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December 15, 2016

Mark L. Gamble, General Manager
Colorado Western Outdoor Advertising Inc.
P.O. Box 2906
Grand Junction, CO 81502

Re: Grand Junction Sign Code and Outdoor Advertising

Dear Mark:

You have requested that I discuss my analysis of the impact of the United States Supreme Court's ruling in its decision in the case of *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015), as it affects the City of Grand Junction's approach to revising its Sign Code, particularly relating to off-premises, outdoor advertising.

I understand that you may be providing this letter to City officials who do not know me, so let me start with a brief description of my background in this area. Starting 44 years ago, I have continually represented Colorado's largest outdoor advertising (billboard) company in all of its litigation and regulatory legal issues in Colorado. For about the last 20 years, I have also been primary counsel for all of the other major billboard companies for much of their legal work in Colorado, and have served as counsel for the Colorado Outdoor Advertising Association. For example, in 1975, I represented Denver's largest outdoor advertising company in its successful challenge to Denver's Sign Code which would have effectively terminated outdoor advertising in the entire City. Most recently, I was heavily involved in the complete revamping and adoption of the Colorado Department of Transportation's new outdoor advertising regulations.

In these various roles, I have kept very close tabs on decisions of the United States Supreme Court relating to billboard regulations, including closely studying the *Reed* decision when it was announced. The decisions in those cases usually revolve around the relationship of signs to First Amendment Freedom of Speech. In short, the Court has been concerned about laws that either stifle speech or that discriminate against certain subject matters and favor others (*e.g.,* political speech versus religious speech). These regulations are generally referred to as "content based" and are subjected to very strict analysis, usually resulting in their invalidation under the First Amendment. Laws that are not based on the content of the sign are "content neutral" and are subject to a less stringent First Amendment analysis, which normally finds the laws valid and enforceable.

Although the *Reed* decision relates primarily to non-commercial signage, my clear conclusion when it was issued, and still today, is that it has very little, if any, relevance to the regulation of billboards. I will try to summarize the bases for my conclusion without making this letter too long.

First, when the author of *Reed,* Justice Thomas, was discussing content based signs, he described them as laws that apply "to particular speech because of the topic discussed or the ideas or message expressed." A content based law, he said, "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Given these descriptions of content based laws, *Reed* was not aimed at laws that merely regulate signs based on the location of the signs – *i.e.,* on-premise signs with messages about the establishment located on the same physical location, or off-premise signs containing messages about any topic, idea or message that is not located on the same physical site as the sign.

Second, the discussion in *Reed* was approved by only six justices. Three of the six explicitly stated that *Reed* "does not mean that municipalities are powerless to enact and enforce reasonable sign regulations," including "Rules distinguishing between on-premises and off-premises signs." Without the three concurring justices and their significant modification (or, perhaps, more kindly stated, clarification) of Justice Thomas' opinion, his opinion would not have prevailed. Thus, their view has to be considered as crucial to understanding *Reed.*

Third, *Reed* was clearly concerned about laws concerning non-commercial signs – laws specifically based on signs carrying messages on religious, political and ideological topics. *Reed* was not dealing with commercial signs because it did not cite, mention or discuss any of the prior Supreme Court decisions that had related to laws involving commercial signs, including the 1980 landmark decision in *Central Hudson Gas & Electric Corp. v. Public Service,* 447 U.S. 557 (1980). If the Court were going to change the law concerning commercial signs, it would have had to deal with and distinguish those cases.

I was recently pleased to learn that Harvard Law Professor, Laurence Tribe, perhaps to most knowledgeable and widely recognized expert on the First Amendment in this country (outside of the Supreme Court Justices themselves), reached the same conclusions that I did (suggesting that the conclusions were not so difficult that only Professor Tribe could figure them out). I have included his letter to the Outdoor Advertising Association of America for a more erudite explanation why *Reed* does not apply to billboards.

Neither Professor Tribe, nor I, had the advantage that one can have now of a series of judicial decisions that have reached the same conclusions that we did. Those cases include: *Geft Outdoor LLC v. Consol. City of Indianapolis,* 1:15-cv-01568-SEB-MJD (S.D. Ind. May 20, 2016); *Contest Promotions, LLC v. City and County of San Francisco,* No. 15-cv-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015); *California Outdoor Equity Partners v. City of Corona,* No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at * 10 (C.D. Cal. July 9, 2015); *Citizens for Free Speech, LLC v. County of Alameda,* No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015).

