INTERMEDIATE SCRUTINY AS PROPORTIONALITY REVIEW IN FIRST AMENDMENT DOCTRINE

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Intermediate scrutiny is the First Amendment's workhorse, yet it is often treated as a deferential formality. This Article argues that this view is outdated. At the Supreme Court and in the federal courts of appeals, intermediate scrutiny increasingly functions as structured proportionality review. Courts frequently demand record support, specify and weigh speech burdens, and ask whether comparably effective, less speech-restrictive measures are available.

The Article reconstructs intermediate scrutiny's evolution and assesses its modern practice. It traces three cycles in Supreme Court doctrine: early stringency, O'Brien*-era deference, and the modern proportionality turn. It then tests that modern cycle with an original dataset of 434 federal appellate decisions from 2006 to 2025. Across subfields, opinions treat intermediate scrutiny as a disciplined means-ends inquiry with growing regularity. Claimants prevail in roughly 40 percent of these appeals, nearly 50 percent higher than in Ashutosh Bhagwat's landmark 1983–2005 study. Read alongside the opinions' reasoning, that shift reflects a doctrine that has moved beyond plausibility review and begun to function as a meaningful constraint.*

Still, recent Supreme Court decisions underscore how contingent that development remains. TikTok Inc. v. Garland *and* Free Speech Coalition, Inc. v. Paxton *illustrate how intermediate scrutiny can revert toward deference and splinter into siloed subtests. The Article responds with a standardized four-part framework that unifies the method across subfields, reduces fragmentation, cabins discretion,*

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and helps entrench proportionality review as a feature of First Amendment doctrine.

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INTRODUCTION

Intermediate scrutiny, which does much of the First Amendment's day-to-day work, has long been described as weak and formulaic.[1] But the test has evolved. Over the last few decades, the

1. *See, e.g.*, Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012) ("[C]ontent-neutral laws receive what the Court calls 'intermediate scrutiny,' in practice a highly deferential form of review which virtually all laws pass." (citing, among other cases, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997))); Clay Calvert, *Scrutiny-Determination Avoidance in First Amendment Cases: Laudable Minimalism or Condemnable Evasion?*, 22 NEV. L.J. 1, 5 (2021) ("[T]he Supreme Court's implementation of intermediate scrutiny typically is 'extremely light and differential.'" (quoting Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in* McCullen v. Coakley, 2014 SUP. CT. REV. 215, 223 [hereinafter Kendrick, *Nonsense on Sidewalks*])); David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE W. RSRV. L. REV. 259, 261 (2019) ("The distinction [between strict and intermediate scrutiny] is often outcome determinative in free-speech cases, as most content-based laws are struck down and most content-neutral laws are upheld."); Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for*

Supreme Court and the federal courts of appeals have increasingly applied intermediate scrutiny as what Justice Breyer recognized as "proportionality review": a structured inquiry that asks whether the government can justify a speech restriction with record support and a close fit, after accounting for less intrusive options.[2]

This Article documents that shift through an original dataset of 434 federal appellate decisions from 2006 to 2025. Claimants prevailed in 40 percent of intermediate scrutiny appeals, up from the roughly 27 percent success rate Professor Ashutosh Bhagwat reported for 1983–2005.[3] This change reflects a deeper methodological maturation. Opinions increasingly turn on whether the government can substantiate its claims, defend the scope of the speech burden imposed, and explain why narrower options will not work.

Those gains are real but partial. Intermediate scrutiny now operates as proportionality review in a substantial share of cases, but it coexists with older, deferential patterns. The test is fragmented across overlapping subtests susceptible to slippage, and its loose formulations allow courts to recite the test's elements without doing the requisite analytical work. Two recent Supreme Court decisions—*TikTok Inc. v. Garland*[4] and *Free Speech Coalition, Inc. v. Paxton*[5]—illuminate how quickly the modern version of the test can soften into deference when the method is left implicit. This Article responds with a standardized proportionality framework that applies across

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Speech Activity and Some Suggestions for a Better Way Forward, 78 OHIO ST. L.J. 779, 803 (2017) ("[P]rovided that government is willing to restrict all speakers alike, the time, place, and manner doctrine, as explicated in *Ward* and subsequent cases, imposes relatively few absolute limits on such regulations." (quoting RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 31 (2012))); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992) ("In either its official or de facto form, intermediate scrutiny is a balancing mode."); *id.* at 301 (stating that intermediate scrutiny "makes outcomes far less predictable" and has a "shifting bottom line"); Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 26 (1995) (contending that judicial scrutiny of content-neutral laws had been "an extremely unsuccessful jurisprudential exercise, with only a few very arbitrary victories for speakers in a period of over fifty years").

2. United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring); *see* Thompson v. W. States Med. Ctr., 535 U.S. 357, 388 (2002) (Breyer, J., dissenting); Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402–03 (2000) (Breyer, J., concurring); *see also* Randall v. Sorrell, 548 U.S. 230, 249 (2006).

3. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 809 (2007).

4. 145 S. Ct. 57 (2025) (per curiam).

5. 145 S. Ct. 2291 (2025).

subfields and makes intermediate scrutiny's core demands explicit without predetermining results.[6]

"Intermediate scrutiny" as used here refers to the family of First Amendment standards that apply means-ends proportionality analysis to content-neutral and certain content-based regulations.[7] The family includes the generic formulation (whether a regulation "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary"),[8] as well as doctrinal variants such as the *O'Brien* test for expressive conduct,[9] the *Ward* time-place-manner framework,[10] *Central Hudson*'s test for commercial speech,[11] the *Pickering* balancing standard for certain public employee speech,[12] "exacting scrutiny" for compelled disclosures and campaign finance rules,[13] and the *Renton* framework for secondary effects.[14] The

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6. *See infra* Part IV.

7. *See infra* Part II.

8. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

9. A regulation of expressive conduct is upheld

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

10. Regulations are upheld if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

11. If commercial speech is neither false nor misleading, regulations of it are upheld if "the asserted governmental interest is substantial"; "the regulation directly advances the governmental interest"; and that interest cannot "be served as well by a more limited restriction on commercial speech." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980).

12. To assess regulations of public employee speech, courts must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (quoting *Pickering*, 391 U.S. at 568).

13. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)). A regulation will be upheld if there is "a substantial relation between the [regulation] and a sufficiently important governmental interest," and if the regulation is "narrowly tailored to the interest it promotes." *Id.* at 2383–84 (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).

14. If an otherwise content-based regulation is targeted at the unwanted secondary effects of adult establishments, it will be upheld if it "is designed to serve a substantial governmental interest and allows for reasonable alternative

formulations vary but share a common orientation around means-ends fit. Across the doctrine (albeit with varying degrees of intensity), the government must identify an important, noncensorial interest and show that the restriction advances it without imposing unnecessary burdens on speech.[15]

The Article reconstructs intermediate scrutiny's historical arc, documents its modern development with an original dataset, reads contemporary Supreme Court decisions as both reflecting and threatening that development, and offers a unified framework that standardizes the method across subfields. It proceeds in four parts. Part I traces three cycles in the Supreme Court's treatment of intermediate scrutiny: (1) an early period of rigorous, fit-focused review before tiered scrutiny hardened into place; (2) a long deferential phase running from *United States v. O'Brien*[16] through the early 1990s, in which the elements often functioned as a plausibility screen; and (3) a modern turn toward formalized proportionality that has crystallized under the Roberts Court. Part II tests that story with the dataset, documenting higher claimant success rates and more disciplined reasoning in the courts of appeals while mapping variation across doctrinal categories and circuits. Part III argues that *TikTok* and *Paxton* mark potential reversions by compressing intermediate scrutiny's key steps. Part IV defends a standardized four-part framework—interest, proof, burden, alternatives—and assesses it against several alternative proposals for addressing the doctrine's confounding complexity.

Intermediate scrutiny, in its most disciplined applications, already operates as proportionality review. But the method remains a fluid practice susceptible to erosion. Because intermediate scrutiny governs the everyday architecture of public discourse, its analytic architecture largely determines what the government must establish to justify the regulations that shape expressive life.

I. THE CYCLES OF INTERMEDIATE SCRUTINY

What courts now group under the label "intermediate scrutiny" is in fact a family of means-ends standards. The test's operative force

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avenues of communication." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

15. Throughout, the Article tracks method rather than label and thus excludes from its analysis various threshold inquiries that determine whether intermediate scrutiny kicks in. For example, the *Central Hudson* framework has a threshold inquiry that leaves false or misleading commercial speech unprotected, as does the *Pickering*/*Garcetti* framework for speech that is not communicated as a private citizen on a matter of public concern. *See supra* notes 11–12. And *Ward*'s time-place-manner framework adds an additional requirement that ample alternative channels of speech remain open. *See supra* note 10.

16. 391 U.S. 367 (1968).

has shifted over time, in a cyclical pattern.[17] This Part traces three cycles: an early, stringent mode of review focused mainly on expressive burdens and tailoring,[18] a long deferential phase in which the elements often functioned as a reasonableness filter,[19] and a more recent turn toward structured proportionality.[20]

A. Rigor Before Doctrine

From the late 1930s through the early 1960s, the Supreme Court often reviewed ostensibly content-neutral regulations with a rigor recognizable today.[21] Although opinions spoke in the language of balancing, the analysis frequently demanded that government officials explain why narrower, comparably effective measures would not address the asserted harm.[22] Merely invoking a legitimate interest was insufficient.[23]

This first cycle took shape in the late 1930s amid a convergence of doctrinal and institutional shifts. As the Court retreated from *Lochner*-era limits on economic regulation and grew more attentive to civil liberties, it also confronted how broadly framed public-order rules could inhibit core expressive activity.[24] The doctrinal vocabulary

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17. As used in this Article, "intermediate scrutiny" is a retrospective shorthand. The Court did not consistently deploy the label in the mid–twentieth century, and cases like *O'Brien*, *Clark*, and *Ward* were not organized at the time as a unified "tier" of review. The grouping here reflects a later synthesis of a family of means-ends tests that share a common structure.

18. *See infra* Section I.A.

19. *See infra* Section I.B.

20. *See infra* Section I.C.

21. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1293 (2007) (noting that "*Lochner*-era jurisprudence knew no tiers of inquiry").

22. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 347–50 (1970).

23. *See id.*

24. *See* MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930–1941, at 1045 (Maeva Marcus ed., 2021) ("From 1937 to 1941 the Roosevelt justices tried to work out a way of dealing—or more precisely, they struggled over several ways to deal—with civil liberties cases that would allow them to rule in favor of the New Deal's constituencies while still deferring to legislative choices about economic regulation."). The period was shadowed by earlier episodes of repression and by contemporaneous anxieties about fascism abroad and racial repression at home, circumstances that made categorical restrictions harder to treat as routine governance. *See* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 396 (1946) (observing that, in the 1930s, "the Supreme Court was faced for the first time with the possibility that American citizens might be hanged or electrocuted for nothing except expressing objectionable opinions or owning objectionable books"); *see also* Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2702 (1992) ("The Angelo Herndon case marked the first occasion on which the Supreme Court was forced to come to terms so directly

was still in flux, and the Court did not yet speak in tiers. But the early public-order and distribution cases repeatedly viewed broad burdens on key channels of communication as suspect and asked whether narrower tools might work.[25]

The landmark cases of the era illustrate the point. In *Schneider v. State*,[26] the Court struck down ordinances banning handbill distribution in public spaces, ostensibly to reduce litter.[27] Despite the cities' substantial interest in clean streets, the Court deemed a ban on an entire medium of communication too severe a burden on speech and treated anti-littering laws as an adequate alternative.[28] As Thomas Emerson observed, the opinion "offer[ed], tentatively, a balancing test, with the balancing weighted by a preference for First Amendment rights," but when it came to deciding the case, the Court did "not really attempt to balance," instead "flatly . . . tell[ing] the cities to protect their interest in clean streets by punishing the action of littering."[29]

The same approach appeared in *Martin v. City of Struthers*,[30] which invalidated a blanket ban on door-to-door literature distribution.[31] While acknowledging that protecting residential privacy was a legitimate goal, the Court again found the restriction far too sweeping.[32] It held that the government could not categorically bar a time-honored mode of communication across an entire community when homeowners could simply post "no solicitation" signs to opt out.[33]

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with the concept of political crime in a case in which the alleged criminal was a black American."). *See generally* BRAD SNYDER, YOU CAN'T KILL A MAN BECAUSE OF THE BOOKS HE READS: ANGELO HERNDON'S FIGHT FOR FREE SPEECH (2025). Personnel changes reinforced the reorientation, including President Roosevelt's 1937 appointment of Hugo Black to replace Justice Van Devanter. William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 329 (2019); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 673, 676 (1963).

25. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1729–31 (1991); EMERSON, *supra* note 22, at 347–50.

26. 308 U.S. 147 (1939).

27. *Id.* at 154–58, 162, 164–65 (simultaneously reviewing and deeming unconstitutional ordinances enacted in Los Angeles, California; Milwaukee, Wisconsin; Worcester, Massachusetts; and Irvington, New Jersey).

28. *See id.* at 160–62. Here, the Court was referring only to the California, Massachusetts, and Wisconsin ordinances. *Id.*

29. *See* EMERSON, *supra* note 22, at 347.

30. 319 U.S. 141 (1943); *see also id.* at 144 (quoting *Schneider*'s balancing framework).

31. *Id.* at 142, 149.

32. *See id.* at 144, 147.

33. *See id.* at 147–49. Emerson again captured the pattern succinctly: as in *Schneider*, the Court "commence[d] with a balancing test and end[ed] up in a full protection position." EMERSON, *supra* note 22, at 350. In *Talley v. California*, 362 U.S. 60 (1960), the Court extended this rigorous approach to an ordinance

Not every regulation fell. In *Kovacs v. Cooper*,[34] the Court upheld a ban on "loud and raucous" sound trucks on public streets because the ordinance targeted only the most intrusive form of amplification and was, on the Court's account, the only workable way to ensure traffic safety and prevent neighborhood disturbance.[35] Other channels, including quieter amplification and door-to-door canvassing, remained open.[36]

Similarly, *Cox v. New Hampshire*[37] upheld a parade-permitting scheme on the strength of a narrowing construction that confined official discretion to time, place, and manner judgments aimed at public convenience.[38] The Court stressed that the defendants, a group of Jehovah's Witnesses marching in formation, were not overly burdened by the neutral permitting scheme and that their ability to communicate outside a street procession—through the distribution of literature or in gatherings beyond organized marches on highways, for example—was not at issue.[39] Read alongside *Kovacs*, the case suggests that when the Court upheld time, place, and manner rules in this period, it did so by carefully parsing the extent of the restriction and the capacity for speakers to continue reaching their audiences.

Collectively, these decisions reflect a pronounced tilt toward protecting expression. Not every opinion from this period fits neatly into the pattern, and the Court did not describe itself as applying "intermediate scrutiny" at the time. But these cases cast an early emphasis on fit that foreshadowed where the doctrine would eventually settle. As the docket widened and the Court's composition changed, the inquiry's focal point shifted from whether broad restrictions were justified in light of narrower tools to whether the restriction would advance a valid governmental interest.

B. The Deferential Turn

The second cycle, beginning with *O'Brien* in 1968 and extending through the early 1990s, replaced the methodical review of the first

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prohibiting anonymous handbills. *Id.* at 60–61. The city invoked fraud prevention, *id.* at 64, but the Court treated the restriction as categorically impermissible absent a compelling need. *See id.* In striking down the ordinance, the Court stressed the historical importance of anonymity in political discourse, from the *Federalist Papers* onward, and dismissed the city's justification as too speculative to warrant suppressing speech. *Id.* at 64–65. Again, the opinion invoked the rhetoric of weighing interests but applied a practical rule of near-categorical protection.

34. 336 U.S. 77 (1949).
35. *See id.* at 87, 89.
36. *See id.* at 89.
37. 312 U.S 569 (1941).
38. *See id.* at 576.
39. *See id.* at 573.

cycle with a more deferential model.[40] Although this era produced the canonical formulations that now comprise "intermediate scrutiny," application often lacked rigor.[41] Courts accepted speculative justifications, dispensed with evidentiary support, and treated tailoring as a formality.[42] In practice, intermediate scrutiny during this period often operated as a plausibility check rather than a genuine tailoring inquiry.[43] This was especially true in cases dealing with quotidian, content-neutral regulations.[44]

Two developments help explain the shift. First, the late Warren Court paired an increasingly speech-protective set of headline rulings with growing pressure for a generally applicable framework for regulatory speech disputes.[45] *O'Brien* supplied that framework, but the Court enforced its elements lightly in the cases that followed.[46] Second, as the Court grew more conservative[47] and the speech docket

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40. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1261 (1995).

41. *See* Kendrick, *Nonsense on Sidewalks*, *supra* note 1, at 222–23.

42. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2133 (2018) (observing that "by the 1980s, [the Court] had almost entirely stopped enforcing" intermediate scrutiny's requirements).

43. *See id.*; Alexander, *supra* note 1, at 26.

44. *See* Lakier, *supra* note 42, at 2134–35.

45. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Cohen v. California, 403 U.S. 15, 26 (1971); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964).

46. *See infra* Section I.B. For an argument that the Court was saving its powder in *O'Brien* for what it viewed as more crucial free speech fights, see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1488–89 (1975) (arguing that "what was unconsciously going on in *O'Brien*" was that the Court was "reserv[ing] the earlier cases' [strict scrutiny-esque approach] for relatively familiar or traditional means of expression, such as pamphlets, pickets, public speeches and rallies—thereby affirmatively obliging the state to free up certain forums, even at some sacrifice of its legitimate expression-unconnected interests—and to relegate other, less orthodox modes of communication to the weak, nay useless, 'no gratuitous inhibition' approach that sustained the draft card burning law" (footnotes omitted)).

47. The Court's composition changed most visibly with the appointment of Justice O'Connor. *See Court Swings to Right, Reagan Wins Victories*, *in* CQ ALMANAC 1984, at 3-A-4-A (40th ed. 1985), http://library.cqpress.com/cqalmanac/cqal84-856-25732-1150607 ("The 1983–84 term—the 15th since Warren E. Burger took over the chief justice's post from Earl Warren—looked like a watershed term, one in which the Supreme Court turned firmly away from judicial activism aimed at enlarging individual rights to a new posture of committed conservativism. In virtually every area of the law, the court swung its weight to the side of the government, deferring to the authority of Congress, the executive branch, states and cities."). Later changes, including the appointment of Justice Scalia and the elevation of Justice Rehnquist to Chief Justice, solidified

moved toward mundane regulations involving signage and protest logistics and away from more paradigmatic censorship, the Court became more willing to uphold regulations without demanding record-based proof.[48] As a result, the Court increasingly required less from the government to sustain speech regulations.[49]

O'Brien exemplified this trend. In 1968, a Vietnam War protester burned his draft card on the steps of a Boston courthouse, an act Congress had recently criminalized.[50] The Court upheld the ban, emphasizing the government's interest in maintaining the selective service system.[51] It announced a test requiring that regulations further important interests unrelated to speech and impose no greater burden than essential.[52] The formulation sounded demanding, but the Court enforced it only tepidly.[53] It dismissed less-restrictive alternatives in a single sentence and did not meaningfully engage with evidence suggesting Congressional hostility toward antiwar protests.[54] Once the government articulated an "important" interest in administering the draft, the Court treated that showing as essentially sufficient, without testing in record-based terms whether the ban materially advanced that interest or whether narrower tools would have done comparable work.[55]

A similar posture marked *Clark v. Community for Creative Non-Violence*.[56] The Court upheld National Park Service rules banning overnight sleeping in certain public parks to curtail the "Reaganville" protests in Lafayette Square, an encampment meant to dramatize homelessness outside the White House.[57] Applying the time-place-manner framework, which it acknowledged is functionally indistinguishable from *O'Brien*'s expressive conduct test,[58] the Court

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the Court's rightward turn. *See William Rehnquist Court (1986–2005)*, JUSTIA (2026), https://supreme.justia.com/supreme-court-history/rehnquist-court/ ("Rehnquist presided over a Court that was more conservative than the preceding Burger Court . . . . Justices O'Connor, Scalia, Thomas, and Kennedy joined him as fellow conservatives for much of his tenure.").

