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 NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA SORONEN
STATE AND LOCAL LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY SCHOOL OF LAW APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

Counsel for Amici Curiae

GibsonMoore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

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INTEREST OF AMICI CURIAE[1]

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments all over the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Here, NLC, USCM, ICMA, and IMLA contend that limiting digital billboards based on their off-premises location is not content-based regulation.

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[1] This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

At least thirty states and thousands of municipal governments have long treated off-premises billboards differently than on-premises signs, out of legitimate concerns regarding public safety and local aesthetics. Numerous courts, including this Court in 1981, have recognized that distinctions based on billboards' off-premises locations alone are content-neutral. The location of a billboard is not the message of the billboard. Were this Court to hold otherwise in this case, local governments would either face challenges to their off-premises rules under strict scrutiny, or they would have to revamp their sign ordinances once again, a costly and time-consuming process.

The main problem with the decision below is its "need to read" test, which posits that if a local official "must read" a sign to determine where it fits in the town's regulatory framework, then the applicable rule is somehow content-based. Applying "need to read" to digital billboards is inconsistent with this Court's prior decisions regarding off-premises billboards and commercial speech. The court below took "need to read" from another circuit, which in turn based it on dicta from this Court. The "need to read" test is too onerous, because it could literally be applied to every sign ordinance, obliterating the concepts of content-neutral and concept-based and making all sign rules subject to strict scrutiny review. "Need to read" is also an unworkable test. It is unclear when signs must be read, and the test could be logically applied to subject other reasonable regulations such as noise ordinances to strict scrutiny review. Instead of the "need to read" test,

this Court should reaffirm that content-based rules involve a billboard's topic, idea, or message—not its location. A cursory examination of content-neutral aspects of a sign, such as its lighting, moving parts, or location, is not a content-based inquiry.

Communities regulate digital billboards out of genuine concern for public safety and local aesthetics, without regard to the billboards' topics, ideas, or messages. Digital billboards pose unique safety risks. They are designed to attract the attention of drivers, thereby distracting them from the job at hand. They cycle through new messages every 6 to 8 seconds, up to 10 new advertisements per minute. They are increasingly interactive, further attracting the attention of individual drivers. Their lighting alone is attention-getting. Numerous studies have shown that digital billboards increase safety risks on America's highways. As for aesthetics, this Court long ago recognized visual blight as a substantive evil that localities can address. A digital billboard is the epitome of visual blight. Put eighty-four of them around Austin, as Respondents have sued to do, and the aesthetics of the town would be forever cheapened.

ARGUMENT

Billboards are "in a class by themselves," because they force themselves on the public. *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932). Accordingly, this Court has long placed the regulation of billboards within the legitimate police powers of local government. *See, e.g.*, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 529 (1917); *St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274-75

(1919). Because billboards pose distinctive problems for local governments, the Court has accepted the "accumulated, common-sense judgments of local lawmakers" for determining the best set of guidelines for signage. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509-10 (1981); *City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8 (1994).

Here, Amici urge the Court to recognize that local community regulations of billboards based on their off-premises location are not content-based, to reject the "need to read" test relied on by the court below, and to understand the valid public safety and aesthetics concerns digital billboards create in local communities.

I. Local communities have long been allowed to regulate billboards based on their off-premises location.

Many state and local lawmakers, this Court, and other courts have allowed localities to regulate off-premises billboards differently than on-premises signs. This Court should require such regulations to be reviewed, if challenged, under intermediate scrutiny. To subject them to strict scrutiny would ignore their historic importance, break from this Court's precedent, harm local governments, and threaten the Highway Beautification Act.

Local sign ordinances have historically distinguished between on-premises and off-premises signs, permitting the former and prohibiting the latter. 3 Patricia E. Salkin, O*n-Premises & Off-Premises Signs*, § 26:8 (5th ed. 2021). Lawmakers have concluded that on-premises signs are less harmful in terms of aesthetics and traffic safety than off-premises billboards. *Id.* As far back as the early

1950s, the New Jersey Supreme Court observed that "[i]t has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards . . . justify the separate classification of such structures for the purposes of governmental regulation and restriction." *United Advert. Corp. v. Borough of Raritan*, 93 A.2d 362, 365 (N.J. 1952).

