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.*,
Respondents.

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

BRIEF OF SUMMUS OUTDOOR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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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.

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INTEREST OF *AMICUS CURIAE*[1]

Summus 2, LLC, doing business as Summus Outdoor, is a sign management company with over 50 years of combined history managing the display of messages on signs in multiple cities across the United States. Throughout decades of experience in applying for sign permits, operating signs in compliance with municipal codes, and defending against various types of purported infractions, Summus has practical knowledge regarding the proliferation and regulation of signs. Summus has also suffered the effects of inconsistent and ideologically motivated enforcement of "proper" or "acceptable" speech—an issue that was exacerbated in cities like Seattle and Portland following last year's riots.

Summus does not, however, seek to reject all government authority over the regulation of on-premise and off-premise signs. In fact, its experience has shown that proper regulation provides a benefit to the public and the industry by reducing overall clutter and improving the ability to connect with viewers. But this experience also comes with an understanding of the limitations of government agents, whose own personal beliefs often bleed into regulation when asked to interpret the meaning of any content—even if simply whether the message is on-premise or off-premise. As such, Summus avers that its brief will inform the Court about the real-world implications of

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[1] Both parties have consented to this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioner's brief and assist with identifying constitutionally supported solutions that further governmental interests in regulating the distinctions between on-premise and off-premise signs.

INTRODUCTION

Every day, property owners across the United States must petition their local governments to engage in speech on their own property. This prior restraint—prohibiting a speaker from broadcasting his or her message before obtaining a permit to do so—requires an applicant to identify the type of sign sought to be installed. With regulations like those at issue here, however, local governments often do not limit their inquiry to only the type, placing, or manner of sign sought to be installed.

Instead, government agents seek to interpret the *content* of the existing or proposed sign messages—making determinations about the meaning and intent of the permit holder or applicant to determine whether they comport with the type of on-premise or off-premise permit sought. In circumstances where this personalized analysis is applied to discriminate between on- and off-premises signs, cities like Austin then seek to penalize certain messages: content and viewpoints that advertise goods, people, or services of businesses that cannot afford store fronts or property in city limits—like the "small, cash-strapped entity that own[ed] no building" in *Reed*.

Contrary to Petitioner Austin's position, the Court has identified many permissible manners of regulating between these types of signs that do not target the content of their speech. As such, *amicus*

respectfully requests that the Court affirm the Fifth Circuit's decision, refute the necessity of Austin's content discrimination in its regulation, and vindicate the First Amendment rights of speakers across the nation who seek to communicate their messages despite government attempts to restrict them.

SUMMARY OF ARGUMENT

Austin's regulation at issue in this case, City Code § 25-10-102(1), inherently targets certain content and viewpoints by defining off-premises signs based on their specific message and communicative content. *See* J.A. 52 (defining off-premises signs as those "advertis[ing] a business, person, activity, goods, products, or services not located on the site where the sign is installed"). By virtue of this definition, Petitioner allows government agents to discriminate against sign owners and messages that those inspectors interpret as impermissible—namely, those that advertise a good, person, or service who are not located within city limits or at a particular building. As a result, those speakers are entirely restricted from engaging the public on their preferred topics; a form of censorship that innately favors those on-premises messages that are not similarly restricted. *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015) (striking down sign code that "imposes more stringent restrictions on these signs than it does on signs conveying other messages").

In addition to discounting this discrimination, Austin's brief also ignores the many reasonable time, place, and manner restrictions that governments may implement to distinguish between on-premise and off-premise signs. Notwithstanding Petitioner's spurious

claim that municipalities will be left powerless to regulate signs if the Fifth Circuit's decision is affirmed, its own regulations already feature many restrictions against certain types of signs that do *not* require a substantive evaluation of the sign's message. Whether based on features like the location of the permit holder, weight, numerosity, size, or light offput, governments have ample means of distinguishing between types of signs—even if the message itself is completely obscured. Accordingly, the Court should disregard Austin's admonition that the sky is falling, reaffirm the availability of those measures, and confirm its repudiation of similar discrimination found in *Reed*.

ARGUMENT

I. AUSTIN IGNORES THAT ITS CODE MANDATES CONTENT AND VIEWPOINT DISCRIMINATION AGAINST MESSAGES ADVOCATING FOR BUSINESSES LOCATED OUTSIDE OF AUSTIN OR A PARTICULAR PROPERTY

Austin claims that its code does not violate the First Amendment because it "regulates based on a commonplace distinction between on-premises and off-premises signs" and "does not single out any subjects, topics, or viewpoints for regulation." Petitioner's Brief ("Pet. Br.") at 9. Such a conclusory statement, however, is factually and legally inaccurate. For whether intentionally or out of support for a practice that has been in place for 38

years,[2] Petitioner ignores that its code directly censors certain content, viewpoints, and speakers related to businesses that are untethered to any particular location in Austin. *See Reed*, 576 U.S. at 163–164 (regulations that "draw[] distinctions based on a message" or differentiate certain "speech by its function or purpose" are subject to strict scrutiny).

