Case No. 19-50354

In the United States Court of Appeals for the Fifth Circuit

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC., ET AL,

PLAINTIFF – APPELLANT,

v.

CITY OF AUSTIN,

DEFENDANT – APPELLEE.

On Appeal from the United States District Court for the Western District of Texas Austin Division

Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiff-Appellant

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 19-50354, *Reagan National Advertising of Austin, Inc., et al v. City of Austin*

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Ilya Shapiro	Counsel to *amicus*
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Cato Institute	*Amicus curiae*

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/s/ Ilya Shapiro

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because Austin's regulatory framework for signs presents an expansive and unnecessary restriction on the freedom of speech and expression.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its analysis of the City of Austin Sign Code ("the Sign Code"), the court below failed to recognize that a city code that distinguishes between on-premises and off-premises signage is a content-based regulation of speech and is subject to strict scrutiny review. As the Supreme Court held in *Reed v. Town of Gilbert*, "A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here,

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[1] No one other than *amicus* and its counsel wrote any part of this brief or paid for its preparation or submission. The parties have consented to this filing.

the Code singles out signs bearing a particular message: the time and location of a specific event." 135 S. Ct. 2218, 2231 (2015). The Court noted that these sorts of restrictions "may seem like a perfectly rational way to regulate signs" but fail to conform with the Court's "clear and firm rule governing content neutrality," which serves as "an essential means of protecting the freedom of speech." *Id.*

Although the Austin Sign Code does not base its restrictions on the ideological content of a specific message, it is nonetheless content-based, and "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's . . . lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)). *Amicus* files this brief to argue that, not only should the Sign Code should be held to strict scrutiny, but it fails even lower levels of scrutiny.

If the means-end fit under a lower level of scrutiny is to be adequate, "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Courts then look to two related crite-

ria. "First, the restriction must directly advance the state interest involved." *Id*. Second, courts should assess whether "the governmental interest could be served as well by a more limited restriction" on speech. *Id.* In other words, even under diminished First Amendment scrutiny for a content-neutral regulation, the regulation "still must be narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (internal quotations omitted).

Because of the Sign Code's broad, overly restrictive applications, it cannot survive constitutional scrutiny. Austin's asserted interests do not overcome its burden to justify such restrictions. The Sign Code also falls far short of the narrow-tailoring requirement, given the numerous and obvious less-burdensome alternatives. It should thus be held to strict scrutiny, but it is unconstitutional even under a lower form of scrutiny.

ARGUMENT

I. THE SIGN CODE IS A CONTENT-BASED SPEECH REGULATION THAT SHOULD BE HELD TO STRICT SCRUTINY

According to the Supreme Court, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v.*

Mosley, 408 U.S. 92, 95 (1972). Further, "selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96. Indeed, the Court has long stood for these core First Amendment principles. In *Mosley*, a city ordinance prohibited all picketing near a school, except for picketing about a labor dispute. According to the Court, "the central problem" with the ordinance in *Mosley* was how it described "permissible picketing in terms of its subject matter. Peaceful picketing regarding a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign." *Id.* at 95.

Here, as in *Mosley*, the distinction between on-premises and off-premises signs is based entirely on the sign's message. Austin did not attempt to regulate signs in a content-neutral manner. If it had, the Sign Code would prohibit *all* signs, on-premises and off, from having digital faces. The city only regulates *certain* signs and determines which signs to regulate based on where the sign directs customers. Reagan National Advertising was thus correct in saying that (1) the code distinguishes based on content, (2) the sign must be read to determine that content, and (3) the applied restrictions would then be content-based. After all,

for a city to enforce a code that imposes restrictions based on the address displayed on a sign, it must read a sign for its content (the address), then make a decision on whether the code applies based on that content.

