No. 20-1029

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, *ET AL.*,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), this Court accorded broad First Amendment protection against the government's content-based restrictions on speech, regardless of the speaker's identity or speech's medium. Petitioner City of Austin, Texas ("Petitioner" or "Austin") asks this Court to eviscerate *Reed* to allow it to prohibit speakers from digitizing their billboards when, and only when, they advertise off-premises activities. Worse, Petitioner would have this Court apply reduced scrutiny to this plainly content-based prohibition to further its asserted aesthetic and safety interests in regulating one type of medium—digital billboards.

This case thus threatens to extend a controversial line of this Court's cases, in which certain media received reduced levels of First Amendment protection against *content-neutral* restrictions, into the highly problematic area of *content-based* restrictions. Applying reduced scrutiny to allow the government to regulate the content of speech on disfavored forms of media would unduly curtail First Amendment rights. A sliding scale of technology-specific standards of review would also be unadministrable and require this

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than Washington Legal Foundation or its counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case have consented to WLF's filing of this brief.

Court to make technical judgments about different forms of media that are rapidly evolving and increasingly offering overlapping services. This Court should make clear, when regulating speech's content, the same rules apply no matter where that speech appears. The government must use a narrowly tailored means to achieve a compelling interest.

Washington Legal Foundation ("WLF") has a strong and enduring interest in the First Amendment's protection of speech. Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus in First Amendment cases. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 962 F.3d 531 (D.C. Cir. 2020). WLF is particularly concerned with Petitioner's suggestion that this Court should allow the government to regulate the content of speech based on the medium a speaker selects to promote its message.

SUMMARY OF ARGUMENT

Respondent Reagan National Advertising of Austin, LLC ("Respondent") ably explains in its brief why Austin's sign code violates the First Amendment under *Reed*. Namely, a selective ban on digital billboards that turns on the message they convey is content-based and cannot survive strict scrutiny. *See* Resp. Br. 12. One especially troubling aspect of Petitioner's position is its suggestion that this Court's

cases framing "rules appropriate to each medium" support relaxed scrutiny for regulations like Austin's that "[s]ingl[e] out a specific medium of communication or speaker for regulation." Pet. Br. 29–31. While this Court has previously, and controversially, applied a more deferential standard of review to regulations aimed at the technical characteristics of specific media, it has not, nor should it, slacken the established rule that restrictions tied to a message's content require strict scrutiny.

Over seventy years ago, Justice Jackson encouraged the Court to adopt different First Amendment standards for different media. He argued that each medium has "differing natures, values, abuses and dangers" and should be considered "a law unto itself." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). This medium-specific approach to the First Amendment has been, at best, highly controversial. Members of the Court and commentators alike have noted that the *sui generis* standards spawned by this approach have led to unfairly favoring some forms of speech over others, while relying on rationales that quickly became obsolete as technology developed. To cite one famous example, the Court's adoption of a more lenient standard for restricting broadcaster speech due to the scarcity of the airwaves—as set forth in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)—seems quaint given the modern-day proliferation of competing forms of news and entertainment.

Whatever vitality these medium-specific standards may retain, they have at least been cabined to regulations purportedly justified by the technical limitations or other characteristics of the given medium. *See* Resp. Br. 29–31 (collecting authorities). Here, however, Petitioner has not tried to adopt a regulation that would apply on a content-neutral basis to all uses of a particular medium. Rather, Petitioner has prohibited existing sign owners from digitizing their messages based solely on the messages' content—whether it concerns off-premises activities. Petitioner thus urges this Court to selectively restrict some speakers' access to a particular medium (here, a digitized billboard) based *solely* on the content of the speech it promotes.

This Court should decline that invitation. Such an approach has no basis in the text of the First Amendment, is impractical given the rapid development of modern communications technologies, and has already been implicitly rejected by this Court. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 175 (1999) (rejecting regulation that prohibited radio and television broadcasters from advertising about commercial casino gambling). Petitioner also fails to explain precisely how the Court should choose among different standards of review based on the characteristics of different media.

