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The Content-Discrimination Principle and the Impact of Reed v. Town of Gilbert

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The Content-Discrimination Principle and the Impact of *Reed v. Town of Gilbert*

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Abstract

The content-discrimination principle remains the chief analytical tool used in First Amendment jurisprudence. Under this doctrine, laws are categorized as content-based or content-neutral. Content-based laws are subject to strict scrutiny and content-neutral ones are subject to intermediate scrutiny.

The U.S. Supreme Court ratcheted up the content-discrimination principle in *Reed v. Town of Gilbert*. Previously, lower courts were divided on whether a law was content-based if the underlying purpose was not to engage in censorship or content-discrimination. In *Reed*, however, the Court declared that the law's purpose is not the central inquiry. It concluded that if a law draws facial distinctions based on speech then it is content-based.

This Article examines the Court's decision in *Reed* and then assesses how this doctrine intersects and interacts with two long–standing and controversial doctrines in First Amendment law: (1) the commercial-speech doctrine; and (2) the secondary-effects doctrine. Under both of these doctrines, content-based laws involving commercial speech or adult-oriented, sexual expression are treated as content-neutral. These doctrines are seemingly irreconcilable with *Reed*.

Contents

Introducing the Content-Discrimination Principle 260

I. *Reed v. Town of Gilbert* (2015) 263

II. Impact of the *Reed* Decision 266

A. Political and Noncommercial Speech 266

B. Commercial-Speech Cases 271

C. The Secondary-Effects Doctrine 276

Conclusion 281

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INTRODUCING THE CONTENT-DISCRIMINATION PRINCIPLE

Perhaps the leading doctrinal concept in First Amendment free-speech jurisprudence is the content-discrimination principle.[1] It has been called "the central inquiry,"[2] "a critically important aspect of First Amendment doctrine,"[3] "central to contemporary free speech law,"[4] "fundamental to free speech doctrine,"[5] a "keystone to [the] First Amendment,"[6] "the touchstone of First Amendment law,"[7] "the most pervasively employed doctrine in the jurisprudence of free expression,"[8] and the "Supreme Court's closest approach to articulating a unified First Amendment doctrine."[9]

Justice Thurgood Marshall, often underappreciated for his First Amendment opinions,[10] expressed the principle most eloquently when

1. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) (calling the principle "one of the most important" in First Amendment law and a principle of "growing prominence"); Genevieve Lakier, Reed v Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233 (describing the distinction between content-based and content-neutral laws as "one of the most important" in First Amend–ment law); Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1428 (2017) (describing the content-discrimination principle as the "central tenet" of First Amendment free-speech jurisprudence).

2. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000).

3. Jay Alan Sekulow & Eric M. Zimmerman, *Uncertainty Is the Only Certainty: A Five-Category Test to Clarify the Unsure Boundaries Between Content-Based and Content-Neutral Restrictions on Speech*, 65 EMORY L.J. 455, 456 (2015).

4. R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006).

5. Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003).

6. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996).

7. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232 (2012) (noting that for forty years the content-discrimination principle has been a "touchstone" of First Amendment analysis).

8. Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

9. DANIEL A. FARBER, THE FIRST AMENDMENT 21 (1st ed. 1998).

10. *See* David L. Hudson, Jr., *Justice Marshall: Eloquent First Amendment Defender*, FREEDOM F. INST. (Feb. 4, 2013), https://www.freedomforum

he wrote in 1972: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] This statement was historic, as it represented the first time that the Court emphatically and explicitly emphasized the need for content neutrality.[12]

Under this now-familiar scheme, laws are considered content-based or content-neutral. A content-based law treats speech or speakers differently because of the message or content of the speech.[13] A content-neutral law applies across the board and does not make such content distinctions.[14] The designation is mightily important, as content-based laws are subject to strict scrutiny, while content-neutral laws are subject to intermediate scrutiny.[15] The distinction is often outcome determinative in free-speech cases, as most content-based laws are struck down and most content-neutral laws are upheld.[16]

The Court expanded the content-discrimination principle in a series of cases after *Police Department v. Mosley*.[17] In the early 1980s, leading free-speech scholar Geoffrey Stone identified the principle as the Burger Court's "foremost contribution to free expression analysis."[18] The

institute.org/2013/02/04/justice-marshall-eloquent-first-amendment-defender/ [https://perma.cc/N3UC-84LY]; David L. Hudson, Jr., *Justice Thurgood Marshall: Great Defender of First Amendment Free-Speech Rights for the Powerless*, 2 How. Hum. & C.R. L. Rev. 167, 168–69 (2018).

11. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

12. Williams, *supra* note 1, at 624 ("Despite some early indications of concern about content discrimination, the classic statement of the requirement of content neutrality did not appear until 1972. In *Mosley*, the Court clearly announced the first amendment's antipathy for content discrimination and, less clearly, described what content discrimination meant.") (footnotes omitted); Steven Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Law*, 10 Wm. & Mary Bill of Rts. J. 647, 650 (2002) ("Although the case attracted little notice at the time, *Mosley*'s doctrine of content neutrality has become the cornerstone of the Supreme Court's First Amendment jurisprudence.") (footnote omitted).

13. Lakier, *supra* note 1, at 233.

14. *Id.*

15. *See* Enrique Armijo, Reed v. Town of Gilbert*: Relax Everybody*, 58 B.C. L. Rev. 66, 92 (2017).

16. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1351–52 (2006).

