No. 17-6238

In the United States Court of Appeals for the Sixth Circuit

JOHN SCHROER, TENNESSEE COMMISSIONER OF TRANSPORTATION, APPELLANT

v.

WILLIAM H. THOMAS, JR., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE (CIV. NO. 13-2987) (THE HONORABLE JON P. MCCALLA, J.)

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.; THE OUTDOOR ADVERTISING ASSOCIATION OF KENTUCKY; THE OUTDOOR ADVERTISING ASSOCIATION OF MICHIGAN; THE OUTDOOR ADVERTISING ASSOCIATION OF OHIO; AND THE OUTDOOR ADVERTISING ASSOCIATION OF TENNESSEE AS AMICI CURIAE SUPPORTING APPELLANT

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INTEREST OF AMICI CURIAE

Founded in 1891, the Outdoor Advertising Association of America, Inc. (OAAA), is the principal trade association representing the outdoor-advertising industry in the United States. It promotes the interests of its nearly 900 member companies on the national, state, and local levels.[1]

OAAA's core mission is to lead a responsible advertising industry, committed to serving the needs of advertisers, consumers, and communities. To that end, OAAA members have adopted a voluntary code of industry principles that promote free speech, environmental stewardship, and pro bono services. *See* OAAA, *Out of Home Advertising Today* 6-8 (2016) (*Out of Home Advertising*). OAAA members have donated advertising space to the Advertising Council, the Boys and Girls Clubs of America, the American Red Cross, the Federal Bureau of Investigation, and other law-enforcement agencies and emergency-management officials. And, of particular relevance here, OAAA has intervened or filed amicus briefs in numerous cases implicating outdoor advertisers' First Amendment rights.

[1] Amici state that no counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici, their members, or their counsel contributed money intended to fund its preparation or submission. Counsel for both parties have consented to the filing of this brief.

The Outdoor Advertising Associations of Kentucky, Michigan, Ohio, and Tennessee likewise represent member companies within their respective States and strive to support responsible outdoor advertising at the state and local levels. Each advocates for safety standards and public service in the industry, while promoting outdoor advertising as an effective and economical medium of communication.

Amici represent more than 25 member companies operating within the Sixth Circuit. Each of those companies is subject to state and local statutes and ordinances, like the statute at issue here, that distinguish between on-premises and off-premises signs. *See*, *e.g.*, Ky. Rev. Stat. Ann. § 177.841 (2017); Mich. Comp. Laws Ann. §§ 252.302, 252.313 (2017); Ohio Rev. Code Ann. §§ 5516.06, 5516.061 (2017); *see also, e.g.*, Cincinnati, Ohio, Municipal Code §§ 895-1-O, 1427-03-O1 (2018); Elizabethtown, Ky., Zoning Ordinance §§ 7.10.1-7.10.2 (2017). Those companies have expended substantial resources complying with the laws that govern their outdoor advertisements.

The decision below works a fundamental change in those laws. Before the Supreme Court's decision in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), courts consistently upheld regulations that distinguish between on-premises and off-premises signs, *see*, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 498-500 (1981) (collecting cases), and they have continued to do so since, *see*, *e.g.*, *Geft Outdoor LLC* v. *Consolidated City of Indianapolis &*

County of Marion, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (collecting cases). If this Court allows the decision below to stand, it will sow confusion about the First Amendment's requirements and upset reasonable, well-established rules regulating outdoor advertising. Moreover, invalidating reasonable distinctions, like the one at issue here, could lead to the uncontrolled proliferation of outdoor advertising and, in turn, cause state and local governments to impose restrictions on all signs. Amici therefore have a strong interest in defending Tennessee's reasonable regulation of outdoor advertising, and they submit this brief to share the experiences, and provide the perspectives, of the outdoor-advertising industry on the issues presented.

ARGUMENT

TENNESSEE'S BILLBOARD REGULATION AND CONTROL ACT DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Distinction Between On-Premises And Off-Premises Signs Is A Central Feature Of The Regulation Of Outdoor Advertising

1. Outdoor advertising has been a fundamental means of communication in this country virtually since its inception. *See* Jacob Loshin, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 Environs Envtl. L. & Pol'y J. 101, 105-107 (2006); Donald W. Hendon, *Origin and Early Development of Outdoor Advertising in the United States*, in *Historical Perspectives in Consumer Research* 309-313 (1985). Today,

there are more than 300,000 billboards nationwide. *See Out of Home Advertising* 2-3. The outdoor-advertising industry has produced annual total revenues of more than $7 billion in recent years, representing almost 5% of all advertising spending. *See id.* at 2-4.

Outdoor advertising has achieved a new level of importance in American life in the 20th and 21st centuries because it is a unique and efficient medium of communication. Billboards are particularly effective for projecting succinct and direct messages to an increasingly mobile population. From commercial advertisements to political campaigning to public service messages, outdoor advertising is often the most effective way to communicate a point to a particular geographic region.

