In the

United States Court of Appeals

for the Seventh Circuit

No. 20-1670

ADAMS OUTDOOR ADVERTISING LIMITED PARTNERSHIP,
Plaintiff-Appellant,

v.

CITY OF MADISON, WISCONSIN,
and MATTHEW TUCKER,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 17-cv-576-jdp — **James D. Peterson**, *Chief Judge*.

ARGUED DECEMBER 10, 2020 — DECIDED JANUARY 4, 2023

Before SYKES, *Chief Judge*, and FLAUM and KANNE,* *Circuit Judges*.

SYKES, *Chief Judge*. Adams Outdoor Advertising owns and operates billboards throughout Wisconsin, including 90 in

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* Circuit Judge Kanne died on June 16, 2022, and did not participate in the decision of this case, which is being resolved under 28 U.S.C. § 46(d) by a quorum of the panel.

the City of Madison. Like many cities, Madison long ago adopted a sign-control ordinance that comprehensively regulates billboards—or "advertising signs," as they are called in the ordinance—to promote traffic safety and aesthetics.

The ordinance defines "advertising sign" as any sign advertising or directing attention to a business, service, or product offered offsite—in other words, a sign that advertises something unrelated to the premises on which the sign sits. In 1989 the City amended the ordinance to ban the construction of new advertising signs. Existing billboards were allowed to remain but cannot be modified or reconstructed without a permit and are subject to strict size, height, setback, and other restrictions. The City amended the ordinance again in 2009 to prohibit digital displays. And in 2017 the City amended the definition of "advertising sign" to remove prior references to noncommercial speech. As amended, the term "advertising sign" is limited to off-premises signs bearing commercial messages.

Just before this latest amendment, Adams Outdoor filed this lawsuit raising a broad-spectrum First Amendment challenge to the City's sign ordinance. It was not the first time the company had brought such a suit. In response to the 1989 amendments, Adams Outdoor sued the City in state court alleging takings claims seeking compensation under the state's inverse-condemnation statute and also challenging the ordinance on First Amendment and equal-protection grounds. The case settled by a stipulated judgment in 1993.

That judgment has preclusive effect on most of this new suit, as the district judge correctly held. But the ban on

digital displays came later, so the challenge to that provision is not precluded, as the judge also properly concluded.

The impetus for this new suit was the Supreme Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which involved a challenge to a local sign ordinance—though not the on-/off-premises distinction at issue here and found in most billboard ordinances. Based on *Reed*, Adams Outdoor argued that any ordinance treating off-premises signs less favorably than other signs is a content-based restriction on speech and thus is unconstitutional unless it passes the high bar of strict scrutiny. The judge disagreed, applied intermediate scrutiny, and rejected the First Amendment challenge.

Adams Outdoor appealed, relying primarily on a Fifth Circuit case that supported its reading of *Reed*. *See Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020). The Supreme Court granted certiorari in that case, so we held this appeal to await its decision.

The Court has now reversed the Fifth Circuit, explaining that nothing in *Reed* altered its earlier precedents applying intermediate scrutiny to billboard ordinances and upholding on-/off-premises sign distinctions as ordinary content-neutral "time, place, or manner" speech restrictions. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC,* 142 S. Ct. 1464, 1472–73, 1476 (2022). That resolves this case. We affirm the judgment.

I. Background

This case began as a sweeping First Amendment challenge to the City's sign ordinance. But the 1993 judgment precludes much of it, and the Supreme Court's *City of Austin*

decision resolves what remains, so our discussion of the background need not be long.

A. Madison's Sign Ordinance

Chapter 31 of the Madison General Ordinances extensively regulates dozens of types of signs. This case concerns billboards, referred to as "advertising signs" in the ordinance. Madison has regulated billboards since at least the 1970s. In 1989 it moved toward more comprehensive regulation, amending the sign ordinance to completely ban the construction of new billboards. Existing billboards were allowed to remain (with a few exceptions) but are classified as nonconforming uses; they cannot be modified, restored, or rebuilt without a permit and must comply with strict size, height, setback, and other restrictions. MADISON, WIS., GENERAL ORDINANCES §§ 31.041, 31.05(2)(b), 31.11 (2013). In short, since 1989 Madison has regulated billboards far more restrictively than other types of signs.

