

Appeals Court: Planet K's Ron Paul Sign Trumps Highway Beautification Act

By Natalie Posgate – (Aug. 30, 2016) – On good days, lawyers win favorable outcomes for their client. On great days, they win for their clients and also change the law for the better.

Meredith Parenti had a great day last Friday.

In a state appeals court ruling, the Houston attorney secured validation for Austin area business owner Michael Kleinman to exercise his First Amendment rights while also challenging the constitutionality of the Texas Highway Beautification Act.

In a unanimous ruling, the Texas Third Court of Appeals in Austin ruled that the core of the Texas Highway Beautification Act, which regulates highway signs and billboards, is unconstitutional because it is content-based by cracking down on various billboards and signs differently based on their message. Therefore, “all content-based provisions” to the act “must be severed.”

As a result of the ruling, Parenti said she anticipates further cases “both in Texas and elsewhere across the country,” as well as the possibility for municipal governments to revisit their laws regardless of whether there is litigation related to the Highway Beautification Act.

“I think this will have a broad impact, both in the state and nationally,” Parenti said. “Many municipal governments in Texas and elsewhere have very similar sign regulations that are now constitutionally suspect. Most states have similar Highway Beautification Acts because the Federal Highway Beautification Act mandates that they do so or lose 10 percent of their federal highway funds.”

Kayleigh Lovvorn, a spokeswoman for the Texas Attorney General's Office, said the Texas Department of Transportation, the named state

agency in the lawsuit, is “reviewing the decision and weighing our options at the moment.”

TxDOT's lead attorney, Assistant Solicitor General Matthew Frederick, did not respond to a request for comment.



Meredith Parenti

Parenti said TxDOT could appeal the Third Court of Appeals' decision to the Supreme Court of Texas.

“The Texas Legislature may also revisit the law, regardless of whether there is a petition for review to the Supreme Court,”

Parenti said. “The law is clearly unconstitutional, and the Legislature may want to address that regardless of further court battles.”

Kleinman's dispute with the state began in July 2011, when he displayed a Ron Paul sign in front his Bee Cave, Texas Planet K store, located off Highway 71, to show his support for the candidate in the May 2012 Republican primary elections.

A few days after Kleinman put up the sign, TxDOT sent him a letter explaining the sign was illegal due to a state statute that only allowed election-related signs that are up within 660 feet of a highway to be displayed 90 days before an election and 10 days after.

Kleinman refused to take down the sign, believing his First Amendment rights were being violated. TxDOT filed suit. After a bench trial in Travis County, a district court sided with TxDOT and ordered Kleinman to pay a \$3,500 fine.

Parenti stepped in for Kleinman's appeal. Fortunately for Parenti, a June 2015 U.S. Supreme Court ruling with similar issues to >

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Kleinman’s case “simplified the [Third] court of appeals’ task enormously.”

In *Reed v. Town of Gilbert*, the U.S. Supreme Court held that the government cannot regulate signs based on their content unless the regulation can withstand “strict scrutiny.”

By the time Parenti and TxDOT appeared for oral arguments in November, the question then became not whether the Texas Highway Beautification Act was constitutional, but “what portions of the Highway Beautification Act could survive,” Parenti said.

Parenti argued that the U.S. Supreme Court ruling in *Reed v. Town of Gilbert* invalidated an entire sign ordinance because it contained content-based exemptions, and that the court of appeals should do the same and strike down all content-based provisions.

While the state acknowledged at oral argument that the provision TxDOT applied to Kleinman’s sign was unconstitutional, the state argued that only that portion of the Highway Beautification Act should be stricken, Parenti said.

In a 29-page opinion, the appeals court rejected the state’s argument and heavily cited SCOTUS’ *Reed* decision, ruling “all of the content-based provisions (of the Texas act) must be severed.

“Severing only the election-sign exemption, as the Department asks us to limit our remedy, would not cure the constitutional infirmities caused by the remaining content-based exemptions,” Third Court of Appeals Chief Justice Jeff Rose wrote.

“In fact, severing only the election-sign exemption would not even remedy [Kleinman’s] harm because the act would still ban [Kleinman’s] election campaign sign – all year, every year – while allowing other categories of signs at all times, all based on their content,” he continued. “In other words, even with the election-sign exemption invalidated, the act would still treat speech differently based on the content of that speech.”

Read *The Texas Lawbook’s* previous coverage on the case.

Our partners at the Houston Chronicle write about state preservation activists’ negative reaction to the decision and how it could trump their efforts to remove other billboards.

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