No. 17-6238

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR.,
Plaintiff/Appellee,

v.

JOHN SCHROER,
in his official capacity as Commissioner, Tennessee Department of Transportation,

Defendant/Appellant.

On appeal from the United States District Court for the Western District of Tennessee
No. 2:13-cv-02987

Appellee's Brief

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CORPORATE DISCLOSURE STATEMENT

William H. Thomas, Jr. is not a nongovernmental corporate party subject to the requirements of Fed. R. App. P. 26.1.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

As this case concerns an important question of constitutional law—whether Tennessee violates the First Amendment by privileging commercial speech over noncommercial speech despite the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)—Appellee respectfully requests oral argument before the Court.

STATEMENT OF ISSUES

To determine whether the Tennessee Billboard Regulation and Control Act of 1972 ("Billboard Act" or "Act") applies to and thus restricts noncommercial speech at a given location, state officials must analyze a sign's message and evaluate whether it supports "activities conducted on the property" to determine the relationship between the two. Tenn. Code Ann. § 54-21-103(3). Accordingly, the district court held that "the Billboard Act is an unconstitutional, content-based regulation of speech." Order, R. 356, Page ID # 6952.

1. Does the Billboard Act's on-premise/off-premise distinction trigger strict scrutiny?
2. Does the Billboard Act satisfy the required constitutional scrutiny?

STATEMENT OF THE CASE

Mr. Thomas owns properties with signs posting commercial and noncommercial messages. *See* Dismissal Order, R. 170, Page ID # 2782. In 2006, the Tennessee Department of Transportation ("TDOT") denied Mr. Thomas's permit application for the Crossroads Ford sign at issue here. Order, R. 356, Page ID # 6914.[1] The Shelby County Chancery Court later found "substantial evidence of

[1] 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. *See* Tenn. Br., ECF No. 24, at 6-9.

selective and vindictive enforcement," and that Mr. Thomas "could well have been entitled to…the permit…were it not for the bias and prejudice" at TDOT. Chancery Sanctions Order, R. 204-1, Page ID ## 3658, 3668; *see also id.* at 3681, ¶¶ 160-63.

After obtaining "a billboard permit from Memphis and Shelby County," Thomas PI Reply, R. 124, Page ID # 1582, Mr. Thomas built the Crossroads Ford sign. When TDOT brought an enforcement action in Shelby County Chancery Court, the court enjoined the State's "selective and vindictive enforcement." Dismissal Order, R. 170, Page ID # 2784 (internal quotation marks omitted).

Nevertheless, on May 11, 2012, Mr. Thomas notified the State "that all paid advertising was being removed…and that no paid advertising would be placed…until he received a state permit." Thomas PI Reply, R. 124, Page ID # 1583. Mr. Thomas subsequently displayed "exclusively noncommercial messages [conveying his] thoughts and ideas." Thomas Proof Offer, R. 262, Page ID # 4318. In particular, "from May of 2012 through the fall of 2012," the sign displayed a message with "an American flag with the Olympic rings." *Id.* Later that fall, the "sign displayed content referencing the then upcoming holiday season with a picture of the American flag." *Id.*

After a trial, the Shelby County Chancery Court concluded that Mr. Thomas's off-premise, noncommercial messages were protected by the First Amendment and exempt from regulation. Chancery Order, R. 289-2, Page ID # 5731. On appeal, the

court's injunction and opinion were vacated on jurisdictional grounds. *See* Thomas PI Reply, R. 124, Page ID # 1584.[2]

On December 17, 2013, Mr. Thomas filed a federal complaint to protect the noncommercial messages displayed on the Crossroads Ford sign. Order, R. 356, Page ID # 6914-15. The district court concluded that "the Billboard Act is an unconstitutional, content-based regulation of speech." *Id*. at 6952. This appeal followed.[3]

SUMMARY OF THE ARGUMENT

Under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the State fails in its claim that the Billboard Act—which restricts the off-premise, noncommercial content on Mr. Thomas's Crossroads Ford sign while permitting commercial and other noncommercial signs—is not content-based. Healing a circuit split, *Reed* held,

[2] As the State noted, a hearing in the state proceedings was set for February 2, 2018. Tenn. Br. at 15 n.13. Based on *Reed* and the federal district court's decisions, the chancery court reasserted jurisdiction and reinstated its orders.

[3] While disagreeing with the State's commentary and legal conclusions, Mr. Thomas generally agrees with Tennessee's statement of the federal procedural history. But, contrary to the State's claims, Tenn. Br. at 19 n.16, the district court's temporary restraining order and preliminary injunction order held the Act unconstitutional because of the Act's directional sign exclusion. TRO Order, R. 110, Page ID ## 1454-55; PI Order, R. 163, Page ID ## 2267, 2270. Mr. Thomas also raised the content-based nature of the directional and official exemption in his preliminary injunction briefing. Thomas PI Reply, R. 124, Page ID # 1591.

without qualification, that a law "is content based if [it] applies to particular speech because of the…message expressed." *Reed*, 135 S. Ct. at 2227.

The State's claim that the Act is location- and not content-based thus fails: the law cannot function without evaluating a message's meaning. Whether the State permits a sign depends on an official's evaluation of that sign's message and her judgment that the message bears a sufficient relationship to the location's activities, whatever she decides them to be.

The Act is thus subject to strict scrutiny, and the State has failed to prove that the Act's content-based requirements are narrowly tailored to compelling governmental interests. The only interests raised before the district court are traffic safety and aesthetics, and the Supreme Court has never held that they are compelling. Moreover, the State has failed to show that off-premise, noncommercial, ideological speech like Mr. Thomas's is any more distracting or ugly than the commercial and noncommercial speech the Act allows. In addition, the lack of narrow tailoring is shown by the availability of less restrictive means to further the State's interests.

Thus, the district court correctly concluded that the Billboard Act is unconstitutional, and should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the Billboard Act's constitutionality. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000).

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In particular, this Court reviews "the scope of injunctive relief…for an abuse of discretion," factual findings for clear error, and legal conclusions de novo. *King v. Zamiara*, 788 F.3d 207, 217 (6th Cir. 2015). "A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law." *Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015) (internal quotation marks omitted).

ARGUMENT

The Tennessee Billboard Act here infringes on ideological speech, which is "probably the most highly protected" category of speech. *Ackerley Commc'ns v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996). In that context, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases).

Accordingly, the State must demonstrate that the Act meets the highest standards of constitutional scrutiny. Under those standards, the district court correctly concluded that the Act unconstitutionally discriminates between speech based on content.

A. The Act Imposes Content-Based Requirements Subject to Strict Scrutiny.

In giving greater protection to on-premise commercial speech and certain forms of noncommercial speech than to Mr. Thomas's sign, the Tennessee Billboard Act imposes content-based requirements that trigger strict scrutiny.

1. The Act is content-based because its applicability depends on a sign's content.

a. Reed *teaches that a law is content-based if its application depends on a message's content.*

Reed clarified that a regulation "is content based if a law applies to particular speech because of the…idea or message expressed." *Reed,* 135 S. Ct. at 2227. In particular, the Supreme Court rejected the position that courts could bypass the first step of testing for content-based laws, and thus avoid imposing strict scrutiny, if a law whose application depended on content also imposed additional criteria—such as the location requirement inherent to the on-premise/off-premise distinction. *See Auspro Enters., LP v. Tex. DOT*, 506 S.W.3d 688, 694 (Tex. App. 2016) ("Before *Reed*, many courts…relied on various arguments to deem as content neutral…statutes that, on their face, differentiated between categories of speech based on topic or ideas expressed."). That is, while some courts held that a law was content-based if it could not function fully without some reference to or use of a message's content, other courts excused that content-based discrimination if other, "objective" factors were also considered. *Reed v. Town of Gilbert*, 707 F.3d 1057,

1069 (9th Cir. 2013) ("*Reed II*") (calling distinctions "content-neutral" because their "restrictions are based on objective factors"), *rev'd* 135 S. Ct. 2218 (2015).

For example, the Ninth Circuit held that a content-dependent ordinance was not content-based because it "regulate[d] physical characteristics, such as size, number and construction of the signs; location of placement; and timing of display." *Reed v. Town of Gilbert*, 587 F.3d 966, 977 (9th Cir. 2009) ("*Reed I*").[4] Similarly, this Court in *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (1987), ignored a law's content-dependence because the law "regulate[d] secondary effects on protected speech," *id*. at 590; met a relationship test requirement that a sign "relate to an activity on the premises," *id*.; was not motivated by a purpose outside the asserted governmental interests, *id*. at 591; and depended on location as well as content, *id*. at 593.

"*Reed*'s significance," then, lies in clarifying "what constitutes a content-based restriction on speech." *Auspro*, 506 S.W.3d at 693-94. In particular, *Reed* instructed that courts err when they "skip[] the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face," and instead justify a content-based law because of other considerations, like a "benign

[4] For example, the Ninth Circuit held that the requirements for event and temporary for sale signs merely required government employees to look at the sign's message to determine "'who' is speaking and 'what event' is occurring." *Reed I*, 587 F.3d at 977.

motive" or a "content-neutral justification." *Reed*, 135 S. Ct. at 2228; *see also Wagner v. City of Garfield Heights*, 675 F. App'x 599, 603-04 (6th Cir. 2017) (noting that *Reed* had rejected this Court's "context-dependent inquiry"); *Auspro*, 506 S.W.3d at 694 (noting that "*Reed* emphatically rejected the[] arguments" lower courts had previously used).

