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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the differential treatment of on-premises and off-premises signs in the City of Austin's sign code is a facially unconstitutional content-based regulation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a municipal sign ordinance that distinguishes between signs connected to the activities conducted on-site and signs that lack such a connection. The United States has a substantial interest in the resolution of issues concerning the constitutional limits on sign regulation. The Department of Transportation, for example, implements the Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131), which encourages States to limit off-premises signs along certain major highways in the interest of promoting highway safety and preserving natural beauty. Although the ordinance at issue here differs from the Highway Beautification Act, the analysis that the Court adopts in this

case may have ramifications for that Act, as well as other federal regulations.

STATEMENT

1. Throughout the Nation's history, governments have regulated the location and features of outdoor advertisements. See, *e.g.*, Charles R. Taylor & Weih Chang, *The History of Outdoor Advertising Regulation in the United States*, 15 J. of Macromarketing 47, 47 (1995) (discussing "municipal laws limiting the size of signs" adopted "[f]ollowing the Revolutionary War"). Following a "relatively calm period" of sign regulation during "the first half of the nineteenth century," the use of outdoor signs rose "dramatically" by the time of the Civil War. *Id.* at 48. "As the use of outdoor advertising grew, so did abuses." *Ibid.* Local governments responded with increasingly detailed sign regulations. See Frank Presbrey, *The History And Development Of Advertising* 500 (1929).

By the early 20th century, this Court had repeatedly sustained such regulations against challenges brought by the burgeoning billboard industry. In *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U.S. 269 (1919), and *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (1917), for example, this Court upheld local sign ordinances that billboard companies had attacked on various constitutional grounds. And in *Packer Corp.* v. *Utah*, 285 U.S. 105 (1932), this Court rejected an equal-protection challenge to a Utah statute that prohibited the "display on any bill board" of an "advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco," with an exception for a tobacconist to "have a sign on the front of his place of business stating that he is a dealer in such articles." *Id.* at 107.

In 1958, against the backdrop of those decisions and increased federal investment in the Nation's roadways, Congress passed what became known as the "Bonus Act" as part of the Federal Aid Highway Act of 1958, Pub. L. No. 85-381, § 12, 72 Stat. 95. See Taylor & Chang 55. The Bonus Act authorized additional highway-related payments to States if they voluntarily undertook to regulate billboards near federal interstate highways in a manner consistent with congressionally prescribed standards. See Pub. L. No. 85-381, § 12, 72 Stat. 95. When the Bonus Act failed adequately to address the proliferation of highway-adjacent billboards, Congress enacted the Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131); see Letter to the President of the Senate and to the Speaker of the House Transmitting Bills to Improve Highway Beauty, 1 Pub. Papers 582–583 (May 26, 1965); *Highway Beautification: Hearings Before the Subcomm. on H.R. 8487 and Related Bills of the House Comm. on Public Works*, 89th Cong. 1st Sess. 4 (1965) (statement of John T. Connor, Secretary of Commerce).

The Highway Beautification Act, which remains in force today, limits signs adjacent to certain major highways in order "to protect the public investment in * * * highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The Act requires States, on penalty of a ten-percent reduction of federal highway funds, to provide for the "effective control of the erection and maintenance * * * of outdoor advertising signs, displays, and devices" in designated areas—generally within 660 feet of Interstate or "primary system" high-

ways and in nonurban areas visible from those highways. 23 U.S.C. 131(b); see 23 U.S.C. 131(t) (defining "primary system" highways).

The Act defines "effective control," for those purposes, to mean that States must generally limit signs in covered areas to (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conducted on the property on which they are located"; (4) landmark signs, or signs of "historic or artistic significance the preservation of which would be consistent with the purposes of" the Act; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." 23 U.S.C. 131(c); see 23 U.S.C. 131(d) (allowing States to enter into customized agreements with the federal government about sign regulation in industrial and commercial areas); see also 23 U.S.C. 131(s) (specialized restrictions for designated scenic byways). In consultation with the federal Department of Transportation, every State has enacted sign controls that comply with the requirements of the Act.

