No. 20-1029

In The
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, INCORPORATED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS*

The American Planning Association (APA) is a non-profit, public-interest research organization founded in 1978 to advance the art and science of land use, economic, and social planning and development at the local, regional, state, and national level. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 39,000 practicing planners, elected officials, and citizens in 47 regional chapters, working in the public and private sector to formulate and implement planning, land use, and zoning regulations, including the regulation of signs. APA has long educated the nation's planning professionals on the planning and legal principles that underlie land use regulation through publications and training programs, as well as by filing numerous *amicus curiae* briefs on important land use law questions in state and federal courts across the country.[1]

SUMMARY OF ARGUMENT

For more than a century, planners have developed and implemented sign regulations for the same reason

[1] Pursuant to Rule 37.6, APA affirms that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than APA or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have indicated via email to the undersigned counsel of record that they consent to the filing of this *amicus curiae* brief.

they have regulated land uses more generally: to create functioning, safe, and attractive communities. As technologies, economics, and preferences have evolved for residents and industry alike, the planning profession has developed planning and regulatory approaches to accomplish these goals—and the judiciary has given them latitude to do so. The American Planning Association has filed this brief in support of neither party because, more than anything else, planners and their colleagues in law, public management, real estate development, and elected office, seek clarity as to: (1) what they may, and may not, do in regulating signs as they fulfill their responsibility to advance the welfare of their communities; and (2) how they may respond to community-specific needs and interests in sign and land use regulation.

Two miles east of Kingdom City, Missouri, billboards so dominate the landscape that six of them spell M-I-Z-Z-O-U—one 672 square-foot sign face for each letter.

Figure 1—For drivers wondering which university central Missourians cheer for, this mile on I-70 will likely answer such an inquiry. Photo credit: The Journal, https://websterjournal.com/2013/11/03/student-athletes-call-for-removal-of-chess-billboard/.

Although the University of Missouri fans traveling this stretch of Interstate 70 likely appreciate the mile-long roadside pep rally, many communities prefer not to be dominated by the oversized, bright, attention-seeking signage known as the "billboard." Certainly, run-of-the-mill yard signs offer a medium for citizens to speak on important issues, and monument and wall signs give businesses a means to identify themselves and connect with customers. Yet signage that is too big, too tall, too bright, too numerous—or too small, unlit, or too few—reflects a community that does not function well and appears unattractive, perhaps even undermining speakers' messages.

Signs impact the function and appearance of the built and natural environments in every neighborhood and every community. Because of their outsized functional, safety-related, aesthetic, and other impacts, all fifty states and most all of the nation's nearly 40,000 local governments regulate them. At the same time, few fundamental rights bring ordinary citizens into contact with their government as sign regulations do. Every person who posts a sign, advertises a brick-and-mortar business, or simply experiences the built environment from a car, transit vehicle, or sidewalk interacts, whether consciously or not, with sign regulation.

Despite the importance of signage to the built environment, planners and their colleagues operate under confusing legal guidance, particularly as it relates to billboards. The modern quartet of sign regulation opinions, spanning *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977) has left planners, and the businesses and citizens who rely on consistent sign regulations, to improvise. When confronted with at-times fractured judicial opinions addressing lofty First Amendment signage questions, planners responsible for the day-to-day management of sign permits and code enforcement lack clear guidance. With this case, the Court can provide that guidance. Reversal of the court of appeals' decision would reaffirm longstanding practice and provide a clear, commonsense means to achieve communities' aesthetic and functional goals.

However, the Court can provide this needed guidance irrespective of its decision in this case. Importantly, it can do so while avoiding a one-size-fits-all mandate and preserving the ability of local communities to achieve their community-specific planning goals.

LEGAL ARGUMENT

A. Regulation of Signs and Outdoor Advertising Serves Several Significant Governmental Interests and is a Necessary Component of Functional, Safe, and Aesthetically Pleasing Communities.

The function and appearance of today's communities and roadsides is no accident. For more than a century, planning, zoning, and building regulations have shaped what can be built, where it can be built, and how it can be used. Today, the archetypal zoning and development ordinance (or code) addresses both the functional and design aspects of urban, suburban, or rural development. Zoning addresses matters such as whether a new industrial plant can dominate a residential neighborhood and the setbacks and number of parking spaces a new restaurant must have—and the subtler aspects of city design, such as whether buildings are oriented adjacent to the sidewalk to create a walkable urban feel, or set back behind broad yards or large parking fields as in suburban areas.