In short, concerning Grand Junction's consideration of rewriting its sign code as it relates to off-premise signs, it should be apparent that *Reed* does not justify any significant (or any) revision of those portions of its existing sign code.

If you have any other questions I can answer, please let me know.

Sincerely,

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for
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MEMORANDUM

To: Nancy Fletcher, President, Outdoor Advertising Association of America

From: Laurence H. Tribe *Laurence H. Tribe*

Date: September 11, 2015

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

This memorandum is in response to your request for my opinion and guidance on the impact of the Supreme Court's recent decision in *Reed v. Town of Gilbert* on regulations that distinguish between off-premises and on-premises signs.

The fact that a regulation distinguishes between off-premises and on-premises signs does not render it content-based and thereby subject it to strict scrutiny after the Supreme Court's June 2015 decision in *Reed v. Town of Gilbert*. Instead, courts will follow a wealth of Supreme Court precedent treating such laws as content-neutral regulations of speech and will review – and ordinarily uphold – those laws under intermediate scrutiny. As three Justices made explicit in a concurring opinion in *Reed*, the on-/off-premises distinction was not called into question by *Reed*'s framework for determining when a regulation is content based. Indeed, a straightforward exercise in Supreme Court vote counting demonstrates that there would be at least six votes on the Supreme Court to uphold regulations that treat on- and off-premises signs differently.

Laws regulating signs and billboards must, of course, comply with the First Amendment, as applied to the States through the Fourteenth Amendment, which prohibits the enactment of laws abridging the freedom of speech. The Supreme Court has established two levels of review for evaluating challenges to such laws based on whether they are content based or content neutral. Laws that are deemed "content based" are evaluated under strict scrutiny, and will be upheld only if they are "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). Laws that are deemed "content neutral," in contrast, are evaluated under less-searching intermediate scrutiny, a standard under which laws

are upheld provided they are "narrowly tailored to serve a significant governmental interest." *Id.* at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)).

Indeed, the Supreme Court has frequently declined to apply strict scrutiny even to laws that at first blush appear to be content based. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Deciding whether a particular regulation is content based or content neutral is not always a simple task."). For example, the Court refused to apply strict scrutiny in a challenge to a municipal sign law that excepted address numbers and commemorative markers from its restrictions. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *see also City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (assuming without deciding that exceptions to a sign ordinance for certain types of signs did not trigger strict scrutiny). Similarly, the Court declined to apply strict scrutiny to a zoning law that banned adult movie theatres in designated areas because it was not designed to "suppress the expression of unpopular views." *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

The Supreme Court issued its most recent formulation of the content-based/content-neutral distinction this June in *Reed v. Town of Gilbert*. 135 S.Ct. 2218 (2015). In *Reed*, the Court applied strict scrutiny to strike down a municipal sign code that expressly singled out "Ideological Signs," "Political Signs," and "Temporary Directional Signs" for different time and size restrictions. *Id.* at 2224 - 25. Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor, held that the a law "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. This "clear and firm rule governing content neutrality," *id.* at 2231, could significantly broaden the sweep of laws vulnerable to invalidation under strict scrutiny.

After *Reed*, many regulations that were previously thought to be content neutral might now be subject to strict scrutiny. For example, since *Reed* was decided, lower federal courts have struck down laws that prohibited or burdened discussion of specific subject matter even when those laws did not manifest any desire to suppress disfavored messages or viewpoints. These include a municipal ban on panhandling, a ban on sharing pictures of completed ballots, and a ban on political "robocalls." *See Norton v. City of Springfield*, No. 13-3581, 2015 WL 4714073 (7th Cir. Aug. 8, 2015) (panhandling); *Rideout v. Gardner*, No. 14-cv-489, 2015 WL 4743731 (Aug. 11, 2015) (ballot photographs); *Cahaly v. Larosa*, No. 14-1651, 2015 WL 4646922 (4th Cir. Aug. 6, 2015) (robocalls).

