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

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

BRIEF OF THE BEACON CENTER OF TENNESSEE, 1851 CENTER FOR CONSTITUTIONAL LAW, AND MACKINAC CENTER LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, all parties to this brief are nonprofit organizations organized under the laws of their respective states (Tennessee, Ohio, Michigan) with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF THE *AMICI CURIAE*

The Beacon Center of Tennessee is a nonprofit, nonpartisan, and independent Section 501(c)(3) organization dedicated principles of free markets, individual liberty, and limited government. The Beacon Center's mission is to empower Tennesseans to reclaim control of their lives, so that they can freely pursue their version of the American Dream. The Beacon Center advocates for the protection of our First Amendment rights in the course of challenging governmental overreach and other actions violating the basic freedoms of Tennesseans. The Beacon Center has a particular interest in this case. Mr. Thomas is a Tennessean and his First Amendment rights are at stake. The Beacon Center demonstrated its concern by filing two separate *amicus* briefs in support of Mr. Thomas at the district court level.

The 1851 Center for Constitutional Law is an Ohio non-profit corporation formed to promote and protect constitutional, human, and civil rights of Ohioans. The 1851 Center works to preserve freedom of political and commercial speech. See *Citizens in Charge, Inc. v. Husted*, No. 2:13-CV-935, 2013 WL 11310689 (S.D. Ohio Nov. 13, 2013) (First Amendment right to circulate initiative petitions); *Univ. of Cincinnati*

Chapter of Young Americans for Liberty v. Williams, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (students' First Amendment right to engage in engage in political speech on campus); *Shaker Heights Taxpayers Union v. City of Shaker Heights, No.* 12-CV-1783 (taxpayer organization's First Amendment right to display yard signs critical of city irrespective of content); *Pfleghaar v. City of Perrysburg*, No. 3:17-CV-1713 (N.D. Ohio) (citizens' First Amendment right to display yard signs irrespective of content); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) (political committee and candidates' First Amendment right to engage in political speech without retaliation from state agency); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 974 (2018)(First Amendment right to abstain from funding ideological speech by private organization); *Liberty Coins, LLC v. Goodman*, 977 F. Supp. 2d 783, 789 (S.D. Ohio 2012), amended, No. 2:12-CV-998, 2012 WL 13026818 (S.D. Ohio Dec. 28, 2012) (First Amendment right to engage in commercial speech without triggering licensing regulations). Consequently, the 1851 Center is interested in ensuring that the content of citizens' signage be afforded the requisite "breathing space" necessary to prevent

government from discriminating against some messages while privileging others.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

All three organizations are based in three of the states located within the Sixth Circuit: Tennessee, Ohio, and Michigan. All three have an enduring interest in the protection of the freedoms set forth in, and promoted by, the First Amendment. Nowhere is that more true than when a law suppresses the expression of ideas as innocuous as supporting America's Olympic athletes, or celebrating the holiday season. All three organizations are dedicated to liberty, limited government, and vigorous protection of the United States Constitution. *Amici* have an unquestionable interest in the outcome of this case as it is sure to affect First Amendment jurisprudence within the Sixth Circuit for many years to come.

Amici received written permission from the parties to file this brief. *See* Fed. R. App. P. 29(a)(4)(D) (LexisNexis 2018).[1]

STATEMENT OF THE ISSUE

Whether the on-premises exceptions to Tennessee's Billboard Act violated the right of Mr. Thomas to engage in free speech.

