No. 20-1029

In the
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,
Petitioner,
v.

REAGAN NATIONAL ADVERTISING OF TEXAS, INCORPORATED, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE, LOUISIANA MUNICIPAL ASSOCIATION, KENTUCKY LEAGUE OF CITIES, AND TENNESSEE MUNICIPAL ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did *Reed v. Town of Gilbert sub silentio* overrule *Metromedia, Inc. v. City of San Diego* such that distinctions in local government sign codes between on/off-premises signs are automatically content based as the Fifth and Sixth Circuits held, or are such distinctions subject to intermediate scrutiny as the Third and Ninth Circuits held.

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INTEREST OF AMICI[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal appellate courts.

The Texas Municipal League (TML) is a non-profit association of over 1,160 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 500 attorneys who represent Texas cities and city officials in the performance of their duties.

The Louisiana Municipal Association is a non-profit organization comprised of 305 governmental entities throughout the State of Louisiana (303 cities, towns, and villages, and 2 parishes) and it was formed in 1929

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici curia*e made a monetary contribution to its preparation or submission. *Amici* state that counsel for all parties received more than ten days' notice of *Amici's* intent in filing this brief and all have consented to the filing of this brief.

for the protection and promotion of the interests of its member entities and their citizens. The LMA fulfills its trifold mission of education, advocacy, and service to its members to promote efficiency and effectiveness in municipal governance.

The Michigan Municipal League (MML) is a non-profit organization comprised of over 500 cities, villages and townships in the State of Michigan. The MML was formed in 1899 for advocacy and educational purposes to advance municipal issues.

The Kentucky League of Cities (KLC) is a non-stock, nonprofit membership association serving 381 Kentucky cities, as well as many municipal agencies. 12 Kentucky cities came together in 1927 to create KLC in recognition of the need to establish a unified front on common legislative issues and create economies of scale for purchases. KLC continues in its mission to provide a united voice for our cities through legal and legislative advocacy, insurance services, and member services that support community innovation, effective leadership, and quality governance.

The Tennessee Municipal Attorneys Association is a voluntary association of city attorneys, assistant and deputy city attorneys, and other municipal practitioners across the state of Tennessee. The Association has 133 members representing cities and towns in east, middle, and west Tennessee. The purpose of the Association is to promote professionalism and competence in the practice of municipal law, to be a clearinghouse of municipal legal information for Tennessee attorneys, to facilitate communication among Tennessee's municipal

practitioners, and to work with the Tennessee Municipal League to promote favorable public policy for Tennessee's cities and towns. The Association regularly provides Continuing Legal Education programs for its members.

This case is of significant concern to the nearly 40,000 local governments nationwide as the circuit split presented has disrupted a basic regulatory function of local governments in this country. *Amici* are member organizations for local governments and one of their core functions is to provide education and guidance to their members on legal issues, including the First Amendment and sign regulation. Since this Court's decision in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), however, they have been unable to definitively advise their members as to whether they can rely on *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) to distinguish between on/off-premises signs and a host of other issues involving arguable content based distinctions common to sign regulations such as distinguishing between commercial and non-commercial speech as allowed in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557 (1980). Because this case presents an ideal vehicle to clarify an important area of First Amendment jurisprudence that affects virtually every local government in this country this Court should grant certiorari and resolve the circuit split.

SUMMARY OF ARGUMENT

In the 2018 ALCS game between the Boston Red Sox and Houston Astros, the umpire called Jose Altuve out for fan interference when fans knocked the would-be home run out of Mookie Betts' glove. In contrast, Chicago Cub fans will never forget the infamous no-call fan interference play in the 2013 NLCS game, after which the Cubs blew a lead and lost the series. While differences in interference calls in baseball games may frustrate die-hard fans, they are part of a pastime that inevitably requires subjective decision-making by umpires. But the First Amendment of the United States Constitution should not be applied unevenly depending on geography.

