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The "Supreme Board of Sign Review": *Reed* and Its Aftermath

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First Amendment jurisprudence is fickle. Sometimes it is transformed in prominent, widely known cases, like *Citizens United*. At other times, it is quieter, lesser known cases that revolutionize the doctrine. One of last summer's cases, *Reed v. Town of Gilbert*, falls squarely into the latter category. The Supreme Court's redefinition of content discrimination in *Reed* has led to rapid changes in how courts across the country are evaluating First Amendment challenges. Many courts have read the ruling as requiring them to strike down various state and local laws. Other courts have attempted to sidestep the implications of *Reed* by applying different First Amendment doctrines to evaluate the challenges that come before them. This divergence in the approaches taken by courts in First Amendment cases illuminates the complexity that results when courts try to apply *Reed*'s expanded content discrimination doctrine to real-world cases.

I. *REED V. TOWN OF GILBERT*

In *Reed v. Town of Gilbert*, the Court applied strict scrutiny and struck down an Arizona sign ordinance as a content-based regulation of speech.[1] The challenged ordinance prohibited the display of outdoor signs without a permit, exempting twenty-three categories of signs, including "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Sign[s]."[2] The petitioners, a local church and its pastor, posted signs each Saturday bearing the church's name and the time and location of the next day's service and did not remove the signs until midday Sunday.[3] The church's practice violated the regulation that Temporary Directional Signs be displayed no more than twelve hours

1. *See* 135 S. Ct. 2218, 2224 (2015).
2. *Id.* at 2224-25 (brackets in original).
3. *See id.* at 2225.

before the "qualifying event" and for no more than one hour afterward.[4] After being cited for violating the ordinance,[5] petitioners sued the Town of Gilbert, claiming that the sign code abridged their right to free speech.[6]

Reversing the lower court,[7] the Supreme Court declared that government regulation of speech is content-based if the regulation "applies to particular speech because of the topic discussed or the idea or message expressed."[8] Under this two-pronged definition, a law can be content-based either because it distinguishes speech by "topic discussed" (meaning that the law is facially content-based), or because the government's justification or purpose for the law depends on the underlying "idea or message expressed" (meaning that the law may be facially content-neutral but is implicitly content-based).[9]

This approach marked a departure from the existing conception of content discrimination. Until *Reed*, courts had focused on the second prong—impermissible government justification or purpose—as the primary basis for finding content discrimination.[10] But under *Reed*, impermissible motive is no longer a prerequisite for finding content discrimination: "A law [can be] content based on its face . . . regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[11] *Reed* marked the first time that the Court articulated this broader two-pronged definition of content discrimination.

As a result, content discrimination now encompasses not only viewpoint-based regulations but also subject matter-based regulations,[12] and all such regulations must survive strict scrutiny to be upheld.[13] Strict scrutiny requires a regulation to be narrowly tailored to further a compelling

4. *Id.* The ordinance originally prohibited Temporary Directional Signs from being posted for more than two hours beforehand or more than one hour afterward. While the litigation was pending, the ordinance was amended to expand the time limit to twelve hours beforehand and one hour afterward. *Id.* at 2225 n.4.

5. *See id.* at 2225.

6. *See id.* at 2226.

7. The Court's ruling was unanimous, although there were four separate opinions, each individually important. Justice Thomas wrote the majority opinion and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor. Justice Alito wrote a concurrence, which was joined by Justices Kennedy and Sotomayor. Justice Kagan wrote an opinion concurring only in the judgment, which Justices Ginsburg and Breyer joined, and Justice Breyer wrote a separate opinion concurring only in the judgment as well. *See id.* at 2223.

8. *Id.* at 2227.

9. *Id.*

10. *See id.* at 2237-38 (Kagan, J., concurring in the judgment).

11. *Id.* at 2228.

12. *See id.* at 2229-30.

