No. 20-1029

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Austin's former sign code contained a general prohibition on all signs that carried a message, whether commercial or noncommercial, that advertised a business, person, activity, goods, products, or services not located where the sign was installed. It also prohibited messages that directed persons to any location not on the same site as the sign. The regulation prohibited such speech regardless of where the sign was located. Whether a sign violated the code was based on what the sign said.

Following the analysis set forth in *Reed v. Town of Gilbert,* the Fifth Circuit ruled that this particular prohibition on speech was content-based on its face and failed the strict scrutiny test. The question presented here is:

Was the City of Austin's prohibition of certain noncommercial messages a content-based regulation subject to strict scrutiny under *Reed*?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

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 Austin, Incorporated, the appellant below and plaintiff in the district court, and Lamar Advantage Outdoor Company, L.P., appellant below and intervenor in the district court.

Reagan National Advertising of Austin, Incorporated has no parent corporation, and no publicly held company owns 10% of its stock.

Lamar Advantage Outdoor Company, L.P. is a wholly-owned subsidiary of Lamar Advertising Company, a company publicly traded on the New York Stock Exchange. Lamar Advertising Company has no parent corporation, and no publicly held company owns 10% of its stock.

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INTRODUCTION

The Fifth Circuit held in this case that a sign regulation that restricts both commercial and noncommercial signs based on the message the sign carries is a content-based regulation subject to strict scrutiny. The particular regulation at issue, which is no longer in effect, had prohibited the display of "off-premise" messages, including noncommercial messages, on digital sign faces. Petitioner City of Austin's statement that its sign code provisions "distinguish between on-premise and off-premise signs based solely on location" is simply wrong. Pet. 1. Austin's code distinguishes between on-premise and off-premise signs based solely on the message that the sign carries.

As Austin concedes, its Petition presents an underdeveloped question with no direct conflict among the circuit courts of appeals. Pet. 17, 21. Just 10 months ago, this Court denied certiorari in *Thomas v. Bright,* a case which, in the Fifth Circuit's view, involved a nearly identical question. Pet. App. 15a. *Thomas v. Bright,* 937 F.3d 721 (6th Cir. 2019), *cert. denied,* 141 S. Ct. 194 (July 9, 2020). Austin presents no argument to suggest that this case provides a better vehicle to address the question presented, particularly where, as here, the sign code provision at issue was repealed even before the case went to trial.

Austin claims the Fifth Circuit hamstrings its ability to regulate digitized signs. Pet. 1. This characterization of the decision below is wrong on multiple levels. First, the Fifth Circuit's decision concerns whether city regulations may distinguish between certain signs based on the content of the messages the sign carries, not the technology employed to display the message. Second, Austin unquestionably

may regulate the type of technology used on signs where the regulations do not discriminate based on content. Third, Austin may even continue to discriminate based on content as long as the regulation does not apply to noncommercial speech.

In holding that Austin's prohibition of "off-premise" messages was a content-based regulation, the Fifth Circuit faithfully followed the majority opinion in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015). At the same time, because its ruling was limited to regulations that implicate noncommercial speech, the Fifth Circuit's decision was entirely consistent with this Court's decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). *Metromedia* held that although local governments may make on-premise/off-premise distinctions in regulating commercial speech, they may not make content-based distinctions in regulating noncommercial speech, which enjoys greater protection.

There is no indication that local governments are having trouble adjusting their on-premise/off-premise regulations to exempt noncommercial speech. In fact, Austin has already done just that. In spite of that fact, Austin asks this Court to carve out an exception to *Reed*. The proposed exception would allow local governments to prohibit signs carrying noncommercial messages if the message refers to persons, activities or services that are not located on the same site as the sign.

Such an exception would have its own First Amendment flaw. It would value some noncommercial speech over other noncommercial speech, as well as favoring some commercial speech over noncommercial speech. Moreover, it is completely unnecessary. In this case, there is no direct conflict in the circuit courts

of appeal, no dispute concerning Austin's own current regulation, and no indication of actual confusion among local governments as to how they may lawfully make on-premise/off-premise distinctions. This is not the case, nor is it the time, for this Court to consider whether it should revise the majority opinion in *Reed*.

STATEMENT

The issue before the Fifth Circuit was the constitutionality of Austin's former sign code provision that had prohibited signs from carrying particular messages. The code had a general prohibition of signs carrying so-called "off-premise" messages. "Off-premise" was defined as a message that "advertised a business, person, activity, goods, products, or services not located where the sign was installed, or that directs persons to any location not on that site." Pet. App. 2a-3a.

