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SIGNS, SIGNS, EVERYWHERE A SIGN[1]:

U.S. SUPREME COURT TO RE-EXAMINE THE LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE BILLBOARDS AND OTHER ADVERTISEMENTS

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Perhaps you noticed the Supreme Court has granted *certiorari* in a Fifth Circuit case, Reagan National Advertising v. City of Austin, 972 F.3d 696 (5th Cir. 2020), cert. granted sub nom. City of Austin v. Reagan National Advertising of Austin, et al., No. 20-1029, 2021 WL 2637836 (June 28, 2021). Or perhaps not. After all, the case has received very little attention among practitioners, and even less in the media, despite the weighty First Amendment issues involved.

At bottom, Reagan National – which is slated to be heard by the Supreme Court on November 10, 2021 – will decide what level of scrutiny is applied to government actions that regulate speech based upon content, but not viewpoint, when it is also clear that the regulations are not actually intended to suppress the message for what *it* says. In a previous decision, Reed v. Town of Gilbert, 576 U.S. 155 (2015), the Court applied what some have characterized as an absolutist rule, observing that "defining regulated speech by a particular subject matter" would trigger strict scrutiny, even though the precise message is of no consequence to the government. Id. But it is not clear if the Supreme Court's decision in Reed was meant to be taken quite that literally, as evidenced by a slew of concurring opinions that limited, cabined, and even questioned this statement of the rule. The Fifth Circuit in Reagan National applied Reed mechanistically, finding that if a regulation looks to the content of speech at all, it cannot escape strict scrutiny. The fact that the Supreme Court has now granted *certiorari* in Reagan National certainly suggests that the Court intends to tell us if this result is truly required by its precedent.

So why does the anticipated resolution of this admittedly abstract principle of First Amendment law merit the attention of defense lawyers across the State of Alabama? It turns out it matters a great deal to those of us who regularly advise local governments, as well as those who represent regulated entities such as advertising companies, and others who use signs to carry out their business – including real estate agents, political campaigns, churches, and the like.

How a city is permitted to regulate signs within its jurisdiction largely flows from restrictions imposed by the First Amendment – and the law in this area is quickly evolving in light of recent and forthcoming Supreme Court decisions.

Picture this: You are advising a small but growing city in Alabama. The city's mayor wants to manage the growth but maintain its "small town charm," and is concerned about the increasing number of billboards. At the same time, he wants to make sure local businesses can still have their own "on premise" signs on their own property. He asks you whether the city can treat billboards differently than "on premise" signs, since they rarely advertise local businesses anyway, and clutter up the roadways.

Or say you represent one of the several sign and media companies doing business in Alabama. Your client would like to reach a new market through the use of billboards in the same growing city, yet the zoning ordinance prohibits signs advertising products or services that occur *off the premises* where the sign is located. As your client's signs would promote products and services available throughout the state, it won't be possible without the use of these banned off-premises signs. Your client asks if there is any way around the city's zoning ordinance restricting such signs.

These two scenarios represent a conundrum facing many municipalities throughout America. While these cities want to open their doors to businesses that want to operate in their limits, they also have an interest in keeping their community functioning, safe, and attractive for visitors and residents alike. How a city is permitted to regulate signs within its jurisdiction largely flows from restrictions imposed by the First Amendment – and the law in this area is quickly evolving in light of recent and forthcoming Supreme Court decisions.

Where We've Been: *Reed v. Town of Gilbert*

To determine whether a law passes First Amendment muster, the Supreme Court applies one of two levels of review. If a law restricts the "content" of speech, then strict scrutiny is applied, under which the government must overcome the presumption of unconstitutionality and show the law is "necessary to serve a compelling governmental interest." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Laws that are subject to strict scrutiny are highly unlikely to be found constitutional. See Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) ("it is the rare case in which we have held that a law survives strict scrutiny."). On the other hand, if the law is content-neutral, then the Court applies intermediate scrutiny, under which laws are upheld if they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

For several years, the Eleventh Circuit's approach to evaluating sign ordinances involved examining the government's reasons for regulating the signage in the first place – if those reasons had nothing to do with content, then the law was content-neutral. Granite State Outdoor Advert., Inc. v. City of St. Petersburg, Fla., 348 F.3d 1278, 1281 (11th Cir. 2003); see also Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir.

