
LEADING CASES

CONSTITUTIONAL LAW

First Amendment — Freedom of Speech — Content Discrimination — City of Austin v. Reagan National Advertising of Austin, LLC

Imagine three kinds of statutes: The first limits only signs displaying political messaging. The second restricts only signs directing passersby to nearby events. And the third regulates only signs advertising off-premises activities. When the Supreme Court decided *Reed v. Town of Gilbert*¹ several Terms ago, it suggested that all three posed serious threats to First Amendment interests and therefore warranted “strict” judicial review.² A law is “presum[ed] unconstitutional,” *Reed* announced, if it regulates speech “based on the message a speaker conveys.”³ That sweeping rule, taken at face value, surely applies to all three of the statutes listed above — as well as many other, perhaps “entirely reasonable” laws.⁴ But one of these statutes, the Supreme Court held last Term in *City of Austin v. Reagan National Advertising of Austin, LLC*,⁵ is not like the others; the third — a location-based sign restriction — just doesn’t belong.⁶ *City of Austin* made two important contributions to constitutional free speech law: It clarified that *Reed* does not go as far as many had feared. And it provided lower courts with some direction for how to think about *Reed* going forward. But serious concerns about *Reed*’s breadth remain — concerns that will continue to trouble and divide courts as they figure out how exactly to apply *Reed*.

Content-based restrictions on speech must overcome “strict” judicial scrutiny.⁷ Much therefore rides on whether a speech regulation is “content based” or “content neutral.”⁸ Yet the Supreme Court, for decades, failed to consistently distinguish one from the other.⁹ Instead, it wavered between two different standards: In some cases, the Court would treat

¹ 576 U.S. 155 (2015).

² *See id.* at 163–64.

³ *Id.* at 163. A law survives “strict scrutiny” only if it serves a “compelling interest” that the government “has no other way” of achieving. *Id.* at 181 (Kagan, J., concurring in the judgment).

⁴ *Id.* at 171 (majority opinion) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring)).

⁵ 142 S. Ct. 1464 (2022).

⁶ *See id.* at 1468–69.

⁷ *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). For an account of why strict scrutiny applies to content-based laws, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 450–51 (1996) (arguing that the designation reflects “the view that content-based regulation emerges from illicit motives,” *id.* at 451).

⁸ *See, e.g.*, Kagan, *supra* note 7, at 443 (describing “[t]he distinction between content-based and content-neutral regulations of speech” as “the keystone of First Amendment law”).

⁹ *See* Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, And the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 249 (2017).

any law that drew subject matter distinctions as content based.¹⁰ In others, it would insist that only regulations lacking a content-neutral purpose were content based.¹¹ It was only a few Terms ago, in *Reed v. Town of Gilbert*,¹² that the Court settled on a purportedly “clear and firm rule”¹³: a restriction on speech is content based, no matter its purpose, if its text draws distinctions “based on the message a speaker conveys.”¹⁴ So an ordinance that treats different subject matters differently — that treats, for instance, “ideological” signs more favorably than “political” signs and “temporary directional” signs least favorably of them all — is content based and subject to strict scrutiny.¹⁵

Reed appeared to initiate “a drastic change” in free speech law,¹⁶ prompting fresh challenges to speech regulations that had long been considered permissible under the First Amendment.¹⁷ Location-based limits on signage, such as those challenged in *City of Austin*, are one such example. Like most jurisdictions, the City of Austin regulates outdoor advertising.¹⁸ By ordinance, Austin had imposed restrictions on the use of “off-premises” signs — signs that advertise a business, person, product, or service “not located on the site where the sign is installed.”¹⁹ Specifically, in order to minimize visual blight and promote traffic safety, Austin’s sign code prohibited the construction of new off-premises signs and the digitization of old off-premises signs.²⁰

In 2017, two years after the Court had decided *Reed*, Reagan National Advertising of Austin, a local outdoor-advertising agency, applied to install digital sign faces on various off-premises billboards.²¹ When Austin denied the applications, the agency brought a First

¹⁰ See, e.g., *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (holding that law prohibiting campaign-related speech near polling places was content based).

