No. 24-881

# In the Supreme Court of the United States

GEORGIA ASSOCIATION OF CLUB EXECUTIVES, INC.,

*Petitioner*,

*v.*

STATE OF GEORGIA, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the Georgia Supreme Court*

## JOINT BRIEF OF *AMICI CURIAE* THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AND THE FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. In lawsuits across the United States, FIRE works to vindicate First Amendment rights without regard to the speakers' views. *E.g.*, Br. *Amicus Curiae* FIRE Supp. Pet'rs in No. 22-555 & Resp'ts in No. 22-277, *Moody v. Netchoice, LLC*, 603 U.S. 707 (2024); Br. *Amicus Curiae* FIRE Supp. Pet'rs, *Free Speech Coal. v. Paxton*, No. 23-1122 (U.S. filed May 16, 2024). FIRE is particularly opposed to government attempts to pass off content-based restrictions as regulations of conduct governed by intermediate or lesser scrutiny. *See, e.g.*, Br. *Amicus Curiae* FIRE Supp. Pls.-Appellants, *Alario v. Knudsen*, No. 24-34 (9th Cir. filed May 6, 2024).

The First Amendment Lawyers Association (FALA) is a nonpartisan, nonprofit bar association comprised of attorneys throughout the United States and elsewhere whose practices emphasize defense of Freedom of Speech and of the Press, and which

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

advocates against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases, including cases before this Court. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and former president Robert Corn-Revere). In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues pertaining to the First Amendment. *See, e.g.*, Br. *Amicus Curiae* FALA Supp. Resp't, *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *United States v. 12,200-ft Reels of Super 8mm Film,* 409 U.S. 909 (1972) (order granting FALA's motion to submit *amicus* brief).

## SUMMARY OF ARGUMENT

This Court has long recognized that, under the First Amendment, content-based laws are "presumptively unconstitutional," and subject to a rigorous form of strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content-neutral "time, place, and manner" regulations, meanwhile, face the more forgiving standard of intermediate scrutiny. The reason is simple: content-based restrictions invite the government to play favorites with speech, an invitation the First Amendment firmly declines.

Laws that regulate speech based on its message or subject matter are rightly treated with extreme skepticism because they pose the greatest risk of government overreach. As the Court put it in *Police*

*Dep't of Chi. v. Mosley*, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 408 U.S. 92, 95 (1972). On the other hand, content-neutral laws—those blind to the message being conveyed—earn more judicial breathing room because they don't put the government's thumb on the scale of public discourse. This is not a technicality; whether a regulation is content-based is the *first question* any court asks in a First Amendment case, and the answer often writes the conclusion before the analysis even begins. The content-based distinction is what keeps government from appointing itself the ultimate editor of American discourse, deciding what speech is safe, what speech is suspect, and ultimately, what speech survives.

But courts cannot referee effectively when the rules of the game are unclear. The "secondary effects" doctrine articulated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and the broader "content-neutral justification" rule announced by *Hill v. Colorado*, 530 U.S. 703 (2000), allow governments to recharacterize content-based distinctions as merely incidental to content-neutral purposes. *Reed*, on the other hand, establishes a clear, administrable rule that gives full effect to the First Amendment: Laws that regulate speech based on its content are subject to strict scrutiny, regardless of the government's benign motive or content-neutral justification. 576 U.S. at 163–64.

In this case, Georgia enacted a tax that, by any measure, is content-based. It specifically targets establishments based on expressive performances, the content of which must be evaluated to determine the

applicability of the tax. Ga. Code Ann. §§ 15-21-209, -201(1)(A). To enforce the tax, government officers must examine whether dancing is nude, whether movements are sexual in nature, and whether these elements constitute "entertainment"—making the tax inherently content-based rather than content-neutral, like laws against public nudity alone.

Yet the Georgia Supreme Court assumed that under *Renton* intermediate scrutiny applied, and upheld the law after deciding the "purpose" of the tax was to address the "undesirable secondary effects" of the content at issue. *Ga. Ass'n of Club Execs., Inc. v. State*, 908 S.E.2d 551, 561 (Ga. 2024). Other lower courts have felt similarly bound by *Renton*, or have extended both *Renton* and *Hill* beyond their original contexts, even when *Reed* would seem to stand in the way.

The Court should end the confusion and clarify that *Reed* means what it says: laws that distinguish based on content are content-based, regardless of the government's purported intent or justifications. The Court should in doing so explicitly acknowledge and resolve in favor of *Reed* the doctrinal inconsistencies that *Renton* and *Hill* introduced. This case offers an ideal vehicle for the Court to do so.

