No. 17-6238

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

v.

JOHN SCHROER, 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

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

The Buckeye Institute for Public Policy Solutions (The Buckeye Institute) was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.

The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country.

The Buckeye Institute is located directly across the street from the Ohio Statehouse on Capitol Square in Columbus, where it assists legislative and executive branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions.

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The Buckeye Institute promotes ideas to remove barriers to prosperity and unleash human flourishing. One significant way that The Buckeye Institute and countless other non-profits disseminate our ideas to a broader audience is through outdoor advertising. *See,* The Buckeye Institute, *The Buckeye Institute Unveils Outdoor Ads Highlighting the Need for Worker Voting Rights*,

https://www.buckeyeinstitute.org/research/detail/the-buckeye-institute-unveils-outdoor-ads-highlighting-the-need-for-worker-voting-rights (last visited Apr. 10, 2018).

Content-based speech restrictions like those found in Tennessee's Billboard Act, which treat ideas or ideological speech less favorably than other speech, necessarily harm the ability of advocacy and public-welfare organizations to widely and publicly disseminate ideas.

Introduction and Summary

Pursuant to the Supreme Court's decision in *Reed v. Town of Gilbert*, Tennessee's Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Ann. 54-21-101, is facially content-based because it "applies to particular speech because of the . . . message expressed." 135 S. Ct. 2218, 2227 (2015). As such, the Billboard Act must satisfy strict scrutiny to survive the current challenge. Id. at 2227.

Tennessee enacted the Billboard Act to comply with the requirements of the federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131 *et seq*., and to avoid the loss of federal funds for failure to comply. A review of the text and legislative history of the federal scheme for highway signage reveals that the federal government enacted the HBA to promote the aesthetic interest in the natural beauty adjacent to the highway system.

The text and legislative history demonstrate that public safety was not a significant purpose for either the Billboard Act or the HBA.

Because Tennessee fails to establish that highway aesthetics constitute a compelling state interest, this Court should affirm the decision of the district court.

I. The Purpose of the Highway Beautification Act is Aesthetics

a. Tennessee's Purpose in Enacting the Billboard Act Is Compliance With the Federal Highway Beautification Act

Appellant concedes that Tennessee enacted the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Ann. 54-21-101, "[t]o comply with the conditions imposed by the federal [Highway Beautification] Act[.]" Tenn. Br. at 6. Tennessee's compliance with federal law in turn was necessary to avoid the loss of federal highway funds. *See Federal Funds in Peril*, THE TENNESSEAN, Feb. 17, 1972, at 8; and *Volpe Reinstates State Road Funds*, THE TENNESSEAN, May 21, 1972, at 14-B. It is therefore necessary to examine the federal Highway Beautification Act to understand the regulatory purpose behind that statute in order to assess whether Appellant is acting in furtherance of a compelling state interest in complying with the federal statute.

b. The Federal Government's Predominant Purpose in Enacting the Highway Beautification Act Was Enhancing Highway Aesthetics

The predominant purpose behind the HBA was improving and protecting highway aesthetics.

The federal effort to regulate billboards began with the Bonus Act of 1958, which incentivized states to regulate billboards along interstate highways with a modest increase to federal highway grants. *See* Pub. L. No. 85-381, § 122, 72 Stat. 89, 95. During floor debates, the bill's sponsor complained, "As these roads are laid out, the billboard companies, or the so-called outdoor advertisers, acquire so-called grandfather rights for the signs that are being put up to shut out the beautiful scenery—mountain, valley, hill, tree, and dale—from the view of the people who drive over those roads." 104 CONG. REC. S866 (daily ed. Jan. 23, 1958) (statement of Sen. Neuberger). The Bonus Act contained exceptions for outdoor advertisements for business being conducted on the subject property.

