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Supreme Court Provides Guidance On When Speech Regulations Are Content-Based And Level Of Scrutiny Applicable In Commercial Speech Cases

On April 22, 2022, the United States Supreme Court decided *City of Austin, Texas* v. *Reagan Nat'l Advert. of Austin, LLC*, 2022 WL 1177494 (U.S. Apr. 22, 2022), in which the Court held that a city regulation allowing digital signs for businesses operating on the premises where the sign was placed, but banning digital signs for off-premises activities, was not unconstitutional under the First Amendment. In so holding, the Court ruled that the law at issue was not content-based and clarified that a law is content-based only if the law discriminates based on the "topic discussed or the idea or message expressed." This holding is significant for two reasons. First, the opinion provides important clarification, following *Reed* v. *Town of Gilbert, Ariz.*[1] and *NIFLA* v. *Becerra*,[2] on when regulations will be considered content-based. Second, the opinion offers additional guidance on the level of scrutiny applicable to content-based restrictions on commercial speech.

I. Factual and Procedural Background

The City of Austin ("City") passed an ordinance allowing digital signs for businesses operating on the premises where the sign was placed, but banning signs describing off-premises activities. The City's stated rationale for the ordinance was to protect the aesthetic value of the City and promote public safety.

On May 25, 2017, the City of Austin denied the applications of two businesses to replace non-digital signs advertising off-premises activities with digital signs. One business, Reagan National Advertising of Austin, LLC ("Reagan"), sued the City of Austin in Texas state court, and the City removed the action to the U.S. District Court for the Western District of Texas. The other business whose application was denied, Lamar Advantage Outdoor Company ("Lamar"), intervened.

Reagan and Lamar alleged that the ordinance's distinction between on- and off-premises signs was a content-based restriction of speech that triggered strict scrutiny and was presumptively unconstitutional under the First Amendment, both facially and as applied to Reagan and Lamar.[3] Following a bench trial, on March 27, 2019, District Court Judge Robert Pitman entered judgment in favor of the City of Austin after finding the ordinance content neutral and thus subject to intermediate scrutiny. The court reasoned that the ordinance "d[id] not require a viewer to

[1] 576 U.S. 155 (2015).

[2] 138 S. Ct. 2361 (2018).

[3] *Reagan Nat'l Advert. of Austin, Inc.* v. *City of Austin*, 377 F. Supp. 3d 670, 673 (W.D. Tex. 2019).

evaluate the topic, idea, or viewpoint on the sign" and instead required only that the viewer "determine whether the subject matter is located on the same property as the sign."[4] The court held that the ordinance satisfied intermediate scrutiny because the regulation "directly advanced" the City of Austin's "substantial justification" for the law (traffic safety and protecting the City's aesthetic value), "reach[ing] no further than necessary," and the regulated speech concerned lawful activity and was not misleading.[5]

Reagan and Lamar appealed to the U.S. Court of Appeals for the Fifth Circuit, which, on August 25, 2020, reversed the lower court's ruling. Citing the Supreme Court's decision in *Reed*, the Fifth Circuit held that the ordinance was facially content-based because the ordinance's distinction between "on-premises" and "off-premises" activities required an inquiry into "who is the speaker and what is the speaker saying," both "hallmarks of a content-based inquiry."[6] The Fifth Circuit stated that its interpretation of *Reed* was "broad" but "not . . . unforeseen," since Justice Breyer, in dissent, predicted that *Reed* would lead to "the application of strict scrutiny to all sorts of justifiable governmental regulations."[7] Indeed, the Fifth Circuit's holding seemed to be a natural progression of *Reed*, which applied strict scrutiny to a sign regulation that prohibited the display of certain signs but had exceptions for "political signs," "ideological signs," and "temporary directional signs," and *NIFLA*, which reaffirmed *Reed* and applied strict scrutiny to a law compelling certain speech about abortion. Since the court held that the City of Austin ordinance was content-based, it applied strict scrutiny and ruled that the ordinance was unconstitutional on its face because it was not narrowly tailored to serve City of Austin's interests in traffic safety and protecting the City's aesthetic value.[8]

II. The Supreme Court's Decision

On April 21, 2022, in a 6-3 decision authored by Justice Sotomayor, the Supreme Court reversed. The Court began by reaffirming *Reed*'s central holding that a regulation of speech is "facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'"[9] The Court held that the Fifth Circuit's interpretation of *Reed*—that a regulation is content-based if a reader must ask "who is the speaker and what is the speaker saying"—was "too extreme an interpretation of this Court's precedent."[10]

The Court held that the ordinance was content neutral because, unlike the law in *Reed*, which "single[d] out specific subject matter for differential treatment," Austin's "off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines" and "is agnostic as to content."[11] The Court thus rejected the "view that *any* examination of speech or expression inherently triggers heightened First Amendment concern,"[12] and instead held that regulations are content-based when they "discriminate based on 'the topic discussed or the idea or message expressed.'"[13]

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[4] *Id.* at 681.

