



# Sign Ordinance Litigation Post *Reagan*

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# Overview



Constitutional Framework



*Reed v. Town of Gilbert*



Off-Premises/Billboards



*Fairway Outdoor Advertising LLC v. High Point*



Takeaways



Questions

# Why Is Sign Regulation Important?



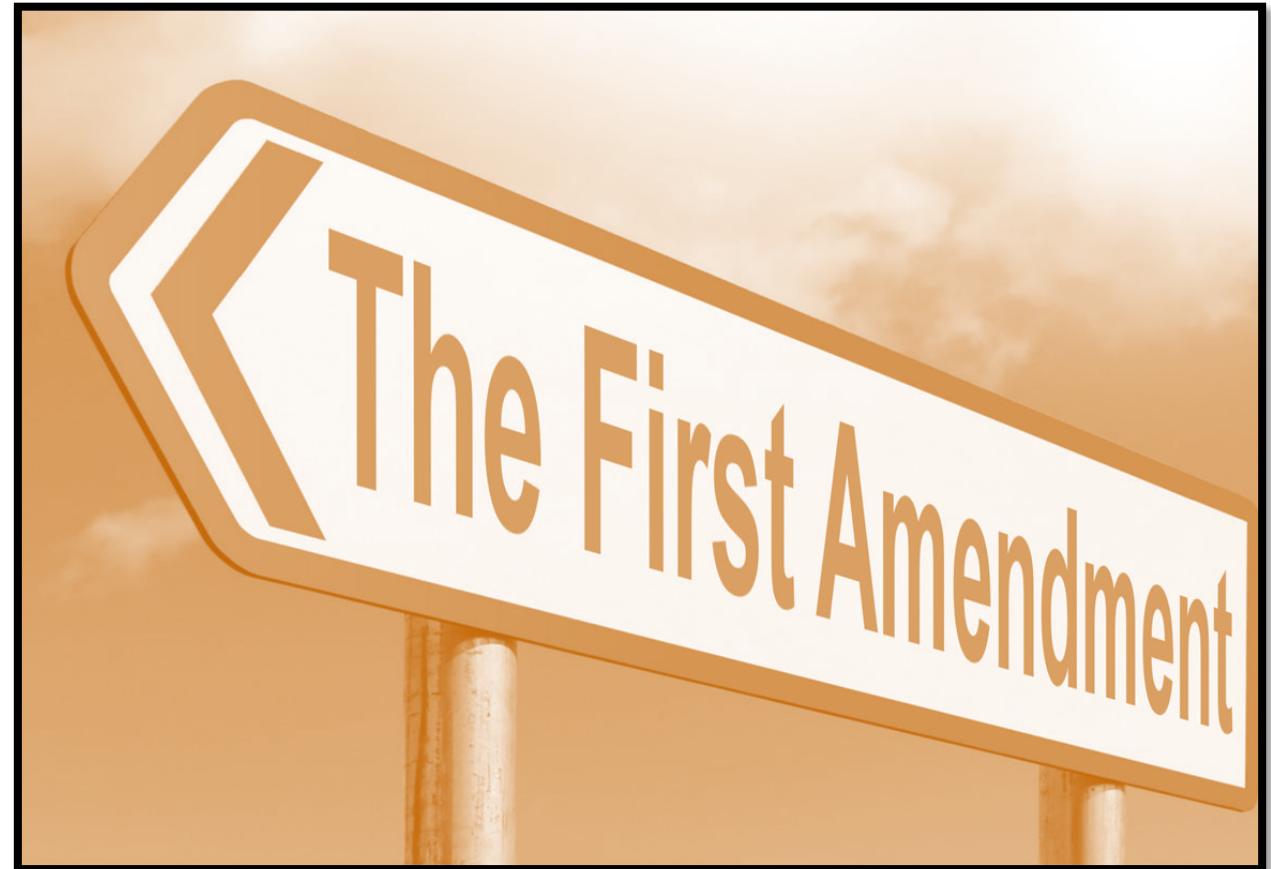
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# Constitutional Framework for Sign Regulations

# Sign Regulations Subject to Free Speech Clause

- Sign regulations are subject to the free speech clause of the First Amendment and must pass the requisite level of constitutional scrutiny.
- Level of scrutiny applicable depends on whether a sign regulation is content neutral or content based.



