



Does a City Code Addressing Signage Constitute an Unconstitutional Content-based Regulation?

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The Supreme Court will soon hear arguments in another First Amendment-related case. This time, the court will decide whether a local code in Austin, Texas, relating to commercial signs amounts to an unconstitutional regulation of speech.

The case, *Reagan National Advertising of Austin v. City of Austin*, revolves around a local code in Austin relating to signage. In the case, Reagan National Advertising (“Reagan”) wanted to construct several off-premise signs and sought the necessary permits. Reagan, a “commercial enterprise” in the billboard business, applied for permits to convert the faces of its existing billboards in Austin to digital faces. The City of Austin ultimately denied the request.

According to the city, its sign code allows on-premise signs and off-premise signs. Off-premise signs are allowed only at their “existing locations” if they were lawful when first installed. As the city contends:

The code allows both on- and off-premise signs to change what they advertise (in billboard parlance, their “face”). The code, though, restricts the technological way by which off-premise signs may change what they advertise. It disallows a change in the “method or technology” used to convey the advertisement. Digitized signs — “electronically controlled changeable-copy sign[s],” — are permitted for on-premise signs but not for off-premise signs.

In rejecting the permits, the City of Austin argued that the distinctions in the code were related to the city's goal of protecting public safety and preserving its aesthetic character. According to the city, the code was not a content-based restriction, but merely a restriction in the method/manner of conveying a message.

Conversely, Reagan argued that the code was a content-based restriction on speech in violation of the First Amendment and that it had to overcome strict scrutiny analysis to survive. Reagan argued that the code prohibited it (and others using off-premise signs) from engaging in any speech through a digital medium while permitting such speech by those using on-premise signs. According to the Cato Institute:

The regulation here is content-based, though it might not seem so at first glance. Content-based restrictions are, as the Supreme Court has said, "those that target speech based on its communicative content" and are "presumptively unconstitutional" unless the law passes strict scrutiny. Because Austin allows for the construction of new signs that read, say, "buy here," while at the same time prohibiting the construction of new signs that read "buy there," then otherwise identical signs are therefore treated differently based upon the message conveyed — that is, the content. Surely, both types of sign, conceivably identical in every other way save for the physical address to which it directs potential customers, would equally affect the attention of drivers or a city's existing beauty.

The district court ruled in favor of the city and applied intermediate, as opposed to the more-stringent, strict scrutiny standard. The court relied on the 1981 Supreme Court case of *Metromedia, Inc. v. City of San Diego*, where the Supreme Court utilized intermediate scrutiny for the regulation of commercial speech in upholding a city sign-code distinction between on- and off-premise signs. In applying *Metromedia*, the court refused to apply the standard set forth in *Reed v. Town of Gilbert* (which *Reagan* argued was the controlling case), which established that "strict scrutiny applies to content-based speech regulations even if they are facially content neutral." While the district court agreed that "facially content neutral" laws are nonetheless content-based if they "cannot be justified without reference to the content of the regulated speech," it did not feel that *Reed* applied to Austin's code.

In essence, the court held that the city's policy did not amount to a content-based regulation merely because someone had to "read" a sign to determine the applicable rules. Specifically, the court found that the sign-code distinctions were not content-based because "deciding whether digitization is permitted requires nothing more than determining whether the subject matter of the advertising message is located on the property where the sign is or elsewhere. The test is not based on the message the billboard conveys but on the location to which the message directs the reader." As a result, the court applied intermediate scrutiny and found that the reasons behind the regulation were appropriately content-neutral. The court also noted that *Reagan's* interpretation

would mean that “all regulations for signs with written text” would be called into constitutional question because they would all be subject to strict scrutiny.

Subsequently, the appellate court reversed the district court’s ruling. Unlike the lower court, the appellate court relied on *Reed* and held that Austin’s code was a content-based restriction. In essence, the appellate court held that, “if an official must ‘read’ the sign to determine whether it is an off-premise sign — which in turn determines whether it can be digitized — that suffices to make it ‘an obvious content-based inquiry.’” According to the court, Austin’s sign-code definition of an “off-premise sign” is “determined by its communicative content,” and thus is content-based. While *Metromedia* seemingly held that the rules regarding on- and off-premise signs are generally considered non-content based, the appellate court held that this rule only applied if the on- and off-premise distinction was defined by a sign’s physical location or some other content-neutral factor, neither of which applied to the City of Austin’s code.

Given the foregoing, the Supreme Court has agreed to hear the case. In doing so, the high court will decide whether Austin city code’s distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.

Time will tell how the court ultimately rules on this interesting and nuanced legal issue.