13. *See id.* at 2231.

government interest.[14] Unsurprisingly, the challenged sign ordinance in *Reed* failed to meet the strict scrutiny standard.[15] As Justice Kagan noted in her concurrence, "it is the 'rare case[] in which a speech restriction withstands strict scrutiny.'"[16] Echoing Justice Kagan, Justice Breyer pointed out that strict scrutiny "lead[s] to almost certain legal condemnation."[17] However, the *Reed* Court reasoned that its new definition of content discrimination and broadened application of strict scrutiny will ensure that subject matter-based legislation that is not initially intended for "'invidious, thought-control purposes'" cannot subsequently be used to favor certain viewpoints over others.[18]

In her opinion concurring in the judgment, Justice Kagan described the potentially wide-ranging effects of the majority opinion. As a consequence of subject matter-based regulation into the sphere of content discrimination, and due to the difficulty (and rarity) of meeting the strict scrutiny standard, "entirely reasonable"[19] laws will begin to be struck down.[20] As Justice Breyer explained, "[r]egulatory programs almost always require content discrimination," and *Reed*'s strong presumption against their constitutionality could have the effect of invalidating government regulation in almost every legal arena—from securities regulation to prescription drug labeling practices.[21] Justice Kagan emphasized that the Town of Gilbert's ordinance could have been struck down for lacking "any sensible basis" for its distinctions—failing "even the laugh test"—and that the Court did not need to apply strict scrutiny and precariously broaden the scope of content-based regulation.[22]

In a separate concurrence, Justice Alito countered Justice Kagan's concerns by stating that the majority's opinion did not leave "municipalities . . . powerless to enact and enforce reasonable sign regulations."[23] Justice Alito listed examples of sign regulations that would not be content-based, such as rules regulating "the size of signs," specifying "the locations in which signs

14. *See id.*

15. *See id.* at 2224.

16. *Id.* at 2236 (Kagan, J., concurring in the judgment) (quoting Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015)).

17. *Id.* at 2234 (Breyer, J., concurring in the judgment). At least one lower court judge has echoed Justices Kagan and Breyer on this point: "Few regulations will survive this rigorous standard." Norton v. City of Springfield, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring).

18. *Reed*, 135 S. Ct. at 2229 (quoting Hill v. Colorado, 530 U.S. 703, 743 (Scalia, J., dissenting)).

19. *Id.* at 2239 (Kagan, J., concurring in the judgment) (quoting *id.* at 2231 (majority opinion)).

20. *See id.* at 2236 (Kagan, J., concurring in the judgment).

21. *Id.* at 2235 (Breyer, J., concurring in the judgment).

22. *Id.* at 2239 (Kagan, J., concurring in the judgment).

23. *Id.* at 2233 (Alito, J., concurring).

may be placed," distinguishing "between on-premises and off-premises signs," and "imposing time restrictions on signs advertising a one-time event."[24] In a footnote, Justice Kagan disputed Justice Alito's characterization of *Reed*'s limited scope. She argued that Justice Alito's examples of valid sign regulations included ordinances that the majority would consider to be content-based under its definition. For instance, "signs advertising a one-time event," would "single[] out specific subject matter for differential treatment" and "defin[e] regulated speech by particular subject matter."[25]

The consequences of the Court's decision have been twofold. On the one hand, as Justices Breyer and Kagan predicted, lower courts have read *Reed* to invalidate a wide range of democratically enacted state statutes and local regulations. At the same time, some courts have started to bypass the stringency of strict scrutiny by applying less rigid standards of review under First Amendment doctrines other than content discrimination.

II. STRIKING DOWN LOCAL LAWS

While the Town of Gilbert's sign code may not have passed "even the laugh test,"[26] other courts have found their hands tied as they strike down otherwise reasonable regulations. Indeed, despite attempts by the majority and concurring opinions to limit the scope of *Reed*, the sweeping effects of the Court's decision have manifested in the subsequent months.

Anti-panhandling ordinances are among the local regulations meeting their demise. Before the Supreme Court's ruling in *Reed*, the Seventh Circuit, in *Norton v. City of Springfield*,[27] upheld the City of Springfield's anti-panhandling regulation in the face of a First Amendment challenge. The court ruled that the ordinance was content-neutral because it regulated by subject matter rather than by content or viewpoint.[28] The ordinance prohibited "oral request[s] for an immediate donation of money" but allowed signs and oral pleas to send money later.[29] According to the majority opinion, the logic of the ordinance's distinction was that signs and deferred donations would be "less impositional" and less "threatening" than immediate requests.[30] Thus, the court upheld the regulation as a valid time, place, or manner restriction, applying a doctrine that

24. *Id.*

25. *Id.* at 2237 (Kagan, J., concurring in the judgment) (quoting *id.* at 2227, 2230 (majority opinion); *id.* at 2233 (Alito, J., concurring)).

26. *Id.* at 2239 (Kagan, J., concurring in the judgment).

