No. 20-_____

In The
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF TEXAS, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Austin sign code provisions distinguish between on-premise and off-premise signs based solely on location. From this distinction—and unrelated to *what* message is conveyed—the sign code establishes a technology-based rule about *how* a sign's message may be conveyed. On-premise signs may be digitized, and off-premise signs may not.

Billboard companies sought permits to digitize 84 billboards—off-premise signs—and sued the city when the permits were denied. The Fifth Circuit ruled that the First Amendment invalidated the challenged provisions, holding that the on-premise/off-premise distinction is content-based under *Reed v. Town of Gilbert* and fails the strict scrutiny test. The question presented is:

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

PARTIES TO THE PROCEEDING

Petitioner is the City of Austin, Texas, which was the defendant in the district court and the appellee in the appeals court.

Respondents are Reagan National Advertising of Texas, Inc., and Lamar Advantage Outdoor Co., L.P., each a plaintiff in the district court and an appellant in the appeals court.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a Texas political subdivision; it has no parent corporation or stock.

DIRECTLY RELATED PROCEEDINGS

Reagan National Advertising of Austin, Inc., *et al. v. City of Austin, Texas*, No. 19-50354 (5th Cir.) (opinion and judgment issued on August 25, 2020; mandate issued on September 23, 2020)

Reagan National Advertising of Austin, Inc., *et al. v. City of Austin, Texas*, No. 1:17cv673-RP (W.D. Tex.) (declaratory judgment denied on March 27, 2019; further proceedings on remand stayed on November 19, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The City of Austin, Texas, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

The country's municipalities have long been confronted with distinctive, complex problems in their regulation of billboards and other signs to protect public safety and ensure that local esthetic values are not degraded. To achieve these important governmental objectives, and at the same time leave the necessary space for speech freedoms, local regulators have to engage in intricate line-drawing using detailed, complex definitions. Drawing careful distinctions between off-premise and on-premise signs is central to this regulatory task.

New sign technologies, particularly the ability to digitize billboards so they can be remotely operated to cycle rapidly through advertising messages, add a new level of difficulty to these local regulatory efforts. This case is about the digitization of billboards and the regulatory tools available to local officials for handling the special problems raised by that technology. The ruling below unduly hamstrings local regulation in this area.

The appeals court uses de-contextualized snippets of the Court's recent First Amendment decision in

Reed v. Town of Gilbert to fashion a wrecking-ball it then wields against regulation of digitized billboards. But the appeals court misinterprets *Reed*'s First Amendment rules for local sign regulation and misapplies them to the distinctions drawn in Austin's regulation of digitized signs.

The distinctions drawn in Austin's sign regulations are quite unlike the distinctions struck down in *Reed*. Austin's distinctions are based on location and technology, not content. *Reed* itself anticipated this difference. The concurrence by three members of the Court who signed onto the *Reed* majority opinion specifically identified two elements of the Austin provisions invalidated by the Fifth Circuit as examples of what cities *can* do to regulate signs. They are exemplars of acceptable, *non*-content based regulations. Austin's rules mirror these two items in the concurrence by distinguishing between "signs with fixed messages and electronic signs that change" and between "on-premises signs and off-premises signs." The first distinction goes unmentioned by the appeals court, and the second one is assigned a meaning that cannot be found in the concurrence.

These shortcomings make the appeals court decision problematic enough, but making it even more problematic is the Fifth Circuit's use of *Reed* to shrink *Metromedia, Inc. v. City of San Diego* to the vanishing point. *Metromedia* validated the very kinds of on-premise/off-premise distinctions at the base of Austin's digitization rules, but in spite of *Reed*'s utter silence on *Metromedia*, the appeals court eviscerates it.

Reed does not answer every First Amendment question about sign regulation. But nothing in the decision instructs appeals courts to force the First Amendment to cut so deeply into local governance, nor to vitiate *Metromedia*. The Court should take this case to clarify the extent of the First Amendment's reach into local regulation of signs in light of *Reed*.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 972 F.3d 696 (5th Cir. 2020). The opinion of the district court (App. 30a-53a) is reported at 377 F.Supp.3d 670 (W.D. Tex. 2019).