2. This case concerns the "Land Management" regulations of the City of Austin, Texas, which include an ordinance "for the regulation of signs within the City of Austin and its extraterritorial jurisdiction" to "protect the health, safety, and general welfare of the City and its residents." Austin City Code § 25-10-1(1)-(2) (2021). The ordinance strives to "allow adequate opportunity for free speech in the form of messages or images displayed on signs, while balancing that interest against public safety and aesthetic concerns impacted by signs." *Id.* § 25-10-1(2) (2021).

The ordinance generally disallows new "off-premises" signs, Austin City Code § 25-10-103(1) (2021), which are

defined under the applicable version of the ordinance as those that "advertis[e] a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that direct[] persons to any location not on that site," *id.* § 25-10-3(11) (2016); see J.A. 52. Signs that advertise businesses, persons, products, services, or activities offered on-premises, or that do not advertise businesses, persons, products, services, or activities at all, are generally permitted. The City allows for the continued use of off-premises signs that were lawful at the time of their installation, and permits owners to display new messages on such signs, as long as any changes to an off-premises sign do not increase the extent to which the sign fails to conform to current sign-code requirements. Austin City Code §§ 25-10-152(A) and (B) (2016); see J.A. 95-96. The sign code also prohibits a "change [in] the method or technology used to convey a message" on an off-premises sign. Austin City Code §§ 25-10-152(B)(2)(b) (2016); see J.A. 96.

3. Respondents are commercial entities engaged in the business of outdoor advertising. In 2017, they applied to the City of Austin for permits to digitize the advertising faces of dozens of existing billboards in and around Austin. See Pet. App. 31a. Respondents designated all of the billboards as "off-premises" signs, see, *e.g.*, J.A. 155, 161, 166-167, but did not otherwise disclose the text or other content that they planned to display on the billboards once they were digitized, see Pet. 7; Pet. App. 35a. The City denied respondents' applications on the ground that digitizing the advertising faces of the billboards would "change the existing technology used to convey off-premise commercial messages." Pet. App. 34a; see J.A. 28-29, 34-35.

Respondent Reagan National Advertising of Austin, Inc., filed suit in federal district court, and respondent Lamar Advantage Outdoor Company, L.P., subsequently intervened in the litigation, asserting that the City's treatment of off-premises signs was inconsistent with the First Amendment. Both respondents sought declaratory relief allowing them to digitize their signs. See J.A. 13, 22-23. Reagan claimed that the ordinance was unconstitutional both on its face and as applied to Reagan, see J.A. 19-23, while Lamar asserted only a facial claim, see J.A. 10-12. Following a bench trial, the district court determined that the parties continued to have a live controversy notwithstanding intervening amendments to the sign code, Pet. App. 39a-40a, but rejected respondents' claims on the merits because the sign code is content-neutral and permissible under intermediate scrutiny, *id.* at 53a.

The court of appeals reversed. Pet. App. 1a-27a. Like the district court, the court of appeals found a continuing controversy, noting that the intervening amendments were substantively immaterial and that applicable state law rendered respondents' entitlement to relief dependent on the constitutionality of the ordinance in effect at the time they submitted their applications. *Id.* at 6a-7a. On the merits, however, the court of appeals took the view that this Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), mandated that the sign ordinance be considered a content-based regulation of speech subject to strict scrutiny, which the ordinance could not survive. Pet. App. 19a-21a, 26a. Although acknowledging a divergence of views among its sister circuits, *id.* at 15a-16a, the court held that strict scrutiny applies because in addition to considering "where the sign is installed," one must "read the sign"

to determine whether it is on-premises or off-premises, *id.* at 14a. And even though "most billboards display commercial messages," the court rejected the City's contention that the sign code should be subject to the intermediate scrutiny applicable to regulations of commercial speech. *Id.* at 25a; see *id.* at 23a-25a.

SUMMARY OF ARGUMENT

This Court has long recognized that governments may enact reasonable time, place, or manner regulations to reduce the harmful effects of outdoor advertising on roadway safety and community aesthetics. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 502 (1981) (plurality opinion); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978). The municipal sign ordinance at issue here—which generally limits outdoor advertisements for goods, services, or events to the place where the advertised goods, services, or events are located—follows in that tradition and is consistent with the First Amendment.