[1] Rule 29(a)(4)(E) statement: Counsel for the parties did not author this brief in whole or in part. No person or entity, other than *amici*, its members and counsel made any monetary contribution in preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

1. The State advanced a new justification on appeal by claiming to protect the constitutional rights of its citizens by providing an avenue for a limited amount of speech with the on-premises exceptions, as Mr. Thomas correctly pointed out. In addition to being too late to be considered, this justification is also at odds with one that the State simultaneously now abandons. To the district court, the State frequently argued that federal officials were "compelling" the State – to use its terms – to continue to enforce the content-based provisions of the Billboard Act, even after the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This never really was a justification in the first place. What was compulsory *on* the State should be regarded as compulsory *for* the State. Regardless, this Court should be unmoved by the State's assurance that it was actually interested in promoting the free speech rights of its citizens, even as it once complained that it was being compelled to do so. Moreover, the ongoing insistence from federal agencies that *Reed* has no bearing on the way in which highway billboards may be regulated is bewildering. The Supreme Court in *Reed* separately addressed these federal agencies while rejecting their

convoluted rationalizations for why the Highway Beautification Act did not make content-based speech distinctions.speech distinctions.

2. Even if intermediate scrutiny is appropriate, the Billboard Act would still fail. The Supreme Court recognized the substantiality of the State's interests in safety and aesthetics, but only in a plurality opinion that this Court subsequently recognized does not govern. This Court later ruled that a speech restriction is only properly tailored under intermediate scrutiny when it is aimed at secondary effects, or when inextricably intertwined with commercial activity, neither of which can plausibly be claimed here.

3. Finally, even if this Court were persuaded that the Billboard Act did not violate the First Amendment, it should certify the question as a matter of Tennessee constitutional law to the Tennessee Supreme Court pursuant to Tenn. Sup. Ct. R. 23. The Tennessee Supreme Court has strongly intimated that state constitutional protections of free speech may be stronger. This is the very sort of close call that ought to warrant review under Tennessee's Constitution before reversal.

ARGUMENT

First, the State's newly announced interest in promoting speech through the on-premises exceptions to the Billboard Act contradicts its previously stated interest in submitting to federal compulsion. The *Reed* opinion should have left little doubt that the on-premises exceptions were based on content, and that the continued defense of the federal Highway Beautification Act was flawed. *Second*, under intermediate scrutiny, the on-premises exceptions are not sufficiently tailored to promote the State's interests in safety and aesthetics because the law does not address secondary effects of speech, nor conduct intertwined with speech like false advertising. *Third*, even if this Court were to find the Billboard Act constitutional as a matter of federal law, it should certify the question as a matter of state law before overturning the district court.

I. Under the commonsense rule announced in *Reed*, the on-premises exceptions to the Billboard Act can no more be justified on appeal as promoting free speech than it was at the trial stage as being compelled by federal officials.

Among the litany of interests asserted by the State, it asserts that it is "complying with its constitutional obligations," Tenn. Br., ECF No. 24 at 40, by providing an avenue for business owners to advertise with

the on-premises exceptions. As opposed to its other stated rationales, that would explain the rather counterintuitive position of the State in allowing commercial signs where it would not allow non-commercial ones, even if it hardly justifies it. However, this dubious justification is, as pointed out by Mr. Thomas, late in arrival and thus ought to be forfeited. Thomas Br., ECF No. 32 at 36-37. Still, this rationale casts light on the abandonment of one of the State's prior justifications: compulsion from federal officials under threat of losing highway funds. This inconsistency in rationales is noteworthy on its own. Much the same way that a law's exceptions to a speech regulation "may diminish the credibility of the government's rationale for restricting speech in the first place," *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994), shifting rationales ought to trigger a measure of skepticism about their validity.

The State previously asserted that the threat of federal officials to withhold highway funding if it ceased enforcing the content-based provisions of the Billboard Act after *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) constituted at least a legitimate governmental interest. Tenn. Resp. to Rule 52 Mot., R. 336, PageID # 6731 ("the need to continue federal funding may not be a 'compelling' State interest, it is at

least a legitimate interest that, along with the compelling interest that the State proved, shows Tennessee has a compelling State interest (or interests) in the Billboard Act.").[2] As the district court observed, the State "fail[s] to provide adequate explanation as to how the federal government would be able to constitutionally withhold federal highway funds from a state on the basis that the state failed to engage in conduct that violates the United States Constitution." PI Order, R. 163, PageID # 2274-75. The district court later outright rejected the notion that the loss of funding would constitute a compelling interest. Order Finding Billboard Act Unconstitutional, R. 356, PageID # 6929 n. 6. Far from asserting that the on-premises exceptions evidenced regard for Mr. Thomas's free speech rights, the State at first contended that it had no choice but to *dis*regard them.