48. *See, e.g.*, Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 787, 791 (1984) (signage); Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989) (noise); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984) (protesting).

49. *See* Lakier, *supra* note 42, at 2133.

50. United States v. O'Brien, 391 U.S. 367, 369–70 (1968).

51. *Id.* at 375–78, 381–82.

52. *Id.* at 377.

53. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1203 (1996).

54. *O'Brien*, 391 U.S. at 381, 385–86.

55. *See id.* at 380–82.

56. 468 U.S. 288 (1984).

57. *Id.* at 289, 298; *id.* at 303–04, 303 n.3 (Marshall, J., dissenting).

58. *Id.* at 298.

accepted without probing that preserving park conditions and aesthetics justified the ban.[59] In sweeping terms, it declared,

> If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.[60]

The Court cited and briefly rejected the lower court's suggestion that narrower measures like limiting "the size, duration, or frequency of" protests might keep the park clean without stripping the communicative force of sleeping as part of the demonstration.[61] But the Court did not reckon with why these alternatives were insufficient, reinforcing the sense that once the government's rationale was credited, the remaining scrutiny was largely formal.[62]

Members of City Council of Los Angeles v. Taxpayers for Vincent[63] exhibited the same logic. The Court upheld a Los Angeles ordinance barring signs on public property, including utility poles and other city fixtures, to reduce "visual clutter" and promote safety.[64] At issue were campaign posters for a city council candidate. The Court credited the city's aesthetic rationale largely at face value and deemed the measure narrowly tailored because speakers could post signs on private property instead.[65] But the opinion never squarely confronted whether that "alternative" was meaningfully available to speakers without access to prominent private locations.[66] In dissent, Justice Brennan criticized the majority's "lenient approach" as "reflect[ing] a

59. *Id.* at 296.

60. *Id.* at 297.

61. *Id.* at 299.

62. *See id.* The Court noted that *O'Brien* and other time-place-manner cases did not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.*

63. 466 U.S. 789 (1984).

64. *Id.* at 793, 802, 816–17.

65. *See id.* at 811; *see also* Lakier, *supra* note 42, at 2135 (explaining that the deficiencies in the Court's tailoring analysis regarding alternative channels of speech—that "not everyone has access to private property on which to post" signs, and handbilling is more expensive and labor intensive than posting—made "it much more difficult for poorly funded political groups like the plaintiffs to make use of a 'critical [and inexpensive] . . . means of communication'" (alterations in original) (quoting *Vincent*, 466 U.S. at 819 (Brennan, J., dissenting))).

66. *See* Lakier, *supra* note 42, at 2135.

startling insensitivity to the principles embodied in the First Amendment."[67]

The deferential cycle culminated in *Ward v. Rock Against Racism*,[68] which upheld a requirement that performers in Central Park use city-provided sound equipment and technicians to control concert volume.[69] The Court accepted the city's claims about noise control without skepticism, declined to meaningfully consider less intrusive options, and disregarded the ways limits on amplification could reduce audience reach.[70] *Ward*'s tailoring standard, which requires that a regulation be "not substantially broader than necessary to achieve the government's interest,"[71] is not overly lax on its face. But the Court applied it with striking deference, and that deferential posture shaped lower court interpretations for decades.[72] Even today, some courts continue to cite *Ward* in upholding sweeping regulations so long as the government's rationale appears reasonable.[73]

Notably, none of these cases used the term "intermediate scrutiny." The label took hold only in the late 1980s and 1990s as courts sought to categorize proliferating First Amendment doctrine,[74] though it remains an imperfect and unevenly applied umbrella. By the time of *Turner Broadcasting System, Inc. v. FCC*,[75] the Court began demanding record-based justification, a turn that helped seed the modern proportionality framework.[76]

C. The Emergence of Proportionality

The third cycle emerged in the 1990s and solidified under the Roberts Court into a more disciplined, cross-contextual proportionality review. What began as discrete doctrinal adjustments—requiring stronger showings in some areas; resistance to sweeping prohibitions in others—coalesced into a more unified approach. Across multiple subfields, the Court now demands concrete

67. *Vincent*, 466 U.S. at 818 (Brennan, J., dissenting).

68. 491 U.S. 781 (1989).

69. *Id.* at 784, 803.

70. *Id.* at 792, 797–800, 802; *see also* Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 17–18 (2021).

71. *Ward*, 491 U.S. at 800.

72. *See id.* at 802 ("That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.").

73. *See, e.g.*, Marcavage v. City of New York, 689 F.3d 98, 101–02, 109 (2d Cir. 2012) (upholding restrictions on protests near the location of the 2004 Republican National Convention).

74. Bhagwat, *supra* note 3, at 784.

75. 512 U.S. 622 (1994).

76. *See* Post, *supra* note 40, at 1263 (describing intermediate scrutiny in 1995 as "extraordinarily lenient").

evidence, careful accounting of expressive costs, and meaningful consideration of less-restrictive alternatives. It is less blunt than the first cycle and more disciplined than the second.[77]

The methodological turn came into focus on three fronts. In the commercial-speech context, the Court stopped taking the government at its word.[78] It rejected regulations resting on conjecture and insisted on evidence that a restriction would materially advance the government's goals.[79] At the same time, it grew more skeptical of near-total bans on entire modes of communication.[80] And in cases involving injunctions targeting particular protesters, the Court imposed heightened tailoring requirements, recognizing the unique censorship risks such orders pose.[81] By the end of the 1990s, a new approach was faintly visible.

The Roberts Court consolidated the turn, in part by forcing the government to show its work. For example, in *Americans for Prosperity Foundation v. Bonta*,[82] the Court rejected California's blanket donor-disclosure regime for charities.[83] It demanded more than generalized assertions of investigatory convenience and required proof that the disclosure rule would appreciably advance the state's fraud-prevention goals.[84] The Court emphasized the State's failure to point to any enforcement gap absent the collected data, or any other meaningful reliance on it.[85] The Court also noted that narrower tools were available, including case-specific subpoenas and

77. As with the prior periods, this description highlights dominant patterns rather than claiming uniform transformation; lines of deference and rigor have continued to coexist, sometimes within the same doctrinal silo.

78. *See* Edenfield v. Fane, 507 U.S. 761, 770–71 (1993); *see also* Greater New Orleans Broad. Ass'n v. United States; 527 U.S. 173, 188 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995).

79. *Edenfield*, 507 U.S. at 770–71; *see also Greater New Orleans Broad. Ass'n*, 527 U.S. at 188; *Liquormart*, 517 U.S. at 507; *Rubin*, 514 U.S. at 487.

80. For instance, in *City of Ladue v. Gilleo*, 512 U.S. 43, 45, 54 (1994), the Court struck down a prohibition on residential yard signs because of its expansive scope, a concern later echoed in cases like *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001).

81. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757, 765 (1994) ("[W]hen evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."); *see also* Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 374 (1997) (stating that the *Madsen* test applied).

82. 141 S. Ct. 2373 (2021).

83. *Id.* at 2380, 2389.

84. *Id.* at 2386.

85. *Id.* at 2386–87.

on-demand, nonpublic requests.[86] The mismatch between an across-the-board mandate and a modest evidentiary showing proved fatal.[87]

The Court also grew more serious about what speech restrictions actually cost. In *Packingham v. North Carolina*,[88] it invalidated a categorical bar on registered sex offenders' access to major social-media platforms, stressing that the law excluded an entire class of speakers from a principal channel of contemporary discourse.[89] It thus foreclosed the medium through which a growing share of public life is conducted. This reasoning echoed *City of Ladue v. Gilleo*,[90] which struck down a blanket ban on residential yard signs.[91] There, too, the Court treated the affected channel as irreplaceable—no realistic substitute could fully replicate the neighborhood audience that yard signs uniquely reached.[92] In both cases, the Court measured the expressive burden in practical terms before assessing fit.

Most distinctively, the Court began treating less speech-restrictive alternatives as a meaningful constraint. The key inflection point was *McCullen v. Coakley*,[93] which struck down a 35-foot buffer zone around abortion clinics.[94] Chief Justice Roberts emphasized that tailoring requires the government to "seriously under[take]" efforts to adopt less intrusive measures.[95] The opinion closely parsed alternatives such as enforcing existing harassment laws and pursuing targeted injunctions, concluding that Massachusetts had not made the requisite showing.[96] Given the heavy burden on core speech such as sidewalk counseling and leafleting, the law failed intermediate scrutiny.[97] *McCullen* thus harkened back to the first cycle's mode of review, as governments could no longer bypass obvious alternatives without explanation.

McCullen's logic has migrated to settings beyond protests. In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*),[98] the Court deemed California's compelled notices for crisis-pregnancy centers "wildly underinclusive" and pointed to public-information campaigns as a lower-cost option, notwithstanding the State's claim

86. *Id.* at 2386.
87. *Id.* at 2387.
88. 137 S. Ct. 1730 (2017).
89. *Id.* at 1733, 1737.
90. 512 U.S. 43 (1994).
91. *Id.* at 58.
92. *See id.* at 56–58.
93. 573 U.S. 464 (2014).
94. *Id.* at 469, 496–97.
95. *Id.* at 494.
96. *Id.*
97. *See id.* at 474, 488–89, 497.
98. 138 S. Ct. 2361 (2018).

that prior efforts had fallen short.[99] And in *Janus v. American Federation of State, County, & Municipal Employees*,[100] it held that Illinois could not justify compelled subsidization of union speech where narrower measures were available, such as charging nonmembers for discrete grievance or arbitration services.[101]

Across these decisions, the Court demanded more than plausibility and treated the availability of narrower tools as a serious check on governmental overreach. That refinement tracks what Fred Schauer described as the First Amendment's growing "magnetic force" in American legal and political discourse.[102] As more disputes are framed as speech controversies, the Court has greater incentive to use forms of reasoning that are publicly legible as principled and constraint-imposing.[103] The modern proportionality framework is part of that response, preserving regulatory flexibility while demanding reasoned, record-based justifications for speech restrictions. It recovers the first cycle's sensitivity to burden and alternatives, and it adds a demand for evidentiary discipline and reason-giving that extends beyond the particular dispute at hand.

Still, the shift remains incomplete. Although the Roberts Court has embraced the "intermediate scrutiny" label and applies the framework with increasing regularity, areas of inconsistency persist. Some domains, such as the regulation of adult businesses under *City of Renton v. Playtime Theatres, Inc.*'s[104] "secondary effects" doctrine, still operate without meaningful evidentiary scrutiny.[105] Elsewhere, courts apply *Ward*'s time-place-manner test mechanically, with only passing attention to burden or alternatives.[106] These pockets persist in part because doctrinal subfields remain siloed. Lower courts often apply inherited frameworks reflexively, without revisiting their analytic premises in light of the broader turn toward proportionality.[107] Whether proportionality continues to function as the organizing method for intermediate scrutiny will depend on how courts respond when pressures test the doctrine's current equilibrium.

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99. *Id.* at 2368–70, 2375–76 (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802 (2011)). The Court did not determine whether strict or intermediate scrutiny applied because it found that the state lost under either test. *Id.* at 2377.

100. 138 S. Ct. 2448 (2018).

101. *Id.* at 2459–60, 2464, 2468–69, 2469 n.6.

102. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1795 (2004).

103. *See id.* at 1795, 1809.

104. 475 U.S. 41 (1986).

105. *See infra* Section II.B.

106. *See infra* Section II.B.

107. *See infra* Sections II.B–II.C.

II. IN THE FEDERAL APPELLATE COURTS (2006–2025)

Intermediate scrutiny is often described as weak or hollow.[108] Ashutosh Bhagwat's pioneering study of intermediate scrutiny in the federal courts of appeals from 1983 to 2005 found that (1) claimants prevailed in roughly 27 percent of cases and (2) outcomes varied sharply across doctrinal subfields.[109]

This Part updates that picture with a new dataset of federal appellate decisions issued between 2006 and 2025 in which courts applied intermediate scrutiny to a First Amendment claim. Claimant success rates are an imperfect measure of doctrinal rigor, but they provide a useful first proxy for how stringently the standard operates. On that measure, claimants prevailed in roughly 40 percent of decisions—about 13 points higher than in Bhagwat's period, or roughly a 50 percent relative increase. The shift is uneven across doctrinal categories and circuits, and the dataset cannot disentangle doctrinal method from shifts in case mix, litigant selection, statutory design, or broader political context. Nonetheless, higher claimant success rates appear alongside opinions that specify the government's interests, demand record support, identify speech burdens, and engage alternatives. Read alongside the opinions' reasoning, the pattern is consistent with a shift from plausibility review toward more structured proportionality analysis, even as pockets of deference and inconsistency remain.

A. Data Collection and Methodology

The dataset consists of 434 federal appellate decisions issued between January 1, 2006, and December 31, 2025, in which a court of appeals applied intermediate scrutiny to a First Amendment claim.[110] Cases were identified through Westlaw searches combining First Amendment terms with "intermediate scrutiny" and common tailoring formulations, followed by iterative citation and cross-reference checks. Decisions were included if the court expressly invoked intermediate scrutiny or applied a test that, in context, functioned as intermediate scrutiny, including *O'Brien* and *Ward* time-place-manner analysis, *Central Hudson*, and *Pickering* and its public-employee progeny. Opinions were excluded if they resolved the dispute on threshold grounds that prevented the court from reaching intermediate scrutiny, such as commercial speech found false or misleading at *Central Hudson* step one, or public-employee speech found unprotected under *Garcetti* and *Pickering* because it was not spoken in the employee's capacity as a private citizen on a matter of public concern.

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108. *See supra* note 1 and accompanying text.
109. Bhagwat, *supra* note 3, at 818.
110. *See infra* Appendix.

The dataset's unit of analysis is the case rather than the claim.[111] Where a decision addressed multiple First Amendment claims under intermediate scrutiny, the case was coded as a claimant success if the challenger obtained any form of relief on an intermediate-scrutiny claim and was coded as a failure if not. Following and updating Bhagwat's framework, each case was assigned to one of five primary doctrinal categories that capture most contemporary appellate applications of intermediate scrutiny:

1. **Content-Neutral Regulations** (including symbolic conduct under *O'Brien*, time-place-manner restrictions, mass media regulation, charitable solicitation, and "pure" intermediate scrutiny).[112]

2. **Commercial Speech** (*Central Hudson*).

3. **Public Employee Speech** (*Pickering* balancing).

4. **Secondary Effects Regulations** (*Renton* and progeny regulating sexually oriented businesses).

5. **Exacting Scrutiny** (political contributions and associational and disclosure regulations).

When a decision implicated multiple categories, it was assigned to the category that best captured the primary doctrinal instrument in the court's analysis. The dataset includes all appellate postures—preliminary-injunction appeals, summary-judgment appeals, and appeals from final judgments—so long as the court substantively engaged intermediate scrutiny. Where a case proceeded *en banc* and the full court applied the relevant analysis, only the *en banc* opinion is counted.

As with any doctrinal dataset, the results reflect judgment calls at the margins, particularly in assigning a primary category in hybrid cases. The criteria, however, were applied consistently across the dataset and are described in sufficient detail to permit replication and

111. Using the case as the unit of analysis avoids double-counting serial challenges to the same law and reflects the practical stakes that litigants and courts experience: A given regulation either survives or falls in the litigation before them.

112. By "pure" intermediate scrutiny, I mean the generic formulation of the test: whether the regulation at issue is narrowly tailored to advance an important governmental interest. And as used here, "content neutral" is a bit of a term of art. In a small subset of cases labeled as "content neutral" in the Appendix, the courts applied intermediate scrutiny to regulations they described as content-based but nonetheless treated as content-neutral. A descriptive note explaining each court's reasoning in these few cases is included in the Appendix.

critique. The design tracks Bhagwat's approach closely enough to support comparison over time while updating the doctrinal categories to reflect contemporary appellate practice.

B. Aggregate Trends

Table 1 summarizes claimant success across the 434 decisions, overall and by doctrinal category.

TABLE 1. CLAIMANT SUCCESS BY DOCTRINAL CATEGORY (2006–2025)

Category	Claimant Wins	Government Wins	Claimant Win %
Content Neutral	81	150	35%
Commercial Speech	47	38	55%
Public Employee Speech	27	32	46%
Secondary Effects	10	32	24%
Exacting Scrutiny	8	9	47%
TOTAL	**173**	**261**	**40%**

Across all categories, claimants prevailed in 173 of 434 intermediate-scrutiny decisions.[113] That 40 percent win rate marks an appreciable increase over Bhagwat's reported 27 percent success rate for 1983–2005.[114] Governments still win a majority of the time, but challengers now succeed often enough to illustrate that intermediate scrutiny is a contestable standard that can constrain outcomes. When governments almost always prevail despite the invocation of intermediate scrutiny, the standard risks becoming a rubber stamp. But when challengers win a substantial minority of cases across multiple doctrinal settings, the standard is functioning as genuine means-ends review.

The aggregate figures also show that claimant success is uneven across doctrinal silos. Commercial speech is the most favorable category for challengers, with claimants prevailing in 55 percent of

113. *See* Table 1.

114. *Compare* Table 1, *with* Bhagwat, *supra* note 3, at 818.

decisions.[115] That pattern aligns with the Supreme Court's more demanding treatment of commercial-speech regulations and with lower-court opinions that emphasize record support and tailoring. Exacting-scrutiny cases sit near parity at 47 percent.[116] Public-employee speech is next, with claimants prevailing in 46 percent of decisions.[117] There, courts are less willing to accept generalized invocations of efficiency or morale and more likely to require a concrete showing of workplace disruption tied to the employee's speech.

Content-neutral regulations are the largest category, comprising 231 of the 434 decisions, and challengers prevailed in 35 percent of them.[118] Even that midrange figure represents a substantial advancement from Bhagwat's content-neutral subset, in which claimants prevailed in roughly 19 percent of cases.[119] And at the end of the spectrum, secondary-effects regulations remain the most government-favorable category, with claimants winning just 24 percent of cases.[120] In this domain, courts frequently credit asserted indirect harms such as crime and blight, reflecting a line of Supreme Court precedent that has historically afforded governments substantial leeway.

The distribution broadly tracks, but does not replicate, Bhagwat's findings. The largest, critical category of content-neutral regulations continues to occupy a middle ground even as claimant success has risen markedly relative to Bhagwat's baseline.[121] Commercial speech remains comparatively favorable for claimants.[122] The dataset tracks Bhagwat's most closely in public employment cases, where *Pickering* outcomes remain clustered close to parity.[123] By contrast, secondary-effects disputes have grown even more strongly government-favorable.[124]

The shift the win-rate data suggests is corroborated by the opinions themselves. Higher claimant success rates appear alongside opinions that display a higher level of rigor in the application of intermediate scrutiny than the Court applied in deferential cases like *O'Brien* and *Clark*. That co-movement is consistent with intermediate scrutiny functioning, in a substantial set of cases, as proportionality review.

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115. *See* Table 1.
116. *See* Table 1.
117. *See* Table 1.
118. *See* Table 1.
119. *See* Bhagwat, *supra* note 3, at 809.
120. *See* Table 1.
121. *Compare* Table 1 (35%), *with* Bhagwat, *supra* note 3, at 809 (18.9%).
122. *Compare* Table 1 (55%), *with* Bhagwat, *supra* note 3, at 818 (38.5%).
123. *Compare* Table 1 (46%), *with* Bhagwat, *supra* note 3, at 809 (50%).
124. *Compare* Table 1 (24%), *with* Bhagwat, *supra* note 3, at 818 (35.3%).

