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

REPLY BRIEF FOR PETITIONER

ANNE L. MORGAN
City Attorney
MEGHAN L. RILEY
Chief–Litigation
H. GRAY LAIRD III
Asst. City Att'y
CITY OF AUSTIN
LAW DEPARTMENT
P.O. Box 1546
Austin, TX 78767
(512) 974-2268

HEATHER WELLES
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90067
(213) 430-8025

RENEA HICKS
Counsel of Record
LAW OFFICE OF
MAX RENEA HICKS
P.O. Box 303187
Austin, TX 78703
(512) 480-8231
rhicks@renea-hicks.com

MICHAEL R. DREEBEN
JEREMY R. GIRTON
RACHEL A. CHUNG
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR PETITIONER

The City of Austin regulates billboards through a categorization long recognized in federal, state, and local law: no new off-premises signs can be constructed, and existing nonconforming signs cannot increase their degree of nonconformity. Nothing about characterizing a sign as off-premises turns on its topic or subject; the definition is an empty vessel. It applies equally to signs discussing any subject or promoting any viewpoint. This Court's precedents, including *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), apply intermediate, not strict, scrutiny to such content-neutral laws.

Respondent reformulates the issue to attack a law that does not exist, on grounds it did not argue below.[1] After suing to challenge Austin's off-premises sign definition, and after convincing the court of appeals to apply strict scrutiny to any law that requires an enforcement official to read a sign, respondent has abandoned both positions.

First, respondent now contends that it is not challenging Austin's *prohibition* on off-premises signs, but only Austin's ban on *digitizing* off-premises signs. But no such "digitization ban" exists. Respondent cannot digitize its billboards because they are nonconforming signs, not because of any particular digitization rule. The argument that Austin's code regulates signs based on content hinges entirely on the on/off-

[1] "Respondent" refers to respondent Reagan National Advertising of Austin, LLC; respondent Lamar Advantage Outdoor Company, L.P. is no longer "actively participating in the proceedings before this Court." Resp. Br. (II).

premises distinction, as respondent elsewhere seems to recognize. Resp. Br. 17, 34. If respondent were to prevail, its underlying position would sweep away all regulations that turn on that distinction and many more besides, notwithstanding its purportedly narrower framing.

Second, respondent no longer defends the "read the sign" test it asked the court of appeals to adopt. Instead, respondent contends that *Reed* expanded the definition of "content-based regulation" to include any law that regulates speech's "function or purpose." But *Reed* was describing laws that use "function or purpose" as a proxy for content, such as a law that identifies political speech by its "purpose" to influence an election. Austin does no such thing. And if applied to reach laws like Austin's, respondent's interpretation would require overruling multiple precedents—including First Amendment decisions on which *Reed* relied—that make clear that content-based regulation means laws focused on topics or subjects. Only such laws implicate the First Amendment principles justifying strict scrutiny: concern about government suppression of messages or skewing public debate.

Austin's law is therefore subject to intermediate scrutiny and is valid under that approach. Respondent's contrary arguments questioning the law's fit and rationale posit narrow-tailoring and justification requirements that are far too stringent for content-neutral laws that leave open multiple channels for expression. And, in any event, this Court has upheld an on/off-premises rule governing billboards that display commercial messages, which respondent's billboards

do. That alone justifies Austin's denial of respondent's application to digitize. To prevail on a facial challenge, respondent would have to show real and substantial overbreadth. It has not even tried. Instead, it claims that Austin's law does not distinguish between commercial and noncommercial speech. But under settled law, that contention does not permit respondent to overturn a law that, as applied to its billboards, is valid.

ARGUMENT

I. THE COURT SHOULD REJECT RESPONDENT'S REFORMULATION OF THE QUESTION PRESENTED

The petition for certiorari presented the question whether Austin's "distinction between on- and off-premise signs" is a "facially unconstitutional content-based regulation under *Reed*." Pet. i. That question addressed the court of appeals' holding, *see* Pet. App. 21a ("[W]e hold that Austin's on-premises/off-premises distinction is content based."), which respondent defended in opposing certiorari, Br. in Opp. 15. Now, however, respondent disclaims any challenge to "the general distinction between on-premises and off-premises signs," Resp. Br. 15, and redrafts the question presented to attack only a purported "digitization" prohibition on off-premises signs, *id.* at (I). That effort is misguided; this case cannot be cabined to the issue of digitization because the underlying rules regulate signs by whether they are on or off premises and whether they qualify as nonconforming signs. And until its merits brief, respondent staked its content-based claim on the on/off-premises distinction.

