ANA/BAA Marketing Law Conference, Nov. 7, 2018

The Potential for Bringing General Constitutional Principles to Bear on Commercial Speech

Ronnie London, Davis Wright Tremaine LLP

Commercial Speech Doctrine

- Commercial speech is not "wholly outside the protection of the First Amendment." *Va. State Bd. Of Pharmacy v. Va. Citizens Consumers Council* (1976).
- Speech is entitled to protection if it concerns lawful activity and is not misleading
- Regulation allowed where (1) asserted interest is substantial; (2) regulation directly advances the interest; and (3) it is no more extensive than necessary. *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980).

Evolution of Protection

- It is "incompatible with the First Amendment" to censor or otherwise burden speech based on fear that people will make bad decisions, or to promote "what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).
- "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2000).
- When the government seeks to further its interests in the commercial arena, "regulating speech must be a last – not first – resort." *Id*. at 373.

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)

- State's acknowledged objective was to correct what it called an "imbalance" in the marketplace of ideas. But the government cannot restrict commercial speech on the theory it is "too persuasive."

  "In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime.

  "Likewise, the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles.

  That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."

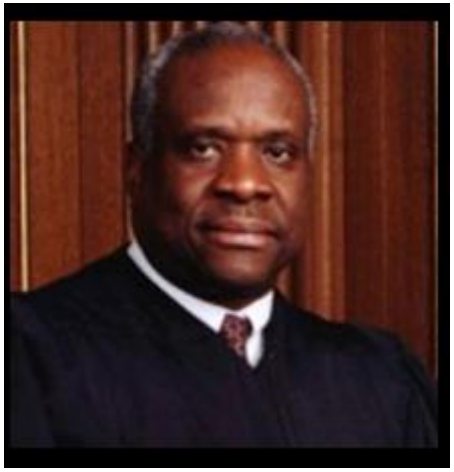
- The "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens.

- Such restrictions on speech are subject to "heightened scrutiny" and it is unnecessary to decide whether to apply the traditional test for regulating commercial speech.

Compelled Commercial Speech: *Zauderer*

- Warnings or disclosures may be required "in order to dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
- Such disclosure may be permissible to convey "purely factual" and "uncontroversial" information.
- Rational basis test: Information need only be "reasonably related" to preventing potential deception.
- Unduly burdensome disclosure requirements might offend the First Amendment.
- Reaffirmed in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 249 (2010).

Why Treat "Commercial Speech" Differently?



Justice Thomas, concurring in part, in *Matal v. Tam*:

> "I [] write separately because 'I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial."'" *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 572 (2001) (THOMAS, J., concurring in part and concurring in judgment); *see also*, e.g.*, 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 518, (1996) (same)."

Potential Tools from Non-Commercial Speech

- Presumptively unconstitutional compelled speech

  E.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)

- Presumptively invalid viewpoint discrimination

  E.g., *Matal v. Tam*, 137 S.Ct. 1744 (2017); *Rosenberger*

- Strict scrutiny for content-based regulation

  E.g., *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011)

COMPELLED SPEECH

Circuits Begin Expanding *Zauderer*

- ***National Elec. Mfrs. Ass'n*, 272 F.3d 104 (2d Cir. 2001)** (upheld requirement for manufacturers to label for presence of mercury and its proper disposal)
- ***New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009)** (upheld calorie-counts on menus/menu boards)
- ***Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005)** (upheld disclosure of conflicts of interest and certain financial arrangements)
- ***Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012)** (upheld graphic warning mandate for cigarette ads and packages despite disavowal of targeting potential to mislead)
- ***Cigar Ass'n of Am. v. FDA*, 315 F.Supp.3d 143 (D.D.C. 2018)** (upheld text warnings under *Zauderer*, bypassing need to target potential to mislead)

***But see R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)** (graphic warnings invalid for, *inter alia*, not targeting misleading marketing)

Reinterpreting *Zauderer*

***American Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*)**

- *Zauderer* "sweeps far more broadly than the interest in remedying deception."
- Overruled other cases limiting the government's interest.
- *Zauderer* does not require proof that disclosure "directly advances" the government's interest. Means-ends fit is "self-evidently satisfied" unless unduly burdensome.

