

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF AUSTIN, TEXAS,)
 Petitioner,)
 v.) No. 20-1029
REAGAN NATIONAL ADVERTISING OF)
AUSTIN, LLC, ET AL.,)
 Respondents.)
- - - - -

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10
11 Washington, D.C.
12 Wednesday, November 10, 2021
13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:00 a.m.
17 APPEARANCES:
18 MICHAEL R. DREEBEN, ESQUIRE, Washington, D.C.; on
19 behalf of the Petitioner.
20 BENJAMIN SNYDER, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting the
23 Petitioner.
24 KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on
25 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-1029, Austin,
5 Texas versus Reagan National Advertising of
6 Austin.

7 Mr. Dreeben.

8 ORAL ARGUMENT OF MICHAEL R. DREEBEN
9 ON BEHALF OF THE PETITIONER

10 MR. DREEBEN: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 This case involves a fundamental
13 question about the meaning of content-based
14 regulation under the First Amendment. The Fifth
15 Circuit interpreted this Court's decision in
16 Reed to mean that any time that an officer must
17 read a sign to apply the law, the law is
18 content-based.

19 That holding is wrong and should be
20 reversed. A law is content-based on its face
21 when the text of the law singles out specific
22 subject matter for differential treatment. The
23 law in Reed did that by distinguishing
24 ideological, political, and directional signs.

25 A rule regulating off-premises

1 advertising does not. The off-premises rule is
2 an empty vessel that applies to all subjects and
3 topics. It turns on the relationship of a sign
4 to its location, not the content of its message.

5 The Fifth Circuit's rigid rule does
6 not further First Amendment values. Austin's
7 law does not skew the marketplace for speech or
8 suppress any ideas. But the Fifth Circuit's
9 rule would have untenable effects. Many
10 ordinances can be applied only by looking at
11 what a sign says. Temporary event signs are a
12 perfect example. Strict scrutiny of such laws
13 is unwarranted.

14 Now Respondent offers a new theory,
15 arguing that any sign code provision tied to the
16 function or purpose of speech is content-based
17 on its face. But many neutral laws are tied to
18 function. Sign regulation is inherently
19 functional. Signs function to present
20 information. And the regulation of solicitation
21 is based on the function of soliciting.

22 So long as these rules are
23 even-handed, they are facially content-neutral.
24 First Amendment review still applies, but the
25 right standard is intermediate, not strict,

1 scrutiny. Because the Fifth Circuit applied the
2 wrong standard, its judgment should be reversed.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Dreeben, would
5 you kindly point to the language that you --
6 that the Fifth Circuit used that said you only
7 need to read the sign, and if you have to read
8 the sign, it's -- it's content-based?

9 MR. DREEBEN: Yes, Justice Thomas.
10 The -- the Fifth Circuit's opinion is in the
11 Petition Appendix, and the Fifth Circuit at
12 several points described the -- the rule that it
13 was adopting as one that involved reading the
14 sign. And I don't have the exact page reference
15 to it in front of me, but we did cite it in our
16 brief repeatedly.

17 And that, I think, is the test that
18 the Fifth Circuit applied. It drew it from what
19 it understood this Court's decision in Reed to
20 hold. But I don't think that Reed, in fact, did
21 hold that.

22 JUSTICE THOMAS: I'm going to ask you
23 one more question. There's a number -- there
24 are a number of hypotheticals that the Fifth
25 Circuit asked Petitioner's count -- counsel, and

1 one I'm interested in what your answer would be.

2 Could Sarah place a digital sign in
3 her yard that said "Vote for Kathy" if Kathy did
4 not live at Sarah's house?

5 MR. DREEBEN: So the answer to that,
6 Justice Thomas, is yes because, under the Austin
7 sign code as it existed at the time of the
8 litigation in this case, there was a political
9 signage exception that was dictated by Texas
10 state law that was incorporated into the -- the
11 -- the Texas sign ordinance that was applicable
12 in Austin. It's no longer in effect the way
13 that it was at the time because Texas -- Austin
14 has amended the code to remove any particular
15 content reference to political signage.

16 And I also think that had the person
17 who wanted to put up such a sign brought a
18 challenge under the City of Ladue versus Gilleo
19 case, that would have been a different case than
20 this one.

21 But, to circle back, I think, to the
22 underlying question, the off-premises rule is a
23 content-neutral rule that would apply to any
24 form of speech. The question here is whether
25 the off-premises rule automatically triggers

1 strict scrutiny.

2 There are other ways in which a law
3 can fall afoul of the First Amendment. One of
4 them is that even if it's content-neutral on its
5 face, if its justifications are tied to the
6 content of the speech or the government's
7 disagreement with the message, that would become
8 content-based.

9 JUSTICE THOMAS: Well, I -- the -- I
10 -- I think I'm having a little bit of trouble
11 because you're saying that if I could speak
12 about, say, a hamburger, a barbecue place,
13 Franklin's, I guess, would be the place in
14 Austin, if -- "If you really want great
15 barbecue" -- "Our hamburgers are great, but if
16 you want great barbecue, go to Franklin's" at a
17 different place. I couldn't -- that sign would
18 not be acceptable under this ordinance, right?

19 MR. DREEBEN: That's correct.

20 JUSTICE THOMAS: Thank you.

21 MR. DREEBEN: The function of the
22 ordinance is to limit off-premises advertising.

23 JUSTICE THOMAS: But, if I were at
24 Franklin's, I could say "Eat at Franklin's"?

25 MR. DREEBEN: That's right. The --

1 the ordinance functions based on the
2 relationship between the sign and its location,
3 and it requires --

4 JUSTICE THOMAS: So, in other words, I
5 can't say certain things unless I'm at a certain
6 location? I can't say "Eat at Franklin's"
7 unless I'm at Franklin's?

8 MR. DREEBEN: Yes, because what Austin
9 is trying to do is regulate the proliferation of
10 off-premises advertising.

11 JUSTICE THOMAS: But I don't
12 understand how that's not content-based if I
13 could say "Eat at Franklin's" if I'm at
14 Franklin's, but I can't say it if I'm at
15 McDonald's or some other place in -- in -- at --
16 at the location in Austin.

17 MR. DREEBEN: So I -- I understand
18 that, and I understand that it's a restriction
19 of speech. What this case turns on is the
20 meaning of content-based restrictions of speech
21 within this Court's First Amendment
22 jurisprudence.

23 And I think the Fifth Circuit
24 interpreted Reed and the -- the impulse behind
25 Your Honor's question is that if you are -- have

1 to look at the content of the sign, in part, to
2 determine whether it is legitimately within the
3 code, then it becomes content-based.

4 That is not my understanding of what
5 content-based has meant under this Court's
6 jurisprudence. And let's start with the Court's
7 case law and the actual cases that this Court
8 cited in Reed to illustrate what it meant by
9 content-based.

10 It cited Sorrell, Carey, and Mosley.
11 Sorrell is a case about the restriction of
12 dissemination of pharmaceutical-related
13 information. Mosley and Carey both involve
14 picketing ordinances that singled out labor
15 picketing as subjects that were permitted and
16 all other picketing was banned.

17 That provides a frame of reference for
18 what the Court meant when it said in Reed itself
19 that laws targeting specific subject matter are
20 content-based. At the other end of the spectrum
21 are laws that are even-handed in their
22 application but deal with a mode of speech, like
23 solicitation.

24 This Court in the Heffron case dealt
25 with a law that limited solicitation of funds at

1 a county fair to a particular booth, and the
2 Court said, as long as it's applied
3 even-handedly to solicitation of all types, it
4 is a content-neutral restriction of speech. It
5 doesn't get a free pass. It goes to
6 intermediate scrutiny.

7 But an open-ended general law that
8 applies to all forms of subjects, all topics,
9 even if it's restricted in the kind of speech
10 that's addressing, remains content-neutral.

11 CHIEF JUSTICE ROBERTS: Mr. Dreeben,
12 what if the rule said no signs within 25 yards
13 of the highway? Does that violate the First
14 Amendment in any way?

15 MR. DREEBEN: No, it doesn't. I --

16 CHIEF JUSTICE ROBERTS: What -- what
17 if it says no signs within 25 yards of the
18 highway, except for signs advertising a business
19 in Austin?

20 MR. DREEBEN: So I think that, Chief
21 Justice Roberts, once you add the specific
22 topical feature to the regulation as you did,
23 signs related specifically to Austin or
24 political signs or any other religious signs,
25 any other specific subject matter, you can't

1 take it out of content-based regulation by
2 saying it only applies to a particular location.

3 But when the in- --

4 CHIEF JUSTICE ROBERTS: So that's --
5 but your test, you said, is -- is if it singles
6 out a particular subject.

7 MR. DREEBEN: Yes.

8 CHIEF JUSTICE ROBERTS: So what
9 subject is that singling out?

10 MR. DREEBEN: Well, I think that that
11 one is singling out businesses that are in
12 Austin as a -- as a subject matter.

13 CHIEF JUSTICE ROBERTS: Well, it
14 singles out location, I would have thought.

15 MR. DREEBEN: It singles out location
16 in where the sign can be, and then the topic of
17 the sign that is written on the sign is language
18 that's being regulated.

19 And even if Your Honor thinks that
20 that would be content-neutral under my test --
21 and perhaps it would be depending on how the
22 Court understands topic -- Austin's law is far
23 more general than that.

24 It doesn't -- it doesn't describe any
25 particular topic, unlike the law in Reed, which

1 differentiated between ideological signs, which
2 could be of one dimension and one duration,
3 political signs, which could be of another
4 dimension and another duration, and event signs
5 related to charitable meetings and religious
6 meetings.

7 There, you have a jurisdiction
8 singling out different kinds of speech and
9 creating a hierarchy of values among those
10 topics, and that resembles what was going on in
11 Sorrell, where the Court said you're
12 distinguishing on who can get
13 pharmaceutical-related information based on the
14 speaker to whom you're providing it.

15 It aligns with Carey and Brown. And
16 it also preserves space for the solicitation
17 line of cases, which deal with a function of
18 speech -- soliciting money does require you to
19 ask what is the person saying, what is he asking
20 for -- but doesn't differentiate within that
21 broad topic of religious speech --

22 CHIEF JUSTICE ROBERTS: Well, why --

23 MR. DREEBEN: -- political speech --

24 CHIEF JUSTICE ROBERTS: -- why -- why
25 isn't it as much of a subject matter as in my

1 hypothetical? Presumably, the signs
2 off-premises are telling you how to get to the
3 premises, as opposed to any other message. Why
4 isn't that as much of a subject matter test as
5 the one about how close to the highway?

6 MR. DREEBEN: I -- I think that's
7 for -- for two reasons. One is locating it
8 within this Court's precedent. There is a
9 differentiation between laws which even-handedly
10 regulate a broad class of subject matters or
11 topics and do not differentiate among them
12 according to what the Court's cases have carved
13 out as topical preferences by the government
14 where it is skewing the marketplace for ideas.

15 So, within the Court's jurisprudence,
16 the Court itself has articulated a line between
17 a regulation of speech that covers all forms of
18 solicitation -- which obviously does require in
19 some ways saying what is the subject of the
20 speech; the subject is asking for something,
21 asking for money, asking for a donation of some
22 kind -- but not restricting it within any
23 particular topic.

24 And the first --

25 JUSTICE BREYER: What about signs for

1 a direction? You know, 495, Route 495, three
2 miles straight ahead, two miles straight ahead,
3 one mile straight ahead.

4 How -- how do they fit in this? I --
5 I'm still -- it may be basic. Maybe everybody
6 understands but me, but I don't understand.