Rather than apply varied amorphous factors to determine which standard applies to a given medium, this Court should affirm its straightforward strict-

scrutiny holding in *Reed*, no matter the technology used to communicate the message. *Reed* first identified the speech regulation at issue as content-based because it, like Austin's regulations here, "depend[ed] entirely on the communicative content of the sign." 576 U.S. at 164. The Court then applied strict scrutiny, because regulations of "[c]ontent-based laws" present "the same dangers as laws that regulate speech based on viewpoint." *Id.* at 174 (Alito, J., concurring). Those dangers threaten to undermine our republican form of government, as content-based restrictions "may interfere with democratic self-government and the search for truth." *Id.* (citing *Consol. Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 537 (1980)). The same exacting scrutiny should apply here.

Applying technology-specific standards of review to content-based regulations would also present a host of challenges. Contrary to the text and spirit of the First Amendment, such diluted standards would encourage governments like Austin to elevate certain speakers (and certain messages) over others based solely on the medium used to express that speech. As Respondent observes (Resp. Br. 4), speakers select media like billboards because they believe the medium's unique characteristics provide the best available platform to deliver their message. As Marshall McLuhan famously observed, "the medium is the message."[2] If Austin can prevent digitization of

[2] Marshall McLuhan, Understanding Media: The Extensions of Man 25 (1964).

certain messages on billboards based on content, the government could similarly target disfavored messages on social media, cable news, or talk radio based on concerns about the purported dangers or abuses unique to each medium.

Also, technology-specific standards are notoriously difficult to develop, as they require both a technical understanding of the medium as it exists in the present and clairvoyance as to how the medium and competing media will develop. For example, the assumptions this Court made in *Red Lion* about how limited broadcast spectrum justified government action to ensure public access to competing points of view seem obsolete in the age of Twitter. Indeed, the very notion of distinct media capable of clear definition has become muddled with increased competition. Courts will be hard pressed to develop a coherent standard for phone companies that create and acquire content, search engines that build broadband networks, or app creators that offer low-cost or free video and talk services.

At bottom, Petitioner offers no persuasive reason for this Court to apply anything but the strict scrutiny required by *Reed*. Any unique interest that Petitioner or the United States may have in how digitized signs are used should be addressed, if at all, in the narrow tailoring portion of this Court's analysis. That second step of strict-scrutiny analysis is the appropriate place to address individual, fact-specific concerns, like Petitioner's interest in public safety, and to gauge whether a proposed regulation addresses that concern

in a narrowly tailored manner. But the government should not be spared exacting judicial review when it imposes different regulatory obligations on different messages, no matter where those messages appear.

ARGUMENT

The First Amendment's protections are clear and broad. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. Under this fundamental freedom, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 573 U.S. at 163 (quoting *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 95 (1972)). As this Court has repeatedly stated, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citations omitted).

A facially content-based speech regulation is one that "draws distinctions based on the message a speaker conveys." *Id.* (citation omitted). Some facially content-based distinctions are "obvious"; others are "more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64. Although appearing neutral, some content-based regulations can also take the form of a law that "cannot be 'justified without reference to the content of the regulated speech.'" *Id.*

at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In relying on the content of the speech, such regulations are like those that are facially content-based and must also satisfy strict scrutiny. *See id.*

Petitioner attempts to sidestep this standard. *See* Pet. Br. 20–38. Petitioner argues that because this Court has applied medium-specific standards of review in other contexts, it should apply the same approach to its content-based digitization ban. *See id.* at 29–30. Petitioner suggests that its interests in safety and aesthetics are more substantial for digitized signs. *See id.* at 15 ("Digital billboards . . . exacerbate [both aesthetic and traffic safety concerns]."); *id.* at 1, 10. Petitioner then contends that these interests outweigh any burdens on speech—or any limitation on how that speech may be conveyed—and deserve special consideration here. *See id.* at 43 (relying on the "uniqueness of each medium of expression" which must be assessed for First Amendment purposes by standards suited to it (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 n.8 (1981))).

Petitioner gets things backwards. The government's purported interests in regulating specific media have no role in deciding which level of scrutiny to apply. At best, the government's interests become relevant only after the regulation at issue is found to be content-based and the government identifies a compelling state interest—that is, at the narrow tailoring stage. The Court should first, as in *Reed*, determine whether the challenged regulation

makes distinctions based on the message a speaker conveys, no matter the medium used to communicate that message.