An on-premises/off-premises sign regulation like the City's ordinance is not a content-based regulation of speech. The ordinance's limit on the placement of signs does not function to censor their content, but instead to organize them based on their connection to a particular site, thereby controlling the proliferation of distracting and unsightly items. This Court has previously upheld zoning restrictions that are similarly focused on the non-communicative secondary effects associated with the location of speech activity, where the contours of the law did not reflect any unrelated content-based distinctions. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986) (upholding limitations on the location of "adult motion picture theaters"). And here, the common distinction between on-premises and off-

premises signs tracks the special harms that the proliferation of off-premises signs has been known to cause.

Contrary to the court of appeals' view, the need to read a sign to determine whether it is in a permissible location does not transform the City's ordinance into a suspect content-based law. This Court has recognized, for example, that municipalities may place reasonable limitations on the time, place, or manner of solicitation, even though enforcing such regulations requires determining whether a speaker is engaging in solicitation as opposed to other speech activity. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 304-306 (1940). This Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015)—which invalidated a sign ordinance that discriminated among signs based solely on their ideological, political, or other content—does not call regulations like the City's ordinance into question. Instead, as three of the six Justices in the majority made clear, "[r]ules distinguishing between on-premises and off-premises signs" are "rules that would *not* be content based" under *Reed*. *Id.* at 174, 175 (Alito, J., concurring) (emphasis added).

Such rules remain subject to significant constitutional scrutiny. They must satisfy the other constitutional requirements for time, place, and manner restrictions, which are aimed at unmasking inappropriate laws that go too far in their restrictions. But the City's ordinance, while not as narrow in scope as the federal Highway Beautification Act, satisfies those requirements. The restriction on off-premises signs directly advances the City's well-recognized interests in community safety and appearance by allowing signs in the locations with which they are most closely connected, while limiting the scattered signs most likely to produce

distraction and visual blight. And the availability of on-premises signs—as well as numerous other media for advertising activities, events, or goods—ensures that the owner of a particular site has ample channels for getting the word out.

Finally, even if this Court were to conclude that the City's ordinance is unconstitutional in some applications, the court of appeals nevertheless erred in holding it facially unconstitutional. Respondents themselves acknowledge that the City may apply an on-premises/off-premises distinction to signs with commercial messages, and they have not shown that the signs they seek to digitize—let alone a substantial number of the signs in Austin—would display only noncommercial messages. As a result, neither traditional nor "overbreadth" facial invalidation would be warranted here, and the decision below—if not reversed outright—should be vacated and remanded for further consideration.

ARGUMENT

"As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects" of billboards and their effect on the surrounding community. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 502 (1981) (plurality opinion). Accordingly, courts have long recognized that governments may regulate the time, place, or manner of outdoor signs in order to mitigate the degree to which they "obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 48 (1994). The ordinance at issue here, which organizes speech based on location, performs precisely that

function, and is accordingly a constitutionally permissible time, place, or manner regulation. This Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), which held that certain other types of sign ordinances are content-based and subject to strict scrutiny, preserves "[r]ules distinguishing between on-premises and off-premises signs" as "rules that would not be content-based," *id.* at 174-175 (Alito, J., concurring). Moreover, even if the City's ordinance were constitutionally problematic in some applications, it could be validly applied to most billboards, including those at issue here, because they are used at least in part to display commercial speech. The court of appeals thus erred in striking the ordinance down on its face.

I. THE CITY'S LIMITATIONS ON OFF-PREMISES SIGNS ARE A PERMISSIBLE REGULATION OF THE PLACE AND MANNER OF ADVERTISEMENTS

This Court has long recognized that governments may adopt "reasonable restrictions on the time, place, or manner of protected speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). "[T]o be constitutional, [such] regulation[s] must meet three requirements." *Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984). First, they must "not be based upon either the content or subject matter of speech." *Ibid.* (citation and internal quotation marks omitted). Second, they "must serve a significant governmental interest." *Ibid.* (citations and internal quotation marks omitted). And third, they "must leave open ample alternative channels for communication of the information." *Ibid.* (citations and internal quotation marks omitted). The City's sign ordinance is constitutionally permissible under that well-established framework.

