No. 20-1029

In the Supreme Court of the United States

CITY OF AUSTIN, TEXAS, PETITIONER

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, ET AL.

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

BRIEF FOR RESPONDENT
REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC

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QUESTION PRESENTED

Whether petitioner's sign code, which permits the digitization of signs that advertise activities on the premises but prohibits the digitization of other signs, violates the First Amendment.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is the City of Austin, Texas; respondents are Reagan National Advertising of Austin, LLC, and Lamar Advantage Outdoor Company, L.P.

Respondent Reagan National Advertising of Austin, LLC, is the corporate successor to Reagan National Advertising of Austin, Inc. It has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondent Lamar Advantage Outdoor Company, L.P., intervened in the proceedings below but is not actively participating in the proceedings before this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 972 F.3d 696. The opinion of the district court (Pet. App. 30a-53a) is reported at 377 F. Supp. 3d 670.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2020. The petition for a writ of certiorari was filed on January 20, 2021, and was granted on June 28, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech[.]

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

The applicable version of Chapter 25-10 of the Austin, Texas, City Code is reproduced in the joint appendix (J.A. 49-129).

STATEMENT

This Court has long recognized that billboards are a "venerable medium" for "expressing political, social and commercial ideas" and "convey[ing] a broad range of different kinds of messages." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (citation omitted). Billboards are unique in offering affordable opportunities for messages to reach a vast and unfiltered audience. At a time when individuals increasingly curate and limit the sources from which they seek information, billboards deliver messages to all passersby in a geographic area, without the preselection involved in newspapers, television, or social media. Because billboards do not require viewers to subscribe, tune in, or even open a publication, their messages reach a broad population with diverse viewpoints. Billboards are thus

often used by speakers seeking to convey novel, disruptive, or controversial messages, to achieve the greatest impact at a low cost.

This case concerns digital billboards, through which advertising companies increase the amount of speech displayed without increasing the number of permanent structures dotting the landscape. State and local governments have addressed this technology in a variety of ways, including by limiting the brightness of digital signs, regulating the display time for each message, or capping the number of signs. But petitioner here—the City of Austin, Texas—took a different approach, permitting the digitization of signs advertising activities on the premises but prohibiting the digitization of other signs.

Respondent Reagan National Advertising of Austin, LLC, is an outdoor-advertising company with billboards that display commercial and noncommercial speech. Respondent sought to convert its existing off-premises signs to digital signs, but petitioner denied its application based on its sign code's ban on digitizing off-premises signs. Respondent challenged the ban under the First Amendment. The district court rejected that challenge, but the court of appeals reversed. It held that, under this Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), petitioner's ban on digitizing off-premises signs was content-based and failed strict scrutiny. The court of appeals' holding was correct, and its judgment should be affirmed.

A. Background

1. Digital billboards are similar to traditional billboards in many respects; they differ primarily in their methods of display. Whereas traditional billboards have painted or printed messages that are physically affixed to a permanent sign face, digital billboards use light-emitting diodes to display images and text. Digital billboards

typically display static messages that can be adjusted remotely. The messages rotate periodically, transitioning in as little as one-tenth of a second. As a result, digital billboards offer more opportunities to communicate with the public, because multiple messages can be displayed at a given time and updated instantly without the physical labor required to change a traditional billboard. See *Scenic America, Inc.* v. *Department of Transportation*, 49 F. Supp. 3d 53, 57 (D.D.C. 2014), aff'd, 836 F.3d 42 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 2 (2017).

Given their many advantages, it is unsurprising that billboard operators nationwide have been converting traditional billboards to digital billboards. As of July 2020, there were approximately 9,600 digital billboards installed across the country. Out of Home Advertising Association of America (OAAA), *2020 Annual Report* 20 (Jan. 7, 2021) <tinyurl.com/oaaa2020rpt>.

2. As their popularity has increased, digital billboards have been subject to various regulations, studies, and uses.

a. Many jurisdictions directly regulate the unique characteristics of digital signs.

The federal Highway Beautification Act requires states to exercise "effective control" over signs along the federal highways. 23 U.S.C. 131(b). In connection with that requirement, the Federal Highway Administration (FHWA) has issued guidance permitting digital signs but recommending restrictions on their use. Those recommendations focus on (1) the duration of the message, (2) transition time, (3) brightness, (4) spacing, and (5) locations. See Federal Highway Administration, Department of Transportation, *Guidance on Off-Premise Changeable Message Signs* (Sept. 25, 2007) <tinyurl.com/offprms-guide>. States and localities have enacted various regulations consistent with that guidance.

Numerous regulations ban or limit animation. An ordinance in San Jose, California, is representative: it broadly prohibits "animated messages, including flashing, blinking, fading, rolling, shading, dissolving, or any other effect that gives the appearance of movement." San Jose, Cal., Code § 23.02.905(A).

Other regulations govern the length of time that each message must be displayed and the transition time between messages. Chicago requires messages to be displayed for at least ten seconds. Chicago, Ill., Municipal Code § 13-20-675(b). Paynesville, Minnesota, imposes a seven-second minimum display time and further requires that messages transition within two seconds to "minimize" any "distraction." Paynesville, Minn., Code § 36-10(n).

Still other regulations restrict the brightness of digital signs. In a typical regulation, Columbus, Ohio, requires that signs not "exceed a brightness level of 0.3 foot-candles above ambient light," and that digital billboards "be equipped with a light sensing device that automatically adjusts the brightness of the billboard as ambient light conditions change." Columbus, Ohio, Code § 3378.06.

With that litany of regulations, digital billboards more closely resemble traditional billboards than they do the signs that adorn Times Square or the Las Vegas Strip.

b. Digital billboards have been subject to numerous studies on driver safety. A 2012 study by the FHWA, using eye-tracking devices, concluded that (1) the presence of digital signs "did not appear to be related to a decrease in looking toward the road ahead"; (2) the longest glances at digital signs were far below the "current widely accepted threshold for durations of glances away from the road ahead that result in higher crash risk"; and (3) while drivers were generally more likely to look at digital signs than traditional signs, the data were variable. Federal

Highway Administration, Department of Transportation, *Driver Visual Behavior in the Presence of Commercial Electronic Variable Message Signs (CEVMS)* 1-4 (Sept. 2012; released Dec. 30, 2013) <tinyurl.com/cevmsrept> (FHWA Report).

While certain studies suggested that digital signs are distracting, the FHWA noted that some of those studies were based on signs that had "moving objects" or "moving video or other dynamic elements"—which are largely prohibited in the United States. FHWA Report 9; see p. 5, *supra*. Ultimately, the FHWA concluded that drivers in its study did not look at digital signs with such intensity that "overall attention to the forward roadway decreased." FHWA Report 55. Consistent with that conclusion, the federal government has permitted digital billboards in guidance under the HBA for over a decade, see p. 4, *supra*, and that guidance has been upheld by the District of Columbia Circuit, see *Scenic America*, 836 F.3d at 57.

c. In addition, various government agencies use digital billboards to notify drivers of important information. Because billboard sign faces are sold in groups, they create a network, broadcasting those messages across a large geographic area. For example, Massachusetts requires that digital billboard operators coordinate with law enforcement to "display, when appropriate, emergency information important to the traveling public." 700 Mass. Code Regs. 3.17(10). Since 2008, Florida has partnered with billboard operators to display emergency weather information during hurricanes and tropical storms. See Federal Emergency Management Agency, *Public Private Partnership Case Study: Digital Billboards Deliver Emergency Messages* 2 (last visited Sept. 22, 2021) <tinyurl.com/femacasestudy>. Through agreements with the Federal Bureau of Investigation and the National

Center for Missing and Exploited Children, respondent and other companies have used their signs to display law-enforcement messages and AMBER alerts, helping to locate fugitives and missing children. See OAAA, *Out of Home Advertising From A to Z* 11 (2016) <tinyurl.com/atozoaaa>. And the National Highway Traffic Safety Administration itself uses digital billboards to communicate safety messages. See Ken Klein, *Billboards for Safety*, Billboard Insider (May 25, 2017) <tinyurl.com/nhtsa-signs>.

B. Facts And Procedural History

1. Petitioner here—the City of Austin, Texas—is the fastest-growing major city in the United States, with a population of nearly 1 million people. Petitioner has a sign code, the express purpose of which is "to protect the aesthetic value of the city and to protect public safety." J.A. 39.

