No. 20-1029

# Supreme Court of the United States

CITY OF AUSTIN, TEXAS,
*Petitioner*,

v.

REAGAN NATIONAL ADVERTISING OF TEXAS, INCORPORATED, ET AL.,
*Respondents*.

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

## JOINT AMICUS BRIEF OF CHAMBERS OF COMMERCE, BUSINESS LEAGUES, ENVIRONMENTAL ORGANIZATIONS, AND ON-PREMISE SIGN ASSOCIATIONS IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Did *Reed v. Town of Gilbert* strike down thousands of statutes and sign codes because they distinguish on-premise from off-premise signs?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES



OTHER AUTHORITIES

## INTEREST OF *AMICI CURIAE*[1]

We are 41 organizations including chambers of commerce and business leagues,[2] scenic and environmental organizations,[3] and leading on-premise sign industry trade groups,[4] representing diverse viewpoints on sign regulation. We are brought

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission. Amici state that counsel for all parties received more than ten days' notice of Amici's intent in filing this brief and all have consented to the filing of this brief.

[2] Houston Northwest Chamber of Commerce, East End Chamber of Commerce, and the business organizations Central Houston, Inc., Uptown Houston, and Houston First Corporation.

[3] Scenic America, Scenic Texas and other state and local scenic organizations in the States of Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Michigan, Nevada, North Carolina, Ohio, Tennessee, Utah, Virginia, Wisconsin; the cities of Austin, Dallas, Fort Worth, Galveston, Houston, Jacksonville, Knoxville, Lafayette, Los Angeles, Philadelphia, Pittsburgh, and San Antonio; the counties of Chatham and Walton; and the region of the Texas Hill Country. In addition are environmental organizations: Austin Outside, Hill Country Alliance, and Environment Texas.

[4] The International Sign Association and two of its affiliated sign associations represented in the 5th Circuit's jurisdiction, the Mid South Sign Association and the Texas Sign Association, as well as the California Sign Association. Another trade group representing the off-premise sign (billboard) industry, the Outdoor Advertising Association of America (OAAA), of which Respondents are listed as members, filed a similar amicus brief in a parallel case, *Schroer v. Thomas*, 937 F.3d 721 (6th Cir. 2019) (Case No. 1638), cert. denied, 141 S. Ct. 194 (July 9, 2020), also in support of Petitioner's position. Our brief largely follows and quotes extensively from the OAAA's excellent brief. *See infra* Part IV.

together for the first time out of concern that certiorari might be denied in this case with dire consequences for property rights, scenic interests, and regulatory certainty.

The International Sign Association (ISA) is the leading trade association for the domestic on-premise sign industry, with member sign companies from 50 states representing 200,000 American workers and millions of sign owner customers. With research conducted by the Sign Research Foundation, the ISA provides guidance to businesses and local officials on best practices in developing sign regulations and navigating the uncertainties created by the *Reed v. Town of Gilbert* decision. The sign industry and scenic organizations often have opposing viewpoints when it comes to the regulation of on-premise signs, but we are strange bedfellows when it comes to our mutual support of maintaining the traditional regulatory distinction of on-premise and off-premise signs. The ISA agrees with the International Municipal Lawyers Association, and business and scenic organizations across the country that the lower court has simply gone too far, harming the interests of the vast majority of businesses that use on-premise signs and local regulations that further community interests such as economic development and protecting the visual environment.

Houston Northwest Chamber of Commerce represents the interests of 700 member businesses in an area of approximately 500,000 residents, in partnership with local government and community organizations.

East End Chamber of Commerce is the premier business organization in Houston's East End representing over 500 chamber members in a vibrant

area with 3,000 businesses, 218,000 residents and 96,000 employees.

Central Houston, Inc., a 501(c)(6), is the leading business league representing the interests of Houston's downtown community and has been the steward of its vision for development of the central business district since 1983. Central/Downtown Houston is the 9th largest business district in the U.S. with 4,100 companies, 10 of which are Fortune 500 headquarters, and is home to approximately 166,000 employees and 11,000 residents.