A. The Ordinance Is Content-Neutral Under This Court's Time, Place, Or Manner Decisions

The City—like the federal government, a significant majority of States, and numerous municipal governments—permits advertisers to post signs advertising goods, services, or events in places where those goods, services, or events are offered, but limits advertisers' posting of such signs elsewhere. In drawing that distinction, a government simply constrains a particular manner of advertising (billboards and outdoor signs) outside of an area defined by its relationship to the sign (the place where the advertised goods, services, or events are offered). As such, laws distinguishing between on-premises and off-premises signs are content-neutral regulations of the place and manner of outdoor advertisements rather than content-based restrictions on speech. See *Reed*, 576 U.S. at 175 (Alito, J., concurring); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978).

1. Under the City's ordinance, the critical feature that determines whether a sign is on-premises or off-premises is its location, not its content. Rather than censoring sign-based speech or singling out particular subjects for different treatment, the City has simply organized the display of signs based on their connection to a given property. "Eat at Joe's" is a wholly permissible sign; the only relevant limitation is that it be displayed on the property containing Joe's, rather than elsewhere. Although the ordinance, which applies throughout the City, is not as geographically focused as a law like the Highway Beautification Act, which generally applies only along interstate and primary highways, it operates in relevant respects as a zoning law—a traditionally content-neutral form of regulation.

In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for example, the Court upheld a municipal ordinance prohibiting "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" as a "'content-neutral' time, place, and manner regulation[]." *Id.* at 43, 49. The ordinance was effectively a "zoning regulation" that was properly "deemed content neutral" because it was "aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods." *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (plurality opinion) (discussing *City of Renton* and applying it to another regulation on the location of adult businesses); see *City of Renton*, 475 U.S. at 48.

The content neutrality of the ordinance here follows *a fortiori* from *City of Renton*. Whereas the focus on the secondary effects of "adult motion picture theaters" led the municipality there to "treat[] theaters that specialize in adult films differently from other kinds of theaters," 475 U.S. at 43, 47, the City of Austin's on-premises/off-premises distinction targets the billboards most likely to produce undesirable secondary effects without singling out any particular type of business or speech. Thus, even more than the ordinance in *City of Renton*, the City's sign rule does "not contravene the fundamental principle that underlies [the] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"

Id. at 48-49 (quoting *Police Dep't* v. *Mosley*, 408 U.S. 92, 95-96 (1972)).

In particular, the City ordinance adheres to the strict limitations of the secondary-effects doctrine because the distinction that it draws between on-premises and off-premises signs carefully tracks the "associat[ion] with particular 'secondary effects.'" *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992) (quoting *City of Renton*, 475 U.S. at 48). The Court has made clear that governments may not invoke the secondary-effects doctrine to shield laws that disfavor specific categories of speech that have the same secondary effects as more favored ones. See, *e.g.*, *Reed*, 576 U.S. at 171 (noting that town's content-based distinctions among signs did not track their secondary effects on traffic safety and aesthetics); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1992) (same for distinction between newsracks distributing different types of materials). Here, however, the special harms to safety and aesthetics caused by proliferating off-premises signs are clear, well-recognized, and unrelated to any inherent value judgment about the signs' content. See, *e.g.*, *Discovery Network*, 507 U.S. at 425 n.20 (discussing *Metromedia*); see also Pet. Br. 45-46; pp. 20-22, *infra*.

2. Even independent of the secondary-effects doctrine applied in cases like *City of Renton* and *Alameda Books*, the ordinance here is permissible under this Court's decisions upholding time, place, or manner regulations more generally. Those decisions make clear that a law need not treat speech as an indecipherable hieroglyph in order to be considered content-neutral.

Perhaps most pertinently, the Court in *Suffolk Outdoor Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978),

found no substantial First Amendment question to review in a state decision upholding as a valid time, place, and manner regulation a paradigmatic on-premises/off-premises ordinance that barred billboards advertising "a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such [sign] is displayed." See *Suffolk Outdoor Advertising Co.* v. *Hulse*, 373 N.E.2d 263 (N.Y. 1977); *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse*, 393 N.Y.S.2d 416, 421 (1977) (Shapiro, J., dissenting) (quoting text of challenged ordinance). And although such a summary order would not on its own receive the same weight as a decision of this Court following plenary review, see *Metromedia*, 453 U.S. at 488-489 (plurality opinion), here it is illustrative of a more widely accepted principle.