Unfortunately, that is what has happened in the wake of this Court's decision in *Reed*. Local government attorneys in Boise, Pittsburgh, and Washington D.C. can confidently advise their clients to draft a sign code that makes distinctions between on/off-premises signs while their counterparts in Lubbock and Toledo violate the First Amendment when drafting the exact same ordinance. Meanwhile, for tens of thousands of local governments in the First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, the jury is still out regarding the same distinctions in sign codes. Those jurisdictions must resort to reading tea leaves and risking costly litigation on the one hand or allowing unsafe driving conditions on the other.

This is not a hypothetical concern. Since this Court decided *Reed,* which some courts dubbed a "sea

change"[2] while others downplayed its impact (further compounding the confusion for local government attorneys), the decision has resulted in a staggering onslaught of lawsuits against local governments. Litigants are using *Reed* to invalidate everything from sign codes and panhandling ordinances to wage equity laws and robo-call regulations.

In the meantime, thousands of local governments have sought to follow Justice Alito's guideposts in his concurrence in *Reed,* which, consistent with *Metromedia*, allows for distinctions between on/off-premises signs. The constitutionality of those distinctions is now uncertain. This Court's intervention is needed to provide a clear and uniform rule for local governments that seek to balance First Amendment principles with the health, safety, and welfare of their citizenry.

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[2] *Wollschlaeger v. Governor*, 848 F.3d 1293, 1332-33 (11th Cir. 2017) (Tjoflat, J. dissenting) ("On its face, *Reed* announced a sea change in the traditional test for content neutrality under the First Amendment, and, in the process, expanded the number of previously permissible regulations now presumptively invalid under strict scrutiny.")

ARGUMENT

I. THE CIRCUIT COURTS ARE SHARPLY DIVIDED FOLLOWING THIS COURT'S DECISION IN *REED*, RESULTING IN CONFUSION FOR LOCAL GOVERNMENTS

Distinctions in local government sign codes between on/off-premises signs are extremely common.[3] For example, according to a leading scholar and professor of land use law who has consulted with local governments on the constitutionality of sign ordinances for almost 50 years, he "cannot recall ever seeing a sign ordinance that does not have the off premise vs. on premise distinction."[4] Two other local government land use specialists that regularly consult with *Amici's*

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[3] *See e.g.,* Cary, N.C., Land Development Ordinance, ch. 9.1.3 (defining off-site sign to mean "any sign that is used to attract attention to an object, person, product, institution, organization, business, service, event, or location that is not located on the premises upon which the sign is located'); Montgomery Co., Md. Zoning Ordinance § 59.1.4.2 (defining off-site sign as "[a] sign that identifies a location, person, entity, product, business, message, or activity that is not connected with a use that is lawfully occurring on the property where the sign is located."); Tucson, Ariz., Unified Development Code, art. 11.4.16 (defining off-site sign as "[a] sign not located on the premises of the use identified or advertised by the sign.")

[4] E-mail from Daniel Mandelker, Professor of Land Use Law and State and Local Government Law, Wash. Univ. in St. Louis School of Law, to Amanda Karras, Deputy Gen. Counsel, Int'l Mun. Lawyers Assoc., (Feb. 2, 2021, 5:23 pm EST) (on file with author). Professor Mandelker is the co-author of Planning and Control of Land Development LexisNexis (9th ed. 2016), and author of Street Graphics and the Law, American Planning Association (4th ed. 2015).

members agree, noting nearly all sign codes they have worked on make these distinctions.[5]

Nevertheless, local governments in the Fifth and Sixth Circuits have been hamstrung by decisions holding that code distinctions between on/off premises signs are content based and subject to strict scrutiny. *See Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696, 704 (5th Cir. 2020); *Thomas v. Bright*, 937 F.3d 721, 729 (6th Cir. 2019). Meanwhile, local governments in the Third, Ninth, and D.C. Circuits can move forward as they have for 40 years making distinctions between on/off-premises signs in their codes without fear of triggering strict scrutiny. *See Strict Scrutiny Media Co. v. City of Reno*, 812 F. App'x 462, 464, 2020 U.S. App. LEXIS 21296, at 4 (9th Cir. 2020); *Adams Outdoor Advert. Ltd. P'ship v. Pa. DOT*, 930 F.3d 199, 207 n.1 (3d Cir. 2019); *Act Now to Stop War & End Racism Coal. v. District of Columbia,* 846 F.3d 391, 404 (D.C. Cir. 2017). The confusion in the circuits arises not only from the narrow issue of on/off-premises distinctions in sign codes, but more broadly on the question of whether the simple "need to read" a sign to determine its import renders it impermissibly content based. The issues are intertwined and have spawned divergent opinions among the circuits,

