No. 20-1029

In The
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the distinction between on- and off-premises signs in the City of Austin's sign code is a facially unconstitutional content-based regulation of speech under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

PARTIES TO THE PROCEEDING

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

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

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BRIEF FOR PETITIONER

The City of Austin has enacted a general sign code to address the problems of esthetic blight and traffic hazards posed by the proliferation of signs. For 38 years, the sign code has included a general ban on off-premises signs—signs that advertise activities off site. The off-premises rule prohibits billboards, which advertise off-premises activities. The code nevertheless allows nonconforming signs that were lawful when installed to remain. But under the code, the degree of nonconformity of such signs cannot increase. Respondents operate billboards in Austin that are grandfathered and thus permitted to continue to display off-premises messages. They sought to convert their billboards to digital signage—thus significantly increasing their esthetic harm and capacity to distract drivers. Austin rejected the digitization requests as barred by its sign code because digitization would increase the degree of the billboards' nonconformity. That left respondents free to use their billboards to display off-premises messages without restrictions based on topic or viewpoint.

The court of appeals nevertheless concluded that Austin's sign code is facially unconstitutional under this Court's decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). It believed that the City's restriction on off-premises signs was a content-based regulation of speech that did not pass strict scrutiny. That holding upends a long tradition in sign regulation of drawing a distinction between on- and off-premises signs. The court's logic would subject to strict scrutiny the federal Highway Beautification Act and countless state and local laws that draw the same distinction.

Reed did not demand that radical result. *Reed*'s analysis of when a law is facially content based turns on whether the law distinguishes between topics or viewpoints; it does not trigger strict scrutiny whenever an official must read a sign to apply a law. Under the proper test, Austin's on/off-premises rule is not content based. Because the Fifth Circuit misread *Reed* and erred in invalidating Austin's law, this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals is reported at 972 F.3d 696 and reprinted in the appendix to the petition for a writ of certiorari at Pet. App. 1a-27a. The opinion of the district court is reported at 377 F. Supp. 3d 670 and reprinted at Pet. App. 30a-53a.

JURISDICTION

The court of appeals entered its judgment on August 25, 2020. Pet. App. 28a-29a. As relevant here, the first paragraph of this Court's Order of March 19, 2020, extended the time for filing a petition for a writ of certiorari to 150 days following the court of appeals' judgment. The petition was filed on January 20, 2021 and granted on June 28, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Section 1 of the Fourteenth Amendment provides: "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; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1.

Relevant provisions of Chapter 25-10 of the applicable version of Austin City Code are reproduced at Pet. App. 54a-63a. The sign code was later amended. *See id*. at 4a-7a, 35a-36a, 39a-40a. All citations in this brief are to the applicable version of the sign code, which is set out in full at J.A. 49-129.

STATEMENT

Respondents, who are in the business of outdoor advertising on billboards, sought to convert their billboards to electronically changeable displays. When the City of Austin rejected their permit applications, respondents sued under the First Amendment. They claimed that Austin's restrictions on off-premises signs constituted a content-based regulation of speech subject to strict scrutiny and that the on/off-premises distinction is invalid under that test. Accordingly, they asserted, Austin had to permit them to digitize their billboards.

The district court rejected that claim, reasoning that Austin's sign code was facially neutral because it

did not ban or curtail discussion of any specific topics or viewpoints and was justified by safety and esthetic interests, which are content-neutral purposes. Austin's sign code, it concluded, was thus subject to intermediate scrutiny and met that standard. Pet. App. 30a-53a. The court of appeals reversed, holding that *Reed v. Town of Gilbert* demands the application of strict scrutiny to an on/off-premises distinction because officials have to read a sign to apply the off-premises rule. It then ruled that the code could not meet that stringent test and invalidated it. *Id.* at 1a-27a.

A. The Relevant Sign Code Provisions

Like many jurisdictions, Austin's sign code distinguishes between signs that advertise activities off the premises on which the sign is located and those that do not. Austin's sign code, as applicable to this case, defines an "off-premise sign" as 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." Sign Code § 25-10-3(11) (J.A. 52). The sign code does not define "on-premises" signs, but certain provisions employ that term. The sign code prohibits any "off-premise sign, unless the sign is authorized by another provision of this chapter." *Id.* § 25-10-102(1) (J.A. 76). This rule allows construction of new on-premises signs but prohibits new off-premises signs.

Existing off-premises signs—which include billboards, J.A. 38—may remain as grandfathered "nonconforming signs." A "nonconforming sign" is one that was "lawfully installed at its current location but does not comply with the requirements of this chapter."

Sign Code § 25-10-3(10) (J.A. 52). The code permits a person to "continue or maintain a nonconforming sign at its existing location," *id.* § 25-10-152(A) (J.A. 95), and to make limited alterations such as changing the "face of the sign," *id.* § 25-10-152(B)(1) (J.A. 95). But any alteration may not "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." *Id.* § 25-10-152(B)(2)(a)-(c) (J.A. 95-96). Under these provisions, a non-digital on-premises sign may convert to use a digital sign face (if not otherwise nonconforming), but a non-digital off-premises sign may not. J.A. 39.

The City's purpose in adopting the sign code, including the off-premises rule, is to "protect the aesthetic value of the city and to protect public safety." J.A. 39.

B. The Current Controversy

1. Respondents are in the business of outdoor advertising, which includes "the ownership and operation of billboards" in the City of Austin and the surrounding areas. J.A. 38. In April and June 2017, Reagan submitted two rounds of permit applications to the City, seeking to install digital sign faces on existing nonconforming billboards. J.A. 39-40. The City denied all the applications, explaining that "[t]hese applications cannot be approved under Section 25-10-152 (*Non-conforming Signs*) because they would change the existing technology used to convey off-premises commercial messages and increase the degree of nonconformity with current regulations relating to off-premises signs." J.A. 28, 34. In June 2017, Lamar submitted its own permit applications, also

seeking to digitize existing billboards. J.A. 40. That August, the City denied all of Lamar's applications for the same reason it denied Reagan's applications. J.A. 10, 40. None of the permit applications by either party indicated what messages would be displayed on the digital billboards. J.A. 155-167.

In June 2017, Reagan sued the City in state court alleging that the on/off-premises distinction was an unconstitutional content-based regulation of speech.[1] J.A. 16; Pet. App. 3a. The City removed to federal court, and Lamar joined the case as an intervenor plaintiff. J.A. 1. Reagan and Lamar then filed amended complaints seeking, as relevant here, declaratory judgments that the sign code's on/off-premises distinction was an impermissible content-based restriction on speech and that the code was invalid and unenforceable. J.A. 8-24. Reagan also sought a declaratory judgment that the sign code was invalid as applied to Reagan. J.A. 22. Lamar did not seek as-applied relief. J.A. 8-14.

2. After a bench trial on stipulated facts, the district court held that the on/off-premises distinction was content neutral and satisfied intermediate scrutiny. Pet. App. 30a-53a. As a threshold matter, the district court raised *sua sponte* the possibility that

[1] Respondents challenged the version of the sign code in place at the time they filed their permit applications. J.A. 49-129. Although Austin amended the sign code in August 2017, the on/off-premises distinction remains materially unchanged from the pre-amendment version of the code. *See* Pet'r Cert. Reply at 11-13. Citations to the sign code reference the version in place when respondents applied for their sign permits. *See supra* at 3.

Reagan and Lamar's claims were moot because of the subsequent amendment of the sign code. *Id.* at 37a. The court found that they were not; the sign code's off-premises rule had not been "sufficiently altered so as to present a substantially different controversy." *Id.* at 39a (internal quotation marks omitted). On the merits, the court held that "*Reed* did not change the First Amendment analysis for on/off premises distinctions." *Id.* at 43a. Rather, "*Reed* affirmed that the phrase 'content based' has a commonsense meaning that requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* at 44a (internal quotation marks omitted). The court explained that the sign code's on/off-premises distinction was not facially content based because, for example, it did "not impose greater restrictions for political messages, religious messages, or any other subject matter, as the impermissible regulation did in *Reed*." *Id.* at 50a. The court thus applied intermediate scrutiny, upheld the on/off-premises distinction under that standard, *id.* at 50a-53a, and denied Reagan and Lamar's requests for declaratory judgments, *id.* at 53a.

