No. 20-1029

IN THE
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,
Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC., ET AL.,
Respondents.

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

BRIEF OF INTERNATIONAL SIGN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOSEPH S. HALL
Counsel of Record
ALEJANDRA ÁVILA
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jhall@kellogghansen.com)

August 20, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 6

I. AFFIRMING THE FIFTH CIRCUIT'S HOLDING WOULD HAVE DISRUPTIVE CONSEQUENCES FOR THE ON-PREMISES SIGN INDUSTRY AND ITS CUSTOMERS 6

A. Regulatory Certainty Is Good For Business And Should Be Preserved 6

B. Eliminating Reasonable On-Premises/ Off-Premises Distinctions Will Chill Protected Speech And Cause Severe Economic Harm To On-Premises Sign Owners And Their Customers 8

II. REGULATORS DO NOT CONSIDER THE CONTENT OF SIGNS WHEN ENFORCING OFF-PREMISES PERMIT REQUIREMENTS 10

III. THE REGULATIONS ARE NARROWLY TAILORED 12

A. The Regulations Are Not Underinclusive 12

B. On-Premises/Off-Premises Distinctions Are The Most Effective And Workable Content-Neutral Means Of Regulating Signs 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 7

Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530 (1980) 10

FEC v. Beaumont, 539 U.S. 146 (2003)..... 16

Kovacs v. Cooper, 336 U.S. 77 (1949) 17

Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 12

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 6, 7, 8, 12, 14, 15, 17

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 15

Packer Corp. v. Utah, 285 U.S. 105 (1932) 6

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 2, 7, 12, 15

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 15

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995)..... 12

St. Louis Poster Advert. Co. v. City of St. Louis, 249 U.S. 269 (1919) 6, 14

Suffolk Outdoor Advert. Co. v. Hulse, 439 U.S. 808 (1978) 6

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) 6, 14

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. amend. I 6

Highway Beautification Act of 1965, 23 U.S.C. § 131 *et seq.* 2

23 U.S.C. § 131(a)-(c) 2

23 U.S.C. § 131(b) 3

Ala. Code § 23-1-273 3

Alaska Stat.:

§ 19.25.090 3

§ 19.25.105 3

Ariz. Rev. Stat. § 28-7902 3

Ark. Code Ann. § 27-74-302 3

Cal. Bus. & Prof. Code § 5442.5 3

Del. Code Ann. tit. 17, § 1121 3

Fla. Stat.:

§ 479.16 3

§ 479.111 3

Ga. Code Ann. § 32-6-72 3

Haw. Rev. Stat.:

§ 264-72 3

§ 445-112 3

Idaho Code § 40-1910A 3

225 Ill. Comp. Stat.:

440/3.17-440/3.18 3

440/4 3

440/4.03-440/4.04 3

Ind. Code § 8-23-20-7 3
Kan. Stat. Ann. § 68-2233 3
Ky. Rev. Stat. Ann. § 177.841 3
La. Stat. Ann. § 48:461.2 3
Me. Rev. Stat. Ann. tit. 23:
§ 1903 3
§ 1908 3
§ 1914 3
Md. Code Ann., Transp.:
§ 8-741 3
§ 8-744 3
Mass. Gen. Laws ch. 93D, § 2 3
Mich. Comp. Laws:
§ 252.302 3
§ 252.313 3
Minn. Stat. § 173.08 3
Miss. Code Ann. § 49-23-5 3
Neb. Rev. Stat. § 39-218 3
Nev. Rev. Stat. § 410.320 3
N.H. Rev. Stat. Ann. § 238:24 3
N.J. Stat. Ann. § 27:5-11 3
N.C. Gen. Stat. § 113A-165 3
Ohio Rev. Code Ann.:
§ 5516.06 3
§ 5516.061 3
Okla. Stat. tit. 69, §§ 1273-1274 3