[5] E-mail from Susan Trevarthen, Partner, Chair of Public Sector Land Use and Zoning Practice Group, Weiss Serota Helfman Cole & Bierman to Amanda Karras, Deputy Gen. Counsel, Int'l Mun. Lawyers Assoc., (Feb. 1, 2021, 12:17 pm EST) (on file with author). E-mail from Brian Connolly, Shareholder with Otten Johnson and Professor of Land Use Planning at the Univ. of Colo. School of Law in Boulder and the Univ. of Denver Sturm College of Law to Amanda Karras, Deputy Gen. Counsel, Int'l Mun. Lawyers Assoc., (Jan. 22, 2021, 6:59 pm EST) (on file with author).

resulting in significant uncertainty for local governments.

For example, in *Thomas*, Tennessee argued that the on/off premises distinction in the State's Billboard Regulation and Control Act was content neutral under *Reed* as it relied on the sign's location rather than its content. The State counted six of nine Justices in *Reed* that would have applied intermediate scrutiny to such a distinction. *Thomas*, 937 F.3d at 732. The Sixth Circuit disagreed, holding the regulation was content based and subject to strict scrutiny. *Id.* at 733. The court reasoned that in order "to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose." *Id.* at 730. (emphasis added).

The Fifth Circuit below agreed with the Sixth Circuit's reasoning in *Thomas*, concluding that Austin's on/off-premises distinction was an "obvious content-based inquiry" that "does not evade strict scrutiny. . . simply because a location is involved." *City of Austin*, 972 F.3d at 707 (citing *Reed*, 576 U.S. at 170). The court reasoned that to determine whether a sign is "off-premises" and therefore not allowed to be digitized, government officials must read it. *Id.* at 704.

In contrast, the Third Circuit declined to apply strict scrutiny to a sign code's on-premises exemption because *Reed* did not address an exemption for on-premises signs, and because the concurring opinions by Justices Alito and Kagan, which received a total of six votes, indicated that on-premises sign regulations are

content neutral and strict scrutiny would *not* apply to outdoor advertising regulations merely because they provide an exemption for on-premises signs. *Adams Outdoor Advert. Ltd. P'ship*, 930 F.3d at 207 n. 1. The court added that *Reed* did not establish a legal standard to evaluate laws that distinguish between on/off-premises signs. *Id.*

The Ninth Circuit, like the Third, also applied intermediate scrutiny to an off-premises ban of commercial speech. In *Strict Scrutiny Media Co. v. City of Reno*, the court held Reno's ban on off-premises billboards "created for the purpose of advertising or promoting the commercial interest of any person . . . which is not principally sold, available or otherwise provided on the premises" is a commercial speech restriction subject to the *Central Hudson* test instead of *Reed*'s strict scrutiny standard. 812 F. App'x. at 464 (quoting Reno Nev. Land Dev. Code § 18.24.203.4570(24)). The Fifth and Sixth Circuits would have concluded that if someone must read the sign to determine if goods are sold on the premises the sign code provision is content based, requiring strict scrutiny.

