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 OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Is the city code's distinction between on- and off-premise signs a facially unconstitutional content-based regulation under *Reed*?

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Austin's sign code prohibits signs from displaying messages that "advertise[] a business, person, activity, goods, products, or services not located where the sign was installed," or that "directs persons to any location not on that site." Reagan Br. 7. It categorizes such signs as being "off-premise." Even grandfathered signs with off-premise content are subject to a variety of restrictions, including loss of grandfathered status if they are changed or improved in various ways. JA 95. Determination of whether a sign falls within these restrictions turns directly on the content of that sign and the relation of that content to the premises where the sign is located.

Regulations that turn on the content of speech are particularly troubling and prone to abuse, even where they are not overtly based on the viewpoint of the restricted speech. Often, a content restriction is merely a proxy for viewpoint discrimination. Other times it involves discrimination against topics, types of speech, or speakers. All such forms of government discrimination offend the First Amendment. Accordingly, this Court correctly subjects content-based regulations to strict scrutiny. *Reed* v. *Town of Gilbert,* 576 U.S. 155, 163-164 (2015).

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of it, nor did any person or entity, other than *Amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations. No publicly traded corporation owns 10% or more of *Amicus*.

The restriction struck down in this case is without doubt content based and is properly subject to strict or exacting scrutiny. That the substance of the content restriction depends upon the non-content fact of location, and varies with every location involved, does not make it content neutral any more than the restrictions on interracial marriage struck down in *Loving* were race-neutral because they applied to persons of any race and varied based on the race of their prospective spouse. See *Loving* v. *Virginia*, 388 U.S. 1, 8 (1967). Austin's sign restriction variably regulates signs based on whether their content relates to the premises to which they are attached or to some other subject. That such restriction allows varied content depending on the premises involved is irrelevant to whether it discriminates against all sorts of protected content, including advertisements involving social, political, or economic activities of general public importance not specifically related to the single premises on which the sign is located.

Amicus Protect the First Foundation ("PT1") is a non-profit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people across the ideological spectrum, including people who may not even agree with the organization's views. This case involves issues of content discrimination and the proper standard of review that are of particular interest to PT1 and its mission to protect First Amendment rights and values.

STATEMENT

Respondent Reagan National Advertising owns billboards that publish "off-premise" messages. Reagan Br. 3. Austin allows Respondent's signs to continue to display off-premise messages under the exception for "grandfathered" signs that were legal when erected. But even grandfathered signs are subject to limitations, and any changes to the signs that would alter the "method or technology used to convey" the signs' messages, such as making a standard sign digital, would eliminate their grandfathered status and restrict the content of messages that may be published on the signs. JA 95. When Respondent applied for permits to digitize its existing off-premise signs, Austin rejected those applications. Reagan Br. 3.

SUMMARY OF ARGUMENT

I. Austin's sign code is a content-based restriction on speech. It distinguishes signs based on their messages: if a sign advertises a person or activity not located on the premises, or directs consumers elsewhere, it is restricted. A sign advertising persons or activities at, or directing consumers to, the sign's location is not. The regulation does not lose its content-based nature simply because it applies to all signs containing off-premise content. As shown by this Court's equal-protection cases, comprehensive and variable application of discriminatory laws does not negate the discrimination, it compounds it.

II. Because Austin's sign code is content-based, it should be subject to—and fail—strict scrutiny. But even if the Court were to conclude that a lesser standard, such as exacting scrutiny, should apply, Austin's restriction would still fail because the city has identified no valid, specific, and genuine government interest sufficient to survive heightened scrutiny. And because Austin has offered no justification for why off-premise signs pose a greater threat to aesthetics and traffic safety than on-premise signs, the regulation is severely underinclusive, and thus not narrowly tailored to achieve any of Austin's purported interests.

