United States Court of Appeals
for the Fifth Circuit

No. 19-50354

REAGAN NATIONAL ADVERTISING OF AUSTIN, INCORPORATED,

Plaintiff–Appellant,

LAMAR ADVANTAGE OUTDOOR COMPANY, L.P., *doing business as* THE LAMAR COMPANIES,

Intervenor Plaintiff–Appellant,

versus

CITY OF AUSTIN,

Defendant–Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-673

(Filed Aug. 25, 2020)

Before ELROD, SOUTHWICK, and HAYNES, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*.

Reagan National Advertising of Austin and Lamar Advantage Outdoor Company both filed applications to digitize existing billboards. The City of Austin denied the applications because its Sign Code does not allow

the digitization of off-premises signs. Reagan and Lamar sued, arguing that the Sign Code's distinction between on-premises and off-premises signs violates the First Amendment. The Sign Code's on-premises/off-premises distinction is content based and therefore subject to strict scrutiny. Because the Sign Code cannot withstand this high bar, we REVERSE and REMAND.

I.

Plaintiffs-Appellants Reagan and Lamar are in the business of outdoor advertising. Reagan and Lamar own and operate "off-premise[s]" signs, including billboards that display both commercial and noncommercial messages.

In April and June 2017, Reagan submitted permit applications to digitize its existing "off-premises" sign structures. The City denied all the permit applications, stating that "[t]hese applications cannot be approved under Section 25-10-152 (*Non-conforming Signs*) because they would change the existing technology used to convey off-premises commercial messages and increase the degree of nonconformity with current regulations relating to off-premises signs." In June 2017, Lamar submitted permit applications to digitize its existing "off-premises" sign structures. The City denied Lamar's applications for the same reasons it denied Reagan's.

The City of Austin regulates signs in Chapter 25-10 of the Austin City Code. The Sign Code defines an "off-premise[s] sign" as "a sign advertising a business,

person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The Sign Code does not expressly define "on-premise[s] sign," but it does use the term "on-premise[s] sign" in some of its provisions. The Sign Code allows new on-premises signs to be built, but it does not allow new off-premises signs to be built. A "nonconforming sign" is defined as "a sign that was lawfully installed at its current location but does not comply with the requirements of [the Sign Code.]" Preexisting off-premises signs are deemed "nonconforming signs."

Persons are permitted to "continue or maintain nonconforming signs at [their] existing location," and can even change the face of the nonconforming sign, as long as the change does not "increase the degree of the existing nonconformity." However, persons are not permitted to "change the method or technology used to convey a message" on a nonconforming sign. The Sign Code permits "on-premise[s] signs" to be "electronically controlled changeable copy signs" (*i.e.*, "digital signs"). Consequently, on-premises non-digital signs can be digitized, but off-premises non-digital signs cannot. The City's stated general purpose in adopting the Sign Code is to protect the aesthetic value of the city and to protect public safety.

In June 2017, Reagan sued the City in state court alleging the Sign Code was unconstitutional. Specifically, it alleged that the distinction between the digitalization of on-premises and off-premises signs was a

violation of the First Amendment. In July 2017, the City removed the case to federal court.

In August 2017, the City amended the Sign Code. The amended Sign Code defines "off-premise[s] sign" as "a sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution, or other commercial message which is generally conducted, sold, manufactured, produced, offered, or occurs elsewhere than on the premises where the sign is located," and it expressly defines an "on-premise[s] sign" as "a sign that is not an off-premise[s] sign."

The amended Sign Code also includes a new section, "§ 25-10-2 – Noncommercial Message Substitution," comprised of the following provisions:

> (A) Signs containing noncommercial speech are permitted anywhere that signs regulated by this chapter are permitted, subject to the same regulations applicable to the type of sign used to display the noncommercial message. No provision of this chapter prohibits an ideological, political, or other noncommercial message on a sign otherwise allowed and lawfully displayed under this chapter.
>
> (B) The owner of any sign allowed and lawfully displayed under this chapter may substitute noncommercial speech in lieu of any other commercial or noncommercial speech, with no permit or other approval required from the City solely for the substitution of copy.

> (C) This section does not authorize the substitution of an off-premise[s] commercial message in place of a noncommercial or on-premise[s] commercial message.

The amendments do not change the prohibition on changing the method or technology used to convey messages (*e.g.*, digitalization) for nonconforming signs, Section 25-10-152, or the definition of "nonconforming sign."

In October 2017, Lamar joined the case as an intervenor plaintiff. In their amended complaints, Reagan and Lamar asserted nearly identical causes of action and requests for relief. They sought declaratory judgments that the Sign Code's distinction between on-premises and off-premises signs was an unconstitutional content-based speech restriction, that the Sign Code was invalid and unenforceable, and that Reagan and Lamar should be allowed to digitize their signs without permits. Reagan sought a declaratory judgment that the Sign Code was invalid as applied to Reagan, but Lamar did not seek this specific relief.

After a bench trial, the district court denied Reagan and Lamar's requests for declaratory judgment, held that the Sign Code was content neutral and satisfied intermediate scrutiny, and entered judgment for the City. Reagan and Lamar appeal.

II.

The first issue we must address is mootness. In August 2017, the City amended the Sign Code. The

impact of the amendment was two-fold. First, it amended the definition of "off-premise[s] sign" and expressly defined "on-premise[s] sign." Second, it included a new section on "noncommercial message substitution." The amendment did not alter the prohibition on changing the method or technology used to convey messages for nonconforming signs (*e.g.*, digitalization) or the definition of a nonconforming sign.

The district court *sua sponte* addressed the question of mootness because the Sign Code amendments occurred after the denial of Reagan and Lamar's applications. The district court reasoned that amendments to a challenged law are not enough to moot an underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993).

The district court determined that the amendments to the Sign Code did not present a substantially different controversy because they: (1) did not alter the prohibition against new digital sign-faces for billboards; and (2) did not change Reagan and Lamar's claim that the application of the Sign Code required an enforcer to read the sign to determine whether it was "on-premises" or "off-premises," and thus, in Reagan and Lamar's view, the post-amendment Sign Code was still content based.

Reagan and Lamar agree with the district court that their case is not moot. However, they disagree on

the why. Reagan and Lamar sought to update grandfathered signs, and they filed their applications to do so in April 2017 and June 2017. At that time, the prior version of the Sign Code was still in effect and Reagan and Lamar's applications were denied under the prior version of the Code. Therefore, they assert that under Texas law, they have the right to have their applications determined based on the regulations in effect at the time their applications were filed. Tex. Loc. Gov't Code Ann. § 245002(a)(1); *see Reagan Nat. Advert. of Austin, Inc. v. City of Cedar Park*, 387 F. Supp. 3d 703, 706 n.3 (W.D. Tex. 2019) ("Texas law requires the permit applications be evaluated under the law as it existed at the time they were submitted, rather than under the new, revised sign code.").

We agree with Reagan and Lamar; the case is not moot. As Reagan and Lamar applied for permits under the old ordinance, we evaluate the constitutionality of the previous version of the ordinance.[1]

III.

There are two substantive issues we must address to determine what standard of scrutiny applies to Austin's Sign Code. First, whether the Sign Code's distinction between on-premises and off-premises signs is content based and second, whether the Sign Code is a regulation of commercial speech and therefore subject to intermediate scrutiny under *Central Hudson Gas &*

[1] We therefore do not need to address the amended ordinance's constitutionality.

Electric Corp. v. Public Service Commission, 447 U.S. 557, 561 (1980). We hold that because the Sign Code is a content-based regulation that is not subject to the commercial speech exception, strict scrutiny applies, and the City has not satisfied that standard. We walk through this analysis below.

A.

We turn first to whether the Sign Code's distinction between "on-premises" and "off-premises" signs is a content-based or content-neutral distinction. If the distinction is content based, then it is "presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). If the Sign Code is content neutral, then it is subject to intermediate scrutiny. *Id.* Because an off-premises sign is determined by its communicative content, we hold that the Sign Code's distinction between on-premises and off-premises signs is content based.

In 2015, the Supreme Court decided *Reed v. Town of Gilbert*, which clarified the law surrounding content-based speech regulations. Justice Thomas, writing for the majority, explained that a law is content based when it "target[s] speech based on its communicative content," or in other words, when it "applies to particular speech because of the topic discussed or the idea or message expressed. *Id.* To determine whether a law is content based, *Reed* states that a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."

