No. 20-1029

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

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

Respondents.

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

AMICUS BRIEF OF OUTFRONT MEDIA INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Outfront Media Inc. (Outfront) is one of the three largest outdoor advertising companies in the United States. Outfront operates in each of the 25 largest advertising markets in the United States and 145 markets in total across the United States and Canada.

Outfront supports the reasonable regulation of signage. Outfront, like all other outdoor advertising companies, is subject to state and local statutes and ordinances that distinguish between what are commonly referred to as on-premise and off-premise signs. The distinction within the regulatory framework and permitting schemes governing these unique sign types has been central to the orderly regulation of outdoor advertising for decades and has been repeatedly upheld as constitutional. Outfront is aligned with cities, states, environmental groups, and the industry's largest trade association in supporting this regulatory framework.

Outfront has an interest in contributing to the Court's understanding of the outdoor advertising industry and the regulatory environment in which it

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[1] This brief is filed with the written consent of both parties. Pursuant to Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amicus, its members, or its counsel contributed money intended to fund its preparation or submission.

operates. Outfront has an interest in avoiding a broad ruling in this case that would upset decades of commercial relationships, property interests, and other settled expectations that have developed in light of this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and decades of other decisions approving the on- and off-premise distinction in connection with permitting decisions.

Outfront has a further interest in avoiding a broad ruling in this case that would be at odds with the Highway Beautification Act and the multitude of state and local land use planning ordinances throughout the country. A stable regulatory structure helps to secure public support for outdoor advertising, including the development of appropriate ways for well-located digital signage to be included in the built environment.

Outfront believes strongly in the pride of place outdoor advertising holds as a critical medium for First Amendment expression. At the same time, Outfront has a strong interest in preserving the historical and content-neutral manner in which the permitting of distinct types of advertising structures has long been regulated. Accordingly, Outfront opposes regulatory and enforcement mechanisms that would purport unreasonably to regulate advertising content. At the same time, Outfront recognizes the permissibility and necessity of land use authorities maintaining effective control over the manner in which the location, maintenance, modification, improvement and structural characteristics of outdoor advertising structures are regulated.

Outfront offers outdoor advertising in a variety of formats, including traditional static and digital billboards; spectacular full motion displays such as in Times Square; advertising integrated into mass transit systems in New York, Washington DC, Boston, and Los Angeles; and more.

Outfront is committed to serving the needs of advertisers, consumers, and communities. Outfront works with tens of thousands of local and national businesses, nonprofits, governmental agencies, and political campaigns across the country as advertisers or lessors.

Newsweek has named Outfront to its list of America's most responsible companies. https://www.newsweek.com/americas-most-responsible-companies-2021.

Outfront is a member of the Outdoor Advertising Association of America (OAAA), the principal trade association representing the outdoor advertising industry in the United States. OAAA routinely advocates for the reasonable regulation of signs, including through the preservation of the Highway Beautification Act and similar state laws. *See, e.g.*, Brief for the OAAA and State Affiliates as Amici Curiae, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019).[2] The Highway Beautification Act has for decades preserved the visual environment on our

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[2] Portions of this brief are adapted from and restate the arguments that the OAAA as amicus made to the Sixth Circuit in *Bright*.

nation's highways. Like the OAAA (and Scenic America), Outfront supports the Highway Beautification Act. That statute, which includes detailed interstate highway regulations and Congressional findings, implicates federal interests not present in the City of Austin's ("City" or "Austin") Sign Code[3] and is not at issue in this case.

SUMMARY OF ARGUMENT

Outdoor advertising signs have long been regulated through codes that distinguish between their on- or off-premise character. The distinction, endorsed by the Court in *Metromedia, Inc. v. City of San Diego*, guides much of all sign regulation today and is grounded in the reality that some advertising signs serve fundamentally different purposes that can be wholly related or unrelated to their particular location and land use. This Court's decision in *Reed v. Gilbert* did not change the nature of traditional sign regulation grounded in the on-/off-premise distinction and its proper classification as content-neutral.

The Sign Code in the City of Austin, like the codes in many cities, utilizes the on-/off-premise distinction for certain regulatory purposes and designates certain off-premise signs as

[3] "Sign Code" refers to the Municipal Code in effect at the time of the applications at issue here. We refer to the "Amended Sign Code" to reflect changes made in 2017. The Amended Sign Code is available at: https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT25LADE_CH25-10SIRE.

nonconforming uses that are not permitted to be modified in ways that expand their degree of nonconformity. The denial of a permit application for a substantial modification of an off-premise nonconforming use that relies on applicable on-premise criteria is not a content-based decision.