1. Respondent contends that Austin adopted a "digitization ban" "to permit digital signs that advertise activities on the premises, but to prohibit the digitization of other signs." Resp. Br. 7, 12. But no such "digitization ban" exists. *See* J.A. 49-129. Instead, the sign code defines off-premises signs, Sign Code § 25-10-3(11) (J.A. 52), and then prohibits them, *id.* § 25-10-102(1) (J.A. 76), saying nothing about digital off-premises signs. *See* Resp. Br. 7-8 (acknowledging these provisions). The only reason respondent's signs are permitted at all is that they were grandfathered as nonconforming off-premises signs. *See* Sign Code § 25-10-3(10) (J.A. 52). Like all nonconforming uses, respondent's signs are permitted to remain in their existing location but cannot be altered in a way that increases their degree of nonconformity, including by changing their technology. *Id.* § 25-10-152(A), (B)(1)-(2) (J.A. 95-96). But a preexisting off-premises digital sign deemed nonconforming could remain digitized under the code. Indeed, six of respondent's signs are tri-vision signs with "electronically controlled changeable copy," J.A. 17 ¶ 8, which respondent regards as "digital signs," Resp. Br. 8. Those signs may remain "digital" under the nonconforming use rule, illustrating that there is no "digitization ban" applicable only to off-premises signs.

Respondent formerly recognized this. In its complaint, respondent alleged that the constitutional problem stemmed from the definition of an off-premises sign because an enforcement official would have to read the sign to apply the definition. *See* J.A. 20-21 ¶ 17. And respondent acknowledged that the only

reason it could not digitize its signs was their nonconforming status. J.A. 21 ¶ 18. Thus, respondent sought to invalidate the entire prohibition on off-premises signs so that it could replace its existing signs with new digital off-premises signs without the need for a permit. *E.g.*, J.A. 22 ¶ 24.

Respondent therefore errs in stating that its position would have no effect on Austin's broader off-premises sign prohibition. *See, e.g.*, Resp. Br. 41 (asserting that "respondent has not challenged the general ban on off-premises signs"). That prohibition is what makes respondent's signs nonconforming and thus prevents their digitization. And it is the only code provision that respondent has identified as creating a First Amendment problem.[2] If respondent prevails, it is difficult to see how Austin could continue enforcing its longstanding prohibition on new billboards.

2. Respondent's new claim also places on Austin a novel burden to justify a "digitization ban" when that was never the issue below. Austin was under no obligation to introduce evidence of a specific governmental interest in regulating off-premises *digital* signs because it did not write any rule specifically regulating those types of signs, and because respondent did not

[2] The rule that nonconforming uses may not increase the nonconformity does not itself violate the First Amendment. The rule is a longstanding principle of zoning regulation that applies to many property uses, not a speech regulation. *See* 2 Am. Law of Zoning § 12:19 (5th ed. 2021); 4 Rathkopf's The Law of Zoning & Planning § 73:2 (4th ed. 2021). Similarly, respondent has never contended that regulation of digitization is itself content based.

base its challenge on that theory. Only by changing course here can respondent argue that the Court should ignore the concerns that support the law that Austin actually wrote and require Austin to justify a law that it did not enact. *See, e.g.*, Resp. Br. 44 (dismissing Austin's proliferation concern as irrelevant to "the specific provision at issue here"). Rather than permit respondent to thrust on Austin a burden to justify a digitization ban, the Court should answer the question it granted certiorari to resolve: whether a law that distinguishes on- and off-premises signs is content based under *Reed*.