The policy was intended to "exclude brand-name advertising, while making available to Interstate Highway travelers information concerning off-highway facilities, particularly sleeping and eating accommodations, tourist resorts, and automotive supply and repair services." William John Martin Jr. and David E. Nelson, *Outdoor Advertising Control along the* Interstate Highway System, 46 Cal. L. Rev. 796 (1958), citing 104 Cong. Rec. 7613 (daily ed. May 13, 1958).

When many states failed to take action based upon the financial incentives provided in the Bonus Act, calls were renewed for Congress to take action. President Johnson in his 1965 State of the Union Speech announced his intention to "landscape" along the national highways, and declared that he would convene a White House Conference on Natural Beauty ("Conference"). 111 CONG. REC. H30 (daily ed. Jan. 4, 1965). At the Conference, President Johnson stated that he would send legislation to Congress that "will eliminate outdoor advertising signs and junkyards from the sight of the interstate and primary highway system--except in those areas of commercial and industrial use." Lyndon B. Johnson, *Remarks to the Delegates to the White House Conference on Natural Beauty* (Gerhard Peters and John T. Woolley, eds., The American Presidency Project), http://www.presidency.ucsb.edu/ws/?pid=26993 (last visited Apr. 10, 2018).

The result of President Johnson's efforts was the Highway Beautification Act. Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. § 131). Rather than providing a carrot in the form of a bonus for states that comply, the Highway Beautification Act uses a stick to strip a portion of federal highway funding from states that do not regulate outdoor advertisements to the satisfaction of the federal government. Id.

In debating the Highway Beautification Act, Congress was clear in expressing that the intent of the legislation was to remove the "garish clutter

symbolic of a crass commercialism." 111 CONG. REC. H26140 (daily ed. Oct. 6, 1965) (statement of Rep. Wright). Representative James Howard argued that, "The people who are paying for these highways deserve to have these highways protected so when they drive along an artery they can enjoy beautiful scenery and not be subjected to roadside ugliness." 111 CONG. REC. H26141 (daily ed. Oct. 6, 1965). Senator Thomas Dodd went as far as to say, "Frequently our highways have been reduced to blighted corridors between billboards which obstruct the traveler's view and mock the glory of the countryside. The creeping cancer of roadside advertising has made a huge and garish want-ad of many of our Nation's highways." 111 CONG. REC. S23891 (daily ed. Sep. 15, 1965).

The congressional record is replete with references that state the need to regulate signage for the purpose of promoting highway aesthetics to the absence of any other significant purpose.

c. Public Safety Was *Not* a Significant Purpose of the HBA or the Billboard Act

Although the HBA states in its preamble that Congress finds that signage should be regulated to promote public safety, 23 U.S.C. § 131(a), the text of the statute operates to the contrary, elevating aesthetic considerations over safety. Furthermore, the conclusion that public safety was not the intended purpose of the HBA is bolstered by a review of its legislative history, in which a colloquy on the

floor plainly stated that the purpose of the statute is beautification, and that public safety was "immaterial." 111 CONG. REC. S24108 (daily ed. Sep. 16, 1965) (statement of Sen. Allott).

The HBA's preamble states:

> The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System . . . should be controlled in order to protect the public investment in such highways, to *promote the safety* and recreational value of public travel, and to preserve natural beauty. 23 U.S.C. § 131 (emphasis added).

But "the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008) (quoting 2A N. Singer, Sutherland on Statutory Construction §47.04, p. 146 (rev. 5th ed. 1992)). Here the enacting part of the statute is clear that the governing principle behind the regulatory scheme is protecting natural aesthetics to the potential detriment of public safety.

In the operative section of the HBA, Congress conditioned funding and required the states to provide for "effective control" of signage only "outside of urban areas," 23 U.S.C. § 131(b) & (c), and gave the states the full authority to permit signs within commercial or industrial areas. 23 U.S.C. § 131(d). Keeping to Tennessee's stated purpose behind the Billboard Act of complying with the

requirements of the HBA, Tennessee exempts signs in industrial or commercial areas, as it is permitted to do by the HBA. Tenn. Code Ann. § 54-21-103(4).