Communities distinguish themselves by these regulatory choices. For example, in Washington, D.C., a strict building height limit sets the District apart from

all other major American cities and ensures that the Capitol maintains its prominence among the District's skyline. Similarly, in Denver, a building ordinance protects iconic vistas of the Rocky Mountains. In Boston, Charleston, and New Orleans (to name only a prominent few), historic preservation rules preserve and protect noteworthy structures and neighborhoods. A community's planning and regulatory choices reflect its values today and its aspirations for tomorrow. Community members, property owners, developers, and public officials collectively identify these goals, and professional urban planners and their counterparts in law and public management provide the planning, regulatory, and enforcement mechanisms to achieve them. Such is the daily function of the police power.

At once mundane and constitutionally intriguing, signs serve an important role in shaping the function, form, and character of our neighborhoods, communities, and places. They are a use of property, their structures form part of the built environment, and, like building design, signs define the community character. The signage found in Pigeon Forge, Tennessee, the tourism-oriented gateway to Great Smoky Mountains National Park says as much about that community's goals and interests as the historically-sensitive signage found in Colonial Williamsburg, Virginia.

Figure 2—Appalachia's most prominent inter-family feud is represented in one large caricature of a sign in Pigeon Forge, Tennessee. Photo credit: Billy Hathorn, Creative Commons.

Figure 3—Colonial Williamsburg's 18th Century aesthetic is reinforced by its signage. Photo credit: David Broad, Creative Commons.

Each community, like others nationwide, has made a deliberate choice about its built environment, including its signage.

In addition to serving as a conduit for protected expression, signs index the community. They "tell people where to find what." DANIEL R. MANDELKER ET AL, STREET GRAPHICS AND THE LAW 9 (4th ed. 2015). A small community without signs would work well only if no one ever visited, just as an interstate highway without signs would be barely navigable. A community or highway with too many signs, or signs that are too bright, too tall, too distracting, too cluttered, or too garish would also function poorly, creating confusion and

undermining the impact of any given speaker's message. For most communities, balancing the needs of speakers and the broader community with the appropriate amount and types of signage lies somewhere between these two extremes. Moreover, that balance varies between communities: what is appropriate for downtown Chicago may not be appropriate for Key West or Annapolis.

In balancing these interests, states and local governments regulate signs to address practical problems. With the guidance of public officials, community members, landowners and developers, planners, and public and private lawyers, the day-to-day business of drafting and enforcing sign codes involves identifying common sense solutions to these practical problems. Good sign planning furthers multiple objectives. Although public officials might recite any number of interests in sign regulation, at its core, sign regulation achieves basic community functionality, economic development, traffic and pedestrian safety, and positive aesthetic character. These interests, and how sign regulation advances them, are discussed in greater detail below.

Functionality. Above all, governments enact sign regulations to ensure that signs deliver information effectively. APA's leading model sign ordinance concerns "the legibility, size, and placement characteristics necessary for effective roadside communication." *Id.* at 25. In designing sign regulations, planners consider the speed limit (and other transportation modes, such as walking or cycling) on the adjacent roadway, the angle at which a reader will view a sign, the time the reader

will have to view the sign, and the interaction among signs in the same corridor. Glance angle, glance duration, glance frequency and a host of other technical factors also figure into the regulatory framework. *See id.* at 41. Sign codes therefore regulate height, size, spacing, location, copy area, and letter sizing among other components to ensure that signs serve their purposes. The government must effectively convey its own messages, as well, which is why sign codes generally prohibit signs that mimic or block standard traffic regulation signage.

Without effective regulation, both public and private signage will struggle to convey any information at all. Compare the infamously sign-saturated stretch of U.S. Highway 30 in Breezewood, Pennsylvania, *see* Figure 4, with a commercial corridor in Petoskey, Michigan that preserves views of Lake Michigan's Little Traverse Bay and allows individual speakers the ability to communicate messages without competition from dozens of other signs, *see* Figure 5.

Figure 4—A cacophony of signs greets drivers in Breezewood, Pennsylvania, making it difficult to identify anything from the speed limit to side streets, or where to turn into a driver's preferred service station or fast food joint. Photo credit: Edward Burtynsky, https://www.edwardburtynsky.com/news-hub/2019/7/25/what-internet-memes-get-wrong-about-breezewood-pennsylvania.

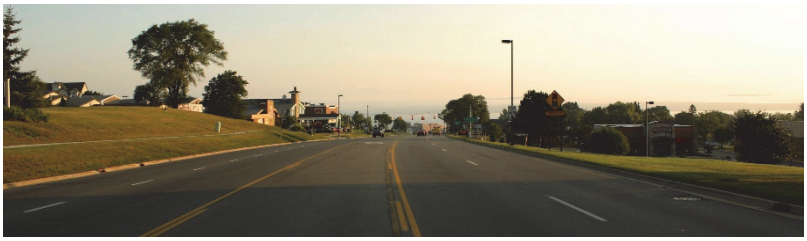

Figure 5—A driver will have no trouble differentiating individual signs—or the view of Little Traverse Bay—along this commercial corridor in Petoskey, Michigan. Photo credit: Author.