## ARGUMENT

### I. The Content-Based/Content-Neutral Distinction is the Most Important Inquiry in Protecting Free Expression

The First Amendment, "[p]remised on mistrust of governmental power," stands as a bulwark against

"attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). And as "a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). Thus, the first inquiry in any free speech case—and the most critical one—is whether the law in question is content-based or content-neutral.

A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. And if it is, the analysis is straightforward—strict scrutiny applies. *See*, *e.g.*, *Alvarez*, 567 U.S. at 724 (referring to the analysis as "the 'most exacting scrutiny'" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). Content-based laws allow the government to "pick and choose" among ideas, *Perry Educ. Ass'n v. Perry Loc. Educator's Ass'n*, 460 U.S. 37, 55 (1983)—something the First Amendment flatly forbids. Laws that fall into this category—whether by punishing disfavored viewpoints, limiting speech from certain speakers, or manipulating the information available to the public—are not just ill-advised. They are unconstitutional.

The Court has repeatedly, and emphatically, recognized that content-based laws "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *see Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may

not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). As a consequence, "content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) ("content-based regulations 'target speech based on its communicative content'" and are therefore "presumptively unconstitutional" (quoting *Reed*, 576 U.S. at 163)).

Ten years ago, in *Reed*, the Court delivered a forceful reaffirmation of the content neutrality principle, striking down a municipal sign code that imposed different restrictions on signs based on their message categories. Writing for the majority, Justice Thomas articulated an expansive definition of content discrimination, declaring that "a law that is content based on its face 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." *Reed*, 576 U.S. at 165 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). The Court rejected the notion that seemingly innocuous distinctions between types of speech could escape strict scrutiny, firmly establishing that a law that "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter," remains inherently suspect. *Id.* at 169. And the Court warned that "innocent motives do not eliminate the danger of censorship. *Id.* at 167–68.

The content-based distinction has real consequences. Because of the deliberately exacting

and unforgiving nature of strict scrutiny review, when it comes to free speech challenges, the content-based/content-neutral distinction isn't just important; it is often the whole ballgame. As this Court has acknowledged, the application of strict scrutiny to content-based regulations is typically fatal: "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 434 (2015) ("[I]t is the rare case in which . . . a speech restriction is narrowly tailored to serve a compelling interest."). In the real world of First Amendment litigation, then, the content distinction isn't a doctrinal nuance—it is the constitutional "toggle switch" that determines whether speech regulations live or die.

## II. *Renton* and *Hill* Have Created Significant Uncertainty About What Is Content-Based and What Is Not

Despite *Reed*'s reaffirmation that laws distinguishing speech based on its content must face strict scrutiny, the persistence of the Court's "content-neutral justification" doctrine injects troubling and unnecessary ambiguity into First Amendment jurisprudence by blurring the line between content-based and content-neutral regulations. The Court should take this opportunity to reaffirm that a regulation which, on its face, targets specific speech based on its content must be subject to strict scrutiny, regardless of governmental assertions about the regulation's purpose or intent.

In *Renton*, the Court upheld a zoning ordinance restricting the location of adult theaters, deeming it

content-neutral despite its obvious focus on a particular category of speech. According to the majority opinion, the city's "predominate concerns" were with the "secondary effects of such theaters"—crime, property values, and the "quality of urban life"—rather than the content of the films themselves, and thus, the ordinance could escape the rigors of strict scrutiny. 475 U.S. at 47–49 (emphases omitted). But what started as a narrow exception tailored to the unique context of urban planning has morphed into something much worse. The "secondary effects" doctrine, which "rides roughshod over cardinal principles of First Amendment law," *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 85–86 (1976) (Stewart, J., dissenting), has become a handy escape hatch from strict scrutiny, inviting governments to recharacterize content-based regulations as content-neutral whenever they can point to some indirect effect of the regulated speech.

But if *Renton* opened a small crack in First Amendment doctrine, *Hill v. Colorado* drove a truck through it. In *Hill*, the Court upheld a statute that prohibited approaching within eight feet of a person near a healthcare facility "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling." 530 U.S. at 707. Despite this law's explicit regulation of specific types of speech (protest, education, counseling), the majority deemed it content-neutral. The statute in *Hill* restricted speech based on what speakers were saying—precisely the kind of content-based regulation that should trigger strict scrutiny. Justice Kennedy's dissent summarized the problem aptly:

> The Court's holding contradicts more than a half century of well-established First Amendment principles. For the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. If from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum.

*Id.* at 765 (Kennedy, J., dissenting).