3. The court of appeals reversed. Pet. App. 1a-27a. Although the court agreed that the challenge was not moot, *id.* at 7a, it disagreed with the district court's interpretation of *Reed*. The court of appeals held that the sign code's on/off-premises distinction was content based because, "[t]o determine whether a sign is on-premises or off-premises, one must read the sign" and assess whether it advertises "a business, person, activity, goods, products, or services not located on the site where the sign is installed, or … directs persons

to any location not on that site." *Id.* at 14a (quoting Sign Code § 25-10-3(11) (J.A. 52)). The court interpreted *Reed* to mean that "a distinction can be facially content based if it defines regulated speech by its function or purpose." *Id.* at 18a. And, the court concluded, the on/off-premises distinction defined signs according to their "purpose: advertising or directing attention to a business, product, activity, institution, etc., not located at the same location as the sign." *Id.*

The court acknowledged divergent interpretations of *Reed* among its sister courts of appeals. It agreed with the Sixth Circuit, which struck down Tennessee's "nearly identical" on/off-premises distinction in a state law regulating billboards near highways. Pet. App. 15a. Under both Tennessee and Austin's on/off-premises rules, "the government official had to read the message written on the sign and determine its meaning, function, or purpose." *Id.* at 18a. In contrast, the court rejected the D.C. Circuit's approach, which permitted a "cursory inquiry" to determine whether a sign regulation applied to a particular sign without rendering the regulation content based. *Id.* at 16a. The Fifth Circuit explained that it would take "no more than a cursory reading to figure out if a sign supports Candidate A or Candidate B," but such a law would "surely be content based." *Id.* But even under that "cursory inquiry" approach, the court found that Austin's off-premises rule was content based. *Id.*

To determine the applicable level of scrutiny, the court considered whether the provision regulated commercial speech. The court noted that the "parties d[id] not dispute" that the sign code applied to "both commercial and noncommercial speech" and that the

on/off-premises distinction did not exempt any messages based on their commercial or noncommercial nature. *Id.* at 23a. Because the regulation applied "with equal force to both commercial and noncommercial messages," the court determined that strict scrutiny applied. *Id.* at 25a.

Applying strict scrutiny, the court of appeals invalidated the off-premises rule. "Strict scrutiny," the court observed, "is, understandably, a hard standard to meet." *Id.* at 25a. The court reasoned that the code was underinclusive; the City had not argued that on-premises signs were "a greater eyesore than off-premises signs" or that off-premises digital signs "pose[d] a greater risk to public safety than on-premises digital signs." *Id.* at 26a. Accordingly, the court concluded, the City failed to show that the on/off-premises distinction "is narrowly tailored to serve a compelling government interest." *Id.*

SUMMARY OF THE ARGUMENT

The court of appeals erred by concluding that the off-premises rule in Austin's sign code is a content-based regulation of speech subject to strict scrutiny. Longstanding First Amendment principles apply strict scrutiny to content-based laws to avoid governmental favoritism of certain messages or viewpoints. Austin's sign code does not do so. Austin regulates signs based on a commonplace distinction between on-premises and off-premises signs. That distinction does not single out any subjects, topics, or viewpoints for regulation. Under a proper First Amendment analysis, and consistent with this Court's decision in

Reed v. Town of Gilbert, it is a content-neutral regulation that is valid under intermediate scrutiny.

I. Signs and billboards pose particular regulatory problems for federal, state, and local governments. Signs can cause esthetic harms by their size, number, and placement. They can also pose traffic dangers by distracting drivers and obscuring views. Billboards, because of their size, prominence, and attention-getting designs, amplify those concerns. And digital billboards take those concerns to new levels. This Court has accordingly recognized a substantial governmental interest in regulating signs—billboards in particular—that advertise activities off premises.

The regulation of on-premises signs has traveled a different path. On-premises signs—which advertise activities related to the premises—are generally integrated into the existing property and are smaller and less distracting. And they implicate the compelling interest of businesses and property owners to advertise their goods and services on their own property.

Zoning and sign codes have therefore long drawn the distinction that Austin draws: banning off-premises signs while permitting on-premises signs and those that do not refer to any premises at all. The federal Highway Beautification Act, for example, conditions certain state highway funding on restricting billboards on public highways. But it makes exceptions for sale or lease signs pertaining to the property and signs advertising activities located on that property. Austin's law reflects this same pattern, singling out no subject or viewpoint as a regulatory target.

II. The court of appeals nevertheless interpreted *Reed* to mandate strict scrutiny of Austin's distinction because an official cannot identify an off-premises sign without reading it. That interpretation of *Reed* is incorrect.

A. *Reed* invalidated a law that regulated signs according to particular topic or subject. Political signs enjoyed more favorable treatment than ideological signs, which enjoyed more favorable treatment than signs promoting nonprofit, charitable, or religious events. *Reed* clarified that a law that textually drew a line like that could not be rendered content neutral by its justification. But it did not redefine the meaning of a "content-based" law. That point is confirmed by Justice Alito's concurrence, which explained that "[l]imiting speech based on its 'topic' or 'subject' . . . may interfere with democratic self-government and the search for truth," meriting strict scrutiny, but "reasonable sign regulations . . . that would not be content based" include "[r]ules distinguishing between signs with fixed messages and electronic signs with messages that change" and "[r]ules distinguishing between on-premises and off-premises signs." 576 U.S. at 174-75 (Alito, J., concurring). That is the kind of regulation involved here.

B. *Reed*'s reasoning also refutes the idea that a law is content based if an official would have to read a sign to apply the law. *Reed* relied on cases finding laws to be content neutral even though an official would have to assess the speech's meaning to apply the law—even to say whether the regulated conduct involved a flag or a sign. And the Court has not treated a law as content based even where it focused

on a type of speech (such as soliciting) or certain expressive conduct or specific media of expression. In contrast, the seminal cases finding laws to be content based involved laws that singled out topics or subjects for distinct regulation (such as labor picketing or religious speech). Those cases make clear that a content-based law is one that favors or disfavors particular topics or viewpoints. That principle accords with the Constitution's distrust of laws that suppress discussion of certain topics or skew public debate.

C. A read-the-sign approach would be unworkable and harmful to First Amendment values. It would subject virtually all distinctions in sign regulation to strict scrutiny. To avoid this, officials may regulate with a far broader brush, thus suppressing more speech. And when they do not, courts would likely be pressed to dilute strict scrutiny to avoid invaliding reasonable regulations (like house-number identifications or event-related sign regulation). Those results cannot be reconciled with the aim of the First Amendment.

III. Under a proper interpretation of *Reed*, Austin's law is subject to intermediate scrutiny and passes that test.

A. The off-premises rule does not place any topics or viewpoints off limits. Rather, it operates based on the relationship between the sign and its location. It therefore qualifies as content neutral.

B. Under the intermediate scrutiny applicable to content-neutral rules, Austin's distinction is valid. It serves important interests in safety and esthetics, it is properly tailored to the particular dangers of off-

premises advertising, and it leaves ample alternative channels for all ideas and expression.

C. Respondents' facial challenge fails for an additional reason: their request to digitize their grandfathered billboards was denied because it "would change the existing technology used to convey off-premise commercial messages and increase the degree of non-conformity with current regulations relating to off-premise signs," J.A. 28-29, 34-35, and Austin can validly refuse to allow such billboards to digitize on that basis alone. Accordingly, the only way for respondents to facially invalidate Austin's law would be to rely on the overbreadth doctrine. But any effort by respondents to prevail based on the protected speech of others fails: they have not even attempted to establish real and substantial overbreadth.