Beyond mere censorship of a particular sign or message, the regulation generally disfavors businesses and messages promoting goods and services outside of the city. By discriminating against those speakers who cannot afford to operate their property from within city limits, Austin's regulation signals that those viewpoints and messages are less worthy of public consumption. On the other hand, the regulation's restrictions intrinsically promote a favored speaker and message—brick and mortar businesses located in Austin. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 658 (1994) ("laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference"). But even without a "hint" of illicit motive, Pet. Br. at 42, such distinctions are

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[2] Petitioner's invocation of the Federal Highway Administration reports and Highway Beautification Act—a federal law that predates almost all state regulation and is not at issue here—are also misplaced. *See* Pet. Br. at 4-6. For notwithstanding Austin's implied threat that the Act could be thrown asunder by invalidation of its code, that law and implementing guidance concerning the digitization of signs explicitly avoid any requirement to distinguish between the *content* of signs near federal roadways. *See* Federal Highway Administration, Department of Transportation, *Guidance on Off-Premise Changeable Message Signs* (Sept. 25, 2007).

impermissible under the First Amendment. *See Reed*, 576 U.S. at 166 ("an innocuous justification cannot transform a facially content-based law into one that is content neutral"). As such, the regulation is discriminative and subject to strict scrutiny.

Austin also misapprehends the nature of the governmental and private interests implicated by such a regulation. Broadly asserting that its regulations against digital off-premises signs serve traffic safety and aesthetic concerns,[3] Austin then concedes that digital on-premises signs are wholly permissible without limitation under the scheme, *see* Pet. Br. at 15-18—effectively admitting that those concerns are untethered to a municipal need to reduce driving distractions or improve aesthetics. *See Reed*, 576 U.S. at 172 ("The Town cannot claim that placing strict limits on temporary directional signs is

[3] Austin also claims its definition of "[o]n-premises signs … implicate[s] the compelling interest of businesses and property owners to advertise their goods and services on their own property." Pet. Br. at 10. However, this supposition ignores other obvious (and countervailing) interests of property owners to (1) dispose of their property how they see fit, in the most profitable means available; (2) be compensated for advertising others' goods they need not stock, sell, or manage themselves; or (3) retain flexibility for the goods and services they must offer on site—i.e., "to possess, use and dispose of it" in any permissible way. *See generally United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972) ("We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected."). Austin fails to contend with these obvious interests, which further undermines its purported governmental interest in limitations on property owners' disposition of their land.

necessary to beautify the Town when other types of signs create the same problem … The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not."). Petitioner's attempt at defining a type of sign by the messaging displayed on it does not further any governmental interest that can be achieved through the regulation of signs. Instead, Petitioner essentially asks the Court to allow the exception to swallow the rule, ignoring the plank of digital on-premises signs in its eye while targeting the speck of off-premises ones. *See Republican Party of Minn. v. White*, 536 U.S. 765, 70 (2002) (a regulation cannot be upheld where it leaves "appreciable damage" to its "supposedly vital interest") (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–542 (1989)).

Most detrimentally, however, Petitioner's regulation creates an unnecessary burden on private speech by inserting a government agent who must individually interpret the content of a sign, the relevant code, and any ambiguity that lies between. In fact, defining a type of sign by the message displayed on the sign actually *promotes* unbridled discretion from government actors who, due to their interpretation of the message on the sign, can unilaterally censor speech on the grounds that the sign does not conform to the code. *See Reed*, 576 U.S. at 167-168 ("[O]ne could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services"). Applied here, government agents in Austin can rely solely upon

their interpretation of the definition in § 25-10-4-9-OFF-PREMISE SIGN, resolving any ambiguity regarding the permissibility of a sign or its content based on their own particular view of a message.

As shown through cases like *Reed*, government agents are not well suited—or sometimes even able—to evaluate the meaning and import of a sign's message. *Reed*, 576 U.S. at 167 (noting that a government's "[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."). For example, if a sign for an Israeli-American owned convenience store displayed "פפסי🙃" in Hebrew, the average government agent could not reasonably be expected to interpret that it communicates a message about Pepsi. In fact, even if published in English, that inspector could hardly divine whether the message is meant to advertise a good that is sold onsite, critically demean the brand, highlight or make light of others' criticism, or promote a good at all. And if that government agent was a personal observer of the age-old stricture that "Coke is for Jews, Pepsi is for Arabs,"[4] or felt offended by the brand's recent marketing around social and racial upheaval in America,[5] he may "interpret" that the

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[4] *See* David Mikkelson, *Coca-Cola and Israel*, Snopes, https://www.snopes.com/fact-check/red-white-and-jew/.

[5] *See* Alexander Smith, *Pepsi Pulls Controversial Kendall Jenner Ad After Outcry*, NBCNews (April 5, 2017), https://www.nbcnews.com/news/nbcblk/pepsi-ad-kendall-jenner-echoes-black-lives-matter-sparks-anger-n742811.

store's principal "good" sold is not Pepsi and the sign does not qualify as "on-premise." In other words, based on a personal opinion alone, the government agent can draw his own conclusions about the nature of the message and deny the store owner's request on his discretion. Therefore, far from furthering legitimate governmental interests in the regulation of signs, Austin's code chills speech by restricting certain viewpoints, increasing unnecessary interference with property use, and upholding prior restraint.