Many states have enacted rules distinguishing between on-premises signage and off-premises billboards. *See* Ala. Code § 23-1-273 (2021); Alaska Stat. § 19.25.105 (2021); Ariz. Rev. Stat. § 28-7902 (2021); Ark. Code § 27-74-302 (2021); Colo. Rev. Stat. §§ 43-1-403, 43-1-404 (2021); Del. Code Ann. tit. 17, § 1121 (2021); Ga. Code Ann. § 32- 6-72 (2021); Haw. Rev. Stat. §§ 264- 72, 445-112 (2021); Idaho Code Ann. § 40-1910A (2021); Ind. Code Ann. § 8-23-20-7 (2021); Iowa Code Ann. § 306B.2 (2021); Kan. Stat. Ann. § 68-2233 (2021); Ky. Rev. Stat. § 177.841 (2021); La. Stat. Ann. § 48:461.2 (2021); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914 (2021); Md. Code Ann., Transp. § 8-741 (2021); Miss. Code § 49-23-5 (2021); Neb. Rev. Stat. § 39-218 (2021); N.H. Rev. Stat. Ann. § 238:24 (2021); N.J. Stat. Ann. § 27:5-11 (2021); Nev. Rev. Stat. § 410.320 (2021); N.C. Gen. Stat. § 113A-165 (2021); Ohio Rev. Code Ann. § 5516.06 (2021); Okla. Stat. tit. 69, § 1273 (2021); S.C. Code §§ 39-14-20, 39-14-30 (2021); Utah Code Ann. § 72-7-504 (2021); Vt. Stat. Ann. tit. 10, §§ 488 (2021); Va. Code § 33.2-1217 (2021); Wash. Code § 47.42.040 (2021); Wyo. Stat. § 24-10-104 (2021).

Numerous courts have upheld laws distinguishing between on-premises signage and off-premises billboards. *See, e.g.*, *Clear Channel Outdoor, Inc. v. Dep't of Fin. of Baltimore Cty.*, 247 A.3d 740, 759 (Md. 2021); *Int'l Outdoor v. City of Livonia*, No. 325243,

2016 WL 3298229, at *7-10 (Mich. Ct. App. June 14, 2016), *appeal denied*, 892 N.W.2d 359 (Mich. 2017); *Nittany Outdoor Advert., LLC v. Coll. Twp.*, 22 F. Supp. 3d 392, 417 (M.D. Pa. 2014); *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 907 (9th Cir. 2007); *Naegele Outdoor Advert. v. City of Durham*, 844 F.2d 172, 173 (4th Cir. 1988).

In *Metromedia*, this Court recognized a distinction between on-premises and off-premises signs. The Court recognized billboards present special problems, explaining that "[e]ach method of communicating ideas is 'a law unto itself,' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." 453 U.S. at 501. The city there prohibited off-premises "outdoor advertising display signs," with exceptions for twelve specific sign categories, such as bus stop signs and religious symbols. *Id.* at 502. Despite not allowing all off-premises commercial signs, the city allowed on-premises commercial signs. *Id.* at 503. The Court applied the commercial speech test from *Central Hudson Gas & Elec. Co. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557 (1980). *Id.* at 512. While applying intermediate scrutiny, the Court upheld different rules for on-premises and off-premises commercial signs, stating that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Id.*

The Court held it was permissible to ban off-site billboards while allowing on-site signs because a city might reasonably conclude that both businesses and the public have a strong interest in allowing on-site signs to identify business locations and the products sold thereon. *Id.* at 510-20; *see also* 2 Edward H. Ziegler, Jr. et al., *Rathkopf's The Law of Zoning and*

Planning § 17:19 (4th ed. 2021) ("Numerous court decisions have relied on this aspect of the *Metromedia* decision to uphold regulatory distinctions between off-site and on-site signs."). Therefore, although the ordinance was held unconstitutional because it permitted on-site commercial signs while not allowing on-site non-commercial signs, the Court held it was constitutional to ban all off-site commercial signs. *Metromedia*, 453 U.S. at 518-21.

This Court's most recent case addressing local sign rules also offers ample support for the City of Austin's contentions. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015). In *Reed*, the Court held that the ordinance in question was content-based "on its face" because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 155. The Court noted that "not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are" and that "[l]aws that are *content neutral* are instead subject to lesser scrutiny." *Id.* at 172. The Court recognized as content neutral "many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability." *Id.* at 173. Similarly, a three-Justice concurrence listed other content-neutral regulations, including "[r]ules distinguishing between on-premises and off-premises signs," "[r]ules regulating the size of signs," "[r]ules distinguishing between lighted and unlighted signs," and "[r]ules distinguishing between signs with fixed messages and electronic signs with messages that change[.]" *Id.* at 174-75 (Alito, J., concurring).

In short, this Court should reject the Fifth Circuit's conclusion that *Reed* requires distinctions between on-premises and off-premises signs to be

subjected to strict scrutiny review. *See Clear Channel Outdoor, Inc. v. Director, Dept. of Finance, Baltimore City*, 247 A.3d 740, 759 (Md. 2021) ("We join the many courts and commentators who have concluded that, even after the *Reed* decision, a distinction between on-premises signs and off-premises signs in a regulatory or tax law does not discriminate on the basis of content and therefore does not trigger heightened scrutiny under the First Amendment."); *Adams Outdoor Advert. Ltd. P'ship v. Pa. Dept. of Transp.*, 930 F.3d 199, 207 (3d Cir. 2019) (declining to apply strict scrutiny to on-premises exemption because *Reed* majority opinion did not establish legal standard to evaluate on- and off-premises regulations and concurrences deemed these regulations content neutral).