1992). As a result, where a municipal ordinance limiting or prohibiting off-premises signs (signs directing the reader to a business *off* the premises) was enacted for reasons of aesthetics, safety, and uniformity, for example, such law was deemed content-neutral. See id. Importantly, such limitations or bans on off-premises signs were also constitutionally permissible because they typically involved regulating off-site advertising or businesses, and thus implicated only commercial speech. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981) (upholding the City of San Diego's ban on offsite billboards containing commercial speech); Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1343-44 (11th Cir. 2004); Southlake Prop. Assocs., Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1115-16 (11th Cir. 1997).

Cities and sign companies alike are left with lingering questions regarding their ability to challenge – and to defend – the constitutionality of what were once considered entirely reasonable sign regulations.

However, in Reed v. Town of Gilbert, Ariz., 576 U.S. 155 (2015), the Supreme Court denounced this practice of upholding sign regulations that, although they were perhaps enacted for the well-meaning and non-discriminatory reasons of aesthetics or safety, were content based on their face. In Reed, the Town of Gilbert, Arizona limited "Temporary Directional Signs," or signs that directed individuals to a qualifying event, to 6 square feet in area. Id. at 160-61. Such signs could be displayed from 12 hours before the event until 1 hour afterwards. Id. at 161. By contrast, "Ideological Signs" were to be no greater than 20 square feet in area and could be placed in all zoning districts without time limits. Id. at 159-60. Further, "Political Signs" could be 16 square feet on residentially zoned property and up to 32 square feet on nonresidential use property, undeveloped property, and Town rights-of-way. Id. at 160. Political Signs also had to be removed no later than 15 days following the election. Id.

After receiving citations for the failure to remove Temporary Directional Signs timely, plaintiffs/petitioners Pastor Clyde Reed and Good News Community Church sued the Town for violating their First Amendment rights. 576 U.S. at 161-62. The petitioners argued to the Supreme Court that the Town's Sign Code was content based, and thus subject to strict scrutiny, because enforcement officials had to read a sign and determine what it said to decide what limitations applied. Pet'rs Br., 2014 WL 4631957 at 38-43. In response, the Town reasoned that since the Sign Code provisions did not favor or censor viewpoints or ideas, the intermediate level of scrutiny should apply. Resp't Br., 2014 WL 6466937 at 27-41. The Town also rejected the petitioners' "absolutist" approach, warning the Court that "if a simplistic if-you-have-to-read-it-it-is-content-based test were adopted, virtually all distinctions in sign laws would be subject to strict scrutiny, thereby eviscerating sign regulations that have been repeatedly upheld under the First Amendment as serving important governmental interests such as safety and aesthetics." Id. at 35.

The Supreme Court, in an opinion written by Justice Thomas, ultimately adopted the formulaic approach advocated by the petitioners. The Court held that the Town's Sign Code was content based on its face since its restrictions that would "apply to any given sign thus depend entirely on the communicative content of the sign." Reed, 576 U.S. at 164. Because the Church's signs inviting the public to attend services were "treated differently from signs conveying other types of ideas," the Town's Sign Code was a content-based regulation of speech and subjected to strict scrutiny. Id. The majority opinion found it irrelevant that the Sign Code did not discriminate among various viewpoints on a topic since the regulation was aimed at, and distinguished between, entire topics altogether. Id. at 169, 171. Therefore, "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 171. And as the Town had no valid governmental interest – much less the requisite *compelling* interest – behind its distinctions, the Sign Code failed strict scrutiny. Id. at 172.

