No. 20–1029

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org
Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment.

SUMMARY OF ARGUMENT

Commercial speech merits the full protection of the First Amendment. As the Court recognized in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, a "particular consumer's interest in the free flow of commercial information, . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 425 U.S. 748, 763

[1] All parties have consented to the filing of this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

(1976). This should come as no surprise given the intimate relationship between the exchange of products and services and the ability of individuals to feed, clothe, heal, educate, entertain, and transport themselves—in short, to satisfy both the most basic needs and the highest aspirations of life.

Although direct regulation of speech is typically subject to strict scrutiny, this Court has made two assumptions to justify the application of intermediate scrutiny to commercial speech regulation. First, that the state's power to regulate commercial transactions extends to speech inherent to those transactions. And second, that the definition of commercial speech is narrow, limited to proposing a commercial transaction, such as: "I will sell you the X prescription drug at the Y price." *Id*. at 761. To the extent these justifications are sufficient to overcome full First Amendment protection merited by speech that sits at the heart of day-to-day living, they should be rigorously limited to carve-out only the most narrow exception from the general rule.

But that is not what has happened. Instead, the exception has swallowed the rule, with ever expansive definitions of "commercial" absorbing speech regarding personal history, topics of public interest, research results, or general product information where no transaction is proposed. This case exemplifies how using the doctrine of commercial speech to prop up laws that are wholly speech-based can burden far more speech than mere transactional information.

The City of Austin sign code differentiated between on-premise and off-premise signs. Had the

City defined on-premise and off-premise without reference to what the sign said, there would be no dispute. But it didn't. Instead, Austin chose to define "off-premise" by the sign's content so that determining whether a sign is on-premise or off-premise requires reading the sign, analyzing what it says, and applying the Code to the meaning of the sign.[2] That is facially content-based.

Under *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015), disposition of this case would be straightforward. Content-based speech regulations are subject to strict scrutiny. Here, the Fifth Circuit held the regulation does not satisfy strict scrutiny and neither party disputes that result. Pet. App. 2a.

The question thus is whether there is some loophole to *Reed* that would allow strict scrutiny to be bypassed if the content of the sign were deemed to be commercial speech. But it is unclear how one might determine whether speech is commercial without first considering its content and triggering strict scrutiny by doing so. *Reed* did not require such an analysis; and, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), does not answer these questions.

The confusion could be eliminated by rationalizing the treatment of all speech under the same content-based level of scrutiny provided by *Reed*—with only regulation of commercial activity that incidentally implicates speech as the narrow exception. Such an

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[2] "OFF-PREMISE SIGN means a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Pet. App. 54a (§ 25-10-3(11)).

approach would not vanquish all sign regulation but instead would require that such regulation be based on characteristics such as size, location, or technology that are not defined by content, unless strict scrutiny could be satisfied.

This straightforward approach would eliminate the lingering anomaly between the treatment of content-based regulation under *Reed* and the illusion that speech can be deemed commercial or noncommercial without reference to its content. This fiction has caused enough mischief.

ARGUMENT

I. COMMERCIAL SPEECH DISTINCTIONS CAN ONLY SURVIVE *REED* FOR SPEECH INCIDENTAL TO REGULABLE CONDUCT.

Whether commercial speech distinctions can survive *Reed* presents a paradox arising from the presumption that government can tell whether content is commercial without actually looking at it. This presumption only ever made sense if one had independent knowledge that the speaker was engaged in regulable business activity such that the associated speech was part of that activity. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions."); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (commercial speech "occurs in an area traditionally subject to government regulation"). But, like the status of Schrödinger's cat, the state of

speech cannot be established without observing its content.

This paradox could be resolved by relying on preexisting commercial activity that determines the status of the content without analyzing the content itself. Such an approach would resemble regulation of speech incidental to lawful regulation of conduct where the speech is not regulated as a stand-alone matter but rather as a manifestation of the regulated activity. *See Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 62 (2006). *See also R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). In cases like these, the distinction between speech intrinsic to commercial activity and noncommercial speech may still make sense.

