

Supreme Court Holds That Regulation Applying Different Rules To Off-Premises Advertisements Is Content Neutral

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[Click for PDF](#) Decided April 21, 2022 *City of Austin, Texas v. Reagan National Advertising of Austin, Inc.*, No. 20-1029 Today, the Supreme Court held that a regulation treating on-premises signs—those that contain advertisements for the place where the signs are located—differently from off-premises signs is content neutral and therefore not subject to strict scrutiny under the First Amendment. **Background:** The Sign Code of Austin, Texas permits the new construction only of signs and billboards that advertise for the place where they are located, which are known as on-premises signs. The Code similarly permits only on-premises signs to be equipped with electronic controls that, for example, allow billboards to cycle through digital advertisements. Advertisers wishing to convert off-premises billboards to digitally changeable displays sued, claiming that the Code discriminates based on the content of their speech in violation of the First Amendment. The Fifth Circuit agreed, holding that because the on-premises/off-premises distinction could be applied only by a person who reads and interprets the sign’s message, the regulation was content-based and subject to strict scrutiny. Finding no compelling government justification, the Fifth Circuit found the Code’s distinction unconstitutional. **Issue:** Whether the Sign Code’s distinction between on- and off-premises signs is a content-neutral regulation of speech. **Court’s Holding:** The Sign Code’s distinction between on- and off-premises advertisements is facially content-neutral and subject to intermediate scrutiny under the First Amendment. The Court remanded the case to the Fifth Circuit to apply that test, rather than strict scrutiny.

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“[H]old[ing] that a regulation cannot be content neutral if it requires reading the sign at issue[] is too extreme an interpretation of this Court’s precedent.”

Justice Sotomayor, writing for the Court **What It Means:**

- The Court’s decision clarifies that its 2015 case, *Reed v. Town of Gilbert*, does not hold that restrictions are content-based every time they require an official to read a sign to determine whether it complies with a regulation. According to the Court, *Reed* involved “a very different regulatory scheme” that placed stricter limitations on some types of signs compared to others—for instance, by placing more restrictions on advertisements for religious services than on political messages. In this case, by contrast, the “sign’s substantive message is irrelevant to the application of” the on-premises/off-premises distinction.
- The Court noted that regulations like Austin’s Sign Code are common, including in provisions of the federal Highway Beautification Act. It expressed reluctance to question these rules where authorities claim they are necessary to combat distracted driving and reduce blight, and where an “unbroken tradition of on-/off-premises distinctions counsels against” invalidating the rule.
- The decision subjects regulations like Austin’s to intermediate scrutiny, which requires the government to show that the rule does not excessively restrict speech and serves an important government interest. The Court reserved judgment on

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whether the Code would satisfy that test.

- In a dissenting opinion joined by Justices Gorsuch and Barrett, Justice Thomas wrote that the Court had departed from *Reed's* "clear and neutral rule" that regulation of signs is content-based whenever enforcing the rule requires determining whether a sign conveys a particular message. He predicted that the departure from *Reed's* "bright-line rule" will lead to future confusion.

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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