7 MR. DREEBEN: So, Justice Breyer, I
8 don't see those as the kind of signs that are
9 providing topical subject matter distinctions,
10 as this Court --

11 JUSTICE BREYER: No, no --

12 MR. DREEBEN: -- has described in --

13 JUSTICE BREYER: -- they only apply to
14 directions.

15 MR. DREEBEN: That is --

16 JUSTICE BREYER: I mean, they only
17 apply to where something physically is. I mean,
18 what's the difference?

19 MR. DREEBEN: This is a question of
20 generality, of how --

21 JUSTICE BREYER: Generality? It's
22 absolutely specific.

23 MR. DREEBEN: No, I -- I -- I think
24 what the generality that I'm referring to is how
25 general does this Court require a law to be.

1 JUSTICE BREYER: I don't know. I'm
2 just saying, why isn't it content discrimination
3 for a town to say you can put up directional
4 signs?

5 MR. DREEBEEN: It --

6 JUSTICE BREYER: Indeed, we put them
7 up all over the place.

8 MR. DREEBEN: Because the question
9 that the Court is asking in content-based
10 regulation is, is the Court going to apply
11 strict scrutiny, and strict scrutiny is the
12 highest level of review that the Court engages
13 in.

14 JUSTICE BREYER: All right. Why not?

15 MR. DREEBEN: And the reason is --

16 JUSTICE BREYER: You know, and if you
17 go to Highway 93, you will see that every mile
18 for five miles they say how many miles left to
19 get to Route 495. They don't have to do that.
20 They could have, like, two of them.

21 MR. DREEBEN: Correct.

22 JUSTICE BREYER: And they're a pest
23 too --

24 MR. DREEBEN: Correct.

25 JUSTICE BREYER: -- because you get

1 mixed up.

2 MR. DREEBEN: And I think Your Honor
3 has put his finger on why strict scrutiny is an
4 inappropriate lens to review laws that don't
5 have the potential to skew the marketplace for
6 ideas.

7 JUSTICE BREYER: Oh, oh, oh, by the
8 way, it does. It does, because it is the result
9 of those marketplace of ideas transmitted to the
10 legislature of what kind of regulation we want.
11 All right? So it's all right in that First
12 Amendment effort to see that the people are
13 connected to the laws.

14 MR. DREEBEN: So I -- I understand,
15 Justice Breyer, the view of the First Amendment
16 that -- that sees regulation as the transmission
17 of the people's beliefs into laws.

18 We're focused here, I think, on a
19 narrower question, which is --

20 JUSTICE BREYER: All right. A
21 narrower question. I still want to know, on
22 your -- on your theory, whatever it is, if the
23 hamburger thing or the food advertising and so
24 forth is a separate category that by itself
25 leads to strict scrutiny, why doesn't

1 direction-giving lead to strict scrutiny?

2 MR. DREEBEN: Well, Justice --

3 JUSTICE BREYER: It's not supposed to
4 be some zinger question. It's just that I don't
5 understand the answer, and I would like to know
6 what you think.

7 MR. DREEBEN: Well, I -- our -- our
8 view is that neither of them is subject to
9 strict scrutiny, Justice Breyer. The
10 on-premises/off-premises line is a broad
11 category that is not limited as to particular
12 types of subject matters. It applies
13 even-handedly to all of them.

14 And it may have discriminatory effects
15 on some forms of speech. It may not.
16 Discriminatory effects do not make a facially
17 content-neutral law a content-based law --

18 JUSTICE KAGAN: I guess --

19 MR. DREEBEN: -- on its face.

20 JUSTICE KAGAN: -- Mr. Dreeben, one
21 way to ask the question is much depends in your
22 -- on your theory on what a topic is or what a
23 subject matter is, and you're excluding various
24 things from that label. You're excuse -- you're
25 excluding sort of off-premises/on-premises

1 rules. You're -- you're excluding navigational
2 guides. You're excluding directions.

3 And all of this might make to me a
4 good deal of sense, but I guess one question is
5 sort of, where do you draw the line? How do you
6 decide what counts as a topic such that it leads
7 to strict scrutiny, and what doesn't count as a
8 topic such that it wouldn't?

9 MR. DREEBEN: So, Justice Kagan, we
10 have examples that provide guideposts in this
11 Court's cases, and the Court's cases where it
12 has actually applied content-based rules to a
13 statute on its face have involved a level of
14 specificity and a type of idea that's akin to
15 what was going on in Reed, political ideas,
16 ideological speech, directional signs that are
17 tied to particular types of meetings.

18 There, it was nonprofits. Religion
19 was right there in the statute. I don't think
20 that it was a surprise that the Court said that
21 those were content-based limitations on speech.

22 Other cases that provide similar
23 examples which were cited in Reed and relied on
24 in Reed to describe what the meaning of
25 content-based is were Sorrell, where you're

1 dealing with a category of information,
2 pharmaceutical information, and the labor
3 picketing cases that I also referred to were
4 cited in Reed itself.

5 That provides an example at one end of
6 the spectrum where you do have specific topics
7 and ideas that are singled out. And the concern
8 arises, looking at that level of specificity, is
9 the government seeking to suppress any idea or
10 skew the marketplace for speech? And the answer
11 is yes.

12 On the other end of the spectrum, you
13 have laws like solicitation. You have the
14 categories of things that Justice Alito
15 described in his concurring opinion in Reed for
16 three members of the Court, which recognized
17 that there were a variety of reasonable sign
18 regulations that should not be deemed
19 content-based under the Court's analysis because
20 they do not have the potential for skewing the
21 marketplace for ideas or the government putting
22 its thumb on the scale.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr.
24 Dreeben.

25 Justice Thomas, anything further?

1 Justice Breyer?

2 Justice Alito?

3 JUSTICE ALITO: You haven't said
4 anything this morning about a facial challenge
5 and overbreadth. Is there anything you want to
6 add on that, on those points?

7 MR. DREEBEN: Yes, Justice Alito. The
8 law in this case was applied to Respondents'
9 billboards, and I don't think that there is any
10 significant dispute that they primarily display
11 commercial speech and commercial advertising.

12 And this Court held in 1981 in the
13 Metromedia opinion, which was fractured, but
14 reduces to the proposition that a jurisdiction
15 can decide to have on-site, on-premises
16 commercial advertising and to totally eliminate
17 billboards, billboards being the quintessential
18 example of off-site advertising.

19 And when the City of Austin denied the
20 application for signage transformation into
21 digital signage, it specifically said you are a
22 non-conforming billboard because of your
23 off-premises commercial speech, and that was the
24 basis for the denial.

25 That basis infringes no First

1 Amendment right under this Court's decision in
2 Metromedia that was reaffirmed later both in the
3 Taxpayers for Vincent case and the City of Ladue
4 case. And, as a result, the only way that
5 Respondents can prevail is by establishing that
6 the application of the statute either to their
7 non-commercial speech or to someone else's
8 non-commercial speech is sufficiently broad,
9 real, and substantial, I think are the words in
10 the Court's overbreadth jurisprudence, in
11 relation to the class of legitimate speech such
12 that you would invalidate the ordinance across
13 the board.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: Yes. The other
18 side suggests that an on-/off-premises
19 differentiation might be okay if the regulation
20 was limited to the size of the sign, to a
21 certain distance from the building, et cetera.

22 I'm unaware of any off-/on-premises
23 legislation that existed at the time of Austin
24 and the time that Justice Alito wrote his
25 concurrence that defined on and off in that way.

1 Are you?

2 MR. DREEBEN: I am not either, Justice
3 Sotomayor. And I think that there's a sound
4 reason why jurisdictions do not legislate in
5 that manner. The very workable distinction
6 between on-premises signage, which is viewed --
7 viewed as necessary to allow people to find the
8 businesses that they want to patronize or visit
9 the homes that they want to go to, has been
10 embedded in the law for more than half a
11 century. Cases dating back as far as this
12 Court's decision in Railway Express versus New
13 York examined a rule that prohibited mobile
14 billboards on trucks in the City of New York but
15 allowed the identification of the business on
16 the truck itself.

17 And this Court, of course, dealt with
18 a similar on-premises/off-premises distinction
19 in the Metromedia case. And thousands of
20 jurisdictions across the country have followed
21 suit.

22 I think it's extremely implausible to
23 think that this multiplicity of jurisdictions in
24 every kind of state, every kind of locality,
25 have all adopted it in order to suppress speech.

1 They haven't.

2 What they've done is tried to have an
3 orderly, organized rule governing signage in
4 towns so that you preserve aesthetic values and
5 avoid visual clutter, and you avoid the safety
6 risks of having an undue amount of signage,
7 particularly large billboards, 672 feet, glowing
8 digital billboards, which create distraction
9 hazards that jurisdictions want to avoid.

10 And a rule that tied the sign to a
11 distance from a building would not fulfill the
12 goal of allowing business owners to tell people
13 where their stores are and, at the same time,
14 avoid the proliferation of off-premises signs.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan,
17 anything further?

18 Justice Gorsuch?

19 JUSTICE GORSUCH: Mr. Dreeben, I -- I
20 just want to make sure I understand your
21 responses to Justice Kagan and -- and -- and
22 Justice Breyer about the line between content
23 and subject matter or topic.

24 Am I correct in understanding you that
25 you -- you think it's a question of degree or a

1 level of generality?

2 MR. DREEBEN: Yes. I think it is a
3 level of generality. And the Court's cases
4 provide the examples of --

5 JUSTICE GORSUCH: Okay, okay. That --
6 thank you. And did I also understand you to --
7 to -- to agree that strict scrutiny is
8 appropriate when we're trying to decide what
9 level of generality to apply when the government
10 is in a position to put its thumb on the scale,
11 I think were your words, in the transmission or
12 competition of ideas?

13 MR. DREEBEN: Yes.

14 JUSTICE GORSUCH: Okay.

15 MR. DREEBEN: I think that's the
16 function of strict scrutiny. It expresses a
17 degree of judicial skepticism towards a
18 regulatory scheme that has the potential for
19 distorting the free exchange of ideas, which the
20 First Amendment promotes.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: Mr. Dreeben, I
25 just want to ask a follow-up about how you think

1 the tiers of scrutiny fit together with some of
2 the other arguments that you've been raising and
3 that are in the amicus briefs about history and
4 precedent.

5 So, if I understand it correctly, if
6 it's content-based, you agree that strict
7 scrutiny applies and you are not making an
8 argument that you could prevail on strict
9 scrutiny, presumably, because you don't think
10 you have a sufficiently compelling interest
11 under this Court's precedents.

12 But, if it's content neutral, you say
13 intermediate scrutiny applies and that you win
14 because you have a sufficiently important or
15 significant government interest, even though not
16 compelling. Is that correct so far?

17 MR. DREEBEN: Yes, with the addition
18 that the fit requirement under strict scrutiny
19 of being the least restrictive alternative is
20 virtually impossible for signage regulation to
21 meet.

22 JUSTICE KAVANAUGH: Okay. And then a
23 lot of the rhetoric, though, in your position --
24 you just mentioned this in response to Justice
25 Sotomayor, and it's not just rhetoric; it's

1 important to the analysis -- is this is a kind
2 of distinction that is historically rooted,
3 still common in jurisdictions all over America
4 and that that somehow indicates some acceptance
5 of this, consistent with the First Amendment,
6 and then you also mentioned precedent,
7 Metromedia and -- and the follow-on.

8 My question is, how do we -- how does
9 that historical practice and the commonality of
10 the restrictions and the precedent affect
11 whether we decide the threshold question of
12 content-based or content neutrality?

13 MR. DREEBEN: So I think, Justice
14 Kavanaugh, that they provide important
15 corroborating data that Austin's traditional
16 off-premises/on-premises distinction, also
17 reflected in the Highway Beautification Act, is
18 not an effort to suppress speech and doesn't
19 require the court to say this law on its face is
20 content-based; therefore, we have to go to the
21 move where we have rigorous inspection of the
22 empirical support for the jurisdiction's rule
23 and we have to measure the fit against our view
24 of could they have done it in a narrower way,
25 which transfers decisions, coming back to

1 Justice Breyer and democratic accountability,
2 from the municipalities that are dealing with
3 these problems, which are very multifarious and
4 varied all over the country, to the courts.

