FREE SPEECH LAW FOR ON-PREMISES SIGNS

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PREFACE FOR THIS SUPPLEMENT

This supplement to Free Speech Law for On-Premises Signs updates its discussion of free speech issues with citation and discussion of cases decided since the last edition. It especially includes discussion of the remand from the Supreme Court's City of Austin case, other cases that have considered the off-premises vs. on-premises distinction since that case, and how courts have applied the decision in City of Austin. The word "premise" has been changed to "premises" in this supplement so that the handbook can follow Supreme Court practice.

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CHAPTER II: FREE SPEECH LAW PRINCIPLES

§ 2:4. The Neutrality Principle and Content-Based Speech

§ 2:4[1]. What This Requirement Means

Camp Hill Borough Republican Ass'n v. Borough of Camp Hill, ___ F.Supp3d ___, 2023 WL 2692400, at *10 (M.D. Pa. Mar. 29, 2023) (singling out Personal Expression Signs for differential treatment, including durational limits, sign size limitations, lighting limitations, and a blanket prohibition of Personal Expression Signs from public parks and public property, held not narrowly tailored to the borough's interests in traffic safety and aesthetics).

§ 2:4[3]. How Courts Have Applied Reed

Florek v. Bedora, 2023 WL 2808313, at *3 (E.D. Wis. Apr. 6, 2023) (different permit requirements based on content of sign held content based; Camp Hill Borough Republican Ass'n v. Borough of Camp Hill, No. 1:22-CV-01679, ___ F.Supp3d ___, 2023 WL 2692400, at *7 (M.D. Pa. Mar. 29, 2023) **(**different durational limits on Personal Expression Signs related to a singular event when compared to other temporary signs, and two-sign limit on Temporary Signs on Residential Lots held content based).

§ 2:4[4](a). Remand Decision and Other Cases After City of Austin v. Reagan National Advertising of Austin

Justice Sotomayor remanded the City of Austin case back to the Fifth Circuit because she decided that the first amendment inquiry was not ended even if the ordinance was content neutral. She held that there may still be evidence of an impermissible purpose or justification, and that a restriction on freedom of speech or expression must be "narrowly tailored to serve a significant governmental interest." This statement is curious, because narrow tailoring is one of the requirements for the constitutionality of time, place, and manner regulations. It is not one of the Central Hudson factors that the Supreme Court applied in Metromedia when it upheld the constitutionality of a ban on billboards.

On remand, the Fifth Circuit in Reagan National Advertising of Austin, Inc. v. City of Austin, 64 F.4th 287 (5th Cir. 2023), upheld the off-premises vs. on-premises distinction. Neither party contested the existence of significant government interests. The court also noted that the Supreme Court has "repeatedly reviewed and never previously questioned" on-premises vs. off-premises distinctions. It also noted that In the context of sign regulations, the Supreme Court has generally accorded municipalities significant leeway in the context of sign regulations.

The Fifth Circuit applied what appeared to be intermediate scrutiny review to off-premises vs. on-premises distinction, but did not clarify the rules courts should apply when carrying it out. After discussing the Supreme Court's City of Austin decision the Fifth Circuit noted that the plaintiffs did not assert an impermissible purpose or justification, so that it had to decide only whether the ban on digitizing existing off-premises signs was "narrowly tailored to serve a significant government interest." Quoting an earlier Supreme Court decision, the court held that narrow tailoring means that the government's interests need not be accomplished through the "least restrictive or least intrusive means," but that "the requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Curiously, the Fifth Circuit then turned to the Metromedia case, which applied the Central Hudson factors when it upheld a ban on billboards, not the narrow tailoring factor that is not one of the Central Hudson factors. It relied on Metromedia's holding that on-premises advertising permitted by the sign ordinance did not make it underinclusive. The court also held that the sign company's decision to limit its challenge to a ban on digitizing off-premises signs, not a ban on off-premises signs, was irrelevant. "[I]ntermediate scrutiny does not require perfect tailoring."

