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GRESHAM

LAW 668: LAND LAW USE
UNIVERSITY OF OREGON SCHOOL OF LAW

Rewriting a Visual Language: Modernizing Gresham's Municipal Sign Code

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Contents

4	About SCI
4	About SCYP
5	About City of Gresham
6	Course Participants
6	Course Description
7	Executive Summary
8	Introduction
8	Purposes and Objectives of Sign Codes
11	City of Gresham's Particular Concerns
13	Content Neutrality and First Amendment Protections
17	Commercial and Non-Commercial Speech
19	Time, Place, and Manner Restrictions
20	Suggestions and Examples
26	Conclusion
27	References
29	Appendix A: Sign Code Definitions & Content Neutrality
35	Appendix B: Commercial and Noncommercial Speech
39	Appendix C: Differential Treatment of Commercial Signs
42	Appendix D: Differential Treatment of Noncommercial Signs
47	Appendix E: Time, Place, and Manner Restrictions
51	Appendix F: Purposes and Objectives of Sign Code Regulations
56	Appendix G: A-Board and Temporary Sidewalk Signs
60	Appendix H: Murals
64	Appendix I: Electronic Signs

About SCI

The Sustainable Cities Institute (SCI) is an applied think tank focusing on sustainability and cities through applied research, teaching, and community partnerships. We work across disciplines that match the complexity of cities to address sustainability challenges, from regional planning to building design and from enhancing engagement of diverse communities to understanding the impacts on municipal budgets from disruptive technologies and many issues in between.

SCI focuses on sustainability-based research and teaching opportunities through two primary efforts:

1. Our Sustainable City Year Program (SCYP), a massively scaled university-community partnership program that matches the resources of the University with one Oregon community each year to help advance that community's sustainability goals; and

2. Our Urbanism Next Center, which focuses on how autonomous vehicles, e-commerce, and the sharing economy will impact the form and function of cities.

In all cases, we share our expertise and experiences with scholars, policymakers, community leaders, and project partners. We further extend our impact via an annual Expert-in-Residence Program, SCI China visiting scholars program, study abroad course on redesigning cities for people on bicycle, and through our co-leadership of the Educational Partnerships for Innovation in Communities Network (EPIC-N), which is transferring SCYP to universities and communities across the globe. Our work connects student passion, faculty experience, and community needs to produce innovative, tangible solutions for the creation of a sustainable society.

About SCYP

The Sustainable City Year Program (SCYP) is a yearlong partnership between SCI and a partner in Oregon, in which students and faculty in courses from across the university collaborate with a public entity on sustainability and livability projects. SCYP faculty and students work in collaboration with staff from the partner agency through a variety of studio projects and service-learning courses to provide students with real-world projects to investigate. Students bring energy, enthusiasm, and innovative approaches

to difficult, persistent problems. SCYP's primary value derives from collaborations that result in on-the-ground impact and expanded conversations for a community ready to transition to a more sustainable and livable future.

Community partnerships are possible in part due to support from U.S. Senators Ron Wyden and Jeff Merkley, as well as former Congressman Peter DeFazio, who secured federal funding for SCYP through Congressionally Directed Spending.

About City of Gresham

The City of Gresham is located on the traditional territory of the Chinookan people. In 1851, the Powell brothers settled the area and it would be known as Powell's Valley until the creation of the Gresham post office in 1884. The economy ran mostly on agriculture with trains running between Gresham and Portland every hour. In 1904, the city elected Lewis Shattuck as its first mayor and in 1905 officially incorporated.



Gresham is the fourth largest city in Oregon with a population of just over 110,000 people. Gresham is bordered to the west by Portland, the largest city in the state, and is located near both the Columbia George National Scenic Area and Mount Hood, the highest point in Oregon. It has a wide variety of neighborhoods including: the Civic Center, known for its active transportation network, rapid transit connections, and residential, commercial, and retail mix; Historic Downtown,

which offers a walkable blend of shops, restaurants, and service businesses; and Rockwood, one of the youngest and most diverse neighborhoods in Oregon. It offers community farmers markets, history museums, and several historical landmarks. Gresham's residents care deeply about their heritage as a homestead and agricultural community and are committed to building a vibrant future. Today, Gresham is a dynamic, innovative, and rapidly growing city with a mutual desire and drive to thrive.

Course Participants

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Course Description

LAW 668: LAND LAW USE

This course surveys the function, operation, and legal impact of state and local public planning and land-use control laws, ordinances, and administrative growth-control techniques; transfer of developmental rights; zoning; variances; conditional-use permits; and nonconforming uses. The course also considers newer state-level land-use control devices, such as state environmental impact assessment acts (e.g., in California) and statewide land-use planning laws (e.g., in Oregon).

Executive Summary

This report summarizes the legal analysis and findings from the University of Oregon School of Law's Land Use Law class. Developed in partnership with the City of Gresham, the project addressed the City's interest in modernizing its Municipal Sign Code and the challenges of navigating First Amendment sign code law. Gresham's sign code has not been substantively updated in almost two decades.

With this in mind, the Land Use Law students analyzed First Amendment free speech law applicable to Gresham's concerns and goals related to aesthetics, traffic and pedestrian safety, and local economic vitality.

Students researched relevant case law in Oregon, the Ninth Circuit, and the US Supreme Court, highlighting constitutional limits on municipal sign regulations. This report synthesizes each small group's work into a larger framework of legal context and suggested code amendments. A large portion of this report provides explanations of how courts typically evaluate sign code First Amendment violation claims, as well as listing tests and specific vocabulary that courts have created to better clarify these issues.

The central focus emerging from the students' research are the various distinctions courts have employed to discern free speech infringement from police powers used within a city's purview. The first distinction discussed is the difference between content-based and content-neutral regulations. Content-based regulations (those that depend on the message or subject matter of a sign) are presumptively unconstitutional. Content-neutral regulations are more likely to be upheld. Commercial and non-commercial speech are also identified

as factors relevant for courts in these cases. The third distinction, strict and intermediate scrutiny, dovetails with each type of regulation. The type of scrutiny essentially determines how difficult it will be for a local government to overcome a constitutional challenge. As discussed below, students determined that sign codes are generally more legally defensible when based on Time, Place, and Manner restrictions, rather than any regulations based on messages conveyed.

Based on researched legal precedent and identifying key factors courts rely on in making these decisions, the students compiled suggestions tailored to the City of Gresham's unique concerns. Some are excerpts of other Oregon localities' sign codes, some are recommendations for drafting definitions, while others are larger concepts the class felt the City should keep in mind as it updates the sign code. Collectively, the analysis, findings, and examples provide information that the City can use as it considers how to move forward with its sign code update.

Introduction

In fall 2025, the University of Oregon School of Law's Land Use Law class, led by Professor Sarah Adams, researched, analyzed, and synthesized some of the complex First Amendment law applicable to the City of Gresham's Municipal Sign Code, a document not significantly revised in over twenty years. Each student group was tasked with researching, preparing a brief legal memo, and presenting about an aspect of municipal sign code law. The following report compiles each of the groups' legal analysis, in which students summarized typical sign code motivations; provided context for which First Amendment violations could arise; discussed the differences between content-neutral and content-based regulations; distinguished the differences between commercial and non-commercial speech classifications; and examined the contours of legitimate police power Time, Place, and Manner restrictions. Finally, this report concludes with suggested amendments for the City of Gresham and provides examples from other municipal sign codes.

Purposes and Objectives of Sign Codes

Cities derive their ability to implement regulations regarding the public good from their police powers. A city's sign code must be reasonably related to a legitimate public purpose—typically protecting public health, safety, and overall community welfare. Most sign codes include a statement of purpose explaining why the city adopted the regulations.

This statement serves an important role because courts will look to it when deciding whether the ordinance truly advances the interests that the city claims to be protecting. A clear, well-defined statement of purpose will strengthen a city's legal position if the sign code is challenged. On the other hand, if an ordinance does not include a clear statement of purpose, a court may find that the city has not shown a strong enough connection between the regulations and permissible goals, such as aesthetics or traffic safety. This can make the ordinance more vulnerable to First Amendment challenges.

A sign code's purposes or objectives must be legally relevant. Aesthetics, traffic safety, interference with pedestrian access, and economic development and vitality are legally relevant concerns that give the ordinance purpose.

Police powers are powers reserved for state (and local) governments to protect their citizens and the "public good." Typical police power objectives include the protection of public health, public safety, morality, peace and quiet, law and order, etc. These powers stem from the Tenth Amendment: "The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.” Regulations claiming to be related to police powers must demonstrate a reasonable relationship to the public health, safety, and welfare.

AESTHETICS

Aesthetics is typically one of the most popular purposes cities cite when developing a sign code. Courts historically have found it among the least controversial purposes for a sign code. When creating a code, a stated purpose of aesthetics may even be sufficient to avoid a court investigating a possible pretextual purpose.

Aesthetics itself, as a purpose, is uncontroversial and readily accepted. The primary issue that arises is whether the restriction is sufficiently limited to achieving the aesthetic purpose--if not, the restriction may be considered overinclusive (it regulates more than aesthetics) or pretextual. Aesthetic restrictions have run afoul of the First Amendment when they apply to some categories of signs only, since sign categories are usually based on their content and the content of a sign is unrelated to its appearance. A city can achieve a better fit with its aesthetic purpose and avoid content-based regulation by regulating the appearance and design of signs regardless of classifications based on content.

TRAFFIC SAFETY

Traffic safety is one of the strongest and most widely recognized justifications for sign regulations. Courts have consistently found that cities may regulate signs when doing so helps reduce distractions or hazards for drivers and pedestrians.

Signs can create safety risks in certain situations— for example, when signs are overly large, too bright, placed too close to the road, or clustered in ways that make it harder for drivers to process visual information quickly. Courts have upheld regulations aimed at reducing such risks. One notable example is a California Supreme Court decision that approved a city’s decision to remove billboards visible from streets and highways, finding that billboards are designed to draw a driver’s attention away from the road.

Because of traffic safety concerns, traffic safety justifications are commonly used to support limits on the size, height, placement, and spacing of signs. Cities often articulate this purpose in their statement of purpose. A typical statement of purpose might be: “To promote the free flow of traffic and protect pedestrians and motorists from injury and property damage caused by, or which may be fully or particularly attributable to cluttered, distracting, or illegible signage.” To summarize, a clear articulation of traffic-safety goals helps demonstrate that the sign code is reasonably related to a legitimate public purpose.

INTERFERENCE AND PEDESTRIAN ACCESS

Reducing interference with pedestrian access is not a widely discussed governmental interest in a sign code; nonetheless, preserving pedestrian access has its place in prior case law. For consideration of public right-of-way/ pedestrian access, a sign ordinance needs to contain objective and precise standards for decision-making, such as size, height, location, area, and setback standards. An example of a court-approved sign code had a provision which gave, “a maximum square footage

requirement and time limit for portable signs and banners and prohibits signs which prevent safe vehicular or pedestrian passage along public rights-of-way or sidewalks.” Although this is a valid purpose when designing a sign code, the area of law on this subject matter is less developed than the aforementioned purposes.

ECONOMIC DEVELOPMENT AND VITALITY

Like interference and pedestrian access, economic development and vitality is not a widely discussed government interest. However, a case from Washington, *Demarest v. City of Leavenworth*, discusses the implications of having economic development and vitality as a stated purpose in a sign code ordinance.

In *Demarest*, economic vitality was found to be an “uncontested” substantial government interest. In this case, the plaintiff had challenged Leavenworth’s sign code ordinance. Leavenworth was unique because it is a tourist destination based on its styling as a Bavarian town and depended on tourism revenue. Leavenworth’s sign code was designed so that signs around the city aesthetically matched the Bavarian theme but

provided many exceptions for real estate owners to apply for. The Court upheld the unique sign code ordinance, stating that economic development, among other purposes, like aesthetics, was a substantial government interest. Of particular importance to the Court, was the fact that Leavenworth depended on the tourism revenue created by its unique Bavarian styling. In the Court’s eyes, this meant that the economic rationale for the sign code ordinance was a substantial interest.

Economic development and vitality are a valid purpose for a sign code. However, the area of law and number of cases on this subject matter is less developed than aesthetics and traffic safety. Further, the *Demarest* court’s reasoning took into consideration the unique economic interest of the City’s Bavarian-themed code. This suggests that a stated economic interest will be easier to find if a town or city has a unique attribute that needs to be protected in a sign code ordinance to maintain economic vitality.

City of Gresham's Particular Concerns

The representatives from the City of Gresham touched briefly on each of the following concerns about signs, as sign code concerns, but most specifically highlighted aesthetic issues and concerns regarding structuring regulations to address particular kinds of signs.

FIG. 1

Example of an A-Board or “sandwich” sign in Gresham.

Image courtesy of Ashley Miller, City of Gresham



Firstly, Gresham was concerned with the regulation of A-board or sandwich signs. The primary concern with A-boards was pedestrian accessibility and safety, as A-boards are often placed on the sidewalk. Gresham was also concerned about some local business owners wanting to restrict other business owners' A-board usage in certain areas of the town.

Secondly, Gresham representatives mentioned concerns about regulating murals. The City of Gresham has a thriving artistic community and many eye-catching murals, but representatives wanted to know how to distinguish between “pure art” murals and murals verging on advertisements. Gresham representatives had similar questions about how to best regulate electronic or message board signs while not infringing on free speech rights.



FIG. 2

Example of a non-commercial mural in Gresham.

Image courtesy of Ashley Miller, City of Gresham



FIG. 3

Example of mural gray-area in Gresham

Image courtesy of Ashley Miller, City of Gresham

Content Neutrality and First Amendment Protections

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment of the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech, or of the press." Arguably the cornerstone of American democracy, the First Amendment ensures that the government is not allowed to control individual speech, including what can be written on a sign. More specifically, the government cannot restrict individual speech in ways that prefer certain messages or viewpoints over others. While state and local legislative bodies do have legal authority to cultivate community aesthetics and safety, any regulations regarding signs (and therefore speech) immediately raise First Amendment red flags.

Courts use standards of review to determine the amount of deference they must give lower courts (or municipalities) when presented with a decision or proposed regulation to review. Put simply, courts will give more "benefit of the doubt" to local governments if the proposed sign ordinances skirt free speech issues. Courts will generally uphold regulations when there is a clear connection between a purported governmental goal and the regulation in question.

Courts divide sign regulations into two major types: content-based and content-

neutral. Each triggers its own standard of review from a court.

CONTENT-BASED

A regulation is **content-based** if it restricts speech based on the topic, message, or the ideas expressed. A sign code that defines and treats signs differently based on topic discussed or message expressed (e.g., distinguishing between "political signs," "ideological signs," and "temporary directional signs") is content-based. Even if the regulation is not aimed at limiting a particular viewpoint, the differential treatment of noncommercial subjects is presumptively unconstitutional because an official must read the sign's message to determine which set of regulations apply. Further, even if the regulation is facially neutral (meaning that it isn't immediately obvious that the regulation differentiates based on speech), it may still be content-based if the regulation cannot be justified without reference to the content of the regulated speech.