ARGUMENT

I. THE FIFTH CIRCUIT MISUNDERSTOOD THE DISTINCTION BETWEEN ON- AND OFF-PREMISE SIGNS AND MISAPPLIED THE FIRST AMENDMENT

A. Overview Of The Outdoor Advertising Industry And Regulations

1. The industry

Outdoor advertising has been a fundamental means of communication in this country virtually since its inception. *See* Jacob Loshin, Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation, 30 Environs Envtl. L. & Pol'y J. 101, 105-107 (2006); Donald W. Hendon, Origin and Early Development of Outdoor Advertising in the United States, in Historical Perspectives in Consumer Research 309-313 (1985). Today, there are more than 300,000 billboards nationwide. *See Out of Home Advertising* 2-3. The outdoor advertising industry has produced annual total revenues of more than $7 billion in recent years,

representing almost 5% of all advertising spending. *See id.* at 2-4.

Outdoor advertising benefits advertisers, viewers, and communities by providing a platform for the out of home presentation of truthful, timely messages in creative ways. Outdoor advertising has achieved a new level of importance in American life in the 20th and 21st centuries because it is a unique and efficient medium of communication. Billboards are particularly effective for providing succinct and direct messages to an increasingly mobile population. From political advocacy to commercial advertisements to governmental messaging and public service announcements, outdoor advertising is often the most effective way to communicate a point to a particular geographic region.

Outdoor advertising is also among the most cost-effective means of reaching Americans. *See* Charles R. Taylor et al., *Business Perceptions of the Role of Billboards in the U.S. Economy*, 43 J. Advertising Research 150, 151 (June 2003). Businesses across the country depend on the unique advantages of outdoor advertising to attract consumers and raise awareness. *See Out of Home Advertising* 3-4. That is especially true of local businesses, which account for three out of every four billboards. *See id.* at 3.

2. The regulation of nonconforming structures

Outdoor advertising involves the use of land, property, and structures. The outdoor advertising

industry is therefore subject to state and local land use and permitting regulations, as well as building codes that can vary across the thousands of counties, cities, and towns across the country. While there are variations among these codes, there are also consistent themes.

While many cities once allowed sign companies to erect new billboard structures, many no longer do so. Because of the unique way in which outdoor advertising law evolved in this country in relation to First Amendment principles, *see infra* at I.A.3-5, some sign codes articulate such regulation as a ban on "off-site" or "off-premise" signs. Others use terms like freestanding sign, pole sign, or the like.

However denominated, such prohibitions are not typically as absolute as they may sound at first blush. Either by ordinance or as a result of state laws, such bans typically preserve the ability of existing signs to continue in use as lawful "nonconforming" structures.

Lawful nonconforming structures are generally entitled to continue in operation, and owners retain the right, among others, to engage in customary maintenance and repair. Often this includes the right to maintain the structural integrity of signs and rebuild in the case of a natural disaster or occurrence that causes the destruction of the sign. Some municipal laws allow structures that have become nonconforming in their current location to relocate and to continue their use in a new location. Cities use such laws, for example, to encourage

lawful nonconforming signs that were built in residential areas to move to commercial districts.

Recognition of the right to maintain a nonconforming structure or to relocate it to a different zone derives in part from the fact that cities would have to pay just compensation were they to apply new prohibitions to property rights that have already vested. *See, e.g.*, U.S. Const., Amend. V. Most cities want the flexibility to adopt new land use regulations as times and needs change, and to shift land uses over time as a result of natural attrition, but without taking on this financial burden or having to resort to use of their eminent domain powers to otherwise achieve their planning goals. In addition to these Fifth Amendment concerns, the First Amendment impact of nonconforming rights is that sign companies and their advertisers generally retain existing opportunities for expression on existing structures when new restrictions are enacted.

The City of Austin provides opportunities to relocate lawful nonconforming sign structures and prohibits increases in the degree of nonconformity of nonconforming structures. Sign Code § 25-10-3(10) (J.A. 52); *id.* § 25-10-152 (J.A. 95-106) (nonconforming signs). In doing so, Austin is similar to numerous other cities across the country.[4]

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[4] Some cities allow nonconforming signs to upgrade to digital technology in commercial, industrial, or entertainment zones. Some programs involve a "relocation" process. While Austin does not make this option available now, it may choose, like

3. The on-/off-premise distinction in the regulation of outdoor advertising

Municipal codes using the term "off-premise" to describe an advertising structure are a matter of historical evolution and practice. The point is to distinguish a typical on-premise identification sign for a brick and mortar store or business from off-premise signs that serve a fundamentally different function.

