USSC **FOUNDATION**

# Reed v Gilbert Analysis 1.1

## Impact on On-Premise Signs

USSCF ON-PREMISE SIGNS / LEGISLATIVE INFORMATION

# Reed v. Gilbert Analysis 1.1
# Impact on On-Premise Signs

A Research Project Of The
UNITED STATES SIGN COUNCIL FOUNDATION

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# Foreword

We at the United States Sign Council Foundation review hundreds of sign codes each year, in addition to publishing our own Model Sign Code in 2015.

Sign codes fundamentally deal with speech, and deal with the ability to communicate.

There is likely no other single item covered by a local Zoning Code or Land Development Ordinance, comparable to on-premise signs, that has protection under the First Amendment. Our experience suggests that Sign Codes should be streamlined and simplified.

The Reed v Town of Gilbert case is a landmark decision for signs and sign regulation. The USSCF felt it would be useful to get the insights of an expert, with a background as an active litigator, on Speech and First Amendment issues. The meaning and impact of Reed will be determined by legal scholars going forward, but will also be determined by practicing attorneys in real courtrooms and zoning boards across the United States.

Steven Brody is partner with the law firm Morgan Lewis and is based in New York City. Steve is the co-author of a leading treatise titled Advertising and Commercial Speech: A First Amendment Guide, which is updated annually, and he frequently speaks on PLI and ABA panels, with respect to Commercial Speech, and right of publicity issues.

Some have reacted to the Reed decision by saying "it's just about non-commercial speech". But that is missing the point entirely, and not paying attention to the written decision. Ask anyone who has had to decipher a local sign code. It isn't just about non-commercial speech.

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USSC Foundation Legislative and Zoning Advisor
4.21.17

# Table of Contents


| | |
|---|---|
| The Growing Constitutional Protection of Speech After *Reed* | Page 1 |
| *Reed*: An Important Commercial Speech Decision That Does Not Mention Commercial Speech | Page 2 |
| Framing the *Reed* Case in the Context of Prior Decisions | Page 3 |
| What Does *Reed* Mean for Sign Codes and Speech? | Page 7 |
| The Public Policy Behind *Reed* | Page 9 |
| What Does Justice Thomas Mean for Commercial Speech? | Page 10 |
| Conclusion | Page 11 |
| Report Supplement A: Chart of Opinions Interpreting *Reed v. Town of Gilbert* | Starting After Page 12 |

**THE GROWING CONSTITUTIONAL PROTECTION OF SPEECH AFTER *REED***

1. Free speech advocates believe the U.S. Supreme Court's decision in *Reed v. Town of Gilbert* has radically changed the legal landscape for both commercial and non-commercial speech. They argue that, after *Reed*, when a law singles out a "topic" for discussion, that law should be understood as discriminating based on content and presumptively unconstitutional. More to the point, a content-based sign code regulation, including a regulation that treats "topics" differently, is subject to strict scrutiny, and almost always fails such scrutiny. Attackers of such regulations have a valid point, regardless of whether a case involves commercial or non-commercial speech.

2. From the perspective of commercial speakers, the key is that, even though *Reed* does not mention commercial speech, the Court appears to be getting ready for the next step. There should be equal treatment for all truthful, non-misleading speech on all signage, whether commercial, non-commercial or otherwise. As scholars have argued, there ought to be only one level of constitutional protection, and it should be strict scrutiny.

3. We can think of *Reed* as a tactical intermediate step for pro-speech justices on the Court. Some scholars even argue that, after another favorable decision or so, sign owners, operators and advertisers may be able to combine *Reed* and *Central Hudson*. The remaining combination would favor speech. A more detailed description of *Reed* follows later in this report.

## ***REED*: AN IMPORTANT COMMERCIAL SPEECH DECISION THAT DOES NOT MENTION COMMERCIAL SPEECH**

1. Two years ago, the U.S. Supreme Court issued its decision in *Reed v. Town of Gilbert*.[1] There, a church and its pastor challenged a town's sign code, claiming that the code's regulation of temporary directional signs violated their freedom of speech. The church did not own a building, so it held its services in varying locations. The town's sign code compliance manager cited the church twice for violating the code. The compliance manager informed the church that future violations would be punished; the town claimed the sign code advanced the town's interest in safety and aesthetics.[2]

2. The church sought to enjoin enforcement of the code, but the district court denied the church's motion for a preliminary injunction. On appeal, the Court of Appeals for the Ninth Circuit affirmed and remanded, holding that even though the enforcement officer had to read the content of the sign to classify it, such cursory content examination did not amount to a content-based regulation. On remand, the district court granted summary judgment, holding that the code's distinctions among sign categories were content neutral. On appeal, the Ninth Circuit again affirmed.

