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MEASURING *REED*'S REACH: CONTENT DISCRIMINATION IN THE U.S. CIRCUIT COURTS OF APPEALS AFTER *REED V. TOWN OF GILBERT*

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Commentators and justices on the Supreme Court of the United States speculated when the Court delivered its opinion in Reed v. Town of Gilbert in 2015 that the case would dramatically reshape First Amendment law. This article analyzes Reed's impact to date in the United States Circuit Courts of Appeals. The article demonstrates that, although Reed has been consequential in some circuits, it has not been the basis of any First Amendment revolution. Indeed, the research supports the conclusion that many circuit courts seem to be actively working to narrow Reed's reach. Moreover, the article concludes that Reed did little to clarify — and in some ways made worse — what has been a problematic doctrine for decades.

When the Supreme Court of the United States decided *Reed v. Town of Gilbert*¹ in 2015, many predicted — including some justices on the Court itself² — that the case would bring dramatic changes to First Amendment doctrine.³ On its surface, the Court's holding, written by Justice Clarence Thomas, was simply a reaffirmation of the long-standing practice that a content-based law should be subjected to strict scrutiny. Upon closer reading, however, the strong condemnation of content discrimination contained in the opinion was important for several reasons.

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¹135 S. Ct. 2218 (2015).

²See, e.g., *id.* at 2236-39 (Kagan, J., concurring in judgment).

³See *infra* notes 154-75 and accompanying text.

First, the opinion did not make a distinction between laws that target different categories of speech. Justice Thomas wrote in broad strokes,⁴ as if *all* content-based laws, even those that target less protected areas of speech such as commercial speech, should be subjected to strict scrutiny. While *Reed* thus might be written as if there is categorical disapproval of content-based laws, that cannot be squared with existing Supreme Court precedent. Second, Thomas's opinion created a new standard for determining when a law was content based. According to the opinion, if a court deemed a law to be content based "on its face," the law should be considered presumptively unconstitutional, regardless of the government's purpose in enacting the regulation. Seemingly contrary to previous Supreme Court decisions, then, Justice Thomas's opinion in *Reed* held that facial content discrimination cannot be saved with a benign purpose. In previous cases, the Court had stated that an innocuous government purpose could save a facially content-based law from strict scrutiny.⁵ *Reed*, however, changed the calculus, stating that was not the case. As many authors noted,⁶ this seemed to have the potential to throw many regulations into jeopardy and reshape First Amendment jurisprudence. Third, and similarly, the majority also seemed to treat *Reed* as its chance to clarify a doctrine that had been muddled by the Court and lower courts for decades.

The purpose of this article is to explore *Reed*'s impact in the United States Circuit Courts of Appeal in the three-plus years since the case was decided.⁷ As noted, both members of the Court and scholars predicted dire consequences would come from *Reed*.

⁴He wrote, for example, "[A] clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" 135 S. Ct. at 2231 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)).

⁵*See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. . . . Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'") (citations omitted).

⁶*See, e.g.,* *infra* notes 154-75 and accompanying text.

⁷Cases were identified by using a LexisNexis Academic Shepardize search to retrieve lower court cases that have cited *Reed*. This search returned sixty-eight cases decided by the United States Circuit Court of Appeals. Circuit court cases were chosen because of the courts' ability to set precedent and influence the law within their jurisdiction.

The article examines whether those predictions were correct or if, in the words of Professor Enrique Armijo, everyone simply needs to relax.⁸ The article begins with a discussion of the distinction between content-neutral, content-based, and viewpoint-based regulations. It then provides a historical examination of how the Court approached determining when a law discriminates based on content prior to *Reed*, and it explains the majority and concurring opinions in *Reed*. Next, it provides an exhaustive examination of circuit court cases that have cited *Reed* to this point. Finally, the article draws conclusions about *Reed*'s influence thus far in the circuit courts.

First, the analysis demonstrates that *Reed* has not been the basis of a First Amendment revolution. *Reed* has been consequential, but circuit courts have largely read it narrowly. Second, the article concludes that *Reed* did nothing to clarify what has been a problematic doctrine for decades. The circuits are still unclear on what makes a law content based on its face, and they cannot agree on how to determine when the government's purpose invalidates an otherwise content-neutral law. At least one court post-*Reed* has applied intermediate scrutiny to a law it found facially content based but that had a benign purpose. Other courts have appeared to ignore or downplay *Reed*'s second step and have failed to scrutinize the purpose of facially content-neutral regulations. Finally, the courts of appeals have thus far declined to apply *Reed* to categories of speech that have traditionally been less protected, such as commercial speech. In the conclusion, the article offers several suggestions that would help the Court clarify both *Reed*'s reach and the entire doctrine.

CONTENT-NEUTRAL, CONTENT-BASED, AND VIEWPOINT-BASED REGULATIONS

The doctrine that content-neutral regulations should be treated differently from content-based regulations has a convoluted history. Although the Court did not use the terms "content neutral," "content based," and "content discrimination" until the 1970s, the Court's differential treatment of content-based and content-neutral laws stems from several important earlier cases in which the Court began to put

⁸Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C.L. REV. 65 (2017).

forward “the principle that the government cannot discriminate against speech based on its point of view.”⁹

The concept is simple. Content-based laws are analyzed more closely than content-neutral laws because it is wrong for the government “to regulate speech because of what it is saying,”¹⁰ while it is more acceptable “for the government to regulate speech for reasons other than what it is saying.”¹¹ The rationale behind the concept is simple as well. As Justice Anthony Kennedy noted, “Laws [that discriminate based on content] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.”¹² Thus, the First Amendment generally prohibits laws that regulate expression based on its “message, its ideas, its subject matter, or its content.”¹³ Or, as the Court put it in *R.A.V. v. City of St. Paul*, “[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.”¹⁴ What on its face should be a straightforward distinction, however, has been blurred by years of interpretation, and the Supreme Court’s rulings in this area have been less than consistent and caused problems for lower courts for decades.¹⁵

Under existing Supreme Court precedent, content-based laws that target fully protected expression are subjected to strict scrutiny.¹⁶ A law will be held constitutional under strict scrutiny only if it can be shown that the law advances a compelling government interest and the law is narrowly tailored to regulate speech in the least restrictive way.¹⁷ Thus, even if a law advances a compelling

⁹Dan V. Kozlowski, *Content and Viewpoint Neutrality: How Fundamental Tenets of First Amendment Law Have Come to be Plagued by Inconsistency and Confusion*, 43 FREE SPEECH YEARBOOK 50, 52 (2009).

¹⁰Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235 (2012).

¹¹*Id.*

¹²*Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

¹³*Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁴505 U.S. 377, 385 (1992). *See also*, *Texas v. Johnson*, 491 U.S. 397, 411-14 (1989) (holding that a Texas law that banned flag burning done “in a way that the actor knows will seriously offend” was unconstitutional because it was a content-based restriction of political speech and could not survive “the most exacting scrutiny”).

¹⁵*See generally* Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL’Y 131 (2008).

¹⁶*See Mosley*, 408 U.S. at 98-99.

¹⁷*See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (finding that to justify a content-based restriction “the State

government interest, it will fail strict scrutiny and be held unconstitutional if there is any other way to advance the governmental interest that would restrict less speech.¹⁸ The law must be necessary. Under intermediate scrutiny, content-neutral laws are held constitutional if they advance a significant or important government interest and are narrowly tailored to advance that interest.¹⁹ Content-neutral laws, however, do not have to be narrowly tailored to the least restrictive means. Further complicating matters, historically the Court has also used intermediate scrutiny for certain regulations that are seemingly content based. For example, content-based regulations that target commercial speech are subjected to a form of intermediate scrutiny, what is known as the “*Central Hudson Test*,” under the commercial speech doctrine.²⁰ Also, content-based laws that target adult-oriented businesses have been treated as content neutral if they target the “secondary effects” of the speech and not the speech itself, an approach the Court sanctioned in *Renton v. Playtime Theaters, Inc.*²¹ At one time, strict scrutiny was described as “strict in theory, but fatal in fact.”²² That is, once strict scrutiny was employed by the Court, the law was almost always struck down as unconstitutional.²³ Recent cases, however, suggest a this is no longer the case and that laws can

must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end”).

¹⁸See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (noting that content-based laws must advance a compelling government interest and are required to be “necessary” to advance that government interest).

¹⁹See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“[A] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

²⁰*Central Hudson Gas & Electric Corp. v. Public Service Com.*, 447 U.S. 557 (1980). Under the *Central Hudson* test a regulation that targets commercial speech will be held constitutional only if there is a substantial government interest in regulating the speech, the regulation directly advances that government interest, and the regulation is narrowly tailored. *Id.* at 566-71.

²¹475 U.S. 41, 51 (1986) (“[The trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court’s detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record” (citation omitted)).

²²Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²³See Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 351 (2011) (arguing that in the 1970s, “Once strict scrutiny

survive strict scrutiny.²⁴ Nonetheless, it is still the case that it is much easier for a law to pass intermediate scrutiny than strict scrutiny, making the distinction between content-based and content-neutral laws important.

While the Court's own definitions have varied over time, in general, content-based laws "restrict the subject matter of expression while content neutral laws restrict the opportunity for expression."²⁵ Content-neutral laws "are justified without reference to the content of the regulated speech."²⁶ Viewpoint-based laws go beyond content-based laws and regulate particular views.²⁷ Under current First Amendment doctrine, viewpoint-based laws are especially odious because they skew "public debate in an explicitly message-sensitive way" by suppressing particular views.²⁸ Problems begin, however, when the Court attempts to apply these definitions to specific laws. As Professor Dan V. Kozlowski noted, "[I]n theory, the Court's categorical approach might seem straightforward and obvious.... In operation, however, cases have rarely been so easy for the Court, and the content and viewpoint concepts have proven to be slippery in the Court's hands."²⁹ Or, as the Court itself noted in 1994, "[D]eciding whether a particular regulation is content-based or content-neutral is not always a simple task."³⁰

Many scholars agree the court has primarily focused on three basic approaches — either alone or in some combination — to determine if a regulation is content based.³¹ At times, justices have examined the face of the regulation to determine if the law is content based.³² At

was declared the proper judicial standard in a First Amendment case, the result was foreordained").

²⁴See *id.* at 351 ("Although strict scrutiny is unquestionably still a highly speech-protective standard, cracks in its structure are evident."). See also, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

²⁵Wilson Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L. J. 802, 814 (2004).

²⁶*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

²⁷See Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 76 (1997).

²⁸Leslie Gielow Jacobs, *Clarifying the Content-Based/Content-Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 598 (2003).

²⁹Kozlowski, *supra* note 15, at 132.

³⁰*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

³¹See, e.g., *Kendrick* *supra* note 10, at 238.

³²See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Burson v. Freeman*, 504 U.S. 191 (1992); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

other times, justices have looked instead to the purpose or intent of the regulation.³³ Finally, in some situations, justices have looked at the effects of the law, arguing a law is content based if it disproportionately impacts one group of speakers or one topic of speech.³⁴ Even these basic approaches, however, are fraught with problems. As Kozlowski wrote:

[M]ajorities and dissenters have often reached different results because they have utilized different approaches. At other times, however, the majority and dissent have utilized the same approach, yet disagreed over its application. At still other times, the Court has combined elements of approaches in reaching its decisions. Fundamentally, then, the problem has been that the Court's method for determining content discrimination has been inconsistent and varied.³⁵

Thus, justices have frequently disagreed over whether a law is content based on its face, whether a law has the purpose of discriminating against speakers or topics, and over whether a law is intended to punish speech or is instead a reasonable, content-neutral time, place and manner regulation. Under current First Amendment doctrine, the Court has ruled that the government may impose reasonable restrictions on the time, place and manner of protected speech provided the restrictions are *justified* without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.³⁶ Thus, a law that applies to only one group of people or one type of speech in practice has in some cases still been subjected to intermediate scrutiny if the law can be justified by purposes unrelated to the content of the speech of those most affected by the law.³⁷

DETERMINING WHEN A LAW DISCRIMINATES ON THE BASIS OF CONTENT PRIOR TO *REED*

In the seminal 1968 draft card-burning case, *United States v. O'Brien*,³⁸ the Court discussed how to determine when a law targeted

³³See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

³⁴See, e.g., *Hill v. Colorado*, 530 U.S. 703, 744 (2000) (Scalia, J., dissenting).

³⁵Kozlowski, *supra* note 9, at 59.

³⁶See, e.g., *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

³⁷See, e.g., *infra* notes 77-87 and accompanying discussion of *Hill v. Colorado*, 530 U.S. 703 (2000).

³⁸391 U.S. 367 (1968).

expression. In 1966, David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse to express his "anti-war beliefs."³⁹ O'Brien was convicted of violating section 462(b)(3) of the Universal Training and Service Act of 1948.⁴⁰ The section was one of six subdivisions of 462(b) that was added by a 1965 amendment. At the time the amendment was enacted, a regulation of the Selective Service System already required registrants to keep their draft cards on them at all times.⁴¹ O'Brien argued the *purpose* of Congress in passing the amendment was to suppress speech.⁴² At trial, the district court ruled the law was constitutional on its face and the court was not "competent to inquire into the motives of Congress in enacting the 1965 Amendment."⁴³ The First Circuit Court of Appeals, however, held the 1965 law unconstitutional because the amendment served no valid purpose and, thus, "[Singled] out persons engaged in protests for special treatment."⁴⁴ On appeal,⁴⁵ the Supreme Court reversed, holding the law was constitutional both as enacted and as applied.⁴⁶

Focusing on O'Brien's argument that even if the law was written in a way to apply to both "public and private destruction" it was unconstitutional because the law was *intended* to punish only public — and therefore expressive — destruction, the Court found that under "settled principles," inquiries into the purpose of Congress in enacting legislation was "not a basis for declaring [the] legislation unconstitutional."⁴⁷ Wrote the Court, "Inquiries into congressional motives or purposes are a hazardous matter."⁴⁸ While it might be

³⁹*Id.* at 370.

⁴⁰50 USC § 462(b)(3) (1965).

⁴¹32 CFR § 1617.1 (1962).

⁴²391 U.S. at 376.

⁴³*Id.*

⁴⁴*Id.* at 371.

⁴⁵The First Circuit ruled that while the 1965 Amendment was unconstitutional, O'Brien could be convicted under the "non-possession" regulation, a crime for which he was never charged. The government petitioned for a writ of certiorari arguing the circuit court erred in finding the statute unconstitutional. O'Brien cross-petitioned for certiorari arguing the circuit court erred in sustaining his conviction based on a crime for which he was never charged. The Supreme Court granted both the petition and the cross-petition. *Id.* at 372.

⁴⁶*Id.*

⁴⁷*Id.* at 382-83.

⁴⁸*Id.* at 383-84 ("When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature It is a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the state are sufficiently high for us to eschew guesswork.")

proper for a court to inquire into congressional motives when interpreting legislation, the Court found that declaring a facially constitutional law unconstitutional based on congressional motive was improper.

In the 1972 case *Police Department of Chicago v. Mosley*,⁴⁹ the Court continued to discuss what made a law content based and established what became the three-tiered approach that distinguishes between content-based regulations, content-neutral regulations, and viewpoint-based regulations.⁵⁰ In *Mosley*, the Court considered a Chicago city ordinance that banned pickets or demonstrations within 150 feet of any primary or secondary school building while school was in session.⁵¹ The ban, however, did not “prohibit the peaceful picketing of any school involved in a labor dispute.”⁵² The law was challenged by a federal postal employee who had been picketing a high school in Chicago with a sign reading, “Jones High School practices black discrimination. Jones High School has a black quota.”⁵³ The Court invalidated the law, because, on its face, it prohibited content based on subject matter. The Court wrote:

The central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school’s labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.⁵⁴

Although the city argued the regulation was a constitutional time, place and manner restriction, the Court held it was not because the ordinance distinguished peaceful labor picketing from

⁴⁹408 U.S. 92 (1972).

⁵⁰Some scholars argue the approach is really a two and one-half tier approach as viewpoint-based regulations are sometimes considered to be an especially odious form of content-based regulations. See, e.g., Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 127 (2017) (“Viewpoint-base laws . . . are often considered to be a subset within content-based regulations.”); Calvert, *supra* note 27, at 76-78 (discussing the application of content-based and viewpoint-based laws).

⁵¹408 U.S. at 93-94.

⁵²*Id.* at 93.

⁵³*Id.*

⁵⁴*Id.* at 95.

other types of picketing.⁵⁵ The law in question distinguished between content on its face and was thus subjected to heightened scrutiny.

When the Court considered *Ward v. Rock Against Racism* in 1989,⁵⁶ however, it complicated the application of the doctrine. The case involved a New York City regulation that required all performers at an amphitheater and stage structure in Central Park to use sound-amplification equipment and a sound technician provided by the city.⁵⁷ Rock Against Racism, an unincorporated association “dedicated to the espousal and promotion of antiracist views,”⁵⁸ sought to have the requirements struck down as facially invalid. The Court, however, ruled the law was a time, place and manner regulation that should be reviewed under intermediate scrutiny.⁵⁹ Although the regulation in question was arguably content neutral on its face – it applied to all performers, regardless of the content of their music – the Court hinged its opinion on an analysis of the government’s *purpose* in enacting the regulation and wrote that the government’s purpose was the most important factor for courts to consider. The Court ruled:

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is “*justified* without reference to the content of the regulated speech.”⁶⁰

Because the justification for the regulation in question was the city’s desire to control noise levels at the venue and had nothing to do with

⁵⁵*Id.* at 100. (“If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. ‘Peaceful’ nonlabor picketing, however the term ‘peaceful’ is defined, is obviously no more disruptive than ‘peaceful’ labor picketing. But Chicago’s ordinance permits the latter and prohibits the former.”)

⁵⁶491 U.S. 781 (1989).

⁵⁷*Id.* at 784.

⁵⁸*Id.*

⁵⁹*Id.* at 791.

⁶⁰*Id.* (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

content, the Court found the regulation was content neutral.⁶¹ As Minch Minchin noted in 2017, “The upshot from *Ward* [is] that the focus of content-neutrality analyses apparently shifted slightly away from a strict black-letter evaluation and more toward a subjective evaluation of government intent.”⁶²

In 1994, in yet another attempt to establish what constitutes a content-based regulation, the Court suggested that both the purpose of a law and the way it is written are important in the equation. In *Turner Broadcasting Systems, Inc. v. FCC*,⁶³ the Court wrote, “[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases.”⁶⁴ Also, the Court noted, “[N]or will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.”⁶⁵ As Matthew D. Bunker, Clay Calvert and William C. Nevin noted in 2011, this “suggest[s] that the stated intent or alleged purpose of a law will not necessarily be determinative of whether it is categorized as content based or content neutral, and that the text and terms of a law — its face, as it were — also is important.”⁶⁶ Or, put another way, “[L]aws that employ neither a content-related classification nor a content-related justification are content neutral.”⁶⁷ Thus, it appeared as if a facially neutral law might be struck down as unconstitutional upon a finding of improper government motivation in enacting the law, whereas a facially content-based law might be saved upon a finding the law could be justified without reference to speech or upon a finding that the government’s motivation in passing the law had nothing to do with restricting a particular viewpoint.

In 1994, however, the Court also began hearing cases involving restrictions on abortion protesters, another area of law that has further muddied the content discrimination waters. In *Madsen v. Women’s Health Center, Inc.*,⁶⁸ the Court considered an injunction issued against a group of abortion protesters. Among other things, the injunction prevented picketing and using sound amplification equipment within 300 feet of the clinic staffs’ residences; created a thirty-six-foot buffer zone around the clinic; prevented chanting, singing and

⁶¹*Id.* at 792.

⁶²Minchin, *supra* note 50, at 130.

⁶³512 U.S. 622 (1994).

⁶⁴*Id.* at 642.

⁶⁵*Id.* at 642-43.

⁶⁶Bunker et al., *supra* note 23, at 359.

⁶⁷Kendrick, *supra* note 10, at 238.

⁶⁸512 U.S. 753 (1994).

displaying images observable to those entering the clinic, and prevented protesters from approaching patients or employees within 300 feet of the clinic.⁶⁹ The petitioners argued the injunction was content and viewpoint based because it applied only to abortion protesters. Writing for a six-member majority, Chief Justice William Rehnquist flatly rejected the argument. Chief Justice Rehnquist wrote that an injunction, “by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because the group’s past actions in the context of a specific dispute between real parties.”⁷⁰ To rule the injunction was content based would be to rule that all injunctions were content based, the chief justice contended.⁷¹ Quoting *Ward v. Rock Against Racism*⁷² and returning the Court’s focus to the purpose of a regulation, Chief Justice Rehnquist wrote the Court’s principal inquiry was “whether the government has adopted a regulation of speech ‘without reference to the content of the regulated speech. We thus look to the government’s purpose as the threshold consideration.’”⁷³ The majority opinion concluded that the injunction was issued because the protesters had all violated the court’s original order, not because they all shared the same viewpoint regarding abortion.⁷⁴ Based on this determination, the Court found that the case did not require a “heightened level of scrutiny.”⁷⁵ The Court upheld the noise restrictions and the thirty-six-foot buffer zone, but struck down the remaining provisions because they burdened more speech than necessary to advance the asserted governmental interest.⁷⁶

⁶⁹*Id.* at 759-61.

⁷⁰*Id.* at 762.

⁷¹*Id.*

⁷²491 U.S. 781 (1989).

⁷³*Madsen*, 512 U.S. at 763 (citations omitted).

⁷⁴*Id.* at 764.

⁷⁵The Court held because there were differences between an injunction and a generally applicable ordinance, the traditional intermediate scrutiny test was not “sufficiently rigorous.” *Id.* at 764-65. Instead, the Court found that the standard when evaluating a content neutral injunction should be whether the injunction “burden[s] no more speech than necessary to serve a significant government interest.” *Id.* at 765. This test lay somewhere between traditional strict scrutiny and intermediate scrutiny.

⁷⁶*Id.* at 776 (“In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court’s injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the ‘images observable’ provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction.”).

