

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. _____

CLAY BRIGHT, in his official capacity as Commissioner of the Tennessee Department of
Transportation,

Applicant,

v.

WILLIAM HAROLD THOMAS, JR.,

Respondent.

**APPLICATION TO THE HONORABLE SONIA SOTOMAYOR FOR AN EXTENSION
OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Pursuant to Supreme Court Rules 13(5) and 30.2, Clay Bright, in his official capacity as Commissioner of the Tennessee Department of Transportation (“TDOT”), respectfully moves for an extension of 60 days, to and including April 3, 2020, for the filing of a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The court of appeals issued its opinion and judgment on September 11, 2019 (Exhibit 1) and denied applicant’s timely petition for rehearing on November 6, 2019 (Exhibit 2). Absent the requested extension, the deadline for filing a petition for certiorari will be February 4, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). In support of this request, applicant states as follows:

1. This case presents an important question concerning the constitutionality of Tennessee’s Billboard Regulation and Control Act, 1972 Tenn. Pub. Acts, ch. 655 (codified at

Tenn. Code Ann. § 54-21-1-1 *et seq.*) (“Billboard Act”).

2. The Tennessee Billboard Act generally prohibits outdoor advertising on areas adjacent to interstate and primary highways, but several categories of signs are excepted from that prohibition. As relevant here, on-premises signs—those that advertise “the sale or lease of property on which they are located” or “activities conducted on [that] property”—are allowed without a permit. Tenn. Code Ann. §§ 54-21-103, -107. Off-premises signs are allowed only in commercial or industrial areas subject to size, lighting, and spacing restrictions and require a permit from TDOT. *Id.*

3. Tennessee’s legislature enacted the Billboard Act to comply with the Federal Highway Beautification Act, 23 U.S.C. § 131. The federal Act conditions ten percent of a State’s federal highway funds on the State’s “effective control” of “outdoor advertising signs, displays, and devices” located on areas adjacent to interstate and primary highways. 23 U.S.C. § 131(b). To maintain “effective control” within the meaning of the Act, a State may allow only limited categories of signs in regulated areas, including signs “advertising the sale or lease of property upon which they or located” or “advertising activities conducted on [that] property.” *Id.* § 131(c).

4. Respondent William Thomas, a billboard operator, sued the Commissioner of TDOT alleging that Tennessee’s Billboard Act violates the First Amendment as applied to the non-commercial speech that he occasionally displays on one of his billboards. Thomas argued that, under this Court’s decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Billboard Act’s distinction between on-premises and off-premises signs is content based and cannot satisfy strict scrutiny. The Commissioner argued that the on-premises exception is content neutral, because it is based predominately on location and does not single out a particular topic or subject matter for

differential treatment. Indeed, Justice Alito’s concurring opinion in *Reed*, on behalf of three of the six members of the majority, specifically identified “[r]ules distinguishing between on-premises and off-premises signs” as an example of a regulation “that would *not* be content based.” *Id.* at 2233 (Alito, J., concurring) (emphasis added). The Commissioner also argued that, even if the exception for on-premises signs is content based, it satisfies strict scrutiny because it is the least restrictive means of balancing the State’s compelling interest in highway safety with its compelling interest in safeguarding First Amendment rights.

5. The district court ruled in favor of Thomas, *Thomas v. Schroer*, 248 F. Supp. 3d 868 (W.D. Tenn. 2017), and a panel of the Sixth Circuit affirmed, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019). The Sixth Circuit deemed the question whether the on-premises exception is content based an easy one because, in its view, a regulation is content based if a government official must “examine the content of the message” on the sign to apply the regulation. *Id.* at 729 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)). The Sixth Circuit reasoned that the on-premises exception is content based because a “Tennessee official must read the message written on the sign and determine its meaning, function, or purpose.” *Id.* at 730. As for Justice Alito’s *Reed* concurrence, the district court speculated that “[t]here might be many formulations of an on/off premises distinction that are content neutral,” notwithstanding that on-premises exceptions like those found in Tennessee’s Billboard Act and the Federal Highway Beautification Act have been pervasive in state and local sign law for decades. *Id.* at 733.

The Sixth Circuit subjected the Billboard Act to strict scrutiny and held that it did not satisfy that demanding standard. The court declined to recognize the State’s interest in highway safety as compelling, even though “the Supreme Court has recognized a compelling interest in

‘highway safety’” in the Fourth Amendment context. *Id.* at 733 (quoting *Mackey v. Montrym*, 443 U.S. 1 (1979)). And while the Sixth Circuit acknowledged that the State has a compelling interest in safeguarding First Amendment rights, it concluded that the on-premises exception is an underinclusive means of achieving that interest. *Id.* at 733, 736-37. Rather than address the State’s least-restrictive-means arguments, the court labeled them “policy concerns” that were “problems for the Tennessee Legislature, not the courts.” *Id.* at 737.

6. The Commissioner of TDOT filed a petition for rehearing en banc. After calling for a response from Thomas, the Sixth Circuit denied the petition.

7. Counsel for applicant respectfully requests a 60-day extension of time, to and including April 3, 2020, within which to file a petition for a writ of certiorari. The Sixth Circuit’s decision in this case has prompted some members of the Tennessee General Assembly to consider amending the Billboard Act. The General Assembly just reconvened for its 2020 legislative session on January 14, 2020. The requested extension would allow applicant to monitor legislative action related to the Billboard Act and take into account any legislative developments in determining whether to file a petition and in preparing a petition that will be helpful to the Court.

CONCLUSION

WHEREFORE, the Commissioner of TDOT requests a sixty-day extension, to and including April 3, 2020, to file a petition for a writ of certiorari.

Respectfully submitted,

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