Content-based regulations are very hard for local governments to justify. Due to free speech infringement concerns, courts approach cases regarding content-based regulations with **strict scrutiny**—a standard of review that presumes a regulation is unconstitutional. Cases reviewed with strict scrutiny are extremely difficult for a local government

to win and place a higher burden of proof on municipalities. Content-based rules will only survive strict scrutiny if the government proves:

- It has a **compelling governmental interest in the rule**;
- The rule is **narrowly tailored** to that governmental interest, and;
- The rule uses the **least restrictive means necessary** to further this interest.

This creates an often impossibly high burden of proof for governments. Almost all regulations brought before courts under strict scrutiny are not narrowly tailored enough; courts are also extremely picky about what government interests are “compelling.” Government entities must also avoid both under- and over-inclusive regulations. A regulation is overinclusive when it applies to more speech than it purports to target, and underinclusive when it applies to some speech, but not all similarly situated speech. With all these tightly defined standards, most regulations reviewed under strict scrutiny are essentially dead in the water.

The Supreme Court discusses what can be a compelling state interest in *Metromedia, Inc. v. City of San Diego*, highlighting the limitations on the ability to regulate content on billboards. They found that the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First and Fourteenth Amendments foreclose similar interests in controlling the communicative aspects of billboards. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression. Often recognized

compelling state interests include aesthetics, public health, safety, and welfare.

In *Reed v. Town of Gilbert, Arizona*, the government claimed aesthetics and traffic were compelling state interests. This failed as the regulation was not narrowly tailored to address these issues and there is little case law on compelling government regulations on content in the specific area of signs. However, other cases have demonstrated that the interest must be significant and generally related to safety or other major concerns. The most common method of a compelling government interest that is narrowly tailored is regulation of political signs. This is narrowly tailored in that it only targets them and the compelling government interest is unique to the industry as they are usually only allowed around elections, and most other signs lack the same cyclical usage.

Notably, there are constitutionally recognized exceptions to the regulation of content. These exempted categories of speech include obscene speech, defamatory speech, fraudulent speech, inciting speech, and speech integral to criminal conduct. They are easier to regulate than non-exempted speech.

To mitigate legal risk, it is important to tie rules with differential treatments of signs to a specific compelling interest and clearly demonstrate how each rule advances the compelling governmental interest. A valid compelling governmental interest includes traffic, safety, and aesthetics especially when combined with another compelling interest. It is also critical to formulate the ordinance to specifically fit the governmental interest. The city should provide clear justification for any differential treatment of certain signs and review sign regulations with

Standards of Review for Constitutional Questions

Intermediate Scrutiny	Strict Scrutiny
- Only requires the government prove that: - The rule furthers an important governmental interest, <u>and</u>: - Does so by means that are substantially related to that interest.	- The government must meet high standard and must prove: - It has a compelling governmental interest in the <u>rule</u>: - The rule is narrowly tailored to that governmental interest, <u>and</u>: - The rule uses the least restrictive means necessary to further this interest.

FIG. 4

Standards of Review for Constitutional Questions Table.

legal counsel to ensure they continue to align with the compelling interest and remove outdated or ineffective distinctions. Steps like these can help ensure local sign codes align with First Amendment free speech protections.

The City of Gresham undoubtedly has plausible interests in aesthetics, traffic safety, and pedestrian safety, but must be sure to structure any kind of differential treatment for signs clearly connecting to those compelling governmental interests.

CONTENT-NEUTRAL

Conversely, a regulation is **content-neutral** if it applies to all signs indiscriminately -- regardless of what they happen to say. These regulations are often colloquially referred to as “Time, Place, and Manner” restrictions, typically regulating physical characteristics of signs such as size, location, height, or lighting. Because content-neutral regulations are more likely to avoid free speech restriction concerns, courts review these cases under a lower standard.

Intermediate scrutiny only requires the government prove that:

- The rule **furthers an important governmental interest, and**;
- Does so by means that are **substantially related** to that interest.

Intermediate scrutiny affords governments a fighting chance. While the City of Gresham’s interests like aesthetics and traffic safety generally do not qualify as “compelling governmental interests” under strict scrutiny, they are usually considered “important governmental interests” that then pass intermediate scrutiny.

To ensure a regulation is upheld, governments like the City of Gresham must focus on content-neutral regulations that subsequently afford them intermediate scrutiny should they ever be challenged.

Beyond content neutrality rules, courts also review commercial and non-commercial speech regulations differently. Specific tests have been established to evaluate these respective types of restrictions.

Content Based and Neutral Regulation Distinctions

Content-Based Regulations	Content-Neutral Regulations
- If it restricts speech based on the topic, message, or the ideas expressed. - If it defines and treats signs differently based on topic discussed or message expressed - Even if the regulation is not aimed at limiting a particular viewpoint, the differential treatment of noncommercial subjects is presumptively unconstitutional because an official must read the sign's message to determine which set of regulations apply. - Even if the regulation is facially neutral, it may still be <u>content-based</u> if the regulation cannot be justified without reference to the content of the regulated speech.	- If it applies to all signs indiscriminately -- regardless of what they happen to say. - Typically regulating physical characteristics of signs such as size, location, height, or lighting. - If it applies to all types of signs with similar level of strictness - Often called Time, Place, and Manner regulations

FIG. 5

Content Based and Neutral Regulation Distinctions Table.

Commercial and Non-Commercial Speech

In evaluating municipal sign ordinance First Amendment compliance, courts have also assigned different levels of protection and accordingly different standards of review to sign ordinances regulating **commercial speech** as opposed to sign ordinances regulating **non-commercial speech**.

Non-commercial speech is afforded greater protection and, accordingly, sign ordinances regulating non-commercial speech are subject to **strict scrutiny**. It is more difficult for a government entity to prove that an ordinance regulating non-commercial speech is constitutional than to prove that an ordinance regulating only commercial speech is constitutional. One key challenge courts face when analyzing whether an ordinance regulating commercial speech is valid is whether the regulation directly advances a compelling government interest. This can be split into two questions; first, whether that interest is substantial and second, whether the regulation directly advances the interest.

Even if the governmental interest may focus on traffic safety or aesthetics, the ordinance can still be struck down if there is only speculation that the restrictions on certain types of signs will actually achieve the identified governmental interests. Even if regulations that restrict some signs more than necessary to achieve the compelling interest are capable of being seen as overinclusive. Conversely, exemptions that leave unregulated signs posing the same harm can be underinclusive. Both over- and under-inclusive rules fail the narrow tailoring requirement required to justify a compelling governmental interest.

Laws affecting content-neutral commercial speech are reviewed under **intermediate scrutiny**. Additionally, courts have applied different standards

for regulations of signage on privately owned land (on-site signage) as opposed to signage on public land (off-site signage).

Though there is no universal rule for distinguishing between commercial and non-commercial speech, the United States Supreme Court has adopted tests to make the distinction. The seminal case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*, in which the Supreme Court adopted a four-part test to determine the validity of government restrictions on commercial speech, often referred to as **the “common sense test”**:

- The speech must be about legal products or services and must not be misleading;
- The government must have an important reason for the restriction;
- The rule must actually help achieve that goal, and;
- The rule must not restrict speech more than necessary.

Under the “common-sense” test, speech is commercial if it proposes a commercial transaction and exists in an area traditionally subject to government regulation. Proposing a commercial transaction can include providing price and quantity information.

Application challenges arise when commercial speech is interspersed with non-commercial speech. In such cases,

the court has assessed the totality of the circumstances to classify speech, considering factors such as whether the speech refers to specific products and whether there was an economic incentive for distributing the speech. These factors can combine to render a finding of commerciality, even if the speech at issue does not expressly propose a commercial transaction.

Ultimately, businesses cannot include non-commercial speech in their signage for the purpose of evading commercial speech regulations in sign codes. That speech references or deals with important topics of public debate does not alone make it non-commercial. Conversely, that speech may be motivated by economic incentives does not alone make it commercial. A content-neutral regulation is one that is **justified without reference to the content of the regulated speech**.

A primary legal risk arising from sign codes is that it may violate the First Amendment by treating commercial

speech more favorably than non-commercial speech. This could lead to a sign code being challenged as content- or viewpoint-based if it treats commercial speech more favorably. This risk could be higher if the sign code includes exemptions for commercial speech, such as real estate, or allows for larger signs for businesses.

Location-based regulation specific to commercial or non-commercial speech could also raise legal risk. For example, a sign code that allows commercial signs in locations where noncommercial signs aren't allowed. Broad discretionary rules for signage permitting could result in future legal challenges as well. For example, an application for a sign permit or sign variance in a sign ordinance or design review procedures involves discretionary decision-making. Additionally, omitting time limits from sign ordinances requires discretionary decision-making.

Regulation Permitted?

	On-site	Off-site
Commercial	Yes Central Hudson test allows commercial if: 1) Lawful activity and not misleading 2) Seeks to implement substantial governmental interest (aesthetics, traffic safety) 3) Directly advances that interest 4) Reaches no farther than necessary to accomplish a given objective	Yes – but governmental interest must justify
Non-Commercial	Limited – must allow where on-site commercial is allowed	Most protected – if any comparable signs allowed, these cannot be banned

FIG. 6

Commercial and Non-Commercial Table

Time, Place, and Manner Restrictions

Time, Place, and Manner (TPM) Regulations were established in early licensing cases where the courts frequently upheld content-neutral regulations that applied to a public forum (i.e. regulations for licensing the time, place, and manner of parades on public streets or regulations focused on size, height, and spacing).

The legal framework has been applied inconsistently; the Supreme Court cases that have applied it to sign ordinances have reached different results. Therefore, the guidance on when the Court will uphold any sign ordinance as a TPM regulation **is not black and white**.

Ward v. Rock established that the government **may impose reasonable restrictions** on the time, place, and/or manner of speech if:

- The restrictions are **content-neutral**,
- The restrictions are **narrowly tailored**, and;
- There are **ample alternative channels** open to communicating the information.

Certain approaches to TPM regulations increase the risk of being content-based and being held unconstitutional. TPM regulations that apply to signs only used by certain types of organizations or businesses may be considered content-based. When considering whether a TPM regulation is a content-based regulation, a city should consider whether the regulation results in a preference for certain types of businesses in certain areas, whether the regulation acts as a means to regulate certain types of speakers, and if the regulation specifies applicability by types of sign or area. Any of the previous considerations answered in the affirmative may lend to the regulation being viewed (and reviewed)

as a content-based regulation. A city can mitigate this risk by crafting **content-neutral TPM restrictions**. A content-neutral TPM regulation should **apply to all types of signs and be consistently stringent**. Some content-neutral TPM restrictions provided by Supreme Court Justice Alito include:

- Rules regulating the size of signs... [with different restrictions] among signs based on any content-neutral criteria [such as below criteria].
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguish between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on [all] signs advertising a one-time event.

Though there are some potential legal risks with using TPM regulations, if a city ensures it is content-neutral and that ample alternative channels for communication are available, TPM regulations can be valid restrictions used to meet the city's needs.

Suggestions and Examples

GENERAL ADVERTISING RESTRICTIONS

Gresham's proposed general limitations on advertising are quite likely to survive a First Amendment challenge, as long as they adhere to the content neutrality that ensures that commercial speech is not being favored over non-commercial speech. These limitations are often implemented through TPM restrictions, as is the current case in Gresham's sign code A6.070-72. If the restrictions go beyond the typical TPM and specifically restrict the amount of "advertising" to the number of signs per lot or a total square footage allotment, it still will likely satisfy the intermediate scrutiny required for commercial advertising and other signs. This assumes that non-commercial messages are allowed in place of advertising, which, to help avoid challenges, could be expressly stated in the proposed sign code.

The core legal vulnerability for Gresham's sign regulation appears to lie in drawing the distinction between exempted art and regulated advertising. Sign definitions could be drafted in a content-neutral way that includes both commercial and non-commercial speech. Including a substitution clause that allows for non-commercial signs to be substituted for commercial messages would also ensure that these risks could be diminished. Also, avoiding exemptions for commercial signs would be useful, as well as limiting discretion in language that has to do with sign approval. Lastly, it would be helpful to diminish risk if there was some documentation of the substantial interest

that the government has in enacting sign codes, (i.e. safety, traffic control), though that would do more to address legal challenges as they arise, not prevent them outright.

TPM RESTRICTIONS TO ACHIEVE AESTHETIC GOALS

One of the ways to achieve "beautification" of downtown Gresham is to discourage signs by use of the sign code at a higher level. One way to do this, that is generally content neutral, would be restricting the number of signs per mile. This could be a rule for the entire City of Gresham with further specificity per individual zone or overlay zones. This could allow less signs per mile in aesthetically important areas, such as downtown and neighborhoods, and allow more signs per mile on major highways through Gresham or in industrial/commercial areas. There could also be per-zone exemptions or specificity on types of signs. This could include rules for how many A-frames are allowed in an area or rules that don't count malls or other types of "desirable" signs, such as murals, against the sign/mile limits.

A SUBSTITUTION CLAUSE

A sign ordinance that incorporates a substitution clause is a widely accepted method to prevent favoring commercial speech. Such a clause typically provides that signs containing non-commercial speech are permitted anywhere that advertising or business signs are permitted, while remaining subject to the same regulations that apply to those

signs. For instance, a clause may state that any sign authorized by the ordinance may display noncommercial messaging. This ensures that on-site non-commercial speech is permitted wherever on-site commercial speech is allowed. By allowing for this substitution, the ordinance ensures that the regulation is content-neutral as it affects non-commercial speech, thereby reducing the risk of invalidation due to favoring commercial expression.

MESSAGE-BASED SIGN DEFINITIONS

The most significant First Amendment risk for cities is how the definitions of signs are drafted in a way that could require officials to read or interpret a sign's message in order to classify it. Any time a regulator must rely on the message itself to determine if a regulation applies, the regulation can be challenged for being content-based. Political signs, real-estate signs, ideological signs, directional signs, and event signs are all examples of signs that depend on the communicative content, therefore triggering strict scrutiny. Similarly, speaker-based distinctions are content-based and trigger strict scrutiny because the definition turns on who is speaking the message rather than the physical characteristics of the sign.

The second First Amendment risk is when cities distinguish between commercial and non-commercial speech based on content. Commercial speech typically is reviewed under intermediate scrutiny under *Central Hudson*, and many sign codes define commercial signs by reference to the presence of logos, advertisements, or promotional language. In Oregon, however, *Clear Channel Outdoor v. City of Portland* held that the city's code regulating between "signs" and "painted wall decorations" was unconstitutional under Article 1, Section 8

of the Oregon Constitution because it was a content-based restriction. This means even when a city tries to differentiate between commercial advertising and mural art, this distinction is content-based. The City of Portland could not exempt non-commercial murals because it requires a determination of the mural's textual or symbolic content.

