Committee on Right of Way, Utilities and Outdoor Advertising Control 2019 Annual Meeting

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Chattanooga, Tennessee

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Regulation of Commercial Signs

The billboard law went into effect in January of 1977. Advertising on all commercial billboards by 1984. On 12/23 the U.S. Circuit Court of Appeals ruled that the law, as written, was unconstitutional. These signs shown here are along U.S. Route One.
Regulation of Commercial Signs

- Texas was required to change the regulatory scheme
- Focus is on regulation of Commercial Signs
- Texas still conforms to their Federal-State agreement
- Effective control of signs still provided
- Federal-State agreement exempts “on-premise”
- In Texas statute definition for Commercial Sign is:

Texas Transportation Code §391.001 (1-a)

- (A) intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located;
Regulation of Commercial Signs
Regulated?
Regulated?
Since Texas regulations changed in March 2018 we have had 74 unpermitted, commercial signs removed.

Blank sign, no content, should it be required to be removed?

CFR § 750.711 addresses “Structures which have never had displayed advertising material”

If Texas has proof that at some time in the life of a sign structure having had a permit, it is deemed commercial

Yes the removal of a former commercial sign is required
Effective Control
Effective Control
Freedom of Speech

1st Amendment Speech Signs are not regulated

CFR§ 750.703 (i) Sign, Display or device: hereinafter referred to as “sign,” means an outdoor advertising sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the Interstate or Primary Systems, whether the same be permanent or portable installation.
Regulated?
Regulated?

Steve Page
Brutally Murdered his Wife in 1991
Vidor P.D. Does Not Want to Solve This Case
I Believe They Took A Bribe
The Attorney General Should Investigate
James Fulton - Her Father
Commercial Billboard

Liberals
Please continue on I-40
until you have left our GREAT STATE OF TEXAS
Regulated?
Advantages

- We all agree that the state regulators need to provide effective control of signs.
- We need to comply minimally with the federal requirements.
- A tremendous amount of time and money is spent by some states controlling signs that implicate the First Amendment.
- Inspectors do not have to be concerned with the message to determine applicable laws/regulations.
- This can be done with the commercial sign concept.
Conclusion

"YEA, THOUGH I WALK THROUGH THE VALLEY OF THE SHADOW OF DEATH..."
Standards of Review

- **Strict scrutiny** requires the *government* to prove that:
  
  There is a *compelling state interest* behind the challenged policy, and
  The law or regulation is *narrowly tailored* to achieve its result.

- **Intermediate scrutiny**, it must:
  
  Serve an *important government objective*, and
  Be *substantially related* to achieving the objective.

- **Rational Basis**, the person *challenging the law* (not the government) must prove either:
  
  The government has *no legitimate interest* in the law or policy; or
  There is *no reasonable, rational link* between that interest and the challenged law.
“[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech…Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.”
“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”
Background: Commercial property owner brought action against city, challenging city’s ordinance limiting size of signs on First Amendment grounds and alleging selective enforcement in violation of equal protection.

Holdings: Ordinance was content-based speech restriction, and thus was subject to strict scrutiny;

Ordinance was not narrowly tailored to serve compelling government interest, and thus ordinance violated First Amendment right to free speech;
• Norfolk Redevelopment and Housing Authority (NRHA) initiated condemnation proceedings against Central Radio and several other landowners, allegedly intending to take and transfer the various properties to Old Dominion University (ODU).

• Central Radio’s managers placed a 375–square–foot banner on the side of Central Radio’s building facing Hampton Boulevard, a major, six-lane state highway. The plaintiffs intended that the banner “be visible for several blocks along Hampton Boulevard” and “make a statement about Central Radio’s fight with the NRHA,” which would constitute “a shout” rather than “a whisper.”
50 YEARS ON THIS STREET
78 YEARS IN NORFOLK
100 WORKERS
THREATENED BY
EMINENT DOMAIN!
• The City of Norfolk adopted a zoning ordinance that included a chapter governing the placement and display of signs.

• The sign code exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems. In addition, it exempted “works of art” that “in no way identified or specifically relate[d] to a product or service,” but it applied to art that referenced a product or service.

• It was enacted to promote the City’s “physical appearance” and to “reduce the distractions, obstructions and hazards to pedestrian and auto traffic.”
• In light of Reed, the 4th Circuit determined that the code on its face was content based; that is “the topic discussed or the idea or message expressed.”

• Interests in aesthetics and traffic safety may be “substantial government goals;” however, the court noted that neither it nor the Supreme Court have ever held that they constitute “compelling government interests.”

