

A Reed in the wind or
wandering in a dark woods

Reed v. Town of Gilbert

- Government regulation of speech is “*content based*,” and thus *presumptively unconstitutional*, if:
- a law applies to particular speech because of the *topic discussed* or the idea or message expressed, and
- 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*.

Reed v. Town of Gilbert, Con't

- 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, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
- Laws, though facially content neutral, that cannot be justified without reference to the content of the regulated speech must satisfy *strict scrutiny*.

Thomas v. Schroer, 127 F. Supp. 3d 864 (W.D. Tenn. 2015)

- The State contends that the Billboard Act is content neutral. While on its face the Billboard Act articulates potentially content-neutral restrictions—on-premises versus off-premises—the restrictions under the Billboard Act hinge on content.
- In short, the State argues that Thomas’s sign must be regulated because its non-commercial message does not “speak[] up for the things going on there at that premise.” Thus, the statute’s language, the State’s rules, and the State’s reasoning support a finding that the Billboard Act is content based.

Thomas v. Schroer, Con't

- In his concurring opinion in *Reed*, Justice Alito described the off-premises/on-premises distinction as content neutral. This Court agrees it is possible for a restriction that distinguishes between off- and on-premises signs to be content neutral. For example, a regulation that defines an off-premise sign as any sign within 500 feet of a building is content neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in *Reed*.

Thomas v. Schroer, Con't

- There is no question that Thomas's Crossford Sign displaying an American flag and Olympic rings is non-commercial speech. Because the Billboard Act is a content-based regulation that applies to both commercial and non-commercial speech, and because the nature of the speech at issue is non-commercial, the Billboard Act must survive strict scrutiny to be found constitutional.

*Geft v. Consolidated City of Indianapolis,
87 F.Supp 3d 1002 (S.D. Ind. May 10,
2016)*

- The Sign Ordinance classifies nearly all signs as being either “on-premises” signs or “off-premises” signs.
- GEFT argues that the on-premises and off-premises distinction that relates only to commercial signs constitutes a content-based regulation of speech subjecting it to strict scrutiny under the test set forth in Reed. The City rejoins that Reed addressed only noncommercial speech and did not change or otherwise affect the long line of precedent holding that commercial speech is subject to intermediate rather than strict scrutiny....

Geft, Con't

- Since *Reed* did not pertain to commercial speech and omitted any mention of *Central Hudson* and its progeny, in which the Supreme Court directly addressed the issue of on/off-premises regulations in the commercial context, we have adopted the approach taken by a majority of the courts who have addressed the issue and hold that, since *Reed* does not change the controlling precedent, the Amended Sign Ordinance's on/off-premises distinction, which applies only to commercial speech, is subject to intermediate rather than strict scrutiny.
- On May 20, 2016, the Court entered an order on GEFT's request for preliminary injunction in which it held, in part, that the Old Sign Ordinance violated the First Amendment.

AusPro v. TxDOT, 506 S.W.3d 688 (Tex.App—Austin 2016)

- Dependent as it is on *Reed* and Auspro's underlying claim concerning a restriction of noncommercial speech, our decision here is necessarily limited to government regulation of noncommercial speech....
- While we have acknowledged that *Reed's* holding seems to affect only restrictions of noncommercial speech.

