No. 17-6238

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

CLAY BRIGHT,
in his official capacity as Commissioner, Tennessee Department of Transportation,

Defendant/Appellant.

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

Appellee William H. Thomas's Response to Petition for Rehearing *En Banc*

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INTRODUCTION

There is no error in the panel decision, much less a question of exceptional importance. Rather, the panel's decision is a straightforward application of the Supreme Court's protection of noncommercial speech in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Nevertheless, culling cases from other contexts, the State asserts that a panel of this Court made not one, but four errors of exceptional importance. Conflating commercial and noncommercial speech, however, does not create a question of exceptional importance. Reversing the panel's decision would.

ARGUMENT

Much like the Supreme Court granting *certiorari*, rehearing *en banc* is granted "only in the most compelling circumstances," not merely because a "case was not decided correctly." *Mitts v. Bagley*, 626 F.3d 366, 366 (6th Cir. 2010) (Kethledge, J., concurring in denial of rehearing *en banc*). A panel's decision must create an intra-circuit split or pose "a question of exceptional importance." Fed. R. App. P. 35.

Because *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (6th Cir. 1987), was abrogated by *Reed*, the State does not assert that the panel's decision creates intra-circuit conflict.[1] Rather, the State claims four questions of exceptional importance

[1] The State does not contend that *Wheeler* remains good law. *See* Pet. at 9; *see also see Wagner v. City of Garfield Heights*, 675 F. App'x 599, 603-04 (6th Cir. 2017) (citing to remand after *Reed* and noting that the Supreme Court rejected the

based on supposed circuit splits or deviations from Supreme Court precedent. In particular, although this case involves highly-protected noncommercial speech, the State alleges conflict with decisions 1) applying the on-/off-premise distinction to commercial speech; 2) allowing officials to look at a sign's content for other forms of less-protected speech; 3) allowing restrictions on drunk driving; and 4) reviewing least restrictive means instead of narrow tailoring.[2] The precedent the State cites to, however, resembles the content-based control of noncommercial speech as much as "an apple doth an oyster,"[3] and rehearing should be denied.

A. The panel correctly applied *Reed* to noncommercial speech

"Government regulation of speech is content based if a law applies to particular speech because of the . . . message expressed," whether by regulating "speech by particular subject matter" or "by its function or purpose." *Reed*, 135 S. Ct. at 2227. The Billboard Act does both.[4]

"context-dependent inquiry" of the *Wheeler* line of cases).

[2] The State also inappropriately concludes its petition by raising a new issue: the Act's severability. *See, e.g.*, *Thompson v. Runnels*, 705 F.3d 1089, 1105 (9th Cir. 2013) (stating that the law is "crystal clear" that a party may not "raise an entirely new issue for the first time in a petition for rehearing").

[3] William Shakespeare, *Taming of the Shrew*, Act 4, Scene 2.

[4] The Act favors messages that "advertis[e] the sale or lease" of or "activities conducted" on particular property. Tenn. Code Ann. § 54-21-103(2) and (3); *see also* TRO Tr., R. 121, Page ID ## 1523-24 (restricting message unless sign "speak[s] up for the things going on"). It favors messages that function to "identif[y] the establishment's . . . product or services." Tenn. Regs., R. 46-1: 607 (Rule 1680-02-03-.06). And it favors signs "'designed to,'" *Reed*, 135 S. Ct. at 2227, "advertis[e] activities conducted on the property." Tenn. Code Ann. § 54-21-103(3).

1. The on-/off-premise distinction as to commercial speech is inapposite

Apart from directly applying *Reed*'s requirements for noncommercial speech, the panel's decision accords with the Eleventh Circuit's decisions holding that noncommercial speech must be allowed wherever any commercial speech is allowed. *See, e.g.*, *Southlake Prop. Assocs. v. City of Morrow*, 112 F.3d 1114, 1118 (11th Cir. 1997) (holding noncommercial speech "is always onsite").[5]

The State nonetheless claims that the panel's decision creates a circuit split, but with a case inapposite to the noncommercial speech at issue here, *Adams Outdoor Advertising Limited Partnership v. Pennsylvania Department of Transportation*, 930 F.3d 199 (3rd Cir. 2019). The plaintiff there challenged regulations as applied to *commercial* speech.[6] *Adams* therefore followed the prevailing pattern 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) (applying "*Central Hudson*'s longstanding intermediate scrutiny framework"); Thomas Resp. Br. at 30-31 (compiling cases).

Because *Adams* was a commercial speech case and properly controlled by the

[5] Furthermore, such cases indicate that states have long been able to effectively regulate billboards without trampling on noncommercial speech, and additional jurisdictions have done so since *Reed*. *See* Thomas Br. at 28-30, 30 n.11

[6] *See* Richards Statement of Undisputed Facts ¶ 25, *Adams Outdoor Advert. Ltd. P'ship v. Pa. Dep. of Transp.*, 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. Pa. May 2, 2018), ECF No. 37-1.