Economic Development. Sign regulation also furthers the public interest in promoting economic development. Commercial signage is critical to retail and service businesses of all sizes, particularly those that rely on signage to enable customers to find them. *See*, *e.g.*, Charles R. Taylor et al., *Understanding the Value of On-Premise Signs as Marketing Devices for Legal and Public Policy Purposes*, 31 J. PUB. POL'Y & MARKETING 185, 185 (2012). Eighty-five percent of respondents to a 2012 academic survey of on-premises sign owners indicated that they would lose business without signage, with an average estimate that sales would fall by approximately a third. *Id.* at 188. If done properly, sign regulation "give[s] a business the freedom to express its personality and clearly identify the goods or services it is offering." MANDELKER ET AL., *supra*, at 5.

Planners consider these interests both at the individual level—that is, do regulations permit a specific sign owner to express herself?—and more broadly. A corridor choked with signage reflects a tragedy of the

commons. A free-for-all approach allows sign owners to express themselves, certainly, but also renders that expression effectively meaningless amidst visual discord. Along one roadway in Hampton, Virginia, signage requires a driver traveling at forty-five miles per hour to comprehend more than 1,300 words a minute—an impossible task. *See* SCENIC AMERICA, BILLBOARD CONTROL IS GOOD FOR BUSINESS, https://www.scenic.org/sign-control/billboard-info/good-for-business/ (last accessed, Aug. 8, 2021). Regulations on height, placement, and the number of signs support economic vitality by protecting spaces for businesses to connect with customers. This fact is why, in many newer, master-planned communities, landowners and developers themselves craft sign regulations to ensure that businesses have the opportunity to advertise and to ensure a clean, economically prosperous community.

Safety. Sign regulation also promotes traffic safety. Reading signage takes a driver's attention away from the roadway. A 2018 meta-analysis of "commercial electronic variable message signage" ("CEVMS," effectively, electronic billboards) on traffic safety concluded, "outdoor advertising signs, particularly CEVMS, attract drivers' attention, and that more dramatic and salient signs attract longer and more frequent glances." JERRY WACHTEL, COMPENDIUM OF RECENT RESEARCH STUDIES ON DISTRACTION FROM COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS) (Feb. 2018), *available at* https://www.scenic.org/wp-content/uploads/2019/09/billboard-safety-study-compendium-updated-february-2018.pdf. A corridor with too many

signs makes it difficult for drivers to find driveways, businesses, and other locations. As more signs utilize electronic lighting technologies, bright signs may temporarily blind drivers to objects in or adjacent to roadways.

Figure 6—A bright electronic billboard serves as a beacon of commerce and a blinding potential safety hazard. Photo credit: Arizona Capitol Times, https://azcapitoltimes.com/news/2017/01/23/bill-would-open-part-of-northern-arizona-to-electronic-billboards/.

And signage located at intersections between driveways and sidewalks can obscure drivers' views of pedestrians, cyclists, and one another. In regulating sign number, placement, illumination source (internal versus external), brightness, and movement, as well as the length of time that messages may be displayed on CEVMS, sign regulations advance the interests of traffic safety.

Aesthetics. Aesthetic interests regularly guide and inform community planning and zoning decisions. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance [a]esthetic values."). As with other elements of the built environment, behind safety and functionality, aesthetics often drive sign regulation. *See id.* at 808, quoting *Metromedia*, 453 U.S. at 510 (plurality opinion) ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an '[a]esthetic harm.'"). Aesthetic sign regulations typically focus on sign design—including lighting, lettering, coloration, height, and materials—as well as scenic view protection, historic preservation, reducing visual clutter, and preventing blight from abandoned or deteriorating signs. Sign regulations that advance a community's aesthetic goals can change the look and feel of a locality even when businesses and messages themselves remain the same.

Figure 7—A tall rendition of the Golden Arches competes for readership with other signs on a busy suburban corridor. Photo credit: Author.

Figure 8—A smaller sign communicates the same McDonald's message, and perhaps more effectively so in a commercial corridor less populated by signs. Photo credit: Author.

In the photographs above, both signs lead readers to a Big Mac, but the one on the left dominates the landscape and obscures other signs, while the one on the right is smaller and integrated with landscaping.

Governments also regulate sign height and location to protect scenic views. The federal Highway Beautification Act, 23 USC § 131 *et seq.*, and its state counterparts exist largely for this purpose. Regulation in this context solves a collective action problem: even if private parties could generally agree to preserve scenic views, just one tall sign would spoil the project. In the image below, sign regulations in New York's

Adirondack Park preserve unobstructed views of the mountains, while in Sevierville, Tennessee, a thicket of signage obscures the Smoky Mountain landscape.