ARGUMENT

AUSTIN'S DISTINCTION BETWEEN ON- AND OFF-PREMISES SIGNS IS A CONTENT-NEUTRAL REGULATION THAT IS VALID UNDER INTERMEDIATE SCRUTINY

For more than fifty years, jurisdictions throughout the country have distinguished between signs that advertise activities on the premises and those that refer to activities off the premises. The relationship between a place and the message has proved to be a stable and workable basis for regulation, without restricting any topics, viewpoints, or ideas. The on/off-premises distinction plays a pivotal role in regulating billboards—the signs that respondents display in

Austin. Billboards are off-premises signs that implicate to a heightened degree the safety and esthetic concerns that animate sign regulation generally. Accordingly, reliance on the on/off-premises distinction poses no First Amendment threat—here especially, where what is at stake is respondents' desire to digitize their billboards.

In this case, however, the court of appeals concluded that *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), required that the on/off-premises distinction be treated as content based and subject to strict scrutiny because officials must read the sign to apply the code. *Reed* does not so require. Such an interpretation conflicts with *Reed* itself and an array of First Amendment precedents. Those precedents and their underlying principles make clear that content-based laws are those that restrict particular topics or viewpoints or subject them to differential treatment. Austin's law does neither. Accordingly, it is subject to the intermediate scrutiny that generally governs content-neutral laws (and laws directed at commercial speech) and is valid under that test.

I. THE FEDERAL GOVERNMENT AND STATE AND LOCAL JURISDICTIONS HAVE LONG IMPOSED RESTRICTIONS ON "OFF-PREMISES" SIGNS

An important backdrop to assessing Austin's sign code is the history and tradition of off-premises sign regulation—particularly billboard regulation.

A. Signs "pose distinctive problems" that justify regulation because they "obstruct views, distract motorists, displace alternative uses for land, and pose

other problems that legitimately call for regulation." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). Billboards implicate those concerns to a heightened degree. "[W]hatever its communicative function, the billboard remains a large, immobile, and permanent structure." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (internal quotation marks omitted).[2] Billboards are "designed to stand out and apart from [their] surroundings" and placed to draw attention. *Id.* Unlike house numbers, for example, which provide information about a premises to those seeking it, billboards by design draw the viewer's attention *away* from where the viewer was looking, thus raising both esthetic and traffic safety concerns.

Digital billboards, such as the ones respondents seek to install, exacerbate those concerns. These electronic signs use rapidly changing images and bright lights to intensify their effect. Digital billboards rotate advertisements in a "slide show fashion every 6 to 8 seconds,"[3] or more than 10,000 times a day. Their messages can be changed instantaneously and remotely, without the time-intensive labor required to change a traditional sign face. At night, each 6-to-8-second change casts a different color light into the

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[2] Although I-IV of Justice White's opinion was formally designated as a plurality joined by three other Justices, *see* 453 U.S. at 492, Justice Stevens's partial dissent indicated that he "joined" parts I-IV of that opinion, *id.* at 541. *See also City of Ladue*, 512 U.S. at 49 n.8 (noting that "[f]ive members of the Court joined Part IV of Justice White's opinion"). This brief cites those portions of the opinion without the parenthetical reference to "plurality."

[3] Lamar Advertising, "Digital Billboards," https://www.lamar.com/products/digital (last accessed August 12, 2021).

dark sky (and into nearby homes). Unsurprisingly, these features make digital billboards popular among advertisers. *See* Susan C. Sharpe, *"Between Beauty and Beer Signs": Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of 1965*, 64:2 Rutgers L.J. 515, 529-30 (2012). And billboard owners benefit, too. The ability to rotate between images from multiple advertisers, coupled with the flexibility to change the billboard face instantaneously and remotely, enables sign owners to rent digital space to more advertisers for shorter time periods and thus creates the "potential for skyrocketing profits." *Id*.

This Court has long recognized that billboards create two unique problems. First, "billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Metromedia*, 453 U.S. at 510. To some degree, all manner of outdoor off-premises signs, large or small, temporary or permanent, can create esthetic harms. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (referencing *Metromedia*, 453 U.S. at 510, in describing the esthetic harm created by signs affixed to public utility poles). But the most prominent billboards—because of their large size, fixed location, distracting designs, and, for digital billboards, changing images and bright lights—raise unique concerns.

Second, this "visual clutter" generates particular traffic-safety concerns to a greater degree than other modes of communication. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 816-17; *Metromedia*, 453 U.S. at 511-12. Every passer-by is subjected to the esthetic and

safety harms caused by the "visual assault" that these billboards create. *Taxpayers for Vincent*, 466 U.S. at 807. Unlike methods of communication that the listener may choose to ignore, passers-by cannot avoid the imposing view, nor can drivers avoid the safety risks of having their attention drawn toward a large, often colorful roadside structure. The "radio can be turned off, but not so the billboard." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

On-premises signs, in contrast, are by definition integrated with an existing property and are thus less visually distracting than an off-premises sign that stands alone. There is a practical limit to the number of on-site signs a business with a single location can create, but there is no limit to the number of off-premises signs that same business could proliferate. On-premises signs also relate to an existing home, business, or other appropriate activity permitted under local zoning laws and thus are much more likely to be of limited proportions and less esthetically problematic. As one court of appeals evaluating a billboard regulation explained, the "addition of a sign on an existing building … is only incremental damage to the environment; a sign erected on a site with no buildings creates a new insult to the countryside." *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 595 (6th Cir. 1987), *overruled by Thomas v. Bright*, 937 F.3d 721, 724 (6th Cir. 2019) (overruling *Wheeler* in light of *Reed*), *cert. denied*, 141 S. Ct. 194 (2020). With off-premises signs in general and billboards in particular, then, the "substantive evil … is not merely a possible

by-product of the activity, but is created by the medium of expression itself." *Taxpayers for Vincent*, 466 U.S. at 810.

B. The distinct regulation of off-premises signs is a commonplace response to the unique challenges that off-premises signs—particularly billboards—create. The federal Highway Beautification Act was enacted in 1965 specifically to "prevent an unchecked proliferation [of billboards] which not only results in a public eyesore but undoubtedly impedes the effectiveness of billboard advertising." S. Rep. No. 89-709, at 12 (1965); H. Rep. No. 89-1084, at 4 (1965) (same). The Highway Beautification Act adopts the same on/off-premises distinction used by Austin to restrict the construction of billboards along public highways. To "protect the public investment in … highways, to promote the safety and recreational value of public travel, and to preserve natural beauty," the Act establishes criteria for States to maintain "effective control" of signs displayed near designated highways. 23 U.S.C. § 131(a)-(b). Under these criteria, States must limit "outdoor advertising signs, displays, and devices" within 660 feet of certain federal highways, or forfeit 10% of their federal highway funding—with exceptions for "signs, displays, and devices advertising the sale or lease of property *upon which they are located*" and "signs, displays, and devices … advertising activities conducted on the property *on which they are located*." *Id*. at § 131(b), (c) (emphases added).

In two-thirds of the States, laws implementing the Highway Beautification Act incorporate this same on/off-premises distinction to regulate commercial billboards. *See* Pet'r Cert. Reply, App'x A (collecting

statutes).[4] And, like Austin, tens of thousands of municipalities nationwide have adopted this distinction to harmonize private interests in expression with the countervailing governmental interests in safety and esthetics that off-premises signs—especially billboards—implicate.

C. In generally barring new off-premises signs and regulating changes to existing nonconforming off-premises signs, Austin's sign code reflects this long history of distinguishing between signs that are on and off premises. The code generally prohibits off-premises signs, Sign Code § 25-10-102(1) (J.A. 76), except for a limited number of "nonconforming signs" that were lawful when installed, *id.* §§ 25-10-3(10) (J.A. 52), 25-10-152(A) (J.A. 95). Billboards are off-premises signs. J.A. 38. Nonconforming signs may remain in their current location but cannot convert from analog to more distracting forms of display, such as a digital billboard. Sign Code § 25-10-152 (J.A. 95-96). This framework—defining billboards based on a locational nexus and then regulating them differently than other kinds of signs—mirrors the Highway Beautification Act's premises-based distinctions and the on/off-premises distinctions embedded in hundreds of state laws and municipal codes. It aims not at particular subject or viewpoint, but establishes a

[4] Since the May 26, 2021 filing of that brief, Colorado and Iowa have amended their laws to eliminate premises-based distinctions in light of the continuing uncertainty about *Reed*'s reach. *See* Colo. Rev. Stat. Ann. § 43-1-404 *amended by* Colo. Laws 2021 (S.B. 21-263), § 2 (2021) (eliminating on/off-premises distinction); Iowa Code Ann. § 306B.2 *amended by* Iowa Acts 2021 (89 G.A.) ch. 39, S.F. 548, § 3 (eliminating on-premises exceptions to outdoor advertising ban).

regulatory distinction based on the relationship between a place and a sign.

