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WHEN "FREE COFFEE" VIOLATES THE FIRST AMENDMENT: THE FEDERAL HIGHWAY BEAUTIFICATION ACT AFTER *REED V. TOWN OF GILBERT*

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INTRODUCTION

The Interstate Highway System contains approximately 47,000 miles, or 1 percent of all public roads in the United States.[1] Of these interstates, the five most scenic[2] have something in common: natural beauty unobscured by billboards. Though these highways[3] have managed to avoid the "visual pollution" and "junk mail of the American highway,"[4] there are an estimated 425,000 to 450,000 billboards lining the rest of America's federal aid highways.[5] While the benefits and detriments of billboard placement along the interstate may be debated,[6] they have been a part of the landscape since the 1800s.[7] The earliest billboards featured hand painted posters,[8] while contemporary mass-produced billboards have the potential to launch huge marketing campaigns.[9] The combination of the

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[1] Office of Highway Policy Information, *Highway Finance Data Collection*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter1.cfm (last modified Nov. 7, 2014).

[2] Arthur Weinsten, *5 Great Scenic Interstates in the U.S.*, LISTOSAUR: TRAVEL (Feb. 22, 2016), https://listosaur.com/travel/5-great-scenic-interstates-in-the-u-s/.

[3] Throughout this Note, the terms "highways" and "interstate" will be used interchangeably, unless otherwise noted.

[4] *The Truth About Billboards*, SCENIC AMERICA, http://www.scenic.org/billboards-a-sign-control/the-truth-about-billboards (last visited Mar. 31, 2017).

[5] *HBA: Facts & Figures*, SCENIC AMERICA, http://www.scenic.org/billboards-a-sign-control/highway-beautification-act/117-hba-facts-a-figures (last visited Mar. 31, 2017).

[6] Benefits of outdoor advertising include increased advertising campaign performance and audience reach. *Benefits of Outdoor*, JCDECAUX, http://www.continentaloutdoor.com/benefits-of-outdoor (last visited Mar. 31, 2017). Detriments of billboards along the highways include visual pollution and endangerment of safety. *The Truth About Billboards*, *supra* note 5.

[7] *History of OOH,* OUTDOOR ADVERT. ASS'N OF AMERICA, http://oaaa.org/About/HistoryofOOH.aspx (last visited Mar. 31, 2017) ("The earliest recorded leasings of billboard occurred in 1867.").

[8] *Id.* ("The large format American poster (measuring more than 50 square feet) originated in New York when Jared Bell began printing circus posters 1835.").

[9] *See* Katie Richards, *Chicken With a Beef: The Untold Story of Chick-fil-A's Cow Campaign: How the Richards Group Found a Winning Creative Recipe*, ADWEEK (June 17, 2016), http://www.adweek.com/brand-marketing/chicken-beef-untold-story-chick-fil-cow-

production of the Model T and the standardization of billboard structures led to a booming increase in billboards across the country,[10] later resulting in the Federal Highway Beautification Act.[11]

The Federal Highway Beautification Act ("HBA"), signed into law in 1965, was intended to follow through on President Lyndon Johnson's State of the Union address which proclaimed that "[a] new and substantial effort must be made to landscape highways to provide places of relaxation and recreation wherever our roads run."[12] This act established federal control over billboards along interstate highways by creating size, spacing, and lighting standards, reasoning that

> the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.[13]

While this federal act seems innocuous as just one section in the Highways Title of the United States Code it, along with similar acts promulgated by the states (usually through their Departments of Transportation), bleeds into the purview of First Amendment jurisprudence. This Note will argue that prior to *Reed v. Town of Gilbert*,[14] the HBA was likely an unconstitutional regulation of signs based solely on their content. This Note will then go on to argue that now, in the

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campaign-171834/ (describing how the success of the initial "Eat Mor Chikin" billboard launched Chick-Fil-A's larger marketing campaign).

[10] "With the introduction and wide adoption of Ford's Model T automobile, more people were on the road, on highways, and outside of the home. . . . [Businesses] had [a] relatively captive audience to broadcast messages to with minimal competition" Cat Chien, *Billboard Evolution,* 1 FOUR PEAKS REV. 86, 88–89 (2011). "In 1900, a standardized billboard structure was established in America, and ushered in a boom in national billboard campaigns. Confident that the same ad would fit billboards from coast to coast, big advertisers like Palmolive, Kellogg, and Coca-Cola began mass-producing billboards as part of a national marketing effort. By 1912, standardized services were available to national advertisers in nearly every major urban center." *History of OOH*, *supra* note 8.

[11] 23 U.S.C. § 131 (2012).

[12] Lyndon B. Johnson, President of the U.S., Annual Message to the Congress on the State of the Union (Jan. 4, 1965) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=26907).

[13] 23 U.S.C. § 131(a) (2012).

[14] 135 S. Ct. 2218 (2015).

wake of the Court's sweeping definition of "content based," the HBA almost certainly violates the First Amendment.

This Note proceeds in the following parts: (1) an overview of First Amendment jurisprudence as it relates to sign regulation prior to *Reed v. Town of Gilbert*; (2) a brief explanation of *Reed v. Town of Gilbert* and its resulting effects on the First Amendment (3) a detailed description of the Highway Beautification Act and its regulations; (4) an explanation of how the *Reed* decision has likely rendered the HBA unconstitutional; (5) a short summary of a recent challenge to a state HBA in the wake of *Reed*; and (6) concluding thoughts.