5 And if the Court is trying to decide
6 do we need strict scrutiny here when we have a
7 law of the generality of
8 off-premises/on-premises, its pedigree and its
9 acceptance in this Court's decisions under
10 intermediate scrutiny for 50, 60 years now,
11 without a vanishing of ideas and the vibrancy
12 and flourishing of signage, should give the
13 Court some comfort that it's on the right track
14 if it reads Reed exactly for what Reed said.
15 When you have specific subject matter that's
16 targeted, you're in content-based land, and,
17 therefore, you go to strict scrutiny.

18 JUSTICE KAVANAUGH: So I'll just close
19 with this comment: The tension for me, just so
20 you know and -- and the other side knows, is the
21 tension between this history and common
22 practice, which means a lot to me, but I don't
23 want to water down what it means to be
24 content-based.

25 MR. DREEBEN: I think the risk of

1 watering down strict scrutiny comes from
2 expanding content-based to places where it's
3 never gone. I mean, Respondent will tell you
4 that his theory is based on function or purpose
5 of a sign, which in Reed has that language.

6 We understand that language to be when
7 a jurisdiction regulates through function or
8 purpose as a proxy for content, then you go to
9 strict scrutiny. And the law in Reed had that
10 where it said that a political sign was a law --
11 a sign that was designed to influence an
12 election, so it's based on its purpose, not on
13 specific language in the sign.

14 And the Court treated that as
15 content-based and appropriately so, because,
16 there, function was a proxy for a specific
17 subject matter.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Thank you, Mr. Dreeben.

22 Mr. Snyder.

23

24

25

1 ORAL ARGUMENT OF BENJAMIN SNYDER
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. SNYDER: Mr. Chief Justice, and
5 may it please the Court:

6 The court of appeals held that a sign
7 ordinance that distinguishes between on-premises
8 signs and off-premises signs is just as
9 suspicious as an ordinance that distinguishes
10 between Democratic signs and Republican signs or
11 between religious signs and secular signs.

12 In its view, at page 14a of the
13 Petition Appendix, any law that requires the
14 enforcer to read a sign or listen to a message
15 must be subject to strict scrutiny, even if the
16 law applies even-handedly to all topics or
17 viewpoints.

18 The court of appeals said that Reed
19 compelled that result. But Reed dealt with a
20 law that drew classic content-based distinctions
21 between specific topics or subject matters. It
22 did not address categories like off-premises
23 advertising, which have no inherent content of
24 their own.

25 And adopting the court of appeals's

1 understanding of Reed would conflict with
2 numerous other precedents, including this
3 Court's repeated recognition that laws
4 regulating solicitation are appropriately
5 evaluated using intermediate scrutiny, even
6 though their application depends on whether a
7 speaker is asking for money.

8 The Court should apply that same
9 intermediate scrutiny here and reverse the court
10 of appeals's judgment.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: In your briefs --
13 brief, you recommended that we apply the
14 Secondary Effects Doctrine?

15 MR. SNYDER: That's true, Justice
16 Thomas. To be clear, we think that -- we -- we
17 agree with Austin's argument that the ordinance
18 here is not content-based on its face. We think
19 that the case could readily be resolved on that
20 ground.

21 But we also think that the Secondary
22 Effects Doctrine would apply here in a way that
23 it didn't apply in Reed and would provide
24 another reason to reverse the court of appeals's
25 judgment.

1 JUSTICE THOMAS: Has this Court
2 applied that doctrine outside of the adult
3 entertainment business cases?

4 MR. SNYDER: The Court has, Your
5 Honor. The Court applied it in Ward to uphold
6 the noise ordinance at issue there. And then
7 the Court has also applied in other -- it in
8 other cases but found that its requirements were
9 not met.

10 So, in Discovery Network, for example,
11 dealing with Cincinnati's distinction between
12 newspaper boxes for commercial newspapers and --
13 and traditional newspapers, the Court applied
14 City of Renton but held that it wasn't satisfied
15 because there was no distinction in terms of the
16 danger of littering and the danger of visual
17 blight between commercial newspapers and
18 non-commercial newspapers.

19 The Court has not suggested that the
20 Secondary Effects Doctrine only applies in the
21 adult entertainment context. And the fact that
22 when the Court has applied it in other contexts,
23 it's found that it wasn't satisfied, just shows
24 that it's a -- a demanding requirement, not that
25 it shouldn't apply in those other contexts.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: I guess my
3 question is similar to Justice Thomas's. You
4 rely on the City of Renton case or at least cite
5 it a few times and devote a page or so to it,
6 and I have to say I've always thought that
7 precedent was a bit of a stretch.

8 I mean, it's -- they say, you know, no
9 adult theater within a thousand feet of a
10 residence and then defend it on the theory that
11 it's got nothing to do with the fact that it's
12 an adult theater. It has to do with the fact
13 that it generates more trash or traffic or
14 whatever.

15 I mean, do you -- do you have any
16 other case that's like that? It's -- it -- it's
17 defined in terms of the content of the theater,
18 and yet we don't think it has anything to do
19 with it.

20 MR. SNYDER: So I don't think you'll
21 like this one better, but Alameda Book Stores
22 deals with the same sort of analysis.

23 CHIEF JUSTICE ROBERTS: That's the
24 other one I didn't like.

25 (Laughter.)

1 MR. SNYDER: But -- but, to be clear,
2 Your Honor, I -- I think this case -- and I
3 think this goes to a question that maybe you
4 were asking Mr. Dreeben -- or, no, I'm sorry, it
5 was Justice Kavanaugh was asking Mr. Dreeben,
6 this case deals with a category of speech that
7 doesn't have any inherent content.

8 And so, if -- if you want to think
9 about how to sort of recognize that as a -- a --
10 a separate category that we're not going to
11 treat as content-based without watering down
12 strict scrutiny, I think the sorts of interests
13 that the Court looked to in City of Renton in
14 terms of deciding that a law that, you know, you
15 could plausibly say was content-based on its
16 face would nevertheless be treated as
17 content-neutral.

18 I think, here, it's much, much harder
19 to say that the law is content-based on its
20 face. And so you could apply those same
21 rationales here to conclude that it doesn't make
22 any sense in terms of the First Amendment values
23 that we're trying to -- to further to treat a
24 law like this one that has no inherent content,
25 that doesn't reflect any government approval or

1 disapproval of particular messages.

2 It doesn't make sense to -- to subject
3 that law to the same scrutiny that you would
4 apply to a law that said you can have Republican
5 signs but not Democratic signs.

6 JUSTICE BREYER: All right. So -- so
7 -- so just try -- I -- I mean, what is your
8 theory? I mean, I -- I've said over and over,
9 as you know, what's the answer? You want to
10 know whether -- whether a law is content-based,
11 you have to read it. Every law -- every law is
12 written in English.

13 And if you go look at the statute
14 books, which there are hundreds of, most of them
15 deal with what somebody should say. That's what
16 securities law is about. That's what energy law
17 is about in half of it. That's what railroad
18 laws used to be about as far as fare collection
19 was concerned.

20 There are one after the other, okay?
21 So I stop at Stage 1. What is content-based?
22 What is your theory of what is, unless we're to
23 apply strict scrutiny to every regulation on the
24 books --

25 MR. SNYDER: So --

1 JUSTICE BREYER: -- when -- what --
2 what's the rule and -- and -- what is it? I
3 mean, maybe you can't explain it. There isn't
4 enough time and so forth, so I'll go back to my
5 state of confusion.

6 MR. SNYDER: No, I appreciate the
7 opportunity, Justice Breyer. I -- I think that
8 this Court's cases, in drawing that line, have
9 recognized the sort of problem that you're
10 identifying, and, therefore, they have
11 distinguished between cases that -- that -- or
12 laws that talk to specific topics, like politics
13 or religion or ideology or --

14 JUSTICE BREYER: Every law on the
15 statute books in the SEC part, probably
16 excepting 3 percent, talks about, what was the
17 word you said, specific content.

18 MR. SNYDER: So inherent in --

19 JUSTICE BREYER: And that's true of
20 railroad regulation, airline regulation, energy
21 regulation, you name it. It's about content.
22 It is not about sign direction, but sign
23 direction law is.

24 MR. SNYDER: So I -- I think, in this
25 context, you don't need to deal with all of --

1 with those other areas. I think the -- the
2 important thing here is that a law about
3 off-premises advertising has no inherent content
4 of its own. It only sort of cashes out when you
5 look at what's being sold or offered at a
6 particular location.

7 JUSTICE BREYER: That -- that's why I
8 asked you what your theory was and your honest
9 theory about it, not because I can't think of
10 distinctions of this case. I perhaps can.

11 But what I want to know, since I've
12 been so hostile and unhappy with the theory for
13 the reason I stated, what is the government's
14 theory? You somehow have to deal with these
15 cases. Do you have a theory?

16 MR. SNYDER: So we have dealt with the
17 cases as they've come. I think, here, in terms
18 of addressing the specific regulations that are
19 issue -- at issue here, we think the fact
20 that the -- that Austin's law and the Highway
21 Beautification Act, the distinctions they draw
22 don't have any inherent content, means that
23 it -- it doesn't make sense to subject those to
24 strict scrutiny.

25 Justice Thomas, if I could, I'd like

1 to go back to your Franklin's example.
2 Franklin's example is good to go back to, but
3 also substantively, I -- I think you could have
4 given a -- an almost identical hypothetical in
5 Heffron, for example. So Heffron was the case
6 about the regulation of solicitation at the
7 Minnesota State Fair and you weren't allowed to
8 solicit except at booths that you had rented.

9 So you could walk through the
10 Minnesota State Fair and you could say, "Vote
11 for Tim." That was fine because that wasn't
12 solicitation. But you couldn't say, "Give money
13 to Tim's campaign." And the Court said
14 nevertheless that that was a content-neutral
15 justification because the ban on solicitation
16 applied regardless of the topic you wanted to
17 solicit on.

18 And to give another example, in
19 McCullen, this Court confronted a statute that
20 had an exception for speech within the scope of
21 employment, and the Court said -- the Court
22 acknowledged in that case that you might have to
23 look at what the person had said in order to
24 decide whether it was actually within the scope
25 of their employment but that it was nevertheless

1 content-based because it didn't prefer any
2 particular subject matters.

3 There was disagreement in that case
4 about whether the -- the way the particular
5 requirement was framed reflected viewpoint
6 discrimination because it was only certain
7 people who could speak within the scope of their
8 employment, but I at least don't see any
9 disagreement in the opinions there about the
10 principle that a generally applicable law about
11 speaking within the scope of employment would
12 not be content-based.

13 JUSTICE GORSUCH: Well, counsel,
14 you -- you -- you talk about how this doesn't
15 have any viewpoint discrimination, but I haven't
16 heard anyone yet engage with the argument made
17 by the other side that it necessarily favors
18 majoritarian speech, because, say, there are a
19 thousand Christian churches in an area and 12
20 mosques. By definition, a -- a rule that favors
21 location-based speech over non-premises speech
22 is going to favor the majoritarian voice there.

23 Or say a civil rights organization, a
24 small civil rights organization seeking to
25 advertise for members in an area where that's

1 not a popular viewpoint and there aren't very
2 many places where they could advertise on
3 location, would also have that effect.

4 Do you care to respond to those
5 concerns?

6 MR. SNYDER: I would. Thank you for
7 that. I'd say two or three things in response
8 to that.

9 The first is that the part of the test
10 that -- that Respondent has put at issue is
11 whether the law is content-based on its face.
12 And so, to analyze that, you look at the face of
13 the law, not how it sort of cashes out in
14 practice.

15 JUSTICE GORSUCH: I -- I understand,
16 but on the face of the law, it makes a
17 content-based distinction in -- in the sense of
18 location. It makes a location-based
19 distinction. We can at least agree on that.

