No. _____

In the Supreme Court of the United States

CLAY BRIGHT, COMMISSIONER OF TENNESSEE DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

WILLIAM HAROLD THOMAS, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028, 1028 ("HBA"), requires States to maintain "effective control" of outdoor advertising on property near certain federally funded highways, or else risk losing ten percent of their federal highway funding. 23 U.S.C. § 131(b). To maintain "effective control," States must generally prohibit signs on highway-adjacent areas, subject to limited exceptions. *See id.* § 131(c)-(d). The categories of excepted signs that States may allow include "on-premises" signs—those advertising "the sale or lease of property upon which [the sign is] located" or "activities conducted on [that] property." *Id.* § 131(c).

To ensure that they receive full federal highway funding, all fifty States have enacted laws to regulate outdoor advertising on highway-adjacent areas, and nearly all those laws include exceptions for on-premises signs that mirror the exception in the HBA. Countless municipal sign codes also distinguish between on-premises and off-premises signs.

In the decision below, the Sixth Circuit held that the on-premises exception in Tennessee's decades-old Billboard Regulation and Control Act, 1972 Tenn. Pub. Acts, ch. 655, violates the First Amendment as applied to noncommercial speech. The question presented is:

Whether a sign regulation containing an exception for on-premises signs, for which both commercial and noncommercial speech may qualify, violates the First Amendment under this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Clay Bright, in his official capacity as Commissioner of the Tennessee Department of Transportation. Respondent, plaintiff-appellee below, is William Harold Thomas, Jr.[*]

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Thomas v. Bright, No. 17-5276 (pending appeal of attorney's fees award)

Thomas v. Bright, No. 17-6238 (judgment entered on Sept. 11, 2019)

United States District Court (W.D. Tenn.):

Thomas v. Schroer, No. 13-cv-02987 (judgment entered on Oct. 6, 2017)

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[*] John Schroer, John Reinbold, Patti Bowlan, Robert Shelby, Connie Gilliam, and Shawn Bible, in their individual capacities, were defendants in the district court proceedings. Thomas did not prevail on his claims against the individual defendants, *see* Dist. Ct. Dkt. Nos. 170, 233, and he did not challenge the district court's rulings on appeal. The individual defendants thus were not "parties to the proceeding in the court whose judgment is sought to be reviewed." Sup. Ct. R. 12.6.

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PETITION FOR WRIT OF CERTIORARI

Clay Bright, in his official capacity as Commissioner of the Tennessee Department of Transportation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 937 F.3d 721. The order denying rehearing en banc (App. 134a-135a) is unreported. The district court's order on remedies and denying reconsideration (App. 39a-75a) is unreported. The district court's order finding the Tennessee Billboard Regulation and Control Act of 1972 unconstitutional (App. 78a-133a) is reported at 248 F. Supp. 3d 868.

JURISDICTION

The court of appeals entered its judgment on September 11, 2019. Petitioner filed a petition for rehearing en banc on September 25, 2019, which the court of appeals denied on November 6, 2019. On January 27, 2020, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including April 3, 2020. On March 19, 2020, this Court issued an order extending the deadline for petitions due on or after that date to 150 days from, as relevant here, the date of the order denying rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Relevant portions of the federal Highway Beautification Act of 1965; the Tennessee Billboard Regulation and Control Act of 1972; and Tennessee Department of Transportation regulations are reproduced at App. 136a-148a.

INTRODUCTION

For decades, the federal government, nearly all States, and countless localities have enforced outdoor advertising regulations that distinguish between on-premises and off-premises signs. In the decision below, the Sixth Circuit held that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), rendered that longstanding and pervasive feature of sign regulation content based and subject to strict scrutiny because officials were required to read the sign to determine whether it should be regulated. But another court of appeals held to the contrary, and both federal and state courts have struggled to apply *Reed* to on-premises exceptions and sign regulations more generally. The sign code this Court invalidated in *Reed* did not include an on-premises exception, and Justice Alito's concurring opinion, which was joined by two of the other Justices in the majority, expressly identified "[r]ules distinguishing between on-premises and off-premises signs" as an example of a rule "that would not be

content based" under the majority opinion. 135 S. Ct. at 2233 (Alito, J., concurring).

Absent this Court's review, governments at all levels across the country will continue to face uncertainty and recurring litigation regarding the validity of regulatory schemes containing on-premises exceptions. The First Amendment will mean different things in different jurisdictions. And governments in jurisdictions where courts have invalidated on-premises exceptions under the First Amendment will face the difficult task of fashioning new regulatory schemes against the backdrop of unsettled law.

The decision below squarely conflicts with a recent Third Circuit decision. Although the Sixth Circuit determined that *Reed* required it to overrule an earlier precedent that had upheld a materially identical on-premises exception in Kentucky's billboard law, the Third Circuit reached exactly the opposite conclusion. The Third Circuit rejected an argument that *Reed* required it to apply strict scrutiny to an on-premises exception in Pennsylvania law and adhered to its earlier precedent deeming an on-premises exception in Delaware law content neutral. The Sixth Circuit's view that any regulation that requires an official to read the message on a sign is content based, moreover, is at odds with post-*Reed* decisions of the Ninth and D.C. Circuits that expressly rejected that approach.

The decision below also deepens a longstanding pre-*Reed* conflict about the constitutionality of on-premises exceptions. The plurality opinion in this Court's fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), invalidated on First

Amendment grounds an on-premises exception that did not allow any noncommercial speech, while upholding the exception as applied to commercial speech. From this, a conflict emerged among the courts of appeals and state courts of last resort regarding the constitutionality of on-premises exceptions that apply equally to commercial and noncommercial speech. The Third, Fourth, Sixth, and Eleventh Circuits and the Supreme Courts of Connecticut, Minnesota, and Texas rejected First Amendment challenges to such exceptions, while the First and Ninth Circuits and the Supreme Courts of Virginia and West Virginia invalidated on-premises exceptions on First Amendment grounds.

In short, the constitutionality of on-premises exceptions has divided lower courts for decades, and the issue remains of pressing importance for governments nationwide. Far from resolving that conflict, this Court's decision in *Reed* has added to the confusion. This Court should grant review and provide much-needed and long-overdue clarity to the lower courts.

