

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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10
11 Washington, D.C.
12 Wednesday, November 10, 2021

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:00 a.m.

17 APPEARANCES:

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23 Petitioner.
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25 behalf of the Respondents.

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P R O C E E D I N G S

(10:00 a.m.)

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

Mr. Dreeben.

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

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

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

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

A rule regulating off-premises

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

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

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

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

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

3 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

1 strict scrutiny.

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

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

19 MR. DREEBEN: That's correct.

20 JUSTICE THOMAS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 But when the in- --

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

7 MR. DREEBEN: Yes.

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, why --
24 why isn't it as much of a subject matter as in
25 my hypothetical? Presumably, the signs

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

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

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

23 And the first --

24 JUSTICE BREYER: What about signs for
25 a direction? You know, 495, Route 495, three

1 miles straight ahead, two miles straight ahead,
2 one mile straight ahead.

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

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

10 JUSTICE BREYER: No, no, no --

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

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

14 MR. DREEBEN: That is --

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

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

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

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

25 JUSTICE BREYER: I don't know. I'm

1 just saying, why isn't it content discrimination
2 for a town to say you can put up directional
3 signs?

4 MR. DREEBEN: It --

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

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

12 JUSTICE BREYER: All right. Why not?

13 MR. DREEBEN: And the reason is --

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

19 MR. DREEBEN: Correct.

20 JUSTICE BREYER: And they're a pest
21 too --

22 MR. DREEBEN: Correct.

23 JUSTICE BREYER: -- because you get
24 mixed up.

25 MR. DREEBEN: And I think Your Honor

1 has put his finger on why strict scrutiny is an
2 inappropriate lens to review laws that don't
3 have the potential to skew the marketplace for
4 ideas.

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

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

16 We're focused here, I think, on a
17 narrower question, which is --

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

25 MR. DREEBEN: Well, Justice --

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

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

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

16 JUSTICE KAGAN: I guess --

17 MR. DREEBEN: -- on its face.

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

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

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

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

20 Other cases that provide similar
21 examples which were cited in Reed and relied on
22 in Reed to describe what the meaning of
23 content-based is were Sorrell, where you're
24 dealing with a category of information,
25 pharmaceutical information, and the labor

1 picketing cases that I also referred to were
2 cited in Reed itself.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, Mr.
22 Dreeben.

23 Justice Thomas, anything further?

24 Justice Breyer?

25 Justice Alito?

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

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

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

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

23 That basis infringes no First
24 Amendment right under this Court's decision in
25 Metromedia that was reaffirmed later both in the

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

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

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

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

25 MR. DREEBEN: I am not either, Justice

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

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

20 I think it's extremely implausible to
21 think that this multiplicity of jurisdictions in
22 every kind of state, every kind of locality,
23 have all adopted it in order to suppress speech.
24 They haven't.

25 What they've done is tried to have an

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

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

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan,
15 anything further?

16 Justice Gorsuch?

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

22 Am I correct in understanding you that
23 you -- you think it's a question of degree or a
24 level of generality?

25 MR. DREEBEN: Yes. I think it is a

1 level of generality. And the Court's cases
2 provide the examples of --

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

11 MR. DREEBEN: Yes.

12 JUSTICE GORSUCH: Okay.

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

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Mr. Dreeben, I
23 just want to ask a follow-up about how you think
24 the tiers of scrutiny fit together with some of
25 the other arguments that you've been raising and

1 that are in the amicus briefs about history and
2 precedent.

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

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

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

20 JUSTICE KAVANAUGH: Okay. And then a
21 lot of the rhetoric, though, in your position --
22 you just mentioned this in response to Justice
23 Sotomayor, and it's not just rhetoric; it's
24 important to the analysis -- is this is a kind
25 of distinction that is historically rooted,

1 still common in jurisdictions all over America
2 and that that somehow indicates some acceptance
3 of this, consistent with the First Amendment,
4 and then you also mentioned precedent,
5 Metromedia and -- and the follow-on.

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

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

1 these problems, which are very multifarious and
2 varied all over the country, to the courts.

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

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

23 MR. DREEBEN: I think the risk of
24 watering down strict scrutiny comes from
25 expanding content-based to places where it's

1 never gone. I mean, Respondent will tell you
2 that his theory is based on function or purpose
3 of a sign, which in Reed has that language.

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

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

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Thank you, Mr. Dreeben.

20 Mr. Snyder.

21 ORAL ARGUMENT OF BENJAMIN SNYDER
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE PETITIONER

24 MR. SNYDER: Mr. Chief Justice, and
25 may it please the Court:

1 The court of appeals held that a sign
2 ordinance that distinguishes between on-premises
3 signs and off-premises signs is just as
4 suspicious as an ordinance that distinguishes
5 between Democratic signs and Republican signs or
6 between religious signs and secular signs.

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

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

20 And adopting the court of appeals's
21 understanding of Reed would conflict with
22 numerous other precedents, including this
23 Court's repeated recognition that laws
24 regulating solicitation are appropriately
25 evaluated using intermediate scrutiny, even

1 though their application depends on whether a
2 speaker is asking for money.

3 The Court should apply that same
4 intermediate scrutiny here and reverse the court
5 of appeals's judgment.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: In your briefs --
8 brief, you recommended that we apply the
9 Secondary Effects Doctrine?

10 MR. SNYDER: That's true, Justice
11 Thomas. To be clear, we think that -- we -- we
12 agree with Austin's argument that the ordinance
13 here is not content-based on its face. We think
14 that the case could readily be resolved on that
15 ground.

16 But we also think that the Secondary
17 Effects Doctrine would apply here in a way that
18 it didn't apply in Reed and would provide
19 another reason to reverse the court of appeals's
20 judgment.

21 JUSTICE THOMAS: Has this Court
22 applied that doctrine outside of the adult
23 entertainment business cases?

24 MR. SNYDER: The Court has, Your
25 Honor. The Court applied it in Ward to uphold

1 the noise ordinance at issue there. And then
2 the Court has also applied in other -- it in
3 other cases but found that its requirements were
4 not met.

