Out of Home Advertising Association of America

OAAA Legal Report

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Billboard First Amendment Law and Intermediate Scrutiny

(This OAAA Legal Report provides a discussion of the* Adams v. City of Madison *and* Reagan/Lamar v. City of Austin *decisions issued this year.)

The Supreme Court's decision issued in April of 2022 in *City of Austin v. Reagan,* and two following decisions issued by the United States Courts of Appeals for the Seventh and Fifth Circuits within the last several months, form the new trilogy of outdoor advertising law. This will shape the legal context within which the industry will be operating for the foreseeable future.

The Supreme Court's Decision in *City of Austin v. Reagan*

The Supreme Court's decision in *City of Austin v. Reagan* can be boiled down to a relatively simple principle: sign regulations that impose disparate restrictions on off-premises signs and on-premises signs are facially content-neutral under the First Amendment and thus not subject to review under the strict scrutiny standard. To arrive at that result, a majority of six Justices of all philosophical stripes determined that the typical type of regulations – from the HBA, to state outdoor control acts, to local sign codes – that are drawn based on whether they disseminate on-premises or off-premises messages, are location based, and do not directly impair protected speech…at least on the face of the regulation itself. According to the Court, treating off-premises signs less favorably than other signs draws a regulatory line based on location, not communicative content.

The result was an opinion that validated the Austin sign code on its face. That might seem to be a defeat for the companies challenging Austin's sign code. But in the yin and yang that marks outdoor advertising law, the majority opinion, in fact, delivered very good news in the sense that in the same stroke, it was a validation of the fundamental structure of the HBA and the fabric of state laws that implement the federal act.

The Supreme Court's decision did not entirely bring the constitutional curtain down in *City of Austin*. Rather, the majority opinion left the litigants with the potential for a second bite at the constitutional apple. Free speech as embodied in the First Amendment is the most sacrosanct constitutional right. Therefore, over the years, the

Supreme Court has erected a second backup test to ensure that a seemingly valid regulation when viewed not just theoretically on its face, but in actual practice, does not operate as a subterfuge that restrains those rights in actual operation. To achieve that, a law that does not touch speech on its face, but that seems to carry some potential speech implications, like one that draws a distinction between on-premises and off-premises speech such as the Austin sign code, remains subject to a less onerous level of judicial review under "intermediate scrutiny" to determine whether, in actual operation, the regulation is not just a blind, undirected shotgun blast that undercuts speech without serving any legitimate purpose, but rather that the regulation "directly advances to a material degree" a legitimate governmental purpose and is sufficiently narrowly gauged to achieve that ostensible goal without trading too far into protected speech.

And so, finding that the case before it only dealt with the facial validity of the Austin ordinance, the Supreme Court issued an opinion remanding the case back down to the United States Court of Appeals for the Fifth Circuit with instructions that the court complete the First Amendment analysis by subjecting the Austin ordinance to intermediate scrutiny rather than strict scrutiny and, by implication, directing every other federal court confronted with evaluating any off-premise sign regulation that is otherwise valid on its face to follow the same intermediate scrutiny regimen. And that leads us to the recent Seventh Circuit and Fifth Circuit decisions which at least parade as applying intermediate scrutiny – first to a Madison, Wisconsin sign ordinance and then to the city of Austin's code.

In a way, the Supreme Court's decision and the aftermath of the Circuit Court decisions reveal that even in the wake of outdoor advertising law's most recent trip to the Supreme Court, not much will really change in the manner that billboard regulations are tested under the First Amendment. *City of Austin* eliminated the notion that outdoor advertising control regulations are content-based and thus subject to strict scrutiny, under which most regulations fail. But in doing so, the Court left open the question of whether these types of regulations passed muster under the far less rigorous intermediate scrutiny – the same test that has guided the constitutional analysis of outdoor advertising regulations since the 1980s.

The Seventh Circuit's Decision in *Adams Outdoor Advertising v. City of Madison*

While the United States Court of Appeals for the Fifth Circuit was immersed in briefing and oral argument on the remand of *City of Austin*, on January 2, 2023, the United States Court of Appeals for the Seventh Circuit issued a decision in *Adams Outdoor Advertising v. City of Madison*, which had already been briefed and argued well prior to the *City of Austin* decision. Culminating a running dispute over billboard regulations that began at least twenty years ago, the Seventh Circuit upheld the constitutionality of Madison, Wisconsin's current sign code. *Adams* is the first decision by a major federal court to apply the Supreme Court's landmark April 2022 decision in *City of Austin*.

