No. 19-1201

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

REPLY BRIEF FOR PETITIONER

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I. Lower Courts Are Divided on the Question Presented.

Thomas acknowledges that there is a longstanding conflict among federal courts of appeals and state high courts concerning whether laws that distinguish between on-premises and off-premises signs violate the First Amendment as applied to noncommercial speech. *See* Opp. 15.[1] As explained in the State's petition, this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), only exacerbated this confusion. The two courts of appeals to have considered post-*Reed* whether a distinction between on-premises and off-premises signs is content based—the Sixth Circuit in the decision below and the Third Circuit in *Adams Outdoor Advertising Limited Partnership v. Pennsylvania Department of Transportation*, 930 F.3d 199, 207 n.1 (3d Cir. 2019)—reached directly contrary conclusions.

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[1] Thomas contends that the Eleventh Circuit has "protected noncommercial speech by requiring that it always be treated as on-premise." Opp. 16. But the Eleventh Circuit held in *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), that "a regulation allowing onsite noncommercial signs while denying offsite noncommercial signs would be constitutionally permissible." *Id.* at 1509. The decision that Thomas cites—*Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1343 (11th Cir. 2004)—treated all noncommercial signs as "onsite signs" because the ordinance at issue in that case "expressly allow[ed] noncommercial messages at least as much leeway as commercial ones." *Id.* at 1344; *see also Southlake Property Assoc., Ltd. v. City of Morrow*, 112 F.3d 1114, 1119 (11th Cir. 1997) (deferring to city's interpretation of its ordinance as prohibiting only offsite commercial signs).

Thomas attempts to distinguish *Adams* by claiming that "noncommercial speech was not at issue there and could hardly have been fully litigated." Opp. 17. To the contrary, the plaintiff in *Adams* displayed both commercial and noncommercial speech on its billboards and did not confine its First Amendment challenge to commercial speech. *See* Brief for Appellee Richards at 13-14, *Adams*, 930 F.3d 199 (No. 18-2409), 2018 WL 5886882 (stating that the plaintiff's billboards displayed "commercial, political, non-commercial, and public service" messages and that the record did not indicate what kind of message would be displayed on the billboard at issue in that case). On appeal, the plaintiff noted its "broad use of off-premise signs for political and religious and public service expression" and argued that Pennsylvania's billboard law is content based under *Reed* because it prohibits those noncommercial signs while allowing on-premises signs. Brief of Appellant at 25, 27, *Adams*, 930 F.3d 199 (No. 18-2409), 2018 WL 4369496.

If *Adams* were in fact "a commercial speech case," as Thomas contends, Opp. 18, one would expect the Third Circuit to have cited *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), or other of this Court's commercial speech cases. But the Third Circuit did not cite those cases. Instead, it relied on its earlier decision in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994)—a case involving the application of Delaware's billboard law to *political* speech. *See id.* at 1047.

Rappa held that Delaware's "exception for signs advertising activities conducted on the premises" was "not a content-based exception at all" because it did not "preclude any particular message from being voiced in any place." *Id.* at 1067. *Adams* adhered to *Rappa*,[2] held that Pennsylvania's "exemption for on-premise signs concerning activities on the property" was subject to only intermediate scrutiny, and expressly rejected the plaintiff's argument that *Reed* required it to apply strict scrutiny. *Adams*, 930 F.3d at 207 & n.1. That discussion was hardly "dicta." Opp. 18. And it created a direct conflict with the Sixth Circuit that warrants this Court's review.

Thomas is thus mistaken when he says it is "too early to tell whether there will be any circuit conflict as to noncommercial speech and the on-/off-premise distinction." Opp. 19. A direct conflict between the Third and Sixth Circuits already exists, deepening the conflict that predated *Reed*. And the Fifth Circuit will weigh in on the question soon. *See Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 19-50354 (5th Cir.) (oral argument held Feb. 6, 2020); *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar Park*, No. 20-50125 (5th Cir.) (appeal docketed Feb. 21, 2020).