The edges of this issue, however, have bedeviled courts for decades and are not amenable to easy metaphysical description. But after *Reed*, wherever speech is not part of a concurrent business activity, *i.e.*, if the speech is on a sign, a handbill, the radio, *etc.*, where it can be independently perceived, *Reed* requires that the initial analysis of content be subject to strict scrutiny. And, while the philosophical edges may be hard to pin down, the practical logistics are not: if the words must be read first and delved for meaning before they can be categorized, then strict

scrutiny applies. From a practical standpoint, the process is straightforward.

The Court has tried to provide clarity regarding the unequal treatment of commercial speech by distinguishing some commercial speech as "core" based on certain attributes,[3] but nuanced evaluation of subtle characteristics muddies the analysis.[4]

The Fifth Circuit here essentially sidestepped the question, holding that because the "Sign Code is a content-based regulation that is not subject to the commercial speech exception, strict scrutiny applies, and the City has not satisfied that standard." Pet. App. 8a. But this approach only works if the commercial/noncommercial distinction is not in

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[3] *E.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 n. 17 (1993) (indicating that "core" commercial speech would include the availability, nature, and prices of products and services); *Bolger v. Youngs Drug Prod. Corp*., 463 U.S. 60, 66–67 (1983) ("Most of appellee's mailings fall within the core notion of commercial speech-speech which does no more than propose a commercial transaction.") (cleaned up).

[4] *E.g., Bolger*, 463 U.S. at 66–67 ("[P]roper classification as commercial or non-commercial speech . . . presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. . . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. . . . Finally, the fact that [defendant] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.") (citations omitted); *44 Liquormart*, 517 U.S. at 504 ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

dispute, such as where the commercial activity is regulated and any speech is merely incidental to it. It leaves unanswered the question of *how* to determine whether speech that is standing alone is commercial without considering its content.

This Court could kick the can down the road—at least in part—and adopt the Fifth Circuit's approach, in which the commercial/noncommercial distinction could persist if the parties did not dispute it, *i.e.*, if everyone stipulated that Schrödinger's cat is alive, there would be no need to open the box. But that approach would be a ruse, because wherever a dispute arises over whether speech is commercial, as has happened so many times before, content must be examined, and *Reed* must be satisfied.

Indeed, the Fifth Circuit noted that this Court "has warned against parsing speech in order to apply the proper test. Where 'the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.'" Pet. App. 24a (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). If the Court's warning from *Riley* has substance, it casts into doubt whether the commercial/noncommercial distinction is meaningful at all when applied to pure speech.

The Court should take the opportunity to rationalize the two models, acknowledge the fiction that commercial speech can be identified without examining its content, and apply strict scrutiny across the board—at least where pure speech is regulated.

Such an approach would not require abandoning the government's interest in protecting consumers from untruths, for "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia Pharmacy Board*, 425 U.S. at 721. What other government interest could there be in commercial speech? When the facts are available, the public can draw its own conclusions. The Court has repeatedly warned against paternalistic protections. *See, e.g., 44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). So too here where the on-premise/off-premise, commercial/noncommercial distinction fosters unnecessary government immersion in the content of speech.

A. "Commercial" or "Noncommercial" is a Conundrum the Court Should Address as Necessary to Full Resolution of this Case.

Any distinction between commercial and noncommercial speech becomes increasingly arbitrary the farther removed the speech is from basic transactional information. This issue, which was highlighted in *Metromedia*, 453 U.S. 490, also stymied the Fifth Circuit here. Justice Brennan, in *Metromedia*, provided a few examples of just how hard it is to draw non-arbitrary distinctions and how inappropriate it would be to place such a responsibility on bureaucrats:

> I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to

> permit: the first billboard contains the message "Visit Joe's Ice Cream Shoppe"; the second, "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; the third, "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; and the fourth, "Joe says to support dairy price supports; they mean lower prices for you at his Shoppe." Or how about some San Diego Padres baseball fans—with no connection to the team—who together rent a billboard and communicate the message "Support the San Diego Padres, a great baseball team." May the city decide that a United Automobile Workers billboard with the message "Be a patriot—do not buy Japanese-manufactured cars" is "commercial" and therefore forbid it? What if the same sign is placed by Chrysler?

Id. at 538–39 (Brennan, J., concurring).

The forty years since *Metromedia* have provided no clarity on how or where to draw the line on categorizing sign content. The Fifth Circuit noted that when the panel posed a series of hypotheticals at oral argument, counsel for the City struggled to answer whether these signs were on-premises or off-premises:

- Could Sally have a digital sign in her front yard that says "Sally makes quilts here and sells them at 3200 Main Street"?