S.C. Code Ann.:
§ 39-14-20 3
§ 39-14-30 3
S.D. Codified Laws:
§ 31-29-63 3
§ 31-29-63.4 3
Utah Code Ann. § 72-7-504 3
Vt. Stat. Ann. tit. 10:
§ 488 3
§ 493 3
Va. Code Ann. § 33.2-1217 3
Wash. Rev. Code § 47.42.040 3
Wyo. Stat. Ann. § 24-10-104 3
23 C.F.R. § 750.705(h) 3
Austin, Tex., Code of Ordinances:
§ 25-10-3(10) 4
§ 25-10-3(11) 4
§ 25-10-152(A) 4
§ 25-10-152(B)(1) 4
§ 25-10-152(B)(2)-(5) 4
§ 25-10-152(B)(2)(b) 4
Chicago, Ill., Municipal Code § 13-20-680 16
Cincinnati, Ohio, Municipal Code:
§ 895-1-O 3
§ 1427-03-O 3
§ 1427-03-O1 3

Dallas, Tex., Code:

§ 51A-7.306 3

§ 51A-7.1715 3

Sup. Ct. R.:

Rule 37.3(a)..... 1

Rule 37.6 1

OTHER MATERIALS

H. Gene Hawkins, Jr. et al., Statistical Analysis of the Relationship between On-Premise Digital Signage and Traffic Safety (Dec. 17, 2012), *available at* http://www.signresearch.org/wp-content/uploads/Digital-Signage-Traffic-Safety-A-Statistical-Analysis.pdf 15

Indianapolis Advertising Sign Permit Application, https://www.indy.gov/activity/signs-and-advertising-permits 11

Int'l Sign Ass'n et al. Amicus Br. in Support of Appellant, *Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 245 Cal. App. 4th 610 (Cal. Ct. App. 2016) (B260074) (Nov. 19, 2015)..... 7

Deanna Isaacs, *"Little" LED billboards, big nuisance*, Chi. Reader (Sept. 4, 2013), https://www.chicagoreader.com/chicago/scott-waguespack-unregulated-led-billboards-stalled-ordinance/Content?oid=10853242 16

Maryland Outdoor Advertising Sign Permit Form, https://onestop.md.gov/licenses/outdoor-advertising-sign-permit-5d1540bf54f24d03e999879c 11

Paul Merrion, *Digital ad signs a turnoff for City Hall*, Crain's Chi. Bus. (July 23, 2013) 16

Mississippi Application for Permit To Erect Outdoor Signs, https://mdot.ms.gov/documents/Maintenance/ODA/MND-800%20(rev.%2012-19).pdf 11

New Jersey Application for Outdoor Advertising Permit, https://www.state.nj.us/transportation/business/epermits/oda/pdf/oa-6.pdf 11

Out of Home Advert. Ass'n of Am., Billboards Lead OOH Recovery and Over Half of Top 100 OOH Advertisers More Than Double Spend (May 21, 2021), https://oaaa.org/AboutOOH/Factsamp;Figures/AnnualQuarterlyRevenue.aspx 13

Out of Home Advert. Ass'n of Am. et al. Amicus Br. Supporting Appellant's Pet'n for Reh'g En Banc, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) (No. 17-6238) (Oct. 7, 2019) 7, 8

Wyoming Outdoor Advertising Permit Application, http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Right_of_Way/Permit%20Application.pdf 11

INTEREST OF *AMICUS CURIAE*[1]

Amicus International Sign Association ("ISA") is the leading trade association for the on-premises sign industry in the United States – an industry with more than 15,000 businesses employing more than 200,000 Americans.[2] The ISA represents the interests of its member manufacturers, users, and suppliers of on-premises signs and other visual communications systems. Its member sign companies are mostly small businesses that manufacture, install, and maintain on-premises signs. Many of those sign companies are family-owned, multi-generational businesses. Its members also include several nationally recognized suppliers and distributors.

The ISA is devoted to supporting, promoting, and improving the on-premises sign industry through education and training programs, technical resources, advocacy, stakeholder outreach, and industry events. One of the core functions of the ISA is to provide guidance to local officials and businesses on best practices

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represent that all parties have consented to the filing of this brief.