Adding to the confusion, while not a case involving an on/off-premises distinction, in its decision below, the Fifth Circuit acknowledged that the D.C. Circuit has taken the opposite approach in determining if a regulation is content based in the wake of *Reed*. *See City of Austin*, 972 F.3d at 705. *Act Now to Stop War & End Racism Coal. v. District of Columbia ("Act Now")* involved a District of Columbia regulation that allowed any sign to be affixed to a publicly owned lamppost for

no more than 180 days, but indicated that any sign related to a specific event would need to be removed 30 days after the event. *See Act Now,* 846 F.3d at 396; D.C. MUN. REGS. tit. 24, §§ 108.5, 108.6. The court rejected the plaintiff's arguments that *Reed* rendered the regulation content based, concluding the mere "fact that District officials may look at what a post says to determine whether it is 'event related' does not render the District's lamppost rule content based." *Id.* at 404. Just as an official in Austin, Texas or Franklin, Tennessee would have to read a sign to determine if it is on or off-premises (to see if "Joe's Tires" indeed was the purveyor of tires at that location), the D.C. Circuit reasoned that an official "might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser." But the signs in question would only be content based in Austin or Franklin and would be content neutral in Washington D.C.

Like the D.C. Circuit, the Ninth Circuit also rejected the argument that *Reed* means that an ordinance is *per se* content based simply because an enforcement officer must examine a message. *See Recycle for Change v. City of Oakland,* 856 F.3d 666, 670 (9th Cir. 2017). In *Recycle for Change*, the City made it unlawful to allow unstaffed donation collection boxes on any real property without the owner first obtaining a permit for the collection box. *Id.* at 668. The court concluded the ordinance was not a content-based regulation. *Id.* at 673. In rejecting the challenge to the provision, the Ninth Circuit explained "[t]he officer must read it test cuts too broadly if used as a bellwether of content. If applied without common

sense, this principle would mean that every sign, except a blank sign, would be content based." *Id.* at 671 (internal quotations omitted).

This split in the circuits has real world consequences for local governments, impeding one of their core regulatory functions and extending well beyond the question of on/off-premises signs. Whether this kind of cursory examination is compatible with *Reed*'s framework is a matter only the Court can reconcile. *Amici* seek review of these issues because their members have a strong interest in clear, uniform, and predictable standards for assessing whether a regulation which requires a government official to read a sign's message is inherently subject to strict scrutiny, and if so, whether such an examination subjects on/off-premises distinctions to *Reed*'s strict scrutiny standard as well.

II. CERTIORARI IS WARRANTED TO RESOLVE THE TENSION BETWEEN THIS COURT'S HOLDING IN *METROMEDIA* AND *REED*

In *Metromedia,* this Court held that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Metromedia*, 453 U.S. at 512. For the last 40 years, local governments around the country have relied on that ruling as a guidepost when drafting sign ordinances.

Despite what Respondents argued below, Justice Alito's concurrence in *Reed* did not "muddy the issue" as to whether on/off-premises regulations are content-

based and automatically subject to strict scrutiny.[6] To the contrary, his concurrence offered guidance to local governments by providing a non-exhaustive list of rules that would not be content based under the majority's ruling, including, significantly "[r]ules distinguishing between on-premises and off-premises signs." *Reed*, 576 U.S. at 174 (Alito, J., concurring). The inclusion of on/off-premises distinctions in Justice Alito's concurrence is hardly surprising given *Metromedia's* holding on the issue and the fact that *Reed* did not so much as mention *Metromedia,* let alone overrule it.

Though neither the Fifth or Sixth Circuits took *Metromedia* head on, the decisions in *Thomas* and the case below cannot be reconciled with *Metromedia's* on-point ruling to the contrary.[7] It is axiomatic that this Court does not, *sub silentio,* overrule its own precedents. In fact, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989). Far from heeding this requirement, the Fifth and Sixth Circuits ignored *Metromedia's* controlling precedent in the area of on/off-premises sign regulation, which was not overruled by *Reed.*

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[6] Brief of Appellant at 23, n. 3, *Reagan Nat'l Advert. of Austin v. City of Austin*, no. 19-cv-50354 (5th Cir. July 9, 2019).

[7] Indeed, it is unlikely that the on/off-premises distinction at issue in *Metromedia* would be upheld by the Fifth or Sixth Circuit given their "need to read" standard.

