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ZONING AND LAND USE PLANNING

Dispute Over Sign Ordinance Reaches US Supreme Court

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The U.S. Supreme Court does not take many land use-related cases. On June 28, however, it granted the petition for certiorari to the U.S. Court of Appeals for the Fifth Circuit in *City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029—a case of significant practical importance for towns and villages in New York and across the country.

The *Austin* case focuses specifically on the ability of local municipalities to regulate the digitization of on-premises and off-premises signs, a complicated subject that typically involves studies, administrative and executive time, public hearings, and associated attorney fees and other costs. Indeed, depending on the court's decision, even more general sign ordinances may need to be reconsidered and, perhaps, even amended.

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Background

The case arose in April 2017 when Reagan National Advertising of Austin, which is in the outdoor advertising business, submitted permit applications to Austin, Texas, to digitize its existing "off-premises" sign structures. The city denied the applications, stating that Reagan's applications could not be approved under the city's sign code "because they would change the existing technology used to convey off-premises commercial messages and increase the degree of nonconformity with current regulations relating to off-premises signs."

In June 2017, another company involved in the outdoor advertising business, Lamar Advantage Outdoor Company, submitted permit applications to Austin to digitize its existing off-premises sign structures. The city denied Lamar's applications for the same reasons it denied Reagan's.

The city's sign code defined an "off-premise[s] sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The code did not expressly define "on-premise[s] sign," but it used the term "on-premise[s] sign" in some of its provisions. The code allowed new on-premises signs to be built, but did not allow new off-premises signs to be built. It defined a "nonconforming sign" as "a sign that was lawfully installed at its current location but does not comply with the requirements of [the sign code.]" Pre-existing off-premises signs were deemed "nonconforming signs."

The sign code permitted persons to "continue or maintain nonconforming signs at [their] existing location," and even to change the face of a nonconforming sign, as long as the change did not "increase the degree of the existing nonconformity." However, it did not permit changes to "the method or technology used to convey a message" on a nonconforming sign. By contrast, it permitted "on-premise[s] signs" to be "electronically controlled changeable copy signs"—that is, "digital signs."

In other words, on-premises non-digital signs could be digitized, but off-premises non-digital signs could not be. The city's stated general purposes in adopting the sign code were to protect the aesthetic value of the city and to protect public safety.

Reagan and Lamar sued Austin, alleging that the sign code was unconstitutional. In particular, they asserted that the distinction between the digitalization of on-premises and off-premises signs was an unconstitutional content-based speech restriction, that the sign code was invalid and unenforceable, and that they should be allowed to digitize their signs without permits.

The district court ruled in favor of the city, and Reagan and Lamar appealed to the Fifth Circuit.

Fifth Circuit's Decision

The Fifth Circuit reversed.

In its decision, the circuit court explained that it had to determine whether the sign code's distinction between on-premises and off-premises signs was content-based, and whether the sign code was a regulation of commercial speech subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

With respect to the first issue, the Fifth Circuit pointed out that the majority opinion by Justice Thomas in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), stated that a law was content-based when it targeted speech "based on its communicative content." To determine that, a court had to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys"—and that analysis must be undertaken before turning to the law's justification or purpose.

The Fifth Circuit then declared that, to determine whether a sign is on-premises or off-premises, one had to read the sign and ask: Does it advertise "a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site"? Therefore, in the opinion of the Fifth Circuit, the sign code's limitation depended "on the content of the message" and it was not a simple time, place, or manner restriction based on the location of signs.

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Accordingly, the Fifth Circuit held that because an off-premises sign was determined by its "communicative content," the sign code's distinction between on-premises and off-premises signs was content-based.

The Fifth Circuit then addressed whether the city's sign code regulated only commercial speech. The circuit court pointed out that the sign code made no exceptions or carve outs to the applicability of the law based on whether the speech involved commercial or noncommercial messages.

The circuit court rejected the city's contention that because the sign code applied to billboards, which primarily shared commercial messages, and only intermittent noncommercial messages were affected, the ordinance should be evaluated in the realm of commercial speech. In the court's view, the sign code did not regulate noncommercial speech "only intermittently" but, rather, applied to any noncommercial message "off-premises" whether it was displayed for 10 minutes or 10 years.