JURISDICTION

The court of appeals issued its judgment on August 25, 2020, App. 28a-29a. The first paragraph of this Court's Order of March 19, 2020, extended the time for filing a petition for certiorari in all cases involving petitions due after that date to 150 days following, as relevant here, the appeals court judgment. This petition is due by January 21, 2021. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND CITY CODE PROVISIONS INVOLVED

The First Amendment (U.S. Const. amend. I) provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press[.]

Section 1 of the Fourteenth Amendment (U.S. Const. amend. XIV, sec. 1) 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[.]

Relevant provisions of Chapter 25-10 of the Austin City Code are reproduced in the Appendix at App. 54a-58a.

STATEMENT

A. The City Sign Code And Digitized Billboards

The location and number of off-premise signs in Austin are fixed and unchanging. What the off-premise signs advertise is not. The technology the off-premise signs are allowed to use to deliver their advertising messages is regulated. Billboards are off-premise signs. App. 60a.

The City's intricate sign code sets the rules.[1] It allows on-premise signs. Off-premise signs, too, are allowed but only at their "existing location" if they were lawful when first installed. App. 55a (§§ 25-10-102(1), 25-10-152(A)). The code allows both on- and off-premise signs to change what they advertise (in billboard parlance, their "face"). App. 56a (§ 25-10-152(B)(1)).

The code, though, restricts the technological way by which off-premise signs may change what they advertise. It disallows a change in the "method or technology" used to convey the advertisement. App. 56a (§ 25-10-152(B)(2)(b)). Digitized signs—"electronically controlled changeable-copy sign[s]," App. 55a (§ 25-10-102(6))—are permitted for on-premise signs but not for off-premise signs. *Compare* App. 55a (§ 25-10-102(6)) (on-premise) *with* App. 56a (§ 25-10-152(B)(2)(b)) (off-premise).

The billboard companies attack this technology-based differential treatment of on-premise and off-premise signs as a content-based restriction on First Amendment rights. The claim is not that digitization of the signs has anything to do with content. Rather, it is that the differential treatment of sign digitization is content-based because the code requires that the content of a sign be read before a determination can be made whether it is an on-premise or an off-premise sign—and hence whether it may be digitized or not.

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[1] The sign code governs territorial Austin plus its extraterritorial jurisdiction, but they are collectively referenced here simply as Austin.

The sign code does not define on-premise signs, but does define off-premise signs. They are signs that advertise things "not located on the site" of the signs or that direct persons to some other location. App. 54a (§ 25-10-3(11)).[2] The argument is that the applicability of this locationally-based definition cannot be determined without reading the sign and that having to read the sign to determine whether it is on-premise or off-premise is content-based. Taking the next step from this argument, the billboard companies argue that the technological restriction on the changes in the method for billboards to deliver their advertisements is itself content-based. Their claim is that the First Amendment compels the city to permit them to digitize their billboards.

B. Denial Of Permit Applications For Digitization Of Billboards

Reagan National Advertising of Austin, Inc. ("Reagan") and Lamar Advantage Outdoor Company, L.P. ("Lamar"), are commercial enterprises in the billboard business. App. 33a, 60a. In the spring and summer of 2017, they separately applied to the city for permits to convert the advertising face of their existing Austin billboards to digital sign faces. Reagan sought

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[2] "OFF-PREMISE SIGN means a sign advertising 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."

to convert sixty-one billboards.[3] App. 34a, 61a-62a. Lamar sought to convert twenty-three. App. 34a, 62a.

The applications identified a different location than the owners' address for 82 of the 83 billboards that they wanted to digitize. None of the applications included the text or an image of the face of the billboards that would be digitized.[4] The city already had a running list of all off-premise signs and their locations around town, because sign owners have to provide an annual inventory of existing off-premise signs and register them with city officials. App. 56a-58a (§§ 25-10-152(F)(1)(a) & (g); 25-10-231(A); 25-10-233(B)).

The city reviewed the applications under the rules of the then-extant sign code, App. 62a-63a, and partly because none had been provided, without reference to the text or image of any of the signs. All of the permit applications were denied. App. 62a-63a.[5] The city

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[3] Reagan said that seven of the sixty-one signs it wanted to digitize were "tri-vision" signs, which it characterized as "electronically controlled changeable copy signs." App. 61a-62a. It never pursued an argument, then or later, that the applications to digitize these seven signs should be treated differently than its other digitization applications in terms of applying the city code or analyzing Reagan's First Amendment claims.

[4] The facts in these two sentences are from the stipulated joint exhibits that the district court relied on. App. 35a.