27. 768 F.3d 713 (7th Cir. 2014), *rev'd*, 806 F.3d 411 (7th Cir. 2015).

28. *See* 806 F.3d at 412.

29. 768 F.3d at 714.

30. *Id.*

has traditionally permitted certain kinds of content-neutral regulations of speech.[31]

However, after *Reed* was handed down, the Seventh Circuit granted a rehearing and struck down the anti-panhandling ordinance.[32] As the majority explained in the reversal, *Reed* "abolishe[d] any distinction between content regulation and subject-matter regulation"[33] and made it clear that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[34] This was true even if the distinctions were originally implemented in order to make the ordinance *less* speech-restrictive.[35] As a result, the Seventh Circuit's application of time, place, or manner doctrine to uphold the ordinance in its initial review[36] was undone by *Reed*'s content discrimination doctrine. Indeed, *Norton* augurs the weakening of time, place, or manner regulations—the First Amendment doctrine that until now has allowed local and state governments to balance their interests in public order with First Amendment interests.

In another recent case, a federal district court struck down New Hampshire's law banning "ballot selfies."[37] Since at least 1979, the state had

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31. *See id.* at 717-18 (noting, *inter alia*, that subject-matter regulation is "usually allowed" and content-based distinctions are "usually forbidden"). *Reed* eliminated the distinction between permissible "subject-matter" and impermissible "content-based" regulation that the Seventh Circuit identified in the first *Norton* ruling. *See supra* text accompanying notes 8-12. *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (outlining the Court's test for valid time, place, or manner regulations).

32. *See* 806 F.3d at 411.

33. *See id.* at 412.

34. *Id.* (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015)).

35. *See* 806 F.3d at 412. The Seventh Circuit suggested that "the distinctions that plaintiffs call content discrimination appear to be efforts to make the ordinance less restrictive," presumably by only prohibiting a particular kind of panhandling and not panhandling more generally, "which should be a mark in its favor." *Id.* However, the ordinance still fell under the court's application of *Reed*. *See id.* at 412-13.

36. *See* Norton v. City of Springfield, 768 F.3d 713, 717-18 (7th Cir. 2014). In the Seventh Circuit's original decision upholding the anti-panhandling ordinance, the court looked to *United States v. Kokinda* and *International Society for Krishna Consciousness, Inc. v. Lee*, both of which upheld anti-panhandling regulations. *See id.* at 715. As the Seventh Circuit explained, in those decisions, Justice Kennedy wrote separately to note that the regulations were appropriate under time, place, or manner doctrine, because the regulations were "narrowly tailored," "reasonable," and did "not burden substantially more speech than necessary." *Id.* at 715-16. In fact, it was the limited nature of the regulation that made it "pernicious content discrimination" in the eyes of the plaintiffs but was "the soul of reasonableness" in the regulation for Justice Kennedy. *Id.* at 716. The same tension arose in the Seventh Circuit's reversal of its earlier decision after *Reed*. *See supra* note 35.

37. *See* Rideout v. Gardner, 123 F. Supp. 3d 218, 2015 WL 4743731 (D.N.H. 2015), *appeal filed* (1st Cir. 2015); Robert Barnes, *Is a Ballot-Booth Selfie Free Speech, or a Threat to the Sanctity of the Secret Vote?*, WASH. POST (Aug. 23, 2015), http://www.washingtonpost.com/politics/courts_law/is-a-ballot-booth-selfie-free-speech-or-a-threat-to-the-sanctity-of-the

made it unlawful for voters to show their ballots to someone else with the intention of disclosing how they intended to vote.[38] In 2014, the state legislature updated the law to prohibit taking a digital image or photograph of one's marked ballot and distributing or sharing the image via social media or other means.[39] During the course of the litigation over the law's constitutionality, the state defended the statute as necessary "to prevent vote buying and voter coercion."[40] The state argued that the law was a content-neutral time, place, or manner restriction on speech and therefore not subject to strict scrutiny.[41] Applying *Reed*, the court held that the law was facially content-based because the only digital and photographic images that the law barred were images of marked ballots disclosing how a voter had voted; the law did not prohibit people from sharing other kinds of images.[42] Because the law "require[d] regulators to examine the content of the speech to determine whether it include[d] impermissible subject matter,"[43] it qualified as subject matter-based discrimination and was subject to the fatal gaze of strict scrutiny. Once again, a government's contention that a law was a valid time, place, or manner restriction failed in the face of *Reed*.[44]

Governments often must balance their interests in protecting free speech with other public interests. In the context of panhandling, the government sought to balance the right to free speech with the desire to regulate solicitations for money in public spaces; in the context of ballot selfies, the government sought to balance the right to free speech with the desire to preserve electoral integrity. But government interests in public order have clearly proven insufficient to preserve state statutes in the face of *Reed*'s broad proscription on content discrimination. And government attempts to protect private interests have begun to falter in the face of *Reed* as well.