¹¹ See, e.g., *Hill v. Colorado*, 530 U.S. 703, 724 (2000) (holding that law that furthered state’s interest in protecting patients from “potential physical and emotional harm,” *id.* at 718 n.25, by prohibiting “oral protest, education, or counseling” near health care facilities, *id.* at 724, was content neutral).

¹² *Reed* involved a challenge to a sign code that treated “ideological” signs, “political” signs, and “temporary directional” signs differently. *Reed v. Town of Gilbert*, 576 U.S. 155, 159–60 (2015).

¹³ *Id.* at 171.

¹⁴ *Id.* at 164.

¹⁵ *Id.* at 159–60, 163–64.

¹⁶ *Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702 (5th Cir. 2020) (quoting *Free Speech Coal., Inc. v. Att’y Gen.* U.S., 825 F.3d 149, 160 n.7 (3d Cir. 2016); and citing other opinions across circuits). However, some courts have characterized *Reed* differently. See, e.g., *Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670, 678 (W.D. Tex. 2019) (“*Reed* did not change the test for content-based speech. Rather, *Reed* recites the familiar standard.”).

¹⁷ See Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1986–87 (2016) (noting post-*Reed* challenges to “other municipal sign codes, antipanhandling regulations, commercial speech regulations, and regulations of general commercial conduct” (footnotes omitted)).

¹⁸ *City of Austin*, 142 S. Ct. at 1469.

¹⁹ *Id.* (citing AUSTIN, TEX., CITY CODE § 25-10-3(11) (2016)).

²⁰ *Id.* at 1469–70.

²¹ *Id.* at 1470.

Amendment challenge against the city's sign code, asserting that, under *Reed*, the ordinance's on/off premises distinction was a content-based restriction of speech subject to strict scrutiny.²²

The Western District of Texas disagreed. Judge Pitman rejected Reagan National's theory that a sign regulation is content based simply because its enforcement requires the government to read what the sign says.²³ Such a broad rule, he explained, "would apply strict scrutiny to all regulations for signs with written text," even "stop signs."²⁴ Instead, Judge Pitman embraced a more modest interpretation of *Reed*: a regulation of speech is not content based if it does not restrict "discussion of any specific topics, ideas[,] or viewpoints."²⁵ And because Austin's ordinance regulated signs based on location, not on the message conveyed, it was not content based on its face.²⁶

The Fifth Circuit reversed and remanded.²⁷ Writing for a unanimous panel, Judge Elrod²⁸ held that the challenged ordinance was content based under *Reed* because its application "depend[ed] on the content" of the sign's message.²⁹ To determine whether a sign was "off-premises," an Austin official would have to read it and ask: Does this sign advertise a business, product, or service located elsewhere?³⁰ "This," Judge Elrod concluded, "is an 'obvious content-based inquiry,' and it 'does not evade strict scrutiny' simply because a location is involved."³¹

The Supreme Court reversed and remanded.³² A majority of the Court, speaking through Justice Sotomayor,³³ held that Austin's on/off premises distinction was content neutral on its face.³⁴ Justice Sotomayor began with the history of outdoor-advertising regulation in the United States. "American jurisdictions," she explained, "have regulated outdoor advertisements for well over a century."³⁵ And, "[a]s part of this regulatory tradition," governments "have long distinguished" between signs that promote things located elsewhere and those that promote things located onsite.³⁶ The Court's own free speech precedents,

²² *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670, 675 (W.D. Tex. 2019).

²³ *Id.* at 680.

²⁴ *Id.*

²⁵ *Id.* at 681.

²⁶ *Id.*

²⁷ *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 699 (5th Cir. 2020).

²⁸ Judge Elrod was joined by Judges Southwick and Haynes.

²⁹ *City of Austin*, 972 F.3d at 705 (quoting *Thomas v. Bright*, 937 F.3d 721, 731 (6th Cir. 2019)).

³⁰ *Id.* at 704.

³¹ *Id.* at 707 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015)).

³² *City of Austin*, 142 S. Ct. at 1476.

³³ Justice Sotomayor was joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh.

³⁴ *City of Austin*, 142 S. Ct. at 1471.

³⁵ *Id.* at 1469.