[5] After denying Reagan and Lamar's permit applications, Austin amended its sign code. The district court determined that the amended code made no material difference in evaluating whether digitization would have been permitted. App. 39a-40a. The appeals court did not consider the case under the amended code because state law required the city to consider the permit

determined that the applications could not be approved under § 25-10-152's rules for nonconforming signs because digitizing the advertising faces of the billboards would "change the existing technology used to convey off-premise commercial messages." App. 34a.

C. Proceedings Below

1. District Court Proceedings

Reagan sued Austin in state district court, challenging the permit denials as an infringement of its rights under the First Amendment. The city removed the suit to federal district court, where Lamar subsequently intervened as a plaintiff.

Reagan asserted a First Amendment violation because the city's sign code meant that the Reagan billboard company "is prohibited from any speech through the digital medium," whereas those using on-premise signs could "speak without restriction through the same medium." It sought a declaratory judgment that the First Amendment requires that Reagan be allowed "to convert its outdoor advertising signs to digital copy," notwithstanding city signage rules. Lamar made the same claims and also sought declaratory relief, arguing that the city's prohibition of "off-premise digital signs" is a content-based speech regulation and that it

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applications under the law in effect at the time the permit applications were filed. App. 6a-7a. This petition's references to Austin's sign code are to the one in effect before the city council revised it on August 17, 2017, after all of the digitization applications were denied.

should be allowed to "convert its outdoor advertising signs to digital signs," regardless of city code requirements. Neither billboard company raised any other constitutional or statutory claims.[6]

The district court held a bench trial based on a joint stipulation of facts and evidence, which the court adopted as its own. App. 32a.[7] Following argument, the court denied relief to the billboard companies, upholding the sign code's validity under the First Amendment against the Reagan and Lamar's facial and as-applied challenges. App. 53a.

The first step in the district court's analysis was to determine whether intermediate or strict scrutiny applies to the challenged provisions of the sign code. This analysis boiled down to a determination whether the case was governed by this Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), or its earlier decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). The parties agreed that *Metromedia* controlled if *Reed* were inapplicable and that the court

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[6] The facts recited in this paragraph are drawn from Reagan and Lamar's amended complaints in the trial court.

[7] The jointly stipulated facts (but not the stipulated exhibits) are at App. 59a-63a. The court also added findings on a limited set of additional facts concerning the Austin city council's revisions to the sign code. App. 35a-36a. It held that these facts—the code amendments—did not moot the case because they did not change the sole basis of Reagan and Lamar's claim in the suit, which was "if a person must read a sign to determine" whether an on-premise or off-premise sign regulation applies, "the regulation is content-based and subject to strict scrutiny." App. 39a-40a.

should apply intermediate, not strict, scrutiny if *Metromedia* controlled. App. 40a.

The district court held that *Metromedia* controlled, with the result that the challenged provisions should be evaluated using the intermediate scrutiny test for regulation of commercial speech from *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980)—the test *Metromedia* used to uphold a city sign code distinction between on- and off-premise signs. App. 50a-51a.

The district court agreed that *Reed* did establish that strict scrutiny applies to content-based speech regulations even if they are facially content neutral. App. 43a. But it did not see that *Reed* changed First Amendment analysis for "on/off premises distinctions." App. 43a.

The court understood *Reed* to have confirmed that the phrase "content-based" is to be given a "commonsense meaning." App. 44a. And it similarly understood that this meaning included the principle that "facially content neutral" laws are nonetheless content-based if they "cannot be justified without reference to the content of the regulated speech." App. 44a. It identified the Town of Gilbert's sign code as an example of such content-based regulation because the town had adopted different rules for different kinds of messages, giving more favorable treatment to signs with political messages than signs with ideological messages, and more favorable treatment to signs with

ideological messages than signs with messages about events. App. 46a.

But the court found that Austin's sign code drew no such lines. It rejected the billboard companies' argument that, under *Reed*, merely having to "read" a sign to determine the applicable rules triggers strict scrutiny as a "content-based" regulation. App. 46a-48a. Such an approach to First Amendment analysis, the court said, would mean that imposing greater restrictions on commercial signs than on noncommercial signs would necessarily be content-based because a sign would have to be read to determine whether it was conveying a commercial or a noncommercial message. App. 48a. The result of such an interpretation of *Reed* would mean that "all regulations for signs with written text" would be called into constitutional question because they would all be subject to strict scrutiny. App. 48a.