. . . like an application of *Central Hudson* "where several of [the] elements have already been established . . ."

Reinterpreting *Zauderer*

***National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (*aff'd on rehearing*)**

- Invalidated SEC mandate for issuers using minerals from Democratic Republic of the Congo to state in reports and on websites whether products were "DRC conflict free"
- *Zauderer* is still limited to ads
- Disclosure was not purely factual and uncontroversial
- SEC presented no evidence to show asserted goal – promoting peace and security in the Congo – would be advanced by the disclosure
- SEC had burden to prove mandated disclosure would alleviate harms "to a material degree."

Reinterpreting *Zauderer*

***Kimberly-Clark Corp. v. D.C.*, 286 F.Supp.3d 128 (D.D.C. 2017)**

- "So what does it mean for a disclosure to be 'purely factual and uncontroversial'? Nobody knows exactly. "
- "Kimberly–Clark 'vehemently disagrees' that its wipes 'should not be flushed.' Indeed, that is what this suit is fundamentally about. The company designed its wipes to be flushable and 'strongly believes' it did so successfully. Yet the Act would suppress that view, while simultaneously compelling Plaintiff to announce that its wipes 'should not be flushed.' That requirement is hardly a "disclosure" of undisputed facts; rather, whether the wipes can be flushed—and the harms they might cause to sewers—is subject to serious debate. "

Remains Very Much in Play in Ninth Circuit

- ***Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009)** (disclosures must target consumer deception and be purely factual and noncontroversial, and cannot even "arguably ... convey a false statement"), *aff'd*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011)
- ***CTIA-The Wireless Ass'n v. City & Cnty. of San Fran.*, 494 F.App'x 752 (9th Cir. 2012)** (requiring cell phone retailers to provide RF radiation fact sheet violates First Amendment)
- ***CTIA-The Wireless Assn. v. City of Berkeley*, 854 F.3d 1105 (9th Cir.), *reh'g denied*, 873 F.3d 774 (9th Cir. 2017), *GVRed* 138 S.Ct. 2709 (2018)** (RF radiation disclosure requirements upheld)
- ***American Beverage Assn. v. City & Cnty. of San Fran.*, 871 F.3d 884 (9th Cir. 2017), *reh'g en banc granted*, 880 F.3d 1019 (9th Cir. 2018)** (invalidating sugar-sweetened beverage "health warnings")
- ***Nationwide Biweekly Administration, Inc. v. Owen*, 873 F.3d 716 (9th Cir., 2017), *cert denied* 138 S.Ct. 1698 (2018)**

CTIA-The Wireless Assn. v. City of Berkeley

- Ninth Circuit upheld denial of preliminary injunction of Berkeley ordinance requiring disclosures by cellphone retailers.
- Panel had concluded "any governmental interest will suffice so long as it is substantial" to support disclosure requirements.
- Disclosures are acceptable so long as they are "purely factual," dispensing with the inquiry into whether they may be "controversial."
- Court denied rehearing, saying "[o]ur opinion largely speaks for itself," and reaffirming expanded scope of *Zauderer*.

Am. Beverage Assn. v. City & Cnty. of San Fran.

- Invalidated compelled health "warning" on sugar-sweetened beverages as "misleading and, in that sense, untrue" in singling out only some sugared products.
- City sought to force advertisers to convey city's "disputed policy views" and Supreme Court precedent does not allow government to require corporations "to use their own property to convey an antagonistic ideological message."
- Size and format of required "overwhelms other visual elements in the advertisement" and turns ads "into a vehicle for a debate about the health effects of sugar-sweetened beverages."