The sign company argued that the court should not allow an exemption for on-premises digital signs because the Austin sign ordinance did not have any limits for the display of these signs, but the court rejected this argument as factually incorrect. It may have implied that an ordinance can exempt on-premises signs only if it regulates these signs effectively.

A number of other courts have decided legal issues raised by the off-premises v. on-premises distinction. Prior to the Fifth Circuit remand in City of Austin, the Seventh Circuit in Adams Outdoor Advertising Ltd. Partnership v. City of Madison, 56 F.4th 1111 (7th Cir. 2023), upheld an ordinance that banned billboards but allowed digital signs in a few locations subject to strict limits. Following City of Austin, it held that the off-premises vs. on-premises distinction was content neutral, and that Adams Outdoor had not "meaningfully argued" that the digital sign ban "flunks" intermediate scrutiny because prohibiting digital signs serves significant governmental interests in promoting traffic safety and preserving visual aesthetics. See also Adams Outdoor Advert. Ltd. P'ship v. Town of Mount Pleasant, 2023 WL 4491197, at *12 (D.S.C. July 12, 2023) (upholding ban on digital signs based on City of Austin because "regulation does not prohibit any

sign based on its political or ideological message and instead draws regulatory lines only based on the form that the sign takes").

For other cases following and applying City of Austin see StreetMediaGroup, LLC v. Stockinger, 2023 WL 5355119 (10th Cir. Aug. 22, 2023) (state highway beautification act content neutral when it defined "outdoor advertising" such as billboards as a sign for which compensation was paid); Street Media Group, LLC v. Bd. of Cnty. Comm'rs of County of Adams, 2023 WL 5613018, at *2 (D. Colo. Mar. 30, 2023) (citing City of Austin as upholding distinction between off-premises and on-premises signs, and holding that billboard regulation survived intermediate scrutiny); Cincinnati v. Fourth Nat'l Realty, LLC, 2023 WL 2672038 at ¶ 20 (Ohio App. March 29, 2023) (upholding prohibition on off-premises signs; Ohio constitution did not confer broader free speech rights than federal constitution); Road Space Media, LLC v. City of Birmingham, 2023 WL 2617397 (N.D. Ala. Mar. 23, 2023) (cap-and-replace provision for billboards held content neutral); Spring House Com., LLC v. City of Richmond, Kentucky, 2022 WL 17406310, at *3 (E.D. Ky. Dec. 2, 2022) (rejecting argument that off-premises v. on-premises distinction had impermissible purpose or justification); Fairway Outdoor Advert., LLC v. City of High Point, 2022 WL 17975990, at *3 (M.D.N.C. Dec. 28, 2022) (billboard prohibition not content based and was narrowly tailored and advanced traffic safety and aesthetic interests). But see Advantage of Advert., LLC v. City of Opelika, 2023 WL 5022264, at *7 (M.D. Ala. Aug. 7, 2023) (rejecting motion to dismiss, court held that city made no real effort to show that off-site sign and billboard prohibitions survive intermediate scrutiny). See also Florek v. Bedora, 2023 WL 2808313, at *4 (E.D. Wis. Apr. 6, 2023) (City of Austin does not apply to content based distinctions between different types of signs because it involved a simple "on-premises/off-premises distinction); Fairway Outdoor Advert., LLC v. City of High Point, 2022 WL 17975990, at *6 (M.D.N.C. Dec. 28, 2022) (distinction between off-premises and on-premises sign well established under Metromedia decision).

§ 2:4[5]. The "Need to Read" Rule

Lamar Co., LLC v. Lexington-Fayette Urb. Cnty. Gov't, 2023 WL 3956149, at *12 (E.D. Ky. June 12, 2023) (following Supreme Court's City of Austin case and rejecting "need to read" rule).

§ 2:6. Judicial Standards for Regulating Commercial Speech

§ 2:6[3]. The Metromedia Case

Cincinnati v. Fourth Nat'l Realty, LLC, 2023 WL 2672038, at ¶ 27 (Ohio App. March 29, 2023) ("While Fourth National contends that the existence of on-site signs undercuts the City's reliance on its stated interests, this line of argument has been repeatedly rejected by federal and state courts.").