Both risks can be significantly reduced by drafting definitions that rely solely on physical or locational elements of the sign. Courts have consistently upheld regulations that define sign types based on attributes such as height, area, illumination, portability, material, placement, and duration. For example, A-frame signs could be defined as a portable, hinged, two-sided, freestanding construction. This avoids any content risk because the classification applies regardless of what the sign says. Signs can be regulated based on on-site and off-site distinctions. Gresham should maintain ordinance distinctions based on location, function, and advertising content, rather than distinctions based on the subject matter itself. Furthermore, size limits (such as 10% wall area) are another example of a content-neutral restriction applicable to Gresham's concerns.

Regarding the City's intention to regulate the provided example case of "Steal Gas Get Shot" signs (see Figure 7), any attempt to regulate this speech should be done without reference to the content of these signs. Although it may be tempting to classify these signs under a category of speech not protected by the First Amendment (such as speech integral to the commission of a crime— i.e., illegal shooting of trespassers), more research is required to determine the validity of such a regulation, and, moreover, such a regulation is particularly likely to be contested and difficult to justify in

**FIG. 7**

Example of aesthetically concerning sign in Gresham.

Image courtesy of Ashley Miller, City of Gresham

court. The City of Gresham could instead consider regulating these signs through restricting their size, location, or other non-content characteristics.

BETWEEN COMMERCIAL AND NON-COMMERCIAL MURALS & CONTENT-NEUTRAL MURAL EXAMPLE

In the context of the City of Gresham's proposed sign ordinance to distinguish between commercial and non-commercial murals, as long as the ordinance does not prohibit non-commercial speech in the same situation where it allows commercial speech, it will likely comply with the First Amendment with respect to its commercial/non-commercial distinction. On the other

hand, because commercial speech is afforded less protection than non-commercial speech, the ordinance could likely restrict commercial speech more than non-commercial speech. In other words, Gresham's new mural ordinance could restrict murals in certain areas to non-commercial speech; it just cannot allow commercial speech and prohibit non-commercial speech in the same situation. Therefore, barring content-neutrality concerns, Gresham's proposal to restrict murals with a commercial message will likely be ruled constitutional if challenged.

Billboards are recognized as a distinct class of signs from others, and, as such,

this could be a possible way to regulate signs in a way that favors artistic murals. Billboards are made distinct because of their unique function and difficulty in determining on/off site status, like artistic murals downtown. Artistic murals are different from traditional signs in both “type” and “purpose.” Murals are generally much larger than traditional signs and applied to buildings differently. Murals usually take up an entire outside wall of a business, rather than a small percentage of it. Additionally, murals are painted directly onto the outside wall, rather than being a separate piece attached to the wall. Artistic murals often have no customer-conversion related purpose though there are instances of murals having advertising elements.

As long as the City does not discriminate against murals based on their subject matter or viewpoint, a content-based regulation that is narrowly tailored to address traffic and pedestrian safety can likely withstand a First Amendment challenge.

The City of Gresham may reasonably regulate the time, place, and manner of murals—even if they directly restrict oral or written expression—as long as the ordinance meets the prior tests and other relevant jurisdictional laws.

The following sign code regulation is from San Diego’s Municipal Code Division 12: Sign Regulations §142.1210(a)(3):

“Painted graphics that are murals, mosaics, or any type of graphic art 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, are not signs for the purposes of these regulations. When painted graphics are installed on other than a wall or fence or contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products, or services, only the actual copy area is considered sign area and shall comply with these regulations.”

CONTENT-NEUTRAL A-BOARD EXAMPLE

The Central Hudson requirement that a regulation directly advances a compelling governmental interest is incredibly important for A-boards, other temporary signs, and off-premises temporary signs. These types of signs are often numerous in commercial areas and have a high visibility potential. The City of Gresham undoubtedly has plausible interests in aesthetics, traffic safety, and pedestrian safety, but Gresham must structure any kind of differential treatment to those compelling governmental interests.

For A-boards, Gresham increases its legal risk if it applies restrictions for some businesses but allows others to utilize similar signs. If restaurants are allowed A-boards, but retail stores are not, a court could view the ordinance as underinclusive rather than as a genuine safety regulation.

The City of Salem includes A-frame signs in its definition for “Sidewalk sign” as:

“A temporary sign that does not meet an 80-mph wind load factor and is designed to be moved from place to place. Sidewalk signs include, but are not limited to, A-frame or sandwich board signs, and signs attached to self-supporting and moveable wood or metal frames.”

The key element of both definitions is identifying the sign solely by its physical characteristics. It does not matter so much what category A-frame signs are categorized under, if there is no mention of its message, purpose, or subject matter.

All of Gresham's A-board sections only reference physical characteristics of A-board signs, except A6. 133 “Limited Duration Event A-Board Signs”. While the criteria are valid, the title specifically mentioning “Limited Duration Event” is likely a risk. Section A6. 133 (C) mentions examples of garage sales and open houses. This would likely trigger strict scrutiny because it requires reading the message of the sign to determine if the sign advertises a qualifying event. Instead, the title could be changed from “Limited Duration Event A-Board Signs” to “Temporary A-Board Signs”. This slight change helps clarify that the

purpose of the regulation is to limit the duration of the sign's usage, not which limited duration events A-board signs are permitted for.

Downtown sidewalks and roads are city property, and the government has enhanced rights to determine what is or is not allowed on its own property. Gresham could make a rule disallowing A-frame signs on sidewalks entirely. Sidewalks are city property and a public right of way – thus, this regulation would be in pursuit of a legitimate and, possibly, compelling government interest. This option could alleviate the issue of A-frames being an eyesore or impediment to sidewalk access. However, it could also make the zoned businesses feel targeted while eliminating a vital means of advertising and potentially impacting their revenue.

The City of Salem includes the following definitions for Illuminated Signs and, more specifically, Electronic Display Signs:

“Illuminated sign means a permanent sign that uses electronic illumination as part of the sign. Illuminated signs are electronic display signs, electronic time and temperature signs, externally illuminated signs, and internally illuminated signs, which are further defined as follows: Electronic display sign means a sign including, or comprised solely or partially of, an electronic display which can be changed by automatic means, including, but not limited to, the operation of computer software.”

CONTENT-NEUTRAL ELECTRONIC SIGN EXAMPLE

Legal risks regarding Electronic Message Boards mirror the issues raised with Murals and A-Frame signs. However, signs with flashing lights, visual transitions, or even scrolls of text pose perhaps a larger risk for distracting drivers and/or detracting from Gresham’s goal of a streamlined aesthetic. Although cities may rely on traffic safety as a common-sense justification, they must do more than invoke general concerns: any regulation must be evidence-responsive, supported by credible data sets, and capable of demonstrating that the restrictions produce measurable safety benefits. Absent such evidence, safety rationales risk being treated as pretext for speech suppression.

The City of Salem provides an excellent example of a balanced approach to these signs. In Sec. 900.07022, the City delves into a myriad of regulations and specifics that these signs must adhere to, including but not limited to the amount of time a message or display must remain before changing to another, the prohibition

of these types of signs in historic districts, distinctions regarding time and temperature signs, the brightness of the sign in relation to a district’s ambient light, etc. Notably, the City’s distinctions focus on limiting distracting signs—those that are overly bright, flashing or rapidly changing, too large, or out of character with a particular district—yet all are facially content neutral.

Looking at Gresham’s current code, Electronic Message Boards are discussed in both A6.100 and A6.101. Gresham should continue to avoid any content-based regulations, and can follow Salem’s example in regulating location, brightness, speed at which messages change, etc.

Conclusion

This report highlights some of the key Free Speech law considerations the City of Gresham is likely to encounter as it modernizes its Municipal Sign Code.

One common theme runs through each small group's work: sign codes are the most legally defensible when their regulations are content-neutral, focus on Time, Place, and Manner restrictions, and can be clearly tied to a governmental interest relating to public health, safety, or welfare. The students' suggested amendments and further recommendations attempt to address

the City of Gresham's concerns of aesthetics, traffic and pedestrian safety, while introducing regulatory tools like substitution clauses and general content-neutral drafting strategies. Together, students hope these recommendations provide the City of Gresham with clear, action-based next steps that will help to stabilize their sign code while uplifting community goals and still adhering to constitutional ideas.

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Appendix A:

Small Group 1: Sign Code Definitions & Content Neutrality

APPLICABLE CONTENT-NEUTRALITY LAWS AND TAKEAWAYS FOR THE CITY OF GRESHAM

The First Amendment of the United States Constitution provides that “Congress shall make no law...abridging the freedom of speech, or of the press.” This means the government is not allowed to control speech—such as what can be written on signs—in ways that prefer some viewpoints or messages over others. Courts divide sign regulations into two major types: content-based and content-neutral.

A regulation is content-based if it restricts speech based on the topic, message, or the ideas expressed. For example, a law that treats political signs one way, church event signs another way, and ideological signs another way is content-based because the law is dependent on the topic or message displayed on the sign. Content-based regulations are very hard for the government to justify. They are presumed to be unconstitutional and can survive only if the government proves: (1) it has a compelling reason for the rule, and (2) that the rule is narrowly tailored, meaning it doesn’t restrict speech more than absolutely necessary.

A regulation is content-neutral if it applies to all signs regardless of what they say. These are often called “time, place, and manner” restrictions and typically regulate physical characteristics such as size, location, height, or lighting. Content-neutral rules are judged under a lower standard called intermediate scrutiny, which means the rules must be reasonably related to an important government goal. Beyond content-based and content-neutral rules, the First Amendment also treats commercial speech differently, and courts use a specific test to evaluate these types of restrictions.

The seminal case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*, in which the Supreme Court adopted a four part test to determine the validity of government restrictions on commercial speech: (1) The speech must be about legal products or services and must not be misleading, (2) the government must have an important reason for the restriction, (3) the rule must actually help achieve that goal, and (4) the rule must not restrict speech more than necessary.

Billboards and other outdoor signs are considered a form of speech protected by the First Amendment. However, even though they are protected, cities and towns still have the authority—through what is known as their police power—to regulate the placement, size, and type of billboards in order to promote public safety and community aesthetics. However, those regulations must still follow the First Amendment, meaning they cannot favor certain messages or restrict more speech than necessary. In this way, local governments have flexibility in controlling billboards but must still respect free-speech protections.

A legal risk, which many municipalities struggle with, is maintaining the content neutrality of sign regulations. A key distinction in content neutrality exists between commercial and noncommercial speech. Attempts to regulate noncommercial speech are subject to a higher standard of judicial review, called “strict scrutiny”. Strict scrutiny starts with a basis of unconstitutionality and the government must accordingly persuade the judge that the regulation is “narrowly tailored” to a “compelling governmental interest”, and that the regulation was the “least restrictive means” to further this interest. Alternatively, if the sign is considered commercial, it receives a lower standard of judicial review called “intermediate scrutiny”. With intermediate scrutiny, there is still a presumption of unconstitutionality, but the government must only show that the regulation “furthers an important government interest” and does so by “means substantially related to that interest”. Some courts have often held that murals are noncommercial speech, which entitles them to strict scrutiny, where others have held that murals with a commercial element can be regulated as commercial speech.

In Oregon specifically, Clear Channel Outdoor, Inc. successfully challenged the City of Portland’s sign ordinance which distinguished between signs and painted signs, or murals, in an attempt to regulate commercial speech.

The definition of painted wall decorations specifically excluded “text, numbers, registered trademarks, or registered logos” and the city exempted painted wall decorations from regulations that applied to other signs. Since the distinction was content based from the statute itself, rather than based on the application of the statute, strict scrutiny applied. Here, the Court ruled that this violated Article I Section 8 of the Oregon Constitution by differentiating based on the facial presence of text, numbers, registered trademarks, or registered logos, holding that the code was not content neutral. While the court did find the statutory regulation of mural content to be unconstitutional, the court upheld provisions that restricted the allowable size and height of signs.

From this specific case, we can understand that state courts may uphold reasonable time, place, and manner restrictions on signs, including size regulations, but will likely not uphold content based differentiation that exempts on form of sign. For the city of Gresham, this means that attempting to exempt murals from the regulations that other signs are subject to may not be upheld. Other ways to regulate murals could include on site and off site distinctions as upheld in *City of Austin* or including murals within the sign code as well, though this may limit expression substantially.

Reed held that “facial distinctions based on a message are obvious, defining regulated speech by particular subjects, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” An ordinance regulating an A-frame sign advertising products is content-based because the sign’s message must be read to classify it. This approach triggers strict scrutiny, which Street Graphics Model Ordinance notes, “strict in theory but usually fatal in fact. Courts that apply it usually find the ordinance unconstitutional.” Similarly, ordinances regulating by directional function trigger strict scrutiny. Street Graphics warns that not only is “distinguish[ing] between ideological and political signs are clearly content based. So are permissive exceptions that allow temporary signs if they advertise an event.” Portable and A-frame sign regulations relying on these definitions require officials to read the message to determine if the regulation applies, and any regulation requiring message-based classification faces the burden of proving it is narrowly tailored to serve a compelling governmental interest.

For the City of Gresham specifically, these risks might be avoided by creating ordinances restricting A-frame signs based on physical characteristics rather than message content or function. To remain content-neutral, it must be identified by structure alone, not by reading the message. Once defined structurally, various content-neutral restrictions can be imposed, such as (1) size limits, (2) location/setback requirements, (3) time restrictions, (4) numerical limits, and (5) safety requirements. For enforceable A-frame regulations to remain content-neutral, the case law suggests that they must avoid message-based and function-based distinctions and event-based exceptions.

KEY LEGAL RISK IN DEFINING SIGN TYPES AND WAYS TO MITIGATE RISK

The most significant First Amendment risk for cities is how the definitions of signs are drafted in a way that could require officials to read or interpret a sign’s message in order to classify it. Any time a regulator has to rely on the message itself to determine if a regulation applies, the regulation can be challenged for being content-based. Political signs, real-estate signs, ideological signs, directional signs, and event signs are all examples of signs that depend on the communicative content, therefore triggering strict scrutiny. Similarly, speaker-based distinctions are content-based and trigger strict scrutiny because the definition turns on who is speaking the message rather than the physical characteristics of the sign.

The second First Amendment risk is when cities distinguish between commercial and noncommercial speech based on content. Commercial speech typically is reviewed under intermediate scrutiny under *Central Hudson*,

and many sign codes define commercial signs by reference to the presence of logos, advertisements, or promotional language. In Oregon, however, *Clear Channel Outdoor v. City of Portland* held that the city's code regulating between "signs" and "painted wall decorations" was unconstitutional under Article 1, Section 8 of the Oregon Constitution because it was a content-based restriction. This means even when a city tries to differentiate between commercial advertising and mural art, this distinction is content-based. The City of Portland could not exempt noncommercial murals because it requires a determination of the mural's textual or symbolic content.

