

No. 19-1201

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In The  
**Supreme Court of the United States**

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CLAY BRIGHT, COMMISSIONER OF TENNESSEE  
DEPARTMENT OF TRANSPORTATION,

*Petitioner,*

v.

WILLIAM HAROLD THOMAS, JR.,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit**

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

The State suggests that this case has created a crisis for billboard regulation, sowing confusion and “cast[ing] doubt on the constitutionality of a federal statute . . . as well as countless state and local laws, regulations, and ordinances.” (Pet. 26-27) But far from invalidating a wide swath of sign regulations, the Sixth Circuit ruled only on a narrow, as-applied claim concerning noncommercial speech.

Tennessee permits signs to be erected without a permit if they advertise activities, including commercial activities, occurring on the property where the sign is located. In that context, the court of appeals applied *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to hold that the “Billboard Act’s on-premises exception scheme is a content-based regulation of (restriction on) free speech,” App. 13a, because Tennessee’s law “draws distinctions based on the message a speaker conveys,” *Reed*, 135 S. Ct. at 2227.

The question presented is:

Whether the court of appeals correctly held that the Tennessee Billboard Act’s exception for on-premise speech, which restricts noncommercial speech in places where commercial speech is allowed, violates the First Amendment as applied to noncommercial messages.

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## INTRODUCTION

The State argues that it will be unable to effectively regulate billboards, and risks the loss of federal highway funds, because of the decision in this case. (Pet. 26-27, 30) But the Sixth Circuit merely provided a narrow, as-applied protection for noncommercial speech, and in doing so joined three of its sister circuits with combined jurisdiction over 18 states and territories. *See* 28 U.S.C. § 41. Tennessee has provided no evidence that the dire consequences it predicts have come to pass in any of those places, and any harm it may anticipate here is a result, not of the modest holding below, but of its failure to enact a severable provision.

Finally, to the extent there is any confusion as to the application of *Reed*, and there appears to be little, it occurs in the commercial context and has not yet ripened into a circuit split, as the State’s numerous citations to district court opinions suggest. Accordingly, even if the Sixth Circuit were mistaken—and it was not—the State’s request for a writ of certiorari is premature.



## STATEMENT OF THE CASE

Mr. Thomas “post[s] outdoor advertising signs . . . on the various tracts of real property he owns throughout Tennessee.” App. 85a (citations omitted). In 2006, the Tennessee Department of Transportation (“TDOT”) denied his permit application for the

Crossroads Ford sign at issue here. App. 86a.<sup>1</sup> The Shelby County Chancery Court later found “substantial evidence of selective and vindictive enforcement,” including emails coordinating efforts between TDOT employees and Mr. Thomas’s competitors to “defeat” him and emails from TDOT employees attempting to scare off Mr. Thomas’s customers. App. 7a-8a. After obtaining “a billboard permit from Memphis and Shelby County,” App. 8a, Mr. Thomas built the Crossroads Ford sign.

Five years into an enforcement action against the sign in Shelby County Chancery Court, App. 86a, Mr. Thomas “stopped posting commercial advertising on the Crossroads Ford billboard,” App. 8a. In support of “that year’s U.S. Olympic” team, App. 85a, he placed a message that stated “Go USA!,” App. 8a, while showing “an American flag with the Olympic rings,” App. 85a. Later that fall, the sign “displayed content referencing the then upcoming holiday season with a picture of the American flag.” App. 85a. The state court of appeals reversed the chancery court’s decision that such noncommercial speech was exempt from regulation, holding that the trial court lacked jurisdiction to hear First Amendment defenses, Pet. 11, “[r]egardless of what message is displayed,” App. 8a (internal quotation marks omitted) (alteration in original); *see id.* (noting ruling that noncommercial speech was exempt).

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<sup>1</sup> While disagreeing with the State’s commentary and legal conclusions, particularly as to the relationship between the Act and the Federal Highway Beautification Act, Mr. Thomas generally agrees with Tennessee’s description of the Act. (Pet. 6-9)

On December 17, 2013, Mr. Thomas filed a federal complaint to protect the noncommercial messages displayed on the Crossroads Ford sign. App. 87a. The district court concluded that “the Billboard Act is an unconstitutional, content-based regulation of speech,” App. 132a, because “[t]he only way to determine whether a sign is an on-premise sign[] is to consider the content of the sign and determine whether that content is sufficiently related to the ‘activities conducted on the property on which they are located,’” App. 97a. The Act could not meet the strict scrutiny thus required, because the State had not demonstrated that it has a compelling interest, App. 101a-07a, that its asserted interests were related to the Act’s restrictions, App. 107a-11a, or that the Act is narrowly tailored to its interests, App. 111a-32a.

