

SUBJECT: Regulating commercial signs on highways

COMMITTEE: Transportation — favorable, without amendment

VOTE: 11 ayes — Morrison, Martinez, Burkett, Y. Davis, Goldman, Israel,  
Minjarez, Phillips, Simmons, E. Thompson, Wray

0 nays

2 absent — Pickett, S. Thompson

SENATE VOTE: On final passage, April 26 — 24-6-1 (Bettencourt, Burton, Creighton,  
Estes, Hall, V. Taylor, nay; Huffines, present not voting)

WITNESSES: *On House companion bill, HB 3855:*

For — Margaret Lloyd, Scenic Texas; Jim George; (*Registered, but did not testify*: Jennifer Woodard, AGC of Texas; Don Riley, Lamar Advertising; Tim Anderson and Rusty Kelley, Outdoor Advertising Association of Texas)

Against — None

On — James Bass, Texas Department of Transportation; (*Registered, but did not testify*: Becky Blewett, Texas Department of Transportation)

BACKGROUND: The Texas Highway Beautification Act was enacted in 1972 to comply with the federal Highway Beautification Act, which requires states to exert effective control over outdoor advertising located in certain areas surrounding the main traveled ways. Noncompliance would cost the state 10 percent of its federal highway funding.

Provisions of the Texas Highway Beautification Act, codified in Transportation Code, ch. 391, regulate the placement of outdoor advertising along state highways. Outdoor advertising includes any outdoor sign, billboard, or other thing designed, intended, or used to advertise or inform if the content is visible from the main-traveled way of

the interstate or primary system. Some of these signs are exempted from these regulations based on their content. Ch. 394 governs the regulation of outdoor signs on rural roads, and makes several references to the rules established in ch. 391.

In 2015, the U.S. Supreme Court ruled in *Reed v. Town of Gilbert* that laws that, on their face, regulate speech based on content are subject to strict scrutiny. Strict scrutiny requires the government to prove that the regulation in question is narrowly tailored to serve a compelling state interest. In light of *Reed*, in 2016 the Texas Third Circuit Court of Appeals determined in *Auspro v. TxDOT* that the Texas Highway Beautification Act's outdoor-advertising regulations and the corresponding permitting rules are, on their face, content-based, and that these regulations and rules failed strict scrutiny. As a result, Transportation Code, ch. 391, subch. B and C were ruled unconstitutional.

**DIGEST:**

SB 2006 would repeal the definitions of outdoor advertising and off-premise sign, as defined in Transportation Code, ch. 391, and would replace applicable references to those terms with "commercial sign" in provisions that provided for the regulation, licensing, and permitting of outdoor advertising. All references in Transportation Code, ch. 394 to outdoor advertising would be replaced with references to commercial signs.

A "commercial sign" would be defined as a sign:

- located on property owned or leased for the primary purpose of displaying the sign; or
- intended to be leased, or for which payment of any type is intended or received, for the display of any good, service, brand, slogan, message, product, or company.

A sign leased to a business entity that was located on the same property as the business would not be considered a commercial sign.

A "sign," as defined in the bill, could be any structure, display, light,

device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol that was designed, intended, or used to advertise or inform.

The bill also would repeal content-based exemptions from regulation in Transportation Code, ch. 391. The bill would exempt from commercial sign offenses a person who:

- held a permit issued by the Texas Department of Transportation for the sign; or
- erected or maintained a commercial sign located within 660 feet of the nearest edge of a right-of-way in an area in which the land use is designated industrial or commercial, or is consistent with such designation.

The Texas Transportation Commission could adopt rules to implement these changes.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2017.

**SUPPORTERS  
SAY:**

SB 2006 would meet the directives provided by the U.S. Supreme Court in *Reed* by shifting the regulatory focus away from a sign's content to instead regulate commercial signs. The Texas Department of Transportation would be able to continue regulating billboards in a constitutionally permissible way, while still respecting private property and free speech rights.

Revision is necessary during this legislative session due to the change in federal law caused by *Reed* and the likelihood of *Auspro* being upheld on appeal. If the ruling is upheld without any new regulation passed, a significant portion of billboards in Texas would become unregulated until the next legislative session, and the state could lose 10 percent of its federal highway funds for those years. Regulation is necessary for both safety and beautification purposes.

While some argue that regulating commercial speech is no more constitutional than content-based regulation, that argument fails to acknowledge that commercial speech is subject to a lesser bar, intermediate scrutiny, which requires that the law not be substantially broader than necessary to achieve the government's interest.

OPPONENTS  
SAY:

SB 2006 would alter sign regulation to include only signs subject to commercial transactions, which would be difficult to determine without inquiry into the ownership and potential lease of a sign. This could impede business and could place a burden on the Texas Department of Transportation and private property owners.

This bill would be a premature reaction to pending litigation. The Legislature should wait to craft a new law until a final directive is provided. Any deregulation resulting from the court case could be beneficial as signs located on private property should be free from government interference.

Regulation based on the payment for a sign could inhibit this form of expression, as spending money can be an expression of speech, and recreating a similar regulatory scheme may not resolve the free speech issues.

NOTES:

A companion bill, HB 3855 by Morrison, was reported favorably by the House Transportation Committee on April 20 and placed on the General State Calendar for May 10.