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### ZONING AND LAND USE PLANNING

# ‘Sign’ Ruling Brings Relief to NY’s Towns and Villages

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On April 21, the U.S. Supreme Court issued its decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, No. 20-1029 (U.S. April 21, 2022), a case involving a First Amendment challenge to an Austin, Texas, ordinance that regulated on-premises and off-premises signs differently. The *Austin* case would have been significant even without considering the specific issues it raised because land use disputes rarely reach the court.

The substance of the litigation, however, has quite important practical implications for local governments in New York and, indeed, throughout the country. If the court had decided to uphold the underlying decision by the U.S. Court of Appeals for the Fifth Circuit, municipalities very likely would have been obligated to amend their ordinances

and local codes governing 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.

Moreover, if the court had affirmed the Fifth Circuit, towns and villages might have been forced to reconsider—and perhaps to update or amend—even their more general rules and regulations governing signs.

Fortunately, the court reversed the Fifth Circuit and, in the process, clarified the First Amendment’s application to sign ordinances. The court, in a decision by Justice Sonia Sotomayor, made clear what many land use attorneys have long recognized, namely that local governments need not provide the same regulatory scheme for on-premises and off-premises signs.

### Background

The case involved the sign code of the city of Austin, which distinguished between on-premises and off-premises signs, specifically regu-

lating the latter in a stated effort to “protect the aesthetic value of the city and to protect public safety.” The code defined an “off-premise sign” to mean “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 prohibited the construction of any new off-premises signs but allowed existing off-premises signs to remain as grandfathered “non-conforming signs.” An owner of a grandfathered off-premises sign could “continue or maintain [it] at its existing location” and could change the “face of the sign,” but could not “increase the degree of the existing nonconformity,” “change the method or technology used to convey a message,” or “increase the illumination of the sign.” The code prohibited the digitization of off-premises signs but, by contrast, permitted the digitization of on-premises signs.

An outdoor advertising company, Reagan National Advertising of

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Austin, LLC, sought permits from the city to digitize some of its off-premises billboards. The city denied the applications and Reagan filed suit, 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. A second outdoor advertising company, Lamar Advantage Outdoor Company, L. P., intervened as a plaintiff.

The U.S. District Court for the Western District of Texas entered judgment in favor of the city, holding that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The district court explained that "the on/off premises distinction [did] not impose greater restrictions for political messages, religious messages, or any other subject matter," and "d[id] not require a viewer to evaluate the topic, idea, or viewpoint on the sign." Instead, the district court ruled, the distinction required the viewer only "to determine whether the subject matter is located on the same property as the sign."

Therefore, the district court held, the distinction was a facially content neutral regulation reviewable under the standard of intermediate scrutiny applicable to content neutral regulations of speech. It found that the Austin code satisfied this standard.

The Fifth Circuit reversed. The circuit court decided that because Austin's on-premises/off-premises dis-

inction required a reader to inquire "who is the speaker and what is the speaker saying," the distinction was content based. It reasoned that the fact that a government official had to read a sign's message to determine the sign's purpose was enough to render the regulation content based and subject to strict scrutiny. As is well recognized, strict scrutiny is a difficult test to meet in the First Amendment context.

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### 'Reed v. Town of Gilbert'

Because *Reed* was so crucial to the district and circuit court decisions in *Austin* (and ultimately to the Supreme Court's ruling in the case), it is important to quickly review what was involved.

The dispute in *Reed* arose over a comprehensive sign code of the town of Gilbert, Arizona, that singled out specific subject matter for differential treatment. In particular, Gilbert's code applied distinct size, placement and time restrictions to 23 different categories of signs, including signs that displayed ideological, political or certain temporary directional messages.

Gilbert's code gave the most favorable treatment to ideological signs, defined (with certain exceptions) as those "communicating a message or ideas for noncommercial purposes." It offered less favorable treatment to political signs, defined as those "designed to influence the outcome of an election." Most restricted were temporary directional signs relating to a qualifying event, with qualifying events defined as gatherings "sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."

The Supreme Court decided in *Reed* that these restrictions were facially content based and it rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of viewpoint. The court reasoned that a speech regulation "targeted at specific subject matter" was content based even if it did not discriminate among viewpoints within that subject matter. For example, the court said, a law banning the use of sound trucks for political speech—and only for political speech—would be a content based regulation, even if it imposed no limits on the political viewpoints that could be expressed.

The court concluded that by treating ideological messages more favorably than political messages, and by treating both more favorably than temporary directional messages, Gilbert's sign code likewise singled out specific subject matter

for differential treatment, even if it did not target viewpoints within that subject matter.

The Fifth Circuit, in its decision in *Austin*, interpreted *Reed* to mean that if, to apply a regulation, a reader had to ask who was the speaker and what was the speaker saying, then the regulation was automatically content based.

The Supreme Court set forth a quite different view of *Reed* in its decision in *Austin*.

### The 'Austin' Decision

In its decision in *Austin*, the court explained that, under *Reed*, a regulation of speech was facially content based under the First Amendment if it targeted speech based on its “communicative content”—that is, if it applied to particular speech “because of the topic discussed or the idea or message expressed.”

The court then declared that the Fifth Circuit’s interpretation of *Reed*—that is, that a regulation could not be content neutral if it required reading the sign at issue—was “too extreme.”

The court acknowledged that enforcing Austin’s sign code provisions required reading a sign to determine whether it directed readers to the property on which it stood or to some other, offsite location. The court added, however that, unlike the sign code at issue in *Reed*, Austin’s provisions did “not single out any topic or subject matter for differential treatment.”

According to the court, a sign’s substantive message itself was “irrelevant” to the application of Austin’s provisions and there were no content-discriminatory classifications for political messages, ideological messages or directional messages concerning specific events, such as those sponsored by religious or non-profit organizations.

Austin’s provisions, the court found, distinguished based on location and were “agnostic as to content.” A given sign was treated differently based solely on whether it was located on the same premises as the topic being discussed or not. The message on the sign mattered only to the extent that it informed the sign’s relative location. Thus, the court ruled, the on-premises/off-premises distinction was similar to “ordinary time, place, or manner restrictions” and, absent a content-based purpose or justification, Austin’s distinction was content neutral and did not warrant the application of strict scrutiny.

(The court’s determination that Austin’s ordinance was facially content neutral did not completely resolve the dispute. It remanded the case, explaining that, for example, if there was evidence that an impermissible purpose or justification underpinned a facially content neutral restriction, that restriction might be content based. Moreover, it noted, to survive intermediate scrutiny, a restriction on speech or expression must be “narrowly tailored to serve

a significant governmental interest.” Those issues had not been fully examined below.)

### Conclusion

The court, as it itself recognized, reached the “commonsense” result that a location-based and content-agnostic on-premises/off-premises distinction did not, on its face, “singl[e] out specific subject matter for differential treatment” within the meaning of *Reed*. The significance of this result for local governments simply cannot be overstated.

Adopting the Fifth Circuit’s reading would have meant that tens of thousands of jurisdictions across the country that regulate signs that advertise products or services not located on the same premises as the sign, as well as signs and billboards that direct people to off-site locations, had presumptively violated the First Amendment, some for more than half a century. The court recognized that such a “bizarre result” was not required by the Constitution. Given the court’s decision, local government officials can breathe a sigh of relief.