Id. It may be the case that a distinction "defining regulated speech by its function or purpose" is drawn based on the message the speaker conveys and is thus facially content based and subject to strict scrutiny. *Id.*

Reed held that if a law is facially content based, it is "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). For this reason, a court must consider whether a law is facially content based or content neutral "*before* turning to the law's justification or purpose." *Id.* at 166.

While *Reed* did not profess to be creating new First Amendment law, federal courts have recognized that *Reed* constituted "a drastic change in First Amendment jurisprudence." *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 160 n.7 (3d Cir. 2016); *see also Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1332–33 (11th Cir. 2017) (en banc) (Tjoflat, J., dissenting) ("*Reed* announced a sea change in the traditional test for content neutrality under the First Amendment, and, in the process, expanded the number of previously permissible regulations now presumptively invalid under strict scrutiny."); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) ("*Reed* has made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant.").

Given this "sea change," other circuits have had to assess their pre-*Reed* case law. The Third and Fourth

Circuits, recognizing that *Reed* conflicted with their prior precedent, both abrogated certain *pre-Reed* cases. *See Free Speech Coalition*, 825 F.3d at 149 (explaining that *Reed* "requires us to take another look at our holding that intermediate scrutiny applies to the First Amendment analysis"); *Cahaly*, 796 F.3d at 405 ("This formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality. . . ."). The Sixth and Seventh Circuits have also acknowledged the impact of *Reed* in cases before them on rehearing. *See Wagner v. City of Garfield Heights*, 675 F. App'x 599 (6th Cir. 2017) (revisiting prior decision on remand from the Supreme Court after *Reed*); *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (reversing a prior holding, on petition for rehearing, based on *Reed*).

This circuit has yet to take inventory of our pre-*Reed* cases.[2] We do so now. We had previously held that "[a] statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech. . . . Content-neutrality has continued to be defined by the justification of the law or regulation, and this court has consistently employed that test." *Asgeirsson v. Abbott*, 696 F.3d 454, 459–60 (5th Cir. 2012) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal

[2] This is not the first instance since 2015 that this court has cited to *Reed.* Several of our cases have cited *Reed*, but not for the direct proposition at issue here. *See Seals v. McBee*, 898 F.3d 587, 595 (5th Cir. 2018); *United States v. Petras*, 879 F.3d 155, 166–67 (5th Cir. 2018); *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 468–69 (5th Cir. 2016) (Jones, J., dissenting).

inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." (citation omitted))). The *Asgeirsson* case predates *Reed* and cites to *Ward*, which the Supreme Court addressed in *Reed*.

While the Supreme Court did not overturn *Ward* in *Reed*, it did explain that the Ninth Circuit, who had interpreted *Ward* just as this court had in *Asgeirsson,*" misunderst[ood] [the] decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face." *Reed*, 576 U.S. at 166. The Supreme Court explained: "That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban. . . ." *Id.* at 166–67. It went on to clarify the correct law:

> Our precedents have . . . recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government "because of disagreement with the message [the speech] conveys." Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Id. at 164 (alteration in original) (quoting *Ward*, 491 U.S. at 791). But, if a law is content based on its face, then it is "subject to strict scrutiny regardless of the government's . . . content-neutral justification." *Id.* at 165.

In the wake of *Reed*, our *Asgeirsson* precedent must be revisited. Like the Ninth Circuit, our pre-*Reed* case law ascribed to an incorrect understanding of the test for content-neutrality given in *Ward*. *See Asgeirsson*, 696 F.3d at 459–60. Therefore, *Asgeirsson* and any portion of a case that relies on *Asgeirsson*'s content-neutrality analysis must be abrogated.[3]

Having clarified our case law, we now return to the case at bar and consider whether the challenged ordinance is content neutral or content based. *Reed* serves as our guide.

All nine Justices concurred in the judgment in *Reed*, six joining fully in the majority opinion and three concurring in the judgment only and proffering instead that intermediate scrutiny should have applied. *Reed*, 576 U.S. at 179 (Kagan, J., concurring in the judgment).

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[3] *See*, *e.g.*, *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 510 (5th Cir. 2009); *Pruett v. Harris Cty. Bail Bond Bd.*, 499 F.3d 403, 409 n.5 (5th Cir. 2007); *Illusions-Dall. Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 554–56 (5th Cir. 2006); *Brazos Valley Coal. for Lift, Inc. v. City of Bryan*, 421 F.3d 314, 326–27 (5th Cir. 2005); *de la 0 v. Hous. Auth. of City of El Paso*, 417 F.3d 495, 503 (5th Cir. 2005); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 174 (5th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003); *Horton v. City of Houston*, 179 F.3d 188, 193 (5th Cir. 1999).

Justice Alito, joined by Justices Kennedy and Sotomayor, all of whom concurred fully in the majority opinion, wrote a "few words of further explanation" in which he cautioned against the potential breadth of the majority opinion by discussing certain types of regulations that would still be content neutral under the opinion's holding. *Id.* at 174 (Alito, J., concurring). Justice Alito specifically notes, without further explanation, that "[r]ules distinguishing between on-premises and off-premises signs" should not be considered content based. *Id.* at 175 (Alito, J., concurring).

The City cites to Justice Alito's concurrence as support for its position that the type of regulation here is not content based and is simply exempted from *Reed.* But we do not agree that Justice Alito's concurrence supports the City. Like the Sixth Circuit, we

> agree[ ] it is possible for a restriction that distinguishes between off-and on-premises signs to be content-neutral. For example, a regulation that defines an off-premise[s] sign as any sign within 500 feet of a building is content-neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in *Reed.* The Court declines such a reading. Justice Alito's exemplary list of "some rules that would not be content-based" ought to be read in harmony with the majority's holding. [ ] Read in harmony with the majority, Justice Alito's concurrence enumerates an

> 'on-premises/off-premises' distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor.

Thomas v. Bright, 937 F.3d 721, 732–33 (6th Cir. 2019) (Batchelder, J.) (alteration in original) (quoting *Thomas v. Schroer*, 248 F. Supp. 3d 868, 879 (W.D. Tenn. 2017)); *see also* Note, *Free Speech Doctrine after* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1993 (2016) (explaining the potential "inconsistency between the *Reed* majority's far-ranging reasoning and Justice Alito's attempt to identify exceptions"). The City's Sign Code must be evaluated under the clear rule set forth by the *Reed* majority.

Austin's Sign Code permits on-premises sign owners to install digital sign faces that allow the copy to be changed electronically, while off-premises sign owners are forbidden from using this technology. To determine whether a sign is on-premises or off-premises, one must read the sign and ask: does it advertise "a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site"? The City claims that this is not a regulation over a sign's content; rather, it is a time, place, or manner restriction based on the location of signs. But "whether the Act limits on-premises signs to only certain messages or limits certain messages from on-premises locations, the limitation depends on the content of the message." *Thomas*, 937 F.3d at 731.

The Sixth Circuit recently decided a nearly identical question. In *Thomas v. Bright*, the court considered an "on-premises exception allow[ing] a property owner to avoid the permitting process and proceed to post a sign without any permit, so long as the sign is 'advertising activities conducted on the property on which [the sign is] located.'" *Id.* at 730 (second alteration in original) (quoting Tenn. Code Ann. § 54-21-103(3)). The enabling regulation specified that the sign had to be "located on the same premises as the activity" and "have as its purpose the identification of the activity, products, or services offered on that same premises." *Id.* (alterations omitted) (quoting Tenn. Comp. R. & Regs. 1680-02-03-.06)).

The Sixth Circuit explained that to determine whether the on-premises exception applied, the government official had to read the message written on the sign and determine its meaning, function, or purpose. *Id.* It wrote: "Some facial distinctions based on a message are obvious, . . . and others are more subtle, defining regulated speech by its *function or purpose.*" *Id.* (quoting *Reed*, 576 U.S. at 163). Consequently, the Sixth Circuit held the challenged regulation "contains a non-severable regulation of speech based on the content of the message." *Id.* at 733.

The D.C. Circuit has interpreted *Reed* differently. *See Act Now to Stop War and End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 334 (2017). In *Act Now*, the D.C. Circuit concluded that a distinction between event-related signs

and those not related to an event was content neutral because it was "not a 'regulation of speech,' but a 'regulation of the places where some speech may occur.'" 846 F.3d at 403 (quoting *Hill v. Colorado*, 530 U.S. 703, 719 (2000)).