Rather, the Supreme Court emphasized that a law is content-based if it either "applies to particular speech because of the…message expressed" or if its application "cannot be justified without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227 (internal quotation marks omitted). And, at this first step, courts must remember that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id*. At the end, if a law is dependent on content in any way, that law "is subject to strict scrutiny." *Id*.; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) ("The Act would be content based if it required 'enforcement authorities' to 'examine [a message's] content…to determine whether' a violation has occurred.").

b. The Act is content-based because its application depends on content.

The Tennessee Billboard Act is facially content-based because it "applies to particular speech because of the…message expressed." *Reed*, 135 S. Ct. at 2227; *see also Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (noting

that a law is "content-based because it applied or did not apply as a result of…[the] message expressed" (internal quotation marks omitted)); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.").

The statute on its face exempts a sign from permitting and other requirements based on the content of the sign's message: If the message "advertis[es] the sale or lease" of particular property or "activities conducted" on particular property, then it is not subject to permitting or other requirements. Tenn. Code Ann. § 54-21-103(2)-(3); *see also* Tenn. Code Ann. § 54-21-107(a)(1)-(2). Signs with any other content are subject to permitting and other requirements that burden speech. *See* Tenn. Code Ann. §§ 54-21-104(a)-(b); 54-21-107. Indeed, Shawn Bible, one of the state officials coordinating enforcement of the Act, admitted that the Act and federal law restrict speech unless a sign is "speaking up for the things going on" at particular locations. TRO Tr., R. 121, Page ID ## 1523-24; *see also* Trial Tr., R. 334, Page ID ## 6663:12-21, 6664:20-25 (conceding that the state cannot regulate signs without looking to the content of a sign's message).

Moreover, Tennessee's regulations explicitly state that a sign is *off-premise* and thus restricted unless the message on the sign "identifies the establishment's principle or accessory product or services offered on the premises." Tenn. Regs., R.

46-1, Page ID # 607 (Rule of Tennessee Department of Transportation Maintenance Division, Control of Outdoor Advertising, 1680-02-03-.06); *accord* Order, R. 356, Page ID # 6912; *see also* Tenn. Regs., R. 46-1, Page ID # 607 (giving examples of permissible messages, such as "Skeet Range Here"); *id*. (noting that if a sign "states" something other than "selling or leasing the land on which the sign is located," the sign is off-premise and thus restricted).

This content-based discrimination falls afoul of *Reed*'s central example. Under the Act, a sign "inform[ing] its reader of the time and place a book club [on the premises] will discuss John Locke's Two Treatises of Government…will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election" or from "a sign expressing an ideological view rooted in Locke's theory of government." *Reed*, 135 S. Ct. at 2227. Thus, as in *Reed*, "the [law]is a content-based regulation of speech." *Id*.

Furthermore, one can discern the "more subtle" content-based discrimination described by the *Reed* Court in the Act's differential treatment based on a sign's design, "function or purpose." 135 S. Ct. at 2227. The Supreme Court described the Town's ordinance as imposing an "obvious content-based inquiry" by "requir[ing] Town officials to determine whether a sign is '*designed* to influence the outcome of an election'…or merely 'communicating a message or ideas for noncommercial *purposes*' (and thus 'ideological')." 135 S. Ct. at 2231 (emphasis added); *cf. Centro*

De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 112 (2d Cir. 2017) (holding ordinance content-based, even as applied to commercial speech, where it required officials to "evaluate the speech" to determine if it was "done 'for [a particular] purpose'").

The State has admitted that it exempts a sign that has "as its *purpose* (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising." Tenn. Regs., R. 46-1, Page ID # 605; Tenn. Dismissal Mem., R. 46-6, Page ID # 719; *see also* Trial Tr., R. 334, Page ID # 6635 (Shawn Bible testifying that the Act requires that state officials investigate whether a sign has as "its *purpose* advertising what's happening there" (emphasis added)). Thus, paraphrasing *Reed*, the Act permits signs "designed to influence" drivers to take part in activities on the premises, but it restricts truly ideological signs, those with "'noncommercial purposes'" that are, by their message, disconnected from specific premises. 135 S. Ct. at 2231. Consequently, just as in *Reed*, the State cannot "evade strict scrutiny review" given the "obvious content-based inquiry" related to purpose and design. *Id*.

In addition, this content-based discrimination is magnified when one considers the enormous range of speech the Act burdens. The *Reed* Court explicitly stated that "a speech regulation targeted at specific subject matter is content based

even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. Here, the state would assert that the law does not discriminate against particular viewpoints:[5] it just targets any subject matter that is not related to activities that can be and are conducted on private property. But, to state the obvious, by permitting only a tiny subset of messages on any particular property, the Act disallows an enormous range of potential speech.

And the Act's discrimination against the whole field of ideological speech is particularly pernicious. For example, would a sign saying, "Be kind" have anywhere it could go? Is kindness a product or service, an "activit[y] conducted on the property," that would qualify a message as on-premise? No. It is an abstraction, an

[5] The State might argue that the law is content-neutral because of innocent motives. But, the Supreme Court has stated 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." *Reed*, 135 S. Ct. at 2229. Here, one does not need to "imagine a Sign Code compliance manager who disliked the [Mr. Thomas] deploying the Sign Code to make it more difficult for" him to speak. *Id*. at 2229. Such is in fact the case.

On May 22, 2007, the Shelby County Chancery Court issued a temporary injunction regarding Mr. Thomas's Kate Bond and Crossroads Ford signs, finding "substantial evidence of selective and vindictive enforcement against Defendant Thomas." Chancery Sanctions Order, R. 204-1, Page ID # 3658. The court noted evidence such as emails within TDOT's Beautification Office directing personnel "to 'win' a matter for Mr. Thomas' competitor…and 'ultimately defeat' Mr. Thomas." *Id*. Later, in its show cause order, the court held that Mr. "Thomas could well have been entitled to the issuance of the permit at the Crossroads Ford site were it not for the bias and prejudice" of TDOT employees. *Id*. at Page ID # 3668; *see also id.*, Page ID # 3681, ¶¶ 160-63.

idea, a modifier to describe activities. Layers of inference are necessary to link the message to any activity. And in that space the State finds room to reject any such message. Especially when the state believes that the only permissible message is one that "would build business." Trial Tr., R. 334, Page ID # 6675:16-24. Thus, the Act discriminates against almost all ideological speech.

Indeed, the law's sweep is tremendous. For example, unless a sign includes a self-aggrandizing invitation to commerce, *see id.*, the Act might not permit—anywhere in the state—a simple patriotic message with the American flag and the Olympic rings. *See* TRO Tr., R. 121, Page ID # 1523:10-1524:11 (stating that such a sign is impermissible because it fails to "speak[] up for the things going on there at that premise"). Even more than in *Reed*, the Act "is a paradigmatic example of content-based discrimination." 135 S. Ct. at 2230. Thus, as the district court stated, "[t]he statutes' language, the State's rules, and the State's actions as to Thomas's non-commercial messages on his Crossroads Ford sign…compel a finding that the Billboard Act is content based." Order, R. 356, Page ID # 6924.

2. Location requirements do not change the Act's dependence on content-based requirements.

As noted above, the Supreme Court has held that the government cannot avoid strict scrutiny under the first step of the content neutrality test by adding supposedly objective factors to sign laws. *See Reed*, 135 S. Ct. at 2226-28. Nevertheless, the State argues that the Act is not content-based, not because it avoids regulating

content at all, but rather because the law *also* depends on location. *See* Tenn. Br. at 30-36.

The State's position depends on two arguments: First, that the "distinction between on-premises and off-premises signs is based on a sign's location, not its content." Tenn. Br. at 21; *see also* Tenn. PI Resp., R. 118, Page ID # 1487 (stating that the distinction "is entirely based on location or placement of the signs"). Second, that *Reed* held that speech restrictions are content-based only when they "depend 'entirely on…communicative content,'" Tenn. Br. at 21 (quoting *Reed*, 135 S. Ct. at 2227); *but see id*. at 2227 (noting that a law is content-based whenever "a law applies to particular speech because of the topic discussed or the idea or message expressed"). Both are wrong.

a. The Act depends on content, not just location.

It is possible to construct a truly location-based law, one in fact not based on content, but the state of Tennessee has not done so. For example, a law would make no reference to content if it simply prohibited signs on properties without any buildings. Under such a law, examination of the location alone would reveal to government officials whether the law applied. They would know whether the sign was allowed even if it was covered by a tarp.

Similarly, a law limiting signs based on spacing or placement would be entirely location-based. For example, if a law banned a new sign within 1000 feet of

an existing sign, a government official would need only examine the location to see if there were a nearby sign. *See* Order, R. 356, Page ID # 6947. Or, if the law exempted a sign if it was not visible from adjoining streets, a government official would need to examine only the sign's location at a particular site. *See Solantic, Ltd. Liab. Co. v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (noting that "exemption (1) for signs not visible from any street or adjoining property…are restrictions on sign placement, not content" (emphasis removed)); *cf. McCullen*, 134 S. Ct. at 2531 (noting violation "merely by standing in" location).

The Tennessee Billboard Act is not such a law. As the State suggests, the Act would restrict signs where there was no business or activity at the location. Tenn. Br. at 32-33. But the converse—having a business or organization at a location—is not sufficient. To escape the Act's restrictions, an owner must convince State officials that certain activities happen on the premises, or that certain ideas are integral to the organization's mission, and then show that the content of the sign matches the activity or mission. *See* TRO TR. R. 121, Page ID ## 1524-25 (stating that Greenpeace could have a sign about saving the water). Thus, while meeting the State's location-based requirements is necessary, it is not sufficient. Before being permitted to speak, one must *also* meet the State's content-based requirements.