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

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

21 JUSTICE THOMAS: Thank you.

22 CHIEF JUSTICE ROBERTS: I guess my
23 question is similar to Justice Thomas's. You
24 rely on the City of Renton case or at least cite
25 it a few times and devote a page or so to it,

1 and I have to say I've always thought that
2 precedent was a bit of a stretch.

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

10 I mean, do you -- do you have any
11 other case that's like that? It's -- it -- it's
12 defined in terms of the content of the theater,
13 and yet we don't think it has anything to do
14 with it.

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

18 CHIEF JUSTICE ROBERTS: That's the
19 other one I didn't like.

20 (Laughter.)

21 MR. SNYDER: But -- but, to be clear,
22 Your Honor, I -- I think this case -- and I
23 think this goes to a question that maybe you
24 were asking Mr. Dreeben -- or, no, I'm sorry, it
25 was Justice Kavanaugh was asking Mr. Dreeben,

1 this case deals with a category of speech that
2 doesn't have any inherent content.

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

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

22 It doesn't make sense to -- to subject
23 that law to the same scrutiny that you would
24 apply to a law that said you can have Republican
25 signs but not Democratic signs.

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

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

15 There are one after the other, okay?
16 So I stop at Stage 1. What is content-based?
17 What is your theory of what is, unless we're to
18 apply strict scrutiny to every regulation on the
19 books --

20 MR. SNYDER: So --

21 JUSTICE BREYER: -- when -- what --
22 what's the rule and -- and -- what is it? I
23 mean, maybe you can't explain it. There isn't
24 enough time and so forth, so I'll go back to my
25 state of confusion.

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

9 JUSTICE BREYER: Every law on the
10 statute books in the SEC part, probably
11 excepting 3 percent, talks about, what was the
12 word you said, specific content.

13 MR. SNYDER: So inherent in --

14 JUSTICE BREYER: And that's true of
15 railroad regulation, airline regulation, energy
16 regulation, you name it. It's about content.
17 It is not about sign direction, but sign
18 direction law is.

19 MR. SNYDER: So I -- I think, in this
20 context, you don't need to deal with all of --
21 with those other areas. I think the -- the
22 important thing here is that a law about
23 off-premises advertising has no inherent content
24 of its own. It only sort of cashes out when you
25 look at what's being sold or offered at a

1 particular location.

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

6 But what I want to know, since I've
7 been so hostile and unhappy with the theory for
8 the reason I stated, what is the government's
9 theory? You somehow have to deal with these
10 cases. Do you have a theory?

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

20 Justice Thomas, if I could, I'd like
21 to go back to your Franklin's example.
22 Franklin's example is good to go back to, but
23 also substantively, I -- I think you could have
24 given a -- an almost identical hypothetical in
25 Heffron, for example. So Heffron was the case

1 about the regulation of solicitation at the
2 Minnesota State Fair and you weren't allowed to
3 solicit except at booths that you had rented.

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

13 And to give another example, in
14 McCullen, this Court confronted a statute that
15 had an exception for speech within the scope of
16 employment, and the Court said -- the Court
17 acknowledged in that case that you might have to
18 look at what the person had said in order to
19 decide whether it was actually within the scope
20 of their employment but that it was nevertheless
21 content-based because it didn't prefer any
22 particular subject matters.

23 There was disagreement in that case
24 about whether the -- the way the particular
25 requirement was framed reflected viewpoint

1 discrimination because it was only certain
2 people who could speak within the scope of their
3 employment, but I at least don't see any
4 disagreement in the opinions there about the
5 principle that a generally applicable law about
6 speaking within the scope of employment would
7 not be content-based.

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

18 Or say a civil rights organization, a
19 small civil rights organization seeking to
20 advertise for members in an area where that's
21 not a popular viewpoint and there aren't very
22 many places where they could advertise on
23 location, would also have that effect.

24 Do you care to respond to those
25 concerns?

1 MR. SNYDER: I would. Thank you for
2 that. I'd say two or three things in response
3 to that.

4 The first is that the part of the test
5 that -- that Respondent has put at issue is
6 whether the law is content-based on its face.
7 And so, to analyze that, you look at the face of
8 the law, not how it sort of cashes out in
9 practice.

10 JUSTICE GORSUCH: I -- I understand,
11 but on the face of the law, it makes a
12 content-based distinction in -- in the sense of
13 location. It makes a location-based
14 distinction. We can at least agree on that.

15 MR. SNYDER: It --

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

18 MR. SNYDER: Because that
19 location-based distinction, it -- it doesn't
20 have any inherent content of its own. It
21 depends on what happens at the particular
22 locations.

23 JUSTICE GORSUCH: No.

24 MR. SNYDER: And that --

25 JUSTICE GORSUCH: I -- I understand

1 that point, but doesn't it necessarily favor
2 majoritarian voices? Wouldn't you agree with
3 that?

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

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

21 JUSTICE GORSUCH: But -- but would you
22 at least agree that it does have a
23 disproportionate effect on majoritarian and
24 minority voices?

25 MR. SNYDER: I -- I think it would

1 depend. I mean, I'm not sure it's exactly
2 majoritarian and minority voices. It would
3 depend on who has property in the -- the City of
4 Austin.

5 JUSTICE GORSUCH: Okay. Prop --
6 property voices. We could agree that it favors
7 property voices then?

8 MR. SNYDER: So --

9 JUSTICE GORSUCH: Right?

10 MR. SNYDER: -- yes, Your Honor, in --
11 in some respects, it does. I -- I don't think
12 you can rest the case on that, though.

13 Respondent concedes at page 39 of the red brief
14 that you -- that Austin could adopt an ordinance
15 that regulates signs based on whether they
16 generate revenue.

17 JUSTICE GORSUCH: And it could also
18 regulate on commercial speech. That would be an
19 option, for example, and, in fact, Austin's done
20 that already in the wake of this lawsuit, right,
21 I understand.

22 MR. SNYDER: It -- it could, Your
23 Honor, and -- and I think that that's a
24 significant thing. We, of course --

25 JUSTICE GORSUCH: Or -- or it could,

1 as Chicago has, focus on the brightness and the
2 size of signs and things like that, right?

