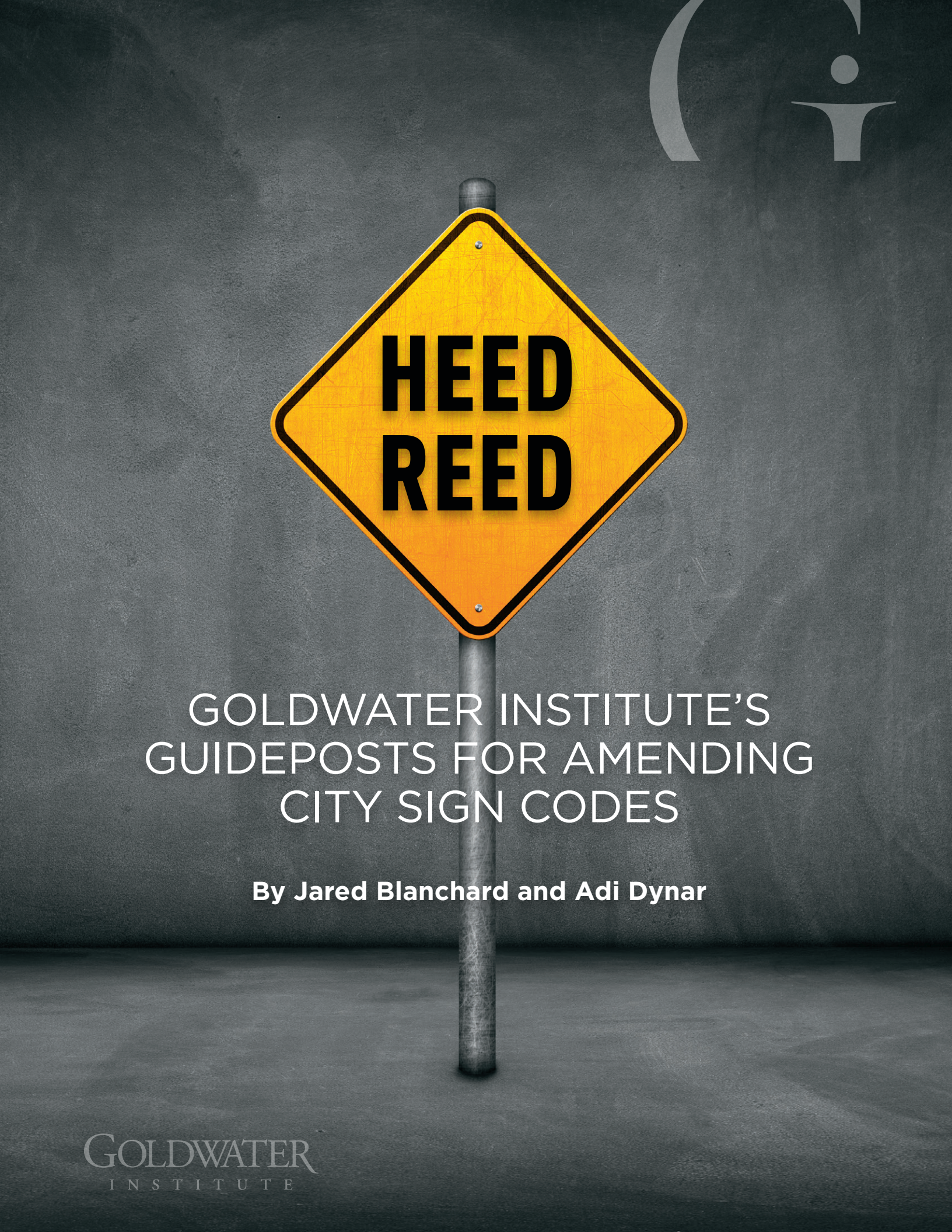

GOLDWATER INSTITUTE'S GUIDEPOSTS FOR AMENDING CITY SIGN CODES

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City officials across the country are wondering: *is my city code unconstitutional?* That's a good question to ask because *Reed v. Town of Gilbert* has changed the game.[1] In that 2015 decision, the United States Supreme Court made it clear that restricting signs based on their content violates the right to free speech guaranteed by the First Amendment. Unfortunately, a quick look around the state shows that Arizona municipalities have either failed to revise their sign codes in accordance with *Reed*, or have failed to do so properly.