II. *REED* EMBRACES A SUBJECT-OR-TOPIC TEST FOR ANALYZING WHETHER A LAW IS CONTENT BASED

A. *Reed* Did Not Adopt Respondent's Broad "Function or Purpose" Test

In the courts below, respondent expressly advocated for the "read the sign" test that the court of appeals adopted. *See, e.g.*, J.A. 20 ¶ 16 ("[I]f you have to read the sign to determine whether the sign is legal, then the regulation is content-based."); Pet. App. 14a, 19a. But before this Court, respondent declines to defend its victory. That is for good reason: a "read the sign" test misreads *Reed*, contradicts many of the decisions upon which *Reed* relied, and would create an administrative nightmare. *See* Pet. Br. 20-38.

Instead, respondent fashions a new test out of one line in *Reed*, in which the Court noted that although some content-based rules are "obvious" because they expressly regulate by subject matter, "others are more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. From this, respondent argues that *any* function- or purpose-based rule is

necessarily content based, even if not targeting particular subject matter. *See* Resp. Br. 20, 24, 34. The phrase cannot bear that weight.

1. Nothing in *Reed* suggests that the Court intended to identify a new type of content-based regulation. In *Reed*, the Town of Gilbert's sign code triggered strict scrutiny because it expressly defined sign categories by subject matter: political signs, ideological signs, and signs relating to events put on by religious, nonprofit, and charitable organizations. *See* 576 U.S. at 159-60. The Court had no occasion to expand the definition of content-based discrimination because the ordinance on its face "single[d] out specific subject matter for differential treatment," as the Court reiterated multiple times. *Id.* at 169; *see id.* at 163-64, 171.

The "function or purpose" language in *Reed* recognized only that ordinances can sometimes use function or purpose as a proxy for regulating speech based on subject matter or viewpoint. The Town of Gilbert's treatment of "Political Signs" illustrates this point. The Town defined "Political Signs" "on the basis of whether a sign's message is 'designed to influence the outcome of an election'"—that is, it used the speech's purpose to identify regulated subject matter. *Reed*, 576 U.S. at 164.

Respondent's treatment of "function or purpose" as a free-standing test, in contrast, takes that language far beyond *Reed*'s facts and ignores what *Reed* said. Contrary to respondent's argument, *see* Resp. Br. 23, *Reed* did not "expressly reject[]" the traditional understanding of content-based as limited to the two cate-

gories of subject-matter and viewpoint discrimination. The Court highlighted the difference between those forms of content-based regulations, stating that "it is well established that 'the 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*.'" *Reed*, 576 U.S. at 169 (emphasis added) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). Nothing in that discussion suggests that the Court intended to create a new category of content-based regulation whenever a function- or purpose-based law is at issue.

One only need finish the paragraph upon which respondent relies to recognize that the Court applied the existing framework of content-based regulation as either subject-matter or viewpoint discrimination, and classified *Reed* as a subject-matter case. As the Court explained, "speech regulation *targeted at specific subject matter* is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* (emphasis added). That was the problem with the Town's ordinance: it "*single[d] out specific subject matter* for differential treatment, even if it does not target viewpoints within that subject matter." *Id.* (emphasis added). This statement makes clear why *Reed* found that the Town's law involved subject-matter discrimination—exactly as Austin explained, *see* Pet. Br. 20-24, and exactly as subsequent opinions have also noted, *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion); *Matal v. Tam*, 137 S. Ct. 1744, 1765-66 (2018) (Kennedy, J., concurring in part).

2. Also fatal to respondent's position is Justice Alito's concurrence. Justice Alito, writing for three of the six justices in the majority, reiterated that "[c]ontent-based laws" are those that limit speech "based on its 'topic' or 'subject'"; he made no mention of "function" or "purpose" as additional categories. *Reed*, 576 U.S. at 174 (Alito, J., concurring). He also explained that "[r]ules distinguishing between on-premises and off-premises signs" and "[r]ules imposing time restrictions on signs advertising a one-time event" "would not be content based" under a correct interpretation of the majority opinion because they "do not discriminate based on topic or subject." *Id.* at 175. These examples are incompatible with respondent's proposed test because both types of rules draw distinctions between speech based on the speech's "function or purpose"—just not in a way that targets particular subjects or viewpoints.

