

TEXAS MUNICIPAL LAW Bulletin™

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NEW BILLBOARD CASE—REAGAN V. CITY OF AUSTIN

The 5th Circuit recently held in *Reagan National Advertising of Austin v. City of Austin*, (Aug. 2020) that the distinction between “on-premise” and “off-premise” signs is content based and therefore “presumptively unconstitutional” under *Reed v. Town of Gilbert*, and subject to strict scrutiny. A court applying strict scrutiny is likely to find the sign code violates the First Amendment.

In 2015, the U.S. Supreme Court in *Reed* held that sign regulations that vary based on the sign’s message are content based and must meet strict scrutiny. In *Reed*, the town distinguished between ideological, political, and temporary directional signs. The court held that such distinctions were content based and did not survive strict scrutiny. In response to *Reed*, many cities updated their sign codes to differ between on-premise and off-premise signs, distinguish between commercial and non-commercial signs, and ensure non-commercial messages (e.g. political or religious) were allowed, but regulated by the size and material of the sign.

Before *Reed*, courts could consider sign regulations content neutral and subject to lesser scrutiny, even if applied based on their messages, if justified for reasons other than restricting disfavored speech. Since *Reed*, facially content-based regulations are subject to strict scrutiny regardless of the government’s intent.

The Austin ordinance at issue in *Reagan* defined an “off-premise 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 city’s code allowed digitization of on-premise but

not off-premise signs. Before *Reagan*, numerous cities relied on Justice Alito’s concurrence in *Reed*, which listed distinctions between on-premise and off-premise signs as not being content based. However, the 5th Circuit disagreed. The court noted that to decide if a sign is on-premises or off-premises requires reading the sign’s message to determine its meaning, function, or purpose; thus, the regulation was content-based.



Austin’s justification for the sign code was to “protect the aesthetic value of the City and to protect public safety.” However, the court held those justifications do not satisfy strict scrutiny. The case is pending appeal to the U.S. Supreme Court.

In light of the 5th Circuit’s decision, cities should reevaluate distinctions that categorize signs based on their messages. Content neutral sign regulations include: (a) size; (b) lighting; (c) location (right-of-way, trees, poles); (d) types of signs (pole, monuments, digital); (e) duration; (f) number; (g) zoning distinctions; and (h) condition (dilapidated signs).

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