Uptown Houston Association is the leading business organization in Uptown, the 15th largest business district in the U.S., with 34 hotels, 2,000 companies, 8,100 hotel rooms, 200,000 workers, and 180,000 residents. Uptown Houston focuses on area-wide planning, implementation of area improvements in mobility, streetscapes, and mixed-use developments. It also serves as a forum for all Uptown area business interests.

Houston First Corporation is a local government corporation that operates the city's convention, arts and entertainment venues. Houston First's vision is to promote Houston as a premier global destination, build partnerships to improve the quality of life of Houstonians, and become a top generator of new revenue to the Houston region.

Scenic America, along with its nationwide affiliates and chapters, is the only national organization dedicated solely to the preservation and enhancement of the country's visual environment. The scenic affiliates and chapters work closely with local and state officials to assure that laws and

ordinances, including sign regulations, work in harmony with the community.

Scenic Texas is the only statewide organization dedicated solely to the preservation and enhancement of the State's visual environment. At the state level, and through its local chapters and affiliates, it works closely with the Texas legislature, the Texas Department of Transportation, business groups and local governments, including the estimated 350 Texas cities and towns that distinguish between on- and off-premise signage.

## SUMMARY OF THE ARGUMENT

The on-/off-premise distinction has been used for more than a century, most importantly in the Federal Highway Beautification Act of 1965. Millions of businesses and communities have developed in reliance on this basic principle of land use law. This Court has upheld the distinction at least ten times. Two circuits have now held the distinction violates the First Amendment under this Court's decision in *Reed*. Three went the other way. Sign owners and communities across the country now face profound uncertainty and protracted, expensive disruption due to this split. We strongly support the petition for writ of certiorari.

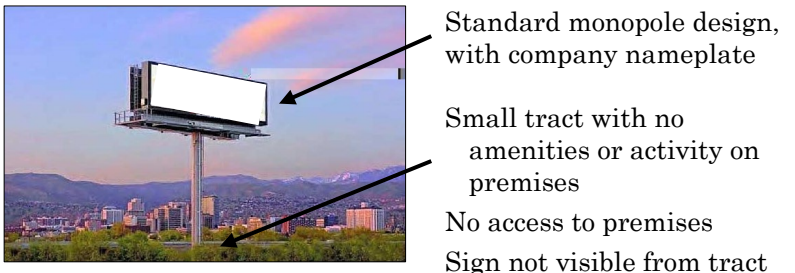
## ARGUMENT

The on/off-premise distinction is a neutral way to balance competing demands to the roadside view. It maximizes visibility, safety, and the rights of landowners and businesses to attract traffic. The circuit split has caused regulatory uncertainty and

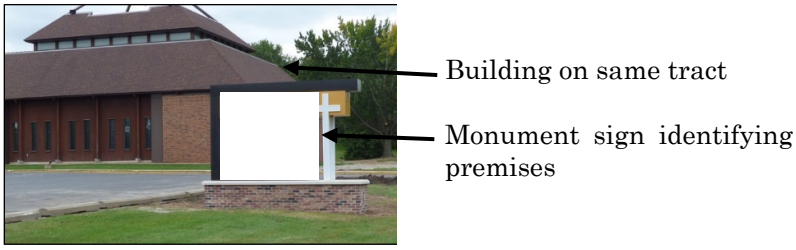
threatens sweeping damage to local businesses and to the nation's scenic heritage.

## I. The on/off-premise distinction works.

In practice, on-premise signs are easily distinguished from off-premise signs as different types of land use.

