs would relate to the triggering event (*i.e*., an election or the sale of a house), but did not mandate that the temporary signs comply with content restrictions and revealed the extent to which the city was willing to go to avoid content-based restrictions on expression. (*Id*.) The Ninth Circuit termed the exemptions event-based regulations and found them constitutional. Most recently, the Ninth Circuit found that the distinction between different types of noncommercial speech, such as ideological, political and temporary directional signs, was content-neutral because it did not require consideration of the content of the sign.[96] In other words, if all political signs were treated the same way based on objective criteria for the category of signs, with no distinction made based on the specific political message, the regulation is content-neutral. Such an analysis seems more typical of a determination of viewpoint neutrality rather than content neutrality, but appears to be the approach the Ninth Circuit is now taking when evaluating exceptions in sign codes for noncommercial signs.[97] The Ninth Circuit appears to be departing from its earlier approach where it explained that such distinctions were not allowable. A key element of the Ninth Circuit's most recent ruling that may account for its more permissive approach is that it found that the city's distinction between noncommercial messages was not based on a preference for some type of noncommercial speech over another, but instead it was employing objective criteria to address the special needs of the different types of noncommercial speech.[98]

As the cases illustrate, careful analysis of the specific facts of each situation and a strong knowledge of the dynamic jurisprudence of political signage is critically important to determining whether a regulation is likely to be upheld against a constitutional challenge. Cities should be aware that courts evaluate the totality of sign regulations when doing their First Amendment analysis and regulations for political signage will need to be considered within the overall regulatory framework.

V. CONCLUSION

A city may regulate signs on public property and private property. The constitutionality of these regulations will be based on many fact specific inquires such as the classification of the forum as a public, non-public, designated public or limited public forum. Compliance with First Amendment requirements will also depend on whether the signs being regulated are commercial in nature triggering the *Central Hudson* standard of review If instead, the signs being regulated are noncommercial in nature, such as political signage, the time, place and manner doctrine is applied for signs on private and public forum property. Sign

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[95] *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1077-78 (9th Cir. 2006).

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

[97] *Id*. at 1069-1071.

[98] *Id*. at 1070-1074.

regulation is a dynamic and ever-developing area of law that requires cities to be vigilant as to the details and particulars of their regulations and jurisdictions.

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