

Refining *Reed*: *City of Austin* Updates Test for Content-Based Speech Restrictions

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The Supreme Court’s April 21, 2022, decision in *City of Austin v. Reagan National Advertising of Austin, LLC* is the latest development in the Court’s free speech jurisprudence on content neutrality. Content neutrality is important because it largely determines the level of scrutiny that a court would apply to a law regulating speech in a First Amendment challenge, with content-neutral laws receiving less rigorous scrutiny than content-based ones do. In this case, the Court **held** that the city’s restriction on “off-premises” signs—signs advertising or directing readers to businesses or activities at another location—was content neutral on its face because it regulated signs based on their location rather than their subject matter or topic. This Sidebar provides a brief overview of how the Court’s standards for evaluating content neutrality have changed over time. It then discusses the *City of Austin* decision and why the case could have implications beyond sign ordinances, potentially paving the way for broader location- or function-based regulation of speech, including online speech.

Background

The **First Amendment** generally prohibits the government from regulating speech based on the **content** or **viewpoint** of the message expressed. Outside of **certain areas**, laws that are “content based” typically receive **strict** judicial scrutiny, requiring the government to show that the challenged law is the “least restrictive means” of serving a “compelling” governmental interest. In contrast, “content-neutral” restrictions on speech—such as those that regulate only the **time, place, or manner** of speech without reference to its content—typically receive intermediate scrutiny. Intermediate scrutiny generally **requires** the government to show that the law is “narrowly tailored” (but not necessarily the least restrictive way) to serve a “significant” governmental interest and leaves open “ample alternative channels for communication.” Because laws **rarely** survive strict scrutiny, a key step in the First Amendment analysis is to determine whether the law under consideration is content based or content neutral.

The Supreme Court has modified its standards for assessing content neutrality over time. During the 1980s, for example, the Court examined the text of the law, but the “**controlling consideration**” was the government’s purpose. Under this test, even if a law reached only speech of a particular subject matter, it sometimes received **intermediate scrutiny** if the government had a content-neutral purpose for enacting the law. For example, the Court considered zoning restrictions aimed at the “**secondary effects**” of adult

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movie theatres on neighboring communities to be content neutral, even though they applied only to businesses that showed that particular kind of speech.

The Court's 2015 decision in *Reed v. Town of Gilbert* restated the difference between content-based and content-neutral laws, placing more emphasis on the text of the law. *Reed* involved a local [sign ordinance](#) whose restrictions varied depending on the topic of the sign. For example, the law [imposed](#) more onerous restrictions on "temporary directional" signs than on "political" signs and more onerous requirements on "political" signs than on "ideological" signs. The Court [ruled](#) that the ordinance was content based and failed strict scrutiny. The Court [held](#) that a law is content based and "presumptively unconstitutional" whenever it "applies to particular speech because of the topic discussed or the idea or message expressed." An "obvious" form of content discrimination, the Court [observed](#), would be a law that, on its face, "defin[es] regulated speech by particular subject matter." However, the Court [reasoned](#) that laws that define regulated speech by its "function or purpose" also involve "facial" content-based distinctions. Significantly, the Court [clarified](#) that while a law's discriminatory purpose can render a facially neutral law content based, a facially content-based law is subject to strict scrutiny "regardless of the government's benign motive" or "content-neutral justification." Three Justices concurred in the judgment alone. Although they agreed that the ordinance was unconstitutional, they expressed [reservations](#) about the majority's "rigid" approach to content-based laws.

City of Austin Case

Like *Reed*, *City of Austin* involved a sign ordinance. Instead of distinguishing among signs based on categories such as "political" or "ideological" speech, though, the [ordinance](#) prohibited the construction of new off-premises signs—that is, signs advertising or directing readers to businesses or events at another location. The ordinance also provided that existing off-premises signs could not be digitized. In a lawsuit brought by two billboard operators, the U.S. Court of Appeals for the Fifth Circuit [ruled](#) that the city's distinction between on- and off-premises signs was content based and failed strict scrutiny. In order to determine whether a sign was on- or off-premises, the court [reasoned](#), "one must read the sign" and ask if it relates to a business or activity at that location. In the court's view, that need to examine the sign's content meant that the law was content based under *Reed*.

The Supreme Court [reversed](#) the Fifth Circuit's decision, [calling](#) the appellate court's reasoning "too extreme an interpretation" of *Reed*. Justice Sotomayor wrote the majority opinion, joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh. Relying on cases in which the Court upheld laws regulating solicitation, the majority [reasoned](#) that its precedents "have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." The Court also [recounted](#) the long history of regulations on outdoor advertisements in the country, including a [federal law](#) incentivizing states to limit off-premises signs near federal highways.

As to Austin's sign ordinance, the Court [acknowledged](#) that enforcement of the law required officials to determine whether a sign "directs readers to the property on which it stands or to some other, offsite location." The Court [observed](#), however, that unlike the ordinance in *Reed*, the city's code did not "single out any topic or subject matter for differential treatment," and enforcement did not turn on the sign's "substantive message." The "message on the sign matters," the Court [reasoned](#), "only to the extent that it informs the sign's relative location." The Court [concluded](#) that such a "location-based regulation" was content neutral on its face and subject to intermediate rather than strict scrutiny. However, the Court [remanded](#) the case to the lower courts to consider whether there was any evidence the law might be content based because of an "impermissible purpose" and to conduct the intermediate scrutiny analysis in the first instance.