The State's own soup kitchen and animal shelter examples demonstrate this. An animal shelter could have a "sign bearing the message 'Please Spay or Neuter

Your Pet.'" Tenn. Br. at 30. But, no matter how much it cared about an upcoming initiative on homelessness, the animal shelter could not put up "[a] sign that reads "Help End Hunger." *Id*. Similarly, as the State admits, a soup kitchen could put up a sign against hunger, but it could not put up a sign advocating animal control. *Id*. The same location could have one sign but not the other because of the sign's content. "If the [Act's] distinctions were truly [location] based, both types of signs would receive the same treatment" at each location. *Reed*, 135 S. Ct. at 2230.

b. *The State mistakenly argues that a law is not content-based as long as it depends, even slightly, on some other factor.*

As demonstrated by the previous example, the Act's restrictions apply based on a sign's message. This is true whether the Act "distinguishes…between permissible and impermissible signs at a particular location by reference to their content," *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981), or instead distinguishes between permissible and impermissible signs with given content by reference to its location. According to the State, however, this content-dependence does not matter because the Act's application does not depend "entirely" on the content. Tenn. Br. at 21, 25, 33, 34, 35; *see also* Outdoor Association Br., ECF No. 28, at 11; U.S. Br., ECF No. 29, at 10.

The State's position is untenable for several reasons. First, while the Supreme Court did describe the Town of Gilbert's ordinance as particularly egregious because it "depend[ed] entirely on the communicative content of the sign," that was not the

Court's holding. *Reed*, 135 S. Ct. at 2227. Rather, the Court stated, quite clearly, that a law is content-based if it "applies to particular speech because of the…message expressed." *Id*. Similarly, in approaching the second step of its analysis, the Court held that a law is content-based if it "cannot be justified without reference to the content of the regulated speech." *Id*. (internal quotation marks omitted). Thus, the Supreme Court brooks no dependence on content unless a law meets strict scrutiny. In such cases, strict scrutiny is required of a content-dependent law, not because the Act or any other content-based legislation necessarily will be "used for invidious, thought-control purposes," but because a content-based law "lends itself to use for those purposes." *Reed*, 135 S. Ct. at 2229 (internal quotation marks omitted). The First Amendment simply does not require citizens to trust the State in such matters. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" (quoting *United States* v. *Stevens*, 559 U.S. 460, 480 (2010))); Tenn. Code Ann. § 54-21-113 (providing potential criminal penalties).

Second, applying anything less than strict scrutiny would allow the government to create great loopholes in the First Amendment jurisprudence governing freedom of religion, content-based speech, and time, place, and manner restrictions.

The Supreme Court and "the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). The foundation of the ministerial exception is that courts and the government may not decide what messages and activities are core to a religious group's mission and beliefs. *See id*. at 197 (Thomas, J., concurring) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987)). But, if a religious group attempted to put up a sign, that is precisely what the Act would require. That is, if a church wanted to put up a sign against hunger, or a sign advocating Locke's theories of government,[6] it could not do so until a State official affirmed that the sign's content—fighting hunger or advocating for voting rights—matched the church's activities and purposes. Such content-related decisions are bound to raise controversies surrounding the State "suppress[ing] disfavored speech." *Reed*, 135 S. Ct. at 2229.

Furthermore, a "location-based" loophole would undermine the Supreme Court's jurisprudence on content-based restrictions outside the billboard context.

[6] *See* Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* 135 (1990) (noting that "the New England ministers…regularly fed their congregations 'doses' of Locke's political theory in a 'scriptural spoon.' As a result, 'Locke rode into New England on the backs of Moses and the Prophets.'" (quoting Clinton Rossiter, *Seedtime of the Republic* 40, 53, 237 (1953))).

For example, the Court in *Mosley* addressed a law that prohibited picketing or demonstrations next to a public school, unless that picketing related to labor disputes on the school premises. *See id*., 408 U.S. at 92-93. Like Tennessee's Billboard Act, Chicago's law was certainly location-based. But the law did not spring into effect without reference to a message's content. There, the "operative distinction [was] the message on" the sign. *Id*. at 95.

The Supreme Court held the law unconstitutional because "*[a]ny restriction* on expressive activity *because of its content* would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id*. at 96 (emphasis added) (quoting *N.Y. Times Co*. v. *Sullivan*, 376 U.S. 254, 270 (1964)); *cf*. *Reed*, 135 S. Ct. at 2231 (stating that a law "is content based if [it] applies to particular speech because of the…message expressed"). A broad exception like that sought by the State—that a law is location-based and content-neutral whenever a law does not "'depend entirely'" on content—would similarly undermine that national commitment. Tenn. Br. at 35.

And the State's position would also undermine the First Amendment protections surrounding time, place, and manner requirements. The Supreme Court has held that, when a law "distinguishes…between permissible and impermissible signs at a particular location by reference to their content," that law is outside "the

domain of time, place, and manner restrictions." *Metromedia*, 453 U.S. at 516-17.[7] That is, permissible time, place, and manner requirements allow a city to limit the hours a protester may be on public property, or limit the places on public property where she may speak, but they do not allow a city to control the content of what a protester may say at that location.[8] For example, a city may not restrict the doctrines or teachings people may protest in the free speech zones around a church. Similarly, while Tennessee might be able to use time, place, and manner requirements to control the hours a sign is lit or its distance from the road, it cannot limit the content of a sign meeting those requirements. But, in deciding whether a sign is permitted or not "at a particular location by reference to" the sign's message, *id*. at 516, the Act does just that. And allowing it to do so would undermine the limits the Supreme Court has placed on time, place, and manner restrictions. Thus, the State's attempt

[7] Indeed, the fact that the State wishes to use the Act to limit billboard speech generally means that the Act cannot be justified as a time, place, and manner restriction. The Supreme Court has allowed time, place, and manner restrictions only "to further an important governmental interest *unrelated to the restriction of communication*." *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (*per curiam*). Here, however, the governmental interest is directed specifically to restricting speech. The Act's very point is to limit the total amount of communication, to impose restrictions on the quantity of speech on America's highways. Thus, the Act is outside "of the domain of time, place, and manner restrictions." *Metromedia*, 453 U.S. at 517.

[8] As discussed in greater detail below, the Supreme Court has traditionally applied time, place, and manner requirements to individuals' use of public property. The seepage of such requirements into how individuals' may use their own property is dubious, at best.

to justify the law as a time, place, and manner restriction—whether directly or indirectly as a "location-based" restriction—fails.

c. The Act's "location" requirements are a thin disguise for unconstitutional speaker-based restrictions.

Furthermore, in practical terms, the Act devolves into an unconstitutional speaker-based regulation. The Supreme Court has held that "the First Amendment" does not stand only "against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Id*. Such unconstitutional speaker-based discrimination includes both "dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978).

Yet that is exactly what the Act does. A citizen may not erect a sign advocating a viewpoint unless she has a business or runs an organization with activities relating to that topic, or unless placing the sign will somehow "build business." Order, R. 356, Page ID # 6950 (quoting Trial Tr., R. 334, Page ID # 6675:16-24). For example, the Act would allow a coal company to put up a sign on its property advocating for coal-powered generators, but a farmer's co-op could not put up a sign advocating for wind-generated electricity. Or, to adapt the State's example, Valero could put up a sign with a gun, stating, "Valero Honors Our Veterans," or a picture of coal with

the tagline, "Valero Honors Our Energy Security." *See* Order, R. 356, Page ID ## 6949-50. But, a homeowner could not put up a sign advocating against gun violence or for solar power. *See Solantic*, 410 F.3d at 1265-66 (noting similar examples of speaker-based discrimination).

And the Act's restrictions would be particularly pernicious to ideological speech. Billboard advertising is important to "'poorly financed causes,'" because "outdoor advertising, based upon cost per exposure, is a far less expensive means of communication than radio, television, newspaper or magazines." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 16 (1st Cir. 1980); *see also* Outdoor Association Br. at 4 ("Outdoor advertising is also among the most cost-effective means of reaching Americans." (citing Charles R. Taylor et al., *Business Perceptions of the Role of Billboards in the U.S. Economy*, 43 J. Advertising Research 150, 151 (June 2003))).

Where those advocating such cash-strapped causes lack any related business or organization in the State, or have but one or two locations, the Act could in fact eliminate all or almost all speech about certain topics. For example, absent a consulate, the Act would limit anyone without a permit from putting up a sign advocating for peace in the Middle East. Absent a harpoon company willing to advocate against its own interests—and assuming Tennessee authorities would permit advocacy that would *harm* one's business—no one without a permit could

put up a sign against whale or shark hunting. And no one could put up a sign advocating for or against a bond measure.[9]

Thus, because the Constitution prohibits the government from dictating "the speakers who may address a public issue," the Act is unconstitutional. *Bellotti*, 435 U.S. at 785.

3. Justice Alito's *Reed* concurrence does not support the conclusion that the Act's on-premise/off-premise distinction is content-neutral.

The State errs in arguing that Justice Alito's concurrence gives a court license to ignore the *Reed* Court's holding that a law "is content based if [it] applies to particular speech because of the…message expressed." 135 S. Ct. at 2227. *Reed* is not controlled by *Marks v. United States*, 430 U.S. 188 (1977), because Justice Alito, and those joining his opinion, also joined the majority opinion. *But see* Tenn. Br. at 27-28, 28 n.19 (arguing that the concurrence and dissent should be used together to conclude that the on-premise/off-premise distinction is content-neutral). *Reed*'s holding is announced by a binding majority. It is not scattered among various opinions, and there is no need for this Court to count votes and assemble a governing principle.