Confining its “analysis . . . to non-commercial speech,” the Sixth Circuit affirmed. App. 14a. It held that the Act is content based because of the multi-layered examination necessary to determine if a message is allowed or not. First, officials must examine the sign. “There is no way to” apply the law “without understanding the content of [a sign’s] message,” and that requires that officials “assess the meaning and purpose of the sign’s message.” App. 16a. Second, officials must “identify, assess, and categorize the activity conducted at that location.” *Id.* Third, they must “determine whether the content of the message sufficiently relates to that activity, product, or service.” *Id.* Accordingly, a “Tennessee official decides” whether a message is allowed. App. 17a.

The Sixth Circuit rejected the State’s proffered aesthetics and safety interests, the latter as a post-hoc justification undermined by the “significant commercial signage” the State allows. App. 24a. And although the court assumed for the sake of its tailoring analysis that the State had “sufficiently raised [an interest in safeguarding First Amendment rights] and preserved it for appeal,” App. 24a-25a, it ultimately held that the Act’s underinclusiveness undermined any claim “that Tennessee is safeguarding its citizens’ First Amendment rights,” App. 31a. Furthermore, it held that the Act failed strict scrutiny because, in discriminating among noncommercial messages and failing to “accord[] non-commercial speech a greater degree of protection than commercial speech,” App. 28a-31a (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality op.)), the Act was insufficiently tailored.

Finally, the court rejected the State’s assertion that it had no less restrictive means available to achieve its interests. (Pet. 14 (stating that the court ignored this argument as a policy concern)) “The district court [had] held that the Billboard Act was not severable, and Tennessee ha[d] not challenged that holding [on] appeal.” App. 12a. *Reed* had outlined “ample content-neutral options,” such as regulating signs’ “size, building materials, lighting, moving parts, and portability.” 135 S. Ct. at 2232. Noting that other jurisdictions had “cure[d] their signage restrictions to satisfy the First Amendment,” the court of appeals reminded the State that it merely needed to address

the specific problems with its sign law to similarly be “free to regulate the erection and attributes of billboard[s].” App. 32a-33a.

“No judge [having] requested a vote on the suggestion for rehearing en banc,” reconsideration was denied. App. 134a-35a.

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## ARGUMENT

The State argues that First Amendment protection for off-premise noncommercial speech will upend state and federal law, making it impossible to “curb the proliferation of billboards” and causing states to lose their “federal highway funding.” (Pet. 30) But the Sixth Circuit has merely joined three of its sister circuits, which together cover 18 states and territories already subject to the First Amendment rule Tennessee complains of here. *See* 28 U.S.C. § 41. Despite this ample experience, some of it decades old, Tennessee has failed to identify a single state that has been infected by non-commercial billboard blight or suffered from a loss of federal highway funding. (Pet. 26-27, 28) These facts alone call Tennessee’s petition into question.

Nevertheless, to justify a writ of certiorari, the State suggests that what the court of appeals called “neither a close call nor a difficult question,” App. 13a, was, in fact, a stunning, multifaceted departure from the practice of its sister circuits and binding precedent. For the reasons given below, the State is mistaken.

To the contrary, the decision below correctly followed this Court’s guidance. Before *Reed*, some courts held that a law was content based if it could not function without reference to or use of a message’s content. But other courts had justified content-based laws, or redefined them as content neutral, where those laws had not been adopted for an improper purpose, or where they made use of other, “objective factors.” *Reed v. Town of Gilbert*, 707 F.3d 1057, 1069 (9th Cir. 2013).<sup>2</sup>

In *Reed*, this Court resolved that disagreement by reiterating that courts may not “skip[] the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.” 135 S. Ct. at 2228. Regardless of any other “benign motive” or “content-neutral justification” the government may advance, *id.*, “if a law applies to particular speech because of the . . . message expressed” or “draws distinctions based on the message a speaker conveys,” *id.* at 2227, it is content based and must meet strict scrutiny.

In its decision below, the Sixth Circuit followed that guidance. It evaluated all the ways officials must examine a message’s content, meaning, and purpose before applying the Billboard Act, App. 14a-17a, and

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<sup>2</sup> See *id.* (calling distinctions “content-neutral” because their “restrictions are based on objective factors”), *rev’d*, 135 S. Ct. 2218, 2226 (2015); *Wagner v. City of Garfield Heights*, 577 F. App’x 488, 495 (6th Cir. 2014) (“*Wagner I*”), *vacated and remanded for consideration in light of Reed*, 135 S. Ct. at 2888 (stating that “there are content-based distinctions and ‘content-based distinctions,’” that “context matters [when] assess[ing] content neutrality,” and that laws fall into the impermissible category only when “based on content because of an impermissible purpose”).

the ways in which the Act depends on content even when taking account of its location-based factors, App. 17a-18a. As this Court instructed, it denied the State’s request that it jump over the first step, calling “specious” the argument that the Act is content neutral because it depends on location as well as content, App. 18a, and rejecting the State’s invitation to approve the law because of its “justifications or motivations,” App. 19a-20a. That decision was a correct application of *Reed*.