[2] The Texas Sign Association and Mid-South Sign Association, which covers the other two States in the Fifth Circuit (Mississippi and Louisiana), join the ISA in this brief. The following affiliated sign associations also join this brief: Arizona Sign Association, California Sign Association, Colorado Sign Association, Midwest Sign Association, Nevada Sign Association, Northeast States Sign Association, Northwest Sign Council, Southern States Sign Association, Tri-State Sign Association, Utah Sign Association, and Virginia Sign Association.

in developing and complying with sign regulations. Since this Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the ISA has partnered with the American Planning Association and its various state and regional chapters to educate more than 3,000 city planners and local officials through two dozen sessions, webinars, and workshops on how to develop and enforce content-neutral sign regulations.

The daily work of on-premises sign companies, including applying for sign permits on behalf of their customers, is subject to control through local sign ordinances in every jurisdiction in the country. Their livelihood depends on reasonable and workable sign regulations. Because the on-premises sign industry has relied heavily on the traditional regulatory distinction between on-premises and off-premises signs for decades, it has an interest in the preservation of regulatory certainty and, therefore, in the outcome of this case. The ISA believes that its perspective may assist the Court in assessing the industry implications of affirming the Fifth Circuit's decision below.

INTRODUCTION AND SUMMARY

Laws that distinguish between on-premises and off-premises signs have been on the books for decades. These codified distinctions, also known as "on-premises/off-premises" distinctions, exist at the federal, state, and local levels throughout the United States. At the federal level, for example, the Highway Beautification Act of 1965 requires States to "control" off-premises signs but exempts from that requirement signs "advertising activities conducted on the property on which they are located" or "advertising the sale or lease of property upon which they are located." 23 U.S.C. § 131(a)-(c). States are required to adopt "laws, regulations, and procedures" to accomplish the

requirements of the Act, 23 C.F.R. § 750.705(h), and those that do not comply with the Act risk forfeiting federal highway funding, 23 U.S.C. § 131(b). As a result, state agencies also have enacted regulations that distinguish between on-premises and off-premises signs.[3] And, like the City of Austin, thousands of municipalities – the government entities primarily responsible for regulating the sign industry – similarly have codified these distinctions.[4]

In line with this pre-existing body of law, the City of Austin adopted a series of regulations that prohibit digital off-premises signs but permit digital on-premises signs. The regulations define an "off-premise[s] sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site

---

[3] *See*, *e.g.*, Ala. Code § 23-1-273; Alaska Stat. §§ 19.25.090, 19.25.105; Ariz. Rev. Stat. § 28-7902; Ark. Code Ann. § 27-74-302; Cal. Bus. & Prof. Code § 5442.5; Del. Code Ann. tit. 17, § 1121; Fla. Stat. §§ 479.16, 479.111; Ga. Code Ann. § 32-6-72; Haw. Rev. Stat. §§ 264-72, 445-112; Idaho Code § 40-1910A; 225 Ill. Comp. Stat. 440/3.17-440/3.18, 440/4, 440/4.03-440/4.04; Ind. Code § 8-23-20-7; Kan. Stat. Ann. § 68-2233; Ky. Rev. Stat. Ann. § 177.841; La. Stat. Ann. § 48:461.2; Me. Rev. Stat. Ann. tit. 23, §§ 1903, 1908, 1914; Md. Code Ann., Transp. §§ 8-741, 8-744; Mass. Gen. Laws ch. 93D, § 2; Mich. Comp. Laws §§ 252.302, 252.313; Minn. Stat. § 173.08; Miss. Code Ann. § 49-23-5; Neb. Rev. Stat. § 39-218; Nev. Rev. Stat. § 410.320; N.H. Rev. Stat. Ann. § 238:24; N.J. Stat. Ann. § 27:5-11; N.C. Gen. Stat. § 113A-165; Ohio Rev. Code Ann. §§ 5516.06, 5516.061; Okla. Stat. tit. 69, §§ 1273-1274; S.C. Code Ann. §§ 39-14-20, 39-14-30; S.D. Codified Laws §§ 31-29-63, 31-29-63.4; Utah Code Ann. § 72-7-504; Vt. Stat. Ann. tit. 10, §§ 488, 493; Va. Code Ann. § 33.2-1217; Wash. Rev. Code § 47.42.040; Wyo. Stat. Ann. § 24-10-104.