In 2000, in *Hill v. Colorado*,⁷⁷ another abortion-related speech case, the Court considered a state law that prohibited anyone within 100 feet of a health care facility from knowingly approaching within eight feet of any other person to engage in “oral protest, education, or counseling” without the other’s consent.⁷⁸ A group of “sidewalk counselors”⁷⁹ sought to have the law overturned, arguing the law was unconstitutional on its face and seeking an injunction against its enforcement. In another 6-3 decision, the Court ruled the law was content neutral for two reasons. First, the law did not make any textual distinction between any subjects or views on its face.⁸⁰ The Court reasoned that because the statute placed no restrictions on “either a particular viewpoint or any subject matter that may be discussed by a speaker,”⁸¹ it was content neutral on its face. “The statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries,” the Court wrote.⁸² Second, as it had done in *Madsen*, the majority held the law was content neutral because it was not motivated by an illegitimate purpose. Citing *Ward* again, the Court held the Colorado statute was not adopted because of any disagreement with the content of sidewalk counselors’ speech. To support its holding, the Court cited three points. First, the Court held the law was not a “regulation of speech,” rather, it was a regulation “of the places where some speech may occur.”⁸³ Second, the Court wrote, the Colorado courts’ interpretation of the law’s legislative history and “the State Supreme Court’s unequivocal holding that the statute’s ‘restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech,’” showed the Colorado law prohibiting the speech was not adopted “because of disagreement with the message it conveys”⁸⁴ and thus passed *Ward*’s requirement. Third, the state’s interests in protecting access and privacy, and providing the police with clear guidelines, the Court wrote, were “unrelated to the content of the demonstrators’ speech.”⁸⁵ Thus, while the Court focused on the

⁷⁷530 U.S. 703 (2000).

⁷⁸COLO. REV. STAT. § 18-9—122(3) (1999).

⁷⁹“Sidewalk counselors” sought “to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.” 530 U.S. at 708.

⁸⁰*Id.* at 723.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.* at 719.

⁸⁴*Id.* (citations omitted).

⁸⁵*Id.* at 720.

purpose of the law, it gave great deference to the Colorado courts' analysis without conducting its own inquiry into the law's purpose. Using intermediate scrutiny, the Court held the law was a valid time, place and manner regulation that was content neutral, narrowly tailored to serve significant governmental interests, and left open ample alternative channels for communication.⁸⁶ Thus, *Hill* seemed to suggest, a facially neutral law that had the practical effect of restricting the content or viewpoint of only one group of speakers could be constitutional if its purpose was unrelated to that effect.⁸⁷

In 2014, the long history of how to determine when a law discriminates on the basis of content continued in *McCullen v. Coakley*.⁸⁸ In *McCullen*, the Court ruled that provisions of a Massachusetts law that established thirty-five-foot buffer zones around abortion clinics⁸⁹ were unconstitutional.⁹⁰ Unlike *Madsen* and *Hill*, the opinion in *McCullen* was unanimous. The reasoning of the justices, however, was split.⁹¹

The petitioners, another group of sidewalk counselors,⁹² argued the law was a content-based and viewpoint-based restriction on freedom of expression. Writing for the Court, Chief Justice John Roberts began

⁸⁶*Id.* at 725-26.

⁸⁷The three dissenters in *Hill* vehemently disagreed with the majority's conclusion. Justice Kennedy, looking both to the law's purpose and effect, argued that it was viewpoint based and intended to restrict the speech of abortion protesters. *Id.* at 767-70 (Kennedy, J., dissenting). In Justice Scalia's dissent, joined by Justice Thomas, he argued that it "blinks reality" to interpret the law as content neutral. *Id.* at 748 (Scalia, J., dissenting).

⁸⁸134 S. Ct. 2518 (2014).

⁸⁹MASS. GEN. LAWS, ch. 266, §§ 120E $\frac{1}{2}$ (a), (b) (2012) ("No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.")

⁹⁰134 S. Ct. at 2541.

⁹¹Chief Justice Roberts wrote the opinion for the Court. Justice Scalia concurred in judgment, contending the law was content based and therefore should be subjected to strict scrutiny. *Id.* at 2543-48 (Scalia, J., concurring in judgment). Justice Samuel Alito also wrote an opinion concurring in judgment, contending the law was content based and viewpoint based. *Id.* at 2549-50 (Alito, J., concurring in judgment).

⁹²*Id.* at 2527. While many of the individuals who stand outside Massachusetts abortion clinics were classified by the Court as "protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods," the petitioners in the case offered information about alternatives to abortion. The petitioners considered it essential "to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges" because such interactions were "a more effective means of dissuading women from having abortions than confrontational methods." *Id.*

his analysis by restating the general concepts behind treating content-based laws differently from content-neutral laws and the difference between strict scrutiny and intermediate scrutiny. Chief Justice Roberts wrote the law restricted speech in a traditional public forum, locations where “the government's ability to restrict speech in such locations [was] ‘very limited.’”⁹³ Citing *Mosely*, Roberts wrote that “the guiding First Amendment principle” in such locations was that “government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content.”⁹⁴ Thus, content-based regulations would be subjected to strict scrutiny.⁹⁵ Roberts, however, noted that even in traditional public forums the government had “wider leeway” to regulate the time, place or manner of speech.⁹⁶ These laws would be subjected to intermediate scrutiny.

The petitioners argued the act was content based because of its effect: It “discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions.”⁹⁷ Because the law only applied to abortion clinics, “virtually all speech affected by the Act [was] speech concerning abortion.”⁹⁸ They also argued that by exempting clinic employees and agents, the law was viewpoint based because it favored “one viewpoint about abortion over the other.”⁹⁹ The Court disagreed. The chief justice dealt with the second argument quickly: “There was nothing suspect about providing [an] exemption to allow individuals who work at the clinics to enter or remain in the buffer zones.”¹⁰⁰ Addressing the first argument, Chief Justice Roberts wrote the law was neutral on its face. Invoking what is frequently referred to as the “enforcement authorities” or “enforcing officer” test, he wrote the law would be content based “if it required ‘enforcement

⁹³*Id.* at 2529. (citations omitted).

⁹⁴*Id.* (citations omitted).

⁹⁵*Id.* at 2530 (holding that if the law discriminated on the basis of content “it must be the least restrictive means of achieving a compelling state interest”).

⁹⁶*Id.* 2529 (citations omitted) (finding such regulations constitutional, “[P]rovided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information’”).

⁹⁷*Id.* at 2530.

⁹⁸*Id.* at 2531.

⁹⁹*Id.*

¹⁰⁰*Id.* at 2533 (“Given the need for an exemption for clinic employees, the ‘scope of their employment’ qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs.”)

authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."¹⁰¹ The chief justice noted, however, that was not the case. Whether someone violated the law did not depend on what an individual said, but rather on where it was said.¹⁰² "Indeed," the chief justice wrote, the sidewalk counselors could "violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word."¹⁰³

Chief Justice Roberts next examined the *effect* of the law. He admitted that the buffer zone had the "inevitable effect" of restricting abortion-related speech more than speech on other topics. But, he contended, a facially neutral law "does not become content based simply because it may disproportionately affect speech on certain topics."¹⁰⁴ Quoting *Ward*¹⁰⁵ and *Renton v. Playtime Theatres, Inc.*,¹⁰⁶ Chief Justice Roberts wrote:

On the contrary, "A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages but not others." The question in such a case is whether the law is "justified without reference to the content of the regulated speech."¹⁰⁷

The chief justice wrote that if the law's *purpose* was to prevent undesirable effects that might arise from the impact of the counselors' speech on its audience or the listeners' reactions to their speech, it would be a content-based law. He wrote, "If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech."¹⁰⁸ That, however, was not the purpose of the law. Instead, Chief Justice Roberts contended the law's "stated purpose [was] to 'increase forthwith public safety at reproductive health care facilities.'"¹⁰⁹ Thus, like it had in *Hill*, the Court gave deference to the legislators' stated purpose and did not conduct an independent inquiry into the purpose of the law. Even under intermediate scrutiny, however,

¹⁰¹*Id.* at 2531 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵491 U.S. 781, 791 (1989).

¹⁰⁶475 U.S. 41, 48 (1986).

¹⁰⁷*McCullen*, 134 S. Ct. at 2531 (citations omitted).

¹⁰⁸*Id.* at 2531-32.

¹⁰⁹*Id.* at 2531 (citations omitted).

the Court struck down the law as overbroad.¹¹⁰ Because other laws already protected the right of abortion access by prohibiting per se obstruction of access to clinics,¹¹¹ the Court ruled the law was unconstitutional without expressly overruling *Hill*.

Despite the unanimous outcome, the Court was divided over whether the law was content neutral. Justice Scalia, joined by Justices Kennedy and Thomas, concurred in judgment only. Justice Scalia argued the law was content based and failed strict scrutiny.¹¹² First, Scalia argued the law was content based on its face because it was “a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur — and where that speech can most effectively be communicated.”¹¹³ Second, he contended the law was content based because its purpose was not to promote safety and access, but rather to suppress a particular type of speech.¹¹⁴ Thus, Justice Scalia looked to both the text of the law as well as its purpose to conclude it was content based. Justice Alito also wrote an opinion concurring in judgment. Justice Alito argued the law was both a content-based regulation and a viewpoint-based regulation and was thus unconstitutional.¹¹⁵ Justice Alito wrote that facially neutral laws “enacted for the purpose of suppressing speech on a particular topic” were “not ... content neutral.”¹¹⁶ In addition, Justice Alito wrote the law was viewpoint based because it did not apply to clinic workers.¹¹⁷ The law only affected the speech of anti-abortion protesters and not clinic workers who would hold the opposite views. Thus, both Justice Scalia and Justice Alito suggested in their opinions that the purpose and effect of a law were as important as how the law was written when determining if it was content and viewpoint neutral. The majority focused on how the law was written and its intent, while the concurring opinions focused on how the law was written, its purpose and its effect. While the majority deferred to the stated purpose of the law, the concurring

¹¹⁰*Id.* at 2534.

¹¹¹*Id.* at 2537 (holding “[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests”)

¹¹²*Id.* at 2543-48 (Scalia, J., concurring in judgment).

¹¹³*Id.* at 2543 (Scalia, J., concurring in judgment).

¹¹⁴*Id.* at 2544-45 (Scalia, J., concurring in judgment).

¹¹⁵*Id.* at 2549-50 (Alito, J., concurring in judgment).

¹¹⁶*Id.* at 2550 (Alito, J., concurring in judgment).

¹¹⁷*Id.* at 2549 (Alito, J., concurring in judgment) (“It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.”).

opinions did not. This led one commentator to remark post-*McCullen* that the “crucial distinction” between content-neutral laws and content-based laws had “diminished in clarity, coherence and practical significance.”¹¹⁸ One year after *McCullen*, the Court took another opportunity to clarify the doctrine in *Reed v. Town of Gilbert*.¹¹⁹ Unfortunately, as one scholar noted, the Court “failed again” to do so.¹²⁰

REED V. TOWN OF GILBERT

In the 2015 case *Reed v. Town of Gilbert*,¹²¹ the Court considered sign codes enacted by the town of Gilbert, Arizona. The sign codes identified various categories of signs based on the content of a sign. The code prohibited all outdoor signs within the town limits without a permit, but exempted twenty-three categories, including political and ideological signs. One of the categories was “Temporary Directional Signs Relating to a Qualifying Event.” The code imposed “more stringent restrictions on [this category] of signs than it [did] on signs conveying other messages.”¹²² Under the code, temporary directional signs could be no larger than six square feet. They could be placed on private property or on a public right-of-way, but no more than four signs could be placed on a single property at any time. And they could not be displayed more than twelve hours before the qualifying event and no more than one hour after.¹²³ Clyde Reed, the pastor of a small church without a permanent building, challenged the law. Because the church did not own a building, it held its services in a variety of locations, requiring Reed to place fifteen to twenty temporary signs around Gilbert. The signs typically displayed the church’s name and the time and location for services. Church members would post signs early Saturday and then remove them around midday Sunday.¹²⁴ When the town cited the church for violating the code, confiscated one of the church’s signs, and refused to work on accommodations for the church, Reed filed a complaint arguing the sign code violated the First

¹¹⁸R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That is no Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2082 (2015).

¹¹⁹135 S. Ct. 2218 (2015).

¹²⁰Minchin, *supra* note 50, at 133.

¹²¹135 S. Ct. 2218 (2015).

¹²²*Id.* at 2224.

¹²³*Id.* at 2225.

¹²⁴*Id.*

Amendment.¹²⁵ Although the Supreme Court unanimously agreed the ordinance was unconstitutional, the case produced four opinions.

Writing for the majority, Justice Clarence Thomas noted that a law is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”¹²⁶ According to Justice Thomas, there were two types of regulations that discriminated based on content. First, there were laws that were facially discriminatory. “Some facial distinctions based on a message are obvious,” he wrote, “defining regulated speech by particular subject matter.”¹²⁷ Others, however, according to Justice Thomas were “more subtle,” defining speech “by its function or purpose.”¹²⁸ Both kinds of laws drew distinctions based on the message a speaker conveys, Thomas wrote, and were thus subject to strict scrutiny.¹²⁹ Contrary to what the Ninth Circuit had ruled in the case,¹³⁰ a law that was content based on its face would be subjected to strict scrutiny regardless of the justification or motivation for the law. “In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral,” wrote Justice Thomas.¹³¹ Thomas explained that a government’s purpose in passing a law was irrelevant when the law was content based on its face.¹³² Therefore, it did not matter that the city’s sign ordinance did not “mention any idea or viewpoint, let alone single one out for differential treatment.”¹³³ This, to Justice Thomas, only meant the law was *viewpoint neutral*, not content neutral.¹³⁴

Citing *Ward*, Thomas wrote that Supreme Court precedent recognized a second category of regulations also subject to strict scrutiny: those that were content neutral on their face but could not be “justified without reference to the content of the regulated speech,” or

¹²⁵*Id.* at 2226.

¹²⁶*Id.* at 2227.

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.* at 2228 (“The Court of Appeals [misunderstood] our decision in *Ward* as suggesting that a government’s purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.”)

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* at 2229.

¹³⁴*Id.* at 2230 (“Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech — and only political speech — would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.”)

that were adopted by the government “because of disagreement with the message [the speech] conveys.”¹³⁵ Justice Thomas did not explain *how* courts should determine when a regulation could not be justified without reference to content or *how* to determine when a law was passed because of disagreement with a message. He did not need to elaborate on how laws would be classified as belonging to this second category because, he said, Gilbert’s law was facially discriminatory¹³⁶ and that it failed strict scrutiny.¹³⁷ Justice Thomas explained that an inquiry into the purpose of a law was only necessary if a law was content neutral on its face. Thus, Justice Thomas wrote, there was a two-step process for determining when a law was content based.¹³⁸ First, a court should determine if a law was content based on its face.¹³⁹ If it was, strict scrutiny should apply regardless of the government’s motivation or purpose in enacting the regulation, and the analysis could end without an inquiry into these issues. If, however, the regulation was content neutral on its face, the court should then consider the regulation’s justification or purpose.¹⁴⁰ If the regulation could not be justified without reference to content or was adopted because of animosity toward the speech, the law would be considered content based and strict scrutiny would also apply. Thus, as Professor Armijo noted, Justice Thomas’s two-step analysis seemed “contrary to how the lower courts previously understood and applied content discrimination doctrine.”¹⁴¹ Whereas before a benign government purpose could save a facially content-based law from strict scrutiny, *Reed* stated that was not the case – that instead purpose was only relevant if a law was neutral on its face.

In separate concurrences, three justices explained their concerns with Justice Thomas’s new two-step approach to content discrimination. Justice Samuel Alito, joined by Justices Kennedy and Sonia

¹³⁵*Id.* at 2227 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹³⁶*Id.* (“The Town’s Sign Code is content based on its face. . . . The restrictions in the Sign Code that apply to any given sign . . . depend entirely on the communicative content of the sign.”)

¹³⁷*Id.* at 2231-32.

¹³⁸Justice Thomas wrote in *Reed*, “Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.” *Id.* at 2228.

¹³⁹*Id.* (writing that the Court of Appeals analysis of the sign code was flawed because it “skipped the crucial *first step* in the content-neutrality analysis: determining whether the law is content neutral on its face”) (emphasis added). *See also, id.* (“[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law’s justification or purpose.”) (emphasis in the original).

¹⁴⁰*Id.*

¹⁴¹Armijo, *supra* note 8, at 67.

Sotomayor, wrote separately to quell fears that municipalities were now “powerless to enact and enforce reasonable sign regulations.”¹⁴² Alito went so far as to list nine hypothetical sign regulations that he claimed would survive Justice Thomas’s first step, although at least one of his hypotheticals seemed to in fact make facial references to content.¹⁴³ Concurring in judgment, Justice Breyer echoed his previous First Amendment opinions and called for a more nuanced approach to cases involving content discrimination. Using content discrimination to trigger strict scrutiny made sense to Justice Breyer sometimes, as there were cases in which the Court found that content discrimination was used to suppress a particular viewpoint.¹⁴⁴ Justice Breyer, however, wrote that as useful as the concept was, “[C]ontent discrimination ... cannot and should not *always* trigger strict scrutiny.”¹⁴⁵ Using content discrimination as an “automatic trigger” for using strict scrutiny would go too far, Justice Breyer argued, because regulatory programs “almost always require content discrimination.”¹⁴⁶ Because strict scrutiny “call[s] into play a strong presumption against constitutionality,” Breyer wrote, using it whenever there was content discrimination would “write a recipe for judicial management of ordinary government regularity activity.”¹⁴⁷ Justice Breyer wrote that the majority’s opinion called into question regulations regarding securities, energy conservation labeling-practices, doctor-patient confidentiality, income tax statements, and commercial airplane briefings.¹⁴⁸ Importantly, Justice Breyer contended the majority’s opinion called into question the Court’s commercial speech doctrine.¹⁴⁹

¹⁴²135 S. Ct. at 2233 (Alito, J., concurring).

¹⁴³*Id.* at 2233 (Alito, J., concurring) (stating that regulations “imposing time restrictions on signs advertising a one-time event” would not be content based).

¹⁴⁴*Id.* at 2234 (Breyer, J., concurring in judgment). Justice Breyer identified *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Boos v. Barry*, 485 U.S. 312 (1988), and *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) as cases where the use of strict scrutiny was appropriately triggered by content discrimination. Justice Breyer advocated for an approach that generally treated content discrimination as “a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.” *Id.* at 2235 (Breyer, J., concurring in judgment).

¹⁴⁵*Id.* at 2234 (Breyer, J., concurring in judgment) (emphasis in original).

¹⁴⁶*Id.* (Breyer, J., concurring in judgment).

¹⁴⁷*Id.* (Breyer, J., concurring in judgment).

¹⁴⁸*Id.* at 2235 (Breyer, J., concurring in judgment).

¹⁴⁹*Id.* (Breyer, J., concurring in judgment).

The strongest critic of the majority's opinion was Justice Elena Kagan, who, like Justice Breyer, concurred in judgment only. Justice Kagan, joined by Justices Ruth Bader Ginsburg and Breyer, wrote the majority's two-step approach would threaten the ability of government to regulate private signage and force the courts to strike down numerous other non-censorial laws that nonetheless referred to content.¹⁵⁰ Justice Kagan wrote that the consequence of the majority's approach—

unless courts water down strict scrutiny to something unrecognizable — is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.¹⁵¹

Justice Kagan worried that many common sense regulations unrelated to attempts to suppress favoring or disfavoring a viewpoint would be subjected to strict scrutiny. In addition, Justice Kagan argued that the Court's approach was unneeded since “[T]he law’s distinctions between directional signs and others does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.”¹⁵² Finally, Justice Kagan predicted the majority's opinion would cause problems for lower courts and, by extension, eventually the Supreme Court. Kagan concluded her opinion by writing:

I suspect this Court and others will regret the majority's insistence today on [using strict scrutiny instead of intermediate scrutiny]. As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one — certainly not the majority — has ever explained why the vindication of First Amendment values requires that result.¹⁵³

¹⁵⁰*Id.* at 2236-39 (Kagan, J., concurring in judgment).

¹⁵¹*Id.* at 2237 (Kagan, J., concurring in judgment).

¹⁵²*Id.* at 2239 (Kagan, J., concurring in judgment).

¹⁵³*Id.* (Kagan, J., concurring in judgment).

REACTION TO *REED*

In the aftermath of the Court's decision there was "much wringing of hands and gnashing of teeth,"¹⁵⁴ as commentators speculated that *Reed* would have potentially dramatic implications for First Amendment jurisprudence. *New York Times* Supreme Court correspondent Adam Liptak wrote that *Reed* was the "sleeper case" of the term that "transformed the First Amendment."¹⁵⁵ Liptak quoted Robert Post, a First Amendment scholar and former dean of Yale Law School, as saying the *Reed* decision was "so bold and so sweeping that the Supreme Court could not have thought through its consequences."¹⁵⁶ *Reed*'s logic, Post said, threatened the viability of laws that regulate areas such as advertising and professional malpractice, since laws in those areas regulate speech based on its content. "Effectively," Post said, "this would roll consumer protection back to the 19th century."¹⁵⁷ Liptak characterized *Reed* as marking "an important shift toward treating countless laws that regulate speech with exceptional skepticism."¹⁵⁸ Liptak also quoted Floyd Abrams, a renowned First Amendment lawyer, who called *Reed* a "blockbuster" and celebrated the decision for expanding First Amendment rights.¹⁵⁹

Other commentators called *Reed* a groundbreaking decision¹⁶⁰ that "will likely have profound consequences"¹⁶¹ and "vast implications for First Amendment jurisprudence generally."¹⁶² *Reed* makes "all regulations that target specific topics presumptively unconstitutional," one scholar wrote, which endangers "countless legitimate regulations on expression."¹⁶³ Another wrote that *Reed* "effected a significant change in the law of the First Amendment and local government

¹⁵⁴Armijo, *supra* note 8, at 67.

¹⁵⁵Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES, Aug. 17, 2015, available at <https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, ILL.B.J., Oct. 2015, at 12.

¹⁶¹Anthony D. Lauriello, Note, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1106 (2016).

¹⁶²Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 956 (2017).