Both of these risks can be significantly reduced by drafting definitions that rely solely on physical or locational elements of the sign. Courts have consistently upheld regulations that define sign types based on attributes such as height, area, illumination, portability, material, placement, and duration. For example, A-frame signs could be defined as a portable, hinged, two-sided, freestanding construction. This avoids any content risk because the classification applies regardless of what the sign says. Signs can be regulated based on on-site and off-site distinctions. *City of Austin* held that location-based distinctions are permissible because the classification turns on where the sign is located rather than what it communicates.

Lastly, cities can further mitigate the risk of First Amendment content-based challenges by incorporating provisions that allow noncommercial speech anywhere commercial speech is allowed. This is known as a substitution clause, which aims at preserving the equal treatment of noncommercial speech.

EXAMPLES, LEGAL RISKS, AND APPLICABILITY TO GRESHAM

The following sign code regulation is from San Diego's Municipal Code Division 12: Sign Regulations §142.1210(a)(3):

(3) Painted graphics that are murals, mosaics, or any type of graphic art 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, are not signs for the purposes of these regulations. When painted graphics are installed on other than a wall or fence or contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products, or services, only the actual copy area is considered sign area and shall comply with these regulations.

The most significant legal risk is associated with the First Amendment, specifically whether a city's sign definition requires officials to read or interpret a sign's message as to classify it. When a regulator must rely on the message itself to determine if a regulation applies, the regulation can be challenged for being content-based. A distinction dependent on the message being conveyed triggers strict scrutiny. Therefore, it is important to maintain a content-neutral regulation for murals.

In *Architectureart, LLC v. City of San Diego*, the court applies the Central Hudson test for commercial which triggers intermediate scrutiny, which applies to content-neutral regulations rather than content-based. The plaintiff argued that *Reed v. Gilbert* should designate the ordinance as content-based; however, the court distinguishes this ordinance from *Reed*, highlighting the mural exception, on- and off-premise distinction, and the public interest message exception.

Furthermore, the court emphasized that the ordinance's distinctions were based on location and function and the presence of advertising content.

Gresham's current sign code does not specifically list murals; however, it regulates "Painted wall decorations and painted wall highlights" under A6.050(G) as a "Sign Code Exception." Similarly, in *Architectureart*,

there was a mural exemption in the sign code. The court therefore found the exception content-neutral, distinguishing “art work from signs containing speech” rather than between different speakers. *Id.* This suggests that Gresham should maintain ordinance distinctions based on location, function, and advertising content, rather than distinctions based on the subject matter itself. Furthermore, size limits such as 10% wall area are another example of a content-neutral restriction applicable to Gresham’s concerns.

The City of Salem includes the following definitions for Illuminated Signs and, more specifically, Electronic Display Signs:

Illuminated sign means a permanent sign that uses electronic illumination as part of the sign. Illuminated signs are electronic display signs, electronic time and temperature signs, externally illuminated signs, and internally illuminated signs, which are further defined as follows: Electronic display sign means a sign including, or comprised solely or partially of, an electronic display which can be changed by automatic means, including, but not limited to, the operation of computer software.

Legal risks regarding Electronic Message Boards mirror the issues raised with Murals and A-Frame signs. However, signs with flashing lights, visual transitions, or even scrolls of text pose perhaps a larger risk for distracting drivers and/or detracting from Gresham’s goal of a streamlined aesthetic.

The City of Salem provides an excellent example of a balanced approach to these signs. In Sec. 900.070, the City delves into a myriad of regulations and specifics that these signs must adhere to, including but not limited to the amount of time a message or display must remain before changing to another, the prohibition of these types of signs in historic districts, distinctions regarding time and temperature signs, the brightness of the sign in relation to a district’s ambient light, etc. Notably, the City’s distinctions are all related to limiting distracting signs (too bright, flashing or changing too fast, too large, out of place in a particular district), yet all are facially content-neutral.

As clarified in *City of Austin* signs can still be regulated through “time, place, and manner” restrictions. As discussed prior, these sorts of regulations are typically content-neutral and therefore subject to intermediate scrutiny, which is a standard that cities are more likely to be able to meet as long as the time, place and manner restriction is based on legitimate governmental concerns like traffic safety.

Looking at Gresham’s current code, Electronic Message Boards are discussed in both A6.100 and A6.101. Gresham should continue to avoid any content-based regulations, and may find helpful Salem’s example in regulating location, brightness, speed at which messages change, etc.

The City of Salem includes A-frame signs in its definition for “Sidewalk sign” as:

Sidewalk sign means a temporary sign that does not meet an 80 -mph wind load factor and is designed to be moved from place to place. Sidewalk signs include, but are not limited to, A-frame or sandwich board signs, and signs attached to self- supporting and moveable wood or metal frames.

The City of Portland includes A-frame in its definition for “Portable sign” as:

Portable sign. A movable sign that is not attached to a structure or the ground. Portable signs include A-boards, portable readerboards, and similar signs.

The key element of both definitions is identifying the sign solely by its physical characteristics. It does not appear to matter so much what category A-frame signs are categorized under, as long as there is no mention of its message, purpose, or subject matter.

The primary risk associated with A-frame sign regulation arises when cities try to regulate based on the communicative purpose of the sign, in addition to physical characteristics. For example, a town trying to allow A-frame signs only for advertising, special events, or directional information could be struck down. Definitions that include any of these purpose-based classifications require officials to read the sign to determine whether the regulation applies. Any sign that requires an official to read the message to determine if the regulation applies would render the restriction content-based, subject to strict scrutiny.

However, courts have allowed Time, Place, and Manner Restrictions. These are regulations that regulate the size, placement, number, or duration of A-frame signs. Content-neutral regulations are subject to intermediate scrutiny, which are usually upheld when tied to a legitimate government interest such as pedestrian safety, sidewalk accessibility, traffic safety, and aesthetics.

All of Gresham's A-Board sections only reference physical characteristics of A-Board signs, except A6.133 "Limited Duration Event A-Board Signs". While the criteria are probably valid, the title specifically mentioning "Limited Duration Event" is likely a risk. Section A6.133 (C) mentions examples of garage sales and open houses. This would likely trigger strict scrutiny because it requires reading the message of the sign to determine if the sign advertises a qualifying event. Instead, the title could be changed from "Limited Duration Event A-Board Signs" to "Temporary A-Board Signs". This slight change helps clarify that the purpose of the regulation is to limit the duration of the sign's usage, not which limited duration events A-board signs are permitted for.

Appendix B:

Small Group 2: Distinguishing Commercial and Noncommercial Speech

In evaluating municipal sign ordinance First Amendment compliance, courts have assigned different levels of protection and accordingly different standards of review to sign ordinances regulating commercial speech as opposed to sign ordinances regulating non-commercial speech. Non-commercial speech is afforded greater protection and, accordingly, sign ordinances regulating non-commercial speech are subject to a more stringent standard of review. In other words, it is more difficult for a government entity to prove that an ordinance regulating non-commercial speech is constitutional than to prove that an ordinance regulating only commercial speech is constitutional. Laws affecting content-neutral commercial speech, such as sign ordinances, are reviewed under an intermediate scrutiny standard. Additionally, courts have applied different standards for regulations of signage that is on privately owned land (on-site signage) as opposed to signage on public land (off-site signage).

Though there is no universal rule for distinguishing between commercial and non-commercial speech, the Supreme Court has adopted the “common-sense” test to make the distinction. Under the “common-sense” test, speech is commercial if it proposes a commercial transaction and exists in an area traditionally subject to government regulation. Proposing a commercial transaction can include providing price and quantity information.

Application challenges arise when commercial speech is interspersed with non-commercial speech. In such cases, the court has assessed the totality of the circumstances to classify speech, considering factors such as whether the speech refers to specific products and whether there was an economic incentive for distributing the speech. These factors in addition to others can combine to render a finding of commerciality even though the speech at issue does not expressly propose a commercial transaction. Ultimately, businesses are not able to include non-commercial speech in their signage for the purpose of evading commercial speech regulations in sign codes. That speech references or deals with important topics of public debate does not alone make it non-commercial and that speech may be motivated by economic incentives does not alone make it commercial. A content-neutral regulation is one that is justified without reference to the content of the regulated speech.

The aforementioned hierarchy of protection operates to require that on-site non-commercial speech be permitted where on-site commercial speech is permitted. The Austin court reasoned that because commercial speech is subordinate to non-commercial speech, and non-commercial signs are no more burdensome on traffic safety and aesthetic concerns than commercial signs, the First Amendment requires that on-site non-commercial speech be permitted where on-site commercial speech is permitted. In doing so, the court effectively announced a rare brightline rule in the field of sign code ordinance constitutional compliance; regulations of on-site signage that permit commercial speech must also permit on-site non-commercial speech.

Metromedia Inc. v. City of San Diego illustrates the distinction between on-site and off-site sign regulations and its corresponding legal effect on sign ordinance constitutionality. The *Metromedia* court held that it is permissible for sign ordinances to favor on-site commercial speech as compared with off-site commercial speech like billboards. Because permitting on site commercial speech and prohibiting off site commercial speech like billboards did not contradict the announced interests of traffic safety and aesthetics the ordinance sought to protect, the court found that the ordinance complied with the First Amendment.

KEY LEGAL RISKS RELATED TO A SIGN CODE THAT FAVORS COMMERCIAL SPEECH

A primary risk is that a sign code may violate the First Amendment by treating commercial speech more favorably than non-commercial speech. This could lead to a sign code being challenged as content- or viewpoint-based if it treats commercial speech more favorably. This risk could be higher if the sign code

includes exemptions for commercial speech, such as real estate, or allows larger signs for businesses. Location-based regulation for specifically commercial or non-commercial speech could also raise legal risk. A sign code that allows commercial signs in locations where noncommercial signs aren't allowed is an example. Broad discretionary rules for signage permitting could result in future legal challenges as well. For example, an application for a sign permit or sign variance in a sign ordinance or design review procedures involves discretionary decision-making. (Mandelker 60). Additionally, omitting time limits from sign ordinances requires discretionary decision-making. (Mandelker 63).

The easiest way to diminish the risk of favoring commercial speech in sign code is to apply the same standards to all signs regardless of content, i.e., size, location, and duration. Applying different standards not only risks invalidation due to lack of content neutrality, but also risks invalidation for over- or underinclusivity. A regulation is overinclusive when it applies to more speech than it purports to target, and underinclusive when it applies to some speech but not all similarly situated speech. This was the case in *Reed v. Town of Gilbert*, where the sign code at issue applied different restrictions to different categories of signs. Temporary directional signs were subject to restrictions in their number, size, and duration, while larger ideological signs were allowed with more leniency regarding these restrictions. The court in *Reed v. Town of Gilbert*, applying strict scrutiny to the sign code, explained that the code's distinctions among different types of signs were "hopelessly under-inclusive." (Mandelker 18). The sign code was not narrowly tailored to achieve the asserted aesthetic and traffic safety interests; there was no evidence that the temporary directional signs were less aesthetically appealing or more dangerous than political or ideological signs. The Town could not claim that placing strict limits on temporary directional signs was necessary to beautify the town while allowing an unlimited number of other types of signs that created the same problem. (Mandelker 18). The Supreme Court's ruling in *Austin v. Reagan* established that the regulatory distinction between on-premises and off-premises signs is location-based and content-neutral.

Based on this analysis, sign codes may be legally vulnerable if they distinguish between non-commercial and commercial signs, such as signs that constitute art versus signs that constitute advertising. Sign definitions could be drafted in a content-neutral way that includes both commercial and non-commercial speech. As discussed below, including a substitution clause that permits noncommercial signs anywhere commercial signs are permitted can help diminish these risks. Also, avoiding exemptions for commercial signs would be useful, as well as limiting discretion as a whole in language that has to do with sign approval. Lastly, it would be helpful to diminish risk if there was some documentation of the substantial interest that the government has in enacting sign codes, i.e. safety, traffic control.

EXAMPLE OF A SIGN CODE REGULATION FAVORING COMMERCIAL SPEECH OVER NONCOMMERCIAL (OR VICE VERSA) AND BRIEF EXPLANATIONS

An example of a regulation that favors commercial speech is the sign ordinance at issue in *Metromedia*. The sign code at issue in *Metromedia v. City of San Diego* favored commercial speech over noncommercial speech. There, San Diego's ordinance allowed on-site commercial advertising but prohibited other commercial and noncommercial advertising for fixed-structure signs, unless an exception applied. In effect, most outdoor off-site signs were prohibited. The city's stated purposes were to preserve and improve aesthetics and traffic safety, particularly regarding the hazards to pedestrians and motorists from distracting sign displays. *Metromedia*, 453 U.S. 514. The Court held that the ordinance was unconstitutional as to the restrictions on noncommercial speech under the First Amendment right to free speech. In accordance with precedent evaluating commercial and noncommercial speech differently, the Court used both approaches for the commercial and noncommercial restrictions. Regarding the restrictions on noncommercial speech, the Court explained that because the ordinance imposed more restrictions on noncommercial speech than commercial (by banning outdoor off-site advertisements of noncommercial speech), the restrictions on

noncommercial were unconstitutional. As the court stated, “[t]here was a broad exception for on-site commercial advertisements, but no similar exception for noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited.” *Id.* Because the city offered no explanation for why noncommercial billboards in places where commercial billboards were allowed would be more dangerous or unattractive than commercial billboards, the regulation favored commercial speech.

A sign ordinance that incorporates a substitution clause is a widely accepted method to prevent favoring commercial speech. Such a clause typically provides that signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, while remaining subject to the same regulations that apply to those signs. For instance, a clause may state that any sign authorized by the ordinance may display noncommercial messaging. This ensures that on-site noncommercial speech is permitted wherever on-site commercial speech is allowed, addressing the constitutional requirement established above in *Metromedia*. By allowing for this substitution, the ordinance ensures that the regulation is content-neutral as it affects noncommercial speech, thereby reducing the risk of invalidation due to favoring commercial expression.

PROPOSED ORDINANCES

Assuming the sign ordinance is content neutral (as explained by group 1), whether a proposed ordinance that seeks to regulate commercial and non-commercial speech differently complies with the First Amendment will likely be contingent on whether commercial speech is favored over non-commercial speech in some way in the context of on-site signage.

To comply with the First Amendment, a sign ordinance cannot regulate on-site non-commercial signage more restrictively than on-site commercial signage. In practice, this means that sign ordinances cannot allow commercial signs in places or circumstances that it does not allow non-commercial signs, and cannot provide exemptions for commercial signs that it does not provide for non-commercial signs.

In the context of the City of Gresham’s sign ordinance, distinguishing between commercial and non-commercial murals therefore entails some risk, although commercial/non-commercial distinctions that favor non-commercial speech can comply with the First Amendment, barring content-neutrality concerns. This suggests that Gresham’s new mural ordinance might be able to restrict murals in certain areas to non-commercial speech but cannot allow commercial murals in areas where non-commercial murals are prohibited.