With regard to digital signs, rather than regulating their unique features, petitioner chose to permit digital signs that advertise activities on the premises, but to prohibit the digitization of other signs.

During the relevant time period, petitioner's sign code defined an "off-premise sign" as a sign that "advertis[es] a business, person, activity, goods, products, or services not located on the site where the sign is installed," or that "directs persons to any location not on that site." Austin City Code § 25-10-3(11) (2014) (J.A. 52). The sign code prohibited new off-premises signs, but it permitted existing off-premises signs, which were grandfathered as "nonconforming signs" (*i.e.*, signs that were lawfully installed but that did not comply with the requirements of the sign code). *Id.* §§ 25-10-3(10), 25-10-102(1) (J.A. 52, 76). The owner of such a sign was permitted to change the

"face of the sign," but could not alter the "method or technology used to convey a message." *Id.* § 25-10-152(B)(1), (2)(b) (J.A. 95).

Petitioner's sign code did not define "on-premises signs," though it used the phrase in various provisions. The permissible size of such signs depends on their location. Austin City Code §§ 25-10-121 to 25-10-133 (2014) (J.A. 79-94). Of particular note, on-premises signs may be "electronically controlled changeable-copy sign[s]"—*i.e.*, digital signs. *Id.* § 25-10-102(6) (J.A. 76). The sign code contains no regulations concerning the use of animation or video on digital signs, their brightness, the length of display time, or the number of signs.

2. Respondent Reagan National Advertising of Austin, LLC, is a family-owned outdoor-advertising company with billboards throughout Austin. Respondent's signs publish a wide range of messages, including both commercial and noncommercial speech. The joint appendix contains numerous examples of those signs; they advertise local businesses, J.A. 145-147, promote nonprofit organizations, J.A. 130-131, 136, 140, convey political speech, J.A. 132-135, 137, and even display art, J.A. 138-139, 141.

Beginning in April 2017, respondent applied for permits to digitize a number of its grandfathered "off-premises" signs. J.A. 25-27, 31-33. Respondent cited this Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), which held that a content-based regulation in a sign code violated the First Amendment. J.A. 26, 32. In May and July 2017, petitioner denied respondent's applications, citing Chapter 25-10 and Section 25-10-152 of the Austin Code (the provision that prohibits the owner of a nonconforming sign from changing the "method or technology used to convey messages"). J.A. 28-30, 34-36; see J.A. 95.

In June 2017, shortly after respondent submitted its applications, the Austin City Council adopted a resolution to consider updates to its sign code to "achieve consistency with federal and state case law affecting municipal sign regulation"—presumably referring to this Court's decision in *Reed*. J.A. 153-154. In accordance with the resolution, petitioner's law department proposed various amendments, which the City Council adopted in August 2017. Pet. App. 35a.

The stated purpose of the amendments was to "ensure that * * * the City's sign regulations can be administered and enforced without having to read the sign." J.A. 149. Despite that purpose, the amendments stopped short of eliminating the distinction between on-premises and off-premises signs. Instead, they merely permitted "[s]igns containing noncommercial speech" on the same terms as on-premises signs. Austin City Code § 25-10-2(A) (2021). And while the amendments modified the definition of "off-premises signs" in certain respects, see *id.* § 25-10-4(9), they did not alter the prohibition on new "off-premises signs" or the restrictions on grandfathered "off-premises signs" (including the prohibition on changing "the method or technology used to convey a message"). Pet. App. 5a.[1]

3. On June 9, 2017, respondent filed suit against petitioner in state court, alleging that petitioner's ban on digitizing off-premises but not on-premises signs violated the First Amendment. J.A. 16; Pet. App. 3a-4a. Petitioner removed the case to federal court, J.A. 1, and Lamar Advantage Outdoor Company, L.P.—another billboard company that had submitted applications similar to respondent's—intervened as a plaintiff, J.A. 8. Respondent then

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[1] Petitioner has taken the position that the amendments do not affect respondent's applications. See Pet. Cert. Reply Br. 11-12.

filed an amended complaint seeking declaratory relief: specifically, declarations that it be "allowed to convert its outdoor advertising signs to digital copy without having permits issued" and that "any relevant part of Chapter 25-10" is invalid and unenforceable, both generally and "as applied to [respondent]." J.A. 23-24.

4. After a bench trial on stipulated facts, the district court denied respondent's request for declaratory relief and entered judgment in favor of petitioner. Pet. App. 30a-53a. The court first held that the sign code's distinction between on-premises and off-premises signs was content-neutral. *Id.* at 50a. Applying intermediate scrutiny without specific reference to the digitization ban, the court then held that the sign code served significant government interests in ensuring public safety and protecting the city's aesthetic value and that the sign code directly advanced those interests. *Id.* at 51a-52a.

5. The court of appeals reversed and remanded. Pet. App. 1a-29a.

The court of appeals first held that the sign code's distinction between on-premises and off-premises signs was content-based, because whether a sign qualifies as an off-premises sign "is determined by its communicative content." Pet. App. 8a. After a lengthy discussion of this Court's decision in *Reed*, the court of appeals explained that, in order to determine whether a sign advertises activities not located on the premises and thus qualifies as an off-premises sign, one would have to "read the sign." *Id.* at 14a. That inquiry, the court explained, was "not a mere cursory one." *Id.* at 17a. Rather, a reader must ask questions that are "hallmarks of a content-based inquiry": "who is the speaker and what is the speaker saying?" *Id.* at 17a-18a.

The court of appeals further explained that, because the sign code regulated content on its face, it did not matter that petitioner may have benign motivations for the distinction. Pet. App. 8a-9a. Under *Reed*, "if a law is content based on its face, then it is subject to strict scrutiny regardless of the government's * * * content-neutral justification." *Id.* at 12a (citation omitted; alteration in original). The court also declined to apply the lower standard of scrutiny applicable to commercial speech, reasoning that the sign code's distinction between on-premises and off-premises signs "applies with equal force to both commercial and noncommercial messages." *Id.* at 24a-25a.

The court of appeals then held that petitioner's ban on digitizing off-premises but not on-premises signs could not withstand strict scrutiny. Pet. App. 25a-27a. The court noted that petitioner had invoked interests in ensuring public safety and protecting the city's aesthetic value. *Id.* at 26a. But the court determined that petitioner had "provided no evidence" to support its stated justification that "off-premises digital signs pose a greater risk to public safety than on-premises digital signs," *ibid.*, and that petitioner had "not provided any argument" that one kind of sign was a "greater eyesore" than the other, *ibid.* The court therefore concluded that the digitization ban was underinclusive and not narrowly tailored to serve a compelling government interest. *Ibid.*

The court of appeals remanded to the district court for further proceedings on the appropriate remedy. Pet. App. 27a. The district court has stayed further proceedings pending this Court's disposition of the case.

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner's ban on digitizing off-premises but not on-premises signs violates the First Amendment. Petitioner's definition of off-premises signs depends on the communicative content of the signs—specifically, whether they advertise activities on the premises—thus requiring the application of strict scrutiny. And because the digitization ban is not narrowly tailored to further a compelling government interest, it cannot withstand such scrutiny. The judgment of the court of appeals should be affirmed.

A. The court of appeals correctly applied this Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), in holding that the sign code's distinction between on-premises and off-premises signs is content-based.

1. In *Reed*, the Court made clear that a regulation is content-based on its face if its application depends on the topic discussed or the message expressed. The Court further recognized that strict scrutiny applies not only to obvious content-based distinctions, such as regulations based on subject matter, but also to more subtle distinctions, such as regulations based on the function or purpose of particular speech. In *Reed*, the Court applied that understanding to invalidate the Town of Gilbert's sign code, determining that regulations for political, ideological, and temporary directional signs were content-based on their face and could not survive strict scrutiny.

Applying that reasoning here leads to the same result. Like the sign code in *Reed*, petitioner's sign code defines off-premises signs based on communicative content—"advertis[ing] a business, person, activity, goods, products, or services not located on the site where the sign is installed." J.A. 52. That the sign's location is also taken into account does not eliminate the content-based nature of the inquiry; instead, it merely renders the regulation a

content-based *restriction*, rather than a content-based *prohibition*. Because classifying a sign as "off-premises" is content-based, a regulation that depends on that distinction, such as the digitization ban, is subject to strict scrutiny.

