No. 17-6238

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR.,
Plaintiff-Appellee

v.

JOHN SCHROER, Commissioner of Tennessee Department of Transportation,
Defendant-Appellant

and

JOHN H. REINBOLD; PATTI C. BOWLAN; ROBERT SHELBY; SHAWN BIBLE; CONNIE GILLIAM,
Defendants

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

BRIEF OF APPELLANT

HERBERT H. SLATERY III
Attorney General and Reporter
of the State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Special Assistant to the Solicitor
General and the Attorney General
Counsel of Record

JONATHAN DAVID SHAUB
Assistant Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Because this appeal presents an important issue regarding the constitutionality of Tennessee's regulatory scheme for outdoor advertising under the U.S. Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), appellant respectfully requests that this Court grant oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On October 6, 2017, the district court entered judgment. Judgment, R. 377, PageID #7416. On October 19, 2017, defendant timely filed a notice of appeal. Notice of Appeal, R. 381, PageID #7603. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in holding that Tennessee's Billboard Regulation and Control Act of 1972, Tenn. Code Ann. § 54-21-101 *et seq.*, violates the First Amendment as applied to plaintiff's noncommercial speech.

A. Whether the Billboard Act's exception for on-premises signs is a content-based regulation of speech that warrants strict scrutiny under the First Amendment.

B. Whether the Billboard Act satisfies the applicable level of scrutiny.

STATEMENT OF THE CASE

For more than fifty years, federal law has required States to regulate outdoor advertising on areas adjacent to federally funded highways or else lose a significant percentage of their federal highway funding. To satisfy those requirements, Tennessee, like other States, enacted a billboard law that generally prohibits outdoor advertising on areas adjacent to interstate or primary highways, subject to certain

exceptions. Tennessee's Billboard Act allows a limited number of signs to be erected in commercial and industrial areas, provided a permit is first obtained from the Tennessee Department of Transportation ("TDOT"). "On-premises" signs—those advertising activities on the property on which the signs are located or the sale or lease of that property—are excepted from the Act's general prohibition on outdoor advertising and its permitting requirement.

Plaintiff is in the business of outdoor advertising and owns a number of legally permitted billboards. He applied for a permit to build another billboard on property adjacent to Interstate 40 in Memphis, Tennessee. The State denied the application because the proposed billboard did not comply with the spacing requirements for signs located in commercial and industrial areas. Plaintiff erected the billboard anyway, changed its content to noncommercial messages after the State initiated proceedings to remove the billboard, and brought suit in federal court alleging, among other things, that the State's attempts to remove his billboard violate his First Amendment rights because the Billboard Act's exception for on-premises signs is content based under the U.S. Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and does not satisfy strict scrutiny.

A. Statutory Background

1. Federal Highway Beautification Act

In 1965, Congress enacted the Federal Highway Beautification Act "to protect the public investment in [the interstate and primary highway system], to promote the safety and recreational value of public travel, and to preserve natural beauty." Pub. L. No. 89-285, § 101, 79 Stat. 1028 (1965) (codified at 23 U.S.C. § 131). Congress found that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to [such highways] should be controlled" to further those interests. 23 U.S.C. § 131(a). The Act conditions ten percent of a State's federal highway funds[1] on the State's "effective control" of "outdoor advertising signs, displays, and devices" that are located within 660 feet of the nearest edge of the right-of-way of interstate or primary highways and visible from the roadway. *Id.* § 131(b).[2]

To maintain "effective control" within the meaning of the Act, a State generally must limit outdoor advertising within the regulated area to the following

[1] Approximately $80 million of Tennessee's annual federal highway funding is contingent on compliance with the federal Act. SJ Order, R. 233, PageID #4173.

[2] Congress later extended the federal Act's reach to cover outdoor advertising located in nonurban areas more than 660 feet from such highways but erected "with the purpose of their message being read" from the roadway. *See* Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, § 109(a), 88 Stat. 2281, 2284 (1975) (amending 23 U.S.C. § 131(b)).

kinds of signs: (1) "directional and official signs and notices"; (2) "signs, displays, and devices advertising the sale or lease of property upon which they are located"; (3) "signs, displays, and devices . . . advertising activities conducted on the property on which they are located"; (4) certain "landmark" signs that were lawfully in existence when the Act became effective; and (5) "signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on" covered highways. *Id.* § 131(c). In areas designated by the State as industrial or commercial, however, the State may also allow "signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary." *Id.* § 131(d).[3]

All fifty States have enacted laws regulating outdoor advertising that comply with the conditions prescribed by the federal Act. *See* Brief for the United States as Amicus Curiae at 2, *Reed*, 135 S. Ct. 2218, 2014 WL 4726504, at *2. Most, if not all, of these state laws contain exceptions that parallel those found in the federal Act, including exceptions for on-premises signs. *See, e.g.*, Ky. Rev. Stat. Ann. § 177.841(2); Mich. Comp. Laws § 252.313; Ohio Rev. Code Ann. § 5516.02.

[3] The Act does not preclude States from imposing limits stricter than those required to maintain "effective control." *See* 23 U.S.C. § 131(k); 23 C.F.R. § 750.110.

2. Tennessee's Billboard Act

To comply with the conditions imposed by the federal Act, Tennessee enacted the Billboard Regulation and Control Act of 1972 ("Billboard Act"). *See* 1972 Tenn. Pub. Acts, ch. 655 (codified at Tenn. Code Ann. § 54-21-101 *et seq.*). Consistent with the requirements of the federal Act, Tennessee's Billboard Act applies to outdoor advertising[4] located within 660 feet of the nearest edge of the right-of-way of interstate or primary highways and visible from the roadway. Tenn. Code Ann. § 54-21-103.[5]

The Billboard Act generally prohibits outdoor advertising within 660 feet of the edge of the right-of-way, but, consistent with the federal Act, excepts several categories of signs, including "[d]irectional or other official signs and notices"; on-premises signs advertising either "the sale or lease of property on which they are located" or "activities conducted on [that] property"; and signs in zoned or unzoned commercial or industrial areas "whose size, lighting and spacing are consistent with

[4] The Act defines "outdoor advertising" as "any outdoor sign, display, device, bulletin, figure, painting, drawing, message, placard, poster, billboard or other thing that is used to advertise or inform." Tenn. Code Ann. § 54-21-102(12).

[5] Like the federal Act, Tennessee's Billboard Act was later extended to cover outdoor advertising located more than 660 feet from the edge of the right-of-way but "with the purpose of [its] message being read" from the roadway. Tenn. Code Ann. § 54-21-109(a).

customary use as determined by agreement" between the State and the federal government. Tenn. Code Ann. § 54-21-103(1)-(5).[6]

The State and the federal government entered the agreement referenced in § 54-21-103 in 1971. *See* Agreement, R. 166-2, Ex. B, PageID #2608-16.[7] That agreement states that Tennessee desires to "implement and carry out" the federal policy to "protect the public investment in the Interstate and Federal-aid primary highways, to promote the safety and recreational value of public travel and to preserve natural beauty." *Id.*, PageID #2608-09. The "purpose of [the] agreement," moreover, is to "promote the reasonable, orderly and effective display of outdoor advertising" while remaining consistent with that federal policy. *Id.*, PageID #2608.

The Billboard Act requires anyone wishing to erect outdoor advertising within the regulated areas to first obtain a "permit and tag" from TDOT. Tenn. Code Ann. § 54-21-104(a). But several categories of signs are exempt from the permit and tag requirement, including the same on-premises signs that are excepted from the Billboard Act's general prohibition on outdoor advertising. *See* Tenn. Code Ann. § 54-21-107(a)(1)-(2).

---

[6] Outdoor advertising that was lawfully in existence when the Billboard Act became effective may also remain in place and in use until "compensation for removal has been made." Tenn. Comp. R. & Regs. 1680-02-03-.04; *see also* Tenn. Code Ann. § 54-21-108.

[7] The State and the federal government entered a supplemental agreement in 1984. *See* Supp. Agreement, R. 166-2, Ex. C, PageID #2617-19.

To be eligible for a permit, a sign must comply with the size, spacing, and lighting requirements established in the federal-state agreement and reflected in regulations promulgated by TDOT. *See* Tenn. Comp. R. & Regs. 1680-02-03-.03. Under those requirements, signs on the same side of the roadway must be spaced at least 1000 feet apart on interstate highways and at least 500 feet apart on primary highways. *See* Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(4)(i)-(ii).[8]

TDOT's regulations provide further guidance regarding the signs that are excepted from the Billboard Act's general prohibition or exempt from the permitting requirement.[9] Of particular relevance here, to be considered "on-premises," a sign must be "located on the same premises as the activity or property advertised" and "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." Tenn. Comp. R. & Regs. 1680-02-03-.06(2). A number of factors are considered in determining whether the "premises" and "purpose" requirements are met. *See id.* 1680-02-03-.06(3)-(4). As for the "purpose" requirement, the regulations provide that a "sign which consists solely of

[8] On-premises signs are not counted for purposes of determining compliance with the spacing requirements. *See* Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(4)(iv)(I).

