

City of Austin, Texas v. Reagan National Advertising of Austin, LLC, et al. (2022)

Justice SOTOMAYOR delivered the opinion of the Court.

Like thousands of jurisdictions around the country, the City of Austin, Texas (City), regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. These are known as off-premises signs, and they include, most notably, billboards. The question presented is whether, under this Court's precedents interpreting the Free Speech Clause of the First Amendment, the City's regulation is subject to strict scrutiny. We hold that it is not.

I

A

American jurisdictions have regulated outdoor advertisements for well over a century. . . . As part of this regulatory tradition, federal, state, and local governments have long distinguished between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite. . . .

On-/off-premises distinctions, like the one at issue here, proliferated following the enactment of the Highway Beautification Act of 1965 (Act). In the Act, Congress directed States receiving federal highway funding to regulate outdoor signs in proximity to federal highways, in part by limiting off-premises signs. . . . The City represents, and respondents have not disputed, that “tens of thousands of municipalities nationwide” have adopted analogous on-/off-premises distinctions in their sign codes.

The City of Austin is one such municipality. The City distinguishes between on-premises and off-premises signs in its sign code, and specially regulates the latter, in order to “protect the aesthetic value of the city and to protect public safety.”

During the time period relevant to this dispute, the City's sign code defined the term “off-premise sign” to mean “a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site.” This definition was materially analogous to the one used in the federal Highway Beautification Act and many other state and local codes referenced above. The code prohibited the construction of any new off-premises signs, but allowed existing off-premises signs to remain as grandfathered “non-conforming signs.” An owner of a grandfathered off-premises sign could “continue or maintain [it] at its existing location” and could change the “face of the sign,” but could not “increase the degree of the existing nonconformity,” “change the method or technology used to convey a message,” or “increase the illumination of the sign.” By contrast, the code permitted the digitization of on-premises signs. § 25–10–102(6) (permitting “electronically controlled changeable-copy sign[s]”). . . .

II

A regulation of speech is facially content based under the First Amendment 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.” [*Reed v. Town of Gilbert* (2015)]. The Court of Appeals interpreted *Reed* to mean that if “[a] reader must ask: who is the speaker and what is the speaker saying” to apply a regulation, then the regulation is automatically content based. This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

A

The *Reed* Court confronted a very different regulatory scheme than the one at issue here: a comprehensive sign code that “single[d] out specific subject matter for differential treatment.” The town of Gilbert, Arizona, had adopted a code that applied distinct size, placement, and time restrictions to 23 different categories of signs. The Court focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain temporary directional messages. . . .

The *Reed* Court determined that these restrictions were facially content based. Rejecting the contention that the restrictions were content neutral because they did not discriminate on the basis of viewpoint, the Court explained: “[I]t is well established that ‘[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.’”¹ Applying these principles, the Court reasoned that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.... For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.” By treating ideological messages more favorably than political messages, and both more favorably than temporary directional messages, “[t]he Town's Sign Code likewise single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter.”

¹ FN4: The concurrence in *Reed*, which spoke for three of the six Justices in the majority, similarly explained that “[c]ontent-based laws merit th[e] protection” of strict scrutiny “because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its ‘topic’ or ‘subject’ favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.” *Reed* (ALITO, J., concurring).

In this case, enforcing the City’s challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City’s provisions at issue here do not single out any topic or subject matter for differential treatment. A sign’s substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City’s provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign’s relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation. Cf. *Frisby v. Schultz* (1988) (sustaining an ordinance that prohibited “only picketing focused on, and taking place in front of, a particular residence” as content neutral).

B

This Court’s First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.

Most relevant here, the First Amendment allows for regulations of solicitation—that is, speech “requesting or seeking to obtain something” or “[a]n attempt or effort to gain business.” Black’s Law Dictionary. To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present “the potential for becoming a means of suppressing a particular point of view,” so long as they do not discriminate based on topic, subject matter, or viewpoint. *Heffron v. International Soc. for Krishna Consciousness, Inc.* (1981). . . .

Consistent with these precedents, the Court has previously understood distinctions between on-premises and off-premises signs, like the one at issue in this case, to be content neutral. . .

Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, it is regulations that discriminate based on “the topic discussed or the idea or message expressed” that are content based. *Reed*. The sign code provisions challenged here do not discriminate on those bases.

C

Reagan[’s] ... argument relies primarily on one sentence in *Reed* recognizing that “[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.”

