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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Austin sign code provisions distinguish between on-premises and off-premises messages based solely on location. From this distinction, the sign code establishes a technology-based rule about *how* a sign's message may be conveyed. On-premises messages may be digitized, and off-premises messages may not.

Billboard companies sought permits to digitize 84 billboards—off-premises signs—and sued the city when the permits were denied. The Fifth Circuit ruled that the First Amendment invalidated the challenged provisions, holding that the on-premises/off-premises distinction is content-based under *Reed v. Town of Gilbert* and fails the strict scrutiny test. The question presented is:

Is the city code's distinction between on- and off-premises messages a facially unconstitutional content-based regulation under *Reed*?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation seeks to ensure that all speakers enjoy the full protection of the First Amendment to the United States Constitution. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including content-based and commercial speech issues arising under the First Amendment. *See, e.g.*, *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015), *Contest Promotions, LLC v. City and County of San Francisco, Cal.*, 138 S. Ct. 2574 (2018), *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 552 U.S. 889 (2007); and *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reagan National Advertising of Austin, Inc., and Lamar Advantage Outdoor Company, L.P., own and operate billboards, most of which are "off-premises" signs displaying both commercial advertisements and noncommercial content. The city's Sign Code, which applies to both commercial and noncommercial speech, defines an "off-premises 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." App. 2a–3a. On-premises non-digital messages can be digitized, but off-premises non-digital messages cannot. App. 3a. The City's stated general purpose in adopting the Sign Code is to protect the aesthetic value of the city and to protect public safety. *Id.*

In *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), this Court held that a law is content-based when it "target[s] speech based on its communicative content;" that is, when it "applies to particular speech because of the topic discussed or the idea or message expressed." To determine whether a law is content-based, courts must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* If a law draws a distinction "defining regulated speech by its function or purpose" based on the message the speaker conveys, then it is facially content-based and subject to strict scrutiny. *Id.* Strict scrutiny applies in this situation "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. Therefore, courts must consider whether a law is facially content-based or content-neutral "before turning to the law's justification or purpose." *Id*. at 166.

Using this analytical framework, the Fifth Circuit correctly held that the City's sign ordinance was facially content-based and thus subject to strict scrutiny under the First Amendment. App. 2a. It is content-based because to determine whether a sign is on-premises or off-premises under the city code, one must read the sign and ask: does it advertise "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"? App. 2a–3a. The court also held that the content-based restriction demanded strict scrutiny even though most billboards display commercial messages because the regulation facially applied with equal force to both commercial and noncommercial messages. App. 25a. Having determined that strict scrutiny applied, the court held that the city's asserted justifications—aesthetics and public safety—were insufficient because they were hopelessly underinclusive and thus not narrowly tailored. App. 26a.

The Court should affirm for two reasons. First, the sign code's distinction in this case between on-premises and off-premises advertising requires government officials to read the content of the sign to know whether it advertises goods or services available on that lot or on a different lot, and therefore whether the law applies. As such, the content of the sign determines how the speaker is regulated and courts

must apply the strict scrutiny analysis mandated by *Reed*.

Second, strict scrutiny should apply to content-based distinctions even if the burdened speech is commercial in nature. In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), this Court held that restrictions on commercial speech must satisfy intermediate scrutiny. *Id.* at 566. In *Reed*, however, this Court held that a law must be subject to strict judicial scrutiny if "'on its face' [the law] draws distinctions based on the message a speaker conveys." 576 U.S. at 163. There is no meaningful distinction that would make *Reed*'s reasoning any less applicable to laws that distinguish between commercial and noncommercial speech. But this tension between *Reed* and *Central Hudson* need not exist at all. This Court should dispense entirely with *Central Hudson*'s vision of a bifurcated First Amendment and treat commercial speech as on par with all other forms of expression. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504, 522 (1996) (Thomas, J., concurring) (there is no "philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech.") (cleaned up).

ARGUMENT

I

THE ON-PREMISES VERSUS OFF-PREMISES REGULATION IN THIS CASE IS A CONTENT-BASED RESTRICTION ON SPEECH

Some billboards are erected on the premises of a business to attract customers to that site. Some

billboards advise readers to take the next exit to patronize a business a few miles down the road.[2] Some billboards advertise products and services that have no physical location open to the public at all.[3] A billboard ordinance that benefits on-site billboards and burdens billboards advertising businesses on other sites or advertising products and services that have no physical site at all discriminates based on the content of the billboard's message. *Reed*, 576 U.S. at 163 (the ordinance "'on its face' draws distinctions based on the message a speaker conveys."). *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

Other than purely location-based restrictions, e.g., limiting billboards within so many feet of complicated intersections, the only way a regulator can determine whether a particular sign complies with an ordinance that distinguishes between on-premises and off-premises messages is by reading the sign and identifying whether the content refers to the location of the sign or some other place. *See, e.g.*, *Thomas v. Bright*, 937 F.3d 721, 730 (6th Cir. 2019) (to decide whether an on-premises exception to a billboard ordinance should apply requires reading the

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[2] *See Metromedia v. City of San Diego*, 453 U.S. 490, 499 (1981) (defining off-premises signs as those "which direct[] attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed.").