As the Court reiterated in *Reed*, "A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea." 135 S. Ct. at 2231. A Sign Code like Austin's is content-based because it "singles out signs bearing a particular message: the time and location of a specific event." *Id.*

Austin's stated purpose for enacting the Sign Code was to "protect the aesthetic value of the city and to protect public safety." *Reagan Nat'l Adver. of Austin, Inc. v. City of Austin*, Case 1:17-CV-673-RP, 2019 U.S. Dist. LEXIS 52009 at *5 (D.Tex. Mar. 27, 2019). The city's motives, while certainly not malevolent, do not absolve it from creating a content-based restriction. Justice Thomas, writing for the Court in *Reed*, took an opportunity to remind lower courts that "[i]nnocent 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." 135 S. Ct. at 2229. In fact, "one could easily imagine

a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Id.*

Although Austin is not purposely trying to shut down church activities or ideological messages, "'[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 537 (1980)). Likewise, in *Boos v. Barry*, the Court established that "'content-neutral' speech restrictions . . . 'are justified without reference to the content of the regulated speech,'" and such restrictions can't crowd out entire categories of speech. 485 U.S. 312, 320 (1988). In that case, the Court held that a D.C. provision prohibiting the display of signs critical of a foreign government near its embassy was an impermissible content-based restriction. The sole reason for the *Boos* restriction was to shield diplomats from criticism. The restriction was thus content-based because "[w]hether individuals may picket in front of a for-

eign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies." *Id.* at 318–19.

The Court clarified that the *Boos* speech restriction was "not viewpoint based" because it "determine[d] which viewpoint [was] acceptable in a neutral fashion by looking to the policies of foreign governments," but nonetheless was content-based. *Id.* at 319. Because Austin's Sign Code, like the *Boos* restriction, treats certain messages more favorably than others—some regarding on-premises services, others off-premises—it regulates the discussion of a topic, and is content-based even without directly touching viewpoints or ideological messages. In keeping with Supreme Court precedent, such restrictions are subject to strict scrutiny.

II. EVEN IF THE SIGN CODE IS CONTENT-NEUTRAL, IT STILL DOES NOT PASS SCRUTINY FOR GOVERNMENT REGULATIONS OF COMMERCIAL SPEECH

Under the heightened scrutiny required by the First Amendment, "the Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quo-

tations omitted); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (addressing whether the relevant regulations served the government's interests "in a direct and effective way" and were designed to alleviate certain harms "in a material way"). The government fails to meet this burden if the regulation "provides only ineffective or remote support for the government's purpose." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). Instead, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). The Sign Code provisions do not advance interests in traffic safety or roadway aesthetics in a sufficiently direct, material, and effective way.

In addition, the First Amendment requires that there be an adequate "fit between the legislature's ends and the means chosen to accomplish those ends" when regulating speech. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). Accordingly, a commercial speech regulation must be narrowly tailored if it is to survive even diminished scrutiny under the First Amendment. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("Even making the as-

sumption that the statute is content neutral and thus subject to intermediate scrutiny . . . a law must [still] be narrowly tailored to serve a significant governmental interest."). Austin could have chosen many less-burdensome methods in serving its governmental interests. The Sign Code was not narrowly tailored and is unconstitutional.

A. The City Has Failed to Carry Its Burden of Proving that the Sign Code Directly Advances Its Asserted Interests

The city has half-heartedly attempted to overcome its burden to prove that the on-premises/off-premises distinction directly and materially advances its asserted interests. Yet the city's burden "is not satisfied by mere speculation or conjecture," *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188, and the city's attempted justifications for the distinction would require the court to engage in just this sort of conjecture. Even if the distinction were wrongly determined to be content-neutral and thus subject to less-than-strict scrutiny, the city's unsubstantiated declarations must still yield to the First Amendment.

The city claims that the Sign Code materially advances its asserted interests in preserving the city's aesthetic beauty and traffic safety. But commercial sign restrictions do not advance the interests of preserving aesthetics or increasing safety when they treat some signs as hazards but

nearly identical signs as harmless. The government "cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." *Reed*, 135 S. Ct. at 2231. Like news racks bearing certain magazines, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993), and temporary directional signs, *Reed*, 135 S. Ct. at 2231, an off-premises sign is "no greater an eyesore" than an on-premises one. *Id.* Surely, both types of sign, conceivably identical in every way save for the address to which it directs a potential customer, are "equally at fault" for distracting drivers and standing in the way of city beautification. *Cincinnati*, 507 U.S. at 426.