³⁶ *Id.*

she noted, have permitted this regulatory practice.³⁷ And, more broadly, they teach that not all restrictions that “require[] an examination of speech” are content based.³⁸ The Court, for example, has held that location-based regulations on solicitation — speech “requesting or seeking to obtain something”³⁹ — are not content based even though, “[t]o identify whether speech entails solicitation, one must read or hear it first.”⁴⁰

Reed did not disturb these traditions.⁴¹ It did not, Justice Sotomayor urged, hold that a sign-code provision is content based simply because “it requires reading the sign at issue.”⁴² Such a broad interpretation “would upend settled understandings of the law” — of “history, experience, and precedent” — while reaching a “bizarre result.”⁴³ Rather, she instructed, *Reed* stood for the much narrower view that a regulation of speech is facially content based if it “applies to particular speech because of the topic discussed or the idea or message expressed”⁴⁴ — that is, when it “single[s] out specific subject matter for differential treatment.”⁴⁵

So, on this view of *Reed*, Austin’s sign code is not a facially content-based restriction. Much like an “ordinary time, place, or manner restriction[],”⁴⁶ Justice Sotomayor reasoned, the challenged ordinance “distinguish[es] based on location,” not on topic or subject matter: “A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed”⁴⁷ And to the extent that the “distinction requires an examination of speech,” it does so “only in service of drawing neutral, location-based lines.”⁴⁸

Justice Breyer concurred.⁴⁹ He agreed that *Reed* controlled the outcome of the case, but insisted that *Reed* had been wrongly decided.⁵⁰ Some restrictions on speech, he acknowledged, threaten democratic values by “driv[ing] certain ideas or viewpoints from the marketplace [of ideas].”⁵¹ “But not all laws that distinguish between speech based on its

³⁷ *Id.* at 1473–75 (citing *Packer Corp. v. Utah*, 285 U.S. 105, 107, 110 (1932); *Suffolk Outdoor Advert. Co. v. Hulse*, 439 U.S. 808 (1978); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503–12 (1981) (plurality opinion)).

³⁸ *Id.* at 1471; *see also id.* at 1473.

³⁹ *Id.* at 1473 (quoting *Solicitation*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

⁴⁰ *Id.*

⁴¹ *See id.* at 1474.

⁴² *Id.* at 1471.

⁴³ *Id.* at 1475.

⁴⁴ *Id.* at 1471 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

⁴⁵ *Id.* (quoting *Reed*, 576 U.S. at 169).

⁴⁶ *Id.* at 1473.

⁴⁷ *Id.* at 1472–73.

⁴⁸ *Id.* at 1471. The remainder of the inquiry — whether the ordinance was underpinned by an impermissible purpose or justification, or whether it could survive even intermediate scrutiny — was left for the Fifth Circuit to resolve. *See id.* at 1475–76.

⁴⁹ *Id.* at 1476 (Breyer, J., concurring).

⁵⁰ *Id.*

⁵¹ *Id.* at 1477 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)).

content” do so.⁵² And categorically applying strict scrutiny whenever a regulation targets speech because of its content, as *Reed* requires, “can sometimes disserve the very First Amendment interests it was designed to protect.”⁵³

Indeed, Justice Breyer continued, countless federal, state, and local regulations — think laws requiring tax disclosures, prescription-drug labeling, or workplace-safety warnings — “turn, often necessarily, on the content of speech.”⁵⁴ But if “courts must strictly scrutinize [these] regulations simply because they refer to particular content,” then *Reed*’s formal rule comes with undue costs.⁵⁵ Courts will have to “strike down ‘entirely reasonable’ regulations,”⁵⁶ “dilute” the strict scrutiny standard to avoid doing so,⁵⁷ or “develop a matrix” of subrules and exceptions to sort reasonable content-based regulations from unreasonable ones.⁵⁸

Justice Alito concurred in the judgment in part and dissented in part.⁵⁹ He disagreed with the majority as to whether Austin’s ordinance was content based.⁶⁰ Under Austin’s sign code, he reasoned, a coffee-shop owner can post a storefront sign promoting a new drink inside, but not one advertising free COVID-19 tests at a nearby pharmacy or urging attendance at a local city council meeting.⁶¹ Such disparate treatment is “discrimination on the basis of topic or subject matter.”⁶² Justice Alito nevertheless agreed with the majority that Austin’s ordinance was not facially unconstitutional. A plaintiff challenging a law on its face, he explained, must show that at least “a substantial number” of the law’s applications would violate the Constitution.⁶³ But because applications of Austin’s sign code would count as regulations of *commercial* speech,

⁵² *Id.*

⁵³ *Id.* at 1476.