ARGUMENT

I. The Challenged Law Is Not Content-Neutral Just Because it Discriminates Differently Depending on a Sign's Location.

PT1 agrees with Respondent that Austin's distinction between signs containing on-premise messages and off-premise messages is content-based because the distinction depends on the communicative content of the signs. Reagan Br. 17-22. *Amicus* writes to emphasize that, even though Austin's restriction applies equally to all signs containing off-premise messages, and the content restricted necessarily varies in small ways location-by-location, it is still a content-based restriction. That is because its application—or lack thereof—turns on the sign's message, not its location alone. As shown by this Court's equal-protection cases, comprehensive and variable application of discriminatory laws does not negate the discrimination, it compounds it. Austin's attempt to escape that conclusion is akin to Virginia's attempt to escape the conclusion that its anti-miscegenation law discriminated against blacks by pointing out that it applied to all mixed-race couples. *Loving*, 388 U.S. at 8.

1. A long line of this Court's free speech cases supports the conclusion that Austin's restriction is content-based. This is so because application of the ordinance depends on a sign's message—a sign directing consumers to one location (away from the sign's current site) is subject to the restriction, whereas a sign directing consumers to another (to the sign's own location) is not. And all signs discussing persons, activities, or other topics that are not location-specific in their nature are restricted at all locations.

It is hornbook law that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (internal citations omitted). While governments may restrict "the time, place or manner of protected speech," even those restrictions must be "justified without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (cleaned up). Speech-limiting laws that do reference speech's content are "presumptively unconstitutional." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). *Amicus* thus agrees with Respondent's thorough discussion of what constitutes content-based regulation and its application of this Court's jurisprudence to this case. Reagan Br. 17-22.

2. Despite the numerous cases establishing that regulations based on the communicative impact of speech are content based, Austin suggests that it gets a pass because it does not discriminate against specific viewpoints and does not single out particular "subject matter" for restriction. Austin Br. 20. Such assertions are wrong in fact and wrong in their narrow view of the First Amendment.

As a factual matter, Austin's claim not to discriminate based on viewpoint ignores the range of viewpoints involved in signage. Even commercial signs can have a viewpoint: "The best chicken sandwich is at Pete's Diner" is a viewpoint that is prohibited on any sign not attached to that diner. Likewise, a sign on the building across from or leasing to Pete's Diner saying "Wendy's chicken sandwich puts Pete's to shame" plainly expresses a viewpoint

yet is prohibited unless Wendy's happens to be in the building with a sign. That the regulation prohibits *all* non-self-referential (and thus presumably favorable) viewpoints does not mean it is viewpoint neutral; it means that the discrimination is extensive and oppressive. A law that provides special treatment to a narrow category of content or viewpoints (*i.e.*, self-referential and self-promoting content and viewpoints), but discriminates broadly against all other content and viewpoints, is not saved by its breadth of discrimination; it is all the more condemned thereby.

Similarly, the regulation in this case discriminates against broad categories of content involving subjects that do not lend themselves to a premise-specific communication. Generally applicable statements such as "Vote," "Get Vaxxed," or "Jesus Saves" are not specific to a particular premise but involve persons or activities that occur throughout any geographic area. Limiting exhortations to vote, vaccinate, or even pray only to signs on polling places, doctor's offices, or churches, and directed towards those locations alone, is as surely restrictive discrimination against the more general content as any example in this Court's cases. Once again, the fact that such content is barred from all but a few limited locations does not negate the content-based nature of the restriction, it merely increases its severity.

That the challenged regulation is both content and viewpoint discriminatory is confirmed by examining what constitutes discrimination in the Equal Protection context. *Mosley*, 408 U.S. at 95 ("Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection

Clause."); Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 Duke J. Const. L. & Pub. Pol'y 13, 45–48 (2017) (noting claims under the First Amendment and Equal Protection Clause are on "separate but related tracks—with official discrimination acting as the joist connecting the two"; noting this Court's early content-based cases were viewed as Equal Protection claims) (citing *Carey* v. *Brown*, 447 U.S. 455 (1980)).

3. Contrary to Petitioner's suggestion that it regulates equally all off-premise signage, Equal Protection jurisprudence confirms that the "mere fact" that a statute "equally" applies invidious classifications is *not* enough to make it nondiscriminatory. In *Loving*, for example, the Court was rightly unpersuaded by the claim that Virginia's anti-miscegenation statute was constitutional because it applied to all races equally. 388 U.S. at 8.