The purpose of this policy report is to provide Arizona cities and towns with a guide to revising their sign codes in ways that both respect the constitutional rights of Arizonans and avoid the possibility of costly litigation.

REED AND HOW THE COURTS NOW LOOK AT SIGN CODES

Reed involved an ordinance in Gilbert, Arizona, that, like other municipalities in the state, regulated outdoor signs in different ways "based on the type of information they convey."[2] Gilbert's code prohibited outdoor signs without a permit but exempted 23 categories of signs from this requirement, including signs that were labeled as "Ideological Signs," "Political Signs," and—specifically at issue in the *Reed* case—"Temporary Directional Signs Relating to a Qualifying Event." In other words, Gilbert's code effectively singled out signs displayed by a church that advertised the time and location of their Sunday services and imposed stricter restrctions on them than on other signs.[3] Because the code imposed "more stringent restrictions" on temporary directional signs than on other types of signs, citizens challenging the constitutionality of the restrictions argued that they were content-based regulations of speech that could not survive the "strict scrutiny" test applied in free speech cases.

Strict scrutiny is the most stringent standard of judicial review, and courts use it when determining whether a law violates freedom of speech, freedom of religion, or other "fundamental" constitutional rights. The strict scrutiny test presumes strongly in favor of the citizen. Under this test, the government may not curtail a constitutional right any more than is necessary to serve an important government goal, and it must provide overwhelming evidence that the restriction directly serves that goal, without going further and interfering with people's rights unnecessarily. For Gilbert's sign code to satisfy strict scrutiny, therefore, the town would have had to prove that its differential treatment of signs "furthers a compelling interest and is narrowly tailored to achieve that interest."[4]

The Supreme Court determined that Gilbert's sign code did not satisfy strict scrutiny because it was under-inclusive, meaning that the ordinance did not go far enough to actually advance the purposes the town claimed to be seeking. The town said its code was meant to protect the aesthetic look of Gilbert and to promote traffic safety—but the 23 exemptions in the ordinance contradicted those purposes, since signs for ideological or political purposes presented as much of a a traffic hazard and harmed the aesthetics of the town just as much as signs promoting Sunday church services. The Supreme Court also rejected the theory, previously adopted by the Ninth Circuit and some other courts, that cities may treat different types of communication differently, as long as they do not do so out of hostility toward the message. Even without such hostile intent, any differential treatment of speech based on the message or the topic discussed, is forbidden in all but the rarest cases: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[5] Thus the town of Gilbert's differential treatment of signs based upon the messages they conveyed failed the strict scrutiny test.[6]

Reed came only four years after the Supreme Court's decision in *Sorrell v. IMS Health Services*,[7] which struck down a Vermont law prohibiting the distribution of certain medical information for "marketing" purposes. The law allowed the information to be distributed, but not for people or companies engaged in advertising or selling medicine. The Court found this unconstitutional on the grounds that it limited speech "based on the content of speech and the identity of the speaker." A "great deal of vital expression," the justices noted, "results from an economic motive." Any restriction on expression that is "directed at certain content" or that is "aimed at particular speakers" violates the First Amendment.[8]

In January 2016, the Fourth Circuit Court of Appeals clarified in the wake of the *Reed* decision that efforts to regulate commercial speech differently from other types of speech must survive the stringent test of strict scrutiny. In *Central Radio Company v. City of Norfolk*,[9] that court struck down Norfolk, Virginia's former sign code,[10] which restricted the display of flags and emblems except for government or religious flags and emblems. The code also "exempted 'works of art' that 'in no way identif[ied] or specifically relate[d] to a product or service,'" but prohibited "art that referenced a product or service."[11] The case came about because the owners of a radio repair shop threatened with eminent domain decided to emblazon their building with a sign criticizing the local government for attempting to take their property; the city then cited them for violating the sign code.[12]

