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Regulating Off- And On-Premises Signs: Can It Be Done?

ATTORNEYS KENDALL O'CONNOR AND JACOB WITTE

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DISCLAIMER

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
- Please contact an attorney if you need assistance related to a specific legal issue.



MUNICIPAL AUTHORITY TO REGULATE SIGNS

- Municipalities have the broad power to regulate for the general safety, public welfare, and health of residents.
- Townships regulate signs to remove clutter, control aesthetics, and improve traffic safety.
- This power is not without limits. As a form of protected expression under the First Amendment, signs are entitled to special treatment under municipal regulation.



FIRST AMENDMENT AND “FREE SPEECH”



- The First Amendment generally prohibits the government from restricting expression because of its messages, ideas, subject matter, or content—it protects “free speech.”



Content-Based v. Content-Neutral

When a municipality enacts laws related to signs, it must be careful not to regulate signs based on their content. If a regulation is “content-based,” a reviewing court will apply a higher scrutiny, which is difficult to meet and often results in such regulations being impermissible. This higher level of scrutiny is called “strict scrutiny.”

Courts also apply a slightly more forgiving level of scrutiny, identified as “intermediate scrutiny,” for content-neutral regulations.

A content-neutral regulation is more likely to be upheld than a content-based regulation.



SIGNS: AN OPEN QUESTION

2015

Reed v Town of Gilbert



REED V GILBERT - BACKGROUND

- The Town of Gilbert prohibited “outdoor signs” generally, but exempted “political signs,” “temporary directional signs,” and “ideological signs” from the permit requirement.
- All of these types out outdoor signs were treated differently.
- After being cited for violating the code, a church sued the Town alleging a violation of their freedom of speech.
- The Supreme Court found that the code was content-based on its face.



Reed's Statutory Framework

Reed analyzed Temporary Directional Signs under a statutory framework that contained a general prohibition on outdoor signs and that created a list of exemptions thereto (such as Political Signs, Ideological Signs, and Temporary Directional Signs).

That statutory framework, on its face, was content-based because it “single[d] out specific subject matter for differential treatment, even if it d[id] not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals.”



REED V GILBERT - BACKGROUND

- The Supreme Court explained that content-based laws are those that “target speech based on its communicative content,” and held that those laws are presumptively invalid.
- The Court reasoned that the Town of Gilbert’s sign code was content-based on its face, as it defined categories of signs based on their messages and regulated them differently according to those messages.
- Because the regulations were content-based on their face, the Reed Court reviewed the regulations under strict scrutiny. The regulations were ultimately held invalid and unconstitutional under that standard of review.



REED – THE OUTCOME

“[A] speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed.”

This holding was interpreted to mean that a regulation is content-based if an individual must read the sign to understand how the regulation applies (e.g., to distinguish a political sign from an advertising sign).



Supreme Court Decision After *Reed*

CITY OF AUSTIN, TEXAS V REAGAN NATL ADVER OF AUSTIN, LLC



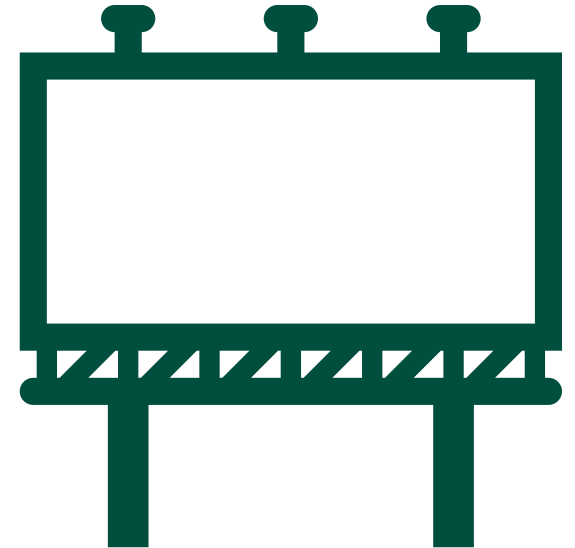
CITY OF AUSTIN

- Supreme Court evaluated whether local government could regulate “off-premises” advertising signs.



OFF-PREMISES SIGNS

- The term “off-premises sign” is used in many ordinances to refer to signs that reference or advertise a business that is not located on the same parcel as the sign, or a product or service that is not made or offered on the same premises as the sign.
- In the *City of Austin*, the City chose to regulate its off-premises signs by defining them 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.”





CITY OF AUSTIN BACKGROUND

- The City's sign code prohibited the construction of new off-premises signs but allowed grandfathered off-premises signs to remain as nonconforming signs that could not be altered in ways that would increase their nonconformity.
- The City's code had no similar restrictions for on-premises signs.

CITY OF AUSTIN BACKGROUND

- The question before the Supreme Court in *Reagan* was whether the City's distinction between off-premises signs and on-premises signs was content-based in light of its holding in *Reed*.
- It held that *Reed* cannot be interpreted to mean "that if a reader must ask: 'who is the speaker and what is the speaker saying' to apply a regulation, then the regulation is automatically content based." The *Reagan* Court considered this interpretation "too extreme."



City of Austin's Statutory Scheme

Unlike in *Reed*, off-premises signs and on-premises signs were not listed as exceptions to a prohibited category of signs (such as outdoor signs). The Court instead limited its review only to the City's definition of an off-premises sign, which did not contain subparts or exceptions that treated off-premises signs differently based on the content of the off-premises sign.

Under the City's statutory scheme, all off-premises signs, no matter the content, were treated the same. For example, the City would not deny a sign because it contained an advertisement for a car as opposed to a bag of chips.



Cont.

Under the City of Austin's statutory scheme, off-premises signs are treated differently based solely on whether it is located on the same premises as the thing being discussed or not.

The Court also relies on other past precedents and the "Nation's history of regulating off-premise signs" to support its holding.

The Court found that the City's off-premises sign regulations were content-neutral on their face. However, "if there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based."





KEY TAKEAWAYS

1. A regulation is not content-based simply because the sign must be read to know if a regulation applies. There is more needed to determine whether a regulation is content-based.
2. The scheme of a Zoning Ordinance could affect whether a certain regulation is or is not content-based.
3. Proof of historical regulation of categories of speech may bolster an argument that a regulation concerning that category is content-neutral.
4. *Reagan* may provide more support to municipalities that have their regulations challenged as content-based, but it is an open question as to how the Courts will apply *Reagan* moving forward.
5. Even if a regulation is not content-based, the regulation still must survive intermediate scrutiny by showing that the regulation is “narrowly tailored to serve a significant governmental interest.”



WHAT CAN YOU DO TODAY?

Even if you're a long way from revising your ordinances, there are still steps you can take today to avoid a constitutional challenge.

- An important starting point is identifying problematic provisions in your ordinance. What are some provisions that seem unconstitutional?
- After you identify these provisions, you should talk with your Zoning Administrator and consider whether the Township should enforce these regulations until they can be updated.
- Look for creative ways to regulate signs with your existing regulations without relying on content-based provisions.





Questions?

Attorney Kendall O'Connor

Attorney Jacob Witte

FAHEY SCHULTZ BURZYCH RHODES PLC

4151 Okemos Rd., Okemos, MI 48864

Tel: 517-381-0100

koconnor@fsbriaw.com

[jwtte@fsbriaw.com](mailto:jwitte@fsbriaw.com)

www.fsbriaw.com

