No. 20-1029

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 LAND DEVELOPERS, CHAMBERS OF COMMERCE, AND SCENIC ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Pages

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

We are leading developers and scenic organizations brought together for the first time out of concern for property rights and regulatory certainty.

Hines is a global real estate investment, development and management firm, founded in 1957, with a presence in 240 cities.

Crow Holdings is one of the largest developers in the United States with completed projects in 35 states in three subsidiaries: Trammel Crow Residential, Crow Holdings Office, and Crow Holdings Industrial.

Transwestern Development Company is a developer of office, industrial, multifamily, mixed-use and healthcare projects with 34 offices nationwide.

Central Houston is the leading business league representing the interests of Houston's downtown community and steward of its vision for development of the central business district since 1983.

Houston Northwest Chamber of Commerce represents the interests of 700 member businesses in an area of approximately 500,000 residents, in partnership with local government and community organizations.

East End Chamber of Commerce is the premier business organization in Houston's East End representing over 500 chamber members in a vibrant

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission. All parties consent to the filing of this brief.

area with 3,000 businesses, 218,000 residents and 96,000 employees.

Uptown Houston Association is the leading business association representing a business district 200,000 workers, focused on area-wide planning, implementation of area improvements, and serving as a forum for area business interests.

Houston First Corporation is a local government corporation that operates the city's convention and performing arts facilities and promotes Houston as a world-class destination for tourism and conventions.

Howard Group is a real estate development company based in Miramar Beach, Florida.

Constructive Ventures, Inc. is a real estate development firm based in Austin.

The Garden Club of America, founded in 1913, a volunteer organization comprised of 199 member clubs and 18,000 club members, has been advocating for billboard controls since the 1920s.

Scenic America, along with its 30 nationwide chapters,[2] is the only national organization dedicated to the preservation of the visual environment.

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[2] Scenic America, Scenic Texas and other state and local scenic organizations in the States of Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Michigan, Nevada, North Carolina, Ohio, Tennessee, Utah, Virginia, Wisconsin; the cities of Austin, Dallas, Fort Worth, Galveston, Houston, Jacksonville, Knoxville, Lafayette, Los Angeles, Philadelphia, Pittsburgh, and San Antonio; the counties of Chatham and Walton; and the region of the Texas Hill Country. In addition to the scenic groups are environmental organizations: Austin Outside, Hill Country Alliance, and Environment Texas.

SUMMARY OF THE ARGUMENT

The lower court gave zero weight to property rights. While land use restrictions can be burdensome and violate due process, striking down off-premise restrictions would impose enormous costs on landowners and developers. Off-premise restrictions work.

ARGUMENT

I. The lower court disregarded property rights.

The lower court erred by treating billboards simply as form of speech. Billboards are property—an unusual type of property "designed to stand out and apart from its surroundings," creating "a unique set of problems for land-use planning and development." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Their entire economic output is equal to "impressions" or driver distractions, which are equal to traffic count multiplied by dwell time ("time of the unobstructed view").[3] As a form of land use, billboards do nothing but obstruct others' view as much as possible.

The ordinance addresses "off-premise" signs that "direct persons to any location not on that site" or "advertis[es] a business, person, activity . . . not located on the site." Sign Code § 25-10-3(11) (emphasis

[3] Robert Thomas Helmer, "Outdoor billboard real property valuation," The Appraisal Journal, 84(1), 51 (2016).

added). By contrast, on-premise signs direct traffic *to* the premises.

"Signs directing traffic" and "street numbers" satisfy strict scrutiny and further a compelling governmental interest. *Reed*, 576 U.S. 155, 173 (2015). Street number signs, however, are not generally required and difficult to read while driving. On-premise signs thus play an essential role in directing traffic. The consequence of striking down the on-premise exception would be to "require motorists to pay more attention to street numbers and less to traffic." *Metromedia*, 453 at 532 n.10 (Brennan, J., dissenting). Off-premise controls are "the least restrictive means of making necessary information available to motorists." *See* Brief for the United States, *Schroer v. Thomas*, 937 F.3d 721 (6th Cir. 2019) (Case No. 1638), *cert. denied*, 141 S. Ct. 194 (July 9, 2020).

Since *Metromedia*, on-premises or "wayfinding" signs have evolved into a wide variety of formats that are incorporated into the structure of buildings. In contrast to traditional on-premise signs that consisted mainly of text messages on square plates, wayfinding signs "rely heavily on non-text cues such as colors and symbols," and "reliance on text-based messaging is minimized."[4] At the same time, billboards have also become more graphical and expanded onto other surfaces in the right-of-way like benches and busstops.

