SCENIC AMERICA, INC.: BILLBOARD REGULATION POST-*REED*

The "Good News" for Billboard Control in America following the United States Supreme Court Decision in *Reed v. Gilbert*, 135 S.Ct. 884, 190 L.Ed.2d 701, 83 USLW 3365, 2015 WL 2473374 (June 18, 2015).

A significant victory was obtained by Pastor Clyde Reed and the Good News Community Church on June 18, 2015 against the Town of Gilbert, Arizona. Local governments across the country must now take a close look on what is currently on the books for the regulation of all manner of *temporary noncommercial* signs as well as other signage. The decision impacts thousands upon thousands of sign ordinances across the country - but there was a silver lining framed by the following question.

What is the impact on the regulation of billboards?

In examining the lasting impact of *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), it is important to first note the Supreme Court precedent that predated the *Metromedia* decision. The case of *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978), takes on added significance as precedential value in examining the time, place and manner view of the distinction between the *location* of off-premises signs and on-premises signs. On October 2, 1978 in *Suffolk*, over the objection of Justices Blackmun and Powell, the U.S. Supreme Court denied review of the underlying decision for the want of a substantial federal question. The denial of review on that basis was *a decision on the merits*. To understand the merits as decided in *Suffolk Outdoor*, it is necessary to review petitioner Suffolk Outdoor Adv. Co.'s Jurisdictional Statement. The First Question presented was a claim directed to the constitutionality of a total ban on billboards within the entire municipality of the Town of Southampton, New York.

The petitioner Suffolk Outdoor claimed that this disparate treatment of off-premises billboards from on-premises accessory signs was a violation of the First Amendment. The U.S. Supreme Court determined that this claim lacked a substantial federal question. The California Supreme Court in *Metromedia* believed that *Suffolk* was controlling, and ruled in favor of the City of San Diego; however, the San Diego ordinance had loopholes and exceptions in its verbiage and it was not the same ordinance in substance as the one in the Town of as Southampton.

The significance is that the *Suffolk Outdoor* merits decision in 1978 recognized that it is constitutionally permissible to distinguish between on-site signs and off-site signs (Billboards) for regulatory purposes. This Supreme Court precedent has never been overturned and the decision is based not on content *but on the location of the sign*, i.e., a non-accessory sign. It is a classic time, place and manner regulation that is subject to intermediate scrutiny as a law that is based

upon substantial government interests, aesthetics and traffic safety. The *Reed* decision did not overrule *Suffolk Outdoor* or *Metromedia*.

In *Reed* in the key two-page concurring opinion of Justice Alito, joined by Justice Kennedy and Justice Sotomayer, there is indeed good news. These Justices made it clear that "properly understood" the distinction between onsite signs and offsite signs would be considered content neutral, and therefore subject only to the intermediate standard of review. This level of review requires a substantial government interest. Aesthetics have long been deemed a substantial government interest for this level of review. Scenic advocates for billboard control, as well as state and local governments, were handed a significant victory on this point.

It goes without saying that the present Court did not overrule *Metromedia*, where the Court addressed the issue of whether offsite commercial billboards could be prohibited within the constraints of the First Amendment. "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them," *Metromedia,* 453 U.S. at 508 (White, J. for plurality); "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted," *id.* at 512 (White, J. for plurality); "a wholly impartial ban on billboards would be permissible," *id.* at 533 (Stevens, J.); "In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community," *id.* at 570 (Rehnquist, J.). In *Metromedia,* however, the overall sign ordinance reached too far into the realm of protected speech, *id.* at 521, and the Court found the regulations to be a general ban on signs carrying noncommercial advertising, *Id.* at 512-513. These flaws rarely appear in modern sign regulations that incorporate message substitution clauses.

In 1984 in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court stated "we reaffirm the conclusion of the majority in *Metromedia*" and observed:

> seven Justices explicitly concluded that this interest was sufficient to justify a prohibition of billboards, *see id*. [*Metromedia*, 453 U.S.], at 507-508, 510, 101 S.Ct., at 2892-2893, 2894 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL, JJ.); *id*., at 552, 101 S.Ct., at 2915 (STEVENS, J., dissenting in part); *id*., at 559-561, 101 S.Ct., at 2919-2921 (BURGER, C.J., dissenting); *id*., at 570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting). Justice WHITE, writing for the plurality, expressly concluded that the city's esthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards; San Diego's interest in its appearance was undoubtedly a substantial governmental goal." *Id*. at 507-508, 101 S.Ct. at 2892-2893.