2. Petitioner attempts to avoid that straightforward conclusion by cabining and distinguishing *Reed*. But in so doing, petitioner recycles the same arguments that the Town of Gilbert advanced—and the Court rejected—in *Reed*. *Reed* made clear that a law may be subject to strict scrutiny *either* because it draws facial distinctions based on content, *or* because it is motivated by an impermissible content-based purpose. Because petitioner's sign code falls into the first category, petitioner's justifications are relevant only to *how* strict scrutiny applies—not *whether* it does.

Petitioner's efforts to narrow *Reed* are unavailing. Petitioner contends that *Reed* stands for the proposition that strict scrutiny applies only when regulations single out specific subjects or viewpoints. But while the Court recognized viewpoint discrimination as a particularly egregious form of content-based regulation, it also noted that other, more subtle forms of content discrimination—including distinctions based on function or purpose—are likewise subject to strict scrutiny. Petitioner's definition of off-premises signs unambiguously qualifies as a content-based regulation because it singles out specific subjects for differential treatment.

Justice Alito's concurring opinion in *Reed* does not suggest a different result. Justice Alito noted that localities could enact content-neutral rules distinguishing between on-premises and off-premises signs. That remains true under the court of appeals' rule. For example, a regulation may define off-premises signs based solely on their location, encompassing any sign more than a certain

distance from a building. Here, however, petitioner's definition of off-premises signs depends on a sign's communicative content in addition to its location, and thus cannot qualify as content-neutral.

3. Petitioner and the federal government contend that applying strict scrutiny here would be inconsistent with numerous of this Court's pre-*Reed* precedents. That is a thinly disguised attack on *Reed*, and in any event it lacks merit: neither petitioner nor the federal government identifies a single case in which applying a proper interpretation of *Reed* would lead to a different result. To the contrary, this Court has consistently invalidated restrictions based on content, and it has upheld laws that neutrally regulate the time, place, and manner of speech. Nor is petitioner correct in claiming that laws aimed at regulating particular mediums of speech will necessarily be classified as content-based. A regulation is content-based when it depends on the content of the message expressed through a particular medium, not when it regulates the medium itself.

B. Petitioner's ban on digitizing off-premises but not on-premises signs cannot survive strict scrutiny. Conspicuously, petitioner does not attempt to argue otherwise. Even assuming that petitioner's asserted interests in ensuring safety and protecting the city's aesthetic value are compelling, the digitization ban is not narrowly tailored to further those interests. Petitioner has provided no reason to think that digitizing the limited number of grandfathered off-premises signs would be more problematic than the unrestricted digitization of on-premises signs, which petitioner currently permits. The court of appeals correctly held that the ban is underinclusive and should be invalidated.

C. Petitioner resorts to a parade of horribles, but the fact that petitioner's digitization ban cannot survive strict

scrutiny does not mean that all other regulations distinguishing between on-premises and off-premises signs must fail. Localities have adopted numerous methods of regulating signs. Some do not distinguish between on-premises and off-premises signs. Others distinguish only between on-premises and off-premises commercial speech and will thus be subject to intermediate scrutiny. And still others distinguish between on-premises and off-premises signs but with narrower applicability, making them better tailored and more likely to survive the applicable review.

Invalidating petitioner's digitization ban will neither doom all other sign codes nor water down strict scrutiny. And to the extent that some content-based regulations cannot survive strict scrutiny, that is an inevitable consequence not just of *Reed* but of this Court's First Amendment jurisprudence more generally.

D. Even if this Court were to hold that intermediate scrutiny applies, the digitization ban for off-premises signs cannot survive. While the Court has recognized that safety and aesthetics qualify as significant government interests that can support a ban on commercial off-premises signs, petitioner's digitization ban does not match up at all with the proffered interests.

Petitioner's arguments to the contrary ignore that respondent is challenging the digitization ban and not the general distinction between on-premises and off-premises signs. Petitioner asserts that off-premises signs are more problematic because they are "periodically changing" and "could proliferate exponentially." But the latter concern is inapplicable, because petitioner has already limited the number of off-premises signs and respondent is not challenging that limit. And petitioner can effectively address the former concern simply by limiting the frequency of message changes for both on-premises and off-premises

signs. Indeed, the fact that petitioner has placed no limits on the number of on-premises signs (digital or otherwise), the brightness or the manner of display of digital signs, or the display or transition time for messages wholly undermines any claim that the ban on digitizing off-premises signs serves any safety or aesthetic interest.

E. Finally, petitioner contends that respondent's as-applied challenge should be rejected because respondent's signs display mostly commercial speech and the digitization ban could constitutionally be applied to that speech. But the record shows that respondent displays both commercial and noncommercial speech; the classification of respondent's signs as off-premises did not depend on whether they displayed commercial or noncommercial speech; and petitioner prohibited respondent from converting its signs without regard to whether respondent intended to display digitized commercial or noncommercial messages. There is thus no basis to apply a lower level of scrutiny to the as-applied challenge.

Nor is petitioner correct that the sign code's applicability to commercial speech dooms any facial challenge. In every application, the digitization ban prevents billboard companies with off-premises signs from displaying digitized commercial and noncommercial messages alike. And even if its application to commercial speech could be isolated, the digitization ban would fail intermediate scrutiny. The court of appeals correctly held that the ban on digitizing off-premises signs violates the First Amendment, and its judgment should be affirmed. The question of the appropriate remedy is a matter for the district court in the first instance; on remand, the district court should enter an appropriate declaratory judgment, permitting respondent to digitize its existing off-premises signs.

ARGUMENT

PETITIONER'S BAN ON DIGITIZING OFF-PREMISES BUT NOT ON-PREMISES SIGNS VIOLATES THE FIRST AMENDMENT

Relying on this Court's decision in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), the court of appeals correctly held that petitioner's ban on digitizing off-premises signs violates the First Amendment. As in *Reed*, the sign code's distinction between on-premises and off-premises signs depends on the communicative content of the signs. Because the digitization ban depends on that distinction, it is subject to strict scrutiny under *Reed* and this Court's other First Amendment precedents. And because the digitization ban cannot survive strict scrutiny, the court of appeals correctly held it invalid.

A. Petitioner's Distinction Between On-Premises And Off-Premises Signs Is Content-Based And Thus Subject To Strict Scrutiny

1. Under **Reed***, Petitioner's Distinction Between On-Premises And Off-Premises Signs Is Content-Based Because It Applies Based On The Communicative Content Of The Signs*

a. In *Reed*, this Court addressed the Town of Gilbert's sign code, which prohibited outdoor signs subject to 23 exemptions for particular categories, including ideological signs; political signs; and temporary directional signs relating to a qualifying event. See 576 U.S. at 159-160. The sign code imposed different requirements for each category of signs as to size, number, and time limits for display. See *id.* at 160-161. A local church sought to use temporary signs to advertise the time and location of its Sunday services, which were held in various locations around the town. See *id.* at 161. The town cited the church for violating the restrictions on such signs, and the

church challenged the sign code under the First Amendment. See *id.* at 161-162.

i. In assessing the constitutionality of the challenged provisions, the Court explained that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 163. The Court described as "commonsense" the understanding that a regulation is content-based when it "'on its face' draws distinctions based on the message a speaker conveys." *Ibid.* (citation omitted). A facially content-based regulation may be "obvious, defining regulated speech by particular subject matter," or it may be "more subtle, defining regulated speech by its function or purpose." *Ibid.* But because both involve "distinctions drawn based on the message a speaker conveys," they are subject to strict scrutiny. *Id.* at 163-164.

In so articulating the standard, the Court emphasized that a facially content-based law is subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 576 U.S. at 165 (citation omitted). "In other words," the Court explained, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 166.

The Court further noted that, separate and apart from facially content-based regulations, there is a second category of regulations that cannot be "justified without reference to the content of the regulated speech" or were "adopted by the government because of disagreement with the message [the speech] conveys." 576 U.S. at 164 (internal quotation marks and citation omitted). Those regulations, "like those that are content based on their face, must also satisfy strict scrutiny." *Ibid.*

ii. Applying that standard, the Court determined that the relevant provisions of the town's sign code were content-based on their face. See 576 U.S. at 164-165. As the Court explained, the code "defines 'Temporary Directional Signs' on the basis of whether a sign conveys the message of directing the public to church or some other 'qualifying event.'" *Id.* at 164. The same was true of political and ideological signs: each of those definitions "depend[ed] entirely on the communicative content of the sign." *Ibid.* The Court underscored that, because the relevant provisions were facially content-based, it had "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny." *Id.* at 164-165.