A number of justices authoring concurring opinions took heed of the Town's warning and saw the inherent problems with the majority's rigid approach to determining whether a law is content based. Helpfully, Justice Alito, joined by Justices Kennedy and Sotomayor, provided a list of "rules" regarding signs that would not be content based – among them are "[r]ules distinguishing between on-premises and off-premises signs." Reed, 576 U.S. at 175 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring). Three additional justices wrote separately to object to any "automatic 'strict scrutiny' trigger" of the type that could result from deeming a law content based. Reed, 576 U.S. at 176 (Breyer, J., concurring); see also id. at 181 (Kagan, Breyer, and Ginsburg, JJ., concurring in the judgment). Justice Kagan specifically recognized the "unenviable bind" that cities

across the nation would face if ordinances that are facially content based are automatically subject to strict scrutiny. Id. at 180. Her concluding remarks actually presaged the granting of *certiorari* in Reagan National, the case that the Supreme Court will take up this fall:

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." Ante, at 2231. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result.

Reed, 576 U.S. at 185 (Kagan, J., concurring in the judgment).

Reaction to *Reed*

To some extent, Justice Kagan was exactly right about what might happen following Reed. The Reed majority opinion's broad language deeming a law content based due to "the topic discussed or the idea or message expressed," particularly compared with Justice Alito's samples of possibly content-neutral rules in his concurrence, left district courts and the courts of appeals grappling with Reed's application to commercial speech, particularly by way of traditional billboards, and to ordinances distinguishing between on-premises and off-premises signs. Not surprisingly, the courts examining these issues in light of Reed came to vastly different conclusions. Advocates for a hardline reading of Reed contended that, to determine whether a sign regulation applied, one must read the sign and determine its content and the message expressed therein. This reading requirement renders the law content-based since the application of the law necessarily turns on the sign's content. See, e.g., Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020), cert. granted sub nom. Austin, TX v. Reagan Nat. Advert., No. 20-1029, 2021 WL 2637836 (U.S. June 28, 2021) ("To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an 'obvious content-based inquiry,' and it 'does not evade strict scrutiny' simply because a location is involved."); Thomas v. Bright, 937 F.3d 721, 730 (6th Cir. 2019), cert. denied, 141 S. Ct. 194, 207 L. Ed. 2d 1119 (2020) ("Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose. The Supreme Court has made plain that a purpose component in a scheme such as this is content-based[.]").

In the other camp, governmental entities argued against such a simplistic application of Reed's holding, claiming that neither Reed, nor any other Supreme Court precedent, has held that a mere "cursory examination" of a sign simply to determine what regulation applies to it does not equate to a content-based restriction. See, e.g., Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C., 846 F.3d 391, 404 (D.C. Cir. 2017) ("So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based."). Further, the inclusion of on-premise signs in Justice Alito's list of content-neutral regulations in his concurrence meant Reed did not apply to sign laws distinguishing between on-premise and off-premise signs that implicated commercial speech. See Adams Outdoor Advert. Ltd. P'ship by Adams Outdoor GP, LLC v. Pennsylvania Dep't of Transportation, 930 F.3d 199, 207 n.1 (3d Cir. 2019) (noting Reed "did not establish a legal standard by which to evaluate laws that distinguish between on-premise and off-premise signs"); Contest Promotions, LLC v. City & Cty. of San Francisco, 704 F. App'x 665, 667 (9th Cir. 2017) (finding Reed did not apply to commercial speech regulations). Unhelpfully, the Eleventh Circuit did not have the occasion on weigh in on the issue in the context of the constitutionality of sign regulations.

Amid the backdrop of this circuit split are the players involved. Notably, the litigants in Reed were sympathetic plaintiffs – a pastor and his church that were cited for violating the Town's sign code. Yet far and away, the majority of plaintiffs who bring these kinds of First Amendment sign claims are multimillion dollar sign and media companies seeking to place more billboards throughout cities large and small. Prior to Reed, attorneys for sign companies already engaged in scores of litigation challenging any barrier a city placed in their path that prevented them from putting up more billboards. One judge in the Southern District of Florida aptly described this "ever-increasing trend" of sign litigation as one in which "advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being." Nat'l Advert. Co. v. City of Miami, 287 F. Supp. 2d 1349, 1356-57 (S.D. Fla. 2003), rev'd, 402 F.3d 1329 (11th Cir. 2005). Such companies now saw Reed as another tool to attack dated and vulnerable municipal sign ordinances, many of which had not been evaluated in decades.