The D.C. Circuit reasoned that even though government "officials may look at what a poster says to determine whether it is 'event-related,'" that did "not render the District's [regulation] content-based," and "the fact that a [government] official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the [regulation] content based." *Id.* at 404. "[S]uch 'cursory examination' did not render the statute facially content based." *Id.* (quoting *Hill*, 530 U.S. at 720).

We do not see, as the D.C. Circuit does, an exception for mere "cursory" inquiries into content in the holding of *Reed.* But even if we did, the sign ordinance here does not depend on merely a cursory inquiry into content. The City of Austin advances this "cursory" test as well, but the distinction does not hold water. It takes no more than a cursory reading to figure out if a sign supports Candidate A or Candidate B. But a law allowing advertising for Candidate A and not Candidate B would surely be content based. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that viewpoint discrimination is a more "blatant" and "egregious" form of content-based discrimination).

Determining whether a sign is on-premises or off-premises is not a "cursory" inquiry under the circumstances here. At oral argument, the panel posed numerous hypotheticals to the City asking whether a certain sign would be on-premises or off-premises:

- Could Sally have a digital sign in her front yard that says "Sally makes quilts here and sells them at 3200 Main Street"?
- Could Barbara and Tom maintain a digital sign in their yard that says "We love hamburgers" that contained the logo and address to a Whataburger location two miles away?
- Could the local school have an electronic message board that rotated between messages that said "Finals Start Tuesday" and "Eat at the Main Street Café on Friday to Support the Boosters"?
- Could Sarah place a digital sign in her yard that said "Vote for Kathy" if Kathy did not live at Sarah's house?
- How could one determine whether a digital billboard that said "God Loves You" is on-premises or off-premises?

Counsel for the City struggled to answer whether these hypothetical signs were on-premises or off-premises. And if prepared counsel cannot quickly assess whether these signs are permitted under the Sign Code, the inquiry is not a mere cursory one. A reader must ask: who is the speaker and what is the speaker saying? These are both hallmarks of a content-based

inquiry. *See Reed*, 576 U.S. at 166–69. The fact that the reader must also ask, where is this sign located?—a content-neutral inquiry—does not save the regulation.

Reed reasoned that a distinction can be facially content based if it defines regulated speech by its function or purpose. Here, the Sign Code defines "off-premises" signs by their purpose: advertising or directing attention to a business, product, activity, institution, etc., not located at the same location as the sign. The City clams that it is not content based because it does not target one specific viewpoint or message, but the Sign Code does not need to discriminate against a specific viewpoint to be "content based."

As explained in *Reed*, "A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea." 576 U.S. at 171. Hence why the ordinance at issue in *Reed* was deemed content based; it "single[d] out signs bearing a particular message: the time and location of a specific event." *Id.*

Our sister circuits have recognized this important principle. In addition to the Sixth Circuit decision discussed above, consider *Norton v. City of Springfield*, a decision in which the Seventh Circuit struck down an anti-panhandling ordinance that prohibited asking for immediate donations but allowed requests for future donations. 806 F.3d at 412. Relying on *Reed*, the Seventh Circuit reasoned that the ordinance was content

based. *Id.* at 413. It prohibited speech that said "Donate Now!" but allowed speech that said "Donate Later!" What time was to the anti-panhandling ordinance in *Norton*, location is to Austin's on-premises/off-premises distinction. Austin's Sign Code treats a sign that says "Stop Here!" differently than a sign that says "Stop Over There!"

We take *Reed* at its word. Recall that in *Reed*, the sign code required town officials to examine a sign to determine its purpose, and "[t]hat obvious content-based inquiry does not evade strict scrutiny review simply because an event . . . is involved." 576 U.S. at 170.

Or recall *Thomas*'s faithful application of *Reed:* The fact that a government official had to read a sign's message to determine the sign's purpose was enough to subject the law to strict scrutiny even though the sign's location was also involved. *Thomas*, 937 F.3d at 730–31 (explaining that the fact that Tennessee's law involved location did not make it content neutral because "the Supreme Court has repeatedly held that laws combining content-based and content-neutral factors are nonetheless content-based"). So here too. To determine whether a sign is "off-premises" and therefore unable to be digitized, government officials must read it. This is an "obvious content-based inquiry," and it "does not evade strict scrutiny" simply because a location is involved.

"[A]bove all else, the First Amendment means that government has no power to restrict expression

because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based regulations of speech 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" *Wollschlaeger*, 848 F.3d at 1327 (Pryor, J., concurring) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). "The power of the state must not be used to 'drive certain ideas or viewpoints from the marketplace,' even if a majority of the people might like to see a particular idea defeated." *Id.* (Pryor, J., concurring) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

The rule in *Reed* is broad, but this is not an unforeseen consequence. The separate opinions in *Reed* warned of just how broadly the rule could be interpreted. Justice Kagan's concurrence in *Reed* highlights the majority opinion's breadth by pointing out that the *Reed* majority opinion subjects signs advertising a one-time event to strict scrutiny because "a law with an exception for such signs 'singles out specific subject matter for differential treatment.'" 576 U.S. at 181 n.1 (Kagan, J., concurring in the judgment) (quoting 576 U.S. at 156, 169). Justice Breyer wrote that the *Reed* majority opinion cannot "avoid the application of strict scrutiny to all sorts of justifiable governmental regulations." *Id.* at 178 (Breyer, J., concurring in the judgment).

Indeed, the *Reed* majority itself acknowledged that "laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" *Id.* at 165 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)). As Justice Thomas explained, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them." *Id.* at 167 (alteration in original) (quoting U.S. Const. amend. I).

For the foregoing reasons, we hold that Austin's on-premises/off-premises distinction is content based.

B.

That still leaves the question of whether the Sign Code is regulating commercial speech. "Commercial speech is '[e]xpression related solely to the economic interests of the speaker and its audience.'" *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 487 n.2 (5th Cir. 2019) (alteration in original) (quoting *Central Hudson*, 447 U.S. at 561). Prior to *Reed*, "commercial speech enjoy[ed] lesser, intermediate-scrutiny constitutional protection." *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 224 (5th Cir. 2009), *cert. denied*, 130 U.S. 644

(2010); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981). We need not decide the issue of whether *Reed* changes the analysis of commercial speech unless Austin's Sign Code regulates only commercial speech.[4]

So, does Austin's Sign Code regulate commercial speech? Commercial speech is protected by the First Amendment, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976), but *Central Hudson* dictates that commercial speech is given "lesser protection . . . than . . . other constitutionally guaranteed expression," 447 U.S. at 563. This is because commercial speech "serves the economic interest of the speaker." *Id.* at 561. While the Supreme Court has "rejected the . . . view that government has complete power to suppress or regulate commercial speech," *id.* at 562, there is no "constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity," *id.* at 563.

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[4] The district court concluded that the lesser scrutiny outlined in *Central Hudson* and *Metromedia* applied because the Sign Code's "on/off-premises distinction is content neutral." This was error. Assuming *Reed* has not altered the law on commercial speech, courts do not apply the *Central Hudson* test to "content neutral" regulations, but to commercial speech regulations—regardless of whether they regulate content. Therefore, the district court erred in applying *Central Hudson's* test based on the law's content neutrality—both because this is a misapplication of *Central Hudson* and because, as we establish above, the law is not content neutral.

The parties do not dispute that the Sign Code, prior to the amendments, applied to both commercial and noncommercial speech. The relevant provisions made no exceptions or carve outs to the applicability of the law based on whether the speech involved commercial or noncommercial messages. Notwithstanding the law's general applicability, the City argues that because the Sign Code applies to billboards, which primarily share commercial messages, and only intermittent noncommercial messages are affected, the ordinance should be evaluated in the realm of commercial speech. But the Sign Code does not regulate noncommercial speech only intermittently. The regulation applies to any noncommercial message "off-premises" whether it is displayed for ten minutes or ten years.

