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File Name: 24a0093p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NORTON OUTDOOR ADVERTISING, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF ST. BERNARD, OHIO; GERALD L. STOKER,
Building Commissioner, BOARD OF ZONING APPEALS,
Village of St. Bernard, Ohio,

Defendants-Appellees.

No. 23-3623

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 20-cv-00350—Michael R. Barrett, District Judge; Stephanie K. Bowman, Magistrate Judge.

Argued: March 19, 2024

Decided and Filed: April 19, 2024

Before: BOGGS, MOORE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Michael A. Galasso, ROBBINS, KELLY, PATTERSON & TUCKER, Cincinnati, Ohio, for Appellant. Ray C. Freudiger, MARSHALL, DENNEHEY, P.C., Cincinnati, Ohio, for Appellee. **ON BRIEF:** Michael A. Galasso, Zachary C. Schaengold, ROBBINS, KELLY, PATTERSON & TUCKER, Cincinnati, Ohio, for Appellant. Ray C. Freudiger, MARSHALL, DENNEHEY, P.C., Cincinnati, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Like many municipalities, the Village of St. Bernard (“Village”) regulates billboards and other signs displayed within the Village limits. Norton Outdoor Advertising (“Norton”) has operated billboards within the Village for decades. The Village recently revoked one of Norton’s permits, however, after Norton constructed two variable-message signs. The relevant Village ordinance regulates signs based principally on whether what is being advertised is located on or off the premises of the sign. Under controlling Supreme Court precedent, this is a permissible, content-neutral means of regulation. But the Village’s ordinance also has an exemption that functions beyond this on- and off-premises dichotomy. And that exemption is content based. Accordingly, the Village ordinance must satisfy strict scrutiny. Because the Village ordinance is not narrowly tailored to fulfill a compelling interest, it cannot stand as written. The parties and the district court, however, have yet to consider whether the unconstitutional provision is severable. Accordingly, we REVERSE the district court’s judgment and REMAND for proceedings consistent with this opinion.

I. BACKGROUND**A. The Village Ordinances**

The Village regulates signs and billboards via two chapters of its code: Chapter 711 and Chapter 1185. Chapter 1185 pertains to “signs.” As a threshold matter, a sign is “any writing, pictorial representation, emblem, flag or any other figure or similar character which is a structure or part thereof or is attached to or painted on or in any means represented on a building or structure; and is used to announce, direct attention to, or advertise; and is visible from outside a building.” R. 1-1 (Ordinances, Ch. 1185.001(a)) (Page ID #43). This definition includes billboards but excludes “the flag, pennant, or insignia of any nation, state, city or other political unit, or any political, educational, charitable, philanthropic, civic, professional, religious or like campaign, drive, movement or event.” *Id.* (Page ID #43–44).

Chapter 1185 then identifies two further categories: advertising signs and business signs. An advertising sign “directs attention to a business, commodity, service or entertainment conducted, sold or offered elsewhere than on the premises where displayed or only incidentally on the premises.” *Id.*, Ch. 1185.001(c) (Page ID #44). A business sign accomplishes the same but does so on the premises where the activity is located. *Id.*, Ch. 1185.001(d) (Page ID #44). The parties agree that these two categories essentially refer to those advertising a subject matter that is “on-premises,” and those advertising the same “off-premises.” Appellant Br. at 8; Appellee Br. at 7. One must receive a permit before installing or erecting any sign, *id.*, Ch. 1185.002 (Page ID #44), but different rules otherwise pertain to advertising and business signs and to signs that do not fall into one of these two categories, *see, e.g., id.*, Chs. 1185.01, 1185.02 (Page ID #44). As far as “[e]xpressway [a]dvertising” is concerned, Chapter 1185.01(c) directs readers to Chapter 711 for “definition, rules, regulations and penalties.”

Chapter 711 is titled “[e]xpressway [a]dvertising.” Chapter 711.01 contains the Village’s statement of intent for promulgating rules “regulating outdoor advertising signs,” including reducing motorists’ distractions, improving highway safety, protecting emergency responders, maintaining and improving property values, and reducing “visual blight.” *Id.*, Ch. 711.01(a–e) (Page ID #41). The chapter then defines “[o]utdoor [a]dvertising [s]ign,” as “any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or to give information in the nature of advertising, or any part thereof, the advertising or informative contents of which are visible from the main traveled way of any highway on the Interstate system or primary system in this Village.” *Id.*, Ch. 711.02(a) (Page ID #41). Exempted from this definition are “[s]igns primarily intended to promote the sale of goods, products, services, or events on the same premises as the sign”; public traffic signs; signs located on property for sale; and “[p]ublic service signs which disclose information such as time or weather.” *Id.*, Ch. 711.02(a)(1–4) (Page ID #41). Outdoor advertising signs are subject to a variety of rules and regulations, but relevant here, they may not use “[m]ultiple message or variable message” displays, *id.*, Ch. 711.07(e) (Page ID #43), which

are essentially digital signs that can rotate through displayed messages, *id.*, Ch. 711.02(l), (m) (Page ID #41).¹