Whatever else can be said of this as a justification, the fear of federal withholding was at least based in fact. As shown through a

[2] By this point, the retreat of this justification was already underway. Previously, the State maintained that the threatened loss of highway funds made for a justification that was more than merely legitimate. *See* Tenn. PI Resp., R. 118, PageID # 1491 ("federal funding constitute[s] significant (or even compelling) governmental interests."); *id*. at 1493 (the State interests "in combination constitute a compelling State interest as noted above.").

revealing article of evidence, the State introduced an email with federal officials where they directly instructed Tennessee officials post-*Reed* that the Supreme Court had not addressed the Highway Beautification Act, and it expected continued enforcement of it via the Billboard Act. Aff. of Shawn Bible, R. 127, PageID # 1634. In rejecting the idea that this was a legitimate interest, the district court quoted *Villejo v. City of San Antonio*, 485 F. Supp.2d 777, 783 (W.D. Tex. 2007), where the city disclosed "[p]erhaps the City's primary motivation" in its responses: to secure revenue funding. This district court in this case concurred with the result in *Villejo* that "the desire to secure a [state]'s funding is, of course, not a compelling interest that would justify the suppression of … First Amendment speech…." *Id.*

The district court was quite right. While significant for what this email reveals about both the perceptions of federal officials following *Reed*, and the State's determination to prohibit signs promoting holiday cheer and patriotism, Order Finding Billboard Act Unconstitutional, R. 356, PageID # 6914, a First Amendment infraction is not any less so when demanded by the federal government. Just because the federal government was – to use the State's terms – "compelling the State to

continue enforcing the Billboard Act in the face of *Reed v. Town of Gilbert*," Resp. to Pl.'s Mot. for Summ. J., R. 164, PageID # 2286-87, does not give the State leave to resort to compulsion of its own.

Nor was this the only time the State described the threatened loss of highway funds using some variant of the word, "compulsion." *See* Tenn. Resp. to Rule 52 Mot., R. 336, PageID # 6731 ("the State enacted the Billboard Act and is compelled to retain the Billboard Act at least in part …."); *id.* at 6738 ("the federal government compels the States to have in place an adequate billboard regulation statute."). Elsewhere, the State responded that it "is *constrained* to enforce the Act or risk losing federal funds." Resp. to Pl.'s Mot. for Summ. J., R. 164, PageID # 2286 (emphasis added). Never before did the State assert that the Billboard Act promoted the free speech rights of Mr. Thomas and other Tennesseans. On the contrary, it consistently explained that its overriding concern was what the federal government was forcing it to do in order to keep federal funding.

It should go without saying that federal threats are not any kind of a justification for a First Amendment violation. If continued enforcement was compulsory *on* the State, then it was compulsory *for*

the State to enforce it on Mr. Thomas. Should this Court consider at all the State's claim to be "facilitating and safeguarding the First Amendment rights of its business and property owners," Tenn. Br., ECF No. 24 at 40, then it should also scrutinize "[p]erhaps the … primary motivation" for enforcement, *see Villejo*, 783 F. Supp.2d at 783, and observe that this was not the State's initial perception. Despite the clarity that *Reed* brought regarding exactly how the Billboard Act impacted the First Amendment Rights of Tennessee business and property owners, the State's original response was not to jump to their defense, but instead to protest that it had no options. The initial characterization of ongoing enforcement as compulsion was the correct one. The State just aimed its litigation in the wrong direction.

Between the constitutional rights of its citizens and highway funds, the State of Tennessee – which declares in its own Constitution that "the doctrine of nonresistance against arbitrary power and oppression is absurd [and] slavish," *see* Tenn. Const. art. I, § 2, had a meaningful ability to choose. No matter what federal officials thought about *Reed*, the State has independent judgment, ample means and

excellent attorneys, *see* Tenn. Br., ECF No. 24 at 1-56, with which to respond to federal overreach.