Determining a content-neutral "structural" formula to distinguish these types of signs would be

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[4] *See* Society for Experiential Graphic Design, https://segd.org/what-wayfinding.

futile.[5] In *Reed,* the Court suggested cities could work around First Amendment issues by replacing traditional sign categories with "many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability." *Reed v. Town of Gilbert*, 576 U.S. 155, 173 (2015). This has helped to eliminate some offensive categories but unfortunately has resulted in longer and more convoluted sign codes. *See, e.g., Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar Park,* No. 20-50125, 2021 U.S. App. LEXIS 23456 (5th Cir. Aug. 6, 2021) (upholding ban on off-premise sign via "harmonization" of retrospective alternative grounds for denial).

Amici are aware of no instance in which regulators could not easily distinguish on and off-premise signs after a cursory inspection of the premises. On and off-premise signs are entirely different land uses, "separate and distinct businesses. . . different in their purposes, their clientele, their sales methods, their production facilities and skills, and their national organizations." *Combined Communications Corp. v. City & Cty., Denver*, 542 P.2d 79, 82 (Colo. 1975).

The lower court ignored key evidence in the record and misunderstood basic facts about the development process. As with other development

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[5] We reject the notion that buildings are not expressive and lack content. *See* John Nivala, Constitutional Architecture: The First Amendment and the Single Family House, 33 San Diego L. Rev. 291, 316-317 (1996) ("Architecture is entitled to First Amendment protection…the same protection as Ms. Gilleo was given in posting her sign. The exterior design of the house is speech; it can be read by its viewers.").

regulations, the City regulates signs through permits. On the sign permit applications at issue, Respondents both certified in advance that all their signs were off-premise and provided their locations, ownership, and structural drawings of *blank* signs. J.A. 155-167. Sign content was not part of the permitting process. With the property information provided in the permit application, the permitting officer was able to verify that the property owners had leased small billboard tracts to Respondents[6] who leased the sign faces to advertisers.[7] Finally, in the event any of the digital billboards were installed without a permit, a code enforcement officer could visit the property and speak to the owner and confirm whether the use of the sign for advertising was related to the use of the premises.

In practice, determining whether a sign is off-premise is easier and involves less examination of content than addressing other code violations, which often require city officials to assess conflicting oral and written statements about different land uses, e.g. residential use or unsightly conditions. For a century, tens of thousands of officials in cities across the country have applied the exact same off-premise criterion to the same 14x48-foot standard billboard on the interstate highway system, without difficulty.

The lower court was correct, in a sense, that a regulator may struggle to distinguish off-premise signs based on hypothetical sign messages without seeing actual signs or premises. While comparing hypothetical textual messages can sometimes help in sign cases, in this case it simply precluded any

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[6] *See* http://propaccess.traviscad.org.

[7] *See* https://www.reaganoutdoor.com/austin/ (map).

consideration of the property basis for the ordinance. It was impossible to determine whether the ordinance was based on land use or based on content without considering the use of the land. *See Metromedia*, 453 U.S. at 503 (court "may not escape…weighing [billboard owner's speech interest] against the public interest allegedly served by the regulation"). And "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack." *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

II. The Third Circuit got it right.

In *Rappa v. New Castle County*, 18 F.3d 1043, 1066 (3d Cir. 1994), the Third Circuit upheld the same language in the Delaware HBA on grounds that on-premise signs "are more related to the particular location" than billboards, "so that the messages they contain have an equal chance to be communicated."[8] *Rappa*'s approach has stood the test of time. It has been used successfully to resolve several difficult sign control cases over the last 25 years. *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 384 (3d Cir. 2010) (upholding restriction with respect to naming rights); *Johnson v. City & Cty. of Phila.*, 665 F.3d 486, 491 (3d Cir. 2011) (striking *Reed*-like content-based restrictions); *Riel v. City of Bradford*, 485 F.3d 736, 740 (3d Cir. 2007) (upholding some, striking some);

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[8] The Sixth Circuit previously upheld the Kentucky HBA on similar grounds. *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 591 (6th Cir. 1987): "The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property."

Adams Outdoor Advertising LP v. Pennsylvania DOT, 930 F.3d 199 (3d Cir. 2019) (Pennsylvannia HBA). It is cited approvingly 139 times.

The Third Circuit's approach is consistent with the First Amendment. The First Amendment presupposed the common law of property that is the primary basis for off-premise sign regulation. The First Amendment did not require that a citizen be held captive on his own property and forced to hear or view intrusive messages. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (notwithstanding the First Amendment, cities may ban "unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance").

As billboards proliferated along new roadways in the 1920s, the Court tacitly acknowledged that off-premise signs were subject to reasonable limits just like other land uses, by affirming a zoning ordinance that restricted billboards and allowed on-premise "accessory" signs based on location. *Village of Euclid v. Ambler Realty Co.*272 U.S. 365, 380 (1926). The zoning ordinance was based on location: "a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." *Id.* at 388.