[9] TDOT's regulations are consistent with regulations promulgated by the Federal Highway Administration. *See* 23 C.F.R. §§ 750.151-.155, 750.709.

the name of the establishment" or "which identifies the establishment's princip[al] or accessory product or services offered on the premises" will be considered an on-premises sign. *Id.* 1680-02-03-.06(4)(a). A sign will be considered off-premises, however, when it "brings rental income to the property owner," "consists principally of brand name or trade name advertising," or advertises a product or service that is "only incidental to the princip[al] activity." *Id.* 1680-02-03-.06(4)(b).

B. Factual Background

1. Tennessee's Interests in Regulating Billboards

The federal-state agreement that was entered the year before the Billboard Act's passage enumerates three "purpose[s]" of Tennessee's regulation of outdoor advertising: "[1] to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the National policy to protect the public investment in the Interstate and Federal-aid primary highways, [2] to promote the safety and recreational value of public travel and [3] to preserve natural beauty." Agreement, R. 166-2, Ex. B., PageID #2608-2609.

Public Safety: Paramount among the State's interests in enacting and enforcing the Billboard Act is the safety of drivers and passengers on Tennessee's interstates and highways. Trial Tr. I, R. 332, PageID #6284-86, 6289-91, 6299-6300, 6343, 6346. Distracted driving, particularly at high speeds, is the top safety concern in the country. Trial Tr. II, R. 333, PageID #6458-59, 6470-72. Indeed, the

risk of a crash increases 3.7 times when people are looking at external objects such as billboards. *Id.*, PageID #6544-46. Even traditional billboards are adept at capturing drivers' attention with provocative and prominent displays, and digital billboards present an even greater risk of distraction. *Id.*, PageID #6445-46; Trial Tr. III, R. 334, PageID #6575-76.

If no limits were imposed on outdoor advertising along interstates and highways, billboards would proliferate, increasing distractions for drivers and associated accidents. Trial Tr. I, R. 332, PageID #6299; Trial Tr. II, R. 333, PageID #6484-89; Trial Tr. III, R. 334, PageID #6575-76, 6646-47. A proliferation of billboards could also prevent drivers from seeing and appreciating warning signs and other safety related signs that the State erects to assist drivers. Trial Tr. I, R. 332, PageID #6286-87; Trial Tr. III, R. 334, PageID #6575-76. The presence of too much information along the roadway could also lead to congestion, which increases the risk of rear-end crashes. Trial Tr. I, R. 332, PageID #6330-31. Moreover, billboards themselves are physical structures that can pose dangers to drivers and undermine the physical design of the roadways. Trial Tr. I, R. 332, PageID #6285-89, 6296.

Aesthetics: Maintaining the State's natural beauty and the recreational value of travel by ensuring that outdoor advertising does not mar the myriad scenic vistas of the highway system is one of the original purposes of the federal Act and remains vitally important to the State. Agreement, R. 166-2, PageID #2608-09; Trial Tr. I,

R. 332, PageID #6348-49; Trial Tr. II, R. 333, PageID #6440-42; Trial Tr. III, R. 334, PageID #6621-22; 6640-43. Over ninety percent of tourists to the State arrive by vehicle, bringing in $17.7 billion of revenue to local businesses and $1.5 billion in local and State taxes. Trial Tr. I, R. 332, PageID #6348-50; Trial Tr. II, R. 333, PageID #6442-46; 6448. The number one reason tourists visit Tennessee is for its scenic beauty. Trial Tr. II, R. 333, PageID #6444. One of TDOT's primary missions is to ensure that tourists driving through Tennessee experience its beauty and want to return. Trial Tr. I, R. 332, PageID #6348-50. More than 5,000 of Tennessee's 15,500 miles of roadway are included in 16 scenic driving tours promoted by the State, and many of those roadways are regulated by the Billboard Act. Trial Tr. II, R. 333, PageID #6440-41, Trial Tr. III, R. 334, PageID #6633, 6640-43.

***Effective Communication and First Amendment Expression*:** Tennessee's regulation of outdoor advertising pursuant to the Billboard Act is also grounded in its interest in "promot[ing] the reasonable, orderly and effective display of outdoor advertising." Agreement R. 166-2, Ex. B, PageID #2608-09. Tourism is a major source of income for the State, and the State thus has an interest in facilitating the communication of information along its roadways to promote local businesses and increase the State's revenue. Trial Tr. I, R. 332, PageID #6348-50. The State also has an obvious interest in safeguarding the constitutional rights of its businesses and property owners, including their First Amendment rights of expression. *See Wheeler*

v. Comm'r of Highways, 822 F.2d 586, 591 (6th Cir. 1987); Resp. to Rule 52 Mot., R. 336, PageID #6740.

2. Plaintiff's Billboards

Plaintiff owns various tracts of real property in Tennessee and is in the business of posting outdoor advertising on billboards he owns. Am. Compl., R. 45, ¶¶ 10-11, PageID #560. In 2006, plaintiff owned as many as thirty legally permitted billboards. State Decisions, R. 164-5, PageID #2380.[10] That year, he applied for permits at additional locations, including sites known as Crossroads Ford, Kate Bond, and Perkins Road in Shelby County. *Id*. Although TDOT denied the requested permits, plaintiff constructed his billboards anyway. *Id.* Plaintiff also constructed billboards without a permit in Fayette County. Am. Compl., R. 45, ¶¶ 49, 86, PageID #568, 576. These unpermitted billboards, and the State's efforts to stop plaintiff from constructing and operating billboards without a permit, form the basis for this lawsuit. Compl., R. 1, PageID #1-20; Am. Compl., R. 45, PageID #558-82.

[10] Copies of some of the numerous state judicial decisions regarding plaintiff's billboards were entered into the record, including as part of the summary judgment briefing. State Decisions, R. 164-5, PageID #2361-453. The two most relevant decisions of the Tennessee Court of Appeals concerning the Crossroads Ford billboard at issue in this case—*State ex rel. Comm'r of Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 592 (Tenn. Ct. App. 2010) and *State ex rel. Dep't of Transp. v. Thomas*, 2014 WL 6992126 (Tenn. Ct. App. Dec. 11, 2014)—are included in that filing.

Only one of plaintiff's unpermitted billboards remains at issue in this appeal: the billboard erected at the Crossroads Ford site, which is an undeveloped tract of land owned by plaintiff and located along Interstate 40 in Memphis. Judgment, R. 377, PageID #7416; PI Tr., R. 150, PageID #2117-18; State Decisions, R. 164-5, PageID #2380. TDOT denied plaintiff's permit application for that site because it did not satisfy the Billboard Act's spacing requirements. State Decisions, R. 164-5, PageID #2380. Undeterred, plaintiff began constructing a billboard on the site in 2007. *Id.*, Page ID #2371-72. In the process of constructing the billboard, plaintiff's contractor "excavated a roadway over a box culvert on the State-owned right-of-way at the Interstate 40/Interstate 240 interchange, without permission to do so" and interfered with the State's drainage easement. *Id*., PageID #2380. And as early as 2009, while the State pursued judicial proceedings in state court to have the Crossroads Ford billboard removed, plaintiff began operating it for commercial advertising despite lacking a permit. *Id.*, PageID #2368.

In January 2011, after the Tennessee Court of Appeals had ruled in the State's favor in the enforcement proceedings, TDOT sent plaintiff a letter demanding that he remove the Crossroads Ford billboard. *Id*. Plaintiff responded that he intended to remove paid commercial advertising from the Crossroads Ford billboard and instead "display his First Amendment Rights of Freedom and Speech . . . from time to time." *Id*. (internal quotation marks omitted). In 2012, plaintiff began displaying

noncommercial messages on the Crossroads Ford billboard,[11] and contested the State's attempts to have it removed through judicial proceedings. Am. Compl., R. 45, ¶¶ 22-25, PageID #563-64. On December 11, 2014, after plaintiff had initiated this case, the Tennessee Court of Appeals again ruled in the State's favor, holding that "[r]egardless of what message is displayed on the Crossroads Ford site billboard, the fact remains that, in the absence of the required permit and tag, [plaintiff] is 'not allowed to erect a billboard. Period.'" *Id*., PageID #2372.[12]

After the Tennessee Supreme Court denied plaintiff's petition for review of that decision, the State sent plaintiff a letter demanding that he comply with the court order to remove his Crossroads Ford billboard. Enforcement Letters, R. 96-1, PageID #1399. About a week later, the State sent another letter to similar effect, attaching a proposed judgment to be issued in the Chancery Court declaring the

[11] For example, the sign displayed an American flag with Olympic rings during the 2012 Olympic Games and a sign referencing the holiday season with a picture of the American flag that fall. Am. Compl., R. 45, ¶¶ 23-24, PageID #563; Billboard Picture, R. 207-2, PageID #3868.

[12] The Court of Appeals held that the state trial court had lacked jurisdiction to consider plaintiff's "somewhat novel First Amendment defense," because he was required to raise it in a petition for judicial review of TDOT's decision denying him a permit for the Crossroads Ford site. State Decisions, R. 164-5, PageID #2372-73.