. . . The argument stretches *Reed*'s "function or purpose" language too far. The principle the *Reed* Court articulated is more straightforward. While overt subject-matter discrimination is facially content based (for example, "Ideological Sign[s]," defined as those "communicating a message or ideas for noncommercial purposes"), so, too, are subtler forms of discrimination that achieve identical results based on function or purpose (for example, "Political Sign[s]," defined as those "designed to influence the outcome of an election"). In other words, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a "function or purpose" proxy that achieves the same result. That does not mean that any classification that considers function or purpose is *always* content based. Such a reading of "function or purpose" would contravene numerous precedents, including many of those discussed above. *Reed* did not purport to cast doubt on these cases.

Nor did *Reed* cast doubt on the Nation's history of regulating off-premises signs

D

Tellingly, even today's dissent appears reluctant to embrace the read-the-sign rule adopted by the court below. Instead, the dissent attacks a straw man. Contrary to its accusations, we do not "nullif[y]" *Reed*'s protections, "resuscitat[e]" a decision that we do not cite, or fashion a novel "specificity test" simply by quoting the standard repeatedly enunciated in *Reed*. Nor do we cast doubt on any of our precedents recognizing examples of topic or subject-matter discrimination as content based. We merely apply those precedents to reach the "commonsense" result that a location-based and content-agnostic on-/off-premises distinction does not, on its face, "singl[e] out specific subject matter for differential treatment." *Reed*.

It is the dissent that would upend settled understandings of the law. Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.

III

This Court's determination that the City's ordinance is facially content neutral does not end the First Amendment inquiry. If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based. See *Reed*. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism* (1989).

The parties dispute whether the City can satisfy these requirements. This Court, however, is "a court of final review and not first view," and it does not "[o]rdinarily ... decide in the first instance issues not decided below." *Zivotofsky v. Clinton* (2012). "In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

Justice BREYER, concurring.

Reed v. Town of Gilbert (2015), is binding precedent here. Given that precedent, I join the majority's opinion. I write separately because I continue to believe that the Court's reasoning in *Reed* was wrong. The Court there struck down a city's sign ordinance under the First Amendment. It wrote that the First Amendment requires strict scrutiny whenever a regulation "target[s] speech based on its communicative content." It therefore concluded that "[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."

But the First Amendment is not the Tax Code. Its purposes are often better served when judge-made categories (like "content discrimination") are treated, not as bright-line rules, but instead as rules of thumb. And, where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive conclusions without first considering "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Barr v. American Assn. of Political Consultants, Inc.* (2020) (BREYER, J., concurring in judgment and dissenting in part); *Sorrell v. IMS Health Inc.* (2011) (BREYER, J., dissenting). Here, I would conclude that the City of Austin's regulation of off-premises signs works no such disproportionate harm. I therefore agree with the majority's conclusion that strict scrutiny and its attendant presumption of unconstitutionality are unwarranted. The majority reaches this conclusion by applying *Reed*'s formal framework, as *stare decisis* requires. I would add that *Reed*'s strict formalism can sometimes disserve the very First Amendment interests it was designed to protect. . . .

Justice ALITO, concurring in the judgment in part and dissenting in part.

I agree with the majority that we must reverse the decision of the Court of Appeals holding that the provisions of the Austin City Code regulating on- and off-premises signs are facially unconstitutional. The Court of Appeals reasoned that those provisions impose content-based restrictions and that they cannot satisfy strict scrutiny, but the Court of Appeals did not apply the tests that must be met before a law is held to be facially unconstitutional. "Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the [law] would be valid,' or show that the law lacks 'a plainly legitimate sweep.'" *Americans for Prosperity Foundation v. Bonta* (2021). A somewhat less demanding test applies when a law affects freedom of speech. Under our First Amendment "overbreadth" doctrine, a law restricting speech is unconstitutional "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens* (2010).

In this case, the Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. Many (and possibly the great majority) of the situations in which the relevant provisions may apply

involve commercial speech, and under our precedents, regulations of commercial speech are analyzed differently. See *Sorrell v. IMS Health Inc.* (2011). . . .

Because the Court of Appeals erred in holding that the code provisions are facially unconstitutional, I agree that we should reverse that decision. On remand, the lower courts should determine whether those provisions are unconstitutional as applied to each of the billboards at issue.

Today’s decision, however, goes further and holds flatly that “[t]he sign code provisions challenged here do not discriminate” on the basis of “ ‘the topic discussed or the idea or message expressed,’ ” and that categorical statement is incorrect. The provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required. . . .

For these reasons, I would simply hold that the provisions at issue are not facially unconstitutional, and I would refrain from making any broader pronouncements.

Justice THOMAS, with whom Justice GORSUCH and Justice BARRETT join, dissenting.

