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 THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether petitioner's sign code, which permits the digitization of signs that advertise activities on the premises but prohibits the digitization of other signs violates the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center is headquartered in Chicago, Illinois, and is interested in this case because the freedom of speech is a core value vital to a free society. To that end, the Liberty Justice Center has long represented clients seeking to protect their First Amendment rights before this Court. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018); *Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), *petition for cert. denied* No. 19-792 (April 27, 2020); *Bennett v. AFSCME Council 31*, 991 F.3d 724 (7th Cir. 2021), *petition for cert. filed* No. 20-1603 (May 14, 2021).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Reed v. Town of Gilbert, 576 U.S. 155 (2015), is not a departure from this Court's previous cases. Rather, it reaffirmed and simplified its content-discrimination analysis into two steps—first, if a law's text makes any reference to content, then strict scrutiny applies; and second, a content-neutral law will be subject to strict scrutiny when the purpose and justification are content-based—while overturning some lower court's misapplication of content-based analysis by clarifying that a content-based law on its face is *always* subject to strict scrutiny, regardless of whether its purpose is content-neutral.

Ruling for the City of Austin would require this Court to overturn *Reed* because the City denies that its sign code's definition of off-premises sign is content-based, despite the fact that that definition on its face depends on the sign's content—whether the sign refers to activities that take place on the same lot as the sign itself. The City asks the Court to ignore the fact that the sign code's definition of off-premises signs is content-based because, it argues, the sign code is viewpoint-neutral and the purpose of the sign code is content-neutral.

This Court should not overturn *Reed* because its stated factors for overturning precedent do not support doing so. This Court should reject the City of Austin's arguments and uphold the decision of the Circuit Court of Appeals.

ARGUMENT

I. *Reed* clarified this Court's analysis as to when a restriction on speech was content-based and thus subject to strict scrutiny.

One of the most, if not the most, important concepts in this Court's First Amendment free-speech jurisprudence is the content-discrimination principle. *See, e.g.,* David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 Case W. Res. 259, 260 (2019); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. Rev. 615, 616 (1991); Genevieve Lakier, Reed v. Town of Gilbert, Arizona, *and the Rise of the Anticlassificatory First Amendment*, 2016 Sup. Ct. Rev. 233, 233; Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 Iowa L. Rev. 1427, 1428 (2017). That is, the idea that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). The concern over content-discrimination is important because "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate." *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

It is well established that strict scrutiny applies to content-based regulations. "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disap-

proval of the ideas expressed. Content-based regulations are presumptively invalid." *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted).

Despite the importance of the principle, the Court had trouble settling on a single test of content-based lawmaking. According to Professor Lakier, it had wavered between two different tests.

> In one line of cases, the Court ha[d] insisted that laws are content-based whenever they treat speakers differently because of the content of their speech—that is to say, whenever they employ explicit content distinctions. In another line of cases, the Court ha[d] instead insisted that laws are content-based only when they cannot be justified by a content-neutral purpose—that is to say, when the government cannot adequately demonstrate that the distinction the laws draw furthers some purpose other than to restrict speech because the government dislikes its content, or fears its communicative effects.

Lakier, *supra*, at 234. Courts following the "purpose test" would often give only a cursory review even to ordinances that facially discriminated against some speech based on its content. Joseph Mead, *Why We Need* Reed*: Unmasking Pretext in Anti-Panhandling Legislation*, 7 ConLawNOW 37, 29 (2015).

Over time, divisions developed in the lower courts over the application of the content-discrimination principle, with some courts focusing on explicit content-based distinctions, while other courts focused on

the purpose. *See* Hudson, Jr., *supra*, at 262. The result was the creation of what commentators described as a confused, inconsistent, and highly malleable body of law. Lakier, *supra*, at 234.

For example, Professor Mead deemed this case law a "recipe for mischief" because: (1) it was difficult to determine purpose, (2) it was unsettled which purposes were constitutionally suspect and which were not, and (3) it led to a charade where law departments would invent rationales for laws and throw them into ordinance preambles that were so unrelated to the concerns actually considered by the legislators. According to Professor Mead, these issues led to an underprotection of speech that was disliked by majorities. Mead, *supra*, at 40.