II. AUSTIN IGNORES REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS BETWEEN ON- AND OFF-PREMISES SIGNS THAT WOULD NOT REQUIRE CONTENT DISCRIMINATION

Relying heavily on a single line from Justice Alito's concurrence in *Reed*, Austin asserts that the Court has already held that "on-off-premises distinctions would *not* trigger strict scrutiny." Pet. Br. at 20. Not so. Under the Court's established jurisprudence, a property owner need not be regulated based on the communicative intent of any individual message or restricted from posting any type of advertising content in order for a government to meet its asserted interests. For although Justice Alito did say that municipalities could enact "[r]ules distinguishing between on-premises or off-premises signs," *see Reed*, 576 U.S. at 176, it does not follow that such a distinction should be made on the "commonsense" basis of the sign's communicative content. Instead, case law and Austin's own regulation provide ample means of regulating between on- and off-premises signs through time, place, and manner restrictions;

cities will not be left powerless with "only broad and blunt tools" remaining to regulate all signs. Pet. Br. at 36-37.

As this Court made clear in *Reed*, "[n]ot 'all distinctions' are subject to strict scrutiny, only *content-based* ones are." 576 U.S. at 172 (emphasis original). Accordingly, the Court need not give credence to Petitioner's claims that affirming the Fifth Circuit "would subject virtually all distinctions in sign regulation to strict scrutiny." Pet. Br. at 12. For under a "black tape test"—whereby the communicative content of a sign is practically obscured when inspected—governments still have ample means of regulating between on- and off-premises signs that would not require a city to penalize a property holder based on the *content* of her message. Most easily, Austin can regulate between on- and off-premises signs by examining the ***location of the permit holder***, without any need to look at the sign's face at all.

In particular, § 25-10-4(9) could define "OFF-PREMISE SIGN" to mean "a sign that is permitted to a business, person, institution, or other entity without a license to occupy or conduct a business or other activity located on the premises where the sign is located." Further, "ON-PREMISE SIGN" could be defined as "a sign that is permitted to a business, person, institution, or other entity licensed to occupy or conduct a business or other activity located on the premises where the sign is located." In that way, restrictions against off-premises signs could be enforced through examination of the location of the permit holder instead of distinguishing between

revenue streams that result from advertising goods on site versus goods sold elsewhere. Fully ignoring the communicative content of the sign, the government agent's own biases against a particular message would also not come to bear in the form of state-approved censorship.

Moreover, Austin's current regulations also provide a window into additional means of regulating between these types of signs and meeting government objectives—further undermining its claim that "an official cannot identify an off-premises sign without reading it." *See* Pet. Br. at 11-12. Addressing purported concerns with unruly proliferation of signs at a given location, *id.* at 17, 46, governments can regulate the ***number*** and ***size*** of types of signs permitted for each property (or sign changes for digital displays). In this case, the government actor would only need to examine the (1) number of particularly-sized signs and (2) associated permit to determine whether the property owner is in compliance.

With regard to digitized signs and concerns about "electric signs [that] use rapidly changing images and bright lights to intensify their effect," *id.* at 15, governments could constrain certain signs to ***weight*** or ***light offput*** limitations while still allowing their messages to be broadcast. Under those circumstances, the government agent would only need to examine the weight of a sign or its brightness when compared to the associated permit to determine whether it violates a regulation and implicates Austin's concerns about safety, distractions and blight. As those factors are wholly unrelated to the

communicative content of the sign's message and do not restrict certain viewpoints from being observed by the public, they would not come with the same content-based concerns. And while such means would not be as simple as looking at a sign's message to divine whether it is allowed, Austin's "[m]ere administrative convenience" does not supersede every putative speaker's First Amendment right to publish messages untethered to a physical location in that city. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (citing *Reed*, 561 U.S. at 196).

CONCLUSION

The First Amendment exists, in part, to place limits "on government regulation of speech." *See Reed*, 561 U.S. at 168. As such, when the government seeks to divest a property owner of her right to speak on any permissible matter—while allowing her to speak on other, more "desirable" topics—the First Amendment demands the courts apply strict scrutiny to that censorship. Furthermore, allowing government agents to investigate and deny certain types of speech or viewpoints based solely upon the character of a sign's message inherently provides an opportunity for unbridled discretion and discrimination to occur.

Fortunately, multiple means exist for governments to regulate between on-premise and off-premise signs by reviewing only the time, place and manner characteristics of a particular sign. Not only do these means protect against the opportunity for such unchecked censorship to occur, they also further the governmental interests at stake without the

attendant chilling of speech that comes with codes like the one here. Because Austin's code fails to make use of such distinctions and off-premises signs currently "are treated differently from signs conveying other types of ideas," *id.* at 164, the Court should affirm the Fifth Circuit's decision and strike down the regulation as a content-based regulation of speech.

Respectfully submitted,

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