Id. at 806-807.

In 1993, in writing for the majority in *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410 (1993), Justice Stevens commenting on Chief Justice Rehnquist's dissenting opinion, stating:

> THE CHIEF JUSTICE is correct that seven Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards. *Post,* at 1524-1525.

Id. at 425. In his own opinion*,* Chief Justice Rehnquist observed:

> . . . in *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality opinion), where we upheld San Diego's ban of offsite billboard advertising, we rejected the appellants' argument that the ban was invalid under *Central Hudson* because it did not extend to onsite billboard advertising. *See* 453 U.S., at 511, 101 S.Ct., at 2894 ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising").

Id. at 442.

The Seven Justices' views in *Metromedia*, as expressly recognized in the later Supreme Court decisions in *Taxpayers for Vincent* and *Discovery Network*, have never been overturned. More than a dozen published Circuit Court of Appeal decisions followed *Metromedia* on the permissible distinction between onsite signs and offsite signs-when it comes to government's substantial interest in prohibiting the latter sign type (the offsite sign), including: *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986); *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 45-46 (4th Cir. 1987); *Naegele Outdoor Adver., Inc.* v. *City of Durham,* 844 F.2d 172, 173-174 (4th Cir. 1988); *Nat'l Adver. Co. v. City and County of Denver,* 912 F.2d 405, 408-411 (10th Cir. 1990); *Nat'l Adver. Co.* v. *Town of Niagara,* 942 F.2d 145, 157-158 (2nd Cir. 1991); *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 610-612 (9th Cir. 1993); *Outdoor Graphics, Inc. v. City of Burlington, Iowa,* 103 F.3d 690, 695 (8th Cir. 1996); *Ackerley Communications of Northwest* v. *Krochalis,* 108 F.3d 1095, 1099 (9th Cir. 1997); *Southlake Property Associates, Ltd. v. City of Morrow, Ga.,* 112 F.3d 1114, 1117·1119 (11th Cir. 1997)*, cert. denied, 525* U.S. 820 (1998); *Bad Frog Brewery, Inc. v. New York State Liquor Authority,* 134 F.3d 87, 99 (2nd Cir. 1998); *Lavey v. City of Two Rivers,* 171 F.3d 1110, 1114-1115 (7th Cir. 1999); *Long Island Bd. of Realtors, Inc. v. Incorp. Village of Massapequa Park,* 277 F.3d 622, 627 (2d Cir. 2002); *Clear Channel*

Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 814-816 (9th 2003); *Riel v. City of Bradford,* 485 F.3d 736, 753 (3rd Cir. 2007); *Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27, 36 (1st Cir. 2008); and *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 225 (5th Cir. 2009).

This reaffirmation in *Reed* on June 18, 2015 of how the distinction between onsite and offsite signs should be "properly understood" is welcome news to the scenic community and local governments across the country.[1]

The Significance of the 2-Page Concurrence by Justice Alito, joined in by Justices Kennedy and Sotomayor.

Justice Alito's two page concurring opinion is critical to understanding the holding in *Reed* and to how the decision impacts the country's sign regulations. Indeed, Justice Alito, with Justices Kennedy and Sotomayor, used the term

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[1] The following exchange during oral argument between Pastor Reed's counsel and Justice Scalia reflects that Pastor Reed's position and expectation was no different than OAAA, Scenic America, and the amici National League of Cities, et al.:

Reed Transcript
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21 And I think one of the things to take a --
22 to take look at is the amici brief that's been filed on
23 behalf of the town by the National League of Cities, and
24 the reason that brief is important, for example, on
25 page 10 and 13, it lists dozens and
[continued]