- Could Barbara and Tom maintain a digital sign in their yard that says "We love hamburgers" that contained the logo and address to a *Whataburger* location two miles away?

- Could the local school have an electronic message board that rotated between messages that said "Finals Start Tuesday" and "Eat at the Main Street Café on Friday to Support the Boosters"?

- Could Sarah place a digital sign in her yard that said "Vote for Kathy" if Kathy did not live at Sarah's house?

- How could one determine whether a digital billboard that said "God Loves You" is on-premises or off-premises?

Pet. App. 17a.

It should come as no surprise that counsel would struggle to draw such distinctions. Although each question was framed in terms of on-premise/off-premise, the commercial/noncommercial distinction is embedded in the analysis of whether the sign advertises "a business, person, activity, goods, products, or services not located on the site where the sign is installed" for at least three of the examples. And the revised sign code[5] fares even worse by

[5] "In August 2017, the City amended the Sign Code. The amended Sign Code defines 'off-premise[s] sign' as 'a sign that displays any message directing attention to a business, product,

expressly requiring the commercial/noncommercial distinction to be made to determine whether the sign is off-premise.

This practice is in direct contrast to the Court's holding in *City of Cincinnati v. Discovery Network, Inc.*, in which the issue was whether the city's ban on newsracks "that distribute 'commercial handbills,' but not 'newspapers,'" was content-based. 507 U.S. at 429. There, the city asserted that "its regulation of newsracks qualifie[d] as [a non-content-based] restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications." *Id*. But the Court was unpersuaded because "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id*. Like the Austin Sign Code, which requires analyzing the content of the sign to determine which category of regulation applies, "[u]nder [Cincinnati's] newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id*. Accordingly, the "city's naked assertion that commercial speech has 'low value'" could not be used to justify a distinction that was content-based. *Id*. at 430. So too here where whether a sign falls within the

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service, profession, commodity, activity, event, person, institution, or other commercial message which is generally conducted, sold, manufactured, produced, offered, or occurs elsewhere than on the premises where the sign is located,' and it expressly defines an 'on-premise[s] sign' as 'a sign that is not an off-premise[s] sign.'" Pet. App. 4a.

ban is determined by the content of the message resting on the sign.

The arbitrary line between commercial and noncommercial speech stands as a lingering impediment to consistent First Amendment protection that should be eliminated or strictly limited.

B. The Concurrence in *Reed* Does Not Immunize Rules That Rely on Content.

Petitioner places heavy reliance on Justice Alito's concurrence in *Reed*, claiming that because he included on-premise/off-premise distinctions among types of regulations that would be non-content-based, he therefore conclusively declared them to *not be* content-based. But the examples provided in the concurrence cannot bear that weight, nor do they appear intended to do so.

Justice Alito provided nine examples of rules that by "nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed":

> Rules regulating the size of signs. . . .
>
> Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
>
> Rules distinguishing between lighted and unlighted signs.
>
> Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

> Rules that distinguish between the placement of signs on private and public property.
>
> Rules distinguishing between the placement of signs on commercial and residential property.
>
> Rules distinguishing between on-premises and off-premises signs.
>
> Rules restricting the total number of signs allowed per mile of roadway.
>
> Rules imposing time restrictions on signs advertising a one-time event.

Reed, 576 U.S. at 174–75 (Alito, J, concurring).

These regulations would most naturally be drafted without reference to content. Each of these could, however, be drafted based on content, if, like here, the drafter adopted a rule that required the reader to analyze the substance of the sign to determine which regulation applied. For example, "[r]ules that distinguish between the placement of signs on private and public property" would most naturally be based solely on control of the property, such as "no electronic signs shall be erected on public property by private entities." But, like here, that regulation could instead be drafted to distinguish based on content, such as "no electronic signs shall be erected on public property that refer to private entities." That simple switch would convert a content-neutral rule into a content-based rule, one that would depend on the value judgment of a government employee to enforce. The same is true for every other example on the list—including the on-premise/off-premise distinction.

