No. 17-6238

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. 13-CV-02987, HON. JON P. MCCALLA, PRESIDING

BRIEF *AMICUS CURIAE* FOR THE CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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**Not admitted in this court.*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-6238 Case Name: Thomas v. Schroer

Name of counsel: Ilya Shapiro

Pursuant to 6th Cir. R. 26.1, Cato Institute
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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

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s/Ilya Shapiro

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. TENNESSEE HAS FAILED TO CARRY ITS BURDEN OF PROVING THAT THE BILLBOARD ACT DIRECTLY ADVANCES ITS ASSERTED INTERESTS 3

A. Tennessee Has Failed to Offer Sufficient Evidence to Overcome Its Burden 4

B. The Statute's Irrational Scope Prevents It from Directly Advancing the State's Asserted Interests 9

II. THE BILLBOARD ACT IS NOT NARROWLY TAILORED BECAUSE IT RESTRICTS MORE SPEECH THAN IS NECESSARY 13

A. There are Numerous and Obvious Less-Burdensome Alternatives to the Statute's Restrictions 15

B. By Disadvantaging Noncommercial Speech, the Statute Restricts Substantially More Speech than Is Necessary to Further Tennessee's Purported Interests 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Pages(s)

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 19

Ackerley Commc'ns of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) 17

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)...2, 13

Cincinnati v. Discovery Network, 507 U.S. 410 (1993) 15

Edenfield v. Fane, 507 U.S. 761 (1993) .... *passim*

Fla. Bar v. Went for It, 515 U.S. 618 (1995) 14

GEFT Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, 187 F. Supp. 3d 1002 (S.D. Ind. 2016) 18

Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997) ....

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999).... *passim*

McCullen v. Coakley, 134 S. Ct. 2518 (2014) 2, 13, 16

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)....................................18

Packingham v. North Carolina, 137 S. Ct. 1730 (2017) 13

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) .... *passim*

State Univ. of New York v. Fox, 492 U.S. 469 (1989) 2, 6, 13, 15

Thomas v. Schroer, 248 F. Supp. 3d 868 (W.D. Tenn. 2017) .... *passim*

Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997)....................................3

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 15

Statutes

Tennessee Code Annotated §§ 54-21-101, *et seq*....................................1

Regulations

Rule of Tenn. Dep't of Transp. Maintenance Division, Control of Outdoor Advertising, 1680-02-03.06(4)(a) (2008) 10

Rule of Tenn. Dep't of Transp. Maintenance Division, Control of Outdoor Advertising, 1680-02-03.06(4)(b) (2008) 10

Other Authorities

Brief for Cato Institute and National Federal of Independent Business Small Business Legal Center as Amici Curiae Supporting Pet. for Writ of Cert., *Spirit Airlines, Inc. v. Dep't of Transp.*, 569 U.S. 903 (2013) (No. 12-656)......14

Brief for Pacific Legal Foundation and Cato Institute as *Amici Curiae* Supporting Respondents, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (No. 10-779)...19

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

The present case concerns Cato because Tennessee's statutory and regulatory framework for "billboards" presents an irrational, unnecessary, and overly expansive restriction on the constitutionally guaranteed freedoms of speech and expression.

SUMMARY OF ARGUMENT

In its analysis of the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Annotated §§ 54-21-101, *et seq*., the court below was correct that the statute's distinction between on-premises and off-premises signage renders it a content-based regulation of speech that is thus subject to strict scrutiny review. *See Thomas v. Schroer*, 248 F. Supp. 3d 868 (W.D. Tenn. 2017). Appellee has briefed this point thoroughly, but *amicus* files this brief to show that the Act should fail even

[1] Fed. R. App. P. 29 Statement: Both parties consented to this filing. No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* and its members funded its preparation and submission.

lower levels of scrutiny designated for content-neutral regulations. Moreover, because "the application of the *Central Hudson* test" for commercial speech is "substantially similar to the application of the test for validity of [content-neutral] time, place, and manner restrictions upon protected speech," *State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), this brief will pull not only from the jurisprudence of content-neutral speech regulations but also from commercial-speech doctrine.