Notwithstanding such decisions, *Reed* does not have dire implications for regulations making use of the long-standing on-premises/off-premises distinction. Under *Reed*'s own terms, such regulations are content neutral. As an initial matter, it is worth noting that the great majority of signs covered by such regulations are commercial speech, which is categorically afforded less protection than non-commercial expression. Signs displaying the name or logo of a restaurant,

gas station, retail store, or any other business are "expression related solely to the economic interests of the speaker and its audience," unlike the signs advertising a religious service that were at issue in *Reed*. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). Because speech proposing a commercial transaction "occurs in an area traditionally subject to government regulation," and for other reasons as well, restrictions on commercial speech are generally subject to nothing beyond a form of *intermediate* scrutiny rather than strict scrutiny. *Id.* at 562. Justice Thomas's opinion in *Reed* made no reference at all to commercial speech and, as three district courts have already held, there is no reason to think that *Reed* silently revolutionized commercial speech doctrine by requiring strict scrutiny rather than intermediate scrutiny of place-based distinctions in the regulation of advertising. *See Contest Promotions, LLC v. City and Cnty. of S.F.*, No. 15-cv-93, 2015 WL 4571564 at *4 (N.D. Cal. July 28, 2015); *Cal. Outdoor Equity Partners v. City of Corona*, No. 15-cv-3172, 2015 WL 4163346 at *9 (C.D. Cal. July 9, 2015); *Citizens for Free Speech, LLC v. Cnty. of Alameda*, No. C14-2513, 2015 WL 4365439 at *13 (N.D. Cal. July 16, 2015).

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

By contrast, the on-premises/off-premises distinction does not "single[] out specific subject matter for differential treatment." *Reed*, 135 S. Ct. at 2223. Such a distinction "is fundamentally concerned with the location of the sign relative to the location of the product which it advertises." *Contest Promotions*, 2015 WL 4571564, at *4. The very same sign will be permissible in one location but not in another. As one of the district courts to consider the question noted, "one store's non-primary use will be another store's primary use, and there is thus no danger that the challenged law will work as a 'prohibition of public discussion of an entire topic.'" *Id.* (citing *Reed*, 135 S.Ct. at 2230). A regulation that singles out off-premises signs does not apply to a particular topic, idea, or viewpoint. It regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

What's more, the Supreme Court itself has concluded, and has not subsequently questioned, that the distinction between on-site and off-site advertising is content neutral and is thus presumptively constitutional. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court concluded that a city could ban off-site billboards while permitting on-site billboards, a conclusion repeated by a unanimous Court in *City of Ladue v. Gilleo*, 512 U.S. 43,

49 (1994). "[T]he city could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying its place of business . . . than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere." *Metromedia*, 453 U.S. at 512. Given this stronger interest in on-site advertisement, a city can reasonably decide to sacrifice its aesthetic and safety interests in one physical location but not the other. As the Court itself has recognized, the on-/off-premises distinction is *location based*, not content based.

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

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

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

Justice Kagan, joined by Justices Ginsburg and Breyer[1], penned a concurrence that rejected Justice Thomas's broad willingness to apply strict scrutiny to all manner of reasonable regulations that cannot be applied without reading what the signs regulated say, instead focusing on the underlying purposes of the First Amendment. Kagan argued that the Court ought to "apply strict scrutiny to facially content-based regulations of speech [*only*] when there is [a] 'realistic possibility that official suppression of ideas is afoot.'" *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring in the judgment) (quoting *Davenport v. Washington Educ. Assn.*, 551 U.S.

[1] Justice Breyer, though he joined Justice Kagan's opinion, concurred separately in *Reed* to further argue that the majority's pat application of strict scrutiny to all regulations that on their face distinguish between speakers or subjects failed to take into account the "judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories" that the First Amendment requires, advocating more explicitly the adoption of a test that balances these competing objectives. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in the judgment). This nuance is unlikely to impact his position on the on-/off-premises distinction.

177, 189 (2007)). Justice Kagan thus applied a healthy dose of common sense to Justice Thomas's strict formulation, expressing her concern that the Supreme Court "may soon find itself a veritable Supreme Board of Sign Review." *Id.* at 2239. This approach to limiting the reach of strict scrutiny would almost certainly lead Kagan, along with Ginsburg and Breyer, not to apply such searching review to regulations distinguishing between on-premises and off-premises signage absent the specter of official suppression.

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

* For identification purposes only.