I. FIRST AMENDMENT PROTECTION OF SIGNS AND BILLBOARDS BEFORE *REED*

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech."[15] Though not "speech" in the traditional sense,[16] signs and billboards are protected by the First Amendment as "a well-established medium of communication, used to convey a broad range of different kinds of messages."[17] The challenge in regulating this area emerges in the conflict between the communicative and non-communicative aspects of signs and billboards:

> [a]s with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests

[15] U.S. CONST. amend. I.
[16] *See Speech*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/speech (last visited Mar. 31, 2017) (defining speech as "the communication or expression of thoughts in *spoken* words") (emphasis added).
[17] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

> with the individual's right to expression.[18]

Though First Amendment Protection for signs is presently well established, federal and local governments are able to work around this challenge by regulating the time, place,[19] and manner of speech, as long as the regulations are reasonable.[20] Prior to *Reed,* a regulation of speech, and thereby signs, was permissible if it was narrowly tailored to serve significant government interests, left open ample alternative channels for the communication of the same information, and could be justified without reference to the content of the speech.[21] The content neutrality analysis of the restrictions was critical in determining whether a governmental regulation fell within the bounds of the First Amendment. Before the *Reed* decision, a regulation was usually said to be content-neutral if it could be "justified without reference to the content of the regulated speech."[22] Conversely, regulations were not content-neutral when they prohibited "restrictions not only on particular viewpoints but also an entire topic."[23]

This analysis was and remains crucial because it determines the level of scrutiny with which courts review challenged regulations. Regulations that are content- neutral are reviewed with a lower level of scrutiny such that they must only advance legitimate or significant government interests—a wide ranging spectrum which includes public safety,[24] traffic control,[25] and even unwanted noise protection.[26] Conversely, regulations that are content-based are presumed to

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[18] *Id.* at 502 (citations omitted).
[19] "Place" in this context may also be referred to as "forum." *See* Boardley v. U.S. Dep't of Interior, 615 F.3d. 508, 514 (D.C. Cir. 2010) (referring to "traditional public fora" as "places").
[20] Dimas v. City of Warren, 939 F. Supp. 554, 557 (E.D. Mich. 1996) (internal quotation marks and citations omitted).
[21] *Id.* (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)).
[22] Ward v. Rock Against Racism, 491 U.S. 781, 782 (1989).
[23] William M. Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction*, 71 A.L.R. 6th 471 (2012).
[24] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2535 (2014) ("We have, moreover, previously recognized the legitimacy of the government's interests in 'ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks . . . .'" (citing Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997))).
[25] *See id.*
[26] *See, e.g.*, *Ward*, 491 U.S. at 796 ("[I]t can no longer be doubted that government 'has a substantial interest in protecting its citizens from unwelcome noise." (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984))) (internal alterations omitted).

violate the First Amendment[27] and must survive strict scrutiny. To survive strict scrutiny, the interests advanced by the government must be compelling, the regulation must be narrowly tailored to achieve the compelling interest, and the content-based regulation must be the least restrictive means of advancing the compelling interest.[28] While the lower level of scrutiny used for content-neutral regulations is easily met by the government, the compelling interest standard of strict scrutiny is a much higher bar.

Another aspect of First Amendment jurisprudence that relates to the HBA is the slightly different protection granted to commercial speech. Regulations for commercial speech receive "different, less rigorous protection" from courts compared to the protections given to noncommercial speech detailed above.[29] "Signs with commercial messages are a form of commercial speech,"[30] and as a result, billboard and sign regulation may at times implicate the commercial speech doctrine,[31] which "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[32] The test for the commercial speech examines whether the speech concerns a lawful activity, and if so, whether the regulation implements and directly advances a substantial government interest, and whether the regulation reaches no further than necessary.[33] The test differs from that of noncommercial regulations in two basic regards: (1) the court must first determine whether the commercial speech falls within protected expression, and (2) the presumption of

[27] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").
[28] *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (explaining the standard of review for content-based speech restrictions).
[29] DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 1051 (9th ed. 2016).
[30] *Id.*
[31] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980).
[32] *Id.* at 563.
[33] The Supreme Court has "adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (citing Cent. Hudson Gas & Elec. Corp., 447 U.S. 557, 563–66 (1980)).

constitutionality is modified to determine whether the regulation is "not more extensive than necessary."[34]

For the First Amendment commercial speech protections to apply, the speech "must concern a lawful activity and not be misleading."[35] If the speech meets this criteria, the test continues on to determine whether the speech is protected and as a result whether the regulation is permissible.[36] If the speech does not concern a lawful activity and/or is misleading, the speech is not protected by the First Amendment.[37] The commercial speech doctrine is an important component in understanding the relationship between the sign and billboard regulation and the First Amendment and worth this brief discussion. However, the HBA itself likely falls outside the bounds of this doctrine and will thus be analyzed later in this paper under general First Amendment protections of speech.

As described, prior to *Reed*, the content-neutrality analysis for regulations on speech looked at whether the regulation was narrowly tailored to serve significant government interests, left open ample alternative channels for the communication of the same information, and could be justified without reference to the content of the speech.[38] This note now turns to an examination of *Reed* and the new content-neutrality analysis it established.

II. *REED V. TOWN OF GILBERT* AND ITS RESULTING EFFECTS ON THE FIRST AMENDMENT

The Supreme Court's decision in *Reed v. Town of Gilbert*[39] seemed at first glance to be a simple decision regarding the constitutionality of a small town's signage ordinance with little impact on ordinances elsewhere. However, the Supreme Court, in deciding this case, "rearticulated the standard for when regulation of speech is content based,"[40] possibly changing the content-neutrality analysis for all government ordinances.