II. CONTENT-BASED REGULATIONS ARE THOSE THAT REGULATE SPECIFIC SUBJECTS OR VIEWPOINTS

In *Reed*, this Court found a sign ordinance that "single[d] out specific subject matter for differential treatment" to be content based, 576 U.S. at 169, noting that the ordinance's restrictions on political, ideological, and nonprofit, religious, and charitable event signs "depend[ed] entirely on the communicative content of the sign," *id.* at 164. Here, in contrast, neither Austin's definition of off-premises sign nor the restrictions placed upon those signs (such as the rule that respondents' signs cannot be digitized) is "targeted at specific subject matter" or "singles out signs bearing a particular message." *Id.* at 169, 171. The court of appeals nonetheless held that *Reed* mandated application of strict scrutiny because an official would need to read the sign to determine if the rule applies. That holding is incorrect.

The off-premises rule—ubiquitous in American law—is quite different from the types of regulations that this Court has deemed "content based," including the ordinance at issue in *Reed*. Justice Alito's concurrence in *Reed* underscored that point, explaining that on/off-premises distinctions would *not* trigger strict scrutiny. *Id.* at 174-75 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring). The court of appeals' "read the sign" test is not only incompatible with *Reed* itself and a number of the Court's other precedents; it

is unworkable and inconsistent with the values underlying this Court's First Amendment jurisprudence.

A. *Reed* Did Not Change The Fundamental Meaning Of Content-Based Regulation

According to the Fifth Circuit, *Reed* "constituted a drastic change in First Amendment jurisprudence" by treating any sign regulation as content based if "one must read the sign" to determine whether the regulation applies. Pet. App. 9a, 14a (internal quotation marks omitted). But *Reed* did not announce that rule. And such a rule would be incompatible with much of what *Reed* says. Instead, *Reed* clarified the order of operations for analyzing whether a law is content based, without overturning this Court's longstanding understanding of what "content based" means: regulation of speech's particular subject matter or viewpoint.

The sign ordinance in *Reed* treated signs differently based *entirely* on the sign's subject matter, a classic content-based restriction. The Town of Gilbert's ordinance prohibited all outdoor signs, but exempted 23 categories, many of which were defined exclusively by their subject matter. 576 U.S. at 159. The Court focused on "[t]hree categories of exempt signs" as central to its analysis of whether the law was content based: ideological signs, political signs, and temporary signs "intended to direct" people to a "qualifying event" held by "a religious, charitable, community service, educational, or other similar nonprofit organization"—the category into which petitioner's sign fell. *Id.* at 159-60 (internal quotation

marks omitted). The problem with the town's ordinance, the Court explained, was that these subject-matter categories "depend[ed] entirely on the communicative content of the sign," and the ordinance treated signs differently based on these categories. *Id*. at 164.

The Court illustrated this point by noting that the "political signs" exception applied only to signs "designed to influence the outcome of an election." *Id*. at 170. The vice of defining signs this way, the Court explained, was not that the town limited signs based on physical or temporal proximity to an event like an election, but that it distinguished signs "because of the topic discussed or the idea or message expressed." *Id*. at 163. That is the "commonsense meaning of the phrase 'content based,'" and the Court did not indicate an intent to modify that understanding. *Id*. On this point, *Reed* thus holds that speech regulations that facially discriminate among categories of speech based solely on subject matter—such as by treating political speech more favorably than ideological speech—are subject to strict scrutiny.

Justice Alito's concurring opinion for three members of the six-member majority, "add[ing] a few words of further explanation," confirms that *Reed* accords with this understanding of subject-matter discrimination. *Id*. at 174 (Alito, J., concurring). Justice Alito explained that what the Court has deemed "[c]ontent-based laws" merit strict scrutiny because "[l]imiting speech *based on its 'topic' or 'subject'* favors those who do not want to disturb the status quo." *Id*. (emphasis added). Justice Alito then articulated a list of "some rules that would not be content based" under

the majority's reasoning "[p]roperly understood," including "[r]ules distinguishing between signs with fixed messages and electronic signs with messages that change" and "[r]ules distinguishing between on-premises and off-premises signs"—that is, both of the rules that are at issue in this case. *Id.* at 174-75. Justice Kennedy, who joined both the *Reed* majority and Justice Alito's concurrence, later echoed this framing: "The First Amendment guards against laws 'targeted at specific subject matter,' a form of speech suppression known as content based discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765-66 (2017) (Kennedy, J., concurring in part) (quoting *Reed*, 576 U.S. at 169); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (*Reed*'s "description" of "content-based" regulation "applies to a law that 'singles out specific subject matter for differential treatment'" (quoting *Reed*, 576 U.S. at 169)).

Reed's contribution was not in redefining the *nature* of a content-based law but in clarifying the analytical *process* courts should use to identify one. The Town of Gilbert and the United States argued that even laws that draw clear and overt content-based distinctions could avoid strict scrutiny if the government's *justification* was unrelated to subject matter or viewpoint. *Reed*, 576 U.S. at 165. The Court rejected this contention. It explained that the "first step in the content-neutrality analysis" is determining whether the law is facially content based, and if it is, the law "is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained'

in the regulated speech." *Id.* at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Only if a law is facially content *neutral* may a court consider the law's justification and purpose, to determine if they independently require application of strict scrutiny. Strict scrutiny thus "applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based." *Id.* at 166 (emphases added).

B. A "Read The Sign" Test Is Incompatible With *Reed* And This Court's Longstanding First Amendment Precedents

The court of appeals saw *Reed* as upending prior understandings and mandating strict scrutiny whenever enforcing a law requires reading a sign. That understanding is mistaken. A test that treats a rule as content based whenever officials must read the sign contradicts the *Reed* majority's own analysis and would require overruling countless precedents of this Court about what "content based" means.

1. The *Reed* majority identified several cases in which the Court had previously found laws "content neutral on [their] face *before* turning to the law's justification or purpose," including *United States v. Eichman*, 496 U.S. 310 (1990), and *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). *Reed*, 576 U.S. at 166. Under the Fifth Circuit's interpretation of *Reed*, neither of the laws at issue in those cases would be considered facially content neutral because an official would have to examine the speech's content to determine the law's ap-

plicability. *Reed* did not suggest that it was overruling these precedents (rather, it relied on them)—so the decision must be read in light of their reasoning.

Eichman involved a statute that prohibited destruction of the American flag. The Court found that the law "contain[ed] no explicit content-based limitation" on its face, even though it prohibited conduct that "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." 496 U.S. at 315, 317 (internal quotation marks omitted). Yet, as the Court itself acknowledged, enforcement of this law would require an official to at least cursorily examine the nature of the expression at issue, so it would qualify as content based under respondents' interpretation of *Reed*.

First, an enforcement official would be required to assess the nature of the individual's conduct to determine whether it constituted "disrespectful treatment" of the flag as required to violate the statute. *Id*. at 317. Second, as a practical matter, the official would have to examine the object at issue to determine it was a flag. As discussed further *infra* at 34-35, applying even the ordinary meaning of "flag" requires an official to recognize aspects of the object's communicative content—its colors, patterns, and symbols—and their meaning to distinguish a flag from any other piece of fabric.

Eichman did not treat these requisites as creating any kind of content or viewpoint discrimination in and of themselves. According to *Reed*, only by looking to the government's *justification* for the law was the Court able to conclude that the law was designed to suppress disfavored speech and thus triggered strict

scrutiny. 576 U.S. at 166. That conclusion is irreconcilable with the court of appeals' reading of *Reed*.