3. The Supreme Court reversed, holding that the sign code was a content-based regulation of speech because the restrictions depend entirely on the communicative content of the sign and are therefore subject to strict scrutiny. The Court found that the town cannot show that the code was narrowly tailored to advance its interests in aesthetics and safety. In sum, the Court found that "the Code's distinctions fail as hopelessly underinclusive."[3] But the Court never mentioned commercial speech.

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[1] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).
[2] *Id.*, 135 S. Ct. at 2224-26.
[3] *Id.* at 2231.

4. *Central Hudson*,[4] which remains the Court's go-to commercial speech test, and the still-new *Reed* decision, are in limbo. When they settle down, we anticipate that strict scrutiny will prevail.

**FRAMING THE *REED* CASE IN THE CONTEXT OF PRIOR DECISIONS**

1. So why do we find ourselves stuck in this confusion of legal tests? Why does *Central Hudson*'s definition of commercial speech still matter at all? Because the definition of commercial speech remains case-dispositive in many matters. Until the Court overrules *Central Hudson* and its progeny, a risk of backsliding will remain.

2. While we await the next big decision, protectors of speech have to remain vigilant. Still at play is the *Central Hudson* test, and its several incarnations, created by the Court in 1980 and modified from time to time. That test remains the one most frequently relied upon by the courts, even while it is being attacked as outmoded in other quarters.

3. Simply put, government usually loses when the courts categorize the restricted speech as fully-protected non-commercial speech. Strict scrutiny is applied and the challenged speech restriction is invalidated.

4. When the speech is deemed to be commercial, however, the courts apply the *Central Hudson* test. While *Central Hudson* has become a tougher test over the years, there is still much leeway within it for a court to uphold restrictions, if it does not like the specific speech at issue. So, yes, the definition matters. Yet, astoundingly, the Supreme Court has yet to state the precise definition of commercial speech.

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[4] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

5. It has been 49 years since the Court's seminal commercial speech decision -- *Virginia State Board*[5] -- and the nation still does not know which communications fall within the commercial speech category and which instead qualify as fully protected non-commercial speech.

6. The Supreme Court's failure to provide clarity keeps commercial speech lawyers employed but does not otherwise advance the rule of law.

7. The Supreme Court and lower courts currently focus on two inconsistent definitions of commercial speech -- the *Virginia State Board* definition and the *Bolger* definition. The Supreme Court has vacillated between the two, although it has relied more heavily on the *Virginia State Board* definition.

8. The *Virginia State Board* definition is this -- commercial speech is "speech that does no more than propose a commercial transaction." This test is often referred to as the "no more than" test.

9. Advocates of this definition say that it serves the underlying purpose of the commercial speech exception to general First Amendment principles. Commercial speech receives less than full constitutional protection because it is inextricably tied to commercial transactions, an area traditionally subject to the police power. Thus, it is perfectly logical that the commercial speech exception should extend only to speech that does no more than propose a commercial transaction.

10. But opponents of the "no more than" definition say it is too broad. They say that advertisers can avoid speech restrictions by including in their advertisements discussions of public policy or images that are not directly related to the product

[5] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

being sold. Such advertisements would do "more than propose a commercial transaction," and so would be fully protected.

11. Seven years after *Virginia State Board*, the Supreme Court addressed the definitional issue again in *Bolger v. Youngs Drug Products Corp*.[6] The Court held that a message may be considered commercial speech if (1) it is in the form of an advertisement; (2) it refers to a specific product; and (3) the speaker has an economic motivation for the speech. The Court made clear that, standing alone, no one of these factors is sufficient, but suggested that a combination of the factors could be enough.

12. Opponents of the *Bolger* test argue that fundamental First Amendment values are put at risk by a definition of commercial speech broader than the "no more than" definition. When a speaker's message does more than propose a commercial transaction, that message may be the first step in a public discussion. Protection of such discussion is at the heart of the First Amendment. There are other definitions to mention only briefly because they are cited infrequently.

13. For example, the *Central Hudson* decision itself occasionally defines commercial speech as "Expression related solely to the economic interests of the speaker and its audience."[7]

14. Another decision comes out of California. It arises from a case named *Nike v. Kasky*,[8] a 2002 decision issued by the Supreme Court of California. Under the test, the courts must consider three elements: the speaker, the intended audience and the content of the message. All three elements are defined so

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[6] *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983)
[7] *Central Hudson*, 447 U.S. at 561.
[8] *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 45 P.3d 243 (2002), *as modified* (May 22, 2002).

broadly that, practically speaking, they could include virtually any statement made by a corporation about itself.

15. Another evolving test is the *Zauderer*[9] test. That test was introduced by the Court in 1985, during a dark period for commercial speakers. *Zauderer* remains alive and kicking.