In *Reed*, a Church and pastor sought to place temporary signs around town that announced the location of their service each week.[41] The Town's ordinance prohibited

[34] MANDELKER, *supra* note 30, at 1051.
[35] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (1980).
[36] MANDELKER, *supra* note 30, at 1051.
[37] *Id.*
[38] MANDELKER, *supra* note 30, at 1053.
[39] 135 S. Ct. 2218 (2015).
[40] Anthony D. Lauriello, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 COLUM. L. REV. 1105, 1105 (2016).
[41] *Reed*, 135 S. Ct. at 2225.

any outdoor sign display without a permit, but exempted various categories of signs from this requirement, as long as those signs complied with certain regulations.[42] The church was frequently stopped from placing its signs around town because the signs violated the town's restrictions on the size, duration, and location of temporary directional signs.[43] The Church and pastor challenged the ordinance as a violation of free speech because the ordinance contained varying restrictions for signs based on the category of sign.[44] Pertinently, the ordinance allowed "Ideological Signs"[45] to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits, allowed "Political Signs"[46] to be up to 16 square feet on residential property and up to 32 square feet on nonresidential property and displayed up to 60 days before a primary election and up to 15 days following a general election, and allowed "Temporary Directional Signs"[47] to be six square feet on private property or on a public right-of-way as long as no more than four signs were placed on a single property at any time and displayed, no more than 12 hours before the event and no more than 1 hour afterward.[48]

The Supreme Court ultimately found the town's ordinance invalid, concluding it was an unconstitutional restriction on free speech because it was not "content-neutral" as applied and thus failed a strict scrutiny analysis.[49] While the ruling regarding the Town of Gilbert's ordinance was unanimous, the reasoning was fractured, with several judges coming to the conclusion differently.[50]

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[42] *Id.*
[43] *Id.*
[44] *Id.* at 2224–26.
[45] "This category includes any sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." *Id.* at 2224 (internal quotation marks omitted).
[46] "Political signs" are defined as a "temporary sign designed to influence the outcome of an election called by a public body." *Id.*
[47] "This includes any 'Temporary Sign' intended to direct pedestrians, motorists, and other passersby to a 'qualifying event'. . . . A 'qualifying event' is defined as any 'assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.'" *Id.*
[48] *Id.*
[49] *Id.* at 2231–32.
[50] The rationales used by the justices to reach the decision were different. Four opinions were issued: the majority opinion (authored by Justice Thomas and joined by five others), one concurrence (authored by Justice Alito and joined by two others, representing three of the six justices in the majority), and two concurrences in the judgment (one by Justice Kagan, joined by two others, and one by Justice Breyer). *See generally id.*

Writing for the majority, Justice Thomas found that the town's ordinance imposed more stringent restrictions on temporary directional signs (the type used by the Church) than were placed on other types of signs.[51] Thus, because "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign . . . [o]n its face, the Sign Code is a content-based regulation of speech."[52] Since the ordinance was content-based, it needed to be justified by compelling government interests; the majority found that it was not.[53]

In coming to this decision, the majority reaffirmed the traditional definition of content-based regulations, stating that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[54] However, the majority departed from previous standards in setting out a new test, or order of events, for determining content neutrality that genuinely changed the analysis. Courts must now consider first "whether a law is content neutral on its face *before* turning to the law's justification or purpose."[55] The majority further held that, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[56] This holding demonstrated a significant departure from the previous content-neutrality analysis where the intent of the governmental regulation played a key role in determining whether an ordinance was content-neutral.[57] The two-part test and content-neutrality standard set forth in the majority is in conflict with the previous understanding of how government ordinances are scrutinized after First Amendment challenges. In his concurrence, Justice Alito claims that "[p]roperly understood, today's decision will not prevent cities from

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[51] *See id.* at 2224.
[52] *Id.* at 2227.
[53] The town offered two interests: (1) preserving the town's aesthetic appeal and (2) traffic safety. *Id.* at 2231. The Court held that the interests were not "compelling" but, even if they were, they still failed as under-inclusive distinctions. *Id.*
[54] *Id.* at 2227.
[55] *Id.* at 2228.
[56] *Id.*
[57] "[T]he United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be 'justified without reference to the content of the regulated speech.'" *Id.* (citing Brief for United States as *Amicus Curiae* at 20, 24, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)).

> regulating signs in a way that fully protects public safety and serves legitimate esthetic [sic] objectives."[58]

The other concurring Justices, while agreeing with the majority's conclusion, push back against this change in the content-neutrality analysis, which they seem to view as significant. Justice Kagan's concurrence critiques the broad sweep of the majority opinion, denouncing "the consequences of subjecting more laws to strict scrutiny under Justice Thomas's formalist approach."[59] Justice Kagan states that "communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs . . . or else lift their sign restriction,"[60] in order to comply with the First Amendment.

In the alternative, Justice Kagan suggests a content-neutrality analysis that allows the administration of "our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[61] Justice Kagan writes that "[t]he Town of Gilbert's defense of its sign ordinance . . . does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[62] Thus she finds that the majority did not need to address the level-of-scrutiny question.[63]

Justice Breyer's concurrence also rejects the black and white approach taken by the majority writing, "content discrimination . . . cannot and should not *always* trigger strict

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[58] *Id.* at 2233–34 (Alito, J., concurring). Joining the majority, Justice Alito provides "words of further explanation."*Id.* at 2233 (Alito, J., concurring). Justice Alito offers a list of sign regulations that he suggests would not be content-based after *Reed*: rules regulating the size of signs, rules regulating location, distinguishing between lighted and unlighted, fixed messages versus messages that change, private versus public property, on-premises versus off-premises, restricting total number of signs allowed per mile of roadway, and time restrictions on signs advertising a one-time event. *Id.* (Alito, J., concurring). While the purpose of the concurrence is to clarify the ruling, it may in fact muddle things further. This last category, which Justice Alito claims would be content-neutral, appears on its face to be content-based because it distinguishes between events that happen once and those that are reoccurring—seemingly a message-content distinction. Further, Justice Alito suggests that distinctions between on- and off-premise signs would be permissible. However, in order to determine whether a particular sign would comply, the content of the sign would need to be examined, thus seemingly rendering the sign content-based. *See id.*

[59] Lauriello, *supra* note 41, at 1132; *See also Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring).