Crossroads Ford billboard a nuisance pursuant to Tenn. Code Ann. § 54-21-105(a)(2). *Id.*, PageID #1400-03.[13]

C. Procedural Background

On December 17, 2013, during the pendency of his state-court appeal, plaintiff sued the Commissioner of TDOT and other state officials in their official and individual capacities under 42 U.S.C. § 1983.[14] Compl., R. 1, Page ID #1. The operative complaint, filed on October 27, 2014, alleged violations of the First Amendment and the Equal Protection Clause of the U.S. Constitution and violations of the parallel provisions of the Tennessee Constitution and sought declaratory and injunctive relief, as well as damages from the individual defendants. Am. Compl., R. 45, PageID #571-81. All of the alleged violations rested on state officials' actions

[13] The state court proceedings are ongoing. The state trial court has taken no action while the federal case has proceeded. After the district court entered its order in this case holding the Billboard Act unconstitutional, plaintiff filed a motion in the state trial court asking it to enter judgment in his favor and award attorney's fees based on that order. *State ex rel. Comm'r of Dep't of Transp. v. Thomas*, No. CH-07-0454-I (Shelby Ch. Ct. Dec. 18, 2017). A hearing on that motion is set for February 2, 2018.

[14] Plaintiff had previously brought related claims against TDOT, but those claims were dismissed on the basis of sovereign immunity. *See Thomas v. Tenn. Dep't of Transp.*, No. 2:13-cv-02185, 2013 WL 12099086 (W.D. Tenn. Oct. 28, 2013), *aff'd*, 579 Fed. Appx. 331 (6th Cir. 2014).

to enforce the Billboard Act against plaintiff's unpermitted billboards. *Id*., PageID #560-70.

After the district court granted in part the State's motions to dismiss and for summary judgment,[15] plaintiff's only remaining claim was that the State had violated the First Amendment by seeking to remove the Crossroads Ford billboard displaying noncommercial content. Order on Constitutionality, R. 356, PageID #6909, 6913-14. Plaintiff alleged that, because of this noncommercial content, his billboard should be treated in the same manner as on-premises signs, which are exempted from the permitting requirement by Tenn. Code Ann. § 54-21-107(a)(1)-(2). Am. Compl., R. 45, ¶¶ 18, 22-28, 62-66, 97-98, PageID #562-64, 571-72, 579.

On June 24, 2015, at plaintiff's request, TRO Mot., R. 96, PageID #1362-63, the district court issued a temporary restraining order, enjoining the State from removing or seeking to execute any judgments against plaintiff's Crossroads Ford billboard. TRO Order, R. 110, PageID #1447-64. Relying on the Supreme Court's decision in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), the district court concluded that plaintiff was likely to succeed on the merits of his First Amendment claim. *Id*., PageID #1451-56. The court reasoned that the Billboard Act's exceptions were

[15] The court dismissed plaintiff's claims on multiple grounds, including statute of limitations, qualified immunity, quasi-judicial immunity, state sovereign immunity, and failure to state a claim for retaliation. Mot. to Dismiss Order, R. 170, PageID #2823. The court then granted summary judgment to the State on plaintiff's remaining claims. SJ Order, R. 233, PageID #4184.

content based under *Reed* and likely failed to satisfy strict scrutiny. *Id.*, PageID #1454-56. On September 8, 2015, the court converted the TRO to a preliminary injunction. PI Order, R. 163, PageID #2259-83.

After denying cross-motions for summary judgment on plaintiff's Crossroads Ford claim, SJ Order, R. 233, PageID #4182-83, the court empaneled an advisory jury to help determine "two factual issues: (1) whether the State has a compelling interest that is furthered by the [Billboard Act]; and (2) whether the Billboard Act is narrowly tailored to the State's interest," Order on Mot. in Limine, R. 301, PageID #5964. At trial, the State presented witnesses over two days who explained the rationale for and operation of the Billboard Act, the State's maintenance of the interstate highway system, and the interests of the State in enforcing the Act against unpermitted signs such as plaintiff's. Trial Tr. I, II, and III, R. 332-34, Page ID #6257-687; Resp. to Rule 52 Mot., R. 336, PageID #6718. At the conclusion of the trial, the jury ruled in favor of the state officials, concluding that the State "has a compelling interest that is furthered by the Billboard Act" and that "the Billboard Act is narrowly tailored to the State's compelling interest." Jury Verdict Form, R. 329, PageID #6250. After plaintiff filed a motion for judgment as a matter of law, the court requested additional briefing on whether the Billboard Act's distinction between on-premises and off-premises signs was the "least restrictive means" of

accomplishing the State's objectives. Order on Least Restrictive Means, R. 342, PageID #6782-83.

On March 31, 2017, the court entered an order granting plaintiff's motion for judgment as a matter of law and holding the Billboard Act unconstitutional as applied to the noncommercial speech on plaintiff's Crossroads Ford billboard. Order on Constitutionality, R. 356, PageID #6909-10. The Court affirmed its earlier conclusion that "the applicability of the on-premises sign exemption depends on the sign's content," and the distinction "thus is a content-based regulation." *Id.*, PageID #6925 (citing *Reed*, 135 S. Ct. at 2222). Applying strict scrutiny in light of that conclusion, the court held that the State's interests were not compelling "because they are unrelated to the Billboard Act's on-premises/off-premises distinction" and because, "in practice," that distinction "undermines the State's interests." *Id.*, PageID #6934-35.

Even assuming the State's interests were compelling, however, the district court concluded that the on-premises exception is not narrowly tailored to them. *Id.*, PageID #6935. The court reasoned that "the State has not shown how a distinction between on-premises and off-premises signs advances" its interests. *Id.*, PageID #6936. It also concluded that the Act was overinclusive, underinclusive, and not the least restrictive means of advancing the State's interests. *Id.*, PageID #6935-52. The court noted in a footnote that it was "unpersuaded" that the "Tennessee legislature

would have enacted the Billboard Act with[out] the unconstitutional on-premises/off-premises distinction," and declined to "sever the unconstitutional provisions." *Id.*, PageID #6952 n.12.[16]

After additional briefing on remedies, *see* Remedies Briefing Order, R. 357, PageID #6953, the district court held that the only remedy available to plaintiff was an order converting into a permanent injunction the preliminary injunction that prevented the State from proceeding against the Crossroads Ford billboard. Remedies Order, R. 374, PageID #7210. The Court rejected plaintiff's request for broader relief, noting that plaintiff's only remaining claim was an as-applied challenge limited to the noncommercial speech on his Crossroads Ford billboard, not a facial challenge to the Billboard Act. *Id.*, PageID #7202-06. In the same order,

---

[16] The district court at times included in its list of the Billboard Act's allegedly content-based exceptions Tenn. Code Ann. § 54-21-103(1), which provides an exception for "[d]irectional or other official signs." *See, e.g.*, Order on Constitutionality, R. 356, PageID #6911, 6924, 6936. But the court did not separately evaluate whether this exception is content based or so hold; nor did the court evaluate whether that exception survived strict scrutiny. *See id.*, PageID #6924 ("The language of the Billboard Act requires one to assess the sign's content to determine if it is exempt. *Signs that advertise activities conducted or the sale/lease of the property on which they are located* are exempted . . . ." (emphasis added)); *id.*, PageID #6911 (citing Tenn. Code Ann. § 54-21-103(1)-(3) but including in the text only the latter two exceptions); *id.*, PageID #6936 (limiting the strict scrutiny inquiry to the "distinction between on-premises and off-premises signs"). And plaintiff's operative complaint did not challenge that exception. Am. Compl., R. 45, ¶¶ 18, 22-28, 40-41, 62-66, 97-98, PageID #562-64, 567, 571-72, 579. The State therefore understands the district court's constitutional ruling to be limited to the on-premises exception.

the court also denied the State's motion for reconsideration of its severability analysis. *Id.*, PageID #7193-200.

On October 6, 2017, the court entered judgment, permanently enjoining the State and its agents "from removing or seeking removal of [plaintiff's] Crossroads Ford sign" pursuant to the Billboard Act. R. 377, PageID #7416. The State timely appealed. Notice of Appeal, R. 381, PageID #7603.[17]

SUMMARY OF ARGUMENT

The district court's decision rests on a fundamental misreading of the Supreme Court's decision in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), directly contradicts the view of a majority of the Justices in *Reed*, and upends decades of precedent. The Billboard Act, including its longstanding distinction between off-premises and on-premises signs, is a reasonable, content-neutral regulatory scheme of the sort that both this Court and the Supreme Court have upheld as comporting with the First Amendment after applying the applicable intermediate scrutiny. Nothing in *Reed* changes that. But even if the district court were correct to conclude that the on-

[17] Given the tension between the district court's ruling on severability and the narrow, as-applied injunctive relief granted to plaintiff, the State, as a cautionary measure, filed a motion to stay the district court's judgment only to the extent the court intended its judgment "to preclude the State from enforcing the Billboard Act with respect to outdoor advertising *other than* [plaintiff's] Crossroads Ford billboard." Stay Mot. (Nov. 14, 2017), R. 384, PageID #7653. The State did not seek a stay of the judgment enjoining it from taking action against plaintiff's Crossroads Ford billboard. *Id.* The district court has not ruled on that motion.

premises exception is content based and thus subject to strict scrutiny under *Reed*, it misapplied that scrutiny in holding that the distinction did not satisfy that admittedly demanding test.