16. The *Zauderer* test has been applied by some courts in cases challenging laws that mandate disclosures, as distinguished from cases that involve restrictions on speech. *Zauderer*, which is weaker than *Central Hudson*, asks merely whether the government's disclosure requirements are reasonably and rationally related to the government's asserted interest. This is not a difficult standard to meet.

17. In a separate concurrence, Justice Thomas stated his view that non-misleading commercial speech deserves full First Amendment protection, and should not be subject to the "relaxed scrutiny" of *Zauderer*. He also rejected the idea that disclosure requirements are somehow less deserving of judicial scrutiny than are laws that actually suppress speech. In doing so, he pointed out that, in other First Amendment contexts, the Court has not distinguished between mandatory disclosures and prohibitions on speech.

18. Justice Thomas, who has emerged as the Court's progressive thinker on commercial speech issues, has expressed a willingness to reexamine *Zauderer* and its progeny in a future case.

19. Eventually a case will reach the Supreme Court where *Zauderer* will be directly challenged. Some will argue, as has Justice Thomas, that *Zauderer* be rejected completely, since "rational basis" review has no place when considering

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[9] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

restrictions on commercial speech protected by the First Amendment. Others, of course, will seek to solidify the Court's reliance on *Zauderer*. And, as a middle ground, another group will argue that *Zauderer* should only be applied where the government can show that a particular advertisement is inherently misleading absent the government-dictated disclosure. That latter approach may be the easiest way to contain *Zauderer*.

20. In other words, First Amendment advocates should ask the Court to rule that *Zauderer* only could apply, if at all, when the government carries its burden to demonstrate that, without the mandatory disclosure, the challenged speech is inherently misleading.

21. Better yet, the day will arrive when the various tests that are bandied about will be abandoned. *Reed* is the bellwether. The Court does not lightly adopt such a far-reaching decision, without some or all the justices prepared to embrace it. In the interim -- and it cannot be emphasized enough, judges, scholars and civil rights lawyers should maintain their vigilance.

## WHAT DOES *REED* MEAN FOR SIGN CODES AND SPEECH?

1. Under *Reed*, regulatory distinctions based on communicative "topics" could be subject to strict scrutiny.

2. Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government satisfied strict scrutiny.

3. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny.

4. The Court said that even when the distinctions seem benign, content-based laws are "presumptively unconstitutional."[10]

5. For example, a decision was rendered concerning the Texas Highway Beautification Act soon after *Reed* was decided. That decision was called *Auspro Enterprises v. Texas Dep't of Transportation.*[11] Because the challenged restriction regulated speech based on its content, the Texas Court of Appeals found the entire Highway Beautification Act violated the First Amendment to the U.S. Constitution.

6. The state agreed that the act could not pass strict scrutiny review, and the court thus found the act unconstitutional.

7. Another harbinger of enhanced speech protection is *Thomas v. Schroer*,[12] a case that invalidated the Tennessee Billboard Regulation and Control Act. Noting that there has been "an undeniable trend in Supreme Court cases to guard against regulations that selectively ban speech on the basis of its subject matter,"[13] including *Reed*, the court held that the sign code "regulates both commercial and non-commercial speech by banning some forms of both on the basis of content and therefore does not survive First Amendment scrutiny."[14]

8. In addition to these individual cases, the statistics tell a persuasive story about where the post-*Reed* decisions are heading.[15]

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[10] *Reed*, 135 S. Ct. at 2226.
[11] *Auspro Enterprises, LP v. Texas Dep't of Transportation*, 506 S.W.3d 688, 691 (Tex. App. 2016).
[12] *Thomas v. Schroer*, No. 13-CV-02987-JPM-CGC, 2017 WL 1208672 (W.D. Tenn. Mar. 31, 2017).
[13] *Id.* at *1.
[14] *Id.*
[15] Attached hereto is a chart that summarizes and categorizes recent cases that have interpreted *Reed*.

- We have not identified any appellate court that treated *Reed* critically.
- Of the lower court cases that do treat *Reed* critically, none sufficiently address *Reed's* broad language applying to an entire sign code and content neutrality, and most are limited to pockets in only two specific jurisdictions. Notably, one of these jurisdictions is California, which is subject to Ninth Circuit precedent -- precedent which was overruled by the U.S. Supreme Court in *Reed*.

**THE PUBLIC POLICY BEHIND *REED***

1. The Court's decision in *Reed* has been ridiculed as advancing an "economic libertarian" agenda, but a little economic libertarianism is a good thing sometimes. Towns have been regulating and over-regulating on premise signs for decades. Being in the content control business can be complicated.