The Supreme Court clarified the proper understanding of the content-discrimination principle in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). *See* Hudson, Jr., *supra*, at 263. In *Reed*, the Court reaffirmed that, for purposes of First Amendment review, a court should deem a speech-restrictive law content-based, and thus presumptively unconstitutional, if the law "'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. 155, 163 (2015) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011)). The Court rejected interpretations of its cases that had held governments could make facial references to a particular type or category of content in their laws so long as those laws were not referring to that content in order to express disagreement with or disapproval of it. Enrique Armijo, Reed v. Town of Gilbert: *Relax, Everybody*, 58 B.C. L. Rev. 66, 66–67 (2017).

The Court in *Reed* applied a two-step analysis to determine whether strict scrutiny applied. First, if a law's text makes any reference to content, then strict scrutiny applies. *Reed*, 576 U.S. at 163. The second step only applies if the law's text makes no reference to content. Under the second inquiry, if the government adopted the law because of disagreement with the message expressed by the speech the law infringes upon, *id.* at 164, or, in the words of the Court, "when the purpose and justification for the [content-neutral] law are content based" *id.* at 166.

The Court in *Reed*, then, essentially consolidated its two precedents regarding content-based restrictions on speech that had confused the lower courts, while clarifying that strict scrutiny applied to all laws where the text is based on content even if the law had a content-neutral purpose. *Reed* was therefore not a departure from this Court's previous cases. Rather, it simply reaffirmed its prior decisions on how to determine whether a law was content-based while clarifying that laws referencing content on their face were content-based even if the purpose of those laws was not to express disagreement with or disapproval of that content.

The content discrimination rule adopted in the U.S. Court of Appeals for the Ninth Circuit in *Reed*, prioritized governmental purpose in the content neutrality inquiry—in particular, whether a law's reference to content was based on discrimination against or disagreement with that content. *Reed v. Town of Gilbert*, 707 F.3d 1057, 1069 (9th Cir. 2013) ("distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers.").

Relying on the Court's 1972 statement in *Police Department of Chicago v. Mosley* that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," 408 U.S. 92, 95 (1972), the lower courts had held that a regulation was content-based when its "underlying purpose [in referencing content] . . . is to suppress particular ideas or [to] single[] out particular content for differential treatment." *Reed v. Town of Gilbert*, 587 F.3d 966, 974 (9th Cir. 2009) (quoting *Berger. v City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009)); see also *Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014).

This Court in *Reed* firmly rejected this interpretation of its content regulation cases. The Court made clear that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429 (1993)). Further, this Court found that legislative intent is not necessary to find a violation of the First Amendment and a party opposing the government need adduce no evidence of an improper censorial motive. *Reed*, 576 U.S. at 165. Indeed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*. at 166.

Focusing on whether the governmental purpose of a facially content-based law at the time of its adoption was biased or benign toward that content does nothing to restrict a government official who uses a facially content-based law for content-discriminatory purposes. Armijo, *supra*, at 89.

The Court has long been concerned with excessive governmental discretion in the application of existing content-neutral laws, on the ground that such discretion "has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). "It would be odd for the First Amendment to be oblivious to the same concern with respect to facially content-based laws—where the concern about censorially-motivated constructions of such laws by government officials should be at least as great." Armijo, *supra*, at 90.

The Court's clarification in *Reed* of the content-based test also helped clarify another problem created by the purpose-based test. The purpose-based definition of a content-based law "unnecessarily conflated the First Amendment's content neutrality requirement with its viewpoint neutrality requirement." Armijo, *supra*, at 90. The Ninth Circuit had held "that the Sign Code was content neutral because it 'does not mention any idea or viewpoint, let alone single one out for differential treatment.'" *Reed*, 576 U.S. at 168. The Court rejected this reasoning conflating limitations on content-based laws and limitations on viewpoint-based laws: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169.

II. Accepting the City of Austin's arguments would require this Court to overturn *Reed*.

In this case, the City of Austin's sign code defined "off-premise sign" as a sign that "advertis(es) 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." Austin City Code § 25-10-3(11) (2014) (J.A. 52). On-premise signs may be "electronically controlled changeable-copy sign(s)"—i.e. digital signs, *Id*. § 25-10-102(6) (J.A. 76). The City of Austin's sign code defines off-premises signs based on the communicative content—"advertis[ing] a business, person, activity, goods, products, or services not located on the site where the sign is installed" J.A. 52. Thus, in order to know whether a sign in the City of Austin may be converted to a digital sign, one must determine the content of those signs—if the content advertises activities not located on the same premises or directs persons to a location not on that site, then a digital sign is prohibited. But if the content of the sign refers to activities located on the same site, then a digital sign is permitted.