Members of the Court have since signaled their discomfort with *Hill*. In *McCullen v. Coakley*, while declining to overrule the earlier case, the Court emphasized that buffer zone laws impose "serious burdens" on speech. 573 U.S. 464, 487 (2014). In *City of Austin v. Reagan National Advertising of Austin, LLC*, Justice Thomas, in a dissent joined by Justices Gorsuch and Barrett, proclaimed that "*Hill* is an aberration in our case law" and declared *Hill* to be "defunct." 596 U.S. 61, 92, 103 (2022) (Thomas, J., dissenting). Most recently, in a dissent from a denial of certiorari this term, *Coalition Life v. City of Carbondale*, Justice Thomas called on the Court to explicitly overturn *Hill*, noting that five justices have already "acknowledged that *Hill* 'distorted'" the Court's First Amendment precedents. 145 S. Ct. 537 (2025) (Thomas, J., dissenting) (quoting *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022)). Comparing *Hill*'s degraded status to that of the long-abandoned three-part Establishment Clause test under *Lemon v. Kurtzman*, Justice Thomas

concluded that "*Hill*'s abandonment is arguably even clearer than *Lemon*'s." *Id.* at 540. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971).

These concerns reflect reality: The Court simply cannot square the clarity of *Reed* with the theoretical contortions of *Hill* and *Renton*. Under *Reed*'s straightforward analysis, the regulations in both *Renton* (singling out adult theaters) and *Hill* (singling out "protest, education, or counseling") would be plainly content-based and subject to strict scrutiny. Justice Kagan recognized this tension in her concurrence in *Reed*, noting the majority's sweeping approach might cast doubt on many "entirely reasonable" regulations that have been on the books for years. 576 U.S. at 180 (Kagan, J., concurring). While Justice Kagan worried about *Reed*'s potential breadth, her concerns expose *Renton* and *Hill*'s fundamental incompatibility with *Reed*.

The inconsistencies between *Reed*, *Renton*, and *Hill* have also created a doctrinal quagmire for lower courts. When faced with a regulation that appears content-based on its face, but might be justified by reference to secondary effects or other purportedly content-neutral concerns, which precedent controls?

Some courts have treated *Reed* as implicitly overruling aspects of *Renton* and *Hill*. *See, e.g.*, *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 160 (3d Cir. 2016) (holding that in light of *Reed*, the recordkeeping, labeling, and inspection requirements of the Child Protection and Obscenity Enforcement Act were content based and subject to strict scrutiny under First Amendment, reversing its previous holding applying intermediate scrutiny). Others continue to

apply these earlier precedents, particularly in contexts similar to their original applications. *See, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (refusing to "upend[] established doctrine" and continuing to apply *Renton* to adult business zoning despite *Reed*); *Price v. City of Chicago*, 915 F.3d 1107, 1117–19 (7th Cir. 2019) (adhering to *Hill*, despite acknowledging it is "incompatible with current First Amendment doctrine as explained in *Reed*"). Still others have applied *Hill* even in cases with facts like those presented in *Reed*. *See, e.g.*, *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403–04 (D.C. Cir. 2017) (citing *Hill* and applying intermediate scrutiny to uphold an ordinance that set different rules for lamppost signs depending on whether or not the signs were event-related). And more generally, appellate courts have demonstrated an alarming willingness to engage in doctrinal gymnastics to avoid applying strict scrutiny in speech cases. *See, e.g.*, *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir.) (classifying Texas's law requiring age verification for sexual material as content-neutral by focusing on the overarching purpose of protecting minors rather than the law's facial content discrimination), *cert. granted*, 144 S. Ct. 2714 (2024), *argued*, No. 23-1122 (Jan. 15, 2025).

The Georgia Supreme Court's opinion in this case is a clear application of the *Renton*/*Hill* doctrine that exemplifies its contradiction with *Reed*. Although the Georgia statute explicitly taxes "adult entertainment establishments" based on the sexually expressive nature of their entertainment—clearly a content-based distinction—the court nevertheless classified the tax as content-neutral, relying solely on the state

legislature's purported intention to address the establishments' negative "secondary effects." *Ga. Ass'n of Club Execs.*, 908 S.E.2d at 560. The court emphasized the legislature's stated purpose to regulate not the expressive conduct itself but only its indirect consequences, allowing the law to evade strict scrutiny under the guise of intermediate scrutiny. This epitomizes precisely the danger Justice Kennedy warned against: The elevation of a government's purported justification over the clear textual targeting of speech. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring). ("The fiction that this sort of ordinance is content neutral—or 'content neutral'—is perhaps more confusing than helpful . . . . It is also not a fiction that has commanded our consistent adherence.").