B. Norton's Permit and the Revocation

Norton sells and leases billboard space to third parties who “engage in political speech, social speech, public service speech, other forms of non-commercial speech, or commercial speech.” R.1 (Compl. ¶¶ 14, 18) (Page ID #5–6). Norton operates nine outdoor advertising signs in the Village, some of which are digital billboards. *Id.* ¶¶ 17, 51 (Page ID #6, 14–15). Since the 1970s, Norton has operated a sign in the Village at 130 West Ross Avenue. *Id.* ¶ 76 (Page ID #21). Norton applied for and received a permit from the Village to convert two static sign faces at 130 West Ross Avenue to “digital display faces.” *Id.* ¶¶ 76–79 (Page ID #21–22). After Norton completed construction of the updated faces, however, the Village revoked the permit, citing Chapter 711.07(e)'s ban on “[m]ultiple message or variable message outdoor advertising signs.” *Id.* ¶ 80 (Page ID #22); *see also* R. 38-3 (Not. of Non-Compliance at 1–2) (Page ID #1501–02) (letter from Gerald Stoker to Steve Knapp stating that Norton received a permit to construct only an LED billboard, not a variable-message sign, and that its sign violated Chapter 711.07(e)).

C. Procedural Background

Norton sued the Village on April 30, 2020, alleging that the Village's ordinances are unconstitutional for a variety of reasons. *See generally*, R.1 (Compl. ¶¶ 1–179) (Page ID #1–40). Between September 10, 2021, and September 13, 2021, both parties cross-moved for summary judgment. *See* R. 37 (Norton Mot. Summ. J.) (Page ID #1433–34); R. 38 (Village Mot. Summ. J.) (Page ID #1456–57). On February 16, 2022, the magistrate judge stayed the case pending the Supreme Court's resolution of *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), because “a decision [was] expected to be issued in the near future that [was] highly likely to have a dispositive effect on the issues presented.” R. 46 (February 16, 2022 Order at 1) (Page ID #1662).

¹Because the parties do not suggest that the distinction matters for purposes of this appeal, we refer to these signs collectively as “variable-message signs.”

After the Supreme Court decided *Austin*, the parties filed supplemental briefing addressing its import. *See* R. 49 (Village Suppl. Br.) (Page ID #1669–90); R. 50 (Norton Suppl. Br.) (Page ID #1691–1708). On June 16, 2022, the magistrate judge issued a report and recommendation, recommending that the district court grant the Village’s motion for summary judgment. R. 51 (R. & R. at 1) (Page ID #1709). The magistrate judge found that Norton lacked standing to challenge any provisions of the ordinances other than Chapter 711.07(e) and accompanying provisions, *id.* at 9–20 (Page ID #1717–28); that the provisions for which Norton had standing to challenge are content-neutral regulations under *Austin*, *id.* at 10–12 (Page ID #1718–20); and that the regulations satisfied intermediate scrutiny, *id.* at 20–27 (Page ID #1728–35). Norton filed objections to the magistrate judge’s report but did not object to the standing findings. R. 54 (Norton Objs.) (Page ID #1910–54); *see also* R. 63 (July 20, 2023 Order at 4 n.1) (Page ID #2149).

The district court adopted the report and recommendation in full. *See generally*, R. 63 (July 20, 2023 Order) (Page ID #2146–52). The district court agreed that Chapter 711 is content neutral under *Austin*, *id.* at 5–6 (Page ID #2150–51), and that the regulations pass intermediate scrutiny, *id.* at 6–7 (Page ID #2151–52). Norton timely filed its appeal on July 26, 2023. R. 66 (Not. of Appeal at 1–2) (Page ID #2156–57).

II. DISCUSSION

Norton launches a barrage of attacks on the Village’s sign regulations. So many, in fact, that one is left to wonder whether a more constitutionally offensive scheme could exist. *See, e.g.*, Appellant Reply at 7 (referring to the Village’s sign regulations as a “caste system of speakers”). The reality is much more modest than Norton’s dystopian account. Still, a single content-based exemption in the relevant ordinance calls for application of strict, rather than intermediate, scrutiny. And because the Village’s regulations are not narrowly tailored to serve its stated interests, the sign ordinance cannot stand as written.

A. Standard of Review

We review de novo a district court’s grant of summary judgment. *Hughes v. Gulf Interstate Field Servs., Inc.*, 878 F.3d 183, 187 (6th Cir. 2017). Summary judgment is proper “if

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