



Austin's ban on 'off-premises' digital billboards is going to the Supreme Court. Here's what the case is about.

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While most of the attention at the Supreme Court has been on high-profile cases over Texas' abortion law and gun rights, the justices are about to hear another case involving something seemingly more mundane: Austin's billboard laws.

The justices will hear a case Wednesday over a city ordinance that prevents billboard companies from changing their existing analog signs into digital ones.

The case may be about billboards, but it's also about a more fundamental question of free speech rights.

For decades, Austin has outlawed what it calls "off-premises signs" — that is, billboards advertising something that's not on the same property as the sign. The billboards you do see around town existed before the ban went into effect and were allowed to stay up. The city says the limitations on billboards were for aesthetic and safety reasons, basically arguing billboards are ugly and distracting to drivers.

Reagan National Advertising applied for a city permit in 2017 to turn its regular billboards into electronic ones — giant digital screens that can change images or messages, as opposed to static billboards that show only whatever information is manually glued onto them. Lamar Advertising also filed an application to digitize its billboards.

The requests were denied because the city ordinance allows only on-premises signs to be digitized.

So, the companies sued.

Their argument: The city's distinction between "off-premises" and "on-premises" signs is an unconstitutional infringement on the companies' First Amendment rights.

Why? Because the only way to know if the sign is off premises is to read it.

Content based vs. content neutral

OK, let's back up a little. When it comes to regulating speech — and yes, billboards are a form of speech — there are a few ways courts can judge whether a regulation is constitutional. In general, regulations fall into two categories: content neutral and content based.

A content-neutral regulation is one that regulates speech based on the *form* it takes, regardless of what the message is. These are also called time, place and manner restrictions. In the case of billboards, that could be restrictions on the size or shape of signs — regulations that apply to all billboards.

On the other hand, a regulation that's content based would be something that restricts the *kinds* of messages on a billboard — for example, a rule that says you can't advertise cars or show political messages.

Courts treat those kinds of regulations much more skeptically. They're subject to what's called "strict scrutiny" — basically the highest standard a court will use to judge whether a law is constitutional.

"If a court finds that a law is content based, it's extremely difficult for the law to survive," Genevieve Lakier, a law professor at the University of Chicago, said. She filed a brief in the Austin case, arguing the city's ordinance should be upheld.

Even though Austin's billboard regulations might not sound like traditional content-based restrictions, the billboard companies argue the distinction between on-premises and off-premises signs *is* content based. You'd have to read a sign advertising a car dealership that's miles away, for example, in order to know that it's an off-premises sign.

The city, of course, disagrees.

"Longstanding First Amendment principles apply strict scrutiny to content-based laws to avoid governmental favoritism of certain messages or viewpoints," the city said in written arguments to the Supreme Court. "Austin's sign code does not do so."

The question for the court is whether having to read a billboard just to figure out if it's advertising something on the same property automatically makes the law a content-based regulation.

Beyond billboards

The legal test for whether a restriction is content based comes from a 2015 Supreme Court case, *Reed v. Town of Gilbert*. It revolved around an Arizona town's restrictions on posting certain kinds of signs, in this case a sign advertising a church service.

The court unanimously struck down Gilbert's law because it treated signs with different kinds of messages differently — and you would need to read the sign to determine how to treat it under the law.

Supporters of the billboard companies argue that while this may seem like an odd set of circumstances, it's important for the court to keep this "read the sign" test to ward off what could be illegitimate content-based restrictions on speech.

"It's an important constitutional test in other situations like political speech, where governments might pass a law that they might say isn't about the content of the speech, but is actually about the content of the speech," said Trevor Burrus, a fellow at the libertarian think tank the Cato Institute. Burrus also filed a brief in the case arguing Austin's on- and off-premises distinction should be considered content based and subject to strict scrutiny.

But just how expansive should the definition of "content based" be? Should it apply to what appear to be benign limits designed to serve a public interest that are only tangentially related to the content?

Lakier, the University of Chicago law professor, points to concerns raised by privacy advocates that such a broad definition of what makes a regulation content based could be applied to something like health privacy laws. For instance, she said, how would you know if a health care provider is disclosing protected health information unless you read the information? Does restricting speech based on the content of the health information also make it a content-based regulation?

"Privacy scholars have been yelling for years that this makes no sense and it threatens all of these really important privacy laws for no good reason," she said.

The on- and off-premises distinction is a common one in laws regulating signs and billboards across the country, so the outcome of this case could have consequences far beyond Austin.