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

Typically, because buildings with businesses are large in number and operate in close proximity to one another, signage relating to the use of such buildings is relatively small in size. In addition, numerous signs can exist on the same lot with minimal spacing required between them and without overwhelming the visual environment. Think of a typical Main Street with many small, irregular signs or the collection of signs on a

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other cities, to do so in the future. Such a decision would allow dynamic messaging in appropriate locations.

monument at the entrance of a shopping plaza, each one ancillary to a small business.

Off-premise signs, however, serve a fundamentally different purpose than on-premise signs and, accordingly, are regulated in a fundamentally different manner. While an on-premise sign communicates information about the business where the sign is located to individuals already at that location, an off-premise sign communicates information about activities, goods, services and ideas not physically connected to that location. In this way, off-premise signs uniquely allow an airline to entice people in New York to travel to Hawaii, allow a radio station to attract an audience of drivers to its new format regardless of where it is broadcast, allow a local politician running for higher office to reach new potential voters, or allow a bakery in Georgetown to attract tourists arriving to town in the North East part of Washington, DC.

Cities that have opted to authorize structures for off-premise signs typically subject off-premise signs to specific regulatory regimes that allow these signs to be significantly larger in size than on-premise signs, but impose additional restrictions to maintain balance in the visual environment. Examples of such restrictions include spacing restrictions for the distances between signs and from areas where signs are not allowed; setback restrictions; other location restrictions; lighting restrictions; and orientation restrictions specifying whether and how a sign is displayed in relation to a

particular street, intersection, or adjacent residential zoning use.

The Sign Code in effect in the City of Austin at the time Plaintiffs submitted their applications included restrictions of this kind governing, for example, the degree of nonconformity with current regulations, Sign Code § 25-10-152(B)(2)(a) (J.A. 95); sign area, *e.g*., *id.* § 25-10-101(B)(3) (J.A. 69-70); *id.* § 25-10-123(B)(2) (J.A. 82-83); sign height, *e.g*., *id.* § 25-10-101(B)(5)(a) (J.A. 70); *id.* § 25-10-123(B)(3) (J.A. 82-83); setback requirements, *e.g*., *id.* § 25-10-191 (J.A. 121); location, *e.g*., *id.* §§ 25-10-121 - 25-10-133 (J.A. 79-94 (defining different sign districts in relation to surrounding land uses)); *id.* § 25-10-152(B)(5)(c) (J.A. 98-102 (districts for relocated signs)); and number of signs per lot, *e.g., id.* § 25-10-123(B)(1) (J.A. 82); *and id.* § 25-10-131 (J.A. 91-92).

4. The permitting process for signs

A typical large format billboard, known in the industry as a "bulletin," includes an advertising display of 672 square feet (14' x 48'). By way of comparison, bulletins are more than twice the size of each frieze that adorns the Courtroom of the U.S. Supreme Court.[5] Another standard billboard size is a "poster," typically measuring 12' x 24'. Posters are

[5] *See* https://www.supremecourt.gov/about/northandsouthwalls.pdf ("Each frieze in the Courtroom measures 40 feet long by 7 feet, 2 inches high").

eight square feet larger than the Supreme Court friezes.

Because of their size, the process for installing a billboard or converting its display to digital message technology usually requires a permit. The need to obtain a building permit to install or modify a structure is not a content-based requirement.

Because different structural requirements apply to on- and off-premise signs, an applicant typically elects at the time it submits an application, whether it is seeking to install or modify an on- or off-premise sign. If the applicant wants a larger sign, available for advertising by all comers, it will apply for an off-premise sign permit.

Cities reviewing permit applications review them in light of the applicant's election of the type of sign the applicant wishes to install. Cities then apply the standards relevant to that election in deciding whether a permit can issue. The practice in the City of Austin appears consistent with this standard procedure.[6] The City denied permits here for structural modifications that Austin's Sign Code does not authorize for the signs at issue.

The Sign Code does not generally authorize nonconforming off-premise signs to be converted to digital, a right available only for on-premise signs with different characteristics and which do not enjoy

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[6] Examples of signs and applications pertinent to this case can be found at J.A. 41, 130-147 & 155-167.

the benefits accorded to off-premise signs, which are governed by a separate regulatory regime that allows nonconforming off-premise signs of large formats, at greater heights, and, significantly, untethered to the business being operated at the location of the sign.[7] (J.A. 155-167).