17. *See*, *e.g.*, Sable Commc'ns of Cal. v. FCC, 492 U.S. 115 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

18. Stone, *supra* note 8, at 189.

concern over content-discrimination is crucial, as the government may be seeking to favor some forms of speech over others, engage in thought control, or distort the marketplace of ideas.[19] In 1992, the Court broadened the content-discrimination principle's scope by holding that the government could not make impermissible content distinctions in areas of expression traditionally not protected by the First Amendment, such as fighting words.[20] In 1994, Justice Sandra Day O'Connor may not have given the content-discrimination principle a ringing endorsement, but she noted that "no better alternative has yet come to light."[21]

While the division between content-based and content-neutral seems easy to understand, the Supreme Court acknowledged that it is not always a simple task to apply the principle.[22] Critics have charged that the Court has been inconsistent and arbitrary in its application of the content-discrimination principle.[23] Others have criticized the Court for relying too much on the doctrine.[24] Division developed in the lower courts over the application of the content-discrimination principle. Some courts applied the doctrine quite broadly to cover most facial distinctions on the basis of speech,[25] while others focused more on the underlying purpose of the regulation.[26]

The U.S. Supreme Court reiterated the importance of the content-discrimination principle in *Reed v. Town of Gilbert*, a case involving a challenge to an Arizona ordinance that made many distinctions between types of signs.[27] The Court reasoned that a law can be content-based even if the government does not have an explicit purpose to favor

19. *See* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

20. *R.A.V.*, 505 U.S. at 377.

21. *Gilleo*, 512 U.S. at 60 (O'Connor, J., concurring).

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

23. *See* Wright, *supra* note 4, at 335.

24. *See, e.g.*, Heyman, *supra* note 12, at 652 ("In my view, the time has come to reconsider the content neutrality doctrine. . . . Content neutrality . . . is an important element of free speech jurisprudence, but it should not be regarded as 'the first principle of the First Amendment.'") (quoting Hill v. Colorado, 530 U.S. 703, 789 (2000) (Kennedy, J., dissenting)); John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103, 1106 (2005) ("To the extent that the First Amendment requires government to treat equally speech that it favors and disfavors, these circumstances are limited and are for more modest reasons than the overarching goal of government impartiality.").

25. Jacobs, *supra* note 5, at 605.

26. Lakier, *supra* note 1, at 234.

27. 135 S. Ct. 2218, 2224 (2015).

certain speech or disfavor certain ideas.[28] Some view the Court's decision in *Reed* as a significant change, or as something that might cause a "sea change" in the law.[29] A recent federal district court decision referred to it as a "watershed First Amendment case."[30] A leading legal journalist called *Reed* the "sleeper" case of the Court's term and one that would have "far-reaching consequences."[31]

This Article addresses the impact of *Reed v. Town of Gilbert* in the lower courts. Part I provides an overview of the Court's decision, including its several concurrences that seek to limit or take issue with the majority's approach to content-discrimination. Part II addresses and assesses the decision's impact in several areas, including cases involving political speech, the commercial-speech doctrine, and the secondary-effects doctrine. Finally, Part III comments on the future of the content-discrimination principle.

I. *REED V. TOWN OF GILBERT* (2015)

The Supreme Court reaffirmed and expanded the importance of the content-discrimination principle in *Reed v. Town of Gilbert*.[32] The case involved a challenge to an Arizona city's sign ordinance that made distinctions between various types of signs, including ideological, political, and temporary directional signs.[33] Ideological signs were treated most favorably under the ordinance. They could be twenty feet in diameter and could be placed in any city-zoned area.[34] Political signs could be sixteen feet wide on residential property and thirty-two feet wide on nonresidential property.[35] Political signs also had durational limits; they could be placed only sixty days before an election and could

28. *Id.* at 2227.

29. *See* Anthony D. Lauriello, Note, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 COLUM. L. REV. 1105, 1106 (2016) (speaking of a "coming sea change" caused by *Reed*); Kolby P. Marchand, *Free Speech and Signage After* Reed v. Town of Gilbert*: Signs of Change from the Bayou State*, 44 S.U. L. REV. 181, 182 (2017) (calling *Reed*'s impact a "significant change" to First Amendment law).

30. Wash. Post v. McManus, 355 F. Supp. 3d 272, 296 (D. Md. 2019).

31. Adam Liptak, *Court's Free Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/45C5-FYSG].

32. *Reed*, 135 S. Ct. at 2224.

33. *Id.* at 2224–26.

34. *Id.* at 2224.

35. *Id.*

stay up to fifteen days after.[36] Meanwhile, temporary directional signs were subject to many more restrictions. There could be no more than four signs on a property, they could be placed only twelve hours before a qualifying event, and they had to be taken down no later than one hour after an event.[37]

Clyde Reed, pastor of the Good News Church, wanted to post signs informing the public about church services, which were held at different locations.[38] Reed argued that twelve hours in advance was not enough time to inform the public about each service (each church service was a qualifying event for a temporary directional sign). He claimed that he could not post the signs far enough in advance to be useful without running afoul of the ordinance's enforcers.[39] Ultimately, he sued in federal court.[40] Both the federal district court and the U.S. Court of Appeals for the Ninth Circuit denied injunctive relief and deemed the town's sign ordinance to be content-neutral.[41] The Ninth Circuit reasoned that the ordinance did not consider the content of the signs' messages and that there was no purpose to discriminate against speech.[42]

On appeal, the U.S. Supreme Court unanimously reversed that judgment; but it was not unanimous in its reasoning.[43] In his majority opinion, Justice Clarence Thomas reasoned that laws are content-based on their face if they either draw distinctions based on the speaker's message or define speech based on its function or purpose.[44] He also noted that laws are content-based if the government adopts the law because of a disagreement with the speech's message.[45] He explained that "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[46]

Justice Thomas reasoned that the town's sign ordinance was content-based on its face because it drew distinctions based on the

36. *Id.* at 2224–25.