Appendix C:

Small Group 3: Differential Treatment of Various Types of Commercial Signs

There are various issues that arise under the First Amendment when sign codes include differential treatment of various types of commercial signs. One major issue is the distinguishing between commercial and noncommercial signs/getting rid of the blurry line between the two. This distinction is crucial given that signs considered to be commercial are subjected to intermediate scrutiny and regulated under the Central Hudson Test, which is a lesser form of judicial review than strict scrutiny applied to noncommercial speech.

Another major issue that arises is the differential regulation of on-premises versus off-premises commercial signs. Sign codes may place restrictions or prohibit off-premises signs while permitting on-premises signs. This distinction has been found to be content-neutral and upheld through intermediate scrutiny when such restrictions/prohibitions are for aesthetics and/or a safety purpose.

COMPELLING INTERESTS

One of key challenges courts face when analyzing whether an ordinance regulating commercial speech is valid is whether the regulation directly advances a compelling government interest. This can be split into two questions; first, whether that interest is substantial and second, whether the regulation directly advances the interest. These two questions represent the second and third factor of the *Central Hudson* test for validity of regulations on commercial signage.

The second question, whether the regulation directly advances that interest, is the subject of more debate. The Court will say that a regulation is either under- or over-inclusive if the regulation does not directly advance the interest. In *Metromedia*, despite tenuous evidence showing a connection between billboards and lower traffic safety, the Court chose to defer to the legislature's judgment that billboards are hazardous to safety and therefore the blanket commercial ban directly served that interest. The petitioners in *Metromedia* argued that the ban on commercial billboard was underinclusive due to the on/off premises distinction allowing on premises commercial billboards, but the Court held that the off-premises billboards had "periodically changing content" which may be more distracting, thus serving as the important link between the regulation and the interest.

The approach in *Metromedia* was hands-off; the Court did not require significant evidence of the link between billboard prohibition and traffic safety. However, in *Edenfield vs. Fane*, the Court held that speculation as to the link must demonstrate that the harms sought to be enjoined by the regulation are real and that the "restriction will in fact alleviate them to a material degree."

KEY LEGAL RISKS RELATED TO FIRST AMENDMENT AND WAYS TO AVOID/DIMINISH THEM

The key legal risk is a sign code regulation enacted without a compelling government interest. If the land use code treats different commercial signs unequally without a direct connection to a compelling interest, the regulation is at risk of being struck down under strict scrutiny. For example, a land use code cannot protect certain businesses from others, disfavor certain advertisers, or control what kind of messages are shown without having a compelling interest in doing so.

Another issue is that the ordinance must be narrowly tailored to fit some compelling governmental interest. Even if the governmental interest is something such as traffic safety or aesthetics, the ordinance can still be struck down if there is only speculation that the restrictions on certain types of signs will actually achieve the identified governmental interests. Even if regulations that restrict some signs more than necessary to achieve the compelling interest are capable of being seen as overinclusive. Conversely, exemptions that leave unregulated signs posing the same harm can be underinclusive. Both over- and under-inclusive rules fail the

narrow tailoring requirement necessary to overcome the presumption of unconstitutionality that arises under the strict scrutiny standard.

To mitigate risk, it is important to tie each differential treatment to a specific compelling interest and clearly demonstrate how each rule advances the compelling governmental interest. A valid compelling governmental interest includes aesthetic reasons, traffic safety, visual clutter, etc.

It is also critical to formulate the ordinance to specifically fit the governmental interest. The City should provide clear justification for any differential treatment of certain commercial signs. The City should also periodically review sign regulations to ensure they continue to align with the compelling interest and remove outdated or ineffective distinctions. This will probably make it more likely that a court will find that the ordinance satisfies what is required to survive strict scrutiny.

EXAMPLE

Sign code regulation that reduces or eliminates the risks of failing to advance a compelling governmental interest:

In *Metromedia, Inc. v. City of San Diego*, the Court accepted traffic safety and aesthetics as valid governmental interests that can justify limits on commercial signs, including billboards. The Court struck down portions of San Diego's ordinance not because the interests were invalid, but because the City applied them inconsistently, which allowed certain content-based exceptions while prohibiting others without adequate justification.

To reduce legal risk, the City can follow the valid part of *Metromedia*: regulate commercial signs through content-neutral criteria like size, placement, lighting, and structural features, all tied directly to safety and aesthetics.

APPLICABILITY TO GRESHAM

The *Central Hudson* requirement that a regulation directly advances a compelling governmental interest is incredibly important for several of the sign types that the city of Gresham is contemplating. Some of the signs that this applies to are A-boards, other temporary signs, and off-premises temporary signs. The city of Gresham undoubtedly has plausible interests in aesthetics, traffic safety, and pedestrian safety, but Gresham has to be sure to structure any kind of differential treatment to those compelling governmental interests while also maintaining content neutrality (see Appendix D).

For A-boards, Gresham increases its legal risk if it restricts them for some businesses but allows others to utilize similar signs. If restaurants are allowed A-boards, but retail stores or not, a court could view the ordinance as underinclusive rather than as a genuine safety regulation.

Appendix D:

Small Group 4: Differential Treatment of Various Types of Noncommercial Signs

The differential treatment of various types of noncommercial signs creates a significant First Amendment risk because it typically is considered a content-based restriction on speech. As a result, it is presumptively unconstitutional; thus, a demanding standard of strict scrutiny applies. Content-neutrality is violated when a law's application depends on the topic discussed or the message expressed. In *Reed v. Town of Gilbert*, the Supreme Court struck down an ordinance as a content-based regulation that imposed varying restrictions on specific categories of noncommercial signs. A sign code that defines and treats signs differently based on topic discussed or message expressed (e.g., distinguishing between "political signs," "ideological signs," and "temporary directional signs") is content-based. Even if the regulation is not aimed at limiting a particular viewpoint, the differential treatment of noncommercial subjects is presumptively unconstitutional because an official must read the sign's message to determine which set of regulations apply. Furthermore, to survive strict scrutiny, the government must prove that the regulation is narrowly tailored to serve a compelling governmental interest. A regulation is not narrowly tailored to achieve those interests if it is under or over inclusive. *Reed*. This occurs when the law fails to regulate speech that poses the same threat the government claims to be interested in preventing, or the law restricts constitutionally protected speech that does not pose the threat the government is trying to prevent.

Content-based laws targeting speech are regulations based on communicative intent; these regulations are presumptively unconstitutional and are **only justifiable** if the government proves that they are **narrowly tailored** to serve **compelling state interests**. *Reed*. (Note that commercial speech—i.e., speech that intends to sell a product—is not protected to the same degree as noncommercial speech and the Supreme Court has subjected commercial speech to a less rigorous test.)

When is a regulation content-based? A regulation is content-based if the law applies to a particular speech because of the topic discussed or the idea or message expressed. *Reed*. An example of a regulation that regulates based on content would be a code that differentially treats signs because a sign is political, ideological, or religious. *Reed*. Even if the regulation is facially neutral (meaning that it isn't immediately obvious that the regulation differentiates based on speech), it may still be content-based if the regulation cannot be justified without reference to the content of the regulated speech, or was adopted by the government because it disagreed with the messaging. *Reed*.

When is a content-based regulation narrowly tailored to serve a compelling state interest, and thereby constitutional? This question can be further divided: (1) What is a compelling state interest?; and (2) When is a regulation *narrowly tailored* to serve that compelling state interest?

WHAT IS A COMPELLING STATE INTEREST?

The Supreme Court discusses what can be a compelling state interest in *Metromedia, Inc. v. City of San Diego*, with the court discussing the limitations on the ability to regulate content on billboards in this instance. They found that the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First and Fourteenth Amendments foreclose similar interests in controlling the communicative aspects of billboards. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression. Often recognized compelling state interests include aesthetics, public health, safety, and welfare.

In *Reed*, the government tried to utilize aesthetics and traffic safety as compelling state interests. This failed as the regulation was not narrowly tailored to address these issues and there is little case law on compelling government regulations on content in the specific area of signs. However, other cases have demonstrated that the interest must be significant and generally related to safety or other major concerns. An example is in

Sable Communications v. FCC, where a dial in pornographic service ban was found to not be narrowly tailored enough to the allowed compelling purpose of preventing children from consuming harmful content. The most common method of a compelling government interest that is narrowly tailored is regulation of political signs. This is narrowly tailored in that it only targets them and the compelling government interest is unique to the industry as they are usually only allowed around elections, and most other signs lack the same cyclical usage.

WHEN IS A REGULATION NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST?

Ultimately, if a court has to review a regulation and determine whether it is narrowly tailored, it will depend on the specific regulation and its unique relation to the purported state interest. So while aesthetics are a compelling state interest, see *Metromedia*, it is unlikely that any content-based regulation can be supported by the state's interests in aesthetics, because a regulation on the content does not serve aesthetic interests. For example, a regulation that restricts placement of political signs cannot be supported by the state's interests in aesthetics (meaning the state's interest in keeping an area free of signs), because other, permitted signs would frustrate the aesthetic interest in exactly the same way as political signs.

To give another example, a regulation that imposes restrictions on temporary signs providing direction (such as directional signs for a race, directions to a local event, or directions to a garage sale) is unconstitutional where other, temporary signs (such as political campaign signs) are allowed unconditionally. *Reed*. This would be unconstitutional because the distinction between directional signs and other signs cannot be supported by the state's interests in aesthetics (because keeping the city clean of signs would be frustrated by allowing other, non-directional signs to be placed), or public safety (for the same reason except instead of the interest in aesthetics this would be an interest in keeping distractions—that is, signs—away from drivers). See *Reed*. An example that is commonly utilized is regulation of political signs, which while content specific, serves a specific interest and unique area of content which is cyclical.

The primary legal risk associated with content-based laws as described in the previous question is that by creating an ordinance that distinguishes between categories for signs of noncommercial speech such as “political” or “event related,” and applies different rules to each (e.g. size, placement, duration), a municipality will likely automatically fall afoul of strict scrutiny. Even the most narrowly tailored distinctions that are tailored for a municipal sign code would be very unlikely to provide a sufficiently compelling government interest to pass strict scrutiny. Going hand and hand with the creation of categories, courts have held that having numerous exemptions for broad sign regulations similarly does not comport with the First Amendment because it has the same effect of treating some content differently. Municipalities have very little latitude when it comes to the range of choices they have to regulate noncommercial speech. Courts, following *Metromedia*, have held that sign ordinances providing more favored treatment for on-premise signs properly advance governmental interests in safety and aesthetics and are not content based because they are concerned with the location of signs, not their content. As such, it is best practice to avoid risk by regulating the location of signs (on or off-premise) rather than what the signs have on them pursuant to Supreme Court precedent.

The best ways, other than avoiding content-based sign ordinances entirely, are to consolidate all potential categories into a single unified “non-commercial message” category and avoid exemptions based on content (see *Reed*), draft all regulations based on neutral criteria that do not require reading the message, tie your restrictions closely to public safety and aesthetic concerns that apply across all sign types regardless of message, and regulate location of signs rather than what they say. By treating all signs, regardless of message, the same in the municipal ordinance and making the public interest front and center it allows the ordinance to fly under the radar of strict scrutiny while also hedging by having a public welfare justification in the event it would be challenged. Having all noncommercial signs being treated the same in a practical sense looks like having the same limitations on size, timing, height, etc., be the same across the board.

Furthermore, another risk associated with content-based laws is treating noncommercial speech less favorably than commercial speech. For instance, in *Metromedia*, the ordinance permitted onsite commercial billboards but effectively prohibited most noncommercial messages on billboards. This ordinance was struck down as a fatal flaw because it impermissibly discriminated against noncommercial speech by affording greater protection to commercial than to noncommercial speech. To avoid this risk, a city must avoid permitting commercial signs while choosing to limit noncommercial signs in the same site. Instead, they could include a provision in the ordinance that guarantees that a noncommercial message may be substituted for any permitted commercial sign, highlighting that no commercial sign is given greater protection than noncommercial.

An example of a sign code regulation that differentiates between types of noncommercial signs and increases the legal risks previously discussed includes sign codes that separate noncommercial signs by their content, imposing differing regulations. For instance, in the City of Eugene's code, *Exemptions to Sign Standards* section of its code creates content-based categories between noncommercial signs, such as "seasonal decorations", "signs during elections", and "traffic directing signs."⁵ (EC 9.6610(2)). Each of these exemptions carries its own time and/or size limitations.

By creating these specific, time or size-limited categories, the code is making a content-based distinction that heightens its legal risk. Similar to *Reed*, where the ordinance distinguished between "temporary directional signs," "political signs," and "ideological signs," an enforcement officer here must read the sign's message to determine whether it falls within a particular category (e.g., whether the message is election-related or seasonal). Under *Reed*, because these distinctions impose differing regulations based solely on the sign's communicative content, the municipality must defend them under the strict scrutiny standard, which is rarely successful.

A permissible example of a content-based distinction in a sign code that reduces or eliminates the content-based risk is a regulation of signs that are necessary to eliminate harm and protect public safety. For instance, a sign code that exempts danger/warning signs from limitations that are otherwise placed on other noncommercial signs.

This example is acknowledged in *Reed*, where the Court stated that content-based regulations are "presumptively unconstitutional;" however, recognized that an ordinance may survive strict scrutiny for this content-based regulation if the ordinance is "narrowly tailored to the challenges of protecting the safety of [the public] – e.g. warning signs marking hazards." This regulation does not involve the government favoring one noncommercial viewpoint over another. Rather, it differentiates between noncommercial content-based safety warnings from other forms of noncommercial speech due to a compelling public safety justification, thus eliminating the legal risk.

CORE TAKEAWAYS

Regulations that restrict noncommercial speech (or apply differential treatment based on content—effectively favoring certain types of speech over others) are presumptively unconstitutional and rarely upheld in court. These "content-based regulations" are only constitutional if they are (1) *narrowly construed* to support a (2) *compelling state interest*. Local governments have many different types of compelling state interests that could justify a regulation on speech. For example, cities have a compelling interest in promoting the health, safety, and welfare of the community. Within these broad categories, and specific to sign regulations, a local government may regulate signs for the purposes of promoting traffic safety, the aesthetic of the regulated area, or even public morality/protection of children. Without commenting on their constitutionality, the

following are examples of regulations in service of these compelling interests: a restriction on signage near highways (traffic safety), a restriction on signs in a neighborhood to preserve its aesthetic value (aesthetics), and a restriction on pornographic signs (public morality/protection of children). Because it is not difficult to articulate a city's compelling purpose underlying a regulation, cities often run afoul on the second requirement—that the regulation be narrowly tailored toward achieving the compelling state interest. Cities run afoul of this requirement when the regulation is over- or under-inclusive (meaning that the regulation either unnecessarily imposes restrictions on other types of speech not relating to the purported public purpose or fails to regulate each type of speech necessary to achieve the public purpose).