5. The outdoor advertising industry and its regulators have relied on *Metromedia* for decades

The distinction many city codes have made between on-premise and off-premise signs is supported by (and in many cases was likely adopted because of) this Court's *Metromedia* decision.

In *Metromedia*, this Court "sustain[ed] the distinction between offsite and onsite commercial advertising." 453 U.S. 490, 511 n.17 (1981). In doing so, it built on decades of case law accepting this distinction. *Id.* at 511-512.

Several major outdoor advertising markets, including the City of Los Angeles, which is among the most significant locations for outdoor

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[7] As set forth in Section III below, neither the District Court nor the Fifth Circuit addressed whether the permit applications here would have been granted but for the on-/off-premise distinction. In a similar situation, a Fifth Circuit panel ruled earlier this month that a sign permit applicant had not established standing. *See Reagan National Advertising of Austin, Inc. v. City of Cedar Park*, --- Fed. Appx. ---, 2021 WL 3484698 (5th Cir. August 6, 2021).

advertising in the country, adopted an on-/off-site distinction in the years following the 1981 *Metromedia* decision. *Compare* Los Angeles Municipal Code §§ 91.2901-91.8906 (1985 revision contained in 1970-1987 compilation reflecting that before and after *Metromedia*, Los Angeles continued to define signs as pole signs, roof signs, and the like, and did not use the term "off-site sign"); *and* Los Angeles Municipal Code § 14.4.2 (current "off-site sign" definition), *available at* https://codelibrary.amlegal.com/codes/los_angeles/latest/lamc/0-0-0-199316#JD_14.4.2. Los Angeles first began using the term "off-site" sign in 1986. Presumably cities like Los Angeles began to use this terminology not because they wanted to regulate content, but because, guided by *Metromedia*, they wanted to remain free from constitutional challenge.

In the meantime, settled practices, business models, property rights, and commercial agreements have developed as a result of this regulatory distinction. This would not have happened if fundamental problems existed with the application of such laws.

As Chief Justice Roberts wrote, regarding standards that evolve as a result of long historical practice relating to property rights: "in this area as others, 'a page of history is worth a volume of logic.'" *eBay v. MercExchange*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (*quoting New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) (opinion for the Court by Holmes, J.)).

History is an important guide here, too. The on-/off-premise distinction has been with us for a long time, and it has not caused serious problems. The hypothetical example of an overzealous inspector reading sign copy and imposing fines based on message content, if it happens at all, is highly unusual. If it were to happen, the issue would presumably be confined to structural and safety issues or confirming that the use accorded with the one the sign owner had itself selected in applying for the permit. In any event, this is not what happened in the City of Austin.

B. This Case Is Distinguishable From *Reed v. Town Of Gilbert, Ariz.*

The Fifth Circuit's ruling invalidating the City of Austin sign regulations rested on the conclusion that the City's distinction between on-premise and off-premise signs is content-based. That conclusion is incorrect under *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).

Whether a sign qualifies as on-premise turns primarily on its location, not on "the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. As a result, the designation of a sign as on-premise is content-neutral. That proposition is supported by longstanding Supreme Court precedent predating *Reed*, and the majority of lower courts to have considered the issue after *Reed* have agreed. The Fifth Circuit's holding that Austin's sign regulations violate the First Amendment therefore cannot stand, and its judgment should be reversed.

1. *Reed* involved an enforcement action that was based entirely on the message of a sign.

In *Reed*, the Supreme Court considered the constitutionality of the municipal sign code of Gilbert, Arizona. 576 U.S. 155. The City's code generally prohibited the display of outdoor signs anywhere in Gilbert without a permit, subject to an exception for events "sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at 159-161 (citation omitted). The code restricted the size of temporary directional signs and also specified how long before and after the qualifying event they could be displayed. *Id.* at 161. The code applied different restrictions to other categories of excepted signs, such as "ideological signs" and "political signs." *Id.* at 159-161. The plaintiffs in *Reed* were a small community church and its pastor. The church did not own a building, so it held services at elementary schools or other locations in or near Gilbert. *See id.* at 161. Each week, church members would post signs displaying the church's name, along with the time and location of the upcoming service. *See id.* The town cited the church for exceeding the time limits for displaying temporary directional signs. *Id.* When attempts to negotiate an accommodation failed, the church and its pastor filed suit, alleging that the Gilbert sign code violated the First Amendment. *See id.* at 162.