[4] *See*, *e.g.*, Dallas, Tex., Code §§ 51A-7.306, 51A-7.1715; Cincinnati, Ohio, Municipal Code §§ 895-1-O, 1427-03-O, 1427-03-O1; *see also* Pet'r Cert-Stage Reply Br., Appendix B (listing others).

where the sign is installed, or that directs persons to any location not on that site." JA52 (§ 25-10-3(11)). This definition tracks the traditional definition of an "off-premises sign" codified in other jurisdictions. *See supra* notes 3-4.

The City of Austin's regulations impose limitations on the technology that off-premises signs may use to display their messages. The City has banned off-premises signs for more than 30 years, but it has allowed grandfathered off-premises signs to operate in the City. JA95 (§ 25-10-152(A) (defining grandfathered signs as "nonconforming signs")); JA52 (§ 25-10-3(10) (defining "nonconforming sign")). Nonconforming signs may be relocated, modified, and replaced so long as they comply with the Code's specifications. JA95-102 (§ 25-10-152(B)(2)-(5)). Most relevant here, billboard operators such as respondents may change the "face" – i.e., the content – of their nonconforming signs. JA95 (§ 25-10-152(A), (B)(1)). They cannot, however, "change the method or technology used to convey a message" on nonconforming billboards. *Id.* (§ 25-10-152(B)(2)(b)).

The City of Austin denied respondents permission to digitize their nonconforming billboards. JA28-36, 39-41. Respondents did not request – and were not denied – permission to install new off-premises signs. Nor were they banned from operating their nonconforming billboards or from changing the face of those signs other than through digitization. In other words, the gravamen of respondents' complaint is that they cannot use a different type of technology to operate their billboards. Such limited burden does not warrant the consequential relief respondents seek.

Respondents invite this Court to upend the workable and well-established on-premises/off-premises

distinction by adopting the Fifth Circuit's sweeping interpretation of content neutrality. But such a paradigm shift would have disruptive consequences for the sign industry and its customers by creating ongoing regulatory uncertainty, imposing serious economic burdens, and chilling protected speech. In addition, the Fifth Circuit's conclusion rests on an incorrect premise that is contrary to the record and defies the realities of regulatory enforcement: that to ascertain whether a sign is off-premises one "must read the sign." App. 14a. And the court's holding that the City of Austin's regulations are underinclusive is incorrect because, unlike billboards, on-premises signs do not impair the City's aesthetics and public safety. The City properly modeled its regulations after the thousands of laws across the United States that codify the on-premises/off-premises distinction – the most effective and workable formula to regulate signs that policymakers at all levels of government have favored in their sound legislative judgment.

Instead of adopting the Fifth Circuit's overreaching approach, the Court should use this case to clarify that on-premises/off-premises distinctions remain a reasonable content-neutral manner of regulating signs. The Court should uphold the City of Austin's regulations as constitutional.

ARGUMENT

I. AFFIRMING THE FIFTH CIRCUIT'S HOLDING WOULD HAVE DISRUPTIVE CONSEQUENCES FOR THE ON-PREMISES SIGN INDUSTRY AND ITS CUSTOMERS

Adopting the Fifth Circuit's novel reading of content neutrality as applied to on-premises/off-premises distinctions will create substantial uncertainty and confusion in the sign industry and cause significant economic harm to on-premises sign businesses and their customers.

