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 SUPREME COURT OF GEORGIA

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE* [1]

Amici are 22 legal scholars who research, teach, and publish scholarship on the First Amendment's free speech clause. Their names, their institutional affiliations, and examples of their relevant scholarship are set forth in the Appendix to this brief. *Amici* have no personal interest in this case; they submit this brief to urge the Court to grant certiorari to resolve a long-standing inconsistency in its First Amendment jurisprudence.

SUMMARY OF ARGUMENT

The threshold question in deciding whether a government regulation offends the First Amendment's guarantee of freedom of speech is whether the regulation discriminates based on the content of the speech. Laws "that target speech based on its communicative content . . . are presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). They are subject to strict scrutiny, which requires the government to show that the restriction "is 'narrowly drawn' to further a 'compelling interest' and that the restriction amounts to the 'least restrictive means' available to further that interest." *Ashcroft v. ACLU*, 542 U.S. 656, 677 (2004) (citations omitted).

"On the other hand, so-called 'content-neutral' time, place, and manner regulations" aimed at combating "the undesirable secondary effects" of expression are subject to the less exacting standard of intermediate scrutiny. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 49 (1986). To survive intermediate scrutiny, a restriction on speech or expression need only be "narrowly tailored to

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[1] Pursuant to Rule 37, all parties were timely notified of the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than the *amici* and their counsel, contributed money to its preparation or submission.

serve the government's legitimate, content-neutral interests"; it need not "be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

In most cases, the decision whether to apply strict or intermediate scrutiny will determine whether the regulation survives. But the line dividing content-based laws and content-neutral regulations has never been entirely clear. In recent years, that line has become even blurrier.

In *Reed*, this Court declared that content-based regulations are 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." 576 U.S. at 165. This holding is in obvious tension with *City of Renton*'s view that, in at least some cases, a content-neutral "secondary effects" justification is enough to escape strict scrutiny—even where a law singles out a particular type of expressive content for regulation. Some lower courts have read *Reed* as undermining *City of Renton* and have revisited their prior jurisprudence in this area.

But other courts continue to apply *City of Renton*'s "secondary effects" rationale to uphold laws that, on their face, discriminate between types of speech. And they apply them in contexts beyond the "time, place, and manner" restrictions at issue in *City of Renton*. Here, the Georgia Supreme Court upheld a tax levied on certain businesses featuring nude dancing[2]—a type of expressive content—because the ordinance was "'aimed not at the *content*' of adult entertainment, but 'rather at the *secondary effects*'" of the expression. Pet. App. 15a (quoting *City of Renton*, 475 U.S. at 47–48) (emphasis in original). Other courts

[2] *See* Ga. Code Ann. § 15-21-201 *et seq.*

have applied this rationale to uphold laws regulating not just adult entertainment but also other types of speech, including public protest.

In short, there is incoherence at the center of this Court's First Amendment jurisprudence. Government regulators, speakers, and lower courts have no clear guidance as to whether a particular regulation will be viewed as content-based and subject to exacting strict scrutiny, or as a content-neutral regulation of secondary effects that need only satisfy intermediate scrutiny. This confusion has the potential both to confound good faith attempts at regulation and to chill speech that should be protected by the First Amendment.

Amici have differing perspectives on the continuing viability of *City of Renton*, as well as on the extent to which the government may constitutionally regulate specific types of speech based on that speech's secondary effects. They therefore take no position on whether *City of Renton* should be overruled, limited to a particular context, or read to cover facts like those here. Nor do they take any position on how the Court should rule on the challenged Georgia law.

But they agree that the Court must provide clear guidance as to the level of scrutiny that applies to a law which singles out a particular type of expressive content but provides a content-neutral justification. Until it resolves the tension between *Reed* and *City of Renton*, lower courts will continue to be afloat.

The Court should grant certiorari to resolve this fundamental inconsistency in its free speech jurisprudence.

ARGUMENT

The Court Should Grant Certiorari to Resolve the Inconsistency between *Reed* and *City of Renton* and Its Progeny.

A. There is substantial tension between this Court's rulings in *City of Renton* and its progeny, on the one hand, and *Reed*, on the other.