Adding to the confusion, other lower courts have explicitly rejected arguments that *Reed* should apply to on/off-premises sign distinctions over *Metromedia's* explicit holding to the contrary.[8] For example, in coming to its conclusion that *Metromedia* controls, the

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[8] *See e.g., Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, No. 17-cv-576-jdp, 2020 U.S. Dist. LEXIS 60861, at *34-36 (W.D. Wis. Apr. 7, 2020) (holding *Reed* did not "purport to change the level of scrutiny applicable to billboard regulations like Madison's, which single out signs for regulation based on … whether they direct attention on-or-off premise", reasoning that *Reed* made no mention of *Metromedia*); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM (AGRx), 2015 U.S. Dist. LEXIS 89454, at *26-27 (C.D. Cal. July 9, 2015), *aff'd* 244 Cal. App. 4th 291, 303-04 (2016) (concluding "that *Reed* has no bearing on this case" regarding on and off-site signs, which was "abundantly clear from the fact that Reed does not even cite *Central Hudson,* let alone apply it" and that "*Metromedia* and its progeny remain good law"); *Matter of Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals,* 46 N.Y.S.3d 725, 730 (App. Div. 4th Dept. 2017) (rejecting argument that distinctions in on and off-premises signs violate the First Amendment, concluding *Reed* "did not overturn the prevailing intermediate scrutiny test for restrictions on commercial speech and citing to *Central Hudson* and *Metromedia*); *see also Adams Outdoor Advert. Ltd. P'ship v. Pa. DOT*, 930 F.3d 199, 207 n. 1 (3d Cir. 2019) (applying intermediate scrutiny to on/off-premises distinction relying on its own decision in *Rappa v. New Castle Cty.,* 18 F.3d 1043, 1061 (3d Cir. 1994), which while critical of the Court's splintered reasoning in *Metromedia,* nevertheless concluded it was "bound by its result."); *But see Jeff Anthnoy* [sic] *Props. v. Alviti,* No. 1:19-CV-00360, 2020 U.S. Dist. LEXIS 121576, at *2 (D.R.I. July 10, 2020) (concluding although "it may have been a foregone conclusion some time ago that Rhode Island's statute [prohibiting off-premise advertising] be subjected only to intermediate scrutiny pursuant to [*Metromedia* and *Central Hudson*], the plaintiffs have raised a serious issue concerning whether *Reed* … is superseding authority in this context").

district court in *Adams Outdoor Advert. Ltd. P'ship v. City of Madison* acknowledged that:

> *Reed* may create some tension with *Central Hudson* and *Metromedia.* But the concurring opinions of Justices Breyer and Alito, and the absence of any mention of *Central Hudson* and *Metromedia* in the majority opinion, show that these two precedents apply to the regulation of billboards. Regardless of what *Reed* may portend for the Court's future decisions, this court has no authority to disregard a Supreme Court decision that the Court itself has not overruled. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (warning lower courts against concluding that more recent Supreme Court cases "have, by implication, overruled an earlier precedent").

City of Madison, 2020 U.S. Dist. LEXIS 60861, at *35-36.

What the district court in *City of Madison* called "tension," the nearly 40,000 local governments in this country call "confusion." If *Metromedia* is no longer good law, then more than anything, local governments need to know that, but the ruling must come from this Court.

III. UNLESS THIS COURT PROVIDES FURTHER CLARITY, *REED* WILL SUBVERT *CENTRAL HUDSON*

Conflicting interpretations of *Reed* are undermining far more than the regulation of on/off-premises signs. They threaten to eviscerate a longstanding and foundational pillar of First Amendment law—the rule that commercial speech may be regulated more stringently than non-commercial speech. Premised on the principle that commercial messaging which promotes unlawful, unsafe, or fraudulent business activity does not command the absolute protections afforded non-commercial speech, *Central Hudson* has endorsed intermediate scrutiny of commercial speech for more than four decades. *Central Hudson Gas & Electric Corp.*, 447 U.S. at 561.

