

PLACEMAKING OR BLANK WALLS?

CONTENT-NEUTRAL SIGN REGULATIONS AND MURALS

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Overview

- Legal Issues
 - Content Neutrality
 - On- & Off-Premises
 - Commercial v. Non-Commercial
 - Other Legal Pitfalls
 - Recent Mural Cases
- Putting it All Together
- Concepts to Consider

Common Definitions

Sign:

- Any device (including but not limited to letters, words, numerals, figures, emblems, pictures, or any part or combination) used for visual communication intended to attract the attention of the public and visible to the public right-of-way or other properties. The term “sign” shall not include any flag, badge, or insignia or any governmental unit, nor shall it include any item of merchandise normally displayed within a show window of a business. (Glendale, Ariz.)
- A communication device, structure, or fixture that incorporates graphics, symbols, or written copy intended to promote the sale of a product, commodity, or service, or to provide direction or identification for a premises or facility. (Redmond, Wash.)

Mural:

- A graphic displayed on the exterior of a building (pictured below), generally for the purposes of decoration or artistic expression, including but not limited to painting, fresco, or mosaic. (Columbus, Ohio)
- Any picture, scene, or diagram painted on any exterior wall or fence not interpreted by the zoning administrator to be advertising. Murals determined to be advertising shall be considered a sign and shall be included in the calculations of allowable sign area. (Clarkdale, Ariz.)

Sign or Mural?



Sign or Mural?





LEGAL ISSUES

Power to Regulate Signs

- Based on Power to Protect Health, Safety, and Welfare
- Generally Supported by “Substantial Government Interest” in Traffic Safety and Aesthetics

Right to Free Speech

- First Amendment to the U.S. Constitution:
“Congress shall make no law. . . abridging
the freedom of speech. . .”
- Applies to States Through the 14th Amendment

Standards of Review

Rational Basis

- Most Deferential to Government
- The Ends Must be a “Legitimate” Governmental Purpose
- The Means of Addressing the Ends Must be “Reasonably Related” to the End
- Applies Generally to Local Government Regulations

Intermediate Scrutiny

- Not Deferential to Government
- The Ends Must be a “Substantial” “Important” or “Significant” Governmental Purpose
- The Means of Addressing the Ends Must “Directly Advance” the End and Reach no Further than Necessary to Accomplish the End
- Applies to Commercial Speech if Legal Transaction and Truthful Statement

Strict Scrutiny

- Not Deferential to Government
- The Ends Must be a “Compelling” Governmental Purpose
- The Means of Addressing the Ends Must be the “Least Restrictive Means” to the End
- Applies when a Regulation Limits a Fundamental Right or Applies a Suspect Classification

Content Neutrality

Reed v. Town of Gilbert

576 U.S. 155, 135 S. Ct. 2218 (2015).

Content Neutrality: *Reed v. Town of Gilbert*

- Temporary directional sign relating to a qualifying event.
- A “qualifying event” is defined as any “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.”
- Directional signs are subject to more controls and are limited in number and duration than other categories.



Source: Michigan Municipal League

Content Neutrality: *Reed v. Town of Gilbert*

- “Government regulation of speech is *content based* if a law applies to particular speech because of the topic discussed or the idea or message expressed.”
- “A law that is content based on its face is subject to *strict scrutiny* regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”
- Created legal uncertainty on the validity of sign regulations:
 - On- vs. Off-Premises Distinctions
 - Commercial vs. Non-Commercial Signs

On- & Off-Premises Signs

City of Austin v. Reagan National Advertising, LLC

596 U.S. ___, 142 S. Ct. 1464 (2022).

On- & Off-Premises Signs: *Reagan National*

- Billboard companies applied to convert 84 existing billboards to digital displays.
- The City denied the permit applications because the sign code permits digital displays for on-premises signs but prohibits them for off-premises signs.
- Off-Premises: “a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.”



Source: Lamar Advertising

On- & Off-Premises Signs: *Reagan National*

- “Unlike the regulations at issue in *Reed*, the City’s off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City’s distinction is content neutral and does not warrant the application of strict scrutiny.”
- “[E]nforcing the City’s challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City’s provisions at issue here do not single out any topic or subject matter for differential treatment.”

On- & Off-Premises Signs: *Reagan National*

- Decision on remand in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 64 F.4th 287 (5th Cir. 2023) upheld the sign ordinance.
- Court applied the intermediate scrutiny test and found:
 - The stated purposes of traffic safety and aesthetics were significant government interests; and
 - The ordinance was narrowly tailored. The intermediate scrutiny test does not require a perfect fit. The court accepted the underinclusive regulation to serve the stated purposes.