[9] Thus, the Act may also demonstrate one of those cases where speaker-based restrictions amount to content control. *See Citizens United*, 558 U.S. at 340 (noting that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

It is true that Justice Alito included the on-premise/off-premise distinction among examples of laws that might not be content-based. *See* Tenn. Br. at 26-29. But because he "join[ed] the opinion of the Court" without qualification, this Court must interpret his examples in light of the majority opinion and prior Supreme Court precedent, not the other way around.

As the district court pointed out, Justice Alito's "concurrence fails to provide any analytical background." PI Order, R. 163, Page ID # 2269. But when Justice Alito's examples are interpreted in light of the Court's opinion, the Act cannot meet the requirements for a content-neutral on-premise/off-premise distinction. After all, neither the *Reed* majority opinion nor Justice Alito's concurrence purported to blaze new ground. *See, e.g.*, 135 S. Ct. at 2228 (noting that the Supreme Court had "repeatedly considered" first "whether a law is content neutral"). Thus, his concurrence must be interpreted in light of *Metromedia*, and in that light a law is invalid if it gives greater protection to any form of commercial speech than it does to any form of noncommercial speech.

Metromedia's controlling opinion held that "noncommercial speech [must be given] a greater degree of protection than commercial speech." 453 U.S. at 513.[10]

[10] The concurrence would have gone even further: because of the danger to noncommercial speech, it would have subjected to scrutiny even a commercial/noncommercial determination. *See Metromedia*, 453 U.S. at 522, 536-37 (Brennan, J., concurring).

As the First Circuit has made clear, that means that as long as the government would permit any form of commercial speech at a given location, it cannot prohibit any form of noncommercial, ideological speech. *Ackerley Commc'ns v. City of Somerville*, 878 F.2d 513, 517 (1st Cir. 1989) ("This result follows logically from the First Amendment's value structure; if a commercial message overrides the city's aesthetics and safety interests, any message that is at least as important in the First Amendment hierarchy also must override those interests."); *see also Metromedia*, 453 U.S. at 513 (noting that the government "may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages").

And this is particularly true given the noncommercial messages likely to be restricted under the Act: the pure ideological speech, including discussions of controversial issues like abortion and gun violence, that "command[] the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015); *see also Ackerley*, 88 F.3d at 37 (permitting only onsite noncommercial messages disadvantaged "the expression of ideas," which is "probably the most highly protected" "category of noncommercial speech").

Thus, under *Metromedia*, an on-premise/off-premise distinction may be permissible when privileging one type of commercial speech over another, but not

if the law exempts any form of commercial speech from restrictions imposed on any form of noncommercial, ideological speech. Any law to the contrary would "impact[] more heavily on ideological than on commercial speech—a peculiar inversion of First Amendment values." 453 U.S. at 513 n.18 (quoting *John Donnelly*, 639 F.2d at 15-16).

This point is fundamental, and the State may not prevail simply by imposing the on-premise/off-premise distinction on both commercial and noncommercial speech. *See Nat'l Advert. Co. v. Orange*, 861 F.2d 246, 248 (9th Cir. 1988) ("Merely treating noncommercial and commercial speech equally is not constitutionally sufficient."). In short, while the Act might find cover within the Supreme Court's discussion of commercial speech, it fails to respect the hierarchy between commercial and noncommercial speech. It fails to "accord[] noncommercial speech a greater degree of protection than commercial speech." *Metromedia*, 453 U.S. at 513; *see also Outdoor Sys. v. City of Merriam*, 67 F. Supp. 2d 1258, 1267 (D. Kan. 1999) (holding that "noncommercial speech is entitled to a higher degree of protection than commercial speech").

Thus, whatever Justice Alito meant by an on-premise/off-premise distinction, it could not have referred to the Act's exemptions for commercial speech from requirements imposed on noncommercial speech. As noted above, anything else would effect "a peculiar inversion of First Amendment values." *John Donnelly*, 639

F.2d at 16; *see also Metromedia*, 453 U.S. at 513 and 513 n.18 (citing *John Donnelly* and noting that it would "invert[]" the First Amendment hierarchy to "afford[] a greater degree of protection to commercial than to noncommercial speech").

4. The State attempts to use inapposite cases to reopen the pre-*Reed* circuit split.

The State ignores the many courts and communities that recognized the unconstitutionality of its distinction before and after *Reed*. And the post-*Reed* cases it cites are inapposite.

This Court previously upheld the on-premise/off-premise distinction as applied to noncommercial speech. *See, e.g.*, *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (6th Cir. 1987). But, as discussed above, *Reed* rejected the arguments and tests that some courts created after *Metromedia* to make the content-neutrality test more regulation-friendly. And this Court has already recognized that *Reed* rejected this Circuit's approach. *Wagner*, 675 F. App'x at 603-04 (citing to remand after *Reed*). Moreover, *Rappa v. New Castle Cty.*, 18 F.3d 1043 (3d Cir. 1994), another case cited by the State, was suspect even before *Reed*. *See Solantic*, 410 F.3d at 1261 n.10, 1262 n.11 (noting that the Third Circuit disregarded the *Metromedia* plurality, which provided the prevailing approach among other circuits, and created its own context-sensitive relationship test).

After *Metromedia*, however, other courts held either that the distinction was unconstitutional or that the government had to treat all noncommercial speech as on-

premise. *See, e.g.*, *Ackerley*, 88 F.3d at 34 n.3 (calling distinction "misleading" because application was "determined not by a sign's location, but by its message"); *Vono v. Lewis*, 594 F. Supp. 2d 189, 189 (D.R.I. 2009) (holding "the exception for on-premises activities…is essentially a content-based restriction"); *Clear Channel Outdoor, Inc. v. City of St. Paul*, No. 02-1060 (DWF/AJB), 2003 U.S. Dist. LEXIS 13751, at *10 (D. Minn. Aug. 4, 2003) (noting that the distinction "imposes a content-based restriction" and disfavors off-premise noncommercial speech); *Burkhart Advert., Inc. v. Auburn*, 786 F. Supp. 721, 731 (N.D. Ind. 1991) (holding that application "depends upon what it *says*").

Other courts, attempting to save the distinction, held that *all* noncommercial speech is on-premise. *See, e.g.*, *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1344 (11th Cir. 2004) ("We concluded that a noncommercial message is inherently onsite, whatever its location."); *Southlake Prop. Assocs. v. City of Morrow*, 112 F.3d 1114, 1118 (11th Cir. 1997) ("An idea, unlike a product, may be viewed as located wherever the idea is expressed…."); *Infinity Outdoor Inc. v. City of N.Y.*, 165 F. Supp. 2d 403, 422 n.12 (E.D.N.Y. 2001) (noting that the distinction would otherwise unconstitutionally favor some noncommercial speech over others).

Furthermore, from New York to Arizona and in between, communities likewise reacted to *Metromedia* by eliminating the on-premise/off-premise distinction or exempting all noncommercial speech. *See, e.g.*, *Contest Promotions*,

LLC v. City & Cty. of S.F., 874 F.3d 597, 603 (9th Cir. 2017) (noting that Mesa exempted noncommercial signs); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (law exempted "all noncommercial expression"); *Nat'l Advert. Co. v. Denver*, 912 F.2d 405, 408 (10th Cir. 1990) (Denver law permitted all noncommercial speech); *Major Media of Se., Inc. v. Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) (change in ordinance to moot constitutional challenge); *Infinity Outdoor Inc.*, 165 F. Supp. 2d at 422 (New York City law allowing all noncommercial signs wherever commercial signs allowed).

Considering *Reed*, however, any post-*Metromedia* split about the on-premise/off-premise distinction as applied to noncommercial speech is moot. As this Court has already recognized, incompatible precedent must give way before "*Reed*'s central teaching" that "government…regulat[ion] for reasons related to content" requires courts to be "particularly diligent in" their scrutiny. *Wagner*, 675 F. App'x at 604; *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1458 (2014) (Roberts, C.J., controlling op.). In particular, *Reed* requires strict scrutiny where the Act requires State officials to "'examine the content of a sign to determine which ordinance should apply.'" *Wagner*, 675 F. App'x at 604.

And the post-*Reed* cases cited by the State and amici are not to the contrary. In *GEFT Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion, Ind.*, 187 F. Supp. 3d 1002 (S.D. Ind. 2016), the city sought to bring its sign "ordinance

into compliance with *Reed*" by amending it to exempt all noncommercial speech. *Id*. at 1009 (internal quotation marks omitted).[11] The court rejected the plaintiff's argument that the distinction as applied to *commercial* speech violated *Reed*. *Id*. at 1016. In particular, the court held that it had to follow the *Central Hudson* standard in *Metromedia*, the case that directly controlled on commercial speech. *Id*. (citing *Agostini v. Felton*, 521 U.S. 203 (1997)).[12]

And four of the other cases cited by the State or amici also dealt with commercial speech. *See ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828, 840 (S.D. Cal. 2017) (holding that "sign ordinance constitutionally limits commercial speech"); *Contest Promotions, LLC* v. *City & Cty. of S.F.*, Civ. No. 15-93, 2015 U.S. Dist. LEXIS 98520 (N.D. Cal. July 28, 2015);[13] *Citizens for Free*

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[11] Moreover, in response to *Auspro*, the Texas legislature complied with *Reed* by substituting restrictions on commercial signs for those on outdoor advertising. *See* Tex. Transp. Code § 391.031; Tex. S.B. 2006, 85th Leg., ch. 964, §§ 6, 7, 33(3), effective June 15, 2017, http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB02006F.pdf#navpanes=0.