[5] *Id.* at 682.

[6] *Reagan Nat'l Advert. of Austin, Inc.* v. *City of Austin*, 972 F.3d 696, 706 (5th Cir. 2020).

[7] *Id.* at 707 (quoting *Reed*, 576 U.S. at 178 (Breyer, J., Concurring)).

[8] *Id.* at 710.

[9] *City of Austin*, 2022 WL 1177494, at *4 (quoting *Reed*, 576 U.S. at 163).

[10] *Id.*

[11] *Id.* at *4-5.

[12] *Id.* at *7.

[13] *Id.* (quoting *Reed*, 576 U.S. at 171).

In response to the argument that the ordinance impermissibly defined off-premises signs based on their "function or purpose"[14] (which the Court in *Reed* stated was a "subtle" form of content regulation), the Court held that Reagan and Lamar had "stretche[d] *Reed*'s 'function or purpose' language too far."[15] The Court ruled that the "function or purpose" test applies only to regulations that "swap[] an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result," for example a regulation that defines "political signs" as signs "designed to influence the outcome of an election."[16]

The Court also discussed the level of First Amendment scrutiny applicable to commercial speech regulations. In 1980, the Supreme Court decided *Central Hudson* v. *Public Service Commission of New York*, which held that commercial speech is subject to intermediate scrutiny, meaning that speech "concern[ing] lawful activity" that is not misleading is protected, unless the government shows that its restriction on speech serves "a substantial interest," the restriction "directly advance[s] the state interest involved," and the restriction is not "more extensive than necessary to serve that interest."[17]

Since then, many First Amendment scholars and Supreme Court Justices have argued that the Court should abandon the *Central Hudson* test and instead apply strict scrutiny to regulations of commercial speech.[18] This viewpoint seemed to gain traction beginning in 2011, when the Court issued *Sorrell* v. *IMS Health Inc.*,[19] which applied "heightened judicial scrutiny" to a Vermont law restricting pharmacies and pharmaceutical manufacturers from disclosing pharmacy records revealing doctors' prescribing practices, and in 2015, when the Court issued *Reed*, which held that a sign regulation permitting only certain categories of signs was subject to strict scrutiny, and again in 2018, when the Court issued *NIFLA*, which held that a content-based restriction of compelled speech about abortion was subject to strict scrutiny.

But this broad reading of *Reed* and *NIFLA* was rejected in *City of Austin*. Specifically, the Court stated that not every "examination of speech or expression inherently triggers heightened First Amendment concern" and suggested that regulations on commercial speech—even those targeting specific content—trigger intermediate, not strict, scrutiny. The Court, citing its 1981 decision *Metromedia, Inc.* v. *San Diego*,[20] which involved an on-/off-premises-distinguishing commercial advertising ordinance, explained that in *Metromedia* it "did not need to decide whether the off-premises prohibition was content-based, as it regulated only commercial speech and so was subject

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[14] *Id.* (quoting Brief for Respondent Reagan at 20).

[15] *Id.*

[16] *Id.*

[17] 447 U.S. 557, 564, 566 (1980).

[18] *See, e.g.*, Lora E. Barnhart Driscoll, Citizens United v. Central Hudson: *A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical Advertisements*, 19 GEO. MASON L. REV. 213 (2011); Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626 (1997); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 434-36 (1993) (Blackmun, J., concurring); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring). Justices Kennedy and Scalia also expressed "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech," *id.* at 571-72 (Kennedy, J., concurring), however they did not join Justice Thomas's nearly-categorical advocacy of strict scrutiny. Moreover, in *44 Liquormart, Inc.* v. *Rhode Island*, Justice Stevens, writing for the majority and joined by Justices Kennedy and Ginsburg, advocated strict scrutiny for commercial speech regulations that "prohibit[] the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." 517 U.S. 484, 501 (1996).

[19] 564 U.S. 552 (2011).

[20] 453 U.S. 490 (1981).

to intermediate scrutiny in any event." Justice Thomas also seemed to adopt this view in his dissent in *City of Austin*, arguing that "restrictions on commercial speech are subject to intermediate scrutiny in any event."[21]

III. Implications

The Court's decision is notable because it provides further guidance on when a regulation is content-based. Whereas before *City of Austin*, ambiguity existed because courts seemingly were directed to apply strict scrutiny whenever a reader had to ask "who is the speaker and what is the speaker saying" to apply a regulation, now courts may apply strict scrutiny more sparingly, namely to regulations that apply "to particular speech because of the topic discussed or the idea or message expressed."[22] In addition, although the Court did not definitively resolve the question of whether content-based restrictions on commercial speech always trigger intermediate scrutiny, at least six sitting Justices appear to currently endorse this view.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Associate) at 212.701.3445 or jmacgregor@cahill.com; or Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; or email publications@cahil.com.

[21] *City of Austin*, 2022 WL 1177494, at *19 (Thomas, J., dissenting) (internal quotation markets omitted).

[22] *Id.* at *4.