This Court agreed with the church, holding that the sign code constituted an impermissible content-

based regulation of speech. *See id.* at 163. The Court began by observing that, under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 163-164 (internal series of exceptions). Among the exceptions was one for "Temporary Directional Signs Relating to a Qualifying Event"—that is, signs designed to direct passers-by to any "assembly, gathering, activity, or meeting." *See id.* at 159-161 (quotation marks and citation omitted). "Government regulation," the Court continued, "is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*." *Id.* at 163 (emphasis added).

Under that standard, the Gilbert sign code was impermissibly content-based because "[t]he restrictions . . . that apply to any given sign . . . depend *entirely* on the communicative content of the sign." *Id.* at 164 (emphasis added). To illustrate its point, the Court gave an example of three signs that the code would treat differently based entirely on content: If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. *Id.* Because "the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas," the regulation drew impermissible content-based

distinctions. *Id.* Under the strict scrutiny applicable to content-based regulations, the Court concluded, the restriction on temporary directional signs could not survive. *See id.* at 171-172.

Justice Alito, joined by Justices Kennedy and Sotomayor—half of the six-Justice majority—filed a concurring opinion. *See id.* at 174 (Alito, J., concurring). Justice Alito explained that content-based laws merit strict scrutiny "because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Id.* In particular, "[l]imiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo" and thus "may interfere with democratic self-government and the search for truth." *Id.* At the same time, Justice Alito emphasized that governments are not "powerless to enact and enforce reasonable sign regulations." *Id.* To illustrate the permissible bounds of sign regulation, he offered examples of "rules that would not be content based." *Id.* Among those were rules "distinguishing between the placement of signs on private and public property"; rules "regulating the size of signs"; rules "distinguish[ing] between the placement of signs on commercial and residential property"; and, as especially relevant here, "[r]ules distinguishing between on-premises and off-premises signs." *Id.*

As Justice Alito's concurring opinion in *Reed* correctly suggests, the City of Austin's distinction between on- and off-premise signs is not content-based. In the words of the majority opinion in *Reed*, on-premise and off-premise signs are not treated

differently "because of the topic discussed or the idea or message expressed." *Id.* at 163. Instead, the distinction between those signs depends primarily on their location, the associated land use, the relationship between the land use and the sign, and the use the sign operator selected for the sign. The regulatory interest is in enabling different types of outdoor advertising to function in the same physical environment. And while it may be true that subject matter cannot be entirely eliminated in considering whether a sign relates to its premises, the essence of the matter is the location of the property, the function of the sign, and the use the operator elected.

The Court should therefore make clear the on-/off-premise distinction remains content neutral. *Reed* did not silently work a fundamental change in decades of caselaw on this issue and does not require thousands of cities across the country to rewrite their sign codes.

So long as the test for content-neutral distinctions is satisfied, building and zoning codes may treat large structures available for all comers differently from smaller signs that are used to identify an on-premise business or activity and that need to coexist with many others doing the same.

Notably, the application of the on-/off-premise distinction at the permitting stage typically involves no review of message content. That is true in this case, where the relevant permit applications did not describe the messages they were planning to show. (J.A. 155-167).

Rather, a permit applicant is invited to designate whether the sign will be used in connection with an existing business, and if so the on-premise rules govern. If, instead, the sign will be used as part of the market for third-party outdoor advertising, the content-neutral off-premise rules will govern.[8]

The *Reed* majority's Locke hypotheticals illustrate how distant this case is from core First Amendment concerns. The essence of the matter is whether digital sign faces can be installed on particular structures for which the relevant permit applications were denied. This does not mean the signs cannot display messages relating to John Locke at all, but rather that they cannot be modified by converting their static faces to digital faces capable of electronically displaying a series of John Locke quotes and images in 8-second increments.

When the City of Austin denied the conversion applications, no inspector made any decision that the reason for denying the permit had anything to do with content relating to John Locke, or any other content. The signs may still be used to carry any message the operators or advertisers like about John Locke. On-premise signs, under the City's amended ordinance, may also carry any noncommercial message. (J.A. 150 (describing amendment to Sign Code § 25-10-2 (2017))). The technological

[8] Discriminatory enforcement, such as where a city creates mechanisms to police regulatory compliance for off-premise but not on-premise signs raise different issues not presented here.

restriction is not based on content but on the regulatory framework in Austin governing off-premise signs generally.

2. *Reed* did not overrule prior cases holding that the on-/off-premise distinction is content neutral.