Adams was litigated a year before the Supreme Court's decision in *City of Austin*. The constitutionality of outdoor advertising sign regulation was drawn into question in *Adams* as an outgrowth of an earlier 2014 decision by the Supreme Court in *Reed v. Town of Gilbert*. There, the Court seemed to set a new direction in First Amendment jurisprudence. While *Reed* could be read narrowly, several federal and state courts applied the decision to find that typical sign regulations were content-based because they required that the message on a particular sign must first be read to determine if the sign was on-premise or off-premise in character. Under that analysis, the only way that such a blatant undermining of protected speech could be justified was in the unlikely event that under strict judicial scrutiny, the speech restriction at issue was so critical to the achievement of some overwhelmingly compelling governmental purpose that its impact on speech could be compromised. The Madison ordinance seemed to fall into the *Reed* trap. Therefore, relying on *Reed,* Adams argued that the Madison ordinance operated as an automatic restraint on speech that violated the First Amendment. That seemed like a pretty good bet at the time since *Reed* had been decided by a 9-0 majority.

Yet Adams' reliance on *Reed* proved to be the trap door when the Supreme Court then issued its opinion in *City of Austin* on April 21, 2022. In a 6-3 decision, the Supreme Court held that *Reed* was being construed too broadly with respect to the constitutionality of sign codes. The Court found that *Reed* did not apply to outdoor advertising regulations predicated on the distinction between on-premises and off-premises content. Rather, the Court held that the distinction between on-premises and off-premises signs was simply geared to determining where a specific type of sign could be located and did not constitute an attempt to control or censor the content of the particular message displayed on a sign.

It was a short jump from the Supreme Court's decision in *City of Austin* for the Seventh Circuit to conclude that Madison's sign code, by its terms, was also a location-based regulation that conformed to First Amendment standards, finding that "treating off-premises signs less favorably than other signs draws a regulatory line based on location, not communicative content."

But the Seventh Circuit's decision does not end there. The Seventh Circuit moves on to resolve the same lingering issue that the Supreme Court remanded to the Fifth Circuit in *City of Austin*, *i.e.*, whether the Madison regulation passed muster under less intensive "intermediate scrutiny." Under that test, Madison had the constitutional burden of demonstrating that its sign code's scope was "narrowly tailored" in a manner that directly advanced a recognized, but not necessarily compelling, governmental purpose. That is where *Adams* takes on real significance.

Madison justified the restrictions on off-premise signs in its sign code by simply asserting that its limitations on off-premise signs advance traffic safety and improve the City's aesthetic environment. However, the City had failed to offer a scintilla of evidence to bolster those claims. Indeed, the record was completely devoid of any empirical tests or other evidence to demonstrate that freezing the number of off-premises signs or prohibiting the conversion of some of those signs to digital operation would in fact have any palpable impact on either safety or aesthetics. In essence, the City's entire case was based on conjecture. Nevertheless, the Seventh Circuit finds

that supposition is enough to satisfy intermediate scrutiny in the case of outdoor advertising signs. In order to understand the full impact of that finding, it is important to quote the Seventh Circuit at length on the issue:

> Prohibiting digital signs serves Madison's stated interests in promoting traffic safety and preserving visual aesthetics. It's well established that these are significant governmental interests. *Metromedia*, 453 U.S. at 507–08 (holding that "traffic safety and the appearance of the city . . . are substantial governmental goals").

The Seventh Circuit further emphasizes that the City really doesn't need much to substantiate its regulation:

> Adams Outdoor questions the degree of fit between Madison's means and its ends. It contends that the City must provide empirical evidence linking digital billboards to aesthetic or safety-related harms. Not so. "[B]illboards by their very nature . . . can be perceived as an esthetic harm . . . ." Likewise, the connection between billboards and traffic safety is too obvious to require empirical proof. "It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it." *Luce v. Town of Campbell*, 872 F.3d 512, 517 (7th Cir. 2017).

The Fifth Circuit's Decision in *Reagan/Lamar v. City of Austin*

On March 30, 2023, nearly three months after the *Adams* decision was issued, the United States Court of Appeals for the Fifth Circuit issued an opinion in *Reagan/Lamar v. City of Austin*, upon the remand of *City of Austin* from the United States Supreme Court. In a 2-1 decision, the Fifth Circuit found Austin's ordinance banning off-premises digital billboards, but allowing on-premises digital billboards, to be constitutionally valid. The Fifth Circuit applied intermediate scrutiny, noting that the restriction on speech in Austin's sign code must be narrowly tailored to serve a significant government interest.