[60] *Reed*, 135 S. Ct. at 2237 (Kagan, J., concurring).

[61] *Id.* at 2238 (Kagan, J., concurring).

[62] *Id.* at 2239 (Kagan, J., concurring) ("The best the Town could come up with at oral argument was that directional signs 'need to be smaller because they need to guide travelers along a route'. . . .Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance . . . .").

[63] *Id.* at 2239 (Kagan, J., concurring).

scrutiny."[64] Justice Breyer points out that many ordinary government regulatory activities involve some sort of regulation of speech, and the categorical approach which the majority takes does not account for government regulation that "inevitably involve content discrimination, but where a strong presumption against constitutionality has no place."[65] Rather, he suggests, the better approach is to use content discrimination analysis as "a supplement to a more basic analysis."[66] Justice Breyer proposes to "treat content discrimination as a strong reason weighing against the constitutionality of a rule where . . . viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification."[67]

The majority opinion clearly announced a new content-neutrality analysis that looks first to the face of the regulation and only later, possibly, to the intent of the regulation. However, the different approaches to this case muddy the analysis slightly. One probable result of the *Reed* decision is that all government ordinances must not only be facially content-neutral, but the restrictions must also not have any unintended discriminatory impact on protected speech, or they will likely be found unconstitutional.

With this background of First Amendment protections for signs and billboards pre and post-*Reed* established, this note now turns to the Highway Beautification Act to examine its language and regulations, eventually showing that the Act is an impermissible content-based regulation.

III. THE HIGHWAY BEAUTIFICATION ACT

The Highway Beautification Act ("HBA"), promulgated in Title 23, Section 131 of the United States Code "[i]ncreased the scope of controlling signs to include the primary system and applied to all States"[68] by allowing only certain kinds of signs "visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way."[69]

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[64] *Id.* at 2234 (Breyer, J., concurring).
[65] *Id.* at 2234–35 (Breyer, J., concurring).
[66] *Id.* at 2235 (Breyer, J., concurring).
[67] *Id.* (Breyere, J., concurring).
[68] Office of Planning, Environment, & Realty, *Outdoor Advertising Control: A History and Overview of the Federal Outdoor Advertising Control Program*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/real_estate/oac/oacprog.cfm (last updated June 27, 2017).
[69] 23 U.S.C. § 131(c) (2012).

The act prohibits all signs within the 660-foot area, except for those signs which are:

> (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, . . . which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system.[70]

[70] *Id.*

The definitions and standards for the permitted signs are found in Standards for Directional Signs, 23 C.F.R § 750. 154 (2017). The HBA defines the kinds of signs that fall under this regulation as "directional signs" where:

> [d]irectional signs means signs containing directional information about public places owned or operated by Federal, State, or local governments or their agencies; publicly or privately owned natural phenomena, historic, cultural, scientific, educational, and religious sites; and areas of natural scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public.[71]

The regulation lays out several standards for the signs, including a list of prohibited signs,[72] the size,[73] the lighting,[74]

[71] 23 C.F.R. § 750.153(r) (2017).

[72] The following signs are prohibited:

> (1) Signs advertising activities are illegal under Federal or State Laws or regulations in effect at the location of those signs or at the location of those activities.
> (2) Signs located in such a manner as to obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic.
> (3) Signs which are erected or maintained upon trees or painted or drawn upon rocks or other natural features.
> (4) Obsolete signs.
> (5) Signs which are structurally unsafe or in disrepair.
> (6) Signs which move or have any animated or moving parts.
> (7) Signs located in rest areas, parklands or scenic areas.

Id. § 750.154(a).

[73] *See id.* § 750.154(b) (listing the maximum area, height, and length of permitted signs, and noting that the dimensions include the borders and trim of a sign, but exclude the supports).

[74] *See id.* § 750.154(c) (providing that signs may be illuminated subject to certain restrictions and that no sign may be illuminated if the illumination interferes with or obscures traffic devices).

and spacing of the signs,[75] as well as the message content[76] and the selection method and criteria[77] for the signs.

The regulation also limits the messages on directional signs to "the identification of the attraction or activity and directional information useful to the traveler in locating the attraction, such as mileage, route numbers, or exit numbers"[78] and also states that "[d]escriptive words or phrases, and pictorial or photographic representations of the activity or its environs are prohibited."[79] Further, for privately owned activities or attractions to qualify as "directional signs" they must be "natural phenomena; scenic attractions; historic, educational, cultural, scientific, and religious sites; and outdoor recreational areas"[80] which are "nationally or regionally known, and of outstanding interest to the traveling public."[81]

The HBA is a mandatory program—states are subject to a ten-percent cut in their federal highway funding if they are not in compliance its standards.[82] The passage of the HBA prompted many states to enact their own outdoor advertising control acts so as to ensure conformity with the federal statutes.[83] Additionally, the HBA authorizes states to establish standards that are more restrictive[84] than those promulgated by the HBA. Despite the compulsory nature of the Act, the penalty "has seldom been imposed, and the federal act does not preempt state and local sign regulations."[85] Though "billboards along federal highways ha[ve] long presented an