The conclusion that Austin's distinction between on-premise and off-premise signs is not content-based is consistent with pre-*Reed* Supreme Court precedent. In *Metromedia*, the Court considered the constitutionality of a San Diego billboard ordinance that drew a similar distinction between on-premise and off-premise signs. *See* 453 U.S. at 503. Although the Court ultimately held that the ordinance was unconstitutional on its face, a majority of the Court agreed that the distinction between on-premise and off-premise signs was permissible. *See id.* at 503-512 (plurality opinion); *id.* at 541 (Stevens, J., dissenting in part). That determination was consistent with a series of earlier summary affirmances by the Court, in which the Court determined that similar distinctions between on-premise and off-premise signs did not present a substantial question under the First Amendment. *See id.* at 498-500 (collecting cases).

Reed did not cite, much less explicitly overrule, *Metromedia*. The Supreme Court, like Congress, does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 468 (2001). Thus, when "a precedent of [the] Court has direct application in a case, yet appears to rest

on reasons rejected in some other line of decisions," courts should "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted).

Consistent with *Metromedia*, the majority of lower courts that have addressed on-premise/off-premise distinctions after *Reed* have held that such distinctions are not content-based. For example, in *Contest Promotions, LLC* v. *City & County of San Francisco*, 2015 WL 4571564 (N.D. Cal. July 28, 2015), *aff'd*, 704 Fed. Appx. 665 (9th Cir. 2017), an advertising company challenged a city code allowing on-premise advertising only if it related to the "primary use" of the premise. *See id.* at *3-*4. The court concluded that the restriction was not content-based. *Id.* at *4. "The distinction between primary versus non-primary activities," the court explained, "is fundamentally concerned with the location of the sign relative to the location of the product which it advertises"; as a result, the provision at issue, "unlike the law in *Reed*," "does not single out specific subject matter or specific speakers for disfavored treatment." *Id.* (internal quotation marks and alterations omitted). The court explained that there is "no danger that the challenged law will work as a prohibition of public discussion of an entire topic," because "one store's non-primary use will be another store's primary use." *Id.* at *4 (internal quotation marks omitted).

Other courts considering on-/off-premise distinctions have reached the same result. *See*, *e.g.*,

ArchitectureArt, LLC v. *City of San Diego*, 231 F. Supp. 3d 828, 839 (S.D. Cal. 2017); *Geft Outdoor LLC v. Consolidated City of Indianapolis and County of Marion, Indiana*, 187 F. Supp. 3d 1002, 1016-1017 (S.D. Ind. 2016); *Citizens for Free Speech, LLC* v. *County of Alameda*, 114 F. Supp. 3d 952, 968-969 (N.D. Cal. 2015); *Lamar Central Outdoor, LLC* v. *City of Los Angeles*, 245 Cal. App. 4th 610, 623 (2016); *but see Auspro Enterprises, LP* v. *Texas Department of Transportation*, 506 S.W.3d 688, 696-701 (Tex. App. 2016) (holding that a Texas law limiting the time during which political signs could be displayed was content-based, stating in dicta that on-premise/off-premise distinctions could be considered content-based), *review granted and judgment vacated as moot* (April 6, 2018).

3. *Reed* is also inapplicable because the City's determination was not related to message content.

This case is distinguishable from *Reed* because it did not involve the review of any message content. It relates to permits for a structural modification for signs that are nonconforming.

The City's denial letters point to the code provision governing nonconforming signs, as well as the off-premise nature of the signs. (J.A. 28-30, 34-36). If a city can designate existing off-premise signs as nonconforming, it can limit the degree to which the non-conformity can be increased. That is the essence of the right to continue as a nonconforming structure or use.

A denial can rest on multiple grounds, and a sign can be nonconforming for reasons other than its off-premise status. If a permit applicant applied for a sign using terms like "freestanding" sign or "roof" sign, rather than "off-premise" sign, the City would review the application according to the standards governing such signs, and might still conclude that the sign was nonconforming and that the permit had to be denied. Such a denial could stem, for example, from applicable size and/or height restrictions governing the structures. Sign Code §§ 25-10-123 to 25-10-132 (J.A. 82-92). *Reed* does not make such rules content based simply because they regulate structures that are used for speech.