Respondents, Reagan National Advertising of Austin, Incorporated, and Lamar Advantage Outdoor Company, L.P., own sign structures that publish "off-premise" messages. In spite of its general prohibition, Austin's sign code allowed Respondents' signs to continue to display such messages as "grandfathered" or "non-conforming" signs. Pet. App. 3a. However, these grandfathered signs were subject to strict limitations. One limitation was that they were prohibited from using "electronically controlled changeable copy" (i.e., "digital signs"). Pet. App. 3a. As a result of this statutory framework, messages falling outside the definition of "off-premise" could be displayed on a digital sign. But other messages, such as ones that directed persons to other locations or that advertised an activity at another location, could not be displayed on a digital sign. Pet. App. 3a.

Respondents Reagan and Lamar believed that Austin's prohibition of "off-premise" messages, and the restrictions on grandfathered signs carrying those messages, was unconstitutional. So they applied for permits that would allow them to change some of their existing sign structures to digital signs. Pet. App. 34a. The City denied their permit applications, and Reagan and Lamar sued. They claimed that the distinction the City drew between certain messages was content-based and subject to strict scrutiny under *Reed v. Town of Gilbert*.

After a trial, the district court held that the City's distinctions between on-premise and off-premise signs were not subject to strict scrutiny under *Reed.* Instead, the court held the regulation was subject to the intermediate scrutiny standard applicable to commercial speech, although the regulations applied to both commercial and noncommercial speech. Pet. App. 50a.

The intermediate scrutiny test provides that a restriction of otherwise protected commercial speech is valid if it seeks to implement a substantial government interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, at 563-66 (1980).

In 1981, this Court held that the *Central Hudson* intermediate scrutiny test was to be applied to restrictions on commercial speech displayed on bill-boards. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507 (1981). However, the decision in *Metromedia* resulted in a finding that San Diego's sign ordinance was "unconstitutional on its face" in its regulation of noncommercial speech. 453 U.S. at 522.

The parties do not dispute that Austin's prohibition of off-premise messages had applied to both commercial and noncommercial speech. Nor is there any dispute that Reagan and Lamar publish noncommercial speech as well as commercial speech. Pet. App. 2a-3a.

Even before this case went to trial, Austin amended its sign code so that the term "off-premise" would not apply to noncommercial messages. Pet. App. 4a. While this action may have cured the code's constitutional deficiency, it did not resolve the narrow issue raised by Reagan and Lamar. This is because under Texas law, their permit applications are governed by the law in place at the time the applications were filed. Pet. App. 7a.; TEX. LOC. GOV'T CODE ANN. § 245.002(a)(1).

The Texas law relied upon by Reagan and Lamar creates rights commonly referred to as "vested rights." *City of Houston v. Commons at Lake Houston, Ltd.,* 587 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The statute creates a system by which property owners may rely on a municipality's land-use regulations in effect at the time the original application for a permit had been filed. *Id.* Chapter 245 "freezes" the rules at the time the original permit application is filed and limits the rights of a municipality to change the rules in the middle of the game. *Id.*

Reagan and Lamar claim that if the regulation in place at the time their permit applications were filed was unconstitutional, Austin cannot apply its off-premise limitations when assessing their applications to install digital sign faces. The district court did not reach that issue. Pet. App. 40a. Instead, it found that Austin's on-premise/off-premise distinction satisfied

intermediate scrutiny and was constitutional. Pet. App. 50a, 53a.

Contrary to Austin's description of the case, the issue before the Fifth Circuit was not whether the First Amendment compels the city to grant permit applications to install digital sign faces. That end result will be determined under Texas law. The issue was whether the general prohibition of all "off-premise" messages, and the related provision which prohibited digitalization of "grandfathered" signs, was a content-based regulation of speech requiring strict scrutiny.

The Fifth Circuit held "the on-premise/off-premise distinction [in Austin's former code provision] is content-based and fails under strict scrutiny. It thus runs afoul of the First Amendment." Pet. App. 27a. Austin did not petition for a rehearing *en banc*. The case was remanded to the district court for further proceedings, where the remedy sought by Reagan and Lamar will be determined pursuant to Texas law.