If, however, this Court decides that on/off-premises rules are automatically content-based distinctions subject to strict scrutiny, many local governments will be harmed. They will either be unable to uphold regulations of off-premises billboards, should billboard operators seek invalidation of their ordinances under strict scrutiny, or they will have to amend their sign codes. Local governments expend tremendous time, money, and resources to amend their sign codes. The process can take many months, if not years, and can involve numerous staff meetings, attorney research and drafting time, studies, site visits and photography, studying of other local government's sign codes, finding and meeting with outside sign law consultants, meeting with industry representatives, presentations to city or county councils, public hearings, and review by citizens.

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 thousands like them. Outside sign experts can cost these local governments, many small and strapped for cash, tens of thousands of dollars.

Following *Reed*, many local governments overhauled their sign regulations, taking care to avoid content-based distinctions. In so doing, 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 thousands of local governments that make these distinctions. If this Court were to affirm the Fifth Circuit's conclusion that Austin's on/off premises distinction is content-based and subject to challenge under strict scrutiny, a new round of costly overhauls would be necessary.

Finally, affirming the Fifth Circuit's decision that Austin's off-premises distinction is content-based would affect interstate highways, not just localities. The federal Highway Beautification Act was passed in 1965 and outlined a way for states to address the then-proliferating billboard industry. 3 U.S.C. §

131(c) (2006); Caroline L. Nowlin, *"Hey! Look at Me!": A Glance at Texas's Billboard Regulation and Why All Roads Lead to Compromise*, 44 Tex. Tech L. Rev. 429, 437 (2012). The Act "[i]ncreased the scope of controlling signs to include the primary system and applied to all States" by allowing only certain kinds of signs "visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way." Emily Jessup, *When "Free Coffee" Violates the First Amendment*, 16 First Amend. L. Rev. 73 (2017).

The Act requires the states to enact legislation providing for the "effective control" and eventual elimination of outdoor advertising signs and displays that are within 660 feet of interstate and primary highways and visible from the roadway. *Id.* States risk a loss of ten per cent of federal highway funds for failure to comply. 3 U.S.C. § 131(c). Many states have codified their own version of the federal Act, including Texas and New Mexico. *See* Tex. Transp. Code Ann. § 391.036; N.M. Stat. Ann. § 67-12-1 to 67-12-14.

The Highway Beautification Act relies on the on/off-premises distinction. Unless the Court continues to recognize that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted," *Metromedia*, 453 U.S. at 512, the Act may be in jeopardy, because it allows governments to restrict advertising signs and displays that are within a certain distance of interstates even if they are allowed on an advertiser's premises. *See Reed*, 576 U.S. at 180 (Kagan, J., concurring) (stating that Highway Beautification Act and "many sign ordinances of that kind are now in jeopardy"). The government has continued to defend the constitutionality of the Highway Beautification

Act after *Reed*, reasoning that "rules distinguishing between on-premises and off-premises signs are content neutral." *See, e.g.*, Brief of United States as Amicus Curiae in Support of Appellant, at *7, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), 2018 WL 1314789.

State courts have recognized the on/off premises distinction inherent in highway beautification acts. For example, the Arizona Court of Appeals held that a digital billboard off-premises permit was improperly granted because the proposed "billboard's lighting violate[d] the Arizona Highway Beautification Act" due to its location. *Scenic Arizona v. City of Phoenix Bd. of Adjustment*, 268 P.3d 370, 387 (Ariz. Ct. App. 2011); *see also* Susan C. Sharpe, *Between Beauty and Beer Signs: Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act Of 1965*, 64 Rutgers L. Rev. 515, 519 (2012). Thus, the on/off premises distinction is a crucial factor in maintaining the natural beauty along our federal and state highways.

II. The court below's "need to read" test is inconsistent with this Court's precedent, based on dicta, onerous, and unworkable.

The court below held that Austin's off-premises restriction is content-based and subject to strict scrutiny because, "To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it." Pet. App. 19a. This "need to read" test is not found in this Court's decisions, is based on dicta, is too onerous because it would prevent local officials from regulating any signs, and is otherwise unworkable. This Court should reject "need to read."