C. Proportionality in the Lower Courts

Outcomes tell only part of the story. The reasoning in the appellate decisions also reveals how courts conduct intermediate scrutiny, with a substantial share of the dataset reflecting the hallmarks of proportionality review. A useful illustration is *McCraw v. City of Oklahoma City*.[125] Oklahoma City barred pedestrians from standing or sitting on many roadway medians, sweeping in expressive activity such as sign-holding and solicitation.[126] The City defended the restriction as a public-safety measure.[127]

The Tenth Circuit treated safety as a premise to be justified, declining to take the City's claims of danger to motorists and pedestrians at face value.[128] It instead examined what the record showed about the harm the City claimed to be addressing and why a broad median ban was necessary to address it, noting that the City had provided no examples of vehicle accidents or injuries to pedestrians in medians.[129] Citing *McCullen*, the court also faulted the City for failing to grapple with narrower options identified in the litigation, including limiting restrictions to the most dangerous medians or peak traffic times, requiring speakers to stand back from the curb, or relying on existing traffic and obstruction law.[130] It rejected sidewalks as an adequate substitute, emphasizing evidence that sidewalk communications were less visible to motorists and that, for speakers seeking direct interaction with drivers, they did not provide comparable access.[131]

This more robust approach to intermediate scrutiny is visible across the doctrine's various subtests. *Safelite Group, Inc. v. Jepsen*[132] is a representative example from the commercial speech context. Connecticut regulated how claims administrators spoke to insureds by barring service provider recommendations to an affiliate unless the speaker also offered the name of at least one competitor.[133] The State defended its law as "protecting consumer choice, preventing steering, and combating the undue influence of self-interested insurance claims adjusters."[134]

The Second Circuit found these interests unsubstantiated.[135] It emphasized the paucity of the State's evidentiary showing, including testimony that the preexisting regime had not generated consumer

125. 973 F.3d 1057 (10th Cir. 2020).
126. *Id.* at 1061.
127. *Id.* at 1071.
128. *See id.*
129. *Id.* at 1072–74.
130. *Id.* at 1074–75.
131. *Id.* at 1079.
132. 764 F.3d 258 (2d Cir. 2014).
133. *Id.* at 260.
134. *Id.* at 265.
135. *Id.*

complaints.[136] The court found inadequate support for the claim that the mandated disclosure would materially improve consumer outcomes.[137] It also treated the statute's structure as probative, pointing to narrower alternatives such as a straightforward affiliation disclosure or a clearer notice that insureds could select any licensed shop.[138] Finally, it credited underinclusive coverage as a reason to doubt the State's causal account.[139]

These decisions illuminate the broader pattern in the dataset: In the more rigorous opinions, intermediate scrutiny functions as a robust method. Many opinions treat "important interests" as only the beginning of the analysis.[140] Governments often invoke safety, order, privacy, consumer protection, election integrity, and the like at a high level.[141] When courts apply intermediate scrutiny with discipline, they require an evidentiary explanation connecting those interests to the particular speech restriction at issue.[142] Where the asserted harm is poorly specified or mismatched to the law's design, intermediate scrutiny does not allow the government to win by abstraction.[143] That

136. *Id.*

137. *Id.*

138. *Id.* at 265–66, 265 n.3.

139. *Id.* at 266 (noting the law was underinclusive "because it only applie[d] to third-party insurance claims administrators who also own[ed] an affiliated glass shop. It [did] not apply to insurance companies themselves or to claims administrators who [did] not own an affiliated glass shop. Accordingly, customers of those companies would not get the information about glass shops that Connecticut [contended was] necessary to protect consumer choice.").

140. *See, e.g.*, Rideout v. Gardner, 838 F.3d 65, 71–72 (1st Cir. 2016); Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 115 (2d Cir. 2017); Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013); Am. Acad. of Implant Dentistry v. Parker, 860 F.3d 300, 306 (5th Cir. 2017); Saieg v. City of Dearborn, 641 F.3d 727, 736 (6th Cir. 2011); Comite de Jornaleros v. City of Redondo Beach, 657 F.3d 936, 947 (9th Cir. 2011) (en banc); Aptive Env't, LLC v. Town of Castle Rock, 959 F.3d 961, 996 (10th Cir. 2020); iMatter Utah v. Njord, 774 F.3d 1258, 1266 (10th Cir. 2014); Edwards v. District of Columbia, 755 F.3d 996, 1002 (D.C. Cir. 2014).

141. *See, e.g.*, *Rideout*, 838 F.3d at 72 (election integrity); *Centro de la Comunidad Hispana*, 868 F.3d at 115 (safety); *Insley*, 731 F.3d at 299 (underage drinking); *Parker*, 860 F.3d at 309 (consumer protection); *Saieg*, 641 F.3d at 736 (safety and order); *Comite de Jornaleros*, 657 F.3d at 947 (safety and order); *Aptive Env't*, 959 F.3d at 996 (privacy); *iMatter*, 774 F.3d at 1266 (safety and order); *Edwards*, 755 F.3d at 1002 (economy).

142. *See, e.g.*, *Rideout*, 838 F.3d at 72–73; *Centro de la Comunidad Hispana*, 868 F.3d at 115; *Insley*, 731 F.3d at 299; *Parker*, 860 F.3d at 309–11; *Saieg*, 641 F.3d at 736–38; *Comite de Jornaleros*, 657 F.3d at 948; *Aptive Env't*, 959 F.3d at 996–99; *iMatter*, 774 F.3d at 1266–67; *Edwards*, 755 F.3d at 1003–04.

143. *See, e.g.*, United States v. Lierman, 151 F.4th 530, 541–42 (4th Cir. 2025); Pagan v. Fruchey, 492 F.3d 766, 773–78 (6th Cir. 2007); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 638–39 (6th Cir. 2010); Annex Books, Inc. v. City of Indianapolis, 624 F.3d 368, 370 (7th Cir. 2010) (per curiam); Valle Del Sol Inc. v.

dynamic is especially visible when courts take underinclusivity or exemptions as evidence that the regulation's architecture does not actually track its stated rationale.[144]

Courts are also increasingly meticulous about tailoring across doctrinal categories.[145] They evaluate the expressive cost in practical terms,[146] including whether a restriction forecloses a distinctive audience, moment, or medium and whether proposed substitutes are realistically comparable.[147] And they ask whether similarly effective, less costly options were available.[148] Post-*McCullen* decisions in particular push governments to confront obvious alternatives and to explain why targeted enforcement, narrower geographic or temporal

Whiting, 709 F.3d 808, 824 (9th Cir. 2013); Doe v. City of Albuquerque, 667 F.3d 1111, 1132 (10th Cir. 2012); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1219–21 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

144. *See, e.g.*, Project Veritas Action Fund v. Rollins, 982 F.3d 813, 836, 838–39 (1st Cir. 2020); Heffner v. Murphy, 745 F.3d 56, 91 (3d Cir. 2014); Knowles v. City of Waco, 462 F.3d 430, 436–37 (5th Cir. 2006); Wis. Right to Life State Pol. Action Comm. v. Barland, 664 F.3d 139, 153–55 (7th Cir. 2011); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012) (en banc); Berger v. City of Seattle, 569 F.3d 1029, 1043 (9th Cir. 2009) (en banc); *Aptive Env't*, 959 F.3d at 998–99; Wollschlaeger v. Governor, 848 F.3d 1293, 1313–15 (11th Cir. 2017) (en banc).

145. *See, e.g.*, Deegan v. City of Ithaca, 444 F.3d 135, 143–44 (2d Cir. 2006); Reynolds v. Middleton, 779 F.3d 222, 230–32 (4th Cir. 2015); *Knowles*, 462 F.3d at 434–35; McGlone v. Bell, 681 F.3d 718, 733–35 (6th Cir. 2012); ACLU of Ill. v. Alvarez, 679 F.3d 583, 605–07 (7th Cir. 2012); *Berger*, 569 F.3d at 1041–48; Verlo v. Martinez, 820 F.3d 1113, 1134–37 (10th Cir. 2016); Boardley v. U.S. Dep't of Interior, 615 F.3d 508, 520–24 (D.C. Cir. 2010).

146. *See, e.g.*, Cutting v. City of Portland, 802 F.3d 79, 87–89 (1st Cir. 2015); Turco v. City of Englewood, 935 F.3d 155, 165–67 (3d Cir. 2019); Sisters for Life, Inc. v. Louisville-Jefferson County, 56 F.4th 400, 404–05, 407 (6th Cir. 2022); Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266, 1295–96 (11th Cir. 2021).

147. *See, e.g.*, *Deegan*, 444 F.3d at 143–44; Bruni v. City of Pittsburgh, 824 F.3d 353, 369 (3d Cir. 2016); *Reynolds*, 779 F.3d at 230–32; *Knowles*, 462 F.3d at 434–35; *McGlone*, 681 F.3d at 733–35; *Alvarez*, 679 F.3d at 606–07; *Berger*, 569 F.3d at 1040–48; *Verlo*, 820 F.3d at 1137; *Boardley*, 615 F.3d at 522–23.

148. *See, e.g.*, *Reynolds*, 779 F.3d at 231–32; Billups v. City of Charleston, 961 F.3d 673, 686–88 (4th Cir. 2020); *Alvarez*, 679 F.3d at 606–07; *Berger*, 569 F.3d at 1042–45; *Boardley*, 615 F.3d at 524.

limits, or existing laws would not achieve comparable gains with less expressive cost.[149] That logic appears in myriad contexts.[150]

But this proportionality-inflected approach remains unevenly distributed. In some domains, courts apply the more robust approach with regularity; in others, application of intermediate scrutiny remains more deferential.[151] Secondary-effects doctrine is the clearest illustration of the latter. Many decisions in that area accept generalized claims about crime and blight and rely on studies from other jurisdictions without sustained attention to local conditions or to the breadth and duration of the speech burden.[152] Yet the dataset also contains counterexamples, sometimes even within the secondary-effects cases, that demand a more localized showing and a tighter explanation of why broader restrictions are necessary.[153] The contrast underscores both the spread and the fragility of proportionality-style review in the lower courts.

The dataset thus points to a doctrinal shift that outcomes help reveal but do not fully explain. Across many areas of First Amendment doctrine, intermediate scrutiny is doing more than sorting interests at a high level. Without a shared method, intermediate scrutiny can harden into meaningful proportionality review in some settings and thin back into deference in others.

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149. *See, e.g.*, *Cutting*, 802 F.3d at 89–92; *Bruni*, 824 F.3d at 369–70; *Turco*, 935 F.3d at 167–69; *Reynolds*, 779 F.3d at 230–32; *Billups*, 961 F.3d at 688–90; *Sisters for Life*, 56 F.4th at 405–08; McCraw v. City of Oklahoma City, 973 F.3d 1057, 1074–76 (10th Cir. 2020); *Food Not Bombs*, 11 F.4th at 1296; Fla. Preborn Rescue, Inc. v. City of Clearwater, 161 F.4th 732, 744–45 (11th Cir. 2025).

150. *See, e.g.*, *Bruni*, 824 F.3d at 356–57 (protests); *Billups*, 961 F.3d at 676, 690 (licenses); *Sisters for Life*, 56 F.4th at 406 (protests); *Food Not Bombs*, 11 F.4th at 1296 (permits).

151. *Compare, e.g.*, Art & Antique Dealers League of Am., Inc. v. Seggos, 121 F.4th 423, 439–43 (2d Cir. 2024) (finding a regulation too restrictive under *Central Hudson*), *cert. denied* 145 S. Ct. 2732 (2025), *and* Pagan v. Fruchey, 492 F.3d 766, 772–78 (6th Cir. 2007) (rejecting "a standard of 'obviousness' or 'common sense'" for a government's interest under *Central Hudson*), *with* Doe I v. Landry, 909 F.3d 99, 108–13 (5th Cir. 2018) (failing to discuss alternative methods of achieving the interest in secondary effects case), *and* Wacko's Too, Inc. v. City of Jacksonville, 134 F.4th 1178, 1184–90 (11th Cir. 2025) (upholding a secondary-effects regulation despite "the ordinance's own recitals and the city's own supporting evidence" that the regulation was underinclusive since intermediate scrutiny "aims to eliminate regulations that are overinclusive").

152. Am. Entertainers, LLC v. City of Rocky Mount, 888 F.3d 707, 716 (4th Cir. 2018); *Landry*, 909 F.3d at 109–10; Richland Bookmart, Inc. v. Knox County, 555 F.3d 512, 523–28 (6th Cir. 2009); Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 630 F.3d 1346, 1355–58 (11th Cir. 2011).

153. *See, e.g.*, Conchatta Inc. v. Miller, 458 F.3d 258, 267–68 (3d Cir. 2006); Illusions–Dall. Priv. Club, Inc. v. Steen, 482 F.3d 299, 312–15 (5th Cir. 2007); Foxxxy Ladyz Adult World, Inc. v. Village of Dix, 779 F.3d 706, 712, 715–17 (7th Cir. 2015); *see also, e.g.*, *McGlone*, 681 F.3d at 733–35 (content neutral).

D. Circuit-Level Analysis

The dataset also reveals meaningful variations among individual circuits, suggesting regional nuances in the application of intermediate scrutiny:

TABLE 2. CLAIMANT SUCCESS BY CIRCUIT

Circuit	Claimant Win %	Total Cases
1st	50%	18
2d	39%	38
3d	42%	31
4th	32%	37
5th	49%	43
6th	43%	51
7th	37%	30
8th	33%	24
9th	39%	79
10th	46%	24
11th	35%	34
D.C.	24%	21
Fed.	75%	4

Among the regional circuits, claimants fare best in the First, Fifth, and Tenth Circuits, where win rates hover between 46 percent and 50 percent.[154] The Fourth, Eighth, and D.C. Circuits are more government-friendly, with claimant success rates ranging from 24 percent to 33 percent.[155] Other circuits cluster nearer the overall average, and the Federal Circuit's outlier rate reflects a small and atypical docket.[156] These numbers suggest variation across circuits, though the smaller sample sizes in several circuits counsel caution in

154. *See supra* Table 2.
155. *See supra* Table 2.
156. *See supra* Table 2.

treating the differences as precise estimates rather than directional signals.

Although some variation is inevitable, the depth of these disparities underscores the problem of fragmentation.[157] This pattern is consistent with both docket mix and methodological divergence. Even within shared doctrinal families, opinions vary in how demanding they are. The result is a geography of intermediate scrutiny in which similarly framed burdens can receive materially different treatment across circuits.

E. Stability and Evolution Over Time

One natural question is whether these patterns reflect a one-off spike or a more stable shift. To test that, the dataset can be divided into two decades:

TABLE 3. CLAIMANT SUCCESS OVER TIME

Timeframe	Claimant Wins	Government Wins	Claimant Win %
2006–2015	105	139	43%
2016–2025	68	122	36%

Two points emerge from this bifurcation. First, both slices cluster in the same general band: claimants win between roughly one-third and one-half of decided cases.[158] Even in the later period, claimant success remains substantially higher than in Bhagwat's dataset.[159] Intermediate scrutiny is more contestable now than it was in the late twentieth century. Second, the pattern over time is not steadily upward. Claimant success is higher in the earlier slice and dips modestly in the later one.[160] That dip is not uniform across categories. Claimant success rises in commercial-speech cases in the later slice, while the overall dip is concentrated in content-neutral, exacting, and secondary-effects cases.[161] The pattern further suggests uneven adoption and underscores that the proportionality turn has not hardened into a stable equilibrium.[162]

The dip is also consistent with the very development this Article describes. As intermediate scrutiny has grown more demanding, governments and legislatures have had reason to adapt, building fuller records before enacting speech restrictions and drafting them

157. *See supra* Table 2.
158. *See supra* Table 3.
159. Bhagwat, *supra* note 3, at 818.
160. *See supra* Table 3.
161. *See infra* Appendix.
162. *See supra* Table 3.

more narrowly in the first place. Where that adaptation succeeds, the expected result would be fewer successful constitutional challenges. A doctrine that disciplines its inputs should, over time, produce fewer easy tailoring losses even as the underlying inquiry grows more rigorous. The win-rate data cannot prove that account, but they are at least as consistent with it as with any story of doctrinal regression.

This temporal snapshot is necessarily coarse. Still, the pattern is clear enough for present purposes. The doctrine has morphed into something sturdier but remains vulnerable to regression.

III. *TIKTOK*, *PAXTON*, AND DOCTRINAL DRIFT

Two recent decisions, *TikTok* and *Paxton*, test the durability of intermediate scrutiny's modern, proportionality-inflected form. Most commentary on the cases has focused on whether strict scrutiny should have applied.[163] This Part instead asks what intermediate scrutiny required once the Court adopted that frame. In both opinions, the Court invokes intermediate scrutiny but applies it with little exactitude. Alternatives receive little sustained engagement, burdens are described at a high level of generality, and the Court largely accepts governmental predicates without the careful consideration modern intermediate scrutiny often demands.[164] Although each case deals with a regulatory domain where the government is generally afforded substantial latitude, the opinions' methodological thinning could carry broader implications.

A. TikTok Inc. v. Garland

In *TikTok*, the Court upheld a federal law that would have effectively removed a major platform from the U.S. market unless it underwent a qualified divestiture likely to remake it in practice.[165] The law required TikTok either to cease U.S. operations or to sever all ties with its parent company, ByteDance.[166] The stakes were extraordinary: a platform used by 170 million Americans would be shut down altogether or undergo a forced sale likely to transform it

163. *See, e.g.*, Evelyn Douek, *TikTok and the First Amendment Anticanon*, 2026 SUP. CT. REV. (forthcoming 2026) (manuscript at 26) ("The Court should therefore have considered the content manipulation rationale, and once it considered it, it should have treated [the law] as a content-based regulation of speech that deserved the most searching judicial review."); Mary Anne Franks, Free Speech Coalition v. Paxton*: The Supreme Court Pretends to Think of the Children*, GEO. WASH. L. REV.: ON DKT. (July 31, 2025), https://perma.cc/5TFC-WNTU ("[T]he Court engaged in extraordinary contortions of law and logic to justify the application of intermediate scrutiny instead and declare it satisfied."); Leading Case, TikTok Inc. v. Garland, 139 HARV. L. REV. 280, 280 (2025).

164. *See* TikTok Inc. v. Garland, 145 S. Ct. 57, 69–72 (2025) (per curiam); Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2317–19 (2025).

165. *See TikTok*, 145 S. Ct. at 64–65, 72.

166. *Id.* at 62–63.

into something materially different.[167] Yet the Court, applying intermediate scrutiny, readily concluded that the law was appropriately tailored to address the government's asserted interest in protecting Americans' user data from potential exploitation by the Chinese government.[168]

The Court labeled its review intermediate scrutiny,[169] but it moved through the test's steps in unusually abbreviated fashion, treating the analysis largely as a reasonableness inquiry.[170] The opinion credited the government's risk account without probing, gave alternatives little traction, and paid limited attention to the scale of the speech burden.[171] Those moves sit uneasily with the evidence-sensitive proportionality the Court has demanded in other intermediate-scrutiny settings.[172]

Petitioners offered narrower measures aimed at the same data-security concerns, including heightened oversight, targeted restrictions on transfers, transparency and auditing mandates, and a comprehensive privacy regime modeled on the European Union's General Data Protection Regulation (GDPR).[173] Under the Court's contemporary proportionality-inflected cases, proposals of that kind typically force a clear explanation of why they would not materially advance the government's interests at lower expressive cost. But *TikTok* gave those alternatives little traction, as the Court framed its review through intermediate scrutiny's more deferential lineage. The Court invoked *Ward*'s familiar point that intermediate scrutiny does not invalidate a regulation simply because a court can imagine a less speech-restrictive path,[174] and also leaned on *Clark* and *Vincent* to justify its light-touch review.[175] On that approach, tailoring becomes little more than a check against facial unreasonableness[176]—a posture difficult to square with opinions like *McCullen*, *NIFLA*, and *Bonta*, where the Court demanded record support and reason-giving

167. *Id.* at 63–64.

168. *Id.* at 69–71.

169. *Id.* at 69.

170. *See* Genevieve Lakier, *The TikTok Ban and the Limits of the First Amendment*, LPE PROJECT (Jan. 22, 2025), https://perma.cc/JVT6-9PH6 ("The Court upheld the law after applying a remarkably deferential version of the intermediate scrutiny standard that courts apply in First Amendment cases to content-neutral regulations of speech.").

171. *Id.* at 69–72.

172. *See supra* Section I.C.

173. *See id.* at 71; Brief of National Security Professors Aaronson et al. as *Amicus Curiae* in Support of Petitioners at 5, 9, 20–21, *TikTok*, 145 S. Ct. 57 (Nos. 24-656 & 24-657).

174. *TikTok*, 145 S. Ct. at 71.