Figure 9—The Adirondacks along I-87 in northern New York, without a sign—other than traffic control signs—to be seen. Photo credit: Daniel Case, Creative Commons.

Figure 10—Signs, rather than the Great Smoky Mountains, dominate the skyline of Sevierville, Tennessee. Photo credit: http://garysoutdoorwanderings2.blogspot.com.

The same concerns with respect to historic districts can be addressed with sign regulations. A historic district that preserves historic elements of signage—if not the messages of signs—contributes to the cultural and educational value of the district where a brightly lit electronic billboard would detract from that value.

Figure 11—Historic signage contributes to the historic character of Denver's Lower Downtown neighborhood, including the neon sign on the city's early-20th Century train station. Photo credit: unknown, Creative Commons.

Aesthetic regulations also aim to reduce visual clutter by decreasing the number of permitted signs, and often to promote a particular design language that comports with community character. The commercial corridor in Figure 12 below suffers from a profusion of signage and imagery, contributing to a cluttered, ramshackle appearance.

Figure 12—If the red inflatable character atop the liquor store doesn't scare customers away, the cluttered appearance of this commercial corridor might do so. Photo credit: Rory Bolger.

In contrast, the commercial corridor in Figure 13 differs in its building design as well, but demonstrates how reducing the number of signs and adding to their consistency can improve a community's appearance.

Figure 13—A row of commercial businesses in Harbor Springs, Michigan presents less clutter, contributing to the small-town character of the community. Photo credit: Author.

Of course, some communities choose to allow a large proliferation of signs—perhaps most famously, Times Square in New York City or the Strip in Las Vegas—in furtherance of a vibrant, commercial character.

Figure 14—Sin City or Sign City? Las Vegas in 1985. Photo credit: Miss Shari, Creative Commons.

Moreover, because signs reach the end of their useful lives, businesses close, and signs otherwise end up abandoned or in a state of disrepair, localities also regulate derelict signage to prevent blight.

Figure 15—An abandoned sign has lost its communicative function, but not its deleterious impact on the surrounding community. Photo credit: Author.

Codes often specify maintenance standards and require owners to bring them into compliance with modernized codes in the event of substantial repairs or the sign's destruction.

Overall, local governments develop sign regulations to make their communities more functional, safe, and attractive. The routine business of sign regulation lies more in calculating setbacks and luminance and establishing and managing permitting processes than in resolving disputes about who may speak and what they may say. Practicality, not a desire to promote or suppress, drives decision-making.

B. Regulation That Addresses the Special Problems Presented by Off-Premises Billboards is a Widely-Employed Feature of State and Local Land Use Regulation, and Has Been So For Over a Hundred Years.

Much like Justice Stewart's oft-quoted observation regarding adult material, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), most observers know a billboard when they see it; still, they have difficulty defining a billboard relative to other signs. A sign that is all at once tall, large, bright, and distracting, the typical billboard is designed to attract attention. And in sign regulation parlance, a billboard is a sign that advertises something not available on the sign's premises, such as "Ominously Cheap Coffee. Exit 232." Unlike on-premises signs that advertise an establishment or land use where the sign is located, billboards provide a means for owners of vacant and underutilized property to generate income, which often means more signs and disincentives for redevelopment or other productive uses for these properties. A roadside farm doesn't often advertise, "Soybeans grown here," for example, but billboards tend to sprout wherever the law permits and potential customers exist. Because of these special problems, along with their ubiquity on the American landscape and the economic incentive to create more billboards,[2] these signs frequently merit special regulatory attention.

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[2] A recent count yielded more than 450,000 off-premises advertisements nationwide, bringing in a total of $8.5 billion. *See* Outdoor Advertising Association of America, Inc., *OOH Revenue*

1. Billboard Regulation Today

Billboards and the laws regulating them are widespread. Federal legislation restricts off-premises signs, and all fifty states maintain highway advertising laws to control the spread of billboards. Four states, including Alaska, Hawaii, Vermont and New Hampshire, ban billboards them from their roadsides. In addition, local government regulation of off-premises signs is pervasive. Although there is no way of knowing how many local governments in the United States regulate billboards or off-premises signs differently from other signs, a sample of local governments in the Washington, D.C. area, where Congress first banned billboards in the federal District in 1931, indicates that every single local government inside the Beltway bans them:

Table 1—Billboard Regulations Inside the Beltway.

	Bans Billboards?	Code Section	Notes
Washington, D.C.	Yes	N101.7.6.1	Banned billboards in 1931, then briefly revived "special signs" in 2000
Alexandria	Yes	Section 9-104(B)(12)	

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by Format, https://oaaa.org/AboutOOH/Factsamp;Figures/OOH RevenuebyFormat.aspx (last viewed Aug. 15, 2021).