[75] *See id.* § 750.154(d) (requiring the placement of all directional signs to be approved by the State highway department).
[76] *See id.* § 750.154(e) ("The message on directional signs shall be limited to the identification of the attraction or activity and directional information useful to the traveler in locating the attraction, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, and pictorial or photographic representations of the activity or its environs are prohibited.").
[77] *See id.* § 750.154(f) (limiting the kinds of privately owned signs allowed and identifying that states may prescribe the criteria "to be used in determining whether or not an activity qualifies for this type of signing").
[78] *Id.* § 750.154(e).
[79] *Id.*
[80] *Id.* § 750.154(f)(1).
[81] *Id.* § 750.154(f)(2).
[82] *See* 23 U.S.C. § 131(b) (2012) (providing for a ten percent cut in states' federal highway funding if they fail to comply).
[83] *See, e.g.*, 36 PA. CONS. STAT. ANN, § 2718.104 (2016) (passing the Outdoor Advertising Control Act of 1971); N.C. GEN. STAT. § 136-126 (2016) (The Outdoor Advertising Control Act in 1967); GA. CODE ANN. § 32-6-70 (2016) (Control of Signs and Signals in1967); COLO. REV. STAT. § 43-1-401 (2016) (Outdoor Advertising Act in 1981).
[84] 23 C.F.R. § 750.155 (2017).
[85] MANDELKER, *supra* note 30, at 1050.

aesthetic problem,"[86] many of the challenges to the HBA arise out of First Amendment free speech protections.

IV. IMPACT OF *REED* ON THE HIGHWAY BEAUTIFICATION ACT

Prior to *Reed*, "many [] courts, construed pre-*Reed* precedent as allowing 'content-based regulations [to be treated] as content-neutral if the regulations are motivated by a permissible content-neutral purpose,' as long as 'the Act does not endorse any particular viewpoint.'"[87] However, as previously noted, *Reed* changed this analysis, stating that "an innocuous justification cannot transform a facially content-based law into one that is content neutral. That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose."[88] Through this statement, the Court has created a test[89] that has the effect of "stiffen[ing] the content-neutrality rules."[90] As a result, many sign regulations with inoffensive and harmless purposes, including the Highway Beautification Act, will no longer survive as content-based and "[t]here is a possibility that the distinctions between commercial and noncommercial, and between on-premise and off-premise signs, are content-based,"[91] as well.

A. The Highway Beautification Act is a Content Based Regulation

Similarly to the sign ordinance at issue in *Reed*, the HBA restricts "speech" based on content. The act's provisions prohibit all signs inside the 660-foot buffer except for

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[86] *Id.*

[87] Auspro Enters., LP v. Texas Dep't of Transp., 506 S.W.3d 688, 700 (Tex. App. 2016) (quoting Texas Dep't of Transp. v. Barber, 111 S.W.3d 86, 93, 98 (Tex. 2003)); *see also* Gresham v. Peterson, 225 F.3d 899, 905 (7th Cir. 2000) ("The Supreme Court has held that government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

[88] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

[89] This test suggests explicitly circular reasoning as well—that in order to evaluate whether a regulation is content-neutral, the court (and presumably municipalities who seek to regulate) must look beyond the actual content of the ordinance to consider the possibility that the application of the ordinance might have unintended discriminatory impact on protected speech. *See* Gresham v. Peterson, 225 F.3d 899, 905 (7th Cir. 2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). To help apply this somewhat circular definition, the Court instructed that the principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[90] MANDELKER, *supra* note 30, at 1052.

[91] *Id.*

> (1) directional and official signs and notices . . . pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, (2) signs . . . advertising the sale or lease of property upon which they are located, (3) signs . . . advertising activities conducted on the property on which they are located, (4) signs . . . determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance, (5) signs . . . advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system.[92]

These provisions clearly distinguish between different types of signs, based on their messages. For example, a sign or billboard advertising the distribution of free coffee by nonprofit organizations is permitted, while a billboard advertising the distribution of coffee for sale, even if sold by a non-profit, would not be allowed. As a result, the HBA is clearly a content-based regulation since the "nature of the message defines the sign."[93]

Additionally, the HBA's location distinctions are likely impermissible post-*Reed.* The HBA distinguishes between signs based on whether they are on or off-premise signs. On-premise signs are located on the site of the thing being advertised, while off-premise signs are not located on the site, but somewhere else, presumably directing one to that site. Traditionally this form of differentiation was viewed as a permissible location regulation. However post-*Reed*, this distinction is possibly content-based.[94] Generally, a "typical definition is that an off-premises sign is one with messages not

[92] 23 U.S.C. § 131(c) (2012).
[93] MANDELKER, *supra* note 30, at 1062.
[94] However, as noted previously, Justice Alito stated in his concurrence that on-/off-premise signs would be considered content-neutral. *See supra* note 58 and accompanying text.

related to business or activity on the premises,"[95] and the HBA only allows on-premise signs within the 660-foot buffer.[96] Thus, in order for this restriction to be enforced, the content of the sign must be examined to determine whether the sign complies with this regulation.

Based on these distinctions—i.e., that only certain signs are allowed inside of the buffer—the HBA appears facially to be a content-based regulation. Consequently, as Justice Thomas, who authored the majority opinion, wrote, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive."[97] It is quite arguable that the HBA was passed with, and continues to have, a benign motive for the regulation, which previously would likely have rendered the HBA permissible.[98] However, after *Reed*, a finding that the HBA is content-based requires that it must survive strict scrutiny, regardless of its motive, which requires that the regulation advance a compelling government interest, be narrowly drawn to achieve that end, and be the least restrictive means to achieve that compelling state interest.[99]

B. The Highway Beautification Act Does Not Survive Strict Scrutiny

1. Compelling State Interest

The purpose of the HBA and its resulting regulations, as declared in 23 U.S.C. § 131, is that "[t]he erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote safety and recreational value of public travel, and to preserve natural beauty."[100] Thus, the stated interests designed to be furthered by the regulation are the preservation of natural beauty and the aesthetics of the highway, the promotion of safe public travel, and the protection of the public investment. The interests advanced by the HBA likely suffice as compelling[101]; even so, they warrant a brief analysis.