In striking down Norfolk's code, the Fourth Circuit relied in part on the distinction it made between art that conveys a commercial message and art that conveys a noncommercial message.[13] The court found that the rules were not content-neutral, and found no compelling justification for restricting certain types of speech while allowing others. Even restrictions that distinguish between commercial and noncommercial messages were subject to the same stringent test applied in the *Reed* case.[14] Thus although Norfolk, like Gilbert, argued that the restriction was justified by aesthetic and traffic-safety interests, the court concluded that these interests were insufficient to justify restricting speech. "Although interests in aesthetics and traffic safety may be *substantial* government goals," the Fourth Circuit wrote, "neither we nor the Supreme Court have ever held that they constitute *compelling* government interests."[15]

Reed makes clear that city sign ordinances must treat signs alike, without regard to the messages they convey. A city may limit the sizes, colors, locations, and appearances of signs but may not allow one kind of sign while banning another, or permit large signs carrying political messages while requiring smaller signs for religious or commercial messages. Nor may a city impose identity- or motive-based restrictions on speech. Just as it may not ban a sign because of its message or its viewpoint, so it may not restrict signs based on the identity of the person speaking or that speaker's motive.[16] A sign ordinance, therefore, that prohibits the display of artwork when used for commercial purposes but permits it for noncommercial purposes, or that allows the display of a political or religious flag but requires a permit for any other kind of flag, is likely unconstitutional.

ARIZONA'S CONSTITUTION AND STATUTES OFFER EVEN MORE PROTECTION FOR FREE EXPRESSION

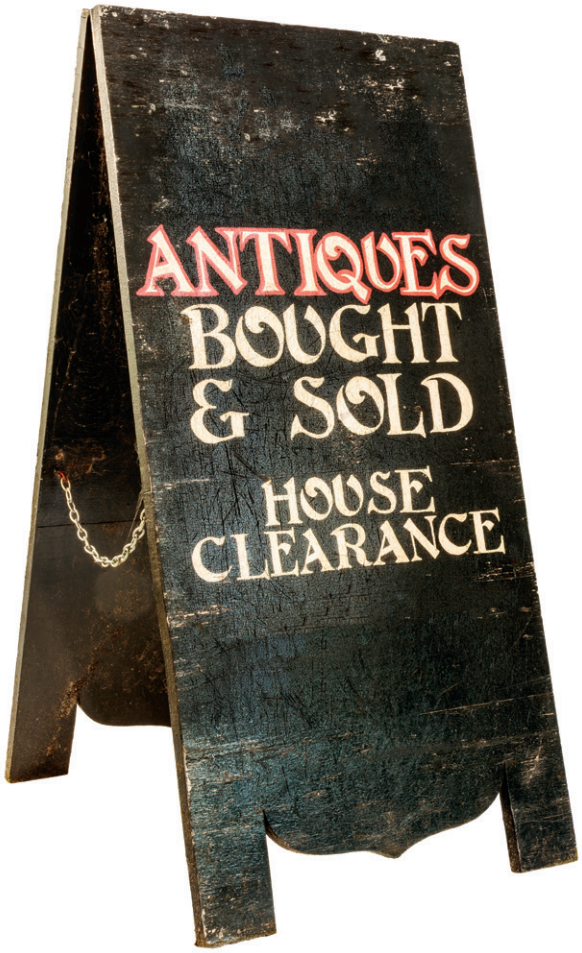
Federal constitutional rules are highly protective of free expression, but the Arizona Constitution and Arizona state law provide additional protections for free speech. These state law protections secure individual freedom—and limit local governments' power to restrict speech—even more than the U.S. Constitution does.[17]

As Arizona municipalities continue to revise their sign codes in light of *Reed*, they should take the opportunity to incorporate changes in state law, as well.[18]