2. To put it in layman's terms, the *Reed* case has to mean something. If the holding and precedent of *Reed* only applies to non-commercial signs, then *Reed* was a waste of time, and meaningless, even in terms of judicial economy.

3. If one takes the time to read the decision, however, it is obvious that the *Reed* court is dealing with an issue (content neutrality and content control) comprehensively, not narrowly. The justices in Reed think they are rendering an opinion on "signs" and a "sign code". They draw no distinctions between commercial and non-commercial signs, nor do they clarify that they are only addressing non-commercial signs.

4. In the majority opinion, the terms "Sign Code" or "Code" are referred to 45 times (not counting the syllabus or the footnotes). The decision is clearly referring to the entire Sign Code, not just that part that applies to non-commercial signs.

5. The Town of Gilbert Sign Code dealt with all manner of signs, some commercial, some non-commercial. The section of the Gilbert Sign Code where the lack of content neutrality was found - Section 4.402 General Sign Regulations - encompasses all sorts of signs, including signs that Reed (a church) was using; but many of the signs covered in Section 4.402 were commercial signs: real estate signs, business banners, window signs, A-frame signs, construction signs, suspended signs, restaurant menu signs, and sign walkers.

6. Later in the Code, all manner of temporary signs are covered – political signs, ideological signs, business ID banners, A-frame signs – some used by commercial uses, some non-commercial – and all have different rules – and that is what the *Reed* Court was trying to comprehensively address. Codes that deal with signs have to do so in a content neutral fashion.

7. Therefore, it might be considered disingenuous, and at a minimum reflecting a lack of understanding of the mechanics of a sign code, to suggest that *Reed* only applies to non-commercial signs.

**WHAT DOES JUSTICE THOMAS MEAN FOR COMMERCIAL SPEECH?**

1. *Reed* must be seen in a larger context, personified by Justice Thomas, and not limited to non-commercial speech. He has been attempting for decades, whether in the Court's principal opinions or in concurrences, to teach the rest of us about commercial speech. And he has been the most consistent Justice on these issues.

2. To be fair, Justice Thomas started out as an opponent of commercial speech, but that was long ago. By 1995, he authored *Rubin v. Coors Brewing*[16] a beer

[16] *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

advertising case. As Justice Thomas said there, the historic evidence of original intent supports full First Amendment protection for commercial speech.[17]

3. Again in *Rubin*, Justice Thomas quoted for the Court that a "particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[18]
4. Several years later, he wrote in *Lorillard*[19] (another advertising case) that "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.' I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment."[20]

5. Perhaps most impressive about Justice Thomas's commercial speech jurisprudence is his patience. More than twenty years after he switched from commercial speech skeptic to advocate, Justice Thomas has become the embodiment of not just commercial speech rights, but content neutrality generally.

## CONCLUSION

In the wake of *Reed*, the vast majority of judges have emphasized the status of speakers, in lieu of assessing the speech itself. Indeed, the town in *Reed* discriminated between speakers in its sign codes. It did not matter whether the speaker was displaying commercial or non-commercial messages. The town was discriminating among speakers, not the speech itself. Moreover, not all speakers were deemed equal under the relevant code provisions. Governments

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[17] *Rubin*, 514 U.S. at 522
[18] *Id.* at 482.
[19] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).
[20] *Id.*, at 572.

will be hard-pressed to win cases like this one, which will only be maintainable if content-neutrality is satisfied and strict scrutiny is applied.