⁵⁴ *Id.* at 1477; *see also* *Reed v. Town of Gilbert*, 576 U.S. 155, 177–78 (2015) (Breyer, J., concurring in the judgment) (listing “examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place,” *id.* at 177).

⁵⁵ *City of Austin*, 142 S. Ct. at 1477.

⁵⁶ *Id.* (quoting *Reed*, 576 U.S. at 171 (majority opinion)).

⁵⁷ *Id.* at 1478.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1479 (Alito, J., concurring in the judgment in part and dissenting in part).

⁶⁰ *See id.* at 1480.

⁶¹ *Id.* at 1481.

⁶² *Id.*

⁶³ *Id.* at 1479–80 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Generally, “a plaintiff bringing a facial challenge must ‘establish that no set of circumstances exists under which the [law] would be valid,’ or show that the law lacks ‘a plainly legitimate sweep.’” *Id.* at 1479 (alteration in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021)). But for a law burdening free speech, a plaintiff need show only that “a substantial number of its applications are unconstitutional,” *id.* at 1480 (quoting *Stevens*, 559 U.S. at 473) — a “somewhat less demanding test,” *id.* at 1479–80. Justice Alito expressed doubt that the challengers could prevail under either inquiry. *Id.* at 1480.

which are analyzed under a much more lenient standard of review, Austin’s ordinance would likely survive a facial challenge.⁶⁴

Justice Thomas,⁶⁵ who had written for the Court in *Reed*,⁶⁶ dissented.⁶⁷ Under Austin’s sign code, he explained, “[a] sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not.”⁶⁸ The ordinance thus singles out for regulation a “categor[y] of signs based on the type of information they convey.”⁶⁹ And, per *Reed*’s “commonsense” test, such disparate treatment is content based and triggers strict scrutiny.⁷⁰

The majority, Justice Thomas asserted, had reached the opposite result by “recasting facially content-based restrictions as only those that target *sufficiently specific* categories of communicative content.”⁷¹ But *Reed* drew no such distinction, and any rule that does is both “incoherent and unworkable.”⁷² For one thing, Justice Thomas explained, “there is no principled way” to determine how specific is “‘specific’ enough.”⁷³ (Why is singling out off-premises advertising “insufficiently specific to qualify as content based under *Reed*”?⁷⁴) Worse yet, he continued, the majority’s approach “turns the concept of content neutrality into a ‘vehicl[e] for the implementation of individual judges’ policy preferences.”⁷⁵ (Who is to say when a given outcome makes for a “bizarre result”?⁷⁶) Replacing *Reed*’s “clear and firm rule”⁷⁷ with an “arbitrary” and “ad hoc” approach poses a “serious threat[]” to First Amendment values.⁷⁸

When *City of Austin* came before the Court, free speech law under *Reed* was in a state of disarray. Lower courts, troubled by *Reed*’s apparent scope, had split on whether to interpret *Reed* at full breadth — and, if not, when to apply it. But *City of Austin* did little to address these troubles. The interpretations of *City of Austin* that are most plausible do little to cabin *Reed*’s scope, and the interpretations that most narrow *Reed*’s reach suffer from their own ambiguities. As a result, *City of Austin* left this core area of constitutional free speech law

⁶⁴ See *id.* at 1480–81.

⁶⁵ Justice Thomas was joined by Justices Gorsuch and Barrett.

⁶⁶ *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

⁶⁷ *City of Austin*, 142 S. Ct. at 1481 (Thomas, J., dissenting).

⁶⁸ *Id.* at 1483 (citing *Reed*, 576 U.S. at 171).

⁶⁹ *Id.* (alteration in original) (quoting *Reed*, 576 U.S. at 159).