STATEMENT

For more than fifty years, federal law has required States to regulate outdoor advertising on areas adjacent to federally funded highways or else lose ten percent of their federal highway funding. To satisfy those requirements, Tennessee, like every other State, enacted a law prohibiting outdoor advertising on highway-adjacent areas, subject to certain exceptions. Tennessee's law allows a limited number of signs in commercial and industrial areas, provided a permit is first obtained from the Tennessee Department of Transportation ("TDOT"). "On-premises" signs—those advertising activities conducted on the property where the signs are located or the sale or lease of that property—are excepted from the general prohibition and the permitting requirement.

William Harold Thomas, Jr., a commercial billboard operator, sought a permit from TDOT to erect a billboard on undeveloped property adjacent to Interstate 40 in Memphis, Tennessee. TDOT denied the permit because the billboard did not satisfy the spacing requirements for signs in commercial or industrial areas. But Thomas erected the billboard anyway and initially began displaying commercial messages.

After TDOT initiated proceedings in state court to remove the billboard, Thomas changed the content to noncommercial speech and sued the TDOT Commissioner in federal court, alleging that TDOT's attempts to remove his billboard violated the First Amendment under *Reed*. The court of appeals agreed with Thomas, reasoning that the on-premises exception

is content based under *Reed* because officials must read the message on a sign to determine whether the sign should be regulated and that the exception fails to satisfy strict scrutiny.

I. Federal Highway Beautification Act

In 1965, Congress enacted the Highway Beautification Act ("HBA") "to protect the public investment in [interstate and primary highways], to promote the safety and recreational value of public travel, and to preserve natural beauty." Pub. L. No. 89-285, § 101, 79 Stat. 1028, 1028 (1965) (codified at 23 U.S.C. § 131). Congress found that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to [such highways] should be controlled" to further those interests. 23 U.S.C. § 131(a).

The HBA conditions ten percent of a State's federal highway funds[1] on the State's "effective control" of "outdoor advertising signs, displays, and devices" that are located within 660 feet of the "nearest edge of the right-of-way" of interstate or primary highways and visible from the roadway. *Id.* § 131(b). Congress later extended the HBA's reach to outdoor advertising located in nonurban areas more than 660 feet from such highways but visible from the roadway. Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643,

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[1] In 2018, nearly $90 million of Tennessee's federal highway funding was contingent on compliance with the HBA. *See* Robert S. Kirk, Congressional Research Service, The Highway Funding Formula: History and Current Status 8 (May 20, 2019), https://fas.org/sgp/crs/misc/R45727.pdf.

§ 109(a), 88 Stat. 2281, 2284 (1975) (amending 23 U.S.C. § 131(b)).

To maintain "effective control" within the meaning of the HBA, a State must limit signs within the regulated areas to the following categories: (1) "directional and official signs and notices"; (2) "signs, displays, and devices advertising the sale or lease of property upon which they are located"; (3) "signs displays, and devices . . . advertising activities conducted on the property on which they are located"; (4) certain "landmark" signs that were lawfully in existence when the HBA became effective; and (5) "signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system." 23 U.S.C. § 131(c). To "promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of the Act," a State may also allow signs in areas designated by the State as industrial or commercial. *Id.* § 131(d). The "size, lighting[,] and spacing" of signs in those areas is "to be determined by agreement between the [State] and the Secretary [of Transportation]." *Id.*

The HBA does not preclude States from imposing stricter limits on outdoor advertising than those necessary to achieve "effective control." *See id.* § 131(k). But States may not allow more signs than the HBA allows without endangering their federal highway funding.

II. Tennessee Billboard Act

Tennessee's response to the HBA was the Billboard Regulation and Control Act of 1972, ("Billboard Act"), 1972 Tenn. Pub. Acts, ch. 655 (codified at Tenn. Code Ann. § 54-21-101 *et seq*.). Consistent with the HBA, the Billboard Act generally prohibits outdoor advertising on property adjacent to interstate and primary highways or visible from those roadways in nonurban areas, *see* Tenn. Code Ann. §§ 54-21-103, -109(a), subject to three limited exceptions, *see id.* §§ 54-21-103(1)-(5), -107(1)-(3).

First, the Billboard Act allows signs in zoned and unzoned commercial or industrial areas, provided the signs comply with "size, lighting, and spacing" requirements set out in Tennessee's agreement with the federal Secretary of Transportation and reflected in TDOT regulations. *Id.* § 54-21-103(4)-(5); *see also* Tenn. Comp. R. & Regs. 1680-02-03-.03. Anyone wishing to erect a sign in a commercial or industrial area must first obtain a permit from TDOT. Tenn. Code Ann. § 54-21-104(a).

Second, the Billboard Act allows "[d]irectional or other official signs and notices including, but not limited to, signs and notices pertaining to natural wonders, scenic and historical attractions that are authorized or required by law." *Id.* § 54-21-103(1). Like signs in commercial and industrial areas, directional signs require a permit from TDOT and must comply with certain size, spacing, and lighting requirements. *Id.* § 54-21-104(a); Tenn. Comp. R. & Regs. 1680-02-03-.05.

Third, and particularly relevant here, the Billboard Act allows "on-premises" signs—those that advertise "the sale or lease of property on which they are located" or "activities conducted on [that] property." Tenn. Code Ann. § 54-21-103(2)-(3); Tenn. Comp. R. & Regs. 1680-02-03-.06 (referring to these two categories as "on-premise[s] signs"). On-premises signs do not require a permit; are not subject to size, spacing, or lighting requirements; and are allowed in all areas, not just commercial or industrial areas. *See* Tenn. Code Ann. § 54-21-107(a)(1)-(2); Tenn. Comp. R. & Regs. 1680-02-03-.03.[2]

Both the Billboard Act's general prohibition and its exceptions apply equally to commercial and noncommercial speech. App. 85a, 100a.

III. Factual Background

William Thomas is a commercial billboard operator who at one time owned over 30 billboards. App. 7a. In 2006, he applied for a permit from TDOT to erect another commercial billboard on undeveloped property adjacent to Interstate 40 in Memphis, Tennessee. App. 7a. The property, which he owns, became known as the "Crossroads Ford" site. App. 7a, 85a. TDOT denied the application because the proposed billboard did not satisfy the spacing requirements applicable to

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[2] TDOT's regulations provide additional guidance about on-premises signs. *See* Tenn. Comp. R. & Regs. 1680-02-03-.06 (reproduced at App. 144a-148a). Those regulations mirror regulations promulgated by the Federal Highway Administration. *See* 23 C.F.R. § 750.709.

permitted signs in commercial and industrial areas. App. 7a, 86a.