As Thomas acknowledges, *see* Opp. 21, the district court's decision in *City of Cedar Park* directly addressed the constitutionality of an on-premises exception as applied to noncommercial speech. *Reagan*

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[2] Thomas asserts that *Reed* overruled *Rappa*, Opp. 18 n.12, but the Third Circuit's decision to adhere to *Rappa* even after *Reed* belies that claim.

Nat'l Advert. of Austin, Inc. v. City of Cedar Park, 387 F. Supp. 3d 703, 713 (W.D. Tex. 2019). The district court also addressed that question in *City of Austin*. *See Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670, 681-83 (W.D. Tex. 2019). Although the current version of Austin's sign ordinance does not regulate noncommercial signs, that change did not occur until after the city denied the billboard permits at issue in that case. *Id.* at 675. The version of Austin's sign code under which the plaintiff asserted its claims restricted both commercial and noncommercial off-premises signs. *Id.* at 673-74.

Thomas suggests that this Court should await a case involving *commercial* speech because "that is where the greatest potential for circuit conflict exists." Opp. 23. But Thomas readily admits that there is no current conflict on "the applicability of *Reed* to commercial speech." *Id.* The possibility that there might eventually be a conflict on that distinct issue provides no reason to deny review on a question that has already divided the lower courts.

The decision below also deepens a circuit conflict about the appropriate standard for determining whether a regulation is content based. *See* Pet. 20-23. The court of appeals held that Tennessee's Billboard Act is content based because officials "must read the message written on the sign" to determine whether the on-premises exception applies. App. 15a. The Ninth and D.C. Circuits, on the other hand, have expressly rejected this "officer must read it" test. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir. 2017); *Act Now to Stop War and End Racism Coal. v.*

District of Columbia, 846 F.3d 391, 404 (D.C. Cir. 2017).

Thomas argues that *Act Now* is distinguishable because it involved "the regulation of a limited public forum" rather than of private property. Opp. 13 n.7. But the D.C. Circuit treated the District of Columbia's lampposts as a "designated" public forum, not a limited public forum. *Act Now*, 846 F.3d at 407. And because "the government lacks the 'power to restrict expression'" in a designated public forum "because of its message, its ideas, its subject matter, or its content,'" the D.C. Circuit squarely considered whether the regulation was content neutral. *Act Now*, 846 F.3d at 403 (quoting *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

Thomas maintains that the Ninth Circuit did not reject the "officer must read it" test, but instead simply declined to apply it "without common sense." Opp. 13 (quoting *Recycle for Change*, 856 F.3d at 671). To be sure, the Ninth Circuit emphasized that, "[i]f applied without common sense," the "officer must read it test . . . would mean that every sign, except a blank sign, would be content based." *Recycle for Change*, 856 F.3d at 671 (internal quotation marks omitted). But the Ninth Circuit also made clear that "an officer's inspection of a speaker's message *is not dispositive* on the question of content neutrality." *Id.* (emphasis added). The decision below, by contrast, held that "a law regulating speech is facially content-based if it . . . 'require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.'" App. 14a

(brackets in original) (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)).

Thomas maintains that the Ninth Circuit "may have erred in relying in *Hill v. Colorado*, 530 U.S. 703 (2000), rather than *McCullen*." Opp. 14. To the extent there is tension between *Hill* and *McCullen*, that is further reason for this Court to grant the petition and clarify the test for facial content neutrality. *Compare Hill*, 530 U.S. at 721 ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."), *with McCullen*, 573 U.S. at 480 (noting that a law "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

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

Thomas does not dispute that distinctions between on-premises and off-premises signs are a pervasive feature of sign regulation in the United States. He nevertheless argues that the question presented is unimportant because some circuits had already prohibited the regulation of noncommercial signs before *Reed*, and "uncontrollable blight" has not occurred in those jurisdictions. Opp. 8.