**1. Tennessee has failed to show an important federal question.**

The State asserts that the decision below casts doubt on the constitutionality of “countless state and local” laws, making it impossible for states “across the country” to restrain billboard blight altogether. Pet. 27; *id.* at 3. But this case does not involve a facial challenge to billboard regulation, but only an as-applied challenge to Tennessee’s restriction on off-premise *noncommercial* speech where it allows commercial speech.<sup>3</sup> Moreover, even after a trial, the State failed to show an

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<sup>3</sup> While this case concerned a single noncommercial billboard, the Sixth Circuit’s decision has broader effects because the State failed to create severable restrictions in its laws and, whatever its reason, did not appeal severability. App. 12a-13a. These errors can be easily mended by the Tennessee General Assembly. See Appl. to Extend the Time to File a Petition for a Writ of Certiorari at 4, *Bright v. Thomas*, No. 19A814/19-1201 (U.S. Jan. 16, 2020) (requesting a 60-day extension of time to file the Petition because, in part, “[t]he Sixth Circuit’s decision in this case has prompted some members of the Tennessee General Assembly to consider amending the Billboard Act”).

increase, much less a significant one, in blight or hazard where off-premise, noncommercial signs are allowed. App. 107a-09a (finding that the “State fail[ed] to establish how this specific distinction relates to traffic safety”); *cf. Ackerley Commc’ns v. City of Cambridge*, 88 F.3d 33, 38 (1st Cir. 1996) (noting that “onsite signs typically are commercial in nature”).

Indeed, that failure undercuts the State’s assertion of an important federal question in two ways. For years before *Reed*, the First, Ninth, and Eleventh Circuits had protected the right to display noncommercial messages where on-premise commercial signs were allowed. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 906 (9th Cir. 2007) (noting law prohibited noncommercial messages “not related to the site” (citing *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996))); *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1343-44 (11th Cir. 2004) (holding law avoided unconstitutional favoritism because noncommercial speech inherently onsite, while applying *Southlake Prop. Assocs. v. City of Morrow*, 112 F.3d 1114, 1117-19 (11th Cir. 1997)); *Ackerley Commc’ns v. Somerville*, 878 F.2d 513, 517 (1st Cir. 1989) (protecting any noncommercial sign once a commercial sign is allowed). If allowing noncommercial speech in these circumstances resulted in uncontrollable blight, the experiences of the states in those three circuits was available to Tennessee at trial. But it failed to show blight from

a noncommercial billboard boom or any loss in federal funding.

More to the point, those circuits cover a significant portion of the country's land and population. The Ninth Circuit alone spans most of the western United States, including California, the Union's most populous state. 28 U.S.C. § 41. And while Tennessee provides a lengthy list of state statutes including on-/off-premises distinctions, (Pet. 28-29) it fails to distinguish those jurisdictions that may enforce those provisions from those that may not.<sup>4</sup>

It is therefore unlikely that states "across the country" will be unable to control billboard blight

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<sup>4</sup> Simply stating that states have statutory on-/off-premise distinctions does little. Beyond the circuit decisions identified, several states are also barred from enforcing those laws by state judicial decisions, and some will change their laws when confronted with that distinction's incompatibility with *Reed*. For example, as the State noted, (Pet. 29 n.7) Oregon changed its law in response to an adverse court ruling that the "on-premises/off-premises distinction . . . is, on its face, an impermissible restriction on the content of speech." *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 132 P.3d 5, 18 (Or. 2006). And although it has not changed the law that the State cites, (Pet. 29) the state of Washington cannot enforce its on-/off-premise distinction against speech like that at issue here because of a decision of its highest court. *See Collier v. City of Tacoma*, 854 P.2d 1046, 1056 (Wash. 1993) (in response to *Metromedia*, holding that the privileging "of on-site commercial signs over political signs indicates that its" asserted interests were "not compelling"). Maine has likewise kept its law on the books, but it has been unenforceable for 40 years. *See John Donnelly & Sons v. Campbell*, 639 F.2d 6, 16 (1st Cir. 1980) (noting that it creates "a peculiar inversion of First Amendment values"); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914.

absent the ability to restrict off-premise noncommercial messages. (Pet. 3) Rather, while some cities and states may need to revise their laws to comply with the protection *Reed* provides, there is no fundamental uncertainty or impossible choice between obeying the Constitution and receiving federal highway dollars. The way is well trod.<sup>5</sup>

But, even if the Sixth Circuit's enforcement of *Reed* cast doubt on the constitutionality of laws in every city, every county, and every state across the country, that still would not demonstrate an important federal question. Indeed, widespread legal change is a foreseeable consequence whenever this Court issues a writ of certiorari, as it does so precisely to correct widespread problems, not to correct mere error in a single case or overreach in just one jurisdiction.