Central Hudson line of cases, any discussion of noncommercial speech—including any discussion of *Reed*—was dicta.[7] And another court's dicta certainly fails to create a question of exceptional importance.[8]

The State further takes the unusual position that there is a *circuit* split leading to a question of exceptional importance because of supposedly contrary *district* court decisions. But, even if such a thing were possible, those decisions also concerned commercial speech.[9]

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[7] It certainly provides no authority for rejecting Justice Alito's decision to join the majority rather than concur in the judgment. Knowing that concurring only in the judgment would have triggered *Marks v. United States*, 430 U.S. 188 (1977), and uncertainty concerning which opinion controlled, Justice Alito rejected such vote-counting and joined in the majority, indicating that his concurrence must be interpreted to be consistent with the majority.

[8] *Adams* also relied on precedent overruled by *Reed*. The court in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), created a "significant relationship" test to avoid scrutiny of "literal[ly]" content-based laws that the court felt did "not raise [typical First Amendment] concerns." *Id*. at 1054, 1063, 1065-66. But *Reed* held that courts may not ignore that a law is content-based "on its face" by instead determining, through some context-based inquiry, that it has a "benign motive." *Reed*, 135 S. Ct. at 2228; *see also Wagner*, 675 F. App'x at 603-04.

[9] *See GEFT Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion*, 187 F. Supp. 3d 1002, 1006, 1016-17 (S.D. Ind. 2016) (noting amended ordinance exempted noncommercial speech and applying *Central Hudson* to commercial speech); *see also Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 600-01 (9th Cir. 2017) (noting "noncommercial signs are exempted" and applying *Central Hudson*); *ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828, 840 (S.D. Cal. 2017) ("commercial speech"); *Citizens for Free Speech, LLC* v. *Cty. of Alameda*, 114 F. Supp. 3d 952, 968 (N.D. Cal. 2015) ("only commercial speech" (emphasis in original)).

2. Binding precedent requires strict scrutiny when an official must examine noncommercial speech to determine whether a law applies

The State also argues that the panel created a circuit split when it followed Supreme Court and *en banc* precedent holding that a law is content-based when it requires officials to assess a message's meaning and purpose. But not only was the panel bound to follow precedent, the decisions the State cites do not apply to highly protected, noncommercial speech.

In *McCullen v. Coakley*, 573 U.S. 464 (2014), in testing whether a law distinguished between speech based on what speakers said or "simply on where they [said] it," the Supreme Court held that a law is "content based if it require[s] enforcement authorities to examine the content of the message . . . to determine whether" a violation has occurred. *Id*. at 479 (internal quotation marks omitted). When the Ninth Circuit resisted this strict standard in *Reed*, upholding an unconstitutional law as requiring only a "kind of cursory examination," the Supreme Court reversed, holding that "Government regulation of speech is content based if a law applies . . . because of . . . the message expressed." 135 S. Ct. at 2226-27 (internal quotation marks omitted).

But even before *McCullen* and *Reed*, this Court held that examining a sign's content triggers strict scrutiny. In *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007), the *en banc* Court held that "any regulation that requires reference to the content of speech to determine its applicability is inherently content-based." *Id*. at 779. As the

Wagner Court noted, *Reed* served only to reinforce that point. 675 F. App'x at 604 (noting that such examination is "determinative" under *Reed*).

The State's out-of-circuit precedent, applying lesser scrutiny to other types of speech, is not to the contrary. The law at issue in *Act Now to Stop War and End Racism Coal. v. D.C.*, 846 F.3d 391 (D.C. Cir. 2017), implicated different interests than the billboards on private property here, inasmuch as it dealt with signs posted on public property—on "lampposts [that] are a textbook example of a limited or designated public forum." *Id*. at 403 (internal quotation marks omitted). Given that it was a limited public forum, some content-based regulation had to be permitted—a limited public forum by definition regulates content. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (holding that control over limited public forums "can be based on subject matter" (internal quotation marks omitted)). In addition, the law did not require officials to look at the message to determine if it was prohibited or restricted, as the Billboard Act does, just to see if 30 days had passed since an event. *Act Now*, 846 F.3d at 396, 406.

In *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017), the court held that a law regulating unattended donation collection boxes ("UDCBs") was not content-based because there was no need for an officer to even glance at the message: an official was required to examine only "whether (1) an unattended structure accepts personal items and (2) the items will be distributed, resold, or

recycled." *Id*. at 670. In an alternative holding, the court stated that content examination supported but was not dispositive of a conclusion that a law is content-based. *Id*. at 670-71. But that holding was purely dicta, cited precedent overruled by *McCullen* and *Reed*, and failed to heed this Court's precedent on UDCBs (that examining for a particular type of content to apply the law is content-based). *Id*. at 671-72 (discussing *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015)).

