Reed v. Town of Gilbert
U.S. Supreme Court Key Quotes and Opinion Summary

Key Quotes

From the Majority Opinion, written by Justice Thomas (joined by Justices Roberts, Scalia, Kennedy, Alito, and Sotomayor)

"The Town's Sign Code is content based on its face. It defines 'Temporary Directional Signs' on the basis of whether a sign conveys the message of directing the public to church or some other 'qualifying event.'"

"The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government."

"In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive."

"But [The Town's] analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face."

"Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."

"Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

"Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of likeminded individuals. That is a paradigmatic example of content-based discrimination."

"The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws."

"…it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. The Town cannot do so."

"[The Town] has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive."

"The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability."

From the Concurring Opinion written by Justice Alito (joined by Justices Kennedy and Sotomayor)

"I will not attempt to provide anything like a comprehensive list [of reasonable sign regulations], but here are some rules that would not be content based:

- Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.
- Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.

Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed."

From the Concurring Opinion written by Justice Kagan, joined by Justices Ginsburg and Breyer

"This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' McCullen v. Coakley, 573 U. S. ___, ___–___ (2014) (slip op., at 8–9)"

"The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."

"The best the Town could come up with at oral argument was that directional signs 'need to be smaller because they need to guide travelers along a route.' Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to 'time, place, or manner' speech regulations."

Opinion Summary

Justice Thomas' Opinion (Roberts, Scalia, Kennedy, Thomas, Alito, Sotomayor)

Content-based laws trigger strict scrutiny. A law is content based if it draws distinctions based on the message a speaker conveys. A law is facially content based not only if it defines speech by its subject matter, but also if it defines speech based on its function or purpose. Both categories wholly depend on the message a speaker conveys and thus trigger strict scrutiny. A law may also be content based if it was adopted based on the government's disagreement with a message, but such illicit motivations are not required.

The Code is content based on its face because the Temporary Directional Sign category only applies to signs that direct the public to an event. The Town's motives for enacting the Code are irrelevant. If a law is content based on its face, it is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus towards the ideas expressed. A content-based purpose is sufficient to show a regulation is content based but it is not and has never been required. No innocuous justification can transform a facially content-based law into a content-neutral one. Courts must consider whether a law is facially content neutral *before* turning to the law's justification or purpose.

Ward v. Rock Against Racism, 491 U.S. 781 (1989), does not apply to laws that are facially content based, only to those that are content neutral. Innocent motives do not protect speech because future officials may use the same law to suppress disfavored ideas. That is why the First Amendment expressly targets the operation of a law, not merely the motives of those enacting it. That a law lends itself to invidious, though-control purposes is enough to render it invalid under the First Amendment.

Viewpoint based and content based discrimination are distinct categories. A law may be invalid under the First Amendment even if it does not discriminate among viewpoint within a subject matter.

The Ninth Circuit's reasons for upholding the Code are both factually and legally incorrect. The Code's categories are not speaker based and, even if they were, they would still be content based and trigger strict scrutiny. The Code does not treat all events the same, political events are treated more favorably. And singling out signs bearing the time and location of a specific event is content based on its face. Even though it may seem like a perfectly rational way to regulate signage, a clear and firm rule mandating content neutrality is essential to protecting free speech. Sign codes that are reasonable but content based will just have to give way.

The town bears the burden of showing that differentiating between temporary directional signs and other signs furthers a compelling governmental interest and is narrowly tailored to that end. Even assuming that safety and aesthetics are compelling interests, the Code is not narrowly tailored because it is "hopelessly underinclusive." Temporary directional signs are no greater an eyesore than ideological or political ones, yet the Code allows them to proliferate. The Town has also given no reason why directional signs pose a great threat to safety than other signs, particularly sharply-worded, ideological signs that are more likely to distract a driver than directions to church. The Code thus fails strict scrutiny.