Thus, in both practice and principle, the State has failed to demonstrate an important federal question, or to show that the decision below, except when joined with a poorly drafted, non-severable law, affects anything more than a tiny area of sign regulation. The number of circuit splits and errors the State asserts cannot conceal this lack of a record. But even if the

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<sup>5</sup> Indeed, following the examples of Texas and Oregon, the Tennessee legislature is currently considering still another content-neutral form of the on-/off-premise distinction, treating as off-premise any sign not close to a public facility or any sign for which the property owner receives compensation. *See* Tennessee H.B. 2255, Section 10, <http://www.capitol.tn.gov/Bills/111/Bill/HB2255.pdf>; Testimony at 1:23:00-1:23:40, 1:40:00-1:43:30, Senate Transportation and Safety Committee, March 11, 2020, [tnga.granicus.com/MediaPlayer.php?view\\_id=440&clip\\_id=22117](https://tnga.granicus.com/MediaPlayer.php?view_id=440&clip_id=22117).

State had demonstrated an important question of federal law, it has failed to prove the second half of the equation: that such a decision conflicts with the rulings of other circuit courts or with a relevant decision of this Court.

**2. Courts agree that *examining* the content of a sign’s noncommercial message triggers strict scrutiny.**

Tennessee construes the Sixth Circuit as requiring strict scrutiny whenever an official merely glances at a sign. But that is not what happened here. In *Reed*, this Court cautioned that “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech,” 135 S. Ct. at 2229, or to favor what certain speakers may say, *id.* at 2230. Because of this danger of censorship, or “vindictive” enforcement of the kind seen here, App. 7a, this Court requires strict scrutiny when application of a law requires that an official examine the content of a sign, *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). The Sixth Circuit’s decision fits comfortably within *McCullen*’s holding.

In *McCullen*, this Court did not hold that merely glancing at a sign to see a date, or to verify size, font, or color requirements, triggered strict scrutiny. Rather, it held that a law is “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.” *Id.* at 479; *see also Fed. Commc’ns Comm’n v. League of Women Voters*, 468 U.S. 364, 383 (1984) (noting that “enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether” a law applied).

And that is the test that was applied below. Indeed, the Sixth Circuit addressed here a law delving far deeper into examination than the *McCullen* standard forbids. The Act requires that an official first “assess the meaning and purpose of the sign’s message.” App. 16a. Second, the official must “identify, assess, and categorize the activity conducted at the location.” *Id.* Third, the official must determine whether there is a sufficient relationship between how she has categorized the activity on the site and the meaning of the sign’s message. *Id.*<sup>6</sup>

The First Amendment aims directly at such quagmires of administrative discretion, because they pose such a “danger of censorship” against “disfavored speech” and speakers, *Reed*, 135 S. Ct. at 2229-30. And that is why the Billboard Act is unconstitutional under *McCullen* and its progeny.

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<sup>6</sup> Furthermore, it is important to note that the examination test was only part of the Sixth Circuit’s content-neutrality analysis. (Pet. 34 (arguing the Sixth Circuit forwent any analysis required by *Reed*)) After reviewing the multiple layers of examination and discretion inherent in the Billboard Act, the court examined multiple hypotheticals and tested the State’s assertion that the Act was merely location based. App. 28a-30a. This analysis showed that the Act was based on content. *Id.* at 7a.

The cases raised by the State are not to the contrary. Compared to the multilayered evaluation and discretion at issue here, the State points to the situation in *Act Now to Stop War and End Racism Coalition v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir. 2017), where the police officer simply had to look at the sign to see if there was a date on it.<sup>7</sup> (Pet. 21)

To the extent a district court decision can contribute to a circuit split, the decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670 (W.D. Tex. 2019), likewise does not do so: the court simply recoiled at applying strict scrutiny to all “signs with written text.” *Id.* at 680. (Pet. 23 (asserting split)) In any event, the Fifth Circuit on appeal may have to correct the district court for failing to apply or even cite the controlling case, *McCullen*.

And because there was no need for an official to even look at the container’s message, *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017), is the least relevant of all. (Pet. 22 (asserting split)) The plaintiff argued that the law was content based because “an enforcing officer would have to examine a container’s message” to determine whether the box functioned to

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<sup>7</sup> Furthermore, different standards may apply here and in *Reed* than in *Act Now*, inasmuch as the former cases involved restrictions on noncommercial speech on private property while *Act Now* involved the regulation of a limited public forum. 846 F.3d at 403. Unlike noncommercial speech in general, restrictions on speech in limited public forums “can be based on subject matter.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (internal quotation marks omitted).

collect charitable donations. *Id.* at 670. The Ninth Circuit rejected the challenge because there was no need to even glance at the container—the law applied regardless of the reason items were donated. *Id.*