# Report Supplement A

Chart of Opinions Interpreting
Reed v. Town of Gilbert

| Court Opinions Interpreting *Reed v. Town of Gilbert* | | | | |
|---|---|---|---|---|
| Case Name | Treatment? (Favorable/ Critical/Neutral) | Jurisdiction | Comments | Physical Sign, A-frame or poster? (Y/N) |
| Act Now to Stop War and End Racism Coalition v. District of Columbia, 846 F3d 391 (2017) | Neutral | D.C. Circuit | Case cites *Reed* as setting forth standard for content based restrictions, but does not apply *Reed* because it holds the regulation is content-neutral, although the case does discuss *Reed* at length in order to come to that conclusion. | N |
| Brickman v. Facebook, 2017 WL 386238 (2017) | Favorable | N.D. Cal. | Plaintiff sued Facebook for texting him in violation of federal law, the TCPA. Facebook alleges that the TCPA is unconstitutoinal based on *Reed.* The court found that *Reed* applied because the regulations require the examination of the content of the message, but that the TCPA survived strict scrutiny. | N |
| Browne v. City of Grand Junction, No. 14-CV-00809-CMA-KLM,<br>2015 WL 5728755, at *9 n. 8 (D. Colo. Sept. 30, 2015) | Favorable | D. Colo. | Case involves city ordinance prohibiting soliciting. Any law prohibiting all solicitation speech in a public forum constitutes content discrimination under *Reed.* | N |
| Bruni v. City of Pittsburgh, 824 F.3d 353 (2016) | Favorable | Third Circuit | Case involves "buffer zone" ordinance prohibiting congregating outside health care facilities. Court cited to *Reed* for its content-based restriction on speech proposition, but did not delve into analysis because it would require the court to overrule precedent. Instead, the court reversed defendant's MTD based on content neutral analysis. | N |
| Cahaly v. Larosa, 796 F.3d 399 (2015) | Favorable | Fourth Circuit | Case involves politically-related unsolicited calls made by automatically dialed announcing devices (ADAD). Under *Reed,* the anti-robocall statute is a content-based regulation that does not survive strict scrutiny. | N |
| California Outdoor Equity Partners v. City of Corona, No. CV 15–03172 MMM (AGRx), 2015 WL 4163346, at * 10 (C.D.Cal. July 9, 2015) | Critical | C.D. Cal. | Case involves ban on off-site commercial billboards. "*Reed* does not concern commercial speech, let alone bans on offsite billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite Central Hudson, let alone apply it." | Y |

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| Central Radio v. City of Norfolk | Favorable | Fourth Circuit | USSC remanded in light of *Reed*. Fifth Circuit applied Reed and held sign code regulating size of signs violated strict scrutiny test. Court also held thet *Reed* displaced former case law governing content-neutrality. | Y |
| Chiropractors United for Research & Educ., LLC v. Conway, 2015 WL 5822721, at *5 (W.D.Ky. Oct. 1, 2015) | Critical | W.D. Ky. | Case involves solicitation ordinance. "Because the [challenged] [s]tatute constrains only commercial speech, the strict scrutiny analysis of Reed is inapposite."<br><br>Appeal pending | N |
| Citizens for Free Speech, LLC v. County of Alameda, --- F.Supp.3d ---- (2016) | Favorable | N.D. Cal. | Case involves county's zoning ordinance regulating billboards and advertising signs as applied to noncommercial signs challenging political ideology espoused by county officials. Court followed *Reed*'s guidance, in dicta, on speaker-based distinctions to addressed whether the challenged speaker-based distinctions—(i) allowing "official public signs" but not noncommercial signs by private individuals, and (ii) allowing grandfathered billboard companies to display billboards, but not newcomers—reflect a content preference. The court held the public signs preference to be content-based and subject to strict scrutiny, and the grandfathering clause to be content neutral and subject to rational basis review. | Y |
| CMSG Restaurant Group, LLC, doing business as Larry Flynt's Hustler Club, et al., v. The State of New York, 145 AD3d 136 (2016) | Neutral | First Dept., New York | Case involves sales tax laws as applied to strip clubs. Court distinguished *Reed* from this case because *Reed* concerned a law that prohibited speech outside of certain restrictions where as the tax laws challenged in this case do not prohibit speech under any circumstances but merely involve the payment of a broadly applicable sales tax. | N |

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| Committe to Imose Term Limits v. Ohio Ballot Board | Neutral | S.D. Ohio | Case involves a challenge to Ohio's process for filing a voter initiative on the ballot. Plaintiff's claim that the requirement that an initiative consist of only individual petitions is unconstitional. Court found law did not require examination of content of petition and held that law was not content neutral, thus *Reed* did not apply. | N |
| Contest Promotions, LLC v. City and County of San Francisco, No. 15–cv–00093–SI, 2017 WL 76896 | Critical | N.D. Cal. | Case involves signage ordinances. *Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test. | Y |
| CTIA–The Wireless Ass'n v. City of Berkeley, 139 F.Supp.3d 1048, 1061, 2015 WL 5569072, at *10 (N.D.Cal.2015) | Critical | N.D. Cal. | Case involves city ordinance requiring cellphone retailers to warn customers about possible radio signal dangers. "[Plaintiff] completely ignores the fact that the speech rights at issue here are its members' *commercial* speech rights .... The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech ... and nothing in its recent opinions, including *Reed*, even comes close to suggesting that well-established distinction is no longer valid." | N |
| Defense Distributed v. US Dept of State | Favorable | Fifth Circuit | Held that government requirement of prepublication approval of firearm-related specifications to be posted online violated *Reed's* strict scrutiny test. Language in opinion indicates broad application of *Reed* to any regulation which touches on content. | N |
| Free Speech Coalition, Inc. v. Attorney General United States, 825 F.3d 149 (2016) | Favorable | Third Circuit | Case involves statutes governing recordkeeping, labeling and inspection of pornographic materials. Under *Reed*, these statutes are subject to strict scrutiny because they are content-based restrictions of speech.<br><br>"[T]he language of Reed is plain. It clearly rejects any justification of a facially content-based law because of some benign purpose. If the secondary effects doctrine is going to have a broader reach, then existing jurisprudence suggests that the Supreme Court will need to take that step." | N |