# Two Important Exceptions



## Government Speech

- When government speaks, it's not subject to free speech clause
- Ordinance Example: exempting government signs



## Commercial Speech

- Commercial speech is a lesser protected type of speech
- Regulations of signs with commercial speech = intermediate scrutiny
- Ordinance Example: exempting signs with noncommercial speech from regulation and regulating commercial signs

# Level of Scrutiny Depends On...

## Content Based

- Regulations that draw distinctions based on a sign's "communicative content" or the message or idea that the sign is trying to convey
- Subject to **strict scrutiny** (regulations most likely unconstitutional)
- Ordinance Example: regulating political or ideological signs more strictly or differently than other sign types (*Reed*)

## Content Neutral

- Regulations that don't draw distinctions based on a sign's communicative content
- Regulations based on sign size, location, etc. (i.e., time, place, and manner restrictions)
- Subject to **intermediate scrutiny** (regulations may be constitutional if "narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication")
- Ordinance Example: restricting sign height and sq. ft. based on their location



*Reed v. Town of Gilbert*



# *Reed v. Town of Gilbert*

- The controlling precedent on sign regulation was *Reed v. Town of Gilbert*, 675 U.S. 155 (2015).
- In *Reed*, the Court held a sign regulation was content based if it “targets speech based on its communicative content” or, in other words, if it “applies to particular speech because of the topic discussed or the idea or message expressed.”
- The Court held Gilbert’s sign regulations, which grouped and regulated signs by categories such as political and ideological signs, were content based because they targeted signs based on the communicative content on the sign.
- Many courts interpreted *Reed* to hold that a sign regulation was content based if the regulator had to read the sign in order to determine if the regulation was applicable (the “read to regulate” test).





# The Off-Premises / Billboard Problem

# The Off-Premises / Billboard Problem

- Off-premise signs are signs advertising a product, service, or activity located on another site.
- Cities have been regulating off-premise signs (aka billboards or outdoor advertising signs) for decades.
- After *Reed*, courts struggled with whether off-premise sign regulations were content based or content neutral.
- While off-premise regulations are technically based on location, not content, you have to read the sign to determine whether an off-premise regulation applies.



# *Austin v. Reagan National Advertising of Austin, LLC*

## Facts

- Lamar (a billboard company) sought sign permits from the City of Austin to digitize some billboards. Austin denied the permits based on the ordinance's ban of the construction of new billboards and digitizing existing billboards.
- In response, Lamar sued Austin and claimed that the ordinance favored on-premise signs to off-premise signs, which is an unconstitutionally content based regulation.

## Fifth Circuit

- Fifth Circuit held Austin's off-premise sign regulations were content based because their application required the regulator to read the sign in order to determine whether the regulation is applicable (i.e., the City had to "read to regulate").

## Supreme Court

- Supreme Court rejected the "read to regulate" test and explained that off-premise sign regulations are facially content neutral because they distinguish based on **location** and not **content**.
- Thus, Austin's restrictions on the construction and digitization of off-premise billboards—and similar ordinances—are only subject to intermediate scrutiny.
- Remanded to determine if intermediate scrutiny met.



*Fairway Outdoor Advertising  
LLC v. High Point*

# High Point's Sign Ordinance

- Like most cities, High Point's sign ordinance regulated billboards.
- Specifically, under the ordinance, billboards were:
  - Required to get a permit;
  - Limited to Heavy Industrial districts;
  - Required 500' buffer from another billboard and 300' from a residential district or religious institution; and
  - Prohibited from being digitized.

## **5.7.11. OUTDOOR ADVERTISING SIGN REQUIRING A SIGN PERMIT**

### **A. Districts Allowed**

An outdoor advertising sign shall only be allowed in the HI district.

### **B. Location**

An outdoor advertising sign shall be located off-site.

5-58 | City of High Point Development Ordinance

Supp. No. 2

## **CHAPTER 5: DEVELOPMENT STANDARDS**

### **Section 5.7. Signage**

Subsection 5.7.12. Sign for Historic Structures or Properties

### **C. Size**

The sign area of an outdoor advertising sign, including any extension(s), shall not exceed 450 square feet.

### **D. Height**

An outdoor advertising sign shall not exceed 30 feet in height. The height may be increased to 50 feet if the sign is within 400 feet of an interstate highway ROW.

### **E. Spacing Requirements**

#### **1. Between Signs**

(a) Except within the U.S. Highway 311 Bypass corridor, an outdoor advertising sign shall not be erected, affixed, or otherwise installed within a 500-foot radius of another outdoor advertising sign.

(b) Within 1,500 feet of the U.S. Highway 311 Bypass corridor ROW, an outdoor advertising sign shall not be within a 2,000-foot radius of another outdoor advertising sign.

#### **2. Adjoining a Residential District or Religious Institution**

(a) An outdoor advertising sign shall not be erected, affixed, or otherwise installed closer than 300 feet to a residential district or a lot containing a religious institution.