[12] Similarly, because *Reed* and *Metromedia* are the cases that "directly control[]" here, *Agostini*, 521 U.S. at 237, the State's citations to *Boos v. Barry*, 485 U.S. 312, 318-19 (1988), *Ark. Writers' Proj. v. Ragland*, 481 U.S. 221, 229 (1987), *Fed. Commc'ns Comm'n v. League of Women Voters*, 468 U.S. 364, 383 (1984), and *Mosley*, 408 U.S. at 95, fail to sustain its argument that a law is content-neutral if it depends on any other consideration, no matter how small. *See* Tenn. Br. at 33-34.

[13] *See Contest Promotions*, 874 F.3d at 600-01 ("Because noncommercial signs are exempted," the law at issue "is a regulation of commercial speech…subject to intermediate scrutiny under *Central Hudson*….").

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). *Cf. 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-premise/off-premise distinction for commercial cases).

The other cases cited by the State and amici are similarly inapposite.[14] *Act Now to Stop War and End Racism Coal. v. D.C.*, 846 F.3d 391 (D.C. Cir. 2017), dealt with signs posted on public property, which implicates different interests than the billboards on private property at issue here. That is, "the District's lampposts are a textbook example of a limited or designated public forum," not private property. *Id*. at 403 (internal quotation marks omitted). And, as the ordinance simply limited

[14] Moreover, even in areas outside the context of billboards on private property, other courts have begun to apply *Reed* to content neutrality. *See, e.g.*, *Lucero v. Early*, 873 F.3d 466, 471 (4th Cir. 2017) (remanding for determination whether enforcement required officials to check leaflet content).

the amount of time content could be posted, rather than limiting almost all noncommercial content at any given location, it was "a reasonable time, place, and manner restriction." *Id*. at 409.

Moreover, *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017), had nothing to do with the on-premise/off-premise distinction, or any other content-examining exception. There, an "ordinance regulat[ed] unattended donation collection boxes," and "applie[d] to any unattended structure that accepts personal items 'for distribution, resale, or recycling.'" *Id*. at 668, 670. An official was required to examine only "whether (1) an unattended structure accepts personal items and (2) the items will be distributed, resold, or recycled." *Id*. at 670. There was no need to even glance at the message.[15]

Similarly, *March v. Mills*, 867 F.3d 46 (1st Cir. 2017), had nothing to do with this case. *March* examined a Maine statute that "bars a person from making noise that can be heard within a building when such noise is made intentionally." *Id*. at 49 (internal quotation marks omitted). And, casting the case even further afield, the

[15] In an alternative holding, the Ninth Circuit noted that content examination is not "dispositive" regarding content neutrality. *Recycle for Change*, 856 F.3d at 671. As with Outdoor Systems, however, the facts of the case are "admittedly in some tension with [any] analysis" regarding an on-premise/off-premise distinction as to noncommercial speech. *Contest Promotions*, 874 F.3d at 603.

statute did not depend on the content of a message because even an "entirely unintelligible message" could trigger its application. *Id*. at 58.

On the other hand, as noted above, communities and courts directly addressing the issue have concluded that the on-premise/off-premise distinction is unconstitutional. *See GEFT*, 187 F. Supp. 3d at 1009 (noting that city brought its "ordinance 'into compliance with *Reed*'" by amending it to exempt all noncommercial speech); *Auspro*, 506 S.W.3d at 700 (holding Texas law content-based).

Thus, while *Metromedia* established that the government cannot privilege commercial over noncommercial speech, as the Act does, that requirement was not at first clear to all courts. *Reed* clarified, however, that a law restricting noncommercial speech triggers strict scrutiny whenever its application depends on content. And other courts and communities have recognized that holding. The State's citations are not to the contrary.

B. The Billboard Act Cannot Meet Strict Scrutiny.

Because the Act is "presumptively unconstitutional" as a content-based law, it "can stand only if [it survives] strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2226, 2231 (internal quotation marks omitted). And the State's burden is great: "it is the rare case in which a State

demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S. Ct. at 1665-66 (internal quotation marks omitted) (collecting cases). The State has failed to prove either a compelling interest or narrow tailoring to that interest.

1. The Supreme Court has never held that the State's asserted interests are compelling.

The Supreme Court has noted only a "few historic and traditional categories" of speech where "content-based restrictions… have been permitted," *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Here, the State goes outside that list: it has not asserted an interest in preventing inherently criminal speech, defamation, fraud, obscenity, or "speech presenting some grave and imminent threat." *Id*.

Rather, the State has advanced patently-insufficient interests in traffic safety and aesthetics. But the Supreme Court has never considered those interests to be "compelling" in the First Amendment context. Indeed, had the Court considered "traffic safety and the appearance of the city" to be compelling governmental interests, San Diego might have salvaged its otherwise-unconstitutional restrictions on noncommercial speech in *Metromedia*. 453 U.S. at 507-08 (finding those interests to be "substantial" rather than compelling).

As Amicus United States notes, the district court's analysis is no outlier. "At least two courts of appeal have suggested that the interests of traffic safety and aesthetics 'have never been held to be compelling.'" U.S. Br. at 15 n.1 (quoting

Neighborhood Enters. v. City of St. Louis, 644 F.3d 728, 737-38 (8th Cir. 2011)) (citing *Solantic*, 410 F.3d at 1267). And the Fourth Circuit agreed just two years ago. *See Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 628 (4th Cir. 2016). Moreover, federal district courts throughout the country have concurred with these courts of appeal. Order, R. 356, Page ID # 6930 (collecting cases). In short, the State invites a circuit split.[16]

The State does so by conjuring supposedly contrary Supreme Court and Sixth Circuit precedent: decisions upholding the government's ability to suspend a driver's license for drunken driving, *Mackey v. Montrym*, 443 U.S. 1 (1979); drug testing for United States Customs employees, *Nat'l Treas. Emps. Union v. Von Rabb*, 489 U.S. 656 (1989); Memphis's aggressive early-morning policing, *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016); and drug testing for bus drivers involved in accidents, *Tanks v. Greater Cleveland Reg'l Transit. Auth.*, 930 F.2d 475 (6th Cir. 1991). But none of these cases touched on the compelling interests listed above, those needed to justify infringing upon First Amendment freedoms, and none involved a content-based restriction on speech.[17]

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[16] In fact, the State concedes that its aesthetics interest has never been considered a compelling interest by either this or the Supreme Court. Tenn. Br. at 39, n.21.

[17] The State's remaining citation, to dicta in the *Reed* opinion, posits that there *may* be a compelling interest in ensuring the security of "pedestrians, drivers, and passengers." Tenn. Br. at 39 (citation omitted). But this passing sentence, written to

Perhaps cognizant that it failed to advance compelling interests before the district court, the State seeks to introduce new governmental interests on appeal. *Compare* Order, R. 356, Page ID ## 6927-29 (listing interests asserted by Tennessee below), *with* Tenn. Br. at 40, 48 (advancing new interests). "But because [the State] failed to raise this argument in the district court, [it has] forfeited the argument on appeal." *Grain v. Trinity Health*, 551 F.3d 374, 378 (6th Cir. 2008); *see also Galinis v. Cty. of Branch*, 660 F. App'x 350, 354 (6th Cir. 2016) ("declin[ing] to give [party] a second bite at the apple").[18]

In any event, the State's new interests are unavailing. The new interest in "facilitating and safeguarding the First Amendment rights of its business and property owners"—as opposed, presumably, to those who do not own property—is advanced entirely by assertion, and then bootstrapped into the admittedly compelling interest in a state's "'complying with its constitutional obligations.'" Tenn. Br. at 40

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note that the Court was not necessarily striking down laws requiring "marking hazards on private property" or "street numbers associated with private houses," is—if the pun can be pardoned—a very thin reed.

[18] Likewise, new arguments raised by the United States are not properly presented. Had the Federal Government sought "to raise the issue properly in this case, it could have intervened instead of appearing as amicus." *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982); *see also Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 205 n.3 (1st Cir. 1999) ("Amici cannot interject into a case issues which the litigants have chosen to ignore."); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 452 (5th Cir. 1973) (noting the government, as amicus, "cannot control the course of this litigation").

(quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)). This, of course, begs the question. The State is here precisely because the district court found that it was *not* complying with its constitutional obligations.

Regardless, the State's decision to explicitly frame its law as privileging the speech of business owners and organizations—as opposed to all other Americans—carries with it different constitutional concerns.[19] Concomitantly, the State's second new introduced interest, that its regulations "further[] a uniquely effective means of communication," has things precisely backwards. Tenn. Br. at 48. One does not "further" speech by squelching it. Moreover, this interest in fact supports Mr. Thomas's point: it is highly improper for the State to restrict, on a content basis, access to "a uniquely effective means of communication." *Id*.

The State cannot cure its failure to provide a compelling governmental interest below by introducing new, constitutionally problematic, governmental interests here.

[19] Similar reasoning strikes against considering as compelling, even if it would be proper to consider the point, the United States's argument that there is a compelling governmental interest in privileging "property owners interested in providing information about their property." U.S. Br. at 16. Property owners, at least in modern times, do not have inherently broader constitutional protections than non-property owners.