As Respondent explains, Austin's selective digitization ban is content-based. Resp. Br. 17–22. At root, Petitioner's ban on digitized signs does not apply to all such signs, nor does it seek to address uniformly some technological challenge or danger posed by digital messages. Rather, the partial ban advantages certain messages (those spoken by on-premises speakers) over others (messages spoken by off-premises speakers) by allowing those speakers additional and broader means of communication. Such a ban is subject to strict scrutiny. Adopting Petitioner's suggestion that a lower threshold should apply simply because the suppressed content appears on a digital sign would weaken First Amendment jurisprudence and expand an already problematic line of medium-specific cases into uncharted territory.

I. THIS COURT SHOULD APPLY STRICT SCRUTINY TO CONTENT-BASED LIMITATIONS REGARDLESS OF THE MEDIUM USED TO COMMUNICATE PROTECTED SPEECH.

Petitioner invites this Court to extend an already controversial line of cases, one that relaxes First Amendment scrutiny for rules that regulate the technical characteristics of different communications media, to regulations that prohibit a speaker's use of a medium based solely on the message's content. But such medium-specific standards rest on shaky ground,

and this Court should not extend them to make it easier for the government to do what the First Amendment prohibits: single out particular speech for disfavored treatment.

The text of the First Amendment—and the standard adopted in *Reed*—makes no distinctions based on the medium used for communication. Indeed, the Framers chose broad and unequivocal language despite their obvious familiarity with different forms of media competing for the attention of a politically engaged citizenry at the Founding—such as handbills, pamphlets, placards, partisan newspapers, and books. Rather than turn on the medium used, the appropriate standard of constitutional scrutiny depends on the given regulation and whether it makes distinctions based on, or referencing, the content of the regulated speech. *See Reed*, 573 U.S. at 163. Here, as Respondent explains, Petitioner's digitization ban constitutes a content-based speech restriction and should face strict scrutiny. Resp. Br. 17–22.

The failure to follow *Reed*, and instead to expand an inapposite line of medium-specific First Amendment precedent, would undermine the very protections the First Amendment guarantees. Not only is a technology-specific standard at odds with the text and spirit of the First Amendment, it also elevates and protects certain speakers and messages over others. A technology-specific standard is also difficult to craft and maintain, as technological development often outpaces the evolution of legal doctrine. When that occurs, a technology-specific standard imposes a

dissonance between law and reality that can inhibit speech and stymie innovation.

A. Medium-Specific Standards Of Review Have Significant Potential To Undermine First Amendment Freedoms.

Technology has made life easier, but it has also created unique legal challenges. Technological innovation has posed a particular challenge to this Court in the First Amendment context, especially when this Court must evaluate the technical characteristics and potential harms of new media.

The principal federal statute that regulates different communications media is the Communications Act of 1934. Pub. L. No. 73-416, 48 Stat. 1065, codified throughout Title 47, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. It broadly regulates telephone, telegraph, television, radio, and other media. Historically, media regulations developed based on the distinct physical and economic characteristics of the technology at issue. *See generally* Christopher S. Yoo, VERTICAL INTEGRATION AND MEDIA REGULATION IN THE NEW ECONOMY, 19 YALE J. ON REG. 171, 178 n.23, 286–90 (2002) (discussing media regulations based on the technology-specific approach embodied in the Communications Act of 1934). This historical division is evident in the Communications Act itself, which is split into Titles that provide a unique regulatory framework for each medium—Title II (the

telephone network), Title III (radio), Title VI (cable), and so on.

The Communications Act's technology-specific approach was mirrored in the development of certain strands of this Court's First Amendment jurisprudence. In a series of cases, the Court relied on government justifications for regulating the technical aspects of discrete types of communications to justify more lenient standards of review for medium-specific rules. The result was that the First Amendment provided greater protection for messages conveyed in certain media and less protection for messages conveyed in others.

Justice Jackson first embraced this multi-tiered approach to the First Amendment in his concurrence in *Kovacs v. Cooper*. In *Kovacs*, the Court upheld a New Jersey regulation of sound-amplifying vehicles. Responding to a concern that the Court's ruling may turn on the media used, Justice Jackson rejected the argument that regulations must be valid as applied to "other methods of 'communication of ideas.'" 336 U.S. at 97. He insisted that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself." *Id.* That is, Justice Jackson previewed the notion that the First Amendment's protections may differ depending on whether the speech at issue arises from a political rally, a book, or the radio.