1. The Billboard Act's distinction between on-premises and off-premises signs is based on a sign's location, not its content. That is why Justice Alito, writing for three of the six Justices who joined the majority opinion in *Reed*, expressly singled out this distinction as one that "would not be content based" under the majority's analysis. 135 S. Ct. at 2233 (Alito, J., concurring). *Reed* held that where restrictions of speech depend "entirely on [its] communicative content," they are content based. *Id.* at 2227 (majority opinion). But the Billboard Act's on-premises exception does not depend on the communicative content of the speech. The same message—whether commercial or noncommercial—may be displayed on some billboards but not others because of the location of the sign. No particular message is disfavored or disadvantaged.

2. As a content-neutral regulation of speech, the Billboard Act, and its on-premises exception, is subject only to intermediate scrutiny. It must be narrowly tailored to substantial government interests and leave open ample alternative channels for effective communication. Binding precedent dictates that the Act and its exception for on-premises signs survive that level of scrutiny.

3. Even if this Court were to conclude, as the district court did, that the on-premises exception is content based and subject to strict scrutiny, the exception satisfies that review. Despite the district court's conclusion to the contrary, binding precedent indicates the State has a compelling interest in safety and in complying with its constitutional obligation to safeguard the First Amendment rights of its businesses and property owners. And the Act is the least restrictive means of advancing those interests effectively. The Act's generally applicable restrictions advance the State's interests in safety and aesthetics. At the same time, the on-premises distinction protects the rights of businesses and property owners to communicate messages that are uniquely related to their property and therefore cannot be as effectively conveyed in any other location, furthering the State's compelling interest in safeguarding their First Amendment rights. The on-premises distinction thus balances the State's compelling interests in the least restrictive way possible, allowing businesses and property owners to communicate through the uniquely effective medium of on-premises signs while providing content-neutral restrictions on off-premises signs in furtherance of its interests in safety and aesthetics.

STANDARD OF REVIEW

In reviewing a district court's decision to grant permanent injunctive relief, this Court reviews the district court's legal conclusions de novo, its factual findings

for clear error, and the scope of injunctive relief for abuse of discretion. *See Int'l Union, UAW v. Kelsey-Hays Co.*, 854 F.3d 862, 865 (6th Cir. 2017). The constitutionality of a state statute, including whether the statute satisfies the applicable level of scrutiny, is a legal question that is reviewed de novo. *See Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT TENNESSEE'S BILLBOARD ACT VIOLATES THE FIRST AMENDMENT AS APPLIED TO PLAINTIFF'S NONCOMMERCIAL SPEECH.

The district court held that Tennessee's Billboard Act is a content-based regulation of speech that failed to satisfy the strict scrutiny applicable to such regulations. The district court was wrong on both scores. The Billboard Act's exception for on-premises signs is not content based and is therefore subject only to intermediate scrutiny. And even if strict scrutiny applies, the on-premises exception is narrowly tailored to achieving the State's compelling interests in promoting safety and safeguarding the constitutional rights of businesses and property owners.

A. The Exception for On-Premises Signs Is Not Content Based.

The district court concluded that, as applied to plaintiff's noncommercial speech, the Billboard Act's exception for on-premises signs is content based under the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

As explained below, however, both Justice Alito's concurring opinion in *Reed* and the reasoning of *Reed*'s majority make clear that the Billboard Act's longstanding and commonplace exception for on-premises signs is content neutral. The on-premises exception hinges on the *location* of the sign, not its content, and therefore must be upheld as a reasonable regulation of the time, place, and manner of communicating through the medium of outdoor advertising.

1. Under *Reed*, a Law Is Content Based If It Draws Distinctions Based on Content or If It Cannot Be Justified Without Reference to Content.

The First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Laws that "target speech based on its communicative content" are therefore "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. The government has "somewhat wider leeway," however, "to regulate features of speech unrelated to its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

In *Reed*, the Court reaffirmed that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. The Court clarified, however, that there are two distinct ways in which a regulation may be content based. *Id.*

First, a law is content based "on its face" if it "draws distinctions based on the message a speaker conveys." *Id.* (internal quotation marks omitted). Second, a law that is "facially content neutral" is content based if it "cannot be 'justified without reference to the content of the regulated speech'" or if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (alterations in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Applying these standards, *Reed* held that the Town of Gilbert's sign code was facially content based because application of its restrictions "depend[ed] entirely on the communicative content of the sign." *Id.* The Town of Gilbert subjected signs to different restrictions depending on whether the signs were classified as temporary directional signs, political signs, or ideological signs. *Id.* Temporary directional signs were those that "convey[ed] the message of directing the public to church or some other qualifying event"; political signs were those with messages "designed to influence the outcome of an election"; and ideological signs were those that "communicat[ed] a message or ideas that d[id] not fit within the [sign] Code's other categories." *Id.* (internal quotation marks omitted). Because "[i]deological messages [were] given more favorable treatment than messages concerning a political candidate, which [were] themselves given more favorable treatment than

messages announcing an assembly of like-minded individuals," the sign code was a "paradigmatic example of content-based discrimination." *Id.* at 2230.

2. Under *Reed*, the Exception for On-Premises Signs Is Not Content Based.

The district court relied almost exclusively on *Reed* in concluding that the Billboard Act's exception for on-premises signs is a content-based regulation of speech that warrants strict scrutiny. Order on Constitutionality, R. 356, PageID #6920-25.[18] But *Reed* in fact requires the opposite conclusion. Both Justice Alito's concurring opinion in *Reed* and the majority's reasoning make clear that the exception for on-premises signs, which hinges on the *location* of a sign and not its content, is content neutral.

Justice Alito's concurring opinion in *Reed* leaves no doubt that the Billboard Act's exception for on-premises signs is not content based under the standard applied by the *Reed* majority. Justice Alito, joined by two of the other Justices who comprised *Reed*'s six-Justice majority, wrote separately to "add a few words of

[18] Indeed, but for the Supreme Court's decision in *Reed*, the district court would have been bound by this Court's decision in *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (6th Cir. 1987), which upheld a similar exception for on-premises signs in Kentucky's Billboard Act as a content-neutral place and manner restriction, *id.* at 589-91. *See also Rzadkowolski v. Vill. of Lake Orion*, 845 F.2d 653, 654-55 (6th Cir. 1988) (relying on *Wheeler* to uphold similar on-premises exception in a municipal sign ordinance). In *Wagner v. City of Garfield Heights*, 675 Fed. Appx. 599 (6th Cir. 2017), this Court recognized that *Reed* had abrogated the "context-dependent inquiry into content neutrality" that it had employed in its prior First Amendment cases, *id.* at 604.

further explanation" regarding the majority opinion. *Id.* at 2233 (Alito, J. concurring). He explained that the "regulations at issue in [*Reed*] [were] replete with content-based distinctions" and therefore had to "satisfy strict scrutiny," but that did not mean "that municipalities are powerless to enact and enforce reasonable sign regulations." *Id.* By way of example, Justice Alito identified "some rules that would not be content based," including "[r]ules distinguishing between on-premises and off-premises signs." *Id.*

In light of Justice Alito's express identification of the distinction between on-premises and off-premises signs as content neutral, *Reed* should not be construed to cast doubt on the content neutrality of that longstanding distinction. *Cf. Act Now to Stop War and End Racism Coal. v. Dist. of Columbia*, 846 F.3d 391, 406 (D.C. Cir. 2017) (relying on Justice Alito's concurring opinion to conclude that event-related signs were not content based), *cert. denied*, 138 S. Ct. 334 (2017). The district court's decision to apply strict scrutiny to the on-premises exception is thus "based on at best a shaky footing, given that at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based and therefore do not trigger strict scrutiny." *Geft Outdoor LLC v. Consol. City of*

Indianapolis and Cnty. of Marion, Ind., 187 F. Supp. 3d 1002, 1017 n.2 (S.D. Ind. 2016) (internal quotation marks omitted).[19]

The district court gave short shrift to Justice Alito's concurring opinion by speculating that he must have been referring not to an on-premises exception like the one at issue here, but rather to a "regulation that defines an off-premises sign as any sign within 500 feet of a building." Order on Constitutionality, R. 356, PageID #6923. That speculation was entirely unfounded. Justice Alito was plainly referring to the venerable on-premises exception that has long been a feature of state and local sign regulation—one that allows signs advertising activities being conducted on the property where the sign is located. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 494 (1981) (plurality opinion) (reviewing sign ordinance containing an exception for "onsite signs," defined as those identifying the premises where they are located or "advertising goods manufactured or produced or services rendered" on those premises);[20] *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1067 (3d Cir. 1994)

[19] The three Justices who concurred only in *Reed*'s judgment would have applied a lower level of scrutiny to distinctions like those in the Billboard Act that pose no risk of suppression of certain ideas or viewpoints. *Reed*, 135 S. Ct. at 2237-38 (Kagan, J., concurring in judgment). Thus, at least six of the nine Justices who decided *Reed*—the three Justices who concurred in the judgment and the three who joined Justice Alito's concurring opinion—would *not* subject the Billboard Act's exception for on-premises signs to strict scrutiny.

