No. 20-1029

In The
Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF TEXAS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.[1]

SUMMARY OF ARGUMENT

"The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (internal quotation marks omitted). A content-based distinction does not cease to regulate based on content merely because it has a benign motive or involves other restrictions. Such factors may just make seeing the content regulation more difficult, only heightening the danger of discrimination.

Austin raises various excuses to conceal its law's content dependence, but it nonetheless regulates speech based on the content of a speaker's message. Indeed,

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

Austin's excuses only highlight how dangerous its restrictions are in limiting all political and noncommercial speech, in giving officials discretion that conceals discrimination through layers of evaluation, and in allowing sleight of hand that obscures the law's content dependence. Furthermore, contrary to the City's claims, this case neither raises a circuit split nor undermines the ability to regulate billboards.

ARGUMENT

I. PETITIONER'S RESTRICTIONS ON OFF-PREMISES BILLBOARDS ARE CONTENT-BASED AND SUBJECT TO STRICT SCRUTINY UNDER *REED*.

Far from sowing confusion and invalidating numerous statutes and ordinances, the Fifth Circuit's decision below directly applied *Reed* and prior precedent. Because Austin's ordinance cannot be applied without reference to the messages conveyed, it is content-based and subject to strict scrutiny under *Reed*.

In *Reed*, this Court held that laws must pass strict scrutiny when they discriminate based on content. *Id*. at 159. Some content-based distinctions are obvious, while others are more subtle, defining regulated speech by its function or purpose. *Id*. at 163-64. Moreover, even if a law presents a content-neutral façade, it cannot avoid strict scrutiny if it cannot be "justified without reference to the content of the regulated speech." *Id*. at 164. In addition, a benign motive cannot

save a content-based law. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id*. at 167.

The Fifth Circuit correctly held that Austin's law was content-based and subject to strict scrutiny. Austin regulates a sign depending on its content: on whether the sign advertises activities, goods, or services not located on the site. This requires that enforcement authorities examine the content of a sign's message, define the activity taking place at the site, and then decide whether the message matches the activity there. The law is thus content-based, both because it "defin[es] regulated speech [both] by particular subject matter, and . . . by its function or purpose." *Id.* at 163.

A. The breadth of Austin's restriction is particularly pernicious to political speech.

"The argument that" Austin's law is content-neutral "is reminiscent of Anatole France's sardonic remark that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring). While ostensibly neutral, the law is a de facto ban on political and ideological speech.

Some facial distinctions are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose, but both are subject to strict scrutiny. *Reed*, 576 U.S. at 163-64. While Petitioner's regulations do not state that "digitizing ideological or political messages is prohibited," that is their effect.

By limiting digitized billboards to "on-premises" messages, the City's ordinance effectively prohibits ideological or abstract messages that can never (or rarely) be said to be "on site." As the Fifth Circuit asked at oral argument, "[h]ow could one determine whether a digital billboard that said 'God Loves You' is on-premises or off-premises?" Pet. App. 17a. Similarly, the Sixth Circuit in *Thomas v. Bright* noted that the on-premises/off-premises distinctions invalidated in that case would have allowed a pet store to advertise dogs from a puppy mill but prevent a neighbor from displaying a sign protesting puppy mills, or permit a crisis pregnancy center to protest abortion while preventing a neighbor from advocating for it. *Thomas v. Bright*, 937 F.3d 721, 736 (6th Cir. 2019).

"Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981). Petitioner's on-premises/off-premises distinction threatens to cut off all political and noncommercial speech from this important medium of communication.

B. The Fifth Circuit properly protects speakers from the discrimination encouraged when officials evaluate a message's content.

The Fifth Circuit did not employ a "rigid and formulaic" approach that treats a rule as content-based whenever officials must read the sign (Pet. Br. 24, 32), but instead followed this Court in protecting speakers from the discrimination encouraged whenever officials must evaluate a message's content to decide if a law applies. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (holding that a law is "content-based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred"); *see also FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (noting that "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether" the law applied); *Pagan v. Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007) (en banc) (regulation that requires reference to the content of speech to determine its applicability is "inherently content-based"); *Thomas*, 937 F.3d at 729 (applying *McCullen*).

A discretionary, multilayered evaluation was necessary to apply Petitioner's regulations, not just a cursory look. Pet. App. 16a-18a. An official did not merely glance at a sign to verify size, font, or color requirements. He or she did not, as in *Act Now to Stop War and End Racism Coal. v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir. 2017), simply look at the sign to see if there was a date on it. Rather, the official had to

"examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (internal quotation marks omitted).