This Court has long held that regulations that discriminate based on the content of speech are subject to the most exacting scrutiny. *See*, *e.g.*, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (applying strict scrutiny to strike down ordinance generally prohibiting picketing near schools but permitting labor-related picketing: "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject").

In *City of Renton*, the Court recognized an exception to this rule. Applying intermediate scrutiny, it upheld a zoning ordinance that discriminated against adult movie theaters—on its face, a content-based distinction. While recognizing that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment," the Court concluded that "the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." 475 U.S. at 46–47 (emphasis in original).

City of Renton generated a line of caselaw standing for the proposition that "regulation that serves *purposes* unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491

U.S. 781, 791 (1989) (citing *City of Renton*, 475 U.S. at 46–47) (emphasis added). These cases extend beyond the adult entertainment context and involve regulations that, on their face, apply to specific types of expressive content.

Most notably, in *Hill v. Colorado*, the Court upheld a criminal statute prohibiting knowingly approaching 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. 703, 707 (2000). Applying the framework elaborated in *Ward*, the Court concluded that the law was content-neutral because, among other factors, "it was not adopted 'because of disagreement with the message it conveys.'" *Id.* at 719 (quoting *Ward*, 491 U.S. at 791). Rather, the Court emphasized, the statute served the "prophylactic" purpose of "protect[ing] those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators." *Id.* at 729.

City of Renton and its progeny embody the principle that, even when a law facially singles out a specific type of expressive content, it can nevertheless escape strict scrutiny if it is justified by a content-neutral *purpose*, like combating the secondary effects of the speech. In such cases, intermediate scrutiny applies.

This line of cases is in direct tension with the Court's decision in *Reed*. There, the Court struck down a municipal sign code that classified different types of signs into categories based on their content, and subjected each category to different regulations.[3] While the town offered

[3] For example, the ordinance allowed "Ideological" signs to be 20 square feet in area and placed in all areas without time limits, while "Temporary Directional" signs directing the viewer to a meeting of a

content-neutral justifications for treating different categories of signs differently, the Court concluded that the law was content-based and applied strict scrutiny:

> 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. . . . In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 576 U.S. at 165 (citations omitted). And it emphasized that a court must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.* at 166 (emphasis in original). If it is not, then strict scrutiny applies.

Under *City of Renton* and its progeny, a law that singles out a specific type of expressive content but relies on a content-neutral justification is subject to intermediate scrutiny. Under *Reed*, a facially content-based law is always subject to strict scrutiny, regardless of its purpose or justification. While *amici* take no position on which rule should prevail, it is clear that these principles are not compatible.

B. Lower courts have struggled to reconcile these inconsistent lines of jurisprudence.

Reed did not purport to overrule *City of Renton* or any of its progeny. But members of this Court have noted the

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nonprofit group could only be six square feet and posted no more than 12 hours before the event and one hour afterward. *See Reed*, 576 U.S. at 159–60.

significant tension between the two lines of cases.[4] So have First Amendment scholars.[5] So have some lower courts.[6]

And lower courts struggle to apply these incompatible, but equally binding, precedents in a consistent way. In the wake of *Reed*, some courts reject *City of Renton*-type "content-neutral justification" arguments and apply strict scrutiny to regulations that discriminate based on content. *See*, *e.g.*, *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (striking down law prohibiting politically-related robocalls as impermissibly content-based: "*Reed* has made clear that . . . the government's justification or purpose in

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[4] *See*, *e.g.*, *Reed*, 576 U.S. at 183–84 (Kagan, J., concurring in the judgment) ("[o]ur cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws") (citing *City of Renton*, 475 U.S. at 48); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 86 (2022) (Thomas, J., joined by Gorsuch and Barrett, JJ., dissenting) ("I would adhere to *Reed* rather than echo *Hill*'s long-discredited approach"); *Coalition Life v. City of Carbondale*, 145 S. Ct. 537, 539 (2025) (Thomas, J., dissenting from denial of cert.) ("*Hill* is likewise at odds with *Reed*"); *see also Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 287 & n.65 (2022) (noting that *Hill* has "distorted First Amendment doctrines").