[20] In *Metromedia*, the plurality found that San Diego's on-premises exception was a permissible regulation of commercial speech but invalidated the exception because

(Becker, J., joined by Alito, J.) (finding the "exception for signs advertising activities conducted on the premises" not to be "a content-based exception at all"); 23 U.S.C. § 131(c) (conditioning federal funds on the States' limiting signs near highways to those "advertising the sale or lease of property upon which they are located" or "activities conducted on the property on which they are located"). Indeed, the kind of exception contemplated by the district court—one that would distinguish between signs based only on their distance from a building—was listed separately by Justice Alito as yet another example of a regulation that would not be content based. *See Reed*, 135 S. Ct. at 2233 (Alito, J., concurring) (explaining that rules "regulating the locations in which signs may be placed" and "distinguish[ing] between free-standing signs and those attached to buildings" would not be content based). Justice Alito's reference to "[r]ules distinguishing between on-premises and off-premises signs" was meant to encompass precisely the kind of on-premises exception that is at issue here and pervasive in the regulation of outdoor advertising. The district court erred by disregarding his concurring opinion.

Even when the *Reed* majority opinion is considered in isolation from Justice Alito's concurring opinion, it still requires the conclusion that the Billboard Act's

---

it applied only to commercial activities and therefore "afford[ed] a greater degree of protection to commercial than to noncommercial speech." 453 U.S. at 513 (plurality opinion). The Billboard Act's on-premises exception, by contrast, allows signs advertising both commercial and noncommercial activities being conducted on the property. Order on Constitutionality, R. 356, PageID #6913.

exception for on-premises signs is content neutral. The exception for on-premises signs is facially content neutral because the distinction it draws is based on the *location* of the sign, not its content. The exception's justifications and purposes, which are to promote traffic safety and aesthetics and protect the effective communication of businesses and property owners, are likewise content neutral.

The Billboard Act's on-premises exception is facially content neutral because the distinction hinges on a sign's *location*, not its content. Under the on-premises exception, any message may be displayed provided it is displayed on property where an activity related to that message is occurring. A sign that reads "Help End Hunger" would be allowed on property where a soup kitchen operates, but a sign with the very same message would not be allowed on property that is home to an animal shelter. Conversely, a sign bearing the message "Please Spay or Neuter Your Pet" would be allowed on the animal shelter property, but not on the soup kitchen property. Similarly, a sign advertising the sale or lease of a specific property would be allowed if located on the property that is for sale or lease, but not on a different property. As numerous courts have recognized, whether a given sign is allowed under an on-premises exception thus turns not on *what it says*, but rather *where it is located*. *See Rappa*, 18 F.3d at 1067 (the "onsite exception does not preclude any particular message from being voiced in any place; it merely establishes the appropriate relationship between the location and the use of an outdoor sign to

convey a particular message"); *Geft Outdoor*, 187 F. Supp. 3d at 1017 n.2 (the on-premises distinction "primarily relates to the location of the sign, which is a content-neutral factor"). When, as here, enforcement of a law "depends not on what [individuals] say, but simply on where they say it," it is facially content neutral. *McCullen*, 134 S. Ct. at 2531 (internal quotation marks and citation omitted).

Because the on-premises exception distinguishes between signs based on their location, and not their content, it poses no risk that "public discussion of an entire topic" will be prohibited or disfavored. *Reed*, 135 S. Ct. at 2230 (quoting *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). Rather, "the content of onsite noncommercial signs w[ill] be as varied as the noncommercial establishments on whose premises they w[ill] be found." *Rappa*, 18 F.3d at 1067 (quoting Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 Mich. L. Rev. 2482, 2504 (1990)). In that respect, the on-premises exception is easily distinguishable from the distinctions at issue in *Reed* and other content-based distinctions the Supreme Court has invalidated. Those distinctions were constitutionally problematic because they singled out a specific subject matter for disfavored treatment. *See, e.g.*, *Reed*, 135 S. Ct. at 2230 ("Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals.");

Boos v. Barry, 485 U.S. 312, 319 (1988) (invalidating law that "completely prohibited within 500 feet of embassies" only "[o]ne category of speech," that critical of the foreign government); *Carey v. Brown*, 447 U.S. 455, 461 (1980) (invalidating law giving "preferential treatment to the expression of views on one particular subject," that of labor disputes); *Mosley*, 408 U.S. at 95 (invalidating law prohibiting all peaceful picketing other than that "on the subject of a school's labor-management dispute"). The Billboard Act's exception for on-premises signs does not single out any subject matter for prohibition or disfavored treatment; any topic may be discussed as long as it is related to the property on which it is located.

Notwithstanding that the Billboard Act's distinction between on-premises and off-premises signs turns on the location of the sign, the district court found the distinction content based because, in its view, the distinction "requires one to assess the sign's content to determine if it is exempt." Order on Constitutionality, R. 356, PageID #6924. But that reasoning is flawed. To begin with, it is not true as a factual matter that one must necessarily examine the content of a sign to determine if it qualifies for the on-premises exception. Here, for example, it is undisputed that the property on which plaintiff's Crossroads Ford sign is located is undeveloped and that no activities are being conducted there. PI Tr., R. 150, PageID #2117-18. Given that there were no activities of any sort occurring on plaintiff's property, it was unnecessary to examine the content of the sign to determine that it was not

"advertis[ing] activities conducted on the property." Tenn. Code Ann. § 54-21-107(a)(1).

More importantly, *Reed* does not stand for the proposition that a law is content based whenever its application may require a public official to consider the content of a particular message. As several of this Court's sister circuits have explained in opinions issued after *Reed*, whether enforcement of a law requires "inspection of a speaker's message is not dispositive on the question of content neutrality." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir. 2017), *cert. denied*, --- S. Ct. ---, No. 17-431 (Dec. 11, 2017); *see also March v. Mills*, 867 F.3d 46, 61 (1st Cir. 2017) ("*Reed* does not suggest that a provision is content based merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent."), *petition for cert. filed* (No. 17-689) (U.S. Nov. 6, 2017); *Act Now*, 846 F.3d at 404 ("The fact that District officials may look at what a poster says to determine whether it is 'event-related' does not render the District's lamppost rule content-based.").

Reed instead makes clear that the critical question in determining whether a speech restriction is facially content based is whether it "depend[s] *entirely* on the communicative content" of the speech. 135 S. Ct. at 2227 (emphasis added); *see also Boos*, 485 U.S. at 318-19 (invalidating law under which an individual's right to "picket in front of a foreign embassy depend[ed] entirely upon whether their picket

signs are critical of the foreign government or not"); *Ark. Writers' Proj. v. Ragland*, 481 U.S. 221, 229 (1987) (invalidating law under which "a magazine's tax status depend[ed] entirely on its content"); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984) (law was content based because it defined prohibited speech "solely on the basis of the content of the suppressed speech"); *Mosley*, 408 U.S. at 95 (noting that the "operative distinction" in an ordinance that permitted peaceful picketing only on the subject of a school's labor-management dispute was "the message on a picket sign"). Put another way, "[s]elective exclusions" from speech restrictions "may not be based on content alone." *Mosley*, 408 U.S. at 96.

Consistent with that teaching, the First Circuit and D.C. Circuit have upheld distinctions as content neutral when, even though some consideration of the content of the speech may be required, the permissibility of a given message ultimately turns on a content-neutral factor. In *March*, the First Circuit upheld a Maine statute that prohibits "a person from making noise that 'can be heard within a building' when such noise is made" with the "'intent either (1) [t]o jeopardize the health of persons receiving health services within the building; or (2) [t]o interfere with the safe and effective delivery of those services within the building.'" 867 F.3d at 49 (alterations in original) (quoting Me. Rev. Stat. Ann. tit. 5, § 4684-B(2)(D)). The court explained that whether the noise provision applied "d[id] not 'depend entirely'. . . on the 'communicative content' of [the] noise"; instead, "messages [were] restricted

if—but only if—they [were] conveyed with the intent to disrupt health services being provided in the building in which the noise can be heard." *Id.* (quoting *Reed*, 135 S. Ct. at 2227). And in *Act Now*, the D.C. Circuit upheld as content neutral a law requiring event-related signs to be removed from lampposts no later than thirty days after the event had occurred. 846 F.3d at 403-06. "The fact that District officials may look at what a poster says to determine whether it is 'event-related' [did] not render the District's lampost rule content-based" because the permissibility of a given sign hinged on "'whether and when an event is occurring.'" *Id.* at 404-06 (quoting *Reed*, 135 S. Ct. at 2231).

The Billboard Act's exception for on-premises signs is facially content neutral under *Reed* because it does not "depend entirely on the communicative content" of a sign. 135 S. Ct. at 2227. Rather, the "operative distinction" that is drawn by the on-premises exception is between signs that are related to the property on which they are located and those that are not. *Mosley*, 408 U.S. at 95. Whether a given sign is allowed hinges not on the particular message a sign contains, but rather on the relationship between that message and the location where it is displayed. Indeed, the fact that signs displaying the very same content may be treated differently under the on-premises exception, and signs displaying completely different content may be treated the same, makes clear that the distinction between on-premises and off-premises signs is not "based on content alone." *Id.* at 96.