Nevertheless, the Ninth Circuit’s opinion is not a model of clarity, and the State is correct in noting the opinion’s statement that “examin[ing] a container’s message” did not “render [a city ordinance] *per se* content based.” *Id.* at 670. But the court went on to explain that it in fact uses an “‘enforcing officer’” test—that is, a test of whether the officer must evaluate the sign’s content—“to explain why a law is content based.” *Id.* It just refused to do so “without common sense,” in a way that “would mean that every sign, except a blank sign, would be content based.” *Id.* at 671. But even under that standard, the thorough examination required under Tennessee’s law would trigger strict scrutiny.<sup>8</sup>

Because there is no conflict as to the examination test, the petition for a writ of certiorari should be denied.<sup>9</sup>

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<sup>8</sup> Moreover, the Ninth Circuit may have erred in relying on *Hill v. Colorado*, 530 U.S. 703 (2000), rather than *McCullen*. See *Price v. City of Chi.*, 915 F.3d 1107, 1118 (7th Cir. 2019) (arguing that *Hill* was overturned by *McCullen* and *Reed*). Other courts have adopted *McCullen* as the standard. See *id.*; *Bruni v. City of Pittsburgh*, 941 F.3d 73, 88 (3d Cir. 2019); *Lucero v. Early*, 873 F.3d 466, 470-71 (4th Cir. 2017); *Pursuing America’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 509 (2016); *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 789 (8th Cir. 2015).

<sup>9</sup> The State also argues that there was an “implicit” rejection of the examination test in *Adams Outdoor Advert. Ltd. P’ship v.*

**3. The State has not shown a post-*Reed* circuit split in decisions addressing noncommercial speech.**

The State correctly notes that there was a circuit split before *Reed* as to the on-/off-premises distinction, (Pet. 24-26) with the Third, Fourth, and Sixth Circuits,<sup>10</sup> as well as state supreme courts in Texas, Connecticut, and Minnesota, holding that the on-/off-premises distinction passed scrutiny if it applied to both commercial and noncommercial speech, while other courts, such as the First and Ninth Circuits, rejected that distinction as unconstitutionally favoring commercial over noncommercial speech.

This Court reviewed *Reed* in order to correct the various ways the lower courts had been distorting content-neutrality analysis. And, as one would predict, the Sixth Circuit, which was on the wrong side of the pre-*Reed* split, changed its position to conform to this Court's decision, especially after another of its decisions in the sign context was remanded for reconsideration in light of *Reed*. See *Wagner v. City of Garfield Heights*, 135 S. Ct. 2888 (2015).

This is the first circuit court decision squarely addressing the on-/off-premise distinction as applied to noncommercial speech after *Reed*. Accordingly, it is too

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*Pa. Dep't of Transp.*, 930 F.3d 199 (3d Cir. 2019), (Pet. 23) but it fails to ever show where the question was raised or argued in any briefing.

<sup>10</sup> The State also includes the Eleventh Circuit. (Pet. 24) But as discussed below, the Eleventh Circuit protected noncommercial speech by always treating it as on-premise.

early to tell whether the pre-*Reed* circuit split has survived, or whether decisions like the one below will slowly heal that split as *Reed* is applied in the lower courts. Moreover, as seen in the many other cases testing *Reed*, the vast majority of litigation appears to involve commercial speech, and it is in the commercial speech context that a split is most likely to appear. Should such a split develop, the Court may address it in a suitable case. But this matter is an inappropriate vehicle for doing so.

In *Metromedia*, this Court held that “noncommercial speech [must be accorded] a greater degree of protection than commercial speech,” such that where on-premise commercial speech is allowed, the State cannot “justify prohibiting . . . displaying [one’s] own ideas or those of others,” *i.e.*, noncommercial speech. 453 U.S. at 513. Accordingly, the First and Ninth Circuits held that applying the on-/off-premise distinction to noncommercial speech—when on-premise commercial speech is allowed—triggers strict scrutiny. *See* Pet. 25; *Outdoor Media Grp.*, 506 F.3d at 906; *Ackerley*, 878 F.2d at 517. The Eleventh Circuit similarly protected noncommercial speech by requiring that it always be treated as on-premise. *See Coral Springs*, 371 F.3d at 1343-44. (Pet. 4, 24-25 (arguing that the Eleventh Circuit upheld the distinction))

Of the three circuits—the Third, Fourth, and Sixth—that ignored the hierarchy of First Amendment protection set up in *Metromedia* and affirmed prohibitions on off-premise noncommercial speech, only the Sixth Circuit has squarely addressed the question

since *Reed*. And it did so by rejecting its former position and joining the First, Ninth, and Eleventh Circuits in accepting that a law is content based if it “applies to particular speech because of the . . . message expressed,” 135 S. Ct. at 2227, regardless of the other characteristics the government claims to also regulate.