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

13 So those laws, they -- they are
14 alternatives if -- if the government has to use
15 them, but they're not nearly as effective. And
16 we don't think that the First Amendment requires
17 --

18 JUSTICE GORSUCH: Oh, I mean, the
19 First Amendment prevents -- that can't be the
20 test, how effective a law is at -- at
21 suppressing speech. I mean, that's never been
22 -- the First Amendment's always pretty
23 inefficient, we'd agree, wouldn't we?

24 MR. SNYDER: I -- I wouldn't say that
25 the First Amendment is always inefficient. I

1 would say that if you're applying intermediate
2 scrutiny, then the -- which we think is the
3 appropriate framework here, then Austin is not
4 required to adopt much less effective
5 regulations of signs.

6 The -- the other thing I -- I'd pick
7 up on, you mentioned commercial speech. We
8 don't think that regulating just commercial
9 speech would adequately protect the government's
10 interests in these case -- in this case.

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

19 If you --

20 JUSTICE SOTOMAYOR: Counsel, no matter
21 what or how you subject this to strict scrutiny
22 or not or intermediate scrutiny, this favors not
23 on the basis of majoritarian rule but on the
24 basis of wealth. These big billboards, you've
25 got to be -- have a lot of money to put a sign

1 on them. To build them, to have -- put a sign
2 on them, not every property owner can do it.

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

5 MR. SNYDER: Your Honor, I -- I didn't
6 mean to concede that they would -- I thought I
7 -- I didn't concede that these sort of favor
8 majoritarian views.

9 JUSTICE SOTOMAYOR: What it favors not
10 to do it, is favors people with money against
11 the poor, period.

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

19 JUSTICE SOTOMAYOR: I -- I -- I agree
20 with you wholly, which is -- my point is that
21 it's not favoring the majority over a minority
22 or one group other -- other than basis of
23 wealth, but that happens in speech, period.

24 MR. SNYDER: I --

25 JUSTICE SOTOMAYOR: Wealthier people

1 can speak more.

2 MR. SNYDER: I think that's right,
3 Your Honor. I -- and I think that's why the
4 Court has not embraced a disparate impact theory
5 of the First Amendment and why it would be a
6 mistake to do so here.

7 JUSTICE SOTOMAYOR: I --

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

15 Start with regulations that require
16 disclosure. Those are all content-based. All
17 compelled speech is content-based, is it not?
18 Do you understand this to apply to compelled
19 speech?

20 MR. SNYDER: I -- I -- I'm not -- you
21 know, it would obviously depend on the Court's
22 opinion. I'm not sure what Respondent would say
23 to that. It would certainly raise a host of
24 really difficult questions about things that
25 have long been considered settled.

1 CHIEF JUSTICE ROBERTS: Mr. Snyder, I
2 was fascinated to read in your brief that when
3 the Highway Beautification Act was passed in
4 1965, one of the category of signs that were --
5 was allowed but otherwise be prohibited were
6 signs advertising the distribution by nonprofit
7 organizations of free coffee.

8 Is that still in effect?

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

16 CHIEF JUSTICE ROBERTS: Why -- I mean,
17 it's coffee; it's not tea. That seems
18 content-based.

19 MR. SNYDER: I -- I agree. We would
20 not -- we would not dispute that that is a
21 content-based distinction.

22 CHIEF JUSTICE ROBERTS: Are there any
23 of these left?

24 MR. SNYDER: There are some left.
25 They're put out when organizations are

1 attempting to raise money to -- to let you know
2 that you can stop at the rest stop to get a
3 coffee to keep driving. And so there's --
4 there's a safety --

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

7 MR. SNYDER: They -- they take
8 donations.

9 CHIEF JUSTICE ROBERTS: Oh, okay.
10 Justice Thomas?
11 Justice Breyer?
12 Justice Alito?
13 Justice Sotomayor? No? No?
14 Justice Gorsuch?

15 JUSTICE KAVANAUGH: One -- one
16 question. If you're concerned about safety and
17 blight, which are the two concerns that the City
18 has articulated, the question we have to ask is
19 whether that -- those interests could be served
20 in ways that wouldn't draw a distinction based
21 on content or wouldn't infringe speech
22 generally, whether you could serve the same
23 interests.

24 And couldn't the City do so by
25 limiting the number of signs, the number of

1 billboards, the placement of billboards, and the
2 size of billboards to achieve the safety and
3 blight interests just as effectively? I realize
4 that would be a lot of change for a lot of
5 jurisdictions around the country, and that
6 matters, but put that aside for now.

7 MR. SNYDER: So two things.

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

16 But -- but two, sort of the substance
17 of --

18 JUSTICE KAVANAUGH: Just satisfying
19 the -- the scrutiny, what -- whatever the
20 scrutiny is, just satisfying the scrutiny, can
21 -- can't they achieve the interests -- whichever
22 tier of scrutiny it is, can't they achieve the
23 interests by placement, number, and size
24 restrictions rather than anything that has to
25 do, arguably, with the words that are written on

1 the -- on the sign?

2 MR. SNYDER: No, I don't think they
3 can nearly as effectively because the
4 on-premises/off-premises distinction sort of
5 tracks the places in which signs provide the
6 most value in terms of organizing the community.

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

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

15 JUSTICE KAVANAUGH: Don't -- a number
16 of states don't use this distinction. I don't
17 know if people are just running around lost in
18 all those states, but they -- they -- they
19 presumably find their way to the place.

20 MR. SNYDER: So they do find their way
21 to the place. I don't think jurisdictions have
22 completely eliminated on-premises signs. But I
23 think it's -- it's far more difficult to
24 accomplish the objectives of eliminating visual
25 blight and protecting traffic safety without

1 those things.

2 And we think that under intermediate
3 scrutiny, which we -- is the appropriate
4 standard here, that the -- the City's interest
5 in doing that more effectively suffices.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

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

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

16 MR. SNYDER: That's correct.

17 JUSTICE BARRETT: So why, if the
18 off-premises/on-premises distinction, why
19 couldn't you achieve that simply by limiting it,
20 so you're not going to get any more billboards
21 because no more can be built? Why can't
22 on-premises just -- just mean on-premises
23 regardless to whether it's, you know,
24 advertising Franklin's Barbecue or the
25 hamburgers inside? I mean, who cares what it

1 says because, you know, as Petitioner pointed
2 out in his brief, if it's on-premises, it's
3 going to be naturally limited in size. People
4 aren't going to put up a big billboard that
5 obscures the front of the building.