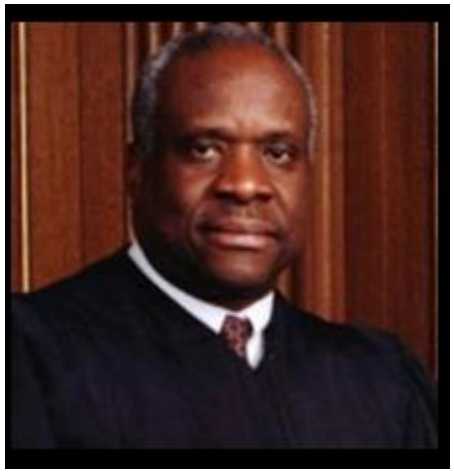
Nationwide Biweekly Admin., Inc. v. Owen

- California bars financial services ads from using name of potential customer's current lender or loan number/amount, absent multiple disclosures, including that competitor is not affiliated with or sponsored by, and offer is "not authorized" by, current lender
- Court could not discern "any meaningful difference between not being 'approved' by a lender and not being 'authorized' that would make the former accurate and the latter misleading."
- Citing *CTIA v. Berkeley*, held that "mere fact" that Nationwide "can conjure up a possible negative connotation of a word in the disclosure does not make the disclosure nonfactual."
- All but ignored *ABA* – relegated to footnote: "disclosures here are not contrary to any established facts or governmental policies."

Other Notable Circuit Cases

- ***National Inst. of Family & Life Advocates (NIFLA) v. Harris*, 839 F.3d 823 (9th Cir. 2016), *rev'd* 138 S.Ct. 2361 (2018)** (affirming denial of preliminary injunction against CA law mandating dissemination of notice by licensed pregnancy-related clinics citing availability of publicly-funded family-planning (incl. contraception and abortions), and by unlicensed pregnancy-related clinics noting lack of license)
  - Rejected application of *Zauderer*, and found content-based, but applied only intermediate scrutiny
- ***Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor & City Council of Baltimore*, 879 F.3d 101 (4th Cir.), *cert. denied* 138 S.Ct. 2710 (2018)** (invalidating disclaimers for limited service pregnancy centers stating they do not provide or make referrals for abortions)
  - Rejected application of commercial speech (and "professional speech") standard in favor of strict scrutiny

NIFLA v. Becerra, 138 S.Ct. 2361 (2018)



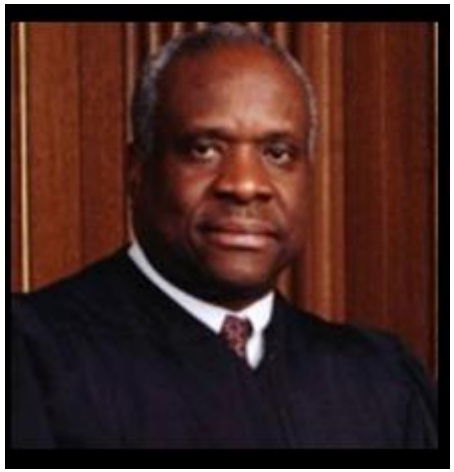
Strict scrutiny applies to notice for licensed facilities because it is content-based, compelled speech.

> Rejects use of "professional speech doctrine," finding "this Court has not recognized 'professional speech' as a separate category…. Speech is not unprotected merely because it is uttered by 'professionals.'"

Zauderer does not apply: (1) notice does not apply to services licensed clinics provide; (2) it is not limited to purely factual and noncontroversial information; (3) it is not an incidental restriction on professional conduct

"The licensed notice regulates speech as speech."

NIFLA v. Becerra, 138 S.Ct. 2361 (2018)

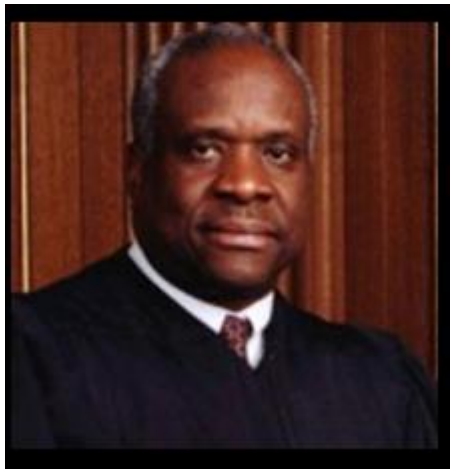


Not only does the licensed notice compel individuals to speak a particular message contrary to their views, it is over and under-inclusive.