In order for the means-end fit under a lower level of scrutiny to be adequate, "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Assessing compliance with this requirement is accomplished through the use of two related criteria. "First, the restriction must directly advance the state interest involved." *Id*. The second criteria inquires whether "the governmental interest could be served as well by a more limited restriction" on speech. *Id.* In other words, even under diminished First Amendment scrutiny, the regulation "still must be narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (internal quotations omitted).

Because of the Billboard Act's broad and haphazard applications, it cannot survive constitutional scrutiny. Tennessee has conceded that the Act's on-premises/off-premises provisions apply to both commercial and noncommercial speech. Indeed, the specific sign at issue here—what has been termed the Crossroads

Ford sign—featured messages that are unquestionably noncommercial in nature. Specifically, two of the messages the sign displayed were "an image of an American flag with Olympic rings" and "content referencing the upcoming holiday season with a picture of an American Flag." *Schroer*, 248 F. Supp. 3d at 874.

The evidence that Tennessee offers is wholly inadequate to overcome its burden to justify such restrictions. In addition, the statutory scheme's sheer irrationality prevents it from directly and materially advancing the state's asserted interests. The Billboard Act also falls far short of the narrow-tailoring requirement, given the numerous and obvious less-burdensome alternatives to its restrictions. Finally, by specifically disadvantaging noncommercial speech, the statute restricts substantially more speech than is necessary to serve its purported ends.

ARGUMENT

I. TENNESSEE HAS FAILED TO CARRY ITS BURDEN OF PROVING THAT THE BILLBOARD ACT DIRECTLY ADVANCES ITS ASSERTED INTERESTS

Under the heightened scrutiny required by the First Amendment, "the Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quotations omitted); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (addressing whether the relevant regulations served the government's interests "in a direct and effective way" and were designed to alleviate

certain harms "in a material way"). This burden is not met if the regulation "provides only ineffective or remote support for the government's purpose." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). Instead, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

Although Tennessee proffered six specific state interests in its attempt to justify the Billboard Act's on-premises/off-premises distinction, the district court found that these could be boiled down to two basic categories: (1) traffic safety and (2) roadway aesthetics. *Schroer*, 248 F. Supp. 3d at 882. Regardless of whether these concerns are generally considered to be significant or substantial, the court was correct that "such general and abstract interests… are unrelated to the distinction between signs with on-premises-related content versus other messages." *Id*. at 883. Accordingly, these provisions fail to advance Tennessee's interests in either traffic safety or roadway aesthetics in a sufficiently direct, material, and effective way.

A. Tennessee Has Failed to Offer Sufficient Evidence to Overcome Its Burden

Tennessee has half-heartedly attempted to overcome its burden to prove that the on-premises/off-premises distinction directly and materially advances its asserted interests through a unique combination of unsupported conclusory assertions and irrelevant testimony. Yet despite the rule that this burden "is not

satisfied by mere speculation or conjecture," *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188, the state's attempted justifications for that distinction would require the court to engage in just this sort of conjecture. Even if the distinction were wrongly determined to be content-neutral and thus subject to less than strict scrutiny, Tennessee's unsubstantiated declarations must still yield to the First Amendment.

Three examples should suffice to illustrate the point. First, the district court found the state's contention that on-premises signs have less impact on aesthetics "because the signs are already integrated with the current land use" to constitute "conclusory arguments that . . . lack evidentiary support and merit." *Schroer*, 248 F. Supp. 3d at 889. Second, the court adjudged the argument that such signs are inherently self-regulating because business owners generally eschew erecting multiple signs to be a "conclusory assumption" that was "speculative and lack[ed] evidentiary support." *Id.* at 886–87. Third, the court considered Tennessee's speculation that billboards would proliferate in the absence of the Billboard Act's restrictions to have been offered "without proof" and to rely on "a hypothetical, unproven negative." *Id.* at 886.

Tennessee's lack of supporting evidence is reminiscent of Florida's failure to prove that its ban on personal solicitation by certified public accountants directly and materially advanced that state's asserted interests. *See Edenfield*, 507 U.S. at 771. Despite that case's involving commercial speech, the scrutiny employed there

and the test for supposedly content-neutral regulations remains "substantially similar." *See Fox*, 492 U.S. at 477. Comparing the present case with *Edenfield* is thus both relevant and illustrative.