Emboldened by *Reed*, adversaries of sign regulation are now blatantly re-casting the history and legitimacy of *Central Hudson*. And case law post-*Reed* is divergent. For example, several district courts concluded that *Reed* did not "explicitly" overturn *Central Hudson* even as some of these same courts acknowledged that commercial speech "inherently requires a content-based distinction." *See Boelter v. Hearst Communs., Inc.,* 192 F.Supp. 3d 427, n.10 (S.D.N.Y. 2016).[9] Other courts have underscored the uncertainty in this area, noting for example: "Whether the Supreme Court upended the *Central Hudson* intermediate scrutiny test in *Sorrell* or *Reed* for content-based or speaker-based commercial speech

[9] *See also Matter of Expressview Dev., Inc.,* 46 N.Y.S.3d at 730*; City of Madison*, 2020 U.S. Dist. LEXIS 60861, at *35-36.

regulations is not abundantly clear." *Chamber of Commerce of Greater Philadelphia v. City of Philadelphia*, 319 F.Supp. 3d 773, 784 (E.D. Pa. 2018).

Moreover, as noted in Part I, the Sixth Circuit applied *Reed* to strike a Tennessee law that distinguished between on/off-premises signs, applying the "if you must read" shorthand. *Thomas*, 937 F.3d at 930. While that court gave lip service to the mythology that a commercial speech regulation could still survive such a test, the Seventh Circuit, in reviewing the *Thomas* decision was unconvinced, noting the Sixth Circuit in *Thomas* "recently held that *Reed* supersedes *Central Hudson*." *See Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove*, 939 F.3d 859 (7th Cir. 2019).

One year after implicitly undermining *Central Hudson*, the Sixth Circuit did so more directly. In *International Outdoor, Inc. v. City of Troy*, the Sixth Circuit unambiguously ruled that *any* content-based sign regulation, including those that apply greater limitations on commercial speech, must now be subject to strict scrutiny analysis. 974 F.3d 690, 703 (6th Cir. 2020). The court held that the City's ordinance was invalid under *Reed* because it regulated commercial speech more rigorously than non-commercial speech—in other words, the very differentiation promoted by *Central Hudson*. *Id.* at 707-08. While the court took care to distinguish cases from the Second, Third, Ninth, and Tenth Circuits applying intermediate scrutiny to regulations of purely commercial speech post-*Reed*, nowhere did it affirm the continued viability of *Central Hudson*. *Id.* at 703-06.

In contrast to the Sixth Circuit, the Ninth Circuit unequivocally interpreted *Reed* as preserving *Central Hudson*. *See Contest Promotions, LLC v. City & Cty. of S.F.*, 867 F.3d 1171, 1175 (9th Cir. 2017). The *Contest Promotions* opinion upheld the municipality's planning code provision, which exempted noncommercial signs from regulation, applying intermediate scrutiny under *Central Hudson*. *Id.* at 1178.

While the case below does not directly address *Central Hudson,* the ripple effects of *Reed* are being felt far and wide, including in the area of commercial and non-commercial speech distinctions. This case presents a vehicle to restore clarity and stability to the entire ambit of speech regulation, allowing courts nationwide to adjudicate with confidence—and enabling local governments to better focus scarce resources on serving their constituents.

IV. THIS CASE PRESENTS AN IMPORTANT ISSUE FOR THE NEARLY 40,000 LOCAL GOVERNMENTS IN THIS COUNTRY

A. Studies Demonstrate that Digitized Off-Premises Signs Present Significant Safety Risks for Local Governments' Citizenry

This Court has recognized that traffic safety and a local government's aesthetics are substantial governmental interests, satisfying intermediate scrutiny.[10] *Metromedia*, 453 U.S. at 507-08. Even *Reed*

[10] While this section only addresses safety considerations, *Amici* agree with arguments that aesthetics are also a substantial and/or compelling governmental interest.

acknowledged that these interests may be compelling. *Reed*, 576 U.S. at 157. Whether the Court wishes to classify them as compelling or substantial, there can be no doubt that local governments have, pursuant to their police powers, the ability to regulate for the health, welfare, and safety of their citizenry. *See De Buono v. Nysa-Ila Med. & Clinical Servs. Fund,* 520 U.S. 806, 814 (1997) (noting "the historic police powers of the State include the regulation of matters of health and safety" (*citing Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)); *see also Ry. Express Agency, Inc. v. New York,* 336 U.S. 106, 109 (1949) (concluding the Court would be "trespassing on one of the most intensely local and specialized of all municipal problems" if it concluded New York's traffic regulation banning advertising vehicles "had no relation to the traffic problem of New York City.") Regulations intended to improve traffic safety fall squarely within state and local government historical police powers.