The exception for on-premises signs is also content neutral in its justifications and purposes. *Reed*, 135 S. Ct. at 2227. Under this second inquiry required by *Reed*, even a facially content neutral law will be considered content based if it "cannot be 'justified without reference to the content of the regulated speech'" or if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (quoting *Ward*, 491 U.S. at 791). The district court did not find the justifications and purposes of the Billboard Act to be content based. Nor could it have, because binding precedent holds otherwise. *See Wheeler*, 822 F.2d at 589-91 (finding that Kentucky's Billboard Act, which was enacted to promote traffic safety and aesthetics, was "justified without reference to the content of the regulated speech").

Nor are the justifications for and purposes of the on-premises exception content based. As this Court explained in *Wheeler*, "allowing persons who own or lease property, to have a sign . . . advertising an activity conducted on the property is not favoring one message over another." 822 F.2d at 591. Rather, such an exception "simply recognize[s] that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property." *Id.* (citing *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85 (1997)); *see also Rappa*, 18 F.3d at 1064 ("Allowing such 'context-sensitive' signs while banning others is not discriminating in favor of the content of these signs; rather it is accommodating the special nature

of such signs so that the message they contain have an equal chance to be communicated."). There is no evidence, moreover, that the exception for on-premises signs was enacted for the purpose of discriminating against certain kinds of speech.

Under the Supreme Court's decision in *Reed*, then, the Billboard Act's exception for on-premises signs is content neutral. It is content neutral on its face, because it distinguishes between signs based primarily on their location, and not their content. And it is content neutral in its justifications and purposes, which are to promote traffic safety and aesthetics and protect the context-sensitive speech rights of businesses and property owners.

B. The Billboard Act and Its Exception for On-Premises Signs Satisfies Both Intermediate and Strict Scrutiny.

If this Court agrees that the Billboard Act's exception for on-premises signs is content neutral, then it need only evaluate the law under intermediate scrutiny. The outcome of that analysis is dictated by this Court's decision in *Wheeler*, 822 F.2d at 594-96, which upheld Kentucky's materially indistinguishable Billboard Act under that standard of review. But even if this Court holds that the exception for on-premises signs is content based, it should still uphold the Billboard Act as applied to plaintiff's billboard. The State's interests are not only substantial; they are compelling under binding precedent. And the on-premises exception is narrowly tailored to those interests.

1. The State's Interests Are Not Just Substantial; They Are Compelling.

For purposes of intermediate scrutiny, the State's interests are undoubtedly sufficient. Both this Court and the Supreme Court have repeatedly recognized States' interests in safety and aesthetics as substantial. *See Metromedia*, 453 U.S. at 507-08 (plurality opinion) (finding no "substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals"); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984) (recognizing municipalities' "weighty, essentially esthetic interest" in regulating signs); *Hucul Advert., LLC v. Charter Twp. of Gaines*, 748 F.3d 273, 277-78 (6th Cir. 2014) (safety and aesthetics are "significant governmental interests") (internal quotation marks omitted); *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 819 (6th Cir. 2005) ("aesthetics and traffic safety" are "legitimate governmental interests"). And although often overlooked as one of the interests underlying the Billboard Act, the State also has a substantial interest in promoting the effective communication of its businesses and property owners and in safeguarding their constitutional rights, including rights of expression. *Wheeler*, 922 F.2d at 591; Agreement, R. 166-2, Ex. B, PageID #2608.

Despite the district court's conclusion to the contrary, the State's interests underlying its enforcement of the Billboard Act and, specifically, the on-premises

distinction are also undoubtedly compelling under binding precedent.[21] The Supreme Court has recognized that there are few, if any, governmental interests more compelling than the safety of citizens and residents, including on public roadways. *See, e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (noting the government's "compelling interest[] in . . . public safety"); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979) (noting a State's "paramount interest . . . in preserving the safety of its public highways" and its "compelling interest in highway safety"); c*f. Reed*, 135 S. Ct. at 2232 (recognizing that a State's interest in "protecting the safety of pedestrians, drivers, and passengers" may be an interest sufficient to satisfy strict scrutiny). Consistent with the Supreme Court's pronouncements, this Court has also concluded that public safety is "a 'compelling' interest." *Cole v. City of Memphis*, 839 F.3d 530, 539 (6th Cir. 2016); *see also Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991) (noting

[21] Both the Supreme Court and this Court have found that the State's interest in the aesthetic beauty of its roadways is undoubtedly a "substantial interest," *Metromedia*, 453 U.S. at 507 (plurality opinion); *Wheeler*, 822 F.2d at 595, but neither has determined whether this interest is "compelling," *see Reed*, 135 S. Ct. at 2232 (assuming without deciding the interest is compelling); *Wagner*, 675 Fed. Appx. at 607 (same). Because the Billboard Act's exception for on-premises signs is narrowly tailored to the State's recognized compelling interests in public safety and safeguarding the constitutional rights of its businesses and property owners, this Court need not decide whether the State's interest in aesthetics is also compelling. The State maintains that the interest is compelling, though, given the State's significant public investment in its interstates and highways and the strong link between the State's tourism industry and the scenic beauty of those roadways. *See* pp. 10-11, *supra*.

the "compelling interest in protecting public safety" on roadways). The district court's erroneous conclusion that "neither the Sixth Circuit nor the Supreme Court has held" that public safety is a compelling interest, Order on Constitutionality, R. 356, PageID #6929, completely ignored these binding precedents.

The State's interest in facilitating and safeguarding the First Amendment rights of its businesses and property owners is also undoubtedly compelling. The Supreme Court has made clear that a State's interest "in complying with its constitutional obligations may be characterized as compelling." *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). For example, the "[Supreme] Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 141 (2001) (Souter, J., dissenting) (citing *Widmar*, 454 U.S. at 271, and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)). The same principle is true of a State's "independent obligation to obey" and safeguard the rights protected by the First Amendment; it is "sufficiently compelling to satisfy strict scrutiny." *Id.* Indeed, a State has few interests more compelling than protecting and preserving the fundamental rights of its citizens and residents, including their rights of expression. *See Walker v. Beard*, 789 F.3d 1125, 1136 (9th Cir. 2015) ("Compliance with the Constitution can be a compelling state interest.").

2. Precedent Dictates that the Billboard Act Satisfies Intermediate Scrutiny.

If the on-premises exception is content neutral, then the Billboard Act must be upheld if it is "narrowly tailored" to the State's interests and "leave[s] open ample alternative channels for communication of the information." *McCullen*, 134 S. Ct. at 2529 (quoting *Ward*, 491 U.S. at 796); *see also Wheeler*, 822 F.2d at 594. Binding precedent—namely, this Court's decision in *Wheeler*—dictates that the Billboard Act satisfies that test.

In *Wheeler*, this Court determined that the Kentucky Billboard Act, which parallels the Tennessee Billboard Act and federal Act in all relevant aspects, satisfied intermediate scrutiny because it was narrowly tailored to substantial state interests and kept open ample alternative channels for communication. 822 F.2d at 594-96. Even though *Wheeler*'s analysis of whether Kentucky's Billboard Act was content based must be reassessed in light of *Reed*, its intermediate scrutiny analysis remains binding on this Court. *See United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014). Neither the district court nor plaintiff questioned the continuing validity of *Wheeler*'s application of intermediate scrutiny, and the district court relied on *Wheeler* as good law in that respect. Order on Constitutionality, R. 356, PageID #6929, 6949.

For the same reasons this Court upheld Kentucky's Billboard Act under intermediate scrutiny in *Wheeler*, the State has met its burden here of demonstrating

that the Billboard Act is narrowly tailored to the State's substantial interests. Intermediate scrutiny requires only that the "regulation promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. Absent the Billboard Act, the State would be unable to maintain "effective control" of outdoor advertising, 23 U.S.C. § 131(a), and its interests in safety and aesthetics would be undermined. *See Metromedia*, 453 U.S. at 508-12 (plurality opinion). Drivers would be distracted from the road, may not see important safety and directional signage, and would be threatened by numerous additional physical obstacles and dangers. Trial Tr. I, R. 332, PageID #6285-89, 6296, 6299, 6330-31; Trial Tr. II, R. 333, PageID #6458-59, 6470-72, 6488-89, 6532-48; Trial Tr. III, R. 334, PageID #6575-76. The natural scenic beauty ordinarily visible from the highway would be obscured, and tightly grouped billboards competing for attention with bright, gaudy, and even digital displays would mar the roadside. Trial Tr. I, R. 332, PageID #6348-49; Trial Tr. II, R. 333, PageID #6440-42; Trial Tr. III, R. 334, PageID #6621-22; 6640-43; *see also Wheeler*, 822 F.2d at 594-95.

The Billboard Act's permitting requirement and its exception for on-premises signs also promote the State's interest in ensuring that its businesses and property owners are able to communicate to drivers effectively. The on-premises exception ensures that businesses and property owners are able to communicate information

that, because of its relationship to a specific property, can be communicated effectively only on that property. *See Wheeler*, 822 F.2d at 591 (noting the exception for on-premises signs "recognizes the important function of these signs" and preserves an alternative channel of communication). And by regulating billboards other than on-premises signs, the Billboard Act prevents a proliferation of billboards from overwhelming and thus diminishing the communicative value of on-premises signs.