The Court adopted, and expanded on, this sentiment in *Red Lion Broadcasting Co. v. FCC*. In *Red Lion*, the Court upheld two FCC regulations compelling broadcasters to host certain speech—at the expense of their own speech interests—to advance the fairness doctrine. Although recognizing that broadcasting is protected by the First Amendment, the Court stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386 (citation omitted).[3] Given the scarcity of radio frequencies and the government's interest in ensuring fair presentation of information to viewers and listeners on those limited frequencies, the Court decided that the regulations were subject to a lower standard of scrutiny.

The Court has relied on the government's interest in fairness, pervasiveness, accessibility, and safety to justify a medium-dependent First Amendment standard in other cases as well. For example, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court announced that "[o]f all forms of communication, broadcasting has the most limited First Amendment protection." *Id.* at 727–28 (upholding regulations

[3] Although *Red Lion* cites *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952), for the proposition that different media justify different First Amendment standards, this citation is misleading. *Burstyn* acknowledged that "[e]ach method tends to present its own peculiar problems," but in the very next sentence the Court emphasized that "the basic principles of freedom of speech and the press, like the First Amendment's command, *do not vary*." *Id.* at 503 (emphasis added).

based on the pervasiveness and accessibility of broadcast messages). And in *Metromedia, Inc. v. City of San Diego*—a case addressing the safety and aesthetics of billboards—the Court stated that "at times First Amendment values must yield to other societal interests." 453 U.S. at 501; *see also, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 367, 377 (1984); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

While making technological assumptions to support a lower level of First Amendment scrutiny, this Court has also acknowledged the limits of those assumptions, including the scarcity rationale in *Red Lion. Red Lion* itself observed that advances in technology "have led to more efficient utilization of the frequency spectrum" that could reduce concerns about scarcity. 395 U.S. at 397. Only a few years later, this Court emphasized that the broadcast industry is "dynamic in terms of technological change . . . [and] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973). And in *FCC v. League of Women Voters*, the Court acknowledged critics who argued that "with the advent of cable and satellite television technology . . . the scarcity doctrine is obsolete." 468 U.S. at 376 n.11; s*ee also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 672 n.5 (1994) (listing sources criticizing the scarcity rationale).

Those critics emerged early in this Court's foray into medium-specific standards of review. Even before *Red Lion*, Nobel-winning economist Ronald Coase had criticized the concept of scarcity as a justification for regulation because "almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, . . . but this of itself, does not call for government regulation." R.H. Coase, THE FEDERAL COMMUNICATIONS COMMISSION, 2 J. LAW & ECON. 1, 14 (1959); *see also* J. Gregory Sidak, TELECOMMUNICATIONS IN JERICHO, 81 CAL. L. REV. 1209, 1231 n.63 (1993) (listing commentary on the scarcity rationale). Others also criticized this Court for the "short shrift it gave to the first amendment implications." *See, e.g.*, Laurence H. Winer, THE SIGNAL CABLE SENDS—PART I: WHY CAN'T CABLE BE MORE LIKE BROADCASTING?, 46 MD. L. REV. 212, 225 (1987).

Even the FCC abandoned the fairness doctrine after concluding that the growing number of television stations and developments in television technologies had undercut scarcity as a basis for giving broadcasting less First Amendment protection. *See* Inquiry into Section 73.1910 of Comm'n's Rules & Reguls. Concerning Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 FCC 2d 142, 204–17 ¶¶ 97–122 (1985). Scarcity is an even less compelling rationale when it arises from government regulation (such as the FCC's exclusive jurisdiction over radio waves). In such case, "any reliance on spectrum scarcity in effect allows regulation to serve as the constitutional justification for other

regulations." Christopher S. Yoo, THE RISE AND DEMISE OF THE TECHNOLOGY-SPECIFIC APPROACH TO THE FIRST AMENDMENT, 91 GEO. L.J. 245, 251 (2003).