• For example, the flag of a private or secular organization was “no greater an eyesore” than the flag of a government or religion.
“Additionally, the sign code allowed the unlimited proliferation of governmental and religious flags, as well as works of art that met the City’s dubious criterion, while sharply restricting the number and size of flags and art bearing other messages.”

“The City also has not shown that limiting the size and number of private and secular flags, as well as works of art that referenced products or services, was necessary to eliminate threats to traffic safety. For example, there is no evidence in the record that secular flags were any more distracting than religious ones.”

Given these facts the court held that City failed strict scrutiny.
• **Background:** Landowner and sign company, that had entered agreement to construct and display noncommercial signs challenging political ideology espoused by county officials, filed § 1983 action against county, claiming that county’s zoning ordinance regulating billboards and advertising signs violated First Amendment right to free speech and Equal Protection.

• **Holding:** Provision exempting signs displayed by public officials violated equal protection.
• Alameda County's Zoning Ordinance divided its unincorporated territory into twenty-five different types of districts, within which allowed only certain buildings, structures, or land uses were permitted. Plaintiffs argued that Reed represents a change in the law by establishing that “speaker-based discrimination offends the constitution.”

• “The question then is whether the challenged speaker-based distinctions—(i) allowing “official public signs” but not noncommercial signs by private individuals, and (ii) allowing grandfathered billboard companies to display billboards, but not newcomers—reflect a content preference.”

• “While it is not necessarily unreasonable to believe that a sign alerting passersby to drought conditions has more value than Plaintiffs’ current, almost-indecipherable political messages, and eventual commercial messages, that belief is still very much a content judgment.”
“Distinctions favoring official signs might not always be innocuous, and it is readily apparent that the County’s preference for official public signs reflects a preference for that content…Accordingly, the Court agrees that the ordinance is content-based.”

“Setting aside the question of a compelling government interest, the public sign preference here fails because “[a]llowing the government to build any signs without any restrictions,” while including a variety of different restrictions for different permitted signs, is the antithesis of narrow tailoring.”

Accordingly, the Court holds that the ordinance is content-based and does not withstand strict scrutiny.
**Background:** These appeals concern the constitutionality of five city ordinances that regulated mobile billboards. One of the ordinances limited the type of sign that may be affixed to motor vehicles parked or left standing on public streets; the other ordinances prohibited non-motorized, “mobile billboard advertising displays” within city limits that the city justified because such signs were found to blight city streets, endanger residents, and reduce available on-street parking.

**Holding:** Ordinances were content neutral and passed intermediate scrutiny.
• The 9th Circuit considered first whether the regulations are content neutral or content based. A regulation is content based if, “on its face,” it “draws distinctions based on the message a speaker conveys.” Reed
• The motorized billboard ordinance regulates the way in which “advertising signs” may be affixed to motor vehicles on city streets. The non-motorized billboard ordinances likewise apply to “mobile billboard advertising displays” which includes as part of California Vehicle Code the definition that the vehicle be “for the primary purpose of advertising.” Neither the California Vehicle Code nor the mobile billboard ordinances define “advertising.”

• The Appellants insist that the ordinances are content based because they distinguish between billboards that “advertise” and all other signs, such as those that do not advertise.

• Appellants’ argument, in essence, is that the only signs that “advertise” are those that propose a commercial transaction.
“Unlike *Reed*, the mobile billboard ordinances do not single out a specific subject matter for differential treatment, nor is any kind of mobile billboard exempted from regulation based on its content. There has been no suggestion that the ordinances apply differently to Lone Star Security’s political endorsements than to its commercial promotional campaigns, for example.”

“An officer seeking to enforce the non-motorized billboard ordinances must decide only whether an offending vehicle constitutes a prohibited “advertising display” because its primary purpose is to display messages, as opposed to transporting passengers or carrying car.”

“An enforcing officer would simply need to distinguish between signs that are permanent or non-permanent, and larger or smaller than the vehicles to which the signs are affixed to determine whether the vehicle violates the ordinance.”

- **Background:** Resident of Ohio city challenged ordinance limiting the size of signs that residents could place on their lawns based on the sign’s content.

- **Holdings:** Post-Reed, the 6th Circuit overturned its prior decision and held that if the content of a sign determines how it is regulated, it will face strict scrutiny.

- **FYI:** Under FRAP 32.1(a), attorneys practicing in any court may freely cite to a federal judicial opinion or other written disposition that has been designated by the issuing court as “unpublished,” “not for publication,” “non-precedential,” “not precedent” or the like if the opinion was issued on or after January 1, 2007.
Under the ordinance, only one “for-sale, sold, for-rent, leasing, open house, religious, holiday or personal sign” not exceeding six square feet was permitted on a given lot in single-family residential districts. However, it also extended this six-square-foot limit to political signs and went even further by providing that the limitation applies to all political signs throughout Garfield Heights, including those in commercial and industrial districts.