"If California's goal is to educate low-income women about the services it provides, the…notice is 'wildly underinclusive'" because most community clinics are excluded, as are federal clinics.

"California could inform low-income women about its services without burdening a speaker with unwanted speech" by "inform[ing] the women itself" or "post[ing] the information on public property near crisis emergency centers."

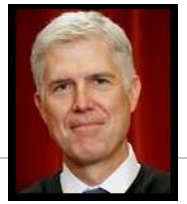
NIFLA v. Becerra, 138 S.Ct. 2361 (2018)



Court need not decide whether the law's disclosure requirement for unlicensed clinics is subject to *Zauderer*, for it would fail even under that test.

State has burden to prove unlicensed notice "is neither unjustified nor unduly burdensome," and its justification is "purely hypothetical."

Even if justified, it is too burdensome.



"This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern."

NIFLA v. Becerra, 138 S.Ct. 2361 (2018)

"[T]he majority's approach at least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."

"Virtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals to 'speak a particular message.'"

After *NIFLA*

- *Cert* denied in *Greater Baltimore Center*
- *NIFLA v. Becerra* remanded, Ninth Circuit vacates, remands to district court to apply remaining preliminary injunction factors
- *CTIA* GVRed, supplemental briefing on impact of *NIFLA* ordered
- Ninth Circuit orders supplemental briefing on *NIFLA* in *ABA*
- D.D.C. grants stay pending appeal in *Cigar Ass'n of America*

Why does it matter?

- Prop 65, anyone?
  - *CKE Restaurants, Inc. v . Moore*, 159 Cal.App.4th 262 (2008) (failure of Carl's Jr. to disclose naphthalene in fries, onion rings, fried zucchini)

  - *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Prop. Cas. Co.*, 197 Cal.App.4th 424 (2011) (failure to disclose DBP in nail products)
  - *Physicians Comm. For Responsible Med. v. KFC Corp.*, 224 Cal.App.4th 166 (2014) (failure of KFC, McDonald's, Applebee's, Outback, and Chick-fil-A to disclose PhIP)
  - *Harris v. R.J. Reynolds Vapor Co.*, 2017 WL 3617061 (N.D. Cal. Aug. 23, 2017) (failure to disclose formaldehyde and acetaldehyde in aerosols produced by electronic cigarettes)
  - *Center for Environ. Health v. Nutraceutical Corp.*, 2018 WL 3032254 (Cal. App. 1st June 19, 2018) (failure to disclose cocamide diethanolamine in cosmetic products)
  - *Charles v. Sutter Home Winery, Inc., et al.*, 232 Cal.App.5th 89 (2018) (failure to disclose inorganic arsenic in wines)

Why does it matter?

- Prop 65, anyone?

  Nat'l Ass'n of Wheat Growers v. Zeise, 309 F.Supp.3d 842 (E.D. Cal. 2018)

  - Challenged listing of glyphosate (used in herbicides) on State's listing of known carcinogens, and warning requirement accompanying it
    - "The Court's First Amendment inquiry here boils down to what the State of California can compel businesses to say."
  - Citing dispute between Int'l Agency for Research on Cancer and, *e.g.*, WHO, EPA on glyphosate's carcinogenic properties, held that requiring a "known to cause cancer" warning would be literally true but misleading to ordinary consumers, and thus unconstitutional under *Zauderer*

Why does it matter?