The correspondence with federal officials immediately following the *Reed* at least sheds some light on the position taken in the *amicus* brief of the United States, which argues, in essence, that *Reed* affected little, if nothing, and certainly not the Highway Beautification Act. U.S. Br., ECF No. 29 at 9 (Concerning the Highway Beautification Act: "*Reed* did not purport to overturn settled precedent or invalidate a broad swath of longstanding rules."). The Department of Transportation and Federal Highway Administration argued then as they continue to argue now that *Reed* did not impact their ability to enforce the content-based speech restrictions mandated by the Highway Beautification Act and effectuated by the State with the Billboard Act.

That position is difficult to accredit beyond just the simple fact that *Reed's* logic makes such a position untenable. These same agencies took a similar position before the Supreme Court in *Reed*, trying to prevent the Court from crafting a standard that would threaten the Highway Beautification Act. *See* U.S. Br. in *Reed v. Gilbert*, R. 188-1, PageID # 2946. The United States argued that while the sign code

reviewed in *Reed* was likely unconstitutional, the Highway Beautification Act was not content-based. *Id.* at 2981, 2983-86. It advanced the same interests in defense of the Highway Beautification Act: "safety and aesthetics." *Id.* at 2961. The argument was unavailing.

Although it did not have to, the Court responded to the *amicus* position of the United States in the *Reed* decision. The Court specifically mentioned the *amicus* brief, sharply criticizing their argument designed to defend the Highway Beautification Act as "skip[ping] the first step in the content-neutral analysis: determining whether the law is content neutral on its face." *Reed*, 135 S. Ct. at 2228. *Reed* does have a lesson readily applicable to the Billboard Act, which "pretty much mirrors the federal act." Tenn. Resp. to Rule 52 Mot., R. 336, PageID # 6738. In light of the rather direct statements in *Reed* made in the context of the federal act, it is mystifying that the United States continues to maintain that *Reed* had no impact on this case.

The State and accompanying *amici* craft labyrinthine lessons out of the straightforward holding in *Reed*. One way of deciding how *Reed* ought to be interpreted would be to take it at face value. The Court described the rule as "commonsense," with laws that facially distinguish

speech based on message as "obvious" content-based speech restrictions. *See Reed*, 135 S. Ct. at 2227. The commonsense version of *Reed* would view the treatment of different signs for different treatment based on the content of their message as a content-based speech restriction. Yet the State presents a delicately complicated version of *Reed* and Justice Alito's concurrence. Two additional *amicus* contribute further pagination to expound further upon the meaning of this supposedly commonsense rule. A simple approach this is not. If it took this much effort to explain, "commonsense" would have been the last word to describe it.

The better understanding takes *Reed* at face value: "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2231. If the exceptions in the Billboard Act for on-premises signs apply based on the content, then they are content-based. *See id*. at 2227. Mr. Thomas wanted signs to celebrate patriotism and the holiday season, Order Finding Billboard Act Unconstitutional, R. 356, PageID # 6914, instead of, say, advertising tires. The State prohibited it precisely because of what he wanted to say, not how he wanted to say it. Any

commonsense understanding would view this as content-based. In an effort to avoid the obvious import of *Reed*, the parties in opposition to Mr. Thomas complicate the simple.

II. Even under intermediate scrutiny, the Billboard Act is insufficiently tailored to promoting the goals of aesthetics and motorist safety.

