

THOMAS v. SCHROER and TEXAS' REED FIX

PREPARED FOR:

OAAA LEGAL SEMINAR

NOVEMBER 13-14, 2018

WESTIN NEW YORK TIMES SQUARE

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The 1st Amendment

- ***“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech, or of the press**; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”***
- U.S. CONST. amend. I.



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<http://mediatrackers.org/wp-content/uploads/2017/10/Freedom-of-Speech.jpg>

The 1st Amendment

- “Speech regulation is **content based** if a law applies to **particular speech** because of the **topic discussed or the idea or message** expressed”
 - *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).
- “Because **content-based laws** target speech based on its communicative content, they **are presumptively unconstitutional** and may be justified only if the government proves that they are narrowly tailored to serve **compelling state interests.**”
 - *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

Reed v. Town of Gilbert

Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015).

- The Town of Gilbert, Arizona prohibited the display of outdoor signs without a permit, but had 23 categories of exempt signs. One of the exempt categories was for “**Temporary Directional Signs,**” which were defined as signs that direct the public to a church or other “qualifying event.”
- No more than four Temporary Directional Signs (limited to six square feet) were allowed to be on a single property at any time and the signs were allowed to be displayed no more than 12 hours before the “qualifying event” and one hour after.
- Good News Community Church and its pastor, Clyde Reed, posted signs every Saturday morning with information about their next service. They would take these signs down around midday Sunday.
- **The Church received a citation** from the town of Gilbert, Arizona for “exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs.”
- The Church filed suit against the Town for **abridging their freedom of speech.**

Reed v. Town of Gilbert

Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015).



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- The Supreme Court held that **“the Sign Code’s provisions are content-based regulations of speech that do not survive strict scrutiny.”**
- The Court explained that because the Code was content-based because it defined categories on the basis of their messages and then subjected each category to different restrictions.
- The restrictions in the Code did not survive strict scrutiny because the Town did not demonstrate that the differentiation furthered a compelling government need and was narrowly tailored to that end.

Texas Department of Transportation v. Auspro Enterprises

Auspro Enterprises, LP v. Texas Dep't of Transp., 506 S.W.3d 688 (Tex. App.—Austin 2016, pet. filed).

- In 2011, Auspro Enterprises, LP, placed a **presidential campaign sign** on its property on State Highway 71 West.
- The Texas Department of Transportation sent a letter to Auspro explaining that its sign was in violation of the Texas Highway Beautification Act because “all outdoor signs must be permitted and, although there is a specific exemption under Department rules for political signs, the exemption **only allows political signs to be displayed 90 days before and 10 days after an election.**” The Department ordered Auspro to remove the sign.
- **Auspro did not remove the sign**, and the Department brought an enforcement action.
- Auspro asserted that the Act and the Department’s rules **violated its right to free speech.**



Image from:
https://www.austinchronicle.com/binary/7ad4/pols_feature35.jpg

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- **“A law can be content based in either of two ways:** (1) by distinguishing speech by the topic discussed; and (2) where the government's purpose or justification for enacting the law depends on the underlying ‘idea or message expressed’—i.e., the law is facially content neutral, but the motives in enacting it were content based.”
- The court found that, under the *Reed* standard for content neutrality, **the Texas Act’s out-door advertising regulations were clearly content based.**
- “Like the Town of Gilbert's sign ordinance, the Texas Act and the related Department rules **restrict speech in different ways based on the communicative content** of the sign.”
- The court then had to determine whether the Act survived a strict-scrutiny analysis.

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- To pass the strict-scrutiny analysis, the Department had to demonstrate that **the Act's differentiation between types of signs furthered a compelling governmental interest and was narrowly tailored to that end**. The Department itself acknowledged that it could not do so.
- The court decided that to resolve the Act's constitutional problems, **all of the content-based provisions must be severed**.
- “Guided by *Reed*, we are compelled to ... render judgment **severing Subchapters B and C** from the Texas Highway Beautification Act **as unconstitutional content-based restrictions of speech**.”



Image from:
<https://redheadedlawyer.com/wp-content/uploads/2014/06/texas-flag-and-gavel.jpg>

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Revised Texas Highway Beautification Act and Administrative Code

- Following the Auspro ruling, by the Texas Court of Appeals and before any action by the Texas Supreme Court on TxDOT's petition for review, the **Texas Legislature amended the Texas Highway Beautification Act**, effective June 15, 2017.
- The primary change was the replacement of the term “off-premise sign” with “commercial sign.”
- **“Commercial sign”** is now defined as a sign that is
 - “(A) intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or
 - (B) located on property owned or leased for the primary purpose of displaying a sign.”

TEX. TRANS. CODE § 391.001 (1 – a).