But even on its own terms, the zoning rationale articulated in *Renton* is fundamentally incompatible with tax-based regulations like Section 15-21-209 of the Official Code of Georgia Annotated. *Renton* permitted zoning ordinances targeting adult establishments to be treated as content-neutral if their primary purpose was addressing "secondary effects" rather than restricting the expressive content itself. Extending this rationale to taxation misapplies *Renton*'s reasoning. Taxation inherently targets economic activity directly tied to expressive content, thereby creating an explicit and unavoidable content-based distinction. And there are no "secondary effects" of the kind contemplated in *Renton* that a tax might address.

Neither Georgia nor any other state should be permitted to weaken the protection of the First

Amendment by cloaking a content-based regulation in content-neutral clothing. Without intervention by this Court, such reasoning will perpetuate the very ambiguity and uncertainty that *Reed* sought to eliminate.

## III. Resolving This Uncertainty is Especially Important as Courts Are Using *Hill* and *Renton* to Justify Restrictions Beyond Adult Businesses and Abortion Clinics

What began as narrow exceptions in specific contexts has morphed into something more troubling—a roadmap for governments to evade strict scrutiny in contexts never contemplated by this Court. Lower courts are now applying *Hill* and *Renton* beyond their original domains of abortion clinics and adult businesses, creating a permission structure for content-based restrictions that threatens to swallow the First Amendment's core protections.

The Ninth Circuit's decision in *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. 2025), exemplifies this expansion. There, the court upheld a ban on non-consensual surreptitious recordings that explicitly distinguished between recordings of law enforcement (allowed) and recordings of everyone else (prohibited)—a textbook content-based distinction under *Reed*. The court, sitting *en banc*, held Oregon's law was content-neutral because the government's purpose wasn't to suppress speech. *Id.* at 950. But that's a misreading of *Reed*—and an overextension of *Hill*. The key question isn't what the government *intends* but whether the law, *on its face*, *treats speech differently based on its content*. Enforcing Oregon's law

required the government to listen to the recording and determine its content. A secretly recorded chat with a Public Records Advocate? Illegal. A conversation with a police officer? No problem. In other words, it is content-based regulation in its most straightforward sense.

Similarly, the Fifth Circuit, in *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024), upheld a city ordinance that restricted public protests and demonstrations near a public amphitheater, holding the regulation was content-neutral under *Hill*. The court rejected a challenge from a Christian evangelist who sought to engage in expressive activities near the venue, holding that intermediate scrutiny applied, and that the ordinance was justified by public safety concerns and left open alternative channels for communication. *Id.* at 304–09. The court relied on *Hill* to support its conclusion that a restriction on speech based on location rather than message is not content-based, even though the ordinance specifically regulated "public protests and/or demonstrations," singling out a category of speech based on its communicative impact. *Id.* at 304–05. In other words, *Hill* has escaped the abortion-clinic context to become a generalized tool for restricting protest speech.

Finally, in *Blythe v. City of San Diego*, No. 24-cv-02211, 2025 WL 108185 (S.D. Cal. Jan. 14, 2025), a district court upheld a sweeping ban on "First Amendment activity" within 100 feet of "health care facilities, places of worship, and school grounds." The court leaned heavily on *Hill*, treating it as controlling precedent despite the fact that the San Diego ordinance reached far beyond abortion clinics to

restrict speech near any "place of worship" or "school grounds." *Id.* at *7. In doing so, the court transformed *Hill*'s already problematic framework into a blank check for governments to create speech-free zones around virtually any "sensitive" location.

But even when the government loses a First Amendment case, there is pressure on courts to integrate the "secondary effects" rationale where it does not, and could not, apply. This is because governments continue to make far-flung arguments rooted in the "secondary effects" doctrine. For instance, in *Free Speech Coalition, Inc. v. Skrmetti*, Tennessee argued that intermediate scrutiny should apply under *Renton* even to a statute that issue imposed content-based restrictions by requiring operators of websites comprised of 1/3 content deemed harmful to minors to verify that each visitor was at least 18 years old. No. 2:24-cv-02933, 2024 WL 5248104, at *14 (W.D. Tenn. Dec. 30, 2024). It did so even though the law *only addressed content*, *not secondary effects*. This Court has previously rejected such attempts to extend the "secondary effects" rationale to directly content-based restrictions. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (holding the "secondary effects" doctrine inapplicable where the law directly targeted the primary effects of online content).

This expansion creates precisely the danger this Court has repeatedly warned against: that the government will "effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), by selectively restricting speech

based on its content. When courts allow governments to recast content-based laws as content-neutral by invoking *Hill* and *Renton* beyond their original contexts, they gut the First Amendment's most basic protection—its prohibition on content discrimination.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

March 18, 2025

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