First, “need to read” is not found in this Court’s decisions, including *Reed*. Nowhere does this Court establish, including in *Reed*, that if an enforcement authority must read a regulated sign to determine compliance with a rule’s content-neutral specifications, then the rule itself is content-based. The majority in *Reed* noted that “content-neutral” “aspects of signs that have nothing to do with a sign’s message” include their “size, building materials, lighting, moving parts, and portability.” 576 U.S. at 173. The majority’s list was non-exclusive and taken solely from the town in question’s code. *Id.* The latter example, portability, clearly depends on a sign’s location, like the off-premises regulation at issue here. *See* Pet. App. 50a (district court conclusion, after bench trial, that Austin sign code provision “is a regulation based on location,” not on speaker’s message). The lighting and moving parts examples are similar to Austin’s technology and illumination provisions. *See* Pet. App. 56a.

Concurring in *Reed*, joined by Justice Kennedy and Justice Sotomayor, Justice Alito listed some of the very same content-neutral aspects of signs included in the majority’s examples, such as size and lighting. *Id.* at 174 (Alito, J., concurring). Justice Alito elaborated, noting that content-neutral criteria would include rules regarding the “locations in which signs may be placed,” “distinguishing between signs with fixed messages and electronic signs with messages that change,” and “distinguishing between on-premises and off-premises signs.” *Id.* at 174-75. Justice Alito’s list, while more detailed, is consistent with the majority’s non-exclusive list that content-neutral aspects of signs include their size, lighting, moving parts, and portability.

In addition to not being found in *Reed*, the Fifth Circuit's "need to read" test is inconsistent with this Court's decisions in *Metromedia* and *Central Hudson*. As the district court below put it, "*Reed* did not quietly overrule *Metromedia* and *Central Hudson*." Pet. App. 48a. Instead, "*Reed* is entirely consistent with *Metromedia*," where this Court held that a regulation restricting off-premises billboards while permitting them on-premises was not content-based discrimination. *See id.*; *see also Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, No. 17-cv-576-jdp, 2020 WL 1689705, at *12 (W.D. Wisc. Apr. 7, 2020) ("courts considering the constitutionality of on-premises versus off-premises distinctions since *Reed* have concluded that such distinctions remain subject to intermediate scrutiny under *Metromedia*"); *Adams Outdoor Advert. Ltd. P'ship*, 930 F.3d at 207 (applying intermediate scrutiny to regulation with on-premises versus off-premises distinction).

The Fifth Circuit also overlooked this Court's framework for evaluating rules concerning commercial speech. The digitization of billboards, with numerous messages rotated each minute, enables commercial speech by allowing more advertisers per billboard. In *Central Hudson*, this Court assigned commercial speech "lesser protection . . . than . . . other constitutionally guaranteed expression" because commercial speech "serves the economic interest of the speaker." 447 U.S. at 561, 563.

Under the Fifth Circuit's "need to read" test, however, the constitutional distinction between commercial speech and noncommercial speech would not exist. *See* Pet. App. 47a-48a ("[R]egulations imposing greater restrictions for commercial signs . . . would be content-based because a viewer

must read a sign to determine if the message was commercial or non-commercial."). This Court should instead apply longstanding *Central Hudson* doctrine to Austin's off-premises billboard digitization rule and reject the Fifth Circuit's "need to read" test. *See Contest Promotions, LLC v. City & Cty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017) ("We have likewise rejected the notion that *Reed* altered *Central Hudson's* long standing intermediate scrutiny framework [for commercial speech].").

Second, the "need to read" test is based on an overly broad reading of dicta in *Reed*. The Fifth Circuit took its "need to read" test from the Sixth Circuit's decision in *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019). The Sixth Circuit in turn relied on dicta in *Reed* that a regulation defining speech by its "function or purpose" is a content-based facial distinction. *See id.* at 730 (quoting *Reed*, 576 U.S. at 163); *Harbourside Place, LLC v. Town of Jupiter, Fla.*, 958 F.3d 1308, 1319 (11th Cir. 2020) ("[The 'function or purpose' language] is dicta, however, because the Supreme Court did not apply it."). The Fifth Circuit below heavily relied on the Sixth Circuit's "function or purpose" analysis. *See* Pet. App. 18a-19a.

This Court should clarify that whether a rule can be said to somehow involve the "function or purpose" of a billboard is not an independent basis for concluding the rule is content-based and must be subjected to strict scrutiny. The Court used the phrase "function or purpose" only a single time and cited no authority for it. *See Reed*, 576 U.S. at 163. The terms "function" and "purpose" have multiple definitions and might be used to support a conclusion that any regulation is facially content-based. Take the Court's list of content-neutral aspects of signs in *Reed*,

for example, such as lighting, moving parts, or portability. An ordinance that regulated signs according to their lighting, moving parts, or portability could be viewed as facially regulating based on their "function or purpose," meaning the ordinance—based on the Fifth and Sixth Circuits' reading of *Reed*—would be content-based and subject to strict scrutiny. Such a result is inconsistent with *Reed*'s statement that the very same qualities are content-neutral and would not be based on a "commonsense" analysis of what it means to be content-based. *Id.* (alluding to Court's longtime requirement that content restrictions be analyzed using "commonsense").