Commercial v. Non-Commercial Signs

Metromedia, Inc. v. City of San Diego

453 U.S. 490, 101 S. Ct. 2882 (1980).

Commercial v. Non-Commercial Signs: *Metromedia*

- San Diego adopted an ordinance restricting outdoor advertising signs but not placing similar restrictions on on-premises signs with the stated purposes of traffic safety and appearance of the city.
- Prohibited outdoor Advertising display signs: "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."
- The ordinance included 12 exceptions, including one for "onsite" signs.

Commercial vs. Non-Commercial Signs: *Metromedia*

- Warning: There were five different opinions with no majority opinion. The plurality opinion was joined by four justices. The precedential value of the opinion can be questioned.
- The Court found the San Diego ordinance was unconstitutional. The plurality opinion reviewed the ordinance under the test from *Central Hudson* to find the commercial limitations acceptable but reasoned that the ordinance overreached by prohibiting some types of noncommercial on-premises speech.
- “[W]e continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be.”
- “[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.”

Commercial vs. Non-Commercial Signs: *Metromedia*

- Metromedia stands as the main authority that commercial signs may be regulated more strictly than non-commercial signs.
- Formulations of commercial speech:
 - “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 561 (1980); or
 - “does ‘no more than propose a commercial transaction.’” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).
- However, the reasoning of more recent decisions and changes in the makeup of the Court bring this conclusion into question.

Other Legal Pitfalls

Other Legal Pitfalls

- Prior Restraint: Scope of discretionary review or undetermined review times.
- Vagueness: Clarity is necessary to inform the public and direct enforcement.
- Overbreadth: Suppresses protected speech in addition to appropriate regulation.
- Under-Inclusiveness: When exceptions cause an ordinance to fail for its essential purpose.
- Selective Enforcement: Enforcement has a discriminatory effect and is motivated by a discriminatory purpose.

Mural Cases Since *Reed v. Town of Gilbert*

Central Radio Co. v. City of Norfolk,
811 F.3D 625 (4TH CIR. 2016).



Source: Institute for Justice

Central Radio Co. v. City of Norfolk, 811 F.3D 625 (4TH CIR. 2016).

- Court struck down Norfolk's sign ordinance as content-based. This is the most important case for South Carolina planners because we're in the 4th Circuit.
- "Sign" did not include a "flag or emblem of any nation, organization of nations, state, city, or any religious organization," or any "works of art which in no way identify or specifically relate to a product or service."
- "[I]t 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."
- "On its face, the former sign code was content based because it applied or did not apply as a result of content, that is, 'the topic discussed or the idea or message expressed.'"

ArchitectureArt, LLC v. City of San Diego, 231 F.Supp.3d 828 (S.D. CA. 2019).

- Court upheld San Diego's sign ordinance under intermediate scrutiny, found it was not content-based or vague.
- Exception for murals: "[p]ainted graphics that are murals, mosaics, or any type of graphic arts that are painted on a wall or fence and do not contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products or services that are provided on the premises where the graphics are located or any other premises..."
- "*Reed* [is not] applicable since the exception is not distinguishing between speakers but distinguishing art work from signs containing speech."

Kersten v. City of Mandan,
389 F.Supp.3d 640 (D. N.D. 2019).



Source: WFYR TV

Kersten v. City of Mandan, 389 F.Supp.3d 640 (D. N.D. 2019).

- Court issued a temporary injunction prohibiting Mandan from enforcing its signs ordinance against a mural owner because it is content-based.
- Definition of mural: "an illustration, diagram or design, not intended to sell a product or to advertise an establishment, that is used for aesthetic purposes or to enhance architectural features of a building."
- "In this case, Mandan prohibits all murals which convey a commercial message while allowing other murals whose messages are not commercial. Clearly, the regulation is based on the content of the speech and thus is not content neutral."

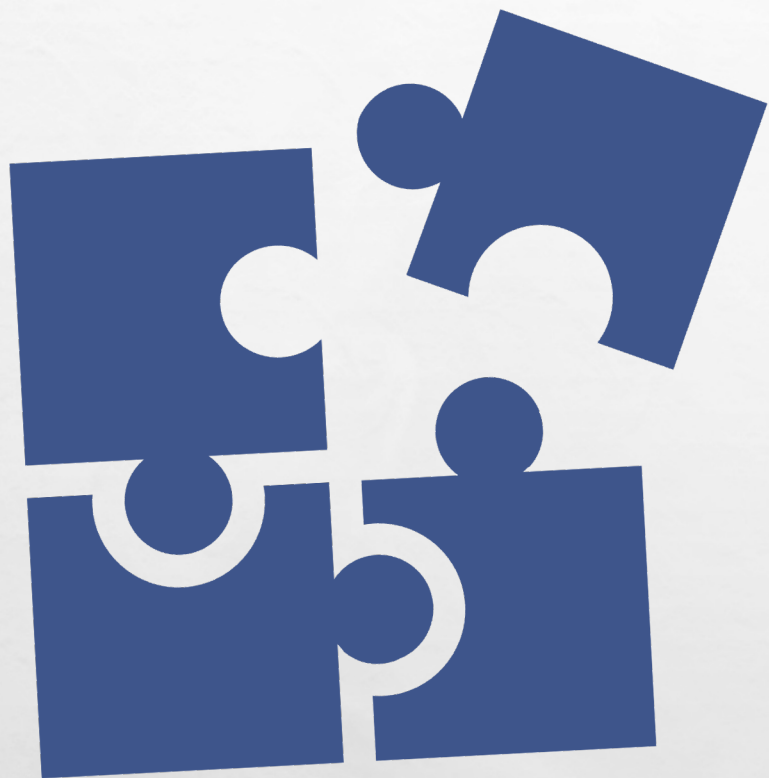
Morris v. City of New Orleans,
399 F.Supp.3d 624 (E.D. LA. 2019).