Arlington County	Yes	Section 34.4.S	
Fairfax County	Yes	Section 12-106.3.A (prohibits off-premise commercial signs between 12:01 P.M. on Monday through 11:59 a.m. on Friday, which amounts to a ban on billboards)	
Falls Church, VA	Yes	Section 48-1242(a)(19)	
Montgomery County	Yes	Section 6.7.4.I	
Prince George's County	Yes	Section 27-593(13)	

2. Historical Billboard Regulation.

State and local regulation of billboards is hardly a modern invention. The history of sign and billboard controls follows the trajectory of both zoning controls more broadly and the growth and development of American communities in response to technological and societal change. Zoning controls have adapted to serve governmental interests such as protecting property values, avoiding traffic congestion, ensuring

public safety, managing the delivery of public services, mitigating nuisances, and creating aesthetically-pleasing places. *See generally Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 3-6 (1974) (discussing a variety of purposes supporting the exercise of zoning authority). For well over one hundred years, this Court has recognized the authority of state and local governments to regulate signs and billboards in furtherance of these very same government interests.

Early Regulations. The dawn of planning and zoning coincided with rapid population growth, urbanization, and technological change—primarily in the form of industrialization and the advent of the automobile as a predominant form of transportation—in the late 19th and early 20th centuries. In rapidly growing cities and towns, conflicts between incompatible land uses and congestion of people and cars necessitated a regulatory response. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (discussing "problems . . . which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities"). Zoning regulations dividing localities into districts governing use and building form were "uniformly sustained . . . for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit streetways, would have been condemned as fatally arbitrary and unreasonable" *Id.* at 387.

Perhaps predictably, population growth, urbanization, and a new form of transportation—the personal

automobile—gave rise to economic opportunity: the use of outdoor signs for advertising purposes. As they had with zoning, state and local governments responded with regulation, and this Court—much as it had with zoning—blessed these regulations as permissible land use controls. In *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), this Court confirmed the validity of a local regulation prohibiting outdoor advertising devices in residential areas and restricting their size. In subsequent cases, the Court upheld ordinances prohibiting the erection of large billboards through permitting requirements and establishing a distinction between on- and off-premises advertising devices, stating with respect to billboards that they "properly may be put in a class by themselves." *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *see also Packer Corp. v. Utah*, 285 U.S. 105 (1931); *Railway Express Agency, Inc. v. City of New York*, 336 U.S. 106 (1949) (approving of a prohibition on "advertising vehicles" that otherwise allowed businesses to advertise on their own delivery vehicles). The Court in these cases acknowledged many of the rationales underlying sign regulation today, from traffic safety, *see id.* at 110, to community functionality, *see St. Louis Poster Advertising*, 249 U.S. at 274.

Postwar Regulations. Urban growth and development changed after World War II, as suburban housing and commercial development expanded cities' footprints, central cities began to experience urban decay and depopulation, and the construction of the interstate highway system provided Americans with

increased ability to travel. Urban planning and development in this era centered on automobile-oriented roads and communities, which provided increased opportunity for businesses and advertisers to market to motorists. Both urban and suburban communities became increasingly focused on aesthetic character—the former concerned with ameliorating blight and the latter interested in preserving pastoral scenes, broad lawns, and small-town charm—and land use regulation responded with design and development standards that achieved these goals. As it had with early zoning laws, the Court again deferred to states and local governments, holding that "[i]t is within the power of the legislature to determine that the community should be beautiful. . . ." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

The proliferation of outdoor advertising enabled by the urban growth and transportation advances of the mid-20th Century did not go unnoticed by drivers on the interstate system—or by Congress. The 1965 federal Highway Beautification Act, 23 U.S.C. § 131 *et seq.*, established limitations on billboards along federal highways while allowing on-premises signs in any circumstances, 23 U.S.C. § 131(b), (c)(3), conditioning states' receipt of federal transportation aid on their enactment of corollary legislation, 23 U.S.C. § 131(b).[3]

[3] To date, every state has passed such legislation. *See* Ala. Code § 23-1-273 (2017); Alaska Stat. §§ 19.25.090, 19.25.105 (2017); Ariz. Rev. Stat. § 28-7902 (2017); Ark. Code § 27-74-302 (2017); Cal. Bus. & Prof. Code § 5442.5 (2017); Colo. Rev. Stat. Ann. §§ 43-1-403, 43-1-404 (2017); Del. Code Ann. tit. 17, § 1121 (2017); Fla. Stat. § 479.15 (2017); Ga. Code Ann. § 32-6-72 (2017);

Congress's acceptance of the distinction between off-premises advertising and on-premises signs paralleled this Court's continuing acceptance of that distinction.[4] In short, all levels of government acknowledged and supported the authority of state and local governments to place reasonable controls on billboards.