ARGUMENT

A. The Fifth Circuit's decision does not raise an important question of federal law that needs to be settled by this Court.

1. The Fifth Circuit's holding was completely consistent with *Reed's* majority opinion.

The issue decided by the Fifth Circuit was simple. Austin's sign code prohibited signs that carried certain messages. The code established a general prohibition of "off-premise" signs, a prohibition that applied to a sign depending on the message the sign carried, *no matter where the sign was located.* If the message

advertised a business, person, activity, goods, or services that were not located on the site where the message appeared, the message was prohibited. If the message directed persons to some other location, for any reason, it was prohibited. For example, a sign on church property inviting people to attend *that* church was allowed. But the same sign structure, in the very same place, was prohibited from inviting people to attend services at another church.

It was a town's regulation of signs directing people to church services at another location that gave rise to this Court's opinion in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015). In *Reed,* a small church in Gilbert, Arizona had no building of its own. The church posted signs around town advertising its church services and directing persons to the location where those services would be held. The sign violated the town's sign regulation, which limited the ability of persons to put up temporary signs directing the public to a meeting of a non-profit group. *Id.* at 159.

In finding that this regulation violated the First Amendment, this Court stated, "[a] law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech." *Id.* at 165. Content-based laws are laws that target speech based on its communicative content. *Id.* at 163. Such laws will be stricken unless the government can meet a strict scrutiny standard. *Id.*

In *Reed,* this Court instructed that, in a First Amendment challenge to laws that target speech, courts must use a content-neutrality analysis that involves two distinct inquiries. *Id.* at 166. The crucial first step is to determine whether the law is content-

based on its face. *Id.* at 165. If it is, the law is subject to strict scrutiny. The government's justification or purpose for enacting the law is irrelevant. Only if the law is content neutral on its face may a court continue the analysis by turning to the law's justification or purpose. *Id.* at 166.

Before this Court decided *Reed,* some courts, including the Fifth Circuit, looked at both questions in determining whether a law was presumptively unconstitutional. *Id.* at 165. Where a law was not content neutral on its face, courts would decide whether the government's *justification* for the law was content-neutral. *See Asgeirsson v. Abbott,* 696 F.3d 454, 459-60 (5th Cir. 2012), *cert. denied,* 568 U.S. 1249 (2013). In *Asgeirsson,* the Fifth Circuit had said, "A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech." *Id.* *Reed* changed all that.

In this case, the Fifth Circuit did nothing more than follow *Reed.* The court looked at Austin's "off-premise" definition and found it was content-based on its face. For that reason, Austin's regulation was subject to strict scrutiny. The Fifth Circuit's conclusion should be no surprise. For years, courts had recognized that such message-based definitions of "off-premise" signs were, in fact, content-based regulations. *See* part C.2. *infra*.

Austin's sign code treated signs differently, depending on the message the sign carried. The analysis described in *Reed* meant the regulation would be subject to strict scrutiny, and that the government's justification or purpose for the law was irrelevant. This Court's majority opinion in *Reed* recognized that its analysis would result in some local regulations

being stricken, but found that result to be necessary. It stated, "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" 576 U.S. at 171 (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 60 (1994)(O'Connor, J., concurring)).

2. *Metromedia's* test for regulation of commercial speech is unaffected by the Fifth Circuit's holding.

The clear and firm rule set out in *Reed* has been in place for six years. Contrary to Austin's hand-wringing, local governments continue to regulate billboards to protect safety and esthetic values, and they can do so without running afoul of *Reed*.

Following the decision in *Reed*, courts have consistently held that *Reed's* analysis applies only to sign regulations affecting noncommercial speech. Regulation of commercial speech continues to be governed by *Metromedia*. *See Contest Promotions, LLC v. City and County of San Francisco,* 874 F.3d 597, 601 (9th Cir. 2017) (because noncommercial signs are exempted from the regulatory framework, the regulations are subject to intermediate scrutiny under *Central Hudson*); *Thomas v. Bright,* 937 F.3d 721, 729 (6th Cir. 2019) (the speech at issue concerned non-commercial speech so the analysis need not consider the commercial-speech doctrine). Under *Metromedia,* local governments may continue to use the same content-based definition for "off-premises" signs, as long as the targeted speech is commercial speech.