The Sign Code is "permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 195. The Code's differential treatment of "speakers conveying virtually identical messages [is] in serious tension with the principles undergirding the First Amendment." *Id.* at 194. This becomes evident when one compares an on-premises sign advertising gas prices with an off-premises gas station's sign, identical in every way except for the address

listed. Both messages serve the same purpose: communicating business location and pricing information to potential customers. While the former is exempt from the Sign Code's requirements, the latter remains subject to the full force of the statute's restrictions. If the second gas station is in a secluded location that gets very little traffic—say, a mile down a rural road—the restriction can have serious adverse effects. Surely it is not enough—either for the business owner who is disadvantaged in his efforts to compete or for the consumers who are unaware of available fueling options—that the owner of the second gas station may place any kind of pricing sign on his property, where most customers will never see it.

While traffic safety and roadway aesthetics are legitimate state concerns, they are not advanced by distinguishing between on-premises and off-premises signage. The city has failed to meet its burden of proving that the Sign Code directly advances its asserted interests under any level of First Amendment scrutiny.

B. The Sign Code Is Not Narrowly Tailored Because There Are Numerous and Obvious Less-Burdensome Alternatives to the Code's Restrictions

Even if this Court were to apply lesser First Amendment scrutiny, it should recognize that there were several less-burdensome options that

the city could have employed in its goal of improving city aesthetics and encouraging traffic safety. This requirement is substantially similar to *Central Hudson*'s recognition "that the First Amendment mandates that speech restrictions be narrowly drawn" within the context of commercial speech restrictions. *Cent. Hudson*, 447 U.S. at 565 (internal quotations omitted). This part of the *Central Hudson* test requires the court to analyze whether the speech restriction "is not more extensive than is necessary to serve [the government's] interest." *Cent. Hudson*, 447 U.S. at 566.

Narrow tailoring under something less than strict scrutiny requires a means-end fit "that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480. The "consideration of alternative, less drastic measures" for how the government "could effectuate its interests in safety and esthetics" does not mean, however, that this Court should apply an unworkable least-restrictive-means analysis. *Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993) ("A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and

obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.") (citations omitted).

While the state need not prove that it employed the least restrictive means conceivable, "the existence of numerous and obvious less-burdensome alternatives to the restriction . . . is certainly a relevant consideration in determining whether the fit between ends and means is reasonable." *Fla. Bar v. Went for It*, 515 U.S. 618, 632 (1995) (cleaned up). This is certainly the rule for commercial speech, where "the availability of . . . options which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights" can be a clear indication that a regulation "is more extensive than necessary." *Rubin*, 514 U.S. at 491. And this holds true in the context of content-neutral regulations as well, where "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540. Here, the existence of several less-burdensome alternatives to the Sign Code's on-premises/off-premises distinction weighs heavily against the city's claims of narrow tailoring.

An outright ban on digital faces is far too restrictive, especially considering that it affects certain signs while leaving others untouched. If the city's goal is to preserve its aesthetic beauty and prevent drivers from being distracted, there are several obvious and more evenhanded alternatives to banning digital faces for off-premises signs. First, it could restrict digital signs—for *all* advertisers, not just off-premises ones—in certain areas that are particularly prone to traffic accidents. After all, if digital faces cause accidents near busy streets or highways, there's no reason why some businesses should be allowed to have digital signs in such an area while others are prohibited from doing so.

An even less restrictive solution could involve regulating sign size generally. Surely, smaller standard or digital signs would be much less distracting for motorists and would go further to preserve the city's aesthetic. Alternatively, it may implement a spacing restriction for digital signs, which would serve a similar function as a size restriction. The city can no doubt come up with countless other creative ways to achieve its goals. It has a multitude of less-restrictive options that it should have employed instead of enacting the Sign Code.