Finally, as this Court concluded in *Wheeler*, "the Billboard Act and [its] regulations leave open ample alternatives for communication of non-commercial and commercial messages." 822 F.2d at 596. The restrictions do not apply to "the erection or maintenance of signs other than in areas" near covered roadways, *id.*, and they do not prevent plaintiff from communicating his preferred messages on his other legally permitted signs. Because an off-premises sign, such as plaintiff's Crossroads Ford sign, "has no relationship to the property on which it is placed[,] . . . [b]anning these signs potentially leaves many alternative means of communicating the same information." *Rappa*, 18 F.3d at 1064. Moreover, signs with both noncommercial and commercial messages "are permitted anywhere provided that an activity relating to the message is conducted on the premises." *Wheeler*, 822 F.2d at 596.

3. The On-Premises Exception Satisfies Strict Scrutiny.

Even if this Court holds that the Billboard Act's exception for on-premises signs is content based and therefore must satisfy strict scrutiny, it should nevertheless uphold the Billboard Act under that standard. The Billboard Act is the least restrictive means of advancing the State's compelling interests. To satisfy strict scrutiny, a law need not "be 'perfectly tailored.'" *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). Instead, it must be the "least restrictive alternative that can be used to achieve" the State's compelling interests. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Meeting that standard is undoubtedly a "demanding task," but not an impossible one. *Williams-Yulee*, 135 S. Ct. at 1665-66. And the Supreme Court in *Reed* acknowledged that "a sign ordinance . . . well might survive strict scrutiny" if it were narrowly tailored to compelling interests such as safety. 135 S. Ct. at 2232

The Billboard Act, as applied here to plaintiff's Crossroads Ford billboard, is one of the "rare case[s]" in which the State can meet this demanding standard. *Williams-Yulee*, 135 S. Ct. at 1666. That is because the Act strikes a balance in furthering interests that have been accepted as compelling—safety and safeguarding constitutional rights—without restricting protected speech any more than is necessary. As a general matter, the Billboard Act unquestionably advances the State's compelling interests in public safety and the aesthetics of its roadways. *See*

pp. 41-42, *supra*. Plaintiff and the district court did not seriously contest that point. Instead, the district court found that Act unconstitutional as applied to plaintiff's unpermitted billboard at Crossroads Ford because the Act exempts on-premises signs, but not plaintiff's off-premises sign displaying noncommercial content, from its permitting requirements. Order on Constitutionality, R. 356, PageID #6952.

In reaching that conclusion, however, the district court failed to account for the complexity of the narrow tailoring analysis in this case. The Supreme Court has made clear that on-premises signs, even commercial ones, implicate unique First Amendment interests. As the Court explained in *City of Ladue v. Gilleo*, "[p]recisely because of their location," on-premises signs "provide information about the identity of the 'speaker.'" 512 U.S. 43, 56 (1994). Under intermediate scrutiny applicable to commercial advertising, the regulation must "leave open ample, alternative channels for communication." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). A message on a sign—whether commercial or noncommercial—associated with the activities on that property is in many instances a much more effective means of communication than an off-premises sign conveying the same message. *See Metromedia*, 453 U.S. at 511-12 (plurality opinion); *Linmark Assocs.*, 431 U.S. at 93. As the Third Circuit recognized in *Rappa*, often "there is no other means of communication that can provide equivalent information." 18 F.3d at 1064.

But subjecting on-premises signs displaying either commercial or noncommercial content related to the "speaker"—i.e., the business or entity located on that property—to the stringent spacing and location requirements of the Billboard Act could effectively eliminate that channel of communication for many speakers. *See Wheeler*, 822 F.2d at 591 (characterizing the on-premises exception as a recognition "that the right to advertise an activity on-site is inherent in the ownership or lease of the property"); *see also Hill v. Colorado*, 530 U.S. 703, 786 (2000) (Kennedy, J., dissenting) ("Government cannot foreclose a traditional medium of expression."). Accordingly, subjecting on-premises signs to the Billboard Act's permitting requirements would not adequately safeguard the First Amendment rights of those speakers. *See City of Ladue*, 512 U.S. at 54-55; *see also John Donnelly & Sons v. Campbell*, 639 F.2d 6, 13-15 (1st Cir. 1980) (pointing to the availability of an on-premises exception to justify other restrictions on speech).

The Billboard Act is thus narrowly tailored to further the State's compelling interests in safety and aesthetics while also furthering its compelling interest—indeed its constitutional obligation—to safeguard the First Amendment rights of its businesses and property owners. The generally applicable, content-neutral requirements related to location, spacing, size, and lighting further the State's interests in safety and aesthetics. And the exception for on-premises signs, even if this Court were to agree with the district court that it is content based, is narrowly

tailored to ensure compliance with the State's constitutional obligations without restricting any more speech than is necessary or undermining the State's other compelling interests in safety and aesthetics.

The Supreme Court has in the past *required* exceptions to generally applicable laws in order to comport with the Constitution. *See Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972). The Billboard Act already includes such an exception. Contrary to the district court's conclusion, the First Amendment does not invalidate a law solely because it includes an exception designed to safeguard First Amendment rights. As the Supreme Court has admonished, "context matters" when applying strict scrutiny, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (alteration omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)), and "strict scrutiny *does* take relevant differences' into account—indeed that is its fundamental purpose," *id.* (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995)). The Billboard Act's exception for on-premises signs does just that; it takes "relevant differences" between on-premises and off-premises signs into account.

The district court concluded that the on-premises distinction is not narrowly tailored for four reasons: it (1) does not advance the State's interests, (2) is arguably overinclusive, (3) is underinclusive, and (4) is not the least restrictive means available. Order on Constitutionality, R. 356, PageID #6935-51. Each of those

conclusions lacks merit and fails to take into account the constitutional underpinnings of the on-premises exception.

Advancing the State's Interests: The court concluded that the distinction between on-premises and off-premises signs does not advance the State's compelling interests. But its analysis failed to recognize that a State always has a compelling interest in complying with its constitutional obligations. The court faulted the State for not proving a negative—i.e. that allowing on-premises signs is not more harmful to safety and aesthetics than allowing unpermitted, off-premises signs displaying noncommercial content would be. *Id.*, PageID #6936-38. In so doing the court missed the forest for the trees. The principal purpose of the exception for on-premises signs is not to further safety or aesthetics; the exception protects and furthers a uniquely effective means of communication. *See City of Ladue*, 512 U.S. at 56 ("Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else[.]"); *Metromedia*, 453 U.S. at 511-12 (plurality opinion).

And, despite the district court's summary dismissal, ample precedent recognizes that on-premises signs have unique characteristics and are accompanied by unique incentives that distinguish them from off-premises signs and reduce their potential impact on traffic safety and aesthetics. *See Wheeler*, 822 F.2d at 596; *John Donnelley & Sons*, 639 F.2d at 13. As the State pointed out, on-premises signs,

unlike off-premises signs, actually do advance safety interests because they provide information that assists drivers by "guiding [them] to their intended destinations." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 n.20 (1993); Trial Tr. II, R. 333, PageID #6503-04; Resp. to Rule 52 Mot., R. 336, PageID #6741-42. And on-premises signs "are the least aesthetically offensive" because "[t]he advertised structure . . . has already violated the landscape." *John Donnelly & Sons*, 639 F.2d at 13. By contrast, "[a] sign erected on a site with no buildings creates a new insult to the countryside." *Wheeler*, 822 F.2d at 595.

Overinclusiveness: The court opined that the Billboard Act is "at least arguabl[y]" overinclusive because it "regulates off-premises signs that are highly distracting," such as "the 'Hollywood' sign in Los Angeles," and "off-premises signs that are not highly distracting," such as a small sign requesting donations to the YMCA. Order on Constitutionality, R. 356, PageID #6938-39. That superficially pithy analysis succumbs to the same error of which the district court accuses the State. The district court failed to consider whether the *on-premises* exception was overinclusive, which is the portion of the Act it held to be content based and unconstitutional as applied to plaintiff. Perhaps that is because the exception, by definition, cannot be overinclusive in light of the interest it is designed to further. The exception for on-premises signs does not burden speech at all, let alone too

much speech; it *permits* speech, in furtherance of the State's interest in promoting effective communication and safeguarding First Amendment expression.

Underinclusiveness: The district court concluded that the Billboard Act is underinclusive because the State could not "establish why it is necessary to regulate off-premises signs and not on-premises signs to eliminate threats to traffic safety" or to advance its aesthetic interests. Order on Constitutionality, R. 356, PageID #6942. But the court's conclusion that the Act is not narrowly tailored because "it regulates less speech than necessary" to advance the State's interests, *id.*, PageID #6943, again omits the State's ever-present obligation to comply with the Constitution. The State's compelling interests in safety and aesthetics justify the content-neutral permitting requirements for off-premises billboards, but these interests must be balanced against the State's need, and compelling interest, to safeguard the First Amendment rights of its businesses and property owners.