Taxpayers for Vincent similarly found content neutrality even though officials would have to read a sign to determine if it was covered by the law. There, the Court upheld a regulation prohibiting posting of signs on public property, but exempting certain plaques "commemorating an historical, cultural, or artistic event, location or personality" and "the painting of house numbers upon curbs." 466 U.S. at 791 n.1. To apply these exemptions, an official would need to look at the object at issue and judge whether it fell into these categories. But in spite of such an inquiry, this Court emphasized that the "text of the ordinance [was] neutral . . . concerning any speaker's point of view," and did not trigger strict scrutiny. *Id.* at 804. And *Reed* itself again endorsed this ordinance as an example of a facially content-neutral statute. 576 U.S. at 166. The Fifth Circuit's interpretation of *Reed* thus cannot stand alongside the *Reed* Court's own reasoning and the precedents it relied on.

2. The Fifth Circuit's interpretation also overlooks this Court's longstanding approach to identifying a content-based law. As a general matter, the Court has treated a regulation as content based if it regulates speech on a specific subject matter or targets a particular viewpoint. When a regulation "accords preferential treatment to"—or discriminates against—"the expression of views on one particular subject," the Court has subjected the regulation to strict scrutiny. *Carey v. Brown*, 447 U.S. 455, 461 (1980). "When the government targets not subject matter, but particular views taken by speakers on a

subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Multiple cases illustrate that "content discrimination" refers to government regulations that either favor or discriminate against speech on a particular subject. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), often cited as foundational to the Court's doctrine on content-based regulation, makes this point. *Mosley* involved an ordinance that banned picketing near a public school during school hours, except for "peaceful picketing of any school involved in a labor dispute." *Id.* at 93. The Court concluded that "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter." *Id.* at 95. The Court reasoned that the government, as a general matter, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

Similarly, in *Carey*, Illinois prohibited picketing in residential neighborhoods, except picketing on the subject of labor disputes, which meant that the "statute discriminates between lawful and unlawful conduct based on the content of the demonstrator's communication." 447 U.S. at 460. In *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981), the Court held that prohibition of religious speech was subject-matter discrimination. And in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987), the Court found content discrimination where the state law exempted from taxation magazines that "were uniformly devoted to religion or sports," but taxed magazines that reported on other subjects. All of these

cases designated laws as content based when they singled out specific subjects or topics.

In contrast, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed"—that is, laws that do not suppress or favor speech on a particular subject or from a particular viewpoint—"are in most instances content neutral." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). That is true even where application of the regulation requires some consideration of content. For instance, in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981), the Court held that a rule limiting handbilling and solicitation of donations to a specific location at a state fair was not content based. It explained that, even though the rule specifically restricted soliciting, it "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds"; no particular subject (*e.*g., religious solicitation) or viewpoint was subject to less favorable treatment. Yet, distinguishing solicitation from other forms of speech inevitably would require some consideration of content. Similarly, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the prohibition on disclosing illegally intercepted communications, 18 U.S.C. § 2511(1)(c), is "a content-neutral law of general applicability." *Id*. at 526. The Court emphasized that "[t]he statute does not distinguish based on the content of the intercepted conversations," *id*., even though determining that the conversations were illegally intercepted would necessarily mean that a court would have to consider the content of the conversation.

3. A read-the-sign approach would also require overruling other precedents that declined to treat as content based laws that incidentally involved reading speech but did not restrict particular topics or viewpoints. For example, the Court "has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981), and has framed rules appropriate to each medium. *See, e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (political speech at polling places); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (residential lawn signs); *Turner Broad.*, 512 U.S. 622 (cable television); *Heffron*, 452 U.S. 640 (solicitation at a state fair); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980) (billing envelope inserts); *Frisby v. Schultz*, 487 U.S. 474 (1988) (picketing in residential areas); *Greer v. Spock*, 424 U.S. 828 (1976) (Army bases); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (outdoor movie theaters); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space within city-owned transit system); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (broadcast television and radio). Although the mode of speech may sometimes be ascertainable without reading the content, a glance (or more) at the content is often required. Thus, in most of those cases, an official would have to identify the communication by taking note of expressive aspects of the medium.

Similarly, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental

limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). As the earlier discussion of *Eichman* demonstrates, determining that the First Amendment is even implicated in such cases requires considering the expressive content of the speech. Only then does intermediate scrutiny apply, demanding proof of an "important or substantial governmental interest … unrelated to the suppression free expression" and a showing that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. Thus, consideration of an expressive component of conduct or mode of communication does not automatically mandate strict scrutiny, so long as that consideration does not amount to subject-matter or viewpoint discrimination.

Turner Broadcasting illustrates this point. As here, the case involved a mode-of-speech and location-based restriction that inevitably touched on content as applied to particular instances of speech. But the restriction was nonetheless subject to intermediate scrutiny because it involved no subject-matter discrimination. *Turner* held that regulations requiring cable television providers to carry broadcast network signals were not content based because they distinguished between speakers "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." 512 U.S. at 645. The Court reached that conclusion even though cable providers were required to carry only specific broadcasters that "operate[d] within the same television market as the cable system" (that is, had a

required geographic relationship)—specifically including "noncommercial educational television stations"—and even though Congress explained in the must-carry legislation that broadcast television provided an "important source of local news" and other specific programming (thus referring to content). *Id.* at 630, 645-46. The key was that Congress did not mandate programming on particular *subjects*, but instead regulated based on characteristics of the television landscape and the availability of television technologies. *Id.* at 648-49. "[A]bility to hypothesize" potential legislative content preferences did "not cast doubt upon the content-neutral character" of the regulations. *Id.* at 652. Singling out a specific medium of communication or speaker for regulation, the Court held, does not require strict scrutiny where "the differential treatment is 'justified by some special characteristic of the medium being regulated.'" *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

4. These authorities show that the essence of content-based regulation is favoring (or disfavoring) particular topics or viewpoints. That is why *Reed* spoke of content-based regulations as laws that apply "to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 163. The Court repeated this formulation throughout its opinion. *E.g.*, *id.* at 171. The Court recognized that viewpoint discrimination is particularly "egregious." *Id.* at 168 (internal quotation marks omitted). But a speech regulation is content based and may implicate special concerns when it is "targeted at specific subject matter." *Id.* at 169. Justice Alito's concurrence

explained why: "Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo." *Id.* at 174 (Alito, J., concurring).

Those concerns are not implicated in every instance in which an official must read a sign to apply a rule. As the D.C. Circuit explained in *Act Now to Stop War and End Racism Coalition v. District of Columbia*, 846 F.3d 391, 403-05 (D.C. Cir. 2017), under *Reed*, a "bare distinction" that requires an official to read a sign does not automatically trigger strict scrutiny unless the regulation discriminates "based on [the sign's] subject matter" or viewpoint, or had a discriminatory justification. That is why a sign ordinance targeting event-related signs for removal "once an event has passed" is not content based. *Id.* Even though an official must read the sign to apply the law, the law "distinguishes only between signs that are event-related and signs that are not," and "[t]hat distinction is not content-based under *Reed*." *Id.* at 405. That understanding of *Reed*—and not the rigid and formulaic approach of the court of appeals—properly reflects this Court's longstanding approach to saying when a law is content based on its face.

C. A "Read The Sign" Test Is Unworkable, Encourages Draconian Speech Regulation, And Risks Diluting Strict Scrutiny

In addition to being in conflict with this Court's analysis in *Reed* and the larger body of First Amendment law, the court of appeals' "read the sign" test is unworkable in practice. An untold number of municipal ordinances and state and federal laws draw distinctions based not on viewpoint or subject matter,

but on where, when, or how messages may be expressed. The vast majority of these rules do not implicate the First Amendment concerns justifying application of strict scrutiny. They are instead reasonable responses to the necessities of modern life. Application of the Fifth Circuit's test will either force governments to adopt blunter measures (thereby restricting a greater amount of speech) or tempt courts to water down the requirements of strict scrutiny to preserve obviously reasonable laws. Neither end serves the First Amendment's purposes.