The Court subsequently recognized the inherent property interest in on-premise signage in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (on-premise For Sale signs); *Metromedia* (on-premise noncommercial signs); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (on-premise political signs). In tandem with these on-premise decisions, the Court affirmed the constitutionality of off-premise restrictions on ten occasions.

- *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269, 274 (1919) (Holmes, J.) (noting that "billboards properly may be put in a class by themselves").
- *Packer Corp. v. Utah*, 285 U. S. 105, 110 (1932) (unanimous) (upholding billboard ban with exception for on-premise business signs)
- *Railway Express Agency, Inc., v. New York*, 336 U. S., 106 (1949) (unanimous) (upholding mobile billboard ban with exception because "those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use")
- *Markham Advertising Co. v. Washington*, 393 U.S. 316 (1969) (summarily dismissing First Amendment challenge to on/off-premise distinction)
- *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976) (unanimous) ("A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere.")
- *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978) (summarily dismissing First Amendment challenge to on/off-premise distinction)
- *Lotze v. Washington*, 444 U.S. 921 (1979) (same)
- *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979) (same)
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 n.17 (1981) ("We agree with those [summary] cases and with our own

decisions…sustaining the distinction between offsite and onsite commercial advertising")

- *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("We reaffirm the conclusion of the majority in Metromedia.…[to] permit billboards to be used for onsite advertising and also justify the prohibition against offsite advertising")
- *City of Ladue v. Gilleo*, 512 U.S. 43, 58 n.17 (1994) (explaining that all nine justices agreed in *Metromedia* that "a prohibition of offsite commercial billboards even though similar on-site signs were allowed" was permissible)
- *Reed v. Town of Gilbert*, 576 U.S. 155, 175 (2015) (Alito, J., concurring) (noting "rules distinguishing between on-premises and off-premises signs" are not content based)

III. Affirming would impose enormous costs on property owners and developers.

More than 1,500 cities and states have enacted billboard restrictions with the same on-premise language, in accordance with model sign laws[9] and the Highway Beautification Act of 1965, 23 U.S. Code § 131(b)(3). The federal government subsequently paid $250 million to billboard companies as just

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[9] *See* Model On-Premise Sign Code (U.S. Sign Council 2011); An Evidence Based Model Sign Code, (International Sign Association 2013); Model Sign Ordinance (Montgomery County [Penn.] Planning Commission Board 2014); Model Zoning Ordinance Regulations for Signs (Southeastern Wisconsin Regional Planning Commission 2015); Model Sign Ordinance (Pocono Mountain Chamber of Commerce 2000).

compensation under the Act. 79 Stat. 1028; 84 Stat. 1713; 88 Stat. 2281; 90 Stat. 425; 92 Stat. 2689. This was the tip of the iceberg of compensation. A single billboard removal in Minnesota, out of tens of thousands of such removals, yielded a payment of $4.3 million. *Minnesota v. Gritz et al.*, No. 62-cv-10-6746 (Ramsey County, Minn. 2d Dist. Ct., Sept. 26, 2013).

Were the Court to strike down the off-premise distinction, the impact on national land value would be astronomical. First, property values in the vicinity of each billboard would immediately drop.[10] Citywide values would then decline as views were lost. In states like Hawaii with off-premise restrictions for scenic purposes, the decline would be statewide. There is simply no market for homes or businesses facing digital billboards. Developers, therefore, prohibit them from master-planned communities.

Another reliance cost is the value of 100 years of work by local business groups, cities, legislatures, and courts to enact and implement off-premise restrictions. Almost every city in the country would have to start over from scratch rewriting thousands of sign codes. There is no one-size-fits-all solution for a sign code.

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[10] For instance, a study in Philadelphia showed homes within 500 ft of a billboard were worth $31,000 less at time of sale than those further away. In addition, every billboard in a census tract correlated with a nearly $1,000 depreciation in home value compared to the city average. Jonathan Snyder, "Beyond Aesthetics: How Billboards Affect Economic Prosperity," (University of Pennsylvania, 2011), https://www.scenic.org/wp-content/uploads/2019/09/Beyond_Aesthetics1.pdf

In Houston, for example, local business groups have spent more than a century negotiating and implementing off-premise restrictions. Its first billboard ordinance was passed after a petition by the Chamber of Commerce in 1913 in response to uncontrolled blight on Main Street. Unlike every other major city, Houston has rejected zoning, instead relying on its Freeway Plan as its primary planning tool; as its freeways were built out, the city was inundated with new billboards, more than any other city. The city became known as the Billboard Capital of the World and inspired Ladybird Johnson to advocate for the HBA. Then in 1980, the business community succeeded in pushing through a ban on new billboards. And that was the beginning. For forty years, local business groups and the city negotiated with billboard companies to remove and swap signs ultimately eliminating 10,000 billboards. This result was only possible because of this Court's affirmation of off-premise regulations; without off-premise restrictions, it would be impossible under Houston's unique land use regime.