The Eleventh Circuit dealt with a similar question in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n.15 (11th Cir. 2005). There, a city ordinance regulating signs applied to both commercial and noncommercial messages. The City argued that it nonetheless should be reviewed under the *Central Hudson* test because it regulates primarily commercial speech. *Id.* The Eleventh Circuit reasoned that because the sign code at issue did not regulate commercial speech as such, but rather applied "without distinction to signs bearing commercial and noncommercial messages," the *Central Hudson* test had no application and strict scrutiny applied. *Id.*[5]

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[5] The City relies on *International Outdoor, Inc. v. City of Troy*, No. 17-10335, 2017 WL 2831702 (E.D. Mich. June 30, 2017),

Indeed, the Supreme Court has warned against parsing speech in order to apply the proper test. Where "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression." *Riley*, 487 U.S. at 796.

This logic also applies to parsing regulations. A regulation covering billboards is not exempt from strict

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for the proposition that intermittent noncommercial speech does not take a regulation out of the realm of commercial speech. We find *City of Troy* both factually distinguishable and unpersuasive. First, *City of Troy* evaluated a variance, which meant it was evaluating the specific sign at issue: an electronic billboard that had 32 rotating messages, 31 of which were commercial. The Michigan district court determined that this was "intertwined" speech. *Id.* at *5. Because the billboards were going to carry mostly commercial messages, the court concluded that this "intertwined" speech was essentially commercial in nature. *Id.* (citing *Riley v. Nat. Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999)).

We do not speak on whether the billboard at issue in *City of Troy* was a proper example of "intertwined" speech, but do point out that the speech at issue (one out of 32 billboards sharing a commercial message) is considerably different than the two cases the district court relied on for *support—Kentucky Registry* and *Riley*. The sort of "intertwined" speech addressed in the cited cases did not involve the kind of discrete messages carried on billboards, where one speaker's message may be noncommercial and another speaker's message commercial. Here, the potential noncommercial messages are not intertwined with other commercial speech. Austin's regulation applies fully to a billboard that seeks to display only noncommercial messages on an off-premises billboard.

scrutiny simply because most billboards display commercial messages. Here, the regulation applies with equal force to both commercial and noncommercial messages. For that reason, strict scrutiny applies. *See Solantic*, 410 F.3d at 1269 n.15 (explaining that because the sign code applies without distinction to signs bearing commercial and noncommercial messages, the *Central Hudson* test does not apply); *Southlake Prop. Assocs., Ltd. v. City of Morrow*, 112 F. 3d 1114, 1116–17 (11th Cir. 1997) (holding that to the extent that a sign ordinance regulates noncommercial speech, it must withstand a heightened level of scrutiny); *Cedar Park*, 387 F. Supp. 3d at 712–14 (noting that a law that applies to both commercial and noncommercial speech must survive strict scrutiny).

C.

Having determined that the Sign Code is content based and that the commercial-speech exception does not apply, we assess the relevant provisions of the pre-amendment Sign Code under strict scrutiny. Under that standard, "the Government [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Strict scrutiny is, understandably, a hard standard to meet. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015); *Reed*, 576 U.S. at 176 (Breyer, J., concurring) (explaining that strict scrutiny leads to almost certain legal condemnation). This is not one of those cases.

The City relied on the stated purpose of the Sign Code—to "protect the aesthetic value of the City and to protect public safety"—for justification of the ordinance. These were the same two justifications relied upon by the municipality in *Reed.* 576 U.S. at 171. As the Supreme Court held in *Reed*, we hold here that these purported justifications do not satisfy strict scrutiny. *See id.* at 172.

The City has not provided any argument that on-premises signs are a greater eyesore than off-premises signs, and the City cannot "plac[e] strict limits on" off-premises signs, as "necessary to beautify the [City] while at the same time allowing" on-premises signs of the same type. *Id.* The City has also failed to support its second stated justification: that off-premises digital signs pose a greater risk to public safety than on-premises digital signs. It has provided no evidence that on-premises signs pose less of a risk to public safety than off-premises signs.

Therefore, like the ordinance in *Reed*, the ordinance here is underinclusive. *See id.* at 171. A "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in the judgment)). The City has failed to show that this ordinance is narrowly tailored to serve a compelling government interest. It therefore fails strict scrutiny.

IV.

We hold that the on-premises/off-premises distinction is content based and fails under strict scrutiny. It thus runs afoul of the First Amendment. We REVERSE the district court's decision and REMAND to the district court for further proceedings consistent with this opinion.

United States Court of Appeals
for the Fifth Circuit

No. 19-50354

REAGAN NATIONAL ADVERTISING OF AUSTIN, INCORPORATED,

Plaintiff–Appellant,

LAMAR ADVANTAGE OUTDOOR COMPANY, L.P., *doing business* as THE LAMAR COMPANIES,

Intervenor Plaintiff–Appellant,

versus

CITY OF AUSTIN,

Defendant–Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-673

(Filed Aug. 25, 2020)

Before ELROD, SOUTHWICK, and HAYNES, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

<table>
<tr><td>REAGAN NATIONAL
ADVERTISING OF
AUSTIN, INC., and
LAMAR ADVANTAGE
HOLDING COMPANY,

Plaintiffs,

v.

CITY OF AUSTIN,

Defendant.</td><td>§
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Mar. 27, 2019)

By ordinance, the City of Austin prohibits new digital signs for off-premises signs, but permits them for on-premises signs. The plaintiffs own and operate billboards. They contend that the City's different rules for on- and off-premises signs is an unconstitutional restriction of speech under the First Amendment.

At the parties' request, the Court held a bench trial on this question on June 26, 2018. The parties submitted pretrial briefing, (Pls.' Br., Dkt. 25; City Br., Dkt. 30; Pls.' Resp., Dkt. 34), joint stipulated facts, (Dkt. 26), and proposed findings and fact and conclusions of law, (Dkts. 27, 29). Both parties then submitted post-trial briefing. (Dkts. 37, 38, 40, 42). Having considered

parties' submissions, the evidence and argument at trial, and the applicable law, the Court now enters the following findings of fact and conclusions of law.[1]

I. BACKGROUND

Plaintiff Reagan National Advertising of Austin, Inc. ("Reagan") filed 50 permit applications to install digital sign-faces on billboards throughout the Austin area. (Am. Stip. Facts, Dkt. 26, at 3). Defendant City of Austin ("the City") denied the applications, citing city code ("the Sign Code") that prohibits the installation of digital faces on "off-premise" signs. (*Id.*). Shortly after, Lamar Advantage Holding Company ("Lamar") filed 23 permit applications, which the City denied on same grounds. (Lamar Am. Compl., Dkt. 13).

Reagan filed suit in Travis County and the City removed to federal court. (Not. Removal, Dkt. 1). Lamar joined the case as an intervenor plaintiff. (Order on Mot. Intervene, Dkt. 9). Reagan and Lamar then filed amended complaints, which assert identical causes of action and requests for relief. (Reagan Am. Compl., Dkt. 19; Lamar Am. Compl., Dkt. 13). Reagan and Lamar assert their claims based on the Sign Code in effect at the time that the City denied their permit applications. (*See* Reagan Am. Compl., Dkt. 19, at 2; Lamar Am. Compl., Dkt. 13, at 2). The City revised Chapter 25-10 on August 17, 2017, after all of Plaintiffs'

[1] Any finding of fact that should be construed as a conclusion of law is so adopted. Any conclusion of law that should be construed as a finding of fact is so adopted.

applications were denied. (*See* Ord. No. 20170817072, Dkt. 37-20).

Reagan and Lamar assert that the distinction between on- and off-premises signs in the Austin Sign Code is an unconstitutional content-based restriction of speech, both facially and as applied to Reagan and Lamar. (Reagan Am. Compl., Dkt. 19, at 7; Lamar Am. Compl., Dkt. 13, at 5). They seek a declaratory judgment that Chapter 25-10, or any relevant part of that chapter, is an unconstitutional content-based regulation of speech; that it is invalid and unenforceable on its face; that it is invalid as applied to Regan and Lamar; and that Reagan and Lamar are "allowed to convert [their] outdoor advertising signs to digital copy without having permits issued." (*Id.* (citing Tex. Civ. Prac. & Rem. Code § 37.003, 37.004)).