37. *Id.* at 2225.

38. *Id.*

39. *Id.* at 2225–26.

40. *Id.* at 2226.

41. *Id.*

42. *Id.*

43. The Court delivered three concurring opinions. *See id.* at 2223.

44. *Id.* at 2227.

45. *Id.*

46. *Id.* at 2228.

"communicative content of the sign."[47] He rejected the idea that the sign ordinance was content-neutral because town leaders did not adopt the ordinance based on disagreement with any message.[48] According to Justice Thomas, the Ninth Circuit erred by skipping over a "crucial first step": determining whether the ordinance was content-based on its face.[49] He explained that courts must first determine whether a law is facially content-based or content-neutral before examining the justi–fication or purpose behind the law.[50] Thus, the first step of a *Reed* analysis is facially examining a statute, regulation, ordinance, or policy to determine if it is content-based.

Justices Samuel Alito, Stephen Breyer, and Elena Kagan authored concurring opinions.[51] Justice Alito explained that the Court's decision did not sound the death knell for all sign regulation.[52] He specifically listed a series of types of laws that would pass muster after the Court's decision, including ordinances regulating the size of signs, whether signs are lighted or unlighted, signs with fixed messages and electronic messages, and rules distinguishing between on-premise and off-premise signs.[53]

Justice Breyer viewed current First Amendment jurisprudence as too focused on labels and favored using content-discrimination as a "rule of thumb" rather than what he called an "automatic 'strict scrutiny' trigger."[54] He warned that applying strict scrutiny to laws that draw content distinctions without any attempts at thought or idea control could lead to unnecessary "judicial management of ordinary government regulatory activity."[55]

Justice Kagan's concurrence criticized the majority's approach the most. She reasoned that courts apply strict scrutiny to content-based laws for two fundamental reasons: to preserve a pure "marketplace of ideas" that the government does not attempt to influence;[56] and to ensure that the government does not regulate speech because it harbors

47. *Id.* at 2227.

48. *Id.*

49. *Id.* at 2228.

50. *Id.*

51. *Id.* at 2223.

52. *Id.* at 2233–34 (Alito, J., concurring).

53. *Id.* at 2233.

54. *Id.* at 2234 (Breyer, J., concurring).

55. *Id.*

56. *Id.* at 2237 (Kagan, J., concurring) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

"hostility—or favoritism—towards the underlying message."[57] She explained: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[58] She warned that the majority's position might cause the Court to become "a veritable Supreme Board of Sign Review."[59]

II. IMPACT OF THE *REED* DECISION

A. Political and Noncommercial Speech

Reed v. Town of Gilbert has had the most indelible impact in cases that involve political speech and other forms of noncommercial speech.[60] For example, the U.S. Court of Appeals for the Fourth Circuit determined that a state's anti-robocall statute that applied to both commercial and political messages was an impermissible content-based restriction on speech.[61] The law prohibited robocalls made "'for the purpose of making an unsolicited consumer telephone call' or [that] are 'of a political nature, including, but not limited to, calls relating to political campaigns.'"[62] The law permitted robocalls in three instances: (1) when the recipient expressly agreed to receive them; (2) when the calls were related to a pre-existing debt; or (3) when there was a pre-existing business relationship.[63]

The Fourth Circuit applied the content-discrimination principle as articulated in *Reed* and held that the law on its face made content distinctions.[64] After all, the law applied to consumer and political messages but not others.[65] Thus, the Fourth Circuit applied strict scrutiny.[66] The appeals court assumed that protecting residential privacy was a compelling governmental interest but held that the law was not narrowly tailored because there were several less speech-

57. *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).

58. *Id.* at 2238.

59. *Id.* at 2239.

60. *See* Free Speech Coal. v. Att'y Gen. U.S., 825 F.3d 149 (3d Cir. 2016) (discussing *Reed*'s effect on a First Amendment analysis); Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) (same); Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (same).

61. Cahaly v. LaRosa, 796 F.3d 399, 402 (4th Cir. 2015).

62. *Id.* (quoting S.C. CODE ANN. § 16-17-446(A) (2014)).

63. *Id.*

64. *Id.* at 405.

65. *Id.*

66. *Id.*

restrictive alternatives, including "time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists."[67]

The *Reed* decision likewise played a major role in a state high court striking down its state cyberbullying statute as a content-based regulation of speech.[68] The law provided that "it shall be unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."[69]

A lower court had determined that the law was content-neutral, because it mainly prohibited conduct instead of speech.[70] The appeals court explained: "The Cyber-bullying Statute is not directed at prohibiting the communication of thoughts or ideas via the Internet. It prohibits the intentional and specific conduct of intimidating or tormenting a minor. This conduct falls outside the purview of the First Amendment."[71] Furthermore, the intermediate appellate court determined that any impact on speech was incidental rather than direct.[72]

The North Carolina Supreme Court reversed, determining that the law was content-based.[73] It primarily relied on *Reed*:

> Recently . . . in *Reed v. Town of Gilbert*, [the U.S. Supreme] Court clarified that *several* paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny. This determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message.[74]

The North Carolina high court explained that the law was clearly content-based because it defined and criminalized speech based on its subject matter[75]: "The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communi–

67. *Id.*

68. State v. Bishop, 787 S.E.2d 814, 818 (N.C. 2016).

69. N.C. Gen. Stat. § 14-458.1(a)(1)(d) (2017).

70. *Bishop*, 787 S.E.2d at 816.