Historically, aesthetics alone were not enough to justify a government regulation. However, following dictum by

[95] MANDELKER, *supra* note 30, at 1062.
[96] 23 U.S.C. § 131(c) (2012).
[97] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).
[98] The advertising and billboard industry, however, might disagree.
[99] *Reed*, 135 S. Ct. at 2230–2231.
[100] 23 C.F.R. § 750.151(a)(1) (2017).
[101] Interests advanced by the government are generally found to be compelling, especially the type advanced by the HBA. *See infra* Section VI and accompanying notes.

Justice Douglas, which found it was "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled,"[102] almost all state courts now accept that aesthetics can be a basis for regulation. While modern courts are usually willing to uphold regulations based on the kinds of signs regulated by the HBA, "non-aesthetic factors often help provide the basis for the decision."[103] For example, in *Reed,* the Supreme Court acknowledged that preserving the town's aesthetic appeal, along with traffic safety, may have qualified as a compelling interest.[104] It may appear "[t]he law has not achieved its desired result of reducing visual pollution along our nation's main thoroughfares" and that "visual pollution remains ubiquitous."[105] However, the mere fact that an interest has not been accomplished does not necessitate a finding that the interest is not compelling.[106]

The promotion of safe travel, its recreational value, and the protection of the public investment in the highways are each likely valid as compelling government interests. Public safety is widely accepted as a compelling government interest[107] and thus the HBA's purpose to promote safe public travel is certainly a compelling interest.[108] Indeed, the Supreme Court has seemed to agree with, or at least defer to, the belief that billboards are traffic hazards.[109] Similarly, the freedom to travel is a

[102] Berman v. Parker, 348 U.S. 26, 33 (1954).
[103] MANDELKER, *supra* note 30, at 1039.
[104] *Reed*, 135 S. Ct. at 2231–32 (2015).
[105] Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 467 (2000).
[106] While this may not have been explicitly held, strict scrutiny requires only that the government regulation "furthers a compelling interest and is narrowly tailored," and does not require that the interest ever be fully accomplished by the regulation. *See Reed*, 135 S. Ct. at 2231.
[107] The government's compelling interest in protecting public safety has been cited and acknowledged in virtually every area of the law, from panhandling and solicitation restrictions to gun control regulations. *See, e.g.*, McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 181 (D. Mass. 2015) (finding that public safety was a compelling state interest in creating an aggressive panhandling ordinance); State v. Webb, 144 So. 3d 971, 983 (La. 2014) (finding that public safety was a compelling interest in enhancing the penalty for illegal drug possession where a firearm is present).
[108] *See* MANDELKER, *supra* note 30, at 1046 ("All courts have accepted a traffic safety justification.").
[109] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) ("If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."). Prior to the decision in *Metromedia, Inc.*, other courts had come to similar conclusions. *See, e.g.*, *In re* Opinion of the Justices, 169 A.2d 762, 764 (N.H. 1961) ("Signs of all sizes, shapes and colors, designed expressly to divert the attention of the driver and occupants of motor vehicles from the highway to objects away from it, may reasonably be found to

fundamental right,[110] and thus the government must have some interest in its recreational value. Conversely, the protection of public investment in highways may be viewed as an *important* interest because is it helpful for public support of infrastructure improvements, but it does not seem to rise to the same level as promoting public safety or the value of travel. That factor notwithstanding, when taken and analyzed together, the several purposes stated and advanced by the HBA are likely to be accepted as "compelling" government interests.

2. Narrowly Drawn to Advance the Interest and Least Restrictive

Assuming the purposes of the HBA meet the compelling government interest threshold,[111] the HBA likely fails strict scrutiny because it is not narrowly tailored to achieve the proposed compelling interests, and the regulations are not the least restrictive means of advancing the interest. A regulation is narrowly tailored for First Amendment purposes "if it promotes a significant or substantial government interest in a manner that would be achieved less effectively if the regulation did not exist."[112] A regulation does not need to be the least restrictive means of advancing a government interest as long as it does not burden more speech than is necessary.[113]

The HBA's limit on permitted signs within the buffer area is likely not narrowly tailored to achieve the government interests. It seems unlikely that travel safety and the recreational value of public travel are advanced by limiting the signs allowed to those advertising activities conducted on the property or pertaining to natural wonders while prohibiting other kinds of messages on signs. Rather, it would seem a limit on all signs within this area would more reasonably advance this interest. Similarly, it is unclear that the limit advances the public investment in the highways for many of the same reasons. It is not convincing that the general public would be more invested in the highway system if billboards were limited to directional and official notices as opposed to other kinds of

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increase the danger of accidents, and their regulation along highways falls clearly within the police power.").

[110] *See* Edwards v. California, 314 U.S. 160, 177 (Douglas, J., concurring) (1941) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.").

[111] The courts in *Reed* and *Auspro* do make this assumption, yet the statutes still fail to pass a strict scrutiny test. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015); Auspro Enters., LP v. Texas Dep't of Transp., 506 S.W.3d 688, 701 (Tex. App. 2016).

[112] 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8:41.

[113] Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

advertised messages. Perhaps, the argument may even be made that the limitation on allowable signs deters the stated purpose of the Act, since "public investment [in the highway system] is important to spur economic productivity,"[114] which may theoretically be advanced by permitting all billboards.

The regulations detailed by the HBA prohibit certain signs inside the 660-foot corridor, but allow other kinds. These regulations are not the least restrictive means of advancing the preservation of natural beauty or the aesthetics of the highway, the promotion of safe public travel, and the protection of the public investment in highways. In fact, other portions of the HBA advance these interests more effectively, perhaps, than the limit on the kinds of signs and billboards that are allowed. The standards that the HBA lays out for directional and official signs, which are permitted, could be applied to all signs within the corridor with the same result and advancement of interests. Regulating the size, lighting, and spacing of all signs, not just those currently permitted, would be less restrictive than the current prohibition and would probably achieve the interests with equal success.