Much like in *Edenfield*, the record here "does not disclose any anecdotal evidence . . . that validates the [state's] suppositions." *See* 507 U.S. at 771. Similarly, Tennessee "presents no studies that suggest" that off-premises signage uniquely "creates the dangers" to driver safety or aesthetic beauty that the state "claims to fear." *Id.* It is true that one witness (Commissioner John Schroer), when asked whether he conducted an independent study of the impact roadways have on the state's business-recruitment efforts, responded that his conversations with unnamed company executives were "as independent as I think I need." *Schroer*, 248 F. Supp. 3d at 881 n.4. And, as discussed below, it is true that another witness (Colonel Tracy Trott) relied on statistical evidence regarding distracted driving accidents. *Id.* at 884. However, neither Commissioner Schroer's anecdotal "independent" study nor Colonel Trott's statistical evidence in any way support Tennessee's claims that the on-premises/off-premises distinction directly advances the state's interests.

In addition to Tennessee's unsupported assertions, the state's attempted reliance on witness testimony to further its narrative of direct advancement also falls far short of meeting the state's burden under the First Amendment. In fact, again like *Edenfield*, the combined testimony of Tennessee's witnesses "contains nothing more

than a series of conclusory statements that add little if anything to" Tennessee's speculative justifications. *See Edenfield*, 507 U.S. at 771.

With regard to traffic safety, Tennessee offered expert testimony from TDOT Assistant Regional Traffic Engineer Jason Moody and highway patrolman Colonel Trott. Mr. Moody's testimony amounted to little more than a conclusion that billboards are a contributing factor to distracted driving. *See Schroer*, 248 F. Supp. 3d at 884. Worse still, while Colonel Trott's testimony established distracted driving as a serious problem on the roadways, the statistics he relied on failed to make any reference to the extent to which billboards or other road signs were to blame. *Id*.

Crucially, though, neither expert's testimony suggested in any way that on-premises signs pose less of a danger of distracted driving than other signs. Indeed, rather than identifying off-premises signage as a special threat in this regard, Colonel Trott instead identified signs that did not feature instantly recognizable symbols or that were placed outside the driver's field of vision as the greatest potential safety threats. *Id*. How these aggravating factors are in any way associated with the on-premises/off-premises distinction remains a mystery. No wonder the district court found unequivocally that Tennessee had "not established that on-premises signs are less distracting than off-premises signs." *Id*. at 886.

Tennessee's witnesses also failed to show how the premises distinction directly advances an interest in roadside aesthetics. This is hardly surprising, given

that aesthetics obviously "are not measured by how relevant the sign's content is to the on-premises activity." *Id.* at 889. For example, while witness John Carr offered testimony about the primary scenic activities that visitors to the state enjoy, he failed to address whether signage in general—much less off-premises signs in particular—had any impact on the aesthetic value associated with such activities. *Id.* at 885.

Commissioner Schroer's testimony was similarly unavailing. Testifying as "a businessman and entrepreneur himself, who is familiar with the business industry and the needs of businesses in Tennessee," Schroer opined that aesthetically pleasing roads are critical to economic development. *Id.* at 881. The district court properly discounted this testimony, partially because it merely "correlates the maintenance and building of roads, sans reference to aesthetics, with transportation to and from Tennessee businesses." *Id.* In other words, while roads are important for travel to businesses, there is no evidence that how pretty those roads are matters.

Finally, the testimony of Shawn Bible, Beautification Coordinator at TDOT, actually "contradicts, rather than strengthens," *Edenfield*, 507 U.S. at 772, the arguments advanced by the state. Instead of attributing the advancement of roadside aesthetics to the on-premises/off-premises distinction, Coordinator Bible instead observed that zoning plays the major role in preventing "billboards [from] blocking the beautiful rural views or hanging over residences." *Schroer*, 248 F. Supp. 3d at 885. Again, such a conclusion is fairly predictable, since "[o]ne can easily anticipate

a scenario where a business chooses to display many obnoxious signs advertising its [on-premises] activity." *Id.* at 889. Aside from the inconsequential attestations recounted above, Tennessee "provides *no further evidence* that the distinction at issue relates to its aesthetic interest." *Id.* (emphasis added).

While distracted drivers and roadway aesthetics are legitimate state concerns, they are not advanced by distinguishing between on-premises and off-premises signage. The state has failed to meet its burden of proving that the Billboard Act directly advances its asserted interests under any level of First Amendment scrutiny.