As relevant here, in 2009 the City amended the sign ordinance again, this time banning all digital-image signs. *Id.* § 31.045(3)(i). A digital-image sign is defined as: "A sign, any portion of which displays static or stationary illuminated digital images, produced by technology such as LED (light emitting diode) or LCD (liquid crystal display) display screens, plasma, high-definition, interactive touch-screen, or other such technology." *Id.* § 31.03(2). Under a preexisting provision, on-premises "electronic changeable copy signs"—signs that feature electronically changing messages (like time and temperature displays)—are permitted in a few locations but are subject to strict limits. *Id.* § 31.046(1).

The City's purposes are spelled out in the text of the ordinance. As a general matter, the sign regulations promote the City's interest in "public safety and aesthetic values." *Id.* § 31.02(1). More specifically, the purpose of the ordinance is to "protect the public and promote safety, including but not limited to traffic and pedestrian safety," *id.* § 31.02(1)(d); to "protect scenic views and the visual environment," *id.* § 31.02(1)(e); and to "promote overall aesthetics, avoid clutter[,] and avoid inappropriate scale," *id.*

B. Adams Outdoor and Its Earlier Litigation

Adams Outdoor, a large national outdoor advertising company, owns and operates billboard structures across Wisconsin, including 90 in Madison featuring almost 200 advertising surfaces. It has long battled the City over its sign ordinance, with a litigation history that dates to 1977 when its predecessor, Hansen Advertising Company, was ordered to remove billboards from certain parts of downtown. Hansen Advertising sued, and in 1983 the parties entered into a stipulated judgment in which the City agreed to amend the ordinance to permit Hansen to relocate the affected billboards. Adams Outdoor later acquired Hansen Advertising and its rights under the stipulated judgment.

A few years later, however, Madison strengthened its billboard restrictions. As we've explained, in 1989 the City completely banned the construction of new advertising signs and imposed strict limits on existing ones. In 1990 Adams Outdoor sued the City in Dane County Circuit Court seeking compensation under takings law and the state inverse-condemnation statute, and also alleging claims under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The suit was settled by a stipulated judgment in 1993. The City gave Adams Outdoor permission to relocate some billboards. In exchange Adams Outdoor agreed that the "causes of action and any and all claims or causes of action which have been brought or which could have been brought, founded upon the facts which are the subject of this action, … may be dismissed upon the merits, with prejudice," once the City Council formally approved the agreement. The Council indeed approved the agreement, and the case was dismissed with prejudice.

C. This Lawsuit

The prelude to the present lawsuit began in 2016 when Adams Outdoor applied for a permit to construct a new advertising sign as a replacement for an existing sign that had been obstructed by recent construction. In 2017 Adams Outdoor filed an additional 26 permit applications seeking to modify or replace existing advertising signs. It was a futile effort. The applications proposed height increases, conversion to digital displays, and other modifications that are expressly prohibited by the ordinance. Predictably, the City denied all but one of the permit applications.

Adams Outdoor responded with this federal suit waging a broad-based First Amendment attack on the sign ordinance. The company took aim at multiple provisions in the ordinance, including many that do not apply to its billboards or business. Meanwhile, in December 2017 the City amended the ordinance again. Most of the changes are immaterial for our purposes, but one is relevant to the regulatory background. Previously the definition of "advertising sign" included off-premises signs with noncommercial messages. The 2017 amendments modified the definition to delete

references to noncommercial messages. The new definition of "advertising sign" is as follows:

> A sign containing a commercial message directing attention to a business, commodity, service, or entertainment, not related to the premises at which the sign is located, or directing attention to a business, commodity, service or entertainment conducted, sold[,] or offered elsewhere than on the premises where the sign is located.

§ 31.03(2). With this amendment, the definition of "advertising sign" is limited to off-premises signs bearing commercial messages.

The case proceeded to cross-motions for summary judgment. Adams Outdoor argued that the Supreme Court's decision in *Reed* dramatically changed First Amendment law as it relates to sign regulations. Relying on *Reed*, Adams Outdoor contended that treating off-premises signs less favorably than other signs amounts to impermissible content-based line drawing, triggering strict scrutiny. The company also challenged the ordinance on vagueness and prior-restraint grounds, and raised an additional claim that the ordinance vests too much discretion in zoning administrators.