[3] *See* Pymnts, *Don't Count Out Billboards—Amazon, Facebook, and Google Haven't*, PYMNTS.com (Aug. 6, 2018), https://www.pymnts.com/in-depth/hmmm/2018/billboards-amazon-facebook-google-outdoor-advertising/.

sign's message and determining its meaning or purpose); *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (whether the definition of "sign" is content-based depends on message conveyed); *H.J. Wilson Co., Inc. v. State Tax Comm'n of State*, 737 So. 2d 981, 996 (Miss. 1998) (sales and use tax violated First Amendment as a content-based restriction where regulators had to review the content of publications to determine if they fit within the "newspaper" exemption). *Cf. Regan v. Time, Inc.*, 468 U.S. 641, 655–56 (1984) (statute's color and size requirements for currency reproductions did not regulate content because officials did not have to evaluate a message when deciding whether it violated the statute).

Some courts hold that the length of time spent reading the sign determines whether it should be regulated, the so-called "cursory examination" factor derived from *Hill v. Colorado*, 530 U.S. 703, 707 (2000). *Hill* was a "sidewalk counselor" case and this Court noted that "it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether 'sidewalk counselors' are engaging in 'oral protest, education, or counseling'" in violation of the statute "rather than pure social or random conversation." *Id.* at 721. Yet "'[c]ursory examination'" of content "to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.* at 722. Cases relying on *Hill* to implement a cursory examination test include *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 434 (4th Cir. 2007) ("To the extent that the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory

examination' did not make the regulation content based."), and *La Tour v. City of Fayetteville*, 442 F.3d 1094, 1096 (8th Cir. 2004) ("It takes some analysis to determine if a sign is 'political,' but one can tell at a glance whether a sign is displaying the time or temperature.").

Yet even in the context of sidewalk counselors, this Court has backed away from its comments in *Hill*, rendering this line of cases suspect. In *McCullen v. Coakley*, 573 U.S. 464, 479 (2014), the Court held that a law establishing a buffer zone around an abortion clinic—though unconstitutional—was not content-based. *Id.* at 480. The Massachusetts statute at issue made it a crime to "knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway" of abortion clinics. *Id.* at 469. Clinic employees and visitors were exempt. The statute did not require enforcement authorities to examine the content of the message conveyed by individuals to determine whether the individual violated the law. *Id.* at 479. An individual would violate the law not based on what they said within the 35 feet, but solely based on their standing within the 35 feet. *Id.* at 480. ("[P]etitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word."). Accordingly, the law was content-neutral. The act *would* be content-based if enforcement authorities had to examine the content of a speaker's message to determine whether they violated the law. *Id. See also Bruni v. City of Pittsburgh, Pa.*, 141 S. Ct. 578 (2021) (Thomas, J., respecting denial of certiorari) (noting that *Hill* is "incompatible" with *McCullen* and *Reed*). *Hill* also contrasts with *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), involving a regulation requiring parade organizers to pay a

variable fee depending on the costs of security anticipated by the event. Because the county officials had to assess the communicative nature of the parade to determine the amount of the fee, the regulation was content-based. *Id.*[4]

As the court below correctly held, a "cursory examination" factor cannot be a legitimate factor in deciding whether a regulation is content-based and therefore subject to strict scrutiny. App. 16a ("It takes no more than a cursory reading to figure out if a sign supports Candidate A or Candidate B. But a law allowing advertising for Candidate A and not Candidate B would surely be content based."). In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), the Court struck down an ordinance as content-based where it discriminated between newsracks containing commercial materials and newsracks containing newspapers, a situation that required enforcement officers to look—briefly—at the substance of the material in the rack to determine if the ordinance applied. The level of scrutiny to be applied to a speech restriction surely cannot turn on whether the regulators take five seconds to read the speech or five minutes. *See Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 810 (1996) (Kennedy and Ginsburg, JJ., concurring in

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[4] *See also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (enforcement authorities must read content of message to decide whether magazine should be taxed); *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (statute forbade any noncommercial educational broadcasting station that receives a grant from the Corporation for Public Broadcasting to "engage in editorializing," and "enforcement authorities must necessarily examine the content of the message" to decide if violation has occurred).

part, concurring in the judgment in part, and dissenting in part) (a "glance" that gives "the government the benefit of the doubt when it restricts speech, is an unusual approach to the First Amendment, to put it mildly."). When it comes to speech, especially via symbolism and imagery, a few seconds can convey complex thoughts and emotions. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."). Because they are most frequently viewed by drivers en route to other destinations, billboards are designed to be viewed and understood in just a few seconds. That is, billboard content is intended to be fully communicated and understood with a cursory examination.