Notably, there are constitutionally recognized exceptions to the regulation of content.(identifying exempt categories). These exempted categories of speech include obscene speech, defamatory speech, fraudulent speech, inciting speech, and speech integral to criminal conduct. Id. (citations omitted). They are easier to regulate than non-exempted speech.

Another legal maxim is that noncommercial speech may not be more restricted than commercial speech. A sign code that imposes more restrictions on noncommercial speech than commercial speech will be struck down.

Because content-based regulations rarely survive a court's scrutiny, a local government's best option to regulate non-commercial speech is to regulate all non-commercial speech equally. Such "content-neutral" regulations do not make distinctions based on a sign's content; rather, these regulate a sign's location, size, or other characteristic not tethered to content.

To avoid regulating based on content, a sign code should not classify signs based on their content (e.g., classifying signs as "political" or "religious"). Exemptions should not be given based on the content of a sign. And the city should avoid accidentally regulating content through facially neutral means (for example, a regulation that bans all signs within a low-class neighborhood but not for an adjacent upper-class neighborhood may be seen as having an impermissible discriminatory intent to regulate the speech of the low-class neighborhood).

Instead, the city should focus on regulating noncommercial speech based on non-content characteristics, such as the size of a sign, its location, or other non-content features (such as lighting).

Regarding the city's intention to regulate "trespassers will be shot" signs, any attempt to regulate this speech should be done without reference to the content of these signs. Although it may be tempting to classify these signs under a category of speech not protected by the first amendment (such as speech integral to the commission of a crime—i.e., illegal shooting of trespassers), more research is required to determine the validity of such a regulation, and, moreover, such a regulation is particularly likely to be contested and difficult to justify in court. The city instead should consider regulating these signs through restricting the size, location, or other non-content characteristics of all non-commercial signs.

Appendix E:

Small Group 5: Time, Place, and Manner Restrictions

FIRST AMENDMENT LAW REGARDING CONTENT NEUTRALITY – TIME, PLACE, AND MANNER FACTORS

Time, Place, and Manner (TPM) Regulations were established in early licensing cases where the courts frequently upheld content-neutral regulations that applied to a public forum (i.e. regulations for licensing the time, place, and manner of parades on public streets or regulations focused on size, height, and spacing). The legal framework has been applied inconsistently; the Supreme Court cases that have applied it to sign ordinances have reached different results. Therefore, the guidance on when the Court will uphold any sign ordinance as a time, place, and manner regulation is not black and white.

Ward v. Rock established that the government may impose reasonable restrictions on the time, place, and/or manner of speech if: 1) the restrictions are content-neutral, 2) the restrictions are narrowly tailored, and 3) there are ample alternative channels open to communicating the information. The *Ward* court also held that the regulation cannot be substantially broader than necessary and cannot burden speech in a manner that does not achieve the stated goals. In *Reed v. Town of Gilbert*, however, the court held that laws which could not be justified without reference to the content of the speech being regulated are content-based, thus changing the first factor of the *Ward* test.

The Supreme Court has also applied the *Central Hudson* test to sign regulations and it has yet to indicate which test (*Central Hudson* or *Ward*) should be used. The tests are similar, except that the time, place, and manner regulations require an ordinance to allow for ample alternatives to communicate the regulated speech – a factor not a part of the *Central Hudson* test for the regulation of commercial speech.

LEGAL RISKS AND MITIGATION STRATEGIES

Some of the potential legal risks with using TPM regulations in the sign code include inconsistent review of TPM restrictions by courts, content-based application of regulations, and other typical commercial and noncommercial speech considerations. As mentioned above, courts reviewing TPM regulations have inconsistently applied the *Central Hudson* and *Ward* tests to determine the validity of regulations. This may present a problem for a city that uses TPM regulations, given that it is not clear what test may be applied if a court reviews the regulations. One way a city can mitigate this risk is by ensuring that the regulation meets the requirements of both tests for constitutionality. A TPM regulation that meets these requirements would be 1) content-neutral, or justifiable without reference to the content of the speech, 2) narrowly tailored, and 3) there are ample alternative channels open to communicating the information. To meet the requirement for availability of ample alternative channels, the city should ensure that more than just newspaper advertising and listings with real estate are available, such as additionally providing a city bulletin board.

Additionally, certain approaches to TPM regulations increase the risk of being content-based and being held unconstitutional. TPM regulations that apply to signs only used by certain types of organizations or businesses may be considered content-based. Take, for instance, the following potential TPM regulations for A-Board signs. If a regulation banned A-Board signs, but A-Board signs are the primary way specific entities choose to communicate, such as churches, political speakers, or only certain types of businesses, then the TPM restriction may be considered a content-based regulation. When considering whether a TPM regulation is a content-based regulation, a city should consider whether the regulation results in a preference for certain types of businesses in certain areas, whether the regulation acts as a means to regulate certain types of speakers, and if the regulation specifies applicability by types of sign or area. Any of the previous considerations answered in the affirmative may lend to the regulation being viewed and reviewed as a content-based regulation. A city can mitigate this risk by crafting content-neutral TPM restrictions such as those already reviewed or spoken about by the courts. A content-neutral TPM regulation should apply to all types of

signs and be consistently stringent. For example, a valid content-neutral TPM regulation may restrict all “signs” at a polling place on election day, but should not apply only to “political signs.”

Additionally, some content-neutral TPM restrictions provided by Supreme Court Justice Alito include:

- Rules regulating the size of signs.... [with different restrictions] among signs based on any content-neutral criteria [such as below criteria].
- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguish between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on [all] signs advertising a one-time event.

Though there are some potential legal risks with using TPM regulations, if a city ensures it is content-neutral and that ample alternative channels for communication are available, TPM regulations can be valid restrictions used to meet the city's needs.

EXAMPLES OF TIME, PLACE, AND MANNER REGULATION

An example of a content based TPM regulation can be found in *Burson v. Freeman*. In this case, the City passed a law banning “politicking, electioneering, and signs within 100 feet of polls on election day.” This law explicitly regulated the content of the expression on signs as part of a Time, Place, and Manner way. When a law regulates expression directly like this, the law is held to strict scrutiny – meaning that the regulation must be narrowly tailored to a compelling governmental purpose. Most laws and regulations that fall under strict scrutiny are struck down, but in this case the Court upheld the law. The Court upheld the law because the law was narrowly tailored and served to prevent election fraud and voter intimidation, a compelling governmental interest. As such, the law was upheld.

An example of a content neutral TPM includes regulations that allow stores to only cover a certain percentage of the total area of a window with signage. This law is specifically regulating only the number of signs in a particular location and particular size. This kind of law will generally only be enforced against commercial businesses. It does not restrict the content of the signage – only the number of signs and the size of the signs. Under this law, a commercial sign could be swapped for a non-commercial, a commercial sign for a different commercial sign, and a non-commercial sign for a different non-commercial sign, all without issue. These sorts of laws can serve both aesthetic and safety purposes, both of which tend to be valid governmental purposes under the law.

APPLICABILITY TO GRESHAM SIGN CODE REGULATION CONSIDERATIONS

A-frame (or A-board) signs and other temporary signs downtown are typically put out onto the sidewalk. While regulating the content of these signs, or the times that the signs would be allowed up, may not be feasible, regulating where and if they are allowed to be present appears to be within the powers granted to the municipalities.

Regulating the content of the A-frames would mean the regulation is not content-neutral. It may also favor non-commercial speech over commercial speech because the A-frame signs are put up by businesses downtown promoting themselves, and a regulation or code change targeting specifically this would be

disfavoring commercial speech in a content based way. Regulating when they are allowed to be present would be a logistical issue for the city, as the City would physically need someone to verify when/if the A-frame signs are present outside of permitted hours. The City would either need to go and proactively patrol, or the City would need to verify any complaint made of signs at a disallowed time.

Downtown sidewalks and roads are city property, and the government has enhanced rights to determine what is or is not allowed on its own property. The City could make a rule disallowing A-frame signs on sidewalks entirely. Sidewalks are city property and a public right of way – thus, this regulation would be in pursuit of a legitimate and, possibly, compelling government interest. This option could alleviate the issue of A-frames being an eyesore or impediment to sidewalk access. However, it could also make the zoned businesses feel targeted while eliminating a vital means of advertising – potentially impacting their revenue.

Billboards are recognized as a distinct class of sign from others, and, as such, this could be a possible way to regulate signs in a way that favors artistic murals. Billboards are made distinct because of their unique function and difficulty in determining on/off site status, similar to artistic murals downtown. Artistic murals are different from traditional signs in both “type” and “purpose.” Murals are generally much larger than traditional signs, and applied to buildings differently. Murals usually take up an entire outside wall of a business, rather than a small percentage of it. Additionally, murals are painted directly onto the outside wall, rather than being a separate thing attached to the wall. Artistic murals also, often, have no customer-conversion related purpose though there are instances of murals having advertising elements.

One of the ways to achieve “beautification” of downtown Gresham is to discourage signs by use of the sign code at a higher level. One way to do this, that is generally content neutral, would be restricting the number of signs per mile. This could be a rule for the entire City of Gresham with further specificity per individual zone or overlay zones. This could allow less signs per mile in aesthetically important areas, such as downtown and neighborhoods, and allow more signs per mile on major highways through Gresham or in industrial/commercial areas. There could also be per-zone exemptions or specificity on types of signs. This could include rules for how many A-frames are allowed in an area or rules that don't count malls or other types of “desirable” signs, such as murals, against the sign/mile limits.

Note, however, that the legal risks of these suggestions have not been fully researched; also see discussions of legal risks related to exemptions discussed elsewhere in the report.

Appendix F:

Small Group 6: Purposes and Objectives of Sign Code Regulations

Cities must be careful when regulating signs because sign code regulations can raise constitutional concerns, especially under the First Amendment. Unlike ordinary zoning rules, sign code regulations must be supported by a clear purpose. To comply with the Constitution, a city's sign regulations must be reasonably related to a legitimate public purpose—typically protecting public health, safety, and overall community welfare. The two most common governmental interests used to justify sign ordinances are

- 1) Aesthetics: preserving the community's visual appearance; and
- 2) Traffic Safety: reducing distractions or obstructions that could affect drivers.

Most sign codes include a statement of purpose explaining why the city adopted the regulations. This statement serves an important role because courts will look to it when deciding whether the ordinance truly advances the interests the city claims to be protecting. A clear, well-defined statement of purpose will strengthen a city's legal position if the sign code is challenged. On the other hand, if an ordinance does not include a clear statement of purpose, a court may find that the city has not shown a strong enough connection between the regulations and permissible goals, such as aesthetics or traffic safety. This can make the ordinance more vulnerable to First Amendment challenges.

AESTHETICS

Aesthetics is typically one of the most popular purposes cities cite when developing a sign code. Courts historically have found it among the least controversial purposes for a sign code. When creating a code, a stated purpose of aesthetics may even be sufficient to avoid a court investigating a possible pretextual purpose.

Additionally, “The supreme court has held that the ... aesthetic interests that usually justify sign ordinances satisfy intermediate scrutiny review, but the court ha[s] not held that aesthetics ... [is a] compelling interest that satisfy strict scrutiny review. Because courts seldom find a narrowly tailored compelling interest sufficient to justify a content-based regulation of speech, this standard of review is usually strict scrutiny in theory but fatal in fact.”

The use of aesthetics as a valid purpose within the 9th circuit comes from *Taxpayers for Vincent*, wherein the court explicitly remunerated its approval of the aesthetic purpose as a central and unquestioned interest of the city, as relating to its citizens' quality of life. To quote the case, “The problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit. [T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.”

Aesthetics itself, as a purpose, is uncontroversial and readily accepted as a justified one. The primary issue that arises is whether the state action actually achieves its purpose, or else the ordinance is overinclusive or pretextual. This is discussed at length in *Reed*, where the court reasoned that the city could not justify its burdened categories of signs on aesthetic grounds, since the content of a sign is unrelated to its appearance. A city can achieve a better fit with its aesthetic purpose and avoid content-based regulation by regulating the look of the sign regardless of its content or viewpoint.

TRAFFIC SAFETY

Traffic safety is one of the strongest and most widely recognized reasons a city can use to justify its sign regulations. Courts have consistently found that cities may regulate signs when doing so helps reduce distractions or hazards for drivers and pedestrians. Signs can create safety risks in certain situations—for example, when signs are overly large, too bright, placed too close to the road, or clustered in ways that make it harder for drivers to process visual information quickly. Courts have upheld regulations aimed at reducing such

risks. One notable example is a California Supreme Court decision that approved a city's decision to remove billboards visible from streets and highways, finding that billboards are designed to draw a driver's attention away from the road.

Because of traffic safety concerns, traffic-safety justifications are commonly used to support limits on the size, height, placement, and spacing of signs. Cities often articulate this purpose in their statement of purpose. A typical statement of purpose might be: "To promote the free flow of traffic and protect pedestrians and motorists from injury and property damage caused by, or which may be fully or particularly attributable to cluttered, distracting, or illegible signage." To summarize, a clear articulation of traffic-safety goals helps demonstrate that the sign code is reasonably related to a legitimate public purpose.

INTERFERENCE AND PEDESTRIAN ACCESS

Reducing interference with pedestrian access is not a widely discussed governmental interest in a sign code; nonetheless, preserving pedestrian access has its place in prior case law. In *B & B Coastal Enters. v. Demers*, the court looked at the adequate standards for sign permits. For consideration of public right-of-way/ pedestrian access, a sign ordinance needs to contain objective and precise standards for decision-making, such as size, height, location, area, and setback standards. In *B & B*, the sign code had a provision which gave, "a maximum square footage requirement and time limit for portable signs and banners and prohibits signs which prevent[] safe vehicular or pedestrian passage along public rights-of-way or sidewalks." Although this is a valid purpose to design a code, the area of law on this subject matter is less developed than the aforementioned purposes in this paper.

ECONOMIC DEVELOPMENT & VITALITY

Like interference and pedestrian access, economic development and vitality is not a widely discussed government interest. However, a case from Washington, *Demarest v. City of Leavenworth*, discusses the implications of having economic development and vitality as a stated purpose in a sign code ordinance.

In *Demarest*, economic vitality was found to be an "uncontested" substantial government interest. In this case, the plaintiff had challenged Leavenworth's sign code ordinance. Leavenworth was unique because it is a tourist destination based on its styling as a Bavarian town and depended on tourism revenue. Leavenworth's sign code was designed so that signs around the city aesthetically matched the Bavarian theme but provided many exceptions for real estate owners to apply for. The Court upheld the unique sign code ordinance, stating that economic development, among other purposes, like aesthetics, was a substantial government interest. Of particular importance to the Court was the fact that Leavenworth depended on the tourism revenue created by its unique Bavarian styling. In the Court's eyes, this meant that the economic rationale for the sign code ordinance was a substantial interest.

Economic development and vitality are a valid purpose for a sign code. However, the area of law and number of cases on this subject matter is less developed than aesthetics and traffic safety. Further, the *Demarest* court's reasoning took into consideration the unique economic interest the city's Bavarian-themed code had. This suggests that a stated economic interest will be easier to find if a town or city has a unique attribute that needs to be protected in a sign code ordinance to maintain economic vitality.