20 MR. SNYDER: It --

21 JUSTICE GORSUCH: And so why doesn't
22 that have a knock-on effect on content?

23 MR. SNYDER: Because that
24 location-based distinction, it -- it doesn't
25 have any inherent content of its own. It

1 depends on what happens at the particular
2 locations.

3 JUSTICE GORSUCH: No.

4 MR. SNYDER: And that --

5 JUSTICE GORSUCH: I -- I understand
6 that point, but doesn't it necessarily favor
7 majoritarian voices? Wouldn't you agree with
8 that?

9 MR. SNYDER: I -- I don't think it
10 necessarily does. And -- and even if you think
11 that it does, the Court has said repeatedly --
12 the Court said this in Ward; it said it in
13 McCullen -- that the fact that a law has
14 incidental effects on certain speakers or
15 messages does not make the law content-based.
16 There's no disparate impact theory of the First
17 Amendment.

18 And so, here, we think it makes sense
19 to look at the law and recognize that the
20 category of off-premises advertising doesn't
21 have inherent content any more than speech
22 within the scope of employment or solicitation
23 and that, therefore, it's sufficient to address
24 that law with intermediate scrutiny, which is --
25 is still demanding.

1 JUSTICE GORSUCH: But -- but would you
2 at least agree that it does have a
3 disproportionate effect on majoritarian and
4 minority voices?

5 MR. SNYDER: I -- I think it would
6 depend. I mean, I'm not sure it's exactly
7 majoritarian and minority voices. It would
8 depend on who has property in the -- the City of
9 Austin.

10 JUSTICE GORSUCH: Okay. Prop --
11 property voices. We could agree that it favors
12 property voices then?

13 MR. SNYDER: So --

14 JUSTICE GORSUCH: Right?

15 MR. SNYDER: -- yes, Your Honor, in --
16 in some respects, it does. I -- I don't think
17 you can rest the case on that, though.
18 Respondent concedes at page 39 of the red brief
19 that you -- that Austin could adopt an ordinance
20 that regulates signs based on whether they
21 generate revenue.

22 JUSTICE GORSUCH: And it could also
23 regulate on commercial speech. That would be an
24 option, for example, and, in fact, Austin's done
25 that already in the wake of this lawsuit, right,

1 I understand.

2 MR. SNYDER: It -- it could, Your
3 Honor, and -- and I think that that's a
4 significant thing. We, of course --

5 JUSTICE GORSUCH: Or -- or it could,
6 as Chicago has, focus on the brightness and the
7 size of signs and things like that, right?

8 MR. SNYDER: So it could. If you look
9 at the amicus brief of the International Sign
10 Association, it talks a little about -- a little
11 bit about the experience in Chicago. And
12 Chicago -- Chicago's experience was that they
13 did away with the on-premises/off-premises
14 distinction and went to a rule about allowing
15 signs up to a hundred square feet, without
16 regard to on-premises or off-premises, and those
17 signs proliferated throughout the city.

18 So those laws, they -- they are
19 alternatives if -- if the government has to use
20 them, but they're not nearly as effective. And
21 we don't think that the First Amendment requires
22 --

23 JUSTICE GORSUCH: Oh, I mean, the
24 First Amendment prevents -- that can't be the
25 test, how effective a law is at -- at

1 suppressing speech. I mean, that's never been
2 -- the First Amendment's always pretty
3 inefficient, we'd agree, wouldn't we?

4 MR. SNYDER: I -- I wouldn't say that
5 the First Amendment is always inefficient. I
6 would say that if you're applying intermediate
7 scrutiny, then the -- which we think is the
8 appropriate framework here, then Austin is not
9 required to adopt much less effective
10 regulations of signs.

11 The -- the other thing I -- I'd pick
12 up on, you mentioned commercial speech. We
13 don't think that regulating just commercial
14 speech would adequately protect the government's
15 interests in these case -- in this case.

16 But, at the very least, we think
17 Respondent has not challenged the City of
18 Austin's ability to regulate commercial
19 billboards. And so the most that Respondent
20 could get from this case would be a declaratory
21 judgment saying that they're entitled to
22 digitize their billboards and display
23 non-commercial messages on their billboards.

24 If you --

25 JUSTICE SOTOMAYOR: Counsel, no matter

1 what or how you subject this to strict scrutiny
2 or not or intermediate scrutiny, this favors not
3 on the basis of majoritarian rule but on the
4 basis of wealth. These big billboards, you've
5 got to be -- have a lot of money to put a sign
6 on them. To build them, to have -- put a sign
7 on them, not every property owner can do it.

8 So I don't understand the major --
9 your concession on the majoritarian rule issue.

10 MR. SNYDER: Your Honor, I -- I didn't
11 mean to concede that they would -- I thought I
12 -- I didn't concede that these sort of favor
13 majoritarian views.

14 JUSTICE SOTOMAYOR: What it favors not
15 to do it, is favors people with money against
16 the poor, period.

17 MR. SNYDER: Your Honor, I -- I think
18 it's hard to know exactly what the results would
19 be in -- in sort of practice, which is another
20 reason why I think it makes sense to look at the
21 face of the statute rather than trying to sort
22 of predict the sociological implications of
23 this.

24 JUSTICE SOTOMAYOR: I -- I -- I agree
25 with you wholly, which is -- my point is that

1 it's not favoring the majority over a minority
2 or one group other -- other than basis of
3 wealth, but that happens in speech, period.

4 MR. SNYDER: I --

5 JUSTICE SOTOMAYOR: Wealthier people
6 can speak more.

7 MR. SNYDER: I think that's right,
8 Your Honor. I -- and I think that's why the
9 Court has not embraced a disparate impact theory
10 of the First Amendment and why it would be a
11 mistake to do so here.

12 JUSTICE SOTOMAYOR: I --

13 JUSTICE ALITO: What would be the
14 effect of adopting the Respondents' test or the
15 -- the Fifth Circuit's, the test that's
16 attributed to the Fifth Circuit, the "if you
17 have to read it, it's content-based" test on --
18 on fed -- on federal regulations? Justice
19 Breyer mentioned some of those.

20 Start with regulations that require
21 disclosure. Those are all content-based. All
22 compelled speech is content-based, is it not?
23 Do you understand this to apply to compelled
24 speech?

25 MR. SNYDER: I -- I -- I'm not -- you

1 know, it would obviously depend on the Court's
2 opinion. I'm not sure what Respondent would say
3 to that. It would certainly raise a host of
4 really difficult questions about things that
5 have long been considered settled.

6 CHIEF JUSTICE ROBERTS: Mr. Snyder, I
7 was fascinated to read in your brief that when
8 the Highway Beautification Act was passed in
9 1965, one of the category of signs that were --
10 was allowed but otherwise be prohibited were
11 signs advertising the distribution by nonprofit
12 organizations of free coffee.

13 Is that still in effect?

14 MR. SNYDER: That -- that provision is
15 still in effect. I believe some states do allow
16 that. We would not suggest that that is a
17 content-neutral distinction. The analysis for
18 that distinction would be quite different from
19 the one dealing with on-premises and
20 off-premises signs.

21 CHIEF JUSTICE ROBERTS: Why -- I mean,
22 it's coffee; it's not tea. That seems
23 content-based.

24 MR. SNYDER: I -- I agree. We would
25 not -- we would not dispute that that is a

1 content-based distinction.

2 CHIEF JUSTICE ROBERTS: Are there any
3 of these left?

4 MR. SNYDER: There are some left.
5 They're put out when organizations are
6 attempting to raise money to -- to let you know
7 that you can stop at the rest stop to get a
8 coffee to keep driving. And so there's --
9 there's a safety --

10 CHIEF JUSTICE ROBERTS: But it's free.
11 How much money do they raise?

12 MR. SNYDER: They -- they take
13 donations.

14 CHIEF JUSTICE ROBERTS: Oh, okay.

15 Justice Thomas?

16 Justice Breyer?

17 Justice Alito?

18 Justice Sotomayor? No? No?

19 Justice Gorsuch?

20 JUSTICE KAVANAUGH: One -- one
21 question. If you're concerned about safety and
22 blight, which are the two concerns that the City
23 has articulated, the question we have to ask is
24 whether that -- those interests could be served
25 in ways that wouldn't draw a distinction based

1 on content or wouldn't infringe speech
2 generally, whether you could serve the same
3 interests.

4 And couldn't the City do so by
5 limiting the number of signs, the number of
6 billboards, the placement of billboards, and the
7 size of billboards to achieve the safety and
8 blight interests just as effectively? I realize
9 that would be a lot of change for a lot of
10 jurisdictions around the country, and that
11 matters, but put that aside for now.

12 MR. SNYDER: So two things.

13 The first, I don't mean to dispute
14 your question, but -- but the -- one of the
15 premises of your question is that that wouldn't
16 restrict speech. And that -- I just disagree
17 with that premise. It would restrict speech.
18 It would do so on different bases, but the
19 question is whether the off-premises/on-premises
20 distinction makes this especially suspicious.

21 But -- but two, sort of the substance
22 of --

23 JUSTICE KAVANAUGH: Just satisfying
24 the -- the scrutiny, what -- whatever the
25 scrutiny is, just satisfying the scrutiny, can

1 -- can't they achieve the interests -- whichever
2 tier of scrutiny it is, can't they achieve the
3 interests by placement, number, and size
4 restrictions rather than anything that has to
5 do, arguably, with the words that are written on
6 the -- on the sign?

7 MR. SNYDER: No, I don't think they
8 can nearly as effectively because the
9 on-premises/off-premises distinction sort of
10 tracks the places in which signs provide the
11 most value in terms of organizing the community.

12 If you think about walking through a
13 downtown area that didn't have on-premises signs
14 up, it would be impossible to find the store or
15 the church that you were trying to get to. And
16 so on-premises signs serve that function in a
17 way that off-premises signs just don't.

18 And so trying to treat both of those
19 things the same and use, you know, number or --

20 JUSTICE KAVANAUGH: Don't -- a number
21 of states don't use this distinction. I don't
22 know if people are just running around lost in
23 all those states, but they -- they -- they
24 presumably find their way to the place.

25 MR. SNYDER: So they do find their way

1 to the place. I don't think jurisdictions have
2 completely eliminated on-premises signs. But I
3 think it's -- it's far more difficult to
4 accomplish the objectives of eliminating visual
5 blight and protecting traffic safety without
6 those things.

7 And we think that under intermediate
8 scrutiny, which we -- is the appropriate
9 standard here, that the -- the City's interest
10 in doing that more effectively suffices.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Just one. So this
14 is similar to Justice Kavanaugh's question.

15 Here, I mean, it seems to me that this
16 interest in avoiding blight and distraction and
17 all of that could be achieved because Austin has
18 limited -- it's only grandfathered in the
19 billboards that were there at the time the
20 ordinance was passed, right?

21 MR. SNYDER: That's correct.

22 JUSTICE BARRETT: So why, if the
23 off-premises/on-premises distinction, why
24 couldn't you achieve that simply by limiting it,
25 so you're not going to get any more billboards

1 because no more can be built? Why can't
2 on-premises just -- just mean on-premises
3 regardless to whether it's, you know,
4 advertising Franklin's Barbecue or the
5 hamburgers inside? I mean, who cares what it
6 says because, you know, as Petitioner pointed
7 out in his brief, if it's on-premises, it's
8 going to be naturally limited in size. People
9 aren't going to put up a big billboard that
10 obscures the front of the building.

11 So couldn't you just achieve the same
12 thing in size limitations and who cares what it
13 says?

14 MR. SNYDER: I -- I don't think so,
15 Your Honor. I mean, if there's no
16 on-premises/off-premises distinction, then, I
17 mean, maybe you wouldn't want to put up a sign
18 face that completely covers your building, but
19 if you've got a plot of land that doesn't have a
20 building on it or a plot of land with some
21 vacant space, you might put up a huge and garish
22 billboard or you might buy that space in order
23 to do that.