In *Reed v. Town of Gilbert* (2015), we held that a speech regulation is content based—and thus presumptively invalid—if it “draws distinctions based on the message a speaker conveys.” Here, the city of Austin imposes special restrictions on “off-premise[s] sign[s],” defined as signs that “advertis[e] a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that direc[t] persons to any location not on that site.” Under *Reed*, Austin’s off-premises restriction is content based. It discriminates against certain signs based on the message they convey—*e.g.*, whether they promote an on- or off-site event, activity, or service.

The Court nevertheless holds that the off-premises restriction is content neutral because it proscribes a sufficiently broad category of communicative content and, therefore, does not target a specific “topic or subject matter.” This misinterprets *Reed*’s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard. In so doing, the majority’s reasoning is reminiscent of this Court’s erroneous decision in *Hill v. Colorado* (2000), which upheld a blatantly content-based prohibition on “counseling” near abortion clinics on the ground that it discriminated against “an extremely broad category of communications.” Because I would adhere to *Reed* rather than echo *Hill*’s long-discredited approach, I respectfully dissent.

I

A

The First Amendment, applicable to the States through the Fourteenth, prohibits laws “abridging the freedom of speech.” U. S. Const., Amdt. 1; see also *Stromberg v. California* (1931). “When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations.” *National*

Institute of Family and Life Advocates v. Becerra (2018). A content-based law is “presumptively invalid,” *United States v. Playboy Entertainment Group, Inc.* (2000), and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests, *R. A. V. v. St. Paul* (1992).²

In *Reed v. Town of Gilbert*, we held that courts should identify content-based restrictions by applying a “commonsense” test: A speech regulation is content based if it “target[s] speech based on its communicative content.” Put another way, a law is content based “‘on its face’ [if it] draws distinctions based on the message a speaker conveys.” While we noted that “[s]ome facial distinctions based on a message are obvious,” we emphasized that others could be “more subtle, defining regulated speech by its function or purpose.” In all events, whether a law is characterized as targeting a “topic,” “idea,” “subject matter,” or “communicative content,” the law is content based if it draws distinctions based in any way “on the message a speaker conveys.”

Applying this standard, we held that the town of Gilbert’s sign code was “a paradigmatic example of content-based discrimination” because it classified “various categories of signs based on the type of information they convey[ed], [and] then subject[ed] each category to different restrictions.” . . .

B

Under *Reed*’s approach for identifying content-based regulations, Austin’s off-premises sign restriction is content based. As relevant to this suit, Austin’s sign code imposes stringent restrictions on a category of “off-premise[s] sign[s].” The code defines “off-premise[s] sign[s]” as those “advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed,” or as signs “direct[ing] persons to any location not on that site.” This broad definition sweeps in a wide swath of signs, from 14- by 48-foot billboards to 24- by 18-inch yard signs. The sign code prohibits new off-premises signs and makes it difficult (or impossible) to change existing off-premises signs, including by digitizing them.

Like the town of Gilbert in *Reed*, Austin has identified a “categor[y] of signs based on the type of information they convey, [and] then subject[ed that] category to different restrictions.” . . . Again, all that matters is that the regulation “draws distinctions based on” a sign’s “communicative content,” which the off-premises restriction plainly does. . . .

This conclusion is not undermined because the off-premises sign restriction depends in part on a content-neutral element: the location of the sign. Much like in *Reed*, that an Austin official applying the sign code must know *where* the sign is does not negate the fact that he also must know *what* the sign says. Take, for instance, a sign outside a Catholic bookstore. If the sign says, “Visit the Holy Land,” it is likely an off-premises sign because it conveys a message directing people elsewhere (unless the name of the bookstore

² FN1: For several categories of historically unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, the government ordinarily may enact content-based restrictions without satisfying strict scrutiny. See *United States v. Stevens* (2010). This Court’s precedents have also declined to apply strict scrutiny to several other types of content-based restrictions, including laws targeting “commercial speech.” As the Court recognizes, Austin’s off-premises sign rule is not limited to any of these categories of speech.

is “Holy Land Books”). But if the sign instead says, “Buy More Books,” it is likely a permissible on-premises sign (unless the sign also contains the address of another bookstore across town). Finally, suppose the sign says, “Go to Confession.” After examining the sign’s message, an official would need to inquire whether a priest ever hears confessions at that location. If one does, the sign could convey a permissible “on-premises” message. If not, the sign conveys an impermissible off-premises message. Because enforcing the sign code in any of these instances “requires [Austin] officials to determine whether a sign” conveys a particular message, the sign code is content based under *Reed*.