§ 2:6[7]. Overbreadth [New]

Adams Outdoor Advert. Ltd. P'ship v. Town of Mount Pleasant, 2023 WL 4491197, at *13 (D.S.C. July 12, 2023) (digital sign restriction narrowly tailored to promote town's interests in traffic safety and aesthetics; "reasonable for the Town to contend that its goals are only served by a blanket prohibition rather than selective enforcement").

§ 2:7. Time, Place, and Manner Regulations

§ 2:7[1]. What They Are

The Seventh Circuit reconciled these different applications of Supreme Court tests by holding that the narrow tailoring factor "aligns with the Central Hudson intermediate-scrutiny test for regulations on commercial speech, which the Court applied in Metromedia and the judge used here." Adams Outdoor Advertising Ltd. Partnership v. City of Madison, 56 F.4th 1111, 1120 (7th Cir. 2023). This decision is debatable.

§ 2:7[2]. As Applied to Sign Regulations

In City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022), the Court held that "the ([c]ity's on-/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny." It applied one of the factors courts consider when they review time, place, and manner regulations when it remanded its decision to the Fifth Circuit to consider whether there was evidence of impermissible purpose or justification, and whether the sign ordinance did not survive intermediate scrutiny because it was not narrowly tailored to serve a significant governmental interest.

The Fifth Circuit on remand in City of Austin characterized the case as a narrow tailoring case but applied Metromedia's holding that the off-premises vs. on-premises distinction was constitutional. The problem is that Metromedia did not apply narrow tailoring but applied the Central Hudson factors. Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 64 F.4th 287, 293 (5th Cir. 2023).

See also Florek v. Bedora, 2023 WL 2808313, at *5 (E.D. Wis. Apr. 6, 2023) (ordinance not narrowly tailored, "City cannot claim that placing strict size and time limits on certain signs is "necessary to beautify" or declutter the City while at the same time allowing other signs "that create the same problem" to be larger or displayed indefinitely); city has "not established that certain 'signs pose a greater threat to safety than' any other types of signs or that limiting certain signs will assist individuals in identifying signs being utilized for business purposes;" ample content neutral options available); § 2:8, infra.

§ 2:8. The Prior Restraint Doctrine

§ 2:8[1]. General Principles

GEFT Outdoor, LLC v. Monroe Cnty., 62 F.4th 321, 327 (7th Cir. 2023) stated a multi-actor rule for prior restraints. They are not per se unconstitutional. They are constitutionally sound time, place, or manner restrictions if they are content neutral, are narrowly tailored to serve a significant government interest, leave open alternative avenues for speech, and do not put too much discretion in the hands of government officials. Censorship concerns motivate these limitations. The court also explained that the review of content-neutral prior restraints is more flexible than the review of content-based restraints.

Spring House Com., LLC v. City of Richmond, 2022 WL 17406310, at *8 (E.D. Ky. Dec. 2, 2022) (new application process for off-premises commercial signs does not constitute prior restraint because it applies to any type of unclassified use, not just those uses involving protected speech or other expressive conduct).

§ 2:8[3]. The Substantive Standards

GEFT Outdoor, LLC v. Monroe Cnty., Indiana, 62 F.4th 321, 328 (7th Cir. 2023) upheld a variance provision because the county removed all content-based sign regulations, the county permitted ample alternatives for speech, the Board's discretion was not central to the overarching zoning scheme, and federalism issues should deter a federal court from stepping "into states' and municipalities' traditional sphere of land-use regulation and facially invalidate zoning laws left and right."

GEFT Outdoor, L.L.C. v. City of Evansville, 2023 WL 1111605, at *6 (S.D. Ind. Jan. 12, 2023), held that there was no prior restraint violation when a permit application approval was not subject to any discretion of the decisionmaker and was not content based. Neither did the variance

provision authorize the Board to deny a variance request based on the content of the sign or the identity of the speaker.