The Court expressly rejected the town's contention that strict scrutiny should apply only where there is an improper motive or suppression of a particular idea or viewpoint. See 576 U.S. at 165-169. The Court noted that "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 166. And it added that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 169 (citation omitted; alteration in original).

Finally, the Court rejected the town's argument that the sign code was not content-based because it turned on the identity of the speaker or the existence of a particular event. See 576 U.S. at 169-171. The Court explained that "the fact that a distinction is speaker based does not * * * automatically render the distinction content neutral." *Id.* at 170. The Court added that the sign code's distinctions did not "hinge on whether and when an event is occurring." *Ibid.* (internal quotation marks omitted). The Court noted that town officials must review signs

posted near the date of an election to determine whether a sign is "designed to influence the [election's] outcome." *Ibid.* "That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved." *Ibid.*

b. Applying *Reed*'s reasoning to petitioner's sign code is a straightforward exercise. Here, as in *Reed*, the sign code defines off-premises signs based on their "function or purpose." 576 U.S. at 163. In *Reed*, the function of the regulated sign was to advertise a particular event; here, the function of an off-premises sign is to "advertis[e] a business, person, activity, goods, products, or services not located on the site where the sign is installed" or to "direct[] persons to any location not on that site." J.A. 52. Whether the sign is off-premises—and thus cannot be digitized—"depend[s] entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164.

Under petitioner's sign code, a church without a permanent home (like the one in *Reed*) could use a digital sign to advertise its services at its current premises, but it could not display a message directing worshippers to its future services elsewhere. Similarly, a candidate for office could put up a digital sign on his own premises encouraging voters to vote for him, but he could not rotate to a get-out-the-vote message directing voters to the nearest polling place. A school could use its digital sign to advertise a book drive seeking donations at the school, but it could not use the same sign to advertise a car-wash fundraiser taking place at a nearby gas station. And a restaurant could advertise its food, but it could not encourage its patrons to get vaccinated.

Here, as in *Reed*, it is irrelevant that application of the sign code also depends on a factor in addition to the content of the sign. Just as the "obvious content-based in-

quiry does not evade strict scrutiny review simply because an event (*i.e.*, an election) is involved," *Reed*, 576 U.S. at 170, neither can petitioner avoid strict scrutiny here simply because the sign's location must also be taken into account. In any event, the relevance of location to the application of the sign code is that it renders the regulation a content-based *restriction* (a sign with particular content may be displayed in one location, but not another), rather than a content-based *prohibition* (a sign with particular content may not be displayed at all). That the sign code limits, rather than bans, certain speech may be considered "when applying scrutiny at the level selected, not in selecting the standard of review itself." *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003).

Indeed, petitioner's sign code operates as an effective prohibition, rather than a mere restriction, on certain messages from certain speakers. Some speakers do not have access to on-premises signs because they do not have premises, or because the speech they wish to convey is not related to their premises. That is particularly likely for nonprofit, advocacy, and political speech. For example, issue-advocacy groups with remotely staffed hotlines assisting with crisis-pregnancy programs or gay and lesbian support may not put up signs advertising such services. In the realm of commercial speech, workers who independently offer in-home services, such as piano tuning, repairs, or elder care, cannot promote their services on signs unless they have premises in Austin. The small number of grandfathered off-premises signs already severely limits the ability of those speakers to communicate their messages to a wide and unfiltered audience. And the ban on digitization of those signs exacerbates the problem, as it effectively restricts the number of messages that can appear on a single off-premises sign. In fact, such a

regulation "probably leads to the effect of favoring commercial speech over non-commercial speech," because "most conspicuous onsite speech is probably commercial." *Rappa* v. *New Castle County*, 18 F.3d 1043, 1056 n.19 (3d Cir. 1994) (Becker, J.).

In addition, here, as in *Reed*, the motives of the locality do not preclude the application of strict scrutiny. As the Court explained in *Reed*, "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" 576 U.S. at 171 (quoting *City of Ladue* v. *Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)). That is because even a seemingly benign content-based regulation may impermissibly distort the marketplace of speech, harming both speakers and listeners alike. For example, petitioner's sign code limits the ability of those without premises in highly trafficked areas to reach a broader audience. A restaurant near the highway may attract hungry travelers with an on-premises sign that can be seen by passersby, whereas restaurants further from the thoroughfare may be unable to do so. That disadvantages both the distant restaurants and the customers who would have preferred to dine there if they had been aware of the location. Applying strict scrutiny avoids that distortion unless the government provides a compelling basis for it.

2. *Petitioner's Attempts To Limit And Distinguish* **Reed** *Should Be Rejected*

a. From the outset, petitioner advances the same arguments that the Court rejected in *Reed*, dedicating the first several pages of its argument to explaining the purposes motivating its ban on off-premises signs and noting the ubiquity of regulations distinguishing between on-

premises and off-premises signs. See Pet. Br. 14-20. In so doing, petitioner implies that the Court should first determine whether the restriction has a valid justification and then determine whether strict scrutiny applies. But as the Court made clear in *Reed*, the justification underlying the regulation is irrelevant to the initial determination of whether a regulation is content-based on its face. "[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive." *Reed*, 576 U.S. at 165 (internal quotation marks and citation omitted). And the mere fact that other jurisdictions may have similar regulations does not immunize a content-based regulation from strict scrutiny. See *id*. at 172.

Petitioner proceeds to attempt to narrow *Reed*, contending that the Court held that strict scrutiny applies only when regulations single out specific subjects or viewpoints. See Pet. Br. 20-24. But the Court expressly rejected that narrowed articulation. In *Reed*, the court of appeals had reasoned that the sign code was "content neutral because it 'does not mention any idea or viewpoint, let alone single one out for differential treatment.'" 576 U.S. at 168 (quoting 587 F.3d 966, 977 (9th Cir. 2009)). But, as this Court explained, such analysis "conflates" content neutrality and viewpoint neutrality. See *ibid.* Moreover, the Court made clear that, while "defining regulated speech by particular subject matter" is an "obvious" facial distinction, strict scrutiny also applies to "more subtle" content-based regulations that "defin[e] regulated speech by its function or purpose." *Id*. at 163.

In any event, petitioner provides no basis for its apparent view that a ban on digitizing signs that "advertis[e] a business, person, activity, goods, products, or services

not located on the site where the sign is installed," somehow does not qualify as singling out a particular subject. Surely, a provision banning signs that advertise *religious* services not located on the premises would qualify as content-based, even under petitioner's view. Petitioner offers no reason why the analysis should differ simply because its ban reaches the advertisement of other goods and services as well. In both cases, the speech is defined based on its subject matter and purpose. Defining the subject more narrowly may make the regulation a "'more blatant' and 'egregious form of content discrimination,'" *Reed*, 576 U.S. at 168 (citation omitted), but the Court has adopted a bright-line rule holding that strict scrutiny applies to *any* form of content discrimination. A law is content-based if it "require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen* v. *Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks and citation omitted).

In a related vein, petitioner asserts that its ban on digitizing off-premises signs does not "hinder the free exchange of ideas on any subject" because "the only consequence of the distinction is the manner in which grandfathered nonconforming signs can advertise." Pet. Br. 41. But that proves too much. A restriction on the manner in which ideas are expressed cannot be applied only to some ideas. Otherwise, governments would be free to limit the size, number, or location of signs with messages on disfavored subjects. Because the digitization ban applies only to speech advertising activities off the premises, it is content-based and must be subject to strict scrutiny.

b. Petitioner claims support for its view in Justice Alito's concurring opinion in *Reed*. After joining the majority in full, Justice Alito, joined by Justices Kennedy and Sotomayor, "add[ed] a few words of further explanation"

to make clear that localities are not "powerless to enact and enforce reasonable sign regulations." 576 U.S. at 174. He proceeded to list "some rules that would not be content based." *Ibid.* After citing a series of unambiguously content-neutral examples, including regulations concerning size, location, lighting, number, and placement of signs, Justice Alito referred to "[r]ules distinguishing between on-premises and off-premises signs." *Ibid.* Petitioner seizes on that passing reference as evidence that Justice Alito would have immunized *any* regulatory distinction between on-premises and off-premises signs. See Pet. Br. 22-23.