⁷⁰ *Id.* at 1482 (quoting *Reed*, 576 U.S. at 163).

⁷¹ *Id.* at 1484 (emphasis added).

⁷² *Id.*

⁷³ *Id.* at 1486.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1491–92 (alteration in original) (quoting *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting)).

⁷⁶ *Id.* at 1492 (quoting *id.* at 1475 (majority opinion) (emphasis added)).

⁷⁷ *Id.* at 1491 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015)).

⁷⁸ *Id.*

in largely the same condition it had found it: a confusing doctrinal mess for the lower courts to sort out.

In *Reed*, the Court attempted to clean up decades of doctrinal confusion by announcing what Justice Thomas described as a “clear and firm rule.”⁷⁹ But *Reed*’s test has been anything but — and, as Justice Breyer predicted,⁸⁰ its apparent breadth is to blame. On its own terms, *Reed* subjects laws that seem “entirely reasonable” to exacting judicial review.⁸¹ Taken to its logical end, *Reed* would invalidate “perhaps thousands” of speech regulations, including those that pose no plausible threat to First Amendment interests.⁸² So courts, reluctant to strike down “entirely reasonable” regulations, have opted instead to narrow *Reed* from below,⁸³ either by diluting the strict scrutiny standard or by devising various ways to distinguish *Reed*.⁸⁴ But they’ve done so with little guidance from above. Because the *Reed* Court likely intended for its rule to apply broadly, the decision says little about when its rule does not.⁸⁵ The result has been considerable inconsistency and incoherency in this area of constitutional free speech law.⁸⁶

So, in *City of Austin*, the Court had a doctrinal decision to make: Either affirm *Reed* and insist that it be interpreted at face value. Or narrow *Reed* and explain when it does (and doesn’t) apply. *City of Austin* tried to do both. As to scope, *City of Austin* affirmed *Reed*’s formal test: a speech regulation is content based, the Court maintained, if it “target[s] speech based on its communicative content.”⁸⁷ But the Court then clarified that *Reed* did not go as far as many had feared. It held that the Fifth Circuit’s broad interpretation of *Reed* — that a law is content

⁷⁹ *Reed*, 576 U.S. at 171.

⁸⁰ *See id.* at 176–78 (Breyer, J., concurring in the judgment).

⁸¹ *Id.* at 171 (majority opinion) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring)).

⁸² Lakier, *supra* note 9, at 235; *see also id.* at 265–66 (listing as examples labor laws restricting certain kinds of employer speech, employment laws prohibiting discrimination, and professional rules regulating doctor and lawyer speech).

⁸³ *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

⁸⁴ *See* Brief of the Knight First Amendment Institute at Columbia University & Professor Genevieve Lakier as *Amici Curiae* in Support of Petitioner at 13–14, *City of Austin*, 142 S. Ct. 1464 (No. 20-1029) [hereinafter Knight Institute & Lakier Amicus Brief]; Note, *supra* note 17, at 2000 (summarizing how courts have distinguished *Reed* “up, down, and sideways”).

⁸⁵ *See* Lakier, *supra* note 9, at 254 n.94 (noting that *Reed*’s failure “to specify in what circumstances the decision applied . . . has led to considerable debate among the lower courts about the scope of the rule”); Note, *supra* note 17, at 1998 (“*Reed* may have pushed courts to develop new ways to avoid the strict scrutiny it seems to demand.”).

⁸⁶ *See* Lakier, *supra* note 9, at 293–94; Note, *supra* note 17, at 2001 (“*Reed* thus appears to have further fragmented First Amendment doctrine, not unified it.”); Knight Institute & Lakier Amicus Brief, *supra* note 84, at 4 (noting the “rampant inconsistency” in the lower courts after *Reed*).