6 So couldn't you just achieve the same
7 thing in size limitations and who cares what it
8 says?

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

19 I mean, that's the -- that's sort of
20 how these billboards end up there in the first
21 place.

22 JUSTICE BARRETT: But couldn't it be
23 limited in terms of size?

24 MR. SNYDER: I --

25 JUSTICE BARRETT: That would be

1 content-neutral.

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

9 JUSTICE BARRETT: And having the
10 grandfathered thing wouldn't solve that problem?

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

18 The federal government did a similar
19 thing after enactment of the HBA and was
20 explicit that part of the purpose of that was to
21 eventually have those signs come down. And we
22 think Austin has the same interest. It's not
23 just saying we're going to have these signs for
24 all time. It can have an interest in
25 encouraging people to -- to not keep using them.

1 JUSTICE BARRETT: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Shanmugam.

5 ORAL ARGUMENT OF KANNON K. SHANMUGAM
6 ON BEHALF OF THE RESPONDENTS

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

9 The City of Austin denied Respondents'
10 application to convert its existing signs to
11 digital signs, and it did so on the ground that
12 the signs advertised off-premises activities.

13 Under this Court's decision in Reed,
14 Austin's distinction between signs advertising
15 on-premises and off-premises activities is
16 content-based.

17 That distinction turns on the subject
18 matter, function, and purpose of the content of
19 the messages on the signs, and it has the effect
20 of prioritizing certain messages from certain
21 speakers and limiting, if not prohibiting,
22 others.

23 The fact that Austin's regulation does
24 not prohibit speech on an entire subject and
25 that the application of the regulation depends

1 on a factor in addition to the sign's content
2 does not render it content-neutral. The Court
3 should therefore apply strict scrutiny.

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

11 Here, the challenged restriction,
12 Austin's prohibition on the digitization of the
13 small number of off-premises signs, flunks any
14 standard of review. It verges on the irrational
15 for Austin to permit digital on-premises signs
16 without any limitation but to prohibit the
17 digitization of the small number of
18 grandfathered off-premises signs.

19 That differential treatment bears no
20 relation to Austin's asserted interests in
21 safety and aesthetics, and Austin presented no
22 evidence at trial to support it.

23 All that the Court need do here is to
24 hold that the digitization ban is invalid.
25 Other restrictions based on similar on- and

1 off-premises sign distinctions may well satisfy
2 strict scrutiny.

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

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Counsel, why wouldn't
11 we analyze this under Commercial Speech
12 Doctrine?

13 MR. SHANMUGAM: So, first of all,
14 Austin didn't seek review on the alternative
15 theory that even if an on-premises/off-premises
16 distinction is subject to strict scrutiny,
17 Austin should somehow still prevail.

18 Now, I would note, as I noted at the
19 outset, that even under intermediate scrutiny,
20 we believe that we should prevail because
21 there's simply no fit here between the
22 regulation at issue and the distinction, whether
23 it's the distinction between on-premises and
24 off-premises signs or any differential treatment
25 of commercial speech and Austin's asserted

1 interests.

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

10 Now we don't even know what that
11 speech is for the simple reason that my client
12 has not yet leased out its signs, and at any
13 given time, the parties that would lease those
14 signs would presumably change.

15 But I think that the critical point
16 here is that the regulation in no way draws a
17 distinction between commercial and
18 non-commercial speech, and, again, the real
19 focus here should be on the speech that is being
20 limited.

21 And this case is no different from the
22 Riley case that we cite in that regard. I think
23 where you have an ordinance that covers both
24 commercial and non-commercial speech and that
25 speech cannot be disaggregated, the natural step

1 is to apply strict scrutiny.

2 And, indeed, even in Metromedia
3 itself, after discussing commercial and
4 non-commercial speech separately, the Court did
5 ultimately invalidate San Diego's ordinance on
6 its face, so it left questions of severability
7 for the lower courts.

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

14 I don't have the same interest in what
15 the billboard 40 miles outside the town says
16 about my kale shop. Okay. There's your
17 difference. And the grandfather is because we
18 love grandfathers, okay?

19 (Laughter.)

20 JUSTICE BREYER: There we are. And
21 that's historic. And go back to the year two,
22 you'll discover those kinds of distinctions. So
23 there are distinctions, and, therefore, I have
24 to get to the content-based.

25 And now I'm back at Justice Alito's

1 question, content-based? Hey, the whole SEC is
2 content-based. And what about the infinite
3 number of FDA rules that say: "You better
4 disclose how much sodium there is?" That's not
5 content, sodium? It isn't. It's salt. But
6 salt, by the way, is a kind of content, and it's
7 not good for you.

8 (Laughter.)

9 JUSTICE BREYER: But, regardless --
10 regardless, FDA, SEC, try the energy world, you
11 better disclose, Mr. Smith Energy, how much coal
12 you're burning, okay? And we can go on through
13 the whole U.S. Code.

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

22 MR. SHANMUGAM: Justice Breyer --

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

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

4 JUSTICE BREYER: Yeah, but it's one
5 person, so, therefore --

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

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

21 JUSTICE BREYER: Oh, I agree, it's
22 content-based. I agree with you there,
23 absolutely. So now what?

24 MR. SHANMUGAM: Okay.

25 JUSTICE BREYER: And -- and you can

1 say I should get on the bandwagon irrespective
2 of the fact that to me it doesn't make any
3 sense. But --

4 MR. SHANMUGAM: Well, let me explain.

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

7 MR. SHANMUGAM: Let me explain to you
8 why you should get on the bandwagon or, at a
9 minimum, why you shouldn't be troubled by the
10 bandwagon rolling out of the station here.

11 And that is for the simple reason that
12 if you think about it from the perspective of
13 the owner of the premises, that owner's speech
14 is being limited and plainly being limited on
15 the basis of content. And let me give you a
16 hypothetical of my own if I may.