A. Regulatory Certainty Is Good For Business And Should Be Preserved

For more than a century, this Court consistently has rejected challenges to regulations targeting off-premises signs. In early cases before the Court, off-premises signs raised equal protection and due process challenges to those regulations, but the Court rejected such challenges on the basis that the regulations fell within the police powers of States and local governments. *See*, *e.g.*, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917); *St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932); *see also Suffolk Outdoor Advert. Co. v. Hulse*, 439 U.S. 808 (1978) (dismissing appeal for want of a substantial federal question). And most recently, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court validated the on-premises/off-premises distinction as constitutional under the First Amendment by approving the City of San Diego's decision to prohibit off-premises commercial signs while permitting on-premises commercial signs. *See id.* at 512 (plurality opinion); *id.* at 541 (Stevens, J., dissenting in part but joining the plurality in this portion of the

opinion); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8 (1994) (explaining that a majority of the Justices joined this portion of the *Metromedia* opinion). Guided by these precedents, the on-premises sign industry has for decades relied on the prevailing understanding that on-premises/off-premises distinctions are content-neutral and constitutionally permissible regulations.

Across municipalities, on-premises and off-premises signs are subject to entirely different sets of rules and regulations. It is this clear regulatory line – a line that has allowed industry participants to conduct business with a high degree of regulatory certainty to their economic benefit – that has drawn *both* the on-premises and the off-premises industries to consistently advocate for the preservation of on-premises/off-premises distinctions as a content-neutral means of regulating signs. *Compare*, *e.g.*, Out of Home Advert. Ass'n of Am. et al. Amicus Br. Supporting Appellant's Pet'n for Reh'g En Banc, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) (No. 17-6238) (Oct. 7, 2019) ("OAAA Amicus Br."), *with* ISA et al. Amicus Br. in Support of Appellant, *Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 245 Cal. App. 4th 610 (Cal. Ct. App. 2016) (B260074) (Nov. 19, 2015).

This Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), did not transform the on-premises/off-premises distinctions that are codified in thousands of laws across the United States into unconstitutional content-based regulations of speech. Indeed, *Reed* did not involve on-premises/off-premises signs or otherwise abrogate – or even mention – *Metromedia*. *See id.* at 159-74. Quite the opposite, the concurrence explained that "[r]ules distinguishing between on-premises and off-premises signs" are content-neutral

restrictions of speech. *Id.* at 174-75 (Alito, J., concurring). The Court should use this case to make this point clear: as the Court held in *Metromedia*, on-premises/off-premises distinctions are content-neutral means of regulating signs.

B. Eliminating Reasonable On-Premises/Off-Premises Distinctions Will Chill Protected Speech And Cause Severe Economic Harm To On-Premises Sign Owners And Their Customers

Affirming the Fifth Circuit's holding will increase litigation costs and chill protected speech in the on-premises sign industry. As the Out of Home Advertising Association of America ("OAAA") – the leading trade group representing the off-premises sign industry of which respondents are listed as members – previously has recognized, invalidating on-premises/off-premises distinctions "could lead to the uncontrolled proliferation of outdoor advertising and ultimately lead state and local governments to impose restrictions on all signs." OAAA Amicus Br. 10. In other words, government officials likely will be left with two unpalatable choices: either permit too many signs or restrict too many signs. But such all-or-nothing approaches to sign regulation constitute "strong and unnecessary medicine" that could sweep up too much speech. *Id.* As the City of Austin acknowledges (at 37), "[f]aced with the choice . . . , States and localities are likely to choose the more speech-restrictive option." Thus, adopting the Fifth Circuit's approach would impose substantial burdens on on-premises sign companies that will be forced either to comply with or to litigate the scope of overinclusive regulatory regimes at great expense.