Such a reading would be inconsistent with the Court's opinion in *Reed*, which Justice Alito joined in full. See pp. 17-22, *supra*. More importantly, it is far from clear that it is the correct reading of the concurrence. As one court of appeals has noted, "[t]here might be many formulations of an on/off-premises distinction that are content-neutral." *Thomas* v. *Bright*, 937 F.3d 721, 733 (6th Cir. 2019), cert. denied, 141 S. Ct. 194 (2020). For example, a regulation that "defines an off-premise[s] sign as any sign within 500 feet of a building" would qualify as content-neutral. *Id.* at 732 (citation omitted; alteration in original). Here, however, the sign code's distinction is dependent not solely on the location of the sign, but on its communicative content.

The same is true for the final example on Justice Alito's list—"time restrictions on signs advertising a one-time event," 576 U.S. at 175—on which petitioner also relies. See Pet. Br. 33. Indeed, petitioner itself unwittingly proved the point. In amending its code in the wake of *Reed*, petitioner took steps to make its restrictions on such signs content-neutral. The amended code provides that a "wall sign, such as those typically associated with a commercial event, sale, or similar activity," is permitted if

"the sign is displayed for not more than 30 days, at least one of which must be a day on which a lawfully permitted special event, sale, or other activity that does not normally occur on the property is scheduled to occur." Austin City Code § 25-10-102(D) (2021). In its accompanying memorandum, petitioner's law department explained that the amendment was designed to "remove content as a basis for regulation." J.A. 152. And under the amended provision, a particular type of temporary sign that is typically associated with a one-time event is subject to a time limitation that does not require looking to the sign.

*3. Applying Strict Scrutiny Is Consistent With This Court's Pre-***Reed** *Precedents*

Unable to show that petitioner's sign code is content-neutral under *Reed*, petitioner and the federal government argue that taking *Reed* at its word would require the Court to overrule numerous precedents. See Pet. Br. 24-32; U.S. Br. 11-16. That is incorrect. Consistent with *Reed*, this Court has long held that content-based restrictions are subject to strict scrutiny. See *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99-101 (1972). Neither petitioner nor the federal government identifies a single precedent that would come out differently under the court of appeals' interpretation of *Reed*. And although both attempt to invoke a host of precedents analyzing time, place, or manner restrictions, *Reed* mandates determining whether a regulation is content-based on its face *before* analyzing the validity of the regulation. See 576 U.S. at 166.

a. i. Petitioner first cites cases on which the Court actually relied in *Reed*, including *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), and *United States* v. *Eichman*, 496 U.S. 310 (1990). See Pet. Br. 24-26. It claims that those cases would have

contained different reasoning if petitioner's sign code were content-based. But that is far from clear in either case.

In *Taxpayers for Vincent*, the Court considered a sign code that prohibited posting signs on public property, with a narrow exception for "the installation of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality." 466 U.S. at 791 n.1. Petitioner contends that this exception would render the code content-based under the court of appeals' interpretation of *Reed*. But the Court treated the regulation in *Taxpayers for Vincent* as a "total prohibition against temporary signs on public property," *id.* at 816, and it addressed the exception—which it termed as one for "permanent signs"—only in the context of a challenge under the Equal Protection Clause (which it ultimately declined to consider). *Id.* at 817 n.34. To the extent the Court viewed the exception as based on the medium of communication (*i.e.*, "permanent signs" versus "temporary signs"), the regulation would not be content-based and strict scrutiny would not apply. See pp. 29-31, *infra*.

In *Eichman*, the Court considered the federal Flag Protection Act, which punished a person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States." 496 U.S. at 314 (quoting 18 U.S.C. 700 (1988)). The Court first distinguished the statute from a similar Texas law it had invalidated, which prohibited desecrating a flag "in a way that the actor knows will seriously offend" onlookers. *Id.* at 313 (quoting Tex. Penal Code Ann. § 42.09 (1989)). The Court acknowledged that, unlike the Texas law, this statute contained "no explicit content-based limitation on the scope of prohibited conduct." *Id.* at 315. But the Court went on to rely on other

language in the statute as indicating "Congress' interest in the communicative impact of flag destruction." *Id.* at 317. Specifically, the Court pointed to the statute's references to mutilation, defacing, and defiling, which "unmistakably connotes disrespectful treatment of the flag" and the regulation of conduct "'only when a person's treatment of the flag communicates [a] message' to others that is inconsistent" with national ideals. *Id.* at 316, 317 (citation omitted; alteration in original). While the Court ultimately applied strict scrutiny based on Congress's content-based *purpose*, see *id.* at 318, it may well have treated the statute as facially content-based because of that language alone.

ii. Petitioner next cites various cases in which the Court defines content-based regulations as those that regulate speech on a specific subject or viewpoint. See Pet. Br. 26-28. But those cases are entirely consistent with the application of strict scrutiny here. For example, in *Mosley*, *supra*, the Court invalidated an ordinance that banned picketing near a public school except when the school was involved in a labor dispute. See 408 U.S. at 93-94. Invalidating the law on the ground that it "describe[d] permissible picketing in terms of its subject matter," the Court explained that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. That is precisely the test applied by *Reed* and the court of appeals here. It is only by adopting an extraordinarily cramped view of "subject matter" and "content" that petitioner can claim that the sign code's distinction between on-premises and off-premises signs is content-neutral. See pp. 22-26, *supra*.

iii. Petitioner also errs in asserting that the court of appeals' decision is inconsistent with decisions upholding time, place, or manner restrictions. See Pet. Br. 28. In

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), for example, the Court upheld a regulation restricting solicitation at a state fair. See *id.* at 643, 655-656. *Reed* casts no doubt on that conclusion: the regulation broadly limited the "[s]ale or distribution of any merchandise, including printed or written material," to a fixed location. *Id.* at 643 (citation omitted; alteration in original). That regulation did not depend on the solicitor's speech, and it was thus correctly upheld under intermediate scrutiny. See *id.* at 647-655.

The same is true of the statute punishing knowing publication of illegally intercepted communications that the Court deemed content-neutral in *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001). Petitioner contends that determining whether conversations were illegally intercepted "would necessarily mean" consideration of the content of the conversation. Pet. Br. 28. But petitioner fails to explain why that is so. The content of the conversations may be one indicator that they were illegally intercepted, but that fact may also be provable by other means, including if the person publishing the material intercepted the conversations. Regardless, the Court in *Bartnicki* did not address the issue; it simply assumed the interception at issue was illegal and that the respondents "had reason to know" it was. 532 U.S. at 524-525.

iv. In a final attempt to show the purportedly wide-ranging implications of the decision below, petitioner contends that the court of appeals' interpretation of *Reed* would call into question a number of cases in which the Court has addressed rules applicable to particular mediums of communication. See Pet. Br. 29-31, 33-36. But provisions that the Court has already recognized as content-based would continue to be deemed content-based. See, *e.g.*, *Consolidated Edison Co.* v. *Public Service Commission of New York*, 447 U.S. 530, 544 (1980) (prohibition on

utilities including bill inserts that express views on controversial issues of public policy); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 206, 217 (1975) (prohibition on nudity in movies). Provisions recognized as content-neutral would continue to be deemed content-neutral. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 482-483 (1988) (prohibition on picketing at a residence, defined without regard to the picketers' communicative purpose). And the government would continue to have greater leeway to restrict speech in nonpublic forums. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 838-840 (1976) (prohibition on certain speech on an army base).

In arguing to the contrary, petitioner conflates the regulation of subject matter with the regulation of specific mediums of communication, claiming that all regulations of signs, flags, or murals would be subject to strict scrutiny because such mediums are distinguished from one another based on their communicative content. See Pet. Br. 33-34. That is incorrect. While a sign and a flag may communicate different messages, that is not always the case. Take the McDonald's sign, with its iconic golden arches alerting customers to the restaurant's location. McDonald's locations also fly a flag with the same logo. The restaurant thus advertises its business using two mediums that are distinguishable based on their noncommunicative features—one is made of fabric and strung up on a pole, and the other is made of metal, plastic, and neon. A regulation is content-based when it depends on the content of the *message* expressed through the medium—not when it regulates a particular medium that is defined based on non-message-related elements.