Austin makes colorful but vague complaints that the Fifth Circuit has somehow undermined *Metromedia.*

Pet. 2, 24. (Fifth Circuit used *Reed* to "shrink [*Metromedia*] to the vanishing point;" the appeals court "eviscerates" *Metromedia*; the court "wrongly relegated *Metromedia* to bit-player status or worse" and "shoved *Metromedia* entirely off the stage").

The Fifth Circuit did no such thing. Its opinion did what the plurality opinion in *Metromedia* did: It left *Central Hudson's* intermediate standard of review in place for commercial speech, and provided greater protection to noncommercial speech. As Justice White wrote in *Metromedia*:

> In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*, *supra*. It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments.

453 U.S. 490, 512-513 (1981).

The Fifth Circuit has summarized the key propositions established in *Metromedia* as follows:

> It held that (1) a billboard ordinance may permit on-premise commercial advertisement while banning off-premise commercial advertisement; (2) the ordinance may not distinguish among non-commercial messages on the basis of their content; and (3) where a city permits commercial billboards, it must also permit non-commercial ones.

RTM Media, L.L.C. v. City of Houston, 584 F.3d 220, 225 (5th Cir. 2008).

Although Austin argues that its former off-premise/on-premise distinction, which encompassed noncom-

mercial messages, is sanctioned by *Metromedia,* the opposite is true. *Metromedia* appears to hold that off-premise/on-premise distinctions may *not* be made when regulating noncommercial speech. It clearly held that "a city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." 453 U.S. at 513. Here, Austin's code had assigned greater value to commercial "on-premise" messages, which were allowed, than it did to noncommercial "offsite" messages, which were prohibited.

3. Local governments are already adjusting their laws to ensure that *Metromedia* will continue to apply to their billboard regulations.

Austin makes the following request in its Petition:

> 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.

Pet. 17. This is an odd request since Austin has already revised its sign code to comply with *Reed***.** Unlike the former sign regulation at issue in this case, Austin's revised regulations now exclude noncommercial speech.

Austin is not alone. In light of *Reed's* teaching and subsequent opinions limiting those teachings to noncommercial speech, it appears that local governments have been adjusting their content-based regula-

tions to apply only to commercial speech. *See Thomas v. Schroer*, 248 F. Supp. 3d 868, 878 (W.D. Tenn. 2017) ("Since *Reed,* some local governments have begun drafting content-based, sign-related ordinances to apply solely to commercial speech."); *see also Contest Promotions, LLC v. City & C'ty of San Francisco,* 2017 WL 1493277, *3 (N.D. Cal. 2017), *aff'd* 874 F.3d 597 (9th Cir. 2017) (City of San Francisco amended its planning code in 2016 to exempt all noncommercial speech).

4. Austin's ability to regulate digital displays remains firmly in place.

Contrary to Austin's complaint, it remains free to pursue its goals, including regulating digital displays and other technological changes to sign faces. In fact, under its revised code, which excludes noncommercial speech, Austin continues to use content-based distinctions in regulating digital signs. Pet. App. 4a-5a.

Austin claims that Reagan and Lamar "argue that the technological restriction on the changes in the method for billboards to deliver their advertisements in itself is content-based." Pet. 6. Austin is incorrect. Reagan and Lamar's claim arises from the code's general prohibition of "off-premises" messages and related restrictions on grandfathered signs. They argue that the First Amendment does not allow Austin to permit some billboards to be digitized and others not, based solely on the message the sign carries. No one argued that Austin cannot enforce technological restrictions on how messages are displayed as long as the regulation is applied uniformly.

Austin also asserts that Reagan and Lamar claim "that the First Amendment compels the city to permit them to digitize their billboards." Pet. 6. Again, this

is incorrect. Reagan and Lamar do not argue that the First Amendment requires that they get permits to digitize their billboards. They claim that *Texas law* requires that they get permits to digitize their billboards. They have shown that the regulation in place at the time they applied for permits was an unconstitutional content-based regulation. Because that earlier regulation was unconstitutional and unenforceable, Reagan and Lamar believe that Texas law will ultimately require that their permit applications be granted. While this one-time result may be inconvenient to Austin's officials, it hardly raises an important issue of federal law that would justify this Court abandoning its analysis in *Reed*.

In sum, this case is not about whether local governments can regulate the digitization of sign faces. Without question they can do so. Moreover, the Fifth Circuit's opinion in no way affects how regulations of commercial speech are to be evaluated. Reagan and Lamar on appeal did not argue, nor did the Fifth Circuit hold, that the analysis under *Metromedia* was not still firmly in place.