This same equal protection principle condemning multilateral discrimination has been recognized in the First Amendment context as well. In *Matal* v. *Tam*, this Court recognized that a law restricting a variable category of viewpoints (namely, the viewpoints of disparagement and giving offense) does not cease to be unconstitutional viewpoint discrimination simply because it prohibits all forms of disparagement equally. 137 S. Ct. 1744, 1763 (2017). ("Our cases use the term 'viewpoint' discrimination in a broad sense, * * * and in that sense, the disparagement clause discriminates on the bases of 'viewpoint.' To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those

arrayed on both sides of every possible issue. * * * But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint."); *id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment) ("A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so."). And in *Iancu* v. *Brunetti*, the Court reinforced that holding. 139 S. Ct. 2294, 2301 (2019) (citing *Tam*, 137 S. Ct. at 1751, 1766-1767).

Where the Constitution prohibits classification and preferential treatment of a protected characteristic or activity, multilateral and multi-valent application of discriminatory laws cannot save the statute from increased scrutiny. The First Amendment prohibits preferential treatment of, and statutory classifications turning on, the communicative content of speech and hence discrimination that turns on such content triggers heightened scrutiny under both First Amendment and Equal Protection principles. *See Mosley*, 408 U.S. at 95; *Reed*, 576 U.S. at 136.

Some regulations—such as those making distinctions based on the speech's subject matter or viewpoint—are "obvious[ly]" content-based. *Reed*, 576 U.S. at 170; *see Mosley*, 408 U.S. at 95 (subject matter); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (viewpoint). Austin's restrictions, by expressly turning on the content of a sign, fall into this category. But even if one imagined that the variable application of Austin's restriction—the specific content that is restricted changes based on

location—were somehow viewpoint and content neutral on its face, it would not change the result. Even a facially neutral regulation may still be content based if it "cannot be 'justified without reference to the content of the regulated speech.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791).

Under even an erroneously favorable assumption of facial neutrality, Austin's restriction must be deemed content-based. To apply the ordinance, an Austin official must "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). That is, an official cannot determine whether a sign violates the restriction without examining at least part of the sign's message: its "function or purpose." *See Reed*, 576 U.S. at 163. If a sign's "function" is to direct consumers to a noncontiguous location, the sign is in violation; if the sign's function is to direct consumers to a contiguous location, it is permissible. Because these distinctions are "drawn on the message" of the signs, *ibid.*, the restriction is content-based.

4. Finally, Petitioner is incorrect in seeking to categorize the challenged regulation as merely a time-place-manner restriction. Austin Br. 43. Permissible time-place-manner rules do not turn on the content of the speech but apply to all speech regardless of the communicative content. Thus, limits on the volume of sound never once ask what is being said, but address noise in all circumstances. See *Ward*, 491 U.S. at 791. That Austin necessarily must ask what a sign says before deciding whether it is in the proper place or

communicates in the proper manner, renders this entire line of cases inapplicable.

For example, a digital sign saying, "Turn Now for Burgers Here," "Enjoy Our New Butterfly Exhibit," or "Come In and Cheer for Austin FC" can be installed anywhere in the city (as long as it is on-premises), while a digital sign that says "Turn in 1 Mile for Burgers," "Visit Our New Butterfly Exhibit Downton," or "Head to Q2 Stadium to Cheer for Austin FC," respectively, *cannot* be installed anywhere in the city—*even if both the first sign and the second sign shared the same location*. Because the restriction applies differently to different messages in the same location, the restriction is not a mere restriction of place.

II. Austin's Content-Based Regulation Should Be Subject to Strict or, at the Very Least, Exacting Scrutiny, Neither of Which Austin Can Satisfy.

The remaining question is what form of heightened scrutiny should apply here. PT1 agrees with Respondent that, because Austin's sign ordinance is a content-based restriction, it must meet the rigorous demands of strict scrutiny. *Reed*, 576 U.S. at 163. If the Court nonetheless were to conclude strict scrutiny is not applicable here, *Amicus* urges the Court to review the regulation under exacting scrutiny to protect the core speech rights at issue. See *McCutcheon* v. *Fed. Election Comm'n*, 572 U.S. 185, 197 (2014). Under either standard, Austin fails to meet its constitutional burden—largely because of the severe underinclusiveness of Austin's ordinance.