Thomas erected the billboard anyway and began operating it for commercial advertising. App. 7a; Dist. Ct. Dkt. No. 164-5, at 8, 20. TDOT brought an enforcement action against Thomas under the Billboard Act in Shelby County Chancery Court, seeking removal of the Crossroads Ford billboard. App. 7a; *State ex rel. Comm'r of Dep't of Transp.* (*Thomas I*), 336 S.W.3d 588, 593 (Tenn. Ct. App. 2010). The trial court initially ruled in favor of Thomas, but the Tennessee Court of Appeals reversed the judgment and remanded the case. *Thomas I*, 336 S.W.3d at 609. The Tennessee Court of Appeals held that the trial court had lacked jurisdiction to consider Thomas's various defenses and counterclaims because Thomas was required to raise them in a petition for judicial review of TDOT's permit denial, over which the Davidson County Chancery Court had exclusive jurisdiction. *Id.* at 601-09.

After losing on appeal in the state-court proceedings, Thomas began displaying noncommercial speech[3] on the Crossroads Ford billboard and asserted a new First Amendment defense on remand in the Shelby County Chancery Court. App. 8a. The trial court again ruled in Thomas's favor, and the Tennessee Court of Appeals again reversed, holding that the trial

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[3] For example, the Crossroads Ford billboard displayed a picture of the American flag with the Olympic rings during the summer of 2012 and a message "referencing the upcoming holiday season" during the fall of 2012. App. 85a.

court had "deviated from the law of the case" in considering the First Amendment defense and reiterating that the trial court "did not have jurisdiction to adjudicate [that] defense under [the appellate court's] holding in *Thomas I*." *State ex rel. Dep't of Transp. v. Thomas*, No. W2013-02082-COA-R3-CV, 2014 WL 6992126, at *8 (Tenn. Ct. App. Dec. 11, 2014).[4]

IV. Proceedings Below

In 2013, while the second state-court appeal was pending and after he had begun displaying noncommercial speech on the Crossroads Ford billboard, Thomas sued the TDOT Commissioner and various other state officials in federal court under 42 U.S.C. § 1983, alleging that their attempts to enforce the Billboard Act against his unpermitted billboards violated the First Amendment and Equal Protection Clause of the United States Constitution and parallel provisions of the Tennessee Constitution. App. 86a-87a. Thomas sought declaratory and injunctive relief, as well as damages from the individual defendants. App. 58a-59a. The district court granted in part the defendants' motions to

[4] There was a third appeal in the state-court proceedings in 2019, after the trial court again reinstated the earlier judgment that the Tennessee Court of Appeals had twice reversed. The Tennessee Court of Appeals reversed the trial court for the third time and reassigned the case to a different judge on remand. *See State ex rel. Dep't of Transp. v. Thomas*, No. W2018-01541-COA-R10-CV, 2019 WL 1602011, at *8 (Tenn. Ct. App. Apr. 15, 2019). The state-court proceedings remain pending but are on hold until final disposition of this case.

dismiss and for summary judgment, Dist. Ct. Dkt. Nos. 170, 233, leaving intact only Thomas's claim that the TDOT Commissioner's enforcement of the Billboard Act against the noncommercial speech on his Crossroads Ford billboard violated the First Amendment. App. 9a-10a, 87a-88a.

The district court ruled in favor of Thomas following a trial.[5] App. 78a-133a. Citing *Reed*, the district court held that the Billboard Act is content based because the "only way to determine whether a sign is an on-premise[s] sign, is to consider the content of the sign." App. 97a (internal quotation marks omitted). The district court acknowledged that Justice Alito's concurring opinion in *Reed* had described the distinction between on-premises and off-premises signs as content neutral. *See* App. 96a (citing 135 S. Ct. at 2233 (Alito, J., concurring)). But rather than follow that guidance, the district court speculated that Justice Alito must have been referring to a different kind of on-premises exception. App. 96a-97a.

Because Thomas's claim was limited to the noncommercial speech on his Crossroads Ford billboard, the district court applied strict scrutiny. App. 99a-100a. The district court concluded that the State's interests in traffic safety and aesthetics were not compelling and that, in any event, the State had not established that the Act's distinction between on-

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[5] The district court held a four-day advisory jury trial on the State's compelling interests and narrow tailoring, at which the State presented seven witnesses. The advisory jury found that the State had a compelling interest and that the Billboard Act was narrowly tailored to that interest. App. 90a.

premises and off-premises signs furthered those interests. App. 107a.

The district court granted Thomas a permanent injunction prohibiting enforcement of the Tennessee Billboard Act against Thomas's Crossroads Ford billboard and awarded him attorney's fees. App. 63a-64a, 69a.[6] Thomas promptly resumed commercial advertising on the billboard. App. 11a.

The court of appeals affirmed. App. 2a-33a. Like the district court, the court of appeals "confin[ed] [its] analysis" to Thomas's noncommercial speech and did "not consider the commercial-speech doctrine." App. 14a. The court of appeals found that *Reed* had overruled *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), an earlier Sixth Circuit decision that rejected a First Amendment challenge to a materially identical on-premises exception in Kentucky's billboard law. App. 3a.

Applying *Reed*, the court of appeals concluded that the Billboard Act's on-premises exception is facially content based because it requires Tennessee officials to "read the message written on the sign" and "assess the meaning and purpose of the sign's message in order to

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[6] The district court granted Thomas only a narrow injunction limited to his Crossroads Ford billboard, but it also held that the Billboard Act was "not severable, either by severing the challenged [on-premises exception] or by limiting the application of those provisions to only commercial speech." App. 51a. The district court later clarified, however, that the State was "not precluded from enforcing the Billboard Act with respect to outdoor advertising other than the Crossroads Ford billboard." App. 35a.

determine if the sign violated the Act." App. 15a-16a. As for Justice Alito's concurring opinion in *Reed*, which identified a regulation distinguishing between on-premises and off-premises signs as an example of a content-neutral regulation, the court of appeals doubled down on the district court's speculation that "[t]here might be many formulations of an on/off premises distinction that are content-neutral." App. 21a.