Pacifica's concerns about the unique pervasiveness and accessibility of broadcast messages are also less salient today given the variety of media platforms and viewing options available. Since *Pacifica* was decided, technologies have developed that allow viewers more ownership over what programming they watch and what programming they screen out. Video-on-demand services, streaming, and other viewing options now allow each individual household to curate its television programming. And due to the Internet and other technological advancements, media generally require affirmative acts by the user to access or obtain content, making the user the solicitor of the information rather than the unsuspecting viewer or listener allegedly needing protection. *Id.* at 303 ("The Court has also emphasized that prohibitions of indecent speech cannot stand when alternative means exist that enable individual viewers to control what they see and hear." (collecting cases)).

These media alternatives have exploded in recent years. For example, since 2014, the number of "cord cutters"—individuals who do not have, or have never had, a subscription to satellite, cable, or telco media—has more than tripled, going from 15.4 million to over

50 million in 2021.[4] This trend is only set to increase, as the vast majority of 18- to 29-year-olds report that their primary way of watching television is internet streaming services.[5]

B. *Reed* Requires Applying Strict Scrutiny To Content-Based Distinctions, Regardless Of Medium Employed.

In more recent years, this Court has shied away from extending its medium-specific line of First Amendment cases. Those cases already contained an important limiting principle: Reduced scrutiny should be limited to those regulations "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Turner Broad.*, 512 U.S. at 645.[6] And *Reed* made clear that all content-based restrictions, regardless of speaker or medium used, merit strict scrutiny.

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[4] *See* Toni Fitzgerald, *The Number Of Cord Cutters And Cord Nevers Has Tripled Since 2014*, Forbes, May 27, 2021, https://bit.ly/3odsIjR.

[5] *See About 6 in 10 young adults in U.S. primarily use online streaming to watch TV*, Pew Research Center, Sept. 13, 2017, https://pewrsr.ch/3o2p8c1.

[6] Other cases cited by Petitioner (at Pet. Br. 29–30) do not rely on a medium-specific analysis at all, but instead were analyzed by this Court as time, place, and manner restrictions, *see, e.g.*, *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650–51 (1981); *Consol. Edison Co.*, 447 U.S. at 537, or through the lens of public forum analysis, *see, e.g.*, *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

Whatever the continuing vitality of this Court's prior medium-specific case law, this Court should reiterate here what *Reed* made plain: All content-based limitations receive the same exacting standard of review.[7]

Even before *Reed*, this Court declined to expand the reasoning from cases like *Red Lion* and *Pacifica*. No recent First Amendment case has relied on the scarcity doctrine and—although it overturned broadcasting prohibitions on commercial casino gambling—*Greater New Orleans Broad. Ass'n, Inc. v. United States*, never referred to scarcity. 527 U.S. at 175. Similarly, in a later case, this Court rejected certain decency regulations in part because technological advances allayed concerns with the pervasiveness or accessibility of undesirable messages, as each household had the ability to block unwanted content. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813–15 (2000).

Then, in *Reed*, this Court held that strict scrutiny should apply to content-based regulations of speech, without regard to the technology used to communicate that speech. *Reed* provides the correct rule for evaluating government restrictions that turn on the message conveyed by the speaker, and the proper framework for evaluating the digitization ban at issue.

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[7] Because Austin's sign code is content-based, this Court need not revisit, in the context of this case, the propriety of content-neutral regulations that apply to a specific medium or the standard of review that should apply to such regulations.

In *Reed*, the Court addressed outdoor regulations of "ideological signs," "political signs," and "temporary directional signs." 576 U.S. at 155. The Court determined that the sign regulations were facial content-based regulations of speech because each pertinent sign category was defined based on the messages conveyed. "The restrictions in the Sign code that apply to any given sign thus depend entirely on the communicative content of the sign." *Id.* at 164. As a result, the Court applied strict scrutiny and—finding that the regulations were overbroad and underinclusive given the Town's interests in aesthetics and traffic safety—struck down the regulations. *Id.* at 171–72.