B. As Austin concedes, the Fifth Circuit's decision does not conflict with other circuit courts of appeals decisions.

Austin claims this Court should revisit and revise its opinion in *Reed* without waiting for "distinct, pinpoint splits among the circuits." Pet. 17. Austin gives no concrete reason to justify such a revision at this time. Austin has *already* amended its code. The only real concern for Austin at this point is the possibility that Reagan and Lamar may be entitled to the permits they seek as a result of Texas law.

Nevertheless, while conceding that "there may not be a direct circuit conflict in terms of specific holdings," Austin argues that there are differences among the circuits and this court should "eliminate the confusion." Pet. 21. Any confusion, however, at least as it concerns "on-premise/off-premise" distinctions, has largely been resolved.

Two years after this Court decided *Reed,* the Ninth Circuit provided all the clarification that local governments needed in *Contest Promotions, LLC v. City & Cty of San Francisco,* 874 F.3d 597 (9th Cir. 2017). The code provision at issue in *Contest Promotions* drew a distinction between a sign that

> directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the sign is located, or to which it is affixed....

and a sign which

> directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such sign is located or to which it is affixed.

874 F.3d at 599-600. Significantly, San Francisco's code was amended shortly after *Reed* to distinguish between commercial and noncommercial signs. The latter are exempted from the regulation entirely. *Id.* at 601.

The Ninth Circuit rejected the argument that *Reed* altered *Central Hudson's* longstanding intermediate scrutiny test for regulation of commercial speech. Because noncommercial signs are exempted from San

Francisco's regulatory framework, the code provision at issue was a regulation of commercial speech. It was therefore subject to intermediate scrutiny under *Central Hudson*. *Id.* at 601. The issue here is the flip side of the Ninth Circuit's holding in *Contest Promotions*. A distinction between "on-premise" and "off-premise" messages, made in a regulation that does *not* exempt noncommercial speech, is subject to strict scrutiny under *Reed*.

As the Fifth Circuit noted below, the Sixth Circuit addressed that precise question in *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), *cert. denied,* 141 S. Ct. 194 (2020). The on-premise/off-premise regulation at issue in *Thomas* implicated noncommercial speech. The regulation prohibited all signage speech, except for an "on-premises exception" which allowed signs advertising activities conducted on the property on which the sign is located. The Sixth Circuit found the issue of whether this regulation was content-based to be "neither a close call nor a difficult question." *Id.* at 729. And because the regulation restricted non-commercial speech, the court held it was subject to strict scrutiny. 937 F.3d at 733.

First the Sixth Circuit and now the Fifth Circuit have squarely held that the type of on-premise/off-premise regulation at issue here is clearly a content-based regulation, and is subject to strict scrutiny when it implicates noncommercial speech. Federal district courts have had no trouble in applying this rule. *See GEFT Outdoor, L.L.C. v. City of Westfield,* 491 F. Supp. 3d 387, 403 (S.D. Ind. 2020) (prohibition against off-premises signs was content-based and because the regulation applied to both commercial and noncommercial speech it was subject to strict scrutiny); *Reagan Nat'l*

Advert. of Austin, Inc. v. Cedar Park, 387 F. Supp.3d 703, 712-13 (W.D. Tex. 2019) (same).

The Third Circuit did express doubt as to whether *Reed* addressed on-premise/off-premise regulations at all. *Adams Outdoor Advertising Ltd. P'ship v. Pa. Dep't. of Transp.,* 930 F.3d 199, n. 1 (3d Cir. 2019). In *Adams*, the plaintiff had challenged an exemption to a regulation that applied to signs that "advertise the sale or lease of, or activities being conducted upon, the real property where the signs are located." *Id.* at 206. The Third Circuit has its own hierarchy of scrutiny for sign regulations. It applies a special "context-specific" scrutiny of "for sale or lease" signs that was crafted in *Rappa v. New Castle County,* 18 F.3d 1043 (3d Cir. 1994). 930 F.3d at 207. It also applies a different level of scrutiny, intermediate scrutiny, for on-premise signs concerning activities on the property. *Id.* The court of appeals in *Adams* found that the government failed to meet its burden under either of those levels of scrutiny and remanded the case for further litigation.