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1 JUSTICE SCALIA: What page?
2 MR. CORTMAN: Page 10 of the amici brief on
3 behalf of the National League of Cities on behalf of the
4 town. And the reason I point out this brief is we don't
5 believe that the content-neutral regulation would tie
6 the hands of the town because, as -- as they say, there
7 are dozens and dozens of ways to regulate signs on a
8 content-neutral way. For example, and this has to do
9 with permanent signs
10 JUSTICE SCALIA: What page is this again?
11 MR. CORTMAN: This is page 10 on the
12 National League of Cities' amici brief.
13 JUSTICE SCALIA: Got it.
14 MR. CORTMAN: It says you can regulate
15 locational criteria, off-site signs, number of signs,
16 spacing, setbacks, placement criteria, roof sign, ground
17 signs, wall signs, projecting signs. And all my point
18 is, as we look through their brief, there are
19 innumerable ways for the Court -- excuse me -- for the
20 town to regulate signs.

“properly understood” to frame the decision vis a vis what survives as content neutral regulations going forward. For local governments, it should come as a relief and a far different outcome than how the *Reed* decision impacts noncommercial temporary signs - traditionally regulated in part by different categories or classifications, and functions or purposes.

The Alito concurrence is notable for its emphasis on what rules will remain content neutral and essentially a ‘safe harbor’ for local governments to regulate signage to advance esthetic interests. Those esthetic interests remain substantial governmental interests subject to intermediate scrutiny review, but they fail strict scrutiny review inasmuch as they are not recognized as compelling governmental interests.

JUSTICE ALITO, with whom JUSTICE KENNEDY and JUSTICE SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.,* 447 U. S. 530, 537 (1980).

* * *

This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, **but here are some rules that would not be content-based:**

[1] Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

[2] Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.

[3] Rules distinguishing between lighted and unlighted signs.

[4] Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

[5] Rules that distinguish between the placement of signs on private and public property.

[6] Rules distinguishing between the placement of signs on commercial and residential property.

[7] Rules distinguishing between on-premises and off-premises signs.

[8] Rules restricting the total number of signs allowed per mile of roadway.

[9] Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. [Footnote omitted.]

[10] In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City* v. *Summum,* 555 U.S. 460, 467-469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

(Brackets and emphasis in bold added.)

It is a mistake to believe that a concurring opinion in the context of *Reed* can have no impact in light of the majority opinion. Here, the majority is a combination of two groups of three Justices. Generally speaking, when there is a majority opinion, concurring opinions are supposed to be given no weight by

lower courts. That is the law in theory, but there are circumstances where lower courts give concurring opinions weight.

There are at least three circumstances where concurring opinions in situations similar to *Reed* have significance. In the sections below, those circumstances are identified as follows: (1) when the concurring opinion is written by a swing vote Justice, (2) when the concurring opinion is narrower than the majority opinion, and (3) when the concurring opinion is clearer than the majority opinion. For each circumstance, a Supreme Court opinion is highlighted. They ultimately explain why Justice Alito's concurrence, with Justices Kennedy and Sotomayor joining, should be given precedential value.

1. The "Swing Vote" Concurrence.

The swing vote concurrence might just be the most popular concurrence that gains precedential value. As Ryan Moore explains, "where the emphatic concurrence agrees with the majority's reasoning and the Justice writing the emphatic concurrence is necessary to provide a majority, the precedential value of that concurrence may be elevated… if the particular Justice writing the emphatic concurrence was necessary for such a majority, a future court might do well to take notice of the particular points the concurring Justice emphasized in his individual opinion." Ryan Moore, Note, *I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, 84 TEMP. L. REV. 743, 759 (2012).

There are plenty of cases in which a swing vote concurrence later became influential. Three are highlighted here. The first is the famous case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). There, Justice Powell's sole concurring opinion was more authoritative than the majority's partly because Justice Powell formed the fifth swing vote for the majority. *See, e.g.*, *Uzzel v. Friday*, 591 F. 2d 997, 999 (4th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1292-93 (5^{tth} Cir. 1978); Igor Kirman, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 n.7 (1995). Another case is *National League of Cities v. Usery*, 426 U.S. 833 (1976), where the majority of the Court most likely adopted a categorical approach to interpreting the Tenth Amendment and whether the Fair Labor Standards Act violated it. However, lower courts, like *United Transportation Union v. Long Island R.R.*, 634 F.2d 19 (2d Cir. 1980), adopted Justice Blackmun's balancing test from his concurrence for determining whether the act in question violated the Tenth Amendment. The reason the Second Circuit did so was because Justice Blackmun was the fifth swing vote for the majority opinion. *Id.* at 25. *See also* Kirman at 2093. One last example where the swing vote concurrence won out over the majority opinion is the famous First Amendment case of *Branzburg v. Hayes*, 408 U.S. 665 (1972). There, part of the reason the lower courts adopted Justice Powell's concurrence is because his vote formed the majority. *See United States v. Liddy*, 478 F.2d 586, 586 (D.C. Cir.