II. FINDINGS OF FACT

A. Stipulated Facts

The parties stipulated to the following facts, which are not contradicted anywhere in the record. (Am. Stip. Facts, Dkt. 26). Although the parties submitted separate proposed findings of fact that feature slightly different wording, (*see* Dkts. 27, 29), they are identical in substance. The Court therefore adopts the Joint Proposed Amended Stipulated Facts as its own findings.[2]

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[2] Unless specified otherwise, all references to the Sign Code pertain to the version of the Sign Code in effect at the time that

Plaintiffs Reagan and Lamar are companies in the business of outdoor advertising, which includes ownership and operation of billboards throughout the City of Austin and surrounding area. (Am. Stip. Facts, Dkt. 26, TT 2-3, 6).

Chapter 25-10 of the Austin Sign Code distinguishes between "on-premise" signs and "off-premise" signs. Under the Sign Code in effect at the time of Plaintiffs' applications, a sign is an "off-premise" sign if it advertises something not located where the sign is installed or directs people to any location other than the site of the sign itself. Section 25-10-3(11) (current version at Section 25-10-4(9)). Billboards are off-premises signs. (Am. Stip. Facts, Dkt. 26, ¶ 9). The Sign Code allows construction of new on-premises signs but prohibits new off-premises signs. (*Id.* ¶ 10). Existing off-premises signs are deemed "nonconforming signs," which were lawful when installed but no longer comply with the current Sign Code. (*Id.* ¶¶ 10-11); *see* Section 25-10-3(10). The Sign Code prohibits changes to "nonconforming signs," including existing off-premises signs. (*Id*. ¶ 10).

The Sign Code allows digital sign-faces for on-premises signs but prohibits digital sign-faces for off-premises signs. (*Id.* ¶ 12); *see* Section 25-10-102(6) (allowing electronically controlled changeable copy signs for on-premises signs); Section 25-10-152(B)(2)(b)

Reagan and Lamar applied for their permits, which is offered as Joint Exhibit J-1. (*See* Sign Code, Dkt. 19-5).

(prohibiting any "change in the method of technology used to convey a message" on a non-conforming sign).

The City's stated general purpose in adopting the Sign Code, including the sign regulations at issue in this lawsuit, is to protect the aesthetic value of the city and to protect public safety. (*Id.* ¶ 13).

On April 17, 2017, Reagan submitted 50 permit applications to install digital sign-faces on existing sign structures. (*Id.* ¶ 14). The next month, the City of Austin denied all 50 of Reagan's applications. (*Id.* ¶ 16). Reagan then submitted another 11 permit applications to install digital sign-faces on existing sign structures in June. *(Id. ¶* 17). In July, the City of Austin once again denied all 11 of Reagan's applications. (*Id.* ¶ 18). In the denial letters, the City stated that "[t]hese applications cannot be approved under Section 25-10-152 (*Nonconforming Signs*) because they would change the existing technology used to convey off-premise commercial messages and increase the degree of nonconformity with current regulations relating to off-premise signs." (First Regan Denial Letter, Dkt. 36-2, at 1 ("Ex. J-4"); Second Reagan Denial Letter, Dkt. 36-3, at 68 ("Ex. J-7")).

On June 29, 2017, Lamar submitted 23 permit applications to install digital sign-faces on existing sign structures. (Am. Stip. Facts, Dkt. 26, ¶ 21). In August, the City of Austin denied all of Lamar's applications. (*Id*. ¶ 22). In its denial letter to Lamar, the City stated that "[t]hese applications cannot be approved under Section 25-10-152 . . . [and] the longstanding prohibition

codified in Section 25-10-102 (*Signs Prohibited in All Sign Districts*)," which prohibits off-premises signs that are not authorized under any other provision of the Sign Code. (Lamar Denial Letter, Dkt. 36-4, at 68 ("Ex. J-9")). Reagan and Lamar have submitted into evidence a complete list of the subject properties for which the City denied permits to install digital sign-faces. (Ex. A, Dkt. 26-1; Ex. B, Dkt. 26-2).

The parties also stipulate that the City amended Chapter 25-10 on August 17, 2017, after the City denied all of Reagan and Lamar's permit applications. (Am. Stip. Facts, Dkt. 26, ¶ 27; *see* Ordinance No. 20170817-072, Dkt. 36-11, at 4-20; Section 25-10 (as amended 2017), Dkt. 36-12, at 1-33).

B. Additional Findings of Fact

The Court also finds the following additional facts, which were undisputed and submitted during and after the bench trial. First, the amendments to the City Code did not alter Section 25-10-152, which prohibits new digital sign-faces for billboards. Section 25-10-152(B)(2)(b) (current version at Section 25-10-152(B)(2)(b) (2017)).[3] However, the amendments did change the definition of an "off-premise" sign. The old Sign Code in effect at the time of Reagan and Lamar's applications provides that an off-premises sign is "a sign

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[3] (*See also* City Post-Trial Br., Dkt. 37, at 2). Reagan and Lamar did not dispute this fact in their response, (*see* Pls.' Resp., Dkt. 42), and the text of the two versions of the Sign Code are identical

advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Section 25-10-3(11) (current version at Section 25-10-4(9) (2017)). The new Sign Code provides that an off-premises sign is "a sign that displays any message directing attention to a business . . . activity, events, person, institution, or other commercial message which is generally conducted . . . or occurs elsewhere than on the premises where the sign is located . . . " Section 25-10-4(9) (2017).

III. CONCLUSIONS OF LAW

Reagan and Lamar argue that the distinction between on-premises and off-premises signs in the Austin Sign Code is an unconstitutional content-based restriction of speech because it "treats on-premise and off-premise signs differently and defines them in such a way that requires one to read the sign to determine which kind of sign it is and what ordinances apply." (Pls.' Br., Dkt. 25, at 2).[4] They contend that "[i]f the Sign Code must be read to determine what ordinances

[4] In their respective Complaints and joint trial brief, Reagan and Lamar specifically identify the following provisions: Section 25-10-3 (defining a non-conforming sign); Section 25-10-3(11) (defining an off-site sign); Section 25-10-102(6) (allowing electronically controlled changeable copy signs only for on-premises signs), Section 25-10-152(B)(2)(b) (prohibiting any "change in the method of technology used to convey a message" on a non-conforming sign). (*See* Reagan Am. Compl., Dkt. 19, at 3; Lamar Am. Compl., Dkt. 13, at 3; Pls.' Br., Dkt. 25, at 11).

apply," it is not content-neutral and therefore subject to strict scrutiny. (*Id.*).

Before reaching the merits of Reagan and Lamar's claim, the Court must consider two preliminary questions. Now that the City has amended parts of the Sign Code, is this lawsuit moot? And if their claim is otherwise moot, do Plaintiffs have a vested right to have their applications considered under the Sign Code in effect at the time that they applied?

A. Mootness

Sua sponte, the Court recognized and raised the possibility of mootness during the bench trial. The parties submitted argument at trial and post-trial briefing on this question. (Dkts. 37, 38, 40, 41, 42).[5]

If a court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the

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[5] The Court also notes the parties' submissions on the related case, *Reagan National Advertising of Austin, Inc. v. City of Cedar Park*, No. 1:17-CV-717-SS (W.D. Tex. filed July 31, 2017) ("the Cedar Park case"). In that case, the Court granted summary judgment in favor of Cedar Park, (*id.*, Dkt. 37), but then vacated that judgment because Court's ruling rested on the conclusion that Reagan lacked standing to challenge the Sign Code's regulation of noncommercial speech, but the Court had not given Reagan notice and opportunity to respond to the issue of standing, (*id.*, Dkt. 42). The Court will issue a revised summary judgment order taking into account the additional evidence that Reagan does publish some noncommercial speech. (*Id.*). In this case, plaintiffs have already submitted evidence that they publish some noncommercial speech. (*See* Ex. J-10, Dkt. 36-4). The Court does not require any further briefing or evidence on this issue.

action. Fed. R. Civ. P. 12(h)(3). A case is properly dismissed for lack of subject matter jurisdiction when the court lacks "the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). The trial court is "free to weigh the evidence and satisfy itself" that subject matter jurisdiction exists. *MDPhysicians & Assocs., Inc. v. State Bd. Of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)). "[T]he fact that a challenged law is amended does not alone moot the underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy." *Peru v. Texas*, 970 F. Supp. 2d 593, 602 (W.D. Tex. 2013) (citing *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993)).