Although the court of appeals agreed that the State has a compelling interest in safeguarding First Amendment rights, App. 24a, which is furthered by the on-premises exception, the court nevertheless held that the exception was underinclusive because it did not allow noncommercial speech unrelated to the premises. App. 25a-31a.

The court of appeals rejected as "policy concerns" the State's argument that the on-premises exception is the least restrictive means of balancing its interests in traffic safety and aesthetics—which are furthered by the Billboard Act's general prohibition—with its interest in safeguarding First Amendment rights. App. 31a. The State had argued that Thomas's proffered less restrictive means—such as exempting all noncommercial speech from regulation—would create intractable enforcement difficulties, but rather than engage with these arguments, the court dismissed them as "problems for the Tennessee Legislature, not the courts." App. 32a.

The court of appeals denied the State's petition for rehearing en banc. App. 134a-135a.

REASONS FOR GRANTING THE PETITION

I. There Is a Direct Conflict Among the Courts of Appeals on the Question Presented.

This Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), injected new confusion into an already unsettled area of First Amendment jurisprudence. *Reed* involved a First Amendment challenge to a municipal sign code containing exemptions for "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* at 2224-25 (alterations in original; internal quotation marks omitted). This Court invalidated the sign code because it was content based on its face and failed strict scrutiny. *Id.* at 2227. But in a concurring opinion that was joined by two of the other Justices in the majority, Justice Alito explained that governments were not "powerless to enact and enforce reasonable sign regulations" and listed as an example of a regulation "that would not be content based" a "[r]ule[] distinguishing between on-premises and off-premises signs." *Id.* at 2233 (Alito, J., concurring).

Even before *Reed*, federal and state courts were divided on whether billboard laws like Tennessee's, with on-premises exceptions that apply equally to commercial and noncommercial speech, comport with the First Amendment. Far from settling that conflict, *Reed* has exacerbated it. While the decision below concluded that *Reed* required it to overrule an earlier decision finding an on-premises exception content neutral, the Third Circuit held precisely the opposite.

And while the decision below held that the on-premises exception is content based because it requires officials to read a sign's message, the Third, Ninth, and D.C. Circuits have rejected that "officer must read it" test. This Courts' review is sorely needed to provide clarity in this important area of the law.

A. The Decision Below Squarely Conflicts with a Decision of the Third Circuit Concerning the Content Neutrality of On-Premises Exceptions After *Reed*.

Two courts of appeals have considered whether on-premises exceptions are content based after this Court's decision in *Reed*, and they have reached directly contrary conclusions. In both cases, earlier circuit precedent had upheld materially identical on-premises exceptions as content neutral. In the decision below, the Sixth Circuit held that *Reed* required it to overrule its earlier precedent and instead find the on-premises exception content based. But the Third Circuit adhered to its earlier precedent, concluding that *Reed* did not dictate a different result. *See Adams Outdoor Adv. Ltd. P'ship v. Penn. Dep't of Transp.*, 930 F.3d 199, 207-08 n.1 (3d. Cir. 2019).

In the decision below, the Sixth Circuit held that *Reed* had abrogated its earlier decision in *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 591-92 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), finding the on-premises exception in Kentucky's billboard law content neutral. App. 3a. Under *Reed*, the Sixth Circuit reasoned, the on-premises exception was facially content based because it required Tennessee

officials to "read the message written on the sign." App. 15a.

In *Adams*, the Third Circuit reached the opposite conclusion. There, a billboard operator argued that the on-premises exception in Pennsylvania's billboard law was a content-based regulation of speech subject to strict scrutiny under *Reed*, and he urged the court to abandon its earlier decision in *Rappa v. New Castle County*, 18 F.3d 1043, 1068 (3d. Cir. 1994), which had held the materially identical on-premises exception in Delaware's billboard law content neutral. *See Adams*, 930 F.3d at 207-08 & n1.

In contrast to the Sixth Circuit in the decision below, the Third Circuit adhered to its earlier precedent, expressly declining the plaintiff's invitation to "deviate from *Rappa* and apply strict scrutiny" under *Reed*. *Id.* at 207 n.1. The court reasoned that *Reed* "did not address an exemption for on-premise[s] signs" and that the "concurring opinions by Justices Alito and Kagan . . . both indicated that on-premise[s] sign regulations are content neutral." *Id.* Because *Reed* "did not establish a legal standard by which to evaluate laws that distinguish between on-premise[s] and off-premise[s] signs," the Third Circuit "f[ell] back to [its] precedent in *Rappa*." *Id.* The court held that Pennsylvania's "exemption for on-premise[s] signs concerning activities on the property" remained subject to only intermediate scrutiny under *Rappa* and remanded "for the parties to litigate further [the State's] justification for the restraint and its exemptions." *Id.* at 207.

Two recent decisions by federal district courts in Texas, both of which are currently on appeal to the Fifth Circuit, also reached conflicting decisions on whether on-premises exceptions are content based after *Reed*. The first decision, *Reagan National Advertising of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670 (W.D. Tex. 2019), *appeal pending*, No. 19-50354 (5th Cir. argued Feb. 6, 2020), involved a First Amendment challenge to an Austin sign ordinance "allow[ing] digital sign-faces for on-premises signs but prohibit[ing] digital sign-faces for off-premises signs." *Id.* at 674. The plaintiffs argued that, under *Reed*, the ordinance's "different rules for on- and off-premises signs are content-based and therefore subject to strict scrutiny" because city officials must "look at the content of the sign" to determine whether the exception applies. *Id.* at 677, 680 (internal quotation marks omitted).

The district court rejected the plaintiffs' interpretation of *Reed*. The court understood the plurality opinion in *Metromedia* as holding that the government may "restrict[] off-premises billboards while permitting them on-premises, so long as [it] did not restrict noncommercial subject matter more than commercial subject matter." *Id.* at 681. The district court reasoned that *Reed* "[wa]s entirely consistent with *Metromedia*" because *Reed* involved "different rules for different subject matter," which were plainly content based, while the on-premises exception was "based on location" and did not prohibit "discussion of any specific topics, ideas, or viewpoints." *Id.* (internal quotation marks omitted). The court also observed that Justice Alito's concurring opinion in *Reed* had

specifically mentioned the on-premises exception as an example of a content-neutral rule. *Id.* Because the ordinance's "on/off premises distinction [wa]s content neutral both facially and in its purpose and justification," the court applied intermediate scrutiny. *Id.* at 682.