2. The Act fails the narrow tailoring requirement.

Even assuming that aesthetics and traffic safety could be compelling interests, the State has failed to "prove that the [Act] is narrowly tailored to achieve" those interests. *Reed*, 135 S. Ct. at 2231 (internal quotation marks omitted). In particular, the State has failed to demonstrate the Act is narrowly tailored in exempting on-premise speech, as well as directional signs, while regulating and restricting off-premise noncommercial speech.[20] *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (holding that, while the government "certainly" had an interest in raising revenue, it had to demonstrate a relationship to the distinction at issue); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 (1983) (same); *Ackerley*, 88 F.3d at 38 (noting that "the [government] must justify" the distinctions between what it protects and does not); *Solantic*, 410 F.3d at 1267 (noting "problem" in reciting governmental

[20] The State notes that "the [district] court did not separately evaluate" whether Tennessee's exemption for directional and official signs is also a content-based restriction. Tenn. Br. at 19 n.16. While the district court relied solely on the on-premises/off-premises distinction in its final order, its temporary restraining order and preliminary injunction explicitly referenced the directional sign exemption. TRO Order, R. 110, Page ID ## 1454-55; PI Order, R. 163, Page ID ## 2267, 2270. Appellee also raised the content-based nature of that exemption in his briefing on the preliminary injunction. Thomas PI Reply, R. 124, Page ID # 1591. Nonetheless, this Court "may affirm the district court's judgment on any additional or alternative grounds for affirmance asserted by the [prevailing] party." *Lansing Dairy v. Espy*, 39 F.3d 1339, 1355 (6th Cir. 1994).

"interests only at the highest order of abstraction, without ever explaining how they are served…by its content-based exemptions").

a. Privileging commercial speech does not further the State's asserted interests.

The State has failed to show that the distinction between off-premise noncommercial speech, like the sign at issue here, and on-premise commercial speech furthers the State's asserted safety or aesthetics interests. But none of the State's proffered evidence, Order, R. 356, Page ID ## 6932-35, showed that off-premise noncommercial signs are any more distracting or have any greater impact on aesthetics than on-premise commercial signs. *See id*., Page ID # 6937.

Indeed, the opposite seems more likely. As discussed above, the "poorly financed causes" underlying much ideological speech, *John Donnelly*, 639 F.2d at 16, would decrease speakers' ability to put up numerous, large signs with distracting features. On the other hand, the Act allows an owner to "make as many [on-premise] signs as he chooses and he may make them as ostentatious as he chooses," Order, R. 356, Page ID # 6937, a privilege business owners exercise, *id*. at 6937 n.8 (noting "big signs" advertising fireworks, that "are often numerous and flashy").

And looking at the cumulative effects from both types of signs, the State has admitted that it could "further[] its interests by regulating signs containing commercial speech…while leaving the comparatively smaller category of signs containing non-commercial speech unregulated." Tenn. Reconsideration Br., R.

371-2, Page ID # 7176. That is, the State has failed to show that the greater restrictions on off-premise noncommercial signs are justified by more distracting and ugly messages, and it has admitted that those signs in the aggregate do not hinder its interests. That admission is fatal under strict scrutiny.

b. Privileging on-premise noncommercial speech over other ideological speech does not advance the State's asserted interests.

Turning to noncommercial speech—the ideological speech most protected by the First Amendment—the State has failed to show that purely ideological speech is any more distracting or aesthetically displeasing than ideological speech tied in some way to a business or organization. For example, the State has not shown that drivers would be any more distracted or revolted by a sign saying "Valero Honors Its Veterans," which the State allows, than by a sign with the American flag and the Olympic rings, which the State does not. *See* Trial Tr., R. 334, Page ID # 6662:16-18; Order, R. 356, Page ID ## 6924, 6949-50.

Moreover, the State has not shown that any given business owner would be any less likely to use distracting or ugly elements because she ties her business to an ideological message. *See* Order, R. 356, Page ID ## 6949-50. Moreover, if distraction and disagreeableness are not inherent to purely ideological speech, but caused by the choices of a sign owner, then the State should be regulating the use of

the distracting and ugly elements both on- and off-premise speech may use, not restricting the purely ideological speech of the latter altogether.

The State's difficulty justifying the distinction it has drawn between on-premise and off-premise noncommercial speech stems from the universal nature of ideological speech. "An idea, unlike a product, may be viewed as located wherever the idea is expressed." *Southlake*, 112 F.3d at 1118. Thus, it makes little sense to say that a person at one location has more of a right to speak about a public issue than another. And attempting to do so only pushes the State even more deeply into investigating a sign's message and its relationship to activities on the site, while putting speakers at the mercy and whims of individual State officials. *See* Order, R. 356, Page ID ## 6949-50; Chancery Sanctions Order, R. 204-1, Page ID ## 3658, 3668.

And the State has further failed to demonstrate how it furthers its interests with the speaker- and subject-based regulation into which the Act's restrictions devolves. The Supreme Court has held that "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-85. Yet the Act restricts discussion about some topics altogether. For example, it is easier to find a service station to put up a sign about a gasoline tax than it is to find a consulate to put up a sign about peace in the Middle East.

Moreover, given the locations where speech on certain issues can find a home, the Act skews the debate—favoring some viewpoints over others. Utilities can speak about coal-powered electricity, hospitals can speak about abortion, gun stores can speak about gun violence, but homeowners and the vast majority of other interested persons cannot. And the State has done nothing to show that those allowed to speak on these issues would make their messages any prettier or less distracting, or that speech on the issues not restricted by the Act would be more so. Thus, as to noncommercial speech, the distinction between on- and off-premise speech is not narrowly tailored to the State's asserted interests.

c. The Act is underinclusive.

The Act also fails narrow tailoring because of its underinclusiveness. As with the ordinance in *Reed*, the Act is "hopelessly underinclusive" because it "allows unlimited proliferation of larger" on-premise signs "while strictly limiting the number, size, and duration" of off-premise signs, even if they were smaller or less intrustive. 135 S. Ct. at 2231; *see also Wagner*, 675 F. App'x at 607. Here, "a small sign with muted colors that says 'Knowledge is Power'…would require a permit and tag, and compliance with the six-hundred-sixty (660)-foot restriction." Order, R. 356, Page ID # 6934. But the Act would exempt from the permit and distance requirements "a large sign" screaming with "loud colors" that states: "This property

is for sale. Right here. This one. The one this sign is on. Look at this sign. Look at this property." *Id.*; *see, e.g. id*. at 6937 n.8 (noting examples of fireworks signs).

Thus, because the Act "leaves appreciable damage to [the State's] supposedly vital interest[s] unprohibited," it "fails strict scrutiny." *Reed*, 135 S. Ct. at 2232 (internal quotation marks omitted).

d. The Act is overinclusive.

Overinclusiveness does not measure whether the Act's on-premise exemption excuses too much speech, but whether the State restricts more speech than necessary to vindicate its interests. And, as the district court pointed out, in regulating even "a small, off-premises sign…that stated, 'Donate Winter Coats at the YMCA,'" Order, R. 356, Page ID # 6939, the Act "unnecessarily circumscribe[s] protected expression." *Republican Party v. White*, 536 U.S. 765, 775 (2002) (internal quotation marks omitted). Thus, the law "does not pass muster under strict scrutiny." *Cahaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015) (holding law overinclusive where it targeted a form of speech even though another was "a far bigger problem").

e. The State's responses are unavailing.

The State responds that it has demonstrated narrow tailoring by showing that it "would be unable to maintain 'effective control' of outdoor advertising" without the Act. Tenn. Br. at 42. This argument is mistaken for several reasons. First, as discussed above, the argument fails because the State must demonstrate an interest

in the distinctions it makes, not in regulation generally. Otherwise, as discussed above regarding the Chancery Court's findings of vindictive enforcement and the example of church signs, the Act's failure to regulate "only with narrow specificity." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967), leaves too much discretion to State officials.

Second, in arguing that it needs to control noncommercial signs like Mr. Thomas's, the State assumes either that it is impossible to draft a billboard act without controlling off-premise noncommercial signs, or that off-premise noncommercial signs alone would result in an explosion of signs. But it has not shown either assumption to be true. Nothing prevents the State from passing a law that eliminates content-based distinctions. Indeed, as discussed above, states and communities like Texas and Indianapolis have already done so. *See also Reed*, 135 S. Ct. at 2232 (noting "ample content-neutral options available to resolve problems with safety and aesthetics," including regulations on "size, building materials, lighting, moving parts, and portability").

Moreover, the State has provided no evidence that allowing noncommercial signs, especially for "poorly financed" ideological causes, *John Donnelly*, 639 F.2d at 16, would result in a proliferation of signs. Indeed, the State has admitted otherwise. *See* Tenn. Reconsideration Br., R. 371-2, Page ID # 7176 (noting that limiting the Act to regulating commercial speech "would result in very little

disruption" because of "the comparatively smaller category of signs containing non-commercial speech"). Thus, it is hard to argue that allowing noncommercial signs would lead to a proliferation of signs that would undermine the Act in general.

Furthermore, the State now argues that the law is narrowly tailored to its newly-raised interest in protecting property owners' rights. As noted above, the State forfeited this argument by not raising it before the district court. But, more than that, the State shows no concern for owners' First Amendment and property rights when they have no businesses or activities on the premises.[21] As discussed above, "noncommercial speech [must be given] a greater degree of protection than commercial speech." *Metromedia*, 453 U.S. at 513. Thus, if the State is going to permit on-premise commercial speech in the name of protecting constitutional rights, it must protect all noncommercial, ideological speech.