The City asserted a threshold defense based on preclusion, arguing that the 1993 state-court judgment blocked all claims except one: the challenge to the 2009 amendment banning digital-image signs. On the merits, the City argued that *Reed* did not change the legal standard for billboard regulations and urged the court to uphold the ordinance

under the intermediate standard of scrutiny specified in the Supreme Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

The judge sided with the City across the board. He first concluded that the 1993 judgment barred all claims except the challenge to the ban on digital-image signs. Turning to the substantive arguments, the judge disagreed with Adams Outdoor that *Reed* had altered the long-standing test for billboard regulations. He instead applied *Central Hudson*, which adopted an intermediate standard of scrutiny for regulations on commercial speech, and *Metromedia*, which applied intermediate scrutiny and upheld the on-/off-premises distinction found in most billboard ordinances. After carefully applying the intermediate standard of review, the judge upheld the ban on digital displays. Although he did not need to go further, he also addressed and rejected the cluster of other First Amendment arguments Adams Outdoor had raised. Final judgment for the City followed, and Adams Outdoor appealed.

II. Discussion

We review de novo the judge's ruling on cross-motions for summary judgment, construing the record and drawing reasonable inferences "in favor of the party against whom the motion at issue was made"—here, Adams Outdoor. *Tripp v. Scholz*, 872 F.3d 857, 862 (7th Cir. 2017). Wisconsin preclusion law applies to the threshold question of claim preclusion. *Robbins v. MED-1 Sols., LLC*, 13 F.4th 652, 656 (7th Cir. 2021) (explaining that under the Full Faith and Credit Act, 28 U.S.C. § 1738, we "apply the preclusion law of the

state that rendered the judgment") (quotation marks omitted)).

A. Claim Preclusion

Under Wisconsin claim-preclusion law, "a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." *Kruckenberg v. Harvey*, 694 N.W.2d 879, 884 (Wis. 2005). Claim preclusion bars all subsequent actions between the same parties as to all matters that were litigated or that might have been litigated in the former proceeding. *Teske v. Wilson Mut. Ins. Co.*, 928 N.W.2d 555, 561 (Wis. 2019). The defense of claim preclusion has three elements: (1) an identity of the parties or their privies in the prior and present lawsuits; (2) a final judgment on the merits in the prior action; and (3) an identity of the causes of action in the two suits. *Id.*

The parties agree that the first two elements are satisfied here. The dispute centers on the third element: an identity of the causes of action in the prior and present litigation. On this element Wisconsin follows the "transactional approach" from the *Restatement (Second) of Judgments*, which implements the principle that "parties who are given the capacity to present their entire controversies shall in fact do so." *Id.* at 562 (quotation marks omitted). Under the transactional approach, "all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." *Id.* (quotation marks omitted).

Adams Outdoor argues that there is no identity of the causes of action because its earlier lawsuit focused mostly on

winning compensation for or relocation of Hansen Advertising's billboards whereas the present suit is a more sweeping First Amendment challenge to the sign ordinance in general. This argument is a nonstarter for two reasons. First, it doesn't matter whether Adams Outdoor *actually litigated* a First Amendment or other constitutional challenge in the prior litigation. What matters is whether a constitutional challenge "might have been litigated." *Id.* at 561 (quotation marks omitted). Second, Adams Outdoor actually *did* plead First Amendment and equal-protection claims in the prior litigation *in addition to* its takings-law inverse-condemnation causes of action.

Adams Outdoor also emphasizes that the City has amended the ordinance since the 1993 judgment. But that has only limited significance here. Most of the amendments are immaterial to Adams Outdoor. Only one new restriction is relevant: the 2009 ban on digital-image signs. In all other respects, the prior and present lawsuits satisfy all three elements for claim preclusion. As such, the 1993 judgment has preclusive effect on all claims in this case except for the challenge to the ban on digital displays.