1. If the definition of content-based regulation is expanded to encompass any rule that requires even a cursory examination of speech, then much of what cities and States do will suddenly be subject to strict scrutiny. Justice Alito's concurrence in *Reed* identifies many ordinances that would fall into this category. For example, a rule that imposes restrictions on "signs advertising a one-time event" requires examination of the sign's message. 576 U.S. at 175 (Alito, J., concurring). Even if the rule made no distinctions "based on topic or subject," *id.*, under the Fifth Circuit's approach, it would still need to satisfy strict scrutiny to survive. Pet. App. 18a-21a; *cf. Act Now*, 846 F.3d at 403 (upholding an ordinance that "makes a content-neutral distinction between event-related signs and those not related to an event").

Indeed, any reasonable sign regulation would likely trigger strict scrutiny under the Fifth Circuit's test. A "sign" is distinguished from other objects—say, a flag or a mural—by its communicative content.

See Sign, Merriam-Webster Dictionary[5] ("a display … used to identify or advertise a place of business or a product"). So any rule that regulates signs as a medium would necessarily require an enforcement official to read the sign to establish that it is, in fact, a sign, and not something else. This type of cursory examination of content to determine a rule's applicability—even to just establish the contours of the mode of expression—would unnecessarily trigger strict scrutiny under the Fifth Circuit's rule.

Some circuits have already begun applying *Reed* in this untenable way. In *Willson v. City of Bel-Nor*, 924 F.3d 995 (8th Cir. 2019), the Eighth Circuit encountered a local sign ordinance that exempted flags from its regulation of signs. The law defined a flag as "any fabric or bunting containing distinctive colors, patterns or symbols used as a symbol of a government or institution." *Id.* at 1000. Even though the city interpreted this definition "exceptionally broadly" to cover any object that would ordinarily be understood as a flag, the court of appeals struck the law down as facially content based because "whether a fabric is a sign or a flag" required examination of the object's "content." *Id.* But all this provision of the ordinance did was define a manner of expression—"flag"—using its ordinary meaning. *See, e.g.*, Flag, Black's Law Dictionary (11th ed. 2019) ("A usu. rectangular piece of cloth, bunting, or other material decorated with a *distinctive design* and used as a *symbol or signal*." (emphasis added)). If jurisdictions cannot even do that

[5] https://www.merriam-webster.com/dictionary/sign.

without triggering strict scrutiny, then many reasonable regulations will be held unconstitutional.

Signs and flags, of course, are not the only forms of expression necessarily defined by their communicative content and frequently subject to commonsense regulations. States and localities have adopted all sorts of reasonable rules governing parades, concerts, graffiti, speeches, and public gatherings that do not regulate what subjects may be discussed. Yet it would be impossible to impose even modest regulations on those categories of expression if local law enforcement must ignore all communicative aspects of the speech. A "parade" is not merely a group of marchers, but "marchers who are making some sort of collective point." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995). What distinguishes graffiti from a blank wall is that it contains some sort of "inscription, figure, or mark" meant to communicate something. *Vincenty v. Bloomberg*, 476 F.3d 74, 77 (2d Cir. 2007). The ordinary definition of "picketing," this Court has explained, encompasses activity that is not only located in a particular place, but "focused on" that location. *Frisby*, 487 U.S. at 482. And it is hard to imagine how a local police officer could apply a law regulating "live musical performances" without listening to music to confirm it is not some other medium of communication such as "a political speech, a religious sermon, an educational presentation, an aerobics class, or a poetry reading." *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1318 (11th Cir. 2020).

The effects of the Fifth Circuit's rule would not be limited to local ordinances. The federal government

and the States have enacted numerous laws regulating communication—"the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection," etc.—that, in practice, require at least a cursory examination of the speech's content to be administered. *Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. at 2360 (Breyer, J., concurring in part). And of course, the federal Highway Beautification Act and implementing statutes in most States draw the same on/off-premises distinction that the Fifth Circuit held requires strict scrutiny here. *See supra* at 18-19. Many other areas of First Amendment law also allow at least some consideration of content, including, critically, the commercial speech doctrine, as well as enforcement of libel laws, identification of protected versus unprotected speech, government subsidization of speech, and speech affecting critical government functions. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188-89 (2007) ("[W]e have identified numerous situations in which" the risk of "driv[ing] certain ideas or viewpoints from the marketplace … is inconsequential, so that strict scrutiny is unwarranted." (internal quotation marks omitted)). No decision of this Court has suggested that all regulations that touch on content must automatically be subjected to strict scrutiny.

2. Adoption of the Fifth Circuit's test would perversely result in less speech, not more. Prohibiting state and local governments from drawing commonsense distinctions such as between on- and off-premises signs (unless they satisfy the rigors of strict

scrutiny) would mean that only broad and blunt tools remain available to regulate signs. Faced with the choice between allowing an unlimited number of signs or prohibiting all signs, States and localities are likely to choose the more speech-restrictive option.

Take as an example a routine type of sign exemption, one that is also embedded in Austin's on/off-premises distinction. Many localities prohibit signs in the right-of-way as a reasonable safety measure but allow signs advertising the sale or rent of the property where the sign is located. *See, e.g.*, Sign Code § 25-10-1(A)(2) (J.A. 49); Pet'r Cert. Reply, App'x B. This same exception is embedded in the federal Highway Beautification Act. 23 U.S.C. § 131(c)(2). Under the Fifth Circuit's rule, such an exception would not be permissible. Jurisdictions with such laws would thus be faced with an unpalatable choice: allow all types of signs in the right-of-way, creating real-world esthetic and safety concerns, or ban all signs in this space. *See Reed*, 576 U.S. at 181 (Kagan, J., concurring in the judgment). It is not difficult to imagine that most jurisdictions would make the safer, but more speech-restrictive choice.

The only other alternative would be to water down the strict scrutiny test to save commonsense sign regulations. As currently articulated, this Court has "emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). That stringent standard may generally be justified when it applies only to laws that facially discriminate based on viewpoint or subject matter, or that were enacted

with such pernicious goals. But routinely asking courts to apply strict scrutiny to laws that do not implicate traditional First Amendment concerns—and that are manifestly reasonable and beneficial to communities—would put significant pressure on the traditional strength of strict scrutiny analysis. That will only "weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force." *Reed*, 576 U.S. at 178 (Breyer, J., concurring in the judgment).

III. AUSTIN'S ORDINANCE IS A CONTENT-NEUTRAL PROVISION THAT SATISFIES INTERMEDIATE SCRUTINY

Under a correct understanding of *Reed*, the court of appeals' holding that Austin's off-premises rule is content based fails: the rule does not restrict particular topics or viewpoints, but addresses the relationship between a particular form of speech and a location. Applying intermediate scrutiny, Austin's distinction is valid because it serves important interests in an appropriately tailored fashion and leaves ample room for free expression. And respondents have not even attempted to show that Austin's rule is facially overbroad.

A. Austin's Off-Premises Rule Is Content Neutral

1. Austin's off-premises rule regulates all subjects and viewpoints equally. The ordinance defines signs based on their off-premises status (*i.e.*, the lack of nexus between the sign and its location); it does not prohibit anyone from speaking on any particular topic or voicing any particular viewpoint. All it says is that,

to use an outdoor sign to communicate a message, the sign must not advertise something at a different location. Thus, the relationship between location, mode of communication, and activity on the property is the regulatory target of the off-premises rule, not speech on any particular subject or expressing any particular viewpoint.

That point is underscored by considering the nature of permitted signs. On-premises business signs identify the business or activity being conducted and advertise its goods or services; the sign is "in actuality part of the business itself, just as the structure housing the business is part of it." *United Advert. Corp. v. Borough of Raritan*, 93 A.2d 362, 365 (N.J. 1952) (Brennan, J.). The same goes for signs in residential neighborhoods expressing the beliefs or views of the home's inhabitant. Such signs are often not off-premises at all, because they do not advertise off-premises activities. Accordingly, such signs can address a wide array of subjects and express a vast field of viewpoints—as varied as American society itself. Thus, as many courts have held, differentiating between on-premises signs and off-premises signs does "not favor[] one message over another," *State by Spannaus v. Hopf*, 323 N.W.2d 746, 754 (Minn. 1982), as in the cases where this Court has applied strict scrutiny based on subject-matter discrimination. The rule itself is agnostic as to subject matter and viewpoint: it treats political signs, commercial signs, ideological signs, religious signs, and signs on all other subjects and viewpoints equally. It is, therefore, content neutral.