The Eighth Circuit's decision in *Willson* v. *City of Bel-Nor*, 924 F.3d 995 (2019), does not suggest otherwise. Contrary to petitioner's claim, the statute at issue in that case did not define the particular medium—there, a flag—

using its "ordinary meaning." Pet. Br. 34. Instead, the court understood the statute—which applied only to fabric used as a "symbol of a government or institution"—to define the medium more narrowly, such that it would not encompass "fabric with a [baseball team's] logo." 924 F.3d at 1000-1001. To avoid being content-based, a provision need only apply to a particular medium without unduly restricting the definition of that medium.

This Court has recognized that strict scrutiny need not apply to "[a] speech regulation that applies to one medium (or a subset thereof) but not others" where "differential treatment is 'justified by some special characteristic of' the particular medium being regulated." *Turner Broadcasting* v. *FCC*, 512 U.S. 622, 660-661 (1994) (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983)). That principle governs where a regulation distinguishes "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Id.* at 645. Here, however, petitioner's sign code defines off-premises signs with reference to their messages and is thus subject to strict scrutiny.

b. The federal government takes a similar tack, citing numerous cases it claims are inconsistent with the court of appeals' interpretation of *Reed*. See U.S. Br. 11-16. Those cases are no more availing.

i. The government principally relies on *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which involved a zoning ordinance prohibiting any "adult motion picture theater" from being located in certain areas. See U.S. Br. 12-13. In *City of Renton*, the Court noted that the ordinance "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category," as it "treats theaters that specialize in adult films differently from other kinds of theaters." 475 U.S. at 47. The Court

nonetheless concluded that, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49.

City of Renton thus announced a particular rule for laws regulating the secondary effects that accompany the presence of sexually explicit materials—allowing for the application of intermediate scrutiny even though such laws are not obviously content-neutral. Consistent with the *sui generis* nature of that rule, the Court has never applied the "secondary effects" doctrine outside the context of adult businesses. The government would nevertheless have the Court apply that analysis in any case in which a regulation is justified based not on the content of speech, but rather on its effects. See U.S. Br. 12. That extension of *City of Renton* is flatly inconsistent with *Reed* and its holding that a Court must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." 576 U.S. at 166. As the Court recognized in *Reed*, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 167.

ii. Like petitioner, the government also cites various cases concerning time, place, or manner restrictions. See U.S. Br. 13-16. The government primarily relies on cases involving restrictions on solicitations. See *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). In each of those cases, the Court invalidated the restrictions, while at the same time recognizing that

"a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon." *Cantwell*, 310 U.S. at 304; see *Watchtower Bible*, 536 U.S. at 162-163. That recognition does not conflict with the correct understanding of *Reed*, as evidenced by the content-neutral restriction on solicitations upheld in *Heffron*. See pp. 28-29, *supra*.

The government also relies on the Court's splintered ruling in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), which addressed restrictions on printing and publishing images of United States currency. The Court held that the provision's requirement that currency reproductions serve a "numismatic, philatelic, educational, historical, or newsworthy" purpose was content-based and invalid. See *id.* at 645-646, 648. Yet the plurality and Justice Stevens (the single Justice who would have upheld the law in full) went on to conclude that various size and color limitations constituted reasonable time, place, and manner regulations. See *id.* at 656 (plurality opinion); *id.* at 704 (Stevens, J., concurring in the judgment in part and dissenting in part). Although the latter limitations would likely now be subject to strict scrutiny in the wake of *Reed*, the government surely has a compelling interest in preventing counterfeit currency, see U.S. Const. Art. I, § 8, cl. 6, and such limitations would serve that interest. Thus, the result in *Regan* would remain the same even if the Court might use somewhat different reasoning.

Further afield is the final case on which the government relies, *United States* v. *O'Brien*, 391 U.S. 367 (1968). There, the Court upheld a statute banning the burning of draft cards. See *id.* at 370. Crucially, the Court recognized that the regulated conduct in that case involved both "speech" and "nonspeech" elements, which required the application of a separate test for "incidental limitations on

First Amendment freedoms" that may permissibly accompany such a regulation. *Id*. at 376. That test has no bearing here, where the regulation at issue involves only speech.

* * * * *

In holding that the sign code's distinction between on-premises and off-premises signs was content-based, the court of appeals faithfully applied *Reed* and did not depart from this Court's pre-*Reed* precedents. The Court should reaffirm that, where a regulation "define[s] regulated speech by its function or purpose," it is content-based on its face and thus subject to strict scrutiny. *Reed*, 576 U.S. at 163-164.

B. Petitioner's Ban On Digitizing Off-Premises But Not On-Premises Signs Fails Strict Scrutiny

Should the Court agree that strict scrutiny applies to petitioner's digitization ban, which depends on the sign code's content-based distinction between on-premises and off-premises signs, then this is an easy case. Conspicuously, petitioner has never attempted to argue that the digitization ban survives strict scrutiny, and it does not do so in this Court. And while the federal government suggests that an interest in ensuring traffic safety "could support an appropriately tailored sign ordinance even under strict scrutiny," U.S. Br. 19, it too declines to argue that petitioner's digitization ban survives strict scrutiny. That is for good reason, because the digitization ban, like the restrictions in *Reed*, "fail[s] as hopelessly underinclusive." 576 U.S. at 171.

1. In its sign code, petitioner has asserted two interests in regulating signs: ensuring public safety and protecting the city's aesthetic value. J.A. 39. Respondent does not dispute that petitioner's asserted safety interest may be compelling. See, *e.g.*, *Mitchell* v. *Wisconsin*, 139

S. Ct. 2525, 2535 (2019). As in *Reed*, moreover, the Court may "assum[e] for the sake of argument" that petitioner's asserted interest in aesthetics also qualifies. 576 U.S. at 171.

2. But even if those interests are compelling ones, petitioner's sign code—which allows digitization for on-premises signs while forbidding it for the limited number of grandfathered off-premises signs—is not narrowly tailored to further them. Indeed, despite proceeding through a bench trial, petitioner failed to bear its burden of presenting any evidence to support the proposition that the differential treatment of digitized on-premises and off-premises signs serves an interest in safety or aesthetics. It offered no studies, surveys, or statistics showing that digital signs are either more dangerous or intrusive than traditional signs—much less that the differential treatment of on-premises and off-premises signs is justified. Instead, consistent with its approach here, petitioner simply made the legal argument that its ban on digitizing off-premises signs was indistinguishable from the ban on commercial off-premises signs upheld under intermediate scrutiny in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 512 (1981). See Pet. Br. 49-50. That argument fails on its own terms, see pp. 42-45, *infra*, but it certainly cannot carry the greater burden petitioner bears here under strict scrutiny.

A ban on digitizing off-premises signs is not narrowly tailored to serve the interests articulated by the Court in *Metromedia* or by petitioner and the federal government here. The fact that on-premises signs "have the particular utility of identifying the site" may justify permitting on-premises signs and not off-premises signs. U.S. Br. 20. The same is true of the concern that off-premises signs may "proliferate exponentially," whereas on-premises signs will be "integrated with an existing property." Pet.

Br. 46. But none of those justifications has anything to do with whether the off-premises signs that petitioner *has already chosen to permit* should be allowed to digitize. Petitioner has thus failed to show the requisite "direct causal link between the restriction imposed and the injury to be prevented." *United States* v. *Alvarez*, 567 U.S. 709, 725 (2012) (plurality opinion).

The federal government tepidly suggests that digital signs may present dangerous distractions and increase visual blight, see U.S. Br. 21—a bewildering suggestion, in light of the contrary conclusions of the government's own study and guidance permitting digital billboards. See p. 4, *supra*. But whatever the government's views, petitioner presented no evidence to that effect in this case. Nor has petitioner offered any reason to think that digitization of the limited number of grandfathered off-premises signs would be more problematic than the unrestricted digitization of the unlimited number of on-premises signs, which petitioner currently permits. That renders the digitization ban impermissibly underinclusive. Cf. *Brown* v. *Entertainment Merchants Association*, 564 U.S. 786, 802 (2011) (invalidating regulation on violent video games that "singled out the purveyors of video games for disfavored treatment" without providing any "persuasive reason why").

Moreover, petitioner's sign code is entirely devoid of any limits on on-premises digital signs—such as limits on their number, brightness or manner of display, the length of time for each message, or the transition time between messages. Indeed, the sign code does not even prohibit animation or video for on-premises digital signs, despite the FHWA's suggestion that such features may be particularly distracting. See pp. 5-6, *supra*. The complete absence of any such limits "diminish[es] the credibility of the government's rationale for restricting speech in the first

place." *Gilleo*, 512 U.S. at 52. Because petitioner has left "appreciable damage" to its "supposedly vital interest," its regulation cannot be upheld. *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 780 (2002) (citation omitted). The court of appeals correctly held that the digitization ban is underinclusive and thus invalid.