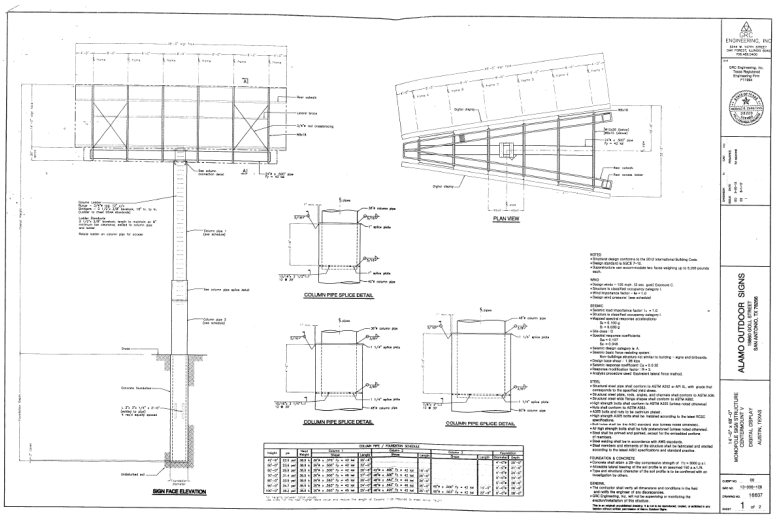



**Off-Premise (Billboard)**




**On-Premise Sign**

Like other land uses, billboards are regulated through building permits. To obtain a permit, one submits an application and drawing of the sign—which is a blank sign:




**Reagan's Permit Application, Tr. Ex. J3**

Regulating sign content is not part of the permit process. Billboard owners freely change their content without seeking new permits, particularly in the case of digital LED billboards.

On- and off-premise signs are used in different ways. On-premise signs "are used primarily for the purpose of identifying a business" located on the premises. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 526 n.5 (1981). "Unlike the on-premises sign, the off-premises billboard 'is, generally speaking, made available to "all-comers," in a fashion similar to newspaper or broadcasting advertising.'" *Id.*

In sum, on- and off-premise sign industries are "two separate and distinct businesses. . . different in their purposes, their clientele, their sales methods, their production facilities and skills, and their national organizations." *Combined Communications Corp. v. City & Cty., Denver*, 542 P.2d 79, 82 (Colo. 1975).

Because of the many differences in the way on- and off-premise signs are used, cities have always regulated them differently. "It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards . . . justify the separate classification of such structures [from on-premise signs]." *United Advertising Corp. v. Borough of Raritan*, 93 A. 2d 362 (N.J. 1952) (Brennan, J.).

The lower court's concerns are entirely theoretical and have been addressed by this Court. Amici are not aware of any factual dispute or difficulty ever arising as to whether an on-premise sign is a billboard.

## II. A century of reliance on the Court's approval of the on/off-premise distinction.

The on/off-premise distinction has been a pillar of land use law since the early 1900s. *Metromedia,* 453 U.S. at 542 & n.5. *See Varney Green v. Williams*, 155 Cal. 318, 319 (1909) (reviewing on-premise exemption to billboard ordinance); *Horton v. Old Colony Bill Posting Co.*, 36 R.I. 507 (1914) (noting "the reasons for so specially regulating this class of advertising and structures are very obvious."); *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269, 274 (1919) (Holmes, J.) (noting that "billboards properly may be put in a class by themselves"). As highways spread across the country, the on/off-premise distinction became integral to commercial property development. Roadside businesses have thrived by attracting traffic with on-premise signs, while benefiting from limited regulation to maintain safety and visibility along the roadway.

Each step of the way, land developers have relied on this Court's approval of the on/off-premise regime.

This Court laid the foundation for modern sign regulation in *Village of Euclid v. Ambler Realty Co.*, upholding a zoning ordinance that restricted billboards and allowed on-premise "accessory" signs based on location. 272 U.S. 365, 380 (1926). The Court found that ordinance was not overly burdensome because it concerned the location of a given land use, which "may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." *Id.* at 388.

The Court subsequently reaffirmed the validity of the on/off distinction in at least ten cases:

- *Packer Corp. v. Utah*, 285 U. S. 105, 110 (1932) (unanimous) (upholding billboard ban with exception for on-premise business signs)
- *Railway Express Agency, Inc., v. New York*, 336 U. S. 106 (1949) (unanimous) (upholding mobile billboard ban with exception because "those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use")
- *Markham Advertising Co. v. Washington*, 393 U.S. 316 (1969) (summarily dismissing First Amendment challenge to on/off-premise distinction)
- *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976) (unanimous) ("A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere.")
- *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978) (summarily dismissing First Amendment challenge to on/off-premise distinction)