Respondent's position is that Justice Alito, without saying so, referred not to an off-premises rule like Austin's, but a different kind of restriction altogether, such as a regulation limiting signs more than 500 feet away from a building. Resp. Br. 25. That response fails to explain Justice Alito's example of event-based signs. And because Justice Alito identified location-based restrictions (including the sign's relationship to nearby buildings) as a *separate* kind of permissible sign regulation, *see Reed*, 576 U.S. at 174, it is implausible that his endorsement of "off-premises signs" simply repeated the same example using different words. The distinction between on- and off-premises signs has a longstanding plain meaning, *see* Pet. Br. 14-19, which Justice Kagan's separate concurrence

highlighted by specifically citing the Highway Beautification Act, *see Reed*, 576 U.S. at 180 (Kagan, J., concurring in the judgment).[3]

B. Respondent Cannot Reconcile Its Interpretation of *Reed* With This Court's First Amendment Precedents

Respondent's position would require overturning numerous precedents governing the meaning of "content based," including cases the Court relied upon in *Reed* itself. And respondent's new test does not solve any of the administrability problems Austin identified with the "read the sign" test.

1. Respondent cannot reconcile its theory with *United States v. Eichman*, 496 U.S. 310 (1990), or *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). *Reed* endorsed those cases as finding laws "content neutral on [their] face *before* turning to the law's justification or purpose." 576 U.S. at 166. Yet under respondent's new "function or purpose" test, the laws in both cases would not be facially content neutral.

Eichman's statute—punishing any person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States"—required the type of content review inimical to a "read the sign"

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[3] Further undermining respondent's position is that, at argument in *Reed*, the petitioner endorsed a brief that identified the regulation of "off-site signs," known as "billboards," based on "function and location" as one of "dozens and dozens of ways to regulate signs on a content-neutral way." Hr'g Tr. 19, *Reed v. Town of Gilbert*, No 13-502 (S. Ct. Jan. 12, 2015) (citing Nat'l League of Cities *et al.* Amici Br. 10).

theory. 496 U.S. at 314 (quoting 18 U.S.C. § 700 (1988)). A function or purpose test would fare no better. Respondent does not contest this; rather, it argues that the Court "may well have" found the statute facially content based but, for some unexplained reason, did not say so. Resp. Br. 28. This unsupported speculation contradicts *Reed*'s analysis, which cited *Eichman* for the proposition that the Court found the statute facially content neutral. *See Reed*, 576 U.S. at 166.

Likewise with *Taxpayers for Vincent*. Respondent first argues that the Court did not address the ordinance's exceptions—"metal plaque[s] or plate[s] or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality" and painted house numbers—in its First Amendment analysis. 466 U.S. at 791 n.1. But the Court specifically concluded that "[t]he text of the ordinance is neutral," 466 U.S. at 804, and *Reed* again cited this analysis as an example of facial neutrality. *Reed*, 576 U.S. at 166. Respondent next says that the Court may have considered the exceptions "as based on the medium of communication (*i.e.*, 'permanent signs' versus 'temporary signs')." Resp. Br. 27. But the permanent or temporary nature of a "commemoration" goes to the "function or purpose" of speech, so the ordinance would fail under respondent's current test.

2. Respondent similarly fails to account for conflicts between its test and the Court's other precedents upholding laws that regulate modes or methods of communication defined by their function or purpose.

Most prominently, this Court has addressed several laws regulating "solicitation" and has never suggested that such laws automatically trigger strict scrutiny, even though identifying speech as solicitation requires consideration of its function or purpose. To the contrary, in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981), the Court *upheld* a solicitation restriction because the rule "applie[d] evenhandedly to all who wish to distribute and sell written materials or to solicit funds" and did not target particular subject matter, such as religious solicitation. 452 U.S. at 649. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), confirms that content based does not mean solely function based. The Court held that the State could not target religious solicitation, but explained that it could "regulate the time and manner of solicitation generally." *Id.* at 304-07. Respondent's assertion that such regulations "d[o] not depend on the solicitor's speech," Resp. Br. 29, 32-33, is wrong. "Solicitation" is speech defined by its purpose: "requesting or seeking to obtain something." *Solicitation*, Black's Law Dictionary (11th ed. 2019).[4]