II. THIS CASE DOES NOT CONCERN THE HIGHWAY BEAUTIFICATION ACT

Outdoor advertising is a heavily regulated industry at the federal, state, and local levels. The federal and state governments have cooperated in regulating outdoor advertising since the federal Bonus Act of 1958, which amended the Federal-Aid Highway Act of 1956 to provide a 0.5% bonus in federal highway aid to states that voluntarily controlled outdoor advertising along interstate highways. *See* Pub. L. No. 85-381, § 122, 72 Stat. 89, 95.

In 1965, Congress went a step further and enacted the Highway Beautification Act (HBA), Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. § 131), which establishes a grant-in-aid condition with which States must comply in order to receive full federal highway funding. The HBA aims "to

promote the safety and recreational value of public travel, and to preserve natural beauty" along the interstate highway system. 23 U.S.C. § 131(a). It was, in large part, a response to a lack of stable and reasonable regulation of signage on the Nation's highways. *See*, *e.g.*, *Highway Beautification: Hearing on H.R. 8487 and Related Bills Before the House Committee on Public Works*, 89th Cong., 1st Sess. 5 (1965) (statement of Secretary of Commerce Connor); 111 Cong. Rec. 26,270 (1965) (statement of Congressman Wright).

To that end, the HBA requires States to maintain "effective control" of outdoor advertising along federal highways, which includes ensuring that signs comply with the requirements of any applicable federal-state agreement. 23 U.S.C. § 131(b); 23 C.F.R. § 750.704(b). All fifty States entered into federal-state agreements pursuant to the HBA in the 1960s and 1970s. *See Scenic America, Inc.* v. *United States Department of Transportation*, 836 F.3d 42, 46 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 2 (2017). If a State fails to exercise "effective control" over outdoor advertising, the Department of Transportation may reduce the State's federal highway funding by 10%. 23 U.S.C. § 131(b).

Of particular relevance here, in striking a compromise between the total prohibition and total lack of regulation of outdoor advertising, the HBA distinguishes between on-premise and off-premise signs. *See* 23 U.S.C. § 131(c). It defines "[e]ffective control" as limiting signs located within certain distances of certain roadways to, *inter alia*,

"directional and official signs and notices," "landmark signs" already in existence, "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.* It also allows other signs in commercial or industrial areas, the "size, lighting and spacing" of which must be determined by federal-state agreement. 23 U.S.C. § 131(d).

In the wake of the HBA, virtually every State has enacted outdoor advertising regulations that similarly distinguish between on-premise and off-premise signs. *See*, *e.g.*, Ala. Code § 23-1-273 (2017); Alaska Stat. §§ 19.25.090, 19.25.105 (2017); Ariz. Rev. Stat. § 28-7902 (2017); Ark. Code § 27-74-302 (2017); Cal. Bus. & Prof. Code § 5442.5 (2017); Colo. Rev. Stat. Ann. §§ 43-1-403, 43-1-404 (2017); Del. Code Ann. tit. 17, § 1121 (2017); Fla. Stat. § 479.15 (2017); Ga. Code Ann. § 32-6-72 (2017); Hawaii Rev. Stat. §§ 264-72, 445-112 (2017); Idaho Code Ann. § 40-1910A (2017); 225 Ill. Comp. Stat. Ann. 440/3.17-4.04 (2017); Ind. Code Ann. § 8-23-20-7 (2017); Iowa Code Ann. § 306B.2 (2017); Kan. Stat. Ann. § 68-2233 (2017); Ky. Rev. Stat. § 177.841 (2017); La. Stat. Ann. § 48:461.2 (2017); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914 (2017); Md. Code Ann., Transp. §§ 8-741, 8-744 (2017); Mass. Gen. Laws Ann. ch. 93D, § 2 (2017); Mich. Comp. Laws Ann. §§ 252.302, 252.313 (2017); Minn. Stat. Ann. § 173.08 (2017); Miss. Code § 49-23-5 (2017); Neb. Rev. Stat. § 39-218 (2017); N.H. Rev. Stat. Ann. § 238:24 (2017); N.J. Stat. Ann. § 27:5-11 (2017);