Overinclusive laws that regulate on-premises and off-premises signs equally will not promote free speech or provide economic benefits to the sign industry as a whole; billboards might benefit, but on-premises signs certainly will suffer. On-premises signs will have to compete with billboards for limited, available sign space. But most municipalities, including the City of Austin, have banned new billboards for decades. Thus, although billboards will be allowed to compete in a market that historically and justifiably denied them entry, the sign space occupied by on-premises signs will be reduced, decreasing the effectiveness and value of on-premises signs. In addition, billboards typically benefit from formal long-term leases and contract arrangements that offer some level of protection against interference by other industry players, including the government. On-premises signs, on the other hand, are less likely to be protected by similar contracts, because the owners of those signs often also own the property where the signs sit. Thus, the erosion of on-premises/off-premises distinctions will benefit billboards to the detriment of on-premises signs – the industry that represents thousands of American retailers, "Mom and Pop" shops, and brick-and-mortar establishments such as churches, hospitals, colleges and universities, public libraries, and other institutional establishments.

Put simply, eliminating reasonable on-premises/off-premises restrictions, such as the ones at issue here, will have devastating consequences for the on-premises sign industry and the businesses and customers it serves. At a fundamental level, the distinctions have become an integral part of property development and sign companies' business models. But if state and local governments suddenly overhaul their

well-settled regulatory regimes in an unprecedented manner, the ISA's member manufacturers, users, and suppliers will be forced to transform their models at significant expense to bring their operations into compliance. And requiring on-premises signs to operate on equal terms with billboards will either render a host of existing on-premises signs nonconforming or less valuable, or subject on-premises signs to a new regulatory regime that for decades has applied only to billboards. Under any of those scenarios, on-premises signs will pay a hefty price: either self-suppress protected speech or incur significant litigation, operational, and regulatory costs.

II. REGULATORS DO NOT CONSIDER THE CONTENT OF SIGNS WHEN ENFORCING OFF-PREMISES PERMIT REQUIREMENTS

The Fifth Circuit incorrectly concluded that the City of Austin's regulations are content-based because government officials "must read the sign" to determine whether the sign is an off-premises sign. App. 14a-17a. The core concern animating strict scrutiny of content-based regulation of speech is government censorship "of public discussion of an entire topic." *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 537-38 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."). That concern is not implicated here because the regulations do not require government officials to police what subject matter or topics off-premises signs convey.

Respondents' permit applications in this case squarely undermine the Fifth Circuit's conclusion. To digitize their signs, respondents submitted applications

that identified the location of the signs and the sign owners' addresses. JA155-67. The applications also contained other content-neutral information, such as the signs' dimensions. *Id.* None of the applications revealed to the City of Austin what the signs said. *Id.* Yet the City was able to evaluate the applications and denied them without regard to the content of the signs' messages. Instead, the City denied the permits because the signs "would change the existing technology used" by respondents. JA28-29, 34-35. The City's content-neutral enforcement of the Code shows the regulations at issue do not police the content of the speaker's message.

The City of Austin's enforcement is consistent with how government officials in other jurisdictions enforce off-premises regulations. Billboard companies – such as respondents – generally are not required to disclose the content of the billboards' messages when applying for a permit. Instead, regulators review and approve applications by obtaining content-neutral information, such as the signs' dimensions and location.[5]

In sum, on-premises/off-premises distinctions regulate *how* and *where* off-premises signs communicate their message. But government officials do not police

---

[5] *See*, *e.g.*, New Jersey Application for Outdoor Advertising Permit, https://www.state.nj.us/transportation/business/epermits/oda/pdf/oa-6.pdf; Maryland Outdoor Advertising Sign Permit Form, https://onestop.md.gov/licenses/outdoor-advertising-sign-permit-5d1540bf54f24d03e999879c; Indianapolis Advertising Sign Permit Application, https://www.indy.gov/activity/signs-and-advertising-permits (application for "signs that advertise any business or entity not conducted on the site where the sign is located"); Mississippi Application for Permit To Erect Outdoor Signs, https://mdot.ms.gov/documents/Maintenance/ODA/MND-800%20(rev.%2012-19).pdf; Wyoming Outdoor Advertising Permit Application, http://www.dot.state.wy.us/files/live/sites/wydot/files/shared/Right_of_Way/Permit%20Application.pdf.