- *Lotze v. Washington*, 444 U.S. 921 (1979) (same)
- *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979) (same)
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 n.17 (1981) (expressly adopting summary rulings: "We agree with those cases and with our own decisions…sustaining the distinction between offsite and onsite commercial advertising")
- *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("We reaffirm the conclusion of the majority in Metromedia.…[to] permit billboards to be used for onsite advertising and also justify the prohibition against offsite advertising")
- *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Rehnquist, J., dissenting) (noting that *Metromedia* upheld the on-premise exception)
- *City of Ladue v. Gilleo*, 512 U.S. 43, 58 n.17 (1994) (explaining that all nine justices agreed in *Metromedia* that "a prohibition of offsite commercial billboards even though similar on-site signs were allowed" was permissible);

Finally, in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Court held that a content-based ordinance targeting a religious sign did not satisfy strict scrutiny, while regulation of identification and traffic signs might be permitted. Justice Alito clarified that "rules distinguishing between on-premises and off-premises signs" are not content based. *Id.* at 175 (2015) (Alito, J., concurring).

Amici have continued to rely on the Court's longstanding precedent upholding the on/off-premise

distinction and on Justice Alito's important clarification.

In the course of the Court's long line of precedent above, thousands of cities and states enacted billboard restrictions, with overwhelming popular support, nearly all with the same on-premise language.[5] Model sign codes were promulgated with similar Court-approved language.[6] In every state, the courts have

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[5] *See* Ala. Code § 23-1-273 (2017); Alaska Stat. §§ 19.25.090, 19.25.105 (2017); Ariz. Rev. Stat. § 28-7902 (2017); Ark. Code § 27-74-302 (2017); Cal. Bus. & Prof. Code § 5442.5 (2017); Colo. Rev. Stat. Ann. §§ 43-1-403, 43-1-404 (2017); Del. Code Ann. tit. 17, § 1121 (2017); Fla. Stat. § 479.15 (2017); Ga. Code Ann. § 32-6-72 (2017); Hawaii Rev. Stat. §§ 264- 72, 445-112 (2017); Idaho Code Ann. § 40-1910A (2017); 225 Ill. Comp. Stat. Ann. 440/3.17-4.04 (2017); Ind. Code Ann. § 8-23-20-7 (2017); Iowa Code Ann. § 306B.2 (2017); Kan. Stat. Ann. § 68-2233 (2017); Ky. Rev. Stat. § 177.841 (2017); La. Stat. Ann. § 48:461.2 (2017); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914 (2017); Md. Code Ann., Transp. §§ 8-741, 8-744 (2017); Mass. Gen. Laws Ann. ch. 93D, § 2 (2017); Mich. Comp. Laws Ann. §§ 252.302, 252.313 (2017); Minn. Stat. Ann. § 173.08 (2017); Miss. Code § 49-23-5 (2017); Neb. Rev. Stat. § 39-218 (2017); N.H. Rev. Stat. Ann. § 238:24 (2017); N.J. Stat. Ann. § 27:5-11 (2017); Nev. Rev. Stat. § 410.320 (2017); N.C. Gen. Stat. Ann. § 113A-165 (2017); Ohio Rev. Code Ann. §§ 5516.06, 5516.061 (2017); Okla. Stat. Ann. tit. 69, §§ 1273-1274 (2017); S.C. Code §§ 39-14-20, 39-14-30 (2017); S.D. Codified Laws §§ 31-29-63, 31-29-63.4 (2017); Utah Code Ann. § 72-7-504 (2017); Vt. Stat. Ann. tit. 10, §§ 488, 493 (2017); Va. Code § 33.2-1217 (2017); Wash. Code § 47.42.040 (2017); Wyo. Stat. § 24-10-104 (2017).

[6] *See* Model On-Premise Sign Code (U.S. Sign Council 2011); An Evidence-Based Model Sign Code, (International Sign Association 2013); Model Sign Ordinance (Montgomery County [Penn.] Planning Commission Board 2014); Model Zoning Ordinance Regulations for Signs (Southeastern Wisconsin Regional Planning Commission 2015); Model Sign Ordinance (Pocono Mountain Chamber of Commerce 2000).

upheld off-premise restrictions as location-based land use laws.