Assuming intermediate scrutiny is the appropriate test, then the Billboard Act would nevertheless fail. It is anything but clear under Sixth Circuit precedent how substantial the stated interests of safety and aesthetics even are. In so arguing, the State relies on the plurality in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), which this Court and others recognized is not the binding opinion in that case. Moreover, this Court – fully in accord with Supreme Court precedent – further circumscribed the means available to curtail speech even under intermediate scrutiny to measures that target secondary effects of speech, *i.e.*, gambling or adult entertainment, or speech inextricably related to the conduct itself, like misleading advertising. Neither concern is remotely at issue here. In any event, the one lesson from *Metromedia* is that commercial speech may not be favored over non-commercial speech. Yet that is what has happened here. Mr. Thomas

cannot erect a clearly non-commercial sign precisely because the message was not commercial.

The State maintains that that the goals of aesthetics and motorist safety are substantial, if not compelling, by citing frequently to the Supreme Court in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507-08 (1981). Tenn. Br., ECF. No. 24 at 38-39, 42, 45, 48. The State cites to the portion of the plurality opinion that this Court has recognized is not controlling.

The *Metromedia* case produced a fractured opinion that struck a San Diego ordinance placing substantial prohibitions on outdoor advertising. *C.f., Rappa v. New Castel County,* 18 F.3d 1043, 1047, 1056 (3d Cir. 1994) "badly splintered, and "difficult to divine what, if any principles from *Metromedia* became the governing standard"). This case, a notable low point in the protection of commercial speech, acknowledged that a city's interest in traffic safety and aesthetics could justify a prohibition of offsite commercial billboards, even if it allowed on-site signage.[3] *See Metromedia,* 453 U.S. at 507-8. The judgment

[3] Since *Metromedia*, the U.S. Supreme Court has habitually struck down commercial speech restrictions as insufficiently tailored under

nevertheless invalidated the ordinance, but under two different lines of reasoning. *See Gilleo*, 512 U.S. at 49. The plurality opinion determined that "the ordinance impermissible discriminated on the basis of content by permitted on-site commercial speech while broadly prohibiting non-commercial messages." *Gilleo*, 512 U.S. at 49. The concurrence struck the ordinance because the "practical effect" was to eliminate the billboard as "effective medium of communication" for non-commercial messages, and that "the city had failed to make the strong showing needed" to justify such a measure." *Id*. at 50 (quotations omitted). The plurality's acknowledgment of aesthetics and safety as substantial interests, however, are not dispositive on the tailoring analysis in any event because: 1) the plurality opinion is not the governing opinion; and, 2) the Billboard Act is such a poor fit for the service of those goals, no matter how substantial.

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intermediate scrutiny. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Thompson v. Western States Medical Center*, 535 U.S. 357, 373-76 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-62 (2001); *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, 193-94 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996); *Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993). For this reason alone, *Metromedia* ought to be regarded as an outlier decision.

This Court's opinion in *Discovery Network Inc. v. Cincinnati*, 946 F.2d 464 (6th Cir. 1991), later affirmed in *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), affects the analysis and reach of *Metromedia*. According to this Court, the governing opinion from *Metromedia* is the concurring opinion and not the plurality upon which the State relies so heavily. *See Discovery Network*, 946 F.2d at 470 n. 9 ("we do not view the plurality dicta in *Metromedia* as controlling the outcome of this case."); *see also Rappa*, 18 F.3d at 1058-59 (recognizing that the *Metromedia* concurrence governs).

Regarding the plurality's view that the San Diego ordinance constitutionally regulated speech, the *governing* concurrence "specifically—and vehemently disagreed with that conclusion." *Discovery Network*, 946 F.2d at 470 n. 9. This Court read the governing portion of *Metromedia* as finding that "San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech." [4]

[4] The test for reviewing commercial speech is "a form of intermediate scrutiny." *Pagan v. Fruchey*, 492 F.3d 766, 770 (6th Cir. 2007). While arguing for intermediate scrutiny, the State cites primarily to *Wheeler v. Commissioner of Highways*, 822 F.2d 856 (6th Cir. 1987). Tenn. Br.,

Id. (citing 536) (Brennan, J., concurring)). In other words, commercial speech cannot be prioritized over non-commercial speech. Furthermore, this Court's opinion makes it anything but clear how substantial aesthetics and motorist safety even are as interests. In the words of this Court, the precedential opinion "vehemently" disagreed that the "perceived evils" of aesthetics and driver safety created by billboards could justify the restrictions. *Discovery Network*, 946 F.2d at 470 n. 9.