Or, using the circumstances of this case, one might say that the "function or purpose" of a digital billboard is to attract the attention of drivers through its rapidly changing, bright images. *See infra* part III.A. Indeed, the attention of drivers is the key safety concern of local governments that have addressed digital billboards. *See id.* But a safety concern due to a particular technological *mode* of speech, which has nothing to do with the traditional markers of the *content* of speech (topic, idea, or message), should not subject the rule to strict scrutiny merely because it can be said to involve the billboard's "function or purpose."

The "function or purpose" dicta of *Reed* should not be used to determine whether a rule regulating speech is content-based. It is sufficient, and well-established, that local governments should avoid targeting the topic, idea, or message expressed in digital billboards. *See, e.g.*, *id.* (noting that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed"); *Police*

Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content").

The "function or purpose" dicta muddies the content-based test and is inconsistent with this Court's precedent. This Court should reject the strict scrutiny analysis of the Fifth and Sixth Circuits on which that dicta is based. *See also Act Now to Stop War and End Racism Coal. & Muslim Am. Soc'y Freedom Found.*, 846 F.3d 391, 403 (D.C. Cir. 2017) (holding sign regulation "does not target the 'communicative content' of those signs, such as by distinguishing among various events by topic, but uniformly restricts" the signs (citation omitted)); *Signs for Jesus v. Town of Pembroke*, 230 F. Supp. 3d 49, 60 (D.N.H. 2017) (holding that absent evidence "suggesting that the Town applied the electronic sign ordinance unevenly in a way that suggests a content preference," restrictions on electronic signs were content neutral and subject to intermediate scrutiny).

Third, the "need to read" test is too onerous because it would prevent local officials from regulating any sign without satisfying strict scrutiny. The test "would apply strict scrutiny to all regulations for signs with written text," because any sign with written text must necessarily be read by a local official to understand its position in a regulatory scheme. Pet. App. 48a; *see also Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir. 2017) ("The 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."). If "need to read" were the law of the land, any municipal

sign rule requiring a local official to review a proposed or existing sign to gauge compliance with content-neutral specifications would be subject to strict scrutiny, and thousands of towns across the country would have to rewrite their sign codes. Pet. App. 18a.

Finally, the Fifth Circuit's "need to read" test is unworkable for various other reasons. It is unclear exactly *when*, if ever, local officials considering billboard permit applications actually "need to read" the content of a proposed billboard. While the Fifth Circuit opined that government officials "must read" an operator's billboards to review its permit applications, the record does not support that conclusion. No proposed content for any of the scores of billboards Respondents seek to digitize around Austin was referred to in Respondents' applications or Petitioners' rejections. *See* Brief of Petitioner at 48-49. Indeed, Austin's off-premises rule does not depend on subject matter, topic, ideas, or viewpoints, only location. *See* Pet. App. 50a.

A "need to read" test could work mischief in other areas. For example, if billboard ordinances are subject to strict scrutiny based on a "need to read" analysis, what about local noise ordinances enacted to keep the peace? A similar "need to listen" test might logically apply to rules meant to prevent nuisance-level noise, subjecting them to strict scrutiny. While it may sound far-fetched to review challenges to nuisance noise level ordinances applying equally to all speakers under strict scrutiny, at least one circuit has already faced that argument since *Reed*. *See March v. Mills*, 867 F.3d 46, 60 (1st Cir. 2017) (holding regulation applying to noise made with disruptive intent was content-neutral time, place, or manner restriction). Moreover, a "need to read" test may lead to strict

scrutiny in other areas of the law where that level of scrutiny is inappropriate. *See, e.g,* Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C.L. REV. 65, 79 (2017) (stating that "[p]rotectability in intellectual property is necessarily content-based" and a test resembling "need to read" would "therefore lead ineluctably to strict scrutiny").

A better rule than "need to read" is that a cursory examination of a permit application or billboard to determine compliance with content-neutral requirements such as lighting, moving parts, portability, or location does not constitute a content-based inquiry. *See, e.g.*, *Act Now*, 846 F.3d at 404 (holding that cursory examination of sign regulation based on location did not render regulation content-based).

III. Local communities regulate digital billboards to promote safety and to preserve aesthetics.

This Court has long recognized that "[i]mproving traffic safety and the appearance of the city are substantial governmental goals." *Metromedia*, 453 U.S. at 507-08. The majority in *Reed* assumed these are "compelling governmental interests" and noted towns have content-neutral options "to resolve problems with safety and aesthetics." 576 U.S. at 171, 173. Three concurring Justices similarly stated the Court's decision "will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." *Id.* at 175 (Alito, J., concurring). In the Congressional debates preceding enactment of the Highway Beautification Act, Representative John Blatnick likewise stated that "the larger public good embodied

in highway beauty and highway safety must prevail over commercial exploitation." 111 CONG. REC. 26, 274 (1965).

