

# Sign Ordinances and the First Amendment - City of Austin v. Reagan National Advertising

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The Supreme Court has narrowed its definition of content based speech discrimination, retreating from a 2015 ruling that sought to draw a bright-line rule for content-related regulations. How the Court defines content discrimination is crucial in a variety of First Amendment cases, since that definition determines what level of scrutiny is applied.

In *City of Austin v. Reagan National Advertising*, decided on April 21, 2022, the Court held that Austin's distinction between on- and off-premises advertising is not a content-based regulation that is subject to strict scrutiny. Like many other jurisdictions, Austin's sign code places additional regulations on signs – typically billboards -- that advertise businesses, goods or services not located on the same site where the sign is installed. In Austin's code, these “off-premises” regulations allowed existing billboards to remain in place, but prohibited increasing “the degree of the existing nonconformity” or changing “the method or technology” used on those signs.

Reagan National Advertising, a billboard company, challenged the regulations after Austin officials denied the company's application to digitize some of its off-premises billboards. Reagan claimed that the regulations were subject to strict scrutiny, based on the Court's unanimous 2015 decision in *Reed v. Town of Gilbert*.

In *Reed*, the Court struck down certain signage regulations in Gilbert, Arizona, which distinguished between “ideological,” “political,” and “temporary directional signs.” The Court unanimously held that those distinctions were content-based regulations, though six justices joined separate concurrences that would have softened Justice Clarence Thomas's majority opinion, which called for strict scrutiny of any regulation that requires officials to evaluate a sign's content.

In *City of Austin*, the divisions from *Reed* resurfaced. A five-justice majority held that Thomas's broad definition had gone too far, and that off-premises regulations were not content-based, and therefore not subject to strict scrutiny.

Justice Sonia Sotomayor, writing for the majority, held that content-based regulations are those “that discriminate based on ‘the topic discussed or the idea or message expressed.’” The fact that an official may need to discern the function or purpose of a message does not necessarily entail content discrimination, according to the opinion, unless such a regulation is crafted as a subtle way of controlling content. The majority held that Austin's sign code “requires an examination of speech only in service of drawing neutral, location-based lines,” calling the regulations “agnostic as to content” and therefore not subject to strict scrutiny.

Justice Thomas, joined by Justices Neil Gorsuch and Amy Coney Barrett, wrote to reiterate his definition from *Reed*. The majority's interpretation “contravenes *Reed*” because “the message on the sign matters” when applying Austin's sign code. Thomas criticized the majority for creating an “arbitrary carveout[]” and for failing to specify how courts should decide when a regulation is substantive or specific enough to qualify as content-based. “We have defined content-based

restrictions to include all content-based distinctions because any other rule would be incoherent,” Thomas wrote.

The dueling opinions echoed the Court’s ongoing battle over *stare decisis*. The majority opinion noted that thousands of jurisdictions had enacted off-premises regulations, over the course of nearly one hundred years, but especially following the federal Highway Beautification Act of 1965. Sotomayor argued that the dissent would “upend settled understandings of the law” by suddenly striking these down. In response, Thomas brushed off that argument and questioned the majority’s use of history, writing that the historical inquiry was “not only meritless but misguided.”

Justice Samuel Alito wrote separately, concurring in the judgment, but stopping short of endorsing the majority’s analysis. Alito suggested that Austin’s regulations “clearly discriminate” based on content, “and at least as applied in some situations, strict scrutiny should be required.” Justice Stephen Breyer also wrote separately to concur, arguing that “judge-made categories” such as content discrimination should be treated “not as bright-line rules, but instead as rules of thumb.”

The clear result from *City of Austin* is that thousands of jurisdictions can maintain their present restrictions on off-premises signs, or enact new ones, to slow the proliferation of billboards or prevent digital upgrades. Less clear is whether *City of Austin* will clarify or confuse lower courts faced with broader content-discrimination claims.

The exact implications will depend on how far the Court’s content-neutral carveout extends. If the opinion serves to undercut *Reed*, it could have far-reaching effects, since *Reed* has been cited in more than a thousand federal cases since it was handed down in 2015, involving a broad range of First Amendment issues, from the regulation of robocalls to the records kept for firearms purchases. But if the decision is limited to preserving off-premises distinction, then its legacy will likely be limited to a few less blinking billboards.