- Or, …

pyraflufen-ethyl, ethyl 2-[2-chloro-5-(4-chloro-5-difluoromethoxy)-1-methyl-1H-pyrazol-3-yl]-4-fluorophenoxy] acetate, and its acid metabolite, E–1, 2-chloro-5-(4-chloro-5-difluoromethoxy-1-methyl-1H-pyrazol-3-yl)-4-fluorophenoxyacetic acid, calculated as the stoichiometric equivalent of pyraflufen-ethyl in or on the following RACs: Cottonseed subgroup 20C at 0.04 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.01 ppm; fruit, stone, group 12–12 at 0.01 ppm; hop, dried cones at 0.02 ppm; nut, tree, group 14–12 at 0.01 ppm; tropical and subtropical, small fruit, edible peel, subgroup 23A at 0.01 ppm; and vegetable, tuberous and corm, subgroup 1C at 0.02 ppm. Available analytical methodology involves multiple-step extractions of the chemical residues from plants and using Gas

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 403

[CMS–4187–P]

RIN 0938–AT87

Medicare and Medicaid Programs; Regulation To Require Drug Pricing Transparency

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the Federal Health Insurance Programs for the Aged and Disabled by amending the Medicare Parts A, B, C

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4187–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Cheri Rice, (410) 786–6499.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in

VIEWPOINT NEUTRALITY

Matal v. Tam, 137 S.Ct. 1744 (2017)

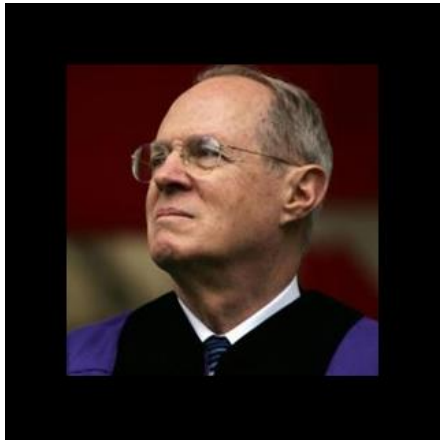
"15 U.S.C. § 1052(a) … offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." "Giving offense is a viewpoint."

Matal v. Tam, 137 S.Ct. 1744 (2017)

Court rejects argument that trademarks are commercial speech and that Section 2(a) must be upheld under *Central Hudson* intermediate scrutiny.

- **Declines to resolve level of scrutiny required, as "the disparagement clause cannot withstand even *Central Hudson* review."**
- **The government has no legitimate interest in "preventing speech expressing ideas that offend."**
- **Section 2(a) "is not an anti-discrimination clause; it is a happy-talk clause."**

Matal v. Tam, 137 S.Ct. 1744 (2017)



"The viewpoint-discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties. "

- Section 2(a)'s ban on derogatory marks "is the essence of viewpoint discrimination."
- "[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise."
- **Trademarks involve "expression of everyday life." "*Commercial speech is no exception*" to the rule that "heightened scrutiny" applies if regulation is based on disagreement with the message.**

In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2018)

fuct®

- "We conclude [] that § 2(a)'s bar on registering immoral or scandalous marks is an unconstitutional restriction of free speech. "
- "While we question the viewpoint neutrality of the immoral or scandalous provision, we need not resolve that issue. Independent of whether the immoral or scandalous provision is viewpoint discriminatory, we conclude the provision impermissibly discriminates based on content in violation of the First Amendment."

In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2018)

fuct®

- "There can be no question that the immoral or scandalous prohibition targets the expressive components of the speech" because it is based on "whether a 'substantial composite of the general public' would find the mark 'shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; ... giving offense to the conscience or moral feelings; ... or calling out for condemnation.'"
  - "The Supreme Court's decision in *Tam* supports our conclusion that the government's interest in protecting the public from off-putting marks is an inadequate government interest for First Amendment purposes."

Wandering Dago, Inc. v. Destito, 879 F.3d 20 (2d Cir. 2018)

- The "defendants denied WD's applications solely because of it's ethnic-slur branding" and *Matal v. Tam* "clarifies that this action amounts to viewpoint discrimination … prohibited by the First Amendment.'"
  - "By rejecting WD's application only on the ground of its branding, defendants impermissibly discriminated against WD's viewpoint and therefore ran afoul of the First Amendment, whether WD's speech is categorized as *commercial speech*, speech in a public forum, or speech in a nonpublic forum."