Outdoor advertising is also among the most cost-effective means of reaching Americans. *See* Charles R. Taylor et al., *Business Perceptions of the Role of Billboards in the U.S. Economy*, 43 J. Advertising Research 150, 151 (June 2003). Businesses across the country depend on the unique advantages of outdoor advertising to attract consumers and raise awareness. *See Out of Home Advertising* 3-4. That is especially true of local businesses, which account for three out of every four billboards. *See id.* at 3.

2. Outdoor advertising is a heavily regulated industry at the federal, state, and local levels. The federal and state governments have cooperated in regulating outdoor advertising since the federal Bonus Act of 1958, which

amended the Federal-Aid Highway Act of 1956 to provide a 0.5% bonus in federal highway aid to states that voluntarily controlled outdoor advertising along interstate highways. *See* Pub. L. No. 85-381, § 122, 72 Stat. 89, 95. In 1965, Congress went a step further and enacted the Highway Beautification Act (HBA), Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. § 131), which establishes a grant-in-aid condition with which States must comply in order to receive full federal highway funding.

The HBA aims "to promote the safety and recreational value of public travel, and to preserve natural beauty" along the interstate highway system. 23 U.S.C. § 131(a). It was, in large part, a response to the "continued, unbridled" proliferation of billboards "cluttering" the Nation's highways. *See*, *e.g.*, *Highway Beautification: Hearing on H.R. 8487 and Related Bills Before the House Committee on Public Works*, 89th Cong., 1st Sess. 5 (1965) (statement of Secretary of Commerce Connor); 111 Cong. Rec. 26,270 (1965) (statement of Congressman Wright). To that end, the HBA requires States to maintain "effective control" of outdoor advertising along federal highways, which includes ensuring that signs comply with the requirements of any applicable federal-state agreement. 23 U.S.C. § 131(b); 23 C.F.R. § 750.704(b). All fifty States entered into federal-state agreements pursuant to the HBA in the 1960s and 1970s. *See Scenic America, Inc.* v. *United States Department of Transportation*, 836 F.3d 42, 46 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 2

(2017). If a State fails to exercise "effective control" over outdoor advertising, the Department of Transportation may reduce the State's federal highway funding by 10%. 23 U.S.C. § 131(b).

Of particular relevance here, in striking a compromise between the total prohibition and the unchecked proliferation of outdoor advertising, the HBA distinguishes between on-premises and off-premises signs. *See* 23 U.S.C. § 131(c). It defines "[e]ffective control" as limiting signs located within certain distances of certain roadways to, *inter alia*, "directional and official signs and notices," "landmark signs" already in existence, "signs, displays, and devices advertising the sale or lease of property upon which they are located" and "signs, displays, and devices . . . advertising activities conducted on the property on which they are located." *Id.* It also allows other signs in commercial or industrial areas, the "size, lighting and spacing" of which must be determined by federal-state agreement. 23 U.S.C. § 131(d).

In the wake of the HBA, virtually every State has enacted outdoor-advertising regulations that similarly distinguish between on-premises and off-premises signs. *See*, *e.g.*, Ala. Code § 23-1-273 (2017); Alaska Stat. §§ 19.25.090, 19.25.105 (2017); Ariz. Rev. Stat. § 28-7902 (2017); Ark. Code § 27-74-302 (2017); Cal. Bus. & Prof. Code § 5442.5 (2017); Colo. Rev. Stat. Ann. §§ 43-1-403, 43-1-404 (2017); Del. Code Ann. tit. 17, § 1121 (2017); Fla. Stat. § 479.15 (2017); Ga. Code Ann. § 32-6-72 (2017); Hawaii Rev. Stat. §§ 264-

72, 445-112 (2017); Idaho Code Ann. § 40-1910A (2017); 225 Ill. Comp. Stat. Ann. 440/3.17-4.04 (2017); Ind. Code Ann. § 8-23-20-7 (2017); Iowa Code Ann. § 306B.2 (2017); Kan. Stat. Ann. § 68-2233 (2017); Ky. Rev. Stat. § 177.841 (2017); La. Stat. Ann. § 48:461.2 (2017); Me. Rev. Stat. tit. 23, §§ 1903, 1908, 1914 (2017); Md. Code Ann., Transp. §§ 8-741, 8-744 (2017); Mass. Gen. Laws Ann. ch. 93D, § 2 (2017); Mich. Comp. Laws Ann. §§ 252.302, 252.313 (2017); Minn. Stat. Ann. § 173.08 (2017); Miss. Code § 49-23-5 (2017); Neb. Rev. Stat. § 39-218 (2017); N.H. Rev. Stat. Ann. § 238:24 (2017); N.J. Stat. Ann. § 27:5-11 (2017); Nev. Rev. Stat. § 410.320 (2017); N.C. Gen. Stat. Ann. § 113A-165 (2017); Ohio Rev. Code Ann. §§ 5516.06, 5516.061 (2017); Okla. Stat. Ann. tit. 69, §§ 1273-1274 (2017); S.C. Code §§ 39-14-20, 39-14-30 (2017); S.D. Codified Laws §§ 31-29-63, 31-29-63.4 (2017); Utah Code Ann. § 72-7-504 (2017); Vt. Stat. Ann. tit. 10, §§ 488, 493 (2017); Va. Code § 33.2-1217 (2017); Wash. Code § 47.42.040 (2017); Wyo. Stat. § 24-10-104 (2017). So too have countless municipalities across the country. *See*, *e.g.*, Cincinnati, Ohio, Municipal Code §§ 895-1-O, 1427-03-O1 (2018); Dallas, Tex., Code §§ 51A-7.1715, 51A-7.306 (2017); Elizabethtown, Ky., Zoning Ordinance §§ 7.10.1-7.10.2 (2017); San Diego, Cal., Municipal Code § 142.1210(a)(1) (2017). Even the States considered to have the most restrictive limitations on outdoor advertising—those that have otherwise effectively banned billboards completely—have exemptions for on-premises signs. *See* Alaska Stat. §§ 19.25.090, 19.25.105; Hawaii Rev. Stat.