175. *Id.*

176. *See id.*

about less restrictive tools even when the alternatives were imperfect or administratively messy.[177]

The Court engaged the proposed alternative measures largely in passing and dismissed *McCullen* in a single sentence, asserting that "the Government [did not] ignore less restrictive approaches already proven effective."[178] This conclusory observation is difficult to square with the record. Europe's GDPR is a fully implemented comprehensive regime that functions precisely as the kind of plausible analogue *McCullen* treated as probative.[179] Multiple other promising proposals short of divestiture were also raised, including a national-security agreement with domestic hosting, auditing, and oversight features.[180] The opinion offered little explanation for why measures of that kind would not materially reduce the asserted risk, and it gave limited attention to a broader regulatory landscape that already targets foreign access to sensitive data through more general tools.[181]

The Court thus conflated deference on predictive national-security judgments with dilution of intermediate scrutiny's tailoring demands.[182] Granting Congress "latitude" to act on information it cannot fully disclose publicly and to make forward-looking judgments about risk is a defensible mode of judicial review, but it is not the same thing as essentially bypassing the test's fit analysis altogether.[183] The conflation allowed the Court to give the alternatives cursory treatment by simply pointing to the national security context.[184] But proportionality requires a showing that the chosen path meaningfully advances the interest relative to plausible, lower-burden options. Even in a national-security setting, if the record identifies a workable alternative, the government must explain, in record-specific terms, why it would not suffice.

In addition, the statute's selectivity bore on tailoring in a way the Court treated as largely beside the point. The law singled out TikTok even though comparable avenues for foreign access to Americans'

177. *See supra* Section I.C.

178. *TikTok*, 145 S. Ct. at 71.

179. *See* McCullen v. Coakley, 573 U.S. 464, 491 (2014) (discussing a plausible legislative alternative to the Massachusetts law at issue there).

180. *TikTok*, 145 S. Ct. at 71; Brief for Petitioners at 11–12, *TikTok*, 145 S. Ct. 57 (No. 24-656), 2024 WL 5264712, at *11–12; *see also* Matt Perault, *What Happened to TikTok's Project Texas?*, LAWFARE (Mar. 20, 2024), https://perma.cc/F5GY-UGA3 (outlining "Project Texas," which proposed to host all American user data on domestic servers controlled by Oracle, to subject operations to oversight by a government-approved board, and to impose robust safeguards against data transfers to China).

181. *TikTok*, 145 S. Ct. at 71.

182. *See id.* at 68–72.

183. *Id.* at 71 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213 (1997)).

184. *Id.*

user data remained open through other major platforms and commercial data brokers.[185] Other China-affiliated apps, including Temu and Shein, were untouched, as were major U.S. technology firms with substantial ties to China.[186] While the First Amendment imposes no freestanding bar on underinclusiveness, the Court has treated selectivity as probative under intermediate scrutiny because it can signal a mismatch between means and ends.[187] If the asserted interest is preventing foreign exploitation of data, leaving similar vectors of data access unregulated weakens the claim of material advancement and heightens the need for a reasoned explanation of why a platform-specific remedy is necessary when more evenhanded, platform-neutral tools remain available.

The record contained detailed legislative findings about PRC data-collection risks but little TikTok-specific evidence of past misuse or coercive access.[188] The Court itself acknowledged that there was no evidence China had "yet leveraged its relationship with ByteDance" to obtain Americans' data.[189] Petitioners disputed key premises about TikTok's data practices and corporate control,[190] but the Court treated Congress's predictive judgments as sufficient without probing those disputes or requiring TikTok-specific proof of heightened risk.[191]

The law's selectivity also complicated the privacy rationale in a manner left unaddressed by the Court.[192] As Justice Gorsuch

185. *See id.* at 70.

186. *See id.*; Reply Brief for Petitioners at 20–21, *TikTok*, 145 S. Ct. 57 (No. 24-656), 2025 WL 66984, at *20–21. Some other exempted U.S. technology firms with Chinese subsidiaries were Snap, Cisco, Meta, Hewlett-Packard, Dell, and Electronic Arts. Reply Brief for Petitioners, *supra*, at 21.

187. *See supra* Section I.C.

188. *See id.* at 68–69, 72.

189. *Id.* at 70.

190. *See id.* at 72; Reply Brief for Petitioners, *supra* note 186, at 20–22.

191. *Id.* at 69–72; *see* Perault, *supra* note 180 ("Lawmakers never seemed to wrestle with these possibilities, with the House instead choosing to pass legislation that presumes both that TikTok is guilty and that no remedy is possible, aside from a sale or a ban. There is limited public evidence that lawmakers reached those conclusions after considering the alternatives discussed above. And despite repeated calls for national security officials to provide more public evidence supporting their assertions of the risk that TikTok poses, few specifics have been brought to light."). TikTok had argued that its parent company, ByteDance, was not as susceptible to Chinese influence as the Government presumed because it is incorporated in the Cayman Islands and primarily owned by institutional investors around the world, its global workforce, and a Chinese national who resides in Singapore. *See* Brief for Petitioners, *supra* note 180, at 8–9. These facts would seem to require response before concluding, as the Court did, that TikTok was uniquely susceptible to Chinese influence.

192. *See* Douek, *supra* note 163 (manuscript at 27) ("If the Court's approach in *TikTok* is taken at face value, any speech-suppressive law, no matter how

observed in his concurrence, the government's alternative justification of "covert content manipulation" raised acute First Amendment risks.[193] Most notably, the Act conditions continued operation on a "qualified divestiture" that severs operational ties with ByteDance, including cooperation on the content-recommendation algorithm that curates and distributes speech on the platform.[194] That condition bears, at best, an attenuated connection to privacy. It instead targets the dissemination and visibility of content, the type of impermissible interest the Court has rejected in analogous contexts.[195]

The government's claim that only immediate, total severance from ByteDance could address the asserted risk to user data is even more questionable in retrospect. Following the Court's decision, the Executive Branch delayed enforcement of the law for over a year beyond the statutory deadline through successive executive orders.[196] Those extensions may reflect diplomacy or enforcement discretion, but they undercut the opinion's posture of urgency. If the risk was so acute that only divestiture could address it, the government's own willingness to tolerate continued ByteDance control for months at a time is difficult to reconcile with the Court's refusal to interrogate narrower operational constraints.

The opinion also avoided a sustained account of the drastic expressive burden the law imposed. Forced divestiture would, at a minimum, sever the platform from the algorithmic infrastructure that shapes what users see and share, and failure to divest would result in a shutdown.[197] Either way, the law would eliminate TikTok as it previously existed for roughly 170 million U.S. users.[198] That is

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severe, can be sustained if Congress, or government lawyers after the fact, can come up with another plausible justification for that law.").

193. *See TikTok*, 145 S. Ct. at 73 (Gorsuch, J., concurring); *see also* REIMAGINING THE INTERNET: *109. Evelyn Douek, Please Tell Us What Is Going on with the First Amendment and Social Media* (Initiative for Digit. Pub. Infrastructure at UMass Amherst, Mar. 20, 2025), https://publicinfrastructure.org/podcast/109-evelyn-douek-please-tell-us-what-is-going-on-with-the-first-amendment-and-social-media/ (noting the evidence suggesting that lawmakers were motivated by concerns that speech on the platform was too pro-Palestinian in the wake of the October 7th Hamas terrorist attack in Israel).

194. *TikTok*, 145 S. Ct. at 64–65.

195. *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2401 (2024) ("[T]he First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude.").

196. Exec. Order No. 14258, 90 Fed. Reg. 15209 (Apr. 4, 2025); Exec. Order No. 14310, 90 Fed. Reg. 26913 (June 19, 2025); Exec. Order No. 14350, 90 Fed. Reg. 45903 (Sep. 16, 2025).

197. *See TikTok*, 145 S. Ct. at 63–64.

198. *Id.* at 63.

a categorical disruption of a major channel of expression, in the neighborhood of cases like *Packingham* that treat exclusion from major digital fora as a serious First Amendment burden. Yet the Court never integrated the scale and character of that burden into its analysis.

Taken together, these omissions position *TikTok* as a sharp break from the proportionality review that has characterized the Court's recent intermediate-scrutiny cases. The Court gave alternatives negligible consideration and treated selectivity as largely irrelevant to fit, and it did not grapple with the scale and character of the law's effect on national discourse. In doing so, it reverted to the plausibility-based reasoning of *O'Brien*, *Clark*, and *Ward*, a method it had largely set aside.[199]

B. Free Speech Coalition, Inc. v. Paxton

The Court's opinion in *Paxton* echoes *TikTok* in method. Upholding Texas's age-verification regime for access to sexually explicit content online, the Court again invoked intermediate scrutiny while relaxing the features that have given its modern iteration teeth.[200] The opinion left key aspects of the burden undefined, treated chilling and privacy costs as largely collateral, and gave proposed alternatives little sustained engagement.[201] On those dimensions, *Paxton* too tracks the *O'Brien-Ward* line more closely than it resembles the Court's recent proportionality-inflected cases.

The law at issue was Texas House Bill 1181, which "requires certain commercial websites [publishing] sexually explicit content" that is obscene to minors to verify that visitors are 18 or older.[202] As in *TikTok*, the Court framed its review through its more deferential precedents of old, approving Texas's interest in shielding minors as substantial and largely accepting without pressing that the statute advanced it.[203] Proposed alternatives received limited traction, and once the State's objective was credited, the remaining analysis operated less as means-ends review than as a reasonableness screen.[204]

The opinion's most consequential methodological move was its willingness to uphold the law without specifying, in operational terms, the burden it imposes on adult users and covered websites. H.B. 1181 requires age "verification using government[] identification or transactional data."[205] But the magnitude of that burden turns on implementation choices that the opinion barely engages, including

199. *See supra* Section I.B.
200. Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2317–19 (2025).
201. *See id.* at 2306, 2317–19.
202. *Id.* at 2299, 2308.
203. *Id.* at 2317.
204. *See id.* at 2317–19.
205. *Id.* at 2317.

how much lawful adult speech is swept in,[206] how the "obscene to minors" standard operates across ages,[207] and what age-assurance methods will be used in practice.[208] Those design choices determine whether the law functions as a narrow access-control measure or a broad gate on lawful adult speech. Nonetheless, the Court claimed that resolution of such determinations was unnecessary in applying intermediate scrutiny.

Without pinning those features down, the Court never offered a sufficiently definite account of the restriction it upheld. Proportionality requires sizing the burden first, as courts cannot measure what they have not defined. Many of the Court's more recent decisions ground that sizing in granular, record-specific findings.[209] *Packingham*, for example, emphasized that the challenged law barred an entire class of offenders from the principal channels of online discourse before asking whether so sweeping a restriction could be justified.[210] *Paxton* took the opposite course, resolving a substantial First Amendment challenge without first defining the burden on speech at issue.[211]

Moreover, after expressing great consternation over the misuse of online user data in *TikTok*, the Court was unmoved by plaintiffs' privacy concerns in *Paxton*. Modern proportionality review treats collateral harms, including privacy risks, as part of the First Amendment burden because the prospect of surveillance or exposure can chill expression as effectively as direct prohibitions.[212] In *Bonta*, the Court invalidated California's blanket donor-disclosure regime in significant part because the information collection regime exposed donors to chilling data leaks.[213] The prospect of private harassment and retaliation against donors, though documented on a relatively modest scale, reinforced the conclusion that the regime's deterrent

206. *See id.* at 2308 n.7.

207. *See id.*

208. *See id.* at 2318 n.14. The difference between device- and platform-level systems, third-party verification services, government identification, or biometric tools could be quite significant in terms of privacy costs.

209. For example, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2430 (2022), the Court took a fine-tooth comb to the record to parse which particular instances of a coach's prayers at school gave rise to which disciplinary responses in order to demonstrate that the specific instances for which the coach was cited were unlikely to have coerced students to join in religious activity.

210. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

211. *See Paxton*, 145 S. Ct. at 2306–09, 2317–19.

212. *See* Tyler Valeska, *First Amendment Limitations on Public Disclosure of Protest Surveillance*, 121 COLUM. L. REV. F. 241, 251, 255 (2021) [hereinafter Valeska, *Limitations on Public Disclosure*]; Tyler Valeska, *Adverse Use Standing*, 112 CORN. L. REV. (forthcoming 2027).

213. *See* Valeska, *Limitations on Public Disclosure*, *supra* note 212, at 254–55 (citing Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388 (2021)).

effect on associational rights was disproportionate to its justification.[214]

In *Paxton*, petitioners similarly argued that age verification would chill lawful adult access to speech because it implicates privacy and the "unique stigma surrounding pornography."[215] The Court rejected that concern largely by reframing it.[216] It emphasized that users need submit verification only to the website or a contracted third-party service, both of which have "every incentive" to protect privacy.[217] It also treated stigma as a longstanding social reality that cannot, by itself, exempt the industry from otherwise valid regulation.[218] The Court analogized verification-related chill to a mere "risk of embarrassment,"[219] and it pointed to the history of some pornographic websites using age checks as evidence that verification is not an "insurmountable obstacle."[220]

That response curtails the burden analysis in a way that modern proportionality review typically resists. Petitioners submitted record-based evidence that age-verification systems create risks of leaks and misuse of sensitive identity data, and that the prospect of those risks predictably deters access to lawful adult speech.[221] In cases like *Bonta*, the Court considered disclosure-related chill as a burden to be weighed and justified.[222] *Paxton* instead deemed verification-induced deterrence largely as manageable discomfort, without sustained engagement with how the statute's design choices shape the magnitude of its imposed chill.[223]

The Court's approach to less restrictive alternatives also mirrors *TikTok*'s. The Court acknowledged alternatives like parental controls, device-level filters, and Internet Service Provider-level blocking.[224] But, invoking *Ward*, it emphasized that intermediate scrutiny does not require the least restrictive means and declined to resolve disputes about whether those tools might be equally or more effective.[225] Unlike in *McCullen* and *Janus*, the Court did not seriously assess whether those tools could reduce minors' exposure at

214. *See id.*
215. *Paxton*, 145 S. Ct. at 2318.
216. *See id.* at 2319.
217. *Id.* at 2318.
218. *Id.* at 2319.
219. *Id.* (quoting United States v. Am. Libr. Ass'n, 539 U.S. 194, 209 (2003) (plurality opinion)).
220. *Id.*
221. *See* Appellees' Cross-Opening Brief at 26–27, Free Speech Coal, Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024) (No. 23-50627).
222. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387–89 (2021).
223. *See Paxton*, 145 S. Ct. at 2318–19.
224. *Id.* at 2318.
225. *See id.*

a substantially lower speech cost.[226] Rather than explain why these options would not advance Texas's aims with less collateral burden, the Court treated plausibility as sufficient and reduced tailoring to a forgiving fit inquiry.[227]

C. Methodological Drift and Segmented Reasoning

Read alongside *TikTok*, *Paxton* thus reinforces the concern that intermediate scrutiny can slide from evidence-sensitive proportionality toward more lenient review in high-salience settings. If that approach calcifies across the doctrine, intermediate scrutiny risks becoming an empty label. But both opinions can also be read narrowly, in a way that might limit any broader implications. Each arose in a setting where courts sometimes credit governmental judgments more readily[228]—national security in *TikTok* and minors' access to sexual content in *Paxton*—and each reached the Court in a posture that can limit factual development.

Context and posture, however, do not require a less demanding method. Intermediate scrutiny can remain robust even in hard cases. To be sure, there are settings in which institutional competence or the costs of judicial error might justify a lighter touch at particular steps of the analysis. But there is a difference between calibrating demands at a particular step and watering down every step of the analysis simultaneously until none functions as a constraint. In *TikTok* and *Paxton*, the Court formally moved through intermediate scrutiny's elements but applied each with so light a touch that the framework operated as little more than a reasonableness screen. That is a contingent doctrine, one vulnerable in hard cases to manipulation or slippage. It also carries containment risks, as lower courts might read the more deferential mode into garden-variety intermediate-scrutiny cases that fall beyond the particular confines of *TikTok* and *Paxton*.

Two cross-cutting features underscore these concerns. First, both opinions invoke *Turner*'s intermediate-scrutiny framework,[229] which *Paxton* characterized as "deferential but not toothless."[230] Yet both

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226. *See id.* In *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), the Court held that such measures could effectively protect minors while better safeguarding privacy and speech. In *Ashcroft*, 542 U.S. at 667, parental filtering software was deemed a constitutionally adequate alternative to burdensome online verification mandates; in *Brown*, 564 U.S. at 803, such tools were recognized as effective without unnecessarily restricting adult speech.

227. *See Paxton*, 145 S. Ct. at 2318–19.

228. For instance, in *Ginsberg v. New York*, 390 U.S. 629, 639–41 (1968), the Court upheld a restriction on the sale of sexually explicit material to minors under a deferential mode of analysis.

229. *TikTok*, 145 S. Ct. at 67; *Paxton*, 145 S. Ct. at 2317.

230. *Paxton*, 145 S. Ct. at 2316.

apply a markedly weaker approach that can aptly be described as toothless—overwhelmingly forgiving and only lightly structured. The pattern suggests that, in certain regulatory domains, the test's "teeth" can be set aside when the subject matter is sufficiently sensitive.[231]

Second, no Justice wrote separately to insist that intermediate scrutiny be applied with full force. Justice Gorsuch concurred in *TikTok* to express concern over the government's claimed interest in preventing "covert content manipulation," but not to press for a more searching intermediate-scrutiny analysis as to the data security interest the Court actually upheld.[232] Justice Kagan's dissent in *Paxton* reinforced the same drift from the other side.[233] In arguing that strict scrutiny should apply, she treated the majority's account of intermediate scrutiny as appropriately lenient, allowing Texas to reject equally effective, less burdensome options and allowing the Court to bracket burden-defining questions.[234] Across opinions, then, the Justices appeared to be in unanimous agreement that intermediate scrutiny was working as it should in *TikTok* and *Paxton*.

Read as a pair, the decisions show how segmented reasoning unmoors the modern test. The Court treated the discrete regulatory domains at issue in the cases as self-contained, abandoning the proportionality method that had defined its modern intermediate-scrutiny cases elsewhere. If that move takes hold more broadly, the test's newfound rigor will become keyed to the regulatory category rather than the burden on speech. The response, therefore, must be methodological: enforcing a unified, evidence-sensitive proportionality framework whenever intermediate scrutiny is the stated test.

IV. TOWARD STANDARDIZATION

Intermediate scrutiny may be at an inflection point. The Roberts Court's proportionality-inflected approach has proved workable in the lower courts,[235] but *TikTok* and *Paxton* illustrate how quickly rigor can dissipate when the method remains underspecified.[236] There is also a problem of complexity. The proliferation of intermediate-scrutiny subtests risks letting courts route disputes into less demanding formulations, and even within a single formulation,

231. *See supra* Sections III.A–III.B.

232. TikTok Inc. v. Garland, 145 S. Ct. 57, 73–74 (2025) (Gorsuch, J., concurring) (per curiam) (suggesting that the statute may have required strict scrutiny but would have met that standard regardless); *see also id.* at 73 (Sotomayor, J., concurring) (writing separately solely to emphasize that the statute implicated the First Amendment).

233. *See Paxton*, 145 S. Ct. at 2319, 2321 (Kagan, J., dissenting).

234. *See id.* at 2320–31.

235. *See supra* Section II.C.

236. *See supra* Part III.

elastic terms like "ample alternatives" can be satisfied by high-level assertions and cursory tailoring. The result is a doctrine that can be recited without necessarily being applied.

This Article proposes standardization as a way to stabilize the doctrine. Standardization entails a shared proportionality method for all of intermediate scrutiny. It channels discretion through a common, justification-forcing framework. Courts must explain, on the record, why the government's chosen means materially advances its aims in light of the expressive costs imposed and the availability of workable, narrower tools.