The City pretends that the definition of "off-premises signs" does not depend on the content of a sign, asserting that it is content-neutral because the definition of "off-premises signs" also depends on the sign's location. Pet. Br. 20 ("Austin's definition of off-premises sign . . . is [not] 'targeted at specific subject matter'"). But, of course, Austin's definition of "off-premises signs" *is* targeted at specific content—if the content of the sign applies to activities that do not take

place on the same location as the sign, or directs persons to a location not on that site, then it is an off-premises sign.

In essence, the City asks this Court to overturn *Reed's* holding that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165.

As Respondents note, Austin devotes "the first several pages of its argument to explaining the purposes motivating its ban on off-premises signs" Resp. Br. 22, implying that "the Court should first determine whether the restriction had a valid justification and then determine whether strict scrutiny applies." Resp. Br. 23. Indeed, the City of Austin defends its content-based definition of off-premise signs by asserting that "[i]t aims not at particular subject or viewpoint, but establishes a regulatory distinction based on the relationship between a place and a sign." Pet. Br. 19–20. The City pretends that the definition of "off-premises signs" does not rely on content simply because it also relies on location. In other words, it defends its content-based definition of off-premise signs by referring to its purpose. The City, then, implicitly relies on the purpose-based test that this Court explicitly rejected in *Reed* and rulings for the City would require this court to overturn *Reed*.

Put simply, the rejection of the purpose-based test is the quintessential holding in *Reed*—laws that are content-based on their face do not evade strict scrutiny simply because their purpose is not to express disagreement with or disapproval of that content. In order to rule in the City's favor one must either reject

the plain meaning of a law that is based on content on its face, or reject the proposition that a content-based law on its face is subject to strict scrutiny even if the purpose of that law is not to express disagreement or disproval of that content. Either way, by ruling in the City's favor this Court would simply return the lower courts to the confusion that existed in applying the First Amendment to content-based restrictions before *Reed*.

Further, the City defends its content-based definition of off-premise signs by asserting that "neither Austin's definition of off-premises sign nor the restrictions placed upon those signs (such as the rule that respondents' signs cannot be digitized) is 'targeted at specific subject matter' or 'singles out signs bearing a particular message.'" Pet. Br. 20 (quoting *Reed*, 576 U.S. at 169, 171). Again, this is not true. The definition on "off-premise signs" clearly targets the subject matter—if the content of the sign applies to activities that do not take place on the same location as the sign, or directs persons to a location not on that site, then it is an off-premises sign.

The City's assertion that the definition of "off-premises signs" is not targeted at specific subject matter and does not single out signs bearing a particular message also threatens another important clarification in *Reed*: that the lower courts had conflated content-based restrictions on speech with view-point based restrictions on speech. In this case, the City threatens to reestablish that confusion by flatly denying that the definition of off-premises sign is content-based while at the same time asserting it not view-point based. But as this Court said in *Reed*: "a speech

regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169. Similarly, here, the definition of off-premises signs in the City's sign code is content-based even if it does not discriminate on viewpoints. It does not matter that the definition does not make a distinction based on viewpoint.

The City of Austin, therefore, asks no less than to overturn *Reed*, at least in part. And at least one brief of amici curiae filed in support of the City explicitly supports overturning *Reed*. *See* Br. of the Knight First Amendment Institute at Columbia University *et al.* 5. Such a decision should not be taken lightly. "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U. S. 808, 827 (1991).

III. None of the factors for overturning this Court's precedent support overturning *Reed*.

This Court has identified a number of potential factors to consider when overruling precedent. The most prevalent are five: "[1.] the quality of reasoning [of the decision to be overturned], [2.] the workability of the rule it established, [3.] its consistency with other related decisions, [4.] developments since the decision was handed down, and [5.] reliance on the decision." *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2478 (2018). The City of Austin has not set forth any reasons that any of these factors support overrul-

ing *Reed*. Proper consideration of any of these five factors would lead to only one conclusion: that *Reed* should remain binding precedent and should not be overturned.