Section 16-1019 of the Arizona Revised Statutes prohibits municipalities and counties from removing any political sign "in a public right-of-way that is owned or controlled by that jurisdiction" so long as that sign is "not placed in a location that is hazardous to public safety,

obstructs clear vision in the area or interferes with the requirements of the Americans with Disabilities Act."[19] Because this law distinguishes political speech from other forms of speech, Arizona Attorney General Mark Brnovich was recently asked whether it was constitutional in light of *Reed*. His official opinion was yes, on the grounds that this law establishes a content-based *permission* rather than a content-based burden: "Nothing in Section 16-1019 restricts speech or compels the regulation of signs," the opinion declares. "Instead, it establishes the limits—under Arizona law—of what local governments may do as they limit or regulate signs."[20] But Section 16-1019 mandates that political signs be allowed in public rights-of-way, and given *Reed's* prohibition on content-based distinctions in regulations of expression, local governments must treat all other signs in the same manner as political signs. This means that the same permission given to political signs must be given to all other signs. Municipalities should allow, at *all* times, *all* signs that meet the physical qualifications of Section 16-1019.[21]

Another statute, Section 9-499.13(a), requires local governments to "allow the posting, display and use of sign walkers." A "sign walker" is someone "who wears, holds or balances a sign," typically for advertising on streets.[22] When municipalities create sign ordinances, the law lets them impose "reasonable time, place and manner regulations relating to sign walkers," but those regulations "may not restrict a sign walker from using a public sidewalk, walkway or pedestrian thoroughfare."[23] As the Arizona Court of Appeals has held, this law "prohibits outright bans on sign walkers and requires that rules regulating conduct on public thoroughfares be uniform as between sign walkers and all other individuals."[24] Most municipalities have complied with this law and have not imposed bans on sign walkers, but many sign codes around the state currently require sign walkers conveying *commercial* messages to obtain permits. *Reed* makes clear that this is unconstitutional. Imposing a permit requirement



on people holding signs, which differentiates between them based on the content of the signs they hold, is a content-based restriction and cannot satisfy the demanding "strict scrutiny" standard. Such permit requirements should be taken off the books.

Indeed, municipalities must be careful to ensure that any sort of permitting process for signs is neutral with respect to the content of the sign, the subject or viewpoint expressed, the identity of the speaker, and the speaker's motive. Even a content-neutral permit requirement applying to *all* signs may be unconstitutional if it qualifies as a "prior restraint" on speech. A prior restraint is a requirement for government preapproval before speaking, and prior restraints have traditionally been considered almost *per se* violations of the First Amendment.[25] If a permit scheme is stated in subjective or ambiguous terms, provides no definite timeline for the approval or denial of the permit, or fails to provide citizens with adequate judicial review in the event that the permit is denied, the permit requirement is likely to be deemed an unconstitutional prior restraint on speech.[26] To be sure that there's no constitutional violation, municipalities should avoid requiring permits for sign displays at all. A permitting process should be unnecessary anyway if a city has a clear, uncomplicated sign code that individuals and businesses can easily understand and follow.[27]

The Arizona Court of Appeals ruled in 2014 that Phoenix officials had acted unconstitutionally when they removed signs promoting handgun training services displayed on city bus stops.[28] Because the bus stops were government-owned property, the city had more authority to determine what sorts of advertisements were displayed than would be the case if the signs had been placed on private property. Nevertheless, the court held that the city's rules were too vague, particularly the requirement that signs be "adequately displayed." Since it was unclear what qualified as "adequate," the court found that city officials had "unbounded discretion…to determine whether a commercial advertisement is proposed and adequately displayed."[29] This was unconstitutional because it was too subjective and ambiguous.

CASE STUDY: REAL ESTATE SIGNS

Many Arizona cities have sign codes that distinguish between commercial signs and noncommercial signs, and impose restrictions on one category but not the other. These are unconstitutional under the *Reed* and *Sorrell* decisions. Consider one example: real estate signs in rights-of-way.