In a footnote, the court of appeals declined to deviate from *Rappa* and apply a strict scrutiny standard. The court believed that the "splintered reasoning" in *Reed* did not establish a legal standard for the case before it. *Id.* at 207, n.1. The footnote did not address or even mention the critical distinction between commercial and noncommercial speech that has now been analyzed by the Ninth, Sixth, and Fifth Circuits since *Reed* was decided.

The D.C. Circuit also addressed the scope of *Reed,* but in connection with a very different type of sign regulation. *Act Now to Stop War and End Racism Coal'n v. Dist. of Columbia,* 846 F.3d 391 (D.C. Cir.), *cert. denied,* 138 S. Ct. 334 (2017). *Act Now* involved limitations on the duration and manner in which the

public may use government property for expressive conduct. Specifically, the regulation involved the public's use of city lampposts to post signs. The D.C. Circuit found the regulation did not target the "communicative content" of the signs, but uniformly restricted the duration that event notices may remain physically affixed to public lampposts. 846 F.3d at 403. The opinion reasoned that just because an official would need to read the date on a poster to determine whether it had been up too long, did not mean the regulation was content-based. *Id.* at 404.

The Fifth Circuit opinion in this case noted that in *Act Now* the D.C. Circuit found that *Reed* would tolerate certain inquiries into content of a sign, so long as the inquiries were merely "cursory examinations."[1] The Fifth Circuit did not see an exception in *Reed* for mere "cursory" exceptions. However, the opinion went on to distinguish *Act Now* by finding that under Austin's sign ordinance, determining whether a sign's message was an on-premise or off-premises message was not a "cursory" inquiry. Pet. App. 17a. Indeed,

[1] The Sixth Circuit in *Thomas* described three different means for deciding whether a particular regulation is content-based or content-neutral, as follows: "A law regulating speech is facially content-based if it 'draws distinctions based on the message,' *Reed,* 135 S. Ct. at 2227; if it 'distinguish[es] among different speakers, allowing speech by some but not by others,' *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340 (2010); or if, in its application, 'it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred,' *McCullen v. Coakley,* 573 U.S. 464, 479 (2014)." *Thomas v. Bright,* 937 F.3d 721, 729 (6th Cir. 2019) (cites omitted). In addition to looking at the distinctions drawn between messages as described in *Reed,* both the Sixth Circuit and the Fifth Circuit looked to the "examination by enforcement authorities" test as well.

the questions the court posed at oral argument based on hypothetical signs had stumped the counsel for the City. *Id.*

In any event, the D.C. Circuit's willingness to allow a "cursory examination" of signs by enforcement officers arose in connection with a regulation limiting the duration that a sign could stay up on government property. In contrast, the regulation at issue here concerns whether certain messages, displayed on private property, can go up at all.

Public use of government property comes with its own rules, rules that are different for local sign codes governing speech on private property. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 814 (1984) (lampposts can be used as signposts, but that does not mean the Constitution requires that such uses be permitted; public property may be reserved by the State for its intended purposes); *Reed,* 576 U.S. at 173 (on public property a town may go a long way toward entirely forbidding the posting of signs as long as it does so in a content-neutral manner); *see also Matthews v. Needham,* 764 F.2d 58, 61 (1st Cir. 1985) (the special nature of private property may justify a greater degree of First Amendment protection).

There is no conflict among the circuits on how *Reed* applies to on-premise/off-premise distinctions restricting noncommercial messages displayed on private property. All three courts of appeals that have considered the issue (the Ninth, Sixth, and Fifth Circuits) appear to agree that local governments are free to make content-based distinctions, as long as noncommercial speech is clearly exempted. But where, as here, the (now defunct) regulation applied to both

commercial and noncommercial speech, *Reed* requires strict scrutiny.

C. The Fifth Circuit's decision was correct.

The only issue raised by Austin in this case is whether the Fifth Circuit erred in holding that Austin's prohibition of certain messages was a content-based regulation. Austin essentially argues that the Fifth Circuit should not have followed *Reed* in this case because its sign code does not target specific ideas or viewpoints, and because the distinction at issue applies only to so-called "locationally based" messages. Common sense and consistent holdings from other courts demonstrate the Fifth Circuit did not err. Austin's sign code's definition of "off-premise" was, on its face, content-based.