Many types of communication can be regulated only through some limited examination of the function or purpose of speech. Regulating temporary event signs, for example, cannot be accomplished

[4] *Frisby v. Schultz*, 487 U.S. 474 (1988), similarly upheld a law as content neutral even though the Court construed it as limited to picketing "focused on" a particular residence. *Id.* at 482. That the regulation addressed only picketing with that function or purpose would render it content based under respondent's test.

without considering their purpose and function. Yet such laws can be facially content neutral if they do not target specific subjects or viewpoints, as identified by Justice Alito's *Reed* concurrence, *see* 576 U.S. at 175, and by the D.C. Circuit in *Act Now to Stop War & End Racism Coalition v. District of Columbia*, 846 F.3d 391, 403-05 (D.C. Cir. 2017). The same holds true for most regulations of flags, parades, concerts, graffiti, and picketing. *See* Pet. Br. 34-35.

Respondent argues that a sign and a flag do not always "communicate different messages," so a flag could be defined as something "made of fabric and strung up on a pole," Resp. Br. 30, rather than its ordinary meaning as piece of fabric bearing "a symbol or signal." *Flag*, Black's Law Dictionary (11th ed. 2019). But that definition would be both over- and under-inclusive. A tent tied to a telephone pole would qualify as a flag, but an American flag not attached to a pole would not. And assuming that a flag and a sign could be distinguished from *one another* based on non-communicative elements only emphasizes that they cannot be easily distinguished from *other objects* on that basis. A regulation of flags should not have to be framed as a "hanging fabric" ordinance so broad that it covers laundry drying on a line.

Respondent's position that regulation must eliminate all reference to speech's function or purpose to avoid strict scrutiny is thus unsound. And the task becomes particularly impractical when function or purpose is fundamental to the ordinary understanding of the regulated medium, such as solicitation. The Court has never considered such rules content based

but has consistently allowed for specialized regulation of "unique forums of expression" that are difficult to define without reference to function or purpose (such as "advertising"). *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) (plurality opinion); *see* Pet. Br. 29-30.

3. Respondent's amici, defending the court of appeals' "read the sign" test, point to several cases in which they assert that the Court previously adopted that test. *See* Cato Inst. Br. 3-8. None did so.

First, amici cite *McCullen v. Coakley*, 573 U.S. 464 (2014), a case involving buffer zones, but there, the Court held that "the Act does not draw content-based distinctions on its face," citing subject-matter cases, and noted that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* at 479-80. Amici also cite *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), which the Court quoted in *McCullen*, but in that case, as in *Eichman*, the Court found the statute, which prohibited public broadcasters from "editorializing," problematic because Congress's *purpose* was "to limit discussion of controversial topics and thus to shape the agenda for public debate," not because the law required some consideration of content as a threshold matter. *See id.* at 384. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), is a subject-matter-discrimination case, as is *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (plurality opinion). And *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), is a prior restraint case in which the Court held that the challenged ordinance

granted local officials too much enforcement discretion, allowing for viewpoint discrimination. *See id.* at 133-34. None of these cases adopts a rule that any ordinance requiring an official to "read the sign," but does not discriminate based on subject matter or viewpoint, is content based.

III. AUSTIN'S RULE IS CONTENT NEUTRAL AND SURVIVES INTERMEDIATE SCRUTINY

A. Austin's Rule Has No Indicia of Content Discrimination

Austin's sign code does not discriminate based on subject matter or viewpoint; nor does it use the function or purpose of speech as a proxy for such discrimination. Rather, the off-premises rule turns on the sign's relationship to its location; the code does not restrict speech based on its subject or topic. *See* Pet. Br. 38-42.