A. The Complexity Critique of Intermediate Scrutiny

Contemporary First Amendment doctrine is widely faulted for complexity and inconsistency.[237] Professor John Inazu calls it "bloated, unwieldy, and difficult to hold together."[238] A recurrent source of that complexity is the proliferation of intermediate-scrutiny frameworks—*O'Brien*, *Ward*, *Central Hudson*, *Pickering*, etc.—each with its own formulations, evidentiary expectations, and doctrinal baggage. Unlike other areas of First Amendment doctrine, intermediate scrutiny has not yet "worked itself pure."[239]

Judge Kevin Newsom has argued that this state of affairs can produce decisions that read as "made up," because the doctrine consists of too many moving parts and too little shared method.[240] In a 2022 concurrence, he emphasized how courts can toggle among overlapping intermediate-scrutiny tests, shifting the governing language with the doctrinal label.[241] The result, on his account, is an "exhausting" body of law that makes it harder to treat like cases alike and easier to announce conclusions that feel driven by outcomes instead of analysis.[242]

That concern is not merely aesthetic. Proliferating formulations weaken the disciplines of proof and tailoring and expand judicial

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237. *See, e.g.*, Alexander Tsesis, *Levels of Free Speech Scrutiny*, 98 IND. L.J. 1225, 1225–27 (2023) (arguing that current heightened-scrutiny doctrine is inconsistent, formalist, under-theorized, and marked by doctrinal flux and unpredictability).

238. John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 4 (2023).

239. The concept of First Amendment doctrine "working itself pure" is most associated with Professor Harry Kalven. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 506 (Jamie Kalven ed., 1988). The broader notion was brought to legal academia by Professor Lon Fuller. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1824 n.11 (2016).

240. Club Madonna Inc. v. City of Miami Beach, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring).

241. *Id.* at 1261–62.

242. *Id.* at 1261.

discretion where scrutiny is supposed to constrain it.[243] The problem has two dimensions. Across subfields, the operative demands of intermediate scrutiny change with the subtest. *Central Hudson*, for example, is often administered with sharper attention to evidentiary support and causal fit than the frameworks commonly used in protest restrictions or public-employment disputes.[244] That disparity is hard to justify from first principles. In practice, challenges to commercial advertising limits might fare better than challenges involving political protest activity because the doctrine supplies different expectations about proof and tailoring, regardless of whether the burdens are in fact lighter.[245] When those expectations diverge, outcomes can turn on label as much as on burden and fit.[246] And even within a single subtest, elastic terms like "substantial interest," "reasonable fit," and "ample alternatives" can sometimes be satisfied by high-level assertions and cursory analysis, depending on how a court applies them.[247]

These dimensions reinforce one another. The availability of multiple formulations makes it easier to route a dispute into a less demanding silo; loose operative standards make it easier to dilute scrutiny once there. *TikTok* and *Paxton* illustrate this pattern, as the Court relied on silo-specific precedent while truncating key proportionality steps.[248] The remedy for these doctrinal ills is a single, structured method that requires courts to move through each stage of the inquiry in a transparent, reviewable way.

B. Standardization as the Path Forward

A standardized proportionality framework implements intermediate scrutiny through four steps that cut across subfields. Courts should require the government to identify a substantial, noncensorial aim and the theory of harm behind it; to support with record evidence the claim that the regulation will materially advance that theory; to specify the burden on protected expression; and to

243. *Id.* at 1261–62.

244. *See supra* Section II.B.

245. *See supra* Section II.B. For arguments that the First Amendment's ultimate end is the facilitation of democratic self-government, see generally ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–16 (1980). For a counterargument that commercial speech should be treated the same as other speech protected by the First Amendment, see generally MARTIN H. REDISH, COMMERCIAL SPEECH AS FREE EXPRESSION: THE CASE FOR FIRST AMENDMENT PROTECTION (2021).

246. *See supra* Section I.C.

247. *See supra* Section I.B.

248. *See supra* Part III.

confront comparably effective, speech-friendlier alternatives. These demands are familiar, capturing what intermediate scrutiny already requires when it functions as a coherent method. Standardization would make that method explicit and portable across subfields.

TABLE 4. PLAUSIBILITY REVIEW VS. PROPORTIONALITY REVIEW

Feature	Plausibility/ Deference	Standardized Proportionality
Government Interest	High-level abstraction often suffices (e.g., "public safety").	Interest specified with precision; theory of harm stated and linked to the regulation's design.
Evidence	Assertions, *post hoc* justifications, or bare findings can suffice.	Support ordinarily required to show material advancement; the government must connect means to ends.
Burden Accounting	Burdens described at a high level (e.g., "some inconvenience").	Burdens specified (who is burdened, how, and which channels are constrained).
Tailoring/Fit	"Reasonable fit" language; alternatives rarely do decisive work.	Comparably effective alternatives must be addressed with evidence-based reasons.

A familiar time-place-manner dispute demonstrates how the framework would operate. Consider an ordinance banning amplified sound in a public park after 10 p.m. The city should identify the harm it is addressing, such as noise pollution for neighbors, and explain how late-night amplification produces it. It should describe the burden imposed by the ban on speakers who might rely on late-night amplification to distribute their messages. And it should explain why narrower tools, such as decibel limits, targeted enforcement against repeat violators, or geographically limited quiet zones, would not achieve comparable gains with less speech cost. Standardization forces those comparative judgments into the open, where reviewing courts (and future courts) can evaluate them.

Step 1 clarifies the government's aim. The inquiry requires substantial, noncensorial aims articulated with precision; neutral labels and high-level abstractions do not suffice. This means linking the asserted interest to the regulation's actual design and asking whether the government pursues the same harm evenhandedly in

comparable settings.[249] The secondary-effects cases illustrate the opposite risk, as courts sometimes credit generalized claims of crime and blight while treating content-targeted ordinances as content neutral.[250] To avoid that hollowing out of the interest inquiry, a valid aim must be concrete and not defined by the speech restriction itself.[251]

Step 2 asks for proof. The regulation's material advancement of its asserted aims must be supported by credible evidence rather than conjecture or post hoc rationalization. Predictive judgments may suffice when grounded in evidence and reasoned analysis.[252] But underinclusivity, exemptions, internal inconsistency, and contrary facts weigh against advancement because they weaken the causal story. The commercial-speech cases offer the clearest template for this evidentiary demand,[253] as seen in *Edenfield v. Fane*,[254] where the Court rejected Florida's ban on in-person CPA solicitation because the State had produced no studies, no anecdotal record, and no concrete account of how the targeted speech actually produced the fraud and overreaching the State invoked.[255] But the same logic appears across intermediate-scrutiny doctrine.[256] By contrast, the Court's opinion in *Heffron v. International Society for Krishna Consciousness, Inc.*[257]

249. Recent Supreme Court cases provide a template. For instance, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407–08 (2024), treated "viewpoint diversity" as an insufficient basis for compelling private platforms to carry speech. Similarly, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–07 (1996), refused to accept "temperance" when implemented as paternalism through bans on truthful price information. And *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 573–74 (2011), held "privacy" inadequate where the statute singled out content and speakers in ways that tilted public debate.

250. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986); *see also, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434–35, 441 (2002); City of Erie v. Pap's A.M., 529 U.S. 277, 291–94 (2000).

251. As Justice Brennan emphasized in dissent in *Vincent*, the record should reflect evenhanded pursuit across comparable fronts rather than selective reliance on speech restrictions. *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 828–31 (1984) (Brennan, J., dissenting).

252. Where the showing is thin, remand for evidentiary development is often the appropriate response.

253. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 190–93 (1999) (invalidating a regime whose patchwork exemptions unraveled the causal account); Rubin v. Coors Brewing Co., 514 U.S. 476, 488–89 (1995) (treating underinclusivity and internal contradictions as evidence against advancement of the asserted interest).

254. 507 U.S. 761 (1993).

255. *See id.* at 770–71 (rejecting speculation in place of proof).

256. *See, e.g.*, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385–86 (2021); McCullen v. Coakley, 573 U.S. 464, 490–97 (2014); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 664–68 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 195–96, 211–16 (1997).

257. 452 U.S. 640 (1981).

shows what happens when that expectation is relaxed. It credited crowd-control predictions to sustain a rule relegating speakers to a fixed area within a fairgrounds, without evidence that the type of speech at issue would actually cause disruptive congestion and without serious engagement with narrower tools like limiting the number of roving solicitors or designating wider walkways.[258]

Step 3 requires a clear account of the burden on protected expression. Under a standardized approach, scope, duration, audience loss, and compliance costs all bear on the analysis. Certain losses are especially weighty. For example, in *Packingham* the Court deemed access to social-media platforms, a principal channel of contemporary discourse, essential to modern life, and in *Ladue*, it found that residential yard signs were an irreplaceable medium for communicating with neighbors and passersby.[259] In practice, however, burden analysis sometimes collapses into a credulous look at speakers' other options. In *Clark*, the Court treated empty tents as an adequate substitute for the protestors who wanted to send a message about homelessness by sleeping in the park across from the White House,[260] and in *Ward*, it viewed city-controlled amplification as a modest adjustment without actually assessing whether the city-limited sound system reached the same audience with comparable volume and clarity.[261] A disciplined burden inquiry identifies the targeted mode and channel and tests whether expressive substitutes are realistically available and similarly effective.

Step 4 tests fit against workable alternatives. The analysis is comparative and evidence-based, examining factors like practical costs, enforceability, and loss of audience. Broader burdens are justified only when the evidence shows narrower measures would not achieve similar results. In *McCullen*, the Court invalidated the protest buffer zone because the Commonwealth did not use tools already on the books like harassment laws or injunctions and offered no reason they would not work.[262] In *O'Brien* and *Vincent*, by contrast, the Court did not engage with narrower options and the analysis withered accordingly.[263] The more careful tailoring inquiry of

258. *See id.* at 653–55. Justice Brennan's separate opinion supplied the missing structure. It disaggregated sales, solicitation, and distribution; demanded proof tied to the particular practice; and identified narrower tools the State had not tried. *Id.* at 656–63 (Brennan, J., concurring in part and dissenting in part).

259. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 54–59 (1994) (protecting residential yard signs as an irreplaceable neighborhood medium).

260. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294–96 (1984).

261. Ward v. Rock Against Racism, 491 U.S. 781, 802–03 (1989).

262. McCullen v. Coakley, 573 U.S. 464, 494–96 (2014).

263. *See* United States v. O'Brien, 391 U.S. 367, 377, 381 (1968); Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810–13 (1984).

McCullen demonstrates an analysis that offers real bite without smuggling in a least-restrictive-means requirement. While the government must engage alternatives and explain on the record why they fall short, it need not prove that no conceivable narrower measure could address the harm.

Together, the four steps supply a single, reviewable method. Applied across subfields, it disciplines analysis by making departures visible and helps keep intermediate scrutiny from regressing into plausibility review.[264]

C. Alternative Proposals

Several alternatives to standardization have been advanced in recent scholarship and case law. Each targets a genuine shortcoming of contemporary First Amendment doctrine. The question is which response best preserves intermediate scrutiny's emerging proportionality discipline while addressing its inconsistencies. The leading proposals sharpen the stakes and help clarify why standardization remains the most stable path forward.

One alternative would replace proportionality with a history-and-tradition test modeled on *New York State Rifle & Pistol Ass'n v. Bruen*,[265] under which speech regulations would be valid only if consistent with the Nation's regulatory tradition as shown through historical analogues.[266] Proponents argue that anchoring constitutional interpretation in fixed historical meanings restrains judicial overreach by promoting objectivity and democratic legitimacy.[267] In the First Amendment context, however, the historical record is contested and often underprotective,[268] and analogical reasoning can reintroduce discretion through disputes over the appropriate level of generality and what counts as a "relevantly similar" comparator.[269] At the founding, expressive freedom was inconsistently understood, filtered through common-law restraints,

264. The framework does not eliminate the need for context-sensitive adaptation. In unique settings like those involving classified evidence, the demands of proof and burden specification may require adjustment to reflect what can realistically be shown. But the adaptation should be explicit. Courts should identify which step requires modification and explain why ordinary showings are unavailable.

265. 142 S. Ct. 2111 (2022).

266. *See id.* at 2126.

267. *See, e.g.*, Nat'l Republican Senatorial Comm. v. FEC, 117 F.4th 389, 398–401 (6th Cir. 2024) (Thapar, J., concurring), *cert. granted*, 145 S. Ct. 2843 (2025); United States v. Jimenez-Shilon, 34 F.4th 1042, 1053–54 (11th Cir. 2022) (Newsom, J., concurring).

268. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 246 (2017).

269. *See Bruen*, 142 S. Ct. at 2132 (quoting Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

and narrower in practice than modern doctrine assumes.[270] The Sedition Act of 1798, used to prosecute core political criticism, underscores the fragility of early speech protections.[271] Many modern protections crystallized only in the twentieth century.[272]

These limitations carry major implications for modern doctrine. Protections for flag burning, anonymous speech, and much of campaign finance do not map cleanly onto founding-era practice or its plausible analogues.[273] Even where historical inquiry is possible, *Bruen* illustrates how comparisons can falter when the record is fragmentary or internally conflicting. The approach risks either freezing doctrine around outdated assumptions or licensing disguised discretion under the mantle of history.[274] It also offers limited guidance for contemporary problems such as platform governance and digital surveillance, where the pressures on speech bear only loose resemblance to founding-era disputes.[275] History can and should inform First Amendment interpretation. But elevating it to a dispositive test would, in many settings, displace the Amendment's modern role in securing meaningful protection for expression in a pluralistic, technologically saturated democracy.

A second alternative, advanced by Professor John Inazu, would replace much of First Amendment doctrine with a uniform strict-scrutiny framework built around three prongs: a compelling-interest requirement, a redefined narrow-tailoring inquiry, and a proportionality analysis.[276] Inazu's project extends over multiple tiers of review across all five of the First Amendment's individual rights.[277] His central argument is that current doctrine too often lets courts resolve First Amendment disputes without ever examining the strength or fit of the government's justification.[278] On his account, threshold considerations do the dispositive work while the

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270. *See generally* Campbell, *supra* note 268 (discussing the origin of First Amendment rights and their understanding at the time of founding).

271. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–77 (1964).

272. Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1490 (2014) (noting that many First Amendment categories of regulation "are entirely different than at the time of the framing; indeed their most recent definitions have been refined in a line of cases beginning in the late 1960s").

273. *See* Campbell, *supra* note 268, at 286, 314.

274. *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

275. *See* Alexander Tsesis, *The Free Speech Clause as a Deregulatory Tool*, 5 J. FREE SPEECH L. 381, 390 (2024) (arguing that many "regulations on expressive content that may become subject to heightened scrutiny are also unrelated to the nation's founding").

276. Inazu, *supra* note 238, at 3–4.

277. *Id.* at 1–4.

278. *See id.* at 3–5.

government's interest goes unexamined, producing malleable outcomes.[279]

That diagnosis carries weight, and the operational overlap between his framework and the one proposed here is substantial. Both require courts to specify the government's interest, demand evidence, measure the burden on expression, and assess fit. The convergence reflects a shared concern that existing doctrine too often lets courts skip the steps that matter most.

The divergence is over remedy, and it tracks a dilemma that any proposal for universal strict scrutiny must confront. Strict scrutiny is deliberately exacting and, in its conventional form, rarely satisfied. Applying even a tempered version across the board risks pushing courts either to invalidate a substantial portion of content-neutral regulations central to ordinary governance or to sand down strict scrutiny until it becomes routinely survivable. Either path destabilizes the existing structure. A softened strict scrutiny would lose its considerable force and speech-protective signaling function in cases where the suppression of ideas might be afoot. If instead a universalized strict scrutiny ends up maintaining most of the current test's bite, it would make routine governance harder to sustain.[280]

Inazu argues that these worries are overstated. As to dilution, he contends that expanding the free speech right's scope has historically not compromised its core.[281] The historical record is more equivocal. The Court has at times broadened First Amendment coverage without diluting the operative standard. But it has also developed weaker subtests precisely to accommodate categories that the Amendment was not originally understood to reach. As more disputes are routed through speech doctrine, courts face structural pressure to keep the framework workable across an ever-widening range of regulatory contexts, and that pressure tends to push the operative standard downward.

Universalizing strict scrutiny would intensify that exact pressure, and would do so across the entire doctrine at once. As the Court explained in *Paxton*, strict scrutiny "enforce[s] 'the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content'" and "[i]t succeeds in that purpose if and only if, as a practical matter, it is fatal in fact absent truly extraordinary circumstances."[282] Recognizing this inherent rigidity, Inazu attempts to make the test workable across domains by acknowledging that narrow tailoring can no longer demand the least restrictive means, advocating instead for

279. *Id.*

280. *See* Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2309–11 (2025).

281. Inazu, *supra* note 238, at 44.

282. *See Paxton*, 145 S. Ct. at 2310 (quoting Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018)).

a "pragmatic" and "reasonable" fit.[283] But a strict scrutiny test that only requires a "reasonable" fit begins to resemble the watered-down standard that First Amendment scholars have long warned against. And the need for the modification is itself indicative of the underlying dilemma.

Inazu also doubts that universalized strict scrutiny would make routine governance significantly harder because the government will often have a compelling interest in whatever it is trying to achieve.[284] That is surely right for many types of free speech dispute. But the cases that populate the intermediate-scrutiny docket rest on interests that are often important but not always self-evidently compelling, like maintaining the tranquility of a residential block.[285] Requiring the government to clear a "compelling" hurdle over the run of free speech disputes would likely demand a more modest conception of "compelling" than the Court has generally displayed, which loops back into the dilution problem.

In addition, as Inazu acknowledges, integration of proportionality into strict scrutiny introduces "an additional degree of subjectivity."[286] Both his and this Article's proposal require evaluative judgment. But standardizing intermediate scrutiny channels that judgment through a tier already built to accommodate context. A universalized strict scrutiny instead risks relocating discretion to the back end while preserving the label's claim to exceptional rigor.

The dataset discussed in Part II offers a further reason for pause. Courts have already moved significantly in the direction that universal strict scrutiny would push them. Claimant success rates have risen as courts have invigorated intermediate scrutiny. Standardization targets the remaining inconsistency with more precision than a field-wide redesign. It preserves strict scrutiny's conventional role as speech doctrine's hard backstop while making proportionality's calibration explicit within intermediate scrutiny's four steps.

A third approach comes from Bhagwat's article and merits consideration even though it emerged against a markedly different intermediate-scrutiny landscape. Alongside his empirical study, Bhagwat argued for disaggregating First Amendment doctrine by subfield, with each domain governed by its own tailored test rather than by a shared intermediate-scrutiny framework.[287] In 2007, that

283. *See* Inazu, *supra* note 238, at 39.

284. *Id.* at 45.

285. *See* Kovacs v. Cooper, 336 U.S. 77, 87 (1949); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (holding that preserving city aesthetics is a sufficiently substantial interest to withstand intermediate scrutiny review).

286. Inazu, *supra* note 238, at 41.

287. *See* Bhagwat, *supra* note 3, at 824–29.

prescription made sense. Convergence across subfields had not yet begun in any significant sense, and the principal intermediate-scrutiny subtests often operated as separate regimes with distinct premises and vocabularies.[288] In that environment, domain-specific rules plausibly promised clearer guidance and better doctrinal fit. Bhagwat was also right to emphasize the more enduring point that a unitary label can obscure context-specific doctrinal signals.

The landscape looks different now. Across areas once treated with considerable deference, courts increasingly deploy a more demanding inquiry.[289] Disaggregation at this stage would risk entrenching fragmentation just as intermediate scrutiny has started to coalesce around a shared proportionality sensibility. Standardization can build on these gains, preserving nuance while reducing pressure to route disputes through separate subtests.

Each alternative addresses a deficiency in current doctrine. But each also introduces instabilities of its own, whether through analogue selection, tier collapse, or deeper fragmentation. Standardization is the least disruptive response, and the best matched to what the data show: a doctrine that has already moved toward proportionality but lacks a shared method to hold the gains.

D. What Standardization Offers

Standardization would provide several doctrinal benefits. Governments often rely on intuitive predictions and "common sense" causal stories in defending speech regulations. A justification-forcing method requires such accounts to be specified and supported.[290] Because courts must answer the same four questions across the doctrine, the framework makes it easier to compare cases and harder for subtests to diverge in "outcome determinative" ways.[291] It also encourages legislatures and agencies to build a record rather than relying on post hoc generalities.

The framework also provides a bulwark against the pressures of contingency. In high-salience contexts—such as national security, public order, and the protection of minors—the temptation to treat methodological discipline as dispensable is predictable. A structured approach resists that pull by requiring justifications not driven by the political moment and supported by a record that observers and future

288. *See id.* at 788–802, 808–09.

289. *See supra* Part II.

290. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3142–43 (2015) (arguing that proportionality "provides a stable framework for persuasive reason-giving," enhances the transparency and accessibility of judicial reasoning, and makes judicial disagreement more intelligible to parties and readers).

291. *See* Club Madonna Inc. v. City of Miami Beach, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring) (quoting Lady J. Lingerie, Inc. v. City of Jacksonville, 76 F.3d 1358, 1365 (11th Cir. 1999)).

courts can assess. Standardization also reduces fragmentation, making it less likely that similar burdens will receive uneven treatment across doctrinal categories. A uniform approach increases the likelihood that like burdens receive like scrutiny even when they arise in different doctrinal compartments.

Method is necessary but insufficient. Courts can still reason in shorthand, records can still be underdeveloped, or salient conflicts can still tempt a return to plausibility review. A durable, shared framework nonetheless raises the floor. It makes it harder to invoke intermediate scrutiny while skipping its proportionality work, and it gives future courts a clearer basis for insisting that the government substantiate its claims.

CONCLUSION

Much of the First Amendment's future will be contested between rational basis review and strict scrutiny. That middle ground, the home for restrictions on parade routes, protest duration, public-employee speech, and digital platforms, looks different today than it did two decades ago. Courts now deploy intermediate scrutiny as an actual intermediate mode of analysis, carefully weighing speech regulations without stacking the deck in either direction. Whether this relative equipoise holds remains uncertain.

The doctrine's development reveals both the promise and the instability of modern proportionality review. The test is more fluid than the literature suggests. Governments today regularly lose when they cannot defend the speech burdens they impose, in a way they did not in the past. But that very flexibility also makes the doctrine easy to unwind. A handful of decisions that treat context as exceptional or reduce tailoring to slogans can pull large swaths of doctrine back toward plausibility review.

Because intermediate scrutiny governs so much of the First Amendment, disputes over its method carry unusually high stakes. They go a long way toward setting the practical boundaries of our system of free expression. In these disputes, the test's analytical structure determines how demanding the Constitution will be when government regulates the ordinary channels of public expression. The question, in turn, is how much courts will require of officials seeking to defend routine speech restrictions.

APPENDIX: CASE DATASET

Case	**Prevailing Party**[292]	**Category**	**Notes**
Deegan v. City of Ithaca, 444 F.3d 135 (2d Cir. 2006)	Claimant	Content Neutral	TPM
Field Day, LLC v. County of Suffolk, 463 F.3d 167 (2d Cir. 2006)	Government	Content Neutral	TPM (unbridled discretion[293])
Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006)	Government	Public Employee	
Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006)	Government	Content Neutral	TPM
181 S. Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006)	Government	Secondary Effects	
Conchatta Inc. v. Miller, 458 F.3d 258 (3d Cir. 2006)	Claimant	Secondary Effects	
Commc'ns Workers of Am. v. Ector Cnty. Hosp. Dist., 467 F.3d 427 (5th Cir. 2006)	Government	Public Employee	
Fantasy Ranch Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006)	Government	Secondary Effects	
Knowles v. City of Waco, 462 F.3d 430 (5th Cir. 2006)	Claimant	Content Neutral	TPM

292. The claimant was coded as prevailing party if they obtained any form of relief on First Amendment intermediate-scrutiny grounds. *See supra* p. 517.

293. This label indicates a facial challenge that a regulation gave government officials unbridled discretion, eliminating the need for a claimant to apply for or be denied a license before suit. *See Field Day*, 463 F.3d at 176 (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 US. 750, 755–56 (1988)).

Case	Prevailing Party	Category	Notes
Piazza's Seafood World, LLC v. Odom, 448 F.3d 744 (5th Cir. 2006)	Government	Commercial Speech	
Speaks v. Kruse, 445 F.3d 396 (5th Cir. 2006)	Claimant	Commercial Speech	
Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410 (6th Cir. 2006)[294]	Claimant	Content Neutral	TPM
Doyle v. McFadden, 182 F. App'x 506 (6th Cir. 2006)	Government	Content Neutral	TPM
Wilson v. Lexington-Fayette Urb. Cnty. Gov't, 201 F. App'x 317 (6th Cir. 2006) (per curiam)	Government	Commercial Speech	
Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550 (7th Cir. 2006)	Government	Secondary Effects	
Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006)[295]	Government	Commercial Speech	Unbridled discretion
Bailey v. Dep't of Elementary & Secondary Educ., 451 F.3d 514 (8th Cir. 2006)	Government	Public Employee	
Bowman v. White, 444 F.3d 967 (8th Cir. 2006)	Claimant	Content Neutral	TPM

294. The Supreme Court reversed and remanded in *Tennessee Secondary School Athletics Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007).

295. The court analyzed the provisions primarily as commercial speech and held that the result would be the same under TPM. *Id.* at 802–03.

Case	Prevailing Party	Category	Notes
Passions Video, Inc. v. Nixon, 458 F.3d 837 (8th Cir. 2006)	Claimant	Commercial Speech	
Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006)	Claimant	Commercial Speech	
Gathright v. City of Portland, 439 F.3d 573 (9th Cir. 2006)	Claimant	Content Neutral	TPM
G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006)	Government	Content Neutral	TPM
Klein v. San Diego County, 463 F.3d 1029 (9th Cir. 2006)	Government	Content Neutral	TPM
Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006)	Claimant	Content Neutral	TPM
Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006)	Government	Content Neutral	Pure
Heideman v. South Salt Lake City, 165 F. App'x 627 (10th Cir. 2006)	Government	Secondary Effects	
Weaver v. Chavez, 458 F.3d 1096 (10th Cir. 2006)	Government	Public Employee	
CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006)	Claimant	Content Neutral	TPM (unbridled discretion)
Granite State Outdoor Advert., Inc. v. Cobb County, 193 F. App'x 900 (11th Cir. 2006) (per curiam)	Government	Commercial Speech	

Case	Prevailing Party	Category	Notes
Mitchell v. Hillsborough County, 468 F.3d 1276 (11th Cir. 2006)	Government	Public Employee	
Asociación de Educación Privada de P.R., Inc. v. García-Padilla, 490 F.3d 1 (1st Cir. 2007)	Claimant	Content Neutral	TPM
Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007)	Government	Public Employee	
Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007)	Claimant	Content Neutral	TPM
Lusk v. Village of Cold Spring, 475 F.3d 480 (2d Cir. 2007)	Claimant	Content Neutral	Pure
Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007)	Government	Public Employee	
Vincenty v. Bloomberg, 476 F.3d 74 (2d Cir. 2007)	Claimant	Content Neutral	Pure
Riel v. City of Bradford, 485 F.3d 736 (3d Cir. 2007)[296]	Government	Content Neutral	TPM
Allstate Ins. v. Abbott, 495 F.3d 151 (5th Cir. 2007)	Claimant	Commercial Speech	
Illusions–Dall. Priv. Club, Inc. v. Steen, 482 F.3d 299 (5th Cir. 2007)	Claimant	Secondary Effects	
Pruett v. Harris Cnty. Bail Bond Bd., 499 F.3d 403 (5th Cir. 2007)	Claimant	Commercial Speech	

296. The court stated that three provisions were content-neutral and applied TPM but held that two other provisions were commercial speech and survived *Central Hudson*. *Id.* at 751–52.

Case	Prevailing Party	Category	Notes
Hamilton's Bogarts, Inc. v. Michigan, 501 F.3d 644 (6th Cir. 2007)	Claimant	Secondary Effects	
Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007)	Claimant	Commercial Speech	
Joelner v. Village of Washington Park, 508 F.3d 427 (7th Cir. 2007)[297]	Claimant	Secondary Effects	
Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996 (9th Cir. 2007)	Government	Secondary Effects	
Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886 (9th Cir. 2007)	Government	Content Neutral	TPM
Ho-Chuan Chen v. Dougherty, 225 F. App'x 665 (9th Cir. 2007)	Claimant	Public Employee	
Porter v. Bowen, 496 F.3d 1009 (9th Cir. 2007)	Claimant	Content Neutral	*O'Brien*
Tollis, Inc. v. County of San Diego, 505 F.3d 935 (9th Cir. 2007)	Government	Secondary Effects	
Abilene Retail No. 30, Inc. v. Bd. of Comm'rs, 492 F.3d 1164 (10th Cir. 2007)	Claimant	Secondary Effects	
Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (10th Cir. 2007)	Claimant	Public Employee	

297. The court held the alcohol ban facially unconstitutional under strict scrutiny and applied intermediate scrutiny in the alternative. *Id.* at 433.

Case	Prevailing Party	Category	Notes
Casey v. W.L.V. Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007)	Claimant	Public Employee	
Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007)	Government	Content Neutral	TPM
DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254 (11th Cir. 2007)	Government	Content Neutral	TPM
Davignon v. Hodgson, 524 F.3d 91 (1st Cir. 2008)	Claimant	Public Employee	
IMS Health Inc. v. Ayotte, 550 F.3d 42 (1st Cir. 2008)[298]	Government	Commercial Speech	
Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27 (1st Cir. 2008)	Government	Content Neutral	TPM
Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir. 2008)	Government	Content Neutral	TPM
Green v. City of Raleigh, 523 F.3d 293 (4th Cir. 2008)	Government	Content Neutral	TPM
Walraven v. N.C. Bd. of Chiropractic Exam'rs, 273 F. App'x 220 (4th Cir. 2008) (per curiam)	Government	Commercial Speech	
Charles v. Grief, 522 F.3d 508 (5th Cir. 2008)	Claimant	Public Employee	

298. The Supreme Court abrogated in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

Case	Prevailing Party	Category	Notes
James v. Texas Collin County, 535 F.3d 365 (5th Cir. 2008)	Government	Public Employee	
Jordan v. Ector County, 516 F.3d 290 (5th Cir. 2008)	Claimant	Public Employee	
BellSouth Telecomms., Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008)	Claimant	Commercial Speech	
Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008)	Government	Content Neutral	TPM
Horina v. City of Granite City, 538 F.3d 624 (7th Cir. 2008)	Claimant	Content Neutral	TPM
Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008)[299]	Claimant	Content Neutral	TPM
Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419 (9th Cir. 2008)	Government	Content Neutral	Pure
Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality v. City of Seattle, 550 F.3d 788 (9th Cir. 2008)	Claimant	Content Neutral	TPM (unbridled discretion)
Union Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB, 540 F.3d 957 (9th Cir. 2008)	Claimant	Content Neutral	TPM
Dr. John's v. Wahlen, 542 F.3d 787 (10th Cir. 2008)	Government	Secondary Effects	

299. The court overruled in *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012).

Case	Prevailing Party	Category	Notes
Emergency Coal. to Def. Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4 (D.C. Cir. 2008)	Government	Content Neutral	Pure
Cablevision Sys. Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009)	Government	Content Neutral	Pure
Int'l Action Ctr. v. City of New York, 587 F.3d 521 (2d Cir. 2009)	Government	Content Neutral	TPM
Brown v. City of Pittsburgh, 586 F.3d 263 (3d Cir. 2009)	Claimant	Content Neutral	TPM
Frantz v. Gress, 359 F. App'x 301 (3d Cir. 2009)	Government	Content Neutral	TPM
McTernan v. City of York, 564 F.3d 636 (3d Cir. 2009)	Claimant	Content Neutral	TPM
Snell v. City of York, 564 F.3d 659 (3d Cir. 2009)	Claimant	Content Neutral	TPM
Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 F. App'x 251 (4th Cir. 2009) (per curiam)	Government	Commercial Speech	
Indep. News, Inc. v. City of Charlotte, 568 F.3d 148 (4th Cir. 2009)	Government	Secondary Effects	
McDoogal's E., Inc. v. Cnty. Comm'rs, 341 F. App'x 918 (4th Cir. 2009)	Government	Secondary Effects	
W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009)	Government	Commercial Speech	

Case	Prevailing Party	Category	Notes
Byrum v. Landreth, 566 F.3d 442 (5th Cir. 2009)	Claimant	Commercial Speech	
Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740 (5th Cir. 2009)	Government	Content Neutral	TPM
Palmer *ex rel.* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502 (5th Cir. 2009)	Government	Content Neutral	Pure
RTM Media, LLC v. City of Houston, 584 F.3d 220 (5th Cir. 2009)	Government	Commercial Speech	
Baar v. Jefferson Cnty. Bd. of Educ., 311 F. App'x 817 (6th Cir. 2009)	Claimant	Public Employee	
Connection Distrib. Co. v. Holder, 557 F.3d 321 (6th Cir. 2009)	Government	Content Neutral	Pure
E. Brooks Books, Inc. v. Shelby County, 588 F.3d 360 (6th Cir. 2009)	Government	Secondary Effects	
H.D.V.-Greektown, LLC v. City of Detroit, 568 F.3d 609 (6th Cir. 2009)	Government	Content Neutral	TPM
Lowery v. Jefferson Cnty. Bd. of Educ., 586 F.3d 427 (6th Cir. 2009)	Government	Content Neutral	TPM
Miller v. City of Canton, 319 F. App'x 411 (6th Cir. 2009)	Claimant	Public Employee	
Richland Bookmart, Inc. v. Knox County, 555 F.3d 512 (6th Cir. 2009)	Government	Secondary Effects	

Case	Prevailing Party	Category	Notes
Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009)	Claimant	Content Neutral	TPM
Corales v. Bennett, 567 F.3d 554 (9th Cir. 2009)	Government	Content Neutral	Pure
Doe v. Reed, 586 F.3d 671 (9th Cir. 2009)[300]	Government	Content Neutral	*O'Brien*
Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009)	Claimant	Content Neutral	TPM
Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009)	Claimant	Content Neutral	TPM
Maldonado v. Morales, 556 F.3d 1037 (9th Cir. 2009)	Government	Content Neutral	*Madsen*[301]
Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898 (9th Cir. 2009)	Government	Commercial Speech	
Sorenson Commc'ns, Inc. v. FCC, 567 F.3d 1215 (10th Cir. 2009)	Claimant	Commercial Speech	
Amnesty Int'l, USA v. Battle, 559 F.3d 1170 (11th Cir. 2009)	Claimant	Content Neutral	TPM
Thomas v. Howze, 348 F. App'x 474 (11th Cir. 2009) (per curiam)	Government	Content Neutral	TPM

300. The Supreme Court affirmed in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010).

301. *See supra* note 81 (explaining the *Madsen* test for a content-neutral injunction).

Case	Prevailing Party	Category	Notes
Nat'l Cable & Telecomms. Ass'n v. FCC, 555 F.3d 996 (D.C. Cir. 2009)	Government	Commercial Speech	
Verizon Cal., Inc. v. FCC, 555 F.3d 270 (D.C. Cir. 2009)	Government	Commercial Speech	
SKF USA, Inc. v. U.S. Customs & Border Prot., 556 F.3d 1337 (Fed. Cir. 2009)	Government	Commercial Speech	
IMS Health Inc. v. Mills, 616 F.3d 7 (1st Cir. 2010)[302]	Government	Commercial Speech	
Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010)	Claimant	Commercial Speech	
Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94 (2d Cir. 2010)	Government	Commercial Speech	
IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010)[303]	Claimant	Commercial Speech	
Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010)	Government	Content Neutral	TPM (unbridled discretion)
Imaginary Images, Inc. v. Evans, 612 F.3d 736 (4th Cir. 2010)	Government	Secondary Effects	
Int'l Women's Day March Plan. Comm. v. City of San Antonio, 619 F.3d 346 (5th Cir. 2010)	Government	Content Neutral	TPM (unbridled discretion)

302. The Supreme Court vacated and remanded for further consideration following its decision in *Sorrell*. IMS Health, Inc. v. Schneider, 563 U.S. 1051 (2011).

303. The Supreme Court affirmed in *Sorrell*.

Case	Prevailing Party	Category	Notes
Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010)	Government	Content Neutral	*O'Brien*
Serv. Emps. Int'l Union, Loc. 5 v. City of Houston, 595 F.3d 588 (5th Cir. 2010)	Claimant	Content Neutral	TPM
Sonnier v. Crain, 613 F.3d 436 (5th Cir. 2010)[304]	Claimant	Content Neutral	TPM (unbridled discretion)
729, Inc. v. Kenton Cnty. Fiscal Ct., 402 F. App'x 131 (6th Cir. 2010)	Government	Secondary Effects	
Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010)	Claimant	Commercial Speech	
Annex Books, Inc. v. City of Indianapolis, 624 F.3d 368 (7th Cir. 2010) (per curiam)	Claimant	Secondary Effects	
Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010)	Claimant	Content Neutral	TPM
Coyote Publ'g, Inc. v. Miller, 598 F.3d 592 (9th Cir. 2010)	Government	Commercial Speech	
Get Outdoors II, LLC v. City of El Cajon, 403 F. App'x 284 (9th Cir. 2010)	Government	Content Neutral	TPM

304. The court later withdrew the analysis of this opinion with exception of the "unbridled discretion" subsection in which the court had held for the claimant. 634 F.3d 778 (5th Cir. 2011) (per curiam).

Case	Prevailing Party	Category	Notes
McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010)[305]	Government	Exacting	
World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010)	Government	Commercial Speech	Unbridled discretion
Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010)	Government	Content Neutral	Pure
Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010)[306]	Government	Content Neutral	Pure
Flanigan's Enters., Inc. v. Fulton County, 596 F.3d 1265 (11th Cir. 2010)	Government	Secondary Effects	
Harrell v. Fla. Bar, 608 F.3d 1241 (11th Cir. 2010)	Government	Commercial Speech	
Kilgore v. City of Rainsville, 385 F. App'x 952 (11th Cir. 2010) (per curiam)	Government	Content Neutral	TPM
Boardley v. U.S. Dep't of Interior, 615 F.3d 508 (D.C. Cir. 2010)	Claimant	Content Neutral	TPM (unbridled discretion)
Decotiis v. Whittemore, 635 F.3d 22 (1st Cir. 2011)	Claimant	Public Employee	
Foote v. Town of Bedford, 642 F.3d 80 (1st Cir. 2011)	Government	Public Employee	

305. The Supreme Court reversed in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

306. The Supreme Court affirmed. 565 U.S. 302 (2012).

Case	Prevailing Party	Category	Notes
Costello v. City of Burlington, 632 F.3d 41 (2d Cir. 2011)	Government	Content Neutral	TPM
Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011)	Claimant	Public Employee	
Galena v. Leone, 638 F.3d 186 (3d Cir. 2011)	Government	Content Neutral	TPM
Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011)	Claimant	Secondary Effects	
McKinley v. Abbott, 643 F.3d 403 (5th Cir. 2011)	Government	Commercial Speech	
Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011)	Claimant	Content Neutral	Pure
84 Video/Newsstand, Inc. v. Sartini, 455 F. App'x 541 (6th Cir. 2011)	Government	Secondary Effects	
Big Dipper Enter., LLC v. City of Warren, 641 F.3d 715 (6th Cir. 2011)	Government	Secondary Effects	
Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011)	Claimant	Content Neutral	TPM
FTC v. Trudeau, 662 F.3d 947 (7th Cir. 2011)	Government	Commercial Speech	
Marcavage v. City of Chicago, 659 F.3d 626 (7th Cir. 2011)	Claimant	Content Neutral	TPM
Milestone v. City of Monroe, 665 F.3d 774 (7th Cir. 2011)	Government	Content Neutral	TPM

Case	Prevailing Party	Category	Notes
Surita v. Hyde, 665 F.3d 860 (7th Cir. 2011)[307]	Claimant	Content Neutral	TPM
Wis. Right to Life State Pol. Action Comm. v. Barland, 664 F.3d 139 (7th Cir. 2011)	Claimant	Exacting	
Alameda Books, Inc. v. City of Los Angeles, 631 F.3d 1031 (9th Cir. 2011)	Government	Secondary Effects	
Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011)	Claimant	Public Employee	
Comite de Jornaleros v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011)	Claimant	Content Neutral	TPM
DISH Network Corp. v. FCC, 653 F.3d 771 (9th Cir. 2011)	Government	Content Neutral	Pure
Hoye v. City of Oakland, 653 F.3d 835 (9th Cir. 2011)	Government	Content Neutral	TPM
Nordyke v. King, 644 F.3d 776 (9th Cir. 2011)[308]	Government	Content Neutral	*O'Brien*
Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011)[309]	Claimant	Exacting	
Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011)	Government	Content Neutral	TPM (unbridled discretion)

307. The court held that all regulations were content-based and triggered strict scrutiny but applied the TPM analysis in the alternative. *Id.* at 870–71.