17 Let's say that you're a church and you
18 want to advertise the services that take place
19 every Sunday on your premises. Of course, under
20 Austin's ordinance, you can do that.

21 But what you can't do is to use your
22 digital sign to advertise an interfaith service
23 that might be taking place at the Jewish
24 synagogue down the road. That is a limitation
25 on the subject matter of your speech.

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

12 And, yes, that is a test that turns on
13 reading the sign but in a very specific way. It
14 turns on whether or not you are examining the
15 content of the sign and determining whether or
16 not the regulation applies.

17 JUSTICE SOTOMAYOR: Counsel, easy
18 rules are -- and bright lines are always
19 attractive to people, but human nature is not
20 bright lines. Life is all gray. You have to
21 read things to know anything about them. You
22 have to read a sign to see if it's covered by
23 the First Amendment, and you have to read it to
24 know whether it's obscenity or not. Directional
25 signs, as Justice Breyer said earlier, you have

1 to read it to see if it's directional.

2 And yet, I think it's illogical and
3 contrary to any common sense to think that a
4 regulation that says states can put up signs --
5 only states can put up directional signs on
6 highways, that that's content-based. It -- just
7 not logical.

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

18 Reed was clear for everybody. It was
19 9-0 on the result. But you can't read a line
20 out of context. Are you suggesting that Reed
21 did -- overturned all the precedent that your
22 colleagues on the other side cited?

23 MR. SHANMUGAM: No, certainly not,
24 Justice --

25 JUSTICE SOTOMAYOR: So can't -- don't

1 we have to read Reed in context?

2 MR. SHANMUGAM: Of course, Justice
3 Sotomayor, but I hope to convince you that the
4 regulation at issue here is really
5 indistinguishable from the regulation that was
6 at issue in Reed in the relevant respect.

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

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

20 MR. SHANMUGAM: I think the best way
21 to understand this Court's solicitation cases --
22 and I would put this Court's picketing cases in
23 the same category -- is that they are cases that
24 involve conduct with an expressive component.
25 And so this Court in the solicitation context

1 has distinguished between --

2 JUSTICE SOTOMAYOR: Well, this is
3 conduct too, conduct of having an off-site
4 grandfathered billboard.

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

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

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

23 MR. SHANMUGAM: No, not --

24 JUSTICE SOTOMAYOR: No on and off
25 signs, no -- signs just on services? You're

1 really taking a radical step in saying your only
2 choice is no signs, period?

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

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

18 JUSTICE SOTOMAYOR: But this sign --

19 MR. SHANMUGAM: -- any different.

20 JUSTICE SOTOMAYOR: -- was no
21 different -- this regulation was no different
22 than the vast majority of other regulations in
23 existence at the time, and Justice Alito said we
24 shouldn't read Reed to extend to those.

25 MR. SHANMUGAM: I grant you, Justice

1 Sotomayor, that there are many jurisdictions
2 that had on-premises/off-premises regulations
3 like the one at issue here.

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

11 And so I really don't think that you
12 can draw the inference that simply because a
13 distinction is framed in terms of on-premises
14 versus off-premises, that that renders it
15 content-neutral.

16 The inquiry is the same. It is
17 whether or not the regulation at issue defines
18 the regulated speech in terms of its subject
19 matter, function, or purpose. And I would note
20 --

21 JUSTICE ALITO: Mr. Shanmugam --

22 JUSTICE KAGAN: Mr. Shanmugam --

23 JUSTICE ALITO: -- is the Austin code
24 content-based as applied to the billboards that
25 are at issue here? Perhaps I don't understand

1 the -- the underlying facts of the case. But,
2 as I understand it, your client has billboards.
3 They are off-premises in the conventional sense
4 of the term. They are not in front of a
5 building. Austin doesn't say you have to take
6 them down. It just says you can't digitize
7 them.

8 An enforcement officer could determine
9 whether you're in compliance or not in
10 compliance without reading what is on the
11 billboard. If everything on the billboard were
12 written in Chinese and the enforcement officer
13 can't read Chinese, the enforcement officer
14 could still say: "You're in violation because
15 they're digitized."

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

18 MR. SHANMUGAM: So, Justice Alito, the
19 critical fact here is that the trigger for
20 whether or not we can digitize our signs is
21 whether or not our signs, as they exist,
22 advertise on-premises or off-premises
23 activities. If they advertise off-premises
24 activities, they are forbidden unless they are
25 grandfathered. Our signs are concededly in that

1 category.

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

8 MR. SHANMUGAM: Yes, the --

9 JUSTICE ALITO: In the conventional
10 sense, not in the -- the peculiar sense in which
11 Austin defines the term.

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

18 So, Justice Alito, just to sort of
19 explain for a minute how all of this operates,
20 when we apply to digitize our signs, the reason
21 that we can't do that is because we are not
22 allowed to alter signs that are non-conforming
23 or grandfathered. The sole reason that our
24 signs are non-conforming or grandfathered is
25 because they are classified as off-premises

1 signs.

2 So our submission to the Court is,
3 first, that that distinction is content-based,
4 that because we were not permitted to digitize
5 our signs because they were off-premises, the
6 regulation should be subject to strict scrutiny.

7 And, second, that the digitization ban
8 itself, which is, after all, the regulation that
9 we were challenging, is invalid under strict
10 scrutiny. And, of course, the City makes no
11 effort to argue that the digitization ban
12 survives strict scrutiny.

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

20 JUSTICE ALITO: Could you --

21 MR. SHANMUGAM: But, of course, that's
22 just a definition.

23 JUSTICE ALITO: Yeah. Could you
24 address the regulations to which Justice Breyer
25 referred, the many, many federal regulations

1 that require disclosure of information?

2 MR. SHANMUGAM: Yes.

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

11 What would be the effect of -- I want
12 to understand where -- what we would be buying
13 if we bought the "if you have to read it, it's
14 content-based" argument?