¹⁶³Minchin, *supra* note 50, at 124.

regulation.”¹⁶⁴ More narrowly, commentators have focused on *Reed*'s potentially significant impact on commercial speech,¹⁶⁵ the regulation of panhandling,¹⁶⁶ and sign restrictions¹⁶⁷ going forward. And scholars have also analyzed what *Reed* might mean for the vitality of the secondary effects doctrine – the doctrine, mentioned above, where what seem to be facially content-based restrictions on sexually oriented businesses have been treated and upheld as content neutral since the restrictions are justified by the secondary effects¹⁶⁸ of the speech. Professor Eugene Volokh wrote that “it’s hard to see how those [secondary effects] cases could be logically reconciled, on their own terms, with the majority’s firm condemnation of facially content-based laws” in *Reed*.¹⁶⁹

It should be noted, however, that not all commentators have assumed that *Reed* would have such far-reaching consequences. For instance, although she argued that *Reed* “represents an important change in First Amendment doctrine ... that will in all likelihood have a significant impact in many areas of law,”¹⁷⁰ Professor Genevieve Lakier also noted that “*Reed*’s potentially more radical implications may be domesticated by the lower courts.”¹⁷¹ Indeed, a student note in the *Harvard Law Review* in 2016 argued that, “rather than applying to all free speech cases, *Reed* only applies to certain regulations of non-commercial speech and can be distinguished up, down, and sideways in other contexts.”¹⁷² Looking at early lower court applications of *Reed*, the author of the note suggested that lower courts would

¹⁶⁴Kolby P. Marchand, *Free Speech and Signage After Reed v. Town of Gilbert: Signs of Change from the Bayou State*, 44 S.U. L. REV. 181, 182 (2017).

¹⁶⁵See Mason, *supra* note 162.

¹⁶⁶See Lauriello, *supra* note 161. See also Steven J. Ballew, Note, *Panhandling and the First Amendment: How Spider-man is Reducing the Quality of Life in New York City*, 81 BROOKLYN L. REV. 1167 (2016).

¹⁶⁷See Marchand, *supra* note 164. See also Brian J. Connolly & Alan C. Weinstein, *Sign Regulation after Reed: Suggestions for Coping with Legal Uncertainty*, 47 THE URB. LAW. 569 (2015).

¹⁶⁸See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

¹⁶⁹Eugene Volokh, *Supreme Court Reaffirms Broad Prohibition on Content-based Speech Restrictions*, in *Today’s Reed v. Town of Gilbert Decision*, THE VOLOKH CONSPIRACY (June 18, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/?utm_term=.9383c4366a04. See also Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 SANTA CLARA L. REV. 385 (2017).

¹⁷⁰Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235.

¹⁷¹*Id.* at 293.

¹⁷²Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1981-1982 (2016).

narrowly interpret *Reed* and resist its “deregulatory potential.”¹⁷³ Similarly, in his 2017 law review article, Professor Enrique Armijo implored those overreacting to *Reed* to relax.¹⁷⁴ Armijo celebrated that *Reed* reduced the role that government purpose plays in determining content neutrality. He acknowledged that after *Reed* governments may, for instance, have to amend sign laws and more narrowly tailor panhandling statutes, but he said First Amendment advocates should welcome imposing a “discipline upon the government when it is regulating speech based on its content.”¹⁷⁵ Ultimately, Armijo argued that First Amendment jurisprudence should better recognize that the effect of regulations, rather than the government purpose that motivated them, is a more consequential issue and should merit more concern in the content-neutrality calculus.

REED IN THE U.S. CIRCUIT COURTS OF APPEALS

Despite the concerns voiced by scholars, it is apparent that *Reed* has not produced the far-reaching consequences that it could have. *Reed* has had an impact – just not as dramatic a one as Post and others predicted. *Reed* has been cited in almost seventy circuit cases that can be broken down into several broad categories: cases that were reheard or decided differently because of *Reed*; cases that discussed whether *Reed* altered the approach to commercial speech, the secondary effects doctrine or professional speech; and cases that have focused on — or seemingly ignored — *Reed*'s new two-step approach to determining content discrimination.¹⁷⁶ In this last category, some courts have used *Reed*'s new approach, while others have declined to use it or simply ignored it. Another category of cases involves courts citing *Reed* but avoiding a determination of whether a regulation was content based under *Reed* by reasoning that it didn't matter what level of scrutiny they used. Some cases could be classified in more than one of these categories. For other cases, the brevity of a court's discussion of *Reed* made it difficult to categorize the case at all.

Overall, responses to *Reed* have varied, even within circuits. The analysis that follows organizes *Reed*'s citations by circuit in order to demonstrate the lack of coherence in most circuits' approach to *Reed*.

¹⁷³*Id.* at 1987.

¹⁷⁴Armijo, *supra* note 8.

¹⁷⁵*Id.* at 84.

¹⁷⁶In addition, a number of cases cited *Reed* for reasons unrelated to its approach to content discrimination. Those cases are not discussed in this article.

Some judges believe *Reed* to be a sea change. Others have largely limited *Reed* or unevenly applied Justice Thomas's two-step approach. Some cases seem to simply ignore *Reed*'s implications. In sum, it appears as if to date *Reed* has done little to clarify a doctrine that continues to confuse.

First Circuit

The U.S. Court of Appeals for the First Circuit has cited *Reed* in five cases. In three of them, the First Circuit cited *Reed* in ruling that the speech restrictions at issue were *not* content based, and in the fourth case, the court decided not to resolve whether the law at issue was content discriminatory. Shortly after *Reed*, in *Cutting v. City of Portland*,¹⁷⁷ the First Circuit seemingly ignored *Reed*'s two-step approach, ruling that a city ordinance that prohibited "standing, sitting, staying, driving, or parking on median strips"¹⁷⁸ was content neutral. The law, which the city passed aiming to curb an increase in panhandling on traffic medians, was neutral, the court ruled, since it restricted speech only on the basis of *where* speech takes place (median strips) and not on *what* was said. "The ordinance does not take aim at – or give special favor to – any type of messages conveyed in such a place because of what the message says," the court noted.¹⁷⁹ The court cited *Reed* as the authoritative precedent involving what is meant by the term "content based."¹⁸⁰ The court, however, did not acknowledge that *Reed* appeared to create a two-step process (first looking to face, then looking to purpose), and in ruling that the law was content neutral, the court generally did not scrutinize the law's purpose. The court held that intermediate scrutiny applied, which the law failed since, in the court's words, it "indiscriminately bans virtually all expressive activity in all of the City's median strips and thus is not narrowly tailored to serve the City's interest in protecting public safety."¹⁸¹

The First Circuit also cited *Reed* in ruling that two other speech restrictions were content neutral. In *Suydam v. Puiia*,¹⁸² the court agreed with a district court ruling that a town's city manager was entitled to qualified immunity after he was sued for asking Richard

¹⁷⁷802 F.3d 79 (1st Cir. 2015).

¹⁷⁸*Id.* at 81.

¹⁷⁹*Id.* at 85.

¹⁸⁰*Id.* (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

¹⁸¹*Id.* at 81.

¹⁸²2017 U.S. App. LEXIS 21049 (1st Cir. 2017).

Suydam to leave his signs outside the meeting room at the Rumford, Maine, town hall. Citing *Reed*, the First Circuit recognized that the town and its manager could not restrict Suydam's speech "because of its message, its ideas, its subject matter, or its content,"¹⁸³ but the court determined that was not what happened. "[T]he undisputed record evidence establishes that appellant was asked to leave his signs outside the meeting room because of the manager's mistaken belief that the signs violated Maine election law, not because of what they said,"¹⁸⁴ the court ruled.

In another case, however, the First Circuit followed *Reed*'s two-step process to determine a regulation was content neutral in *March v. Mills*.¹⁸⁵ At issue there was a "noise provision" that barred a person from "making noise that 'can be heard within a building' when such noise is made intentionally, following an order from law enforcement to cease making it, and with the additional 'intent either: (1) [t]o jeopardize the health of persons receiving health services within the building; or (2) [t]o interfere with the safe and effective delivery of those services within the building.'"¹⁸⁶ Andrew March, a protester who opposed abortion, filed suit, claiming the provision violated the First Amendment. The district court agreed, relying on *Reed* and ruling that the provision was content based and that it failed strict scrutiny.

But, in 2017, the First Circuit reversed, recognizing that, after *Reed*, there are "two distinct ways in which a regulation may be deemed to be content based"¹⁸⁷ – a regulation could be discriminatory on its face or, though facially content neutral, a regulation could be motivated by a discriminatory purpose.¹⁸⁸ March, the protester, argued that by carving out a "disruptive-intent requirement"¹⁸⁹ – targeting not all noise but the subset of speech with the intent to "jeopardize the health of persons receiving health services within the building" or to "interfere with the safe and effective delivery of those services within the building"¹⁹⁰ – the provision became content based on its face. The provision's narrower reach, he argued, regulated

¹⁸³*Id.* at 2 (quoting *Reed*, 135 S. Ct. at 2226).

¹⁸⁴*Id.*

¹⁸⁵867 F.3d 46 (1st Cir. 2017).

¹⁸⁶*Id.* at 49-50.

¹⁸⁷*Id.* at 54.

¹⁸⁸*Id.* "Second, there is a 'separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (quoting *Reed*, 135 S. Ct. at 2227).

¹⁸⁹*Id.* at 56.

¹⁹⁰*Id.* at 49-50.

“noisemaking based on the content of the message conveyed, rather than on the manner of its expression.”¹⁹¹ Not so, the First Circuit ruled. Judge David Barron wrote for the First Circuit:

On its face, the Noise Provision says not a word about the relevance – if any – of the content of the noise that a person makes to the determination of whether that person has the requisite disruptive intent. And, given the limitless array of noises that may be made in a disruptive manner, there is no reason to conclude that disruptive intent is necessarily a proxy for a certain category of content.¹⁹²

The court found, for example, that the provision would also restrict the volume that hospital staff could use in calling for higher wages during a labor strike outside a hospital, provided the staff intended for the noise to disrupt the delivery of health services within the building. The court was saying, in other words, that the noise provision did not only impede speech protesting abortion. Judge Barron wrote that whether an individual has the requisite intent to disrupt the delivery of health services “is a fact-specific inquiry that may depend upon a variety of factors, including, crucially, whether the individual has ignored an initial order by a law enforcement officer to cease such noise.”¹⁹³ The court wrote, citing *Reed*, “[A]t least on its face, the measure does not say anything that makes the outcome of that evidentiary inquiry turn on the ‘communicative content’ of the noise.”¹⁹⁴

March also pointed to *McCullen* for support. In *McCullen*, remember, the Supreme Court, citing precedent, said that a law would be considered content based “if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.”¹⁹⁵ March argued that the noise provision did just that. Again, the First Circuit disagreed: The provision’s “application depends on whether the noisemaker intended to be disruptive in making the noise, whatever its content. Thus, nothing on the face of the Noise Provision indicates that enforcement authorities must examine the content of the

¹⁹¹*Id.* at 56 (“March contends that the disruptive-intent requirement necessarily ensures that those who make noise while protesting abortion rights will be treated less favorably than other noisemakers because, unlike in the case of other speakers, the content of their message necessarily will establish their disruptive intent.”).

¹⁹²*Id.*

¹⁹³*Id.* at 57 (internal quotations and citations omitted).

¹⁹⁴*Id.* (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

¹⁹⁵*McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citations omitted).

speaker's communication in order to find a violation."¹⁹⁶ Facially, the court ruled the provision was thus neutral. And, turning to *Reed*'s second step, the First Circuit ruled the provision was motivated by a neutral purpose as well – preserving patients' rights “to receive safe and effective medical care.”¹⁹⁷ The First Circuit concluded, therefore, that the provision was a content-neutral restriction and that it survived intermediate scrutiny.

Finally, in *Rideout v. Gardner*,¹⁹⁸ the First Circuit passed on deciding whether New Hampshire's “ballot selfie” law was content based. In that case, a New Hampshire law barred voters from “photographing their marked ballots and publicizing such photographs.”¹⁹⁹ Heavily relying on *Reed*, the district court ruled the law was content based and failed strict scrutiny. The First Circuit, however, found that it did not need to even resolve whether the law was content based or content neutral since the law failed even the less-rigorous intermediate scrutiny review.

Second Circuit

Reed has been cited just twice in the Second Circuit and has not had a meaningful impact on the circuit's case law. In *Citizens United v. Schneiderman*,²⁰⁰ the court cited *Reed* in stating that it invokes strict scrutiny for regulations that, either on their face or because of their purpose, are content based. But citing campaign finance precedents, including *Citizens United v. FEC*²⁰¹ and *Doe v. Reed*,²⁰² the court found neutral disclosure requirements, such as the New York regulation here that required nonprofit organizations to disclose their donors on a yearly basis, to be content neutral. And in *Expressions Hair Design v. Schneiderman*,²⁰³ the Second Circuit cited *Reed* for the proposition that “the government generally may not enact speech restrictions favoring one message over another,”²⁰⁴ but the court held

¹⁹⁶867 F.3d at 60.

¹⁹⁷*Id.* at 62.

¹⁹⁸838 F.3d 65 (1st Cir. 2016). In addition to the four cases discussed in this section, a judge concurring in part and dissenting in part cited *Reed*, though not consequentially, in the First Circuit case *Sindi v. El-Moslimary*, 2018 U.S. App. LEXIS 18857, 100 (1st Cir. 2018) (Barron, J., concurring in part and dissenting in part).

¹⁹⁹*Id.* at 67.

²⁰⁰882 F.3d 374 (2nd Cir. 2018).

²⁰¹558 U.S. 310 (2010).

²⁰²561 U.S. 186 (2010).

²⁰³808 F.3d 118 (2nd Cir. 2015).

²⁰⁴*Id.* at 132.

that principle was “of no relevance whatsoever”²⁰⁵ with respect to its resolution of the regulation at issue in the case.²⁰⁶

Third Circuit

Reed has been more of a difference-maker in the Third Circuit, although it has not always been fully embraced. In *Bruni v. City of Pittsburgh*,²⁰⁷ for example, the court reviewed an ordinance that created a fifteen-foot buffer zone around “any entrance to the hospital and or health care facility.”²⁰⁸ No one could “knowingly congregate, patrol, picket or demonstrate” in that zone.²⁰⁹ The petitioners in the case argued the ordinance impeded the sidewalk counseling they engaged in on the public sidewalk outside of a Pittsburgh Planned Parenthood facility.²¹⁰ In an earlier iteration of the case, the Third Circuit had ruled the buffer-zone ordinance was content neutral. But the plaintiffs argued that *Reed* had changed how courts draw the line between content-neutral and content-based restrictions. The Third Circuit noted that, in *Reed*, the Supreme Court had “identified a ‘subtle’ way in which statutes can, on their face, discriminate based upon content, namely by ‘defining regulated speech by its function or purpose.’”²¹¹ That was the case here, the plaintiffs argued. Because the ordinance barred demonstrating or picketing, they contended, it “runs afoul of *Reed* by limiting speech based upon its intended purpose.”²¹² Vacating the district court’s dismissal of the case, the Third Circuit concluded that, although the plaintiffs made a “compelling argument that *Reed* has altered the applicable analysis of content neutrality,”²¹³ the court did not need to rule definitively on the impact of *Reed* since the plaintiffs had presented a viable free-speech challenge to

²⁰⁵*Id.*

²⁰⁶The case involved a New York law that provided that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.” *Id.* at 121. The Second Circuit held that the law regulated conduct, not speech. The Supreme Court later vacated and remanded the Second Circuit’s decision, but the Court’s opinion did not mention or cite *Reed*. See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

²⁰⁷824 F.3d 353 (3rd Cir. 2016).

²⁰⁸*Id.* at 357.

²⁰⁹*Id.*

²¹⁰“[T]hrough close conversation,” the petitioners try “to persuade women to forego abortion services.” *Id.* at 356.

²¹¹*Id.* at 364 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

²¹²*Id.*

²¹³*Id.*

the ordinance even assuming it was content neutral.²¹⁴ Thus the case is another example of a court seemingly avoiding *Reed*.

But one week later, in *Free Speech Coalition, Inc. v. Attorney General United States*,²¹⁵ the Third Circuit more fully explored the change that *Reed* caused. The case involved the constitutionality of recordkeeping, labeling and inspection requirements for pornography producers set forth in two federal statutes. To ensure that performers were not minors, the statutes required producers of material depicting sexually explicit conduct or material that simulated sexually explicit conduct to “examine an identification document for each performer and to maintain records listing each performer’s name, date of birth, and any other name that the performer has previously used.”²¹⁶ When the Third Circuit first heard a challenge to the laws in 2012, it ruled that they were content-neutral regulations, subject to intermediate scrutiny. In reaching that conclusion, the court relied on the Supreme Court’s decision in *Ward v. Rock Against Racism*²¹⁷ and focused on the purpose of the statute – “protecting children from being used in child pornography.”²¹⁸ In *Ward*, the Supreme Court had found that “the government’s purpose is the controlling consideration”²¹⁹ in determining content neutrality. The Third Circuit held that because the laws were thus motivated by a neutral purpose, they were content neutral. Any impact on the plaintiffs’ “protected speech is collateral to the Statutes’ purpose of protecting children from pornographers,”²²⁰ the court ruled.

But the plaintiffs filed a petition for rehearing in light of *Reed*,²²¹ and, as a result of *Reed*, the Third Circuit changed its analysis and ruled the statutes were instead content based and subject to strict scrutiny. Under *Reed*, the Third Circuit noted, “[I]n determining

²¹⁴The court ultimately relied on *McCullen* in vacating the district court’s dismissal in the case: “*McCullen* teaches that the constitutionality of buffer zone laws turns on the factual circumstances giving rise to the law in each individual case — the same type of buffer zone may be upheld on one record where it might be struck down on another. Hence, dismissal of claims challenging ordinances like the one at issue here will rarely, if ever, be appropriate at the pleading stage.” *Id.* at 357.

²¹⁵825 F.3d 149 (3rd Cir. 2016).

²¹⁶*Id.* at 154-55.

²¹⁷491 U.S. 781 (1989).

²¹⁸825 F.3d at 156.

²¹⁹491 U.S. at 791.

²²⁰825 F.3d at 157.

²²¹The Third Circuit also found that the intervening Supreme Court decision in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), forced it to re-examine the inspection provisions of the statutes in question and conclude they were facially unconstitutional under the Fourth Amendment.

whether the Statutes are content based or content neutral for purposes of our First Amendment analysis... our first step must be to conduct a facial examination of the Statutes.”²²² Only if a law is content neutral on its face may a court “then look to any benign purpose.”²²³ And here, the Third Circuit held, each of the statutes is “clearly content based on its face.”²²⁴ Given that the statutes apply only to visual depictions of sexually explicit conduct and of simulated sexually explicit conduct, the court held, quoting *Reed*, the statutes’ “restrictions ‘depend entirely on the communicative content’ of the speech.”²²⁵

The attorney general argued that the Court’s secondary effects doctrine should apply and render the statutes content neutral. The Third Circuit disagreed. It recognized that *Reed*’s logic would seem to proscribe any inquiry into the purpose of a facially content-based statute, which would thus seem to undermine the secondary effects cases entirely. But the court found that it did not need to reach the issue of whether the secondary effects doctrine survived *Reed* because “this is not a secondary effects case.”²²⁶ The secondary effects line of cases involved “regulations affecting physical purveyors of adult sexually explicit content”²²⁷ with laws targeting “the adverse secondary effects of protected speech and not the speech itself.”²²⁸ That was not at issue here. “To allow the secondary effects doctrine to transform a facially content-based law into a content-neutral one any time the Government can point to a laudable purpose behind the regulation that is unrelated to protected speech would render *Reed* a nullity,”²²⁹ the Third Circuit ruled. And *Reed* was far from a nullity, the court noted. In a footnote, the court found that *Reed* “represents a drastic change in First Amendment jurisprudence,”²³⁰ and it pointed out that, at oral argument, counsel for the government argued that *Reed* “will

²²²825 F.3d at 160.

²²³*Id.*

²²⁴*Id.*

²²⁵*Id.* (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

²²⁶*Id.* at 161.

²²⁷*Id.* “We deem it significant that the Supreme Court has never actually *applied* the secondary effects doctrine outside the realm of brick-and-mortar purveyors of adult sexually explicit content. We decline to do so now, because any application of the secondary effects doctrine beyond what the Supreme Court has explicitly endorsed would bring this case into direct conflict with *Reed*’s pronouncement that we cannot look behind a facially content-based law to a benign motive in order to shield the law from the rigors of strict scrutiny.” *Id.* at 163.

²²⁸*Id.* at 160.

²²⁹*Id.* at 163.

²³⁰*Id.* at 160 n.7.

be a much litigated decision” because “it’s so broad and has impacts in many First Amendment areas.”²³¹ Here, *Reed* forced the Third Circuit to reverse its earlier analysis of the laws, since it made clear that the government’s purpose was no longer the controlling consideration. The court concluded:

Despite the very commendable purpose of seeking to prevent child pornography by making it easier for law enforcement officials to ascertain the ages of the performers in the pornographic materials, we can no longer look to the purpose of a law that draws a content-based distinction on its face in determining what level of scrutiny to apply.²³²

The Third Circuit remanded the case to the district court to determine whether the statutes survived strict scrutiny.

Fourth Circuit

Reed has largely reshaped the Fourth Circuit’s approach to determining content neutrality, with most cases in the circuit focusing on how *Reed*’s two-step process conflicted with the circuit’s previous approach. The circuit first reached that conclusion in *Cahaly v. Larosa*,²³³ decided less than two months after *Reed*. A political consultant had been arrested for alleged violations of South Carolina’s anti-robocall statute. The statute restricted political and consumer robocalls but permitted “unlimited proliferation of all other types.”²³⁴ In reaching its decision, the Fourth Circuit noted that *Reed* “clarified the content-neutrality inquiry”²³⁵ by emphasizing that the “crucial first step”²³⁶ in the inquiry is to determine whether the restriction is neutral on its face, and, if it is, to only then look at the government’s purpose. “This formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality,” the Fourth Circuit held.²³⁷ Before

²³¹*Id.* at 163 n.10.

²³²*Id.* at 164. *Reed* has also been cited, though not consequentially, in two other Third Circuit decisions. See *Mirabella v. Villard*, 853 F.3d 641 (3rd Cir. 2017); *Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Simandle*, 658 Fed. Appx. 127 (3rd Cir. 2016).

²³³796 F.3d 399 (4th Cir. 2015).

²³⁴*Id.* at 406.

²³⁵*Id.* at 404.

²³⁶*Id.* at 405 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015)).

²³⁷*Id.*

Reed, the circuit had relied on *Ward* and held that the “government’s purpose is the controlling consideration.”²³⁸ But *Reed* made clear, the Fourth Circuit noted, that “at the first step, the government’s justification or purpose in enacting the law is irrelevant.”²³⁹

Applying that first step, the court found that the anti-robocall statute made content distinctions on its face and thus was content based. The law applied to calls with a consumer or political message but not to calls made for any other purpose. Quoting *Reed*, the court said the law, in other words, “‘applies to particular speech because of the topic discussed or the idea or message expressed.’”²⁴⁰ The court found that it thus did not need to even reach the second step to consider the government’s purpose. The law was facially content based, so strict scrutiny applied, which it failed.