Rejecting the billboard company's argument on this point, the district court pointed out that *Metromedia* had upheld the principle that commercial and noncommercial speech would be subjected to differential regulation. App. 41a-42a. The court understood *Metromedia* to mean that municipal sign codes could restrict off-premise signs while permitting on-premise signs if the restrictions were not harsher for noncommercial subject matter than for commercial subject matter. App. 48a.

The district court "decline[d] to find that *Reed* quietly overruled *Metromedia*," particularly since

Metromedia is not even mentioned in *Reed*. App. 48a. It concluded that *Reed* did not "overrule or alter" *Metromedia*'s test for the validity of distinctions between on- and off-premise signs. App. 49a.

Thus, the sign code distinctions for digitization of signs are not content-based because deciding whether digitization is permitted requires nothing more than determining whether the subject matter of the advertising message is located on the property where the sign is or elsewhere. App. 50a. The test is not based on the message the billboard conveys but on the location to which the message directs the reader. App. 50a.

From this, the court held that the challenged sign code regulations were subject to intermediate, not strict, scrutiny. App. 50a. Applying intermediate scrutiny, the court then upheld the city's justifications for the challenged provisions, which were to protect public safety and aesthetic values. App. 51a-52a. These, the court said, are content-neutral purposes that satisfy the four *Central Hudson* factors and that also satisfy *Metromedia*'s rule that sign regulations may not prohibit noncommercial billboards or distinguish among noncommercial billboard messages based on their content. App. 52a.

2. Proceedings On Appeal

The appeals court reversed the district court decision and held that the challenged sign code provisions are content-based. It consigned *Metromedia* to a string cite and a footnote, treating it as merely a

commercial speech case having nothing to do with content neutrality, App. 22a-23a n.4. Instead, the appeals court's analysis rested on *Reed* and its perceived "sea change" in First Amendment law. App. 9a.[8] Applying strict scrutiny, the court held that the challenged sign code provisions failed the test.

The appeals court characterized the rule it derived from *Reed*'s "sea change" in First Amendment law as "broad," but "clear," App. 14a, 20a, and associated itself with what it called the "faithful application" of *Reed* by another circuit, the Sixth. App. 19a.

The rule adopted was: if a government official has to "read a sign's message" to determine the sign's purpose, that alone suffices to subject the law regulating the sign to strict scrutiny. App. 19a. The principle it derived from *Reed* is that, if an official must "read" the sign to determine whether it is an off-premise sign—which in turn determines whether it can be digitized—that suffices to make it "an obvious content-based inquiry." App. 19a. It does not matter if the sign's content is irrelevant except for the location to which it directs the reader's attention. App. 14a, 18a. It does not matter, either, whether the sign only needs to be skimmed cursorily to determine the rules under which it must operate. App. 16a (rejecting what the court characterizes as a "cursory" inquiry exception to *Reed* adopted in *Act Now to Stop War and End Racism Coal'n v. Dist.*

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[8] Implementing the change it perceived, the appeals court abrogated all or part of ten pre-*Reed* opinions in the circuit. App. 12a & n.3.

of Columbia, 846 F.3d 391, 404 (D.C. Cir.), *cert. denied*, 138 S.Ct. 334 (2017)).

The court held that, under Austin's sign code definition, an "off-premise sign" is "determined by its communicative content," and thus is content-based. App. 8a. It rejected Austin's argument that *Reed*'s three-justice concurrence authored by Justice Alito takes the city's on-premise/off-premise distinction outside the content-based rule announced in *Reed*. App. 13a-14a. The concurrence had listed "[r]ules distinguishing between on-premise and off-premise signs" as an example of non-content based rules. *Reed*, 576 U.S. at 175.[9] But the appeals court saw that example as being applicable only if the on- and off-premise distinction is defined by a sign's physical location or some other content-neutral factor. App. 13a-14a (quoting *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), *cert. denied*, 141 S.Ct. 194 (2020)). The appeals court found that Austin's sign code distinction fit into neither of these two categories.