C. Applying Strict Scrutiny To Petitioner's Digitization Ban Will Not Invalidate Every Other Regulation Distinguishing Between On-Premises And Off-Premises Signs

Petitioner contends that "[a]pplication of the Fifth Circuit's test will either force governments to adopt blunter measures (thereby restricting a greater amount of speech) or tempt courts to water down the requirements of strict scrutiny to preserve obviously reasonable laws." Pet. Br. 33. That is wildly overstated. While *Reed* requires petitioner's digitization ban to be analyzed under strict scrutiny, which it cannot survive, it does not follow that strict scrutiny will apply to every sign regulation. Nor does it follow that any sign regulation that is subject to strict scrutiny will fail that standard; strict scrutiny is exacting, but it need not be fatal. And to the extent that applying strict scrutiny results in the invalidation of some seemingly "reasonable" laws, the Court in *Reed* recognized that may be the necessary result of the protections for free speech that the Constitution guarantees. See 576 U.S. at 171.

1. Many Localities Have Effective And Precise Sign Regulations That Do Not Draw Content-Based Distinctions

Applying strict scrutiny here will not force localities to restrict more speech through blunter regulations. The wide range of sign ordinances across the country—some of them modified after *Reed*—demonstrates that localities

are capable of developing nuanced laws that effectuate their regulatory interests without jeopardizing the protections the First Amendment affords.

a. One method of avoiding strict scrutiny is by limiting the regulation of off-premises signs to commercial speech, which allows for the application of intermediate scrutiny. See *Gilleo*, 512 U.S. at 49 n.8; *Metromedia*, 453 U.S. at 512.

For example, Phoenix, Arizona, provides for noncommercial signs to be subject to the requirements applicable to on-premises "identification signs." Phoenix, Ariz., Code § 705(C)(11)(b). Similarly, in Fargo, North Dakota, "[a]ll noncommercial messages are considered on-premise signs and are entitled to the privileges that on-premise signs receive under the sign code." Fargo, N.D., Code § 20-1303. By treating noncommercial speech the same as on-premises commercial speech, those ordinances leave more speech unrestricted while still facilitating interests in safety and aesthetics.

Indeed, in the wake of *Reed*, petitioner itself amended its sign code to permit "[s]igns containing noncommercial speech" on the same terms as on-premises signs. Austin City Code § 25-10-2(A) (2021). In recommending that amendment and others, petitioner's law department sought to "remove content as an element of the City's sign regulations, particularly with respect to noncommercial messages and signs advertising on-premise activity." J.A. 149. While the amendment does not appear to have fully limited the regulation of off-premises signs to commercial speech (and thus to have mitigated the constitutional problem with the digitization ban), see Austin City Code § 25-10-4(9) (2021); Pet. Cert. Reply Br. 11, it illustrates that petitioner did not consider the requirement of content neutrality to be insoluble within its existing regulatory framework.

b. It is also possible for localities to avoid strict scrutiny by regulating signs without drawing any distinctions between on-premises and off-premises signs. For example, Manitowoc, Wisconsin, regulates signs, including provisions for electronic messaging, based entirely on their noncommunicative features. See Manitowoc, Wis., Municipal Code §§ 31.230, 31.400-31.480 (regulating electric signs, awning signs, marquee signs, monument signs, pylon signs, sidewalk signs, suspended signs, wall signs, and window signs). Chicago first regulated digital signs with stricter permit requirements for larger signs; later, as smaller digital signs began to proliferate, the city updated its regulations to address brightness, display time, and motion for all such signs. See Chicago, Ill., Municipal Code §§ 13-20-675, 13-20-680. And, as petitioner notes (Br. 19 n.4), several States have amended their laws in the wake of *Reed* to eliminate on-premises/off-premises distinctions. See, *e.g.*, Colo. Rev. Stat. Ann. §§ 43-1-403 to 43-1-404 (regulating signs based on location and revenue generation); Iowa Code Ann. §§ 306.B.1-306B.2 (same).[2] Those jurisdictions have not given up on regulating such that they risk being overrun with signs, nor have they sought to restrict greater amounts of speech. Instead, they have crafted their regulations as valid time, place, or manner regulations that maintain content neutrality.

To the extent that the application of strict scrutiny here leads some localities to adopt greater restrictions, it is simply the result of the First Amendment's limitation on content discrimination. That principle "deter[s] the

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[2] Amicus Florida contends that those regulations rely on factors that are "more intrusive and more difficult to detect and enforce than simply consulting what the sign says." Br. 9. As this Court recently noted, however, a State's interest in "administrative convenience" is insufficient to trump First Amendment protections. *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373, 2389 (2021).

government from exempting speech [it] prefers" and "forces the government to limit all speech—including speech the government does not want to limit—if it is going to restrict any speech at all." *Rappa*, 18 F.3d at 1063. In any event, there is no evidence that localities have adopted greater restrictions after *Reed*, and there is little reason to believe they would suddenly do so in the wake of an affirmance here.

2. Courts Can Analyze Sign Regulations With Content-Based Distinctions Under Strict Scrutiny Without Watering Down The Standard

When analyzing regulations that draw content-based distinctions, courts must apply strict scrutiny. But this Court has already recognized that such scrutiny need not be fatal. Contrary to petitioner's contention, courts can continue to uphold "obviously reasonable laws" under strict scrutiny without weakening the standard. Pet. Br. 33.

To withstand strict scrutiny, the government must prove that a regulation "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. This Court has upheld laws under that standard where they "restrict[] a narrow slice of speech" and are "narrowly tailored," even if they are not "perfectly tailored." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 452, 454 (2015). Lower courts have shown they are perfectly capable of doing the same. See, *e.g.*, *Platt* v. *Board of Commissioners on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 261 (6th Cir. 2018); *In re National Security Letter*, 863 F.3d 1110, 1125 (9th Cir. 2017); *Winter* v. *Wolnitzek*, 834 F.3d 681, 693 (6th Cir. 2016).

It simply does not follow from the fact that petitioner's digitization ban cannot survive strict scrutiny, that any

other regulation based on a distinction between on-premises and off-premises signs will necessarily fail. An appropriately tailored regulation may effectively promote safety, aesthetics, and the interests of property owners in communicating information about their premises that could not be effectively conveyed through other means.

For example, although the Court need not reach the question here, it is possible that much of the federal Highway Beautification Act (HBA), 23 U.S.C. 131, would survive strict scrutiny based on those interests. The HBA's exception for "directional and official" signs, 23 U.S.C. 131(c)(1), is tailored to safety interests by ensuring that drivers are aware of important information relevant to their navigation. The exception for signs advertising properties for sale and lease, 23 U.S.C. 131(c)(2), is tailored to the interests of property owners and is unlikely to have a significant aesthetic effect. And crucially, as the federal government notes, the HBA is narrower in relevant respects than petitioner's sign code. See U.S. Br. 8. The HBA applies only to signs located within 660 feet of the rights-of-way of primary highways, see 23 U.S.C. 131(c), and not even then in areas that are zoned industrial or commercial, see 23 U.S.C. 131(d). That limit provides an additional level of tailoring.

Given its narrower application and closer connection to government interests, the HBA may well withstand strict scrutiny, as may other regulations that depend on a distinction between on-premises and off-premises signs. Indeed, respondent has not challenged the general ban on off-premises signs in petitioner's code. But regardless of whether such a ban survives strict scrutiny, petitioner's ban on digitizing off-premises but not on-premises signs does not come close to satisfying that standard. Its lack of narrow tailoring and underinclusiveness render it invalid, even where a broader ban may survive. The court of

appeals correctly held that the digitization ban failed strict scrutiny.

Finally on this point, even if petitioner were correct that applying strict scrutiny here will require courts to strike down other seemingly reasonable regulations, that is no basis to ignore the requirements of the Constitution, especially when the Court acknowledged that possibility in reaching its holding in *Reed*. See 576 U.S. at 171. To the extent petitioner asks the Court to reverse course from *Reed*, it should refuse to do so—especially because that request is based on an exaggerated understanding of the imagined consequences that may flow from a decision reaffirming *Reed* here.