Courts consider traffic safety a substantial or compelling governmental interest for good reason. Driver distraction from digital billboards, which is what is at stake in this case, is significant.[11] Traffic

[11] Jerry Wachtel, Compendium of a Decade's Worth of Research Studies on Distraction from Digital Billboards (Commercial Electronic Variable Message Signs [CEVMS]), The Veridian Group, Inc, p. 3, October 16, 2020 (available on file with author) (hereinafter "Wachtel Safety Research Compendium"); *see also Hucul Advert., LLC v. Charter Twp. of Gaines*, 748 F.3d 273, 280-81 (6th Cir. 2014) (noting digital billboards are more likely to negatively impact safety because of their increased visibility and changing display); *Naser Jewelers, Inc. v. City of Concord,* 513 F.3d 27, 35 (1st Cir. 2008) (providing "it is given that a billboard can

studies demonstrate that the risk of distraction, and therefore of vehicular accidents, increases when digital billboards "competed for the driver's visual attention with more demanding road, traffic, and weather conditions, when travel speeds were higher, or when an unanticipated event or action (such as a sudden lane change or hard braking by a lead vehicle) occurred to which the driver had to respond quickly and correct." Wachtel Safety Research Compendium, p. 3. And, critically, "the most recent epidemiological studies have begun to demonstrate what has long been suspected but not proven – that roadside billboards are associated with increases in crash rates where such billboards are located." *Id.* at 4.

For example, a 2013 study from Denmark involved equipping cars with GPS tracking to measure speed, an eye tracking system, and a laser scanner to measure distances to other cars. *Id.* at 10. The study concluded that "advertising signs do affect driver attention to the extent that road safety is compromised." *Id.* Significantly, 22% of all drivers glanced at the advertisement for a total of two or more seconds. *Id.* And in approximately 25% of the cars studied, the safety buffer to the vehicle ahead of it was less than two seconds. *Id.* Laws of physics affirm the problem where a car traveling at 60 mph travels 88 feet per second. For a two second distraction, a car at that speed travels more than half a football field. Cognitive studies indicate that, while reaction times differ based on stimuli and human differences, the distraction

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constitute a traffic hazard" and concluding that digital billboards "which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous").

caused by digital billboards is significant and likely to cause an increase in traffic accidents.[12]

The implications of the Denmark study were borne out by a 2015 safety study from Florida and Alabama. In this study, a total of 454 collisions on high speed highways in the two states were analyzed, including locations associated with digital billboards and a control area without a billboard. *Id.* at 11, 35. The study found that "the presence of digital billboards increased the overall crash rates in areas of billboard influence compared to control areas downstream of the digital billboard locations. The increase was 25% in Florida and 29% in Alabama."[13] *Id.*

Conversely, research suggests that on-premises signs, and even on-premises digital signs, do not carry the same traffic risks. Specifically, a 2014 traffic study concluded there was "no evidence the installation of on-premise signs at these locations led to an automatic increase in the number of crashes." *Id.* at 10.

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[12] One business that discusses cognitive training describes the distinctions between how different stimuli and differences in people might affect reaction and response time. *Reaction Time Cognitive Ability-Neuropsychology*, COGNIFIT, https://www.cognifit.com/science/cognitive-skills/response-time (last visited Feb. 5, 2021). A less scientific approach easily identifies the distinctions: try and catch a ball thrown at you while you expect it and then try to catch a ball thrown at you when you don't expect it. Anticipated events reduce reaction and response times and improve the response. A distracted driver, like a person trying to react to an unexpected pass, cannot be expected to respond well and when behind the wheel of a car the results can be disastrous.