In this case, the 2017 amendments to the Sign Code change the definition of an "off-premise" sign, potentially but not necessarily altering the types of signs that will be covered as off-premises. For example, the old Sign Code in effect at the time of Reagan and Lamar's applications defines an off-premises sign as "a sign *advertising* a business, person, activity, goods, products, or service . . . " while the new definition is "a sign *that displays any message* directing attention to a business . . . activity, events, person, institution, *or other commercial message*." Section 25-10-3(11) (current version at Section 25-10-4(9) (2017)). However, the amendments do not alter the prohibition against new digital sign-faces for billboards. *See* Section 25-10-152(B)(2)(b) (current version at Section 25-10-152(B)(2)(b) (2017)). Moreover, the amendments do not change Reagan and Lamar's claim in this suit: that if a person must read a sign to determine which regulation applies—the on-premises provision or the off-premises provision—then that the regulation is content-based and subject to strict scrutiny. (Reagan Am. Compl., Dkt. 19, at 4-5; *see also* Lamar Am. Compl., Dkt. 13, at 3 ("The only way to determine whether a sign is an on-premise or off-premise sign is to consider the content of the sign and determine whether that content is sufficiently related to the business or service offered on the sign site.")). This is the sole basis of their challenge to the Sign Code. Because the amendments do not change the question before the Court, the Sign Code has not been "sufficiently altered so as to present a substantially different controversy." *See Perez*, 970 F. Supp. 2d at 602 (citing *Ne. Fla. Chapter*, 508 U.S. at

662 & n.3). Reagan and Lamar's claims are not moot. The Court therefore does not reach the question of whether Reagan and Lamar have vested rights in the consideration of their applications under the Sign Code in effect at the time that they applied.

B. The Merits

The Court now turns to the central question in this case. Reagan and Lamar ask the Court to find that the on/off premises distinction in the Sign Code in effect at the time that the City denied their permits is an unconstitutional content-based restriction of speech, facially and as applied to them. Specifically, they contend that *Reed v. Town of Gilbert, Ark.*, 135 S. Ct. 2218 (2015) "altered the analysis" for regulations that distinguish between on- and off-premises signs. (Pls.' Br., Dkt. 25, at 3). Reagan and Lamar argue that under *Reed*, the Sign Code's different rules for on- and off-premises signs are content-based and therefore subject to strict scrutiny. (*Id.*). The City counters that the on/off-premises distinction only regulates the location of signs, not their content, and that *Reed* did not address the standard for on/off-premises distinctions at all. (City Br., Dkt. 30, at 4).

1. Standard of Review

The parties agree that before *Reed*, regulations distinguishing between on- and off-premises signs were subject to intermediate scrutiny, not strict scrutiny. *See Metromedia, Inc. v. City of San Diego*, 453 U.S.

490, 507 (1981). The Court considers *Metromedia* and *Reed* in turn.

a. The Decision in Metromedia

In *Metromedia*, the city of San Diego prohibited off-premises "outdoor advertising display signs," with exceptions for twelve specific sign categories, such as bus stop signs, "religious symbols," and temporary political campaign signs. *Id.* at 502. In effect, San Diego prohibited all off-premises commercial signs but allowed on-premises commercial signs. *Id.* at 503. For non-commercial signs, San Diego prohibited all signs other than the twelve excepted categories. *Id.* Regarding the commercial sign regulations, the Supreme Court applied intermediate scrutiny: "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Id.* at 507 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, at 563-66 (1980)). Applying that intermediate scrutiny test, the Supreme Court upheld different rules for on-premises and off-premises commercial signs: "offsite commercial billboards may be prohibited while onsite commercial

billboards are permitted." *Id.* at 512.[6] However, the Court added: "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.* at 513.[7] As the Fifth Circuit has summarized: "*Metromedia* established three key propositions. It held that (1) a billboard ordinance may

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[6] The Court explained: "There can be little controversy over the application of the first, second, and fourth criteria. There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals. . . . If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." *Metromedia*, 453 U.S. at 507-08 (internal citations and quotation marks omitted). Regarding the third criterion—whether the regulation "directly advances" governmental interests in traffic safety and the city's aesthetic appearance—the Court deferred to the subjective judgment of local lawmakers in the absence of any claim that San Diego had "as an ulterior motive the suppression of speech." *Id.* at 510.

[7] *Metromedia* concluded that the San Diego regulations were unconstitutional because they "favor[ed] certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others," based on their content, with a complete bar on most non-commercial signs. *Metromedia*, 435 U.S. at 519.

permit on-premise commercial advertisement while banning off-premise commercial advertisement; (2) the ordinance may not distinguish among non-commercial messages on the basis of their content; and (3) where a city permits commercial billboards, it must also permit non-commercial ones." *RTM Media, LLC v. City of Houston*, 584 F.3d 220, 225 (5th Cir. 2009).

b. The Decision in Reed

The City of Austin contends that *Metromedia* continues to apply. (City Br., Dkt. 30, at 5-6). Reagan and Lamar argue that *Reed* "change[d] the landscape applicable to the on-premise/off premise distinction and specifically requires strict scrutiny to apply where ordinances are not content-neutral." (Pls.' Br., Dkt. 25, at 3).

Reagan and Lamar are only correct in part. *Reed* did state that strict scrutiny applies to content-based speech regulations, and that courts must consider whether a facially neutral regulation is nonetheless content-based based on the law's "purpose and justification." *Reed*, 135 S. Ct. at 2227-28. But *Reed* did not change the First Amendment analysis for on/off premises distinctions.

First, *Reed* did not change the test for content-based speech. Rather, *Reed* recites the familiar standard. Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 2226 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92,

95 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011) (holding that a regulation permitting "educational communications" but restricting disclosure for marketing purposes was content-based "on its face"); *Carey v. Brown*, 447 U.S. 455, 462 (1980) (holding that a regulation distinguishing between peaceful labor picketing and other peaceful picketing was content-based); *Mosley*, 408 U.S. at 95 (same)).

Reed affirmed that the phrase "content based" has a "commonsense meaning" that "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell*, 564 U.S. at 565). While "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter . . . others are more subtle, defining regulated speech by its function or purpose." *Id.* Finally, some laws that are "facially content neutral" are nonetheless content based if they "cannot be justified without reference to the content of the regulated speech," or if the

government adopted them "because of disagreement with the message the speech conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (cleaned up). All content-based speech regulations are subject to strict scrutiny. *Id.*

In *Reed*, the Supreme Court applied this framework to the sign code in Gilbert, Arizona, which prohibited the display of outdoor signs anywhere without a permit, with special exemptions for 23 categories of signs. *Id.* at 2224. Exempt sign categories included "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* Each category was subject to different regulations for size, location, and duration of display. The Gilbert sign code treated ideological signs "most favorably," allowing them the largest display size, permission to be placed in all zoning areas, and unlimited display time. *Id.* When a local church posted signs for Sunday services beyond the time limit for "Temporary Directional Signs Relating to a Qualifying Event," town officials issued repeated citations, and the church filed suit. *Id.* at 2225-26.

Reed emphasized that "[b]ecause strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Id.* at 2228. "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at

2230. Thus, although the Gilbert sign code did not discriminate, for example, between different political viewpoints subject to the "Political Signs" category, the sign code did "single out specific subject matter for differential treatment" by adopting different regulations for political messages, ideological messages, and messages about events. *See id.* ("Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination."). Applying strict scrutiny, the *Reed* Court concluded that the Gilbert sign code was not narrowly tailored to achieve a compelling interest. *Id.* at 2231 (citing *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

Here, Reagan and Lamar argue that if a viewer must "read the sign . . . just to determine what rules apply, then the regulation is content based under *Reed*." (Pls.' Post-Trial Br., Dkt. 38, at 1). They submit that the City of Austin Sign Code is content based because the regulations "require the City to look at the content of the sign to determine whether it is an on-premise or off-premise sign," to see if digital sign-faces are permitted. (Pls.' Br., Dkt. 25, at 10-11). They argue that "the location of the structure itself is not what determines what rules apply. Rather, the content of the sign determines what rules apply." (Pls.' Post-Trial Br., Dkt. 38, at 2). "Does the content advertise something at that location? If so, then the on-premise rules apply.

Does th[e] content advertise something not at that location? If so, then the off-premise rules apply." (*Id.*).