Source: The Art Newspaper

Morris v. City of New Orleans, 399 F.Supp.3d 624 (E.D. LA. 2019).

- Court struck down New Orleans' mural permitting ordinance as content-based and vague.
- Definition of mural: "A work of art painted or otherwise applied to or affixed to an exterior surface that does not include any on- or off-premise commercial advertising or does not otherwise meet the definition of a sign as set forth in Article 26 of the Comprehensive Zoning Ordinance."
- Court found that:
 - The city unconstitutionally distinguishes between commercial and non-commercial artwork and did not "advance any substantial governmental interest" in support of the distinction.
 - The terms "work of art" and "exterior surface" make the ordinance unconstitutionally vague.



PUTTING IT
ALL TOGETHER

Content Neutrality

- Content neutrality is here to stay: Content-based distinctions are not allowed in sign ordinances.
- Review and update content-based distinctions in sign/mural ordinances, particularly:
 - Definitions
 - Exemptions
 - Permitting requirements
 - Review standards
- What is and isn't "content?" *Reagan National*: "That does not mean that any classification that considers function or purpose is *always* content based."

On- and Off-Premises

- On- and off-premises distinctions are allowed.
- Reconciling *Reed* and *Reagan National*:
 - Off-premises treatment of a sign is based on the location, not content.
 - These decisions were written by different Justices with different views of individual liberties, especially as it applies to commercial interests. For example, Justice Thomas authored the majority opinion in *Reed* but dissented in *Reagan National*: “Under *Reed*, Austin’s off-premises restriction is content based.”
- It is possible to prohibit off-premises content in murals and signs but include purpose.
- What is the meaning of on- and off-premises for noncommercial signs?

Commercial and Noncommercial

- Commercial and noncommercial distinctions are not recommended.
- This is a distinction that could raise issues of content neutrality.
- At the very least, the distinction must have a valid purpose.
- Do commercial and noncommercial content in murals have any bearing on traffic safety or aesthetics?



CONCEPTS TO
CONSIDER

Concepts to Consider

- Matching-Fund Grant Program
- Districts, Including Overlays
- Sign Area and Height
- Location on Buildings, Setbacks, and Screening
- Purposes: Define them clearly. Can also include findings about particularly offensive sign types.
- Off-Premises Prohibition

Concepts to Consider (Cont.)

- Physical Characteristics and Features of Murals
- Limitation on Text
- Definitions
 - Avoid terms like “work of art” or “artist” in defining a mural.
 - Combine murals and hand-painted wall signs into one category for uniform treatment.
 - Focus on the materials and methods. For example, “A mural or painted wall sign is a hand-produced work in which paint is applied by hand directly on an exterior wall of a building or structure.”
- Regulate, Exempt, or Ignore?
- Avoid Discretionary Review



QUESTIONS?

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IMAGE CREDITS

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SLIDE 14 - [HTTPS://WWW.LAMAR.COM/PRODUCTS/DIGITAL](https://www.lamar.com/products/digital)

SLIDE 24 - [HTTPS://IJ.ORG/CASE/CENTRAL-RADIO-COMPANY-V-CITY-OF-NORFOLK/](https://ij.org/case/central-radio-company-v-city-of-norfolk/)

SLIDE 27 - [HTTPS://WWW.KFYRTV.COM/CONTENT/NEWS/LONESOME-DOVE-MURAL-TO-STAY-UP-AS-LAWSUIT-AGAINST-MANDAN-ENDS-568087281.HTML](https://www.kfyrtv.com/content/news/lonesome-dove-mural-to-stay-up-as-lawsuit-against-mandan-ends-568087281.html)

SLIDE 29 - [HTTPS://WWW.THEARTNEWSPAPER.COM/2018/03/21/ACLU-FILES-ART-CENSORSHIP-LAWSUIT-AGAINST-THE-CITY-OF-NEW-ORLEANS](https://www.theartnewspaper.com/2018/03/21/acLU-files-art-censorship-lawsuit-against-the-city-of-new-orleans)