Am. Freedom Def, Initiative v. King Cnty., 2018 WL 4623720 (9th Cir. Sept. 27, 2018)

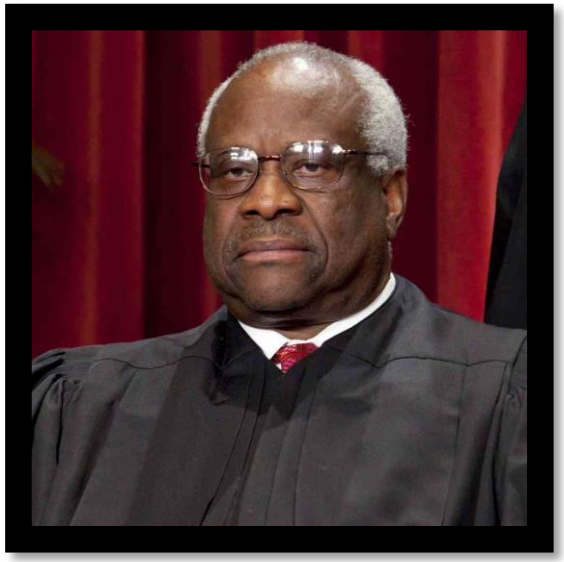
- "The County's disparagement standard discriminates on its face" and "*Matal* applies with full force …."
  - "Metro accepts ads on a wide range of subject matters, including terrorism, but denies access to Plaintiffs and anyone else if the proposed ad offends. We cannot conclude that the appropriate limitation on subject matter is 'offensive speech' any more than we could conclude that an appropriate limitation on subject matter is 'pro-life speech' or 'pro-choice speech.'"

STRICT SCRUTINY

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

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."

- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."
- "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."

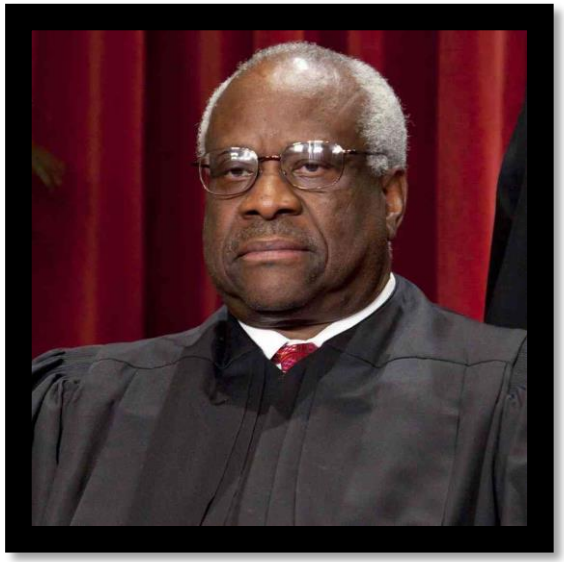


Justice Clarence Thomas

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

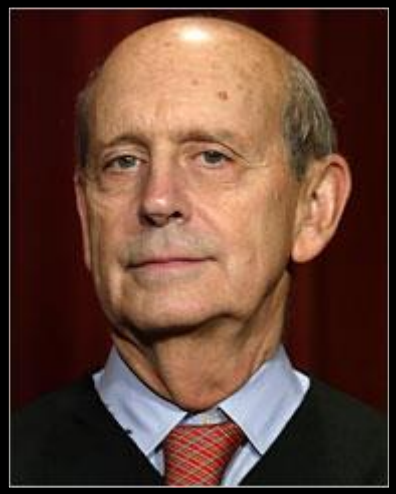
"An innocuous justification cannot transform a facially content-based law into one that is content neutral"

- "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech."
- "The restrictions in the Sign Code that apply to any given sign [ ] depend entirely on the communicative content of the sign. * * * * We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."