Unlike the cases detailed above, *Reed* focuses on the subject of the regulation—rather than the medium regulated—to decide the level of scrutiny that applies. The key question under *Reed* is whether the challenged regulation treats one type of speech differently than another based on the content of the message. That is, *Reed* focused on the language of the regulation—and whether it created content-based distinctions—rather than whether the speaker was a broadcaster, cable company, sign operator, or another party. As *Reed* explained, "'speech restrictions based on the identity of the speaker are all too often simply a means to control content,' . . . and 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Id.* at 170 (internal citations omitted).

Beyond that, *Reed* suggests a focus on the broad textual guarantees of the First Amendment. Indeed, in marked distinction from many of the cases discussed above, the Court's analysis begins by quoting the First Amendment. *Id.* at 163. The opinion emphasizes that the First Amendment on its face limits the government's ability to burden speech and that facially content-based restrictions—as well as restrictions that turn on "reference to the content of the regulated speech," *id.* at 164—are subject to the highest constitutional scrutiny. Further, the opening of Justice Alito's concurrence highlights the First Amendment values of "democratic self-government and the search for truth," emphasizing the historical reasons why government regulations of, and that affect, speech are viewed with suspicion. *Id.* at 174 (Alito, J., concurring).

Reed's straightforward First Amendment analysis was reiterated in *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). In *Barr*, the Court again focused on the text of the First Amendment and whether the regulation, regardless of the technology used, made distinctions based on content. There, the Court determined that the government-debt exception to the federal robocall restriction—which allowed robocalls for the purpose of government debt collection and no others—was a content-based distinction and subject to strict scrutiny. *See id.* at 2347 ("The law here focuses on whether the caller is *speaking* about a particular topic."). In so holding, the Court did not consider whether robocalling technology ("autodialers"

regulated by the statute) poses unique societal harms that merit a more relaxed level of scrutiny. *Barr* thus further signals that the medium-specific era of First Amendment jurisprudence may be coming to a close and provides a road map for how to address the Petitioner's content-based digitization ban.

Austin's sign code distinguishes between on-premises signs and off-premises signs, prohibiting only the latter from installing or using digitized signage. Like in *Reed*, the Austin sign code defines whether a sign is on-premises or off-premises based on its "function or purpose." 576 U.S. at 163. For an off-premises sign, that function is to advertise, or to direct persons to, something that is "not on that site," requiring the government to consider the message on the off-premises sign to determine compliance. Thus, as Respondent makes clear, whether a sign is off-premises "depend[s] entirely on the communicative content of the sign." Resp. Br. 20 (quoting *Reed*, 576 U.S. at 164). Austin's digitization ban, therefore, is content-based and subject to strict scrutiny review.

C. Applying Medium-Specific Standards To Content-Based Limitations Would Undermine Free Speech And Prove Unworkable In Practice.

Apart from conflicting with *Reed* and this Court's more recent First Amendment cases, Petitioner's suggestion that restrictions for digital signs should receive more lenient judicial review would also undermine free speech and prove unworkable in

practice. *First*, as alluded to above, a technology-specific standard conflicts with both the text and purposes of the First Amendment. *Second*, a technology-specific standard invariably ends up favoring certain speech and communications media over others. *Third*, as history has shown, this Court's efforts to craft technology-specific standards are fraught with uncertainty and are quickly outpaced by technological development, creating law that does not align with reality. And, *fourth*, Petitioner has not articulated—and it is not clear from past precedent—what legal standard of scrutiny would be applicable to medium-specific, content-based regulations.

First, technology-specific standards contravene the text and spirit of the First Amendment. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media," much less permits technological development to dictate its protections. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 13 n.1 (1996) (Thomas, J., concurring in part). Indeed, regardless of the technology or medium used, "the basic principles of freedom of speech and the press, like the First Amendment's command, *do not vary*." *Burstyn,* 343 U.S. at 503 (emphasis added). Such distinctions introduce a hierarchy of speech and speakers that threatens the whole of the First Amendment's protections.