Hawaii Rev. Stat. §§ 264-72, 445-112 (2017); Idaho Code Ann. § 40-1910A (2017); 225 Ill. Comp. Stat. Ann. 440/3.17-4.04 (2017); Ind. Code Ann. § 8-23-20-7 (2017); Iowa Code Ann. § 306B.2 (2017); Kan. Stat. Ann. § 68-2233 (2017); Ky. Rev. Stat. § 177.841 (2017); La. Stat. Ann. § 48:461.2 (2017); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914 (2017); Md. Code Ann., Transp. §§ 8-741, 8-744 (2017); Mass. Gen. Laws Ann. ch. 93D, § 2 (2017); Mich. Comp. Laws Ann. §§ 252.302, 252.313 (2017); Minn. Stat. Ann. § 173.08 (2017); Miss. Code § 49-23-5 (2017); Neb. Rev. Stat. § 39-218 (2017); N.H. Rev. Stat. Ann. § 238:24 (2017); N.J. Stat. Ann. § 27:5-11 (2017); Nev. Rev. Stat. § 410.320 (2017); N.C. Gen. Stat. Ann. § 113A-165 (2017); Ohio Rev. Code Ann. §§ 5516.06, 5516.061 (2017); Okla. Stat. Ann. tit. 69, §§ 1273-1274 (2017); S.C. Code §§ 39-14-20, 39-14-30 (2017); S.D. Codified Laws §§ 31-29-63, 31-29-63.4 (2017); Utah Code Ann. § 72-7-504 (2017); Vt. Stat. Ann. tit. 10, §§ 488, 493 (2017); Va. Code § 33.2-1217 (2017); Wash. Code § 47.42.040 (2017); Wyo. Stat. § 24-10-104 (2017).

[4] In this period, this Court dismissed petitions for writ of certiorari challenging the distinction between billboards and on-premises signs for want of a federal question, and offered support of that distinction, albeit in dicta. *See*, *e.g.*, *Lotze v. Washington*, 444 U.S. 921 (1979) (dismissing a First Amendment challenge to an on/off-premise distinction for lack of a federal question); *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979) (same); *Suffolk Outdoor Advert. Co. v. Hulse*, 439 U.S. 808 (1978) (same); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 68-69 (1976) ("a state statute may permit highway billboards to advertise businesses located in our neighborhood but not elsewhere"); *Markham Advert. Co. v. Washington*, 393 U.S. 316 (1969) (dismissing a First Amendment challenge to an on/off-premise distinction for lack of a federal question).

Late 20th Century Regulations. As urban growth and development became increasingly complex in the later part of the 20th Century and early 21st Century—as a result of the repopulation of urban places, interest in non-motorized transportation and accessibility, and greater environmental awareness—states and local governments responded with land use regulation that was increasingly interested in building form, improved mobility, and protecting sensitive lands. Billboard regulation continued to be a feature of these efforts. The Court's extension of First Amendment protections to commercial speech, *see Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), cast into doubt whether billboards could truly be "in a class by themselves," *St. Louis Poster Adver. Co.*, 249 U.S. at 274. Yet faced squarely with this question, the Court affirmed the ability of governments to prohibit off-premises billboards to advance safety and aesthetic interests. *Metromedia*, 453 U.S. at 507-08 (plurality opinion). Although the five-opinion, ninety-page decision in *Metromedia* was challenging to interpret, three years later, a majority of the Court correctly recognized that, in *Metromedia*, the Court determined that "the city's [a]esthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards; San Diego's interest in its appearance was undoubtedly a substantial government goal" and held that "the city could reasonably conclude that the [a]esthetic interest was outweighed by the countervailing interest in one kind of advertising [onsite] even though it was not outweighed by the other [offsite]."

Taxpayers for Vincent, 466 U.S. at 807, 811. These decisions, deferring to the reasonable judgments of state and local governments and cognizant of the aesthetic and functional questions at stake in sign regulation, became the new bedrock of sign and billboard regulation, and guided planners' work in addressing this increasingly complex planning and development landscape. This bedrock remains in place today.

C. Irrespective of Its Decision in This Case, the Court Has a Significant Opportunity to Clarify Questions of Significant Practical Importance to Community Members, Sign Owners, and Regulators.

Figure 16—This billboard identifies a tourist trap in the Upper Peninsula of Michigan, and might also aptly describe how planners and their colleagues view the exercise of preparing constitutionally-sound sign regulations. Photo credit: Author.

