
In Reed the Supreme Court held that strict (usually fatal)-scrutiny applies to content-based restrictions on speech. The Court defined content-based broadly not just to include “obvious” restrictions defining regulated speech by “particular subject matter,” but other “more subtle” restrictions defining regulated speech by its “function or purpose.”

The SLLC amicus brief [3] asks the Court to “cabin Reed by recognizing that purpose or function discrimination is not always content discrimination,” meaning intermediate scrutiny would apply.

The Telephone Consumer Protection Act (TCPA) prohibits automatic dialing or prerecorded calls to cell phones with three exceptions—emergencies, consent, and debt collection owed to or guaranteed by the United States. The American Association of Political Consultants claims the third exception violates the First Amendment.

Applying Reed the Fourth Circuit concluded that this exception is content-based because “automated calls made to cell phones that deal with other subjects — such as efforts to collect a debt neither owed to nor guaranteed by the United States — do not qualify for the debt-collection exemption and are prohibited by the automated call ban.”

The SLLC amicus brief [3] argues that the Supreme Court should narrow Reed because it is difficult for state and local government officials to draft content-neutral requirements in common settings. For example, Reed involved a sign code; most sign codes define the word sign. The brief explains how “a meaningful definition of ‘sign’ enables a sign code to avoid unintentionally regulating T-shirts or architecturally designed buildings. But it is impossible to achieve those goals without, in some way, differentiating based on function or purpose.”

Beyond sign codes, the brief provides other examples of how lower courts have “misused” Reed and taken it in “surprising directions.” For example, quoting Reed, a federal district court prevented a city from rejecting a ballot initiative to decriminalize marijuana possession. Likewise, quoting Reed four times, another court stuck down a state’s ballot selfie law, which prohibits the taking “a digital image or photograph of the voter’s ballot while the voter is in a polling place.”


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