Revised Texas Highway Beautification Act and Administrative Code



Image from:
https://www.equipmentworld.com/wp-content/uploads/sites/2/2015/03/Texas_welcome_sign.jpeg

- In enacting these changes, **Texas no longer distinguishes signs by reading the message displayed on the sign** and determining whether the goods/services are **located on or off the premise**. Instead, the distinction is based on **whether a fee is paid for the display of goods/services** on the sign.
- In February 2018, the Texas Transportation Commission which promulgates regulations consistent with the Texas HBA, voted to adopt new administrative rules. These rules similarly replace “outdoor advertising” and “sign” with “commercial sign.” 43 TEX. ADMIN. CODE §§ 21.141, *et seq.* (effective March 14, 2018).

Texas Department of Transportation v. Auspro Enterprises

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- Following the Appellate Court's judgment, the Texas Department of Transportation petitioned the Texas Supreme Court to review the case. On April 6, 2018, the Texas Supreme Court granted TxDOT's Petition for Review and without hearing oral argument, issuing a formal opinion, or considering the merits of the case, vacated the judgments of the Court of Appeals and trial court (which ruled the Highway Beautification Act in violation of the First Amendment and therefore unconstitutional) and dismissed the case as moot.
- While the appeal was pending, the Texas Legislature amended the Highway Beautification Act. The Court apparently agreed with TxDOT's argument that the newly amended HBA cured the First Amendment concerns addressed by the lower courts, thereby rendering the dispute moot.
- **What are the consequences of the Texas Supreme Court's ruling?:**
 - The ruling from the Supreme Court effectively winds back the clock and nullifies the precedential effect of the decision in *Auspro*, which rendered TxDOT's outdoor advertising rules unenforceable.
 - However, the arguments asserted in the case were not addressed on the merits by the Court. As such, they remain viable and may be reasserted in a similar challenge to the former versions of the HBA and TxDOT's outdoor advertising regulations, but under *Reed v. Gilbert*, *Thomas v. Schroer*, and other authorities instead of *Auspro v. TxDOT*.

Conclusion

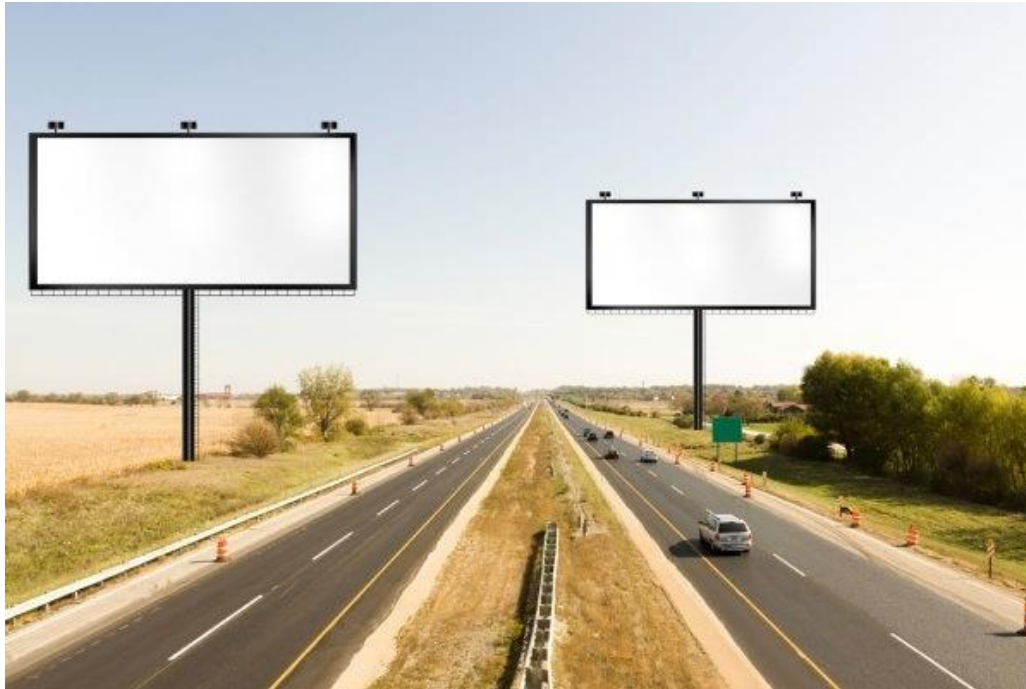


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- The *Reed* case defined content-based restrictions in regards to sign laws.
- If a sign code defines categories on the basis of their messages and then subjects each category to different restrictions, then the code is content-based.
- If a law is content-based, it is considered unconstitutional unless the government proves that the law is narrowly tailored to serve compelling state interests.
- While Texas has addressed its HBA, many sign codes could potentially face legal challenges for being content-based in accordance with *Reed*.