24 I mean, that's the -- that's sort of
25 how these billboards end up there in the first

1 place.

2 JUSTICE BARRETT: But couldn't it be
3 limited in terms of size?

4 MR. SNYDER: I --

5 JUSTICE BARRETT: That would be
6 content-neutral.

7 MR. SNYDER: You could limit it in
8 terms of size. As I mentioned, that's what
9 Chicago did, and the result was that you had a
10 ton of hundred-square-foot billboards all over
11 the City of Chicago prevent -- presenting the
12 same sorts of concerns about visual blight and
13 traffic safety.

14 JUSTICE BARRETT: And having the
15 grandfathered thing wouldn't solve that problem?

16 MR. SNYDER: So I -- I think the
17 grandfathered thing serves a couple of
18 functions. One function is that part of the
19 reason for having a grandfather clause like that
20 that limits the modifications you can make to a
21 sign is an interest in gradually phasing out
22 those off-premises signs.

23 The federal government did a similar
24 thing after enactment of the HBA and was
25 explicit that part of the purpose of that was to

1 eventually have those signs come down. And we
2 think Austin has the same interest. It's not
3 just saying we're going to have these signs for
4 all time. It can have an interest in
5 encouraging people to -- to not keep using them.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Shanmugam.

10 ORAL ARGUMENT OF KANNON K. SHANMUGAM
11 ON BEHALF OF THE RESPONDENTS

12 MR. SHANMUGAM: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 The City of Austin denied Respondents'
15 application to convert its existing signs to
16 digital signs, and it did so on the ground that
17 the signs advertised off-premises activities.

18 Under this Court's decision in Reed,
19 Austin's distinction between signs advertising
20 on-premises and off-premises activities is
21 content-based.

22 That distinction turns on the subject
23 matter, function, and purpose of the content of
24 the messages on the signs, and it has the effect
25 of prioritizing certain messages from certain

1 speakers and limiting, if not prohibiting,
2 others.

3 The fact that Austin's regulation does
4 not prohibit speech on an entire subject and
5 that the application of the regulation depends
6 on a factor in addition to the sign's content
7 does not render it content-neutral. The Court
8 should therefore apply strict scrutiny.

9 Under any standard of review, however,
10 this is an easy case. A through line of this
11 Court's First Amendment cases is that whatever
12 the standard of review, a regulatory distinction
13 between different types of speech has to bear
14 some relation to the governmental interest
15 asserted.

16 Here, the challenged restriction,
17 Austin's prohibition on the digitization of the
18 small number of off-premises signs, flunks any
19 standard of review. It verges on the irrational
20 for Austin to permit digital on-premises signs
21 without any limitation but to prohibit the
22 digitization of the small number of
23 grandfathered off-premises signs.

24 That differential treatment bears no
25 relation to Austin's asserted interests in

1 safety and aesthetics, and Austin presented no
2 evidence at trial to support it.

3 All that the Court need do here is to
4 hold that the digitization ban is invalid.
5 Other restrictions based on similar on- and
6 off-premises sign distinctions may well satisfy
7 strict scrutiny.

8 And numerous jurisdictions have
9 already modified their definitions in the wake
10 of Reed to render them content-neutral. The
11 court of appeals correctly held that Austin's
12 digitization ban violates the First Amendment,
13 and its judgment should be affirmed.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Counsel, why wouldn't
16 we analyze this under Commercial Speech
17 Doctrine?

18 MR. SHANMUGAM: So, first of all,
19 Austin didn't seek review on the alternative
20 theory that even if an on-premises/off-premises
21 distinction is subject to strict scrutiny Austin
22 should somehow still prevail.

23 Now I would note, as I noted at the
24 outset, that even under intermediate scrutiny,
25 we believe that we should prevail because

1 there's simply no fit here between the
2 regulation at issue and the distinction, whether
3 it's the distinction between on-premises and
4 off-premises signs or any differential treatment
5 of commercial speech and Austin's asserted
6 interests.

7 But we ultimately think that strict
8 scrutiny should apply across the board here for
9 the simple reason that Austin's regulation does
10 not in any way disaggregate commercial from
11 non-commercial speech, and that's particularly
12 true with regard to the speech that is being
13 limited here, which is the speech that my client
14 would display on its digital signs.

15 Now we don't even know what that
16 speech is for the simple reason that my client
17 has not yet leased out its signs, and at any
18 given time, the parties that would lease those
19 signs would presumably change.

20 But I think that the critical point
21 here is that the regulation in no way draws a
22 distinction between commercial and
23 non-commercial speech, and, again, the real
24 focus here should be on the speech that is being
25 limited.

1 And this case is no different from the
2 Riley case that we cite in that regard. I think
3 where you have an ordinance that covers both
4 commercial and non-commercial speech and that
5 speech cannot be disaggregated, the natural step
6 is to apply strict scrutiny.

7 And, indeed, even in Metromedia
8 itself, after discussing commercial and
9 non-commercial speech separately, the Court did
10 ultimately invalidate San Diego's ordinance on
11 its face, so it left questions of severability
12 for the lower courts.

13 JUSTICE BREYER: All right. So
14 I'll -- I'll tell you why we let the home -- my
15 own kale shop, I sell fried kale, and right
16 outside I want a big picture of kale that lights
17 up, okay? It's mine. This is my shop. I want
18 to decorate it the way I want, strong interest.

19 I don't have the same interest in what
20 the billboard 40 miles outside the town says
21 about my kale shop. Okay. There's your
22 difference. And the grandfather is because we
23 love grandfathers, okay?

24 (Laughter.)

25 JUSTICE BREYER: There we are. And

1 that's historic. And go back to the year two,
2 you'll discover those kinds of distinctions. So
3 there are distinctions, and, therefore, I have
4 to get to the content-based.

5 And now I'm back at Justice Alito's
6 question, content-based? Hey, the whole SEC is
7 content-based. And what about the infinite
8 number of FDA rules that say you better disclose
9 how much sodium there is? That's not content,
10 sodium? It isn't. It's salt. But salt, by the
11 way, is a kind of content, and it's not good for
12 you.

13 (Laughter.)

14 JUSTICE BREYER: But, regardless --
15 regardless, FDA, SEC, try the energy world, you
16 better disclose, Mr. Smith Energy, how much coal
17 you're burning, okay? And we can go on through
18 the whole U.S. Code.

19 So, as you know, my conclusion is this
20 makes no sense. It does make sense in the
21 context of where you're trying to do time,
22 manner, and circumstance. It does make sense in
23 the context of where you're trying to see if
24 it's viewpoint discrimination. But, as to the
25 rest of it, no. Okay? What do you want to say

1 to me?

2 MR. SHANMUGAM: Justice Breyer --

3 JUSTICE BREYER: Say -- say just get
4 on the boat, it's passed, sailed, do your best?
5 Or what do you want to say?

6 MR. SHANMUGAM: Justice Breyer, you've
7 been nothing if not consistent in your view that
8 the Court should not treat --

9 JUSTICE BREYER: Yeah, but it's one
10 person, so, therefore --

11 MR. SHANMUGAM: Well, let me -- let me
12 address your view directly, which is I
13 understand it has always been that whether or
14 not a regulation is content-based or
15 content-neutral should not be dispositive, it
16 should be one of the factors in the analysis,
17 and as you know, you gave many of those examples
18 in your concurring opinion in Reed itself.

19 And I want to address those, but,
20 first, let me go directly to the fried kale
21 hypothetical and the question of why this is
22 content-based, and perhaps I think the easiest
23 way to think about that is to look at it from
24 the perspective of the owner of the premises.
25 The owner of the premises --

1 JUSTICE BREYER: Oh, I agree, it's
2 content-based. I agree with you there,
3 absolutely. So now what?

4 MR. SHANMUGAM: Okay.

5 JUSTICE BREYER: And -- and you can
6 say I should get on the bandwagon irrespective
7 of the fact that to me it doesn't make any
8 sense. But --

9 MR. SHANMUGAM: Well, let me explain.

10 JUSTICE BREYER: -- it wouldn't be the
11 first time, so -- okay.

12 MR. SHANMUGAM: Let me explain to you
13 why you should get on the bandwagon or, at a
14 minimum, why you shouldn't be troubled by the
15 bandwagon rolling out of the station here.

16 And that is for the simple reason that
17 if you think about it from the perspective of
18 the owner of the premises, that owner's speech
19 is being limited and plainly being limited on
20 the basis of content. And let me give you a
21 hypothetical of my own if I may.

22 Let's say that you're a church and you
23 want to advertise the services that take place
24 every Sunday on your premises. Of course, under
25 Austin's ordinance, you can do that.

1 But what you can't do is to use your
2 digital sign to advertise an interfaith service
3 that might be taking place at the Jewish
4 synagogue down the road. That is a limitation
5 on the subject matter of your speech.

6 And so, while it is certainly true, as
7 we say in our brief, that this regulation
8 defines the regulated speech in terms of its
9 function or purpose, I agree with my good
10 friend, Mr. Dreeben, that ultimately that is, as
11 this Court put it in Reed, a way of sort of
12 getting at the fundamental question, which is
13 whether the regulation in question is regulating
14 speech in terms of its subject matter, whether
15 it's distinguishing between different types of
16 communicative content.

17 And, yes, that is a test that turns on
18 reading the sign but in a very specific way. It
19 turns on whether or not you are examining the
20 content of the sign and determining whether or
21 not the regulation applies.

22 JUSTICE SOTOMAYOR: Counsel, easy
23 rules are -- and bright lines are always
24 attractive to people, but human nature is not
25 bright lines. Life is all gray. You have to

1 read things to know anything about them. You
2 have to read a sign to see if it's covered by
3 the First Amendment, and you have to read it to
4 know whether it's obscenity or not. Directional
5 signs, as Justice Breyer said earlier, you have
6 to read it to see if it's directional.

7 And yet, I think it's illogical and
8 contrary to any common sense to think that a
9 regulation that says states can put up signs --
10 only states can put up directional signs on
11 highways, that that's content-based. It -- just
12 not logical.

13 And so I think what Justice Breyer's
14 trying to get at is that history teaches us --
15 it's just the history in this case; I joined
16 Justice Alito's concurrence -- that there are
17 certain types of functions, not purposes but
18 functions, like on- and off-premises, that don't
19 have a possibility or a direct effect on speech
20 in the same way as a regulation that says only
21 the religious -- as in Reed, that only religion
22 can do X, politics can do Y, and this can do Z.

23 Reed was clear for everybody. It was
24 9-0 on the result. But you can't read a line
25 out of context. Are you suggesting that Reed

1 did -- overturned all the precedent that your
2 colleagues on the other side cited?

3 MR. SHANMUGAM: No, certainly not,
4 Justice --

5 JUSTICE SOTOMAYOR: So can't -- don't
6 we have to read Reed in context?

7 MR. SHANMUGAM: Of course, Justice
8 Sotomayor, but I hope to convince you that the
9 regulation at issue here is really
10 indistinguishable from the regulation that was
11 at issue in Reed in the relevant respect.

12 And we certainly don't think, as we
13 set out at great length in our brief, that this
14 Court needs to disturb any of its First
15 Amendment precedents to rule in our favor. And
16 I'm happy to address the examples that Justice
17 Breyer gave and some of the examples --

18 JUSTICE SOTOMAYOR: Well, how about
19 Heffron? We held the restriction on
20 solicitation to be content-neutral because it
21 applied even-handedly to all who wished to
22 distribute and sell written materials or to
23 solicit funds. So it differentiated between
24 solicitation and just endorsement.