The Fourth Circuit, while it has not yet addressed *Reed* in the billboard context, has applied it in a way that would require strict scrutiny for an on-/off-premise distinction like that at issue here. In *Lucero*, the court applied *Reed* and *McCullen* and remanded for consideration whether application of the law depended on examination of the content of the message—whether it “required officers to check the content of the leaflets before engaging in enforcement measures.” 873 F.3d at 471. Furthermore, Tennessee argues that, unless the distinction entirely relies on content—if it has any location-based component whatsoever—it is not content based and does not require strict scrutiny. But the Fourth Circuit in *Lucero* held the opposite, stating that if there is any content component to a location-based requirement, then strict scrutiny must be applied. *See id.* (requiring review whether “violation . . . depends on ‘what [protestors] say,’ not *just* where they say it” (emphasis added)).

And while the State argues that the Third Circuit remains in conflict because of *Adams*, that court’s statements regarding *Reed* and noncommercial speech were at most underconsidered dicta—noncommercial speech was not at issue there and could hardly have been fully litigated. (Pet. 16-17) The plaintiff in *Adams*

challenged regulations as applied to *commercial* speech.<sup>11</sup> *Adams* therefore followed the prevailing pattern of applying the intermediate scrutiny required by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Adams*, 930 F.3d at 207, 209; see, e.g., *Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 600-01 (9th Cir. 2017) (applying “*Central Hudson’s* longstanding intermediate scrutiny framework”).

As *Adams* was a commercial speech case, any discussion of noncommercial speech—including any discussion of *Reed*—was dicta. And “dicta is not binding on anyone for any purpose.” *Edwards v. Prime Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010). Indeed, because dicta is so easily reconsidered, it can hardly be the basis for a circuit split, or prepare this Court for the deep consideration of an issue required when resolving a split.<sup>12</sup>

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<sup>11</sup> See Richards Statement of Undisputed Facts ¶ 25, *Adams Outdoor Advert. Ltd. P’ship v. Pa. Dep. of Transp.*, No. 17-1253 (E.D. Pa. Apr. 16, 2018), ECF No. 31-2 (noting sign constructed to “advertise businesses”); Adams Statement of Undisputed Facts ¶ 2, *id.* (E.D. Pa. May 2, 2018), ECF No. 37-1.

<sup>12</sup> *Adams* also relied on precedent overruled by *Reed*. The court in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), created a “significant relationship” test to avoid scrutiny of “literal[ly]” content-based laws that the court felt did “not raise [typical First Amendment] concerns.” *Id.* at 1054, 1063, 1065-66. But *Reed* held that courts may not ignore the fact that a law is content based “on its face” by instead determining, through some context-based inquiry, that it has a “benign motive.” *Reed*, 135 S. Ct. at 2228.

“There is some question,” however, whether *Reed*’s strict framework for determining content neutrality applies to “traditional commercial speech jurisprudence, and if so, whether this would alter the *Central Hudson* framework.” *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1234 n.7 (11th Cir. 2017). As just noted, the Third Circuit applied intermediate scrutiny to the commercial speech in *Adams*. In reviewing several of the cases Tennessee cites here, the Ninth Circuit distinguished *Reed* as applying only to noncommercial speech and held that intermediate scrutiny continues to apply to commercial speech. *See Contest Promotions*, 874 F.3d at 600, 604 (noting noncommercial signs exempt and distinguishing between commercial and non-commercial off-premise signs); *ArchitectureArt, LLC v. City of San Diego*, 745 F. App’x 37, 38 (9th Cir. 2018) (unpublished) (upholding “Ordinance [provisions as] permissible regulations of commercial speech”).<sup>13</sup> It is, therefore, too early to tell whether there will be any circuit conflict as to noncommercial speech and the on-/off-premise distinction.

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<sup>13</sup> The district court, apparently without being called to, addressed the on-/off-premise distinction and then applied *Reed*’s reasoning on noncommercial speech to the commercial speech at issue. *See ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828, 839 (S.D. Cal. 2017); *but see* Appellant’s Reply Br. at 30, *ArchitectureArt, LLC v. City of San Diego*, No. 17-55645 (9th Cir. Feb. 2, 2018), ECF No. 26 (noting that ArchitectureArt had not “asserted the argument that the on-premise v. off-premise distinction is unconstitutional”). Regardless, as noted above, the Ninth Circuit analyzed and upheld the ordinance as commercial speech.

There is likewise no current conflict among the state supreme courts as to the application of *Reed* to noncommercial speech. (Pet. 24-25 (asserting conflict)) The State cites to Texas, Connecticut, and Minnesota for their part in the pre-*Reed* conflict. (*Id.*) But, in light of *Reed*, the Texas Court of Appeals invalidated that state’s law, which had allowed only on-premise non-commercial speech. *Auspro Enters., LP v. Tex. Dep’t of Transp.*, 506 S.W.3d 688, 699 (Tex. App. 2016). And the legislature then revised the law before the Texas Supreme Court could even finish its review. Tex. S.B. 2006, 85th Leg., ch. 964, §§ 6, 7, 33(3) (2017), *codified at* Tex. Transp. Code § 391.031; *Tex. Dep’t of Transp. v. Auspro Enters., LP*, No. 17-0041, 2018 Tex. LEXIS 298, at \*1 (Apr. 6, 2018) (unpublished) (dismissing as moot).