1. Respondent contends that Austin's rule involves subject-matter discrimination because the "advertisement of . . . goods and services" is itself a subject. Resp. Br. 24. *Heffron* squarely rejected logically identical reasoning. There, the challenged rule was content neutral because it "applie[d] evenhandedly to all" solicitation and did not single out, for example, religious solicitation. *Heffron*, 452 U.S. at 648-49; *see supra* 12. Austin's rule likewise applies equally to *every* subject: if the sign advertises *any* "business, person, activity, good[], product[], or service[]" that is "not located on the site where the sign is installed" or directs viewers to *any* other location, it is off-premises. J.A. 52. Respondent faults Austin's law for this reason, arguing that if a law targeting off-premises religious signs is bad, a law targeting *all* off-premises

signs is worse. Resp. Br. 24. But equal coverage of all topics is exactly what is required to show content neutrality.

Respondent contends that Austin's rule operates as an "effective prohibition" on "certain messages from certain speakers," namely those with limited funding or without premises. Resp. Br. 21. But this Court has rejected applying strict scrutiny to an otherwise content-neutral statute simply because it may "disproportionately affect" certain speakers. *McCullen*, 573 U.S. at 480; *see Heffron*, 452 U.S. at 643-44, 649 (upholding limitation of solicitation to booths located in a specific area at the state fair even if certain organizations might not be able to afford a booth at all). If certain speakers or certain topics are indirectly disadvantaged by extrinsic forces, such as real estate values, that reality in no way turns the sign code into a content-based regulation or "impermissibly distort[s]" the speech marketplace. Resp. Br. 22. Neither does the ability of digital billboards to display more messages than analog billboards, *id.* at 21, mean that any law that impinges on that technology is content based.

2. Respondent attempts to downplay the radical nature of its position by suggesting that its proposed rule would not have implications beyond Austin's "digitization ban" and that in any event, strict scrutiny would not be fatal to other premises-based sign regulations. *Id.* at 37-40. But expanding the application of strict scrutiny as respondent suggests would impose enormous burdens on municipalities to compile empirical evidence for many basic regulations that, as here, have been in place for decades without

dispute. Most municipalities cannot afford to commission detailed studies justifying every commonsense sign regulation, let alone the kind likely necessary to survive strict scrutiny under respondent's proposed regime. *See* Resp. Br. 35. Neither could the States or the federal government realistically muster scientific evidence to support *every* regulation that relies on some function, purpose or consideration of speech, and would therefore be deemed "content based" under respondent's definition or the court of appeals' "read the sign" test. *See, e.g.*, Florida *et al.* Amici Br. 12-19. And although respondent contends that rules like Austin's could survive if more narrowly tailored, Resp. Br. 40-42, a least-restrictive-alternatives test would make a detailed, locality-specific record indispensable—and in turn make respondent's proposed requirement all the more unrealistic and burdensome. Even if respondent shrinks from that implication, it cannot conceal the seismic doctrinal shift it proposes. Such an expansion of *Reed* would wreak havoc on municipalities' (and States' and the federal government's) ability to enact commonsense laws or else spur a *de facto* watering down of strict scrutiny.

3. Respondent also offers no rationale for why strict scrutiny *should* apply to laws like Austin's that take into account a speech's function or purpose but do not target particular subjects or viewpoints. Laws that facially limit speech based on topic or subject favor the status quo and "may interfere with democratic self-government and the search for truth," justifying the most exacting form of judicial scrutiny. *Reed*, 576 U.S. at 174 (Alito, J., concurring). The same cannot

be said for laws that apply equally to all subjects and viewpoints, such as rules about event-based signs and off-premises signs.

B. Austin's Rule Is Valid Under Intermediate Scrutiny

Austin's rule is neither underinclusive nor insufficiently tailored to serve its important interests. It therefore survives intermediate scrutiny. The Court has long recognized that municipalities like Austin have a significant interest in "proscribing intrusive and unpleasant formats for expression" and "avoiding visual clutter." *Taxpayers for Vincent*, 466 U.S. at 806-07 (citing *Metromedia*, 453 U.S. at 507-08). These safety and esthetic interests are furthered by Austin's rule, which prohibits the proliferation of new billboards and prevents existing ones from becoming more intrusive and unsightly. And Austin's rule is narrowly tailored by targeting off-premises signs, which pose a "more acute problem than does onsite advertising" for safety and esthetics. *Metromedia*, 453 U.S. at 511.