Where We're Going: *City of Austin v. Reagan National Advertising*

Six years following Reed, the Supreme Court can finally clear up some of the confusion caused by the far-reaching effects of that decision. On June 28, 2021, the Supreme Court granted the City of Austin's petition for a writ of *certiorari* in Reagan National Advertising of Austin, Inc. v. City of Austin, 972 F.3d 696 (5th Cir. 2020), cert. granted sub nom. City of Austin v. Reagan National Advertising of Austin, et al., No. 20-1029, 2021 WL 2637836 (June 28, 2021). In City of Austin, the Supreme Court will specifically confront the question of whether the City of Austin's sign code, which distinguishes between on-premise and off-premise signs, is a content-based regulation subject to strict scrutiny under Reed. Previously, the Fifth Circuit decided it was required to "take Reed at its word"

and held that Austin's distinction between on-premises and off-premises signs was content-based since it required government officials to read a sign to determine whether it was "off-premises." 972 F.3d at 706-07. Austin's petition for *certiorari* pointed out that this literal interpretation was an over-extension of Reed's meaning and led to a complete (and perhaps unnecessary) overhaul of municipal sign codes across the country. Pet'r Br. at 16-17.

It's difficult to say if the Supreme Court will fully embrace the opportunity to provide this much-needed clarity on the effects of Reed. Likely the Court did not intend to back itself into a corner with the draconian effects on city sign regulation the language in that decision posed, particularly given the foresight of Justices Alito, Breyer, and Kagan with their concurrences in Reed that pointed out the potential problems of a hard and fast rule automatically applying strict scrutiny to facially content-based sign regulations. The Court may try to swing the pendulum back to a more classic content-based restriction as opposed to the if-you-have-to-read-it-it's-content based rule that some courts have derived from Reed.

One option could be looking at the purpose of the sign or sign regulation at issue, dovetailing from Reed's language against treating signs differently based *entirely* on subject matter. See 576 U.S. at 164 ("The restrictions in the Sign Code that apply to any given sign thus depend *entirely* on the communicative content of the sign.") (emphasis added). Previously the Supreme Court has rejected the idea that the government's justification for differing treatment of signs alone could avoid strict scrutiny. Currently, that stringent level of review applies if a law is facially content based (regardless of the righteous motives of the government), *or* if the government's purpose, motive, or justification discriminate on the basis of content. See Reed, 576 U.S. at 165-66 ("'[A] content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.'") (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994)). But as Justice Breyer suggested in Reed, that "content discrimination" may be present should lead only to a "rule of thumb" of strict scrutiny review, not the automatic trigger and "certain legal condemnation" that follows if a law may be deemed content based. Reed, 576 U.S. at 176 (Breyer, J., concurring). Indeed, the sensitivity of First Amendment review of whether a law is content based requires a healthy "dose of common sense" and less rigidity so as not to automatically apply strict scrutiny and eradicate entire sign codes that have no intention of skewing the public's debate of ideas or discriminating on the basis of content. Id. at 183 (Kagan, J., concurring). Along with this consideration of purpose is the inherent connection between an on-premise/off-premise sign distinction and the regulation of land use generally by municipalities. The Town of Gilbert pointed out the Court's prior recognition of the unique relationship between zoning and the First Amendment in the respondent's brief in Reed:

As Justice Kennedy has observed, "zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use." City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (emphasis added). As he continued, "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. *For this reason, we apply intermediate rather than strict scrutiny.*" Id. (emphasis added).

Resp't Br., 2014 WL 6466937 at 21-22 (emphasis in original). This precedent could allow the Court to consider the overarching zoning or land use purpose behind a sign regulation even if such regulation is effectively content based. Consequently, a city could allow on-premise signs showcasing a business operating on the premises, which would necessarily result in limited signage in a particular area, while at the same time prohibiting off-premises signs, which could overtake and unduly clutter a neighborhood.

Conclusion

Although oral argument in City of Austin is quickly approaching in November 2021, the corresponding opinion will likely not be delivered until sometime in 2022. Until then, cities and sign companies alike are left with lingering questions regarding their ability to challenge – and to defend – the constitutionality of what were once considered entirely reasonable sign regulations.

Endnotes

[1] Five Man Electrical Band, *Signs* (Lionel Records 1970).

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