The circuit’s revised two-step formulation for determining content neutrality was central to it striking down another law in the 2016 case *Central Radio Company v. City of Norfolk*.²⁴¹ There, a radio manufacturing and repair business and two of its managers challenged a sign ordinance they said unconstitutionally exempted certain displays from regulation. The ordinance in question “applied to any sign within the city which is visible from any street, sidewalk or public or private common open space,” but it exempted “any flag or emblem of any nation, organization of nations, state, city, or any religious organization, or any works of art which in no way identify or specifically relate to a product or service.”²⁴² Before *Reed* was decided, the Fourth Circuit had held the sign ordinance was a content-neutral restriction that passed intermediate scrutiny because of its benign purpose. But once *Central Radio* petitioned for certiorari to the Supreme Court, after *Reed*, the Court granted the petition, vacated the Fourth Circuit’s opinion, and remanded for the Fourth Circuit to consider the case in light of *Reed*.²⁴³

And with *Reed* as its guide, the Fourth Circuit changed its holding and ruled the ordinance was a content-based regulation that failed strict scrutiny. Citing *Cahaly*, the court noted that the Supreme Court rejected²⁴⁴ the circuit’s previous approach to determining content

²³⁸See *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

²³⁹796 F.3d at 405.

²⁴⁰*Id.* (quoting *Reed*, 135 S. Ct. at 2227).

²⁴¹811 F.3d 625 (4th Cir. 2016).

²⁴²*Id.* at 629.

²⁴³See *Cent. Radio Co. v. City of Norfolk*, 776 F.3d 229 (4th Cir. 2015), *vacated and remanded*, 135 S. Ct. 2893 (2015).

²⁴⁴811 F.3d at 632.

neutrality that relied solely on evaluating governmental purpose. By instead beginning the analysis by focusing on whether the law was discriminatory *on its face*, the court found the law to be content based. The court held:

The former sign code exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems. In addition, it exempted ‘works of art’ that ‘in no way identif[ied] or specifically relate[d] to a product or service,’ but it applied to art that referenced a product or service.²⁴⁵

On its face, the Fourth Circuit ruled, quoting *Reed*, the sign code was thus content based “because it applied or did not apply as a result of content, that is, ‘the topic discussed or the idea or message expressed.’”²⁴⁶

Fifth Circuit

Reed has had less of a jurisprudence-shifting role in the Fifth Circuit, which has largely avoided deciding what changes, if any, are required. The circuit has cited *Reed* three times. In *United States v. Petras*,²⁴⁷ the court recognized that *Reed* might have altered its previous interpretation of a regulation, but ultimately found that it did not need to answer that question. In the case, Jonathan Petras and Wisam Shaker had been convicted of interfering with the performance of the duties of a flight crew by intimidation, in violation of a federal law that provides that “any individual on an aircraft ... who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the [crew] is criminally liable.”²⁴⁸ Petras and Shaker intimidated the crew by “using profane, aggressive language and menacing conduct that made the attendants fearful for their safety.”²⁴⁹ Petras and Shaker moved to

²⁴⁵*Id.* at 633.

²⁴⁶*Id.* (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). The Fourth Circuit again recognized the significance of *Reed* in *Lucero v. Early*, 873 F.3d 466 (4th Cir. 2017). The district court in the case “did not consider *McCullen*, and did not have the benefit of *Reed*,” and the Fourth Circuit thus vacated and remanded the case so that the district court could appropriately analyze whether the restriction in question – which confined leafleting outside a Baltimore arena to an area designated for protest activities – was content neutral or content based. *Id.* at 467.

²⁴⁷870 F.3d 155 (5th Cir. 2018).

²⁴⁸*Id.* at 160.

²⁴⁹*Id.*

dismiss their indictment, arguing that it violated the First Amendment. The district court denied their motion, relying on a 1992 Fifth Circuit decision, *United States v. Hicks*,²⁵⁰ which had upheld a comparable law as a time, place and manner restriction. Petras and Shaker, however, argued that, after *Reed*, the law should be considered content based instead.

In a footnote, the Fifth Circuit said it was “a close call” whether *Hicks*’ reasoning as to time, place and manner restrictions survives *Reed*.²⁵¹ On the one hand, the court said, the law prohibits “‘intimidation’ on airplanes – which may not turn on what the speaker actually says.”²⁵² As an example, the court explained that a speaker could use any combination of words – the particular words themselves would not matter – “while shouting, acting aggressively, and lunging at flight attendants in a way that is intimidating.”²⁵³ So even under *Reed*, the law “may not be content-based.”²⁵⁴ But to support the other side of the argument, the court pointed to an earlier Ninth Circuit opinion that suggested that a statute that “punishes speech precisely because of the ‘intimidat[ing]’ message it contains” necessarily makes that statute content based.²⁵⁵ Ultimately, the Fifth Circuit decided that it did not need to answer the question because, even if the law were content based, it survived strict scrutiny.²⁵⁶ The law served the compelling government interest of “safety in air travel,”²⁵⁷ the court held, and it was narrowly tailored. Thus, the case can be classified as avoiding *Reed*.

The Fifth Circuit’s two other citations to *Reed* came in *Defense Distributed v. U.S. Department of State*²⁵⁸ and *Serafine v. Branaman*.²⁵⁹ In *Defense Distributed*, the Fifth Circuit upheld a district court’s decision to deny a preliminary injunction to an organization that creates computer files used to make weapons and weapon

²⁵⁰980 F.2d 963 (5th Cir. 1992).

²⁵¹870 F.3d at 166 n. 19.

²⁵²*Id.*

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵*Id.* (quoting *United States v. Cassel*, 408 F.3d 622, 627 (9th Cir. 2005)).

²⁵⁶In *Hicks*, the Fifth Circuit had ruled that the regulation under review there would survive strict scrutiny, and the court in *Petras* held that the “defendants have identified no case that would overrule *Hicks*’s determination that [the statute] is a permissible content-based law.” *Id.* at 167.

²⁵⁷*Id.*

²⁵⁸838 F.3d 451 (5th Cir. 2016).

²⁵⁹810 F.3d 354 (5th Cir. 2016).

parts.²⁶⁰ Defense Distributed wanted to share the computer files freely online. But, in 2013, the state department sent the organization a letter “requesting that it remove the files from the internet on the ground that sharing them in that manner violates certain laws.”²⁶¹ The organization sued, and the district court concluded that, at least at the preliminary injunction stage, the public interest in national security outweighed the plaintiffs’ constitutional rights. In a 2-1 decision, the Fifth Circuit affirmed, concluding that, at this stage, the district court had not abused its discretion.²⁶² Judge Edith Jones wrote a lengthy dissent. Among other things, she argued citing *Reed* that, the prepublication review scheme the government wanted to impose amounted to a content-based restriction on its face that merited strict scrutiny review.²⁶³

Finally, in *Serafine*, the Fifth Circuit cited *Reed* once, in a footnote. In the case, the Texas State Board of Examiners of Psychologists, relying on the state’s psychologists’ licensing act, ordered a candidate for state senate to stop labeling herself as a psychologist on her campaign Web site. Mary Serafine had completed a post-doctoral fellowship in psychology at Yale University and was a professor in the psychology departments at Yale and Vassar College, but she was not licensed to practice as a psychologist in Texas.²⁶⁴ Serafine sued. The Fifth Circuit ruled the relevant section of the act was a facially “content-based restriction on speech — proscribing one’s ability to claim to be a psychologist.”²⁶⁵ In ruling that the act was fatally overbroad, the court cited *Reed* for the proposition that the government “has no power to restrict expression because of its message, its ideas, its subject matter,

²⁶⁰In the court’s words, “Defense Distributed’s innovation was to create computer files to allow people to easily produce their own weapons and weapon parts using relatively affordable and readily available equipment.” 838 F.3d at 454.

²⁶¹*Id.* at 455. “Under the Arms Export Control Act (‘AECA’), ‘the President is authorized to control the import and the export of defense articles and defense services’ and to ‘promulgate regulations for the import and export of such articles and services.’” *Id.* (quoting *Def. Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 687-88 (W.D. Tex. 2015)).

²⁶²*Id.* at 459. “The district court’s decision was based not on discounting Plaintiffs-Appellants’ interest but rather on finding that the public interest in national defense and national security is stronger here, and the harm to the government is greater than the harm to Plaintiffs-Appellants.” *Id.* at 459.

²⁶³*Id.* 469. “As applied to the publication of Defense Distributed’s files, this process is a content-based restriction on the petitioners’ domestic speech ‘because of the topic discussed.’” *Id.* (Jones, J., dissenting) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

²⁶⁴810 F.3d 354, 358 (5th Cir. 2016).

²⁶⁵*Id.* at 361.

or its content,”²⁶⁶ but the court did not engage in any discussion of the specifics of *Reed* or changes it made to First Amendment law.

Sixth Circuit

The Sixth Circuit has cited *Reed* six times. *Reed*'s most noticeable impact in a circuit case came in an unpublished opinion in 2017. When the Sixth Circuit first decided the case, before *Reed*, the plaintiff lost. When the case was reheard after *Reed*, however, the outcome changed. In *Wagner v. City of Garfield Heights*, Frank Wagner placed a sixteen-square-foot political sign on the lawn of his home.²⁶⁷ The City of Garfield sent him a letter threatening legal action and explaining that his sign exceeded a six-square-foot limit for political lawn signs established by municipal ordinance.²⁶⁸ Wagner sued, and though he won in district court, the Sixth Circuit ruled against him in 2014, holding that the district court had erred by applying an absolutist test for content-based discrimination and that instead “context matter[s] when a court assesses content neutrality.”²⁶⁹ Because the context of the case suggested that the city did not have an illegitimate purpose – that the city had not “singled out political signs in an effort to suppress political speech”²⁷⁰ – the court applied intermediate scrutiny and upheld the law. Wagner appealed to the Supreme Court, and the Court decided *Reed* while Wagner’s petition was pending. In light of *Reed*, the Court granted the petition, vacated the Sixth Circuit’s judgment, and remanded the case.

On remand, the Sixth Court changed its ruling and held that the sign restrictions were content based and subject to strict scrutiny, which they failed for not being narrowly tailored. In its per curiam opinion, the court said its “context-dependent inquiry” into the content neutrality of the restrictions in its 2014 holding was “inconsistent with *Reed*.”²⁷¹ The court wrote:

In particular, our holding that the fact that a regulatory scheme requires a municipality to “examine the content of a sign to determine which ordinance to apply should merely be seen as indicative, not

²⁶⁶*Id.* at 370 n. 35 (quoting *Reed*, 135 S. Ct. at 2226 (citations omitted)).

²⁶⁷The sign expressed his opposition to a councilwoman’s reelection campaign.

²⁶⁸675 Fed. Appx. 599, 602 (6th Cir. 2017).

²⁶⁹*Id.* at 603 (quoting *Wagner v. City of Garfield Heights*, 577 Fed. Appx. 488, 493, 495 (6th Cir. 2014)).

²⁷⁰*Id.*

²⁷¹*Id.* at 604.

determinative, of whether a government has regulated for reasons related to content” appears to run afoul of *Reed*'s central teaching.²⁷²

The sign restrictions applied only to political signs – meaning they were discriminatory on their face – so the court concluded the regulation thus “applies to particular speech because of the topic discussed,” and *Reed* commands that it be subject to strict scrutiny.²⁷³

The Sixth Circuit turned to *Reed* for support in *Susan B. Anthony List v. Driehaus*²⁷⁴ in ruling that Ohio’s political false-statements laws²⁷⁵ were content based since they focused on specific subject matter – the laws “only govern[ed] speech about political candidates during an election.”²⁷⁶ The Sixth Circuit found that even though the state’s interests in preserving the integrity of elections was compelling, the laws failed strict scrutiny because they were not narrowly tailored.

In another 2016 case, *Phillips v. DeWine*,²⁷⁷ a dissenting judge pointed to *Reed* in arguing a regulation was content based. The majority in the case ruled that death-row inmates lacked standing to challenge a “newly enacted statutory scheme concerning the confidentiality of information related to lethal injection.”²⁷⁸ But Judge Jane Stranch dissented, arguing that the inmates had standing and that the provision in question – which allows any person or entity who has participated in an Ohio execution “to bring a civil cause of action against any person who discloses [his or her] identity and participation in the activity”²⁷⁹ – was an unconstitutional content-based restriction. Quoting *Reed* – not just the majority opinion but also Justices Samuel Alito’s and Kagan’s concurrences – for explanation of what counts as content discrimination and also why content restrictions are

²⁷²*Id.* (internal citations omitted).

²⁷³*Id.* at 607 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). See also *EMW Women’s Surgical Center v. Beshear*, where the Sixth Circuit cited *Reed* for the proposition that “strict scrutiny generally applies to content-based restrictions on speech.” 2017 U.S. App. LEXIS 24931, *7 (6th Cir. 2017).

²⁷⁴814 F.3d 466 (6th Cir. 2016).

²⁷⁵“Ohio’s political false-statements laws prohibit persons from disseminating false information about a political candidate in campaign materials during the campaign season ‘knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.’” *Id.* at 469-70 (citations omitted).

²⁷⁶*Id.* at 473. The court found: “The Supreme Court’s 2015 decision in *Reed v. Town of Gilbert* sought to clarify the level of review due to certain speech prohibitions. That test focused on whether a law was content-based at all, rather than the type of content the law targeted.” *Id.*

²⁷⁷841 F.3d 405 (6th Cir. 2016).

²⁷⁸*Id.* at 410.

²⁷⁹*Id.* at 422 (Stranch, J., dissenting).

worrisome, Judge Stranch said the provision here was content based on its face. “To determine whether a person’s identity has been disclosed,” she argued, “one must look to the content of the speech, not simply the time, place, or manner in which it occurs.”²⁸⁰

Finally, in the 2018 case *Committee to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Board*,²⁸¹ the Sixth Circuit used *Reed*’s full two-step process in ruling a regulation was *not* content based. The plaintiffs in the case submitted a ballot initiative petition proposing to amend the Ohio constitution in two ways: “Imposing term limits on the justices of the Ohio Supreme Court and requiring that all laws that apply to the people of the State of Ohio ... apply equally to the members and employees of the General Assembly.”²⁸² Because Ohio law contains what is called a “single-subject rule”²⁸³ – which allows initiative petitions to contain only one proposed amendment – the Ohio Ballot Board split the plaintiffs’ initiative into two. The plaintiffs sued, arguing that the initiative process violated their First Amendment rights. The Sixth Circuit ruled in favor of the ballot board, deciding that the single-subject rule was content neutral. Using both *Reed*’s first and second steps, the court recognized that a regulation could be discriminatory either on its face or because of the government’s purpose in passing it. But the court concluded that “Ohio’s single-subject rule is not content based under these standards.”²⁸⁴ The single-subject rule, the court found, “applies to all initiative petitions, no matter the topic discussed or idea or message expressed.”²⁸⁵ And the court also said the rule was not adopted because of “disagreement with the message of any initiative petition.”²⁸⁶

²⁸⁰*Id.* at 423 (Stranch, J., dissenting). In *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015), the Sixth Circuit ruled that the Wayne County Sheriff’s Office “effectuated a heckler’s veto by cutting off the Bible Believers’ protected speech in response to a hostile crowd’s reaction.” The majority recognized the restriction was content based but did not cite *Reed* in ruling that the sheriff’s office unconstitutionally removed the Bible Believers from a festival, rather than addressing the hecklers who were throwing bottles and other garbage at them in response to the Bible Believers’ “anti-Islam religious message.” *Id.* at 241. In his opinion concurring in part and dissenting in part, Judge Jeffrey Sutton cited *Reed* in stating that the defendants curtailed speech “on the basis of its content” and that the Bible Believers’ removal failed strict scrutiny. *Id.* at 266 (Sutton, J., concurring in part and dissenting in part).

²⁸¹885 F.3d 443 (6th Cir. 2018).

²⁸²*Id.* at 445.

²⁸³*Id.*

²⁸⁴*Id.* at 447.

²⁸⁵*Id.*

²⁸⁶*Id.* The plaintiffs pointed for support to *McCullen* and argued that since enforcement authorities examined their proposed petition, the rule was content based. *Id.* The court dismissed that argument: “But like the statute in *McCullen*, whether Plaintiffs violate Ohio’s single-subject rule depends not on what they say, but simply

Seventh Circuit

Reed's impact in the Seventh Circuit came quickly, but the court has inconsistently applied the case, sometimes using *Reed*'s second step and sometimes seemingly glossing over it. In addition, the circuit has held that *Reed* does not apply to the secondary effects doctrine.

Similar to the Third Circuit's decision in *Free Speech Coalition, Inc. v. Attorney General United States*,²⁸⁷ the Fourth Circuit's decision in *Central Radio Company v. City of Norfolk*,²⁸⁸ and the Sixth Circuit's decision in *Wagner v. City of Garfield Heights*,²⁸⁹ in *Norton v. City of Springfield*²⁹⁰ the Seventh Circuit was forced to revisit a decision because of *Reed*. The case involved an anti-panhandling ordinance. The law prohibited panhandling in the town's downtown historic district, defining panhandling "as an oral request for an immediate donation of money."²⁹¹ Signs requesting money were still allowed, however, as were "oral pleas to send money later."²⁹² In a 2014 decision, the Seventh Circuit upheld the law, concluding "that Springfield's anti-panhandling ordinance does not draw lines based on the content of anyone's speech."²⁹³ The court classified the ordinance as permissibly regulating "by subject matter"²⁹⁴ rather than viewpoint or content. "We observed that the ordinance does not interfere with the marketplace for ideas, that it does not practice viewpoint discrimination, and that the distinctions that plaintiffs call content discrimination appear to be efforts to make the ordinance less restrictive, which should be a mark in its favor," the court noted.²⁹⁵

But after the Supreme Court handed down *Reed* in 2015, the Seventh Circuit granted a petition to rehear the case, applied *Reed*, and struck down the law as a content-based restriction. "*Reed* understands content discrimination differently,"²⁹⁶ the Seventh Circuit wrote in its August 2015 decision. The court quoted *Reed* that "regulation of speech is content based if a law applies to particular speech because of the topic discussed *or* the idea or message

on where they say it — in one initiative petition or in two. Ohio's single-subject rule is therefore not content based." *Id.*

²⁸⁷825 F.3d 149 (3rd Cir. 2016).

²⁸⁸811 F.3d 625 (4th Cir. 2016).

²⁸⁹675 Fed. Appx. 599 (6th Cir. 2017).

²⁹⁰806 F.3d 411 (7th Cir. 2015).

²⁹¹*Id.* at 412.

²⁹²*Id.*

²⁹³*Id.* at 411. *See also* *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014).

²⁹⁴*Id.* at 412.

²⁹⁵*Id.*

²⁹⁶*Id.*

expressed”²⁹⁷ and noted that, on its face, the Springfield law regulates “because of the topic discussed.”²⁹⁸ Writing for the court, Judge Frank Easterbrook highlighted that three justices – Kagan, joined by Ginsburg and Breyer – concurred only in the judgment in *Reed* and that they, like the circuit’s 2014 opinion in the *Norton* case, seemed to argue “that the absence of an effort to burden unpopular ideas implies the absence of content discrimination.”²⁹⁹ But Judge Easterbrook recognized that the *Reed* majority held otherwise, and that *Reed* thus forced an alteration of the court’s earlier analysis. “The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation,” he wrote. “Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”³⁰⁰

Judge Daniel Manion wrote a concurring opinion in *Norton*, “[T]o underscore the significance” of *Reed*.³⁰¹ Judge Manion wrote that *Reed* “injected some much-needed clarity into First Amendment jurisprudence and, in doing so, should eliminate the confusion that followed from *Ward*.”³⁰² He noted that, relying on *Ward*’s focus on purpose as the “controlling consideration,” some courts had considered laws content neutral as long as they were not viewpoint based. “On this point,” he wrote, “*Reed* overrules *Ward*.”³⁰³ And that was worth celebrating, he thought, as “*Reed* saw what *Ward* missed – that topical censorship is still censorship.”³⁰⁴ Judge Manion welcomed that a broader range of restrictions would now be subject to strict scrutiny, and “few regulations will survive this rigorous standard.”³⁰⁵

The Seventh Circuit has pointed to *Reed* as a possible difference-making case in other instances as well. In *Left Field Media v. City of*

²⁹⁷*Id.* (emphasis added) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

²⁹⁸*Id.*

²⁹⁹*Id.*

³⁰⁰*Id.*

³⁰¹*Id.* at 413 (Manion, J., concurring).

³⁰²*Id.* (Manion, J., concurring).

³⁰³*Id.* (Manion, J., concurring).

³⁰⁴*Id.* (Manion, J., concurring).

³⁰⁵*Id.* (Manion, J., concurring). In his opinion concurring in the judgment in part and dissenting in part in *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Department of Health*, Judge Manion quoted *Reed* for its definition of strict scrutiny. The government “must ‘prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,’” he wrote. 888 F.3d 300, 312 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (quoting *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231 (2015)).

Chicago,³⁰⁶ the court reviewed a Chicago ordinance that barred peddling “any merchandise on the sidewalk immediately adjacent to Wrigley Field,”³⁰⁷ the home of Major League Baseball’s Chicago Cubs. The case began when a patrol officer asked the editor of *Chicago Baseball*, a magazine that produces four issues over the course of a baseball season, to move across the street to sell the magazine in order to comply with the law. The ordinance made an exception for the selling of newspapers in the area. “[A] law that distinguishes discussion of baseball from discussion of politics, by classifying one kind of publication as a magazine and another as a newspaper, is at risk under the approach” in *Reed*, the Seventh Circuit noted, quoting *Reed* and citing *Norton*.³⁰⁸ At this stage of the litigation – an appeal of a denial of a preliminary injunction, with other issues still to be resolved – the court wrote that it was not ruling that the newspaper exception necessarily invalidated the ordinance. The court recognized that the Supreme Court “has never dealt with the question whether a law that classifies publications by frequency independent of content is invalid just because different kinds of content may lead to a different frequency of publication.”³⁰⁹ But the analysis in *Reed*, the Seventh Circuit found, reinforces “that newspaper exceptions to generally applicable laws create difficult constitutional problems.”³¹⁰

The court also recognized *Reed*’s significance in *Construction and General Laborers’ Local Union No. 330 v. Town of Grand Chute*,³¹¹ a case involving the regulation of inflatable rats and cats that unions used in labor disputes. The Seventh Circuit ultimately remanded the case, finding it unclear whether it still involved a live, justiciable controversy.³¹² In its opinion, however, the court still offered “a few words about other issues that the district court needs to consider if the controversy remains live.”³¹³ It focused on *Reed*’s holding that a benign purpose could not save an otherwise content-based law. At trial, the union had pointed to other structures that it believed violated the ordinance at issue but that escaped punishment. The district court

³⁰⁶822 F.3d 988 (7th Cir. 2016).