The application of Petitioner's regulations was not simple or mechanical. At oral argument counsel struggled to answer hypothetical questions posed by the panel, such as "[c]ould Sarah place a digital sign in her yard that said 'Vote for Kathy' if Kathy did not live at Sarah's house?" As the Fifth Circuit noted, "if prepared counsel cannot quickly assess whether these signs are permitted . . . the inquiry is not a mere cursory one." Pet. App. 17a.

And the "danger of censorship" against "disfavored speech" and speakers inherent in such content-based examinations is not merely theoretical. *Reed*, 576 U.S. at 169. The record in *Thomas*, where the Institute for Free Speech was counsel, demonstrated this danger. "The state trial court found 'substantial evidence of selective and vindictive enforcement against [Thomas],' including emails from TDOT employees working in concert with a competitor of Thomas's to 'defeat' him, and unsolicited emails sent from TDOT employees to advertisers on Thomas's other billboards suggesting that his billboards were illegal and that associating with Thomas would reflect 'negatively' on them." *Thomas*, 937 F.3d at 726.

The evidence of such discrimination will not always be readily available, however, concealed in the layers of evaluation such laws allow. Thus, this and

other courts have drawn a bright line protecting against content-based, non-cursory examinations to determine whether a law will regulate speech. To protect speakers from such discrimination, the Court should continue to affirm the line drawn in *McCullen* and applied below.

C. Adding benign restrictions to content-based laws does not eliminate the danger of discrimination.

This Court rejected the argument that a content-based law could be saved by adding a benign justification. *See Reed*, 576 U.S. at 166. Austin attempts to save its law by arguing that there is a location-based component to its content-based law. But adding content-neutral requirements to a content-based law does not get rid of its content dependence. And added content-neutral requirements, like "[i]nnocent motives," do nothing to "eliminate the danger of censorship presented" by the content-based requirements. *Id*. at 167.

Thus, the fact that location also plays a role in Austin's restriction on billboards does not save the law from its content-based requirements. Austin argues that its sign code restrictions should escape strict scrutiny because they are not "entirely" content-based. But in emphasizing the egregiousness of the law there, *Reed* did not hold that a law is unconstitutional only when it is based "entirely" on content. *Reed*, 576 U.S. at 164. On the contrary, this Court's precedent has established that laws must have nothing to do with

content to escape strict scrutiny. *See*, *e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989)).

Indeed, Petitioner's interpretation—that a law is content-based only if it is "entirely" based on content—flies in the face of *Reed* itself. This Court rejected a similar argument, that a law ceased to be based on content when it was "event-based." *Reed*, 576 U.S. at 170-71. "[T]he fact that a distinction is event based does not render it content neutral." *Id*. at 170.

As in *Thomas*, the on-premises exception employs both location and purpose. Whether the law "limits on-premises signs to only certain messages or limits certain messages from on-premises locations, the limitation depends on the content of the message." *Thomas*, 937 F.3d at 731. Further, this Court has repeatedly held that laws combining content-based and content-neutral factors are content-based. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98 (1972) (law was content-based where it prohibited non-labor picketing outside a school); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (content-based law proscribed non-labor picketing in front of residence); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (law content-based where it prohibited speech critical of a foreign government within 500 feet of that country's embassy).

The Court should maintain this bright line, that the government cannot escape strict scrutiny by inserting additional, content-neutral requirements into

a content-based law. Such an exception would swallow the rule, undermining First Amendment protection against the dangers of censorship in content-based laws.

II. WHILE *REED* MAY RAISE QUESTIONS ABOUT THE PROPER LEVEL OF SCRUTINY FOR COMMERCIAL SPEECH, THIS CASE DOES NOT PRESENT THEM.

Whatever the merits of applying an intermediate standard of scrutiny to commercial speech, that issue is not before the Court here. The City of Austin concedes, as it must, that the ordinance in this case applied to both commercial and noncommercial speech and that Respondents engaged in noncommercial speech, although Austin attempts to cabin it as "occasional." Pet. Br. 49-50. Thus the regulations at issue here applied in theory and fact to both noncommercial and commercial messages, and *Reed* must therefore be applied to adequately protect the noncommercial speech the City of Austin restricts.