This case carries wide-ranging implications for sign owners, businesses, and entire communities. The problems associated with billboards, as discussed

above, will exist irrespective of whether governments can rely on the shorthand distinction between on- and off-premises signs. Communities' interests in ensuring functional, vibrant, safe, and beautiful neighborhoods will remain as important as they have always been, just as the interests of sign owners who wish to communicate unobstructed messages will remain paramount. This case provides the Court with a generational opportunity to establish clear rules on which communities can rely to preserve their essential character, foster economic growth, and support the rights of individual speakers. Reversal of the Fifth Circuit's decision, which upends over a century of sign regulation practice, offers the clearest path to providing these rules and preserving communities' ability to protect aesthetic and functional interests. Nevertheless, even if the Court affirms the court of appeals's decision, the Court can provide answers to many of the as-yet-unanswered questions that vex all parties to the day-to-day management of sign regulations, such as:

- What type of evidence can and should governmental bodies rely upon in substantiating their functional and aesthetic interests in sign regulation and tailoring new or updated sign regulations to those interests?
- How should governmental bodies maintain records to support their initial findings with respect to the need for sign regulations?
- Can billboards and off-premises signage be completely prohibited, or may it only

be subject to functional limitations on, for example, their size, height, lighting characteristics, location, and number?

- What degree of deference should government decision-makers receive in their determinations as to how best to address signage issues in their respective localities?

More than 39,000 planners nationwide, along with the land use and municipal lawyers who support them, are responsible for achieving, maintaining, and preserving their communities' character and protecting the public health, safety, welfare, and economic opportunity of the people they serve. For them, controlling billboards' non-communicative impacts is a means, not an end. If the legal landscape changes while signage problems remain the same, planners will identify new tools to do the job—but they require clear direction in doing so. Planners' primary interest in *this case* is obtaining clear legal guidance from the Court such that they can ensure that the community plans and regulatory tools utilized to advance the community goals described above meet constitutional standards.

The Americans who draft, implement, and operate under localities' sign regulations are not and, more importantly, should not need to be, First Amendment scholars. As with most land use regulations, sign codes and ordinances are regularly drafted, implemented and enforced by planners, with necessary input from lay elected officials and community members. Most communities lack the resources to engage First Amendment specialists, and the need for clear judicial

guidance in the area of sign regulation—for property owners, businesses, sign makers, and regulators alike—cannot be overstated.

Moreover, while clarity is essential, it need not come at the expense of a one-size-fits-all approach—such as allowing all billboards, everywhere—and the Court must be sensitive to questions beyond simply the content neutrality of a billboard regulation. For communities that seek to maximize the likelihood that a sign code both survives First Amendment scrutiny and still functions, related constitutional doctrines can make those objectives difficult to achieve. Avoiding content discrimination is easier if an ordinance's standards are stated broadly and simply, yet that very breadth can open up that regulation to an attack that it fails intermediate scrutiny due to overbreadth, or to an attack that its generality renders it unconstitutionally vague. As *Reed* illustrated, a sign code that embodies this Court's frequently-stated principle that noncommercial and political speech lies at the core of this Court's First Amendment protections can be more problematic, if the means by which that value is furthered creates a content-based hierarchy of types of noncommercial speech. *See* 576 U.S. at 164-65. Cases that reach this Court through a certiorari petition raising a single facet of the full First Amendment analysis, such as content neutrality but not vagueness or overbreadth, can give the artificial impression that writing a complex, constitutional sign code is somehow easy.

Even as planners have achieved successes in reducing sign clutter and improving the aesthetic appearance of neighborhoods and corridors in urban,

suburban, and rural environments alike, the past several decades have presented a legal vacuum to planners in the area of sign regulation. Each medium of expression may well constitute "a law unto itself," *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), but the canon of First Amendment sign law decisions includes just four decisions from this Court in the past five decades that, taken together, offer precious little guidance to sign owners and regulators. *See generally Reed*, 576 U.S. 155 (2015) (finding regulations of political, ideological, and event signs to be content-based and unconstitutional); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (finding prohibition on political signs to unconstitutionally suppress speech given the lack of available alternative for communication); *Metromedia*, 453 U.S. 490 (1981) (invalidating billboard ban that failed exempt noncommercial signage from ban); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977) (invalidating prohibition on real estate for sale signs as unconstitutionally suppressing speech).