If a city prohibits real estate signs but allows other types of signs—such as political, ideological, or directional signs—in rights-of-way, the city has violated the First Amendment and Article II section 6 of the Arizona Constitution, as well as the Equal Protection guarantees of the

federal Fourteenth Amendment, and Article II section 13 of the state Constitution. In practice, such a city code would forbid a commercial real estate owner from communicating to the public that commercial spaces are available for rent in that shopping center—but it would allow the owner to advertise other goods or services, or to display other noncommercial messages—in that same right-of-way. This is unconstitutionally discriminatory. A lopsided sign code that allows the shopping center's owner to convey noncommercial information—displaying a political or religious sign, for instance—but does not allow the owner to disseminate commercial information, such as the fact that spaces are available for rent, would deprive the property owner of the equal protection of the laws *and* infringe upon the owner's free speech rights.

A city cannot impose an across-the-board prohibition on signs in rights-of-way either. So long as a city allows, or is required by state law to allow, some signs in rights-of-way, the city cannot choose *which* signs it will permit and which it will prohibit in any manner that relates to the content of the message, the viewpoint expressed, or the identity or motive of the speaker.[30] A city can restrict signs for content-neutral reasons, such as size and shape, but *all* restrictions on signs in rights-of-way should be content neutral, as well as neutral between commercial and noncommercial speakers, and between commercial advertisements on one hand and political, religious, or public service ads on the other. For example, if a municipality requires people to get permits before displaying real estate signs, it must require the same permit for other categories of signs of the same size and shape. A content-neutral permitting process, if carefully designed to respect the expressive rights of citizens, can satisfy constitutional standards. But as we noted previously, sign permitting should not be necessary at all. For example, cities may require all lighted signs or all electronic signs with rotating messages to obtain a permit. But they may not require a permit for all lighted *real estate* signs or electronic signs with rotating *commercial* messages.[31]

CONCLUSION

In light of *Reed* and changes in state law, local sign codes around the state must be revised. Doing so need not be difficult, so long as the guidelines set out in this report are followed. Following these guidelines will not only protect free speech, but will also lead to simpler sign codes that are easier to follow and enforce, and protect taxpayers from costly and time-consuming lawsuits. ■

IN SUMMARY:

- **If a sign code requires enforcement officers to read a sign to determine whether it violates the code, the code is probably content based and violates the First Amendment.**
- **Commercial messages cannot be treated differently than other types of messages.**
- **Signs must be allowed in public rights-of-way.**
- **Sign walkers cannot be restricted from holding up signs on public sidewalks.**
- **Sign codes must be easy to understand, with (a) clear standards that do not allow enforcement officials to pick when to enforce the restriction, (b) a definite time limit within which a permit will be granted or denied, and (c) an opportunity for meaningful judicial review in the event the permit application is denied. Cities should avoid permit requirements whenever possible.**
- **If a municipality determines that removing or allowing a particular sign is integral to traffic safety, it must provide clear evidence that justifies its determination.**

APPENDIX

A.R.S. § 9-499.13. Sign walkers; regulation; exception; definition

A. From and after December 31, 2008, notwithstanding the authority to regulate signs pursuant to § 9-462.01, and as a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers. Except as provided by subsection B of this section, municipalities may adopt reasonable time, place and manner regulations relating to sign walkers.

B. A municipality that adopts reasonable time, place and manner regulations relating to sign walkers may not restrict a sign walker from using a public sidewalk, walkway or pedestrian thoroughfare.

C. This section may be enforced in a private civil action and relief, including an injunction, may be awarded against a municipality. The court shall award reasonable attorney fees to a party that prevails in an action against a municipality for a violation of this section.

D. For the purposes of this section, "sign walker" means a person who wears, holds or balances a sign.

A.R.S. § 16-1019. Political signs; printed materials; tampering; classification

A. It is a class 2 misdemeanor for any person to knowingly remove, alter, deface or cover any political sign of any candidate for public office or knowingly remove, alter or deface any political mailers, handouts, flyers or other printed materials of a candidate that are delivered by hand to a residence for the period commencing forty-five days before a primary election and ending seven days after the general election.