But the importance of the question presented does not depend on the policy consequences of the decision

below. Rather, the question presented is important because it concerns the constitutionality of the federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131, similar laws enacted by the legislatures of forty-eight States,[3] and countless local ordinances. *See* Pet. 28-30. This Court has frequently granted certiorari to review issues that, like the question presented here, implicate the validity of laws across the country. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (reviewing constitutionality of Missouri law limiting political contributions "[g]iven the large number of States" with similar laws); *New York v. Ferber*, 458 U.S. 747, 749 (1982) (reviewing New York child pornography statute with parallels in nineteen other States).

Nor does the importance of the question presented decline simply because some States have amended their billboard laws in response to adverse court decisions. *See* Opp. 10. That some jurisdictions have been forced to abandon their distinctions between on-

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[3] In addition to the statutes cited on pages 28-29 of the petition, the following state billboard laws also distinguish between on-premises and off-premises signs: Conn. Gen. Stat. § 13a-123(e)(2)-(3); Mo. Ann. Stat. § 226.520(2); Mont. Code Ann. § 75-15-111(1)(b)-(c); N.M. Stat. Ann. § 67-12-4(A)(2)-(3); N.Y. Pub. Auth. Law § 361-a(7)(a)(1)-(2), (c); N.D. Cent. Code § 24-17-03(2)-(3); 36 Pa. Cons. Stat. § 2718.104(ii)-(iii); R.I. Gen. Laws § 24-10.1-3(2)-(3); W. Va. Code § 17-22-7(b)-(c); Wis. Stat. § 84.30(3)(b)-(c). Thomas discounts state laws that may not currently be enforced against noncommercial speech because of adverse court decisions, *see* Opp. 9 n.4, but those laws remain on the books and could again be enforced if this Court were to uphold the constitutionality of on-premises exceptions that apply equally to commercial and noncommercial speech.

and off-premises signs,[4] while others may still enforce them, counsels in favor of this Court's review, not against. So too does the fact that Congress has *not* amended the HBA. Unless the HBA's on-premises exception is eliminated, States that change their own billboard laws will risk failing to maintain "effective control" of outdoor advertising and losing ten percent of their federal highway funding. 23 U.S.C. § 131(b).[5]

Thomas is also mistaken that any harm to the State is attributable to its "failure to enact a severable provision." Opp. 1. Because the on-premises exception is designed to *protect* First Amendment interests, enforcing the Billboard Act without an on-premises exception would present its own First Amendment concerns. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (holding that ordinance prohibiting residential yard signs violated the First Amendment because it foreclosed "a venerable means of communication that is both unique and important"). Enforcing the Billboard Act against only commercial

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[4] The Tennessee Senate passed amendments to the Billboard Act on June 4, 2020, and those amendments will soon be considered by the House. *See* H.B. 2255/S.B. 2188, 111th Gen. Assem. (Tenn. 2020). The State will inform the Court of any further legislative developments by filing a supplemental brief.

[5] Because Congress may not place an unconstitutional condition on the receipt of federal funds, *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006), a State's inability to fully enforce its billboard law because of an adverse court decision should not itself result in the loss of federal funding. But given the significant funds at stake, the prudent course for States that amend their laws is to do so in a manner that complies with the HBA to the greatest extent possible.

speech, moreover, would require state officials to determine whether the message on a sign is commercial or noncommercial—an exercise likely to be far more difficult than determining whether a message relates to activities occurring on the premises.[6] And, as this case well illustrates, billboard operators could avoid enforcement simply by changing the message on a sign to a noncommercial one. *See* App. 11a (noting that Thomas "resumed commercial advertising on his Crossroads Ford billboard" after the district court ruled in his favor). Especially in this age of digital billboards—where content can be changed "daily, weekly, hourly, or even in real time," *Roland Digital Media, Inc. v. City of Livingston*, No. 2:17-cv-00069, 2018 WL 6788594, *10 (M.D. Tenn. Dec. 26, 2018) (internal quotation marks omitted)—the practical difficulties of limiting enforcement to commercial speech are immense.