(b) If a residential zoning district boundary runs along the near edge of a street right-of-way, the width of the right-of-way shall be subtracted from the setback requirement.

# Facts

- Fairway/Lamar has billboards all over High Point (claimed over 68 billboard faces).
- In 2017, Fairway applied for sign permits to erect 7 digital billboards in various (non-HI) zoning districts.
- The City denied all 7 sign permits applications.
  - All violated the requirement to be in an HI district.
  - 2 violated requirement to have a 300' buffer from a residential district/religious institution.
  - 1 violated requirement to not increase nonconformity because it attempted to replace a static (non-digital) nonconforming billboard with a digital one.



# Fairway's Challenge

- Fairway's lawsuit, filed before *Reagan*, claimed High Point's billboard regulations were unconstitutional content-based restrictions on speech and/or violated state law.
- Fairway challenged numerous other provisions in the sign ordinance that had nothing to do with billboards.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION Case No. 1:21-cv-867	
<b>FAIRWAY OUTDOOR ADVERTISING, LLC</b>  <b>Plaintiff,</b>  <b>v.</b>  <b>CITY OF HIGH POINT,</b>  <b>Defendant.</b>	<b>COMPLAINT</b>
<p>NOW COMES Plaintiff, FAIRWAY OUTDOOR ADVERTISING, LLC, LLC ("Fairway"), by and through its undersigned counsel, complaining of the Defendant City of High Point ("City") pursuant to, <i>inter alia</i>, N.C.G.S. §160D-1403.1, N.C.G.S. §143-755, 42 U.S.C. §1983 and 42 U.S.C. §1988, and respectfully alleges and shows unto this Court as follows:</p>	
<p style="text-align: center;"><b>INTRODUCTION</b></p>	
<p>1. On May 16, 2016, after conducting a public hearing the City of High Point adopted Ordinance No. 7206/16-26 with an effective date of January 1, 2017 ("Ordinance"). The Ordinance contains specific standards for signs in Section 5.7. The Ordinance is facially unconstitutional because it, among other things, practically bans all signs such as billboards displaying off-premise messages ("Outdoor Advertising Signs" or "Billboards") or imposes numerous onerous and</p>	



# High Point's Motion to Dismiss

- After High Point filed its answer, the Supreme Court decided *Reagan*.
- High Point then filed a motion to dismiss under rule 12(b)(1) and 12(c) arguing that:
  - The billboard regulations in the sign ordinance were content neutral under *Reagan* and passed intermediate scrutiny.
  - Fairway lacked standing to challenge the other provisions of the sign ordinance that were not the basis of their sign permit denials.



# Passing Intermediate Scrutiny Without Discovery

- Fairway claimed dismissal inappropriate because discovery was necessary to see if billboard regs satisfied intermediate scrutiny (i.e., were “narrowly tailored to serve a significant governmental interest and left open ample alternative channels for communication.”)
- High Point argued it met intermediate scrutiny in 3 ways:
  1. Long line of SCOTUS cases recognize aesthetics and traffic safety as **significant government interests** furthered by sign regulation.
    - Intent and purpose section of the sign ordinance listed aesthetics and traffic safety as intents of the sign regs.
  2. Regs were **narrowly tailored** to “eliminate the exact source of evil (proliferation of digital billboards) that [the City] sought to remedy.”
  3. There were **ample alternative channels** for Fairway to communicate under the sign ordinance (e.g. by erecting non-digital, off-premise billboards in the HI district or erecting digital, on-premise signs elsewhere).



# The Decision



- Judge Eagles in the Middle District of N.C. heard oral arguments on High Point's motion to dismiss on 11/30/22.
- On 12/28/22, she issued a decision that:
  - Granted the motion to dismiss in its entirety;
  - Held Fairway did not have standing to challenge the provisions of the ordinance that were not the basis for permit denials; and
  - Held that High Point's billboard regulations were content neutral and passed intermediate scrutiny.



# Takeaways

# Takeaways

Review sign ordinances for compliance with free speech case law (*Reed* is still good law) and avoid content-based distinctions (even if state law authorizes it). Focus on size, location, etc. instead.

Remember the exceptions: (1) Government signs are not subject to the free speech clause; (2) Regulations targeting commercial signs and off-premise signs are constitutional if they satisfy intermediate scrutiny.

Add substitution and severability clauses, include aesthetics and traffic safety in the purpose/intent sections, and ensure alternative sign options (i.e., other channels of communication).

Check to make sure enforcement is compliant, too (don't just rely on the ordinance) and draft clearly! *See Visible Properties, LLC v. Vill. of Clemmons*, N.C. App. 743 (2022).

# Questions



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