Justice Clarence Thomas

Reed v. Town of Gilbert: Concurring Opinions



Justice Breyer

"Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."

"We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."

Justice Kagan

How far does *Reed* extend?

- *Wagner v. City of Garfield Heights*, --- Fed.Appx. ----, 2017 WL 129034 (6th Cir. Jan. 13, 2017) (GVR post-*Reed*, holding "embrace of context-dependent inquiry into [] content neutrality … may be inconsistent with *Reed*").
- *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015); *Gresham v. Rutledge*, 2016 WL 4027901 (E.D. Ark. 2016) (invalidating, respectively, South Carolina and Arkansas statutes prohibiting unsolicited marketing and politically related calls as content-based and unconstitutional under the First Amendment)

How far does *Reed* extend?

- *Contest Promotions, LLC v. City and Cnty. of San Fran.*, 874 F.3d 597 (9th 2017) (rejecting *Reed* as altering or undermining *Central Hudson*)
  - *See also Vugo, Inc. v. City of N.Y.*, 309 F.Supp.3d 139 (S.D.N.Y. 2018) (despite holding regulation content-based because it applies only to advertising, invalidating it under *Central Hudson* because it has "not been explicitly overturned")
- *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (11th Cir. 2017) (affirming preliminary injunction against ordinance prohibiting "commercial handbilling" under *Central Hudson*, despite district court finding it regulated more than commercial speech, insofar as it reached mere references to commercial establishments, and referenced *Reed* in enjoining)
  - *But see Sweet Sage Café, LLC v. Town of N. Reddington Beach*, 2017 WL 385756 (M.D. Fla. Jan. 27, 2017) (exemptions like that found in *Reed* required strict scrutiny and invalidation even where plaintiff's signs were for commercial enterprise), *appeal dismissed at request of Appellant*, 2017 WL 3624097 (11th Cir. Apr. 4, 2017)
- *Gallion v. Charter Commc'ns Inc.*, 287 F.Supp.3d 920 (C.D. Cal. 2018); *Brickman v. Facebook, Inc.*, 2017 WL 386238 (N.D. Cal. Jan. 27, 2016) (*Reed* applies to challenge to TCPA, but per *Williams-Yulee v. Florida Bar*, strict scrutiny is not "'strict in theory, but fatal in fact," and TCPA survives)

BRETT KAVANAUGH

- Judge on U.S. Court of Appeals for the D.C. Circuit since 2006
- Served in the Bush White House 2001-2006
- Associate Counsel to Kenneth Starr and helped draft impeachment against Clinton
- Law clerk to Justice Anthony Kennedy in 1993
- Graduated Yale Law School in 1990
- Born Feb. 12, 1965

BREAKING NEWS

NBC: TRUMP PICKS JUDGE BRETT KAVANAUGH FOR SCOTUS

MSNBC

Selected Reviews

"The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump's finest hour, his classiest move. Last week the president promised to select 'someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States.' In picking Judge Kavanaugh, he has done just that."

Professor Akhil Reed Amar
***A Liberal's Case for Brett Kavanaugh*, NEW YORK TIMES, July 9, 2018.**

"Here's the bullet: Kavanaugh has been an appellate judge for 12 years and has written many opinions on free speech issues. They trend very protective of free speech, both in substance and in rhetoric. His opinions are consistent with the Supreme Court's strong protection of free speech rights this century."

Ken White
***You'll Hate This Post on Brett Kavanaugh and Free Speech*, POPEHAT BLOG, July 10, 2018**

Kavanaugh's First Amendment Track Record

- Commercial Speech
  - *American Meat Inst*, 760 F.3d 18 (concurring op.) (upholding country-of-origin labeling requiring but on narrower grounds than majority)
- Government Speech
  - *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758 (D.C. Cir. 2007) (government can fund only NGOs that adopt a message of anti-sex-trafficking on the grounds that the government could fund the message it chose)
  - *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008) (the government can restrict who can advertise in military newspapers because such papers are government speech)