Therefore, *Metromedia*, as this Court understood it, called into question whether the goals of aesthetics and safety could justify burdening speech under intermediate scrutiny unless the measure was carefully tailored. Prohibiting non-commercial speech where commercial speech could be in the name of aesthetics and safety was thus on

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ECF No. 24 at 41. *Wheeler* also used intermediate scrutiny, but as a content-neutral time, place, or manner restriction, not a commercial speech restriction. *Id*. at 595. This Court has otherwise largely dismissed the differences between intermediate scrutiny for a commercial speech restriction, and a time, place, or manner restriction. *See Pagan*, 492 F.3d at 778 (the analysis "would still be a form of intermediate scrutiny, focusing on whether the restriction is narrowly tailored to serve government interests and leaves open amble alternative channels of communication."). Thus, commercial speech precedents regarding both the requisite interests and tailoring analysis should be considered readily applicable.

dubious footing even before *Reed* and even under a more deferential form of review.

When the Supreme Court later affirmed this Court's ruling in *Discovery Network*, it did nothing to disturb the findings with respect to the interests. In *Discovery Network*, 507 U.S. 410, 416 (1993), the Court did not analyze the substantiality of the asserted interest in safety and aesthetics because the "respondents [did not] question the substantiality of the city's interest in safety and esthetics." *Discovery Network,* 507 U.S. at 416. Further, the Court had no reason to bring up the issue given the ample reasons why the asserted interest and the implementing legislation failed to satisfy the tailoring analysis. As a result, the substantiality of these interests, while largely taken as a given, should not be.

The downgrading of the interest then affects the tailoring analysis by making it correspondingly higher. In *Greater New OrleansAss'n, Inc. v. U.S.,* 527 U.S. 173, 183-84 (1999), the Court recognized that the parts of the balancing analysis are not "entirely discrete," and that the parts are "interrelated." The Court explicitly acknowledged that its analysis "consider[s] both the quality of the asserted interests and the

information sought to be suppressed" in determining the government's level of "difficult[y] to defend" how tailored the speech restriction needed to me. *Greater New Orleans Broadcasting,* 527 U.S. at 187. The more substantial the interest, the less closely tailored the measure must be.

This Court has since further circumscribed the tailoring analysis even further, allowing speech restrictions under intermediate scrutiny only in two narrow instances. In the wake of *Metromedia*, this Court determined that in order to pass muster, a restriction must relate to regulating *either* the secondary effects of the speech itself *or* activity the speech is promoting. *Discovery Network*, 946 F.2d. at 465, 469. The first relates to attempts to burden speech with effects that "flowed naturally from personal actions fostered by the commercial speech itself," *id*. at 471, *i.e.*, adult entertainment or gambling. The second concerns things such as misleading advertisements or trade names. *Id*. at 470 n. 10. Only in those cases does this Court believe that commercial speech receives lesser first amendment protection. *Id*. at 465.

This Court's understanding is fully consistent with the Supreme Court. Keeping in this vein, the Court deemed "substantial" a

legislative purpose to specifically eliminate a public harm inherently caused by the specific commercial speech. *See 44 Liquormart*, 517 U.S. 484, 485, 500-01. The Court has likewise found that when the at-issue speech "is inextricably linked with the commercial arrangement it proposes" that the "State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfeld v. Fane,* 507 U.S. 761, 768-69 (1993) (citations omitted). For example, in the bankruptcy assistance advertising context, the concomitant interest in "protecting consumers from fraud or overreaching … and maintaining CPA independence and ensuring against conflicts of interest … [were] substantial." *Edenfeld*, 507 U.S. at 761-62. And little doubt surrounds the government's ability to regulate and ban misleading or false advertisements. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (affirming measures designed to prohibit false and misleading attorney advertisements).