This Court has repeatedly recognized, for example, "that 'a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.'" *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150, 162-163 (2002) (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940)). Such laws remain content-neutral, "non-discriminatory legislation" regarding "the times, the places, and the manner of soliciting" even though their enforcement may depend on evaluating a speaker's message to determine whether he is engaged in solicitation or instead visiting a home for some other purpose. *Cantwell*, 310 U.S. at 304. The State is therefore "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience," *id.* at 306-

307, notwithstanding that such regulations will apply only to solicitation speech.

The Court addressed a similarly specific law in *Regan* v. *Time, Inc.*, which involved a First Amendment challenge to federal statutes that prohibited publishers from printing photographs of United States currency at certain sizes or in anything other than black and white ink. See 468 U.S. at 645-646; see also 18 U.S.C. 474, 504 (1982). The Court upheld those size and color requirements as "a valid time, place, and manner regulation," even though determining the law's application to a particular photograph would require examining the photograph to determine whether it depicted United States currency. *Regan*, 468 U.S. at 656 (plurality opinion); *id.* at 704 (Stevens, J., concurring in the judgment in part and dissenting in part) (agreeing that the size and color requirements were permissible "restrictions on the manner of printing").

The Court has upheld laws as content-neutral, notwithstanding the need to read (or listen to) speech in order to determine their application, in adjacent First Amendment contexts as well. The ban on draft-card burning upheld in *United States* v. *O'Brien*, 391 U.S. 367 (1968), for example, would not apply to burning a card of identical shape and size but with different writing. See *id.* at 370. And although *O'Brien* does not directly concern sign ordinances, the Court has applied it to evaluate an ordinance regulating the time, place, and manner of sign posting where—as in this case—the "text of the ordinance is neutral * * * concerning any speaker's point of view" and the ordinance has apparently "been applied * * * in an evenhanded manner." *Members of the City Council* v. *Taxpayers for Vincent*,

466 U.S. 789, 804-805 (1984); see, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298-299 n.8 (1984) (discussing *Taxpayers for Vincent*). As such decisions demonstrate, the need for a literate enforcer does not in itself classify a regulation as content-based.

3. The court of appeals' contrary conclusion rested on an overreading of this Court's decision in *Reed*. That decision did not implicitly overrule prior decisions of this Court or otherwise herald "a drastic change in First Amendment jurisprudence." Pet. App. 9a (citation omitted). Indeed, even the court of appeals recognized that *Reed* "did not profess to be creating new First Amendment law." *Ibid.* And it did not do so.

The municipal ordinance that *Reed* classified as content-based (and invalidated) did not regulate the connection between a sign and the property on which it is located, but instead directly discriminated among specifically described categories of speech based on subject-matter. In particular, the ordinance "identifie[d] various categories of signs based on the type of information they convey[ed], then subject[ed] each category to different restrictions." 576 U.S. at 159; see *id.* at 159-161. The restrictions thus "depend[ed] *entirely* on the communicative content of the sign," *id.* at 164 (emphasis added), and "[i]deological messages [we]re given more favorable treatment than messages concerning a political candidate, which [we]re themselves given more favorable treatment than messages announcing an assembly of like-minded individuals," *id.* at 169.

As three of the six Justices who joined the majority opinion in *Reed* expressly made clear, classification of the ordinance there as content-based does not suggest that an ordinance like the one at issue here is content-

based as well. Justice Alito, joined by Justices Kennedy and Sotomayor, identified a non-exhaustive list of "reasonable sign regulations" that should not be treated as "content based" under a "[p]roper[] underst[anding]" of the majority opinion to which their votes were essential. 576 U.S. at 174, 175 (Alito, J., concurring). The list specifically included "[r]ules distinguishing between on-premises and off-premises signs." *Id.* at 175. That explicit caveat recognizes that the general necessity of reading a sign in order to determine whether it is "on-premises" or "off-premises" does not transform such a rule from a content-neutral time, place, or manner restriction into a suspect content-based classification.