Towns have many content-neutral options available to regulate signage including (1) size, (2) building material, (3) lighting, (4) moving parts, and (5) portability. On public property, the Town may forbid private signs freely as long as it does so in "an evenhanded content-neutral manner." Lower courts have long held similar content-based sign laws unconstitutional and there have been no catastrophic effects. Content based sign codes that are narrowly tailored to advancing legitimate safety interest will stand. But the Town's Code doesn't do that. Instead, the Code is facially content based and neither justified by traditional safety concerns nor narrowly tailored. It is therefore unconstitutional under the First Amendment.

Justice Alito's Concurrence (Kennedy, Alito, and Sotomayor)

Content-based laws merit strict security because they present, albeit in a less obvious way, the same dangers as viewpoint-based laws. Topic or subject-based distinctions favor those who do not wish to disturb the status quo. But they are plenty of non-content-based ways for towns to regulate signs, including regulations based on: (1) size, (2) location, (3) lighting, (4) fixed or changeable messages, (5) private or public property, (6) commercial or residential property, (7) on-premises or off-premises, (8) number of signs, and (9) time restrictions on one-time events. Government also has a free hand in erecting its own signs because they're government speech. Towns may put up all manner of signs to promote, safety or direct people to historic sites and scenic spots. The majority opinion does not endanger legitimate public safety and esthetic objectives.

Justice Breyer's Concurrence In the Judgment (Breyer)

Viewpoint and content-based categories do not solve the problem before the Court. They should be a rule of thumb, rather than a trigger leading to almost certain invalidation. Virtually all government activities involve speech and many involve the regulation of speech. Such regulatory programs almost always require content discrimination. The majority opinion is a recipe for judicial management of ordinary government activity. The only answer is to (wrongly) water down strict scrutiny. But the better approach is to treat content discrimination as a factor weighing against the constitutionality of a law but not a determinative trigger for strict scrutiny. Courts should employ a balancing test and ask whether the regulation "works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." Relevant factors include: (1) the seriousness of the harm to speech, (2) the importance of the government's countervailing objectives, (3) the extent to which the law will achieve those objectives, and (4) whether there are other, less restrictive ways of achieving the same end.

Because the Code fails that test, as explained in Justice Kagan's concurrence, Justice Breyer concurred in the judgment.

Justice Kagan's Concurrence In the Judgment (Ginsburg, Breyer, and Kagan)

Countless cities and towns employ sign codes that are content based. The Highway Beautification Act does the same. Many of those laws are now in jeopardy unless courts water down strict scrutiny. Towns are left with the choice of repealing exemptions to signs bans for helpful signs or lifting the restrictions altogether and inviting clutter. Justice Alito's attempt to limit the majority 's decision is commendable but signs advertising a one-time event are now subject to strict scrutiny regardless of what his concurrence says.

There are two reasons for subjecting content-based laws to strict scrutiny: (1) preserving an uninhibited marketplace of ideas, and (2) ensuring government has not regulated speech based on hostility or favoritism towards a message. Many content-based exemptions in sign codes do neither and pose no realistic possibly that official suppression of ideas is afoot. In such cases, the Court should relax its guard so that entirely reasonable laws are not imperiled by strict scrutiny. A First Amendment buffer zone protecting the freedom of speech "need not extend forever." The Court "can administer … content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function," as it has done in *City of Ladue* and other cases. The majority's alternative approach runs the risk of making the Court "a veritable Supreme Board of Sign Review."

Here, the Town's defense of the Code "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." The Town provides no reason at all for limiting the number of direction signs and placing no limits on the number of other types of signs. Nor does it offer a coherent justification restricting the size of directional signs. At oral argument, its best explanation was that signs need to be smaller to guide travelers along a route. But "[w]hy exactly a smaller signs better helps travelers get to where they are going is left a mystery."

The Town's ordinance is doomed even under intermediate scrutiny applied to time, place, and manner regulations because of the "absence of any sensible basis for [its] distinctions." There is thus no reason in this case to decide "whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption." This case should not "cast a constitutional pall on reasonable regulations quite unlike the law before us." Thus, Justice Kagan concurred only in the judgment.