The HBA regulations which prohibit certain signs inside the 660-foot buffer zone are clearly content-based regulations, and after *Reed,* must pass strict scrutiny, no matter how innocuous the reasoning. The interests advanced by the HBA might be compelling, however the current HBA regulations prohibiting certain signs are more restrictive than necessary to advance the stated purposes of the act. Because the HBA regulations are neither narrowly tailored nor the least restrictive means of furthering the stated government interests, the HBA would still not pass strict scrutiny. Since the HBA cannot pass strict scrutiny and is a facially content-based regulation, the HBA likely violates the First Amendment and its protection of speech.

V. A RECENT CHALLENGE TO A STATE HBA POST-*REED*

Though the Federal HBA likely violates the First Amendment, states should also take heed since many have passed similar acts on the state level to ensure they are in compliance with the federal regulation. In the wake of the *Reed* decision*,* many state and local ordinances on a variety of topics, including sign regulations, have been challenged as

[114] Virginia Postrel, *Economic Scene; Highway Spending is Meant to be a Public Investment in the Nation's Infrastructure That Pays Off for Everyone. Does It?*, N.Y. TIMES (May 20, 2004), http://www.nytimes.com/2004/05/20/business/economic-scene-highway-spending-meant-be-public-investment-nation-s.html.

content-based restrictions on speech. Several ordinances have been struck down as content based and have failed strict scrutiny.[115] Many others have probably ceased to be enforced or have been rewritten to come into compliance with the new standard.[116]

In Texas, the state's Highway Beautification Act was challenged as a violation of the right to free speech.[117] There, the Texas Department of Transportation brought an enforcement action against a landowner who failed to remove a sign that violated the Texas Highway Beautification Act.[118] The district court found that the Act did not violate the First Amendment. However, while the case was before the Court of Appeals, the United States Supreme Court heard arguments in *Reed* and the Texas Court of Appeals held off on a decision until the Supreme Court handed down their decision.[119] Following the precedent established by the Supreme Court's decision, the Texas Court of Appeals found that "[i]n *Reed*'s wake, our principal issue here is not whether the Texas Highway Beautification Act's outdoor-advertising regulations violate the First Amendment, *but to what extent*."[120]

After a summary of the facts and holding in *Reed,* a brief explanation of First Amendment jurisprudence, and a conclusion that "*Reed* has arguably transformed First Amendment free-speech jurisprudence,"[121] the Texas Court of

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[115] *See, e.g.*, Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 628 (4th Cir. 2016) ("Applying the principles of content neutrality articulated in *Reed*, we hold that the sign ordinance challenged in the plaintiffs' complaint is a content-based regulation that does not survive strict scrutiny."); Norton v. City of Springfield, 806 F.3d 411, 412–13 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1173 (2016) (relying on *Reed* to invalidate a city's anti-panhandling ordinance for the city's failure to "contend[] that its ordinance is justified"); *see also* Jim Doherty, *Washington Supreme Court Finds Begging Ordinance Unconstitutional Under* Reed v. Town of Gilbert, MRSC (Jul. 27, 2016), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/July-2016/Washington-Supreme-Court-Finds-Local-Begging-Ordin.aspx ("Citing *Reed v. Town of Gilbert*, the [Washington Supreme Court] found [the municipal code's prohibition against panhandling] to be just that: unconstitutional content-based restrictions on free speech in a traditional public forum.").

[116] I reached this conclusion based on several conversations with local government officials and experts in local government and land use. These conversations regarded potential litigation for local governments with sign ordinances should they enforce them, and what options they might have to avoid it.

[117] Auspro Enters., LP v. Texas Dep't of Transp., 506 S.W.3d 688, 691 (Tex. App. 2016).

[118] *Id.*

[119] *Id*. at 691–92 ("During Auspro's appeal from the district court's final judgment, the United States Supreme Court granted certiorari and heard oral argument in *Reed*, prompting this Court to grant Auspro's motion to abate this appeal pending the resolution of *Reed.* Following the *Reed* decision and with the benefit of its instruction, we reinstated this appeal and allowed the parties to submit briefs regarding *Reed*'s effect on our decision here.").

[120] *Id.* at 691 (emphasis added).

[121] *Id.*

Appeals found that "[u]nder *Reed*'s standard for content neutrality—which simply asks whether the law applies to particular speech because of the topic discussed or the idea or message expressed—the Texas Act's outdoor-advertising regulations are clearly content-based."[122] The court found that the distinctions between permitted and illegal signs drawn by the Act, which essentially mirror those in the HBA, "depend entirely on the subject matter of the sign's message"[123] and, as a result, "[t]he Texas Act . . . on its face draws distinctions based on the message a speaker conveys—i.e., is content based on its face under the *Reed* analysis"[124] and is therefore subject to strict scrutiny.

In the Court's brief strict scrutiny analysis, it noted that the Texas' HBA did not further any compelling government interests, and even if it did, it was not narrowly tailored, finding the provisions of the act "underinclusive."[125] Though the Court determined that the Act did not pass strict scrutiny, rather than declare the entire Act unconstitutional, the Court engaged in a lengthy discussion as to the appropriate remedy. Ultimately, the Court decided to strike two subsections of the Act that included content-based regulations. The Court concluded its opinion stating:

> we note that our opinion here does not hold that the State lacks the power to regulate billboards along Texas highways. Rather, our opinion holds that under *Reed* the Texas Highway Beautification Act's outdoor-advertising regulations and related Department rules are, as written, unconstitutional "content-based" regulations (as defined by *Reed*) of noncommercial speech because they do not pass strict-scrutiny analysis.[126]

[122] *Id.* at 697–98.
[123] *Id.* at 698 ("[M]ost of the Act's exemptions depend entirely on the subject matter of the sign's message: erected solely for and relating to a public election; advertising . . . a natural wonder or scenic or historic attraction; advertising . . . the sale or lease of the property on which it is located; and advertising . . . activities conducted on the property on which it is located.") (internal quotation marks omitted).
[124] *Id.* at 699.
[125] *Id.* at 701.
[126] *Id.* at 707.