The ordinance had adequate criteria. A permit application must be approved if the application was complete and the proposed sign complied with physical requirements. There was no exercise of discretion in the permitting decision. The Board may grant a variance only if it finds that all six of the criteria set forth in the ordinance are satisfied. They narrowly identified the city's standards by which a variance may be granted, including public health, safety, morals; a substantially adverse effect on the use and value of the adjacent area; and practical difficulties in the use of the property. The court also approved the Board's authority to impose "whatever conditions or limitations" it finds "necessary to protect adjacent properties and the surrounding neighborhood and effectuate the purposes of" the ordinance.

See also Adams Outdoor Advert. Ltd. P'ship v. Town of Mount Pleasant, 2023 WL 4491197, at *14 (D.S.C. July 12, 2023) (zoning administrator could not exercise discretion granted by ordinance).

CHAPTER III: SOME BASIC FREE SPEECH ISSUES CONCERNING ON-PREMISES SIGN REGULATIONS

§ 3:2. Must There Be Proof That a Restriction on Signs Directly Advances Governmental Interests?

Lamar Co., LLC v. Lexington-Fayette Urb. Cnty. Gov't, 2023 WL 3956149, at *13 (E.D. Ky. June 12, 2023) (government not required to submit empirical evidence in support of its alleged interests, did not need to "try to prove that [its] aesthetic [or safety] judgments are right.").

§ 3:4. The Federal Highway Beautification Act

StreetMediaGroup, LLC v. Stockinger, 2023 WL 5355119 (10th Cir. Aug. 22, 2023) (state highway beautification act content neutral when it defined "outdoor advertising" such as billboards as a sign for which compensation was paid, an alternative to the off-premises vs. on-premises distinction). Several states have adopted the paid compensation test in their highway beautification acts.

CHAPTER IV. SPECIALIZED ON-PREMISES SIGNS, HOW THEY ARE REGULATED, AND THE FREE SPEECH ISSUES THESE REGULATIONS PRESENT

§ 4:2. Digital Signs, or Electronic Message Centers (EMCs)

Adams Outdoor Advertising Ltd. Partnership v. City of Madison, 56 F.4th 1111 (7th Cir. 2023) (upheld ordinance that banned billboards but allowed digital signs in a few locations subject to strict limits; following City of Austin, court held that the off-premises vs. on-premises distinction was content neutral, and concluded that Adams Outdoor had not "meaningfully argued" that the digital sign ban "flunks" intermediate scrutiny; prohibiting digital signs serves significant governmental interests in promoting traffic safety and preserving visual aesthetics); Adams Outdoor Advert. Ltd. P'ship v. Town of Mount Pleasant, 2023 WL 4491197, at *12 (D.S.C. July 12, 2023) (applying City of Austin to uphold ban on digital signs because "the regulation does not prohibit any sign based on its political or ideological message and instead draws regulatory lines only based on the form that the sign takes; "Sign Ordinance survives intermediate scrutiny. Courts have uniformly found that both on-/off-premises distinctions and digital-sign bans promote traffic safety and preserve visual aesthetics." held "suitable time-place-manner restriction"); Lamar Co., LLC v. Lexington-Fayette Urb. Cnty. Gov't, 2023 WL 3956149, at *12 (E.D. Ky. June 12, 2023) (ban on digital signs held narrowly tailored valid content-neutral regulation of speech; aesthetics and traffic safety are substantial government interests, sufficient evidence provided, ordinance leaves alternative channels for communication open); Fairway Outdoor Advert., LLC v. City of High Point, 2022 WL 17975990, at *5 (M.D.N.C. Dec. 28, 2022) (upholding ban on digital signs).

CHAPTER V. REGULATIONS FOR THE DISPLAY OF ON-PREMISES SIGNS

§ 5:5. Height and Size Limitations

GEFT Outdoor, L.L.C. v. City of Evansville, 2023 WL 1111605, at *5 (S.D. Ind. Jan. 12, 2023), held that height, size, and other physical restrictions on signs do not have any relation to the content of the signs, are content neutral, and intermediate scrutiny applies.

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