The way in which the Billboard Act promotes aesthetics and safety is insufficiently tailored for all of the reasons explained by the Cato Institute, *see* Cato Br., ECF No. 35 at 3-17, but also because the

on-premises exceptions do not regulate secondary effects or activity the speech was promoting. Mr. Thomas's signs obviously did not contain a message relating to professional activity that was believed to be "inherently false or misleading." *Discovery Network*, 946 F.2d 470, n. 10. And there is no allegation that the State's actions "sought to alleviate distinctive adverse effects allegedly caused by and directly flowing from" the message itself. *Id*. Mr. Thomas was trying to encourage people to support American Olympic athletes, not visit his casino. Order Finding Billboard Act Unconstitutional, R. 356, PageID # 6914. If aesthetics or motorist safety were the goals of the Billboard Act, then the on-premises exceptions are simply too "pierced by exemptions and inconsistencies" to survive even an intermediate form of tailoring analysis. *See Greater New Orleans*, 527 U.S. at 190.

Even to the extent that the opinion in *Metromedia* was the last word, then it would help, not hurt, Mr. Thomas's position. As pointed out above, the one takeaway from this split opinion is that commercial speech may not be elevated above non-commercial speech. "Justice Brennan seemed explicitly to reject the first basis for the plurality's holding – that it was impermissible for legislation to favor commercial

over non-commercial speech." *Rappa*, 18 F.3d at 1059; *see also Ackerly Communications of Massachusetts, Inc. v. Somerville*, 878 F.2d 513, 517 (1st Cir. 1989) ("In other words, if the owner of Joe's Hardware wants to replace his 'Joe's Hardware' sign with a sign saying 'No Nukes,' he must be allowed to do so."); *Vono v. Lewis*, 594 F. Supp.2d 189, 203 (R.I. 2009) ("A rule that would allow the display of commercial messages where noncommercial messages are not permitted would invert this First Amendment hierarchy."). Given that Mr. Thomas was forbidden from promoting a non-commercial message in a spot where he could have displayed a commercial one related to the business on-premises, the Billboard Act manages a complete inversion of the First Amendment pyramid.

III. In the event this Court finds the Billboard Act constitutional as a matter of federal law, then it would promote judicial economy to first certify the question as a matter of Tennessee constitutional law before reversing.

As a final matter, *amici* respectfully submit that even if this Court were to believe that the Billboard Act was constitutional, then the appropriate outcome would not be reversal, but first to certify the question as a matter of Tennessee constitutional law to the Tennessee Supreme Court.

Mr. Thomas did raise his state constitutional right to free expression. Amended Compl., ¶ 72, R. 43, PageID # 573. The district court ruled exclusively on First Amendment grounds. Order Finding Billboard Act Unconstitutional, R. 356, PageID # 6910. Nevertheless, this freestanding basis was mooted by the district court's ruling. If, however, this Court believed that the district court erred, the state constitutional claim would need resolution.

The United States Supreme Court repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different and broader protections of individual liberties than those offered by the federal Constitution. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of its corresponding constitutional guarantee."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); *see also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

Accordingly, Tennessee courts are free to interpret the Tennessee Constitution without adherence or deference to federal court decisions.

Tennessee recognizes a device for federal courts to expeditiously send questions of law to the Tennessee Supreme Court:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, *a Court of Appeals of the United States*, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Tenn. Sup. Ct. R. 23, § 1 (emphasis added). The decision to certify "rests in the sound discretion of the federal courts." *Lehman Bros. v. Shein*, 416 U.S. 386, 391 (1974). The parties need not have requested it, nor must the question have been presented to the lower court. This decision may be made *sua sponte* by the court. *See, e.g., Elkins v. Moreno*, 435 U.S. 647, 662 (1978); *c.f.*, *Seals v. H&F Inc.*, 301 S.W.3d 237, 241 n. 3 (Tenn. 2010) (question of law may be certified at any level of the process).