In *Cahaly v. Larosa*, a court reviewed the constitutionality of a South Carolina anti-robocall statute that was enacted by the state legislature in 1991.[45]

-secret-vote/2015/08/23/89623272-4809-11e5-8ab4-c73967a143d3_story.html [http://perma.cc/VKW4-7W4S] (describing a photograph of a marked ballot as a "ballot selfie").

38. *See Rideout*, 2015 WL 4743731, at *1.

39. *See id.*

40. *Id.* at *3.

41. *See id.* at *10.

42. *See id.* at *9.

43. *Id.*

44. An analogous law banning ballot selfies in Indiana was invalidated on similar grounds as a facially content-based regulation. *See* Ind. Civil Liberties Union v. Ind. Sec'y of State, No. 1:15-CV-01356-SEB-DML, at *19 (D. Ind. 2015). This opinion cited the New Hampshire case, noting that while the two anti-ballot selfies laws were not identical, the Indiana statute "presents many of the same issues and infirmities" as the New Hampshire law. *Id.* at *8 n.2.

45. *See* 796 F.3d 399, 402 (4th Cir. 2015).

The statute placed different restrictions on robocalls depending on whether they were unsolicited and whether they were made for consumer, political, or other purposes.[46] The law set up a framework of rules for robocalls and prohibited only unsolicited consumer robocalls and calls that were "of a political nature."[47] Applying *Reed*, the court found that the law was facially content-based, because it applied to "calls with a consumer or political message" but not to "calls made for any other purposes."[48] Therefore, the statute was subjected to strict scrutiny review and subsequently invalidated.[49]

The South Carolina law differed from the regulations challenged in Arizona, Illinois, and New Hampshire because the asserted government interest was the "protect[ion] of residential privacy and tranquility,"[50] as opposed to an interest in public order (as with anti-panhandling ordinances and sign regulations) or the protection of the political process (as with anti-ballot selfie laws). But strict scrutiny spares few statutes, as Justice Kagan suggested. The *Reed* Court's decision to expand the category of content discrimination, coupled with strict scrutiny, implies the invalidation of most, if not all, such laws. In fact, these recent lower court cases highlight that narrowly tailoring a restriction risks unintentional content-based regulation; few state interests, whether in public order or private peace, can shield such a statute from being struck down.

III. CHARTING ROUTES AROUND *REED*

While portending the sweeping effects of *Reed*, Justice Kagan suggested that one route for courts to avoid the mass invalidation of democratically enacted statutes would be to "water down strict scrutiny to something unrecognizable."[51] The danger of this approach is that it would weaken First Amendment protection in cases in which strict scrutiny *should* apply with full force, as Justice Breyer noted.[52] Courts have attempted to avoid this outcome by applying less stringent standards of review under other First Amendment

46. *See id.*

47. *Id.*

48. *Id.* at 405.

49. *See id.* at 406.

50. *Id.* at 405.

51. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring in the judgment).

52. *See id.* at 2235 (Breyer, J., concurring in the judgment). According to Justice Breyer, an example of a case in which content discrimination would appropriately trigger strict scrutiny would be the biased regulation of a public forum. *Id.* at 2234 (Breyer, J., concurring in the judgment).

doctrines, such as secondary effects and commercial speech, to uphold regulations in cases where *Reed* might call for invalidation.