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

23 JUSTICE BREYER: Well, there are
24 plenty of the other, peanut butter. Every
25 lawyer in Washington before you were born was

1 hired to argue yes or no, that real, genuine
2 peanut butter must have lard in it, otherwise it
3 sticks to the roof of your mouth and isn't
4 peanut butter.

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, one

1 thing you'd certainly have to disturb is the
2 Highway Beautification Act, right? What is your
3 -- your position on each of the provisions?
4 There are five sign provisions, and under your
5 theory, I -- I suppose they would be
6 unconstitutional.

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

9 MR. SHANMUGAM: I -- I -- I think
10 those exceptions are content-based and would be
11 subject to strict scrutiny. And then the
12 question would be whether or not they survive
13 strict scrutiny. And I think that --

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

18 MR. SHANMUGAM: I think that the
19 government in prior briefs has suggested that
20 the analysis for each of those exceptions might
21 operate somewhat differently.

22 First, there might be different
23 governmental interests. The government has
24 cited with regard to the sale or lease of
25 property exception the interest of property

1 owners in fully marketing --

2 CHIEF JUSTICE ROBERTS: Landmark signs

3 --

4 MR. SHANMUGAM: -- their own
5 properties.

6 CHIEF JUSTICE ROBERTS: -- or signs of
7 historic or artistic significance.

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

15 And so the question would be, first,
16 whether the government can articulate a
17 compelling interest and, second, whether the
18 regulation at issue would be narrowly tailored.

19 And, of course --

20 CHIEF JUSTICE ROBERTS: I think it
21 would be diluting our content-based test for you
22 to say that those can possibly satisfy it.

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

24 CHIEF JUSTICE ROBERTS: Landmark
25 signs, you know --

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

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

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

21 And I would invite the Court to review
22 the record in this case because there is simply
23 no evidence in the record at all to justify what
24 Austin did here, which is to permit the
25 digitization of on-premises signs without any

1 sort of limitation on brightness, message
2 display time and the like, limitations that are
3 very common in other jurisdictions, but yet to
4 say with regard to the small number of
5 off-premises signs that are permitted in Austin
6 that they can't be digitized.

7 And I think that that's what makes
8 this a very easy case. I don't think that the
9 Court needs to tackle the task of defining how
10 its test for content neutrality would apply in
11 every conceivable context --

12 JUSTICE KAVANAUGH: Mr. Shanmugam --

13 MR. SHANMUGAM: -- in order to rule in
14 my clients' favor.

15 JUSTICE KAVANAUGH: -- as you well
16 know, people will pay close attention to the
17 opinion. And unlike some of our decisions, this
18 decision is going to affect every state and
19 local official around America, and they spend a
20 lot of money and a lot of time trying to figure
21 out how to comply with the First Amendment
22 implications of sign ordinances.

23 So I -- I -- I'm just going to push
24 back a little on, like, oh, this is a nice,
25 easy, narrow case. If you look at the amicus

1 brief of the planning association, for example,
2 I thought was pretty telling about Metromedia.
3 It said, "experts have spent decades in the
4 intellectual wilderness disagreeing about
5 Metromedia. Their debates leave planners in the
6 same wilderness yet under the cover of night
7 with no flashlight or map."

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

14 MR. SHANMUGAM: Well, I -- I -- I
15 appreciate that, Justice Kavanaugh, but I think
16 that the way to provide that clarity is simply
17 to reaffirm the test that this Court articulated
18 in Reed.

19 And I think notwithstanding the
20 suggestion that there is going to be a -- a --
21 a -- a wilderness if this Court rules in my
22 clients' favor, I think that what we have
23 learned from experience --

24 JUSTICE KAVANAUGH: But just to --

25 MR. SHANMUGAM: -- is that --

1 JUSTICE KAVANAUGH: Sorry to
2 interrupt, but to stop you there, I think there
3 was confusion after Reed about
4 on-premises/off-premises because it was unclear
5 where a majority of the Court was in the wake of
6 the different opinions.

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

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

18 First, that I think the jurisdictions
19 in the wake of Reed, over the last six years,
20 have already modified their sign ordinances in
21 important respects. And there were --

22 JUSTICE KAVANAUGH: But they --

23 MR. SHANMUGAM: -- a lot of
24 jurisdictions --

25 JUSTICE KAVANAUGH: -- but some of

1 them rolled the dice on the
2 on-premises/off-premises basis because they
3 couldn't figure out which way that went from
4 Reed.

5 MR. SHANMUGAM: That -- that is
6 correct, many of them did modify those
7 definitions to render them unambiguously
8 content-neutral, but some, like Austin, didn't.

9 And Austin in 2017 overhauled its city
10 code explicitly in reaction to Reed, but it left
11 the definition of off-premises signs materially
12 undisturbed.

13 JUSTICE KAVANAUGH: I --

14 MR. SHANMUGAM: So I think, in some
15 sense --

16 JUSTICE KAVANAUGH: Like a lot of
17 jurisdictions.

18 MR. SHANMUGAM: Like -- like some
19 jurisdictions have. I -- I'm willing to concede
20 that. My point to --

21 JUSTICE GORSUCH: Can -- can I --

22 MR. SHANMUGAM: -- the Chief Justice
23 --

24 JUSTICE GORSUCH: I'm sorry to
25 interrupt, but -- but I -- I -- I -- I want to

1 nail that down a little bit further.

2 You've pointed out that Austin has
3 since modified its statute here, so it only
4 applies to commercial speech, which guarantees
5 intermediate rather than strict scrutiny under
6 our precedents.

7 How many jurisdictions to your
8 knowledge are left that are, in Justice
9 Kavanaugh's words, rolling the dice without
10 making that distinction or, you know, pursuing
11 some other option like Colorado or Chicago has?

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

21 I would just make two points. The
22 first is that, as I said in response to the
23 Chief Justice, the way that the strict scrutiny
24 analysis would operate is going to depend on the
25 type of regulation at issue.

1 Again, it's -- it's very nice to sort
2 of discuss the definition of on-premises and
3 off-premises signs in isolation, but, of course,
4 the real question is, what restrictions or
5 regulations flow from that definition?

6 And the analysis for a law like the
7 Highway Beautification Act, which permits
8 on-premises signs but prohibits off-premises
9 signs, is, I would submit, potentially different
10 from the analysis on the digitization ban.