After concluding that the challenged sign code provisions are content-based, the appeals court addressed whether the provisions regulate commercial speech, which would trigger only intermediate scrutiny. The court held that the provisions apply to both commercial and noncommercial messages, taking them outside the commercial speech category and subjecting them

[9] Another example from the concurrence's list of non-content based rules is that of rules "distinguishing between signs with fixed messages and electronic signs that change." 576 U.S. at 174. The appeals court did not comment on this exception.

to strict scrutiny. App. 23a-25a. It ended by finding that the sign code's "on-premises/off-premises" distinction fails the strict scrutiny test. App. 27a.[10]

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Important, Especially To Local Governments

The Court's jurisprudence has long placed regulation of billboards firmly within the legitimate police powers of local government. *See*, *e.g.*, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 546 (1917) (upholding local rules barring billboards in residential areas); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919) (upholding local restrictions on size of billboards). The Court has deferred to the "accumulated, common-sense judgments of local lawmakers" in circumscribing the threats billboards pose to local public safety and esthetic interests. *Metromedia*, 453 U.S. at 509-10.[11] It recognizes that signs pose "distinctive problems" for local governments. *Ladue*, 512 U.S. at 49. They obstruct views and distract motorists. *Id*. at 48.

[10] Earlier in its opinion, the court pointed out that, while Reagan had sought a declaration of the sign code distinction's invalidity as applied to it, Lamar had not. App. 5a. Whether the invalidation was facial or as-applied is not expressly stated, but it appears to be a facial invalidation.

[11] The citation is to Part IV of the opinion authored by Justice White. This part of the opinion was for the Court and garnered no dissent. *City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8 (1994). Further citations to *Metromedia* are to Part IV.

They are "in a class by themselves," because they force themselves on the public. *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

Local lawmakers, of course, are subject to the First Amendment, operating through the Due Process Clause of the Fourteenth Amendment, when they regulate billboards. *Ladue*, 512 U.S. at 45 n.1. And the Court has invalidated local sign regulations when they infringe on First Amendment rights. *See*, *e.g.*, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (striking down local ban on placement of "for sale" signs on owners' property).

But the Court has never extended the prohibitions of the First Amendment as far as the court below took it—to a point that, as the district court aptly observed, "all regulations for signs with written text" would become presumptively unconstitutional. App. 48a.

This Court's decision in *Reed* was the fulcrum for the appeals court invalidation of Austin's denial of the billboard companies' digitization of their billboards. The appeals court took *Reed* to mean that a locationally-based distinction between on- and off-premise signs was content-based because the off-premise sign definition can require reading a sign, no matter how cursorily, to determine its regulatory category. From this, the court used strict scrutiny to invalidate a technology-based distinction between on- and off-premise signs that makes no reference to text or content.

This is a striking extension—an *over*-extension—of the reach of *Reed*'s ruling on what constitutes a

"content-based" regulation. Whether *Reed* casts political subdivisions across the country so far adrift from traditionally-accepted, longstanding regulatory approaches to the "distinctive problems" posed by off-premise signs presents a matter of considerable importance, now clouded by substantial uncertainty, to local governance.

Review in this case and at this point is fully warranted without awaiting distinct, pinpoint splits among the circuits. Whether the First Amendment "sea change" of *Reed* has over-washed on-premise/off-premise distinctions between signs that the Court itself has blessed is something that needs to be clarified for local governments. If *Reed* requires rewriting municipal sign codes across the country, direction is needed before that disruptive process gets seriously underway. And if *Reed* does not require such a widespread rewrite, then that, too, is better understood before wasteful, unnecessary efforts are set in motion.

This case cleanly and clearly presents the Court the opportunity to provide the needed clarification in this important area of local law. The case was tried on stipulated facts and evidence, leaving it unnecessary to hash out disputed factual matters. Ancillary issues are absent. The case's resolution pivots on the meaning and reach of the Court's decision in *Reed* and its effect on the Court's decision in *Metromedia*.

II. The Fifth Circuit's Decision Takes The Concept Of Content-Based Regulation Beyond *Reed*'s Own Limits

A. The Fifth Circuit's Over-Expansive Interpretation of *Reed*

First, the Fifth Circuit stretched *Reed* beyond its limits. *Reed* does not establish a First Amendment principle that the mere act of having to read the words on a sign to decide the sign's place in a local regulatory scheme makes the scheme "content-based." *Reed* takes care to avoid adopting such an extreme principle.

Reed says that a local sign regulation is content-based if the regulation "applies to particular speech *because of the topic discussed or the idea or message expressed*." 576 U.S. at 163 (emphasis added). This, the Court said, gives a "commonsense meaning" to what is meant by "content-based" by requiring a court to determine whether a regulation draws distinctions "based on the message the speaker conveys." *Id*.