By contrast, “religious,” “holiday,” “personal,” and other non-political temporary signs in commercial and industrial districts could generally be as large as twelve square feet in sign area without a permit, and up to thirty-two square feet with a permit.
The 6th Circuit stated that its former “embrace of a context-dependent inquiry into the content neutrality of Section 1140.362 was inconsistent with Reed. In particular, its holding that the fact that a regulatory scheme requires a municipality to “examine the content of a sign to determine which ordinance to apply ‘should merely be seen as indicative, not determinative, of whether a government has regulated for reasons related to content’ ” runs afoul of Reed’s central teaching.”
The 6th Circuit noted that “Reed held that ‘[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.’ Thus, whether the regulation involves ‘defining regulated speech by particular subject matter ... [or] by its function or purpose’ is ultimately irrelevant. ‘Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.’”

“The Garfield Heights regulation in this case applies explicitly and exclusively to political signs. Thus it ‘applies to particular speech because of the topic discussed,’ and Reed commands that it be subject to strict scrutiny.”
Because Section 1140.362 is not narrowly tailored to further the city’s interest in promoting aesthetic appeal and traffic safety, it fails strict scrutiny and is unconstitutional."

• **Background:** Commercial billboard company brought action in state court against city, challenging city sign code’s differing treatment of on-premises and off-premises signs as content discrimination in violation of the First Amendment after city denied its application for a permit because it proposed to use light-emitting diode (LED) displays which were not allowed for off-premises signs, but were acceptable for on-premises signs.

• **Holding:** Since the company was not entitled to standing to challenge application of sign code to noncommercial speech (it had not shown that it had any noncommercial speech signs), the regulation passed intermediate scrutiny.
After the City denied Reagan’s permit applications, Reagan filed this action in court arguing that the sign code’s differing treatment of on-premises and off-premises signs constituted content discrimination and that this content-based distinction cannot survive constitutional scrutiny, it bans the use of LED displays only in off-premises signs.

The City argued regulation of commercial billboard speech is subject to intermediate scrutiny under the Supreme Court’s decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
Reagan contended, however, that the Supreme Court’s more recent decision in Reed overruled both Metromedia and Central Hudson and requires strict scrutiny.

The federal district court held that Reed does not require the application of strict scrutiny to content-based regulations of commercial speech. To the contrary, a majority of the justices involved in Reed indicated that Reed did not affect the application of Central Hudson to content-based regulations of commercial speech.
Reagan protested that even if Reed does not require the application of strict scrutiny to commercial speech, strict scrutiny should still apply here because the sign code’s distinction between on-premises and off-premises signs might also be applied to noncommercial speech.

The court held that this argument failed because Reagan had not shown it possessed standing to challenge the constitutionality of the sign code as applied to noncommercial speech.
Regulating “Commercial signs”

Tex. Transp. Code Ann. § 391.001

(1-a) “Commercial sign” means a sign that is:

(A) intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or

(B) located on property owned or leased for the primary purpose of displaying a sign.
Naming Rights & Venue Branding
On premise signs must:

❖ Be located on the property/premise; AND
❖ Advertise only activities conducted on premise; or
❖ Services offered and sold on the property the sign is located

23 CFR § 750.709
It’s the Law
What can go on an on-premise sign?

❖ Name of establishment

❖ List of the **principle business** or accessory products available for sale and **actually sold** at the business on that site
  ❖ Principle or accessory products = available and offered for purchase on the property where the sign is located

❖ Identification of the services offered and sold on the property the sign is located
On Premise Sign or Off Premise Billboard?
On Premise Sign or Off Premise Billboard?
THE PEOPLE'S COURT
It’s On Premise!

- Name on the signs is not the primary benefit of the Agreement
- Signs may go on (or within 50 feet of) any building principle to the business
- All rules of on premise advertising apply
Got Questions?
On premise signs must:

- Be located on the property/premise; AND
- Advertise only activities conducted on premise; or
- Services offered and sold on the property the sign is located.
What can go on an on-premise sign?

- Name of establishment
- List of the **principle business** or accessory products available for sale and **actually sold** at the business on that site
  - Principle or accessory products = available and offered for purchase on the property where the sign is located
- Identification of the services offered and sold on the property the sign is located
On Premise Sign or Off Premise Billboard?
On Premise Sign or Off Premise Billboard?
THE
PEOPLE'S
COURT
It’s On Premise!

- Name on the signs is not the primary benefit of the Agreement
- Signs may go on (or within 50 feet of) any building principle to the business
- All rules of on premise advertising apply
Got Questions?