71. State v. Bishop, 774 S.E.2d 337, 343 (N.C. App. 2015).

72. *Id.* at 344.

73. *Bishop*, 787 S.E.2d at 819.

74. *Id.*

75. *Id.*

cation."[76] Because the law was content-based, the court applied strict scrutiny.[77] While the state had a compelling government interest in protecting minors, the state high court determined that the law was not narrowly tailored.[78] The court was troubled by the fact that "the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting."[79] The court concluded that while the state had a laudable purpose, "North Carolina's cyberbullying statute 'create[s] a criminal prohibition of alarming breadth.'"[80]

Reed also has had major influence in cases involving sign ordinances that—like the ordinance at issue in *Reed* itself—impact political speech. Take the example of *Wagner v. City of Garfield Heights*, a case involving an Ohio city's sign ordinance that imposed size limitations on political yard signs.[81] Under the ordinance, political signs were limited to six square feet, but other signs, such as religious and commercial signs, could be twice as large.[82] The Sixth Circuit determined that the law was clearly content-based under *Reed* and also unconstitutional.[83] After all, political signs did not harm aesthetic appeal any more than a variety of other signs.[84]

In another case, a federal district court in New York invalidated a village's ordinance that required a permit for noncommercial signs but exempted many commercial signs from the permitting process.[85] A woman challenged the ordinance after she was cited for posting several protest signs in her yard.[86] The court noted that the law clearly was content-based since it treated protest signs less favorably than other signs.[87]

76. *Id.*

77. *Id.*

78. *Id.* at 819–21.

79. *Id.* at 820.

80. *Id.* at 821 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010), *superseded by statute*, Pub. L. No. 111-294, § 3(a), 124 Stat. 3178 (2010)) (alteration in original).

81. 675 F. App'x 599, 601 (6th Cir. 2017).

82. *Id.*

83. *Id.* at 607.

84. *Id.*

85. *See* Grieve v. Vill. of Perry, No. 15-CV-00365-RJA-JJM, 2016 WL 4491713, at *3 (W.D.N.Y. Aug. 3, 2016), *adopted by* No. 15-CV-365-A, 2016 WL 4478683 (W.D.N.Y. Aug. 25, 2016).

86. *Id.* at *1.

87. *Id.* at *3.

Another federal district court in New York invalidated a town's ordinance that imposed severe restrictions on temporary signs, including political signs, but allowed many types of commercial signs.[88] The court reasoned that the law was content-based because it treated signs differently based on their communicative content.[89] Because the law was content-based, the court applied strict scrutiny. The ordinance failed strict scrutiny because the town's interests in aesthetics and traffic safety were substantial but not compelling.[90]

The Fourth Circuit ruled that Norfolk's sign code violated the First Amendment because it imposed size restrictions on many types of flags, but allowed exemptions for certain flags with political or religious content.[91] The Fourth Circuit explained that, under *Reed*, the city's ordinance was clearly content-based because "[t]he former sign code exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems."[92] The decision was striking because before *Reed* the Fourth Circuit had reached the opposite conclusion after deeming the sign code content-neutral.[93] Legal commentators warned that many cities and towns would need to amend their sign codes after *Reed*.[94] Certainly, many cities have amended their sign codes in the wake of *Reed*, particularly those provisions that impose differential treatment between commercial and noncommercial speech.[95]

Another area in which *Reed* has had a transformative impact is panhandling laws. In *Reed*'s aftermath, many panhandling ordinances have been invalidated or at least temporarily halted.[96] Even when a panhandling ordinance is deemed content-neutral, it may not survive

88. Marin v. Town of Southeast, 136 F. Supp. 3d 548, 552 (S.D.N.Y. 2015).

89. *Id.* at 567–68.

90. *Id.* at 568–69.

91. Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 634 (4th Cir. 2016).

92. *Id.* at 633.

93. *See* Cent. Radio Co. v. City of Norfolk, 776 F.3d 229, 241 (4th Cir. 2015).

94. Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After* Reed*: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 610–11 (2015).

95. *See* Steve Butler, *The Importance of Bringing Your Sign Code Up-to-Date*, MUN. RES. & SERVS. CTR. (Oct. 29, 2015), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/October-2015/The-Importance-of-Your-Sign-Code.aspx [https://perma.cc/2CP4-HVJM] (discussing *Reed*'s impact on local governments' sign codes).

96. *See, e.g.*, R.I. Homeless Advocacy Project v. City of Cranston, C.A. No. 17-334 S, 2017 WL 3327573, at *1 (D.R.I. Aug. 3, 2017) (enjoining an ordinance that effectively made it "too difficult to panhandle successfully").

First Amendment review.[97] One commentator writes that "the constitutionality of current panhandling laws is dubious after *Reed*."[98]

Perhaps the clearest example of *Reed*'s impact comes from litigation over the city of Springfield, Illinois's panhandling ordinance.[99] Before *Reed*, a divided three-judge panel of the U.S. Court of Appeals for the Seventh Circuit upheld the panhandling ordinance as content-neutral.[100] Writing for the panel, Judge Frank Easterbrook reasoned that laws are content-based when they discriminate against speech based on ideas or when the government passes the law to reflect disapproval of a certain message.[101] "It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination," Easterbrook wrote.[102] "'Give me money right now' does not express an idea or message about politics, the arts, or any other topic on which the government may seek to throttle expression in order to protect itself or a favored set of speakers."[103]