Although the Connecticut Supreme Court has not ruled on the on-/off-premise distinction since *Reed*, it recently held that an ordinance was unenforceable against a resident’s noncommercial message. *See Kuchta v. Arisian*, 187 A.3d 408, 410 (Conn. 2018). And its grounds for doing so, that such messages cannot be regulable “advertising” under state law, *id.* at 410, 420, would lead to a similar outcome as the one here: protection for noncommercial speech.

The Minnesota Supreme Court likewise has not ruled on the issue since *Reed*. Given that jurisdictions like Texas and Indianapolis, Indiana, have already moved to revise their laws in compliance with *Reed*, *see GEFT Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion, Ind.*, 187 F. Supp. 3d 1002, 1006 (S.D. Ind. 2016), it is possible that no split will develop

across the state supreme courts. It is simply too early to tell.

Lastly, as with the examination test, Tennessee tries to establish a circuit split based on district court decisions. But even if disagreement between district courts could be considered a circuit split under Rule 10, the cases here do not support the State's position.

Both Western District of Texas decisions upon which the State relies agreed that *Reed* did not overrule *Metromedia* and *Central Hudson* on the applicability of intermediate scrutiny to commercial speech. See *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar*, 387 F. Supp. 3d 703, 712 (W.D. Tex. 2019); *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d at 670. The *City of Cedar* court then held that the on/off-premise distinction as applied to *noncommercial* speech was content based. 387 F. Supp. 3d at 713. Addressing *commercial* speech, the *City of Austin* court held that the *Thomas* holding on noncommercial speech was inapplicable, 377 F. Supp. 3d at 680 n.8, and applied *Central Hudson*, *id.* at 682. But it further noted that any application of the sign code to noncommercial speech passed scrutiny because the code allowed noncommercial signs wherever it "permits commercial" ones, *id.* at 682, and it noted evidence in the record of allowed noncommercial signs, *id.* at 682 n.11.

And the other district court cases the State cites, (Pet 19-20) similarly suggest only that *Reed* does not apply to commercial speech. See *GEFT Outdoor*, 187

F. Supp. 3d at 1009, 1016-17 (noting city amended ordinance to comply with *Reed* by exempting noncommercial speech, and following *Central Hudson* as to commercial speech); *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 968 (N.D. Cal. 2015) (noting that ordinance “explicitly regulates only commercial speech” (emphasis in original)); *Lamar Central Outdoor, LLC v. City of Los Angeles*, 199 Cal. Rptr. 3d 620, 630 (Ct. App. 2016) (noting that *Reed* did not “eliminate the distinction between commercial and noncommercial speech” for the commercial signs at issue); see also *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) (noting that laws restricting “only commercial speech are content based,” but nonetheless “need only withstand intermediate scrutiny” under *Central Hudson*); *Mass. Ass’n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192-93 (D. Mass. 2016) (collecting cases holding that *Reed* did not affect the on-/off-premise distinction for commercial speech).

Despite this consensus, there are many cases in the area of commercial speech, and one has recently created some variation as to the standard applicable to such speech after *Reed*. See *L.D. Mgmt. Co. v. Thomas*, No. 3:18-cv-722-JRW, 2020 U.S. Dist. LEXIS 72593 (W.D. Ky. Apr. 24, 2020) (unpublished). The Western District of Kentucky held that the intermediate scrutiny applicable to commercial speech has “inched closer to strict scrutiny.” *Id.* at \*4. And, even though this Court has held that the aesthetics and traffic safety

interests meet the “substantial governmental interest” necessary for commercial speech, *Metromedia*, 453 U.S. at 507-08, the court in *L.D. Management* held that they were insufficient to sustain Kentucky’s law, 2020 U.S. Dist. LEXIS 72593, at \*4-5. If affirmed on appeal, and Respondent advances no guess as to how the Sixth Circuit might rule, *L.D. Management* could create a circuit split meriting this Court’s attention.

Thus, except in dicta in a case dealing with commercial speech, there is no conflict after *Reed*. The courts of appeals agree that the on-/off-premise distinction, when applied to noncommercial speech, triggers strict scrutiny. Indeed, the question raised by many of the district courts is the applicability of *Reed* to commercial speech, and that is where the greatest potential for circuit conflict exists. But, as this case deals with noncommercial speech, it would be an inappropriate vehicle for resolving such (potential as yet) concerns.

#### **4. The decision below enforced *Reed*.**

As discussed above, the decision below applied *Reed*’s direction that lower courts cease justifying content-based laws as content neutral when they had some benign motive or added other, content-neutral factors to their distinctions. *Cf. Wagner I*, 577 F. App’x at 495 (asserting that “there are content-based distinctions and ‘content-based distinctions’”). If a law is content based at the first step of the content-neutrality analysis, that is, if it relies on content or otherwise

“draws distinctions based on the message a speaker conveys,” then it is content based. *Reed*, 135 S. Ct. at 2227. This Court rejected all the other “objective” factors the Ninth Circuit had believed sufficient to outweigh the content-dependent elements of the law. *Id.* at 2226.