Second, imposing technology-specific standards effectively elevates certain communications or speakers over others based solely on the medium used

to communicate. This is precisely what happened under the scarcity doctrine: the First Amendment "right of the viewers and listeners, not the right of the broadcasters, [was] paramount." *Red Lion*, 395 U.S. at 390 (citations omitted). The favoring of some speakers over others is not merely an abstract concept. Apart from this case, the Court is now considering a petition for certiorari challenging *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, 247 A.3d 740, 755–56 (Md. 2021), in which the Court of Appeals of Maryland affirmed a tax on billboards that effectively granted traditional "newsgathering" organizations greater First Amendment protection than other speech platforms.[8] *Id.*

Petitioner's urged expansion of reduced scrutiny for medium-specific regulations harms not only disfavored speakers. Indeed, as recent events have shown, some speakers (and their messages) may be more powerful given the medium on which they communicate. For example, under a reduced standard of scrutiny, the government may be able to target a particularly successful Twitter user with an unpopular message—or a well-known podcast host with a large audience—based on the perceived harms of spreading misinformation via certain platforms. That is not a mere theoretical possibility; some of the most popular social media sites are currently under intense government scrutiny for perceived failure to moderate

[8] The Petition for Certiorari in *Clear Channel* was filed on August 12, 2021, Supreme Court Case No. 21-219.

their users or enforce community standards.[9] Disfavored or not, the government must satisfy strict scrutiny if it wishes to impose regulations that seek to single speech out based on its content.

Third, technology-specific standards developed by courts in the context of plodding and fact-specific litigation are quickly outpaced by technological advancements. As noted above, the scarcity doctrine was undercut by the steadily expanding range of electromagnetic spectrum available for commercial use, *see Red Lion*, 395 U.S. at 397, and the arrival of alternative television technologies, such as cable television and broadcast satellite. *See* Yoo, THE RISE AND DEMISE OF THE TECHNOLOGY-SPECIFIC APPROACH TO THE FIRST AMENDMENT, 91 GEO. L.J. at 279 (discussing the technological downfall of the scarcity doctrine). And the Court's concerns about the pervasiveness and accessibility of indecent content in *Pacifica* were quickly undermined as technology developed to grant viewers the ability to control what appeared on their televisions. *See id.* at 304 (listing technological advancements); *see also Playboy*, 529 U.S. at 814 (explaining that even "the mere possibility that user-based Internet screening software would 'soon be widely available'" was relevant to the Court's analysis of overbroad cyber-speech restrictions (citing *Reno v. ACLU,* 521 U.S. 844, 876–77 (1997))). Thus,

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[9] *See, e.g.*, Oliver Darcy, *Social media algorithms to face scrutiny as lawmakers look to curb misinformation*, CNN Business, Apr. 27, 2021, https://cnn.it/3ERWYX9.

any technology-specific standard is likely doomed to the historical dustbin sooner or later.

The government has been especially bad at predicting technological change in the past. In 1959, for example, the U.S. Postmaster General predicted that "[b]efore man reaches the moon, mail will be delivered within hours from New York to California, to Britain, to India or Australia" via rocket mail.[10] The FCC also misguessed regarding FM radio, doubting its technical viability (despite hearing a presentation from its inventor of a jazz band performance) and delaying in the adoption of this radio technology for over twenty years.[11] Similarly, cell phone technology was conceived in the 1940s and featured in the *Saturday Evening Post*, and wireline carriers urged the FCC to allocate capacity for a mobile wireless network. The FCC, however, denied that request and limited the amount of spectrum available for its use, resulting in a development lag and delaying widespread commercial application for at least forty years.[12] Thus, the government's failure to anticipate can, and has, harmed innovation and slowed technological development.

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[10] Bob Greene, *When the Post Office Was the Bomb*, Wall St. J., Aug. 24, 2020, https://on.wsj.com/3i72eMO.

[11] Thomas Winslow Hazlett, The Political Spectrum: The Tumultuous Liberation of Wireless Technology, From Herbert Hoover to the Smartphone 64–68 (2017).

[12] *See id.* at 176–78.