Judge Manion disagreed, finding the criminalization of panhandling "alien to our First Amendment jurisprudence."[104] He reasoned that the law clearly criminalized certain speech based on content, namely asking for money.[105] To enforce the ordinance, police officers have to ascertain whether an individual asked for money, which was a violation, or merely asked for time or labor, which was not a violation.[106] Manion accused the majority of confusing or conflating content-discrimination with viewpoint discrimination: "In its attempt to determine whether the ordinance is content-based, the court examines whether the ordinance strips a viewpoint from the marketplace of ideas. That is not the test for determining whether an ordinance is a content-based regulation of speech."[107]

The Seventh Circuit, however, had to re-address the ordinance's constitutionality after *Reed*. Judge Easterbrook recognized that *Reed* had changed the game in that "*Reed* understands content-discrimin–

97. Petrello v. City of Manchester, No. 16–cv–008–LM, 2017 WL 3972477, at *10–11 (D. Mass. Sept. 7, 2017).

98. Lauriello, *supra* note 29, at 1107.

99. Norton v. City of Springfield, 768 F.3d 713, 714 (7th Cir. 2014).

100. *Id.* at 717–18.

101. *Id.* at 717.

102. *Id.*

103. *Id.*

104. *Id.* at 718 (Manion, J., dissenting).

105. *Id.* at 721.

106. *Id.*

107. *Id.* at 722.

ation differently."[108] Easterbrook acknowledged that after *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."[109] Thus, the Seventh Circuit reached a different conclusion after *Reed* and held that the ordinance was unconstitutional.[110] Judge Manion once again concurred separately, writing that "*Reed* injected some much-needed clarity into First Amendment jurisprudence" by recognizing that "topical censorship is still censorship."[111]

A federal district court in Massachusetts invalidated the city of Worchester's ordinance dealing with "aggressive panhandling."[112] The court easily found the law to be content-based under *Reed*.[113] Still another federal district court decision felled another panhandling ordinance in Grand Junction, North Dakota.[114]

The consensus appears to be that many panhandling ordinances do not survive a post-*Reed* analysis.[115] As two legal commentators recently explained in 2019, "[w]ithout a doubt, *Reed* has changed the playing field for regulation of panhandling and solicitation, requiring that henceforth such regulation be content-neutral in order to survive judicial challenges."[116]

B. Commercial-Speech Cases

Reed's impact diminishes in many cases that involve only commercial speech or advertising, a category of speech defined as speech that does no more than propose a commercial transaction[117] or "expression related solely to the economic interests of the speaker and its audience."[118] The commercial-speech doctrine, which allows for greater restriction of the content of commercial speech, as opposed to

108. Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015).

109. *Id.*

110. *Id.* at 412–13.

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

112. Thayer v. City of Worcester, 144 F. Supp. 3d 218, 238 (D. Mass. 2015).

113. *Id.* at 233.

114. Browne v. City of Grand Junction, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015).

115. *See* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling:* Reed *and Beyond*, 63 S.D. L. REV. 579, 606–07 (2019).

116. *Id.* at 606.

117. *See* United States v. United Foods, Inc., 533 U.S. 405, 409–10 (2001).

118. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980)).

noncommercial speech, appears to conflict squarely with *Reed*'s central meaning.[119]

In 1942, the Supreme Court declared that commercial speech had no First Amendment protection.[120] The Court declared that "the Constitution imposes no such restraint on government as respects purely commercial advertising."[121] This rule stood for several decades until the mid-1970s, when the Supreme Court overruled its 1942 decision and declared that "the free flow of commercial information is indispensable" in a commercial culture.[122] The Court explained that a "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"[123] and that "society also may have a strong interest in the free flow of commercial information."[124] While the Court explained that commercial speech was entitled to First Amendment protection, it did not create a specific legal test to determine whether laws impacting commercial speech were constitutional.[125]

In First Amendment jurisprudence, commercial speech receives protection but it is still viewed as a stepchild in the First Amendment family.[126] All regulations of commercial speech—both content-based and content-neutral—are evaluated under the so-called *Central Hudson* test, a variant of intermediate scrutiny developed by the U.S. Supreme Court in 1980.[127]

Thus, commercial speech is treated less favorably than noncommercial speech. Content-based restrictions on noncommercial speech are subject to strict scrutiny, while content-based restrictions on

119. *See* James Andrew Howard, Note, *Salvaging Commercial Speech Doctrine: Reconciling* Reed v. Town of Gilbert *with Constitutional Free Speech Tradition*, 27 GEO. MASON U. C.R.L.J. 239, 243–44 (2017) ("If *Reed* is to be taken on its face, then any separate distinctions for commercial speech must be implicitly overturned."); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 180 (noting that *Reed* "signals growing tension between various First Amendment sub-doctrines").

120. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

121. *Id.*

122. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

123. *Id.* at 763.

124. *Id.* at 764.

125. DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 6.5, at 155 (1st ed. 2012).

126. Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 4 (2002).

127. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

commercial speech nearly always are evaluated under *Central Hudson*'s form of intermediate scrutiny.[128]

The commercial-speech doctrine does not make much sense in a world dominated by advertising and consumer choice. In 1990, Judge Alex Kozinski and legal scholar Stuart Banner penned an incisive article, *Who's Afraid of Commercial Speech*, in which they conclude that the commercial speech versus noncommercial speech distinction "makes no sense."[129]

And yet the *Central Hudson* test and its variant of intermediate scrutiny have proven surprisingly durable.[130] Under *Central Hudson*, a government restriction on advertisements or other commercial speech is permissible only on a showing that: (1) the advertising is misleading, (2) the government interest in regulation is substantial, (3) the regulation directly advances that interest, and (4) the regulation is not more extensive than necessary.[131] Justice Lewis Powell justified this lower level of protection for free speech because of the inherent "hardiness" of commercial speech.[132] Another reason that supposedly justifies less free-speech protection for commercial speech is that advertising is more objectively verifiable.[133]

But the notion that it is easier to determine or verify the truth of commercial speech is doubtful at best.[134] Furthermore, the idea that commercial speech is more "durable" than other forms of speech—because there are profit motivations behind it—is even shakier than the other justification. Kozinski and Banner explain that "the durability of speech is not purely a function of the economic interest behind it; other interests can be just as strong as economics, sometimes stronger."[135] These scholars are far from alone.[136] First Amendment expert Rodney

128. *See* HUDSON, JR., *supra* note 125, § 6.1, at 140 ("For example, recall that a content-based restriction on political speech is subject to the highest form of judicial review, called strict scrutiny. However, content-based restrictions on commercial speech are subject to only intermediate scrutiny.").

129. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627–28 (1990).

130. HUDSON, JR., *supra* note 125, § 6.5, at 156.

131. *Central Hudson*, 447 U.S. at 566.

132. *Id.* at 564 n.6.

133. *See* Kozinski & Banner, *supra* note 129, at 634.

134. *Id.* at 635.

135. *Id.* at 637.

136. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993).

Smolla declared that "[c]ommercial speech, as speech, should presumptively enter the debate with full First Amendment protection."[137]

Commercial speech, however, remains a second-class citizen in the First Amendment family. Justice Clarence Thomas has criticized the *Central Hudson* test as providing too little protection for commercial speech.[138] He believes that bans on truthful, non-misleading speech should be evaluated under strict scrutiny just like bans on political speech.[139] Recall that Justice Thomas also authored the Court's opinion in *Reed*. Some have speculated that this means that the second-class treatment of commercial speech might be nearing its end.[140]

To date, many courts continue to apply the *Central Hudson* test to regulations on commercial speech even after mentioning *Reed*.[141] For example, the U.S. Court of Appeals for the Ninth Circuit upheld a city's mobile billboard ordinance,[142] which prohibited "mobile billboard advertising displays" (namely, billboards on moving vehicles).[143] The ordinance prohibited only signs that advertise; accordingly, mobile billboard companies asserted that this made the ordinance content-based.[144] The Ninth Circuit, however, applied a broader meaning to the term "advertising signs," taking it to mean any sign on a mobile billboard: "[M]obile billboard bans regulate the manner—not the content—of affected speech. The ordinances address only the types of sign-bearing vehicles subject to regulation, and discriminate against prohibited billboards on the basis of their size and mobility alone, and

137. *Id.*

138. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 521–22 (1996) ("I do not see a philosophical or historical basis for asserting that 'commercial speech' is of 'lower value' than 'noncommercial' speech."); *see also* David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial Speech Protector*, 35 CREIGHTON L. REV. 485, 497 (2002).

139. Hudson, Jr., *supra* note 138, at 499.

140. *See* Vugo, Inc. v. City of New York, 309 F. Supp. 3d 139, 148 (S.D.N.Y. 2018) (noting that some have wondered about the fate of the commercial-speech doctrine in light of Justice Thomas's call for abandoning *Central Hudson*'s test and his authoring the Court's opinion in *Reed*).

141. *Id.* ("[T]he Court thus declines to stray from such well-established doctrine absent an express holding from either the Supreme Court or the Court of Appeals for the Second Circuit"); Contest Promotions, LLC v. City of San Francisco, 704 F. App'x 665, 667–68, 667 n.1 (9th Cir. 2017) (noting that *Reed* does not alter the commercial-speech doctrine).

142. Lone Star Sec. & Video Inc. v. City of Los Angeles, 827 F.3d 1192, 1202 (9th Cir. 2016).

143. *Id.* at 1196.

144. *Id.* at 1198–99.

are thus content neutral."[145] The Ninth Circuit specifically addressed and distinguished the mobile billboard ordinance from the ordinance invalidated in *Reed*.[146]

Similarly, a federal district court in New Hampshire determined that a town's denial of a permit to a church to post an electronic sign did not violate the First Amendment.[147] The court reasoned that the town's regulation of electronic signs was a permissible, content-neutral provision.[148] The town asserted that the ban on electronic signs served its substantial interests in aesthetics and traffic safety.[149] The judge wrote that electronic signs could be "garish" and could threaten the aesthetics of the small town.[150] With regard to traffic safety, the judge simply deferred to town officials and wrote that he was not in a position to "second guess" them.[151]

Not all courts ignore *Reed* when an ordinance involves only commercial speech. A federal district court in New Jersey struck down an Atlantic City ordinance prohibiting businesses from engaging in bring-your-own-beer-and-wine advertising.[152] While the ordinance limited commercial speech, the court cited *Reed* and subjected the ordinance to strict scrutiny instead of the familiar *Central Hudson* test.[153] The court wrote that the ordinance "provides a complete ban on truthful, nonmisleading commercial speech about a lawful product."[154] The court also held that, even if the *Central Hudson* test applies, the advertising ban fails intermediate scrutiny, too.[155]

Many commentators have noted that *Reed* involved a specific challenge to a sign ordinance that involved differential treatment of commercial and noncommercial speakers.[156] They point out that *Reed*

145. *Id.* at 1200.

146. *Id.*

147. Signs for Jesus v. Town of Pembroke, 230 F. Supp. 3d. 49, 68–69 (D.N.H. 2017).

148. *Id.* at 63.