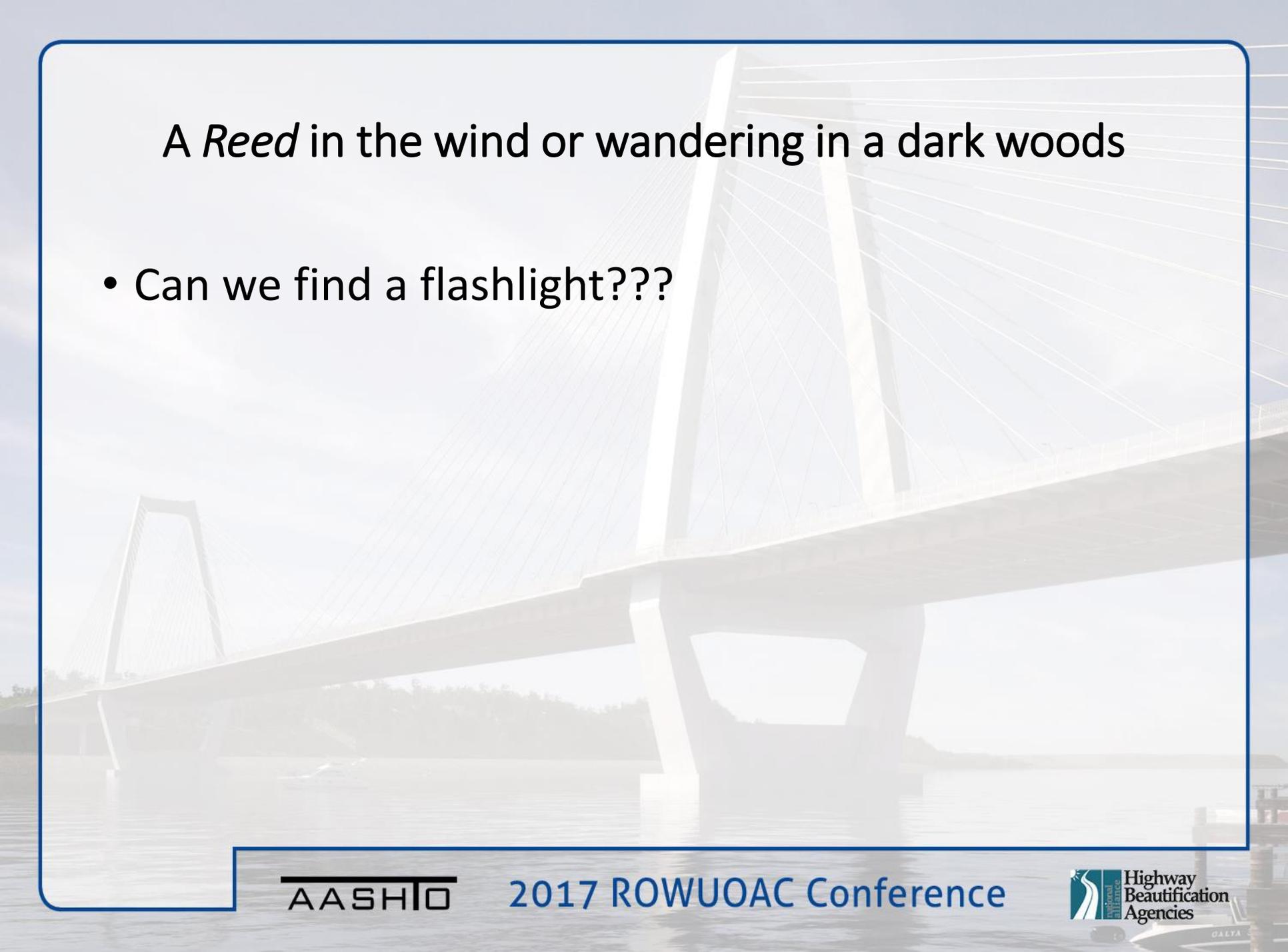
AusPro v. TxDOT

- [O]ur opinion holds that under *Reed* the Texas Highway Beautification Act's outdoor-advertising regulations and related Department rules are, as written, unconstitutional "content-based" regulations (as defined by *Reed*) of noncommercial speech because they do not pass strict-scrutiny analysis. The Legislature may see fit to amend the Act in an attempt to conform to *Reed* or to amend it such that it regulates only commercial speech within the applicable constitutional bounds. In short, it is for the Legislature, not this Court, to clarify its intent regarding the Texas Highway Beautification Act in the wake of *Reed*.

Expressions Hair Design v. Schneiderman, --- S.Ct. ---- (2017)

- If the challenged regulation restricts the ‘informational function’ provided by truthful commercial speech, courts will apply a ‘lesser’ (but still elevated) form of scrutiny. [*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 557, 563-5](#)

JUSTICE BREYER, concurring in the judgment



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- Can we find a flashlight???