what off-premises signs say, i.e., whether the signs contain "political messages, religious messages, or any other subject matter, as the [content-based] regulation did in *Reed*." App. 50a (citing *Reed*, 576 U.S. at 169); *compare Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977) (striking down ordinance that prohibited real estate "for sale" and "sold" signs as unconstitutional content-based restriction "not genuinely concerned with the place of the speech").[6] Indeed, such content-neutral enforcement is necessitated by the "periodically changing content" of billboards. *Metromedia*, 453 U.S. at 511. The Fifth Circuit's conclusion is contrary to the record and the realities of regulatory enforcement.

III. THE REGULATIONS ARE NARROWLY TAILORED

The regulations are narrowly tailored to the City of Austin's asserted interests in preserving aesthetic values and protecting public safety. The Fifth Circuit erred in concluding that the regulations are underinclusive, and the City employed the most effective and workable content-neutral basis of regulating signs.

A. The Regulations Are Not Underinclusive

The Fifth Circuit incorrectly concluded that the City of Austin's regulations are underinclusive because they do not prohibit digital on-premises signs. App. 26a. Contrary to the Fifth Circuit's reasoning, the City had no basis to target on-premises signs, but it did have a reason to target billboards.

---

[6] Similarly, the City of Austin's regulations do not distinguish among viewpoints within those subject-matter categories, "a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 576 U.S. at 168 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)).

It is commonly understood in the sign industry that off-premises and on-premises signs are categorically different in nature, size, and proximity to highly trafficked areas. Off-premises signs typically are billboards of standardized, rectangular dimensions that are erected along the margins of highways and freeways.[7] There are two main types of billboards. The most common type of billboard measures 672 square feet (14 ft. by 48 ft.) and is placed along interstates and highways. The less common type of billboard is 300 square feet (12 ft. by 25 ft.) and located along urban roads. Either way, billboards are usually of rectangular or square dimensions and in the line of vision of drivers. The structures are owned by billboard operators that lease the billboard space for a profit. According to recent data, large corporations such as McDonald's, Apple, Allstate, Geico, and Amazon are the top spenders in billboard advertising.[8] The main purpose of off-premises signs is to advertise businesses or activities at a different location.

By contrast, on-premises signs generally are smaller (ranging from 24 square feet to 300 square feet), come in a wide variety of shapes and creative designs, are located on the owners' properties, and are often set back far from a motorist's line of vision. Unlike billboard operators, business owners of on-premises signs do not derive direct revenue from their signs. Instead, on-premises signs provide economic value by identifying, branding, and marketing the businesses

---

[7] In the sign industry, the term "off-premises signs" is used interchangeably with "off-site signs," "outdoor advertising," or "billboards."

[8] *See* Out of Home Advert. Ass'n of Am., Billboards Lead OOH Recovery and Over Half of Top 100 OOH Advertisers More Than Double Spend (May 21, 2021), https://oaaa.org/AboutOOH/Factsamp;Figures/AnnualQuarterlyRevenue.aspx.

and establishments where the signs are located. On-premises signs are owned by a variety of businesses and brick-and-mortar establishments, many of them local merchants and independent retailers. And their main purpose is the polar opposite of that of billboards: to advertise and promote the property where they sit. In other words, while billboards draw the viewer's attention away from where the viewer is looking, on-premises signs help orient the viewer toward the establishment where the sign is located, which is often the viewer's destination. The traditional on-premises/off-premises distinctions are grounded in these differences and categorical characteristics.

This Court's precedents have recognized this dichotomy. More than a century ago, the Court acknowledged that "billboards properly may be put in a class by themselves . . . 'in the interest of the safety, morality, health and decency of the community.'" *St. Louis Poster*, 249 U.S. at 274 (quoting *Thomas Cusack*, 242 U.S. at 530). And most recently, in *Metromedia*, this Court agreed "with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." 453 U.S. at 509, 541. The Court also concluded that "[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as an 'esthetic harm.'" *Id.* at 510, 541.