25 MR. SHANMUGAM: I think the best way

1 to understand this Court's solicitation cases --
2 and I would put this Court's picketing cases in
3 the same category -- is that they are cases that
4 involve conduct with an expressive component.
5 And so this Court in the solicitation context
6 has distinguished between --

7 JUSTICE SOTOMAYOR: Well, this is
8 conduct too, conduct of having a off-site
9 grandfathered billboard.

10 By the way, going back to Justice
11 Barrett's question, how about if Austin said
12 we're going to treat on- and off-premises the
13 same, you can only advertise on-site premise
14 information, and you can have a billboard
15 on-site, but forget it, now that the First
16 Amendment requires us to treat you all equally,
17 you can't continue to advertise off-premise
18 things? Would you be happy with that?

19 MR. SHANMUGAM: No, I don't think we
20 would be happy with that because I think that
21 that is not so far removed from the regulation
22 at issue here. In other words, if you define it
23 in terms of what is being advertised, namely,
24 only on-premises activities can be advertised,
25 then you're really left with --

1 JUSTICE SOTOMAYOR: So you're telling
2 every state to basically say no signs, period?

3 MR. SHANMUGAM: No, not --

4 JUSTICE SOTOMAYOR: No on and off
5 signs, no -- signs just on services? You're
6 really taking a radical step in saying your only
7 choice is no signs, period?

8 MR. SHANMUGAM: No, not at all. And I
9 want to go to the concurring opinion of Justice
10 Alito, which you joined, Justice Sotomayor,
11 because I don't think that that opinion, you
12 know, should be read to stand for the
13 proposition that any distinction between
14 on-premises and off-premises signs is
15 content-neutral.

16 Let's suppose, for instance, that you
17 had a provision that banned signs advertising
18 religious services not located on the premises.
19 That would plainly be a content-based
20 distinction. And I think merely removing
21 religious from that provision doesn't render the
22 provision --

23 JUSTICE SOTOMAYOR: But this sign --

24 MR. SHANMUGAM: -- any different.

25 JUSTICE SOTOMAYOR: -- was no

1 different -- this regulation was no different
2 than the vast majority of other regulations in
3 existence at the time, and Justice Alito said we
4 shouldn't read Reed to extend to those.

5 MR. SHANMUGAM: I grant you, Justice
6 Sotomayor, that there are many jurisdictions
7 that had on-premises/off-premises regulations
8 like the one at issue here.

9 Now I will note, as Austin concedes,
10 that many jurisdictions, in the wake of Reed,
11 modified those definitions to render them
12 content-neutral, whether by looking to the
13 source of revenue, as the State of Texas itself
14 did and as Tennessee and many other states did,
15 or modifying their ordinances in other ways.

16 And so I really don't think that you
17 can draw the inference that simply because a
18 distinction is framed in terms of on-premises
19 versus off-premises, that that renders it
20 content-neutral.

21 The inquiry is the same. It is
22 whether or not the regulation at issue defines
23 the regulated speech in terms of its subject
24 matter, function, or purpose. And I would note
25 --

1 JUSTICE ALITO: Mr. Shanmugam --

2 JUSTICE KAGAN: Mr. Shanmugam --

3 JUSTICE ALITO: -- is the Austin code
4 content-based as applied to the billboards that
5 are at issue here? Perhaps I don't understand
6 the -- the underlying facts of the case. But,
7 as I understand it, your client has billboards.
8 They are off-premises in the conventional sense
9 of the term. They are not in front of a
10 building. Austin doesn't say you have to take
11 them down. It just says you can't digitize
12 them.

13 An enforcement officer could determine
14 whether you're in compliance or not in
15 compliance without reading what is on the
16 billboard. If everything on the billboard were
17 written in Chinese and the enforcement officer
18 can't read Chinese, the enforcement officer
19 could still say you're in violation because
20 they're digitized.

21 That wouldn't be a content-based
22 distinction, would it? What am I missing?

23 MR. SHANMUGAM: So, Justice Alito, the
24 critical fact here is that the trigger for
25 whether or not we can digitize our signs is

1 whether or not our signs, as they exist,
2 advertise on-premises or off-premises
3 activities. If they advertise off-premises
4 activities, they are forbidden unless they are
5 grandfathered. Our signs are concededly in that
6 category.

7 JUSTICE ALITO: They're grandfathered,
8 so they're permitted, even though all of --
9 everything, as I understand it -- again, correct
10 me if I don't understand the facts. Everything
11 that is on your clients' signs relates to
12 something that is off-premises, right?

13 MR. SHANMUGAM: Yes, the --

14 JUSTICE ALITO: In the conventional
15 sense, not in the -- the peculiar sense in which
16 Austin defines the term.

17 MR. SHANMUGAM: Well, in both senses,
18 because the signs advertise activities that take
19 place off-premises, and that is what renders
20 them not permitted unless they are
21 grandfathered. And, again, that is why we can't
22 digitize our signs.

23 So, Justice Alito, just to sort of
24 explain for a minute how all of this operates,
25 when we apply to digitize our signs, the reason

1 that we can't do that is because we are not
2 allowed to alter signs that are non-conforming
3 or grandfathered. The sole reason that our
4 signs are non-conforming or grandfathered is
5 because they are classified as off-premises
6 signs.

7 So our submission to the Court is,
8 first, that that distinction is content-based,
9 that because we were not permitted to digitize
10 our signs because they were off-premises, the
11 regulation should be subject to strict scrutiny.

12 And, second, that the digitization ban
13 itself, which is, after all, the regulation that
14 we were challenging, is invalid under strict
15 scrutiny. And, of course, the City makes no
16 effort to argue that the digitization ban
17 survives strict scrutiny.

18 But, frankly, the City makes no effort
19 to argue that it satisfies intermediate scrutiny
20 either. In fact, both in the briefing and today
21 at oral argument, Mr. Dreeben doesn't talk about
22 the digitization ban at all. Instead, he simply
23 talks about the on-premises/off-premises
24 distinction in isolation.

25 JUSTICE ALITO: Could you --

1 MR. SHANMUGAM: But, of course, that's
2 just a definition.

3 JUSTICE ALITO: Yeah. Could you
4 address the regulations to which Justice Breyer
5 referred, the many, many federal regulations
6 that require disclosure of information?

7 MR. SHANMUGAM: Yes.

8 JUSTICE ALITO: And there are some
9 that I -- I -- I'm not a -- an expert on, let's
10 say, food labeling regulations, but I -- I -- I
11 believe there are some that prohibit something
12 being labeled as -- as a particular thing unless
13 certain requirements are met -- are met, what
14 you need to be able to label something as juice
15 or -- or cheese.

16 What would be the effect of -- I want
17 to understand where -- what we would be buying
18 if we bought the "if you have to read it, it's
19 content-based" argument?

20 MR. SHANMUGAM: So I don't think that
21 you would have to alter any of this Court's
22 well-established case law with regard to those
23 sorts of regulations. And at least as I
24 understood the examples, I think they are, in
25 the main, all examples of compelled disclosures,

1 and that's particularly, I think, most of them
2 --

3 JUSTICE BREYER: Well, there are
4 plenty of the other, peanut butter. Every
5 lawyer in Washington before you were born was
6 hired to argue yes or no, that real, genuine
7 peanut butter must have lard in it, otherwise it
8 sticks to the roof of your mouth and isn't
9 peanut butter.

10 I don't know how the case came out,
11 but it did say what could be labeled peanut
12 butter, okay? If that isn't content-based, what
13 is? And there are a lot like that.

14 MR. SHANMUGAM: So, again, I think,
15 with regard to compelled disclosure, the way
16 that this Court's case law operates, as I
17 understand it, is that outside the context of
18 commercial speech, the Court generally applies
19 strict scrutiny to compelled disclosures, but,
20 in the context of commercial speech, which I
21 think would cover most of the examples like the
22 SEC and so forth, the Court applies the Zauderer
23 test, which is a lower level of -- of scrutiny,
24 you know, probably closer to intermediate
25 scrutiny.

1 And I don't think that the Court would
2 have to, again, disturb any of that case law.
3 Those were the examples that Justice Breyer
4 cited in his concurring opinion in Reed itself.

5 CHIEF JUSTICE ROBERTS: Well, one
6 thing you'd certainly have to disturb is the
7 Highway Beautification Act, right? What is your
8 -- your position on each of the provisions?
9 There are five sign provisions, and under your
10 theory, I -- I suppose they would be
11 unconstitutional.

12 You can have directional and official
13 signs, content-based, throw it out, right?

14 MR. SHANMUGAM: I -- I -- I think
15 those exceptions are content-based and would be
16 subject to strict scrutiny. And then the
17 question would be whether or not they survive
18 strict scrutiny. And I think that --

19 CHIEF JUSTICE ROBERTS: Well, let's
20 take another one, signs advertising the sale or
21 lease of property upon which they are located.
22 Does that survive strict scrutiny?

23 MR. SHANMUGAM: I think that the
24 government in prior briefs has suggested that
25 the analysis for each of those exceptions might

1 operate somewhat differently.

2 First, there might be different
3 governmental interests. The government has
4 cited with regard to the sale or lease of
5 property exception the interest of property
6 owners in fully marketing --

7 CHIEF JUSTICE ROBERTS: Landmark signs
8 --

9 MR. SHANMUGAM: -- their own
10 properties.

11 CHIEF JUSTICE ROBERTS: -- or signs of
12 historic or artistic significance.

13 MR. SHANMUGAM: And I think that that
14 exception, like the exception for on-premises
15 signs, may be justified by a distinct interest,
16 which is the safety-related interest in
17 motorists getting necessary information about
18 nearby services. That's the argument that the
19 government itself has made.

20 And so the question would be, first,
21 whether the government can articulate a
22 compelling interest and, second, whether the
23 regulation at issue would be narrowly tailored.

24 And, of course --

25 CHIEF JUSTICE ROBERTS: I think it

1 would be diluting our content-based test for you
2 to say that those can possibly satisfy it.

3 MR. SHANMUGAM: Well, and I'm --

4 CHIEF JUSTICE ROBERTS: Landmark
5 signs, you know --

6 MR. SHANMUGAM: I -- I -- I -- I'm not
7 here to defend the free coffee exception, Mr.
8 Chief Justice. I think, ultimately, that would
9 be a question for a court to analyze based on
10 the evidence that the government adduces for
11 each of those exceptions.

12 And I would note that the other thing
13 about the Highway Beautification Act that makes
14 it very different is that it is narrowly
15 tailored in important respects. It covers a
16 relatively limited area, the area within 660
17 feet of a covered federal highway. It excludes
18 areas that are zoned in particular ways.

19 The City of Austin's ordinance, the
20 ordinance at issue here, by contrast, is quite
21 broad. And, again, all we're talking about
22 today is the digitization ban. That is what our
23 clients are challenging because our clients want
24 the ability to digitize their off-premises
25 signs.

1 And I would invite the Court to review
2 the record in this case because there is simply
3 no evidence in the record at all to justify what
4 Austin did here, which is to permit the
5 digitization of on-premises signs without any
6 sort of limitation on brightness, message
7 display time and the like, limitations that are
8 very common in other jurisdictions, but yet to
9 say with regard to the small number of
10 off-premises signs that are permitted in Austin
11 that they can't be digitized.

12 And I think that that's what makes
13 this a very easy case. I don't think that the
14 Court needs to tackle the task of defining how
15 its test for content neutrality would apply in
16 every conceivable context --

17 JUSTICE KAVANAUGH: Mr. Shanmugam --

18 MR. SHANMUGAM: -- in order to rule in
19 my clients' favor.

20 JUSTICE KAVANAUGH: -- as you well
21 know, people will pay close attention to the
22 opinion. And unlike some of our decisions, this
23 decision is going to affect every state and
24 local official around America, and they spend a
25 lot of money and a lot of time trying to figure

1 out how to comply with the First Amendment
2 implications of sign ordinances.