2. Both before and after *Reed*, courts have held that rules distinguishing off-premises signs are not content based because the rules do not discriminate based on particular subjects, topics, or viewpoints. For example, in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), the Third Circuit upheld Delaware's state highway beautification law, which prohibited off-premises signs in certain locations while allowing on-premises signs. The court reasoned that the rule was "not a content-based exception at all" because it did "not preclude any particular message from being voiced in any place; it merely establishes the appropriate relationship between the location and the use of an outdoor sign to convey a particular message." *Id.* at 1067; *see also id.* at 1079-80 (Alito, J., concurring). Thus, although some review of "the content of the sign" was required to determine that relationship, *id.* at 1067 (majority opinion), the statute did not discriminate against any speech on any particular subject matter or from any particular viewpoint on the basis of that review. Rather, the rule equally limited access to billboards as a mode of communication as to all subjects, viewpoints, and speakers. Post-*Reed*, the Third Circuit recognized *Rappa*'s continuing validity on this point, concluding that *Reed* did not support applying strict scrutiny to premises-based sign rules. *Adams Outdoor Advert. Ltd. P'ship v. Pa. Dep't of Transp.*, 930 F.3d 199, 207 n.1 (3d Cir. 2019).

Numerous other federal and state courts have also continued to hold that on/off-premises distinctions are not content based under *Reed*. *See* Pet'r Cert. Reply, App'x C (collecting cases); *Clear Channel Outdoor,*

Inc. v. Dir., Dep't of Fin. of Balt. City, 247 A.3d 740, 759 (Md. 2021) (joining "the many courts and commentators who have concluded that, even after the *Reed* decision, a distinction between on-premises signs and off-premises signs . . . does not discriminate on the basis of content").

These holdings align with this Court's recognition that the First Amendment limits subject-matter- and viewpoint-based restrictions to prevent the government from "effectively driv[ing] certain ideas or viewpoints from the marketplace." *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992). Because a restriction on off-premises signs does not target any particular idea or viewpoint, it cannot realistically have such an effect.

3. For these reasons, subjecting Austin's off-premises rule—and countless other federal, state, and local laws that draw similar premises-based distinctions—to automatic strict scrutiny would not serve any valid First Amendment purpose. Neither traditional rationale for strict scrutiny—government hostility (or favoritism) toward a particular message or interference with the free marketplace of ideas—supports application of strict scrutiny to Austin's distinction between on-premises and off-premises signs. *See R.A.V.*, 505 U.S. at 386; *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980). Regulating signs differently based on a locational nexus does not promote speech on certain topics or hinder the free exchange of ideas on any subject. And as applied here, the only consequence of the distinction is the manner in which grandfathered nonconforming signs can advertise (through fixed, rather than digital, media). It

is difficult to see any threat to First Amendment values in a rule that allows existing billboards to display any message, but restricts *digital* messaging in contexts that are particularly prone to pose the greatest safety and esthetic hazards.

4. This does not mean that on/off-premises distinctions will never be subject to strict scrutiny. As *Reed* explained, even a facially content-neutral law can trigger strict scrutiny if the law's "justification or purpose" is to engage in viewpoint-based or subject-matter-based discrimination. 576 U.S. at 166. This second step of the *Reed* analysis ensures that laws that appear neutral on their face but are nonetheless motivated by an "illicit legislative intent" will still be rigorously scrutinized. *Id.* at 165 (internal quotation marks omitted). This backstop eliminates any need to overextend the first step of *Reed* to encompass regulations that do not draw distinctions based on subject matter or viewpoint.

Not even a hint of such an illicit motive exists here. Nothing either in the law or in the record suggests that the City's off-premises rule was enacted to suppress discussion of certain topics or viewpoints. To the contrary, respondents *stipulated* that the City's purpose in adopting this sign regulation was "to protect the aesthetic value of the city and to protect public safety," and they offered no evidence that these motives were pretextual. J.A. 39. Accordingly, Austin's justifications for the rule are content neutral and further demonstrate that intermediate scrutiny is appropriate.

B. Austin's Off-Premises Rule Meets Intermediate Scrutiny

As this Court has explained, "only content-based" regulations of speech are subject to strict scrutiny. *Reed*, 576 U.S. at 172. Because Austin's off-premises rule is "content neutral," it is evaluated under the lesser standard of intermediate scrutiny. *Id.*; *see also Turner Broad.*, 512 U.S. at 642; Pet. App. 40a (stipulating that intermediate scrutiny is the governing rubric if the law is content-neutral).

In a variety of contexts, the Court has held that government may impose reasonable content-neutral restrictions on speech, provided the restrictions are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted) (time, place, and manner regulations); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (content-neutral burdens); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293-94 (1984) (time, place, and manner restrictions and symbolic conduct where the conduct is subject to regulation); *O'Brien*, 391 U.S. 367, 381 (1968) (content-neutral regulation of conduct with an incidental effect on expression). Those standards are met here.

1. Austin's governmental interests in regulating the proliferation of new off-premises signs are traffic safety and esthetics. J.A. 39; Pet. App. 34a. Whether a particular governmental interest qualifies as "significant" depends in part on the "uniqueness of each medium of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 n.8 (1981). Accordingly,

when evaluating the significance of these interests, it is necessary to consider signs' "special attributes," including their "characteristic nature and function." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981).

In the context of signs, it is "well settled that the state may legitimately exercise its police powers to advance esthetic values." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). In *Taxpayers for Vincent*, the Court explained that municipalities have a "weighty" esthetic interest in "proscribing intrusive and unpleasant formats for expression." *Id.* at 806. And it "reaffirmed" the Court's prior conclusion in *Metromedia* that an "interest in avoiding visual clutter" was sufficiently substantial to justify a prohibition on off-premises signs. *Id.* at 806-07; *see also Metromedia*, 453 U.S. at 507-08. "[T]he visual assault" on a city's citizens created by "accumulation of signs" constitutes "a significant substantive evil within the City's power to prohibit." *Taxpayers for Vincent*, 466 U.S. at 807.

Likewise, Austin undoubtedly has a significant interest in limiting the distinct traffic-safety hazards that off-premises signs like billboards create. "[S]igns take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). That Austin's traffic safety interest is a substantial government goal is beyond "substantial doubt." *Metromedia*, 453 U.S. at 507.

2. Both Austin's general prohibition on new off-premises signs and its restriction on converting existing off-premises signs to more intrusive digital formats are narrowly tailored to vindicate its safety and esthetic interests. To satisfy narrow tailoring, a law "need not be the least restrictive or least intrusive means" of achieving its desired ends. *Ward*, 491 U.S. at 798. Rather, the means must not be "substantially broader than necessary to achieve the government's interest," even if some less-restrictive alternative is available. *Id*. at 800.

By limiting the overall number of billboards as well as preventing existing billboards from converting to more distracting digital sign faces, Austin's regulation is not substantially broader than necessary to achieve its goals. Instead, it is targeted at harms "created by the medium of expression itself," which justifies a prohibition on new off-premises signs. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (quoting *Taxpayers for Vincent*, 466 U.S. at 808) (prohibition on signs "did no more than eliminate the exact source of the evil it sought to remedy"); *Metromedia*, 453 U.S. at 511 ("[T]he prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics.").

Neither of Austin's substantial government interests is undermined by the sign ordinance's application to only off-premises signs. By the time of *Metromedia*, that argument had already "been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising." *Id*.