The court of appeals dismissed the relevance of the concurrence's clarification by positing that it might refer solely to construction-related requirements, such as "a regulation that defines an off-premises sign as any sign within 500 feet of a building," whose enforcement would not require reading any given sign. Pet. App. 13a (brackets and citation omitted). But the concurrence listed rules that "distinguish between freestanding signs and those attached to buildings" in a category of their own, separate from the on-premises/off-premises distinction. *Reed*, 576 U.S. at 174 (Alito, J., concurring). And the concurrence's list of "rules that would not be content based" under *Reed* also included rules "imposing time restrictions on signs advertising a one-time event," which would be impossible to enforce without reading the signs to see if they in fact advertise such an event. *Id.* at 174-175. Such rules are nonetheless content-neutral, because the critical aspect of their application turns not on the content of a sign, but instead on the connection between a sign and an event.

On-premises/off-premises rules like the one at issue in this case, which turn on the connection between a sign and activities occurring at the location where it sits, are likewise content-neutral. Neither type of rule "[l]imit[s] speech based on its 'topic' or 'subject,'" or otherwise regulates a sign's content as such. *Reed*, 576 U.S. at 174 (Alito, J., concurring). Each instead operates to identify signs, whatever they advertise, whose installation or long-term proliferation would produce disproportionate harms. See *Discovery Network*, 507 U.S. at 429-430 (recognizing that a "selective ban on newsracks" could be classified "as content neutral," and potentially upheld as a permissible "time, place, or manner restriction," if justified by particularized harms); p. 13, *supra*.

Such regulations do not, of course, receive a free pass under the First Amendment. Although a need to read speech to determine the applicability of a rule does not in itself disqualify the rule from classification as a content-neutral time, place, or manner regulation, the rule would be valid only if it satisfies the limitations that the First Amendment imposes on such regulations. Those significant requirements ensure that governments do not go too far in their restrictions on signs.

B. The City's Ordinance Serves Significant Governmental Interests And Leaves Ample Alternative Channels For Communication

The City of Austin's rule does not exceed the permissible boundaries of a content-neutral time, place, or manner regulation. It both "serve[s] a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." *Regan*, 468 U.S. at 648 (citation and internal quotation marks omitted).

1. This Court has recognized "that the twin goals" that the City's sign ordinance "seeks to further—traffic safety and the appearance of the city—are substantial governmental goals." *Metromedia*, 453 U.S. at 507-508 (plurality opinion); see *id.* at 541 (Stevens, J., dissenting in part). Indeed, the traffic-safety interest asserted by the City is not merely substantial but compelling, and could support an appropriately tailored sign ordinance even under strict scrutiny. See *Mitchell* v. *Wisconsin*, 139 S. Ct. 2525, 2535 (2019) ("We have called highway safety a 'compelling interest.'") (citation omitted); cf. *Reed*, 576 U.S. at 173 ("A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers * * * well might survive strict scrutiny.").

The City's limitation on "offsite advertising is directly related to th[ose] stated objectives" and is not "broader than is necessary to meet [the City's] interests." *Metromedia*, 453 U.S. at 511-512 (plurality opinion); see *id.* at 541 (Stevens, J., dissenting in part); see also *Ward*, 491 U.S. at 791 (recognizing that time, place, or manner regulations are permissible if, *inter alia*, they are "narrowly tailored to serve a significant governmental interest") (citation omitted). Because signs are designed and displayed specifically to attract attention, they pose "real and substantial hazards to traffic safety" based on their potential to draw drivers' attention away from the road. *Metromedia*, 453 U.S. at 509 (plurality opinion) (citation omitted). And even signs that are designed or positioned in such a way that they will not distract drivers can still, "by their very nature, * * * be perceived as an 'esthetic harm.'" *Id.* at 510 (citations omitted).