That is what the Sixth Circuit did in the decision below. The Sixth Circuit noted that the Act allows certain signs, without even requiring a permit, as long as they contain particular content: advertising for on-premise activities. App. 15a. It detailed the thorough, multi-layered examination of a sign’s content that must take place before a “Tennessee official decides” whether particular speech will be allowed. App. 15a-17a. It discussed all the ways the Act depends on content, even accounting for the location-based elements of the law. App. 17a-19a. And it then rejected attempts to ignore the law’s content-based distinctions because of the state’s motivations and justifications. App. 19a-20a.

The State nonetheless faults the decision below for failing to apply a relationship test first developed in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987). (Pet. 25, 34-36; *see also id.* at 13 (noting that the distinction there is “materially identical” to that at issue here)) But that relationship test directly contradicts *Reed*, as demonstrated by *Wheeler*’s reasoning. The court there acknowledged that the on-/off-premises distinction is content based on its face—that it “is a function of the sign’s message.” *Wheeler*, 822 F.2d at 591. But the court then redefined

what it means to be content based, turning it into a “term of art,” *Wagner I*, 577 F. App’x at 495, because the State could justify the law as aimed at a secondary effect, at the “relat[ionship] to an activity on the premises.” *Wheeler*, 822 F.2d at 590.

That is exactly what *Reed* prohibits. And this Court already remanded a similar Sixth Circuit case, ordering it to reconsider the reasoning descending from *Wheeler* in light of *Reed*. See *Wagner*, 135 S. Ct. at 2888.<sup>14</sup> The State would now ignore or define away the content-based nature of the distinction, rather than justify it as the *Wheeler* court had done. The decision below called this new approach “specious,” App. 18a, but it is a distinction without a difference. Either approach contradicts *Reed* and this Court’s First Amendment jurisprudence. To escape strict scrutiny, a law cannot be part content based and part something else; it must have “nothing” to do with content. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Furthermore, far from “the most egregious flaw in the decision below,” the court correctly respected the implications of Justice Alito’s decision to join the majority in *Reed* rather than concur in the judgment only. That he did not trigger *Marks v. United States*, 430 U.S. 188 (1977), and make his the controlling opinion, but instead chose to join the opinion of the Court, must

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<sup>14</sup> See *Wagner v. City of Garfield Heights*, 675 F. App’x 599, 603 (6th Cir. 2017) (“*Wagner II*”) (unpublished) (noting remand after reliance on *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009)); *H.D.V.-Greektown*, 568 F.3d at 622 (citing *Wheeler* on the on-/off-premises distinction).

mean something. In particular, courts must assume that his reference to a content-neutral on-/off-premise distinction refers to a distinction that is in fact content neutral, *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring), and not to a specific exception in direct conflict with the Court’s opinion.<sup>15</sup> Any other interpretation of *Reed*, one that triggers *Marks* even when there is an opinion of the Court, would invite interpretive chaos.

**5. Holding this case pending *AAPC* would not serve the interests of justice.**

Should this Court conclude that plenary review of the decision below is not warranted, the State asks that the Court hold the Petition pending resolution of *Barr v. American Association of Political Consultants, Inc.*, No. 19-631 (“*AAPC*”). (Pet. 37) There are, admittedly, similarities between that case and this one: Both involve content-neutral laws—a ban on all robocalls and a ban on all billboards. Both have content-based exceptions benefitting commercial speech over other, noncommercial speech—allowing calls by anyone involved with government-backed loans and allowing on-premise commercial speech.

There is, however, a great difference between the two cases. While *AAPC* presents a facial challenge to the automated-call restriction for cellular telephone

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<sup>15</sup> This is especially true given that the other factors Justice Alito lists—such as “[r]ules distinguishing between lighted and unlighted signs,” or between placement on “private and public property”—clearly *are* content neutral. *Reed*, 135 S. Ct. at 2333.

service altogether, this case brought only an as-applied challenge, asking for protection only for noncommercial speech. And while severability is an issue in *AAPC*, it is not here.<sup>16</sup> Accordingly, any decision in *AAPC* is unlikely to affect the validity of the decision below. Given that Mr. Thomas has already been working to protect his sign for 14 years, all the while fighting against “selective and vindictive enforcement.” App. 7a (internal quotation marks omitted), he asks that the Court not hold the Petition pending resolution of *AAPC*.

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## CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: May 22, 2020

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<sup>16</sup> “The district court held that the Billboard Act was not severable, and Tennessee has not challenged that holding in this appeal.” App. 12a-13a; *see also* App. 10a-11a.