Finally, the State argues that the distinction is justified because on-premise signs may be erected only where there is a building—that is, where aesthetic sensitivities have already been injured. Tenn. Br. at 48. But that is an argument for a law that permits any type of sign—whether commercial or noncommercial—once

[21] In its haste, the State seems not to notice that this new interest would raise independent constitutional dangers. To the extent business owners have a state-sanctioned right to speak that others lack, what would a court make of zoning requirements that limit the range of acceptable businesses, and thus messages, the state now seeks to champion?

there is a building on a location. The Act, however, allows only a sign whose content is related in some way to the location.

f. The Act fails least restrictive means analysis.

Even if the State had demonstrated compelling interests in infringing on Mr. Thomas's speech, it still has failed to demonstrate that the Act's on-premise/off-premise distinction is the least restrictive means of furthering those interests. For a content-based restriction to survive a First Amendment challenge under strict scrutiny, "it must be the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530. Thus, so long as Mr. Thomas can point to a less-stringent method of advancing a compelling interest, the statute must be struck. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

The least restrictive means test is not, as the State suggests, simply a hunt for an alternative rule that allows the State to regulate precisely the same quantity of speech it did before.[22] Rather, if a rule exists that would still be effective in furthering

[22] Similarly, Amicus United States oddly suggests that the Act survives least restrictive means review because it prohibits signs that "would undercut the government's stated interests" while exempting the government's preferred categories of speech. U.S. Br. at 15-16. That is no less a content-based restriction, and no better proven, than the State's version of the same argument.

the government's interests—even if not perfectly so—without infringing on the protected speech at issue, this test requires that the government choose that rule.[23]

The district court concluded that there are five less restrictive means by which the State could serve its stated interests: regulating only commercial speech; regulating sign size; spacing restrictions; minimum distance requirements; and restricting presentation characteristics. Order, R. 356, Page ID ## 6945-47, 6950-51. If any of these less restrictive means, or any of the means rejected by the district court, advance the traffic safety and highway aesthetic interests proffered by the State, then the Act is not narrowly tailored.

Exempting all noncommercial speech, in addition to the existing exemption for on-premise commercial speech, is the best alternative.[24] Such an exemption would avoid any content-based decisions with regard to noncommercial speech, as well as any narrowing of subjects and viewpoints in public debates. It would

[23] For example, the Federal Government once sought to advance its governmental interest in upholding "the integrity of the military awards system" by criminalizing all lies regarding service medals or awards. *Alvarez*, 567 U.S. at 729. But although such a system may have prevented some people from lying about their service histories, a flat ban on a whole category of speech was held unconstitutional because it was not the least-restrictive-means of doing so, even though the alternatives may have been less efficient. *Id*.

[24] Contrary to the State's claims, Tenn. Br. at 53, the district court did not reject this alternative. It stated that the alternative "*may* be less effective[,] but not ineffective." Order, R. 356, Page ID # 6945 (emphasis supplied).

foreclose the opportunities for vindictive enforcement created by the content evaluations the Act requires. And because it would avoid further size and presentation characteristics restrictions, it would leave the on-premise commercial signs free from what the State sees as a "fatal flaw": imposing "*more* restrictive" requirements. Tenn. Br. at 51 (emphasis in original). Removing restrictions on noncommercial speech is *inherently* less restrictive than the Act, as "[t]he Constitution…accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980); *see also United States v. Williams*, 553 U.S. 285, 298 (2008) (describing "commercial speech" as "less privileged"). At the same time, as the State admits, exempting noncommercial signs would allow the State to "continue furthering its interests," in part because noncommercial signs are a "comparatively smaller category of signs." Tenn. Reconsideration Br., R. 371-2, Page ID # 7176.

Regardless, it is the State's burden to prove that this alternative would in no way further its interests, and it has not done so. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 797 (3rd ed. 2006) ("The government's burden when

there is an infringement of a fundamental right is to prove that no other alternative, less intrusive of the right, can work.").[25]

The State objects to the other alternatives because they would subject all signs, including "on-premises signs[,] to the same regulations," regardless of content. Tenn. Br. at 51 (emphasis removed). That is precisely the point. As *Reed* established, "[n]ot all distinctions are subject to strict scrutiny, only *content-based* ones are." 135 S. Ct. at 2232. That is, the Court considers content-based distinctions to be a greater evil, constitutionally speaking, than content-neutral ones. Accordingly, restrictions that turn on a message-neutral distinction, while still serving the same traffic safety and aesthetic interests proffered by the State, *must be* a less restrictive means of furthering those interests.

The State also claims that these alternatives are ineffective because it is "the existence of the sign itself," not sign size, that affects "distraction and aesthetics." Tenn. Br. at 52. Not only does the State's position here defy its trial strategy[26] and

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[25] The State worries this alternative might be content-based. *See* Tenn. Br. at 54-55. As *Metromedia* and all the post-*Reed* cases cited by the State recognize, however, such a distinction is permissible because of the lesser protection accorded to commercial speech.

The State also objects to the perceived enforcement costs. As the district court recognized, however, those costs would be little more than the State faces under the current regime in monitoring for off-premise signs. Order, R. 356, Page ID # 6945.

[26] On direct examination, for instance, Ms. Shawn Bible testified that the "four main things" regulated by the Billboard Act "are the spacing of the signs, the zoning

common sense, it is grounded in nothing more than mere assertion, and this Court may never—let alone under strict scrutiny—consider "mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

Because "the Government seeks to regulate protected speech" in a manner which is not "the 'least restrictive means among available, effective alternatives,'" the Act fails strict scrutiny. *Alvarez*, 567 U.S. at 729 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

3. If intermediate scrutiny applies, the Court ought to reconsider *Wheeler*.

Even under intermediate scrutiny, the State still shoulders the burden of demonstrating that its statute is closely tailored—such scrutiny "demand[s] a close fit"—to avoid "'sacrific[ing] speech for efficiency.'" *McCullen*, 134 S. Ct. at 2534 (quoting *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988)).

Thus, the government must demonstrate that the Act does not, even as a time, place, or manner restriction, "burden substantially more speech than is necessary."

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where the signs are located, the size of the signs[,] and the lighting." Trial Tr., R. 334, Page ID # 6633-34. If these "four main things" are now irrelevant to the regulation of billboard signage in Tennessee, as the State now professes, that is another new position the government has taken on appeal. Additionally, the State also introduced a number of photographs of billboards and other signs, both before and after the adoption of the Billboard Act—which would be an odd trial strategy if sign placement and appearance were irrelevant.

Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). Here, the Act fails to do so, because "it cannot be assumed that 'alternative channels' are available." *Metromedia*, 453 U.S. at 516. Many speakers "rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." *Id*. Indeed, while alternatives for messages like Mr. Thomas's theoretically exist,

> in practice certain products are not marketed through leaflets, sound trucks, demonstrations, or the like. [Other] options…involve more cost and less autonomy then signs,…and may be less effective media for communicating the message that is conveyed by a sign. The alternatives, then, are far from satisfactory.

Id. at 516 (internal quotation marks omitted) (internal alterations removed).

The Act may limit a sign like Mr. Thomas's to a handful of locations in the State—where Olympic athletes might chance to train. Similarly, in states limited to one or two abortion clinics, the Act could cut off almost all signs advocating a pro-choice message. The Act can hardly claim to make adequate alternative channels available for ideological noncommercial speech.

That ought to be the end of the analysis, particularly because the Supreme Court overwhelmingly applies time, place, and manner review to laws restricting speech on public property or in other public fora. *See, e.g.*, *Ward*, 491 U.S. at 790 (bandstand on public property); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (camping as part of demonstrations on public property); *Members*

of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984) (signs and leaflets placed on public property); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 642 (1981) (distributing literature at a state fair); *but see Metromedia*, 453 U.S. at 516 (without addressing public/private property issue, rejecting application of time, place, and manner restrictions to billboards because adequate alternatives not available to parties depending on billboards to share their messages).

Accordingly, under intermediate scrutiny, the Government should only be permitted to restrict speech on public property, and only where individuals and groups have adequate opportunities to express similar speech elsewhere. Therefore, if the Court decides intermediate scrutiny applies, Mr. Thomas reserves the right to request *en banc* review of *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), or to seek *certiorari*.

CONCLUSION

The Act "may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" *Reed*, 135 S. Ct.

at 2231 (quoting *City of Ladue* v. *Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)). For the reasons given above, this Court should affirm the district court.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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ADDENDUM

Designation of Court Documents

Thomas v. Schroer, No. 2:13-cv-02987-JPM-cgc (W.D. Tenn.)

Docket Entry No.	Description	Page ID #
R. 1	Plaintiff's Complaint	1-20
R. 45	Plaintiff's Second Amended Complaint	558-582
R. 46-1	Tenn. Dep't of Transportation Rules	587-620
R. 46-6	Def. Memorandum in Support of Motion for Partial Dismissal of Second Amended Complaint	714-734
R. 110	Order Granting Plaintiff's Motion for Emergency Temporary Restraining Order	1447-1464
R. 118	Response in Opposition to Plaintiff's Motion for Preliminary Injunction	1482-1499
R. 121	Testimony of Shawn Bible, June 18, 2015	1509-1572
R. 124	Reply Brief of Plaintiff in Support of Motion for Injunction	1577-1609
R. 163	Order Granting Preliminary Injunction	2259-2283
R. 170	Amended Order Granting in Part and Denying in Part Motion for Partial Dismissal of Second Amended Complaint	2779-2824
R. 204-1	Chancery Order on Show Cause Hearing, Finding TDOT Committed Civil of Contempt of Court, Ordering Sanctions and Other Relief	3657-3687
R. 262	Plaintiff's Offer of Proof	4308-4352
R. 289-2	Chancery Order Denying Tennessee's Request for a Declaratory Judgment	5728-5733
R. 334	Trial Tr., Sept. 21, 2016	6569-6715
R. 356	Order and Memorandum Finding Billboard Act an Unconstitutional, Content-Based Regulation of Speech	6909-6952
R. 371-2	Memorandum in Support of Rule 54(b) Motion to Reconsider	7173-7178
R. 381	Notice of Appeal	7603-7604

Tenn. Code Ann. § 54-21-103

Restrictions on outdoor advertising on interstate and primary highways.