B. This section does not apply to the removal, alteration, defacing or covering of a political sign or other printed materials by the candidate or the authorized agent of the candidate in support of whose election the sign or materials were placed, by the owner or authorized agent of the owner of private property on which such signs or printed materials are placed with or without permission of the owner or placed in violation of state law or county, city or town ordinance or regulation.

C. Notwithstanding any other statute, ordinance or regulation, a city, town or county of this state shall not remove, alter, deface or cover any political sign if the following conditions are met:

1. The sign is placed in a public right-of-way that is owned or controlled by that jurisdiction.

2. The sign supports or opposes a candidate for public office or it supports or opposes a ballot measure.

3. The sign is not placed in a location that is hazardous to public safety, obstructs clear vision in the area or interferes with the requirements of the Americans with Disabilities Act.

APPENDIX

4. The sign has a maximum area of sixteen square feet, if the sign is located in an area zoned for residential use, or a maximum area of thirty-two square feet if the sign is located in any other area.
5. The sign contains the name and telephone number or website address of the candidate or campaign committee contact person.

D. If the city, town or county deems that the placement of a political sign constitutes an emergency, the jurisdiction may immediately relocate the sign. The jurisdiction shall notify the candidate or campaign committee that placed the sign within twenty-four hours after the relocation. If a sign is placed in violation of subsection C and the placement is not deemed to constitute an emergency, the city, town or county may notify the candidate or campaign committee that placed the sign of the violation. If the sign remains in violation at least twenty-four hours after the jurisdiction notified the candidate or campaign committee, the jurisdiction may remove the sign. The jurisdiction shall contact the candidate or campaign committee contact and shall retain the sign for at least ten business days to allow the candidate or campaign committee to retrieve the sign without penalty.

E. A city, town or county employee acting within the scope of the employee's employment is not liable for an injury caused by the failure to remove a sign pursuant to subsection D unless the employee intended to cause injury or was grossly negligent.

F. Subsection C does not apply to commercial tourism, commercial resort and hotel sign free zones as those zones are designated by municipalities. The total area of those zones shall not be larger than three square miles, and each zone shall be identified as a specific contiguous area where, by resolution of the municipal governing body, the municipality has determined that based on a predominance of commercial tourism, resort and hotel uses within the zone the placement of political signs within the rights-of-way in the zone will detract from the scenic and aesthetic appeal of the area within the zone and deter its appeal to tourists. Not more than two zones may be identified within a municipality.

G. A city, town or county may prohibit the installation of a sign on any structure owned by the jurisdiction.

H. Subsection C applies only during the period commencing sixty days before a primary election and ending fifteen days after the general election, except that for a sign for a candidate in a primary election who does not advance to the general election, the period ends fifteen days after the primary election.

I. This section does not apply to state highways or routes, or overpasses over those state highways or routes.

ENDNOTES

[1] 135 S. Ct. 2218 (2015).

[2] *Id.* at 2224.

[3] *Id.* at 2225.

[4] *Id.* at 2231 (internal quotations and citations omitted).

[5] *Reed*, 135 S. Ct. at 2226-27.

[6] *Id.* at 2231–32. In its analysis, the Supreme Court rejected three theories the Ninth Circuit Court of Appeals had offered to explain why the sign code was content-neutral. First, the lower court reasoned that the code was content-neutral because its restrictions on temporary directional signs were not based on animus toward the message. But the Supreme Court ruled that a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive." *Id.* at 2228. Next, the lower court reasoned that the code was content neutral because it did not censor or favor any particular *viewpoint. Id.* at 2229. But, said the Supreme Court, "it is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Id.* at 2230. A prohibition on speech is still unconstitutional even if it applies to speakers on both sides of an argument. Because Gilbert treated both ideological and political signs more favorably than temporary directional signs, it did not matter that signs within each category were treated identically. Finally, the lower court reasoned that the code was content-neutral because its distinctions were based on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." *Id.* (citation and internal quotations omitted). But the Supreme Court clarified that even *speaker*-based distinctions are not "automatically" rendered content-neutral because such restrictions "are all too often simply a means to control content." *Id.* (citation and internal quotations omitted). In fact, this is precisely why the Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny when the [...] preference reflects a content preference.'" *Id.* Furthermore, "[a] regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea." *Id.* at 2231.