The district court's reasoning would force the State either to subject on-premises billboards to the same requirements as off-premises billboards, thus threatening the ability of businesses and property owners use a uniquely effective channel of communication, or to exempt all off-premises billboards that decide to display noncommercial content, even temporarily, from the requirement to get a permit, thus undermining the Billboard Act entirely along with the State's compelling interests in safety and aesthetics. That choice is not required by the First

Amendment. The district court's conclusion that the state must regulate *more* speech to further its interests ignores the countervailing First Amendment interests of businesses and property owners as well as the ample evidence and precedent establishing that on-premises signs, by definition, have a different impact on safety and aesthetics than off-premises signs. *See Wheeler*, 822 F.2d at 596; *John Donnelley & Sons*, 639 F.2d at 13; Trial Tr. II, R. 333, PageID #6503-04; Resp. to Rule 52 Mot., R. 336, PageID #6741-42.

Less Restrictive Means: The district court concluded that the on-premises exception was not narrowly tailored because four of plaintiff's proposed less restrictive alternatives would be at least as effective in advancing the State's interests: 1) a regulation limiting sign size, regardless of content; 2) a spacing restriction for all signs; 3) a regulation requiring all signs to be placed a minimum distance apart; and 4) a regulation restricting all signs to specific presentational characteristics. Order on Constitutionality, R. 356, PageID #6945-47, 6950-52. But all of these alternatives suffer a fatal flaw: they are *more* restrictive, not less, than the Billboard Act because they continue to impose restrictions on signs but also *subject on-premises signs to the same regulations*. These alternatives thus are not "as effective" in furthering the State's interests; they undermine entirely the State's compelling interest in safeguarding the First Amendment rights implicated by on-premises signs.

And each alternative has other significant defects. For example, the court's *sua sponte* proposal to increase the minimum spacing requirements and to include an exemption for signs within 75 feet of a building is not only *more* restrictive than the existing scheme[22] but also amounts to a "difference only in degree, not a less restrictive alternative in kind." *Burson*, 504 U.S. at 210. And the district court's hypothetical regulation limiting signs to "a particular font (or set of fonts)" or "particular colors," Order on Constitutionality, R. 356, PageID #6951, poses its own First Amendment concerns, *see, e.g.*, *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 228-29 (5th Cir. 2012) (invalidating a font restriction under the First Amendment), and would do little to advance the safety and aesthetic problems created by the "large, immobile, and permanent" structures on which the fonts and colors would be displayed. *Metromedia*, 453 U.S. at 502 (plurality opinion) (internal quotation marks omitted). The court's *ipse dixit* that exempting all signs below a certain size from regulation would be just as effective as the existing scheme at promoting safety and aesthetics defies logic. Sign size has less to do with distraction and aesthetics than the existence of the sign itself. And common sense recognizes that the incentives under such a size threshold would be

[22] The district court's proposed alternative would restrict more speech than the current regulatory scheme not only by increasing the minimum spacing requirements, but also by failing to except signs advertising the sale or lease of undeveloped land.

for advertisers to erect signs just under the regulated limit with particularly eye-catching characteristics that would only increase distraction.

In sum, the alternatives suggested by the district court as less restrictive all share the defect of actually regulating more speech, including the unique medium of on-premises signs. Moreover, a close analysis of each alternative in light of precedent, the State's evidence, and common sense demonstrates it would not advance the State's compelling interests as effectively as the Billboard Act.

Finally, plaintiff has argued that another less restrictive means to advance the State's interest would be to limit the Billboard Act's applicability to commercial speech. Order on Constitutionality, R. 356, PageID #6944-45. The district court rejected that argument because that distinction "may be less effective" than the current on-premises exception in advancing the State's interests. *Id.*, PageID #6945. The State agrees. As this case illustrates, that distinction would also present significant practical problems. Plaintiff built his Crossroads Ford billboard, without a permit, in order to display commercial advertising for profit, which he did for the first three years of its existence. State Decisions, R. 164-5, PageID #2368. When the State had prevailed in its attempt to have the state courts order the billboard to be removed, plaintiff began displaying noncommercial content and relied on his First Amendment rights to stop the removal. *Id.* As soon as the district court enjoined the State from enforcing the state court judgment and removing the billboard,

plaintiff sought to display commercial advertising again. Mot. to Display Commercial Messages, R. 205, PageID #3847.

Billboards are "large, immobile, and permanent structures," and, once built, they are not easy or cheap to remove. *Metromedia*, 453 U.S. at 502; Davidson County Chancery Court Compl., R. 46-2, PageID #623-26 (State incurred expenses of $40,000 to remove one of plaintiff's unpermitted billboards). Under plaintiff's proposed approach, the State would be forced to allow the construction of billboards purporting to display only noncommercial content. Once built, the owner could, as plaintiff has sought to do, switch to commercial content until caught, at which point he can switch back to noncommercial content to prevent removal. And billboards built illegally, such as plaintiff's, could not be removed while displaying noncommercial content. Aside from the fact that such a distinction would allow noncommercial billboards to proliferate, thus undermining the State's compelling interests in safety and aesthetics, the cat-and-mouse game resulting from such a distinction would leave the State almost powerless to control even commercial advertising.

Moreover, state enforcement officers would be in the position of determining whether content was "commercial" or "noncommercial," a distinction that some courts have held to be based on content. *See Geft Outdoor*, 187 F. Supp. 3d at 1014-15. And any court or administrative proceeding that permitted a State to remove a

billboard would be meaningless as soon as it was issued. The billboard operator would simply have to change the content to start the process anew. The time necessary for the administrative actions and judicial proceedings that may be required is far more than enough time to change the content on the sign, as this case demonstrates.

Contrary to the district court's conclusion, the Billboard Act's distinction between on-premises and off-premises signs is thus narrowly tailored to the State's interests. When taking into account *all* of the State's interests, including its interest in complying with its constitutional obligation to safeguard the First Amendment rights of its businesses and property owners, that distinction is the "least restrictive alternative that can be used to achieve" those interests. *ACLU*, 542 U.S. at 666.

When the alternatives are either *more* restrictive of speech or less effective at advancing the State's compelling interests, then the State has narrowly tailored its regulation to those interests. This is one of the "rare cases" in which that is so.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the district court and remand with instructions to enter judgment in favor of the State.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

JONATHAN DAVID SHAUB
Assistant Solicitor General

P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Sarah.Campbell@ag.tn.gov

Counsel for Defendant-Appellant

January 26, 2018

ADDENDUM

Page

DESIGNATION OF COURT DOCUMENTS

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

Docket Entry No.	Description	Page ID #
1	Complaint	1-20
45	Amended Complaint	558-582
46-2	Davidson County Chancery Court Complaint (Exhibit to Defendants' Motion to Dismiss Second Amended Complaint)	621-684
96	Plaintiff's Motion for Temporary Restraining Order	1362-1398
96-1	State Enforcement Letters	1399-1404
99	Response in Opposition to Plaintiff's Motion for Temporary Restraining Order	1412-1422
110	Order Granting Plaintiff's Motion for Emergency Temporary Restraining Order	1447-1464
150	Preliminary Injunction Hearing Transcript	1956-2149
163	Order Granting Preliminary Injunction	2259-2283
164-5	State Court Decisions	2361-2453
166-2, Ex. B	Agreement Between the U.S. Secretary of Transportation and State of Tennessee	2608-2616
166-2, Ex. C	Supplemental Agreement Between U.S. Secretary of Transportation and State of Tennessee	2617-2619
170	Amended Order Granting in Part and Denying in Part Motion for Partial Dismissal of Second Amended Complaint	2279-2824
205	Motion for Permission to Rebuild Billboard Structures as Off-Premise Structures and Permission to Resume Operation of the Crossroads Ford Billboard Structure	3847-3849
207-2	Billboard Picture	3868
209	Memorandum in Opposition to Plaintiff's Motion for Permission to Rebuild Billboard Structures as Off-Premise Structures and Permission to Resume Operation of the Crossroads Ford Billboard Structure	3878-3880
213	Order Denying Plaintiff's Motion for Permission to Rebuild Billboard Structures	3946-3947

233	Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment	4168-4184
301	Order Regarding Defendants' Motion in Limine as to Money Damages	5964-5965
325	Plaintiff's Rule 52 Motion for Verdict as Matter of Law	6210-6244
329	Jury Verdict Form	6250-6251
332	Trial Transcript I (Sept. 20, 2016 morning session)	6257-6373
333	Trial Transcript II (Sept. 20, 2016 afternoon session)	6374-6568
334	Trial Transcript III (Sept. 21, 2016)	6569-6688
336	Response in Opposition to Plaintiff's Rule 52 Motion	6718-6743
340	Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Rule 52 Motion	6756-6770
342	Order Concerning Least Restrictive Means	6781-6784
356	Order Finding Billboard Act Unconstitutional	6909-6952
357	Order for Supplemental Briefing on the Issue of Remedies	6953
374	Order Denying Motion for Reconsideration and Order Concerning Remedies	7191-7219
377	Judgment	7416
381	Notice of Appeal	7603-7604
384	Defendant's Motion to Stay Judgment Pending Appeal	7653-7655

Tenn. Code Ann. § 54-21-103

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. § 54-21-107

(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.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)((iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

January 26, 2018

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendant-Appellants and a member of the Bar of this Court, certify that, on January 26, 2018, a copy of the Brief of Appellant was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General