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

20 With regard to what Austin did,
21 Justice Gorsuch, I would just add one further
22 thing, which is that in 2017, it is true that
23 Austin permitted the display of non-commercial
24 signs, but Austin did not materially modify the
25 definition of off-premises signs, which is the

1 trigger for the digitization ban at issue here.

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

10 It is true that the degree of fit --

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

17 But what role does history and
18 precedent play in that? One of the themes of
19 the amicus briefs in particular is these things
20 have been around for a long time,
21 on-premises/off-premises distinctions, and that
22 has coexisted with the First Amendment in the
23 same way that long-standing regulations have
24 coexisted with free exercise or with the Second
25 Amendment, and they're trying to fold in that.

1 How do we think about that, or does
2 that -- is the history wrong, or how do we think
3 about it?

4 MR. SHANMUGAM: Yeah, Justice
5 Kavanaugh, I wouldn't stand here and say that
6 in, you know, 1789 there were a lot of
7 on-premises --

8 JUSTICE KAVANAUGH: Well, the issue --

9 MR. SHANMUGAM: -- and off-premises
10 distinction.

11 JUSTICE KAVANAUGH: -- didn't arise
12 until the 20th Century, really --

13 MR. SHANMUGAM: Yeah. I -- I think
14 that this really --

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

17 MR. SHANMUGAM: I think, if you had to
18 sort of point to some event, I would probably
19 point to the enactment of the Highway
20 Beautification Act precisely because, once the
21 federal law drew that distinction, many states,
22 in order to ensure that they were in compliance
23 with federal law, adopted similar restrictions.

24 At the same time, obviously, those
25 restrictions have been subject to challenge for

1 some time. Metromedia itself involved a -- a
2 challenge to that distinction.

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

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

19 Yes, the Court talked and Mr. Dreeben
20 talked today about the other categories of
21 signs, political and ideological signs and the
22 like. I think those other categories tended to
23 confirm that the Town of Gilbert was rampantly
24 drawing content-based distinctions.

25 But, when you look at the very

1 provision that was being challenged, the
2 definition of temporary directional signs, that
3 provision was exactly like the provision at
4 issue here in that there was some other factor,
5 in addition to content, that governed how the
6 regulation operated.

7 There, it was the occurrence and
8 timing of an event. Here, it is the location of
9 the sign. But that simply defines the
10 restriction. It defines the restriction on the
11 speech that is permitted or not permitted.

12 And so there is no respect in which
13 the on-premises/off-premises distinction is
14 different, other than that it is location rather
15 than the timing of an event.

16 JUSTICE KAVANAUGH: Can I pick up on
17 one of Justice Gorsuch's questions? He said
18 on-premises/off-premises at least as to
19 commercial advertising, if I understood the
20 question, might be different, and that folds in
21 into the Metromedia precedent, which seems to
22 suggest that that would be permissible.

23 Your response?

24 MR. SHANMUGAM: Our view is that when
25 you consider the discrete type of regulation at

1 issue here, the digitization ban, that it would
2 not survive even intermediate scrutiny.
3 Metromedia itself involved an outright
4 prohibition on off-premises signs, and I would
5 submit that the analysis there could be
6 different because the fit between the interests
7 that are asserted and the regulation at issue
8 could be analyzed in a different way.

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

18 And, in our view, because of the
19 examples that we have given, I think that it is
20 clear that an on-premises/off-premises
21 distinction that turns on whether or not a sign
22 advertises on-premises or off-premises
23 activities is a paradigmatic example of a
24 regulation that distinguishes between different
25 types of communicative content.

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

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

18 And there was a colloquy earlier, I
19 believe, between my friend, Mr. Snyder, and
20 Justice Gorsuch about how the Court should think
21 about the effects of the regulation. We're
22 certainly not suggesting that merely because
23 this has a disproportionate effect it is a
24 content-based regulation. But I think that
25 helps to drive home the ways in which this

1 regulation really does draw a distinction based
2 on the subject matter.

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

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

17 MR. SHANMUGAM: No, that isn't
18 content-based because that depends entirely on
19 the location. And so, similarly, as the Sixth
20 Circuit suggested in the Thomas opinion, if a
21 jurisdiction said that it would define an
22 on-premises sign as any sign that is within a
23 certain distance of a building and an
24 off-premises sign as any sign that is further
25 away, that too would be okay.

1 JUSTICE ALITO: What is the difference
2 between that and what happened here? You have
3 certain signs -- I'll come back to my question.
4 I still -- my first question, I still don't
5 quite understand the -- the answer.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, anything further?

24 JUSTICE THOMAS: No questions.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer? Sure?

2 Justice Alito?

3 Justice Kagan?

4 JUSTICE KAGAN: Mr. Shanmugam, I -- I
5 mean, I guess the question is, yes, you can say
6 that there's a piece of content that triggers
7 the restriction. It has to advertise
8 off-premises activities.

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

17 The question is whether we should
18 treat a trigger of religious speech or political
19 speech or speech by Republicans or speech by
20 Democrats or all the kinds of triggers that we
21 understand to be dangerous and -- and -- and
22 that we understand to be content-based as we
23 have always used that label, whether that
24 trigger should be treated in the exact identical
25 way as the trigger in this law, which is, does

1 it advertise off-premises activities?

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

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

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

19 And the Court made clear that even in
20 cases where it might seem as if a regulation is
21 benign or reasonable, the Court still has to
22 take that first step and determine whether or
23 not the distinction is content-based on its
24 face.

25 And as I indicated to Justice Gorsuch,

1 I do think that there is a sense in which a
2 regulation like this is distortive. It could
3 have been designed to favor local businesses.
4 It could have been designed to put --

5 JUSTICE KAGAN: Yeah, that's -- that's
6 --

7 MR. SHANMUGAM: -- a thumb on the
8 scales.

9 JUSTICE KAGAN: -- always true of
10 speech restrictions, including restrictions that
11 we would understand, all of us, to be
12 content-neutral.