Concluding that the sign code applied "with equal force to both commercial and noncommercial messages," the circuit court held that strict scrutiny applied. It then found that the sign code failed under strict scrutiny and, therefore, that it ran afoul of the First Amendment.

Other Circuit Decisions

Other circuit courts have addressed the same or similar issues in the years since the Supreme Court's decision in *Reed*.

For example, the U.S. Court of Appeals for the Sixth Circuit, in *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), considered an on-premises exception allowing a property owner to avoid the permitting process and proceed to post a sign without any permit, so long as the sign was "advertising activities conducted on the property on which [the sign was] located." The enabling regulation specified that the sign had to be "located on the same premises as the activity" and that it had to have as its purpose "the identification of the activity, products, or services offered on that same premises."

The Sixth Circuit explained that to determine whether the on-premises

exception applied, a government official had to read the message written on the sign and determine its meaning, function, or purpose. Consequently, the Sixth Circuit held that the challenged regulation contained a "non-severable regulation of speech based on the content of the message."

By contrast, the U.S. Court of Appeals for the District of Columbia Circuit interpreted *Reed* differently. In *Act Now to Stop War and End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia* , 846 F.3d 391 (D.C. Cir. 2017), the circuit court concluded that a distinction between event-related signs and those not related to an event was content-neutral because it was not a "regulation of speech" but a "regulation of the places where some speech may occur."

It reasoned that the District of Columbia regulation at issue in the case was not "content-based" even though government officials might have to look at what a poster said to determine if it was "event-related" or might read a date and place on a sign to determine that it related to a "demonstration, school auction, or church fundraiser." Such "cursory examination" did not render the statute content-based, the circuit court decided.

The U.S. Court of Appeals for the Third Circuit reached a similar result in *Adams Outdoor Advertising Limited Partnership v. Pennsylvania Department of Transportation*, 930 F.3d 199 (3d Cir. 2019), holding that *Reed* "did not establish a legal standard by which to evaluate laws that distinguish between on-premise and off-premise signs." Thereafter, the Third Circuit applied intermediate scrutiny to exemptions for on-premises signs.

At the Supreme Court

As of this writing, only a limited number of briefs have been filed with the Supreme Court, all relating to the city's certiorari petition. Yet the arguments already seem clear.

In the most simplest terms, the city and its supporters assert that the on-premises/off-premises distinction in Austin's sign code is location-based, not content-based; that *Reed* does not mandate strict scrutiny to review sign ordinances that distinguish between on-premises and off-premises signs; and that the Supreme Court's holding in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), that a municipality could permit on-premises commercial signs while prohibiting off-premises commercial signs, had not been overturned by *Reed*.

Local governments that prohibit off-premises signs, or regulate them differently from on-premises signs, should pay particular attention to this case as it moves to briefing and then argument before the Supreme Court because a decision affirming the Fifth Circuit's decision may invalidate portions of their sign ordinances.

In addition, the parties seeking to overturn the Fifth Circuit's ruling in *Austin* rely on Justice Samuel Alito's concurrence in *Reed*, joined by Justices Anthony Kennedy and Sonia Sotomayor, that specifically stated that the majority's opinion did not mean that "[r]ules distinguishing between on-premises and off-premises signs" would trigger strict scrutiny.

On the other hand, the proponents of having the Supreme Court affirm the Fifth Circuit decision assert that whether a sign violated Austin's sign code depended on what the sign said; that the Fifth Circuit's decision was consistent with the majority opinion in *Reed*; that Justice Alito's concurrence did not alter the majority's opinion; and that Austin had substantial reasons for enacting the ordinance as it did.

Local governments that prohibit off-premises signs, or regulate them differently from on-premises signs, should pay particular attention to this case as it moves to briefing and then argument before the Supreme Court because a decision affirming the Fifth Circuit's decision may invalidate portions of their sign ordinances. Owners of shopping centers and other businesses also will be interested in this case because an affirmance may make their existing signs a more valuable asset that can be leased to off-premises businesses. The decision, when it comes down next term, may affect all of them, one way or another.