The most straightforward way of mitigating those harms is to limit the proliferation of distracting and unsightly signs. And allowing on-premises signs while limiting off-premises ones is a natural way to "allow adequate opportunity for free speech in the form of messages or images displayed on signs, while balancing that interest against public safety and aesthetic concerns impacted by signs." Austin Code § 25-10-1(1)-(2) (2021); see p. 4, *supra*. Rather than permitting the proliferation of signs advertising the activities on a property in any number of locations anywhere in the City, the ordinance here allows such advertisements in the single location where they have the most utility and least potential to distract. The most natural and logical place for a large outdoor "Eat at Joe's" sign is the property where people can and do eat at Joe's. Joe has neither a First Amendment right to place equally obtrusive signs at multiple locations, see *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."), nor a practical reason why a different location would be more appropriate for such a sign.

In addition to providing the most natural home for a sign, on-premises placement has other potential benefits as well. On-premises signs have the particular utility of identifying the site and informing visitors that they have reached their destination. See *Discovery Network*, 507 U.S. at 425 n.20 (discussing *Metromedia*). On-premises signs also are likely to be more in keeping with the adjacent property—and thus to detract less from a given neighborhood's appearance—than off-premises signs. And on-premises signs are less likely

than off-premises signs to change their content in ways that might reinvigorate their potential to distract. While only the operator of the property will choose the content of an on-premises sign, the suppliers of content for off-premises signs like respondents' billboards will often change from month to month or even week to week. See *Metromedia*, 453 U.S. at 511 (plurality opinion) (observing that off-premises signs with "periodically changing content" may "present[] a more acute problem than do[] onsite" signs); *id.* at 541 (Stevens, J., dissenting in part).

The digitization limitation that is the specific focus of respondents' challenge here is consistent with the justifications for an on-premises/off-premises distinction. Although the Department of Transportation has not interpreted the Highway Beautification Act to prohibit digital billboards and has instead left it to individual States to decide whether to distinguish between digital and nondigital signs, some researchers have concluded that the features of digital signs, including their ability to cycle easily and rapidly through discordant advertisements, heighten the risk of distraction and increase visual blight. See, *e.g.*, Virginia Sisiopiku, National Center for Transportation Systems Productivity and Management, *Final Report on Digital Advertising Billboards and Driver Distraction* 87 (Apr. 2015), http://nctspm.gatech.edu/sites/default/files/u63/DigitalAdvertisingBillboardsandDriverDistractionVirginiaSisiopiku.pdf (reporting that "crash data analysis" of approximately 450 crashes at 18 study sites in Alabama and Florida "revealed that the presence of digital billboards increased the overall crash rates in areas of billboard influence compared to control areas downstream of the digital billboard locations"). Limiting the

use of digital technology in off-premises signs could thus directly advance the substantial governmental interests that undergird on-premises/off-premises distinctions more generally.[*]

2. The City's ordinance also "leave[s] open ample alternative channels for communication of the information." *Regan*, 468 U.S. at 648 (citation and internal quotation marks omitted). Advertisers seeking to reach City residents remain free to publish newspaper advertisements, run television or radio spots, buy online advertising space targeted to particular consumers, send physical or electronic mailings, call or visit peoples' homes, and so on. Moreover, the City permits on-premises signs that advertise businesses, products, services, and events in the places where they are actually located—the scenario in which outdoor advertising has the most potential for comparative advantage over other forms of advertising because it directly identifies the precise spot where people can obtain the thing advertised. Cf. *Linmark Assocs.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977) (discussing the advantages of on-premises "For Sale" signs).

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[*] Unlike the federal Highway Beautification Act—which regulates only a narrow corridor of predominantly on-premises signs along major highways, see 23 U.S.C. 131—the City's ordinance applies to an entire metropolitan area and includes a broad exception for preexisting off-premises signs. Austin Code §§ 25-10-1(A), 25-10-152(A) (2021). But the court of appeals' decision in this case did not rely on any potential feature of the City's ordinance that might distinguish it from other on-premises/off-premises rules. Respondents have not, for example, claimed that the exemption for preexisting off-premises signs renders the City ordinance fatally underinclusive—indeed, their own ability to maintain and operate the billboards at issue depends on that exception.

The City's distinction between those signs and off-premises signs like respondents' accordingly satisfies all of the prerequisites for a permissible content-neutral time, place, or manner regulation. The court of appeals erred in concluding otherwise, based on its misapprehension of the proper framework for the constitutional inquiry. Its judgment should accordingly be reversed.