The on-premises versus off-premises distinction also sweeps in a considerable amount of speech that lacks any locational component at all. A billboard that says "Thank You Essential Workers"[5] or "Black Lives Matter"[6] or that honors veterans[7] does not point to the physical land on which it is placed or to any other plot

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[5] Watchfire, *Use Your Digital Billboard to Thank Workers on the Frontline of Covid-19*, https://www.watchfiresigns.com/digital-billboards/use-your-digital-billboard-to-thank-workers-on-frontline-covid-19 (last visited Sept. 3, 2021).

[6] Phil Wright, *Black Lives Matter billboard coming to La Grande*, The Observer (Aug. 7, 2020), https://www.lagrandeobserver.com/news/local/black-lives-matter-billboard-coming-to-la-grande/article_dce55398-d850-11ea-8d20-b3cea33a1dac.html.

[7] Eduardo Huijon, Jr., *Local group honoring veterans with billboards*, CBS (July 1, 2021), https://www.cbs7.com/2021/07/01/local-group-honoring-veterans-with-billboards/.

of land. Because these signs make no reference to the land on which they sit, they are "off-premises" by definition and thereby subject to greater regulation than on-premises signs.

Austin limits billboard digitization to limit the number of "non-conforming" signs in the city; off-premises messages cannot be digitized; on-premises messages can. App. 3a. If Joe digitizes a billboard on his own property that says "Eat at Joe's Place," Austin has no problem with that. But the City outlawed Joe's ability to digitize the same billboard if it says "Neighbors helping neighbors: Eat at Mary's Place." This is equivalent to the content-based law in *Barr v. Am. Ass'n of Political Consultants* that permitted robocalls saying "Please pay your government debt" but forbade robocalls saying "Please donate to our political campaign." 140 S. Ct. 2335, 2346 (2020) ("That is about as content-based as it gets.").

The content-based nature of the premises distinction is also demonstrated when the regulation is not one of location or size or animation, but rather of taxation. *See Clear Channel Outdoor, Inc. v. Director, Dep't of Finance of Baltimore City*, 472 Md. 444 (2021), *petition for writ of certiorari pending* docket no. 21-219 (filed Aug. 12, 2021) (asking whether a tax singling out off-premises billboards is subject to heightened scrutiny under the First Amendment.). In *Clear Channel*, the Maryland Court of Appeals upheld a tax on "outdoor advertising displays" (billboards) that exempted on-premises messages. Baltimore City Code art. 28, § 29-1-2 (2020). Lacking even the usual interests that underlie zoning and sign codes, the tax targeting off-premises

speech highlights the content-based nature of the distinction.[8]

The inability to regulate based on an on-premises versus off-premises message does not mean that municipalities are entirely foreclosed from regulating billboards. There are many content-neutral ways to regulate billboards, including the digital billboards that are at the heart of the dispute in this case. For example, cities may limit nighttime luminance; lengthen the time that each message appears so that motorists are unlikely to see changing messages on a single sign; prohibit message sequencing and animated displays; allow billboards only on straightaways or other areas where driver concentration is not as high as freeway on- and off-ramps, interchanges, or sharp curves; and establish legibility and readability standards based on drivers' sight distance and prevailing speed. Daniel R. Mandelker, *Billboards, Signs, Free Speech, and the First Amendment*, 55 Real Prop. Tr. & Est. L.J. 367, 408 n.199 (2020). These types of content-neutral regulations provide a means for state and federal laws to limit signs in areas where such driver distractions are determined to adversely affect the public.

Many municipalities have already demonstrated the ability to amend their sign ordinances to comply with *Reed*. *See* Karen Zagrodny Consalo, *With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise*, 46 Stetson L. Rev. 533, 544–45 (2017) (citing Atlanta, Ga., Mun. Land Dev. Code § 16-28A). For example, rather than limiting the type of speech advanced by

[8] Amicus Pacific Legal Foundation urges this Court to grant certiorari in the *Clear Channel* case.

signs, Atlanta's amended sign code regulates the size, lighting, materials, proliferation, and aspects of signage based primarily upon the size and shape of the sign. *Id.* *See also The Lamar Co., LLC v. Lexington-Fayette Urban County Government*, No. 5:21-043-DCR, 2021 WL 2697127 (E.D. Ky. June 30, 2021) (noting that Lexington sought to "align the sign regulations with the spirit of *Reed* and conducted a line-by-line review of the Old Sign Regulations") (cleaned up). Government officials may not want to engage in review and revision of their sign regulations, but administrative convenience does not outweigh constitutional rights. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (describing the "weakness" of a state's interest in administrative convenience compared to a burden on First Amendment rights).