[7] 131 S. Ct. 2653 (2011).

[8] *Id.* at 2665.

[9] 2016 WL 360775 (4th Cir. January 29, 2016).

[10] The city revised its code in light of *Reed* while the lawsuit was pending.

[11] *Id.* at *5.

[12] *Id.* at *2.

[13] *Id.* at *5. It should never be forgotten that much of what is today considered great art is the result of commercial motives. Many of the classic paintings of Alphonse Mucha, Maxfield Parrish, and Norman Rockwell, for example, were designed as commercial advertisements. Even such classic characters as Rudolph the Red-Nosed Reindeer, and the modern version of Santa Claus were invented for advertising campaigns.

[14] The Fourth Circuit also struck down an anti-robocall statute under the First Amendment because it was not content neutral. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015). The anti-robocall statute problematically applied to calls with a commercial or political message but did not apply to calls made for any other purpose. *Id.*

ENDNOTES

[15] *Id.* at *6 (emphasis added; citation and quotations omitted).

[16] *Sorrell*, 131 S. Ct. at 2665.

[17] *See, e.g., Coleman v. City of Mesa*, 230 Ariz. 352, 361 (2011); *State v. Stummer*, 219 Ariz. 137, 143 (2008); *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55 (1989).

[18] All municipalities have to comply with state statutes related to sign regulations, charter cities included. *See City of Scottsdale v. State*, 237 Ariz. 467 (Ct. App. 2015) (rejecting city's claim that charter city authority was not preempted by state law permitting sign walkers on all public sidewalks).

[19] A.R.S. §§ 16-1019, 16-1019(c)(1), (3).

[20] Ariz. Op. Att'y Gen. No. I15-011 (December 2, 2015).

[21] Under A.R.S. § 16-1019(c)(4), a political sign must be permitted in a public right-of-way if it "has a maximum area of sixteen square feet, if the sign is located in an area zoned for residential use, or a maximum area of thirty-two square feet if the sign is located in any other area." A.R.S. § 16-1019(f) permits a municipality to create two separate "tourist" zones, each no larger than three square miles, where political signs may be banned in public right-of-ways. Should a municipality decide to implement one of these no-speech zones, it must do so in a content-neutral manner and forbid all signs regardless of content.

[22] A.R.S. § 9-499.13(d).

[23] *Id.* at (b).

[24] *City of Scottsdale v. State*, 237 Ariz. 467, 472 (Ct. App. 2015).

[25] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[26] *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

[27] An example of this would be providing a clear definition of the term "right-of-way" in the code. Many city codes fail to define this term adequately. An example of a clear definition for right-of-way is "a strip of publicly or privately owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." An example of an unclear definition of a right-of-way is "an easement, a privilege to pass over the land of another, whereby the holder of the easement acquires only a reasonable and usual enjoyment of the property, and the owner of the land retains the benefits and privileges of ownership consistent with the easement."

[28] *Korwin v. Cotton*, 234 Ariz. 549 (Ct. App. 2014).

[29] *Id.* at 558.

[30] Obscene signs may be prohibited, as obscenity is categorically beyond the protections of the First Amendment. *Roth v. United States*, 354 U.S. 476, 492-93 (1957). And, again, cities may prohibit signs under reasonable time, place, and manner restrictions that are content neutral and designed to protect public safety—for example, forbidding signwalkers from carrying signs with flashing lights that might distract drivers—or in those rare cases in which a prohibition satisfies the demanding test of strict scrutiny.

[31] *Reed*, 135 S.Ct. at 2233–2234 (Alito, J., concurring).

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