149. *Id.* at 60–61.

150. *Id.* at 61.

151. *Id.*

152. GJJM Enters. v. City of Atlantic City, 352 F. Supp. 3d 402, 408 (D.N.J. 2018).

153. *Id.* at 406.

154. *Id.*

155. *Id.* at 407.

156. Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1981–82, 1987, 1991 (2016).

did not involve commercial speech.[157] It is quite difficult, however, to square the commercial-speech doctrine with numerous statements in *Reed*, including the Court's take on content-based laws: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[158] This is also true with respect to *Reed*'s position that the "[g]overnment['s] regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[159]

C. The Secondary-Effects Doctrine

Reed v. Town of Gilbert's emphasis on content-discrimination also appears to call into question the continued validity of the secondary-effects doctrine, a disturbing legal fiction of sorts which allows for content-based restrictions on businesses conveying "adult" expression to be classified as content-neutral.[160]

Under the secondary-effects doctrine, certain speech can be censored not because of its content's "offensiveness" but because of some adverse side effect—a secondary effect—such as increased crime or decreased property values.[161] The doctrine provides an easy path for government officials to censor expression because government officials can often come up with alleged secondary effects caused by speech.[162] One leading free-speech scholar has called the doctrine both "misleading" and "dangerous."[163]

In a dissenting opinion in an adult-business zoning case, Justice Potter Stewart warned that the secondary-effects doctrine "rides roughshod over cardinal principles of First Amendment law."[164] Despite

157. *Id.* at 1990–91.

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

159. *Id.* at 2227.

160. *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: 'The Evisceration of First Amendment Freedoms',* 37 WASHBURN L.J. 55, 60, 73 (1997).

161. *See id.* at 62.

162. David L. Hudson, Jr., *The Secondary Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL'Y REV. 19, 19–20 (2012).

163. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 293 (2005).

164. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 85–86 (1976) (Stewart, J., dissenting).

that warning, the doctrine has become the dominant analytical model used to justify myriad restrictions on adult businesses.[165]

The U.S. Supreme Court developed the secondary-effects doctrine in a footnote[166] to a 1976 case in which it upheld a Detroit Anti-Skid Row ordinance that imposed locational zoning requirements on adult businesses.[167] The Court also emphasized that the case concerned a form of low-value speech:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment.[168]

Ten years later, in *Renton v. Playtime Theatres*,[169] the Court expanded the secondary-effects doctrine from a footnote into a major doctrinal principle.[170] The Court upheld a Renton, Washington, ordinance that prohibited adult movie theaters from locating within one thousand feet of any residential area, church, park, or school.[171] The Court reasoned that the ordinance was content-neutral because it was not designed to suppress offensive speech, but rather to combat harmful secondary effects associated with the expression.[172]

165. *See* Hudson, Jr., *supra* note 162, at 19.

166. *See* Young, 427 U.S. at 71 n.34; *see also* David L. Hudson, Jr., *Famous Footnotes Step Up in Important First Amendment Cases*, FREEDOM F. INST. (Apr. 13, 2015), https://www.freedomforuminstitute.org/2015/04/13/famous-footnotes-step-up-in-important-first-amendment-cases [https://perma.cc/9UZ5-LCJK].

167. *Young*, 427 U.S. at 71 n.34 (plurality opinion) ("The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

168. *Id.* at 70; *see also* EVELYN BEATRICE HALL, THE FRIENDS OF VOLTAIRE 199 (1907) (the Voltaire comment referenced by the Court is: "I disapprove of what you say, but I will defend to the death your right to say it.").

169. 475 U.S. 41 (1986).

170. *See id.* at 49–52.

171. *Id.* at 43.

172. *Id.* at 47.

The Court later applied the secondary-effects doctrine in cases that involved regulating the form of nude performance dancing.[173] Ironically, in the later of those two decisions, Justice John Paul Stevens—who wrote the Court's initial secondary-effects decision in *Young*—dissented, recognizing the impact of the Court expanding the doctrine beyond restrictions on adult businesses' locations to direct restrictions on their expression.[174] In another decision, the Court extended the secondary-effects doctrine to ban so-called multiple-use adult businesses even though they were under the same roof.[175]

Some courts recognize the tension between the secondary-effects doctrine and *Reed*. For example, the U.S. Court of Appeals for the Eleventh Circuit put it bluntly: "There is no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine."[176] The Eleventh Circuit noted, however, that the Supreme Court in *Reed* never mentioned the term "secondary effects" and, thus, the intermediate appellate court could not "read *Reed* as abrogating either the Supreme Court's or this Circuit's secondary-effects precedents."[177]

Several courts have cursorily dismissed the impact of *Reed* in adult-business secondary effects cases. The Seventh Circuit briefly addressed the tension between *Reed* and the secondary-effects doctrine in a footnote in an adult business case.[178] The appeals court questioned whether *Reed* should impact the law on sexually oriented businesses: "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First

173. City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

174. *Pap's A.M.*, 529 U.S. at 317–18 (Stevens, J., dissenting) ("Until now, the 'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech."); *see also* David L. Hudson, Jr., *Justice Stevens, Justice Souter, and the Secondary Effects Doctrine*, 35 UWLA L. REV. 48, 49 (2003) (explaining that both Justices John Paul Stevens and David Souter initially supported the secondary-effects doctrine but later dissented in secondary-effects cases).

175. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 429–30 (2002).

176. Flanigan's Enters. of Ga. v. City of Sandy Springs, 703 F. App'x 929, 935 (11th Cir. 2017).

177. *Id.*

178. *See* BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (2015).