³⁰⁷*Id.* at 989.

³⁰⁸*Id.* at 992.

³⁰⁹*Id.*

³¹⁰*Id.*

³¹¹834 F.3d 745 (7th Cir. 2016).

³¹²The court found, “By the time the [district] court entered summary judgment, the construction project that led to the use of demonstrative rats and cats had been completed, and the Union was no longer picketing.” *Id.* at 748. The town had also since amended the code that led to the lawsuit.

³¹³*Id.*

responded to the union that it could not “infer from evidence of non-enforcement that an actual enforcement was for an invidious reason.”³¹⁴ But the Seventh Circuit held, citing *Reed*, that was not an adequate response to an accusation that the government was choosing which ideas can be conveyed. “*Reed* tells us that content discrimination is almost always forbidden,” the court found. “If this suit is live, the Union’s claim of content discrimination cannot be dismissed on the ground that the Town lacks an ‘invidious reason’ for preferring some speech over other speech.”³¹⁵

Like other circuits, however, the Seventh has inconsistently used *Reed*’s second step. In *Luce v. Town of Campbell*,³¹⁶ the court reviewed an ordinance that forbade “all signs, flags, and banners (other than traffic-control information) on any of... three overpasses, or within 100 feet of the end of these structures.”³¹⁷ The town’s legislature passed the law in response to two members of the Local Tea Party who started placing banners bearing messages such as “HONK TO IMPEACH OBAMA” on a highway overpass.³¹⁸ Citing *Reed*, the court said the law was content neutral on its face. “[I]t does not matter what message any privately placed sign bears,” the court ruled, but the Seventh Circuit did not seem to employ *Reed*’s second step and scrutinize the government’s purpose for the law. The behind-the-scenes legislative machinations that led to the law, in other words, were not dispositive in the court ruling that the law was content neutral.

In *Patriotic Veterans v. Zoeller*,³¹⁹ the Seventh Circuit also upheld Indiana’s anti-robocall statute as content neutral. The law forbade “recorded phone messages placed by automated dialing machines,” with three exceptions: “messages from school districts to students, parents, or employees”; “messages to subscribers with whom the caller has a current business or personal relationship”; and “messages advising employees of work schedules.”³²⁰ Relying on the Fourth Circuit’s decision in *Cahaly*, the plaintiff maintained that *Reed* rendered this sort of anti-robocall law an invalid instance of content discrimination. But the Seventh Circuit disagreed:

Plaintiff tells us that the statute as a whole disfavors political speech and therefore entails content discrimination, as *Reed* understood that

³¹⁴*Id.* at 749.

³¹⁵*Id.*

³¹⁶872 F.3d 512 (7th Cir. 2017).

³¹⁷*Id.* at 513.

³¹⁸*Id.*

³¹⁹845 F.3d 303 (7th Cir. 2017).

³²⁰*Id.* at 304.

phrase. We don't get it. Nothing in the statute, including the three exceptions, disfavors political speech. The statute as a whole disfavors cold calls (that is, calls to strangers), but if a recipient has authorized robocalls then the nature of the message is irrelevant.³²¹

The court said the law's three exceptions likewise depended on the relationship between the call and the recipient, "not on what the caller proposes to say."³²² In *Cahaly*, South Carolina's anti-robocall statute had restricted political and consumer robocalls but allowed others. That was not what Indiana did here. "Because Indiana does not discriminate by content — the statute determines who may be called, not what message may be conveyed —"³²³ the court said the law was content neutral under *Reed*.

Finally, in *BBL, Inc. v. City of Angola*,³²⁴ the Seventh Circuit, in a footnote, wrote that it did not think *Reed* "upends" the secondary effects doctrine.³²⁵ The case involved a zoning ordinance meant to impede a proposed adult-entertainment venue featuring nude dancing. The court said it was a "legal fiction"³²⁶ to treat laws regulating sexually oriented businesses as content neutral even though they were facially content based. But the Seventh Circuit decided that *Reed* did not overturn the Court's secondary effects precedents. The court wrote, "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection."³²⁷

Eighth Circuit

The Eighth Circuit has cited *Reed* in only three cases, generally finding each case did little to change existing precedent. The court has generally been consistent in using *Reed*'s two-step process.³²⁸

³²¹*Id.* at 305.

³²²*Id.*

³²³*Id.* at 306.

³²⁴809 F.3d 317 (7th Cir. 2015).

³²⁵*Id.* at 326 n.1.

³²⁶*Id.* at 326.

³²⁷*Id.* at 326 n.1.

³²⁸In addition to the cases discussed in this section, in a 2016 case involving student speech, *Reed* was cited in a single footnote in an opinion concurring in part and dissenting in part to question if using a less stringent First Amendment analysis when examining cases involving professional conduct was "consistent with binding Supreme Court precedent." *Keefe v. Adams* 840 F. 3d 523, 544 n.15 (8th Cir. 2016) (Kelly, J., concurring in part and dissenting in part).

In 2017, in *Gresham v. Swanson*,³²⁹ the Eighth Circuit heard a challenge based on *Reed* to a Minnesota state statute that barred robocalls.³³⁰ While a previous Eighth Circuit had upheld the law, a political consultant filed suit arguing the Court's decision in *Reed* superseded the Eighth Circuit's previous decision. Citing the Seventh Circuit's decision in *Patriotic Veterans v. Zoeller*,³³¹ the Eighth Circuit disagreed, finding the law was content neutral on its face and was justified without reference to content. The court found:

Unlike the content-based restrictions in *Reed*, the permissions granted in the Minnesota statute do not reflect a content preference; they are based on an assumption of implied consent.... The State does justify the statute in part based on an interest in protecting residential privacy against disruptive calls, but this interest is not grounded in a preference for certain content.³³²

The court held the statute did not “prefer certain speech based on content” or “certain ideas over others.”³³³ Rather, it “disfavors robocalls to strangers, but it allows them with consent.”³³⁴

In a different 2017 case, the Eighth Circuit again used both the first and second steps of *Reed* to conclude that a law should not be subjected to strict scrutiny. In *Havlak v. Village of Twin Oaks*,³³⁵ the court heard a challenge to a municipal ordinance prohibiting all commercial activity in a neighborhood park without a permit. A commercial photographer, Josephine Havlak, sued the village alleging that the ordinance violated her First Amendment rights. Quickly concluding the ordinance was facially content neutral, the court focused on the second step in *Reed*'s analysis. Although the photographer agreed that the law was facially neutral, she argued the ordinance “was intentionally created to burden the speech rights of commercial photographers.”³³⁶ Using the legislative record to determine legislative intent, the Eighth Circuit found “the regulatory intent was not to burden a message but to allocate resources and address legitimate concerns for safety.”³³⁷

³²⁹866 F.3d 853 (8th Cir. 2017).

³³⁰MINN. STAT. § 325E.27 (2018).

³³¹845 F.3d 303 (7th Cir. 2017).

³³²*Gresham*, 866 F.3d at 856.

³³³*Id.*

³³⁴*Id.*

³³⁵864 F.3d 905 (8th Cir. 2017).

³³⁶*Id.* at 914.

³³⁷*Id.* at 915.

Ninth Circuit

Since *Reed* was decided, the Ninth Circuit has cited it nineteen times,³³⁸ more than any other court of appeals. Some of these cases were challenges brought specifically because a party argued *Reed* had changed existing law or superseded Ninth Circuit precedent. Many times, however, the Ninth Circuit did not agree with these arguments. In addition, the court's use of *Reed* varied widely over the nineteen cases. Perhaps most interestingly, the Ninth Circuit has ruled multiple times that *Reed* does not require all content-based regulations to be subjected to strict scrutiny.

In one of the first cases to cite *Reed*, the Ninth Circuit both stated the case “provided authoritative direction for differentiating between content-neutral and content-based enactments”³³⁹ and, in the next paragraph, the court seemed to narrow *Reed* by setting out examples of categories of speech to which *Reed* did not apply. *United States v. Swisher* involved an appeal to decide whether “the reasoning in *United States v. Alvarez*,³⁴⁰ which invalidated a statute prohibiting lying about being awarded military medals,³⁴¹ also applies to a statute³⁴² criminalizing the unauthorized wearing of such medals.”³⁴³ The court noted that under *Reed*, “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”³⁴⁴ The court, however, then only discussed facially content-based laws and did not discuss *Reed*'s second step. In addition, the court wrote, “Even if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny.” The court continued:

³³⁸*Gresham v. Picker*, 705 Fed. Appx. 554 (9th Cir. 2017), and *Herson v. City of Richmond*, 631 Fed. Appx. (9th Cir. 2016) are short unpublished memorandum opinions. In *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016), the Ninth Circuit only cited *Reed* for the proposition that it is difficult for the government to overcome strict scrutiny. In *International Franchise Association v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015), *Reed* was cited in a non-First Amendment case to show why the case didn't involve the First Amendment. These cases are not discussed here.

³³⁹*United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016). In *Interpipe Contracting, Inc. v. Becerra*, 2018 U.S. App. LEXIS 20990 (9th Cir. 2018), the court quoted a Ninth Circuit case that cited *Reed*, writing that a law amounts to “viewpoint discrimination when it regulates speech ‘based on the specific motivating ideology or perspective of the speaker.’” *Id.* at 38 (citing *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017), *cert. denied*, No. 17-1087 (June 28, 2018) (quoting *Reed*, 135 S. Ct. at 2230).

³⁴⁰567 U.S. 709 (2012).

³⁴¹18 U.S.C. § 704(b) (2011 ed.).

³⁴²18 U.S.C. § 704(a) (2006 ed.).

³⁴³*Swisher*, 811 F. 3d at 303-04.

³⁴⁴*Id.* at 311 (citations omitted).

Although “[c]ontent-based regulations are presumptively invalid,” the Court “has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Both the plurality and concurring opinions in *Alvarez* recognized the existence of “historical” and traditional categories of content-based restrictions that are not subject to strict scrutiny under the First Amendment and which courts have generally found permissible.³⁴⁵

Citing *Alvarez*, the Ninth Circuit wrote that these categories included, but were not limited to, obscenity, defamation, fighting words, incitement, speech integral to criminal conduct, child pornography, fraud, true threats, intentional infliction of emotional distress, lying to a government official, false claims of terrorist attacks, lies about the commission of crimes or catastrophes, impersonation of an officer, and trademark infringement.³⁴⁶

In 2016, the Ninth Circuit discussed *Reed* in *National Institute of Family and Life Advocates v. Harris*³⁴⁷ and seemingly added another category of speech that it thought *Reed* did not apply to. In the case, the National Institute of Family and Life Advocates appealed a district court’s denial of a motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act.³⁴⁸ The California law required licensed pregnancy-related clinics to disseminate a notice stating the existence of publicly funded family-planning services, including contraception and abortion.³⁴⁹ The law also required unlicensed clinics to disseminate a notice stating that they were not licensed by the state of California.³⁵⁰ Specifically citing the Supreme Court’s ruling in *Reed*, the NIFLA argued the act should be subjected to strict scrutiny because it compelled content-based speech and amounted to viewpoint discrimination. In a decision that would ultimately be overturned by the Supreme Court in 2018,³⁵¹ the Ninth

³⁴⁵*Id.* at 313-14 (citations omitted).

³⁴⁶*Id.* (citing both Justice Kennedy’s plurality opinion and Justice Breyer’s concurring opinion in *Alvarez*).

³⁴⁷839 F.3d 823 (9th Cir. 2016)

³⁴⁸CAL. HEALTH & SAFETY CODE § 123472 (2016).

³⁴⁹*Id.* at § 123472(a)(2).

³⁵⁰*Id.* at § 123471(b).

³⁵¹*See Nat’l Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). The Court wrote that although “some courts of appeals” have recognized “professional speech” as a separate category of speech, the Court had only recognized two circumstances in which such speech was afforded less First Amendment

Circuit found that although the act was a content-based regulation, it did not discriminate based on viewpoint, and, because the law regulated “professional speech” related to abortion services, intermediate scrutiny was the appropriate level of review.³⁵²

Citing *Reed*, the Ninth Circuit noted that a regulation was viewpoint based when “on its face,” the regulation “draws distinctions based on the message a speaker conveys.”³⁵³ The court noted that “[b]ecause viewpoint discrimination is a subset of content discrimination, a regulation can be content-based, but viewpoint neutral.”³⁵⁴ The court found the law in question to fit that content-based but viewpoint-neutral category. While the law was content based because it required subjects to speak on a “particular subject matter,” it was viewpoint neutral because it applied to all clinics regardless of their views regarding abortion and merely required the clinics to affirm the existence of publicly funded family-planning services and/or to state that the particular clinic in which it is distributed was not licensed.³⁵⁵ Thus, the Ninth Circuit concluded “that the Act [was] content-based, but [did] not discriminate based on viewpoint.”³⁵⁶ Then, discussing the Supreme Court’s decisions in *Casey v. Planned Parenthood*,³⁵⁷ the landmark Supreme Court case upholding abortion rights, and *Gonzales v. Carhart*,³⁵⁸ the Supreme Court case that upheld the Partial Birth Abortion Ban Act of 2003,³⁵⁹ the court found that it need not apply strict scrutiny. The Ninth Circuit wrote, “In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based.”³⁶⁰

The Ninth Circuit has also repeatedly rejected the argument that *Reed* overturned *Central Hudson Gas & Electric Corp. v. Public Service Commission*³⁶¹ and that strict scrutiny now applies to content-

protection. First, the Court wrote that precedent applied deferential review to laws that required professionals “to disclose factual, noncontroversial information in their ‘commercial speech.’” *Id.* at 2372 (citations omitted). Second, the Court wrote that precedent allows states to “regulate professional conduct, even though that conduct incidentally involves speech.” *Id.* The Court said neither of those precedents was implicated here.

³⁵²839 F.3d at 834.

³⁵³*Id.* at 835 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

³⁵⁴*Id.*

³⁵⁵*Id.* at 836.

³⁵⁶*Id.*

³⁵⁷505 U.S. 833 (1992).

³⁵⁸550 U.S. 124 (2007).

³⁵⁹18 U.S.C. § 1531 (2003).

³⁶⁰839 F.3d at 837.

³⁶¹447 U.S. 557 (1980).

based regulations that target commercial speech. The Ninth Circuit first rejected that argument in the 2016 case *Lone Star Security and Video, Inc. v. City of Los Angeles*,³⁶² a case dealing with — interestingly — city sign ordinances. In the case, the Ninth Circuit never explicitly stated that *Reed* does not apply to commercial speech cases but instead ruled the law was not content based under *Reed*. The case involved consolidated appeals concerning the constitutionality of five different ordinances that regulated mobile billboards. The appellants sued, arguing that the mobile billboard laws violated their First Amendment rights. The Ninth Circuit distinguished the ordinances from the sign ordinances in *Reed*, holding they were content neutral on their face under the enforcing officer test without referencing *Reed*'s second step at all. The court wrote:

Unlike *Reed*, the mobile billboard ordinances do not single out a specific subject matter for differential treatment, nor is any kind of mobile billboard exempted from regulation based on its content. There has been no suggestion that the ordinances apply differently to ... political endorsements than to ... commercial promotional campaigns, for example. Rather, an officer seeking to enforce the non-motorized billboard ordinances must decide only whether an offending vehicle constitutes a prohibited “advertising display” because its primary purpose is to display messages, as opposed to transporting passengers or carrying cargo.³⁶³

The court then approvingly cited Justice Alito's concurring opinion in *Reed* that “rules regulating the ‘size of signs’ or ‘the locations in which signs may be placed,’ including rules that ‘distinguish between free-standing signs and those attached to buildings’ would not be content based.”³⁶⁴

In three 2017 cases, the Ninth Circuit ruled explicitly that *Reed* did not apply to commercial speech regulations. First in *American Beverage Association v. City and County of San Francisco*,³⁶⁵ again in *Nationwide Biweekly Admin., Inc. v. Owen*,³⁶⁶ and finally in *Contest*

³⁶²827 F.3d 1192 (9th Cir. 2016).

³⁶³*Id.* at 1199.

³⁶⁴*Id.* at 1199 n. 5 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015) (Alito, J., concurring)).

³⁶⁵871 F.3d 884, 891 (9th Cir. 2017) (“While content-based regulations of noncommercial speech are subject to strict scrutiny, *see, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), regulations of commercial speech are subject to lesser review.”).

³⁶⁶873 F.3d 716, 732 (9th Cir. 2017) (“*Nationwide* argues that the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) undermines both

Promotions, LLC. V. City of San Francisco,³⁶⁷ the Ninth Circuit stated that *Reed* did nothing to change the law regarding content-based regulations of commercial speech. In addition, in a 2016 right of publicity case³⁶⁸ involving the Hollywood film *The Hurt Locker*, the Ninth Circuit cited *Reed* for the proposition that the First Amendment prevents the abridgement of speech and that content-based laws are subjected to strict scrutiny.³⁶⁹ In a footnote, however, the opinion stated that was so only because the case did not “concern a law that governs commercial speech or speech that falls within one of a few traditional categories which receive lesser First Amendment protection.”³⁷⁰

The Ninth Circuit also specifically ruled that *Reed* does not apply to cases dealing with picketing. In *National Labor Relations Board v. Teamsters Union Local*,³⁷¹ decided in 2016, the Ninth Circuit held in a memorandum opinion that *Reed* did not apply to bans on “peaceful secondary picketing.” Teamsters Union Local No. 70 moved for relief from several previous Ninth Circuit judgments pursuant to Federal Rule of Civil Procedure 60(b). Under that rule, a party seeking a modification to previous judgments “bears the burden of establishing that a significant change in circumstances warrants revision of the decree.”³⁷² The union argued that *Reed* constituted “a significant change” in First Amendment law.³⁷³ The court disagreed, writing:

We assume, without deciding, that *Reed* changed the Supreme Court’s First Amendment jurisprudence in some respects. But it did not do so in a way that matters here. When faced with a constitutional challenge, the Supreme Court has not disturbed the National Labor Relations Act’s prohibition against peaceful secondary picketing. The Court has recognized that picketing might have a coercive effect, not entitling it to full First Amendment protection. *Reed*, in result and rationale, does not necessarily undermine these cases. Therefore, we are not free to disregard the Supreme Court’s picketing-specific jurisprudence.³⁷⁴

Central Hudson intermediate scrutiny . . . review, and that all content-based restrictions (or compelled disclosures) of commercial speech are now subject to strict scrutiny. Nationwide is incorrect.”)

³⁶⁷874 F.3d 597, 601 (9th Cir. 2017) (holding “*Reed* did not alter “*Central Hudson*’s longstanding intermediate scrutiny framework”).

³⁶⁸*Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

³⁶⁹*Id.* at 903. The law in question was then struck down under strict scrutiny.

³⁷⁰*Id.* at 903 n.5.

³⁷¹668 Fed. Appx. 283 (9th Cir. 2016).

³⁷²*Id.* at 283 (citations omitted).

³⁷³*Id.*

³⁷⁴*Id.*

Because the union could not establish a relevant change in law, the Ninth Circuit refused to revisit any of its previous decisions. The court reaffirmed this decision in 2018 in *NLRB v. International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*.³⁷⁵

In a different case, however, the Ninth Circuit held, seemingly contradicting itself, that under *Reed* all facially content-based laws must be subjected to strict scrutiny regardless of their purpose. In the 2017 case *In re National Security Letter v. Sessions*,³⁷⁶ the Ninth Circuit used *Reed*'s first step and discussed its second step to determine the provision that prevented recipients of National Security Letters (called NSLs) from disclosing they had received a letter was content based. A NSL is an administrative subpoena issued by the FBI to a wire or electronic communication service provider.³⁷⁷ NSLs require the provider to produce specified subscriber information that is relevant to an authorized national security investigation.³⁷⁸ By statute, NSLs may include a requirement that the recipient not “disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records.”³⁷⁹ The Ninth Circuit acknowledged *Reed*'s two-step process for determining when a regulation was content based, but wrote the second step was not always necessary. The court wrote:

The first step in determining whether speech is content based is “to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys” ... Thus, a regulation or law that restricts speech based on its topic, idea, message, or content is “content based” on its face, and is accordingly subject to strict scrutiny.³⁸⁰

The Ninth Circuit went on to explain that if “a court determines that the law is content based at this first step, the court need not

³⁷⁵891 F.3d 1182, 1184 (9th Cir. 2018) (“This appeal is the latest in a series of disputes between the National Labor Relations Board (NLRB) and the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Union Local 433 (Ironworkers) regarding Ironworkers’ right to engage in secondary picketing of government entities under Section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA). Because the constitutionality of the challenged statute is not affected by the decision of the United States Supreme Court in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), we deny Ironworkers’ motion to modify the extant consent decree.”).

³⁷⁶863 F.3d 1110 (9th Cir. 2017).

³⁷⁷18 U.S.C. § 2709 (2018).

³⁷⁸*Id.* at § 2709(a).

³⁷⁹*Id.* at § 2709(c)(1)(A).

³⁸⁰863 F.3d at 1122 (citations omitted).

‘consider the government’s justifications or purposes’ for enacting the regulation.”³⁸¹ The law in question, the court held, was content based on its face.³⁸² Subjecting the law to strict scrutiny, the court found the law advanced a compelling government interest,³⁸³ was narrowly tailored, and thus was constitutional.³⁸⁴ Perhaps what the court should have written, given its other decisions discussed above, is that “a regulation or law that restricts speech based on its topic, idea, message, or content is ‘content based’ on its face, and is accordingly subject to strict scrutiny, *unless that regulation deals with commercial speech, abortion-related speech, labor picketing or is one of the historical and traditional categories of content-based restrictions not subject to strict scrutiny.*” Nowhere in the *NSL* opinion, however, did the court indicate that strict scrutiny was not always appropriate when considering these other categories of speech.