Respondent contends that Austin's decision not to regulate certain features of on-premises digital signs such as brightness, animation, and rotation time between messages undermines the tailoring of Austin's rule to its interests. Resp. Br. 16. But regulating the features respondent identifies would not achieve the same goals as Austin's rule. For instance, prohibiting animation and requiring long transition times between messages would still allow the proliferation of off-premises billboards, including digital billboards with nonmoving images. Austin's decision to prohibit

all new billboards, including all new digital billboards, is entirely reasonable; an LED billboard the size of a studio apartment will be bright, unsightly and distracting even if its display does not move. The same goes for respondent's argument that Austin should limit the off-premises rule to commercial speech; a noncommercial display is no less distracting than a commercial one. *See* Resp. Br. 38.

By employing a premises-based rule as opposed to a physical-features rule, Austin has protected property owners' right to speak on their own property, *see City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994), as well as acknowledged the reality that signage relating to "buildings with businesses" is typically "small in size" and integrated into the premises in comparison to free-standing off-premises signs that "serve a fundamentally different purpose," Outfront Media Inc. Amicus Br. 9-10. A scheme with no premises-based distinction or that defines "off-premises" by a sign's distance from *any* building, rather than from the speaker's building, would not serve this purpose. Resp. Br. 13-14, 39. In any event, Austin's rule no less survives intermediate scrutiny merely because other municipalities have enacted different sign regulation schemes. To pass muster, Austin's sign code need not be the only, least restrictive, or even "most appropriate" regulatory scheme. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989).

Respondent next attacks Austin for failing to support its rule with extensive studies on the comparative effects of digital versus non-digital signs. Resp. Br. 35, 43. But, as explained, Austin's code does not

target digitization; it bans all off-premises signs unless grandfathered. And studies *do* support the conclusion that on-premises digital signs are less distracting than their off-premises counterparts. *See, e.g.*, Jerry Wachtel, *Compendium of Recent Research Studies on Distraction from Commercial Electronic Variable Message Signs (CEVMS)* 10 (2020).

More fundamentally, Austin need not generate its own scientific evidence and empirical data to support its policy decision. Intermediate scrutiny has "never required" a municipality to "demonstrate[] not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully" achieve the desired end. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002). Rather, the Court's "settled position" is that municipalities be afforded "a reasonable opportunity to experiment with solutions" to local problems. *Id.* (internal quotation marks omitted).

Here, any driver could confirm that a highway billboard stands out from its surroundings differently than a wall or freestanding sign integrated into a premises and into Austin's broader urban environment. Pet. Br. 46. That distinction remains true even if all those signs are digital. That some studies may be inconclusive or contradictory on this point, *see* Resp. Br. 36, only underscores the need to allow policy experimentation and innovation based on Austin's determination of its needs. And Austin was entitled to rely on ample precedent from this Court recognizing the particularly strong interests local governments have in controlling the proliferation of signs. *See, e.g.*, *Metromedia*, 453 U.S. at 502.

IV. RESPONDENT HAS NOT SHOWN AN ENTITLEMENT TO FACIAL OR AS-APPLIED RELIEF

Respondent framed its complaint to obtain facial invalidation of Austin's sign code or alternatively as-applied relief. J.A. 19-23. Because the code can be constitutionally applied to respondent's billboards even on its own legal theory, however, and respondent never even attempted to show that the sign code is unconstitutionally overbroad, it is entitled to neither form of relief.

1. a. In *Metromedia*, a majority of this Court held that a complete ban on off-premises commercial signs would be constitutionally permissible. *See* 453 U.S. at 512 (plurality); *id.* at 553 (Stevens, J., dissenting in part). There is no reasonable dispute that respondent is in the business of commercial advertising, J.A. 38, and that its billboards "primarily share commercial messages," Pet. App. 23a. Nor can there be any dispute that Austin based its permit denials on that commercial speech. J.A. 28-29, 34-35 (denying applications "because they would change the existing technology used to convey off-premise commercial messages"). Respondent concedes that "*Metromedia* stands for the proposition that banning commercial off-premises signs is constitutional," Resp. Br. 47, meaning that Austin's prohibition, at least as applied to commercial billboards, must be valid. It was therefore perfectly constitutional for Austin to treat respondent's commercial billboards as nonconforming signs that cannot be altered.

b. Respondent resists this conclusion by contending that Austin's sign code at the time drew no dis-

tinction between off-premises commercial and noncommercial signs, so that distinction cannot be invoked to defeat its facial challenge. But this argument misunderstands the nature of as-applied challenges. If Austin's off-premises sign prohibition can constitutionally apply to respondent's signs, the Court cannot invalidate the code based on its hypothetical application to other, purely noncommercial signs, except by applying the overbreadth doctrine. *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *see United States v. Stevens*, 559 U.S. 460, 472-73 (2010).