1972) ("[T]he *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell…*as the fifth Justice of the majority*.") (emphasis added).

In *Reed*, Justices Alito, Kennedy and Sotomayor's votes were all swing votes that were necessary in order to make a majority. As such, there were three swing votes (as opposed to just one) and their concurring opinion should be given *even greater* precedential value than a concurring opinion by one Justice. Lower courts should heed what these Justices categorize as content neutral restrictions because the majority opinion implicitly does—if the other three Justices of the majority opinion did not agree with Justices Alito, Kennedy and Sotomayor on what constitutes a content neutral restriction, the three latter Justices would not have signed on to the majority. Lower courts should indeed recognize this.

2. The "Narrowest Grounds" Concurrence.

In some cases, lower courts decide to give precedential value to the concurring opinion that has a narrower, more specific rationale than the majority's. This "narrowest grounds" approach actually stems from *Marks v. United States*, 430 U.S. 193 (1977). There the Court explained, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five justices, '*the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.*'" *Id.* at 193 (emphasis added). In other words, the opinion with the narrowest, most specific rationale explaining the holding is given precedential weight.

Although the *Marks* Court adopted the narrowest grounds approach in the context of plurality opinions, lower courts have applied the doctrine to cases with majority opinions. There are various examples. Perhaps, the most famous one is *United States v. Container Corp. of America*, 393 U.S. 333 (1969). There, lower courts gave Justice Fortas's concurring opinion precedential value because his opinion was more specific than the six-Justice majority's. At issue was whether the opinion of the Court adopted a rule of reason or *per se* rule of liability regarding a system in which companies exchanged price information. Lower courts looked to Justice Fortas's concurrence because it provided the answer, opining that the Court adopted a rule of reason. *See, e.g.*, *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 208 (9th Cir. 1974).

In *Reed*, Justice Alito's concurrence is narrower than the majority's opinion when discussing the topic of content neutral restrictions. Since the majority does not spend a lot of time on what constitutes a content neutral restriction (see Section IV of the majority opinion for the Court's brief paragraph explanation of content neutral restrictions), but the Alito concurrence does, the latter opinion is narrower and should be given more precedential value by lower courts.

3. The "Clarifying" Concurrence.

Another popular reason why a concurring opinion may get more precedential value than a majority one is because the majority opinion is not clear. Often, majority opinions are the product of compromise among the Justices. Thus, they might not always make perfect sense. When this happens, lower courts naturally look to the concurring opinion to clear the air. Indeed, Judge Kozinski of the Ninth Circuit recognizes this phenomenon. In such cases of confusion, he says, lower courts wisely look for guidance to the concurrence opinion. Judge Kozinski explains: "one clearly expressed view is better than many unclear views." Telephone Interview with the Honorable Alex Kozinski, U.S. Court of Appeals of the 9th Circuit (Apr. 15, 1995) (cited in Kirman at 2084 (1995)).

One example of this phenomenon has already been mentioned: *Container Corp. of America*. There, not only was Justice Fortas's concurrence more specific, it was also clearer. Since the majority opinion was muddied, lower courts looked to the concurrence for guidance. For more, *see* Kirman at 2091 ("Thus, by 'clarifying' the majority opinion, Justice Fortas's simple concurrence has achieved some influence in lower courts, in spite of the fact that it was written by a single Justice and the fact that it represented the sixth, and numerically unnecessary, vote of the majority.")

Of the three circumstances, Justice Alito's concurrence best fits this one. Justice Alito directly stated that he hoped to clarify the majority opinion. He said, "*Properly understood*, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." *Reed v. Town of Gilbert, Arizona*, ----S. Ct.---- (2015) (emphasis added). Justice Alito wanted to ensure that lower courts reading the majority opinion would read that opinion the same way he, Kennedy, and Sotomayor did. He hoped to provide the lower courts with correct guidance for what constitutes a content neutral restriction.

