Sign Law 2023 Update . . .
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Reagan National – *Revisited* – Why it Matters

Courts uphold the onsite/offsite distinction

Background

Several years ago, Reagan National Advertising and Lamar Outdoor sued the City of Austin in Federal Court in Texas because the city refused to allow digital billboard conversions, but did permit digital on-premise signage. In 2019, the local District Court upheld the sign code. In 2020, the 5th Circuit Court of Appeals reversed, holding that the on-premises/off-premises distinction was unconstitutionally content-based, because it discriminated against one *method* of speech over another (i.e., on-premise digital messages v. off-premise digital messages), and therefore could not survive "strict scrutiny" judicial analysis (the standard of review for content-based speech restrictions).*

In 2022, however, the US Supreme Court held the Austin sign code was content-neutral (i.e., not based on the content of the messages) and "absent an impermissible purpose" should instead be subject instead to "intermediate" scrutiny (the standard when a sign code is content-neutral).* The Supreme Court held the sign code was essentially a reasonable "time, place and manner" land use regulation and sent the case back to the 5th Circuit for reconsideration. (CSA participated with ISA and other allied groups in filing e a "friend of the court" *amicus* brief in the matter in support of maintaining the on/off distinction.) [*City of Austin v. Reagan National Advertising* (2022) 142 S. Ct. 1464]

Ultimately, in 2023, the 5th Circuit, applying Supreme Court guidance, came to the (proper) conclusion that the sign code *was valid* – because it did not control, regulate, nor legislate the topic or message, but instead controlled only the location of digital billboards; nor was there an improper purpose or justification underpinning the code. (The "only issue we must address is whether the sign code's ban on digitizing off-premise signs is "narrowly tailored to serve a significant government interest.") [*Reagan National Advertising v. City of Austin* (2023) 64 F.4th 287]

Why is this case important to California?

Because of the US Supreme Court guidance, *Reagan* effectively takes the wind out of the sails of numerous court cases in Federal courts (and thus State courts) around the country that seek to eliminate the onsite/offsite distinction, i.e., it protects the "regulatory tradition" that there is in fact a meaningful difference between an offsite billboard and onsite business identification sign. ("Such distinctions are part of an "unbroken tradition" that traces to the 1800s.")

A commercial billboard is typically a standalone tenant leasing land to do its business; it is not simply protected *speech* mounted on a stick. It is a physical manifestation of the business of *advertising*. A billboard poster (whether paper, paint, vinyl or digital) is the *product* that billboard operators sell. Whereas an on-premise business sign of the type CSA seeks to protect is about *identification* (not only for customers, but for the preservation of the industry). While on-premise signs also serve an advertising function, their primary permanent job is to let the public know where a business is located.

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> A business sign is a part of the business itself, just as the structure housing the business is part of it, and the authority to conduct a business carries with it the right to maintain a business sign on the premises, subject to reasonable regulation by the government. – *Carlin v. City of Palm Springs* (1971) 14 Cal. App. 3d 706 (citations omitted).

Thus, the US Supreme Court's pronouncement, as applied in Texas and thus effectively throughout the nation, finally cements the on/off distinction as a lawful governmental land use regulation (provided it is narrowly tailored and not based on the content of the message). Notably, in California, this issue was resolved in favor of maintaining the distinction in both State and Federal courts, including a 2016 case where CSA/ISA submitted an amicus brief in support of the distinction. *Lamar Central Outdoor, LLC v. City of Los Angeles* (2016), 245 Cal. App. 4th 610.

***Intermediate Scrutiny v. Strict Scrutiny**

There are three basic forms of judicial review to determine the constitutionality of a law: Rational basis, intermediate scrutiny, and strict scrutiny. As applied in the signage context, these terms refer to the constitutionality of a law regulating speech based on its content, whether commercial or noncommercial, i.e., the subject or topic of the message. Courts first look to determine whether the law in question regulates or discriminates (or poses a discriminatory result) against the content without a substantial, legitimate governmental interest to protect (e.g., traffic safety, tobacco advertising).

The *rational basis* test is generally used in cases where no fundamental rights or suspect classifications are at issue. Fundamental rights include those enumerated in the Constitution, including First Amendment protections. To pass the rational basis analysis, the statute or ordinance must have a legitimate state interest, and there must be a rational connection (or "nexus") between the law's means and objectives. For example, a law that serves no purpose is arbitrary and would fail the rational basis test.

Where speech is involved, however (and, in particular, commercial speech for our purposes), courts initially apply a more stringent assessment. When the ordinance at issue is content-neutral, *intermediate scrutiny* is applied. The challenged law must further an important (and justified) government interest by means that are substantially related to that interest, and the law must be narrowly tailored to achieve the intended result. Courts will sometimes refer to intermediate scrutiny as "heightened scrutiny," or "rational basis with bite."

When an ordinance is determined to be content-based (i.e., where the law controls the messaging or speaker, but not necessarily the method), it will be assessed based on *strict scrutiny:* The law must further a "compelling governmental interest," as well as be narrowly tailored to achieve that interest. Most content-based codes fail strict scrutiny and will be struck down as unconstitutional.