3 So I -- I -- I'm just going to push
4 back a little on, like, oh, this is a nice,
5 easy, narrow case. If you look at the amicus
6 brief of the planning association, for example,
7 I thought was pretty telling about Metromedia.
8 It said, "experts have spent decades in the
9 intellectual wilderness disagreeing about
10 Metromedia. Their debates leave planners in the
11 same wilderness yet under the cover of night
12 with no flashlight or map."

13 You know, that -- that's a pretty
14 evocative way to describe what we potentially
15 would be doing. So I think we owe some clarity.
16 That doesn't mean you lose or win. I'm just
17 saying the idea of, oh, we can just kind of do a
18 little narrow thing, I'm not so sure.

19 MR. SHANMUGAM: Well, I -- I -- I
20 appreciate that, Justice Kavanaugh, but I think
21 that the way to provide that clarity is simply
22 to reaffirm the test that this Court articulated
23 in Reed.

24 And I think notwithstanding the
25 suggestion that there is going to be a -- a --

1 a -- a wilderness if this Court rules in my
2 clients' favor, I think that what we have
3 learned from experience --

4 JUSTICE KAVANAUGH: But just to --

5 MR. SHANMUGAM: -- is that --

6 JUSTICE KAVANAUGH: Sorry to
7 interrupt, but to stop you there, I think there
8 was confusion after Reed about
9 on-premises/off-premises because it was unclear
10 where a majority of the Court was in the wake of
11 the different opinions.

12 Now you're saying go with the
13 distinction is content-based and does not work,
14 except in response to the Chief Justice, you're
15 saying: Well, maybe there -- maybe here, maybe
16 there. That's going to be a -- I'm not saying
17 you lose because of this, but I just think you
18 need to acknowledge that's going to be a lot of
19 time and money for a lot of local jurisdictions
20 around America.

21 MR. SHANMUGAM: So I would say two
22 things in response to that, Justice Kavanaugh.

23 First, that I think the jurisdictions
24 in the wake of Reed, over the last six years,
25 have already modified their sign ordinances in

1 important respects. And there were --

2 JUSTICE KAVANAUGH: But they --

3 MR. SHANMUGAM: -- a lot of
4 jurisdictions --

5 JUSTICE KAVANAUGH: -- but some of
6 them rolled the dice on the
7 on-premises/off-premises basis because they
8 couldn't figure out which way that went from
9 Reed.

10 MR. SHANMUGAM: That -- that is
11 correct, many of them did modify those
12 definitions to render them unambiguously
13 content-neutral, but some, like Austin, didn't.

14 And Austin in 2017 overhauled its city
15 code explicitly in reaction to Reed, but it left
16 the definition of off-premises signs materially
17 undisturbed.

18 JUSTICE KAVANAUGH: I --

19 MR. SHANMUGAM: So I think, in some
20 sense --

21 JUSTICE KAVANAUGH: Like a lot of
22 jurisdictions.

23 MR. SHANMUGAM: Like -- like some
24 jurisdictions have. I -- I'm willing to concede
25 that. My point to --

1 JUSTICE GORSUCH: Can -- can I --

2 MR. SHANMUGAM: -- the Chief Justice

3 --

4 JUSTICE GORSUCH: I'm sorry to
5 interrupt, but -- but I -- I -- I -- I want to
6 nail that down a little bit further.

7 You've pointed out that Austin has
8 since modified its statute here, so it only
9 applies to commercial speech, which guarantees
10 intermediate rather than strict scrutiny under
11 our precedents.

12 How many jurisdictions to your
13 knowledge are left that are, in Justice
14 Kavanaugh's words, rolling the dice without
15 making that distinction or, you know, pursuing
16 some other option like Colorado or Chicago has?

17 MR. SHANMUGAM: There are a -- a
18 number, Justice Gorsuch, and it -- it's frankly
19 hard to quantify. And part of the reason why
20 that's true is that many states have state laws
21 that simply track the definitional provisions of
22 the Highway Beautification Act, so I don't mean
23 to minimize the fact that there are many
24 jurisdictions that have laws that draw these
25 distinctions.

1 I would just make two points. The
2 first is that, as I said in response to the
3 Chief Justice, the way that the strict scrutiny
4 analysis would operate is going to depend on the
5 type of regulation at issue.

6 Again, it's -- it's very nice to sort
7 of discuss the definition of on-premises and
8 off-premises signs in isolation, but, of course,
9 the real question is, what restrictions or
10 regulations flow from that definition?

11 And the analysis for a law like the
12 Highway Beautification Act, which permits
13 on-premises signs but prohibits off-premises
14 signs, is, I would submit, potentially different
15 from the analysis on the digitization ban.

16 What makes this such an odd case is
17 that Austin permitted a small number of
18 off-premises signs to remain and yet forbade the
19 owners of those signs from doing what the owners
20 of thousands of signs in Austin have been
21 permitted to do, which is to convert them to
22 digital signs, which enables the owners of those
23 signs to display many more messages and to do
24 that much more efficiently.

25 With regard to what Austin did,

1 Justice Gorsuch, I would just add one further
2 thing, which is that in 2017, it is true that
3 Austin permitted the display of non-commercial
4 signs, but Austin did not materially modify the
5 definition of off-premises signs, which is the
6 trigger for the digitization ban at issue here.

7 And so I think that the parties are in
8 agreement that even under the post-2017
9 regulatory regime, we would not be permitted to
10 convert our signs to digital signs. And, again,
11 ultimately, whether it's strict scrutiny or
12 intermediate scrutiny, the government, of
13 course, bears the burden of coming forward with
14 evidence.

15 It is true that the degree of fit --

16 JUSTICE KAVANAUGH: Can I ask you a
17 doctrinal question there to shift gears for me?
18 I understand your content-based argument. The
19 church hypo is a good one for you that you --
20 that you gave earlier. And then we'll get into
21 the tiers of scrutiny.

22 But what role does history and
23 precedent play in that? One of the themes of
24 the amicus briefs in particular is these things
25 have been around for a long time,

1 on-premises/off-premises distinctions, and that
2 has coexisted with the First Amendment in the
3 same way that long-standing regulations have
4 coexisted with free exercise or with the Second
5 Amendment, and they're trying to fold in that.

6 How do we think about that, or does
7 that -- is the history wrong, or how do we think
8 about it?

9 MR. SHANMUGAM: Yeah, Justice
10 Kavanaugh, I wouldn't stand here and say that
11 in, you know, 1789 there were a lot of
12 on-premises --

13 JUSTICE KAVANAUGH: Well, the issue --

14 MR. SHANMUGAM: -- and off-premises
15 distinction.

16 JUSTICE KAVANAUGH: -- didn't arise
17 until the 20th Century, really --

18 MR. SHANMUGAM: Yeah. I -- I think
19 that this really --

20 JUSTICE KAVANAUGH: -- so I don't
21 think that's going to work for you.

22 MR. SHANMUGAM: I think, if you had to
23 sort of point to some event, I would probably
24 point to the enactment of the Highway
25 Beautification Act precisely because, once the

1 federal law drew that distinction, many states,
2 in order to ensure that they were in compliance
3 with federal law, adopted similar restrictions.

4 At the same time, obviously, those
5 restrictions have been subject to challenge for
6 some time. Metromedia itself involved a -- a
7 challenge to that distinction.

8 And so I tend to think: Look, the
9 Court should obviously take into account the
10 fact that other jurisdictions have these
11 regulations, but I don't think that that should
12 be dispositive any more than it was -- than in
13 Reed itself, that there were other jurisdictions
14 that drew very similar distinctions between
15 political signs and temporary directional signs
16 and the like.

17 And, really, our submission with
18 regard to the test, which, as you say, Justice
19 Kavanaugh, is obviously important in other
20 contexts, is that the Court really can treat
21 this as exactly analogous to the definition of
22 temporary directional signs that was really at
23 issue in Reed.

24 Yes, the Court talked and Mr. Dreeben
25 talked today about the other categories of

1 signs, political and ideological signs and the
2 like. I think those other categories tended to
3 confirm that the Town of Gilbert was rampantly
4 drawing content-based distinctions.

5 But, when you look at the very
6 provision that was being challenged, the
7 definition of temporary directional signs, that
8 provision was exactly like the provision at
9 issue here in that there was some other factor,
10 in addition to content, that governed how the
11 regulation operated.

12 There, it was the occurrence and
13 timing of an event. Here, it is the location of
14 the sign. But that simply defines the
15 restriction. It defines the restriction on the
16 speech that is permitted or not permitted.

17 And so there is no respect in which
18 the on-premises/off-premises distinction is
19 different, other than that it is location rather
20 than the timing of an event.

21 JUSTICE KAVANAUGH: Can I pick up on
22 one of Justice Gorsuch's questions? He said
23 on-premises/off-premises at least as to
24 commercial advertising, if I understood the
25 question, might be different, and that folds in

1 into the Metromedia precedent, which seems to
2 suggest that that would be permissible.

3 Your response?

4 MR. SHANMUGAM: Our view is that when
5 you consider the discrete type of regulation at
6 issue here, the digitization ban, that it would
7 not survive even intermediate scrutiny.
8 Metromedia itself involved an outright
9 prohibition on off-premises signs, and I would
10 submit that the analysis there could be
11 different because the fit between the interests
12 that are asserted and the regulation at issue
13 could be analyzed in a different way.

14 And so, in our view, all that the
15 Court needs to do here is to say, as Justice
16 Kagan suggested in her concurring opinion in
17 Reed, that this digitization ban does not
18 survive either strict scrutiny or intermediate
19 scrutiny if the Court doesn't want to provide
20 guidance on the question of whether
21 on-premises/off-premises distinctions are
22 subject to strict scrutiny across the board.

23 And, in our view, because of the
24 examples that we have given, I think that it is
25 clear that an on-premises/off-premises

1 distinction that turns on whether or not a sign
2 advertises on-premises or off-premises
3 activities is a paradigmatic example of a
4 regulation that distinguishes between different
5 types of communicative content.

6 We've talked about the example of a
7 church that is limited in the speech that it can
8 display on a sign on its premises, but I think
9 many of the other examples that we have
10 discussed today really drive home the extent to
11 which this is a distinction based on content.

12 We talked about the example involving
13 Franklin's Barbecue. Franklin's Barbecue could
14 obviously put up a sign in Austin on its
15 premises advertising Franklin's Barbecue. But
16 let's say that there's a sign across the street
17 and let's say that it's Salt Lick, another
18 famous barbecue restaurant, whose primary
19 premises is outside the city limits, wants to
20 say the best barbecue is actually two miles down
21 the road. It would be disabled from doing that
22 under Austin's ordinance.

23 And there was a colloquy earlier, I
24 believe, between my friend, Mr. Snyder, and
25 Justice Gorsuch about how the Court should think

1 about the effects of the regulation. We're
2 certainly not suggesting that merely because
3 this has a disproportionate effect it is a
4 content-based regulation. But I think that
5 helps to drive home the ways in which this
6 regulation really does draw a distinction based
7 on the subject matter.

8 And, again, we think that a test that
9 -- that says that if you have to examine the
10 content of the sign to determine whether or not
11 the regulation applies is going to be an easily
12 administrable test that is not going to disrupt
13 any of this Court's precedent.

14 JUSTICE ALITO: Suppose a -- a city
15 has two categories of sign regulations. One is
16 for signs that are in front of a building. The
17 other is for signs that are not in front of a
18 building. And it says that signs in the first
19 category may not exceed a certain size. Signs
20 in the second category may not exceed a smaller
21 size. Is that content-based?

22 MR. SHANMUGAM: No, that isn't
23 content-based because that depends entirely on
24 the location. And so, similarly, as the Sixth
25 Circuit suggested in the Thomas opinion, if a

1 jurisdiction said that it would define an
2 on-premises sign as any sign that is within a
3 certain distance of a building and an
4 off-premises sign as any sign that is further
5 away, that too would be okay.

6 JUSTICE ALITO: What is the difference
7 between that and what happened here? You have
8 certain signs -- I'll come back to my question.
9 I still -- my first question, I still don't
10 quite understand the -- the answer.