1. Austin's goals and motives are irrelevant under *Reed*.

Austin appears to argue that its targeting of this particular category of speech should not be treated as content-based because the city's motives are pure. Pet.1 (a city must draw distinctions between off-premise and on-premise signs to protect public safety and ensure local aesthetic values are not degraded). Austin's position is nothing more than an argument that if the government has a neutral *justification* for its content-based regulation, the regulation should be deemed content neutral. This is exactly the analysis that was rejected in *Reed*. *Reed* expressly held that the government's justification for a regulation is irrelevant if the regulation is content-based on its face.

Austin also claimed that its regulation was not content-based because it did not target one specific viewpoint or message. The Fifth Circuit correctly held

that the sign code "does not need to discriminate against a specific viewpoint to be 'content-based.'" Pet. App.18a. "As explained in *Reed*, 'A regulation that targets a sign because it conveys an idea about a specific event is no less content-based than a regulation that targets a sign because it conveys some other idea.' 576 U.S. at 171." Pet. App. 18a. The regulation at issue in *Reed* certainly did not target Pastor Reed's signs because of a specific viewpoint. 576 U.S. at 155 (at issue were signs bearing the church name and the time and location of the next service).

2. Austin's regulation is not based on the location of the sign, but on what the sign says.

Austin claims that its definition of "off-premise" is concerned with the location of the sign itself, and not with what the sign says. This argument defies common sense and was rejected long before this Court's opinion in *Reed*. *See Ackerley Commc'n of Mass., Inc. v. City of Cambridge,* 88 F.3d 33, 36, n. 3 & 7 (1st Cir. 1996).

In *Ackerley,* the law required that a billboard company's noncommercial, off-premises messages must be taken down. The billboard company argued that the law was invalid because it imposed "an impermissible content-based restriction on speech: whether a sign may remain is determined by the message it carries." 88 F.3d at 36. The First Circuit stated, "[i]n 'commonsense' terms, the distinction [between onsite and offsite signs] surely is content-based because determining whether a sign may stay up or must come down requires consideration of the message it carries." *Id.* at n. 7.

The First Circuit also noted: "The descriptive terms 'off-premise' and 'on-premise' can be misleading when used to modify the word 'sign,' since the applicable category is determined not by the sign's *location,* but by its *message* .... a sign attached to a building can carry either off-premise or on-premise messages." *Id.*

This same potential for confusion may have led the district court in this case astray when it said, "This is a regulation based on location, not 'based on the message a speaker conveys.'" Pet. App. 50a. But Austin's prohibition is not based on where the *sign* is located. It forbids certain messages regardless of where the sign happens to be situated. Whether the sign must come down depends solely on what the sign says.

Other courts looking at the same issue were not distracted by the term "off-premise." As one district court said in a case involving an "off-premise" definition similar to Austin's sign code: "Under the ordinance, whether a sign satisfies the ordinance depends on what it *says.* The speech on the sign must relate to an activity going on at the premises. ... [the] signage ordinance is not content neutral. It prohibits all kinds of speech because of what it *says*." *Burkhardt Advertising, Inc. v. City of Auburn, Indiana,* 786 F. Supp. 721, 732 (N.D. Ind. 1991).

The Sixth Circuit made short work of this so-called "locationally based" distinction in *Thomas v. Bright,* 937 F.3d 721, 729 (6th Cir. 2019), *cert. denied,* 141 S. Ct. 194 (2020). In that case, the State of Tennessee, like Austin in this case, argued that the operative distinction was between signs based on their location, not their content. Finding the issue to be "neither a close call nor a difficult question," that court stated:

> Tennessee's argument is specious: whether the Act limits on-premises signs to only certain messages or limits certain messages from on-premise locations, the limitation depends on the content of the message. It does not limit signs from or to locations regardless of the messages - those would be the (content neutral) limitations that would fit its argument.

937 F.3d at 731. *See also L.D. Management Co. v. Gray,* 988 F.3d 836 (6th Cir. 2021) (law imposing special requirements on roadside billboards that advertise off-site activities, which apply to both commercial and noncommercial speech, is a content-based regulation on its face).

