City of Austin, Texas v. Reagan National Advertising of Austin, LLC, et al.

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142 S. CT. 1464 (2022)

In *City of Austin, Texas v. Reagan National Advertising of Austin, LLC., et al.,* the Supreme Court affirmed the power of local municipalities to regulate highway billboards.[1] The decision also provided an illustration of the First Amendment distinction between content-neutral and content-based regulations articulated in *Reed v. Town of Gilbert*.[2]

I. BACKGROUND

Reagan National Advertising of Austin ("Reagan") and Lamar Advantage Outdoor Company ("Lamar") owned and operated multiple billboards that displayed various commercial advertisements and non-commercial messages around the city of Austin, Texas.[3] Like many other municipalities around the country, the City of Austin ("City") regulates the placement and display of billboards and signs.[4] To regulate safety and local aesthetics, the City drew a distinction between off-premises signs, or signs that direct the reader to a separate location than that of the sign (such as a roadside billboard advertising a local restaurant) and on-premises signs, or

1. City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1472 (2022).
2. Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).
3. *See City of Austin*, 142 S. Ct. at 1468-69.
4. *See id.* at 1469-70. In the Highway Beautification Act of 1965, Congress delegated to the States the power to regulate off-premises signs, such as billboards that promote ideas, products, or services located elsewhere than the location of the sign. *See* 23 U.S.C. § 131(a)-(f).

signs that direct the reader to the same location (such as a sign on the face of a restaurant that advertises that same restaurant).[5]

In 2017, the City of Austin passed a law that "prohibited the construction of any new off-premises signs" but grandfathered in those off-premises signs that existed at the time so long as the off-premises signs were not altered in a way to increase their conspicuity, such as by digitization.[6] This case was initiated when the City of Austin denied Reagan's permit application to digitize its off-premises signs.[7]

Reagan sued the City in state court for violating his First Amendment right to free speech, and Lamar intervened, both seeking declaratory judgements finding the off-premises versus on-premises distinction unconstitutional.[8] The trial court summarily dismissed Lamar and Reagans' request, but the Fifth Circuit reversed the lower court's decision, reasoning that the off/on-premises distinction required a state agent to inquire as to "who is the speaker and what is the speaker saying."[9] Therefore, the court reasoned, the content-based regulation should be invalidated because it could not survive strict scrutiny.[10] The City of Austin petitioned for certiorari, which the Supreme Court granted.[11]

II. ANALYSIS

This case turned on determining the level of scrutiny to apply in analyzing the City's distinction between off-premises and on-premises signs.[12] In doing so, the Supreme Court was required to determine whether the regulation prohibiting the digitization of off-premises signs was content-neutral, requiring intermediate scrutiny, or content-based, which would require strict scrutiny.[13]

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5. *See City of Austin*, 142 S. Ct. at 1468-69. While not directly at issue for respondents, there was a third type of sign implicated by this law: a subset of signs displayed on commercial premises that direct the reader to another separate premises. *See id.* at 1480-81 (Alito, J., dissenting in part and concurring in part). For example, the off-premises distinction might apply to a small sign in a coffee shop window that directs customers to "Visit the local park for free ice-cream." *See id*. Justice Thomas, joined by Justices Gorsuch and Barrett in his dissenting opinion, opined on the notion that the regulation would reach signs whose location information is also protected speech, such as a sign on a coffee shop that reads "Come to City Hall to Vote No on Prop. X." *See id.* at 1484 (Thomas, J., dissenting) ("[S]uppose the sign says, 'Go to Confession.' After examining the sign's message, an official would need to inquire whether a priest ever hears confessions at that location. If one does, the sign could convey a permissible 'on-premises' message. If not, the sign conveys an impermissible off-premises message.").

6. *See id.* at 1469-70 (majority opinion).

7. *See id.* at 1470.

8. *City of Austin*, 142 S. Ct. at 1470.

9. *Id.* (quoting Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 705 (5th Cir. 2020)).

10. *See id*. at 1471.

11. *See id.* at 1471.

12. *See id.* ("[A]bsent a content-based purpose or justification, the City's distinction is content-neutral and does not warrant the application of strict scrutiny.").

13. *See id.* at 1470-72.