First, the reasoning in *Reed* is sound. Indeed, *Reed* clarified this Court's precedent by establishing a two-part test for determining whether a restrict was content-based and thus subject to strict scrutiny. First, if a law was content-based on its face it is subject to strict scrutiny. Second, a facially neutral law is still subject to strict scrutiny if the government adopted the law because of disagreement with the message expressed. Further, *Reed* clarified that facially content-based laws are subject to strict scrutiny even if the purpose of those laws was not to express disagreement with or disapproval of that content. *Reed*, 576 U.S. at 163–64.

Second, the rule in *Reed is* workable. By clarifying precedent, *Reed* set up a simple two-step analysis that is more workable than what the lower courts had been applying. As explained, *Reed* also clarified the distinction between content-based restrictions on speech and viewpoint-based restrictions on speech, a distinction that many lower courts had confused, especially under the purpose test that the Court rejected in *Reed*.

Amici in support of the City assert that the *Reed* test is unworkable because some lower courts have narrowly applied the first step of the *Reed* analysis, *see* Br. of the Knight First Amendment Institute at Columbia University *et al*. 12–14, but they propose a more "nuanced" test that would add at least four more steps of analysis and still includes analyzing whether the text of the law is content-based, which they assert

is unworkable. *Id*. at 24. In other words, *amici* propose a less workable test than in *Reed*.

Third, *Reed* is consistent with the Court's other decisions. This Court has long disapproved on content-based restrictions on speech and *Reed* consistently and clearly applies that principle.

Fourth, developments since the Court handed down *Reed* also support upholding it. Despite fears of *Reed* becoming "revolutionary" and courts being forced to strike down a plethora of laws under *Reed's* holding, scholarly analysis demonstrates that *Reed* has not been the basis of a First Amendment revolution, though it has been consequential, the lower courts have largely read it narrowly. Dan V. Kozlowski and Derigan Silver, *Measuring* Reed's *Reach: Content-Discrimination in the U.S. Circuit Courts of Appeals after* Reed v. Town of Gilbert, 24 Comm. L. & Pol'y 191, 193 (2019).

Despite some commentators' concerns, *see, e.g.,* Br. of the Knight First Amendment Institute at Columbia University *et al*. 10–12, the courts of appeals have thus far declined to apply *Reed* to categories of speech that have traditionally been less protected, such as commercial speech. Kozlowski and Silver, *supra*, at 193. This concern expressed by amici in support of the City is almost entirely theoretical as amici provide very little evidence of this actually happening.

Finally, the fifth factor—reliance on the decision—also weighs in favor on upholding *Reed*. After *Reed* clarified the analysis to determine whether a restriction on speech was content-based and thus subject to strict scrutiny, the lower courts have corrected their approaches and made decisions consistent with

Reed. Prior to *Reed*, some federal courts upheld laws that, on their face, discriminated on the basis of content and had substantial evidence of pretext, so long as the laws could be "justified" by a non-censorial motive, often one concocted by the law department after a legal challenge was filed. Mead, *supra,* at 37–38, 45. But the lower courts, following *Reed*, have abandoned this analysis.

For example, at least two courts of appeals who had previously upheld ordinance banning panhandling based on the content of speech based on a "content-neutral" motive, overturned those cases to be consistent with *Reed*, which also eliminated the circuit court's split of authority on the issue. *See Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014), rev'd, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015), declaring ordinance unconstitutional on remand, 2015 WL 6872450, at *15 (D. Mass. Nov. 9, 2015). Thus, the lower courts' decisions analyzing whether restrictions on speech are content-based have become more consistent after *Reed*.

CONCLUSION

This Court made clear in *Reed* that a law that is content-based on its face is subject to strict scrutiny, and that laws that are on their face content-neutral will also be subject to strict scrutiny when the purpose and justification of a facially content-neutral law are content-based. Further, the Court held that facially content-based laws are subject to strict scrutiny even if the government's purpose for regulation is content-neutral.

In order to rule in favor of the City of Austin, the Court would have to do damage to its precedent in *Reed*. But the Court's relevant factors for overturning precedent all favor upholding *Reed*. Thus, this Court should reject the City of Austin's arguments and affirm its holding in *Reed*.

Respectfully submitted,

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