Here, the purpose of the City of Austin's sign code is to "protect the aesthetic value of the City and to protect public safety." Pet. App. 49a. Many other cities cite safety and aesthetics as the driving forces behind their ordinances. *See, e.g.*, Winter Garden, Fla. Code of Ordinances § 102-2 (2020) (code enacted to "promote the public health, safety, aesthetics and welfare and to maintain, enhance, improve and protect the appearance and character of agricultural, residential, professional office, commercial, and industrial areas of the city"); City of Hesperia, Cal. Code of Ordinances § 16.36.010, 100 (2021) (code enacted "[f]or the purposes of . . . promoting the safety of the traveling public, . . . promoting a positive community appearance as part of a concerted city wide effort to protect and enhance the aesthetics of the city for the enjoyment of all citizens").

Amici urge the Court to consider the legitimate safety and aesthetic concerns that digital billboards create for local governments.

A. Digital billboards pose a risk to public safety.

Digitization is a relatively new technology that allows billboard operators to "display more attention-getting messages" than they can on static billboards. Jerry Wachtel, *Safety Impacts of the Emerging Digital Display Technology for Outdoor Advertising Signs* 4 (2009) [hereinafter *Safety Impacts*]. As Respondent Reagan's website notes, "With bright, high-definitions displays, [digital billboards] offer unparalleled visibility

24 hours a day." Reagan Outdoor Advertising, https://www.reaganoutdoor.com/digital/ (last visited July 30, 2021). Similarly, Respondent Lamar's website defines digital billboards as "computer-controlled electronic displays with technological capabilities." Lamar, https://www.lamar.com/products/digital (last visited July 30, 2021).

Lamar's billboards are "located on highways, major arteries and city streets" and show ads that "rotate in a slideshow fashion every 6 to 8 seconds." *Id.* Their advertisers can "[s]tream live data and user-generated content from [their] website/social media in real time." *Id.* Electronic billboards are also becoming interactive: devices in cars can generate "a personalized message on a digital billboard; in other cases, the billboard can display a message tailored to the radio frequency of passing vehicles. Still other billboards encourage drivers to interact with the sign by texting a message or calling a number displayed on the billboard." *Id.*

Potential advertisers are informed that digital billboards are "eye-catching from far away" and "are all connected to the Internet, [allowing you to] use a RSS Feed to display Real-Time information, such as the score of a baseball game, countdown clock to a TV show/movie release or live weather and traffic updates." *Digital Billboard Advertising*, AdSemble, https://adsemble.com/digital-billboards (last visited Aug. 15, 2021).

Billboard operators send out mixed messages regarding safety. "[W]hile the billboard industry tells advertisers 'drivers won't be able to avoid them,' they tell regulators that the signs don't pose a safety hazard." *Digital Billboard Safety Studies*, Scenic

America, https://www.scenic.org/sign-control/digital-billboards/safety-studies/ (last visited Jul. 29, 2020). Despite these mixed messages, the constantly changing images, interactivity, and bright lights of digital billboards pose a safety risk to drivers, passengers, and other vehicles.

1. Their constant changes and interactivity distract drivers.

Drivers likely "find it nearly impossible to avoid a glance [at] digital billboards during switches between advertisements," because "rapid light onsets evoke near obligatory shifts" of eye movements and covert attention. Daniel Belyusar, et al., *A field study on the effects of digital billboards on glance behavior during highway driving*, Accident Analysis & Prevention 88, 95 (2016). As the Illinois Coalition for Responsible Outdoor Lighting explained:

> Picture an Illinois highway which already has a bewildering display of billboards, like stretches of I-294 and I-55 near Chicago, with all of those signs converted to digital, changing displays. Now picture it with all those displays turned up to excessive brightness. Many of us can discern that such a situation would pose increased driving hazards, without the need for a study, or for the accidents, injuries and fatalities which might occur during the study period.

Digital Billboards: New Regulations for New Technology, Illinois Coalition for Responsible Outdoor Lighting (May 2010), http://www.homerglenil.org/DocumentCenter/View/310/Digital-Billboards-New-Regulations-for-New-Technology-PDF. In addition to that commonsense observation,

numerous studies support the conclusion that digital billboards increase safety risks.

A 2012 study measuring participants' visual behavior when passing various signs on a motorway showed that "significantly more participants looked at the electronic billboards . . . than at the other signs." Tania Dukic et al., *Effects of Electronic Billboards on Driver Distraction*, 14 Traffic Injury Prevention 469, 472 (2013). The digital billboards drew drivers' curiosity over a longer period of time because of the graphics changing at regular intervals. *Id.* at 474. "Overall, the electronic billboards attracted more visual attention than the other traffic signs included in the study." *Id.* at 473. Studies that looked at similarly quantifiable data, such as "gaze position, lane drift, and unexpected braking," which are "accident precursor activities," found that electronic billboards "increased these behaviors." Roland Dechesne, *Hazardous Light Pollution from Digital Electronic Billboards* (July 11, 2012), https://calgary.rasc.ca/lp/Digital_Electronic_Billboards.pdf.