Amendment protection."[179] The Supreme Court of Georgia reached a similar conclusion—ironically, also in a footnote.[180]

There is another trend developing in some courts' recent decisions involving First Amendment challenges to adult entertainment reg–ulations. These decisions note the tension between *Reed* and the secondary-effects doctrine, but still apply the doctrine.[181] As one federal district court judge recently wrote, "*Young* and *Renton* remain good law. It is not for me to repudiate these decisions by ruling that the regulation of adult-oriented businesses amounts to content-based regulation and warrants the application of strict scrutiny."[182]

Reed had a significant impact on the Third Circuit's examination of 18 U.S.C. § 2257,[183] the Department of Justice's recordkeeping provision that requires producers of sexually oriented materials to keep records to ensure that minors are not used in the production of the material.[184] The law "requires producers of visual depictions of 'actual sexually explicit conduct' to keep 'individually identifiable records' documenting the identity and age of every performer appearing in those depictions."[185] There are also detailed regulations accompanying the law that impose further recordkeeping requirements on producers of sexually explicit material.[186]

179. *Id.*

180. Maxim Cabaret, Inc. v. Town of Sandy Springs, 816 S.E.2d 31, 36 n.4 (Ga. 2018) ("But *Reed* did not involve secondary-effects legislation. Nor did the opinion in *Reed* mention, much less overrule, prior cases in which the Supreme Court specifically held that regulations designed to reduce the negative secondary effects of adult entertainment businesses are treated as content neutral and thus subject to an intermediate level of scrutiny.").

181. *See, e.g.*, "Q"-Lungian Enters. v. Town of Windsor Locks, 272 F. Supp. 3d 289, 296 (D. Conn. 2017) (applying the secondary-effects doctrine despite acknowledging tension created by *Reed*); 1407, LLC v. City of Fort Wayne, No. 1:18-CV-224-TLS, 2019 WL 341239, at *4 (N.D. Ind. Jan. 25, 2019) (same).

182. *"Q"-Lungian Enters.*, 272 F. Supp. 3d at 296.

183. *See* Free Speech Coal. v. Att'y Gen. U.S. (*FSC III*), 825 F.3d 149, 158 (3d Cir. 2016) (holding § 2257 unconstitutional in light of *Reed*).

184. *See* 18 U.S.C. § 2257 (2012).

185. *FSC III*, 825 F.3d at 154 (quoting 18 U.S.C. § 2257 (2012)).

186. *Id.* at 155. *See generally* 28 C.F.R. § 75.2 (2019) (detailing the Department of Justice's recordkeeping requirements for producers of sexually explicit material).

The Free Speech Coalition and others challenged the law on First Amendment grounds.[187] A key aspect of the litigation concerned whether 18 U.S.C. § 2257 and its accompanying regulations were content-neutral or content-based.[188] The Third Circuit initially determined that the laws were content-neutral.[189] The case returned to the Third Circuit a second time and the appeals court affirmed the law's constitutionality under intermediate scrutiny.[190]

The law's third time before the Third Circuit was the charm, as the Supreme Court had decided *Reed* in the meantime.[191] This time, the Third Circuit reasoned that the law was clearly content-based, because it applied only to expressive material that contained sexually explicit content.[192] The government argued that the secondary-effects doctrine should apply and, thus, intermediate scrutiny should apply.[193] The Third Circuit rejected the government's proposed expansion of the secondary-effects doctrine beyond brick-and-mortar adult entertainment zoning cases.[194] Interestingly, the Third Circuit questioned whether the secondary-effects doctrine should survive *Reed*.[195]

So far, most courts have allowed the secondary-effects doctrine and *Reed* to co-exist.[196] This has led some commentators to predict that the troubled doctrine likely will continue its unsteady stay in First Amendment jurisprudence.[197]

187. Free Speech Coal. v. Att'y Gen. U.S. (*FSC I*), 677 F.3d 519, 528 (3d Cir. 2012).

188. *Id.* at 533.

189. *Id.*

190. Free Speech Coal. v. Att'y Gen. U.S. *(FSC II)*, 787 F.3d 142, 146–47 (3d Cir. 2015).

191. *See FSC III*, 825 F.3d at 153.

192. *Id.* at 160.

193. *Id.*

194. *Id.* at 161–63.

195. *See id.* at 161.

196. *See, e.g.*, Mass. Ass'n of Private Career Schs. v. Healey, 159 F. Supp. 3d 173, 191–93 (D. Mass. 2016); CTIA–The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech and nothing in its recent decisions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid.").

197. Jacobs, *supra* note 5, at 635.

CONCLUSION

Reed v. Town of Gilbert was a significant free-speech decision. It emphasized the importance of the content-discrimination principle by focusing first on the statute's facial language before inquiring into its purpose. *Reed*'s impact has been noticeable in many cases involving noncommercial speech, particularly those dealing with panhandling political speech.

Reed's impact has been minimized, however, as courts have continued to follow two longstanding doctrines in First Amendment law: the commercial-speech and the secondary-effects doctrine.[198] This is disturbing because both doctrines are aberrations from pure First Amendment principles. Both doctrines warrant abject content-discrimination, preventing speech from entering the marketplace of ideas. Hopefully, in the near future the Court will re-examine both doctrines to determine whether they comply with fundamental First Amendment principles and the content-discrimination principle of *Reed*.

198. Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 851 (2017) ("*Reed*'s hard line is almost certainly too extreme to hold, and there is evidence even now that the lower courts are already at pains to minimize its practical effects.").