As the Court noted in *Reed,* location-based rules for "signs directing traffic" and "street numbers associated with private house" would satisfy even strict scrutiny. 576 U.S. at 173. Unlike for billboards, however, there is no national standard for street number signs. In some neighborhoods, every house is numbered; while in others, none are. On-premise signs therefore have come to serve as essential landmarks for traffic and public safety purposes in the U.S. *See Metromedia*, 453 at 532 n.10 (Brennan, J., dissenting) ("A city reasonably may decide that onsite signs, by identifying the premises (even if in the process of advertising), actually promote traffic safety. Prohibiting them would require motorists to pay more attention to street numbers and less to traffic.").

The United States has already taken the unusual step of appearing as *amicus curiae* to defend the on/off-premise distinction in the parallel Sixth Circuit case below, arguing:

> Signs relating to local buildings and businesses assist travelers in identifying their surroundings and locating services essential to travel. *See Discovery Network*, 507 U.S. at 425 n.20. A motorist unable to find gas, lodging, or automotive services may be imperiled. And a driver uncertain of his surroundings may choose to consult a map or phone while driving, thereby creating a risk to himself and others. The on-premises exception is the least restrictive means of making necessary information available to motorists, and is narrowly tailored to provide travelers with

> essential information without allowing additional signs that would undercut the government's stated interests.

Brief for the United States, *Schroer v. Thomas*, 937 F.3d 721 (6th Cir. 2019) (Case No. 1638), *cert. denied*, 141 S. Ct. 194 (July 9, 2020). The lower court's ruling, however, leads to an absurd dichotomy in which cities must either allow on-premise signs to be crowded out by unlimited billboards or not allow either, except for signs with federally approved 6-digit street numbers.

## III. The on/off-premise distinction is essential to the Highway Beautification Act.

The Highway Beautification Act of 1965, one of the principal legislative authorities underlying the federal highway system, includes most importantly a 660-foot billboard-free zone on federal highways with an on-premise exception for "signs…advertising activities conducted on the property on which they are located." 23 U.S. Code § 131(b)(3). This provision was the culmination of fifty years of negotiation between a coalition of hundreds of civic associations and garden clubs, dubbed the "scenic sisters," and the "billboard boys" led by the Outdoor Advertising Association of America (OAAA). The legislation was famously supported by the First Lady, Lady Bird Johnson, but President Johnson delegated the drafting to an attorney for the OAAA. The final act was championed by both the billboard industry and scenic groups and passed with an overwhelming bipartisan majority. As required by the Act, every state enacted legislation and entered into mandatory agreements with the government regarding effective control of billboards. *See* 23 C.F.R. § 750.705(h), (j). It took seven years to

complete the state negotiations, culminating in the final agreement with Texas in 1972.

As counsel for the United States explained in a parallel case on the same issue, the on-premise exception under 23 U.S. Code § 131(b)(3) "furthers the government's interest in traffic safety by assisting motorists in identifying their surroundings and locating needed services. . . . It is precisely tailored to further the First Amendment rights of property owners interested in providing information about their property, and to avoid imposing a unique burden on certain owners merely because their property is adjacent to a designated highway." Brief for the United States, *Schroer*, 937 F.3d 721.

The lower court's opinion directly interferes with every state's obligation to comply with the Highway Beautification Act. It is an extraordinary intrusion into the police power reserved to the states, and by states to local communities, under the Tenth Amendment.

## IV. The circuit split threatens severe losses to property owners, businesses, and scenic communities.

The circuit split is fracturing the sign market. As the OAAA explained on behalf of its 900 billboard company members:

> If allowed to stand, the district court's decision [striking on/off-premise exceptions] would have breathtaking doctrinal and practical implications. To begin with, [it] would work a fundamental change in First Amendment jurisprudence. Under the

> district court's reasoning, any regulation that required any consideration of a sign's contents would automatically be subject to strict scrutiny.
>
> …..
>
> The district court's sweeping interpretation of *Reed* would also have striking practical consequences by calling into question the continued validity of an enormous swath of regulations across the country. That includes the [Highway Beautification Act], which makes on-premises/off-premises distinctions. And it includes state and municipal ordinances in every State in this circuit, and indeed virtually every State in the country. It is impossible to predict how States and municipalities would react to that uncertainty. But they would necessarily face the difficult choice of restricting all outdoor advertising, or facing the substantial costs of litigating the particular provisions of their outdoor-advertising regulations. That is strong and unnecessary medicine. But it is the inevitable consequence of the decision below.