Collision studies also show a correlation between collisions and electronic billboards. "[T]he Wisconsin Department of Transport found a 35% increase in collisions near a variable message sign." *Id.* (citing Wisconsin Department of Transportation, Milwaukee County Stadium Variable Message Sign Study: Internal Report (1994)).

Further, because accidents are largely underreported and the root cause of accidents is rarely investigated, these numbers are likely underinclusive. *Safety Impacts*, *supra*, at 71 (stating that "[u]nless an accident involves major property damage, serious injury or death, police in the US will

rarely endeavor to find the 'root cause' . . . . The vehicle of a driver who crashes as a result of distraction by a roadside billboard may not come to rest for a considerable distance after the distraction occurs, but [that final position will likely] be (erroneously) identified in the Traffic Collision Report as the actual accident location. The use of such information will lead to an artificial reduction in any correlation . . . . [Thus,] accidents may be underreported by 80% or more.").

In contrast to these studies of off-premises digital billboards, a 2014 study found no evidence that on-premises digital signs led to an increase in crashes. Jerry Wachtel, *Compendium of Recent Research Studies on Distraction from Commercial Electronic Variable Message Signs (CEVMS)* 10 (2020). Because on-premise signs typically only identify the business or service where the sign is located, on-premise digitized signs may have "little text or imagery other than that required for such identification." Further, although some studies "funded by the outdoor advertising industry . . . indicate that [digital billboards] have no significant impact on accident rates," these studies have been shown to have flawed methodology." Dechesne, *supra*.

Finally, drivers themselves recognize the distraction caused by digital billboards. A 2008 report for the Highway Agency of the United Kingdom reviewed a multitude of studies on causes of distracted driving. One study involved a focus group with three subgroups: less experienced drivers aged 17-25, experienced drivers 50 years old and above who did not regularly use the motorway, and drivers 33-55 years old who drove 100 or more miles per week. *Safety Impacts*, *supra*, at 72.

The group as a whole agreed that "[e]lectronic billboards [are] more of a potential distraction than fixed displays. Younger drivers, in particular, stated that they looked out specifically for these displays and that they waited for the subsequent advertisement in the cycle to appear." *Id.* at 74.[2] One participant in the older group noted that, when the advertisements are about to change, "you want to see what they are changing to. It's strange… you might not be interested in the adverts, but when things are changing, you watch it… and they'll distract you... But if it's fixed, and you can see that from half a mile away…, I'm not going to be that distracted by it. It's not drawing my attention because I can see from a distance what it is." *Id.*

The participants were given examples of different types of roadside advertisements and asked to select which advertisements would be personally distracting. *Id.* at 76. Seventy-two percent stated that billboards with changing images would distract them, while 82% reported that "electronic ads with changing images are more distracting than static ads." *Id.* at 77.

2. Their lighting distracts drivers.

In addition to the changing scenes of digital billboards, their unique lighting alone poses a safety threat. All "other things equal, a brighter billboard will attract a driver's gaze earlier and, potentially,

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[2] Relevant here, the City of Austin, Texas is filled with younger drivers, due to the presence of the University of Texas, several other colleges, state government employees, and the many start-up tech companies that have earned the town the nickname "Silicon Hills." *See, e.g.*, Laura Begley Bloom, *Is Austin, Texas, the Best City in America?*, Forbes, May 31, 2019, https://www.forbes.com/sites/laurabegleybloom/2019/05/31/is-austin-texas-the-best-city-in-america.

longer, than other visual stimuli in the environment that appear less bright." *Id.* at 153. Digital billboards illustrate the "Moth Effect," a phenomenon "in which the eye is drawn to the brightest objects in the field of view." *Id.* at 119. This effect "may cause drivers to not only look in the direction of a bright light source on the side of the road, but inadvertently steer in that direction as well." *Id.* Loss of lane maintenance due to the Moth Effect has been described as a cause of crashes. *Id.*

Further studies have shown that "[a]t night, dawn or dusk, or in inclement weather such as rain or fog, where visibility conditions are poorer than in daylight, a bright sign can draw attention away from the road, official [traffic control devices], and other vehicles [and their rear lighting], and can render signs lighted to a lesser degree more difficult to discern, particularly when the billboard and the official signs must be viewed at the same time." *Id.* at 153.