B. The Statute's Irrational Scope Prevents It from Directly Advancing the State's Asserted Interests

Even if this Court determines that Tennessee's evidence somehow satisfies the relevant standard of proof, the Billboard Act still "cannot directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme." *See Rubin*, 514 U.S. at 488. "[T]he flaw in the Government's case is more fundamental" than merely failing to meet its evidentiary burden because the statute and accompanying regulations are "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 190. The statute's differential treatment of sign owners' communicating virtually the same information bears no meaningful relationship to Tennessee's interests in traffic safety and roadway aesthetics.

When determining whether signage qualifies as on-premises, Tennessee's

regulations state that "a sign which identifies the establishment's . . . accessory product or services offered on the premises is an on-premises sign," providing the specific example of "a brand of tires offered for sale at a service station." Rule of Tenn. Dep't of Transp. Maintenance Division, Control of Outdoor Advertising, 1680-02-03.06(4)(a) (2008). But then, immediately after this provision, we learn that when "the product or service advertised is only incidental to the principle activity, it shall be considered . . . not an on-premises sign." *Id.* at 1680-02-03.06(4)(b). The example then given for an "incidental" product, as opposed to an "accessory" one, is a sign "located on the top of a service station building that advertised a brand of cigarettes . . . which is incidentally sold in a vending machine on the property." *Id.* The Act deems such a sign "off-premises" and prohibits it.

The definition here is circular and unhelpful. Cigarettes that are defined as "incidentally sold" are then used to purportedly clarify when an advertised product "is only incidental to the principle activity." What if the cigarettes are sold by a cashier rather than from a vending machine? What if the service station generates more revenue (or profit) from cigarette sales than from tires? At what point are tire sales so peripheral to the activities conducted on the premises that they cross over from constituting an all-important "accessory" product to a mere "incidental" product? And what on earth does all this have to do with the safety and aesthetic beauty of Tennessee's roads? Much like the ban in *Rubin*, "the irrationality of this

unique and puzzling regulatory framework ensures that" these regulations will fail to achieve the government's stated ends. *See Rubin*, 514 U.S. at 489.

Tennessee has failed to offer any convincing evidence that its statute's on-premises/off-premises distinction sufficiently advances its interests in part because "it could not [do so] in light of the effect of [the statute's] other provisions." *Id.* at 490. *Rubin* applied First Amendment scrutiny in the commercial-speech context to invalidate a statutory prohibition against companies printing the alcoholic content on beer labels as a means of preventing so-called "strength wars." The Supreme Court found that there was "little chance" that the statute could "directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects." *Id*. at 489.

The statutory and regulatory framework here is similarly self-contradictory. For example, the district court pointed out that "the Billboard Act's exemption and exception provisions would absolve large, ostentatious on-premises signs that are closely placed together from the permit, tag, and location requirement while regulating small, muted off-premises signs." *Schroer*, 248 F. Supp. 3d at 889. The court below illustrated the point by contrasting a small sign with muted colors displaying "Knowledge is Power" against a large sign with loud colors and excessive text advertising a property for sale. *Id*. at 885. The court observed that:

> The exempted "for sale" sign that is bigger, brighter, contains more words, and closer to another sign and road would certainly be a

> distraction and eye-sore under the State's evidence. The regulated "Knowledge is Power" sign, on the other hand, would be less of either. Thus, the Billboard Act's on-premises/off-premises distinction undermines the State's articulated interests.

Id. The statute is thus guilty of "permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 195.

Finally, the Billboard Act's differential treatment of "speakers conveying virtually identical messages [is] in serious tension with the principles undergirding the First Amendment." *Id.* at 194. This becomes evident when one compares an on-premises sign advertising a gas station's gasoline pricing with another sign that is identical in every way except for also stating that the gas station is a mile down a rural road. Both messages serve the exact same purpose of communicating business location and pricing information to highway travelers who are often unfamiliar with the refueling options in their immediate vicinity. While the former is exempt from the Billboard Act's requirements, the latter remains subject to the full force of the statute's restrictions. Surely it is small consolation—either to the business owner who is disadvantaged in his efforts to compete or to the multitude of consumers who will pay more for their gasoline—that the owner of the second gas station may also place a pricing sign on his property where interstate travelers will never see it.