Certification can conserve "time, energy and resources." *Shein*, 416 U.S. at 391. On the other hand, certification can "be overused and

add unnecessary burden on the answering court." *Seals*, 301 S.W.3d at, 241 n. 3. The Tennessee Supreme Court has otherwise disclaimed "the harsh assessment of the general merits of the certification process" expressed by other courts. *Id*.

In the event this Court determines that the Billboard Act meets federal constitutional protections, then the question becomes purely one of Tennessee law and would meet the criterion espoused in Tenn. Sup. Ct. R. 23. The question would by definition be determinative because it would only be primed if this Court determines that Mr. Thomas has otherwise lost.

Furthermore — and most critically — there is no controlling precedent in the decisions of the Supreme Court of Tennessee about if, how, and when Tennessee's Constitution provides greater protection to the right to free expression. On its face, Tennessee's Constitution appears to provide little basis for content-based speech restrictions of any kind. Article I, § 19 of Tennessee's Constitution provides that "every citizen may freely speak, write, and print *on any subject*." (emphasis added). The Tennessee Supreme Court has recognized that its state constitutional free speech protections "at least" as robust, but

never said definitively if they go further. *See Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004) ("Article I, section 19 provides protection of free speech rights at least as broad" as the First Amendment). Implying that it may, the Tennessee Supreme Court has repeatedly emphasized that its free speech holdings do:

> not mean that our interpretation of the protection granted to 'free communication of thoughts and opinions' in Article I, Section 19 of the Constitution of Tennessee is necessarily identical to the U.S. Supreme Court's interpretation of the rights granted under the First and 14th Amendments to the U.S. Constitution.

State v. Marshall, 859 S.W.2d 289, 294-95 (Tenn. 1993); *see, e.g., Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993) (quoting *Marshall* with approval). While reserving the authority to find that state protections of speech were greater, the Tennessee Court declined to do so with respect to obscenity in *Marshall*. 859 S.W.2d at 290-91, 295. Consistently, the Tennessee Supreme Court finds it "unnecessary for the resolution of the issues before the Court," *Davis-Kidd*, 866 S.W.2d at 525, to determine if Tennessee's Constitution is more protective of free speech. But it always leaves the door open.

This exactly the sort of speech question that is ripe for state constitutional review because it is, at worst, a very close call on an free speech issue that is reoccurring around the country. Even if this Court were to accept the State's arguments, the various positions to the contrary well illustrate that the Billboard Act's many exceptions teeter dangerously close to the line. The Tennessee Supreme Court might well conclude that if its greater protections apply to any case, this is it. And that, of course, is in everyone's interests because "neither the government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir 2003); *see also Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quoting *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (has a significant interest in … protection of First Amendment liberties.")).

A cost benefit analysis likewise favors certification. Certification would promote judicial economy. If Mr. Thomas loses, his only course would be to take the matter to the Tennessee Supreme Court. And since this question is a novel question under Tennessee law, the lower court rulings will be *pro forma* proceedings that would operate only to

channel it to the court of last resort. Review of this pure issue of law would be *de novo*. The facts are already fully flushed out. Proceeding through the ordinary process through Tennessee courts would serve no meaningful purpose. A certification gives the Tennessee Court the chance to address the issue directly, bypassing all these unnecessary steps. Even if the Tennessee Supreme Court chose not to accept, that too would be useful as Mr. Thomas considers his next step.

Before overturning the district court, this Court should first ask the Tennessee Supreme Court if it is interested in resolving this vital issue of Tennessee constitutional law. Doing so would promote judicial economy and the public's interest in more expediently resolving a matter of evident public concern.

CONCLUSION

This Court should affirm the decision of the district court, or certify the question before reversing.

Dated: April 11, 2018. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, a true and exact copy of the foregoing was filed with the United States Court of Appeals for the Sixth Circuit using the CM/ECF system and served on all parties. I certify that all participants in the case are registered as ECF filers and will be served through the CM/ECF system:

Dated: April 11, 2018.

Respectfully submitted,

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