Respecting billboard regulations, the most relevant case—*Metromedia*—is almost impenetrable for any non-attorney who must apply it (and even many attorneys would likely characterize it as such). The Court's decision in *Metromedia* is truly "a virtual Tower of Babel, from which no definitive principles can be clearly drawn."[5] *Metromedia*, 453 U.S. at 569

[5] Although the Court has provided guidance on how to interpret such plurality opinions, *see Marks v. United States*, 430 U.S. 188, 193 (1977), the task of interpreting such fractured guidance

(Rehnquist, J., dissenting). Subsequent cases seem to have sharpened *Metromedia*'s meaning to be threefold: government interests in aesthetics and traffic safety are substantial, off-premises billboards *can* be regulated differently from on-premises signs, and such regulations may not deliberately or inadvertently preference commercial speech over noncommercial speech. *See*, *e.g.*, Randal R. Morrison, *Sign Regulation: Private Signs on Private Property*, in BRIAN J. CONNOLLY, ED., LOCAL GOVERNMENT, LAND USE, AND THE FIRST AMENDMENT 42 (2017). Yet *Metromedia*, combined with the remainder of the quartet of sign cases, otherwise provides decidedly little direction to planners or the legislators they serve, particularly with respect to the bulleted subjects identified in the introduction to this Section.

The Court's decision in this case will have far-reaching consequences. If the list of state highway advertising laws, *see* Note 3, *supra*, and the sample of Washington-area localities discussed in Section B.1 provide any indication, then it's clear that tens of thousands of sign regulations could hang in the balance. Particularly if the Court abandons its support for regulations specific to off-premises signage, the consequences will be experienced by the day-to-day users of sign regulations—sign owners, government

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is a tall order. Experts have spent decades in the intellectual wilderness disagreeing about *Metromedia*'s import; their debates leave planners, and any lawyers without substantial First Amendment experience, in the same wilderness, yet under the cover of night, with no flashlight or map.

agencies, and the general public viewing the built environment. But even a decision upholding the distinction offers the Court the opportunity to produce a decision that presents much-needed, practical guidance.

If the Court determines that the distinction between on- and off-premises signage is content-based and subject to strict scrutiny, the Court should clarify the types of regulations that local governments may continue to apply to all types of signage, irrespective of its location, similar to that found in Justice Alito's concurrence in *Reed*. 576 U.S. at 174-75 (2015) (Alito, J., concurring). Reaffirming regulatory approaches such as regulating signs based on their size, height, location, zoning district, display time, and other dimensional or locational characteristics would provide regulators and sign owners with direction as to permissible, content neutral options for sign control. Expanding this guidance to include direction as to *how* governmental bodies can substantiate, both at the time of enactment and on an ongoing basis, their aesthetic, traffic safety, economic development, and other goals to support sign size, height, locational, and other limitations aimed at furthering these goals would answer thorny questions regarding the tailoring analysis applicable to sign regulations. *Compare, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies

upon is reasonably believed to be relevant to the problem that the city addresses.") *with Aptive Environmental, LLC v. Town of Castle Rock*, 959 F.3d 961, 990-96 (10th Cir. 2020) (finding that door-to-door solicitation curfew failed to satisfy intermediate scrutiny because the town lacked sufficient pre- and post-enactment quantitative data to establish the existence of crime necessitating regulation, and could not rely on qualitative judgments of legislators). In addition, providing a better indication regarding the extent to which local governments are entitled to deference in establishing sign regulations will inform everyone from planners to government lawyers, property and sign owners, and lower courts in their analysis of sign regulations' prospective constitutionality.[6]

Similarly, if the Court finds that the distinction between on-premises and off-premises signs is content neutral, there will be an opportunity to clarify many of the outstanding questions from *Metromedia* noted above. For example, the Court will have the opportunity to further articulate the types of evidence that local governments can rely upon to substantiate their interests in aesthetics, traffic safety, and other bases for sign controls, and to tailor their distinctions between on- and off-premises signs to those interests. The Court will also be able to establish the degree to

[6] What is more, if the Court finds the distinction between on-premises and off-premises content-based, it will likely need to address the continuing validity of the Highway Beautification Act, 23 U.S.C. § 131 *et seq.*, which requires states and local governments to control off-premises advertising.

which regulators can treat off-premises signage differently from on-premises signage, given its significant impact on the visual landscape in many places in the United States.

CONCLUSION

Here, the Court has before it an opportunity to provide much-needed clarity on a topic of great importance to millions of Americans. Whether they experience signs and their regulation from the window of a moving car, in posting a sign for a yard sale, or in applying for a permit to post a sign for a business, sign regulation is one of the places where, on a daily basis, ordinary citizens interact with their government on a matter of fundamental constitutional rights. The practical nature of sign regulation drafting, sign permitting, and code enforcement begs the Court to employ a practical approach to billboard regulation, irrespective of its decision on the question presented. The planning profession stands ready and able to advance local communities' interests in ensuring that they have safe, functional, prosperous, and beautiful neighborhoods. Reversing the lower court's decision, which undermines nearly the entire body of existing state and local regulations, is the most direct means of advancing these interests, but it is not an absolute requirement to do so. With adequate legal guidance, planners will be able to work effectively to protect and enhance the function and character of tens of thousands of cities,

towns, villages, communities, and neighborhoods around our nation.

Respectfully submitted,

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