But a different judge on the same district court held to the contrary just a couple of months later in *Reagan National Advertising of Austin, Inc. v. City of Cedar Park*, 387 F. Supp. 3d 703 (W.D. Tex. 2019), *appeal pending*, No. 20-50125 (5th Cir. docketed Feb. 21, 2020). That case involved a First Amendment challenge to provisions of Cedar Park's sign ordinance that distinguish between on-premises and off-premises signs. *Id.* at 706. Although the district court upheld the distinction as applied to commercial speech under *Metromedia*, *id.* at 711-14, it summarily concluded that the ordinance's application to noncommercial speech was subject to strict scrutiny under *Reed* because the "restrictions the [s]ign [c]ode imposes on off-premises speech . . . depend upon the content of the sign." *Id.* at 713.

Numerous other district courts and state intermediate appellate courts have considered whether on-premises exceptions are content based under *Reed*, and they too have divided on that issue. *Compare, e.g.*, *ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828, 839 (S.D. Cal. 2017) (concluding that distinction between on-premises and off-premises signs is not content based under *Reed*), *aff'd on other grounds by* 746 Fed. Appx. 37 (9th Cir. 2018) (mem.); *Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of*

Marion, Ind., 187 F. Supp. 3d 1002, 1017 n.2 (S.D. Ind. 2016) (same); *Contest Promotions, LLC v. City & Cty. of S.F.*, No. 15-cv-00093, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) (same), *aff'd on other grounds by* 704 Fed. Appx. 665 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2574 (2018); *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 968-69 (N.D. Cal. 2015) (same); *Lamar Cent. Outdoor, LLC v. City of L.A.*, 199 Cal. Rptr. 3d 620, 630-31 (Cal. Ct. App. 2016), *with, e.g.*, *Auspro Enters., L.P. v. Tex. Dep't of Transp.*, 506 S.W.3d 688, 698-701 (Tex. Ct. App. 2016) (holding distinction between on-premises and off-premises signs content based under *Reed*), *vacated as moot by* No. 17-0041 (Tex. Apr. 6, 2018).

Instead of bringing clarity to this confusing area of the law, *Reed* further muddied the waters. Lower courts have had difficulty applying *Reed*'s guidance on content neutrality to the on-premises exception, which differs significantly from the facially content-based exemptions at issue in *Reed*. And courts have disagreed about the import of Justice Alito's concurring opinion describing distinctions between on- and off-premises signs as content neutral. This Court should grant review to settle this important issue.

B. The Decision Below Conflicts with Decisions of the Third, Ninth, and D.C. Circuits Concerning the Test for Content Neutrality.

The decision below also directly conflicts with decisions of other courts of appeals concerning the test for determining whether a regulation is content based. The court of appeals held that the on-premises

exception in Tennessee's Billboard Act is content based because a "Tennessee official must read the message written on the sign" to decide whether the sign should be regulated. App. 15a. At least one other circuit court appears to share the Sixth Circuit's view that a regulation is content based if its application requires examination of content, but three other circuit courts have rejected this "officer must read it" test after *Reed*.

In a recent decision upholding an abortion-clinic buffer-zone law under *Hill v. Colorado*, 530 U.S. 703 (2000), the Seventh Circuit interpreted this Court's decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), as providing in "no uncertain terms that a law is indeed content based if enforcement authorities must 'examine the content of the message that is conveyed to determine whether a violation has occurred.'" *Price v. City of Chi.*, 915 F.3d 1107, 1118 (7th Cir. 2019) (quoting *McCullen*, 573 U.S. at 479), *petition for cert. pending*, No. 18-1516 (filed June 4, 2019). The Seventh Circuit followed *Hill*, given that it directly controlled the issue presented in that case, but observed that both *Reed* and *McCullen* had "deeply shaken *Hill*'s foundation." *Id.* at 1119.

The D.C. Circuit and the Ninth Circuit, on the other hand, have expressly declined to adopt an "officer must read it" test for content neutrality after *Reed*. In *Act Now to Stop War & End Racism Coalition v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 334 (2017), the D.C. Circuit rejected a First Amendment challenge to a municipal code that treated event-related signs less favorably than other signs. The regulation at issue ordinarily allowed signs posted

on a public lamppost to remain there for up to 180 days, but signs relating to an event had to be removed within 30 days of the event. *Id.* at 396. The plaintiffs alleged that the distinction between event-related and other signs was content based, but the D.C. Circuit disagreed. "[T]he fact that District officials may look at what a poster says to determine whether it is 'event-related,'" the court explained, "does not render the . . . rule content-based." *Id.* at 404. Because the regulation at issue "treat[ed] all event-related signs alike" and did not "distinguish among types of events based on content," it was content neutral under *Reed*. *Id.* at 405.

The Ninth Circuit reached the same conclusion in *Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). That case involved a First Amendment challenge to an ordinance regulating unattended donation collection boxes, which were defined as containers that "accept textiles, shoes, books and/or other salvageable personal property items to be used . . . for distribution, resale, or recycling." *Id.* at 668 (internal quotation marks omitted). The plaintiff alleged that the ordinance was content based because enforcement officials would need to "examine a container's message" to determine whether to regulate it. *Id.* at 670. The Ninth Circuit rejected that argument, "caution[ing] that an officer's inspection of a speaker's message is not dispositive on the question of content neutrality." *Id.* at 671. "The 'officer must read it' test," the court explained, "cuts too broadly if used as a bellwether of content," and, "[i]f applied without common sense, . . . would mean that

every sign, except a blank sign, would be content based." *Id.* (some internal quotation marks omitted).

The Third Circuit also implicitly rejected the "officer must read it" test in *Adams*. In its earlier decision in *Rappa*, the Third Circuit observed that "evaluating whether a sign is an onsite sign does require the state to analyze the content of the sign," but it nevertheless concluded the on-premises exception was not content based because it did not "preclude any particular message from being voiced in any place." 18 F.3d at 1067. By adhering to that precedent even after *Reed*, the Third Circuit necessarily rejected the Sixth Circuit's view that whether enforcement of a regulation requires the examination of content is the dispositive inquiry for content neutrality.