Nothing in Austin's on-premise/off-premise distinction implicates or is concerned with the topic discussed on a billboard or the message being conveyed. The only thing that matters in what the sign says is whether it is being said in reference to a different location than the sign's location. The sign's "communicative content"—urging support for a worthy cause, plumping for one air conditioning service over another, touting the health benefits of an herbal supplement—is irrelevant to the regulatory distinction drawn in Austin's code. Reading the sign's text may allow a

determination of its status as an on- or off-premise sign.[12] But the applicable regulation is indifferent to the communicative content of the advertisement. The location of the thing advertised is all that matters, and it only matters to the extent it concerns something at a different site than where the communication is made.

Understood this way, Austin's on-premise/off-premise distinction is like the buffer zone regulation upheld in *McCullen v. Coakley*, 573 U.S. 464 (2014). There, the Court broadly noted that it affords wider leeway to regulation of features of speech "unrelated to its content." *Id*. at 477. Challengers to the statutory buffer zone argued that it should be treated as a content-based regulation of speech because its applicability was based on a "place . . . where abortions are offered." *Id.* at 479. The Court rejected the argument. The regulation did not depend on what was said, "but simply on *where* they say it." *Id*. (emphasis added).

Austin's regulation is much like the one that *McCullen* determined was not content-based. *Where* the speech—the advertisement—is made, not what it says, is what the regulation is concerned with. If the speech is made at the place where the topic of the advertisement is directed, it is an on-premise sign. If not,

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[12] Even this minimalist reading of text was unnecessary for the city to make a determination about whether Reagan and Lamar's permit applications were for digitizing off-premise signs. The city already knew the signs were off-premise because Reagan and Lamar had told the city so in their annual inventories of nonconforming signs.

it is an off-premise sign. *Reed* says and does nothing to recede from the principle adopted in *McCullen* less than a year before—a principle which takes the sign code provisions here outside the confines of a "content-based" regulation of speech.

Second, the Fifth Circuit read a limitation into the three-justice concurrence in *Reed* that is not there. The sign code *Reed* considered was plainly content-based, treating different kinds of signs differently based on whether their content had to do with ideology, politics, or events such as attending church services. Reading a sign for content was at the heart of the regulatory line-drawing. No doubt to clarify the limits of its reasoning, the Court closed its opinion by emphasizing that the decision "will not prevent governments from enacting effective sign laws." 576 U.S. at 172.

Three Justices who joined the opinion picked up on the last point to clarify that *Reed* should not be read to leave municipalities in the lurch in regulating signs. *Id*. at 174 (J. Alito concurring, joined by J. Kennedy and J. Sotomayor). The concurrence then itemizes local sign rules "that would not be content-based" under *Reed*. Rules "distinguishing between on-premises and off-premises signs" are not content-based. *Id*. at 175. Nor are rules "distinguishing between signs with fixed messages and electronic signs with messages that change," *id*. at 174, a point particularly pertinent here since Reagan and Lamar's complaint is really about the city's denial of their request for permission to digitize billboards they admit are off-premise signs.

The Fifth Circuit paid no attention to the second description of non-content based sign regulations, despite the fact it precisely captures and affirms the city's digitization rules. And the lower court's effort to confine the first description about on- and off-premise distinctions to those having nothing to do with reading a sign finds no purchase in the concurrence's text.

B. The Narrower Interpretations Of *Reed* In Other Circuits

There may not be a direct circuit conflict in terms of specific holdings, but there are important differences among the circuits nonetheless. This case offers an opportunity for the Court to eliminate the confusion.

As already mentioned in the summary of the Fifth Circuit's opinion, the District of Columbia Circuit has rejected the over-rigidified interpretation of *Reed*'s content-based rule by the court below. The appeals court here says that *Reed* means that a regulation that requires even the most cursory skimming of advertising content is a presumptively unconstitutional content-based regulation. App. 16a. It acknowledged but rejected the contrary position of the District of Columbia in *Act Now*. There, the D.C. Circuit explained that just because an official needed to "look at what a poster says" to determine whether it met the requisite sign category did not make the rule "content-based." 846 F.3d at 404. "[R]ead[ing] a date and place on a sign" is not a "content-based" action. *Id*.