The distinction between on-premises and off-premises signs is a workable means of curbing the proliferation of billboards while safeguarding the First Amendment rights of those who wish to communicate "context-sensitive" messages. *Rappa*, 18 F.3d at 1064. The constitutionality of that longstanding distinction, as applied to noncommercial speech, is a question of

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[6] Thomas asserts that application of Tennessee's on-premises exception requires a "thorough examination" of content. Opp. 14, As the court of appeals acknowledged, however, determining whether a sign is on-premises will often be "straightforward." App. 16a. That was certainly the case here, given that Thomas's billboard is located "on a vacant lot" where no activities are occurring. App. 17a.

exceptional nationwide importance that warrants this Court's review.

III. The Decision Below Is Erroneous.

Thomas accuses the State of attempting to justify the Billboard Act's on-premises exception based on its content-neutral justifications, *see* Opp. 23-25, but the State's position all along has been that the exception is content neutral on its face. The on-premises exception does not "appl[y] to particular speech because of the topic discussed or the idea or message expressed" or "draw[] distinctions based on the message a speaker conveys," it is not "targeted at a specific subject matter," and it does not "depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227, 2230. Whether a particular message may be displayed in the areas regulated by the Billboard Act depends on the *location* where it is displayed, not the content of the message.

While Thomas is correct that Justice Alito's concurring opinion in *Reed* is not controlling, Opp. 25, he erroneously discounts its significance. At the very least, Justice Alito's specific enumeration of a rule distinguishing between on-premises and off-premises signs as a content-neutral regulation underscores that the majority opinion in *Reed* did not resolve that question. *Reed* clarified one aspect of the content-neutrality analysis by explaining that a facially content-based regulation is subject to strict scrutiny, even if it has a content-neutral justification. *See* 135 S. Ct. at 2228. But lower courts now disagree about how to determine whether regulations are content based on their face—especially regulations, like the on-

premises exception at issue here, that are materially distinguishable from the sign code in *Reed*. This Court should grant review to resolve that confusion and reverse the decision below.

IV. If Plenary Review Is Denied, the Petition Should Be Held for *Barr v. AAPC*.

Thomas acknowledges that there are "similarities between" this case and *Barr v. AAPC*, No. 19-631. Opp. 27. He nevertheless contends it is "unlikely" this Court's decision in *AAPC* will "affect the validity of the decision below" because of two purported differences between the cases. Opp. 26-27. Neither difference provides a reason not to hold the petition.

Thomas first observes that *AAPC* "presents a facial challenge," whereas this case involves "only an as-applied challenge, asking for protection only for noncommercial speech." Opp. 26-27. But the plaintiffs in *AAPC*, like Thomas, wish to engage in noncommercial speech. *See* Brief of Respondents at 10, *AAPC*, No. 19-631 (noting that respondents are "entities whose core purpose is to participate in the American political process, including by disseminating political speech"). And, like Thomas, they allege that a statute that restricts their ability to engage in such speech violates the First Amendment because it contains a content-based distinction. *Id.* at 12. Both cases thus require this Court to evaluate whether an exemption from a speech restriction that applies to both commercial and noncommercial speech renders the restriction content based. Because this Court's decision on that issue in *AAPC* is likely to bear on the question presented in this case, a hold is warranted.

Thomas also notes that "while severability is an issue in *AAPC*, it is not here." Opp. 27. But the fact that *AAPC* presents an additional question about severability makes that case no less relevant. This Court will not even reach the severability question unless it first determines that the government-debt exception to the Telephone Consumer Protection Act violates the First Amendment. If this Court determines that the government-debt exception is not content based—or decides that it is, but applies reasoning different from that employed by the Sixth Circuit in the decision below—then it would be appropriate to grant the petition, vacate the judgment, and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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