The district court in *City of Austin* likewise rejected the Sixth Circuit's approach. 377 F. Supp. 3d at 680. The district court reasoned that, "[i]n effect," such an extreme rule "would apply strict scrutiny to all regulations for signs with written text." 377 F. Supp. 3d at 680. For example, even "regulations imposing greater restrictions for commercial signs—a well-established and constitutional practice—would be content-based because a viewer must read a sign to determine if the message was commercial or non-commercial." *Id.* (footnote omitted).

Review of the question presented would provide the Court an opportunity to resolve this confusion among the lower courts and clarify the appropriate standard for content neutrality.

C. The Decision Below Implicates a Longstanding and Entrenched Conflict That Predates *Reed*.

While the question presented concerns *Reed*'s application to on-premises exceptions, it bears mentioning that lower courts were divided on the constitutionality of on-premises exceptions even before *Reed*. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a plurality of this Court invalidated on First Amendment grounds an on-premises exception that allowed only commercial advertising because it "afford[ed] a greater degree of protection to commercial than to noncommercial speech." *Id.* at 513 (plurality opinion). But the plurality upheld the exception as applied to commercial speech, reasoning that the on-premises exception "directly advance[d]" the city's interests in traffic safety and aesthetics because "offsite advertising, with its periodically changing content, [may] present[] a more acute problem than does onsite advertising." *Id.* at 511.

Metromedia did not address whether the First Amendment permits the government to distinguish between on-premises and off-premises *noncommercial* signs. In the wake of *Metromedia*, "a significant split of authority" arose on that question. Mark Cordes, *Sign Regulation After* Ladue: *Examining the Evolving Limits of First Amendment Protection*, 74 Neb. L. Rev. 36, 79 (1995).

Most courts, including the Third, Fourth, Sixth, and Eleventh Circuits and the Supreme Courts of Connecticut, Minnesota, and Texas, concluded that on-premises exceptions that applied equally to commercial

and noncommercial speech were permissible content-neutral regulations of speech. *See, e.g.*, *Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 433-34 & n.9 (4th Cir. 2007); *Rappa*, 18 F.3d at 1067 ; *Messer v. City of Douglasville*, 975 F.2d 1505, 1509-10 (11th Cir. 1992); *Wheeler*, 822 F.2d at 591; *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 99-101 (Tex. 2003), *cert. denied*, 540 U.S. 1177 (2004); *Burns v. Barrett*, 561 A.2d 1378, 1384-86 (Conn. 1989), *cert. denied*, 493 U.S. 1003 (1989); *State by Spannaus v. Hopf*, 323 N.W.2d 746, 754-55 (Minn. 1982). In *Rappa*, for example, the Third Circuit explained that an exception for "signs advertising activities conducted on the premises" is "not a content-based exception at all," because it "does not preclude any particular message from being voiced in any place," but rather "merely establishes the appropriate relationship between the location and the use of an outdoor sign to convey a particular message." 18 F.3d at 1067.

But other courts, including the First and Ninth Circuits and the Supreme Courts of Virginia and West Virginia, held to the contrary, reasoning that even an on-premises exception that applied equally to commercial and noncommercial speech nevertheless impermissibly discriminated against off-premises noncommercial speech based on its content. *See, e.g.*, *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 906 (9th Cir. 2007); *Ackerly Comm'ns of Mass., Inc. v. City of Somerville*, 878 F.2d 513, 517-18 (1st Cir. 1989); *Fisher v. City of Charleston*, 425 S.E.2d 194, 197-99 (W.V. 1992); *Adams Outdoor Adv. v. City of Newport News*, 373 S.E.2d 917, 925-27 (Va. 1988).

Although only the Third and Sixth Circuits have revisited the constitutionality of the on-premises exception after *Reed,* there is no reason to believe that the entrenched conflict on this issue will resolve itself. Courts that invalidated on-premises exceptions before *Reed* are likely to adhere to those decisions. And, as the divide between the Third and Sixth Circuits illustrates, courts that upheld on-premises exceptions before *Reed* will diverge on the issue in the absence of further guidance from this Court.

* * *

The lower courts are hopelessly divided about how to apply the First Amendment to sign regulations after *Reed*. And the decision below directly contradicts decisions of other circuits both as to the specific question of whether on-premises exceptions are content based and the more general question of the appropriate test for content neutrality after *Reed*. Granting review of the question presented would give this Court an opportunity to provide much-needed clarity to lower courts and to settle a conflict that is long overdue for this Court's attention.

II. The Question Presented Is a Recurring Issue of Nationwide Importance.

The question presented is of exceptional and nationwide importance, affecting governments at every level, the outdoor advertising industry, organizations and individuals who communicate through billboards and other signs, and the communities and individuals that suffer the aesthetic and safety harms billboards threaten. The court of appeals' decision, if allowed to stand, casts doubt on the constitutionality of a federal

statute—the HBA—as well as countless state and local laws, regulations, and ordinances. This Court's review is urgently needed.

"Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages," but they are also "large, immobile, and permanent structure[s]" that create "a unique set of problems" for government regulators. *Metromedia*, 453 U.S. at 501-02 (plurality opinion) (internal quotation marks omitted); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) ("While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers."). Regardless of their content, billboards create significant aesthetic harms and "real and substantial hazards to traffic safety." *Metromedia*, 453 U.S. at 509-10 (plurality opinion); *see also Ladue*, 512 U.S. at 48 ("[S]igns take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."). Governments at every level have thus sought ways to reasonably regulate billboards while preserving their effectiveness as a unique and valuable means of communication.

For decades, the federal government, the States, and localities have relied on the common-sense distinction between on-premises and off-premises signs to strike that careful and important balance. At the federal level, Congress has conditioned ten percent of a State's federal highway funding on maintaining "effective control" of outdoor advertising near interstate and primary highways, and has defined "effective

control" to mean, at a minimum, prohibiting all signs except certain limited categories, which include on-premises signs. 23 U.S.C. § 131(c)-(d).

Because Tennessee's on-premises exception is materially identical to the on-premises exception in the HBA, the decision below, if allowed to stand, threatens the validity of an act of Congress. That point is not lost on the federal government: The United States filed an amicus brief in support of Tennessee in the court of appeals urging the court to find the on-premises exception content neutral. *See* Brief for the United States as Amicus Curiae in Support of Appellant at 1, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) (No. 17-6238), 2018 WL 1314789, at *1 (noting the federal government's "strong interest in ensuring that" provisions of the "federal [HBA], implementing regulations, and related state laws" are "correctly interpreted and subjected to appropriate First Amendment review").