STANDARDS OF REVIEW

The standard of review for sign regulations depends on whether the law is content-neutral or content-based. Courts look closely at the regulation's structure to determine that classification. Under *Ward v. Rock Against Racism*, a restriction that regulates only the time, place, or manner of speech, such as limits on the size, illumination, location, or number of signs, is treated as content-neutral. These regulations usually are

evaluated under the intermediate scrutiny standard, which requires that the law be narrowly tailored to serve a significant/substantial governmental interest. As long as the stated government purpose is substantial and the means of accomplishing that purpose, through the sign code, are not overbroad, the regulation is typically upheld. Persuasive authority like *B&B Coastal Enterprises* reinforces that courts evaluating intermediate scrutiny will consider whether the stated interests are advanced by the challenged sign ordinance.

The other standard applicable to sign code ordinances is strict scrutiny. *Austin v. Reagan National Advertising* clarified that when a law is found content-based, strict scrutiny applies, meaning the government must show the regulation is narrowly tailored to a compelling interest. This is extremely difficult to satisfy. The change from intermediate to strict scrutiny has major consequences: governmental purposes that may satisfy intermediate scrutiny may not satisfy strict scrutiny when the regulation is content-based. Identifying the correct context and applicable standard of review is crucial, because it determines both which governmental purposes satisfy the governing tests and how demanding the governing test (either strict or intermediate) is on those government purposes.

STRICT SCRUTINY

In *Reed v. Town of Gilbert*, the U.S. Supreme Court established that if a sign code treats signs differently based on the message they convey, it is a content-based regulation of speech and is subject to strict scrutiny, the most demanding standard of constitutional review. The city's sign code created different categories of signs—such as political signs, ideological signs, and temporary directional signs—and imposed different size, duration, and placement restrictions on each category. A local church challenged the ordinance because its small directional signs were subject to stricter rules than ideological or political signs.

The Court found that the ordinance was content-based because an official had to read the sign to know which rules applied. Once a regulation is classified as content-based, the city must satisfy strict scrutiny by showing that the regulation:

- 1) Serves a compelling governmental interest, and
- 2) is narrowly tailored, meaning that the regulation directly advances the stated governmental interest and does not burden more speech than necessary.

The City relied on aesthetics and traffic safety as its interests. But the Court concluded that, even assuming these were compelling interests, the ordinance failed narrow tailoring because its distinctions did not meaningfully advance those interests. The Court emphasized that temporary directional signs were no more of an aesthetic problem than political or ideological signs. Yet the code allowed unlimited proliferation of larger ideological signs, while tightly restricting the number, size, and duration of much smaller directional ones. This mismatch undermined the City's claim that its regulations were necessary to preserve community appearance.

The Town's traffic-safety justification fared no better. The City offered no reason to believe that temporary directional signs posed a greater risk to drivers than ideological or political signs, which were permitted more freely. If traffic safety were truly the concern, the ordinance's selective burdens made little sense. Because the ordinance's distinctions were both content-based and poorly aligned with the City's stated purposes, it failed strict scrutiny and violated the First Amendment.

INTERMEDIATE SCRUTINY TWO TESTS

In brief, a sign code is much more likely to survive under intermediate scrutiny than under strict scrutiny. There are two tests that establish whether a code is subject to strict scrutiny. First, the best-known is the test used

for time, place, and manner regulations, and the second is the Hudson Central test, for signs that have no discernible connection to the commercial interests of the speaker (considered noncommercial expressions).

General Note on Intermediate Scrutiny

To pass intermediate scrutiny, the challenged law must:

- 1) Further an important government interest (lower burden than compelling state interest required by the strict scrutiny test)
- 2) and must do so by means that are substantially related to that interest.

The Hudson Central Test

Used when signs that have no discernible connection to the commercial interests of the speaker are considered noncommercial expressions.

- A) First, ask whether the speech is lawful and not misleading. If yes, then a law regulating commercial speech must satisfy b-d:
- B) Serve a substantial governmental interest
- C) Directly advance the asserted governmental interest
- D) Be no more extensive than necessary to serve that interest.

In *City of Austin v Reagan National Advertising*, the court held that regulations that differentiate based on on-premises versus off-premises is not a content-based regulation. In that case, the city based an ordinance that allowed on-premises signs to be digitized, but off-premises signs may not be digitized. The city's purpose was for traffic safety, to prevent digital signs' distracting effect along highways. The court held that an ordinance that regulates solely on the location is not content-based regulation, and so is not subject to strict scrutiny. The regulation did not regulate based on content, and was sufficiently linked to the regulation's purpose of traffic safety. Accordingly, the regulation was neither over nor underinclusive and so the regulation was upheld.

UNDER-INCLUSIVE AND OVER-INCLUSIVE

In brief, the purpose of the sign code must comply with the ordinance and be narrowly tailored to a government purpose. When a sign code ordinance is overly-inclusive, the government is infringing on a citizen's otherwise lawful right to communicate their content through broad laws that 'sweep' a substantial amount of protected conduct together. Under-inclusive and over-inclusive grounds may both go to intermediate scrutiny, but they may also be subject to strict scrutiny. Even if a purpose is strong, content-based regulation never survives strict scrutiny. In summary, the purpose of what the sign code seeks to achieve will help determine whether the code would succeed a legal challenge.

Appendix G:

Small Group 7: A-Board and Temporary Sidewalk Signs

OVERVIEW OF FIRST AMENDMENT ISSUES THAT COULD ARISE WITH A-BOARD SIGNS

General Limitations set out by the First Amendment

- Content Neutrality
 - Regulations cannot turn on what the sign itself contains
- Time, Manner, Place
 - Regulations based on TMP for displaying signs are generally permissible.
 - They are subject to the same limitations of content neutrality, and have to implement uniform regulations for signs, regulations have to be uniform across commercial and non-commercial as well as on- and off-site limitations.
 - Need to be implemented in a way that does not allow for differential treatment of advertising parties
- Facially Neutral Regulations
 - Need to be facially neutral in their drafting and in their effect. Regulations and their effects still need to be applied in ways that are facially neutral. Regulation implementation needs to be uniform and not in a way that is discriminatory in practice

APPLYING THE LIMITATIONS TO GRESHAM'S A-BOARDS

- Want to ensure that the implementation and the enforcement of the regulations are uniform for all stakeholders, which means the same treatment for each advertiser/sign user.
- Grandfathering in Older Signs that will no longer comply with a rewritten code (note that more legal research is needed to analyze concerns raised by distinguishing between older and newer signs)
 - Community Engagement will be a huge factor in determining what this process will look like for Gresham in particular, will also help with promoting buy-in for the new code, and people will be more likely to comply with something they felt they had a say in
 - A moratorium will likely be implemented to achieve eventual city-wide consistency with the new code, as well as promote fairness of the code
- Exemptions in the code
 - Need to ensure that the exemptions do not violate content neutrality and are applicable to various signs (no carve-outs like Reed or special treatment)

UNDER- AND OVER-INCLUSIVITY WITH A-BOARD SIGN REGULATION

If a regulation falls short of regulating speech that causes the asserted harm (usually due to exemptions) that regulation runs the risk of underinclusivity. If a regulation burdens more speech than necessary to achieve the governmental interest (usually failing to consider reasonable alternatives) that regulation runs the risk of overinclusivity. When a regulation is found to be poorly tailored (underinclusivity, overinclusivity, or both) then it is typically invalidated.

A regulation is underinclusive when it fails to meaningfully advance the government's asserted interest. If the government claims its A-board restrictions promote traffic safety and the preservation of the town's aesthetics, any regulation that undermines those goals or ignores comparable hazards may face scrutiny.

In *Reed v. Town of Gilbert*, the town's sign code imposed strict limits on the size, number, and duration of small directional signs for church meetings, while allowing unlimited larger ideological and political signs. The Court found the scheme "hopelessly underinclusive" because the town could not justify why directional temporary signs posed a greater threat to traffic safety and town aesthetic compared to the unrestricted ideological and political signs.

Similarly, in *Ballen v. City of Redmond*, the Ninth Circuit invalidated a sign code restricting handheld signs because of the numerous exemptions contained in that code. The court held the code was underinclusive

because the city offered no evidence that exempted signs were less harmful to traffic safety or aesthetics than the prohibited signs.

A regulation is overinclusive when it burdens more speech than necessary to achieve the government's stated interest. If the government asserts that its A-board scheme furthers traffic safety and the preservation of the town's aesthetic, overly restrictive limits that lack a reasonable connection to those interests may be unconstitutional. In *Central Hudson*, although not involving A-boards, the Court invalidated a ban on all promotional advertising by electric utilities adopted in the name of energy conservation. The ban was overinclusive because it prohibited even advertisements promoting energy-efficient products. In the context of A-board signs, a blanket prohibition (including boards and signs that do not obstruct sidewalks or distract drivers) would likely be scrutinized as overinclusive.

KEY LEGAL RISKS WITH OVER- AND UNDER-INCLUSIVE SIGNS

After the first meeting with Gresham, it sounded like the primary concern with A-boards was pedestrian accessibility and safety, as A-boards are often placed in a sidewalk. Gresham is also concerned about some local business owners wanting to restrict other business owner's A-board usage in certain areas of the town. It did not sound like Gresham was concerned with A-board restrictions citing content. The main concern with A-board regulation isn't Gresham's ability to regulate the location of all A-boards, but what happens if Gresham regulates some A-boards differently depending on the A-board's placement in the City.

Using the standard established in *Reed v Gilbert*, Gresham should be aware of risks related to regulating the sign codes based on their content.

The City in *Reed v Gilbert*, differentiated between permitted signs, based on the signs' content. Since the content regulation implicated the First Amendment, the Supreme Court had to apply strict scrutiny. Under strict scrutiny, the City tried (and failed to) show that the regulation on the sign's size would affect the stated purpose of the regulation (aesthetics and public safety).

Applying *Reed* to Gresham, A-board regulations could be subject to strict scrutiny if they differentiate based on the a-board's content. Like in *Reed*, regulations that differentiate based on content are likely to fail under strict scrutiny. If Gresham does not regulate the a-board based on content but location, the regulation is not subject to a strict scrutiny analysis and, therefore, is likely to survive challenge.

Applying *Ballen* to Gresham's code, Gresham probably should not carve out exceptions for A-boards unless Gresham can prove that the A-board exception is because A-boards are somehow more safe or aesthetically pleasing than other forms of signage. Applying this more directly to Gresham's concern over A-board placement in sidewalks, Gresham probably should not carve out an exception for A-boards to be placed in the sidewalk as this violates the rule in *Ballen*. In summary, Gresham could run into legal trouble if they regulate A-boards based on content or if they create exceptions for A-boards.

Applying *Central Hudson* to Gresham, Gresham probably should not create A-board regulations that include either content types or sign types. If Gresham does create these overinclusive regulations, the regulation is likely to be overturned.

EXAMPLES OF A-BOARD SIGN REGULATION THAT COULD INCREASE OR DECREASE LEGAL RISKS

One example of a regulation that would likely increase the legal risks discussed above is a regulation that prohibits all A-boards with exceptions that are content-based and not narrowly tailored to meet the city's interests. The City of Redmond had such a regulation in *Ballen v. City of Redmond*, which the Ninth Circuit

shot down as unconstitutional. In *Ballen*, the city's stated goal of its sign code was to promote traffic safety and community aesthetics. Its sign code prohibited all portable signs, including A-boards, with ten exceptions based solely on the content of signs (such as political signs and real estate signs). A local bagel shop had an employee holding a sign outside, advertising "Fresh Bagels - Now Open," which the city determined was a violation of the portable sign prohibition.

As the U.S. Supreme Court determined in *Central Hudson*, regulations restricting commercial speech must directly advance the governmental interest asserted and not be more extensive than is necessary to serve that interest. In *Ballen*, the court found that all of the exceptions were based solely on the content of the signs and that the city failed to show how any of the exceptions would meet its goals. It was implausible that content-based exceptions, rather than function-based exceptions could advance the governmental interests of traffic safety and community aesthetics. The *Ballen* court determined that many "less restrictive alternatives" existed that could have advanced those interests—notably, time, place, and manner restrictions on portable signs or banning signs held by live people generally. Because the exceptions to the portable sign ban did not directly advance the government's interest and were not narrowly tailored to do so, the ordinance was unconstitutional. The regulation at issue was an example of unlawful underinclusivity because it banned all portable signs and then gave exceptions for just a few signs and based on content.

The best way to regulate A-boards that would likely decrease the legal risks discussed above is to enact a regulation that prohibits all A-boards with narrowly tailored, content-neutral exceptions. An example of this can be found in *Timilsina v. West Valley City*, where the city's sign code prohibited all temporary A-board signs except for signs within a designated City Center Zone and signs "used during a Grand-Opening." The city's stated governmental interest was traffic safety and aesthetics. The court in *Timilsina* determined that the City Center Zone exception directly advanced the city's goals because the City Center Zone had a different aesthetic and traffic plan than other parts of the city, as stated in the code. Thus, allowing A-board signs in that area specifically did not "detract from the City's asserted objectives to the degree that it undermines them." Rather, the city had a clear objective that the signs could help create the visual distinction of the City Center that it sought and there were fewer traffic safety concerns due to the decreased use of single vehicle transport in that area.

Regarding the Grand Opening exception in *Timilsina*, the code expressly limited the period and eligibility of A-board display. The Court found that the exception defined Grand Opening signs "by [their] temporal proximity to the issuance of a business license not by the content of the sign." Though that reflects a preference for speakers that are new business licensees, it was not a content preference because it placed no restrictions on the content of the A-boards placed by new business owners. The Court held that the City's willingness to permit that exception did not "reach so deeply as to undermine the 'direct link' between the restriction and the interest." Therefore, neither exception was constitutionally underinclusive because there was a direct link between the City's stated goals and prohibition of A-boards and the exceptions did not undermine the prohibition "to such a degree so as to render it insufficiently related to its objectives." The court also determined that the restriction was not overinclusive by prohibiting more speech than necessary because the A-board restriction and exceptions had "a very narrow reach." In fact, the regulation affected "only a sliver of potential speech—and only a tiny portion of potential signage—it [did] not prohibit substantially more speech than necessary to serve its interests."

Appendix H:

Small Group 8: Murals

To begin, as the holding in *Reed v. Town of Gilbert* illustrates, a local ordinance that regulates the content of signage is subject to strict scrutiny and rarely upheld. In *Reed*, the court held that the town's ordinance was content based because it required a direct reference to the content of the sign to determine whether it conformed with the local ordinance. Because the ordinance regulated the content of signage, the regulation implicated free speech issues under the First Amendment and was, therefore, subject to "strict scrutiny." Under a strict scrutiny test, a regulation must (1) further a compelling government interest that is (2) narrowly tailored to serve that compelling government interest. The *Reed* Court struck down the ordinance because it was not narrowly tailored to serve a compelling government interest and overcome the First Amendment protections of free speech.