308. The court affirmed in part. 681 F.3d 1041 (9th Cir. 2012).

309. The court overruled in part in *Board of Trustees of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019).

Case	Prevailing Party	Category	Notes
First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011)	Government	Content Neutral	TPM & *O'Brien*
Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 630 F.3d 1346 (11th Cir. 2011)	Government	Content Neutral	*O'Brien*
Cablevision Sys. Corp. v. FCC, 649 F.3d 695 (D.C. Cir. 2011)	Government	Content Neutral	Pure
Hayes v. N.Y. Att'y Grievance Comm., 672 F.3d 158 (2d Cir. 2012)	Claimant	Commercial Speech	
United States v. Caronia, 703 F.3d 149 (2d Cir. 2012)	Claimant	Commercial Speech	
Wag More Dogs, LLC v. Cozart, 680 F.3d 359 (4th Cir. 2012)[310]	Government	Content Neutral	TPM
Lauder, Inc. v. City of Houston, 670 F.3d 664 (5th Cir. 2012) (per curiam)	Government	Content Neutral	TPM
Time Warner Cable, Inc. v. Hudson, 667 F.3d 630 (5th Cir. 2012)[311]	Claimant	Content Neutral	Pure
Bays v. City of Fairborn, 668 F.3d 814 (6th Cir. 2012)	Claimant	Content Neutral	TPM

310. The court briefly stated that the regulation also satisfied the commercial speech test. *Id.* at 370.

311. The court held that the law triggered strict scrutiny and was unconstitutional before applying intermediate scrutiny in the alternative. *Id.* at 638–41.

Case	Prevailing Party	Category	Notes
Bench Billboard Co. v. City of Covington, 465 F. App'x 395 (6th Cir. 2012)	Government	Content Neutral	TPM
Bench Billboard Co. v. City of Toledo, 499 F. App'x 538 (6th Cir. 2012)[312]	Government	Content Neutral	TPM
Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012)	Claimant	Commercial Speech	
McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012)	Claimant	Content Neutral	TPM (unbridled discretion)
Mosholder v. Barnhardt, 679 F.3d 443 (6th Cir. 2012)	Claimant	Public Employee	
Ohio Citizen Action v. City of Englewood, 671 F.3d 564 (6th Cir. 2012)	Claimant	Content Neutral	TPM
PHN Motors, LLC v. Medina Township, 498 F. App'x 540 (6th Cir. 2012)	Government	Commercial Speech	
Satawa v. Macomb Cnty. Rd. Comm'n, 689 F.3d 506 (6th Cir. 2012)[313]	Claimant	Content Neutral	TPM
ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012)	Claimant	Content Neutral	Pure

312. The court analyzed the ban of certain words as a content-based commercial speech regulation, *id.* at 542–45, and analyzed the restriction on trash receptacle placement as content-neutral TPM. *Id.* at 545–47.

313. The court assumed strict scrutiny applied and analyzed under intermediate scrutiny in the alternative. *Id.* at 524–25.

Case	Prevailing Party	Category	Notes
Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012)	Claimant	Exacting	
Phelps-Roper v. City of Manchester, 697 F.3d 678 (8th Cir. 2012)	Government	Content Neutral	TPM
Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012)	Claimant	Content Neutral	TPM (unbridled discretion)
OSU Student All. v. Ray, 699 F.3d 1053 (9th Cir. 2012)	Claimant	Content Neutral	TPM (unbridled discretion)
Show Media Cal., LLC v. City of Los Angeles, 479 F. App'x 48 (9th Cir. 2012)	Government	Commercial Speech	
United States v. Chi Mak, 683 F.3d 1126 (9th Cir. 2012)	Government	Content Neutral	Pure
Doe v. City of Albuquerque, 667 F.3d 1111 (10th Cir. 2012)	Claimant	Content Neutral	TPM
R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012)[314]	Claimant	Commercial Speech	
Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403 (D.C. Cir. 2012)[315]	Government	Commercial Speech	

314. The court overruled in part in *American Meat Institute v. United States Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014).

315. The court applied the lower standard from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), before applying *Central Hudson* in the alternative. *Spirit Airlines, Inc.*, 687 F.3d at 412, 415.

Case	Prevailing Party	Category	Notes
McCullen v. Coakley, 708 F.3d 1 (1st Cir. 2013)[316]	Government	Content Neutral	TPM
Lederman v. N.Y.C. Dep't of Parks & Recreation, 731 F.3d 199 (2d Cir. 2013)	Government	Content Neutral	TPM
Time Warner Cable Inc. v. FCC, 729 F.3d 137 (2d Cir. 2013)	Government	Content Neutral	Pure
Interstate Outdoor Advert., LP v. Zoning Bd., 706 F.3d 527 (3d Cir. 2013)[317]	Government	Content Neutral	TPM
Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013)	Government	Content Neutral	Pure
Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291 (4th Cir. 2013)	Claimant	Commercial Speech	
Maryland v. Universal Elections, Inc., 729 F.3d 370 (4th Cir. 2013)	Government	Content Neutral	Pure
Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013)	Claimant	Content Neutral	TPM (unbridled discretion)
Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535 (5th Cir. 2013)	Claimant	Exacting	
Contributor v. City of Brentwood, 726 F.3d 861 (6th Cir. 2013)	Government	Content Neutral	TPM

316. The Supreme Court reversed. 573 U.S. 464 (2014).

317. The court stated that the ordinance "concern[ed] both commercial and noncommercial speech" and concluded that it survived both analyses. *Id.* at 530.

Case	Prevailing Party	Category	Notes
Ent. Prods., Inc. v. Shelby County, 721 F.3d 729 (6th Cir. 2013)	Government	Secondary Effects	
Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110 (7th Cir. 2013)	Government	Public Employee	
Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094 (8th Cir. 2013)	Claimant	Content Neutral	TPM
Peterson v. City of Florence, 727 F.3d 839 (8th Cir. 2013) (per curiam)	Government	Content Neutral	TPM
Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013)	Claimant	Content Neutral	TPM
Klein v. City of Laguna Beach, 533 F. App'x 772 (9th Cir. 2013)	Government	Content Neutral	TPM
Minority Television Project, Inc. v. FCC, 736 F.3d 1192 (9th Cir. 2013)	Government	Content Neutral[318]	Pure
Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013)[319]	Government	Content Neutral	TPM
Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013)	Claimant	Commercial Speech	

318. The court applied the intermediate-scrutiny test for broadcasting regulations created in *FCC v. League of Women Voters*, 468 U.S. 364 (1984). *Minority Television Project, Inc.*, 736 F.3d at 1197–98. While Bhagwat had broadcasting cases in a category of their own, *see* Bhagwat, *supra* note 3, at 811, this Article omitted such categorization because there were so few in the data set.

319. The Supreme Court reversed and remanded. 576 U.S. 155 (2015).

Case	Prevailing Party	Category	Notes
Johnson v. City of Murray, 544 F. App'x 801 (10th Cir. 2013)	Government	Public Employee	
Showtime Ent., LLC v. Town of Mendon, 769 F.3d 61 (1st Cir. 2014)	Claimant	Secondary Effects	
Castine v. Zurlo, 756 F.3d 171 (2d Cir. 2014)	Government	Public Employee	
Safelite Group, Inc. v. Jepsen, 764 F.3d 258 (2d Cir. 2014)	Claimant	Commercial Speech	
Dougherty v. Sch. Dist. of Phila., 772 F.3d 979 (3d Cir. 2014)	Claimant	Public Employee	
Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014)	Claimant	Commercial Speech	
Kimmett v. Corbett, 554 F. App'x 106 (3d Cir. 2014)	Government	Public Employee	
King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014)[320]	Government	Commercial Speech	
Ross v. Early, 746 F.3d 546 (4th Cir. 2014)	Government	Content Neutral	TPM
Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014)	Claimant	Commercial Speech	
Cath. Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014)	Claimant	Exacting	

320. The case was abrogated by *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

Case	Prevailing Party	Category	Notes
Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014)	Government	Content Neutral	Pure
Hucul Advert., LLC v. Charter Township of Gaines, 748 F.3d 273 (6th Cir. 2014)	Government	Content Neutral	TPM
Wagner v. City of Garfield Heights, 577 F. App'x 488 (6th Cir. 2014)[321]	Government	Content Neutral	TPM
Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n, 742 F.3d 282 (7th Cir. 2014)	Claimant	Content Neutral	TPM (unbridled discretion)
Hemminghaus v. Missouri, 756 F.3d 1100 (8th Cir. 2014)	Government	Public Employee	
Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, 775 F.3d 969 (8th Cir. 2014)	Government	Content Neutral	TPM
Doe v. Harris, 772 F.3d 563 (9th Cir. 2014)	Claimant	Content Neutral	Pure
Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014)[322]	Government	Content Neutral	TPM
Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414 (9th Cir. 2014)	Government	Content Neutral	Pure

321. The Supreme Court vacated. 576 U.S. 1049 (2015). On remand, the Sixth Circuit applied strict scrutiny and ruled for the claimant. 675 F. App'x 599 (6th Cir. 2017) (per curiam).

322. The Supreme Court affirmed. 577 U.S. 153 (2016).

Case	Prevailing Party	Category	Notes
Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Berch, 773 F.3d 1037 (9th Cir. 2014)	Government	Content Neutral	TPM
United States v. Tomsha-Miguel, 766 F.3d 1041 (9th Cir. 2014)	Government	Content Neutral	*O'Brien*
Vivid Ent., LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014)	Government	Content Neutral	Pure
iMatter Utah v. Njord, 774 F.3d 1258 (10th Cir. 2014)	Claimant	Content Neutral	TPM
Pine v. City of West Palm Beach, 762 F.3d 1262 (11th Cir. 2014)	Government	Content Neutral	TPM
Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014)	Claimant	Content Neutral	Pure
Cutting v. City of Portland, 802 F.3d 79 (1st Cir. 2015)	Claimant	Content Neutral	TPM
Free Speech Coal., Inc. v. Att'y Gen. U.S., 787 F.3d 142 (3d Cir. 2015)[323]	Government	Content Neutral	Pure
Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)	Government	Public Employee	

323. The court vacated, 825 F.3d 149 (3d Cir. 2016), and subsequently affirmed the district court's holding that the requirements violated the First Amendment under strict scrutiny. 974 F.3d 408 (3d Cir. 2020).

Case	Prevailing Party	Category	Notes
Cent. Radio Co. v. City of Norfolk, 776 F.3d 229 (4th Cir. 2015)[324]	Government	Content Neutral	Pure
Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015)	Claimant	Content Neutral	TPM
Stinebaugh v. City of Wapakoneta, 630 F. App'x. 522 (6th Cir. 2015)	Claimant	Public Employee	
BBL, Inc. v. City of Angola, 809 F.3d 317 (7th Cir. 2015)	Government	Secondary Effects	
Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937 (7th Cir. 2015)	Government	Content Neutral	*O'Brien*
Foxxxy Ladyz Adult World, Inc. v. Village of Dix, 779 F.3d 706 (7th Cir. 2015)	Claimant	Secondary Effects	
Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 793 F.3d 822 (8th Cir. 2015)	Government	Public Employee	
CPR for Skid Row v. City of Los Angeles, 779 F.3d 1098 (9th Cir. 2015)	Government	Content Neutral	TPM
Crazy Ely W. Vill., LLC v. City of Las Vegas, 618 F. App'x 904 (9th Cir. 2015)	Claimant	Commercial Speech	

324. The Supreme Court vacated, 576 U.S. 1049 (2015), and the Fourth Circuit held for the claimant under strict scrutiny on remand. 811 F.3d 625 (4th Cir. 2016).

Case	Prevailing Party	Category	Notes
Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286 (9th Cir. 2015)	Government	Content Neutral	TPM
Buehrle v. City of Key West, 813 F.3d 973 (11th Cir. 2015)	Claimant	Content Neutral	TPM
Dana's R.R. Supply v. Att'y Gen., Fla., 807 F.3d 1235 (11th Cir. 2015)	Claimant	Commercial Speech	
Moss v. City of Pembroke Pines, 782 F.3d 613 (11th Cir. 2015)	Government	Public Employee	
Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015)	Claimant	Commercial Speech	
POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015)	Claimant	Commercial Speech	
In re Tam, 808 F.3d 1321 (Fed. Cir. 2015)[325]	Claimant	Commercial Speech	
Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016)	Claimant	Content Neutral	Pure
Vosse v. City of New York, 666 F. App'x 11 (2d Cir. 2016)	Government	Content Neutral	TPM
Doe v. Cooper, 842 F.3d 833 (4th Cir. 2016)	Claimant	Content Neutral	Pure

325. The court held that the regulation was not restricting commercial speech and applied strict scrutiny, *id.* at 1337–39, before applying *Central Hudson* in the alternative. *Id.* at 1355. The Supreme Court affirmed in *Matal v. Tam*, 137 S. Ct. 1744 (2017).

Case	Prevailing Party	Category	Notes
Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016)	Claimant	Public Employee	
Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016)	Government	Content Neutral	TPM
Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823 (9th Cir. 2016)[326]	Government	Content Neutral	Pure
United States v. Swisher, 811 F.3d 299 (9th Cir. 2016)[327]	Claimant	Content Neutral	Pure
Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016)	Government	Content Neutral	*O'Brien*
Verlo v. Martinez, 820 F.3d 1113 (10th Cir. 2016)	Claimant	Content Neutral	TPM
March v. Mills, 867 F.3d 46 (1st Cir. 2017)	Government	Content Neutral	TPM
Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay 868 F.3d 104 (2d Cir. 2017)[328]	Claimant	Commercial Speech	

326. The Supreme Court reversed and remanded in *Becerra*. 138 S. Ct. 2361 (2018). It held that the Ninth Circuit had erred in applying intermediate scrutiny because "professional speech" is not a category of content-based speech that may be subjected to a lesser standard than strict scrutiny. *Id.* at 2371–72.

327. The court held that the restriction was content-based but applied intermediate scrutiny as it fell within the "'historical' and traditional categories of content-based restrictions that are not subject to strict scrutiny." *Id.* at 314 (quoting United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion)).

328. The court affirmed on other grounds. 705 F. App'x 10 (2d Cir. 2017).

Case	Prevailing Party	Category	Notes
Kass v. City of New York, 864 F.3d 200 (2d Cir. 2017)	Government	Content Neutral	TPM
De Ritis v. McGarrigle, 861 F.3d 444 (3d Cir. 2017)	Government	Public Employee	
Mirabella v. Villard, 853 F.3d 641 (3d Cir. 2017)	Claimant	Content Neutral	TPM
Borzilleri v. Mosby, 874 F.3d 187 (4th Cir. 2017)	Government	Public Employee	
Cricket Store 17, LLC v. City of Columbia, 676 F. App'x 162 (4th Cir. 2017) (per curiam)	Government	Secondary Effects	
Crouse v. Town of Moncks Corner, 848 F.3d 576 (4th Cir. 2017)	Government	Public Employee	
Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017)	Government	Public Employee	
Maages Auditorium v. Prince George's County, 681 F. App'x 256 (4th Cir. 2017) (per curiam)	Government	Secondary Effects	
Am. Acad. of Implant Dentistry v. Parker, 860 F.3d 300 (5th Cir. 2017)	Claimant	Commercial Speech	
Moore v. Brown, 868 F.3d 398 (5th Cir. 2017) (per curiam)	Government	Content Neutral	TPM (unbridled discretion)
Luce v. Town of Campbell, 872 F.3d 512 (7th Cir. 2017)	Claimant	Content Neutral	TPM
Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303 (7th Cir. 2017)	Government	Content Neutral	TPM

Case	**Prevailing Party**	**Category**	**Notes**
Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017)	Government	Content Neutral	*O'Brien*
Gresham v. Swanson, 866 F.3d 853 (8th Cir. 2017)	Government	Content Neutral	TPM
Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 864 F.3d 905 (8th Cir. 2017)	Government	Content Neutral	TPM (unbridled discretion)
Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017)	Government	Content Neutral	TPM
Contest Promotions, LLC v. City of San Francisco, 874 F.3d 597 (9th Cir. 2017)	Government	Commercial Speech	
Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017)	Government	Content Neutral	*O'Brien*
Retail Digit. Network, LLC v. Prieto, 861 F.3d 839 (9th Cir. 2017)	Government	Commercial Speech	
Helget v. City of Hays, 844 F.3d 1216 (10th Cir. 2017)	Government	Public Employee	
FF Cosmetics FL, Inc. v. City of Miami Beach, 866 F.3d 1290 (11th Cir. 2017)	Claimant	Commercial Speech	
Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228 (11th Cir. 2017)	Claimant	Commercial Speech	
Wollschlaeger v. Governor, Fla., 848 F.3d 1293 (11th Cir. 2017)	Claimant	Commercial Speech	

Case	Prevailing Party	Category	Notes
Act Now to Stop War & End Racism Coal. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017)	Government	Content Neutral	TPM (unbridled discretion)
A.N.S.W.E.R. Coal. v. Basham, 845 F.3d 1199 (D.C. Cir. 2017)	Government	Content Neutral	TPM
Holmes v. FEC, 875 F.3d 1153 (D.C. Cir. 2017)	Government	Exacting	
In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017)[329]	Claimant	Commercial Speech	
Caravalho v. City of New York, 732 F. App'x 18 (2d Cir. 2018)	Government	Content Neutral	TPM
Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018)	Government	Exacting	
Corren v. Condos, 898 F.3d 209 (2d Cir. 2018)	Government	Exacting	
Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018)	Claimant	Commercial Speech	
Am. Entertainers, LLC v. City of Rocky Mount, 888 F.3d 707 (4th Cir. 2018)	Claimant	Secondary Effects	Unbridled discretion
Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018)	Government	Secondary Effects	

329. The Supreme Court affirmed in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

Case	Prevailing Party	Category	Notes
Zimmerman v. City of Austin, 881 F.3d 378 (5th Cir. 2018)	Claimant	Exacting	
Haddad v. Gregg, 910 F.3d 237 (6th Cir. 2018) (per curiam)	Government	Public Employee	
Lexington H-L Servs., Inc. v. Lexington-Fayette Urb. Cnty. Gov't, 879 F.3d 224 (6th Cir. 2018)[330]	Government	Content Neutral	TPM
Ill. Liberty PAC v. Madigan, 904 F.3d 463 (7th Cir. 2018)	Government	Exacting	
HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cnty. of Marion, 889 F.3d 432 (7th Cir. 2018)	Government	Secondary Effects	
Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018)	Claimant	Content Neutral	Pure
Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450 (9th Cir. 2018)[331]	Government	Commercial Speech	
Italian Colors Rest. v. Becerra, 878 F.3d 1165 (9th Cir. 2018)	Claimant	Commercial Speech	

330. Subsequently, the Sixth Circuit affirmed the district court's grant of summary judgment to the government on grounds that the ordinance was a valid TPM restriction. 920 F.3d 1126 (6th Cir. 2019), *aff'g* 329 F. Supp. 3d 333 (E.D. Ky. 2018).

331. The court later amended its statement of the *Central Hudson* test in a memorandum order. 881 F.3d 792 (9th Cir. 2018).