A version of Houston's long history with off-premise regulation has played out in almost every city in the country. In Maine, like Alaska and Hawaii and Vermont, a statewide ban was pushed through with the support of the Chambers of Commerce. When a repeal was proposed in 2011, 94% of Mainers polled by the Portland Press said no.

Washington, D.C. was awash in billboards even surrounding the National Mall prior to Congress passing a billboard statute in 1931. That, however, was the beginning of decades of work to implement the

statute. It took almost fifty years for the last billboard to come down pursuant to this ban.

Even if reenacting these efforts over the last century were feasible, there is no good alternative to the off-premise restriction. Two fixes that have been proposed are both content-based and anti-business, as well as incomprehensible. The first would redefine "billboard" as a sign owned by a person earning compensation from a third party. The second would provide that a noncommercial message may be substituted for a commercial message on any sign. The obvious problem is neither of these fixes bears any rational relationship to the purpose of restricting off-premise signs. Both fixes blatantly discriminate against business and would needlessly entangle local officials in unrelated business affairs of sign owners. They represent the worst type of oppressive regulation.

The Sixth Circuit has already ruled out the second fix, striking down the Kentucky HBA even though its off-premise restriction expressly did *not* apply to "noncommercial signs." *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 707 (6th Cir. 2020). This fix would also conflict directly this Court's ruling in *Discovery Network*, as the Third Circuit has noted. *Rappa*, 18 F.3d at 1074 n.54 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)). Justice Brennan forewarned of this exact nightmare scenario in *Metromedia*: "It is one thing for a court to classify in specific cases whether commercial or noncommercial speech is involved, but quite another –and for me dispositively so—for a city to do so

regularly for the purpose of deciding what messages may be communicated by way of billboards." 453 U.S. at 536-40. Justice Brennan's concerns have only grown more acute. *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017).

Finally, no one has asked for such an upheaval. Even the billboard industry is opposed. The Outdoor Advertising Association of America (OAAA) addressed the importance of the off-premise distinction in a 2018 brief on behalf of its 900 members—including Respondents Reagan and Lamar—which was drafted by Respondents' counsel Kannon Shanmugam:

> If allowed to stand, the district court's decision [striking on/off-premise exceptions] would have breathtaking doctrinal and practical implications. To begin with, [it] would work a fundamental change in First Amendment jurisprudence. Under the district court's reasoning, any regulation that required any consideration of a sign's contents would automatically be subject to strict scrutiny.
>
> .....
>
> The district court's sweeping interpretation of Reed would also have striking practical consequences by calling into question the continued validity of an enormous swath of regulations across the country. That includes the [Highway Beautification Act], which makes on-premises/off-premises distinctions. And it includes state and municipal ordinances in every

> State in this circuit, and indeed virtually every State in the country. It is impossible to predict how States and municipalities would react to that uncertainty. But they would necessarily face the difficult choice of restricting all outdoor advertising, or facing the substantial costs of litigating the particular provisions of their outdoor-advertising regulations. That is strong and unnecessary medicine. But it is the inevitable consequence of the decision below.

Brief of the Outdoor Advertising Association of America, *Schroer*, 937 F.3d 721. The OAAA has continuously supported the core provision of the HBA since 1965. As its President explained: "We have a clear common interest in the outcome. We have a common interest and a self- interest in the protections built into existing law that support value of our inventory."[11] Nothing has changed in the meantime. Unlike prior cases like *Metromedia*, no one's business is being shut down. Respondents simply want to put up additional digital billboards. Mr. Reagan himself, apparently, does not wish to overturn off-premise regulations nationwide.[12] No one has called for such a

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[11] OAAA & IBOUSA: We're In This Together, https://specialreports.oaaa.org/ibousa2018/ (OAAA, April 26th, 2018).

[12] *See* Kathryn Hardison, "Should digital billboards be allowed across Austin? Supreme Court could decide", Austin Business Journal, https://www.bizjournals.com/austin/news/2021/02/01/us-supreme-court-could-hear-billboard-case.html ("I just see this as a huge waste of time and taxpayer money when we could be working proactively on a more positive solution.").

disruptive outcome, which would be an extraordinary intrusion into state and local land use regulation.

CONCLUSION

Off-premise restrictions are based on billboards' impact on neighboring property. They are embedded in thousands of sign codes. Affirming would cause severe disruption and costs for property owners and developers.

Respectfully submitted,

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