In sum, the off-premises rule is content based and thus invalid unless Austin can satisfy strict scrutiny. Because Austin has offered nothing to make that showing, the Court of Appeals did not err in holding that the off-premises rule violates the First Amendment.

II

To reach the opposite result, the majority implicitly rewrites *Reed*’s bright-line rule for content-based restrictions. In the majority’s view, the off-premises restriction is not content based because it does not target a specific “topic or subject matter.” The upshot of the majority’s reasoning appears to be that a regulation based on a sufficiently general or broad category of communicative content is not actually content based.

Such a rule not only conflicts with *Reed* and many pre-*Reed* precedents but is also incoherent and unworkable. Tellingly, the only decision that even remotely supports the majority’s rule is one it does not cite: *Hill v. Colorado*. There, the Court held that an undeniably content-based law was nonetheless content neutral because it discriminated against “an extremely broad category of communications,” supposedly without regard to “subject matter.” The majority’s decision today is erroneous for the same reasons that *Hill* is an aberration in our case law.

A

The majority concedes that “[t]he message on the sign matters” when applying Austin’s sign code. *Ante*. That concession should end the inquiry under *Reed*. But the majority nonetheless finds the sign code to be content neutral by recasting facially content-based restrictions as only those that target sufficiently specific categories of communicative content and not as those that depend on communicative content *simpliciter*. . . .

The majority’s holding that some rules based on content are not, as it turns out, content based nullifies *Reed*’s clear test.

B

The majority offers several reasons why its approach is consistent with *Reed* and other cases. None of these arguments is persuasive. Instead, they only serve to underscore the Court’s ill-advised departure from our doctrine.

1

The majority first suggests that deeming Austin’s sign code content based would require us to adopt an “extreme” reinterpretation of *Reed*. *Ante*. Specifically, the majority faults the Court of Appeals for concluding that Austin’s regulation was content based because, to enforce the off-premises rule, “[a] reader must ask: who is the speaker and what is the speaker saying’ ”? *Ibid*. In the majority’s view, *Reed* cannot stand for such a simplistic read-the-sign test.

The majority’s skepticism is misplaced. We have often acknowledged that the need to examine the content of a message is a strong indicator that a speech regulation is content based. . . . Ultimately, the majority’s objection to the Court of Appeals’ reliance on a read-the-sign test is a red herring; its real objection is to *Reed*’s rule that any law that draws distinctions based on communicative content is content based. . . .

4

Near the end of its analysis, the majority invokes an allegedly “unbroken tradition of on-/off-premises distinctions” that it claims “counsels against” faithful application of *Reed*. To be sure, history and tradition are relevant to identifying and defining those “few limited areas” where, “[f]rom 1791 to the present,” “the First Amendment has permitted restrictions upon the content of speech.” *Brown v. Entertainment Merchants Assn.* (2011). But the majority openly admits that off-premises regulations “were not present [at] the founding.” And while it asserts that “large outdoor advertisements proliferated in the 1800s,” it offers no evidence of any content-based restrictions from that period, let alone off-premises restrictions on *noncommercial* speech. The *earliest* example of an off-premises restriction that the majority cites arose in *Packer Corp. v. Utah* (1932), but that case involved a restriction on *commercial* advertising and did not even feature a First Amendment claim.

Ultimately, the majority’s only “historical” support is that regulations like Austin’s “proliferated following the enactment of the Highway Beautification Act of 1965.” The majority’s suggestion that the First Amendment should yield to a speech restriction that “proliferated”—under pressure from the Federal Government—some two centuries after the founding is both “startling and dangerous.” *United States v. Stevens* (2010). This Court has never hinted that the government can, with a few decades of regulation, subject “new categories of speech” to less exacting First Amendment scrutiny.

Regardless, even if this allegedly “unbroken tradition” did not fall short by a century or two, the majority offers no explanation why historical regulation is relevant to the question whether the off-premises restriction is content based under *Reed* and our modern content-neutrality jurisprudence. If Austin had met its burden of identifying a historical tradition of analogous regulation—as can be done, say, for obscenity or defamation—that would not make the off-premises rule content neutral. It might simply mean

that the off-premises rule is a constitutional form of content-based discrimination. But content neutrality under *Reed* is an empirical question, not a historical one. Thus, the majority's historical argument is not only meritless but misguided. . . .

Because *Reed* provided a clear and neutral rule that protected the freedom of speech from governmental caprice and viewpoint discrimination, I would adhere to that precedent rather than risk resuscitating *Hill*. I respectfully dissent.