These urban exemptions to the operative language of the HBA and the Billboard Act are fully consistent with President Johnson's expressed purpose of protecting natural beauty, but they are inconsistent with the arguments that Tennessee is now making regarding public safety. If the concern motivating regulations involve protecting public safety from accidents that may occur due to driver distractions, then the governmental interest in regulating signs in urban areas is even *stronger*, given the greater density of cars, pedestrians, number of lanes, and shorter distance between on- and off-ramps. The urban signage exemption cannot be reconciled with Tennessee's claim that the statute's regulatory purpose is public safety.

Furthermore, Congress made no findings, and did not engage in any meaningful discussion of the possible effects of the act on public safety. Indeed, a review of the congressional record finds only a passing reference to public safety as a consideration of Congress, which after mimicking the language of the preamble rather goes on to emphasize the strong interest in protecting aesthetics:

> I have today introduced a bill which would ask the Congress to declare . . . that outdoor advertising signs. . . must be controlled in order to protect lives, to promote the recreational value of public travel, and to preserve and enhance natural beauty; and that off premise outdoor advertising signs. . . must be prohibited in order to protect the highway

> user from the visual aggression of unnecessary forced viewing and unwarranted interference with freedom and the right to be let alone.

111 CONG. REC. H15759 (daily ed. July. 7, 1965) (statement of Rep. Udall).

The beautification purpose of the HBA to the exclusion of public safety is made crystal clear by examining the floor debate over a proposed amendment offered by Senator Ribicoff to fund a study of highway safety standards. The Secretary of Commerce had been required to conduct the safety study in a bill passed a few weeks prior to consideration of the HBA, but the funds to conduct the study had not been appropriated. 111 CONG. REC. S24107-8 (daily ed. Sep. 16, 1965) (statement of Sen. Ribicoff).

Senator Ribicoff offered a successful amendment to the HBA to appropriate these funds, and was met with fierce resistance to the amendment by Senator Allott, who argued that:

> "We have before us **a bill which involves only beautification and the control of signs**, junkyards, auto graveyards, and other eyesores along the interstate and primary highway systems of this country. I really cannot understand why such a matter as this should be interpolated into the measure . . . . My only objection to it is that it does not belong in the bill. It is a rider which, for the purposes of the bill, is as immaterial as an amendment on child labor. **It has no more relation to the purposes of the bill than an amendment on child labor would have to the bill**."

111CONG. REC. S24107-8 (daily ed. Sep. 16, 1965) (statement of Sen. Allott) (emphasis added).

Given that the HBA and the Billboard Act operate contrary the State's purported theory of public safety, the absence of legislative findings regarding

public safety as a rationale for the HBA, and the legislative history which makes clear that public safety was immaterial to the purposes of the act, the reference to public safety in the preamble is mere window dressing, and public safety was not a significant purpose of the HBA, if it was any purpose at all.

II. Highway Aesthetics Are Not a Compelling State Interest

The predominant purpose of the HBA is, as the name would suggest, promoting highway beauty. It is strange, then, that Tennessee and the United States do not offer any meaningful attempt to justify the regulatory scheme based upon aesthetics. Beyond strange, the failure to establish aesthetics as a compelling state interest sufficient to justify the content-based restrictions at issue is fatal to their defense of the statute.

In defending Tennessee's law, the United States does not even suggest that aesthetics constitute a compelling interest, conceding instead that at least two courts of appeals have found that aesthetics "have never been held to be compelling." U.S. Br. at 15, n.1 (citing Neighborhood Enters. v. City of St. Louis, 644 F.3d 728, 737-38 (8th Cir. 2011); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1267 (11th Cir. 2005)).

