Update on the Aftermath of *Reed vs. Town of Gilbert*

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Introduction – The issue

Is the distinction between on- and off-premise signs a facially unconstitutional content-based regulation?

- On-premise
- Off-premise

Introduction – The backstory

- Austin prohibited new off-premise signs beginning in 1983.
  - Existing off-premise signs are non-conforming signs.
  - May not increase the degree of nonconformity, change the method of technology used to convey a message, or increase the sign's illumination.

- Austin's amendments since 1983.
  - Allowed to relocate some non-conforming signs. (2008)
  - *Reed*-focused amendments that did not impact the City's off-premise sign/non-conforming sign requirements. (Aug. 2017)

Introduction – The litigation
Reagan National Advertising v. City of Austin

- RNA wants to digitize some of its off-premise signs.
- RNA alleged that the distinction between on- and off-premise signs is an unconstitutional content-based restriction of speech (facially and as applied).
- RNA sought a declaration that City's regulations are unconstitutional, and RNA may convert its off-premise signs to digital.

Introduction – The status of the litigation

- City won at the trial court: 377 F.Supp.3d 670 (W.D. Tex. 2019).
- Reagan won at the appellate court: 972 F.3d 696 (5th Cir. 2020).
- City's petition for certiorari is pending: No. 20-1029.

The law before *Reagan*

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

- Commercial speech and noncommercial speech can be treated differently.
- Applies *Central Hudson* (intermediate scrutiny) test to CoSD's billboard regulations.
- Traffic safety and aesthetics are substantial government interests.
- The government can value one kind of commercial speech over another.

The law before *Reagan*

- *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).
  - Government must establish a "reasonable fit" between its legitimate interests and its regulation.
  - The regulation must achieve more than a marginal impact on the government's interest.

- *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).
  - Concerned noncommercial speech.
  - Only reference to off-premise is Justice Alito's concurrence

The law before *Reagan*

Act Now to Stop War and End Racism Coalition v. District of Columbia, 846 F.3d 391 (D.D.C. 2017).

- D.C.'s Sign Rules:
  - A sign may be posted for 60 days when not related to a specific event.
  - A sign may not be posted for more than 30 days after the event if related to a specific event.
- Regulations that treat event-related signs differently are lawful provided the regulations are time, place, or manner restrictions that are narrowly tailored to serve a significant government interest.
- Intermediate scrutiny.

- ***** Justice Alito's concurrence rejects the position that the distinction between event-related and other signs is itself content-based. *****

The law during the *Reagan* litigation.

Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019).

- Sign was located on a vacant lot and TN said sign would not qualify as "on-premise" so a permit was required. (Note: An as-applied challenge.)
- The on-premise exception to the permit requirement was unconstitutional restriction on free speech.
  - To determine whether the exception applies, TN must read the sign and determine its meaning, function, or purpose.
  - If regulation was based on location, then TN discriminates against speakers.
- Aesthetics is not a compelling government interest.
- TN law: content-based, failed strict scrutiny, and not severable.

- ****** Applied law to non-commercial speech so the Court does not consider commercial-speech doctrine but also discusses Justice Alito's concurrence. *****

The law during the Reagan litigation.

Adams Outdoor Advertising Limited Partnership v. City of Madison, 2020 WL 1689705 (W.D. Wisc. 2020).

- Madison prohibits new billboards and digital displays; and makes existing billboards "non-conforming" signs.
- *Reed* leaves the general framework for evaluating restrictions on commercial speech intact.
- Madison's sign regulations distinguished between signs based on whether the sign contained commercial content and whether they direct attention on- or off-premises.
  - Applies *Central Hudson*, considers *Metromedia*, and finds the prohibition on new billboards constitutional.
  - Applies intermediate scrutiny because digital display limitation is a time, place, and manner restriction and finds the limitation lawful.

- ***** Distinguished this case from *Thomas v. Bright*. *****

The law during the *Reagan* litigation.

L.D. Management Co. v. Thomas, 456 F.Supp.3d 873 (W.D. Ky. 2020).

- Billboard on the side of tractor trailer that directs a driver to "exit now" to visit the store.
  - Unlawful because not securely affixed to the ground, on a mobile structure, and lacks a permit.
  - Would be lawful if the billboard was on-premise.
- Court found that the regulations are content based and strict scrutiny applies.
  - The legality of sign depends on what the sign says
  - For government interests, Court focused on the interests vis-à-vis the actual sign at issue.
  - Raised concerns about selective enforcement.
- Court ruled it was not constitutional and not severable.

- ***** Relied on *Thomas v. Bright*. *****

The Fifth Circuit's Decision In *Reagan*: Reversed the Trial Court

- Held that the City's on-premise/off-premise distinction is content-based under *Reed v. Town of Gilbert*.
- Reasoned that if one must read the sign to determine whether the sign is "off-premises" then it is a content-based inquiry and subject to strict scrutiny.
- Held that since on-premise/off-premise distinction applied to both commercial and noncommercial messages, strict scrutiny applies.
- Ruled that traffic safety and aesthetics are not compelling interests.
- ***** Relied on *Thomas v. Bright* and rejected DC case. *****

The law post-*Reagan*

International Outdoor, Inc. v. City of Troy, 974 F.3d 690 (6th Cir. 2020).