In *Reed,* this Court said "a speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 171. If a prohibition applies because of the "message expressed," the regulation is content-based. As the majority opinion pointed out, "[h]ere the Code singles out signs bearing a particular message: the time and location of a specific event." *Id.*

The same is true of Austin's regulation. It singles out signs bearing particular messages. It singles out signs that direct people to another location. It singles out signs with messages that direct attention to activities, persons or services located elsewhere. Logically, it is no different than a regulation that singles out signs bearing the message of the time and location of a specific event, as did the regulation at

issue in *Reed*. Indeed, Austin's former regulation would have prohibited the sign at issue in *Reed*.[2]

3. Austin asks this Court to carve out an unnecessary and problematic exception to *Reed.*

The majority opinion in *Reed* gave examples of content-neutral options available to a city to resolve problems with safety and aesthetics that have nothing to do with the sign's message, including: "size, building materials, lighting, moving parts, and portability." 576 U.S. at 173. Absent from the majority's list were rules distinguishing between on-premises and off-premise signs.

That type of regulation did appear in Justice Alito's concurrence, however. Included in his list of rules that would not be content-based were "[r]ules distinguishing between on-premises and off-premises signs." *Id.* at 175 (J. Alito concurring, joined by J. Kennedy and J. Sotomayor). Austin argues that the inclusion of this rule in Justice Alito's concurrence "takes the city's on-premise/off-premise distinction outside the content-based rule announced in *Reed*." Pet. 14.

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[2] The majority opinion in *Reed* cited two cases that it described as addressing "similar content-based sign laws" that were subject to strict scrutiny. 576 U.S. at 173 (citing *Matthews v. Needham,* 764 F.2d 58, 59-60 (1st Cir. 1985), and *Solantic, LLC v. Neptune Beach,* 410 F.2d 1250, 1264-69 (11th Cir. 2005)). Both cases included distinctions between on-premise signs and other signs. *Matthews* involved a distinction drawn between political signs and certain on-premise signs. 764 F.2d at 60. The regulation at issue in *Solantic* contained many content-based exemptions, including messages about on-site activities. 410 F.3d at 1258 (exemptions included on-site "for sale" signs and on-site signs to advertise temporary uses like fairs, festivals and revivals).

Austin's position is essentially that the majority opinion made a mistake, a mistake that Justice Alito tried to fix in his concurrence, and one that this Court should now repair. Essentially, Austin asks this Court to now carve out the following exception to the rule established in *Reed's* majority opinion: Where the prohibited messages concern the location of persons, activities, services or goods, *Reed* simply should not apply. According to Austin, a government prohibition of those particular messages should not be subject to strict scrutiny regardless of whether the restricted speech includes noncommercial messages.

However, Austin fails to demonstrate why such an exception to *Reed* is needed. There is no indication of actual confusion among local governments as to how to lawfully use an on-premise/off-premise distinction in light of *Reed* and *Metromedia*. Local governments can make rules that distinguish between on-premise and off-premise signs as long as noncommercial speech is exempted from the rule.

Further, the exception urged by Austin has its own First Amendment flaw. It is well-established that the government "may not value certain types of non-commercial speech more highly than others." *Ackerley Commc'n,* 88 F.3d at 37. While a city may favor certain types of commercial speech in this way, it may not do so in the area of noncommercial speech. *RTM Media, LLC v. City of Houston,* 584 F.3d 220, 224 (5th Cir. 2010) (citing *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981)).

As this Court said in *Metromedia,* "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or

distinguish between, various communicative interests." 453 U.S. at 515.

The result of an on-premise/off-premise carve-out to *Reed* would be to favor some noncommercial speakers over others. *See Ackerley,* 88 F.3d at 37 (a regulation of noncommercial speech that drew on-premise/off-premise distinctions suffered from a First Amendment flaw). For example, noncommercial organizations with buildings in advantageous locations would be favored over other institutions located on quiet streets. And noncommercial speakers with no permanent location for their activities would be at the bottom of the list: They would have no place to post their signs, which was the same disadvantage faced by the church in *Reed.*

The proposed exception would also assign greater value to "on-premise" commercial speech and less value to "off-premise" noncommercial speech in contravention of *Metromedia.* 453 U.S. at 513 (a city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater values than the communication of noncommercial messages). (For a clear demonstration of that problem, see the "puppy mill" hypothetical described in *Thomas*. 937 F.3d at 736.)

The Fifth Circuit's application of the analysis described in *Reed's* majority opinion was correct. If further clarification of Justice Alito's concurrence should ever be required, it should happen only after different circuit courts of appeals have conducted reasoned analyses and reached opposite conclusions. To date, no such conflict exists, and it is likely that it never will. Moreover, the narrow dispute presented in this case, which ultimately hinges on Texas law and

concerns a regulation that has been repealed, is certainly not the vehicle for such a review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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