It has been posited that the First Amendment does not protect such distinctions because regardless of how the rule defines the distinction, the outcome is the same. *See* Pet. at 18–19. But that misses the point: the very exercise of drafting a rule to distinguish between content involves government in a process that the First Amendment forbids—prioritizing some messages over others—regardless of whether a similar outcome could be achieved a different way. Why would government prefer to evaluate content when it could otherwise serve its stated interests without doing so? The obvious answer is because in some cases the practice is a stalking horse for imposing value judgments on certain categories of speech.

Like other speech, when it comes to commercial speech, value is in the eye of the beholder. To some, a billboard providing the location of the only kosher restaurant in town may be "low value" commercial speech; but for other readers it may provide information critical to freely exercising religion or the right to travel. To others, the location of a charging station necessary to operating an electric car may be equally important, as would directions to the nearest 24-hour urgent care. That each of these could be deemed "commercial," does not diminish their importance or justify allowing government to assign "low" value to them—especially where listeners' interest, which carries the same First Amendment protection as the speakers' interest, may be as high or higher than their interest in noncommercial speech. *Virginia Pharmacy Board*, 425 U.S. at 756, 763. The Court has long held that such judgments of value are infirm as unavoidably based on content and the

message it delivers. *See Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984).

Moreover, although Rip Van Winkle might well be surprised at the extent of expression political speech comprises today, the will-o'-the-wisp nature of parsing purely commercial speech from political without tying it directly to regulable commercial activity would be clear to anyone who has been awake for the past twenty years. The content-based sign code at issue here captures the risk associated with content-based distinctions by highlighting how high-value speech can be smuggled out from under full First Amendment protection by clothing it as "low-value" commercial speech.

C. The Commercial Speech Doctrine is Often Misapplied to Excuse Broad Regulation of Speech.

This case does not stand alone in relying on the commercial speech exception to justify broad regulation of speech. For example, in *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the Third Circuit held that a prohibition on asking for the wage history of job seekers related to commercial speech subject to intermediate scrutiny as "part of a 'proposal of possible employment'"—regardless whether any such proposal was ever made, 949 F.3d 116, 137 (3d Cir. 2020), while simultaneously recognizing "[i]t does limit the prospective employer's speech, but only because that limitation prevents the tentacles of any past wage discrimination from attaching to an employee's subsequent salary," *id.* at 139. Tentacles aside, any potential downstream use of

information cannot define whether speech is commercial at the moment at which it is spoken.

The array of speech that has been averred to be commercial where no commercial transaction was proposed sweeps broadly, from the relatively mundane to potentially life-or-death topics:

- yellow pages directories, *Dex Media W., Inc. v. City of Seattle*, 793 F. Supp. 2d 1213, 1222 (W.D. Wash. 2011), *rev'd in part*, 696 F.3d 952 (9th Cir. 2012);

- an ad congratulating Michael Jordan on his induction into the Naismith Memorial Basketball Hall of Fame—but not the special edition of *Sports Illustrated Presents* celebrating Jordan's career in which the ad was placed, *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 511 (7th Cir. 2014);

- publication of impersonal information regarding the performance or value of a particular commodity, *Commodity Trend Servs., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 681 (7th Cir. 1998);

- using the words "skim milk" to describe all-natural, unfortified milk, *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1231 (11th Cir. 2017);

- describing products as "ozone friendly", "biodegradable", "photodegradable", "recyclable" or "recycled" *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 727 (9th Cir. 1994);

- requiring limited-service pregnancy centers to post disclaimers that they did not provide or make referrals for abortions or certain birth-control

services, *Greater Baltimore Ctr. For Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013); and,

- the government's construction of the FDCA to impose a complete and criminal ban on off-label promotion by pharmaceutical manufacturers, *United States v. Caronia*, 703 F.3d 149, 167 (2d Cir. 2012).

The underlying theory behind expansive application of the "commercial" moniker to speech is the notion that any financial interest makes the speech amenable to reduced protection. But, in addition to demonstrating how easy it can be to find a financial hook for nearly any topic, these examples also show the persistent risk that viewpoint restrictions lurk below the surface.

D. Speaker-Based Distinctions Raise the Spector of Content Censorship.

The Austin Sign Code distinguishes among speakers, allowing greater flexibility to those who would advertise a business, person, activity, goods, products, or services located on the site where the sign is installed than for those who want to do those things but do not have a business or a location. The law thus favors speakers who have a physical footprint over those who do not. "This Court's precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010) (cleaned up). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own

views." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (cleaned up).