VIEW OF THE INDUSTRY

The Outdoor Advertising Association of America, Inc. (OAAA), the trade organization for the nation's billboard industry, sought the opinion of Professor Laurence Tribe of Harvard Law School on the impact of *Reed*. Upon receipt of Professor Tribe's September 11, 2015 memorandum, the OAAA began circulating the same to make it clear that the *distinction* between offsite commercial signs (billboards) and onsite signs is still valid under the U.S. Constitution.

This position is aligned with the position of Scenic America, Inc. (ABOVE). OAAA and Scenic America are not often of the same view on legal and policy issues when it comes to

signage. On the issue of the ongoing applicability of intermediate scrutiny for billboard regulations post-*Reed*, they share a similar view.

Professor Tribe's memorandum to OAAA's Executive Director provided in pertinent part:

Applying the First Amendment to Regulations Distinguishing Between Off-premises and On-premises Signs After *Reed v. Town of Gilbert*

> This memorandum is in response to your request for my opinion and guidance as to the impact of the Supreme Court's recent decision in *Reed v. Town of Gilbert* on regulations that distinguish between off-premises and on-premises signs.
>
> The fact that a regulation distinguishes between off-premises and on-premises signs does not render it content-based and thereby subject it to strict scrutiny after the Supreme Court's June 2015 decision in *Reed v. Town of Gilbert.* Instead, courts will follow a wealth of Supreme Court precedent treating such laws as content-neutral regulations of speech and will review - and ordinarily uphold - those laws under intermediate scrutiny. As three Justices made explicit in a concurring opinion in *Reed,* the on- off-premises distinction was not called into question by *Reed's* framework for determining when a regulation is content based. Indeed, a straightforward exercise in Supreme Court vote counting demonstrates that there would be at least six votes on the Supreme Court to uphold regulations that treat on- and off-premises signs differently.
>
> Laws regulating signs and billboards must, of course, comply with the First Amendment, as applied to the States through the Fourteenth Amendment, which prohibits the enactment of laws abridging the freedom of speech. The Supreme Court has established two levels of review for evaluating challenges to such laws based on whether they are content based or content neutral. Laws that are deemed "content based" are evaluated under strict scrutiny, and will be upheld only if they are "the least restrictive means of achieving a compelling state interest," *McCullen v. Coakley,* 134 S. Ct. 2518, 2530 (2014). Laws that are deemed "content neutral," in contrast, are evaluated under less-searching intermediate scrutiny, a standard under which laws are upheld provided they are "narrowly tailored to serve a significant governmental interest." *Id.* at 2534 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 796 (1989)).
>
> The Supreme Court issued its most recent formulation of the content-based/content-neutral distinction this June in *Reed v. Town of Gilbert.* 135 S.Ct. 2218 (2015). In *Reed,* the Court applied strict scrutiny to strike down a municipal sign code that expressly singled out "Ideological Signs," "Political Signs," and "Temporary Directional Signs" for different time and size restrictions. *Id.* at 2224 - 25. Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor, held that the a law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message

expressed." *Id.* at 2227. This "clear and firm rule governing content neutrality," *id* at 2231, could significantly broaden the sweep of laws vulnerable to invalidation under strict scrutiny.

After *Reed,* many regulations that were previously thought to be content neutral might now be subject to strict scrutiny. For example, since *Reed* was decided, lower federal courts have struck down laws that prohibited or burdened discussion of specific subject matter even when those laws did not manifest any desire to suppress disfavored messages or viewpoints. These include a municipal ban on panhandling, a ban on sharing pictures of completed ballots, and a ban on political "robocalls." [Citations omitted.]

