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

SUPPLEMENTAL BRIEF FOR PETITIONER

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULE

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner files this supplemental brief pursuant to this Court's Rule 15.8 to notify the Court of recent legislative action related to Tennessee's Billboard Regulation and Control Act, Tenn. Code Ann. § 54-21-101 *et seq.*—the law the Court of Appeals held unconstitutional in the decision below. Both houses of the Tennessee General Assembly have now approved legislation that would repeal the Billboard Act, including its on-premises exception, and replace it with the Outdoor Advertising Control Act of 2020, which would exempt from regulation signs for which no compensation is being received that are located within 50 feet of the facility that owns or operates the sign or that have sign faces not exceeding 20 square feet. *See* H.B. 2255, 111th Gen. Assemb. (Tenn. 2020); Amendments 3, 4, and 5 to S.B. 2188, 111th Gen. Assemb. (Tenn. 2020).

For two reasons, the General Assembly's actions provide no reason for this Court to deny the petition. *First*, if the approved legislation becomes law,[1] it will not render this case moot because there remains a possibility that the General Assembly will reenact the challenged on-premises exception if this Court grants

---

[1] The legislation the General Assembly approved has not yet been presented to the Governor. *See H.B. 2255 Bill History*, Tennessee General Assembly, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2255&GA=111 (last updated June 18, 2020). Once presented, the bill will become law if the Governor signs it or takes no action within ten days of presentment. *See* Tenn. Const. art. III, § 18. The General Assembly may override any veto by a simple majority vote in both houses. *Id.*

review and reverses the decision below. *See Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977). *Second*, if the case is moot, it would be appropriate for this Court to grant the petition and vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

I. Repeal of the Billboard Act Would Not Render This Case Moot.

It is well settled that the repeal or amendment of a challenged law does not moot the underlying challenge if there is a possibility of reenactment. *See* 13B Charles Alan Wright *et al.*, Federal Practice & Procedure § 3533.2.2 (3d ed. 2008) ("Even in the unusual case when a legislature complies with a court mandate to enact a new statute the possibility of later repeal or revision defeats mootness."). In *Maher v. Roe*, 432 U.S. 464, 466 (1977), for example, this Court considered a challenge to a Connecticut regulation restricting Medicaid benefits for first trimester abortions to those that were medically necessary. *Id.* at 466. After a federal district court held the regulation unconstitutional and enjoined Connecticut from enforcing it, Connecticut revised the regulation. *Id.* at 468 n.4. This Court held that the "subsequent revision of the regulation d[id] not render the case moot" because the revision "was made only for the purpose of interim compliance with the District Court's judgment and order," and the "appeal was taken and submitted on the theory that Connecticut desire[d] to reinstate the invalidated regulation." *Id.*

This Court reached similar conclusions in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289

(1982), and *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993). In *City of Mesquite*, this Court "confronted the merits" of the vagueness issue in that case even though the petitioner had revised the challenged ordinance to remove the problematic language. 455 U.S. at 288-89. The vagueness issue was not moot because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289.

The same result followed in *Northeastern Florida*. *See* 508 U.S. at 662-63. Although the city had repealed the challenged ordinance and replaced it with a slightly different one, this Court held that "the case [wa]s not moot." *Id.* There was "no mere risk that [the city] w[ould] repeat its allegedly wrongful conduct; it ha[d] already done so" by reenacting a substantially similar ordinance. *Id.* at 662.

If the legislation that was recently passed by the General Assembly becomes law, it will not render this case moot. The legislative record makes clear that the General Assembly enacted the legislation to comply with the Court of Appeals' holding in the decision below that the Billboard Act violates the First Amendment. The sponsors of the legislation in both the House and the Senate explained that the amendments were "necessary" because of that ruling. *See* Senate Floor Session, 2020 Leg., 111th Sess., at 1:00:08-1:00:35 (Tenn. June 4, 2020) (statement of Sen. Massey), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=23082; House Floor Session, 2020 Leg., 111th

Sess., at 1:10:35-1:11:21 (Tenn. Mar. 19, 2020) (statement of Rep. Howell), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=22270&meta_id=483080. That fact alone suggests a possibility that the legislature would reinstate the challenged on-premises exception if this Court were to grant review and reverse the decision below on the merits.

Moreover, the House sponsor acknowledged that legislators were "struggling to thread the needle" between remedying the purported First Amendment violation found by the Sixth Circuit and complying with the "effective control" requirement of the federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131. *See* House Floor Session, 2020 Leg., 111th Sess., at 1:14:37-1:14:53 (Tenn. Mar. 19, 2020) (statement of Rep. Howell), http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=22270&meta_id=483080. The HBA conditions a significant percentage of States' federal highway funding on compliance with the "effective control" requirement. *See* Pet. 6. It stands to reason, then, that if this Court were to reverse the decision below, the General Assembly would have a strong incentive to reinstate the longstanding exception for on-premises signs that mirrors and unquestionably complies with the HBA.

Because the General Assembly repealed the Billboard Act's on-premises exception only "for the purpose of . . . compliance with the [Court of Appeals'] judgment" and may well reinstate the exception if this Court reverses that judgment, *Maher*, 432 U.S. at 468 n.4, the repeal, if signed into law, would not moot this case. This Court should thus grant review to resolve

the direct conflict among the lower courts regarding whether laws that distinguish between on-premises and off-premises signs violate the First Amendment as applied to noncommercial speech.

II. If This Case Is Moot, the Court Should Vacate the Decision Below Under *Munsingwear*.

If this Court concludes that the General Assembly's repeal of the Billboard Act renders this case moot, it would be appropriate for this Court to grant the petition and vacate the decision below. *See Munsingwear*, 340 U.S. at 39-40. The "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. This Court has adhered to that practice when the reason for mootness is the legislature's amendment of the challenged law. *See U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (vacating decision under *Munsingwear* after concluding that Congress's amendment of challenged law rendered federal agency's appeal moot).

Vacatur would be warranted here because the General Assembly's decision to amend the Billboard Act "cannot fairly be attributed to" the parties in this litigation. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994). Petitioner is the Commissioner of the Tennessee Department of Transportation—an executive-branch official. When mootness is caused by the legislature's amendment of a statute, the "executive branch is in a position akin to a party who finds its case mooted on appeal by

'happenstance,' rather than events within its control." *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 353 (D.C. Cir. 1997); *see also Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583, 590 (4th Cir. 2016) (vacating decision following legislative amendment and cautioning "against conflating the actions of a state executive entity with those of a state legislature"). When, as here, there is "no evidence to indicate" that the legislature's actions "represent[] 'manipulation of the legislative process' rather than 'responsible lawmaking,'" vacatur is appropriate. *Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (quoting *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1185 (D.C. Cir. 1992)).

CONCLUSION

For the reasons explained in the petition, the State of Tennessee respectfully requests that this Court either grant plenary review or hold this petition pending its decision in *Barr v. American Association of Political Consultants, Inc.*, No. 19-631. In the alternative, if this Court determines that the case is moot, it should vacate the decision below and remand with instructions to dismiss.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Petitioner