Respondents' main substantive arguments were focused on the Court's 2015 decision in *Reed v. Town of Gilbert*.[14] Reagan argued that *Reed* stood for the proposition that regulations focused on the "function or purpose"[15] of a sign were content-based regulations and presumptively invalid.[16] Thus, they argued, regulations based on the purpose of a sign (here, whether the sign's purpose is to direct the reader to a local, or satellite, location) contravene the First Amendment's Free Speech Clause.[17]

The Majority disagreed, holding that the sign code regulation was content-neutral and would receive intermediate scrutiny.[18] The Court reasoned that, unlike the sign code provision at issue in *Reed*, the City of Austin's regulation did not single out any topic or subject matter for differential treatment.[19] Rather, the location-based distinction was more similar to a permissible time-place-manner restriction than an impermissible subject-matter restriction such as the one in *Reed*.[20] In addition, the Court noted that the vast majority of the signs in this case were commercial solicitations that have been consistently and successfully regulated more stringently than other, more protected forms of speech.[21]

In doing so, the Court abrogated the Fifth Circuit's purported rule, that a regulation is content-based if it requires the reader to evaluate the content of the message,[22] as overbroad.[23] Instead, the Court reasoned, not every regulation that hinges on the content of the speech is presumptively content-based: "[T]he City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content."[24]

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14. *See City of Austin*, 142 S. Ct. at 1470-72; Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that an ordinance restricting the size, number, duration, and location of temporary directional signs violated the Free Speech Clause of the First Amendment because the facially content-based regulation awarded improper selective status to certain content, earning strict scrutiny and holding that a facially content-based regulation cannot be saved by a neutral justification).

15. *City of Austin*, 142 S. Ct. at 1474 (quoting *Reed*, 576 U.S. at 163 ("[S]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*.") (emphasis added)).

16. *See id.* at 1475.

17. *See id.* at 1474.

18. *See id.* at 1475-76.

19. *See id.* at 1473.

20. *See id.* ("The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation.").

21. *City of Austin*, 142 S. Ct. at 1474-75 ("Most relevant here, the First Amendment allows for regulations of solicitation . . . to identify whether speech entails solicitation, one must read or hear it first.").

22. *See* Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 706 (5th Cir. 2020), *rev'd*, 142 S. Ct. 1464 (2022).

23. *See City of Austin*, 142 S. Ct. at 1471 ("[The Court of Appeals'] rule, which holds 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.").

24. *Id.*

In a dissenting opinion penned by Justice Thomas joined by Justices Gorsuch and Barrett, Thomas focused primarily on a secondary genus of sign affected by the regulation: those located not on vacant roadsides, but those located on residential or business premises that direct customers to a different location.[25] Justice Thomas argued that the Majority created a new, unwieldy rule that misinterpreted the *Reed* holding and invented a distinction between 'subject matter' content (protected) and 'location-based' (unprotected) content.[26] Like in *Hill v. Colorado*,[27] Thomas argued, the Majority ignored the true, pointed, and "undeniably content-based"[28] effect of the regulation.[29]

Justice Alito concurred in part and dissented in part, writing that the *Reed* precedent required his concurrence because "[t]he distinction between a digitized and non-digitized sign is not based on content, topic, or subject-matter."[30] Justice Alito dissented to argue that the Majority's rule was too broad in that it left open the door for facially content-neutral laws that have unequal effects, using an example of two signs in a coffee shop window.[31] One sign that advertises a new coffee drink would be permissible, while another that reads "Attend City Council meeting to speak up about Z" would be impermissible—this clearly content-based distinction would be lawful under the Majority's interpretation.[32]

Justice Breyer wrote a concurring opinion in which he agreed with the Majority that the City's sign code provision was a content-neutral regulation under the *Reed* precedent but opined that *Reed* too strictly tied facially content-based regulations with strict scrutiny, when in reality many laws turn necessarily on the content of speech.[33] Instead, he argued, the First Amendment was written to protect the marketplace of ideas—when there is no "idea" at issue, there should be no presumption of unconstitutionality.[34]

III. CONCLUSION

The Supreme Court once again wrestled with the notion of content-based regulations in the shadow of the Free Speech Clause of the First Amendment. While the Majority relied on Reed to justify its application of intermediate scrutiny to uphold the City's location-based regulation, multiple dissenting and concurring Justices questioned the applicability of Reed's

25. *See id.* at 1483 (Thomas, J., dissenting) (stating that defining off-premises signs as signs "'advertising' . . . or . . . 'direct[ing] persons to any location not on that site' . . . sweeps in a large swath of signs, from 14- by 48-foot billboards to 24- by 18-inch yard signs." (quoting AUSTIN, TEX., CITY CODE § 25-10-3(11) (2016)).

26. *See id.* at 1485-86.

27. Hill v. Colorado, 530 U.S. 703 (2000).

28. *City of Austin*, 142 S. Ct. at 1491 (Thomas, J., dissenting) (quoting *Hill*, 530 U.S. at 742-43 (Scalia, J., dissenting)).

29. *See id.* at 1484-92.

30. *Id.* at 1480 (Alito, J., concurring in part and dissenting in part).

31. *See id*. at 1480-81 (Alito, J., concurring in part and dissenting in part).

32. *See id.* at 1480-81.

33. *See id.* at 1477-78 (Breyer, J., concurring).

34. *See City of Austin*, 142 S. Ct. at 1479.

content-based versus content-neutral distinction as applied to circumstances where the effect of the regulation is felt unequally.