Although Justice Breyer joined the majority opinion, he [wrote separately](#) to reiterate his concerns with the consequences of *Reed*'s rigorous content-based standard. Justice Alito [dissented in part](#). In his [view](#), the

sign code “clearly discriminate[d]” based on content, but the Fifth Circuit erred by invalidating the challenged provision in all its applications.

Justice Thomas, the author of the majority opinion in *Reed*, [dissented on broader grounds](#), joined by Justices Gorsuch and Barrett. In the [dissent’s view](#), the city’s ordinance was content based because it turned on a sign’s message—specifically, whether a sign “promote[d] an on- or off-site event, activity, or service.” The dissent [opined](#) that the majority had “implicitly rewrit[ten] *Reed*’s bright-line rule,” turning it into an “unworkable” rule that deems laws content neutral if they are “based on a sufficiently general or broad category of communicative content.”

Potential Consequences for First Amendment Law

Depending on how lower courts interpret *City of Austin*, the decision could make subtle or sweeping changes to First Amendment law. *City of Austin* reaffirmed at least some aspects of the *Reed* test for evaluating whether a law is content based or content neutral. The majority appeared to [agree](#) that a law is content based if it regulates speech based on its subject matter, topic, or viewpoint, and it did not disrupt *Reed*’s holding that facially content-based laws receive strict scrutiny. Thus, the decision’s ramifications for First Amendment law may be more limited than they might have been had the Court affirmed the Fifth Circuit’s decision or returned to its pre-*Reed* approach of lesser scrutiny for laws with a content-neutral justification.

The point of disagreement between the Court and the dissenting Justices was over whether classifications that depend on a sign’s “[message](#)” necessarily make a law facially content based. The majority [held](#) that some laws requiring a regulator to consider a sign’s message may nonetheless be content neutral, while the [dissenting](#) Justices would have held that the need to consider the sign’s message makes the law content based and thus subject to strict scrutiny. That difference points to the next set of issues that lower courts may have to address and could have significant consequences for legislatures seeking to regulate speech based on its physical location, proximity to the speaker, or other characteristics apart from its subject matter, topic, or viewpoint.

Given the Court’s [acknowledgement](#) that a sign’s “message” mattered for purposes of determining compliance with Austin’s code, lower courts must likely hold that at least some laws are content neutral under *City of Austin* even if they turn on the message expressed. If courts interpret that rule narrowly, they may apply intermediate scrutiny to laws with a “[location-based](#) and content-agnostic on-/off-premises distinction” similar to the particular law in *City of Austin*. Even this narrow interpretation, however, could signal an expansion of the types of distinctions that qualify as content-neutral [time, place, or manner](#) restrictions on speech, particularly if extended outside of the context of sign ordinances. For example, would *City of Austin* allow a state to prohibit pregnancy resource centers from [posting signs](#) about any off-premises entities or activities? Would Congress have more leeway to regulate online speech across all topics because an internet user has posted it on another person’s website or social media page as opposed to the user’s own site or page? *City of Austin* suggests that such laws—at least on their face—would distinguish speech based on its physical or [virtual](#) location rather than its content and thus could receive intermediate scrutiny. Under that test, such laws would still need to be narrowly tailored to advance a significant government interest and leave open ample alternative channels for communication.

Alternatively, courts could give *City of Austin* a broader interpretation, applying it to identify other kinds of message-based distinctions that could be considered content neutral and thus subject to intermediate scrutiny. Justice Thomas’s dissent [highlighted](#), for example, the Court’s statement that the off-premises restriction did not turn on a sign’s “[substantive](#) message,” a point that may invite lower courts to identify other kinds of messages as non-substantive. In particular, the dissent [questioned](#) whether restrictions on “editorializing” or “anonymous” speech would evade strict scrutiny review under the Court’s decision because they do not single out a particular topic or subject matter. For example, if Congress were to ban

“anonymous” speech on social media platforms or prohibit those platforms from removing posts “created by third parties,” could a court consider those laws to be facially content neutral under *City of Austin* because they are “agnostic as to content” (i.e., subject matter or topic)? *City of Austin* raises additional questions about when Congress or states may regulate speech based on its “function or purpose.” *Reed* stated that facial distinctions based on speech’s “function or purpose” are content based and subject to strict scrutiny. However, *City of Austin* appeared to limit this passage to instances where the legislature clearly used a “‘function or purpose’ proxy” to “achieve[] the same result” as a content-based classification, stating that not every “classification that considers function or purpose is *always* content based.”

Lastly, while *City of Austin* focused on the code’s location-based distinctions, the lawsuit also concerned a restriction on the manner of speech in the form of Austin’s prohibition on digitizing off-premises signs. The constitutionality of this restriction remains to be seen because the Supreme Court remanded the case to the lower courts to consider that issue instead of applying intermediate scrutiny in the first instance. The courts below may consider whether the city’s technology-based distinction—which Justice Alito opined was not content based on its own—was narrowly tailored to advance a significant governmental interest. Resolution of such questions may help to inform options for regulating other forms of technology used to convey speech, such as algorithms and bots—both of which have been the subject of *First Amendment* debate.

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