Adams Outdoor resists this conclusion by invoking a Wisconsin exception to claim preclusion for declaratory judgments: "[A] declaratory judgment is only binding as to matters which were actually decided therein and is not binding as to matters which might have been litigated." *Barbian v. Lindner Bros. Trucking Co.*, 316 N.W.2d 371, 375 (Wis. 1982) (quotation marks omitted). Adams Outdoor contends that the 1993 judgment does not preclude this suit because its 1990 lawsuit sought a declaratory judgment that

the City had taken its property and that the sign ordinance was unconstitutional.

But the declaratory-judgment exception "operates only if the plaintiff seeks *solely* declaratory relief in the first proceeding." *Stericycle, Inc. v. City of Delavan*, 120 F.3d 657, 659 (7th Cir. 1997) (applying Wisconsin preclusion law). "[A] plaintiff who seeks an injunction cannot later seek other coercive relief on the same claim." *Id.* at 660 (emphasis omitted). In its 1990 complaint in state court, Adams Outdoor sought declaratory relief *and* an order requiring the commencement of inverse-condemnation proceedings for payment of compensation for the taking of its property. The latter was a request for injunctive relief. The declaratory-judgment rule is inapplicable.

Finally, Adams Outdoor argues that applying preclusion doctrine here is manifestly unfair because First Amendment law has dramatically changed since 1990. More particularly, Adams Outdoor contends that the law now treats commercial speech more favorably, *see, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and that under *Reed*, 576 U.S. at 159, restrictions on off-premises signs are now subject to strict scrutiny.

This argument is meritless. For starters, the premise is wrong. Billboard law has not changed much since the 1990 litigation. More particularly, as the Supreme Court has now confirmed, nothing in *Reed* requires the application of strict scrutiny to sign codes that treat off-premises signs—i.e., billboards—less favorably than other types of signs. *City of Austin*, 142 S. Ct. at 1472–73. Rather, as we will explain at greater length in a moment, regulations that treat off-premises signs differently are content-neutral "time, place,

or manner" speech restrictions and are subject only to intermediate scrutiny, as they have been since the 1980s. *Id.*

Moreover, although the doctrine of *issue* preclusion includes a "fairness" element, claim preclusion does not. The Wisconsin Supreme Court has not adopted a general fairness factor as part of its claim-preclusion doctrine. *Kruckenberg*, 694 N.W.2d at 890. Nor has the state supreme court recognized an exception to claim preclusion when the law has changed. And nothing suggests that it would do so if given the opportunity.[1] As the United States Supreme Court long ago observed, the preclusive effect of a final judgment on the merits is not altered "by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). We think it unlikely that the Wisconsin Supreme Court would break with the United States Supreme Court by creating an exception to claim preclusion when the law has changed.

To the contrary, "[e]xceptions to the doctrine of claim preclusion are rare." *Kruckenberg*, 649 N.W.2d at 888; *see also Patzer v. Bd. of Regents of Univ. of Wis. Sys.*, 763 F.2d 851, 856 (7th Cir. 1985) (applying Wisconsin law). Recognizing an exception to claim preclusion when the law has changed would open the floodgates to relitigation of already decided cases, seriously undermining the main objectives of the doctrine: "to promote judicial economy and to conserve the

[1] In a nonprecedential decision, the Wisconsin Court of Appeals rejected an exception to claim preclusion where an intervening change in the law would likely create a different result. *Samuels Recycling Co. v. Cont'l Cas. Co.*, 2006 WL 559435, at *1 (Wis. Ct. App. 2006).

resources the parties would expend in repeated and needless litigation." *Hanlon v. Town of Milton*, 612 N.W.2d 44, 48–49 (Wis. 2000) (quotation marks omitted). We see no reason to recognize such an exception here.

B. First Amendment Challenge

What's left on the merits is the challenge to the ban on digital displays. Our analysis can be brief. Adams Outdoor built its case on a faulty legal foundation. The animating theory of this suit is that under *Reed*, sign codes that distinguish between on-premises signs and off-premises signs draw content-based regulatory lines and therefore must satisfy strict scrutiny. Adams Outdoor found support for this position in the Fifth Circuit's decision in *Reagan National Advertising v. City of Austin*, 972 F.3d at 706. As the Supreme Court has now held, however, the Fifth Circuit's reading of *Reed* was incorrect. *City of Austin*, 142 S. Ct. at 1471–73.