Appellant Tennessee does little better. Appellant first was obligated to concede that the Supreme Court and this Court have never found aesthetic beauty

of roadways to be a compelling state interest. Tenn. Br. at 39, n.21. Appellant nonetheless stated perfunctorily in an argument relegated to a footnote that the "State maintains that the [aesthetic] interest is compelling" given "the strong link between the State's tourism industry and the scenic beauty of those roadways." Id.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Nixon v. Shrink Mo. Gov't Pac, 528 U.S. 377, 391 (2000).

Given the novelty and implausibility of Appellant's argument—an argument for which Appellant can provide no precedent—the quantum of evidence needed surely is above a blanket assertion in a footnote. Indeed, "[t]he deleterious effect of graphic communication upon visual aesthetics . . . , substantiated here only by meager evidence in the record, is not a compelling state interest of the sort required to justify content based regulation of noncommercial speech." Dimmitt v. Clearwater, 985 F.2d 1565, 1570 (11th Cir. 1993).

Perhaps recognizing the weakness of Tennessee's position, Appellant argues that "this Court need not decide whether the State's interest in aesthetics is [ ] compelling." Id. This Court should not take Appellant's invitation to avoid a central issue in the case, but instead should join every circuit to previously decide this issue and find that highway aesthetics are not a compelling state interest.

a. Because Public Safety Is a Post Hoc Rationale, It Is Not the State's Interest

Even in the more lenient category of intermediate scrutiny, the burden is on the state to establish that "[t]he justification [is] genuine, not hypothesized or invented post hoc in response to litigation," or "relying on overbroad generalizations." United States v. Virginia, 518 U.S. 515, 533 (1996). Here the weight of the evidence from both the text and legislative history demonstrate that public safety was not the interest that the state was seeking to protect in enacting either the HBA or the Billboard Act. The state should not be able to rely on the post-hoc rationalization of public safety—bolstered by studies on distracted driving of dubious applicability to signs rather than to the more apt and ubiquitous electronic devices in the hands of drivers—in order to avoid defending the actual and indefensible basis for the content-based speech restrictions at issue: aesthetics.

If public safety were the compelling interest that the state claims, then one would expect that the legislature would have drafted the regulations to address that concern. Yet it did not. The regulations were not crafted to minimize distractions. Rather, the regulations permit signs to be placed without limitations in the very places where they are most likely to be distracting. See Tenn. Code Ann. § 54-21-103(4). "[W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit

the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." United States v. Nat'l Treasury Emples. Union, 513 U.S. 454, 475 (1995) quoting Turner Broadcasting System, 512 U.S. 662, 664 (1994). Here, the state has not demonstrated that the regulation will alleviate the harms in a material way.

Because public safety was not the interest that the federal government intended to address in enacting the HBA, and because public safety was not the interest that Tennessee intended to address in enacting the Billboard Act, the state should not be able to rely on public safety as a post hoc interest to justify what are, and were originally stated to be, aesthetic regulations.

III. Affirming the District Court Will Not Lead to a Parade of Horrible Signs

If this Court upholds the decision of the district court, the result will not necessarily lead to the placement of any additional signs, or to any impairment of public safety or despoliation of natural beauty. The District Court identified multiple alternatives to the existing regulation that would advance the state's actual interest (and would better satisfy the state's additional interest in public safety)—through regulations on the size, spacing, minimum distance between signs. RE 356, Page ID # 6945, 6947, & 6950. But affirming the district court would

certainly mean an end to the First Amendment violations arising from the content-based restrictions on speech under the Billboard Act.

Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

/s/ Robert Alt

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APRIL 11, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of the Fed. R. App. P. 29(a)(5) and 6th Cir. R. 32 because it contains 3,044 words, excluding the parts of the brief exempted by Fed. R. App. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 29(a)(4) and 32(a)(5) and 6th Cir. R. 32 and the type-style requirements of Fed. R. App. P. 29(a)(4) and 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2008 in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that April 11, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: April 11, 2018 /s/ Robert Alt