The decision below also threatens the validity of billboard laws in nearly every State. Given that ten percent of their federal highway funding hinges on compliance with the HBA, all States have enacted billboard laws of their own. And nearly all these laws distinguish between on-premises and off-premises signs. *See* Ala. Code § 23-1-273; Alaska Stat. §§ 19.25.090, 19.25.105; Ariz. Rev. Stat. § 28-7902; Ark. Code § 27-74-302; Cal. Bus. & Prof. Code §§ 5272(a), 5442.5; Colo. Rev. Stat. Ann. §§ 43-1-403, 43-1-404; Del. Code Ann. tit. 17, § 1121; Fla. Stat. § 479.16; Ga. Code Ann. § 32-6-72; Hawaii Rev. Stat. §§ 264-72, 445-112; Idaho Code Ann. §§ 40-1910A, 40-1911; 225 Ill.

Comp. Stat. Ann. 440/3.17-3.19, 4, 4.02-4.04; Ind. Code Ann. § 8-23-20-7; Iowa Code Ann. § 306B.2; Kan. Stat. Ann. § 68-2233; Ky. Rev. Stat. § 177.841; La. Stat. Ann. § 48:461.2; Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914; Md. Code Ann., Transp. §§ 8-741, 8-744; Mass. Gen. Laws Ann. ch. 93D, § 2; Mich. Comp. Laws Ann. §§ 252.302, 252.313; Minn. Stat. Ann. § 173.08; Miss. Code § 49-23-5; N.J. Stat. Ann. § 27:5-11; Neb. Rev. Stat. § 39-218; N.H. Rev. Stat. Ann. § 238:24; Nev. Rev. Stat. § 410.320; N.C. Gen. Stat. Ann. § 136-129; Ohio Rev. Code Ann. §§ 5516.06, 5516.061; Okla. Stat. Ann. tit. 69, §§ 1273-1274; S.C. Code §§ 57-25-140, 57-25-150; S.D. Codified Laws §§ 31-29-63, 31-29-63.4; Utah Code Ann. § 72-7-504; Vt. Stat. Ann. tit. 10, §§ 488, 493; Va. Code § 33.2-1217; Wash. Code § 47.42.040; Wyo. Stat. § 24-10-104.[7] Even States that regulate above the minimum floor required by the HBA by banning billboards in commercial and industrial areas still have exceptions for on-premises signs. *See* Patricia E. Salkin, *American Law of Zoning* § 26.2 (5th ed. 2017) (discussing restrictive laws in Alaska, Hawaii, Maine, and Vermont).

The conflict on the question presented creates uncertainty not only for the federal government and States, but also for local governments. As evidenced by the decisions cited above, *see* pp. 18-20, 24-25, *supra*,

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[7] Several States have amended their billboards laws in response to adverse court rulings. California maintained its on-premises exception but now exempts all noncommercial speech from regulation. *See* Cal. Bus. & Prof. Code § 5275. Oregon and Texas eliminated their distinctions between on-premises and off-premises signs. *See* Or. Rev. Stat. §§ 377.700 *et seq.*; Tex. Transp. Code Ann. §§ 391.001 *et seq*.

local sign ordinances frequently distinguish between on-premises and off-premises signs and face challenges under the First Amendment. Indeed, after the decision below, many Tennessee cities imposed moratoriums on new billboard permits while local governing bodies considered whether and how to amend their sign codes to comply with the decision. *See How Tennessee Cities Are Responding to* Thomas v. Bright, Billboard Insider (Mar. 3, 2020), https://billboardinsider.com/how-tennessee-cities-are-responding-to-thomas-v-bright/.[8]

Those localities—and other governments attempting to navigate the unsettled law in this area—face difficult choices. If exceptions for on-premises signs are content based and unconstitutional, as the decision below held, then governments must identify new ways to curb the proliferation of billboards—and address the "unique set of problems" that accompany these "large" and "immobile" structures, *Metromedia*, 453 U.S. at 502 (plurality opinion)—without prohibiting too much speech or speech for which there are no adequate substitutes. *See, e.g.*, *Ladue*, 512 U.S. at 55-56 (invalidating sign code prohibiting residential yard signs because no "adequate substitutes exist[ed]"). States, moreover, must also consider compliance with the HBA, on which ten percent of their federal highway funding hinges. Threading the needle between these

[8] The Tennessee General Assembly considered amendments to the Tennessee Billboard Act during its most recent legislative session. *See* H.B. 1071/S.B. 243, 111th Gen. Assem. (Tenn. 2020); H.B. 2255/S.B. 2188, 111th Gen. Assem. (Tenn. 2020). But the amendments did not pass before the General Assembly adjourned until June 1, 2020, due to the COVID-19 pandemic.

various requirements is no small task. Whether this Court affirms or reverses the decision below, governments at all levels would benefit from additional guidance on the issue presented.

The numerous federal and state court decisions on the issue in the wake of *Reed*, *see* pp. 18-20, *supra*, leave no doubt that the question presented is a recurring one that will continue to arise throughout the country absent this Court's intervention. The importance of the question presented and the likelihood of its recurrence counsel strongly in favor of this Court's review, and this petition provides an excellent vehicle for the Court to consider the issue. The decision below is a final judgment based on a fully developed record. The issue is cleanly presented. The First Amendment question is the only issue remaining after dispositive motions. And the court of appeals' conclusion that the on-premises exception is content based and subject to strict scrutiny was case dispositive, given that the law satisfies intermediate scrutiny under circuit precedent. *See Wheeler,* 822 F.2d at 594-96.[9]

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[9] The possibility that the Tennessee General Assembly may amend the Billboard Act in the future to comply with the decision below provides no reason to deny review. *See, e.g.*, *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977); 13B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533.2.2 (3d ed. 2008).

III. The Decision Below Is Erroneous.

The court of appeals erred in concluding that Tennessee's on-premises exception violates the First Amendment. *Reed* does not require that result, nor do any other of this Court's precedents.

Reed involved a First Amendment challenge to a town sign ordinance that generally prohibited the display of outdoor signs without a permit but "exempt[ed] 23 categories of signs from that requirement." 135 S. Ct. at 2224. Three categories of exempted signs were of particular relevance: (1) "Ideological Sign[s]," which could be up to 20 square feet in area and be placed in all zoning districts without time limit; (2) "Political Sign[s]," which were treated less favorably than ideological signs; and (3) "Temporary Directional Signs Relating to a Qualifying Event," which were treated still less favorably. *Id.* at 2224-25 (alterations in original; internal quotation marks omitted). The exemptions at issue did *not* include an exemption for on-premises signs.