Unfortunately, it would be difficult to establish uniform luminance parameters to satisfy the safety concerns of municipalities. "There is no single luminance level that can be established as a reasonable criterion because brightness (although not actual luminance) is dependent upon the surrounding environment in the context of which a particular [digital billboard] is viewed." *Id.* Because of this, a digital billboard "of the same size and luminance will appear to the driver to be much brighter if it is located in a rural area or along an unlit roadway, than it would if it was in a brightly lit urban environment or adjacent to an illuminated freeway." *Id.*

In short, safety concerns justify the regulation of digital billboards, including the off-premises location distinction at issue here.

B. Digital billboards undermine community aesthetics.

This case presents a clash of interests. On the one hand, Respondents—"companies in the business of outdoor advertising"—seek to place eighty-four (84) digital billboards all over Austin, Texas. Pet. App. 33a-34a. With a new advertisement per billboard every 6 seconds or so, they would bombard the Austin area with about 800 bright digital advertisements per minute. *See also* Ray Ring, *Billboard companies use money and influence to override your vote*, High Country News, Jan. 30, 2012, https://www.hcn.org/issues/44.1/billboard-corporations-use-money-and-influence-to-override-your-vote/print_view (describing litigation by billboard operators against local communities in Arizona, California, South Dakota, Utah, and Washington).

On the other hand, local communities have the right to set reasonable standards to maintain their aesthetic appeal. This truism was perhaps most eloquently expressed, two score and seven years ago, by this Court:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values,

> and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). The federal government also recognized the value of community aesthetics when it enacted the Highway Beautification Act, the purpose of which is, among other things, "to preserve natural beauty." 23 U.S.C. § 131 (2014).

Many communities have regulatory bodies whose sole purpose is to protect the community's aesthetics and design. Such "design review boards" can be found in cities such as Miami Beach, Florida; Hilton Head, South Carolina; College Station, Texas; and Charleston, South Carolina. *See* Miami Beach, Fla., Code of Ordinances § 118-71 (2021); Hilton Head Island, S.C., Land Management Ordinances, Appendix A-4 (2015); College Station, Tex., Code of Ordinances § 2.5 (2021); Charleston, S.C., Zoning Appendix K (2012).

This Court has long recognized that local governing bodies have a right to protect their communities' aesthetics. For example, in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 793 (1984), Los Angeles removed election signs that had been attached to utility poles and other similar objects around the city. This Court stated that the "substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself" and the visual blight was a "substantive problem which legitimately concerns the City." *Id.* at 810.

Similarly, visual blight is "not merely a possible by-product" of the digital billboards in Austin; it is created by the billboards themselves. Like

Los Angeles, Austin is faced with a substantive evil, digital billboards, which legitimately concern the city. Despite digital billboards' draw to advertisers, they are far from aesthetically pleasing to the community members forced to live in their vicinity 24/7. The Federal Highway Administration has acknowledged that "'[h]arsh visual contrast with the ambient environment is generally considered to be unaesthetic, as is a dense clustering of signs and sign structures.'" Susan C. Sharpe, *"Between Beauty and Beer Signs": Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of 1965*, 64 Rutgers L. Rev. 515, 532 (2012) (quoting Jerry Wachtel & Ross Netherton, Fed. Highway Admin., U.S. Dep't of Transp., FHWA-RD-80-051, Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage 2 (1980)).

In addition to the visual blight associated with digital screens, the light emitted poses a risk of "light trespass" on neighboring properties. Illinois Coalition for Responsible Outdoor Lighting, *supra*, at 6. "Light trespass occurs when unwanted light enters one's property, for instance, by shining over a neighbor's fence. A common light trespass problem occurs when a strong light enters the window of one's home from the outside." Gregory Young, *Illuminating the Issues: Digital Signage and Philadelphia's Green Future* (2010) https://www.scenic.org/wp-content/uploads/2019/09/Digital_Signage_Final_Dec_14_20101.pdf.

Elected local officials should be allowed to decide how best to gauge the risks posed by digital billboards to the aesthetics and quality of life in their own communities. The risks of visual blight and light

trespass further justify the conclusion that regulation of off-premises digital billboards should not be subjected to strict scrutiny.

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In the film *It's a Wonderful Life*, when George Bailey sees what Bedford Falls would be like without him, Main Street is filled with bright, flashing, and garish neon signs. Absent its moral compass, the town's values have been transformed, as reflected by the big city glare. In Austin and other real towns all across America, multiple elected officials—not a single fictional hero—maintain local values through sign codes and other ordinances. In order to protect the safety and preserve the aesthetics of their communities, they need to regulate the location of digital billboards. This Court should not construe the First Amendment in a way that causes every town to resemble Times Square or the Las Vegas Strip. *See, e.g.*, Sharpe, *supra*, at 532 ("Times Square is not the appropriate landscape for Indianapolis").

CONCLUSION

The judgment below should be reversed.

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

/S/ JOHN J. KORZEN
JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

AUGUST 2021 *Counsel for Amici Curiae*