In determining that Austin met its burden to satisfy intermediate scrutiny, the majority found that municipalities do not need to provide empirical data to show that an ordinance is valid but instead can rely on "common sense" to support the constitutionality of their ordinances. The majority further determined that Austin was entitled to wide discretion in its legislative judgment that off-premises advertising undermines its interests in safety and aesthetics more than on-premises advertising does. The majority cites *Metromedia* for the propositions that substantial weight should be given to the legislative judgment that on-premises speech is more valuable than off-premises speech and that, in order not to run afoul of the First Amendment, restrictions must treat commercial and non-commercial messages alike.

The majority also points to *Adams*, asserting that it lends support to its determination that Austin's off-premises digitization ban is constitutional. The opinion concludes by

noting that "[m]unicipalities have traditionally been given wide discretion in the domain of sign regulations."

The dissent in *Reagan/Lamar* was well-reasoned and called out the majority immediately, observing that the majority's approach was really the lower standard of rational basis review "masquerading as intermediate scrutiny." The dissent goes on to note:

> The City offers no studies, surveys or statistics to suggest digitizing the limited number of grandfathered off-premises signs would be either more dangerous or less attractive than digitizing on-premises signs. Neither does common sense support the distinction because off-premises digital signs employ the exact same technology as their on-premises counterparts. . . . When put under the appropriate quantum of scrutiny, the City's justification do not hold up.

The dissent addressed the majority's reliance on *Metromedia* for the proposition that substantial weight should be given to Austin's legislative judgment that on-premises speech is more valuable than off-premises speech, stating that "[a] more precise reading of *Metromedia* suggests something different." The dissent noted that in *Metromedia*, the Supreme Court limited its deference to legislative judgment "to purely *commercial* speech restrictions" and explained that non-commercial speech requires more protection. According to the dissent, "the substantial deference applied by the majority opinion has no place in the intermediate-scrutiny analysis of non-commercial speech restrictions." The dissent disagrees with the majority's contention that *Metromedia*'s commercial v. non-commercial distinction "is not legally relevant," stating that the majority "invents a logical rule that does not exist in *Metromedia*."

The dissent also responds to the majority's contention that *Adams* supports its decision. As noted by the dissent, *Adams* only applied to commercial messages, unlike the Austin ordinance, "which appl[ied] to both commercial and non-commercial messages."

The dissent notes that the parties do not dispute that the provisions at issue apply to non-commercial speech and that the panel had previously observed that "the regulation applies to any noncommercial message 'off-premises.'" Therefore, consistent with *Metromedia*, the dissent "would not defer to legislative judgments, rely on the City's scant empirical evidence, or construct possible reasons for why the distinction 'may' be justified" in reviewing Austin's ordinance under intermediate scrutiny. As a result, the dissent concluded that Austin did not carry its burden to survive intermediate scrutiny.

Without question, the dissent in *Reagan/Lamar* is a strong dissent, and Reagan and Lamar have filed a petition for rehearing en banc by the Fifth Circuit based on the compelling points raised in the dissent. Consequently, stay tuned for more.

Before we're done, let's take a quick look beyond *Reagan/Lamar* and *Adams.* Is there an avenue to change the cavalier attitude that the courts bring to outdoor advertising litigation? Deferral to "legislative judgment" is based in 1980s judicial thinking about billboards that involved a record replete with clever legal arguments by industry lawyers. The world of computers and data were little more than a dream at the time. There has been a lot of water under the bridge since then. If data is the major thrust in sales and marketing, there are new tactics available to counteract the Seventh and Fifth Circuits' "world-is-flat" rejection of empiricism. Beginning at the legislative level of a city council hearing, there are strategies that might be employed where an outdoor advertising litigant takes the initiative and counters supposition with real world tests, data, and other evidence that billboards do not pose an unsafe distraction, forcing courts to confront facts, not forty-year-old supposition. Some of that empirical evidence already exists in safety studies that OAAA conducted a number of years ago. In fact, OAAA is considering renewed studies to supplement and update that data. In the final analysis, outdoor advertising lawyers have to use data as a subtle way of interesting a legislative body and ultimately a judge to subliminally reflect upon whether their safety is really compromised when they pass by a billboard. We know the answer to that already. We now have to shift the paradigm.

This Legal Report is a collaboration between Eric Rubin and Allen Smith for the OAAA on April 13, 2023. Allen has been named Eric's successor as OAAA Association Counsel.