

TYPES NOT MAPPED YET April 22, 2022 | TTR not mapped yet | Talar A. Berberian

Supreme Court rules for Austin, Texas, upholding off-premise sign regulations

The regulation of off-premise advertising has long been a contentious issue both for municipalities enforcing such regulations, and for advertising and sign companies hoping to profit from revenue generated by the industry. In its decision on [City of Austin v. Reagan National Advertising, slip op. \(U.S. Supreme Court, April 21, 2022\)](#), issued this Thursday, the Supreme Court weighed in on this matter. In its decision, which reversed the Fifth Circuit, the Court concluded that the City of Austin's ordinance prohibiting the erection of new off-premise advertising signs and the conversion of existing, static off-premise advertising signs to digital ones without similarly regulating on-premise signs, is a content neutral restriction subject to intermediate scrutiny by the court. The decision is important to municipalities, the constitutionality of whose off-premise advertising sign regulations would have been called into question had the Supreme Court agreed with the Fifth Circuit.

Municipalities have relied on previous cases, like [Metromedia, Inc. v. San Diego, 453 U.S. 490](#), decided in 1981, permitting the regulation, and outright prohibition, of off-premise advertising signs to formulate their sign codes. More recently, however, [Reed v. Town of Gilbert, 576 U. S. 155](#), raised questions about how and when signs could be regulated. In *Reed*, the Court considered a comprehensive sign code that gave more favorable treatment to some categories of signs and less favorable treatment to others, and held that applying different regulations to different types of signs (based on what is on them) is a content based regulation, and thus, is subject to strict scrutiny. On Thursday the court clarified a distinction between the type of ordinance considered in *Reed* and in *Reagan*.

In *Reagan*, the respondent, Reagan National Advertising of Austin, LLC (an outdoor-advertising company that own billboards in Austin) sought permits from the City to digitize some of its off-premises billboards. The City denied the applications. Reagan filed suit against the City in state court alleging that the code's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment.

The City removed the case to Federal court and the District Court found the prohibition against digitizing off-premise signs was content neutral on its face, and accordingly applied the intermediate scrutiny test. Ultimately, the District Court ruled in favor of the City, finding that the City's stated purpose of preserving esthetics and promoting safety were sufficient to pass that test.

The Fifth Circuit Court of Appeals reversed, opining that the prohibition is content-based and deeming that having to read a sign's message to determine its purpose is enough to make a regulation content-based and require strict scrutiny, taking direction, in part from *Reed*.

In its decision written by Justice Sonia Sotomayor, the Supreme Court disagreed. The Court reasoned that to say that content neutrality is upended when you have to read a sign to determine whether or not it is prohibited by a given regulation takes *Reed* too far. In this case the City of Austin is not regulating the message of the sign itself. Instead it governs where that message can be placed, which is a content-neutral rule, subject to the less onerous intermediate scrutiny test.

However, the opinion stopped short of determining whether the City of Austin's regulation is indeed unconstitutional. Since the Fifth Circuit did not weigh in on the question of whether the regulation could withstand the intermediate scrutiny test, the Supreme Court declined to decide that question. An open question remains as to whether the regulation will pass the intermediate scrutiny test now that it is deemed content neutral. The question is remanded back to the lower court to determine whether the regulation is narrowly tailored to serve a significant governmental interest.

Although that question remains, the Supreme Court's decision is a win for municipalities that hope to control how off-premise signs are regulated, and where they are located.



[Talar Berberian](#) is a partner in Thompson Coburn's Real Estate and Real Estate Land Use Groups.

authorsTest

talar

Talar A. Berberian