13 You know, if you have a regulation
14 that says there shall be no sound trucks in the
15 city after 8 p.m., there are various ways in
16 which that can be distortive and in which it can
17 affect certain speakers more than other
18 speakers.

19 Down that road, madness lies, and the
20 Court has never gone down that road.

21 MR. SHANMUGAM: I agree with that.
22 And -- and I think that all that the Court said
23 in Reed is that where you have a distinction
24 that on its face depends on the content of
25 speech, that's a reason to look more closely.

1 And I do think that this regulation
2 falls squarely into that category because of the
3 hypotheticals that we have set out. There is no
4 question --

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

6 MR. SHANMUGAM: -- that this
7 regulation requires --

8 JUSTICE KAGAN: -- Mr. Shanmugam, that
9 formally one can understand this in -- in
10 exactly the way you say. You have to examine
11 the content, so, formally, one can understand
12 this as content-based, even though I think the
13 Court has defined that term more narrowly.

14 But put that aside. I mean, it's
15 formally true that you have to examine something
16 about the content, but just to go back to the
17 Chief Justice's questions, I mean, there are
18 some laws where, you know, the laws of -- lots
19 of municipalities have these laws that say you
20 can't have illuminated signs unless the
21 illumination is for your address or for your
22 name so that people can identify. There are
23 some laws that sort of scream out not to worry
24 in terms of any First Amendment values.

25 Now we can do two things with those

1 laws. As I understood what you said to the
2 Chief Justice, you said: Well, don't worry
3 because the strict scrutiny analysis can be
4 different.

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

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

21 And that may be possible with regard
22 to categories such as directional signs
23 depending on how the category is defined. But I
24 think that what we haven't seen in the wake of
25 Reed is a great deal of chaos in the lower

1 courts.

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

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

18 What makes this case such an
19 artificial case in which to be discussing this
20 issue is because Austin simply has no
21 justification for the differential treatment
22 when it comes to the digitization ban given that
23 Austin is permitting digital signs on premises
24 with complete abandon and without any
25 limitation.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.

4 JUSTICE GORSUCH: I'll give you some
5 examples. I -- I just want to understand how
6 this would cash out.

7 Let's say a sign just says "Black
8 Lives Matter." I -- I -- I think we'd agree
9 that that's not an off-premises sign because it
10 doesn't identify a particular location. Is that
11 right?

12 MR. SHANMUGAM: Yes. I would -- I
13 would say that that would not qualify as an
14 off-premises sign because it's not advertising
15 an activity.

16 JUSTICE GORSUCH: But what if Black
17 Lives Matter has a local office and it isn't
18 there?

19 MR. SHANMUGAM: Well, I mean, it would
20 be a question for Mr. Dreeben. I think he would
21 say that that sign does not advertise an
22 activity, business, or person.

23 JUSTICE GORSUCH: So that one's okay?

24 MR. SHANMUGAM: Potentially so.

25 JUSTICE GORSUCH: How about -- how

1 about if it says "Black Lives Matter, Do
2 Something About It," anticipating an upcoming
3 rally, but no information is provided?

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

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

10 MR. SHANMUGAM: At that point, it
11 seems more clearly to be advertising a
12 particular activity.

13 JUSTICE GORSUCH: And so an official
14 would have to -- somebody's going to have to
15 read this and decide which side of the line
16 these four examples fall on.

17 MR. SHANMUGAM: Well, I -- I think
18 that that's right. And I think what I would say
19 is that the examples that were in the Fifth
20 Circuit's opinion illustrate that this is not a
21 case in which a mere cursory of examination of
22 content -- a mere cursory examination of content
23 is necessarily going to be sufficient. There
24 are hard questions about whether a particular
25 sign would qualify.

1 And I think it was telling that my
2 friend, Mr. Dreeben, when he was asked the
3 question about the, you know, Vote For Person X
4 sign, said, well, there's this -- there was this
5 exception in the ordinance for political signs.

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

17 Justice Barrett?

18 Thank you, counsel.

19 MR. SHANMUGAM: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
21 Dreeben.

22 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

23 ON BEHALF OF THE PETITIONER

24 MR. DREEBEN: Thank you, Mr. Chief
25 Justice. Three quick points on the record and

1 three substantive points.

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

9 Second, Respondent invited this Court
10 to read the record to determine what Austin said
11 in the district court. I invite the Court to
12 read the record on what Austin argued in the
13 district court and on appeal.

14 Austin did not appeal the intermediate
15 scrutiny holding of the district court. Its
16 sole appeal is on the theory that strict
17 scrutiny applied because the law is
18 content-based by virtue of its distinction
19 between on-premises and off-premises
20 advertising.

21 So I think the intermediate scrutiny
22 question is not here and it's for the Fifth
23 Circuit to decide whether it's waived.

24 And then, finally, Justice Thomas,
25 your question about commercial speech and

1 whether Respondents' billboards could be
2 regulated as such, Respondents said that the
3 question presented is about the facial validity
4 of the statute under strict scrutiny.

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

16 Now, substantively, we've talked a lot
17 this morning about how strict scrutiny is the
18 highest rung of review that the -- the Court
19 applies and that applying it where it is not
20 warranted runs the risk of dismantling a host of
21 reasonable signage regulation by jurisdictions.

22 Now that does not mean that they get a
23 free pass. If strict scrutiny is not applicable
24 because of the text, the face of the statute, as
25 we submit it should not be here, you still have

1 the question whether the law can be justified
2 without reference to the content.

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

10 You still have intermediate scrutiny,
11 and laws can fail that, as they did in McCullen
12 and in the City of Ladue case with respect to a
13 total preclusion of residential signage. The
14 jurisdiction lost that.

15 And, Mr. Chief Justice, if I could
16 finish one point. In response to your question,
17 Justice Barrett, about the prevalence and
18 alternatives of this kind of regulation, it
19 remains extremely prevalent, and in our petition
20 reply brief in Appendix B, we collected a
21 sampling of laws that still reflect this.
22 Jurisdictions have found that it works. Other
23 things do not.

24 And, accordingly, we ask the Court to
25 reverse the judgment of the Fifth Circuit with

1 respect to its holding that strict scrutiny
2 applies to Austin's law.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

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

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