11 You have certain signs. Austin
12 doesn't say you have to take them down. It just
13 says you can't digitize them. And that isn't a
14 content-based distinction between a digitized
15 sign and a non-digitized sign. Maybe it's not a
16 defensible distinction, but it doesn't seem to
17 be content-based.

18 MR. SHANMUGAM: Justice Alito, the
19 critical fact is that the trigger for the
20 digitization ban, for the differential
21 treatment, is whether or not the sign advertises
22 off-premises activities, and that requires an
23 examination of content in a way that your
24 hypothetical, which depends entirely on the
25 location, does not.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: No questions.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer? Sure?

7 Justice Alito?

8 Justice Kagan?

9 JUSTICE KAGAN: Mr. Shanmugam, I -- I
10 mean, I guess the question is, yes, you can say
11 that there's a piece of content that triggers
12 the restriction. It has to advertise
13 off-premises activities.

14 You said before Justice Alito couldn't
15 possibly have meant what he said in his
16 concurrence because, after all, the way he
17 framed that piece of the concurrence, it would
18 have applied, for example, if the trigger was
19 religious speech or political speech, and he
20 couldn't have meant that, and I'm sure he didn't
21 mean that.

22 The question is whether we should
23 treat a trigger of religious speech or political
24 speech or speech by Republicans or speech by
25 Democrats or all the kinds of triggers that we

1 understand to be dangerous and -- and -- and
2 that we understand to be content-based as we
3 have always used that label, whether that
4 trigger should be treated in the exact identical
5 way as the trigger in this law, which is, does
6 it advertise off-premises activities?

7 I think that that's the issue, and I'm
8 just wondering why you would say that those two
9 triggers should be treated in an identical way?

10 MR. SHANMUGAM: I -- I grant you,
11 Justice Kagan, that in the hypothetical
12 involving religious speech, there's a much
13 stronger sense that something nefarious is going
14 on, that the government in question is targeting
15 religious speech and is singling out a
16 particular type of subject matter.

17 But, in some sense, the whole point of
18 the framework that this Court established in
19 Reed -- and I don't think it was inconsistent
20 with this Court's past precedents -- was a
21 framework that looked first to the face of the
22 regulation and, only after that, to the purpose
23 of the regulation.

24 And the Court made clear that even in
25 cases where it might seem as if a regulation is

1 benign or reasonable, the Court still has to
2 take that first step and determine whether or
3 not the distinction is content-based on its
4 face.

5 And as I indicated to Justice Gorsuch,
6 I do think that there is a sense in which a
7 regulation like this is distortive. It could
8 have been designed to favor local businesses.
9 It could have been designed to put --

10 JUSTICE KAGAN: Yeah, that's -- that's
11 --

12 MR. SHANMUGAM: -- a thumb on the
13 scales.

14 JUSTICE KAGAN: -- always true of
15 speech restrictions, including restrictions that
16 we would understand, all of us, to be
17 content-neutral.

18 You know, if you have a regulation
19 that says there shall be no sound trucks in the
20 city after 8 p.m., there are various ways in
21 which that can be distortive and in which it can
22 affect certain speakers more than other
23 speakers.

24 Down that road, madness lies, and the
25 Court has never gone down that road.

1 MR. SHANMUGAM: I agree with that.

2 And -- and I think that all that the Court said
3 in Reed is that where you have a distinction
4 that on its face depends on the content of
5 speech, that's a reason to look more closely.

6 And I do think that this regulation
7 falls squarely into that category because of the
8 hypotheticals that we have set out. There is no
9 question --

10 JUSTICE KAGAN: I mean, I grant you --

11 MR. SHANMUGAM: -- that this
12 regulation requires --

13 JUSTICE KAGAN: -- Mr. Shanmugam, that
14 formally one can understand this in -- in
15 exactly the way you say. You have to examine
16 the content, so, formally, one can understand
17 this as content-based, even though I think the
18 Court has defined that term more narrowly.

19 But put that aside. I mean, it's
20 formally true that you have to examine something
21 about the content, but just to go back to the
22 Chief Justice's questions, I mean, there are
23 some laws where, you know, the laws of -- lots
24 of municipalities have these laws that say you
25 can't have illuminated signs unless the

1 illumination is for your address or for your
2 name so that people can identify. There are
3 some laws that sort of scream out not to worry
4 in terms of any First Amendment values.

5 Now we can do two things with those
6 laws. As I understood what you said to the
7 Chief Justice, you said: Well, don't worry
8 because the strict scrutiny analysis can be
9 different.

10 And I guess I would say, I think he
11 said, that's the thing to worry about, is
12 diluting the strict scrutiny analysis. The
13 thing not to worry about is drawing some kind of
14 sensible line which takes laws like this one and
15 puts it on the other side of the
16 content-neutral, content-based divide.

17 MR. SHANMUGAM: I do think, Justice
18 Kagan, that in a lot of those hypotheticals, the
19 regulations at issue are easily going to satisfy
20 strict scrutiny. In many of those
21 hypotheticals, what you're doing is really
22 defining a medium of speech. That was true, for
23 instance, in Taxpayers for Vincent, where the
24 Court analyzed temporary signs as itself a
25 medium.

1 And that may be possible with regard
2 to categories such as directional signs
3 depending on how the category is defined. But I
4 think that what we haven't seen in the wake of
5 Reed is a great deal of chaos in the lower
6 courts.

7 Yes, we do have a circuit conflict on
8 this very specific question of whether
9 on-premises/off-premises distinctions are
10 subject to strict scrutiny. But the reality is
11 that jurisdictions have been coming into
12 conformity with this Court's decision in Reed.
13 There isn't an avalanche of litigation about
14 this issue.

15 And I do think that some regulations
16 that distinguish between on-premises and
17 off-premises signs, including potentially the
18 Highway Beautification Act, are going to survive
19 strict scrutiny. That is obviously a
20 case-specific analysis that depends on the
21 evidence that is adduced to justify the
22 particular regulation.

23 What makes this case such an
24 artificial case in which to be discussing this
25 issue is because Austin simply has no

1 justification for the differential treatment
2 when it comes to the digitization ban given that
3 Austin is permitting digital signs on premises
4 with complete abandon and without any
5 limitation.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: I'll give you some
10 examples. I -- I just want to understand how
11 this would cash out.

12 Let's say a sign just says "Black
13 Lives Matter." I -- I -- I think we'd agree
14 that that's not an off-premises sign because it
15 doesn't identify a particular location. Is that
16 right?

17 MR. SHANMUGAM: Yes. I would -- I
18 would say that that would not qualify as an
19 off-premises sign because it's not advertising
20 an activity.

21 JUSTICE GORSUCH: But what if Black
22 Lives Matter has a local office and it isn't
23 there?

24 MR. SHANMUGAM: Well, I mean, it would
25 be a question for Mr. Dreeben. I think he would

1 say that that sign does not advertise an
2 activity, business, or person.

3 JUSTICE GORSUCH: So that one's okay?

4 MR. SHANMUGAM: Potentially so.

5 JUSTICE GORSUCH: How about -- how
6 about if it says "Black Lives Matter, Do
7 Something About It," anticipating an upcoming
8 rally, but no information is provided?

9 MR. SHANMUGAM: I mean, that seems
10 like it might be advertising an activity at that
11 point. And, again, I don't mean to --

12 JUSTICE GORSUCH: So that one might
13 not be permissible. And -- and then what if it
14 gives the date and the time of the rally?

15 MR. SHANMUGAM: At that point, it
16 seems more clearly to be advertising a
17 particular activity.

18 JUSTICE GORSUCH: And so an official
19 would have to -- somebody's going to have to
20 read this and decide which side of the line
21 these four examples fall on.

22 MR. SHANMUGAM: Well, I -- I think
23 that that's right. And I think what I would say
24 is that the examples that were in the Fifth
25 Circuit's opinion illustrate that this is not a

1 case in which a mere cursory of examination of
2 content -- a mere cursory examination of content
3 is necessarily going to be sufficient. There
4 are hard questions about whether a particular
5 sign would qualify.

6 And I think it was telling that my
7 friend, Mr. Dreeben, when he was asked the
8 question about the, you know, Vote For Person X
9 sign, said, well, there's this -- there was this
10 exception in the ordinance for political signs.

11 That is true, but the really
12 fundamental question is, would a sign like that
13 be advertising a person not at the premises? I
14 think the answer to that is yes, but that would
15 be a matter for Austin's sign regulators to
16 decide, and I think that really drives home why
17 this requires not just an examination of content
18 but particularly a close examination of content
19 to determine whether or not it is regulated.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 Justice Barrett?

23 Thank you, counsel.

24 MR. SHANMUGAM: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

1 Dreeben.

2 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN
3 ON BEHALF OF THE PETITIONER

4 MR. DREEBEN: Thank you, Mr. Chief
5 Justice. Three quick points on the record and
6 three substantive points.

7 First of all, Justice Thomas, in
8 response to your question to me, the "read the
9 sign" language appears in the Fifth Circuit's
10 opinion at pages 14a and 19a of the Petition
11 Appendix. That's the test that the Court
12 applied to identify something as facially
13 content-based.

14 Second, Respondent invited this Court
15 to read the record to determine what Austin said
16 in the district court. I invite the Court to
17 read the record on what Austin argued in the
18 district court and on appeal.

19 Austin did not appeal the intermediate
20 scrutiny holding of the district court. Its
21 sole appeal is on the theory that strict
22 scrutiny applied because the law is
23 content-based by virtue of its distinction
24 between on-premises and off-premises
25 advertising.

1 So I think the intermediate scrutiny
2 question is not here and it's for the Fifth
3 Circuit to decide whether it's waived.

4 And then, finally, Justice Thomas,
5 your question about commercial speech and
6 whether Respondents' billboards could be
7 regulated as such, Respondents said that the
8 question presented is about the facial validity
9 of the statute under strict scrutiny.

10 And that is correct. The question
11 presented asks whether the statute is facially
12 invalid under strict scrutiny by virtue of the
13 on- and off-premises distinction, and the answer
14 is no because, as Respondent concedes,
15 commercial billboards can be regulated
16 off-premises, while on-premises commercial
17 signage is permitted, and at JA 29, Austin
18 squarely premised its denial of the digitization
19 permit request on the commercial speech that
20 Respondents' billboards display.

21 Now, substantively, we've talked a lot
22 this morning about how strict scrutiny is the
23 highest rung of review that the -- the Court
24 applies and that applying it where it is not
25 warranted runs the risk of dismantling a host of

1 reasonable signage regulation by jurisdictions.

2 Now that does not mean that they get a
3 free pass. If strict scrutiny is not applicable
4 because of the text, the face of the statute, as
5 we submit it should not be here, you still have
6 the question whether the law can be justified
7 without reference to the content.

8 If it cannot, it goes to strict
9 scrutiny, except insofar as this Court carves
10 out categories of content-based regulation, like
11 commercial speech and possibly the regulatory
12 examples that Justice Breyer has been talking
13 about from the strict scrutiny category, even
14 though they regulate content.

15 You still have intermediate scrutiny,
16 and laws can fail that, as they did in McCullen
17 and in the City of Ladue case with respect to a
18 total preclusion of residential signage. The
19 jurisdiction lost that.

20 And, Mr. Chief Justice, if I could
21 finish one point. In response to your question,
22 Justice Barrett, about the prevalence and
23 alternatives of this kind of regulation, it
24 remains extremely prevalent, and in our petition
25 reply brief in Appendix B, we collected a

1 sampling of laws that still reflect this.

2 Jurisdictions have found that it works. Other
3 things do not.

4 And, accordingly, we ask the Court to
5 reverse the judgment of the Fifth Circuit with
6 respect to its holding that strict scrutiny
7 applies to Austin's law.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 11:38 a.m., the case
11 was submitted.)

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