Endeavoring to keep regulations alive, some courts have turned to the secondary effects doctrine. This was the case in a recent First Amendment challenge to the International Traffic in Arms Regulation (ITAR), which regulates the disclosure of "technical data" relating to "defense articles."[53] The plaintiffs, who had posted "technical information regarding a number of gun-related items" on the Internet, were found to have violated the ITAR and challenged its constitutionality.[54] Under the *Reed* framework, the ITAR is subject matter-based regulation, since it regulates speech concerning a specific "topic discussed" (whether it relates to "defense articles"), and therefore should be subject to strict scrutiny. However, the court bypassed *Reed* and applied the secondary effects doctrine, which finds regulations to be content-neutral "where the regulations are aimed not at suppressing a message, but at other 'secondary effects.'"[55] Although the secondary effects doctrine evolved from a distinct line of cases involving contentious social issues, such as *City of Renton v. Playtime Theatres, Inc.*[56] (which involved the zoning of adult theatres) and *McCullen v. Coakley*[57] (which involved buffer zones around abortion clinics), the court applied the logic of secondary effects to the case at hand.[58] The court held that the ITAR did not regulate the disclosure of technical data based on the "message that [the data] is communicating."[59] Rather, the court focused on the fact that the regulation was "intended to satisfy a number of foreign policy, and national defense goals."[60] The court concluded that the regulation is content-neutral and therefore subject to intermediate scrutiny, which it survives.[61] Thus, the court ignored the facially content-based nature of the ITAR and analyzed only the government's purpose for the law, as was common before *Reed*. In so doing, the court drew a clear exception for the national security-related regulation and extended the application of the secondary effects doctrine, allowing the law to survive.

Commercial speech doctrine is proving to be a similar byway for courts. In *Contest Promotions v. San Francisco*, a national company challenged the City of

53. Def. Distributed v. U.S. Dep't of State, No. 1-15-CV-372-RP, 2015 WL 4658921, at *1-2 (W.D. Tex. 2015).

54. *Id.* at *2.

55. *Id.* at *8.

56. 475 U.S. 41 (1986).

57. 134 S. Ct. 2518 (2014).

58. *See Def. Distributed*, 2015 WL 4658921, at *20-21.

59. *Id.* at *22.

60. *Id.* at *23.

61. *See id.*

San Francisco's sign code.[62] As a part of its business model, the company leased signage space from stores and used the space to promote its contests to passersby, who were invited to go into the stores and enter the company's contests.[63] The City's code banned the use of off-site signage while permitting on-site signage, defining the latter as signs "which direct[] attention to . . . *the primary* business . . . which is sold, offered or conducted . . . on the premises upon which such sign is located."[64] The company challenged the prohibition of its off-site signage by arguing that the City's code abridged the company's right to commercial speech.[65] After analyzing the speech restriction under the commercial speech framework—which is much less stringent than strict scrutiny—the court found that the City's code could be upheld as a constitutional regulation of commercial speech.[66] By bypassing the content discrimination analysis, the court avoided *Reed*'s imposition of strict scrutiny and upheld the city's sign code.

In sharp contrast to this ruling, a federal district court in Tennessee recently struck down a state law that distinguished between on-site and off-site signs as a content-based regulation that could not withstand strict scrutiny.[67] Applying *Reed*, the court reasoned that the regulation was facially content-based because the only way to determine whether a sign was on-site was by determining whether the content of the sign was sufficiently closely related to the activities conducted on the property where the sign was located.[68] Thus, the court in Tennessee took the tack that the court in California had avoided by classifying the San Francisco sign code as a regulation of commercial speech. The two courts approached factually similar cases with different First Amendment reasoning—one applying *Reed* and one avoiding *Reed*—and arrived at opposite outcomes. Rulings such as these bring the doctrinal incoherence resulting from *Reed* into stark relief.

CONCLUSION

While it remains to be seen if these holdings withstand appellate review, these rulings suggest the various avenues available to courts that are faced with challenges to democratically enacted regulations. These regulations seek to

62. *See* Contest Promotions v. City & Cty. of San Francisco, 100 F. Supp. 3d 835 (N.D. Cal. 2015).

63. *See id.* at 839.

64. *Id.* at 840.

65. *See id.* at 842.

66. *See id.* at 842-44.

67. *See* Thomas v. Schroer, No. 2:13–cv–02987–JPM–cgc, 2015 WL 5231911 (W.D. Tenn. 2015).

68. *See id.* at *4.

balance First Amendment interests with other government interests, but in so doing, often run up against the categorical rule of *Reed*. The development of the different First Amendment doctrines and the extent to which they are balanced with or overruled by *Reed* will determine the scope of content discrimination—and the First Amendment—in future cases. Indeed, advocates supporting regulations that are challenged under *Reed* may increasingly turn to these other First Amendment doctrines as ways to avoid the heavy hand of *Reed*. Thus, it remains to be seen whether Justice Kagan's prediction that *Reed* could transform the Court into a veritable "Supreme Board of Sign Review"[69] turns out to be true.

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69. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring in the judgment).