II. ANY CONSTITUTIONAL INFIRMITIES IN THE ORDINANCE WOULD NOT JUSTIFY ITS FACIAL INVALIDATION

Even if the City's ordinance were unconstitutional in some of its applications, the court of appeals erred in deeming it facially unconstitutional. At the very least, therefore, this Court should vacate the court of appeals' judgment that the sign ordinance's distinction between on-premises and off-premises signs is unconstitutional in all of its applications, see Pet. App. 27a, and remand for consideration of the as-applied claim of respondent Reagan (the only respondent that has asserted such a claim).

A. "'[C]ommercial speech [enjoys] a limited measure of protection" under the First Amendment, "commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). A regulation of commercial speech is thus valid so long as it advances a "substantial" government interest, and "reasonabl[y] fit[s]" that interest. *Id.* at 480; see *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980) (holding that a regulation of com-

mercial speech is valid if it "directly advances" a "substantial" government interest and is "not more extensive than is necessary to serve that interest"). That less-stringent standard has long been understood to allow distinctions between on-premises and off-premises commercial signs.

In *Metromedia, Inc.* v. *City of San Diego*, seven Justices (including five Justices who joined the relevant section of Justice White's opinion) agreed that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." 453 U.S. at 512 (plurality opinion); see *id.* at 541 (Stevens, J., dissenting in part) (joining Parts I-IV of Justice White's opinion); see also *Discovery Network*, 507 U.S. at 425 n.20 ("[S]even Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards."). Respondents do not ask this Court to revisit that determination. To the contrary, they have acknowledged (Br. in Opp. 9) that the City's distinction between on-premises and off-premises signs would be constitutional "[u]nder *Metromedia*, * * * as long as the targeted speech is commercial speech."

As a result, respondents cannot prevail on a facial challenge to the ordinance under the standard this Court applies in most settings. Such "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). And although this Court has relaxed that standard in some First Amendment contexts to allow facial "overbr[eadth]" challenges when "a

substantial number of [a law's] applications are unconstitutional," *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (citation omitted), respondents cannot prevail under that standard either.

This Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," in order for it to be facially invalid. *United States* v. *Williams*, 553 U.S. 285, 292 (2008) (emphasis omitted). Respondents have shown neither form of substantiality here. The court below recognized that "most billboards display commercial messages," Pet. App. 25a, and the record does not demonstrate that a "substantial" number of the signs to which the ordinance applies carry only noncommercial messages. Although respondents' billboards have apparently displayed some amount of noncommercial speech in the past, see *id.* at 52a n.11, the record does not show that such speech is sufficiently predominant to justify the "strong medicine" of the overbreadth doctrine, which this Court has repeatedly emphasized is appropriate "only as a last resort." *Los Angeles Police Dep't* v. *United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 769 (1982)).

B. The decision below struck down the City's ordinance in its entirety without applying either standard that this Court has described for facial challenges. The court of appeals instead took the view (Pet. App. 25a) that because the ordinance "applies with equal force to both commercial and noncommercial messages," the facial validity of the statute would stand or fall based on a single undifferentiated application of strict scrutiny. See *id.* at 23a-25a. That was error.

This Court has explained that when a law applies to both commercial and "some noncommercial speech," its application to commercial speech may be "found to be valid," unless "substantial overbreadth nonetheless makes it unenforceable" altogether. *Fox*, 492 U.S. at 482, 486; see *id.* at 469-481 (describing standard to be applied in assessing the regulation's application to commercial speech on remand). The decision below cannot be squared with that approach. The court of appeals should instead have recognized that the ordinance is at the very least constitutional as applied to commercial speech under *Metromedia*; that the trial record does not show that a substantial number of off-premises signs will focus on non-commercial messages; and that respondents accordingly were not entitled to a declaration that the ordinance is facially unconstitutional. Thus, if necessary, the judgment should be vacated on that alternative ground and remanded for further consideration of any properly preserved as-applied challenge.

CONCLUSION

The judgment of the court of appeals should be reversed or, in the alternative, vacated and remanded for further proceedings.

Respectfully submitted.

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