Reagan and Lamar are urging an interpretation of *Reed* that no court in this circuit has adopted.[8] On their reading, regulations governing stop signs are content based because they must be read to determine its governing provision under the Sign Code. On this view, regulations imposing greater restrictions for commercial

[8] Courts in our circuit have not yet ruled on this question. Reagan and Lamar offer one supporting authority, which is not binding on this Court. *See Thomas v. Schroer*, 248 F. Supp. 3d 868, 880 (W.D. Tenn. 2017), *reconsideration denied*, No. 13-CV-02987-JPM-CGC, 2017 WL 6489144 (W.D. Tenn. Sept. 20, 2017) ("Even though the on-premises/off-premises distinction appears facially content neutral, it ultimately cannot be justified without reference to the content of the regulated speech and thus is a content-based regulation.") (cleaned up). Moreover, as the City notes, *Thomas* case concerned regulations that only restricted noncommercial speech. (City Trial Br., Dkt. 30, at 5). Outside of the Fifth Circuit, an overwhelming majority of courts have rejected the construction of *Reed* that Reagan and Lamar propose. *See Act Now to Stop War and End Racism Coal. and Muslim Am. Soc.*"), *Freedom Found. v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017), *cert. denied sub nom., Muslim Am. Soc'y Freedom Found.*, 138 S. Ct. 334 (2017) ("cursory examination" does not render the statute facially content based); *Contest Promotions, LLC v. City & Cty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017) ("We have likewise rejected the notion that *Reed* altered *Central Hudson's* longstanding intermediate scrutiny framework [for commercial speech].") (citing *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016); *Signs for Jesus v. Town of Pembroke*, 230 F. Supp. 3d 49, 60 (D.N.H. 2017) (holding that absent evidence "suggesting that the Town applied the electronic sign ordinance unevenly in a way that suggests a content preference," restrictions on electronic signs were content-neutral and subject to intermediate scrutiny).

signs—a well-established and constitutional practice[9]—would be content-based because a viewer must read a sign to determine if the message was commercial or non-commercial. In effect, Reagan and Lamar urge a rule that would apply strict scrutiny to all regulations for signs with written text.

This Court declines to find that *Reed* quietly overruled *Metromedia* and *Central Hudson* without saying so. In fact, *Reed* does not mention *Metromedia* at all. *Reed* is entirely consistent with *Metromedia.* In *Reed*, the Supreme Court struck down a regulation that compelled town officials to categorize the content of a sign—for example, as "Ideological" or "Political"—in order to apply different rules for different subject matter. *Reed*, 135 S. Ct. at 2230. In *Metromedia*, the Supreme Court upheld the portion of the regulations that restricted off-premises billboards while permitting them on-premises, so long as the city did not restrict non-commercial subject matter more than commercial subject matter. *Metromedia*, 453 U.S. at 512-13.

Finally, the only mention of on- or off-premises signs in *Reed* appears in Justice Alito's concurrence, which states that the rules for on/off-premises distinctions would remain unchanged after *Reed*. "I will not attempt to provide anything like a comprehensive list,

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[9] "[W]e continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be." *Metromedia*, 453 U.S. at 506 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379-381, 383-384 (1977); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978)).

but here are some rules that would not be content based: . . . Rules distinguishing between on-premises and off-premises signs." *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring). *Reed* did not overrule or alter the analysis for on- and off-premises signs under *Metromedia*.

2. The City of Austin Sign Code

The Court now considers the City of Austin Sign Code. As detailed above, an off-premises sign is "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Section 25-10-3(11) (current version at Section 25-10-4(9) (2017)). The Sign Code allows digital sign-faces for on-premises signs but prohibits digital sign-faces for off-premises signs. *See* Section 25-10-102(6) (allowing electronically controlled changeable copy signs for on-premises signs); Section 25-10-152(B)(2)(b) (current version at Section 25-10-152(B)(2)(b) (2017) (prohibiting any "change in the method of technology used to convey a message" on a non-conforming sign).

Reed directs courts to evaluate whether a regulation is facially content based *and* whether the "purpose and justification for the law are content based" before a court may "conclude that the law is content neutral and thus subject to a lower level of scrutiny." 135 S. Ct. at 2228. First, a court must consider whether the law is content-neutral on its face. *Id.* Here, the Court agrees with the City that the Sign Code's on/off premises

distinction is facially neutral because it "do[es] not ban or otherwise curtail discussion of any specific topics, ideas or viewpoints." (City Br., Dkt. 30, at 5). For example, the on/off premises distinction in the Sign Code does not impose greater restrictions for political messages, religious messages, or any other subject matter, as the impermissible regulation did in *Reed*. *See Reed*, 135 S. Ct. at 2230. The Sign Code does not require a viewer to evaluate the topic, idea, or viewpoint on the sign in order to determine which provision applies. It only requires a viewer to determine whether the subject matter is located on the same property as the sign, or on a different property. This is a regulation based on location, not "based on the message a speaker conveys." *Id.* at 2227 (citing *Sorrell*, 564 U.S. at 565).

Second, the City's stated "purpose and justification" is to "protect the aesthetic value of the City and to protect public safety." (City Br., Dkt. 30, at 6). Applied without bias to different messages or speakers, community aesthetics and public safety are indeed content neutral grounds. There is no evidence in the record that the City of Austin has applied these grounds differently for different messages or speakers, or that these grounds are pretext for any other purpose. The Court concludes that the Sign Code's on/off premises distinction is content neutral both facially and in its purpose and justification.

Because the Sign Code's on/off-premises distinction is content-neutral, the Court applies the intermediate scrutiny standard for commercial speech restrictions from *Metromedia* and *Central Hudson*.

Neither party disputes the first requirement: the regulated speech "concerns lawful activity and is not misleading." *See Metromedia*, 453 U.S. at 507 (citing *Central Hudson*, 447 U.S. at 563). For the second requirement, the City of Austin submits that the distinction for on/off-premises signs is intended to "protect the aesthetic value of the City and to protect public safety." (City Br., Dkt. 30, at 6). Reagan and Lamar argue that "no compelling interest is being served, nor can the regulation be narrowly tailored to achieve that interest." (Pls.' Br., Dkt. 25, at 12). But *Metromedia* directly contradicts Reagan and Lamar: "Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals." *Metromedia*, 453 U.S. at 507-08. On the third requirement, that a regulation must "directly advance" a government's substantial interest, the Supreme Court further stated that courts should "hesitate to disagree with the accumulated, common-sense judgments of local lawmakers . . . that billboards are real and substantial hazards to traffic safety." *Id.* at 509. "Such [a]esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Id.* at 510. And here, as in *Metromedia*, there is no claim that the City of Austin "has as an ulterior motive the suppression of speech." *Id.*[10] Finally, the fourth

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[10] Reagan and Lamar assert in their post-trial briefing that the City's true purpose is to "reduce or eliminate billboards," (Pls.

requirement mandates that the City's regulation "reaches no further than necessary to accomplish the given objective." *Id.* at 507. The facts in this case again parallel *Metromedia*: "The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite [billboards]. . . ." *Id.* at 508; *see also RIM Media*, 584 F.3d at 224 n.5. No further showing is required.

Finally, the Court notes that the Sign Code satisfies the corollary rules in *Metromedia* for noncommercial speech. An ordinance "may not distinguish among non-commercial messages on the basis of their content," and "where a city permits commercial billboards, it must also permit noncommercial ones." *RTM Media*, 584 F.3d at 225 (citing *Metromedia*, 453 U.S. at 513). Here, there is no evidence in the record that the Sign Code distinguished among non-commercial messages based on their content or that the City prohibited noncommercial billboards.[11]

Post-Trial Br., Dkt. 38, a 7), but *Metromedia* expressly permits the reduction of billboards so long as the relevant regulations satisfy the requirements of the First Amendment. Further, there is no evidence before the Court that the City is in fact seeking to "eliminate" billboards.

[11] In fact, Reagan and Lamar provided exhibits with images of their own non-commercial billboards displayed in Austin, including signs promoting a ballot initiative, a non-profit children's advocacy organization, and a public art display. (*See* Ex. J-10, Dkt. 36-4).

The Court concludes that the distinction between on-premises and off-premises signs in the City of Austin Sign Code satisfies intermediate scrutiny.

IV. CONCLUSION

For the reasons given herein, **IT IS ORDERED** that Reagan and Lamar's request for declaratory judgment that the City of Austin Sign Code is an unconstitutional content-based regulation of speech is **DENIED**.