Respondent seeks to avoid that conclusion by asserting that its commercial speech is "inextricably intertwined" with noncommercial speech and so deserves heighted protection. Resp. Br. 47. But respondent identifies no example of a sign face containing both commercial and noncommercial messages that would need to be parsed phrase-by-phrase. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (inextricably intertwined doctrine applies when the various forms of expression are "component parts of a single speech"). Instead, respondent's billboards primarily display purely commercial messages but occasionally display *separate* noncommercial messages. Because those messages are carried on distinct sign faces, Austin can unquestionably regulate the purely commercial speech the sign primarily displays. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (rejecting reliance on *Riley* where "there is nothing whatever 'inextricable' about the noncommercial aspects" of a commercial presentation).

Any other ruling would create an enormous loophole. So long as a sign bore a single noncommercial message (even for ten seconds once a year on a digital sign), Austin would be required to regulate the entire sign as though it always displayed purely noncommercial speech. This Court has rejected that untenable approach. *Id.* at 475. Accordingly, because Austin can validly regulate respondent's billboards because of their displays of commercial speech, their occasional displays of noncommercial speech does not entitle respondent to evade restrictions on its nonconforming signs.

c. Respondent also seeks to distinguish *Metromedia* by contending that the authority to ban all off-premises commercial signs "does not extend to [a] ban on digitizing off-premises signs." Resp. Br. 47. That proposition lacks logic: If a municipality can ban off-premises commercial advertising entirely (because of billboards' potential for distraction and esthetic harm, *see Metromedia*, 453 U.S. at 512), those same interests support a more modest, content-neutral regulation that precludes the most intrusive, distracting, and unsightly technology on commercial billboards. Austin can conclude that, while any distraction or esthetic harm from *on-premises* signs is justified by the countervailing interest of "a commercial enterprise . . . in identifying its place of business and advertising the products or services available there," no such countervailing interest supports digitizing off-premises signs. *Id.*; *accord Taxpayers for Vincent*, 466 U.S. at 806-07, 810-11. In any event, as discussed *supra*, Austin did not enact a "digitization ban"; it

adopted a general prohibition that, as applied to respondent, is indistinguishable from the type of law *Metromedia* endorsed.

2. Because Austin can constitutionally apply its sign ordinance to respondent, respondent could obtain relief only by satisfying the requirements of the overbreadth doctrine. Pet. Br. 51-53; *Fox*, 492 U.S. at 484. But respondent has made no attempt to meet that standard and does not even address the issue of overbreadth in its brief, *see* Resp. Br. 45-48, precluding relief on that doctrine here, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020). And respondent has introduced no evidence that Austin's ordinance reaches so much purely noncommercial speech that facial invalidation would be appropriate. *United States v. Williams*, 553 U.S. 285, 292 (2008). Respondent's amici, although relying on abundant creative hypotheticals, provide no such evidence either. The record thus falls far short of the showing of "real" and "substantial" overbreadth. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RENEA HICKS
Counsel of Record
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, TX 78703
(512) 480-8231
rhicks@renea-hicks.com

MICHAEL R. DREEBEN
JEREMY R. GIRTON
RACHEL A. CHUNG
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

HEATHER WELLES
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90067
(213) 430-8025

ANNE L. MORGAN, City Attorney
MEGHAN L. RILEY, Chief–Litigation
H. GRAY LAIRD III, Asst. City Att'y
CITY OF AUSTIN
LAW DEPARTMENT
P.O. Box 1546
Austin, TX 78767
(512) 974-2268

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