⁸⁷ *City of Austin*, 142 S. Ct. at 1471 (alteration in original) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

based so long as its application requires a government official to examine a speaker's message⁸⁸ — is wrong.⁸⁹ Rather, a regulation is facially content based only if its text discriminates on the basis of specific kinds of content — namely, “topic or subject matter.”⁹⁰

And as to guidance, *City of Austin* affirmed that history and tradition matter.⁹¹ As Justice Sotomayor emphasized, the Court has long approved “location-based” regulations on advertising signs.⁹² And jurisdictions have, for decades, relied on that endorsement to address the unique safety and aesthetic concerns posed by outdoor advertising.⁹³ Five Justices were not willing to unsettle this “unbroken tradition of on/off premises distinctions.”⁹⁴ Nor were they inclined to endorse an interpretation of *Reed* that would call into question a good number of the Court's long-standing precedents, such as cases permitting regulations of solicitation.⁹⁵ This aversion to disturbing these regulatory and judicial traditions suggests that lower courts, too, must heed “the teachings of history, experience, and precedent” when applying *Reed*.⁹⁶

But even after *City of Austin*, *Reed*'s breadth remains a thorny problem. A doctrine that applies strict scrutiny whenever a regulation of speech draws distinctions based on “topic or subject matter” still imperils a wide range of “entirely reasonable” regulatory activity.⁹⁷ Such scrutiny, as the saying goes, though “‘strict’ in theory,” ends up being quite “fatal in fact.”⁹⁸ So judges bothered by *Reed*'s sweeping nature have good reason to remain concerned after *City of Austin*.

And even if *Reed* is not as broad as critics initially feared, *City of Austin* offers little clarity on when it actually applies. Instead, *City of Austin*'s effort to distinguish *Reed* raises as many difficult doctrinal questions as it resolves. The Court in *City of Austin* maintained that laws discriminating between “political,” “ideological,” and “directional” messages are meaningfully different from laws disfavoring “off-premises”

⁸⁸ Other circuits shared the Fifth Circuit's understanding of *Reed*. See, e.g., *Thomas v. Bright*, 937 F.3d 721, 730 (6th Cir. 2019).

⁸⁹ *City of Austin*, 142 S. Ct. at 1471.

⁹⁰ *Id.* at 1472.

⁹¹ See *id.* at 1474–75 (citing *Packer Corp. v. Utah*, 285 U.S. 105, 107, 110 (1932); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015)); see also Transcript of Oral Argument at 27, *City of Austin* (No. 20-1029) (statement of Kavanaugh, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1029_jifl.pdf [<https://perma.cc/T5WM-CPHQ>].

⁹² *City of Austin*, 142 S. Ct. at 1475.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *id.* at 1473–74 (citing, for example, *Cantwell v. Connecticut*, 310 U.S. 296, 306–07 (1940)).

⁹⁶ *Id.* at 1475.

⁹⁷ See Transcript of Oral Argument, *supra* note 91, at 35 (statement of Breyer, J.) (noting that virtually “[e]very law on the statute books in the SEC[,] . . . railroad regulation, airline regulation, energy regulation, you name it,” all refer to “specific content”).

⁹⁸ Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

advertising.⁹⁹ But it didn't clearly explain why. Despite the Court's suggestion otherwise, the difference cannot simply be that the sign code in *Reed* treated certain "topic[s] or subject matter[s]" less favorably than others.¹⁰⁰ After all, Austin's ordinance too singled out specific topics — off-premises people, products, services, and businesses — for differential treatment.

This ambiguity leaves lower courts with at least a few plausible directions to take *City of Austin's* treatment of *Reed*. For one, courts might interpret *City of Austin* to mean, narrowly, that a subject matter distinction does not automatically trigger strict scrutiny if the distinction bears a close relation to noncontent aspects of the regulated speech, such as where it takes place. So a subject matter distinction that disfavors off-premises advertising, and does so only to demarcate "neutral, location-based lines," evades strict scrutiny.¹⁰¹ But this interpretation does little to limit *Reed's* reach; it is hard to think of other noncontent features of speech that a subject matter distinction could plausibly track.¹⁰²

Alternatively, courts might take *City of Austin* to mean, more expansively, that speech restrictions drawing *broad* subject matter distinctions are not content based. As the Court suggested, off-premises advertising, like solicitation, is speech that encompasses a wide range of topics.¹⁰³ It subsumes all of the categories of speech differentiated under the ordinance in *Reed* — political, ideological, and temporary directional messaging — and more. Under Austin's ordinance, a sign in a coffee-shop window may not advertise free COVID-19 testing at a nearby pharmacy. But it also can't direct patrons to church services across the street or provide directions to the charity organization next door. In other words, Austin's sign code, much like a law prohibiting solicitation, "applie[d] evenhandedly to all who wish[ed]" to advertise off-site things.¹⁰⁴

The problem is that this principle will be hard to apply going forward. A breadth-based theory of content neutrality would require courts to differentiate sufficiently broad subject matters from narrower ones.¹⁰⁵ That is no simple task; how broad is broad enough? Why, for

⁹⁹ See *City of Austin*, 142 S. Ct. at 1472.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1471.