II. THE BILLBOARD ACT IS NOT NARROWLY TAILORED BECAUSE IT RESTRICTS MORE SPEECH THAN IS NECESSARY

Speech regulations require that there be an adequate "fit between the legislature's ends and the means chosen to accomplish those ends." *Fox*, 492 U.S. at 480. Accordingly, the statute must be narrowly tailored if it is to survive even diminished scrutiny under the First Amendment. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny . . . a law must [still] be narrowly tailored to serve a significant governmental interest."). This requirement is substantially similar to *Central Hudson*'s recognition "that the First Amendment mandates that speech restrictions be narrowly drawn" within the context of commercial speech restrictions. *Cent. Hudson*, 447 U.S. at 565 (internal quotations omitted). This part of the *Central Hudson* test "complements the direct-advancement inquiry," *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188, and requires the court to analyze whether the speech restriction "is not more extensive than is necessary to serve [the government's] interest." *Cent. Hudson*, 447 U.S. at 566.

Regardless of whether the statute at issue is a content-neutral speech regulation or a restriction on commercial speech, this narrow tailoring "need not be the least restrictive or least intrusive means of serving the government's interests." *McCullen*, 134 S. Ct. at 2535 (internal quotations omitted); *see also Fox*, 492 U.S. at 480 (stating that the Court requires "a fit between the legislature's ends and the

means chosen to accomplish those ends . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective") (internal quotations omitted). But while the state need not prove that it employed the least restrictive means conceivable, "the existence of numerous and obvious less-burdensome alternatives to the restriction . . . is certainly a relevant consideration in determining whether the fit between ends and means is reasonable." *Fla. Bar v. Went for It*, 515 U.S. 618, 632 (1995) (internal quotations omitted). Here, the potential alternatives to the Billboard Act are indeed both abundant and apparent.

In addition, the statute's on-premises/off-premises distinction inverts the traditional understanding of the First Amendment by substantially favoring commercial over noncommercial speech. *Amicus* has consistently argued against courts providing less protection for commercial speech than for its noncommercial counterpart. *See, e.g.*, Brief for Cato Inst. and Nat'l Fed. of Indep. Bus. Small Bus. Legal Center as Amici Curiae Supporting Pet. for Writ of Cert., *Spirit Airlines, Inc. v. Dep't of Transp.*, 569 U.S. 903 (2013) (No. 12-656). But an inversion of this practice in favor of commercial speech only serves to exacerbate the mistake rather than correct it. Instead of equalizing the treatment of these artificially delineated types of speech, the Billboard Act's very structure absurdly restricts noncommercial speech to an even greater extent than the already-too-severe constraints it places on

commercial speech. Accordingly, Tennessee's restrictions are "substantially broader than necessary to achieve the government's interest." *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

A. There Are Numerous and Obvious Less-Burdensome Alternatives to the Statute's Restrictions

Although it was applying strict scrutiny, the district court's finding that there were several less-burdensome options that the state could have employed remains highly relevant even if this Court were to apply lesser First Amendment scrutiny. Narrow tailoring under something less than strict scrutiny requires a means-end fit "that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480. However, the "consideration of alternative, less drastic measures" for how the government "could effectuate its interests in safety and esthetics" is not synonymous with subjecting speech regulations to the inapplicable least restrictive means analysis. *Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993) (going on to state definitively that "[a] regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable") (citations omitted).

This is certainly the rule for commercial speech, where "the availability of… options which could advance the Government's asserted interest in a manner less

intrusive to . . . First Amendment rights" can be a clear indication that a regulation "is more extensive than necessary." *Rubin*, 514 U.S. at 491. And this holds true in the context of content-neutral regulations as well, where "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540. Accordingly, the existence of several less-burdensome alternatives to the Billboard Act's on-premises/off-premises distinction weighs heavily against Tennessee's claims of narrow tailoring.

The valid, less-burdensome alternatives include regulating sign size, implementing a spacing restriction, and placing certain other restrictions on presentation characteristics. Here, the district court is worth quoting at length:

> For example, an alternative regulation may require all signs, regardless of content, to be a particular size, use a particular font (or a set of fonts), be limited to a particular colors, face a particular direction, or stand at a particular height, etc. The Court finds that there are various content-neutral, presentation-related regulations that would be less restrictive than the Billboard Act's on-premises/off-premises distinction. These presentation-related regulations would also advance the State's interests. Signs could be required to be within the driver's zone of vision, thus reducing distracted driving. A regulation could also require that signs be placed and sized in such a manner as to have less of an impact on aesthetics.