City of Austin, like this case, concerned a municipal sign ordinance that distinguished between on-premises and off-premises signs, regulating the latter more heavily to protect public safety and preserve aesthetic value. *Id.* at 1469–70. Like Madison's ordinance, the City of Austin's sign code banned the construction of new off-premises signs but grandfathered preexisting ones subject to strict restrictions, including a prohibition of digitized messages. *Id.* Relying on *Reed*, the Fifth Circuit held that the on-/off-premises distinction amounted to a content-based regulatory classification because it required municipal officials to read each sign to determine how to classify it. *Reagan Nat'l Advert.*, 972 F.3d at 706–07. The Fifth Circuit accordingly applied strict scrutiny and invalidated Austin's ordinance. *Id.* at 709–10.

The Supreme Court reversed, rejecting the Fifth Circuit's interpretation of *Reed*, particularly its "need to read" rule for determining when a speech regulation is content based and thus subject to strict scrutiny. *City of Austin*, 142 S. Ct. at 1471. As the Court explained, the Fifth Circuit's rule—"that a regulation cannot be content neutral if it requires reading the sign at issue"—was "too extreme an interpretation of this Court's precedent." *Id.* The Court reiterated the long-standing principle in its caselaw that a speech regulation is considered content based only "if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id.* (quoting *Reed*, 576 U.S. at 163).

Applying this principle, the Court held that treating off-premises signs less favorably than other signs draws a regulatory line based on *location*, not communicative content. *Id.* Because Austin's "off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines," strict scrutiny did not apply. *Id.* Rather, the Court held that regulations governing off-premises signs are ordinary, content-neutral "time, place, or manner" speech restrictions subject only to intermediate scrutiny. *Id.* at 1473. Finally, the Court confirmed that nothing in *Reed* disturbed its earlier precedents—notably *Metromedia*, 453 U.S. 490—approving the on-/off-premises distinction and upholding a municipal ban on off-premises signs under an intermediate standard of scrutiny. 142 S. Ct. at 1473–75.

Returning now to our case, the district judge's constitutional analysis correctly anticipated *City of Austin*, and his application of intermediate scrutiny was spot on. As *City of Austin* explains, content-neutral "time, place, or manner"

restrictions—like the on-/off-premises sign regulations typical in most municipal sign codes—need only be "narrowly tailored to serve a significant governmental interest." *Id.* at 1475–76 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This standard aligns with the *Central Hudson* intermediate-scrutiny test for regulations on commercial speech, which the Court applied in *Metromedia* and the judge used here. (Recall that after the 2017 amendments, the definition of "advertising sign" in Madison's ordinance is limited to off-premises signs bearing commercial messages.)

Adams Outdoor has not meaningfully argued that the City's digital-sign ban flunks intermediate scrutiny. Prohibiting digital signs serves Madison's stated interests in promoting traffic safety and preserving visual aesthetics. It's well established that these are significant governmental interests. *Metromedia*, 453 U.S. at 507–08 (holding that "traffic safety and the appearance of the city … are substantial governmental goals").

Adams Outdoor questions the degree of fit between Madison's means and its ends. It contends that the City must provide empirical evidence linking digital billboards to aesthetic or safety-related harms. Not so. "[B]illboards by their very nature … can be perceived as an esthetic harm," *id.* at 510 (quotation marks omitted), and the City "need not try to prove that [its] aesthetic judgments are right," *Leibundguth Storage & Van Serv., Inc. v. Village of Downers Grove*, 939 F.3d 859, 862 (7th Cir. 2019). Likewise, the connection between billboards and traffic safety is too obvious to require empirical proof. "It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to

cause some drivers to slow down in order to read the sign before passing it." *Luce v. Town of Campbell*, 872 F.3d 512, 517 (7th Cir. 2017).

In sum, the legal foundation of this suit—that the on-/off-premises distinction in Madison's sign code is a content-based classification triggering strict scrutiny—is unsound. As *City of Austin* has now made clear, the on-/off-premises line is content neutral, so intermediate scrutiny applies. And we see no flaw in the judge's analysis and decision upholding the City's ban on digital-image signs under that more lenient standard of review.

AFFIRMED