INSTITUTE FOR FREE SPEECH

July 26, 2019

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: State's Notice of Supplemental Authority regarding *Adams Outdoor Advertising Limited Partnership v. Pennsylvania Department of Transportation*, No. 18-2409, slip op. (3d Cir. July 15, 2019), in *Thomas v. Bright*, No. 17-6238

Dear Ms. Hunt:

Appellee William Thomas respectfully submits this letter pursuant to Fed. R. App. P. 28(j) in response to Appellant's July 17, 2019 notice of supplemental authority.

Adams is a commercial speech case. *See* Richards Statement of Undisputed Facts ¶ 25, *Adams Outdoor Advert. Ltd. P'ship v. Pa. DOT*, No. 17-1253 (E.D. Pa. Apr. 16, 2018), ECF No. 31-2 (noting sign constructed to "advertise businesses"); Adams Statement of Undisputed Facts ¶ 2, *id*. (E.D. Penn. May 2, 2018), ECF No. 37-1. In that respect, *Adams* follows the prevailing doctrine of applying intermediate scrutiny to commercial speech under *Central Hudson*. *See, e.g., Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 600-01 (9th Cir. 2017) (noting "*Central Hudson*'s longstanding intermediate scrutiny framework" still applied); Thomas Resp. Br. at 30-31. And like all those commercial speech cases, it is inapposite here.

Furthermore, because *Adams* is about commercial speech, any statements about *Reed* are dicta. And another court's dicta provides no authority for using irreconcilable concurring opinions to reject a binding, majority opinion of the United States Supreme Court. *See* Thomas Resp. Br. at 23-27; Brechner Amicus at 11-14.

And, to the extent that *Adams* might be applied to non-commercial speech, such reasoning defied the prevailing approach and was rejected by other courts before *Reed*, *see* Thomas Resp. Br. at 27, and was utterly discredited after. The court in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), erred in drafting a "significant relationship" test to avoid scrutiny of "literal[ly]" content-based laws, simply because it felt those laws did "not raise [typical First Amendment] concerns," *id*. at 1054, 1063, 1065-66; *contra Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (holding that courts may not ignore that a law is content-based "on its face" by determining through some context-based inquiry that it has a "benign motive"). Any

such use of a context-based test violates *Reed*, as this court recognized in *Wagner II*. *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 603-04 (6th Cir. 2017).

Respectfully submitted,

Allen Dickerson

/s/ Owen Yeates
Owen Yeates
Institute for Free Speech
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703-894-6800
oyeates@ifs.org

Counsel for Plaintiff-Appellee

CC: All counsel of record by CM/ECF