Thus, the panel did not raise a question of exceptional importance, but only sustained this and the Supreme Court's strict standard for noncommercial speech.

B. The panel properly applied strict scrutiny

The State incorrectly asserts that the panel's decision conflicts with Supreme Court precedent by ignoring public safety as a compelling interest and holding that no other alternative allows it to achieve all its interests.

1. The State has not demonstrated a compelling safety interest

The State *seeks* a circuit split as to the traffic safety interest, because "traffic safety and aesthetics . . . have never been held to be compelling" by the other circuits. *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995); *see also Willson v. City of Bel-Nor*, 924 F.3d 995, 1001 (8th Cir. 2019) ("not compelling"); *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) ("neither we nor the Supreme Court have ever held" compelling); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (not "recognized").

This is unsurprising because the Supreme Court has also declined to recognize traffic safety as a compelling interest, despite repeated opportunities to do so. *See Cent. Radio Co.*, 811 F.3d at 633 (noting Supreme Court not held compelling); *see also Metromedia v. San Diego*, 453 U.S. 490, 507-08 (1981) (holding merely "substantial"); *cf. Reed*, 135 S. Ct. at 2232 (suggesting limited restrictions that might serve a narrow safety interest).

And even though the State "must demonstrate that the recited harms are real," it failed to show at trial that off-premise noncommercial signs are any more dangerous than on-premise signs. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995); *see* Opinion at 28-30, Page ID ## 6936-38.

Failing that, the State has interpreted cases recognizing a very narrow interest in protecting against drunk driving as instead approving a broad power to regulate essentially anything, including speech. *See* Tenn. Pet. at 13; *but see Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535 (2019) (allowing blood alcohol concentration tests to protect lives from drunk driving); *Mackey v. Montrym*, 443 U.S. 1 (1979) (upholding license restrictions for drunk driving); *Tanks v. Greater Cleveland Reg'l Transit. Auth.*, 930 F.2d 475 (6th Cir. 1991) (permitting drug testing for bus drivers involved in accidents).

As the State's asserted interest is unrelated to any of the interests the Supreme Court has indicated might be compelling, the Act fails strict scrutiny.

2. The Billboard Act fails narrow tailoring

Strict scrutiny's narrow tailoring requirement and the least restrictive means test are two sides of the same coin, and the panel committed no error by examining the Act's fit using the narrow tailoring test. *See Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (requiring that restrictions be "narrowly tailored to be the least-restrictive means"); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (noting both requirements).

After a trial, the district court concluded not only that the Act failed the least restrictive means test, but that it failed the narrow tailoring test on three separately sufficient grounds. *See* Opinion at 23-25, 27-30, R. 356, Page ID ## 6931-33, 6935-38 (holding that the State's "general and abstract interests . . . are unrelated to the" Act's requirements); *id*. at 30-31, Page ID ## 6938-39 (overinclusive); *id*. at 31-35, Page ID ## 6939-43 (underinclusive); *id*. at 35-44, Page ID ## 6943-52 (not the least restrictive means to achieve the State's interests). The panel affirmed, holding that the Act failed tailoring because of underinclusiveness. *See* Slip Op at 18-20.

The State has the burden of demonstrating a law's fit, and it has provided no authority that this Court has to analyze that fit in multiple ways, much less that it must do so exclusively under the least restrictive means test. But, even under the least restrictive means test, the Act fails tailoring. The State has conceded that regulating just commercial speech would serve its interests. *See* Tenn.

Reconsideration Br., R. 371-2, Page ID # 7176 (noting it could "further[] its interests by regulating signs containing commercial speech").[10] Furthermore, the State could rely on the "ample content-neutral options" noted in *Reed*, such as regulating signs' "size, building materials, lighting, moving parts, and portability." 135 S. Ct. at 2232; *see also* Thomas Br. at 46-50 (discussing less restrictive means). Because the State has less restrictive alternatives available, its current approach fails strict scrutiny.

CONCLUSION

The State has not shown that the panel's decision was wrong, much less any error of exceptional importance. Accordingly, for the reasons given above, the Court should deny the Petition.

Dated: Oct. 22, 2019

Respectfully submitted,

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[10] To the extent the State asks this Court to resolve various policy quandaries, Tenn. Pet. at 15, its solution must lie in the passage and enforcement of a constitutional law. Furthermore, the State's argument begs another question: Why protect the State's favored rights but not others? That is the basic question in *Reed*, and it requires an answer other than, "The State is trying to protect rights."

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the page limit ordered by the Court, ECF No. 87, because it does not exceed 10 pages, excluding the parts exempted by Fed. R. App. P. 32(f).

This petition 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—Times New Roman—using 14-point font.

Dated: October 22, 2019

/s/ *Owen Yeates*
Owen Yeates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: October 22, 2019

/s/ *Owen Yeates*
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