That reasoning is sound: "[O]ffsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising," both for safety and esthetics. *Id.* On-premises signs, in contrast, are "used primarily for the purpose of identifying" a property, and thus ordinarily do not implicate those concerns to nearly the same degree. *Id.* at 525 n.5 (Brennan, J., concurring in the judgment); *see Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 n.20 (1993). And while off-premises signs could proliferate exponentially, wherever advertisers may place them, on-premises signs are by definition integrated with an existing property and thus create less "visual clutter." *E.g.*, *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 595 (6th Cir. 1987), *overruled by Thomas v. Bright*, 937 F.3d 721, 724 (6th Cir. 2019) (overruling *Wheeler* in light of *Reed*), *cert. denied*, 141 S. Ct. 194 (2020). Finally, allowing on-premises signs ensures that property owners, as speakers entitled to First Amendment protections, have ample channels to communicate information about the activities they conduct on their property. *See, e.g.*, *City of Ladue*, 512 U.S. at 54 (explaining that signs on residential property are a "unique and important" method of communication); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977). That Austin has "stopped short" of fully prohibiting all signage is a reason to uphold the ordinance, not strike it down. *Metromedia*, 453 U.S. at 508.

3. The final requirement, that the ordinance leave open ample alternative channels for communication, is easily met, and respondents have never argued oth-

erwise. *Ward*, 491 U.S. at 802. As noted, the ordinance does not bar on-premises signs, which are less likely to create traffic safety or esthetic problems. Although the ordinance prohibits the creation of additional off-premises billboards, it does not eliminate the billboards that existed before the ordinance's enactment in 1983, which may continue displaying off-premises content (as well as content that has no reference to a place at all), and which are grandfathered as nonconforming signs—barred only, as relevant here, from digitizing. Indeed, the record reflects that the two respondents here have at least 84 billboards between them displaying a variety of messages. J.A. 39-41, 46-48. Finally, the ordinance imposes no restrictions whatsoever on other avenues for communicating commercial and noncommercial messages, such as flyers, television, radio, or the internet. *See Taxpayers for Vincent*, 466 U.S. at 812.

C. Austin's Off-Premises Rule Is Constitutional As Applied To Respondents And Is Not Overbroad

Respondents' facial challenge cannot succeed for an additional reason: the off-premises rule has constitutional applications (including as applied to respondents here), and respondents failed even to attempt to show it was unconstitutionally overbroad. Respondents have never disputed that, even though their billboards display some noncommercial speech, they mostly display commercial speech, the regulation of which is subject to intermediate scrutiny. Because respondents' commercial speech was sufficient to trigger the off-premises rule, Austin could constitutionally reject respondents' permit applications. The

proper inquiry, then, is overbreadth. And respondents have never sought to introduce evidence that the law is substantially overbroad compared to its plainly legitimate sweep.

1. Respondents "are in the business of outdoor advertising, which includes the ownership and operation of billboards." J.A. 38. And respondents have not contested the point that billboards "primarily share commercial messages and only intermittent noncommercial messages are affected" by Austin's regulatory scheme.[6] Respondents asserted in reply only that Austin's *regulation* of noncommercial off-premises speech "is not 'intermittent.'"[7] That much is true: the ordinance does not flip off and on during the day, month, or year. *See* Pet. App. 23a. But while respondents do display some noncommercial messages, *id.* at 2a, they do not and cannot contest that they primarily display commercial advertising that falls within the commercial speech doctrine. Indeed, Austin denied their permit applications "because they would change the existing technology used to convey *off-premise commercial messages* and increase the degree of nonconformity with current regulations relating to off-premise signs." *Id.* at 34a (quoting denial letters; emphasis added). Neither respondents' applications to digitize nor Austin's rejections made any reference to

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[6] Pet. App. 23a; *see* Br. for Appellee, *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 19-50354, 2019 WL 4132262, at *15-*16 (5th Cir. Aug. 22, 2019).

[7] *See* Reply Br. for Appellants, *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 19-50354, 2019 WL 4547011, at *19-*20 (5th Cir. Sept. 11, 2019).

specific topics or messages that respondents intended to include on their signs.

As applied to billboards like those owned by respondents, Austin's prohibition on the erection of new off-premises signs and its anti-digitization rule for existing nonconforming signs are valid commercial speech regulations. Commercial speech is afforded "lesser protection" than "other constitutionally guaranteed expression." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). A government restriction on commercial speech is subject to a four-part test: "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Metromedia*, 453 U.S. at 507 (citing *Central Hudson*, 447 U.S. at 563-66).

Metromedia made clear that a prohibition on off-premises commercial advertising satisfies all these factors because it is narrowly tailored to directly further the government's "substantial" interests in traffic safety and esthetics. *Id.* at 507-11. A regulation targeted at billboards is "obviously the most direct and perhaps the only effective approach to solving the problems they create." *Id.* at 508. And the Court's prior summary decision in *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978), had "reject[ed] the submission" that "prohibiting offsite commercial advertising violates the First Amendment." *Id.* at

498-99. *Metromedia* therefore establishes that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Id.* at 512; *see City of Ladue*, 512 U.S. at 49 n.8 (*Metromedia* "approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards.").

That respondents may periodically display sign faces that contain noncommercial speech does not change the analysis. Respondents have never disputed that each of the billboards at issue displays commercial speech that falls within the off-premises sign definition. *See also* J.A. 28, 34 (acknowledging that respondents' signs are "commercial billboards"). And, as noted, Austin denied respondents' applications to convert their signs to digital formats "because they would change the existing technology used to convey off-premise commercial messages." J.A. 28, 34. So the rules applicable to off-premises signs—including the anti-digitization rule—would apply to respondents' signs regardless of their occasional display of noncommercial speech. Their display of commercial speech would alone suffice to deny their applications to digitize. Accordingly, Austin's off-premises rule is constitutional as applied to respondents in this case. *See Discovery Network*, 507 U.S. at 412, 417 (magazines "consist[ing] primarily of promotional material" but including some noncommercial speech properly analyzed as commercial speech); *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894 (9th Cir. 2007) (where size and height restrictions were independently sufficient to deny permits, court declined to reach challenge to off-site ban).

2. Because the ordinance is valid as applied to respondents, they could only prevail on their facial challenge by establishing that the law is unconstitutional as applied to others. Yet that issue is not before the Court because respondents have never attempted to make an overbreadth challenge. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 190-91 (2007) (declining to consider constitutionality of statute as applied to parties not before the Court "because at no stage of this litigation has respondent made an overbreadth challenge"). And nothing in the record would support a claim of facial overbreadth.

To invalidate a law in all its applications, the statute's overbreadth must be "real" and "substantial" when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Although Austin's off-premises rule applies to both commercial and noncommercial messages, respondents introduced no evidence that its real-world application to noncommercial speech is substantial compared to its legitimate application to commercial displays on billboards. Unlike the ordinance at issue in *Metromedia*, the rules at issue do not broadly ban all noncommercial signs. To the contrary, Austin's off-premises definition is quite similar to the definition of "billboard" at issue in *Suffolk*, which was understood to cover largely commercial speech. *Compare Metromedia*, 453 U.S. at 499 ("A sign which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed." (quoting municipal ordinance in

Suffolk)) *with* J.A. 52 ("[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." (quoting Sign Code § 25-10-3(11))). *Metromedia* held that *Suffolk*'s definition "did not sweep within its scope [a] broad range of noncommercial speech," *Metromedia*, 453 U.S. at 499, and the same conclusion applies here.

The overbreadth doctrine would not justify invalidating Austin's entire prohibition on off-premises signs based on its potential application to some noncommercial speech on billboards. The district court stated that "there is no evidence in the record" that Austin "prohibited noncommercial billboards." Pet. App. 52a. And respondents have never attempted to point to any "substantial number" of actual applications to others in which the off-premises rule would be unconstitutional, as required to succeed on a facial challenge. *United States v. Stevens*, 559 U.S. 460, 473 (2010). Indeed, respondents and the court of appeals relied heavily on hypothetical scenarios, rather than any evidence that the sign code actually restricts any meaningful number of purely noncommercial signs by others. This is contrary to this Court's instruction that "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Repub. Party*, 552 U.S. 442, 449-50 (2008); *see also United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing [a law] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). There

is no reason to apply the "strong medicine" of the overbreadth doctrine here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 13, 2021