Nev. Rev. Stat. § 410.320 (2017); N.C. Gen. Stat. Ann. § 113A-165 (2017); Ohio Rev. Code Ann. §§ 5516.06, 5516.061 (2017); Okla. Stat. Ann. tit. 69, §§ 1273-1274 (2017); S.C. Code §§ 39-14-20, 39-14-30 (2017); S.D. Codified Laws §§ 31-29-63, 31-29-63.4 (2017); Utah Code Ann. § 72-7-504 (2017); Vt. Stat. Ann. tit. 10, §§ 488, 493 (2017); Va. Code § 33.2-1217 (2017); Wash. Code § 47.42.040 (2017); Wyo. Stat. § 24-10-104 (2017). So too have countless municipalities across the country. *See*, *e.g.*, Cincinnati, Ohio, Municipal Code §§ 895- 1-O, 1427-03-O1 (2018); Dallas, Tex., Code §§ 51A-7.1715, 51A-7.306 (2017); Elizabethtown, Ky., Zoning Ordinance §§ 7.10.1-7.10.2 (2017); San Diego, Cal., Municipal Code § 142.1210(a)(1) (2017). Even the States considered to have the most restrictive limitations on outdoor advertising—those that have otherwise effectively banned billboards completely—have exemptions for on-premise signs. *See* Alaska Stat. §§ 19.25.090, 19.25.105; Hawaii Rev. Stat. §§ 264-72, 445-112; 23 Maine Rev. Stat. tit. 23, §§ 1903, 1908, 1914; Vt. Stat. Ann. tit. 10, §§ 488, 493; *see also* Patricia E. Salkin, *American Law of Zoning* § 26:2 (5th ed. 2017) (discussing those States' billboard bans).

However this Court rules with respect to the City of Austin, it should make clear that the HBA and its state analogues implicate unique interests relating to transportation, safety, and aesthetics and a unique federal framework that is not raised here.

III. THIS CASE PRESENTS SERIOUS QUESTIONS OF STANDING

This Court has "'an obligation to assure [itself]' of litigants' standing under Article III." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 340 (2006); *Frank v. Gaos*, --- U.S. ---, 139 S. Ct. 1041, 1043-44 (2019) (vacating decision in light of "substantial questions" regarding standing).

"[A]t an irreducible minimum," the constitutional requisites under Article III for the existence of standing are (1) that the plaintiff must personally have suffered some actual or threatened injury; (2) that the injury can fairly be traced to the challenged action of the defendant; and (3) that the injury is likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Though courts often consider them together, "causation" and "redressability" are separate inquiries. *See Sprint Commc'ns Co., L.P. v. APCC Servs*., 554 U.S. 269, 286–87 (2008). The former examines whether the plaintiff has shown that "but for" the action complained of, it would not have been injured. *Id.* The latter examines whether there is a "substantial likelihood" that the alleged injury will "be redressed through the litigation." *Id.*; *see also Simon v. Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 45 (1976) (showing of redressability requires a "substantial likelihood" that the alleged harm will be redressed by victory in the litigation).

"The party invoking federal jurisdiction bears the burden of establishing these elements" by submitting affidavits or other evidence. *Lujan*, 504 U.S. at 561; *see also Wittman v. Personhuballah*, 578 U.S. 1076, 136 S. Ct. 1732, 1736-37 (2016); *see also Warth v. Seldin*, 422 U.S. 490, 507 (1975) (noting plaintiffs had relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief.").

Earlier this month, the Fifth Circuit applied these concepts to another case involving outdoor advertising. *See Reagan National Advertising of Austin, Inc. v. City of Cedar Park*, --- Fed. Appx. ---, 2021 WL 3484698 (5th Cir. August 6, 2021). Notwithstanding the City of Austin decision, a panel of the Fifth Circuit held that the sign operator lacked standing to sue the City of Cedar Park over the denial of digital conversion permit applications. 2021 WL 3484698, at *1. The Court concluded that the applicant's "signs are not treated differently on the basis of their content." *Id*. This is because Cedar Park's Code, "properly interpreted, prevents construction of new 'pylon signs' regardless of the on-/off-premises distinction." *Id.*

Here, while the City relied on the on-/off-premise distinction in denying permit applications, no further administrative process occurred. Through such a process, the City might have based its determinations on aspects of the applications beyond those addressed in its initial denials.

Neither the District Court nor the Fifth Circuit has addressed this point, and it is not apparent from either the First Amended Complaint (J.A. 15-24) or the Stipulation of Facts (J.A. 37-48) whether the permits would have been granted but for the on-/off-premise distinction.

Because the permit applications in the record, when compared to Sign Code requirements governing size, height, and nonconforming use raise serious questions whether the applications would have been granted but for the on-/off-premise distinction, the District Court and the Fifth Circuit ought not to have proceeded to the merits without addressing standing.

It would be inappropriate to disturb the settled expectations of regulators, communities, or the rest of the outdoor advertising industry in a case in which Plaintiffs may lack standing.

CONCLUSION

The judgment of the Fifth Circuit should be reversed or vacated.

Respectfully submitted,

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