Further complicating matters, like other circuits, the Ninth Circuit has selectively used the second step of *Reed*. In addition to *Lone Star Security and Video, Inc. v. City of Los Angeles*,³⁸⁵ discussed above, in 2017, in *First Resort, Inc. v. Herrera*,³⁸⁶ the court also skipped *Reed*’s second step, and instead wrote that it was improper to consider legislative intent. The case involved a challenge by a health clinic that did not provide abortions but was using advertising to compete with clinics that did provide abortions. That was against a San Francisco ordinance that made it illegal for a clinic to falsely advertise abortion services if it did not provide them. The clinic challenged the ordinance on many grounds, including that it was a viewpoint-based regulation. Citing *Reed*, the Ninth Circuit wrote that viewpoint-based regulations restrict speech “based on ‘the specific motivating ideology or perspective of the speaker.’”³⁸⁷ The Ninth Circuit held the ordinance was not viewpoint based, however, because it applied to clinics based on the services offered, “not on the particular views espoused or held by a clinic,”³⁸⁸ and because the ordinance regulated speech because it was “false or misleading speech, irrespective of ... viewpoint.”³⁸⁹ When the

³⁸¹*Id.* at 1123.

³⁸²*Id.*

³⁸³*Id.* (concluding that national security and keeping information related to national security secret were compelling government interests).

³⁸⁴*Id.* at 1124-27 (arguing the law was narrowly tailored for a variety of reasons).

³⁸⁵827 F.3d 1192 (9th Cir. 2016).

³⁸⁶860 F.3d 1263 (9th Cir. 2017).

³⁸⁷*Id.* at 1277 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015)).

³⁸⁸*Id.*

³⁸⁹*Id.* at 1277-78.

court turned to *Reed's* second step, the question of examining the motive behind the ordinance to determine if the city had “an illicit motive” in passing the ordinance that would subject it to strict scrutiny, the court did not cite *Reed*. Instead, the court quoted *United States v. O'Brien*³⁹⁰ for the proposition that it was improper for a court to consider the motive in passing a law when examining the law’s constitutionality.³⁹¹ Thus, the case didn’t just skip *Reed's* second step, it appeared to explicitly reject it.

In other cases, however, the Ninth Circuit has used both *Reed's* first and second steps in tandem to determine that regulations were either facially content based or content based because of the purpose or intent of the law. In 2018, for example, in *Animal Legal Defense Fund v. Wadsen*,³⁹² a case involving Idaho’s so-called “ag-gag” law,³⁹³ the Ninth Circuit used *Reed's* first and second steps to determine whether strict scrutiny was appropriate. The court found the law was content based on its face, *and* the legislative history of the law demonstrated it was designed to target specific content. Idaho’s law, which targeted undercover investigations of agricultural operations, “[B]roadly criminalize[d] making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner’s consent.”³⁹⁴ The law was passed after a secretly filmed exposé of the operation of an Idaho dairy farm showed “dairy workers ... dragging a cow across the ground by a chain attached to her neck; twisting cows’ tails to inflict excruciating pain; and repeatedly beating, kicking, and jumping on cows to force them to move.”³⁹⁵ Under *Reed*, the Ninth Circuit ruled that “regulation is content-based when it draws a distinction ‘on its face’ regarding the message the speaker conveys or ‘when the purpose and justification for the law are content based.’”³⁹⁶ The Idaho law, the court wrote, “checks both boxes.”³⁹⁷

³⁹⁰391 U.S. 367 (1968).

³⁹¹*First Resort*, 860 F.3d at 1278 (“Even if [First Resort] could establish that the City had an illicit motive in adopting [the Ordinance], that would not be dispositive” because “[t]he Supreme Court has held unequivocally that it ‘will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.’” *Menotti v. City of Seattle*, 409 F.3d 1113, 1130 n.29 (9th Cir. 2005) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).”).

³⁹²878 F.3d 1184 (9th Cir. 2018).

³⁹³IDAHO CODE § 18-7042 (2016).

³⁹⁴878 F.3d at 1189.

³⁹⁵*Id.*

³⁹⁶*Id.* at 1204 (citations omitted).

³⁹⁷*Id.*

The Ninth Circuit held that under *Reed* the law was an obvious example of a facially content discriminatory regulation of speech because it “defin[ed] regulated speech by particular subject matter.”³⁹⁸ Referencing the enforcing officer test, the court wrote that “because the Recordings Clause prohibits the filming of agricultural ‘operations’ but nothing else, its application explicitly pivots on the content of the recording; in other words, only by viewing the recording can the Idaho authorities make a determination about criminal liability.”³⁹⁹ Examining the legislative history of the law, the Ninth Circuit also found the law was content based under *Reed*’s second step.⁴⁰⁰ Applying strict scrutiny, the law was struck down as both over-inclusive and under-inclusive.⁴⁰¹

In *Recycle for Change v. City of Oakland*,⁴⁰² a 2017 case, the Ninth Circuit also used both steps to determine a law was content neutral on its face and in its purpose. The case was a challenge to the City of Oakland’s ordinance regulating unattended donation collection boxes (called UDCBs).⁴⁰³ The court ruled the ordinance was content neutral under *Reed* and included a lengthy discussion of what made a law content based. Under *Reed*, the court wrote, “A content-based law is one that ‘target[s] speech based on its communicative content’ or ‘applies to particular speech because of the topic discussed or the idea or message expressed.’”⁴⁰⁴ The “crucial first step” was to determine if a regulation draws a distinction based on the message a speaker conveys, the court wrote, again citing *Reed*.⁴⁰⁵ The Ninth Circuit continued that the second step would be to also apply strict scrutiny “if the law is facially neutral but ‘cannot be ‘justified without reference to the content of the regulated speech,’ or [was] adopted by the government ‘because of disagreement with the message [the speech] conveys.’”⁴⁰⁶ The court held

³⁹⁸*Id.*

³⁹⁹*Id.*

⁴⁰⁰*See id.* at 1191-92 (“The legislative history reveals a complex series of motivations behind the statute. The bill was drafted by the Idaho Dairymen’s Association, a trade organization representing Idaho’s dairy industry. When the Association’s lawyer addressed legislators, he stated that one goal of the bill was ‘to protect Idaho farmers from wrongful interference. . . . Idaho farmers live and work spread out across the land where they’re uniquely vulnerable to interference by wrongful conduct.’ Another goal was to shield the agricultural industry from undercover investigators who expose the industry to the ‘court of public opinion,’ which destroys farmers’ reputations, results in death threats, and causes loss of customers.”).

⁴⁰¹*Id.*

⁴⁰²856 F.3d 666 (9th Cir. 2017).

⁴⁰³The court held that the solicitation of charitable donations via UDCBs was “speech” and thus analyzed the law under First Amendment standards.

⁴⁰⁴*Id.* at 669-70 (citations omitted).

⁴⁰⁵*Id.*

⁴⁰⁶*Id.* (citations omitted).

the ordinance did not discriminate based on content because it was content neutral on its face, could be justified without reference to the content of the regulated speech, and there was no evidence the ordinance was passed because it disagreed with any message conveyed by unattended donation collection boxes.⁴⁰⁷

The Ninth Circuit then addressed the enforcing officer test. The court rejected the argument that under this test the ordinance was content based. First, the court found the ordinance's application was not limited to UDCBs that solicited charitable donations. The court contended that to "enforce the Ordinance, an officer need only determine whether (1) an unattended structure accepts personal items and (2) the items will be distributed, resold, or recycled."⁴⁰⁸ Second, the court found that because an officer must inspect a UDCB's message to determine if the law applied did not automatically mean the law was content based. The court wrote, "While at times we have used this 'enforcing officer' test to explain why a law is content based, we — and the Supreme Court — have also cautioned that an officer's inspection of a speaker's message is not dispositive on the question of content neutrality."⁴⁰⁹ The court noted that in *Reed* the Ninth Circuit chose not to follow the test, and when the case reached the Supreme Court, the Court didn't even consider the test.⁴¹⁰ Instead of relying on the enforcing officer test, the Ninth Circuit instead contrasted the ordinance with the sign regulation in *Reed*. Unlike the regulation in *Reed*, the ordinance in *Recycle for Change* did not discriminate on the basis of any message. Rather, it discriminated "on the basis of non-expressive, non-communicative conduct."⁴¹¹

The Ninth Circuit then turned to the second step in its analysis, the law's purpose or "whether there [was] evidence that Oakland passed the Ordinance with an intent to burden RFC's charitable message."⁴¹²

⁴⁰⁷*Id.* at 670.

⁴⁰⁸*Id.* at 671.

⁴⁰⁹*Id.* at 671.

⁴¹⁰*Id.* ("The 'officer must read it' test cuts too broadly if used 'as a bellwether of content.' If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based."). *See also id.* at 671 n.2 ("While the Supreme Court reversed our court in *Reed*, the Court held only that the sign regulation was content based on its face because its application depended 'entirely on the communicative content of the sign.' 135 S. Ct. 2227. It did not adopt, or even discuss, the merits of the 'officer must read it' test as a proper content-neutrality analysis.").

⁴¹¹*Id.* at 672. ("Although collecting donations to further charitable causes is 'content' . . . that is not the Ordinance's target. Instead, the Ordinance regulates the unattended collection of personal items for distribution, reuse, and recycling, without regard to the charitable or business purpose for doing so. That conduct is neither expressive nor communicative.").

⁴¹²*Id.* at 673.

The Ninth Circuit found there was nothing in the record to demonstrate the ordinance was passed “with an intent to burden the message expressed by RFC’s UDCBs,”⁴¹³ nor was there “any evidence in the record that anyone in the Oakland City Council disagreed with RFC’s message.”⁴¹⁴

On the other hand, in 2018, in *Eagle Point Education Association v. Jackson City School District No. 9*,⁴¹⁵ the Ninth Circuit ruled that while a district policy adopted in anticipation of a teacher’s strike that prohibited picketing on property owned by a school district was content neutral on its face, it was intended to be content based and therefore was subject to strict scrutiny. While the policy was formally rescinded shortly after the strike ended, the union, one of its members, and a student filed a civil rights action contending the district infringed their First Amendment rights.⁴¹⁶ The school district appealed the district court’s summary judgment in favor of the petitioners, arguing that the policies enacted by the district during the strike should be viewed as “government speech” by the school district itself. The Ninth Circuit disagreed, holding “[n]o reasonable observer would have misperceived the speech which the district sought to suppress — speech favoring the teachers’ side in the strike — as a position taken by the school district itself.”⁴¹⁷ Using *Reed*’s second step, the Ninth Circuit instead found that the regulation was both content based and viewpoint based because even though it was content neutral on its face, it was “adopted because of government disagreement with the speech’s message.”⁴¹⁸

Tenth Circuit

The Tenth Circuit has only cited *Reed* once. *Yeasin v. Durham*⁴¹⁹ involved a claim that a vice provost for student affairs at the University of Kansas violated a student’s First Amendment rights

⁴¹³*Id.* (finding the ordinance could “be justified by ‘other considerations’: the record suggests that the City Council enacted the Ordinance out of concern that UDCBs attract illegal dumping, scavenging, and graffiti, and had been placed in a manner that tended to harm the safety of drivers and pedestrians, and the Ordinance itself states that its purpose is to ‘promote the health, safety, and/or welfare of the public by providing minimum blight-related performance standards for the operation’ of UDCBs”) (citations omitted).

⁴¹⁴*Id.*

⁴¹⁵880 F.3d 1097 (9th Cir. 2018).

⁴¹⁶*Id.* at 1100.

⁴¹⁷*Id.*

⁴¹⁸*Id.* at 1108.

⁴¹⁹719 Fed. Appx. 844 (10th Cir. 2018).

when she expelled the student for tweets he made about his ex-girlfriend. Among other things, the student argued that the vice provost's actions violated his rights because *Reed* clearly established that content-based restrictions are “presumptively invalid under the law.”⁴²⁰ Without discussing *Reed* substantively at all, however, the court determined that because at the “intersection of university speech and social media, First Amendment doctrine [was] unsettled,” the vice provost was protected under qualified immunity.⁴²¹

Eleventh Circuit

Cases in the Eleventh Circuit Court of Appeals that cited *Reed* have focused largely on whether it applies to certain categories of speech. The court has had to decide whether *Reed* changed approaches to regulations that target professional speech, commercial speech, and adult-oriented businesses.

In 2017, judges from the Eleventh Circuit cited *Reed* in multiple opinions when the court heard a case *en banc* involving a challenge to a Florida law that prohibited doctors from asking questions of patients or recording their answers about firearm ownership. The case, *Wollschlaeger v. Governor*,⁴²² involved a challenge to Florida's Firearms Owners Privacy Act.⁴²³ The law prevented physicians from entering information about firearm ownership into a patient's medical record and from refusing to see patients who owned firearms. It also stated medical professionals “should refrain” from making inquiries about firearm ownership or “unnecessarily harassing a patient about firearm ownership during an examination.”⁴²⁴ There were two majority opinions for the *en banc* court, one by Judge Adalberto Jordan and one by Judge Stanley Marcus.

Judge Jordan's opinion avoided interpreting *Reed's* reach. The opinion noted that under *Reed* the record-keeping, inquiry, and anti-harassment provisions of the law were content based because the regulations “appl[ie]d only to the speech of doctors and medical professionals, and only on the topic of firearm ownership.”⁴²⁵ The court, however, stopped short of saying this meant that strict

⁴²⁰*Id.* at 851.

⁴²¹*Id.* at 852.

⁴²²848 F.3d 1293 (11th Cir. 2017).

⁴²³FLA. STAT. §§ 790.338 (2011).

⁴²⁴*Id.*

⁴²⁵484 F.3d at 1307-08. There were two majority opinions for the *en banc* Court, one by Judge Jordan and one by Judge Marcus. Judge Jordan's opinion was joined by Chief Judge Ed Carnes and Judges Hull, Marcus, William Pryor, Martin, Rosenbaum,

scrutiny should be applied. Judge Jordan wrote that it did not matter if the court should use strict scrutiny or not because the regulations were unconstitutional even under the lower standard of “heightened scrutiny”⁴²⁶ articulated by the Supreme Court in *Sorrell v. IMS Health Inc.*⁴²⁷ Judge Jordan’s opinion then launched into a lengthy discussion of what level of scrutiny applied to professional speech. Judge Jordan discussed Justice Byron White’s approach to professional speech laid out in his concurrence in *Lowe v. S.E.C.*⁴²⁸ and his dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*.⁴²⁹ In those opinions, Justice White wrote that the state may regulate professional *conduct*, even though that conduct incidentally involves *speech*. Judge Jordan, however, ultimately did not adopt Justice White’s approach, concluding that neither Supreme Court precedent⁴³⁰ nor Eleventh Circuit precedent supported treating professional speech differently.⁴³¹ Judge Jordan concluded:

In sum, we do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review. If rationality were the standard, the government could — based on its disagreement with the message being conveyed — easily tell architects that they cannot propose buildings in the style

Julie Carnes and Jill Pryor. Judge Marcus’ opinion was joined by Judges Hull, Wilson, Martin, Jordan, Rosenbaum and Pryor.

⁴²⁶*Id.* at 1301 (“[B]ecause these three provisions do not survive heightened scrutiny under *Sorrell*, we need not address whether strict scrutiny should apply to them.”).

⁴²⁷564 U.S. 552 (2011). The “heightened scrutiny under *Sorrell*” the Eleventh Circuit was referring to is the *Central Hudson* test for commercial speech regulations. *Sorrell* involved a challenge to a Vermont law that restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors. The Court ruled the law was content based on its face. *Id.* at 563-64. It also ruled that the law was viewpoint discriminatory in practice. *Id.* at 571. However, Vermont argued the Court should use the *Central Hudson* test for commercial speech regulations because most, if not all, of the impacted speech was commercial speech. *Id.* Like the Eleventh Circuit in *Wollschlaeger*, the Court ruled ultimately it didn’t matter if strict scrutiny was used because the statute could not survive the lower standard of *Central Hudson*. *Id.* at 572-79.

⁴²⁸472 U.S. 181, 232 (White, J., concurring in the judgment).

⁴²⁹476 U.S. 747, 802 (White, J., dissenting).

⁴³⁰*Wollschlaeger*, 484 F.3d at 1310. (“The Supreme Court has never adopted or applied Justice White’s rational basis standard to regulations which limit the speech of professionals to clients based on content.”). *Wollschlaeger* was decided before the Supreme Court’s decision in *Nat’l Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁴³¹*Id.* at 1311 (“Our own circuit precedent also cuts against adoption of a rational basis standard for evaluating so-called professional speech.”).

of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on.⁴³²

Judge Jordan's opinion thus concluded that the record-keeping, inquiry and anti-harassment provisions violated the First Amendment.⁴³³ Unlike Judge Jordan's opinion, Judge Marcus's opinion did not cite *Reed* but added that the anti-harassment provision was also unconstitutionally vague.⁴³⁴ Finally, a concurring opinion by Judge Charles R. Wilson cited *Reed* to highlight "the importance of applying the most demanding standard of scrutiny to this content-based law."⁴³⁵ Judge Wilson wrote that while in the panel decision of the case his dissent "evaluated the Act through the lens of intermediate scrutiny," after the Court's decision in *Reed* "reiterated that content-based restrictions must be subjected to strict scrutiny," he was "convinced" that the law in question must be reviewed under strict scrutiny.⁴³⁶

In a dissenting opinion, Judge Gerald Tjoflat criticized the majority opinions for declining to clarify how *Reed* changed First Amendment law. He wrote, "By declining to elucidate and apply a particularized standard of review, the majority missed a critical opportunity to provide much needed doctrinal clarification in the wake of the Supreme Court's recent decision in [*Reed*]."⁴³⁷ Judge Tjoflat then laid out his views on "the logical path forward for First Amendment doctrine."⁴³⁸ According to Tjoflat, *Reed* "announced a sea change in the traditional test for content neutrality"⁴³⁹ and "expanded the number of previously permissible regulations now presumptively invalid under strict scrutiny."⁴⁴⁰ Tjoflat wrote that *Reed* established a new test for determining if a regulation was content based. Tjoflat wrote that under *Reed's* "new approach to content neutrality, the reviewing court must 'consider whether a regulation of speech 'on its face' draws distinctions

⁴³²*Id.*

⁴³³*Id.* at 1319.

⁴³⁴*Id.* ("While FOPA proscribes 'unnecessarily harassing' behavior, a definition of what such conduct entails is markedly absent from the pages of the Florida Statutes. Reasonable doctors are . . . left guessing as to when their 'necessary' harassment crosses the line and becomes 'unnecessary' harassment – and wrong guesses will yield severe consequences.")

⁴³⁵*Id.* at 1324 (Wilson, J., concurring).

⁴³⁶*Id.* (Wilson, J., concurring).

⁴³⁷*Id.* at 1331 (Tjoflat, J., dissenting).

⁴³⁸*Id.* (Tjoflat, J., dissenting).

⁴³⁹*Id.* at 1332 (Tjoflat, J., dissenting).

⁴⁴⁰*Id.* at 1333 (Tjoflat, J., dissenting).

based on the message a speaker conveys.”⁴⁴¹ Under this approach, Tjoflat reasoned that courts must now subject regulations that facially discriminate against speech on the basis of content to strict scrutiny, “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”⁴⁴² Tjoflat noted the “astonishing breadth” of this new approach and made it clear he was not a fan of it.⁴⁴³ He wrote:

In my view, the First Amendment trajectory created by the *Reed* majority carries with it the dangerous potential to legitimize judicial interference in the implementation of reasonable, democratically enacted laws. In my view, the First Amendment does not require such rigorous interventionism, so I outline an alternative path — one that both effectuates core First Amendment values and avoids excessive judicial interference in the everyday process of government.⁴⁴⁴

Tjoflat advocated that lower courts should use existing First Amendment doctrine to narrow *Reed*⁴⁴⁵ by continuing to enforce speech “categories” traditionally subject to intermediate scrutiny. He noted that many courts had already done so.⁴⁴⁶ Alternatively, he wrote that lower courts should follow Justice Breyer’s opinion in *Reed*.⁴⁴⁷

⁴⁴¹*Id.* (Tjoflat, J., dissenting) (citations omitted).

⁴⁴²*Id.* (Tjoflat, J., dissenting) (citations omitted).

⁴⁴³*Id.* (Tjoflat, J., dissenting).

⁴⁴⁴*Id.* (Tjoflat, J., dissenting).

⁴⁴⁵*Id.* (Tjoflat, J., dissenting) (“Established First Amendment doctrine offers lower courts many opportunities to narrow *Reed*’s scope via cordoning speech into particular jurisprudential categories subject to less intensive forms of judicial review.”).

⁴⁴⁶*Id.* at 1333-34 (Tjoflat, J., dissenting). Tjoflat cited both circuit court cases and federal district court cases, including *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (noting certain “traditional categories of content-based restrictions that are not subject to strict scrutiny under the First Amendment”); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131-32 (2d Cir. 2015) (relying on the threshold distinction between speech and conduct not implicated by *Reed* to find that a challenged law regulated only conduct, not speech, and thus failed to trigger constitutional scrutiny under the First Amendment); *In re Tam*, 808 F.3d 1321, 1337-39 (Fed. Cir. 2015) (en banc) (emphasizing the critical importance of categorizing speech as commercial for purposes of avoiding the application of strict scrutiny); *CTIA — The Wireless Association v. City of Berkeley, Cal.*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (noting that “the Supreme Court has clearly made a distinction between commercial speech and noncommercial speech . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid”).

⁴⁴⁷*Id.* at 1335-38 (Tjoflat, J., dissenting) (discussing Justice Breyer’s approach to content-based regulations and arguing that content-based regulations should not automatically be subjected to strict scrutiny).

The Eleventh Circuit has also narrowed *Reed* by either using existing First Amendment doctrine in cases involving commercial speech and adult-oriented businesses or by avoiding answering how *Reed* applied to these categories of speech. In *Dana's Railroad Supplies v. Attorney General*,⁴⁴⁸ the first Eleventh Circuit case to cite *Reed*, the court considered a challenge to Florida's long-standing "no surcharge law." The law made it a misdemeanor to impose a surcharge on a buyer for using a credit card, but allowed sellers to offer a discount to buyers using cash.⁴⁴⁹ Based upon a facial analysis and without much discussion of *Reed*, the court concluded the surcharge law was content based, speaker based, and viewpoint based. The court wrote:

The no-surcharge law is content based: it applies only to how a merchant may frame the price difference between cash and credit-card payments. The no-surcharge law is speaker based: it applies only to those merchants who accept payment by both cash and credit card and engage in dual-pricing. And the no-surcharge law is viewpoint based: it denies the expression of one equally accurate account of reality in favor of the State's own.⁴⁵⁰

Though the court found the regulation was a content-based, speaker-based, and viewpoint-based regulation on speech, it debated whether strict or intermediate scrutiny should apply because the law applied to a hybrid of commercial and political speech. In an opinion by Judge Tjofla — who criticized the circuit in *Wollschlaeger v. Governor*⁴⁵¹ for not directly addressing *Reed* — the court suggested that *Reed* did not apply to commercial speech.⁴⁵² Ultimately, however, he said the court did not need to decide which level of scrutiny to use because the ordinance could not survive intermediate scrutiny much less strict scrutiny.⁴⁵³ Later, in *Ocheese Creamery LLC v. Putnam*⁴⁵⁴

⁴⁴⁸807 F.3d 1235 (11th Cir. 2017).