Schroer, 248 F. Supp. 3d at 894. By eliminating the on-premises/off-premises distinction, such an alternative would also eliminate the comparative disadvantage under which noncommercial speech currently labors.

B. By Disadvantaging Noncommercial Speech, the Statute Restricts Substantially More Speech than Is Necessary to Further Tennessee's Purported Interests

The Billboard Act's distinction between on-premises and off-premises signage "has the effect of disadvantaging the category of noncommercial speech that is probably the most highly protected: the expression of ideas." *Schroer*, 248 F. Supp. 3d at 893 (quoting *Ackerley Commc'ns of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996)). A few short hypotheticals should be sufficient to illustrate the Billboard Act's disproportionate burden on such expressive speech.

The statute, for example, would exempt from its restrictions a sign located at a roadside motel displaying pricing for a one-night stay. By contrast, it would apply restrictions to a billboard featuring a message from a Christian charity for the homeless quoting the advice of Isaiah 58:7 "that thou bring the poor that are cast out to thy house." A pricing sign at a roadside gas station would also be considered on-premises and exempt, while a sign by a small-government group advocating to "End Ethanol Subsidies Now" would be restricted. Finally, the statute would exempt signage at a roadside restaurant advertising "The Best BBQ in Tennessee," but a sign by an animal-rights group proclaiming that "Meat is Murder" would be restricted. Such comparative disadvantaging of highly protected speech constitutes a particularly egregious demonstration of the statute's overall tendency to restrict

substantially more speech than is necessary. Accordingly, even under diminished First Amendment scrutiny, the Billboard Act falls far short of narrow tailoring.

With the Billboard Act, Tennessee seems to have impermissibly "conclude[d] that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981). That odd situation comes from the fact that—as another court observed when analyzing a similar restriction—noncommercial speech on roadside billboards "rarely involves a locational component; thus, presumably it would come within the off-premises definition." *See GEFT Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion*, 187 F. Supp. 3d 1002, 1015 (S.D. Ind. 2016). It thus makes sense that, for example, all provisions of "the Billboard Act and the State's Rule reference 'advertising' in the commercial context." *See Schroer*, 248 F. Supp. 3d at 874. Commissioner Bible offered even more explicit confirmation of the inherent rarity of on-premises noncommercial speech through his testimony that "on-premises" messages should be considered those that someone "could legitimately say would build business." *Id*. at 894. The district court found that this statement "appear[ed] to require that the [speech] content must serve a commercial purpose" *Id*.

In the past, *amicus* has agreed with various Supreme Court justices that commercial speech should be afforded full First Amendment protections. *Compare,*

e.g., Brief for Pacific Legal Found. & Cato Inst. as *Amici Curiae* Supporting Respondents, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (No. 10-779) with *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment) and *Rubin*, 514 U.S. at 493 (Stevens, J., concurring in judgment). But those who critique the Court's commercial-speech doctrine have consistently advocated that commercial and noncommercial speech be treated equally, not that commercial speech should be elevated above noncommercial speech. Yet that is exactly what the Billboard Act does via its on-premises/off-premises distinction.

CONCLUSION

For these reasons, and those presented by the appellee, the Court should affirm the court below and hold that the Billboard Act violates the First Amendment.

Respectfully submitted,

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**Not admitted in this court.*

Form 6. Certificate of Compliance With Type-Volume Limit

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1. This document complies with [the type-volume limit of Fed. R. App. P. [**n/a**___________________________]] [the word limit of Fed. R. App. P. [**29(a)(5)**________________________]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [**n/a**__________________________]]:

☑ this document contains **4,428** ____________words, or

☐ this brief uses a monospaced typeface and contains _________ lines of text.

2. This document 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:

☑ this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** ____________________ in

Times New Roman, 14 point font ________________, or

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____ with

____.

/s/**Ilya Shapiro**

Attorney for **Cato Institute**

Dated: **4/10/2018**

CERTIFICATE OF SERVICE

I certify that on April 10, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Ilya Shapiro
April 10, 2018