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| Geft Outdoor LLC v. Consolidated City of Indianapolis and..., --- F.Supp.3d ---- (2016) | Critical | S.D. Ind. | Case involves sign ordinance. Since *Reed* did not pertain to commercial speech and omitted any mention of *Central Hudson* and its progeny, the court applied intermediate scrutiny under *Central Hudson* to sign ordinance for commercial speech. "[W]e invoke the well-established principle that "if a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."<br><br>Appeal pending, 7th Cir. (filed June 17, 2016) | Y |
| Gresham v. Picker, --- F.Supp.3d ---- (2016) | Critical | E.D. Cal. | Case involves California's automatic dialing-announcing device statute (ADAD). The court refused to interpret *Reed* to have overruled the Ninth Circuit's holding in *Bland v. Fessler* that the ADAD Statute, subjected to intermediate scrutiny, is a content neutral, reasonable time, place, and manner regulation. The statute's exceptions are based on the relationship of the speaker and recipient of the message rather than the content of the message. "This Court would be reading too far beyond the holding in *Reed* to find that the decision reaches relationship-based, consent-based, or emergency-based distinctions [that were deemed content neutral in *Bland*]."<br><br>Appeal pending, 9th Cir. (filed Oct. 12, 2016) | N |
| Homeless Helping Homeless, Inc. v. City of Tampa, Florida, Slip Copy (2016) | Favorable | M.D. Fla. | Case involves city ordinance prohibiting soliciting. Applied *Reed* to a city ordinance penalizing a speaker soliciting donations or payment because it is a content based regulation subject to strict scrutiny. Does not raise commercial speech issue. | N |
| Indiana Civil Liberties Union Foundation. Inc. v. Indiana Secretary of State, Slip Copy (2015) | Favorable | S.D. Ind. | Case involves provision prohibiting photographing election ballots. Court applied *Reed* to a provision prohibiting taking photos of election ballots and distributing those images on social media and other means and found it to be a content-based restriction on speech that cannot survive strict scrutiny. | N |

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| Josephine Havlak Photographer v. Village of Twin Oaks | Neutral | E.D. Missouri | Citing to *Reed* to flesh out the analysis of content neutrality. A regulation prohibiting professional photography in a park but not amateur photography was content neutral. | N |
| Lamar Central Outdoor, LLC v. City of Los Angeles, 245 Cal.App.4th 610 (2016) | Critical | Court of Appeal, Second District, Div. 8, Cal. | Case involves city ordinance restricting off-site outdoor advertisements. "[*Reed*] does not purport to eliminate the distinction between commercial and noncommercial speech. It does not involve commercial speech, and does not even mention *Central Hudson*." | Y |
| Left Field Media LLC v. City of Chicago, 822 F.3d 988 (7th Cir.2016) | Neutral | Seventh Circuit | Case involves peddling ordinance. Court said *Reed* does not apply to peddling restriction because it is facially content neutral. The court did not address the commercial speech issue because the City did not argue that the magazine amounts to commercial speech subject to strict scrutiny. | N |
| Lone Star Security and Video, Inc. v. City of Los Angeles, 827 F.3d 1192 (2016) | Neutral | Ninth Circuit | Case involves motorized billboard ordinance. Court said the Appellants did not directly challenge the mobile billboard laws on restriction of "commercial speech" grounds. The court found that *Reed* does not apply to this case because the billboard regulation is content neutral.<br><br>"In the context of mobile billboard regulations, the California Court of Appeal has already recognized that the word 'advertising' refers to the activity of displaying a message to the public, not to any particular content that may be displayed." | Y |
| March v. Mills | Favorable | D. Maine | Case involves "noise provision" of an ordinance amendment that prohibits intentionally made noise that can be heard within a health building. Court applied *Reed* to find the Noise Provision was content-based on its face and must survive strict scrutiny to be upheld as constitutional. Case did not raise commercial speech issue.<br><br>Appeal pending, 1st Cir. (filed June 23, 2016) | N |