⁴⁴⁹FLA. STAT. § 501.0117(1)-(2) (2016).

⁴⁵⁰807 F.3d at 1248 (citations omitted).

⁴⁵¹848 F.3d 1293 (11th Cir. 2017).

⁴⁵²*Dana's Railroad Supplies*, 807 F.3d at 1246 ("As is so often true, the general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas.")

⁴⁵³*Id.* at 1248-49 ("We will . . . analyze Florida's no-surcharge law as if it were commercial speech because it crumbles under even this lower form of heightened scrutiny. Accordingly, were the no-surcharge law subject to strict scrutiny, it would likewise fail.")

⁴⁵⁴851 F.3d 1228 (11th Cir. 2017).

the court questioned whether *Reed* superseded the *Central Hudson* test but avoided answering the question, ultimately ruling it did not matter because, again, the law in question would not survive either intermediate scrutiny or strict scrutiny.

The Eleventh Circuit also heard a challenge that explicitly argued that *Reed* now invalidated laws governing the regulation of strip clubs and other adult-oriented businesses. In *Flanigan's Enterprises, Inc. v. City of Sandy Springs*,⁴⁵⁵ two strip clubs, "Mardi Gras" and "Flashers," and a sex shop, "Inserrection," challenged several Sandy Springs ordinances governing adult-oriented businesses based on the Supreme Court's decision in *Reed*, arguing the case made substantive changes to the Court's secondary effects doctrine. The businesses argued that under *Reed* content-based regulations that targeted adult-oriented businesses must be subjected to strict scrutiny. The Eleventh Circuit, however, did not agree. The court wrote that "[t]here [was] no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine"⁴⁵⁶ and that in *Reed* "the Court also declared that content-based laws should be subjected to strict scrutiny."⁴⁵⁷ The court held, however, that because the majority opinion in *Reed* did not *directly* address the secondary effects doctrine, *Reed* did not abrogate any Supreme Court or Eleventh Circuit secondary-effects precedents.⁴⁵⁸

Finally, at least once, the Eleventh Circuit chose to let a lower court determine the effects of *Reed*. In a short per curiam opinion in *O'Boyle v. Town of Gulf Stream*, which involved a city sign ordinance, the court remanded the case for the district court to decide "in the first instance" whether the ordinance was constitutional under *Reed*.⁴⁵⁹

⁴⁵⁵703 Fed. Appx. 929 (11th Cir. 2017).

⁴⁵⁶*Id.* at 935.

⁴⁵⁷*Id.*

⁴⁵⁸*Id.* See also, *id.* at 935 n.4. ("Plaintiffs read Justice Kagan's concurrence as advocating for a qualification of the majority's reasoning so that the secondary-effects doctrine could be left intact. Regardless of whether certain aspects of Justice Kagan's concurrence may prove to be correct, however, today we must concern ourselves with only the holding of the majority in *Reed*.").

⁴⁵⁹667 Fed. Appx. 767, 768 (11th Cir. 2016) ("We remand for the district court to decide in the first instance the constitutionality of the Town's Sign Code under *Reed*. The district court must determine the kind of regulation on speech imposed by the Sign Code and the constitutionality of that regulation. If the Sign Code is found to be unconstitutional, then the district court should assess damages and injunctive relief, as appropriate.").

D.C. Circuit

The D.C. Circuit has discussed *Reed* substantially in three cases.⁴⁶⁰ The circuit has seemed to selectively follow *Reed*'s two-step process. In 2017, the court heard *Act Now to Stop War & End Racism Coalition v. District of Columbia*,⁴⁶¹ a case involving the District of Columbia's law regulating the way members of the public could post signs on the District's lampposts. The law allowed signs to remain on public lampposts for up to 180 days, but a sign relating to an event had to be removed within 30 days after the event.⁴⁶² Act Now to Stop War and End Racism Coalition (known as ANSWER) and the Muslim American Society Freedom Foundation challenged the District's sign-posting rule and argued that *Reed* required the court to use strict scrutiny and strike down the law as unconstitutional. Citing *Reed*, the court ruled that the regulation was a content-neutral time, place and manner restriction. Although the court cited *Reed*, it seemed to emphasize the rationale of the law in its holding rather than use *Reed*'s two-step approach. The court wrote that content-based laws were of "special concern ... because they pose the risk that government is favoring particular viewpoints or subjects."⁴⁶³ According to the court, the law in question, "a broad-based, general distinction between event-based signs and other signs," did not pose any risk of favoring a viewpoint or subject.⁴⁶⁴ Instead, the court reasoned the law "simply reflects the common-sense understanding that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter. The promulgation and function of the District of Columbia's wholly viewpoint neutral lamppost rule reveals 'not even a hint of bias or censorship.'"⁴⁶⁵ Under the enforcing officer test, the court wrote, it did not matter that an official had to look

⁴⁶⁰The court has cited *Reed* six times altogether. In *True the Vote, Inc. v. IRS*, 831 F.3d 551, 560 (D.C. Cir. 2016) the D.C. Circuit cited *Reed* solely for the propositions that government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content" and that content-based laws are subjected to strict scrutiny. In *Wagner v. FEC*, 793 F.3d 1, 28 n.33 (D.C. Cir. 2015), the court cited *Reed* as a counter-example to the case it was discussing. In *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 2018 U.S. App. LEXIS 21109 (D.C. Cir. 2018) (Wilkins, J., concurring), Judge Wilkins cited *Reed* once in his concurring opinion to support the contention that viewpoint-based regulations are more egregious than content-based regulations.

⁴⁶¹846 F.3d 391 (D.C. Cir. 2017).

⁴⁶²*Id.* at 396.

⁴⁶³*Id.* at 403.

⁴⁶⁴*Id.*

⁴⁶⁵*Id.* at 403-04 (citation omitted).

at a poster to determine if it was “event-related.” Instead, citing *Hill v. Colorado*⁴⁶⁶ and *United States v. O’Brien*⁴⁶⁷ approvingly, the court determined that the lamppost rule made a “content-neutral distinction between event-related signs and those not related to an event.”⁴⁶⁸ The rule, according to the court, was “not a ‘regulation of speech,’ but ‘a regulation of the places where some speech may occur.’”⁴⁶⁹ That is, because the law did not target the “communicative content” of the signs, it was a time, place and manner regulation subject to intermediate scrutiny. The rule was content neutral, the court wrote, because its “clutter-minimizing rationale does not depend on the content of a sign’s message.”⁴⁷⁰

The court distinguished the regulations from those in *Reed* because the Town of Gilbert’s sign ordinance made a distinction between different kinds of events, whereas the District of Columbia rule treated all event-related signs the same. The court wrote:

Reed makes clear that a municipality may continue to treat event-related signs differently from non-event-related signs by means of time, place, and manner restrictions, as long as it does not distinguish among types of event based on content. What *Reed* held constitutionally suspect was the way in which the Town of Gilbert’s Sign Code made content-based distinctions among different types of issues and events, and even different types of signs relating to the same event. Unlike the content-based treatment of event-related signs invalidated in *Reed*, District of Columbia law treats all event-related signs alike and is thus content neutral.⁴⁷¹

The court then ruled the ordinance withstood intermediate scrutiny.⁴⁷²

In 2017, ANSWER also challenged a National Park Service regulation that authorized a priority permit that set aside space at the inauguration of President Donald Trump for the Presidential Inaugural Committee. In contrast to the case just discussed, the D.C. Circuit seemed to more closely follow *Reed*, examining the regulation

⁴⁶⁶503 U.S. 703, 719 (2000).

⁴⁶⁷391 U.S. 367, 376 (1968).

⁴⁶⁸*Act Now to Stop War & End Racism Coalition*, 846 F.3d at 403.

⁴⁶⁹*Id.* (citations omitted).

⁴⁷⁰*Id.* (emphasis added).

⁴⁷¹*Id.* at 405. *See also id.* at 406 (discussing Justice Alito’s concurring opinion in *Reed* and concluding “[a]ll four of the opinions in *Reed* confirm that the District of Columbia’s lamppost rule is not a content-based regulation of speech”).

⁴⁷²*Id.* at 406-09.

on its face and inquiring into the regulation's purpose. In *A.N.S.W.E.R. Coalition v. Basham*,⁴⁷³ the D.C. Circuit wrote that under *Reed* a law was content based if it "applie[d] to particular speech because of the topic discussed or the idea or message expressed."⁴⁷⁴ The court continued, "Facial distinctions based on message, whether they regulate the speech's subject matter, function, or purpose, are content based and so subject to strict scrutiny. Meanwhile, 'laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.'"⁴⁷⁵ The court held the regulation was content neutral on its face because the "priority granted to the Inaugural Committee ... turn[ed] not on the content of any speech, but on the desirability of providing to the Inaugural Committee as the event organizer a limited amount of reserved seating for ticketed spectators."⁴⁷⁶ In addition, again relying on *Hill*, the court found the "provision for bleachers at Freedom Plaza [was] 'not a 'regulation of speech,' but a 'regulation of the places where some speech may occur.'"⁴⁷⁷ Next, the court ruled the regulation was content neutral because it could be justified without reference to the content of speech and "and was not adopted 'because of disagreement with the message' of any anticipated expression on Inauguration Day."⁴⁷⁸ The court then upheld the regulations under intermediate scrutiny.⁴⁷⁹

In a 2016 case, the D.C. Circuit cited the enforcing officer test more favorably and seemed to embrace *Reed's* changes to First Amendment doctrine. *Pursuing America's Greatness v. Federal Elections Commission*⁴⁸⁰ involved a challenge to the Federal Election Commission's naming regulations. Under FEC regulations, unauthorized political action committees could not use a candidate's name in their own name or any "project," including Web pages or social media pages, unless the project included a statement that was clearly in opposition to the candidate.⁴⁸¹ Thus, unauthorized political action committees could create a social media page titled "Citizens Against Doe" but not a social media page called "We Like Doe." Pursuing America's Greatness, an unauthorized political action committee,

⁴⁷³845 F.3d 1199 (D.C. Cir. 2017).

⁴⁷⁴*Id.* at 1208 (citations omitted).

⁴⁷⁵*Id.* (citations omitted).

⁴⁷⁶*Id.* at 1209.

⁴⁷⁷*Id.* (citations omitted).

⁴⁷⁸*Id.* at 1210 (citations omitted).

⁴⁷⁹*Id.* at 1212-16.

⁴⁸⁰831 F.3d 500 (D.C. Cir. 2016).

⁴⁸¹*See* 11 C.F.R. § 102.14(a) (2014).

sought an injunction preventing the FEC from enforcing the rule, arguing it was a content-based regulation. The court concluded the law was content based because on its face it drew distinctions based solely on what a political action committee says. The court wrote, “As an unauthorized committee, PAG can use a candidate's name in a title of a communication only if the title demonstrates opposition to the candidate.”⁴⁸² The court then referenced the enforcing officer test. It wrote, “In other words, to know whether to apply [the regulation], the FEC must ‘examine the content’ of the title of PAG's website or Facebook page and ask whether the title supports or opposes the candidate. That is content-based discrimination pure and simple.”⁴⁸³ Citing a 1996 D.C. Circuit decision, *Republican National Committee v. Federal Election Commission*,⁴⁸⁴ which had relied on *Ward v. Rock Against Racism*,⁴⁸⁵ the FEC argued the law was not content based because it had a “benign purpose: avoiding voter confusion.”⁴⁸⁶ The court, however, ruled that *Reed* had changed the law:

In *Reed*, the Court instructed that we should look to purpose only if the text of the law is not content based. If a law, by its terms, discriminates based on content, we apply strict scrutiny “regardless of the government's benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”⁴⁸⁷

Thus, the court followed *Reed* closely and subjected the regulation to strict scrutiny. Holding the law advanced a compelling government interest but was not the least restrictive means to advance that interest, the court reversed the district court’s denial of PAG’s motion for a preliminary injunction and remanded the case.⁴⁸⁸

Federal Circuit

The Federal Circuit has cited *Reed* in two cases, both involving challenges to the bar on registering immoral or scandalous trademarks.⁴⁸⁹

⁴⁸²831 F.3d at 509.

⁴⁸³*Id.* (citations omitted).

⁴⁸⁴76 F.3d 400, 409 (D.C. Cir. 1996)

⁴⁸⁵491 U.S. 781 (1989).

⁴⁸⁶*Pursuing America's Greatness*, 831 F.3d at 509.

⁴⁸⁷*Id.* (citations omitted).

⁴⁸⁸*Id.* at 512.

⁴⁸⁹15 U.S.C. § 1052(a) (§ 2(a)) (2006).

First, in *In re Tam*,⁴⁹⁰ the court cited *Reed* when it ruled that bans on offensive trademarks were unconstitutional. Later, in *In re Brunetti*,⁴⁹¹ the court cited *Reed* and ruled the government could not bar the registration of immoral trademarks. In both cases, the discussion of *Reed* was limited because the court found the regulations at issue were clearly content based on their face⁴⁹² and there was thus no reason to use *Reed*'s second step. In *Brunetti*, the court explained that under *Reed*, "The government restricts speech based on content when 'a law applies to particular speech because of the topic discussed or the idea or message expressed,'"⁴⁹³ and that content-based laws were subjected to strict scrutiny.⁴⁹⁴ In *Tam*, the court wrote that under *Reed* a regulation is content based when its reach was defined by the topic or subject matter of the covered speech.⁴⁹⁵ In addition, the court wrote that under *Reed* the regulation at issue was also content based because it did "more than discriminate on the basis of topic."⁴⁹⁶ The court ruled the regulation also discriminated "on the basis of message conveyed, 'the idea or message expressed.'"⁴⁹⁷ The government was denying trademark applications because it disapproved of the message the speaker was conveying, wrote the court.⁴⁹⁸

The *Tam* decision was upheld by the Supreme Court in 2017, though the reasoning of the justices was split. In an 8-0, yet highly fractured,⁴⁹⁹ decision, the Court held that the section was an unconstitutional viewpoint-based restriction.⁵⁰⁰ Writing for four justices, Justice Alito said the Court did not need to resolve the

⁴⁹⁰808 F.3d 1321 (Fed. Cir. 2015), sub' history *Matal v. Tam*, 137 S. Ct. 1744 (2017).

⁴⁹¹877 F.3d 1330 (Fed. Cir. 2017).

⁴⁹²*See, e.g.*, *In re Tam*, 808 F.3d at 1335 (writing "it cannot reasonably be argued that this is not a content-based restriction or that it is a content-neutral regulation of speech").

⁴⁹³877 F.3d at 1348 (citations omitted).

⁴⁹⁴*Id.*

⁴⁹⁵808 F.3d at 1334.

⁴⁹⁶*Id.* at 1335 (citations omitted).

⁴⁹⁷*Id.* (citations omitted).

⁴⁹⁸*Id.* at 1336 (citations omitted).

⁴⁹⁹Here is a summary of the vote breakdown in *Tam* as it appears in LexisNexis: "Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined, and in which Thomas, J., joined except for Part II, and an opinion with respect to Parts III-B, III-C, and IV, in which Roberts, C. J., and Thomas and Breyer, JJ., joined. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which Ginsburg, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Gorsuch, J., took no part in the consideration or decision of the case."

⁵⁰⁰137 S. Ct. 1744 (2017).

debate between the parties on whether trademarks should be considered commercial speech because, even if they were, the disparagement clause at issue could not withstand even the *Central Hudson* test.⁵⁰¹

In Justice Kennedy's opinion concurring in part and concurring in the judgment, though, which was joined by Justices Sotomayor, Ginsburg, and Kagan, he argued that "the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny."⁵⁰² Interestingly, *Reed* was only mentioned twice in the case, both times in Justice Kennedy's concurring opinion. Once Kennedy mentioned *Reed* for the proposition that the First Amendment "guards" against content-based discrimination⁵⁰³ and once for the proposition that "[t]he Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs."⁵⁰⁴

DISCUSSION AND CONCLUSION

Now that the dust has begun to settle on *Reed* in the courts of appeals, a number of conclusions about the case's impact are apparent. First, the above analysis shows that *Reed* has not produced the First Amendment revolution of Armageddon proportions that some commentators predicted. In his opinion concurring in the judgment, Justice Breyer argued that the majority opinion called into question regulations regarding securities, energy conservation labeling-practices, doctor-patient confidentiality, income tax statements, and commercial airplane briefings, among others.⁵⁰⁵ Commentators also speculated that *Reed* signaled the death of the commercial speech doctrine and jeopardized the viability of laws regulating areas such as professional malpractice.⁵⁰⁶ But so far, *Reed* hasn't triggered any sort of dramatic overturning of First Amendment jurisprudence.

It is not for a lack of plaintiffs trying to argue that *Reed* is a game changer. Plaintiffs have argued in litigation, for instance, that *Reed*'s rationale undermines the Court's commercial speech and secondary effects doctrines. But circuit courts have thus far said that *Reed* did

⁵⁰¹*Id.* at 1764.

⁵⁰²*Id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁰³*Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁰⁴*Id.* at 1766-67 (Kennedy, J., concurring in part and concurring in the judgment) (citations omitted).

⁵⁰⁵*Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring in the judgment).

⁵⁰⁶*See, e.g.,* Liptak, *supra* note 155.

not change the law in those areas.⁵⁰⁷ The Ninth Circuit also ruled that *Reed* did not alter its previous judgments against labor picketers,⁵⁰⁸ and it likewise ruled, though the decision was later overruled by the Supreme Court, that, even after *Reed*, a law content based on its face that regulated “professional speech” related to abortion services should be reviewed under intermediate scrutiny.⁵⁰⁹ Moreover, writing after *Reed*, the Ninth Circuit in *United States v. Swisher* laid out an array of “historical and traditional” categories of content-based restrictions that it said are still not subject to strict scrutiny.⁵¹⁰ In some circuit opinions, individual judges writing separately have expressed frustration that majorities in those cases are not taking *Reed*’s changes to First Amendment law seriously enough. In *Defense Distributed v. United States Department*

⁵⁰⁷See, e.g., *Am. Bev. Ass’n v. City & Cty of S.F.*, 871 F.3d 884, 891 (9th Cir. 2017) (“While content-based regulations of noncommercial speech are subject to strict scrutiny, see, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), regulations of commercial speech are subject to lesser review.”); *Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 601 (9th Cir. 2017) (holding “*Reed* did not alter “*Central Hudson*’s longstanding intermediate scrutiny framework”); *Dana’s R.R. Supply v. AG*, 807 F.3d 1235, 1246 (11th Cir. 2017) (“As is so often true, the general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas.”); *Flanigan’s Enters., Inc. v. City of Sandy Springs*, 703 Fed. Appx. 929, 935 (11th Cir. 2017) (“But significantly, the majority opinion in *Reed* did not address the secondary-effects doctrine. For this reason alone, we cannot read *Reed* as abrogating either the Supreme Court’s or this Circuit’s secondary-effects precedents.”); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017) (“*Nationwide* argues that the Supreme Court’s recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) undermines both *Central Hudson* intermediate scrutiny . . . review, and that all content-based restrictions (or compelled disclosures) of commercial speech are now subject to strict scrutiny. *Nationwide* is incorrect.”); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (“We don’t think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection.”).

⁵⁰⁸*NLRB v. Teamsters Union Local*, 668 Fed. Appx. 283 (9th Cir. 2016).

⁵⁰⁹*Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), *rev’d Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁵¹⁰811 F.3d 299, 313 (9th Cir. 2016) (citations omitted). The Ninth Circuit, citing the Supreme Court’s opinion in *United States v. Alvarez*, said these categories included, but were not limited to, obscenity, defamation, fighting words, incitement, speech integral to criminal conduct, child pornography, fraud, true threats, intentional infliction of emotional distress, lying to a government official, false claims of terrorist attacks, lies about the commission of crimes or catastrophes, impersonation of an officer, and trademark infringement. *Id.* at 313-14 (citing *United States v. Alvarez*, 567 U.S. 709 (2012) (Kennedy, J., plurality), (Breyer, J., concurring)).

of *State*,⁵¹¹ for instance, the Fifth Circuit upheld a district court's decision to deny a preliminary injunction to an organization that creates computer files used to create weapons and weapon parts and that wanted to distribute those files freely online. In her dissent, however, Judge Edith Jones, relying in part on *Reed*, argued that the prepublication review scheme the government wanted to impose in the case amounted to a content-based restriction that should have merited strict scrutiny review.⁵¹² Though her opinion was only a dissent, however. Professor Lakier's prediction thus far seems to be right that "*Reed*'s potentially more radical implications may be domesticated by the lower courts."⁵¹³

But it would not be fair to say that *Reed* has had no impact. Notably, *Reed* has changed the content-neutrality calculus in some circuits, forcing courts to prioritize the face of regulations rather than letting the government's purpose be their controlling consideration. That altered approach has then caused circuits to overturn earlier decisions. In *Cahaly v. Larosa*, for instance, the Fourth Circuit ruled that *Reed* abrogated the circuit's "previous descriptions of content neutrality,"⁵¹⁴ which had emphasized the government's purpose in deciding whether a regulation in question was discriminatory. Applying instead *Reed*'s "crucial first step"⁵¹⁵ of determining whether a restriction is neutral on its face, no matter the government's purpose, the court in *Cahaly* struck down as content based South Carolina's anti-robocall statute that applied to calls with a consumer or political message but not to calls made for any other purpose. Similarly, in *Norton v. City of Springfield*,⁵¹⁶ the Seventh Circuit reversed an earlier decision and struck down an anti-panhandling ordinance. The court had upheld the law as a permissible subject matter regulation in 2014, but it reheard the case after *Reed* and recognized that, because "*Reed* understands content discrimination differently,"⁵¹⁷ post-*Reed* the court needed to declare the law – which barred oral requests for immediate donations of money but allowed signs requesting money and oral pleas to send money later – as content based and subject

⁵¹¹838 F.3d 451 (5th Cir. 2016).

⁵¹²*Id.* at 469 (Jones, J., dissenting).