The majority opinion in *Reed* held that the exemptions rendered the ordinance "content based on its face" and thus subject to strict scrutiny. *Id.* at 2227. A regulation of speech is "content based," the Court explained, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* The exemptions in *Reed* were content based because they "depend[ed] entirely on the communicative content of the sign." *Id.*

Reed clarified that a regulation that is content based on its face—i.e., that "draws distinctions based on the message a speaker conveys"—"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." *Id.* at 2227-28 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). While a "'content-based purpose may be sufficient'" to show that a regulation is content based, the Court explained, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)).

In a concurring opinion joined by Justices Kennedy and Sotomayor, Justice Alito agreed that the "regulations at issue . . . [were] replete with content-based distinctions" but wrote separately to explain that the majority opinion "d[id] not mean . . . that municipalities are powerless to enact and enforce reasonable sign regulations." *Id.* at 2233 (Alito, J., concurring). To illustrate this point, Justice Alito provided some examples of "rules that would not be content based." *Id.* That list included, among other things, "[r]ules distinguishing between on-premises and off-premises signs." *Id.*

In the decision below, the Sixth Circuit held that *Reed* required it to overrule its earlier decision in *Wheeler* upholding an on-premises exception under intermediate scrutiny. But while *Reed* may have abrogated the Sixth Circuit's justification-focused content-neutrality inquiry, it did not dictate the

conclusion that the on-premises exception is content based on its face and thus subject to strict scrutiny.

The on-premises exception is easily distinguishable from the plainly content-based exemptions that were at issue in *Reed*. Because the on-premises exception focuses on the *relationship* between the message on the sign and its location, Tennessee's regulatory scheme does not "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Nor does it "depend entirely on the communicative content of the sign." *Id.* Whether a sign is allowed under the on-premises exception depends not on its content, but instead on the location where that content is displayed, with the result that no discrete topic or subject matter is singled out for differential treatment.

The court of appeals reached the contrary conclusion by foregoing the analysis required by *Reed* and instead focusing simplistically on whether an officer "must read the message written on the sign" to apply the exception. App. 15a. But this Court has never adopted this "officer must read it" test as the dispositive inquiry for content neutrality. In *FCC v. League of Women Voters of California*, 468 U.S. 364, 366, 383 (1984), this Court held that a law forbidding certain federal grant recipients from "engag[ing] in editorializing" was content based because the ban was "defined solely on the basis of the content of the suppressed speech," such that "enforcement authorities . . . necessarily [had to] examine the content of the message" to determine whether it constituted editorializing. The kind of "official scrutiny" of content

that was at issue in *League of Women Voters* and subsequent cases, *see Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), however, is a far cry from the cursory review that the Sixth Circuit found dispositive in this case. Tennessee officials do not examine the content of a sign to determine whether it falls within a particular topic that is allowed or prohibited; rather, they consider content only to determine its relationship to the location where the sign is displayed.

The court of appeals also erred in equating the on-premises exception with the laws at issue in *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Carey v. Brown*, 447 U.S. 455, 460-61 (1980); and *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98 (1972), all of which prohibited speech on a particular topic in a particular area—for example, in *Boos*, speech critical of a foreign government within 500 feet of that government's embassy. *See* App. 19a. Unlike the laws in those cases, the on-premises exception does not prohibit speech on any discrete topic or subject matter.

But perhaps the most egregious flaw in the decision below was its complete disregard of Justice Alito's concurring opinion in *Reed*, which specifically identified "[r]ules distinguishing between on-premises and off-premises signs" as an example of a regulation that would *not* be content based under the majority opinion. 135 S. Ct. at 2233 (Alito, J., concurring). The court of appeals speculated that Justice Alito must have been referring to a different kind of on-premises exception from the one in Tennessee's Billboard Act, but that is implausible. Tennessee's on-premises

exception is the same as the on-premises exception in the HBA, which featured prominently in the United States' amicus brief in *Reed*,[10] and it is the same on-premises exception that has been a common feature of sign regulation in the United States for decades. In any event, Justice Alito's identification of "[r]ules imposing time restrictions on signs advertising a one-time event," 135 S. Ct. at 2233, as another example of a content-neutral regulation should have made clear that the court of appeals' singular focus on whether officials must "read the message written on the sign," App. 15a, was deeply flawed.

The on-premises exception is a content-neutral means of ensuring that "context-sensitive" expression—i.e., expression that is important not because of its content but because of the relationship between the content and its location—is sufficiently accommodated. *Rappa*, 18 F.3d at 1064; *see also Ladue*, 512 U.S. at 56-57 (discussing importance of location to message communicated by residential yard sign); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (same with respect to "for sale" signs). The court of appeals erred in concluding otherwise, and this Court should accept review to provide clarity on this important First Amendment issue.

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[10] *See* Brief for the United States as Amicus Curiae Supporting Petitioners 2-3, 28-31, *Reed*, 135 S. Ct. 2218 (No. 13-502) (describing the HBA and arguing that it is constitutional).

IV. If Plenary Review Is Denied, the Petition Should Be Held for *Barr v. American Association of Political Consultants, Inc.*

This Court recently granted review in *Barr v. American Association of Political Consultants, Inc.* (*AAPC*), No. 19-631, to consider whether the government-debt exception to the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, is a content-based regulation of speech. The question presented in that case, like the question presented in this petition, concerns the application of *Reed* and the appropriate test for content neutrality.

The United States argued in its petition that the government-debt exception is content neutral because it depends "on the call's economic purpose" rather than "the content" of the call, and that "the use of a call's content as evidence of the type of economic activity involved is not the sort of content-based *restriction* that triggers strict scrutiny." Petition for Writ of Certiorari at 6, 8, *AAPC*, No. 19-631 (Nov. 14, 2019) (emphasis in original). Those arguments are similar to Tennessee's arguments about the proper interpretation of *Reed* and the content neutrality of its on-premises exception.

Accordingly, if this Court denies plenary review of the decision below, Tennessee respectfully requests that this Court hold the petition pending its resolution in *AAPC* and remand to the court of appeals for application of that decision if appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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