IT IS FURTHER ORDERED that Reagan and Lamar's request for declaratory judgment that the City of Austin Sign Code is invalid and unenforceable is **DENIED**.

IT IS FINALLY ORDERED that Reagan and Lamar's request for declaratory judgment allowing them to install digital sign-faces without approved permits from the City is **DENIED**.

SIGNED on March 27, 2019.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES
DISTRICT JUDGE

CHAPTER 25-10. – SIGN REGULATIONS.

§ 25-10-1 – APPLICABILITY.

(A) Except as otherwise provided in this section, this chapter applies to a sign that is:

(1) located in the planning jurisdiction;

(2) visible from a street right-of-way; and

(3) used for advertising

. . . .

§ 25-10-2 – COMPLIANCE REQUIRED.

(A) A person may not install, move, structurally alter, structurally repair, maintain, or use a sign except in accordance with the provisions of this chapter and other applicable Code provisions.

. . . .

§ 25-10-3 – DEFINITIONS

In this chapter:

. . . .

(10) NONCONFORMING SIGN means a sign that was lawfully installed at its current location but does not comply with the requirements of this chapter

(11) OFF-PREMISE SIGN means a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.

. . . .

§ 25-10-21 – ENFORCEMENT AND IMPLEMENTATION.

The building official shall:

(1) enforce and implement this chapter;

(2) issue permits and collect fees required by this chapter[.]

. . . .

§ 25-10-102 – SIGNS PROHIBITED IN ALL SIGN DISTRICTS.

Unless the building official determines that the sign is a nonconforming sign, the following signs are prohibited:

(1) an off-premise sign, unless the sign is authorized by another provision of this chapter;

. . . .

(6) a sign that uses an intermittent or flashing light source to attract attention, excluding an electronically controlled changeable-copy sign[.]

. . . .

§ 25-10-152 – NONCONFORMING SIGNS.

(A) A person may continue or maintain a nonconforming sign at its existing location.

(B) A person may not change or alter a nonconforming sign except as provided in this subsection.

(1) The face of the sign may be changed.

(2) The sign may be changed or altered if the change or alteration does not:

(a) increase the degree of the existing nonconformity;

(b) change the method or technology used to convey a message; or

(c) increase the illumination of the sign.

. . . .

(F) This subsection applies to an off-premise sign.

(1) This paragraph prescribes registration and identification requirements.

(a) The owner of the sign must register the sign every year with the director.

(b) The sign owner shall, on a form prescribed by the director, provide:

(i) information regarding the sign location, height, size, construction type, materials, setback from property boundaries, and illumination; and

(ii) the name and address of the sign owner.

(c) The sign owner shall initially register the sign by August 31, 1999, or within 180 days after the date the sign becomes subject to the City's planning jurisdiction, as applicable, and shall pay a registration fee set by separate ordinance.

(d) A person who fails to register a sign as required by this paragraph commits an offense.

(e) A sign owner is prohibited from relocating a sign if the sign owner is in violation of the registration requirements for any sign owned by that sign owner within the City's jurisdiction.

(f) The sign owner shall place identifying markers on the sign as required by the director. Such markers shall include, but not be limited to, the applicable registration number and measurement points to assist in verifying the height of a sign.

(g) A sign owner shall, in a manner prescribed by the director, provide an annual inventory of all signs owned by that sign owner, including but not limited to a description of the sign, the location of the sign, and the owner of the property on which the sign is located.

(h) The building official shall notify the property owner of the pending expiration of a sign registration, no earlier than 90 days and no later than 30 days prior to the expiration. The director shall provide the same notice to the sign owner if the inventory required under subsection (f) has been provided.

. . . .

§ 25-10-231 – REGISTRATION REQUIRED.

(A) Except as provided in this section, a person may not install, move, structurally alter, structurally repair, or maintain a sign unless the person is registered with the building official in accordance with this article.

. . . .

§ 25-10-233 – PREREQUISITES; EXPIRATION; NONTRANSFERABLE.

. . . .

B) Registration expires on December 31 of each calendar year.

C) Registration under this article is not transferable.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC., and LAMAR ADVANTAGE HOLDING COMPANY, Plaintiffs, v. CITY OF AUSTIN, Defendant.	§ § § § § § § § § § §	1:17-CV-673-RP

AMENDED JOINT STIPULATION OF FACT AND EVIDENCE

(Filed Jun. 5, 2018)

The parties submit these amended stipulations, to modify those that were previously submitted in accordance with paragraph 4 of the Scheduling Order that was entered by the Court on January 29, 2018.

I. FACTS

A. Background

1. Jurisdiction and venue are proper in this Court.
2. Plaintiff Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising ("Reagan") is a Delaware corporation doing

business in Austin, Travis County, Texas, and the surrounding areas.

3. Intervenor Lamar Advantage Outdoor Company, L.P. ("Lamar") is a Delaware limited partnership doing business in Austin, Travis County, Texas and the surrounding areas.

4. The City of Austin, Texas ("City") is a home-rule municipality located in Travis, Hays, and Williamson Counties.

5. The City does not have sovereign immunity, either immunity from suit or from liability, in this case.

6. Reagan and Lamar are in the business of outdoor advertising, which includes the ownership and operation of billboards. Reagan and Lamar engage in outdoor advertising within the City of Austin and in the surrounding areas.

7. Reagan and Lamar have standing to bring this suit.

B. The City's Sign Code

8. The City regulates off-premise signs in Chapter 25-10 of the Austin City Code ("Sign Code").

9. Billboards are off-premise signs.

10. The Sign Code allows new on-premise signs to be built, but new off-premise signs are prohibited and existing off-premise signs are

deemed to be nonconforming signs that are not allowed to change.

11. Non-conforming signs are those that were lawful when installed but that do not comply with the Sign Code.

12. The Sign Code allows digital sign faces to be used for on-premise signs, but digital sign faces are prohibited on off-premise signs. *See e.g.*, Section 25-10-102(6) (allowing electronically controlled changeable copy signs for on-premise signs) and Section 25-10-152(B)(2)(b) (disallowing a change in the method of technology used to convey a message on a non-conforming sign).

13. The City's stated general purpose in adopting its sign regulations, including the sign regulations at issue in this lawsuit, is to protect the aesthetic value of the city and to protect public safety.

C. Reagan's Applications

14. On or about April 17, 2017, Reagan submitted fifty[1] permit applications, along with the required fees, to the City for installation of digital sign faces on existing sign structures.

15. Forty-three addresses applied for on April 17, 2017, were applications for permits for conversion of existing signs to digital copy. In

[1] Reagan's First Amended Complaint says forty-nine applications were submitted. That was an error. In fact, fifty were submitted

seven[2] instances, the existing sign structures are currently electronically controlled changeable copy signs, as they are tri-vision signs.

16. On May 25, 2017 the City denied all fifty permit applications.

17. Additionally, on or about June 7, 2017, Reagan submitted another eleven permit applications, along with the required fees, to the City for installation of digital sign faces on existing sign structures.

18. On July 20, 2017 the City denied all eleven permit applications.

19. The addresses of Reagan's sign structures that were the subject of its sixty-one permit applications are listed in the attached **Exhibit A**.

20. The version of Chapter 25-10 of the Austin City Code ("Sign Code") that is stipulated to as Exhibit J-1 was in effect at all times relevant to the applications submitted by Reagan.

D. Lamar's Applications

21. On or about June 29, 2017, Lamar submitted twenty-three permit applications, along with the required fees, to the City for installation of digital sign faces on existing sign structures.

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[2] Reagan's First Amended Complaint says six. That was an error. In fact, seven were tri-vision signs.

22. On or about August 10, 2017, the City denied all twenty-three permit applications.

23. The addresses of Lamar's Sign structures that were the subject of its twenty-three permit applications are listed in the attached **Exhibit B**.

24. The version of Chapter 25-10 of the Austin City Code that is stipulated to as Exhibit J-1 was in effect at all times relevant to the applications submitted by Lamar.

E. Photographs of Signs

25. Exhibit J-10 depicts exemplar signs of Reagan's billboards within the City of Austin and in the surrounding areas.

26. Exhibit J-11 depicts exemplar signs of Lamar's billboards within the City of Austin and in the surrounding areas.

F. Revisions to the Sign Code

27. Chapter 25-10 of the City Code was amended on August 17, 2017, after all the Reagan and Lamar permit applications were received and denied by the City.