D. Petitioner's Ban On Digitizing Off-Premises But Not On-Premises Signs Also Fails Intermediate Scrutiny

In any event, even if the Court were to depart from *Reed* and conclude that intermediate scrutiny applies, it should still reach the same result. Petitioner's defense of the specific provision at issue here—the ban on digitizing off-premises but not on-premises signs—"does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Reed*, 576 U.S. at 184 (Kagan, J., concurring in the judgment). Under any conceivable standard of review, the Court should affirm the court of appeals' invalidation of that ban.

To survive intermediate scrutiny, the government must show that a restriction is "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks and citation omitted). The government must also show that "the challenged regulation advances [its] interest in a direct and material way." *Rubin* v. *Coors Brewing Co.*, 514 US. 476, 487

(1995) (internal quotation marks and citation omitted). The government may not satisfy its burden by "mere speculation or conjecture," *Edenfield* v. *Fane*, 507 U.S. 761, 770 (1993); rather, it must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," *id.* at 771; cf. *Central Hudson Gas & Electric Corp.* v. *Public Services Commission*, 447 U.S. 557, 563-566 (1980) (applying similar test to commercial speech).

In contending that the sign code survives intermediate scrutiny, petitioner focuses almost exclusively on the general distinction between on-premises and off-premises signs. Petitioner relies heavily on *Metromedia*, in which the Court recognized that safety and aesthetics qualify as significant government interests and upheld a ban on commercial off-premises signs based on such interests. See 453 U.S. at 507-508. But respondent is not challenging petitioner's ban on new off-premises signs, see, *e.g.*, Resp. C.A. Br. 40; instead, respondent is challenging only the ban on digitizing *existing* off-premises signs. Because petitioner has failed to show that the digitization ban is narrowly tailored to serve its stated interests, that ban cannot be upheld under intermediate scrutiny.

Petitioner has already determined that any safety and aesthetic interests in limiting off-premises signs do not extend so far as to eliminate the grandfathered off-premises signs at issue here. With respect to the digitization ban specifically, petitioner makes only the conclusory assertions that digital signs are "more distracting" and "more intrusive." Pet. Br. 45. But it nowhere explains why any such distraction or intrusiveness is more problematic for the small number of grandfathered off-premises signs than for on-premises signs. Indeed, under petitioner's sign code, there are no limits on the brightness or the manner of display of on-premises digital signs, or

the length of time for each message—thus undercutting the argument that there is anything "distracting" or "intrusive" about even the most modest off-premises digital signs. The sign code thus "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Association, Inc.* v. *United States*, 527 U.S. 173, 195 (1999).

Petitioner asserts that off-premises signs generally warrant different treatment because those signs are "periodically changing" and "could proliferate exponentially." Pet. Br. 46 (citation omitted). But neither concern supports the specific provision at issue here. Off-premises signs cannot "proliferate exponentially" because petitioner has already banned any new off-premises signs. And as for signs "periodically changing," petitioner can effectively address that concern by limiting the frequency of message changes for both on-premises and off-premises digital signs, as many other jurisdictions have done. See, *e.g.*, Boston, Mass., Zoning Code § 11-7(5)(u); Columbus, Ohio, Code § 3378.06(C)(3); San Jose, Cal., Code § 23.02.905(C). Petitioner's other professed concerns with billboards, including their "large size, fixed location, distracting designs, and for digital billboards, changing images and bright lights," Pet. Br. 16, can be addressed through direct regulation of each of those features that applies evenhandedly to on-premises and off-premises signs. In choosing to ban off-premises digital signs rather than directly regulating those effects, petitioner's regulation is "more extensive than is necessary" to serve its interests. *Central Hudson*, 447 U.S. at 566.

Insofar as petitioner contends that its decision to deny respondent's permit applications could be justified on the alternative ground that it is consistent with an interest in

limiting changes to grandfathered signs, see Pet. Br. 13, that is likewise insufficient. Petitioner has not distinguished any such interest from its interests in safety and aesthetics, to which digitization ban is inadequately tailored. And even assuming that any such interest is distinct, petitioner has provided no reason to think that it should qualify as substantial.

E. Petitioner's Ban On Digitizing Off-Premises Signs Is Unconstitutional As Applied And Facially

Finally, petitioner contends that, because respondent's signs "mostly display commercial speech," the regulation of which is subject to intermediate scrutiny, petitioner "could constitutionally reject [the] permit applications" even if the on-premises/off-premises distinction is content-based, rendering the digitization ban constitutional as applied. Pet. Br. 47. Relatedly, both petitioner and the federal government argue that, even if the digitization ban is unconstitutional as applied to noncommercial speech, it may be constitutionally applied to commercial speech and thus any facial challenge must fail. See Pet. Br. 47-53; U.S. Br. 23-26. Both arguments lack merit.

1. As the record makes clear, respondent displayed both commercial and noncommercial messages on the relevant signs. J.A. 130-141. Under the applicable version of the sign code, respondent's signs qualified as "off-premises signs" regardless of whether they displayed commercial or noncommercial messages, and respondent's permit applications were denied on that basis. J.A. 28-30, 34-36.

Notably, in its applications, respondent did not indicate whether it intended to display commercial or noncommercial messages if the applications were approved and the signs converted to digital signs. It is a safe inference from the record that, if petitioner had approved the

applications, respondent would have made the digital sign faces available to customers with either commercial or noncommercial messages (and that, over time, the signs would have displayed both). But the critical point is that, when petitioner denied the applications, it prohibited respondent from displaying commercial and noncommercial speech alike.

Petitioner appears to suggest that this would be a different case if respondent had applied to convert its signs with the promise that it would display only noncommercial messages, or if petitioner had conditioned approval on the display of only noncommercial messages. But the sign code does not provide for either possibility. Whether with regard to the speech respondent has displayed or the speech it intends to display, therefore, petitioner's sign code "applies without distinction to signs bearing commercial and noncommercial messages." *Solantic LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1268 n.15 (11th Cir. 2005). For that reason, "the *Central Hudson* test [for commercial speech] has no application here," *ibid.*, and petitioner cannot avail itself of that test in connection with respondent's as-applied challenge.

Petitioner's reliance on *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), is misplaced. See Pet. Br. 50. In that case, the magazines at issue "consist[ed] primarily of promotional materials," though they included "some information about current events of general interest." 507 U.S. at 412. The plaintiffs "d[id] not challenge their characterization as 'commercial speech,'" and the relevant provision of the municipal code expressly regulated only "*commercial* handbills." *Id.* at 413, 416 (emphasis added). Here, by contrast, petitioner's sign code regulates without regard to whether the signs bear commercial or noncommercial messages. The digitization ban is therefore unconstitutional as applied to respondent.

2. Respondent's facial challenge also succeeds because the "pertinent facts in these cases are the same across the board." *Bonta*, 141 S. Ct. at 2389. In every case, a billboard operator with a sign deemed to be "off-premises" cannot digitize its sign, without regard to whether the operator has displayed or intends to display commercial or noncommercial speech. This Court recognizes that when commercial and noncommercial speech are "inextricably intertwined," it is "artificial and impractical" to "parcel out the speech, applying one test to one phrase and another test to another." *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). The same logic applies when a regulation's application to commercial and noncommercial speech cannot be disaggregated. Because that is the case here, the digitization ban cannot operate constitutionally and is invalid both as applied and facially.

Even if the digitization ban's application to commercial speech could somehow be isolated for purposes of a facial challenge, petitioner has not shown that the ban survives the applicable standard. In arguing to the contrary, petitioner and the federal government heavily rely on *Metromedia*. See Pet. Br. 51-52; U.S. Br. 24-26. But while *Metromedia* stands for the proposition that banning commercial off-premises signs is constitutional, that reasoning does not extend to petitioner's ban on digitizing off-premises signs. See pp. 42-45, *supra*. Applying the digitization ban to commercial speech would thus not constitute a circumstance "under which the Act would be valid," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), and would not provide a basis for rejecting respondent's facial challenge.

3. The court of appeals remanded to the district court for further proceedings on the remedy, which have been stayed pending this Court's disposition of the case. See

Pet. App. 27a. In order to permit the district court to enter an appropriate remedy, all that this Court need do is hold that the digitization ban violates the First Amendment, whether as applied or facially. If the Court so holds, the district court could then proceed to enter an appropriate declaratory judgment, permitting respondent to digitize its existing off-premises signs. J.A. 23-24.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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