Although the speaker-based analysis can be used to unearth underlying content distinctions, here the speaker-based preference is rooted in the same language as the content-based preference, thus corroborating the non-neutral basis for the rule. The rule targets certain speakers for additional burdens, looking at who the speaker is to determine whether the speaker is allowed to speak in a certain location. "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship." *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 763–64 (1988). This approach triggers strict scrutiny. *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2347 (2020) (robocall restriction with the government-debt exception was content-based and subject to strict scrutiny.).

II. *METROMEDIA* AND *REED* CAN BE RECONCILED, BUT ONLY *REED* CONTROLS HERE.

This case is presented as a conflict between *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, and *Reed v. Town of Gilbert*, 576 U.S. 155, but recognition that commercial speech is content-based unless narrowly cabined to speech incidental to commercial transactions, and thus should be eligible for the same heightened scrutiny as any other stand-alone speech, would be faithful to *Reed's* command that strict scrutiny be applied to content-based distinctions, while satisfying the narrow holding of *Metromedia* that noncommercial speech cannot receive less protection than commercial speech.

A. *Reed* Requires the Content-Based Inquiry to be Addressed First and Strict Scrutiny to be Applied.

The regulation at issue in *Reed* was similar to the regulation here. In both cases, determining whether a permit was required, depended on comparing the text of a sign to the provisions of a sign code and determining whether an exemption applied. *Compare Reed*, 576 U.S. at 159, *with* Pet. App. 54a (§ 25-10-3(11)). Here, Respondents were denied permits to digitize signs because the content of the signs placed them within the definition "off-premise" under the Sign Code. *See* Pet. App. 2a.

In *Reed*, the town "offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety." *Reed*, 576 U.S. at 171. The same governmental interests are asserted here. *See* Pet. App. 3a.

In *Reed* the town had "ample content-neutral options available to resolve problems with safety and aesthetics. For example, [the] Code regulate[d] many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability." *Reed*, 576 U.S. at 173. Similarly, here, Austin has shown no impediment to taking a content-neutral approach. Indeed, it declares an intent to be content-neutral while simultaneously, and inexplicably, looking at content as the basis for drawing distinctions. *See* Pet. Br. at 38–39.

In *Reed*, the Court based its analysis on the straightforward principle that "Government

regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (citations omitted). There are no hidden mouseholes in this rule or subtle terms of art to trap the unwary. Rather the definition of "content-based" is the "commonsense meaning of the phrase" 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 163–64 (citations omitted).

Particularly pertinent here, although "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, . . . others are more subtle, defining regulated speech by its function or purpose." *Id*. Petitioner argues that "[n]othing in Austin's on-premise/off-premise distinction implicates or is concerned with the topic discussed on a billboard or the message being conveyed." Pet. at 18. Regardless whether this dubious assertion could be used to conform the Austin Sign Code to *Reed*, it is beyond cavil that defining off-premise 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," Pet. App. 3a, is a distinction based on the speech's "function or purpose." Either way, the distinction is drawn based on the message conveyed, and, therefore, is subject to strict scrutiny. *See Reed*, 576 U.S. at 163–64.

Nowhere in *Reed* is commercial speech exempted from the initial application of strict scrutiny to content-based distinctions. Petitioner would have it that this step was either overlooked or intentionally evaded because *Reed* did not expressly overrule

Metromedia and "over-wash[] on-premise/off-premise distinctions between signs". Pet. at 17, 24. But such a step was not necessary to the holding in *Reed* because no on-premise/off-premise conflict was presented, nor was there any dispute regarding the commercial content of speech.

B. *Metromedia*, Which Holds that Noncommercial Speech Cannot Receive Less Protection Than Commercial Speech, Is Not Instructive Here.

Metromedia is a highly fractured opinion in which the Court splintered over whether a San Diego ordinance that prohibited "outdoor advertising display signs," was completely constitutional, partially constitutional, or completely unconstitutional. *See* 453 U.S. at 493–94. Advertising was defined to comprise commercial and noncommercial speech; and there were two kinds of exception to the ban: (1) onsite signs; and (2) signs falling within twelve specified categories. *See id.*

Like the regulation at issue here, "onsite" signs were defined by their content: "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." *Id.* at 494. The offsite exceptions

were based on ownership,[6] location,[7] or content.[8] *See id*. at 494–95.