The City of Austin's policy choice to impose technological limits on off-premises signs must be scrutinized against the backdrop of this common-sense understanding of the differences between off-premises and on-premises signs. Indeed, this Court has recognized that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down

with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). As this Court's decisions make clear, the City's legislative judgment in this case is neither novel nor implausible. If the total "prohibition of offsite advertising" at issue in *Metromedia* was "directly related to the stated objectives of traffic safety and esthetics," 453 U.S. at 511, the more limited burden imposed by the City of Austin's restrictions on billboard digitization is narrowly tailored.

Unlike off-premises signs, on-premises signs do not impair the City of Austin's asserted interests. A law is underinclusive if "'it leaves appreciable damage to [the government's] supposedly vital interest unprohibited.'" *Reed*, 576 U.S. at 172 (quoting *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002)). But the record is devoid of any evidence that on-premises signs cause "appreciable damage" to the City's aesthetics and public-safety concerns. *Id.* To the contrary, research shows that on-premises signs do not cause those problems. For example, a study by researchers from Texas A&M University shows "scientifically based data . . . indicate that the installation of digital on-premise[s] signs does not lead to a statistically significant increase in crashes on major roads."[9] And the Court in *Metromedia* rejected the argument that the ordinance at issue was "underinclusive because it permit[ted] onsite advertising." 453 U.S. at 511. Thus, there is no basis to conclude

---

[9] H. Gene Hawkins, Jr. et al., Statistical Analysis of the Relationship between On-Premise Digital Signage and Traffic Safety at viii, 35 (Dec. 17, 2012), *available at* http://www.signresearch.org/wp-content/uploads/Digital-Signage-Traffic-Safety-A-Statistical-Analysis.pdf.

that the City failed to address damage caused by on-premises signs.

B. On-Premises/Off-Premises Distinctions Are The Most Effective And Workable Content-Neutral Means Of Regulating Signs

On-premises/off-premises distinctions are the most effective and workable content-neutral means of regulating signs; other content-neutral distinctions have proven to be unworkable. The City of Chicago, for example, adopted a regulation imposing stricter permit requirements on digital signs larger than 100 square feet. *See* Chicago, Ill., Municipal Code § 13-20-680. That is, the City regulated digital signs based on their size rather than on their on-premises/off-premises nature. But this regulatory scheme backfired as billboard companies began to size their signs just under the regulations' size limits, causing Chicago to be cluttered with digital billboards smaller than 100 square feet.[10] Chicago's experience demonstrates that jurisdictions across the country have chosen to rely on the traditional on-premises/off-premises distinctions – as opposed to other content-neutral means – for sound, practical reasons. This Court should defer to the City of Austin's policy choice to rely on those workable distinctions – distinctions that the U.S. Congress, the States, and numerous municipalities across the United States have favored in their sound legislative judgments over the years. *See FEC v. Beaumont*, 539 U.S. 146, 162 n.9 (2003) ("Judicial deference is particularly warranted where,

---

[10] *See* Deanna Isaacs, *"Little" LED billboards, big nuisance*, Chi. Reader (Sept. 4, 2013), https://www.chicagoreader.com/chicago/scott-waguespack-unregulated-led-billboards-stalled-ordinance/Content?oid=10853242; Paul Merrion, *Digital ad signs a turnoff for City Hall*, Crain's Chi. Bus. (July 23, 2013).

as here, we deal with a [legislative] judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'").

CONCLUSION

As this Court held in *Metromedia*, "[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(quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). The nature of and dangers posed by on-premises and off-premises signs are fundamentally different. The Fifth Circuit erred in blurring the reasonable line that divides the two across thousands of statutes and regulations. The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOSEPH S. HALL
Counsel of Record
ALEJANDRA ÁVILA
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jhall@kellogghansen.com)

August 20, 2021