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Supreme Court Clarifies Constitutional Analysis Regarding Municipal Commercial Sign Restrictions

The U.S. Supreme Court's recent decision in *City of Austin v. Regan National Advertising of Austin*, 596 U.S. ___ (2022), clarified the thorny issue of whether a municipal regulation is to be considered content based or content neutral in the context of regulation of commercial speech. The city of Austin, Texas' sign regulation, like many such regulations, distinguishes between on-premises signs and off-premises signs. Off-premises signs are those that have content that does not relate to the property on which the sign is located. These off-premises signs are typically classified as billboards. The complainant sought city approval to digitize some of its preexisting billboards, which the city refused to permit. The complainant filed suit and argued that the city's code regulated content in violation of the First Amendment, which required application of a strict scrutiny standard of review. The District Court held that the regulation was content neutral, applied an intermediate scrutiny standard and upheld the provision. The Court of Appeals reversed, finding the on-premises/off-premises dichotomy to be content driven. Thus, the regulation could not satisfy strict scrutiny and was therefore unconstitutional.

All the reviewing courts looked to the Supreme Court's prior decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) for guidance. In *Austin*, Justice Sotomayor, writing for the majority, held that a "regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed,'" citing *Reed*, 576 U.S. at 163. In distinguishing the Court's decision in *Reed*, where the Court applied strict scrutiny to invalidate the sign regulation at issue, Justice Sotomayor noted that "[u]nlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content." Hence, the Court reasoned, "absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny." The Austin regulation, unlike the provision in *Reed*, "[did] not single out any topic or subject matter for differential treatment." The distinguishing feature of Austin's code rested solely on location. Therefore, reasoned the Court, the holding of the Court's decision in *Reed* did not require the application of strict scrutiny,

Having determined that the intermediate scrutiny analysis applied, the Court noted that "If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction ... that restriction may be content based," and that in order "to survive intermediate scrutiny, a restriction on speech or expression must be 'narrowly tailored to serve a significant government interest.'" Apparently, the parties disputed whether or not Austin could satisfy those standards and therefore the matter was remanded for further adjudication.

The upshot of the *Austin* decision is that location-based distinctions in signage ordinances, without more (as noted above), are not *per se* content based under *Reed* and therefore are analyzed under the intermediate scrutiny test pursuant to *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). In so doing, the Court defined "content-based" restrictions by narrowly looking to the subject matter or viewpoint of the restriction, rather than by accepting the more all-encompassing position of the three dissenting justices, who argued that off-premises restrictions are content based because they discriminate against certain signage based on the messages they convey, "*e.g.,* whether they promote an on- or off-site event, activity or service." Utilizing the intermediate scrutiny standard, per the majority's opinion, is likely to permit municipalities to continue to apply different restrictions for on-premises signs as compared to off-premises signs.

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