Notwithstanding such decisions, *Reed* does not have dire implications for regulations making use of the long-standing on-premises/off-premises distinction. Under *Reed's* own terms, such regulations are content neutral. As an initial matter, it is worth noting that the great majority of signs covered by such regulations are commercial speech, which is categorically afforded less protection than non-commercial expression. Signs displaying the name or logo of a restaurant, gas station, retail store, or any other business are "expression related solely to the economic interests of the speaker and its audience," unlike the signs advertising a religious service that were at issue in *Reed. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 561 (1980). Because speech proposing a commercial transaction "occurs in an area traditionally subject to government regulation," and for other reasons as well, restrictions on commercial speech are generally subject to nothing beyond a form of *intermediate* scrutiny rather than strict scrutiny. *Id.* at 562. Justice Thomas's opinion in *Reed* made no reference at all to commercial speech and, as three district courts have already held, there is no reason to think that *Reed* silently revolutionized commercial speech doctrine by requiring strict scrutiny rather than intermediate scrutiny of place-based distinctions in the regulation of advertising. [Citations omitted.]

Even when the commercial speech doctrine does not rule out the application of strict scrutiny, the on-premises/off-premises distinction would be deemed content neutral under the framework laid out in *Reed.* The Court held in *Reed* that "a speech regulation targeted at a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter," *Reed,* 135 S. Ct. at 2230, but made clear that "a speech regulation is content based" only "if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.*

By contrast, the on-premises/off-premises distinction does not "single out specific subject matter for differential treatment." *Reed,* 135 S. Ct. at 2223. Such a distinction "is fundamentally concerned with the location of the sign relative to the location of the product which it advertises." *Contest Promotions,* 2015 WL 4571564, at *4. The very same sign will be permissible in one location but not in another. As one of the district courts to consider the question noted, "one store's

non-primary use will be another store's primary use, and there is thus no danger that the challenged law will work as a 'prohibition of public discussion of an entire topic.'" *Id.* (citing *Reed,* 135 S.Ct. at 2230). A regulation that singles out off-premises signs does not apply to a particular topic, idea, or viewpoint. It regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

What's more, the Supreme Court itself has concluded, and has not subsequently questioned, that the distinction between on-site and off-site advertising is content neutral and is thus presumptively constitutional. In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), the Court concluded that a city could ban off site billboards while permitting on-site billboards, a conclusion repeated by a unanimous Court in *City of Ladue v. Gilleo,* 512 U.S. 43, 49 (1994). "[T]he city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business ... than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere." *Metromedia,* 453 U.S. at 512. Given this stronger interest in on-site advertisement, a city can reasonably decide to sacrifice its aesthetic and safety interests in one physical location but not the other. As the Court itself has recognized, the on-/off-premises distinction is *location based,* not content based.

Moreover, it is easy to confirm that a majority of the Court continues to view regulations distinguishing between on-site and off-site signs as content neutral simply by counting the Justices who joined the various opinions in *Reed.*

To begin that counting process, three Justices who joined the majority opinion in *Reed—Justices* Kennedy, Sotomayor, and Alito — explicitly affirmed in a concurring opinion by Justice Alito that regulations distinguishing between on-premise and off-premise signs are content neutral under the framework developed by Justice Thomas (which achieved majority support only with the votes of Kennedy, Sotomayor, and Alito). *See Reed,* 135 S. Ct. at 2233 (Alito, J. concurring) ("I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content-based . . . [r]ules distinguishing between on-premises and off-premises signs.").

Further, it is virtually certain that Justices Breyer, Kagan, and Ginsburg would view a regulation distinguishing between on-site and off-site signs to be content neutral. While all three of these Justices concurred in the Court's judgment in *Reed,* they emphatically disagreed with Justice Thomas's claim that laws which "on [their] face" draw distinctions based on the topics or subject matter discussed necessarily trigger strict scrutiny. *Reed,* slip op. 6-7 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

* * *

Thus, based on the opinions in *Reed,* at least six Justices (and possibly seven or more) would not apply strict scrutiny to regulations distinguishing between on-premises and off-premises signs. Justices Alito, Sotomayor, and Kennedy said as much explicitly, while Justices Kagan, Breyer, and Ginsburg favor a more measured and nuanced approach in general. Confronted with the question, Chief Justice Roberts might also take this tack, given his opinion for the Court in *McCullen v. Coakley,* which held that a buffer zone law that applied only to the area surrounding abortion clinics was content neutral because the law did not focus on *what* people say "but simply on where they say it." *McCullen,* 134 S. Ct. at 2531.