¹⁰² Perhaps subject matter could serve as a proxy for the "secondary effects" of regulated speech, such as the impact an adult-movie theater has on the surrounding community, which was at issue in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986). But the Court seemed to have little appetite for this argument. No opinion in *City of Austin* mentions the secondary effects doctrine. And during oral argument, two Justices expressed deep skepticism about applying it here. See Transcript of Oral Argument, *supra* note 91, at 31 (statement of Thomas, J.) (asking whether the doctrine has ever been applied "outside of the adult entertainment business cases"); *id.* at 32 (statement of Roberts, C.J.) (finding *City of Renton* to be "a bit of a stretch").

¹⁰³ See *City of Austin*, 142 S. Ct. at 1473–74.

¹⁰⁴ *Id.* at 1473 (alterations in original) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

¹⁰⁵ *Id.* at 1484–87 (Thomas, J., dissenting).

instance, is political speech, which too subsumes a wide range of more-specific topics (tax policy, abortion, gun control, and the like), insufficiently broad? It is already hard for courts to distinguish viewpoint from subject matter;¹⁰⁶ asking them also to differentiate between various subject matters on the basis of breadth may prove even more difficult.

Nor does *City of Austin*'s reliance on history and common practice offer much additional guidance. It's certainly true that many regulations of speech — such as those found in securities,¹⁰⁷ antitrust,¹⁰⁸ and evidence¹⁰⁹ law — have long fallen “well beyond the First Amendment's borders.”¹¹⁰ For these laws, the Court's explicit reluctance to disturb long-standing policy and judicial practice is welcome news. But it's still unclear whether these regulations really are safe from *Reed*'s reach. *City of Austin* did not specify the weight that lower courts should accord long-standing regulatory traditions. Nor did it explain whether such traditions could shield from strict scrutiny laws that clearly discriminate on the basis of topic or subject matter. And because politics and culture, not necessarily doctrinal coherence, have shaped the historical development of the First Amendment,¹¹¹ courts may have trouble explaining why, for instance, a notice requirement regarding workplace safety survives *Reed* but a disclosure requirement as to abortion services does not.¹¹²

In *Reed* and *City of Austin*, the Court revisited a question that has long perplexed courts: What do we do about laws that single out specific subject matter for special treatment? Both decisions, however, left this “keystone of First Amendment law”¹¹³ in a continued state of disarray. One cannot help but wonder how much longer this doctrinal uncertainty will continue before the Court will have to settle on a definite path: Either recognize that *Reed*, interpreted at full breadth, is unworkable — and that First Amendment purposes are “better served” when designations like “content based” are treated “as rules of thumb,” “not as bright-line rules.”¹¹⁴ Or accept *Reed* for what it plainly says — despite all the untoward consequences that will come with it.¹¹⁵

¹⁰⁶ See Kagan, *supra* note 7, at 443 (noting the “fuzzier line” separating subject matter-based restrictions from viewpoint-based ones).

¹⁰⁷ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778–80 (2004).

¹⁰⁸ See *id.* at 1781–82.

¹⁰⁹ See *id.* at 1784.

¹¹⁰ *Id.* at 1778.

¹¹¹ See *id.* at 1784–87.

¹¹² See Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371, 2376, 2378 (2018).

¹¹³ Kagan, *supra* note 7, at 443.

¹¹⁴ *City of Austin*, 142 S. Ct. at 1476 (Breyer, J., concurring).

¹¹⁵ Cf. Lakier, *supra* note 9, at 235–36 (noting how *Reed* “demonstrates once again the pronounced deregulatory tilt of the Roberts Court's First Amendment jurisprudence”).