In the end, the partially constitutional viewpoint was joined by one justice in dissent (who would have found the regulation wholly constitutional) and the partially unconstitutional viewpoint picked up two votes from the concurrence (who would have found the regulation wholly unconstitutional)—rendering a judgment that invalidated the ordinance in its entirety but rested on starkly different lines of reasoning; "a genuine misfortune" that, as Justice Rehnquist observed in dissent, would have "the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id*. at 569 (Rehnquist, J., dissenting).

Five justices joined the first four sections of the opinion finding that for commercial billboards the distinction between onsite and offsite and the allowance of other specifically exempted signs "meets the constitutional requirements of *Central Hudson*." *Id*. at 512 (citing *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)). The analysis presumed agreement whether speech was commercial and included no analysis of how one would make that determination in the first place. This weakness was identified by the concurrence, which observed: "If anything, our cases recognize the

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[6] Government signs.

[7] Bus stops; within shopping malls; on public or commercial vehicles.

[8] Historical plaques; religious symbols; time, temperature, and news; temporary subdivision directional signs; and temporary political campaign signs.

difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'" *Id*. at 539 (Brennan, J., concurring). The concurrence also presaged the issue now before the Court, questioning how a government entity could differentiate between commercial and noncommercial speech without making content-based distinctions that rely on discretionary interpretation:

> It is one thing for a court to classify in specific cases whether commercial or noncommercial speech is involved, but quite another—and for me dispositively so—for a city to do so regularly for the purpose of deciding what messages may be communicated by way of billboards. Cities are equipped to make traditional police power decisions, . . . not decisions based on the content of speech.

Id. at 538–39 (Brennan, J., concurring).

Although the various opinions in *Metromedia*, taken together, identify the myriad of challenges involved in categorizing and applying disparate tests to speech, the precedential value of the case is thin and provides no guidance regarding the level of scrutiny applicable to the initial determination whether speech is commercial or noncommercial.

Moreover, *Metromedia* demonstrates that it is not obvious, natural, or inevitable that commercial speech is less valuable or more amenable to regulation than noncommercial speech. Indeed, in *Metromedia*, the constitutional violation arose from the City's preferential treatment of commercial speech over

noncommercial speech—a value judgment that was also present in *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). If nothing else, these cases demonstrate that, in some instances, regulators may perceive greater value in commercial than noncommercial speech, which undercuts at least one judicial justification for applying a lesser standard to commercial speech.

C. *Reed* Did Not Need to Overrule *Metromedia* and Should be Applied Here.

Reed is consistent with *Metromedia* to the extent that it applies to noncommercial speech. *See Metromedia*, 453 U.S. at 514 ("Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests."). Regarding how the government may make an initial designation whether speech is "commercial," the plurality in *Metromedia* was silent and thus there was no holding for *Reed* to overrule or narrow. But that does not mean that this issue is novel or that the Court did not consider it, merely that it was not necessary to the holding of either case. Indeed, Justice Brennan in his concurrence identified the very issue that lingers still:

> I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional. For me, such an ordinance raises First Amendment problems at least as serious as those

> raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is 'commercial' or 'noncommercial.' Of course the plurality is correct when it observes that 'our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech,' . . . but it errs in assuming that a governmental unit may be put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial.

Metromedia, 453 U.S. at 536 (Brennan, J., concurring).

Moreover, the concurrence in *Reed* raised the potential implications of applying strict scrutiny to commercial speech, citing *Central Hudson*. *See Reed*, 576 U.S. at 178 (Breyer, J., concurring). Thus, while it was unnecessary in *Reed* to expressly address *Metromedia*, it does not follow that the holding in *Reed* means anything other than what it says. It does highlight, however, the lingering tension created by the fiction that somehow commercial speech forms a distinct species of speech whose content need not be considered before it can be identified. Faithful application of *Reed* could eliminate this issue.

The holding in *Reed* was straightforward—content-based regulations of speech are subject to strict scrutiny. *Id*. at 159. The same should be true here.

CONCLUSION

The Court should affirm the Fifth Circuit and clarify that commercial speech is limited to speech incidental to regulable commercial activity.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org

Counsel for Amicus Curiae

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