A. Content-Based Speech Restrictions Should Be Subjected to Strict or, at Least, Exacting Scrutiny.

This Court has applied exacting scrutiny in a variety of contexts in which it lacked consensus on, or rejected, strict scrutiny. For example, exacting scrutiny applies "in the context of commercial speech, an[] area where the government has traditionally enjoyed greater-than-usual power to regulate speech."[2] *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2477 (2018). It was also applied recently by several Justices where there was no consensus whether even stricter scrutiny should apply. *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2383 (2021). To the extent there is uncertainty or reluctance in this case, therefore, this Court should apply exacting scrutiny to "limitations on core First Amendment rights" that are not otherwise subject to strict scrutiny. *McCutcheon*, 572 U.S. at 197.

Under exacting scrutiny, government regulation of speech will not stand unless it promotes a sufficiently important government interest and is narrowly tailored to that interest. *Americans for Prosperity Found.*, 141 S. Ct. at 2383-2385. The challenged regulation in this case cannot survive such exacting scrutiny, much less strict scrutiny.

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[2] As the court of appeals correctly held, Austin's ordinance should not be treated as commercial speech because it "applies with equal force to both commercial and noncommercial messages." Pet.App. 25a.

B. Underinclusivity Demonstrates the Disingenuousness of Austin's Claimed Interest.

Here, Austin claims the ordinance is justified by the city's interest in aesthetics[3] and public safety. However, the ordinance is grossly underinclusive when it comes to those purported goals. And that under-inclusivity reveals that the city's purported interests are not substantial enough to constitute the kind of genuine, specific, and proven interest necessary to withstand heightened scrutiny. *See Reed,* 576 U.S. at 172.

Underinclusive restrictions cast doubt on whether the government truly weighs an interest as heavily as it claims, or whether that asserted concern is a guise for otherwise improper efforts to restrict viewpoints, subjects, or speech in general. As this Court held in *Reed*, "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest

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[3] Aesthetic interests are not sufficiently important to withstand exacting or strict scrutiny. As the Sixth Circuit noted in *Thomas* v. *Bright*, this Court has never found an interest in public aesthetics to be compelling. *See Thomas* v. *Bright*, 937 F.3d 721, 733 (6th Cir. 2019) (citing *Metromedia, Inc.* v. *City of San Diego*, 450 U.S. 490, 507–508 (1981); *City of Cincinnati* v. *Discover Network, Inc.*, 507 U.S. 410, 525–529 (1993)). And while this Court has recognized aesthetics as a "substantial" interest sufficient to withstand intermediate scrutiny, *Metromedia, Inc.,* 450 U.S. at 507–508, it should not hold that it is a "sufficiently important" interest to outweigh the significant First Amendment rights at issue in this case. The beautification of a city surely does not outweigh its residents' First Amendment right to free speech. See *Thomas*, 937 F.3d at 733.

unprohibited." *Id.* at 172 (citation and internal quotation marks omitted).

Here, the aesthetics and safety claims advanced by the city mirror those advanced by the government—and rejected by the Court—in *Reed*, 576 U.S. at 171. And here, as in *Reed*, the city allows a potentially limitless number of signs containing on-premise content that would have the same allegedly negative effects as restricted signs with off-premise content. This Court rejected the claimed interests offered for the "hopelessly underinclusive" regulation in *Reed*, *id.* at 172, and it should do the same here. There is no suggestion that signs with on-premise messaging, whether digital or otherwise, pose any less of a problem to aesthetics or safety than identical signs discussing off-premise topics. *Ibid.* (Town of Gilbert failed to identify different safety risks between permissible and impermissible signs).

Because Austin's ordinance shares the same flaws at the law in *Reed*, it should share the same fate. Both laws are underinclusive, and neither is sufficiently tailored to the compelling interests the governments assert. The Court's precedent does not permit cities to restrict constitutionally protected rights because of purported interests that do not closely and accurately align with the regulations supposedly serving those interests. For regulations like Austin's to survive, they must be narrowly tailored and have a close fit to the alleged problem at hand. Neither is true here.

CONCLUSION

This Court should hold that Austin's sign code constitutes a viewpoint- or content-based restriction and therefore is subject to strict scrutiny. Because Austin has not tailored its regulation to its claimed, though doubtful, government interests, this Court should hold it violates the First Amendment.

Respectfully submitted,

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