Further, even with a crystal ball, medium-specific standards are increasingly unworkable in light of new media that cannot be clearly defined and thus cannot fit neatly into a particular regulatory box. For example, courts might be hard-pressed to assign a unique standard of review to hybrid services like Voice over Internet Protocols (telephone services via IP networks) or streaming video services that offer a mix of cable channels and original programming. Such new technology promises to "collapse entirely" the distinctions between media. Yoo, VERTICAL INTEGRATION AND MEDIA REGULATION IN THE NEW ECONOMY, 19 YALE J. ON REG. at 289. "Once all communications are reduced to bits and bytes, they can be transmitted via any technology," and "the distinctions drawn in the columns and the rows represented in Table XI [of the Communications Act] will no longer remain coherent as a regulatory approach." *Id.*

Fourth, Petitioner cannot clearly articulate what type of standard should be applied for medium-specific, content-based restrictions, were it even to be workable. Petitioner tries to shoehorn its regulation into an intermediate scrutiny framework (Pet. Br. 38), but never says whether intermediate scrutiny is appropriate for all such regulations. Petitioner's claim that its digitization ban merely addresses "the relationship between a particular form of speech and a location" (*id.*) arguably invites the even less onerous rational-basis review. Petitioner may even be suggesting that this Court should impose a sliding scale of scrutiny depending on the government's

asserted interests and the nature of the medium being regulated. This Court is left to speculate on these issues, all of which contain the potential to further erode First Amendment protections for a wide variety of messages.

II. TECHNOLOGICAL DISTINCTIONS ARE BETTER DRAWN IN EVALUATING NARROW TAILORING.

As detailed above, strict scrutiny is the appropriate legal standard for content-based speech restrictions like Austin's digitization ban. If the alleged harms of digitization or billboards generally should play any role in the Court's First Amendment analysis, those concerns are best addressed in the application of strict scrutiny. That is, the Court may address any technology-specific concerns when determining whether the pertinent regulation is narrowly tailored to achieve the government's stated compelling interests.

Narrow-tailoring analysis is designed to account for the diverse government interests that may arise in a First Amendment challenge, including changing technology. Addressing technological specifics at this stage of the analysis could still protect the important interests that underlie the First Amendment while making appropriate allowance for factual circumstances and the government's asserted interests.

In the context of billboards and digitized signs, although it is conceivable that government interests in traffic safety and aesthetics could support a narrowly

tailored sign ordinance, Austin's digitization ban clearly fails. Even if Austin's interests in aesthetics and traffic safety are sufficiently compelling, Petitioner provides no basis for its differential treatment of signs displaying on-premises and off-premises messages. For example, Petitioner claims that "[d]igital billboards . . . exacerbate ['both aesthetic and traffic safety concerns']," Pet. Br. 15, yet Austin's regulation allows digital billboards to be installed for on-premises advertising, J.A. 76 (Austin City Code § 25-10-102(6)). Petitioner cannot claim, on one hand, that off-premises digital billboards are an eyesore and put drivers at risk, and on the other hand, allow on-premises digital billboards to be displayed without restriction. Thus, much like the sign policy at issue in *Reed*, Austin's digitization ban is fatally underinclusive. *Reed*, 576 U.S. at 171.

Narrow-tailoring analysis is also the appropriate point at which to consider related federal regulatory schemes like the Highway Beautification Act, Pub. L. No. 89-285, 79 Stat. 1028. Petitioner claims that overturning the digitization ban here will overturn *all* regulations passed to advance the Highway Beautification Act that distinguish between on-premises and off-premises signs. But that is not—and need not be—so. First, as Respondent points out, many localities have passed sign regulations that do not flout *Reed*, either by regulating only commercial speech or by omitting premises distinctions and imposing only content-neutral limitations. *See* Resp. Br. 37–40. Further, it is possible for the Highway Beautification Act to survive strict scrutiny, due to its use of the non-

content characteristics of billboards, narrow application, and close connection to the government's stated interests. *Id.* at 40–42.

A narrow-tailoring analysis is precisely the occasion to evaluate a locality's interests in maintaining federal funding, ensuring traffic safety, or protecting aesthetics, and to ensure that those interests are appropriately served by the challenged regulation. The government's concern for the Highway Beautification Act is understandable, but as in *Barr*, this "slippery-slope argument is unpersuasive." 140 S. Ct. at 2347. Courts are well-equipped to conduct strict-scrutiny analysis and to fairly evaluate a locality's interests, including those related to federal funding and coordination with the Highway Beautification Act. Moreover, the fear of errant invalidation of regulations passed in relation to the Highway Beautification Act is particularly weak given the government's acknowledgment that the Act is narrower in relevant parts than Austin's digitization ban. *See* U.S. Br. 8.

CONCLUSION

This Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

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