Case	Prevailing Party	Category	Notes
S.F. Apartment Ass'n v. City of San Francisco, 881 F.3d 1169 (9th Cir. 2018)	Government	Commercial Speech	
United States v. Lynch, 881 F.3d 812 (10th Cir. 2018)	Government	Content Neutral	TPM
Stardust, 3007 LLC v. City of Brookhaven, 899 F.3d 1164 (11th Cir. 2018)	Government	Secondary Effects	
Vugo, Inc. v. City of New York, 931 F.3d 42 (2d Cir. 2019)	Government	Commercial Speech	
Adams Outdoor Advert. LP v. Pa. Dep't of Transp., 930 F.3d 199 (3d Cir. 2019)	Claimant	Content Neutral	TPM
Bank of Hope v. Miye Chon, 938 F.3d 389 (3d Cir. 2019)	Claimant	Commercial Speech	
Bruni v. City of Pittsburgh, 941 F.3d 73 (3d Cir. 2019)	Government	Content Neutral	TPM
Falco v. Zimmer, 767 F. App'x 288 (3d Cir. 2019)	Claimant	Public Employee	
Reilly v. City of Harrisburg, 790 F. App'x 468 (3d Cir. 2019)	Government	Content Neutral	Pure
Sutton v. Chanceford Township, 763 F. App'x 186 (3d Cir. 2019)	Government	Secondary Effects	
Cap. Associated Indus., Inc. v. Stein, 922 F.3d 198 (4th Cir. 2019)	Government	Content Neutral	Pure

Case	**Prevailing Party**	**Category**	**Notes**
Express Oil Change, LLC v. Miss. Bd. of Licensure for Pro. Eng'rs & Surveyors, 916 F.3d 483 (5th Cir. 2019)	Claimant	Commercial Speech	
Bevan & Assocs., LPA, Inc. v. Yost, 929 F.3d 366 (6th Cir. 2019)	Claimant	Commercial Speech	
Leibundguth Storage & Van Serv., Inc. v. Village of Downers Grove, 939 F.3d 859 (7th Cir. 2019)	Government	Content Neutral	TPM
Price v. City of Chicago, 915 F.3d 1107 (7th Cir. 2019)	Government	Content Neutral	TPM
Proft v. Raoul, 944 F.3d 686 (7th Cir. 2019)	Government	Exacting	
Morgan v. Robinson, 920 F.3d 521 (8th Cir. 2019)	Government	Public Employee	
Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019)	Claimant	Content Neutral	TPM
Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc., 915 F.3d 617 (9th Cir. 2019)[332]	Government	Content Neutral	Pure
Evans v. Sandy City, 944 F.3d 847 (10th Cir. 2019)	Government	Content Neutral	TPM
Libertarian Nat'l Comm., Inc. v. FEC, 924 F.3d 533 (D.C. Cir. 2019)	Government	Exacting	

332. The Supreme Court vacated judgment, 140 S. Ct. 2561 (2020), and the Ninth Circuit vacated and remanded on other grounds. 804 F. App'x 710 (9th Cir. 2020).

Case	Prevailing Party	Category	Notes
Nicopure Labs, LLC v. FDA, 944 F.3d 267 (D.C. Cir. 2019)	Government	Commercial Speech	
Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020)	Claimant	Content Neutral	Pure
Signs for Jesus v. Town of Pembroke, 977 F.3d 93 (1st Cir. 2020)	Government	Content Neutral	TPM (unbridled discretion)
Meyers v. City of New York, 812 F. App'x 11 (2d Cir. 2020)	Government	Content Neutral	TPM
Deon v. Barasch, 960 F.3d 152 (3d Cir. 2020)	Claimant	Exacting	
Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020)	Government	Commercial Speech	
Billups v. City of Charleston, 961 F.3d 673 (4th Cir. 2020)	Claimant	Content Neutral	TPM
Bennett v. Metro. Gov't, 977 F.3d 530 (6th Cir. 2020)	Government	Public Employee	
First Choice Chiropractic, LLC v. DeWine, 969 F.3d 675 (6th Cir. 2020)	Government	Commercial Speech	
Henry v. Johnson, 950 F.3d 1005 (8th Cir. 2020)	Government	Public Employee	
Mo. Broads. Ass'n v. Schmitt, 946 F.3d 453 (8th Cir. 2020)	Claimant	Commercial Speech	
Aptive Env't, LLC v. Town of Castle Rock, 959 F.3d 961 (10th Cir. 2020)	Claimant	Commercial Speech	

Case	Prevailing Party	Category	Notes
Harmon v. City of Norman, 981 F.3d 1141 (10th Cir. 2020)	Government	Content Neutral	TPM
McCraw v. City of Oklahoma City, 973 F.3d 1057 (10th Cir. 2020)	Claimant	Content Neutral	TPM
Am. Hosp. Ass'n v. Azar, 983 F.3d 528 (D.C. Cir. 2020)	Government	Commercial Speech	
Berg v. Village of Scarsdale, Nos. 20-4130-cv, 20-4237-cv, 2021 WL 5751385 (2d Cir. Dec. 3, 2021)	Government	Content Neutral	TPM
Billioni v. Bryant, 998 F.3d 572 (4th Cir. 2021)	Government	Public Employee	
Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors, 854 F. App'x 521 (4th Cir. 2021)	Government	Content Neutral	TPM
Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887 (6th Cir. 2021)	Government	Content Neutral	TPM
Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)	Claimant	Public Employee	
Animal Legal Def. Fund v. Reynolds, 8 F.4th 781 (8th Cir. 2021)[333]	Claimant	Content Neutral	Pure

333. The court held that the regulation was content-based as it governed "false speech" but applied intermediate scrutiny under *Alvarez*. *Id.* at 784–85.

Case	Prevailing Party	Category	Notes
Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)[334]	Government	Public Employee	
Thompson v. Hebdon, 7 F.4th 811 (9th Cir. 2021)	Claimant	Exacting	
Brewer v. City of Albuquerque, 18 F.4th 1205 (10th Cir. 2021)	Claimant	Content Neutral	TPM
Duda v. Elder, 7 F.4th 899 (10th Cir. 2021)	Claimant	Public Employee	
Dyer v. Atlanta Indep. Sch. Sys., 852 F. App'x 397 (11th Cir. 2021) (per curiam)	Government	Content Neutral	TPM
Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266 (11th Cir. 2021)	Claimant	Content Neutral	*O'Brien* & TPM (unbridled discretion)
Henderson v. McMurray, 987 F.3d 997 (11th Cir. 2021)	Government	Content Neutral	TPM
United States v. Jin, No. 20-3008, 2021 WL 5262542 (D.C. Cir. Oct. 15, 2021)	Government	Content Neutral	Pure
Courthouse News Serv. v. Quinlan, 32 F.4th 15 (1st Cir. 2022)	Claimant	Content Neutral	TPM

334. The court held that the claimant spoke as a government employee but considered interests under *Pickering* in the alternative. *Id.* at 1016. The Supreme Court reversed, 142 S. Ct. 2407 (2022), and the Ninth Circuit vacated and remanded. 43 F.4th 1020 (9th Cir. 2022).

Case	Prevailing Party	Category	Notes
Cornelio v. Connecticut, 32 F.4th 160 (2d Cir. 2022)	Claimant	Content Neutral	Pure
Amalgamated Transit Union Local 85 v. Port Auth., 39 F.4th 95 (3d Cir. 2022)	Claimant	Public Employee	
Recht v. Morrisey, 32 F.4th 398 (4th Cir. 2022)	Government	Commercial Speech	
NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022)[335]	Government	Content Neutral	Pure
Kirkland v. City of Maryville, 54 F.4th 901 (6th Cir. 2022)	Government	Public Employee	
Reform Am. v. City of Detroit, 37 F.4th 1138 (6th Cir. 2022)	Government	Content Neutral	TPM
Sisters for Life, Inc. v. Louisville-Jefferson County, 56 F.4th 400 (6th Cir. 2022)	Claimant	Content Neutral	TPM
Redlich v. City of St. Louis, 51 F.4th 283 (8th Cir. 2022)	Government	Content Neutral	*O'Brien*
Dodge v. Evergreen Sch. Dist. #114, 56 F.4th 767 (9th Cir. 2022)	Claimant	Public Employee	
Club Madonna Inc. v. City of Miami Beach, 42 F.4th 1231 (11th Cir. 2022)	Government	Secondary Effects	

335. The Supreme Court vacated in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).

Case	Prevailing Party	Category	Notes
Discotheque, Inc. v. Augusta-Richmond County, No. 21-13218, 2022 WL 5077263 (11th Cir. Oct. 5, 2022) (per curiam)	Government	Secondary Effects	
LaCroix v. Town of Fort Myers Beach, 38 F.4th 941 (11th Cir. 2022)	Claimant	Content Neutral	TPM
NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022)[336]	Claimant	Content Neutral	*O'Brien*
Green v. U.S. Dep't of Just., 54 F.4th 738 (D.C. Cir. 2022)	Government	Content Neutral	Pure
In re Elster, 26 F.4th 1328 (Fed. Cir. 2022)[337]	Claimant	Commercial Speech	
Brokamp v. James, 66 F.4th 374 (2d Cir. 2023)	Government	Content Neutral	Pure
Clementine Co. v. Adams, 74 F.4th 77 (2d Cir. 2023)	Government	Content Neutral	Pure
Heim v. Daniel, 81 F.4th 212 (2d Cir. 2023)	Government	Public Employee	
Alive Church of the Nazarene, Inc. v. Prince William County, 59 F.4th 92 (4th Cir. 2023)	Government	Content Neutral	TPM

336. The Supreme Court vacated and remanded in *Moody*.

337. The Supreme Court reversed in *Vidal v. Elster*, 144 S. Ct. 1507 (2024), and the Federal Circuit vacated on remand. *In re* Elster, No. 2020-2205, 2024 WL 3530200 (Fed. Cir. July 25, 2024).

Case	Prevailing Party	Category	Notes
People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, 60 F.4th 815 (4th Cir. 2023)[338]	Claimant	Content Neutral	Pure
Sharpe v. Winterville Police Dep't, 59 F.4th 674 (4th Cir. 2023)[339]	Claimant	Content Neutral	Pure
Ass'n of Club Execs. of Dall., Inc. v. City of Dallas, 83 F.4th 958 (5th Cir. 2023)	Government	Secondary Effects	
Reagan Nat'l Advert. of Aus., Inc. v. City of Austin, 64 F.4th 287 (5th Cir. 2023)	Government	Content Neutral	TPM
Harcz v. Boucher, No. 21-1664, 2023 WL 5666159 (6th Cir. Sep. 1, 2023)	Claimant	Content Neutral	TPM
Lichtenstein v. Hargett, 83 F.4th 575 (6th Cir. 2023)	Government	Content Neutral	*O'Brien*
Adams Outdoor Advert. LP v. City of Madison, 56 F.4th 1111 (7th Cir. 2023)	Government	Content Neutral	TPM
GEFT Outdoor, LLC v. Monroe County, 62 F.4th 321 (7th Cir. 2023)	Government	Content Neutral	TPM (unbridled discretion)
Hershey v. Jasinski, 86 F.4th 1224 (8th Cir. 2023)	Government	Content Neutral	TPM

338. The court held that all challenged provisions triggered strict scrutiny but stated that they failed intermediate scrutiny as well. *Id.* at 831.

339. The court did "not decide whether the district court properly found the policy to be content neutral and appl[y] intermediate scrutiny." *Id.* at 682 n.10.

Case	Prevailing Party	Category	Notes
Aargon Agency, Inc. v. O'Laughlin, 70 F.4th 1224 (9th Cir. 2023)	Government	Commercial Speech	
Junior Sports Mags. Inc. v. Bonta, 80 F.4th 1109 (9th Cir. 2023)[340]	Claimant	Commercial Speech	
Nat'l Ass'n of Wheat Growers v. Bonta, 85 F.4th 1263 (9th Cir. 2023)	Claimant	Commercial Speech	
Porter v. Martinez, 68 F.4th 429 (9th Cir. 2023)	Government	Content Neutral	*O'Brien*
Santopietro v. Howell, 73 F.4th 1016 (9th Cir. 2023)	Claimant	Content Neutral	TPM
Stewart v. City of San Francisco, No. 22-16018, 2023 WL 2064162 (9th Cir. Feb. 17, 2023)	Government	Content Neutral	TPM
Yim v. City of Seattle, 63 F.4th 783 (9th Cir. 2023)[341]	Claimant	Commercial Speech	
StreetMediaGroup, LLC v. Stockinger, 79 F.4th 1243 (10th Cir. 2023)	Government	Content Neutral	TPM
Green v. Finkelstein, 73 F.4th 1258 (11th Cir. 2023)	Government	Public Employee	

340. On appeal after remand, the court again held for the claimant on commercial speech grounds. No. 24-4050, 2025 WL 1863184, at *2–3 (9th Cir. July 7, 2025).

341. Following remand to the district court, the Ninth Circuit later affirmed on other grounds. No. 24-6214, 2025 WL 2219014 (9th Cir. Aug. 5, 2025).

Case	Prevailing Party	Category	Notes
Tinius v. Choi, 77 F.4th 691 (D.C. Cir. 2023)	Government	Content Neutral	TPM
Pitta v. Medeiros, 90 F.4th 11 (1st Cir. 2024)[342]	Government	Content Neutral	Pure
Art & Antique Dealers League of Am., Inc. v. Seggos, 121 F.4th 423 (2d Cir. 2024)[343]	Claimant	Commercial Speech	
Turco v. City of Englewood, No. 22-2647, 2024 WL 361315 (3d Cir. Jan. 31, 2024)[344]	Government	Content Neutral	TPM
360 Virtual Drone Servs. LLC v. Ritter, 102 F.4th 263 (4th Cir. 2024)	Government	Content Neutral	Pure
Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024)[345]	Claimant	Commercial Speech	
Hines v. Pardue, 117 F.4th 769 (5th Cir. 2024)	Claimant	Content Neutral	Pure
Nat'l Fed'n of the Blind of Tex., Inc. v. City of Arlington, 109 F.4th 728 (5th Cir. 2024)[346]	Government	Content Neutral	TPM (unbridled discretion)
Nat'l Press Photographers Ass'n v. McCraw, 90 F.4th 770 (5th Cir. 2024)[347]	Government	Content Neutral	Pure

342. The Supreme Court denied cert. 144 S. Ct. 2631 (2024).
343. The Supreme Court denied cert. 145 S. Ct. 2732 (2025).
344. The Supreme Court denied cert. 145 S. Ct. 1222 (2025).
345. The Supreme Court affirmed. 145 S. Ct. 2291 (2025).
346. The Supreme Court denied cert. 145 S. Ct. 1311 (2025).
347. The Supreme Court denied cert. 145 S. Ct. 140 (2024).

Case	Prevailing Party	Category	Notes
Siders v. City of Brandon, 123 F.4th 293 (5th Cir. 2024)	Government	Content Neutral	TPM
Ashford v. Univ. of Mich., 89 F.4th 960 (6th Cir. 2024)	Claimant	Public Employee	
Josephson v. Ganzel, 115 F.4th 771 (6th Cir. 2024)	Claimant	Public Employee	
Noble v. Cin. & Hamilton Cnty. Pub. Libr., 112 F.4th 373 (6th Cir. 2024)	Claimant	Public Employee	
OPAWL-Bldg. AAPI Feminist Leadership v. Yost, 118 F.4th 770 (6th Cir. 2024)[348]	Government	Exacting	
Knowlton v. City of Wauwatosa, 119 F.4th 507 (7th Cir. 2024)	Government	Content Neutral	TPM
Navratil v. City of Racine, 101 F.4th 511 (7th Cir. 2024)	Government	Content Neutral	TPM
Animal Legal Def. Fund v. Reynolds, 89 F.4th 1071 (8th Cir. 2024)	Government	Content Neutral	TPM
Warren v. DeSantis, 90 F.4th 1115 (11th Cir. 2024)[349]	Claimant	Public Employee	
Green v. U.S. Dep't of Just., 111 F.4th 81 (D.C. Cir. 2024)	Government	Content Neutral	Pure

348. After the district court subsequently granted plaintiffs an injunction, the Sixth Circuit reversed and remanded, adhering to their prior opinion. 152 F.4th 736 (6th Cir. 2025) (per curiam).

349. The court vacated and superseded on mootness grounds. 125 F.4th 1361 (11th Cir. 2025).

Case	Prevailing Party	Category	Notes
Council for Responsible Nutrition v. James, 159 F.4th 155 (2d Cir. 2025)	Government	Commercial Speech	
Courthouse News Serv. v. Corsones, 131 F.4th 59 (2d Cir. 2025)	Claimant	Content Neutral	TPM
Volokh v. James, 148 F.4th 71 (2d Cir. 2025)	Claimant	Content Neutral	Pure
Fraternal Ord. of Police Pa. Lodge v. Township of Springfield, No. 23-3165, 2025 WL 314108 (3d Cir. Jan. 28, 2025)	Claimant	Public Employee	
Steven A. Conner, DPM, P.C. v. Fox Rehab. Servs., P.C., Nos. 23-1550, 23-1684, 2025 WL 289230 (3d Cir. Jan. 24, 2025)	Government	Commercial Speech	
Courthouse News Serv. v. Smith, 126 F.4th 899 (4th Cir. 2025)	Government	Content Neutral	TPM
Hebb v. City of Asheville, 145 F.4th 421 (4th Cir. 2025)	Government	Content Neutral	Pure
United States v. Lierman, 151 F.4th 530 (4th Cir. 2025)	Claimant	Commercial Speech	
Ass'n of Club Execs. of Tex. v. Paxton, 143 F.4th 602 (5th Cir. 2025)	Government	Secondary Effects	
Healthy Vision Ass'n v. Abbott, 138 F.4th 385 (5th Cir. 2025)	Claimant	Commercial Speech	

Case	Prevailing Party	Category	Notes
LIA Network v. City of Kerrville, 163 F.4th 147 (5th Cir. 2025)	Claimant	Content Neutral	Pure
White Hat v. Murrill, 141 F.4th 590 (5th Cir. 2025)	Government	Content Neutral	*O'Brien*
Blankenship v. Louisville-Jefferson County, 162 F.4th 644 (6th Cir. 2025)	Government	Content Neutral	TPM
Yoder v. Bowen, 146 F.4th 516 (6th Cir. 2025) (per curiam)	Government	Content Neutral	*O'Brien*
Darlingh v. Maddaleni, 142 F.4th 558 (7th Cir. 2025)	Government	Public Employee	
Nicodemus v. City of South Bend, 137 F.4th 654 (7th Cir. 2025)	Government	Content Neutral	TPM
Richwine v. Matuszak, 148 F.4th 942 (7th Cir. 2025)[350]	Claimant	Content Neutral	Pure
Brandt *ex rel.* Brandt v. Griffin, 147 F.4th 867 (8th Cir. 2025)	Government	Content Neutral	*O'Brien*
Jensen v. Brown, 131 F.4th 677 (9th Cir. 2025)	Claimant	Public Employee	
NetChoice, LLC v. Bonta, 152 F.4th 1002 (9th Cir. 2025)	Government	Content Neutral	Pure

350. The court used the content neutral analysis for the limitation on the claimant's advice to clients, *id.* at 954–57, but analyzed the regulation of her advertising as commercial speech. *Id.* at 957. It held for the claimant on both grounds. *Id.* at 957–58.

Case	Prevailing Party	Category	Notes
Olympus Spa v. Armstrong, 138 F.4th 1204 (9th Cir. 2025)[351]	Government	Content Neutral	*O'Brien*
Pharm. Rsch. & Mfrs. of Am. v. Stolfi, 153 F.4th 795 (9th Cir. 2025)	Government	Commercial Speech	
Project Veritas v. Schmidt, 125 F.4th 929 (9th Cir. 2025)[352]	Government	Content Neutral	TPM
Reges v. Cauce, 162 F.4th 979 (9th Cir. 2025)	Claimant	Public Employee	
Solomon v. L.V. Metro. Police Dep't, No. 23-4166, 2025 WL 1678174 (9th Cir. June 12, 2025)	Government	Content Neutral	TPM
Comput. & Commc'ns Indus. Ass'n v. Uthmeier, No. 24cv438-MW/MAF, 2025 WL 3458571 (11th Cir. Nov. 25, 2025)	Government	Content Neutral	Pure
Fannie's, Inc. v. City of South Fulton, No. 24-11915, 2025 WL 1806610 (11th Cir. July 1, 2025) (per curiam)	Government	Secondary Effects	
Fla. Preborn Rescue, Inc. v. City of Clearwater, 161 F.4th 732 (11th Cir. 2025)	Claimant	Content Neutral	TPM

351. The court amended on other grounds. No. 23-4031, 2026 WL 700882 (9th Cir. Mar. 12, 2026).

352. The Supreme Court denied cert. 146 S. Ct. 90 (2025).

Case	Prevailing Party	Category	Notes
Wacko's Too, Inc. v. City of Jacksonville, 134 F.4th 1178 (11th Cir. 2025)	Government	Secondary Effects	
WBY, Inc. v. City of Chamblee, 155 F.4th 1242 (11th Cir. 2025)	Government	Secondary Effects	
Nat'l Ass'n of Broads. v. FCC, 147 F.4th 978 (D.C. Cir. 2025)	Government	Exacting	