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| Massachusetts Association of Private Career Schools v. Healey, 159 F.Supp.3d 173 (D. Mass. 2016) | Critical | D. Mass. | Case involves regulations intended to prevent unfair and deceptive practices in recruiting and enrollment of students at for-profit schools. "Although only a small number of courts have addressed First Amendment challenges to commercial-speech regulations since *Reed*, almost all of them have concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*." Court refused to apply *Reed* to regulations motivated by a "neutral justification": preventing for-profit schools from misleading or deceiving consumers. | N |
| McLaughlin v. City of Lowell, No. 14-10270-DPW, 2015 WL 6453144, at *4 (D. Mass. Oct. 23, 2015) | Favorable | D. Mass. | Case involves panhandling/solicitation ordinance. "It appears at this point clear that regulations of solicitation which single out the solicitation of the immediate transfer of funds for charitable purposes are content-based." | N |
| NAAMPJ v. Lynch | Neutral | Third Circuit | Cited to *Reed* in a footnote, saying it is not applicable because the Rule at issue does not differentiate between viewpoints or content of speech. | N |
| National Institute of Family and Life Advocates v. Harris, --- F.3d ---- (2016) | Critical | Ninth Circuit | Case involves notice dissemination Act. The court found that even though the notice dissemination Act at issue constituted content-based discrimination under *Reed*, strict scrutiny was inappropriate and *Reed* does not require the application of strict scrutiny.<br><br>"Since Reed, we have recognized that not all content-based regulations merit strict scrutiny." See United States v. Swisher, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc) (discussing Reed and noting examples that illustrate that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny"). | N |

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| Nittany Outdoor Advertising, LLC v. College Township, --- F.Supp.3d ---- (2016) | Neutral | M.D. Penn. | Case involves municipally approved outdoor advertisements. "Having not reached the merits, the Court offers no opinion as to the applicability or effect of the *Reed* decision. I mention *Reed* only in recognition that the aftermath of that decision should now properly unravel in communities around the country, rather than by reviving stale federal claims, the latter path having the unseemly tendency to breed activist judging as opposed to measured consideration." | Y |
| Norton v. City of Springfield, Ill., 806 F.3d 411 (7th Cir. 2015) | Favorable | Seventh Circuit | Case involves panhandling/solicitation. Court said panhandling restriction that targeted oral requests for money now but not requests for money later constituted content discrimination under *Reed*. | N |
| Ocheesee Creamery LLC v. Putnam, 2017 WL 1046104, (11th Cir. 2017) | Neutral | Eleventh Circuit | Case deals with restrictions on a dairy that wished to market its all-natural milk as "skim milk" but could not based on Florida's regulation on the use of that term. The court held that the use of "skim milk" is commercial speech. The court noted, in a footnote, that there are conflicting authorities on the scrutiny applied to regulations of commercial speech since *Reed,* but declined to "wade into these troubled waters" because the regulation did not apply *Central Hudson* in any event. | N |
| Patriotic Veterans, Inc. v. State of Indiana, --- F.Supp.3d ---- (2016) | Favorable | S.D. Ind. | Case involves Indiana's Automated Dialing Machine Statute (IADMS). Court applied *Reed* and found IADMS to be facially content neutral and justified without reference to the content or message of the regulated speech. This case is very similar to *Gresham v. Picker* (the California automated dialing case) in facts and outcome, however, this did not discuss commercial speech. Unlike *Gresham*'s reasoning that intermediate scrutiny applies under *Bland* because *Reed* did not overrule *Bland*, the court applied *Reed* and found the automated dialing Statute to be content neutral.<br><br>Appeal pending, 7th Cir. (filed May 6, 2016) | N |

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| Peterson v. Village of Downers Grove, 150 F.Supp.3d 910 (2015) | Critical | N.D. Ill. | Case involves ordinance placing type and quantity restrictions on signs. "[A]bsent an express overruling of Central Hudson, which most certainly did not happen in Reed, lower courts must consider Central Hudson and its progeny—which are directly applicable to the commercial-based distinctions at issue in this case—binding." | Y |
| Peterson v. Village of Downers Grove, Illinois, Slip Copy (2016) | Critical | N.D. Ill. | Case involves city ordinance prohibiting painted wall signs and limiting the size and number of wall signs that a business may display. "[Plaintiff] does not contest the fact that the Supreme Court never directly addressed commercial speech in *Reed.* Nor does it contest the fact that in *Reed* the Supreme Court made no mention of whether its decision there was meant to overrule *Central Hudson* and its progeny. Absent an express overruling by the Supreme Court of *Central Hudson* , which clearly applies to commercial speech like [Plaintiff]'s signs, *Central Hudson* must be deemed to apply here. | Y |
| Price v. City of Chicago, 2017 WL 36444 (2017) | Neutral | N.D. Ill. | Case involves a challenge to a law preventing hand billing outside of healthcare facilities. The court said the law was content neutral and thus did not apply *Reed* . | N |
| Pursuing America's Greatness v. Federal Election Commission, 831 F.3d 500 (2016) | Favorable | D.C. Circuit | Case involves rule prohibiting committee from using candidates' names in titles of their websites and social media pages. Court declined to follow precedent that looked to the purpose of a facially content-based restriction post-*Reed* , and found the rule at issue to be content based and subject to strict scrutiny. | N |
| RCP Publications Inc. v. City of Chicago, --- F.Supp.3d ---- (2016) | Critical | N.D. Ill. | Case involves municipal code prohibiting the posting of commercial advertising material as applied to posters. Court denied MTD and stated it can't resolve First Amendment issue at MTD stage. | Y |