III. OVERTURNING THE SIGN CODE WILL NOT THREATEN THE COMMERCIAL SPEECH DOCTRINE OR SUBJECT ALL SIGN REGULATIONS TO STRICT SCRUTINY

The lower court here erroneously claimed that overturning the Sign Code would subject all commercial signs—and even noncommercial stop signs—to strict scrutiny. Yet, the Court in *Reed* repudiated the government's claim that an "'absolutist' content-neutrality rule would render 'virtually all distinctions in sign laws . . . subject to strict scrutiny.'" *Reed*, 135 S. Ct. at 2232. Instead, Justice Thomas explained that the government can "regulate[] many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability." *Id.* Further, a city or town "may go a long way toward entirely forbidding the posting of signs, so long as it does so in an even-handed, content-neutral manner." *Id.* Far from restricting a city's ability to create a sign code, *Reed* clarified that the government has considerable power over signage, provided it passes regulations that apply equally to everyone and does not distinguish some signs based on content.

Reagan National Advertising, as discussed in Part I, argues that the Sign Code is content-based because to apply it, the city must read a sign, determine the address to which it directs a customer, then decide

whether to apply the Sign Code. It is thus not "even-handed" or "content neutral." *Id.* The problem, isn't with the advertiser's underlying logic. The problem instead lies with the *imagined* version of this argument, that a restriction on any sign containing text is content-based. The Reagan National never made such an assertion. The lower court—perhaps unintentionally—offered a hyperbolic version of the appellant's argument and acted too cautiously for fear of creating a slippery slope.

Understandably, the lower court worried that commercial speech and noncommercial speech regulations, under Regan National's logic, can both be considered content-based. It assumed that adopting such a rule would undermine the lower scrutiny afforded to commercial-speech regulations. The lower court stumbled on the truth of the matter: the line between regulation of commercial and noncommercial speech is largely based on practicality rather than some fundamental difference between the two. But the government still regulates content when it regulates commercial speech. The commercial-speech doctrine is thus an *exception* to the rule that content-based regulations are held to strict scrutiny.

In the past, *amicus* has agreed with various Supreme Court justices that commercial speech should be afforded full First Amendment protections. Compare*, e.g.*, Brief for Pacific Legal Found. & Cato Inst. as *Amici Curiae* Supporting Respondents, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (No. 10-779) with *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment) and *Rubin*, 514 U.S. at 493 (Stevens, J., concurring in judgment). But those who critique the Court's commercial-speech doctrine have consistently advocated that commercial and noncommercial speech be treated equally, not that commercial speech should be elevated above noncommercial speech, or that either form of speech should receive such protection as to be entirely beyond regulatory reach.

Even if the practice of applying lower scrutiny for commercial speech regulations deserves reconsideration, a ruling for Reagan National here would not conflict with that long-established doctrine. It would not render all sign codes unconstitutional or even prevent the city from banning digital faces on all signs if it so wishes. *Amicus* instead urges this court to rule narrowly that the government should have to

meet strict scrutiny in treating on and off-premises signs differently because such regulations are content-based, or, failing that, recognize that the Sign Code as applied does not even meet the lower level of scrutiny afforded to commercial speech regulations.

Whether this Court decides to hold the Sign Code to strict scrutiny or not, the regulation does not pass constitutional muster and should be struck down. The lower court's worry of a slippery slope should not give this Court any pause about invalidating an unconstitutional Sign Code.

CONCLUSION

For the foregoing reasons and those stated by the appellant, this court should reverse the court below and hold that the Sign Code violates the First Amendment.

Respectfully submitted,

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July 17, 2019

Certificate of Filing and Service

On July 17, 2019, I filed this *Brief of the Cato Institute as Amicus Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Ilya Shapiro

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

s/ Ilya Shapiro