No outdoor advertising shall be erected or maintained within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems in this state except the following:

(1) Directional or other official signs and notices including, but not limited to, signs and notices pertaining to natural wonders, scenic and historical attractions that are authorized or required by law;

(2) Signs, displays and devices advertising the sale or lease of property on which they are located;

(3) Signs, displays and devices advertising activities conducted on the property on which they are located;

(4) Signs, displays and devices located in areas that are zoned industrial or commercial under authority of law and whose size, lighting and spacing are consistent with customary use as determined by agreement between the state and the secretary of transportation of the United States; and

(5) Signs, displays and devices located in unzoned commercial or industrial areas as may be determined by agreement between the state

and the secretary of transportation of the United States and subject to regulations promulgated by the commissioner.

Tenn. Code Ann. § 54-21-104

Permits and tags -- Fees.

(a) Unless otherwise provided in this chapter, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used, or maintained, any outdoor advertising within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems without first obtaining from the commissioner a permit and tag.

(b)

(1) Permits and tags shall not be issued until applications are made in accordance with and on forms provided by the commissioner and accompanied by payment of a fee of two hundred dollars ($200) for each permit and tag requested. This fee shall represent payment for the required tag and for the first annual permit and shall not be subject to return upon rejection of any application. The commissioner shall use best efforts to process an application for a permit, in accordance with the rules of the department of transportation, within no greater than one hundred and eighty (180) days after a completed application is received. An application for an addendum to an existing permit requesting authorization to upgrade an existing outdoor advertising device to a

changeable message sign with a digital display, as provided in § 54-21-122, shall also be accompanied by payment of a fee of two hundred dollars ($200), which shall not be subject to return upon rejection of the application. No outdoor advertising device with a digital display lawfully permitted, erected and in operation prior to June 1, 2008, shall be required to apply for such an addendum or to pay the fee.

(2) For the purposes of issuing permits and regulating outdoor advertising devices in accordance with this chapter, the location of a permitted device shall be determined by the location of the supporting monopole, or by the location of the supporting pole nearest to the highway in the case of a device erected on multiple supporting poles; provided, however, that where a permitted multiple-pole device may be lawfully reconstructed, the replacement of the supporting poles with a monopole shall not be considered a change of location requiring a new permit if:

(A) The permittee gives advance notice to, and receives the prior approval of, the department before reconstructing the device;

(B) The monopole is erected within the line segment defined by the previous supporting poles; and

(C) The location of the monopole meets applicable spacing requirements.

(c)

(1) All tags issued shall be permanent; however, permits shall be renewed annually between November 1 and December 31, and the commissioner shall charge the sum of forty dollars ($40.00) for the year 2008, fifty dollars ($50.00) for 2009, sixty dollars ($60.00) for 2010, and seventy dollars ($70.00) for 2011 and thereafter for annual renewal of each permit.

(2) In the event that a permit has not been renewed by December 31 for the following year as required by subdivision (c)(1), the permit shall not be considered void until the commissioner has given the permit holder notice of the failure to renew and the opportunity to correct the unlawfulness, as provided in § 54-21-105(b). The failure to renew may be remedied by submitting a late renewal form and paying the annual permit renewal fee together with a late fee, in the total amount of two hundred dollars ($200), within thirty (30) days of receipt of the notice. If a permit holder fails to renew the permit within this thirty-day notice period, then the permit shall be void and the outdoor advertising device

shall be considered unlawful and subject to removal as further provided in § 54-21-105. The notice given by the commissioner shall include the requirements for renewal and consequences of failure to renew as provided by this subdivision (c)(2).

(d) For each permit issued, the commissioner shall deliver to the applicant a serially numbered permit tag, which shall be attached on the outdoor advertising in a manner as to be visible from the main traveled way of the interstate or primary highway. If more than one (1) side of any structure is used for outdoor advertising, a permit and tag shall be required for each side. Any outdoor advertising sculptured in the round shall be considered to have three (3) sides.

(e) For each replacement tag issued, the commissioner shall deliver to the applicant a serially numbered permit tag. The cost of this replacement tag shall be twenty-five dollars ($25.00), payable at the time of request.

(f) Whenever it becomes necessary to transfer a permit from one (1) permit holder to another, the department will charge a ten-dollar ($10.00) transfer fee to the permit holder of record.

Tenn. Code Ann. § 54-21-107

Exemptions.

(a) The following outdoor advertising are exempt from § 54-21-104:

(1) Those advertising activities conducted on the property on which they are located;

(2) Those advertising the sale or lease of property on which they are located; and

(3) Those that are official as established under authority of any statute or regulation promulgated with respect to the outdoor advertising.

(b) Any advertising structure existing along the parkway system by and for the sole benefit of an educational, religious or charitable organization shall be exempt from the payment of fees for permits or tags under § 54-21-104.

Rule of Tennessee Department of Transportation Maintenance Division, Control of Outdoor Advertising, 1680-02-03-.06 (2008)

ON-PREMISE SIGNS

(1) General

Signs advertising the sale or lease of the property on which they are located and signs advertising activities conducted on the property upon which they are located are called "on-premise" signs. These are not required to be permitted as discussed in § 1680-2-3-.03, 5. and 6., but are subject to the criteria listed below when determining whether a sign is an on-premise sign.

(2) Characteristics of an On-Premise Sign

A sign will be considered to be an on-premise sign if it meets the following requirements.

(a) Premise - The sign must be located on the same premises as the activity or property advertised.

(b) Purpose - The sign must have as its purpose (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising.

(3) Premises Test

The following criteria shall be used in determining whether a device is located on the same premises as the activity or property advertised:

(a) The premises on which an activity is conducted is determined by physical facts rather than property lines. Generally, it is defined as the land occupied by the buildings or other physical uses essential to the activity including such areas as are arranged and designed to be used in connection with such buildings or uses.

(b) The following will not be considered to be a part of the premises on which the activity is conducted and any signs located on such land will be considered "off-premise" advertising.

1. Any land which is not used as an integral part of the principle activity. This would include but is not limited to, land which is separated from the activity, by a roadway, highway, or other obstructions and not used by the activity and extensive undeveloped highway frontage contiguous to the land actually used by a commercial facility even though it might be under the same ownership.

2. Any land which is used for, or devoted to, a separate purpose unrelated to the advertised activity. For example, land adjacent to or adjoining a service station, but devoted to raising of crops, residence, or farmstead uses or other than commercial or industrial uses having no relationship to the service station

activity would not be part of the premises of the service station, even though under the same ownership.

3. Any land which is:

(i) at some distance from the principle activity, and

(ii) in closer proximity to the highway than the principle activity, and

(iii) developed or used only in the area of the sign site or between the sign site and the principle activity, and

(iv) occupied solely by structures or uses which are only incidental to the principle activity, and which serve no reasonable or integrated purpose related to the activity other than to attempt to qualify the land for signing purposes. Generally, these will be facilities such as picnic, playground, or camping areas, dog kennels, golf driving ranges, skeet ranges, common or private roadways or easements, walking paths, fences, and sign maintenance sheds.

(c) Narrow Strips

Where the sign site is located at or near the end of a narrow strip contiguous to the advertised activity, the sign site shall not be

considered part of the premises on which the activity being advertised is conducted. A narrow strip shall include any configurations of land which is such that it cannot be put to any reasonable use related to the activity other than for signing purposes. In no event shall a sign site be considered part of the premises on which the advertised activity is conducted if it is located upon a narrow strip of land:

1. Which is non-building land, such as swamp land, marsh land, or other wet land, or

2. Which is a common or private roadway, or

3. Held by easement or other lesser interest than the premises where the advertised activity is located.

Note: On-premise advertising may extend to fifty (50) feet from the principle activity as set forth above unless the area extends across a roadway.

(4) Purpose Test

The following criteria shall be used for determining whether a sign has as its purpose (1) the identification of the activity located on the premises or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the business of outdoor advertising.

(a) General

1. Any sign which consists solely of the name of the establishment is an on-premise sign.

2. A sign which identifies the establishment's principle or accessory product or services offered on the premises is an on-premise sign.

3. An example of an accessory product would be a brand of tires offered for sale at a service station.

(b) Business of Outdoor Advertising

1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle activity, it shall be considered the business of outdoor advertising and not an on-premise sign. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.

2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is

not an on-premise sign. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating "Skeet Range Here," or "Dog Kennels Here." The on-premise activity would only be the skeet range or dog kennels.

(c) Sale or Lease Signs

A sale or lease sign which also advertises any product or service not located upon and related to the business of selling or leasing the land on which the sign is located is not an on-premise sign. An example of this would be a typical billboard which states "THIS PROPERTY FOR SALE --- SMITHS MOTEL; 500 ROOMS, AIR CONDITIONED, TURN RIGHT 3 BLOCKS AT MA IN STREET."