Secondly, a regulation that distinguishes between "commercial" and "noncommercial" speech can also be subject to strict scrutiny because it implicates First Amendment protections.⁷ For example, in *City of Austin, Texas v. Reagan National Advertising of Austin, LLC* the court held that signs that were regulated based on location were an on- or off-premise distinction, and "therefore similar to ordinary time, place, or manner restrictions." The Court decided that these types of restrictions were content neutral because they did not regulate the sign based on a reference to the sign, but rather to the location of the sign. Nonetheless, the Court cautioned that the location of the sign could implicate commercial and noncommercial distinctions, which would trigger strict scrutiny given its implications for the First Amendment.

Regulations that address the content of a sign or distinguish between commercial and noncommercial speech both pose issues for the regulation of murals because both types of regulations implicate the First Amendment. For the former, if Gresham seeks to regulate the content of murals, the city must prove that the ordinance is narrowly tailored (i.e., not overapplying a restriction to regulate other speech) to serve a compelling government interest (e.g., traffic safety, aesthetics). For the latter, if Gresham seeks to distinguish between commercial and noncommercial speech, the city must still prove that the ordinance is narrowly tailored to serve a compelling government interest. Ideally, Gresham's new sign code should avoid imposing content based restrictions and distinctions between commercial and non-commercial speech.

CONTENT-BASED REGULATIONS OF SIGNAGE ARE SUBJECT TO STRICT SCRUTINY BECAUSE THEY IMPLICATE PROTECTIONS GUARANTEED BY THE FIRST AMENDMENT

As briefly discussed above, regulations that cannot be "justified without reference to the content of the regulated speech . . . [or that are adopted by the government] because of disagreement with the message [the speech conveys]" are content based and therefore subject to strict scrutiny. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question. This is an extraordinarily high standard that local ordinances will rarely meet, so the City of Gresham would do well to avoid regulating the content of murals.

Further, however, a regulation imposed by a local governing body "cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." For example, a local government regulation cannot regulate "commercial" speech separately from "noncommercial speech," because regulating either requires a content based evaluation (i.e., it requires the government to reference the content of the regulated speech). In other words, generally, the City of Gresham should refrain from passing an ordinance that regulates mural content.

These principles were further clarified by the Court in *Reed*, where it held that a restriction on speech that is content based on its face is subject to strict scrutiny, regardless of the government's "benign motive" or "content-neutral justification." Applying this to Gresham, if the city seeks to define what qualifies as a mural, the city's sign code must be narrowly tailored, and any restriction on the speech contained within murals must

serve a compelling government interest. In practice, this would mean that a restriction on overly distracting murals could be acceptable if it evenly banned certain bright colors or patterns proven to distract drivers and lead to crashes. However, a ban on murals depicting the Confederate flag could be unconstitutional because it infringes on free speech (i.e., the ordinance banning such murals would be subject to strict scrutiny), even if the city does not want to promote that message.

CONTENT-BASED REGULATIONS CAN IMPLICATE PROTECTIONS UNDER THE FIRST AMENDMENT, BUT THESE RISKS CAN BE REDUCED OR AVOIDED BY NARROWING THE SCOPE OF SIGNAGE REGULATIONS

The main concern for cities like Gresham trying to regulate murals is how to balance the need to define what is being regulated and restricting certain content without infringing on First Amendment free speech protections. By (1) understanding the legal risks of content based regulations and (2) following advice on how to reduce or avoid those risks, the city can be well-suited to avoid potential legal challenges to its mural regulations.

The First Amendment, which applies to the states via the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” As such, a municipal government—like the city of Gresham—that has power vested in it via state authority “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Any content based municipal regulations—as defined above—“are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling government interest.” In other words, the regulation of murals—if it imposes content based restrictions—must survive strict scrutiny on a First Amendment free speech challenge.

As previously addressed, content based regulations include any laws that cannot be “justified without reference to the content of the regulated speech . . . [or that were adopted by the government] because of disagreement with the message [the speech] conveys.”¹⁶ Further, a municipal ordinance “cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the same result.” For example, a municipal ordinance cannot regulate commercial speech separately and distinctly from noncommercial speech because regulating either requires a content based evaluation. In other words, it requires the government to reference the content of the regulated speech to determine whether or not it complies with the municipal ordinance.

In the broadest sense, a municipal ordinance regulating the content of signage will be subject to strict scrutiny and will survive only if the government demonstrates that it is narrowly tailored to serve a compelling government interest. Generally, a “city may not choose the appropriate subjects for public discourse: ‘To allow a government the choice of permissible subjects for public debate would be to allow that government to control over the search for political truth.’”¹⁹ To protect the City of Gresham against potentially successful First Amendment challenges to its sign code, it should focus on narrowly tailoring its mural regulations to serve a compelling government interest, such as traffic safety.

Laws that are “content neutral” are subject to lesser scrutiny than content based sign regulations.²⁰ Content neutral signage regulations undergo a less rigorous review and do not violate commercial speech rights if the regulation (1) directly advances substantial government interests, (2) is narrowly tailored to serve those interests, and (3) provides adequate alternative means of communication. Often, a regulation can be unintentionally content based, such as speaker-based regulations, making it especially important for municipal governments to apply the “content-based” test from *Reed* when deciding whether to enact a content neutral ordinance. Since murals are a form of expression, a broad restriction on them will likely be considered a content based regulation and thus subject to strict scrutiny.

When regulations need to be content based and therefore must withstand strict scrutiny, a municipal body is best served to ensure that the regulation is as narrow as possible to accomplish its goal. For example, “[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers . . . might survive strict scrutiny.” Additionally, an ordinance limiting the size or spacing of signs on buildings may be a permissible time, place, and manner restriction under the First Amendment.²² It is always helpful if the ordinance states its purpose for the regulation so the court can easily determine whether the ordinance narrowly achieves its purpose or if it is overly restrictive.

A signage regulation is facially unconstitutional if it permits noncommercial murals but restricts commercial murals differently. The line between commercial and noncommercial can be blurry regarding murals, which is especially problematic because case law varies on how to determine whether speech is commercial or noncommercial. Therefore, it is important to examine how a specific jurisdiction makes that distinction. It will likely be helpful for the sign ordinance to specify how to determine whether a sign is commercial or noncommercial in a way that aligns with the relevant jurisdictional case law.

EXAMPLES OF SIGN CODE REGULATIONS OF MURALS THAT DID NOT INCREASE THE LEGAL RISKS DISCUSSED ABOVE

There are methods to regulate murals that courts will not deem unconstitutional. This can include (1) ordinances that are narrowly tailored for the purposes of traffic safety and (2) ordinances that limit the size and spacing of murals on buildings.

In *Reed*, the court concluded that “[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers . . . might survive strict scrutiny.” Even a content based regulation that requires the court to assess “the message [the speech conveys],” but that is narrowly tailored to focus on traffic safety concerns, will likely be upheld. For example, a municipality might regulate the size, illumination, or eye-catching content of a mural to prevent visual obstruction at traffic intersections. As long as the city does not discriminate against murals based on their subject matter or viewpoint, a content based regulation that is narrowly tailored to address traffic and pedestrian safety can likely withstand a First Amendment challenge.

In *Hucul Advertising, LLC*, the court upheld a “spacing requirement for digital billboards” because it constituted a “valid ‘time, place, and manner’ restriction on speech. Content neutral ‘time, place, and manner’ restrictions are valid provided that (1) ‘they are justified without reference to the content of the regulated speech,’ (2) ‘they are narrowly tailored’ (3) ‘to serve a significant government interest,’ and (4) ‘they leave open ample alternative channels for communication of the information.’” Therefore, the City of Gresham may reasonably regulate the time, place, and manner of murals—even if they directly restrict oral or written expression—as long as the ordinance meets the above test and other relevant jurisdictional laws.

Appendix I:

Small Group 9: Electronic Signs

POTENTIAL FIRST AMENDMENT ISSUES WITH ELECTRONIC SIGNS

As with any sign regulations, there is a major First Amendment concern for limiting free speech. If a regulation is designed to restrict the speech of people solely because of a particular message, idea, or topic, then it is a content-based regulation and is not regulatable. This of course extends to electronic signs too, because they are also capable of displaying those sorts of messages.

In addition to the above, what if an electronic sign that cycled through advertisements spent a longer time on commercial advertisements rather than non-commercial advertisements? For example, an electronic sign is programmed to cycle through two signs: one for Joe's Pizza and the other for Jane's Political message. If the sign spends 60% of the time showing Joe's Pizza and only 40% for Jane's message, and this is because of a regulation, then the regulation is likely favoring the content of Joe's Pizza. Favoring a particular type of content has been construed in past to fit the construction of content-based regulations.

FOCUSED FIRST AMENDMENT ISSUE

Whether a particular electronic sign regulation is content-based is important as it bears on the standard of review that a court will apply. A content-based regulation is a regulation that targets speech based on its communicative content. A regulation can be content-based even if it does not discriminate among viewpoints. Additionally, a regulation cannot become content-neutral merely by swapping an obvious subject-matter distinction for a "function or purpose" proxy that achieves the same result.

If a regulation is content-based, a court will apply strict scrutiny. Conversely, if a regulation is content-neutral, the court may apply either intermediate or strict scrutiny depending on whether the speech is noncommercial or commercial. To satisfy strict scrutiny, a regulation must be narrowly tailored to advance a compelling government interest. Mandelker notes that because courts seldom find a narrowly tailored compelling interest sufficient to justify content-based regulation of speech, this standard of judicial review is usually strict scrutiny in theory, but fatal in fact. However, some permissible justifications for content-based regulations could be aesthetics, traffic safety, or public safety.

LEGAL RISKS AND REMEDIAL MEASURES

The legal risks associated with regulating signage, particularly digital and electronic signage, arise primarily from the First Amendment framework governing sign regulation. Signs constitute fully protected expressive activity, meaning any municipal regulation must operate within established free-speech doctrines, including the requirements of content neutrality and the consistent treatment of commercial and noncommercial speech. Traditionally, local governments have relied on two blanket justifications to support sign codes: aesthetics and traffic safety. Both of which have enjoyed a presumption of constitutionality.

However, digital and electronic signs heighten litigation exposure because many local rules governing them inadvertently become content-based. This risk has intensified as courts have grown more skeptical of aesthetic justifications that once carried significant weight. Early cases such as *United Advertising Corp. v. Borough of Metuchen* defended aesthetic regulation as rooted in broad public concepts of congruity "inseparable from the enjoyment and hence the value of property." Subsequent decisions, including *Berman v. Parker* and *State v. Miller*, went so far as to uphold aesthetics as a sufficient standalone governmental interest. But focused First Amendment analysis, such as the *Reed* analysis, renders aesthetics a weaker and increasingly unstable foundation when regulations differentiate among messages or exempt favored categories of signs. Digital signage is especially vulnerable because municipal attempts to control electronic displays often target modes of communication closely linked to advertising or local environments, making content distinctions more likely to appear on the face of an ordinance.

Traffic-safety rationales present another complex constitutional front. While Metromedia recognized traffic safety as a substantial governmental interest, courts have long expressed doubts about whether digital signage meaningfully contributes to driver distraction and whether regulation in this area materially advances safety. Empirical studies are mixed, and split judicial opinions reflect this divide. Although cities may rely on traffic safety as a common-sense justification, they must do more than invoke general concerns: any regulation must be evidence-responsive, supported by credible data sets, and capable of demonstrating that the restrictions actually produce measurable safety benefits. Absent such evidence, safety rationales risk being treated as pretext for speech suppression.

Courts also scrutinize the constitutionality of sign regulations as applied across different spatial contexts. Distinctions between rural and urban environments, between commercial and noncommercial areas, or between generic signage and the use of company logos or trademarks can all trigger additional First Amendment concerns, particularly if these distinctions influence who may display digital signage or what messages such signage may convey.

Overall, the analytical framework demands that digital-sign regulations be narrowly crafted, technologically neutral, grounded in substantial evidence, and fully divorced from any preference for or against particular types of messages.

EXAMPLES

I do not believe there would be a 1st Amendment conflict on the regulation of electronic and hazardous signs inherently, because those are a regulation on the specific type of sign or how it displays its message, as opposed to being a content based restriction. There are plenty of other examples in the sign code of ordinances regulating sign size, shape, and material composition that are not subject to 1st Amendment conflict and strict scrutiny analysis. Look for instance to A6.071(e-f), regarding the use of specific bulbs or tubing of a specific rating.

What could be at issue is regulating specific electronic signs that display words such as “danger” or “warning” as seen in A6.071 (d). This is a content based restriction, though not because the sign is electronic. This ordinance on electronic signs however could see a 1st amendment challenge. I would posit though that it does have a decent chance of passing strict scrutiny because of how narrowly tailored the content restrictions are, and that they are in service to a well defined public service of reducing hazards on roadways.

One example of a sign code regulation that does not appear to increase the legal risks defined in elements two or three is 32.32.030(K)(2) is the City of Portland's sign code. 32.32.030 applies to all zones except signs located within the Rose Quarter Entertainment Sign District. Section (K) discusses temporary signs, with subsection (2) prohibiting all direct or internal illumination and stating that “changing image sign features and electronic elements are prohibited.” Subsection (2) does not magnify the discussed legal risks as it applies to virtually all signs uniformly, regardless of (1) whether those signs are in residential or commercial zones, (2) whether those signs convey a specific message, or (3) whether specific businesses or individuals convey that message. When looking to the standard of review, if challenged, the City of Portland would only have to satisfy a more lenient intermediate scrutiny standard. That standard requires the city further an important government interest (a lower bar than a compelling state interest) and do so by means that are substantially related to that interest. Under this standard, the city would have a strong argument that aesthetics or traffic safety satisfies that standard.

The City of Bend Municipal Code presents another example that does not appear to increase the legal risks defined in elements two or three. 9.50.090 applies to all permanent signs. Section (B) delineates standards for

specific signs, with subsection (6)(c) discussing requirements for primary freestanding signs with electronic components. The text of the subsection limits electronic components to “up to a maximum of 25 percent of the area of a freestanding sign face. Further requirements limit electronic sign elements to monument signs or a ground-mounted sign and allow only one contiguous electronic element on the sign face.

While more pointed, the City of Bend Municipal Code still applies to all primary freestanding signs and does not regulate based on the communicative content of the sign, favoring no message over another. While an argument could be made that limiting electronic sign elements to monument signs or ground-mounted signs is effectively a proxy for limiting the communicative content of specific other types of signs, the only other type of primary freestanding signs in the City of Bend Municipal Code are Pole signs. Pole signs pose unique traffic safety concerns as they are typically placed in high-traffic areas to maximize visibility. As with the previous example, the City of Bend would, if challenged, likely be subject to a more lenient intermediate scrutiny standard.

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