The Texas Court of Appeals applied *Reed*'s stringent content-neutrality analysis and found the distinctions in the Act were content-based, likely setting the stage for many more challenges across the country. This challenge to Texas' Highway Beautification Act should serve as a sort of canary-in-the-coalmine alert to states around the country, as well as for the federal HBA, as to the vulnerability of these regulations post-*Reed*.

VI. CONCLUDING THOUGHTS

In conclusion, the Highway Beautification Act is likely an unconstitutional content-based regulation. In the wake of the Supreme Court's *Reed v. Town of Gilbert* decision, signs and billboards are "speech" protected by the First Amendment, and as a result are subject only to reasonable time, place, and manner restrictions.[127] These restrictions must not regulate in any way signs based on the communicative nature of the speech, and those that do are presumptively unconstitutional and subject to strict scrutiny.[128] A regulation can pass strict scrutiny only when the regulation furthers some compelling government interest, is narrowly tailored to advance that interest, and does not restrict more speech than necessary.[129]

The Supreme Court's decision to invalidate the Town of Gilbert's sign ordinance has had far-reaching effects, as the Court's decision has fundamentally changed the content-neutrality analysis as it relates to the First Amendment and government regulations. The Court's ruling now requires that all state and local government ordinances and regulations be content-neutral on their face and disregards the harmless or even warranted justifications for the ordinances as irrelevant. Because of the Court's newly articulated analysis, far more regulations have been struck down as unconstitutional content-based regulations than were voided in the centuries before.

The HBA regulations that are based on the message displayed on the sign are, on their face, content-based distinctions. Further, the HBA limits the kinds of signs which are allowed within 660 feet of federal public highways to those which are directional signs pertaining to natural wonders or attractions, those advertising the sale or lease of the property where they are located, those advertising activities taking place

[127] *See supra* Section I.
[128] *Id.*
[129] *Id.*

on the property where the sign is located, those which qualify as landmark signs, and, funnily, signs advertising the distribution of free coffee by non-profit organizations.[130] As a result, for the HBA to be constitutional, it would have to pass strict scrutiny, which it likely will not. The stated purposes of the HBA may be compelling government interests. However even working under the assumption that they are, the HBA does not pass the rest of the strict scrutiny test because the regulations are not narrowly tailored to further those interests, and they are not the least restrictive regulations available to advance those interests.

Further evidence of the HBA's likely unconstitutionality is apparent by the recent Texas Court of Appeals case that struck down portions of the Texas Act. The Texas Act, which included language virtually identical to that in the federal HBA, was found by the Court to be a content-based regulation that did not survive strict scrutiny. Though that case likely has relatively minimal implications for the federal HBA, it is noteworthy in that the statute's language has virtually already come under fire and failed to pass constitutional muster.

While the elimination of the content-based language in the Texas Highway Beautification Act points to the unconstitutionality of the federal Act, it is unlikely that a challenge will be brought against the federal HBA in the near future. Several factors likely contribute to a disinclination to challenge the Act, now on the books for over 50 years. Perhaps the most powerful reason is the existence of state acts. As mentioned above, in the wake of the passage of the federal HBA, virtually every state passed a similar, if not identical, statute which enabled them to maintain "effective control"[131] over their outdoor displays along the federal highway systems and thereby not lose 10 percent of their federal highway funds.[132] As a result, it is likely that state acts, not the federal Act, will be the first target of First Amendment challenges going forward. In addition, it is the states that are charged with the enforcement of the HBA, further suggesting it will be state Acts that will first come under attack.

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[130] 23 U.S.C. § 131 (2012).

[131] *Id.* § 131(c).

[132] *Id.* § 131(b) ("Federal-aid highway funds apportioned . . . to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices . . . shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control.").

Should the federal HBA come under fire, the government may be hard-pressed to find ways to strike the offending provisions and avoid a total voiding of the Act. The Texas Court of Appeals, in striking down the Texas HBA, contemplated this dilemma:

> [t]o resolve the Act's constitutional problems, all of the content-based provisions must be severed. . . . Would this leave standing a law—i.e., the Legislature's ban on outdoor advertising—that is "complete in itself"? Perhaps. But what is not so easily answered in the affirmative is the second prong of the severability question: Is the remaining law capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected?[133]

The Court's questions about whether severing the unconstitutional aspects of the Texas Act render the Act as a whole superfluous are applicable to the federal HBA as well. In fact, virtually the very nature of the federal HBA is to permit some signs and not others along the federal highways, a job that would be impossible to do if those distinctions were severed from the rest of the Act. Because the Act could not easily be maintained without the potentially severable portions, it is likely the Court would strike the entire HBA rather than attempt to rework it. As the Texas court stated, "it is for the Legislature, not this Court, to clarify its intent regarding the Texas Highway Beautification Act in the wake of *Reed*."[134]

All things considered, the Highway Beautification Act, noble in its efforts to enhance the scenic nature of the highway system, is likely an unconstitutional restraint on speech in violation of the First Amendment in light of the *Reed* content-neutrality analysis. While it is doubtful the federal HBA will come under fire in the near future, should it be challenged, the federal government must be prepared to make changes to the

[133] Auspro Enters., LP v. Texas Dep't of Transp., 506 S.W.3d at 704–5 (Tex. App. 2016) (internal quotation marks omitted).
[134] *Id.* at 707.

statute or perhaps have several of the provisions struck completely.