Because a sign code's distinction between on-premises and off-premises messages is content-based, it must be analyzed under strict scrutiny. With many content-neutral alternatives available to Austin, the challenged sign code fails strict scrutiny and must be held to violate the First Amendment.

II

REED'S LOGIC APPLIES TO COMMERCIAL SPEECH

It was only happenstance that the temporary directional sign in *Reed* pointed to a church service rather than a commercial enterprise such as a farmer's market. Because the church sign did not implicate commercial speech, the Court did not opine on it. The resulting combination of *Reed*'s requirement of strict scrutiny for content-based speech restrictions

and *Central Hudson*'s flexible multi-factor test under an intermediate level of scrutiny,[9] creates a fractured First Amendment doctrine that lacks a principled foundation.

In *Reed*, this Court warned of "the danger of censorship presented by a facially content-based statute," since government officials may "wield such statutes to suppress disfavored speech." 576 U.S. at 167. *See also Am. Ass'n of Political Consultants*, 140 S. Ct. at 2346 (citing *Reed* for the flat statement that "[c]ontent-based laws are subject to strict scrutiny" without adding qualifiers as to the type of speech); *id.* at 2364 (Gorsuch & Thomas, JJ., concurring) ("The statute is content-based because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters).").[10] The Court explained that even seemingly innocuous distinctions drawn by the sign code could be used by "a Sign Code compliance manager who disliked [a] Church's substantive teachings . . . to make it more difficult for the Church to inform the public of the location of its services." *Id.* at 167–68. Precisely the same concerns are present in the commercial context, as illustrated here. Some content-based commercial speech

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[9] *Central Hudson*, 447 U.S. at 566; *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in" *Central Hudson*). For the reasons set forth by Respondents, Austin's sign code also fails intermediate scrutiny. Respondents' Brief at 42–45.

[10] *American Association* demonstrates that *Reed* is firmly established as a key First Amendment precedent, rejecting any suggestion that it should be narrowed or overruled. 140 S. Ct. at 2347 n.5.

restrictions may be subject to strict scrutiny when the government prevents the public from receiving certain truthful information by "quieting truthful speech with a particular viewpoint that it fears might persuade." *See Sorrell*, 564 U.S. at 563–64 (cleaned up); *44 Liquormart, Inc.*, 517 U.S. at 523. Here, Austin's ordinance distinguishes on its face between billboards that operate in reference to the place where they are physically located and billboards that operate in reference to some other place, or to no physical location at all (such as online businesses). Only billboards with content related to the business at that physical location can digitize in compliance with the law; signs with content beyond the location cannot.

Further, where a regulation draws content-based distinctions purely as a line-drawing mechanism, *Reed* reached the reasonable conclusion that content-based distinctions are the *last* place a municipality should turn, not the first. 576 U.S. at 163. *Reed*'s principle placing content-based discrimination as a last resort is no less powerful when the speech at issue is commercial. As the Sixth Circuit explained: "It follows that the intermediate-scrutiny standard applicable to commercial speech under *Central Hudson*, . . . applies only to a speech regulation that is content-neutral on its face. That is, a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny under *Reed*." *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020).

The only principled way to protect speech is to protect speech. *See United States v. Alvarez*, 567 U.S. 709, 750 (2012) (Alito, J., dissenting) (noting that the Court has found it necessary to protect false statements of fact in order to prevent chilling fully

protected speech).[11] There is no carve-out of the First Amendment's protection for professional speech because "the dangers associated with content-based regulations of speech are also present in the context of professional speech" and professional speech is "a difficult category to define with precision." *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72, 2374–75 (2018). So, too, do restrictions on commercial speech present dangers of favoritism and overall diminishment of information and so, too, is the category difficult to define.[12] Although commercial speech has been treated differently—and badly—in some of this Court's rulings, modern First Amendment doctrine should place it on an equal footing with other protected speech.

CONCLUSION

The decision below should be affirmed.

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[11] *Cf. Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

[12] Speech is often made with more than one motivation, making such categorizations near impossible. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function."); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1207 (2004) ("With greater frequency and subtlety, new technologies and innovative marketing strategies introduce corporate profit-motive into what otherwise would be fully-protected speech. The current commercial speech doctrine cannot predictably resolve disputes resulting from these new modes of expression.")

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