The Third Circuit rejects the Fifth Circuit's broad interpretation of *Reed*'s impact on on-premise/off-premise distinctions for outdoor signs. In *Adams v. Outdoor Advertising Ltd. P'ship v. Pennsylvania Dept. of Transportation*, 930 F.3d 199 (3d Cir. 2019), the circuit court declined to find that *Reed* meant that strict scrutiny applied to sign regulations drawing distinctions between on- and off-premise signs. *Id*. at 207 n.1. *Reed* "did not establish a legal standard by which to evaluate laws that distinguish between on-premise and off-premise signs." *Id*.[13]

The interpretation of *Reed*'s reach in these two circuits, and the conflict between their interpretation of *Reed*'s meaning for local sign regulations and the Fifth Circuit's, shows how the seed planted by the decision is sprouting different plants depending on the circuit soil. The Court should use this case to resolve the circuit differences.

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[13] "That case [*Reed*] did not address an exemption for on-premise signs, and the concurring opinions by Justices Alito and Kagan, which received a total of six votes, both indicated that on-premise sign regulations are content neutral and expressed that strict scrutiny would not apply to outdoor advertising regulations merely because they provide an exemption for on-premise signs. *See id*. at 2233 (Alito, J., concurring) (stating that "[r]ules distinguishing between on-premises and off-premises signs" would not trigger strict scrutiny); *id*. at 2236–37 (Kagan, J., concurring in the judgment) (finding it "challenging to understand why" strict scrutiny would apply to sign regulations that do not suggest government censorship or viewpoint discrimination)."

III. *Metromedia*'s Validation Of On-Premise/Off-Premise Distinctions Was Not Overturned By *Reed*, And Means Austin's Code Provisions Should Not Have Been Subject To Strict Scrutiny

Metromedia upheld as a basic proposition the First Amendment validity of local sign regulations that distinguish between on- and off-premise signs. The off-premise sign prohibition it considered was locational, based on whether the advertisement concerned the "premises upon which such signs are placed." 453 U.S. at 493 n.1. True enough, the Court found First Amendment flaws in the commercial/noncommercial distinctions drawn by the ordinance, but Austin's ordinance does not have, and is not accused of having, such a flaw.

What matters is that *Metromedia* did not treat the locational approach to on-premise/off-premise distinctions as content-based. Working off that locational distinction, the Court upheld local rules distinguishing between on-site and off-site advertising on the same property, finding them justified by the governmental objectives of protecting public safety and esthetics. *Id*. at 511. Tellingly, this Court later characterized *Metromedia* as dealing with a "content-neutral" prohibition on the use of billboards. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).[14]

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[14] Later still, in *Ladue*, the Court described *Metromedia* as upholding the differential treatment of off-site and on-site commercial billboards. 512 U.S. at 49. In this latter regard, it is again important to keep in mind that the "commercial" versus

Reed did not call *Metromedia* into question. In fact, as the district court observed, it did not even mention *Metromedia*.

The Court "does not normally overturn or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). So *Reed*'s elucidation of the meaning of "content-based" sign regulations cannot be combined with its silence about *Metromedia* to arrive at the conclusion that *Metromedia* has been abrogated and its validation of the basic concept of local on-premise/off-premise distinctions jettisoned. Instead, as long as this Court does not say otherwise, *Metromedia* remains operative law.

The upshot is that the appeals court wrongly relegated *Metromedia* to bit-player status, or worse. It should have read *Reed* and *Metromedia* in harmony, rather than giving such a broad interpretation to *Reed* that it shoved *Metromedia* entirely off the stage, dragging Austin's on-premise/off-premise distinction off with it.

It is important for local governments, and their efforts to hew to constitutional requirements when regulating signs, that the Court clarify the way that *Reed* and *Metromedia* interact to guide their regulatory actions. Austin sees the appeals court as mistaken in using *Reed* to apply strict scrutiny to strike down its challenged regulations for the digitization of signs.

"noncommercial" distinction, which presented a constitutional problem in *Metromedia*, is not present in the distinctions drawn by Austin's code.

Metromedia provides the more appropriate analytical framework, and applying it and the intermediate scrutiny it entails would uphold the city's digitization rules.

But more than anything, the state of constitutional affairs for local sign regulations post-*Reed* needs clarification. The rules are muddied now. This case presents an ideal vehicle for imparting to the lower courts and to local governments across the country much-needed guidance in an important area of First Amendment law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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