



U.S. Supreme Court Gives Local Government Rare Win in Regulation of Billboards

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Background

The U.S. Supreme Court delivered a long-overdue victory for local governments and their authority to regulate certain signs. The dispute before the Court in *City of Austin, Texas v. Reagan National Advertising of Austin, LLC* centered on an advertising company's application for permits to convert existing static billboards to digital display billboards.

The Austin sign code, like that of thousands of political subdivisions across the country, distinguishes between on-premises signs (which advertise a connection to the site where the sign is located) and off-premises signs (which advertise anything without a connection to the property). The city's code permitted on-premises signs to change to digital but did not afford off-premises signs the same ability. The advertising company challenged the ordinance as a content-based restriction that was subject to strict scrutiny review under the Court's 2015 ruling in *Reed v. Town of Gilbert*. The city countered that the content itself was not reviewed, only the location of the sign and that review of the restriction should occur under a more forgiving standard.

Analysis

The advertising company sued the city, arguing that permitting the digitization of on-premises signs while barring the same for off-premises signs violated the First Amendment. The district court in Texas rejected the claim, but the U.S. Fifth Circuit Court of Appeals reversed that decision. It held that a city official would need to read the sign first to determine whether it advertised services available on-premises or off-premises, and so the restriction was content-based on its face.

In *Reed*, the Supreme Court held that differential regulation of noncommercial signs based on their content is subject to strict scrutiny review; the reasoning in the *Reed* decision has suggested that this strict scrutiny review would apply well beyond the facts of that case, including to on-premises or off-premises distinctions for commercial signs. To survive strict scrutiny review, requires the restriction must be narrowly tailored and in furtherance of a compelling government interest. Strict scrutiny is strict in theory but fatal in fact; nearly every government restriction reviewed under this standard fails.

Justice Sonia Sotomayor, writing for the majority in *Austin*, explained that the Fifth Circuit had taken “too extreme an interpretation of this Court’s precedent” in *Reed*. In the majority’s opinion, the regulatory scheme in *Reed* permitted the city to grant or deny sign permits based on the actual content of the message (e.g., permitting political campaign signs, but denying signs advertising church meetings). The Court continued that *Reed* does not stand for the position that a regulation cannot be content-neutral if it simply requires reading the sign at issue. The Court determined that although the city’s regulation requires a reading of the sign, it does so “in service of drawing neutral, location-based lines.”

Because the Court determined that the test for off-premises and on-premises signs is not content-based, the appropriate level of review for these restrictions is intermediate, not strict, scrutiny. Under intermediate scrutiny review, the government must show that the restriction is narrowly drawn to advance a significant government interest.

Conclusion

This case provides reprieve to political subdivisions around the country that not every provision of a sign code that remotely touches on content is subject to strict scrutiny and thus illegal. While the Court stressed that this case only settles the question of the proper test that applies to the challenge, government entities can take heart that thoughtfully drafted and enforced regulations distinguishing off-premises from on-premises signs may be upheld.

Again, the government must prove that the different treatment of on-premises and off-premises signs is narrowly drawn to advance a significant government interest. Political subdivisions should review their sign code to determine if it can meet this level of scrutiny, and consider revisions to strengthen the purposes and means by which these distinctions are made.

If you have questions, or would like more information, please contact [Scott Phillips](#), [Jennifer Readler](#), [Thad Boggs](#), [Jesse Shamp](#), or any other member of the [Government Services practice group](#).

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