- Regulation applies to both commercial and non-commercial speech.
- Applies *Reed*.
- Finds that the regulations require the government to consider the content of the message to determine the applicable regulations.
- ***** Relies on *Thomas v. Bright*. *****

The law post-*Reagan*

GEFT Outdoor, L.L.C. v. City of Westfield, 2020 WL 5814875 (S.D. Ind. 2020).

- Sign regulation required permits and prohibited off-premise signs; and included exceptions.
  - Requires the City to read the sign to determine if the sign is lawful and whether exception applies.
  - Content-based restriction that fails strict scrutiny.
- Sign regulation prohibits pole signs.
  - Content-neutral regulation.
  - But not narrowly tailored.

- ***** Relies on *Thomas v. Bright* and *Reagan National v. City of Austin*; distinguishes *City of Madison*. *****

The law post-*Reagan*

Baker v. City of Ft. Worth, 2020 WL 7225993 (N.D. Tex. 2020).

- Required City Council's permission to place any sign in the right-of-way of a public street or any public property except for City-installed signs and political signs.
- Regulation is content-based and constitutes prior restraint.
  - City allows for temporary placement without City Council approval if contains certain content.
  - Regulation requires the government to ask: who is the speaker and what is the speaker saying?
  - Approval requirement allows for unbridled discretion and lacks procedural safeguards.
- Fails strict scrutiny because interests are not compelling, the regulation fails to advance the government's interest in a direct and material way, and the regulation is not narrowly tailored.

- ***** Relied on *Thomas v. Bright* and *Reagan National v. City of Austin* *****

What now?

- The City of Austin filed a petition for writ of certiorari in January.
  - Reasons for granting the writ:
    - Fifth Circuit stretched *Reed* beyond its limits.
    - *Reed* did not overturn *Metromedia's* validation of on-premise/off-premise distinctions.
  - Amicus support: IMLA, Scenic America
  - Court asked Reagan Nat'l to respond.

- Consider your options
  - Defend if sued.
  - Redraft.

If you are sued….

- Is standing an issue?
  - See *Adams Outdoor Advertising Limited Partnership v. City of Madison*, 2020 WL 1689705 (W.D. Wisc. 2020).
  - See *Fanning v. City of Shavano Park*, 429 F.Supp.3d 320 (W.D. Tex. 2019).

- Is severability an option?
  - See *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019).
  - See *GEFT Outdoor, L.L.C. v. City of Westfield*, 2020 WL 5814875 (S.D. Ind. 2020)
  - See *Int'l Outdoor, Inc. v City of Troy*, 974 F.3d 690 (6th Cir. 2020).

If you are sued….

- Is qualified immunity an option?
  - *Knutson v. City of Oklahoma City*, 402 F.Supp.3d 1266 (W.D. Oklahoma 2019).

- Is the case moot?
  - See *Adams Outdoor Advertising Limited Partnership v. City of Madison*, 2020 WL 1689705 (W.D. Wisc. 2020).
  - See *Reagan National Advertising v. City of Austin*, 377 F.Supp.3d 670 (W.D. Tex. 2019).
  - See *Prime-Site Media, LLC v. City of Oak Park*, 2020 WL 2556782 (S.D. Mich. 2020).

If you re-draft….general considerations

- Timing of new regulations
- Justifications
- Existing signs
- Political considerations
- Stakeholder input

If you re-draft….case-specific considerations.

Fanning v. City of Shavano Park, 429 F.Supp.3d 320 (W.D. Tex. 2019).

- Plaintiff installed a banner sign outside of the allowable timeframe (standing) and placed several “bandit signs” (no standing).
- A content-neutral speech regulation may be subject to strict scrutiny when:
  - adopted because of an impermissible legislative motive; or
  - justified with a government interest that is related to suppression.
- Temporal limitation was not facially content based but can only be justified by reference to content so subject to strict scrutiny.

- *****Finds aesthetics is a compelling interest (pre-*Reagan Nat’l* decision)*****

If you re-draft….case-specific considerations.

Signs for Jesus v. Town of Pembroke, 977 F.3d 93 (1st Cir. 2020).

- Town bans electronic signs with few exceptions
- Court upholds the district limitation as an acceptable location-based restriction on speech.
- Church alleges regulation expresses a preference for government speakers.
  - Content-neutral regulations are considered content-based and subject to strict scrutiny when the regulation favors one kind of speaker over other speakers and plaintiff shows the different treatment reflects a content preference.
  - Court examines why the Town allows government speakers to use electronic billboards throughout the Town.
    - Justified because of state law limits the Town's authority.
    - Found that exception for government speakers was not speaker-based or content-based.

The regulatory options if *Metromedia* is no longer good law.

- Permanent signs vs. temporary signs.
- Zoning-related tools.
- Size limitations.
- Technology limits.

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Questions?