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| Reilly v. City of Harrisburg, --- F.Supp.3d ---- (2016) | Favorable | M.D. Penn. | Case involves "buffer zone" ordinance prohibiting congregating outside health care facilities. Court found under *Reed* that the Ordinance is a content-neutral time, place, or manner restriction upon speech requiring intermediate scrutiny. Law enforcement can identify patrolling, picketing, or demonstrating without knowing or needing to ascertain the content of the speech. Case did not raise commercial speech issue. | N |
| Rideout v. Gardner | Neutral | First Circuit | Cites to *Reed* several times to summarize lower court analysis, but fails to apply the *Reed* strict scrutiny test because court held that law failed to pass intermediate scrutiny. | N |
| State v. Packingham, 368 N.C. 380 (2015) | Favorable | North Carolina Sup. Ct. | Case involves statute prohibiting registered sex offenders from accessing some social networking websites. Court applied *Reed* to find the statute was a content-neutral regulation that only incidentally affected speech and required intermediate scrutiny. Case did not raise commercial speech issue. | N |
| Sweet Sage Cafe, LLC v. Town of North Redington Beach, Florida, 2017 WL 385756 (2017) | Favorable | M.D. Fla. | A sign code that contained numerous exceptions was unconstitutional on its face because the regulator would have to read the sign, thus it is content based and subject to strict scrutiny. | Y |
| Thaw v. Lynch | Neutral | S.D. Az. | Citing to *Reed* to establish content neutrality standard. Citing to 9th Dist caselaw indicating that bar admission rules are time, place, and manner restrictions. | N |
| Thayer v. City of Worcester, Massachusetts, No. CV 13-40057-TSH, 2015 WL 6872450 (D. Mass. Nov. 9, 2015 | Favorable | D. Mass. | Case involves panhandling/solicitation ordinance. "Simply put, *Reed* mandates a finding that [the panhandling ordinance] is content based because it targets anyone seeking to engage in a specific type of speech, i.e., solicitation of donations." | N |

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| Thomas v. Schroer, 2017 WL 1208672 (W.D.Tenn. 2017) | Critical | W.D. Tenn. | Case involves Tennessee's Billboard Regulation and Control Act as applied to billboards and signs displaying noncommercial content. Although "the Court finds it must apply strict scrutiny to the Billboard Acts because it is a content-based regulation that implicates Thomas's noncommercial speech", the court did note that regulations on commercial speech, whether content-based or content-neutral, would be subject to intermediate scrutiny. | Y |
| Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Missouri, Slip Op (2016) | Neutral | E.D. Missouri | Case involves distribution provisions. *Reed* does not apply to distribution provisions that regulate the exchange of "any item" without regard for communicative content. | N |
| Wagner v. City of Garfield Heights, 2017 WL 129034 (2017) | Favorable | Sixth Circuit | Case involves a political sign that exceeded the size regulations. The regulaitons said political signs could not exceed 6 square feet. The sign at issue was 16 square feet. After remand in light of *Reed*, the court held that strict scrutiny must apply because to determine whether the sign is political requires the regulator to read the sign, thus the reulation is content based and strict scrutiny applies. | Y |
| Wollschlaeger v. Governor of Florida, 2017 WL 632740 (2017) | Favorable | Eleventh Circuit | Case involving Florida's Firearms Owners Privacy Act which regulted speech by doctors and medical professionals on the subject of firearm ownership. Court found that regulation was content based, even though it was viewpoint netrual, and even though court did not decide whether strict scrutiny applied, it held the regulation failed heightened scrutiny. | N |
| Working America, Inc. v. City of Bloomington, 142 F.Supp.3d 823 (2015) | Favorable | D. Minn. | Case involves amendments to city solicitation regulations. Court applied *Reed* to find the amended solicitation ordinance was content-based on its face and cannot survive strict scrutiny. Case did not raise commercial speech issue. | N |

**Summary**

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| Favorable Cases | 22 |
| Neutral Cases | 13 |
| Critical Cases | 13 |
| Total Cases | 48 |
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| Federal Cases | 45 |
| Federal Cases - District Court Opinions | 29 |
| Federal Cases - Circuit Court Opinions | 16 |
| State Court Cases | 3 |

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