[13] The authors of the study noted the data set was too small to employ statistical analyses.

Where billboards, and in particular, digital billboards, are more likely to cause traffic accidents that could result in increased fatalities, local governments are well within their police powers to regulate those signs and determine, as the City did here, that the advertiser's interest in digitization is outweighed by the municipality's compelling interest in preventing traffic fatalities. Local governments should not have their hands tied behind their backs when it comes to such a core function. This Court should grant certiorari given the important public safety issues at stake.

B. The Issues in this Case are Important to Local Governments Who Spend Significant Time, Money, and Resources on Amending Sign Codes

Both large local governments like Las Vegas and Denver and small cities and towns like Lake Mary, Florida and Bentonville, Arkansas expend tremendous time, money, and resources to amend their sign codes. The process can take many months, or even years in some cases, and can involve: numerous staff meetings to develop language that achieve the goals of the entity; attorney research and drafting time; self-generated studies; site visits and photography; studying other local governments' sign regulations; hiring and meeting with outside sign law consultants; meetings with industry representatives; meetings with design commissions; back and forth review and approval by a sponsoring member of the council; presentations to city or county council; multiple public hearings before

planning commissions and councils; and review and public comment by citizens.

Once the ordinance is approved, the local government will, in some cases, undertake a public information campaign to educate representatives from various industries, it will amend its website, revise handouts, update references, and ultimately publish the ordinance revision in hard copy and online. Each stage in the process may require notice to the public and the production of voluminous staff reports, taking additional time and resources away from other local government functions.

Additionally, smaller localities lack specialized in house legal counsel and will often need to hire experts to help them navigate the legal complexities involved in amending their sign ordinances. Most local government attorneys are generalists, who advise their clients on everything from land use and zoning issues to questions about employment law and new technology like e-scooters and drones. They draft contracts, deal with natural disasters and FEMA reimbursement, handle economic development questions, securities regulations, and advise their clients on First Amendment issues. And lately, they have all been working tirelessly on their local governments' responses to the pandemic, addressing everything from issues surrounding public health regulations to ensuring that their latest zoom council meeting complies with the state's open meetings laws. Most are not sign law experts, and, given the lack of clarity in the law in this area, many have resorted to hiring

consultants to help advise them on revising their sign ordinances.

For example, Bentonville, Arkansas, with a population of 50,000, hired an outside sign law expert to help update its ordinance. The process took several months and hundreds of staff hours, in addition to the time recorded by their paid consultant. Monroe County, Florida, population 75,000, also hired an outside sign code consultant, taking more than three years to amend its ordinance. Manitowoc, Wisconsin, a city of 30,000, recently hired an outside sign consultant and expects the process to be completed in nine months to a year. Litigation can also prolong the process; in Madison, Wisconsin, legal action caused the last major overhaul to consume more than five years. These are merely four examples of many thousands like them. Outside sign experts can cost these local governments, many small and strapped for cash, tens of thousands of dollars.

This is not to say that updates to sign codes are not helpful. Local governments undeniably have a vested interest in ensuring that their sign regulations are responsive to First Amendment rights. Following *Reed,* local governments in great numbers undertook the task of overhauling their sign regulations, taking care to avoid content based distinctions. In doing so, they relied on *Metromedia* and Justice Alito's concurrence in *Reed* that distinctions in on/off-premises signs are not automatically content based distinctions subject to strict scrutiny. Austin is one of many hundreds, if not thousands, of local governments that make these distinctions.

Even more problematic than the Fifth and Sixth Circuit's decisions ignoring this Court's precedent, thousands of local governments in circuits that have not yet weighed in on the split involving on/off-premises sign distinctions and the "need to read" conundrum are stuck in limbo. This Court should grant certiorari to clarify that it did not overturn *Metromedia* or *Central Hudson sub silentio* and that local governments may continue to rely upon them.

CONCLUSION

The Court should grant the City of Austin's petition for writ of certiorari.

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