[5] *See*, *e.g.*, David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 Case W. Res. L. Rev. 259, 278 (2019); Ashutosh A. Bhagwat, *In Defense of Content Regulation*, 102 Iowa L. Rev. 1427, 1441 (2017); Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis after* Reed v. Town of Gilbert, 57 Santa Clara L. Rev. 385, 414–16 (2017).

[6] *See*, *e.g.*, *Price v. City of Chicago*, 915 F.3d 1107, 1109 (7th Cir. 2019) ("*Hill*'s content-neutrality holding is hard to reconcile with . . . *Reed*"); *Free Speech Coal., Inc. v. Attorney General*, 825 F.3d 149, 161 (3d Cir. 2016) ("*if* the secondary effects doctrine survives, *Reed* counsels against expanding its application beyond the only context to which the Supreme Court has ever applied it: regulations affecting physical purveyors of adult sexually explicit content") (emphasis in original; footnote omitted); *id.* at 174 (Rendell, J., dissenting) ("The secondary effects doctrine thus seems logically irreconcilable with *Reed*.").

enacting the law is irrelevant"); *Free Speech Coal., Inc. v. Skrmetti*, — F. Supp. 3d —, 2024 WL 5248104, at *14 (W.D. Tenn. 2024) (striking down law requiring websites containing content deemed harmful to minors to verify the age of users: "the secondary effects doctrine only applies to laws that are *content-neutral*") (emphasis in original); *Champion v. Commonwealth*, 520 S.W.3d 331, 337 (Ky. 2017) (striking down anti-panhandling ordinance as impermissibly content-based: "The government's purpose is only relevant . . . after concluding that the regulation is facially content-neutral.").

Other courts, including the court below, continue to rely on *City of Renton* and its progeny and apply intermediate scrutiny to content-based regulations that are justified by a content-neutral rationale. *See*, *e.g.*, Pet. App. 15a; *Siders v. City of Brandon*, 123 F.4th 293, 304 (5th Cir. 2024) (upholding ordinance restricting protests and demonstrations near public amphitheater: "the Supreme Court has not overruled *Hill*" and "the similarity between this ordinance and the statute in *Hill* is significant"); *Ass'n of Club Executives of Dallas, Inc. v. City of Dallas*, 83 F.4th 958, 964 (5th Cir. 2023) (upholding ordinance restricting hours of sexually-oriented businesses based on secondary effects: "Plaintiffs argue that *Renton* is no longer good law. . . . We reject [that] argument[].").

While some of those courts note the tension with *Reed*, they have concluded, as the Fifth Circuit put it, that "whether to overrule or modify *Renton* is the High Court's business, not ours." *Ass'n of Club Executives of Dallas*, 83 F.4th at 965; *see also Price*, 915 F.3d at 1111 ("The Court's intervening decisions have eroded *Hill*'s foundation, but the case still binds us; only the Supreme Court can say otherwise.").

This Court's intervention is required to resolve the tension between these incompatible strains of its First Amendment jurisprudence. No purpose is served by forcing lower courts—and speakers and governments—to guess whether *City of Renton* remains controlling law or whether *Reed* now provides the operative test. Whichever way the Court resolves this issue, it must be resolved.

C. This case provides an attractive vehicle to resolve the confusion.

This case is a good vehicle to clarify the Court's jurisprudence. The challenged law, which has been definitively interpreted by Georgia's highest court, clearly imposes burdens based on the content of expression: It taxes "adult entertainment establishments" which offer "entertainment" consisting of "nude or substantially nude persons . . . engaged in movements of a sexual nature." Ga. Code Ann. § 15-21-201(1)(A). The Georgia Supreme Court expressly relied on *City of Renton*'s secondary effects framework to apply intermediate scrutiny and uphold the assessment. Pet. App. 15a–18a. Therefore, the continuing vitality and scope of *City of Renton* and its progeny in cases involving facially content-based regulation would be directly before this Court on certiorari. And there are no vehicle problems that would weigh against a grant. *Cf. Bruni v. City of Pittsburgh*, 141 S. Ct. 578 (2021) (Thomas, J., concurring in denial of cert.) ("I agree with the Court's decision not to take up this case because it involves unclear, preliminary questions about the proper interpretation of state law. But the Court should take up this issue in an appropriate case to resolve the glaring tension in our precedents.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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