Given that the Fifth Circuit had no choice but to apply *Reed* to the restrictions on noncommercial speech, it correctly refused to reach the question whether *Central Hudson* analysis still applies after *Reed*. Pet. App. 21a-25a; *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Similarly, this Court need not and should not address the question of whether *Reed* subsumed *Central Hudson*. That question is best left to a case that squarely

addresses commercial speech. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955) ("in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute").

III. UPHOLDING *REED* DOES NOT WREAK HAVOC ON THE ABILITY TO CONTROL BILLBOARDS.

The City of Austin and supporting *amici* assert that correct application of *Reed* is a problem because it would result in "countless state and local" laws being declared unconstitutional. That argument fails, both in principle and in fact.

That a law, even that many laws, might be declared unconstitutional does not justify the government in violating speakers' First Amendment rights or this Court's precedent. If faithful application of *Reed* and *Metromedia* requires that state and local governments revise their laws, that indicates that state and local governments failed in their independent duty to support and defend the Constitution.

Furthermore, even before *Reed*, the First, Ninth, and Eleventh Circuits required state and local governments to find ways to regulate billboards without violating the right to display noncommercial messages. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 906 (9th Cir. 2007) (noting law prohibited noncommercial messages "not related to the site"

(citing *Desert Outdoor Adv., Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996))); *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1343-44 (11th Cir. 2004) (holding law avoided unconstitutional favoritism because noncommercial speech inherently onsite, while applying *Southlake Prop. Assocs. v. City of Morrow*, 112 F.3d 1114, 1117-19 (11th Cir. 1997)); *Ackerley Commc'ns of Mass., Inc. v. Somerville*, 878 F.2d 513, 517 (1st Cir. 1989) (protecting any noncommercial sign once a commercial sign is allowed).

Those circuits cover a significant portion of the country's land and population. And, as with the state of Tennessee in *Thomas*, the City of Austin has failed to show that uncontrollable blight or traffic deaths have resulted from the protections for noncommercial speech in the First, Ninth, and Eleventh Circuits.

Furthermore, state and local jurisdictions have found ways to protect First Amendment rights while still controlling billboards. Oregon changed its law in response to an adverse court ruling that the "on-premises/off-premises distinction . . . is, on its face, an impermissible restriction on the content of speech." *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 132 P.3d 5, 18 (Or. 2006). In response to *Auspro Enters., LP v. Tex. DOT*, 506 S.W.3d 688, 700 (Tex. App. 2016), the Texas legislature complied with *Reed* by regulating commercial rather than off-premises signs. *See* Tex. Transp. Code § 391.031; Tex. S.B. 2006, 85th Leg., ch. 964, §§ 6, 7, 33(3), effective June 15, 2017, https://bit.ly/3kFTDlW.

And before *Reed*, from New York to Arizona and in between, communities recognized from *Metromedia* that they needed to establish sign laws that more carefully protected noncommercial speech. *See*, *e.g.*, *Contest Promotions, LLC v. City & Cty. of S.F.*, 867 F.3d 1171, 1177 (9th Cir. 2017), *amended by and reh'g denied*, 874 F.3d 597, 603 (9th Cir. 2017) (planning code exempted noncommercial signs); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (law exempted "all noncommercial expression"); *Nat'l Advert. Co. v. Denver*, 912 F.2d 405, 408 (10th Cir. 1990) (Denver law permitted all noncommercial speech); *Major Media of Se., Inc. v. Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) (change in ordinance to moot constitutional challenge); *Infinity Outdoor Inc. v. City of New York*, 165 F. Supp. 2d 403, 422 (E.D.N.Y. 2001) (New York City law allowing all noncommercial signs wherever commercial signs allowed).

Indeed, after arguing that it would be unable to regulate billboards without an on-premise/off-premise distinction, the State of Tennessee did just that after the Sixth Circuit's decision in *Thomas*. The state passed the Outdoor Advertising Control Act of 2020, which replaced its content-based exemption with one that exempted signs for which no compensation is received and that are located within 50 feet of the facilities that own or operate the signs. *See* Tenn. Code Ann. § 54-17-103; 2020 Tenn. Pub. Acts 706; 2020 Tenn. Code Ann. Adv. Legis. Serv. 706 (LexisNexis).

The proper application of *Reed* merely requires Austin to follow numerous other jurisdictions, including its own state, that have properly protected noncommercial speech.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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