⁵¹³Lakier, *supra* note 170, at 293.

⁵¹⁴796 F.3d 399, 405 (4th Cir. 2015).

⁵¹⁵*Id.*

⁵¹⁶806 F.3d 411 (7th Cir. 2015).

⁵¹⁷*Id.* at 412.

to strict scrutiny, which it failed. Panels in the Third,⁵¹⁸ Sixth⁵¹⁹ and the D.C. circuits⁵²⁰ have likewise recognized that *Reed* altered their approaches to determining content neutrality and, in some instances, courts have been forced to change opinions that were decided prior to *Reed*.

Reed, then, *has been* consequential, but it has not tied the government's hands in all areas of regulation affecting speech. The Seventh Circuit, for instance, struck down the anti-panhandling ordinance in *Norton* as content based, but in *Cutting v. City of Portland*,⁵²¹ the First Circuit ruled a law there aimed at curbing an increase in panhandling on traffic medians was content neutral. The First Circuit said the law, which prohibited "standing, sitting, staying, driving, or parking on median strips,"⁵²² restricted speech only on the basis of where it took place, not on what was said. Similarly, the Fourth Circuit, in *Central Radio Company v. City of Norfolk*,⁵²³ and the Sixth Circuit, in *Wagner v. City of Garfield Heights*,⁵²⁴ struck down sign ordinances as content based under *Reed*. But in *Luce v. Town of Campbell*, the Seventh Circuit upheld as content neutral an ordinance that forbade "all signs, flags, and banners (other than traffic-control information) on any of...three overpasses, or within 100 feet of the end of these structures"⁵²⁵ because, under the law, it "does not matter what message any privately placed sign bears."⁵²⁶ And the Ninth Circuit also upheld sign ordinances, aimed at mobile billboards, in *Lone Star Security and Video, Inc. v. City of Los Angeles*, ruling that, unlike *Reed*, the ordinances in question "do not single out a specific subject matter for differential treatment, nor is any kind of mobile billboard exempted from regulation based on its content."⁵²⁷ As another example, after *Reed*, laws aimed at regulating robocalls have fared differently in the circuits. The Fourth Circuit struck down one as content discriminatory in *Cahaly*. But the Seventh

⁵¹⁸Free Speech Coal., Inc. v. AG U.S., 825 F.3d 149 (3rd Cir. 2016).

⁵¹⁹Wagner v. City of Garfield Heights, 675 Fed. Appx. 599 (6th Cir. 2017).

⁵²⁰Pursuing America's Greatness v. FEC, 831 F.3d 500 (D.C. Cir. 2016).

⁵²¹802 F.3d 79 (1st Cir. 2015).

⁵²²*Id.* at 81. The court, though, found that the law failed intermediate scrutiny since it "indiscriminately bans virtually all expressive activity in all of the City's median strips and thus is not narrowly tailored to serve the City's interest in protecting public safety." *Id.*

⁵²³811 F.3d 625 (4th Cir. 2016).

⁵²⁴675 Fed. Appx. 599, 602 (6th Cir. 2017).

⁵²⁵872 F.3d 512, 513 (7th Cir. 2017).

⁵²⁶*Id.* at 514.

⁵²⁷827 F.3d 1192, 1199 (9th Cir. 2016).

Circuit, in *Patriotic Veterans v. Zoeller*, distinguished *Cahaly* and upheld Indiana's anti-robocall statute as content neutral, ruling that, unlike South Carolina's law, the Indiana law did not "discriminate by content — the statute determines who may be called, not what message may be conveyed."⁵²⁸ And in *Gresham v. Swanson*,⁵²⁹ the Eighth Circuit also upheld an anti-robocall statute. Without citing *Cahaly*, the Eighth Circuit ruled that the exceptions in the Minnesota law allowing some calls but not others "do not reflect a content preference; they are based on an assumption of implied consent."⁵³⁰ Plaintiffs have found, in other words, that invoking *Reed* is not always the First Amendment panacea they might have hoped for.⁵³¹ Phrased differently, crying out "*Reed*" does not instinctively bully a court into declaring that a regulation is content based.

Second, the circuit cases reflect that *Reed* did not provide much clarity on how lower courts should use the case's first or second steps in determining if a regulation is content based. The *Reed* Court emphasized that a benign purpose could not save a regulation that discriminated on its face. Determining what amounts to a facially discriminatory regulation is therefore crucial. But there does not seem to be widespread agreement on how to determine that. Some circuit court opinions have turned to the enforcing officer test that Chief Justice Roberts invoked in *McCullen*. In finding the Federal Election Commission's naming regulations content based in *Pursuing America's Greatness v. Federal Elections Commission*,⁵³² for instance, the D.C. Circuit wrote that "to know whether to apply [the regulation], the FEC must 'examine the content' of the title of PAG's website or Facebook page and ask

⁵²⁸845 F.3d 303, 306 (7th Cir. 2017).

⁵²⁹866 F.3d 853 (8th Cir. 2017).

⁵³⁰*Id.* at 856.

⁵³¹*See also, e.g.,* A.N.S.W.E.R. Coal. v. Basham, 845 F.3d 1199 (D.C. Cir. 2017) (upholding as content neutral a National Park Service regulation that authorized a priority permit to set aside space at the presidential inauguration for the Presidential Inaugural Committee); A.N.S.W.E.R. v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (upholding as content neutral a law that regulated signs posted on lampposts); Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd., 885 F.3d 443 (6th Cir. 2018) (upholding as content neutral Ohio's single-subject rule pertaining to ballot initiative petitions); Recycle for Change v. City of Oakland, 856 F.3d 666 (9th Cir. 2017) (ruling a law regulating unattended donation collection boxes was content neutral).

⁵³²831 F.3d 500 (D.C. Cir. 2016).

whether the title supports or opposes the candidate. That is content-based discrimination pure and simple.”⁵³³ But numerous circuit court opinions have not employed that test. In *Recycle for Change v. City of Oakland*,⁵³⁴ for instance, the Ninth Circuit found that, even though an officer would need to inspect a box to determine whether it was subject to the ordinance at issue, the law was still content neutral. “While at times we have used [the] ‘enforcing officer’ test to explain why a law is content based, we — and the Supreme Court — have also cautioned that an officer’s inspection of a speaker’s message is not dispositive on the question of content neutrality,”⁵³⁵ the Ninth Circuit ruled. The court pointed out that the Ninth Circuit chose not to follow the test when it decided *Reed*, and that the *Reed* Court did not consider it. In *Recycle for Change*, the Ninth Circuit instead contrasted the ordinance it was reviewing with the sign regulation in *Reed*. And unlike the regulation in *Reed*, the court concluded, the ordinance in *Recycle for Change* “does not discriminate on the basis of any message — whether by targeting speech written on the boxes or by targeting the substantive content of the boxes’ inherent expressive component.”⁵³⁶

As *Recycle for Change* demonstrates, determining whether a regulation, on its face, “target[s] speech based on its communicative content”⁵³⁷ or “applies to particular speech because of the topic discussed or the idea or message expressed”⁵³⁸ or “draws distinctions based on the message a speaker conveys”⁵³⁹ — all phrases from *Reed* — is not always straightforward. Even after *Reed*, then,

⁵³³*Id.* at 509 (citations omitted). See also *Animal Legal Def. Fund v. Wadsen*, 878 F.3d 1184, 1189 (9th Cir. 2018) (“[B]ecause the Recordings Clause prohibits the filming of agricultural ‘operations’ but nothing else, its application explicitly pivots on the content of the recording; in other words, only by viewing the recording can the Idaho authorities make a determination about criminal liability.”); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1199 (9th Cir. 2016) (“[A]n officer seeking to enforce the non-motorized billboard ordinances must decide only whether an offending vehicle constitutes a prohibited ‘advertising display’ because its primary purpose is to display messages, as opposed to transporting passengers or carrying cargo.”); *March v. Mills*, 867 F.3d 46, 60 (1st Cir. 2017) (ruling the provision’s “application depends on whether the noisemaker intended to be disruptive in making the noise, whatever its content. Thus, nothing on the face of the Noise Provision indicates that enforcement authorities must examine the content of the speaker’s communication in order to find a violation.”).

⁵³⁴856 F.3d 666 (9th Cir. 2017).

⁵³⁵*Id.* at 671.

⁵³⁶*Id.* at 672.

⁵³⁷*Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁵³⁸*Id.* at 2227.

⁵³⁹*Id.*

courts at times still grapple with *when* a regulation is content based on its face. In *United States v. Petras*, for instance, the Fifth Circuit said it was a “close call” whether *Reed* rendered a law content based that criminalized interfering with the performance of the duties of a flight crew by intimidation.⁵⁴⁰ The Seventh Circuit wondered whether *Reed* jeopardized a newspaper exception to a law that otherwise barred peddling merchandise on a sidewalk adjacent to a baseball stadium.⁵⁴¹ The First Circuit in *March v. Mills* ruled that *Reed* “does not suggest that a provision is content based merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent,”⁵⁴² overturning a district court ruling that had relied on *Reed* in supporting an abortion protester's argument that the noise provision at issue was content based. In another example, in *Act Now to Stop War & End Racism Coalition v. District of Columbia*,⁵⁴³ the D.C. Circuit upheld as content neutral the law that allowed signs to remain on a public lamppost for up to 180 days but required that any sign relating to an event had to be removed within thirty days after that event. Determining whether a sign relates to an event requires examining the content of the sign, and the law appears to draw a distinction “based on the message a speaker conveys,”⁵⁴⁴ but the D.C. Circuit was not persuaded by those arguments. The court ruled instead that the “‘event-related’ category is not itself content based.”⁵⁴⁵ The D.C. Circuit reasoned that the Supreme Court in *Reed* found problematic that the Town of Gilbert had made content-based distinctions among different types of events. Here, though, the “District of Columbia law treats all event-related signs alike and is thus content neutral.”⁵⁴⁶ In its ruling, the court especially emphasized that the government's rationale for the law was neutral.⁵⁴⁷

Circuit courts are also inconsistently applying the second step from *Reed*. The *Reed* Court emphasized that laws that cannot be “justified

⁵⁴⁰The court ultimately ruled that it did not need to answer the question. *See supra* notes 247-57 and accompanying text.

⁵⁴¹*Left Field Media v. City of Chi.*, 822 F.3d 988 (7th Cir. 2016).

⁵⁴²867 F.3d 46, 61 (1st Cir. 2017).

⁵⁴³846 F.3d 391 (D.C. Cir. 2017).

⁵⁴⁴*Reed*, 135 S. Ct. at 2227. Indeed, the Court held, “A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.” *Id.* at 2231.

⁵⁴⁵846 F.3d at 398.

⁵⁴⁶*Id.* at 405.

⁵⁴⁷The law, the court held, was “wholly viewpoint neutral” and “reveals not even a hint of bias or censorship.” *Id.* at 403-04 (citation omitted).

without reference to the content of the regulated speech” or that were adopted by the government “because of disagreement with the message [the speech] conveys”⁵⁴⁸ amount to a “separate and additional category of laws”⁵⁴⁹ that are considered content based. Since the sign code in *Reed* was discriminatory on its face, however, the Court found it had no need to consider the government’s purpose for enacting it. *Reed*, therefore, provided no clarity to lower courts on what it means to evaluate government purpose in determining content neutrality, and, unsurprisingly, inconsistencies remain. At times courts give what seems to be little more than an approving, deferential nod to the government’s asserted purpose.⁵⁵⁰ Yet other times circuit courts have conducted a more searching examination of the legislative record to establish a regulation’s intent.⁵⁵¹ In *Eagle Point Education Association v. Jackson City School District No. 9*,⁵⁵² for instance, the Ninth Circuit struck down a school district policy that prohibited picketing on property owned by the district even though the policy was neutral on its face. The court said the regulation was both content based and viewpoint based because it was “adopted because of government disagreement with the speech’s message.”⁵⁵³ Yet there have been still other instances in which circuit courts have seemed to declare regulations content neutral without referencing *Reed*’s second step and scrutinizing the government’s purpose for the law at all.⁵⁵⁴ Then, in *First Resort, Inc. v. Herrera*,⁵⁵⁵ in ruling that San Francisco’s Pregnancy Information Disclosure and Protection Ordinance was viewpoint neutral,⁵⁵⁶ the Ninth Circuit appeared to undermine *Reed* entirely while dismissing the plaintiff’s argument that the city had an illicit motive in enacting the ordinance. Quoting a 2005 Ninth Circuit case that was itself quoting *United States v. O’Brien*, the Ninth Circuit in *First Resort, Inc.* found that it would not matter even if First Resort could establish an illicit motive: That would not be dispositive, the

⁵⁴⁸*Reed*, 135 S. Ct. at 2227 (citations omitted).

⁵⁴⁹*Id.*

⁵⁵⁰*See, e.g.*, *March v. Mills*, 867 F.3d 46 (1st Cir. 2017).

⁵⁵¹*See, e.g.*, *Animal Legal Def. Fund v. Wadsen*, 878 F.3d 1184, 1191 (9th Cir. 2018) (noting, “The legislative history reveals a complex series of motivations behind the statute.”); *Havlak v. Vill. of Twin Oaks*, 864 F.3d 905 (8th Cir. 2017).

⁵⁵²880 F.3d 1097 (9th Cir. 2018).

⁵⁵³*Id.* at 1108.

⁵⁵⁴*See, e.g.* *Luce v. Town of Campbell*, 872 F.3d 512 (7th Cir. 2017); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192 (9th Cir. 2016); *Cutting v. City of Portland* 802 F.3d 79 (1st Cir. 2015);

⁵⁵⁵860 F.3d 1263 (9th Cir. 2017).

⁵⁵⁶The ordinance made it illegal for a clinic to falsely advertise abortion services if it did not provide them. *See supra* notes 382-87 and accompanying discussion.

court held, “because [t]he Supreme Court has held unequivocally that it ‘will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.’”⁵⁵⁷ That *First Resort, Inc.* holding seems to conflict head on with *Reed*’s second step. The Supreme Court should thus take a case involving a regulation that is neutral on its face in order to clarify how to determine what amounts to a discriminatory purpose.

Third, and in spite of what Justice Thomas may have hoped for – and there is reason to believe he meant for *Reed* to be as sweeping as possible⁵⁵⁸ – even after *Reed*, muddiness undoubtedly still surrounds the Court’s content discrimination jurisprudence. The Court itself has provided at least some clarity about *Reed*’s reach in its past two terms. In its June 2018 decision in *National Institute of Family and Life Advocates v. Becerra*,⁵⁵⁹ the Court answered whether content-based restrictions on “professional speech” amounted to a category of content immune from *Reed* and subject instead to a lesser standard of review. In overturning the Ninth Circuit’s decision in the case, Justice Thomas, writing again for the Court, found that “this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’”⁵⁶⁰ And one year earlier, in *Matal v. Tam*,⁵⁶¹ the Court indicated that *Reed* did not capsize the commercial speech doctrine when the Court continued to invoke the *Central Hudson* Test. Justice Alito’s opinion in *Tam*, which was written for a majority in some parts and a plurality in others, did not mention *Reed* but, instead, cited *Central Hudson* as the existing test for regulations of commercial speech.⁵⁶² Justice Kennedy’s concurring opinion in *Tam* seemed to suggest that he, too, thought the commercial speech doctrine still survived.⁵⁶³ Only Justice Thomas has indicated that he wants *Reed* to be

⁵⁵⁷860 F.3d at 1278 (quoting *Menotti v. City of Seattle*, 409 F.3d 1113, 1130 n.29 (9th Cir. 2005) (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968))).

⁵⁵⁸See *infra* note 564 and accompanying text.

⁵⁵⁹138 S. Ct. 2361 (2018).

⁵⁶⁰*Id.* at 2371-72. “In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny.” *Id.* at 2375.

⁵⁶¹137 S. Ct. 1744 (2017).

⁵⁶²*Id.* at 1764 (“We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve ‘a substantial interest, and it must be narrowly drawn.’”) (citations omitted).

⁵⁶³“Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in

as sweeping as it could be in this regard. In his short opinion in *Tam* concurring in part and concurring in the judgment, Justice Thomas quoted his 2001 concurring opinion from *Lorillard Tobacco Co. v. Reilly* to stress that he continues to believe that strict scrutiny should be the standard of review even for commercial speech, a seemingly unnecessary argument if he thought *Reed* had already made that dramatic change.⁵⁶⁴ *Reed* can thus be seen as another example of Justice Thomas's long-term strategy to assert that strict scrutiny should be used on *all* content-based laws, regardless of the category of speech targeted by the law.

Implicitly at least, however, the rest of the Court has said that *Reed*'s condemnation of facial content discrimination does not subject all regulations of commercial speech to strict scrutiny, and, to date, no circuit court decision has ruled otherwise. Only an explicit declaration from the Court, of course, would settle the question for sure. That also holds true for the secondary effects doctrine. Three circuits have questioned that doctrine's viability after *Reed*. The Third Circuit, in *Free Speech Coalition, Inc. v. Attorney General United States*,⁵⁶⁵ recognized that *Reed*'s logic would seem to undermine the secondary effects doctrine. In *BBL, Inc. v. City of Angola*, the Seventh Circuit pointed out that it was a "legal fiction"⁵⁶⁶ to treat facially content-based laws regulating sexually oriented businesses as content neutral. And the Eleventh Circuit, in *Flanigan's Enterprises, Inc. v. City of Sandy Springs*,⁵⁶⁷ wrote that "[t]here [was] no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine."⁵⁶⁸ Without clear guidance from the Court, however, all three circuits declined to overturn secondary effects precedents. As with commercial speech and professional speech, then, *Reed* brought more confusion to the secondary effects area, rather than certainty, for the

the commercial context. To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality." *Id.* at 1767 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁶⁴*Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment) ("I also write separately because 'I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial."'") (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment)).

⁵⁶⁵825 F.3d 149 (3rd Cir. 2016).

⁵⁶⁶809 F.3d 317, 326 (7th Cir. 2015).

⁵⁶⁷703 Fed. Appx. 929 (11th Cir. 2017).

⁵⁶⁸*Id.* at 935.

circuit courts. The Court should thus also accept a secondary effects case to clarify if the doctrine survived *Reed*, and if it did, why.

Fourth, perhaps as a further indication of the confusion surrounding *Reed*, it appears that some courts have done their best to avoid *Reed* altogether by declining to decide whether a regulation at issue is content based under *Reed*'s calculus. These courts have instead determined that they do not need to decide if a regulation should be subjected to strict scrutiny or not because they determine the regulation fails intermediate scrutiny⁵⁶⁹ regardless of whether it is content, based or content neutral. In another instance, a court declined to decide whether a law was discriminatory under *Reed* because it found, based on extant circuit precedent, the law at issue would survive strict scrutiny.⁵⁷⁰ While one might argue this is evidence of the principle of judicial restraint at work, this approach appears to contradict how Chief Justice Roberts approached the analysis in *McCullen*. There, the Court wrestled with whether the law was content discriminatory, and declared it content neutral, *even though* the Court ultimately ruled the law failed intermediate scrutiny. Chief Justice Roberts wrote that it was “unexceptional to perform the first part of a multipart constitutional analysis first.”⁵⁷¹ He continued, citing *Bartnicki v. Vopper*⁵⁷² and *Holder v. Humanitarian Law Project*⁵⁷³ as examples, that “[i]t is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive.”⁵⁷⁴ Some circuit court opinions, though, are seemingly ignoring that aspect of *McCullen* and are thus avoiding *Reed* by

⁵⁶⁹See *Wollschlaeger v. Governor*, 848 F.3d 1293, 1301 (11th Cir. 2017) (“[B]ecause these three provisions do not survive heightened scrutiny under *Sorrell*, we need not address whether strict scrutiny should apply to them.”); *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (“We need not wade into these troubled waters, however, because the State cannot survive *Central Hudson* scrutiny, and in any event the Creamery does not argue the State’s restriction was content based or speaker focused.”); *Rideout v. Gardner*, 838 F.3d 65, 72 n.4 (1st Cir. 2016) (“As the statute fails even intermediate scrutiny, we need not resolve the question of whether section 659:35, is a content-based regulation.”); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 364 (3rd Cir. 2016) (“Although the Plaintiffs make a compelling argument that *Reed* has altered the applicable analysis of content neutrality, we need not consider the impact of *Reed* because the Complaint presents a viable free speech challenge to the buffer-zone Ordinance under the lower standard of scrutiny to which a content-neutral restriction on speech is subject.”).

⁵⁷⁰*United States v. Petras*, 879 F.3d 155, 166 n.19 (5th Cir. 2018) (“Ultimately this proves academic in light of the fact that we follow *Hicks* in holding that § 46504 is constitutional as surviving strict scrutiny.”).

⁵⁷¹*McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

⁵⁷²532 U.S. 514 (2001).

⁵⁷³561 U.S. 1 (2010).

⁵⁷⁴*McCullen*, 134 S. Ct. at 2530.

deciding to not decide first if a regulation is content based. These courts are thus declining to resolve *Reed's* reach at this point in time.

In this respect, *Reed* appears to be similar to another Supreme Court opinion, *Milkovich v. Lorain Journal Co.*⁵⁷⁵ In that case, the Supreme Court ruled that statements of “pure opinion” on matters of public concern cannot be the successful basis for a libel action. While courts across the country follow this general rule, they do not always follow the Court’s reasoning in *Milkovich* as to what constitutes a statement of “pure opinion,” and many lower courts in the United States since the Court’s decision have decided libel cases involving statements of opinion without using the *Milkovich* standard, gravitating instead to different approaches for determining whether a remark is intended as an assertion of fact or a statement of opinion. Four years after *Milkovich* was decided, Professor Kathryn Dix Sowle found that lower courts had adopted eight different approaches to *Milkovich*, only one of which was to follow the case precisely.⁵⁷⁶ Similarly here, many circuit court decisions citing *Reed* seem to avoid, misapply or narrow *Reed* from below.

In conclusion, although *Reed* seemingly had the potential to be revolutionary, and perhaps Justice Thomas intended for it to be that way, to date it has neither brought about drastic changes to First Amendment doctrine across the circuit courts, nor has it provided broad clarity to how courts should differentiate between content-neutral and content-based laws. While *Reed* has had some impact, more than three years after the decision, content discrimination jurisprudence in the circuit courts still largely remains muddy and incoherent. *Reed*, in fact, may have made what was already a confusing and incoherent area of First Amendment law worse.

⁵⁷⁵497 U.S. 1 (1990).

⁵⁷⁶Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 498 (1994).