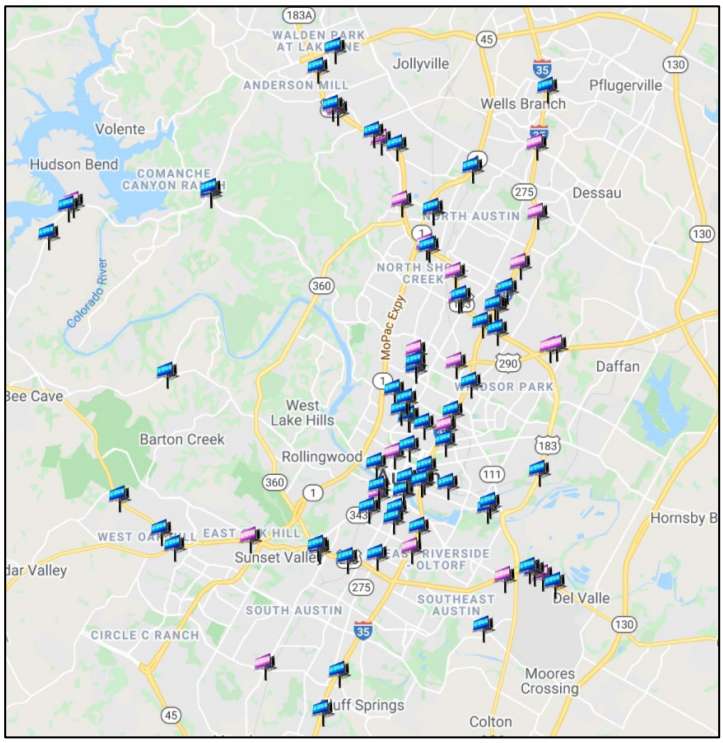
Brief of the Outdoor Advertising Association of America, *Schroer*, 937 F.3d 721. As the circuit split emerged, thousands of cities have been forced to consider all-or-nothing changes to their sign regulations, creating ongoing uncertainty.

The lower court gave zero weight to the property rights of millions of business owners and land owners affected by its ruling. The First Amendment is not a license to trample on other's property rights. "A distributor of leaflets has no right simply to scatter his pamphlets in the air — or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." *Taxpayers for Vincent*, 466 U.S. 789.

Billboards are a uniquely persistent form of communication. "Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard." *Packer,* 285 U.S. 105; *Hill v. Colorado*, 530 U.S. 703 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men."). "Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development." *Metromedia*, 453 U.S. at 502. As many state courts have noted, billboards are "in substance and effect a use of the public highway for advertising purposes." *Markham Advertising Co. v. Washington*, 393 U.S. 316 (1969), *appeal dismissed for want of a substantial federal question*, 393 U.S. 316. Even more,

uncontrolled billboards can impinge on the rights of neighboring land owners and businesses.

Respondents have asserted instantaneous rights to permits for LED billboards across the city of Austin, because they filed a stack of photocopied permits just before filing suit.




**Map of digital billboards to be installed per lower court judgment. Tr. Ex. J; Google Maps.**

Until the Court resolves this matter, cities across the country that have spent decades amortizing and swapping out grandfathered billboards are in a state of limbo, unable to determine whether to invest in the enormous effort to amend their sign codes, as rogue opportunists circle. *See* Brief of Int'l Municipal Lawyers' Association. The sign industry did not ask for this Pandora's box.

## CONCLUSION

Mounted on the front of the Supreme Court Building is an on-premise sign, stating, "Equal Justice for All." At the time it was built in 1935, the capital was awash in billboards. Congress had passed a billboard ban in 1931, but it took almost fifty years for the last billboard to come down pursuant to this ban. Surely no one has accused the Court of content discrimination on the basis of its sign. And surely no sign officer from the District of Columbia has appeared on its front steps to review the sign and determine whether Equal Justice is located on the premises. The Supreme Court Building is not a billboard. Today, the circuit courts are split down the middle over an equally far-fetched argument, contradicting ten opinions in which the Court has approved of the on/off-premise distinction. Meanwhile, every highway beautification act and sign code in the country hangs in the balance. The Court should grant certiorari.