§§ 264-72, 445-112; 23 Maine Rev. Stat. tit. 23, §§ 1903, 1908, 1914; Vt. Stat. Ann. tit. 10, §§ 488, 493; *see also* Patricia E. Salkin, *American Law of Zoning* § 26:2 (5th ed. 2017) (discussing those States' billboard bans).

3. Like the dozens of laws and ordinances cited above, Tennessee's Billboard Regulation and Control Act of 1972 (Billboard Act) distinguishes between on-premises and off-premises signs. As a general matter, and in accord with the HBA and Tennessee's federal-state agreement, the Billboard Act provides that "[n]o outdoor advertising shall be erected or maintained within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems." Tenn. Code § 54-21-103 (2017). Like other statutes, however, the Billboard Act contains a number of exceptions. Signs that "advertis[e] the sale or lease of property on which they are located" are exempt, *id.* § 54-21-103(2), as are signs that "advertis[e] activities conducted on the property on which they are located," *id.* § 54-21-103(3). The regulations implementing the statutory scheme specifically define those signs as "'on-premise' signs." Tenn. Dep't of Transportation Rule 1680-02-03-.06(1), .06(2)(b). In addition to on-premises signs, "[d]irectional or other official signs" and certain other signs in commercial or industrial areas are also exempt. *Id.* § 54-21-103(1), (4)-(5). Even if a sign is exempt, the owner still must "obtain[] from the commissioner a permit

and tag." *Id.* § 54-21-104(a). On-premises signs, however, are not subject to that permitting requirement. *Id.* § 54-21-107(a)(1)-(2).

B. The Billboard Act's Distinction Between On-Premises And Off-Premises Signs Is Not Content-Based

The district court's holding that the Billboard Act violates the First Amendment rested on its conclusion that the Billboard Act's distinction between on-premises and off-premises signs is content-based. That conclusion is incorrect under *Reed*. Whether a sign qualifies as on-premises turns primarily on its location, not "the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. As a result, it is content-neutral. That proposition is supported by longstanding Supreme Court precedent predating *Reed*, and the vast majority of lower courts to have considered the issue after *Reed* have agreed. The district court's holding that the Billboard Act violates the First Amendment therefore cannot stand, and its judgment should be reversed.

1. In *Reed*, the Supreme Court considered the constitutionality of the municipal sign code of Gilbert, Arizona. That code generally prohibited the display of outdoor signs anywhere in Gilbert without a permit, subject to a series of exceptions. *See* 135 S. Ct. at 2224. Among the exceptions was one for "Temporary Directional Signs Relating to a Qualifying Event"—that is, signs designed to direct passers-by to any "assembly, gathering, activity, or meeting

sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at 2224-2225 (citation omitted). The code restricted the size of temporary directional signs and also specified how long before and after the qualifying event they could be displayed. *Id.* at 2225. The code applied different restrictions to other categories of excepted signs, such as "ideological signs" and "political signs." *Id.* at 2224-2225.

The plaintiffs in *Reed* were a small community church and its pastor. The church did not own a building, so it held services at elementary schools or other locations in or near Gilbert. *See* 135 S. Ct. at 2225. Each week, church members would post signs displaying the church's name, along with the time and location of the upcoming service. *See id.* The town cited the church for exceeding the time limits for displaying temporary directional signs. When attempts to negotiate an accommodation failed, the church and its pastor filed suit, alleging that the Gilbert sign code violated the First Amendment. *See id.* at 2226.

The Supreme Court agreed with the church, holding that the sign code constituted an impermissible content-based regulation of speech. *See* 135 S. Ct. at 2226-2227. The Court began by observing that, under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 2226 (internal

quotation marks and citation omitted). "Government regulation," the Court continued, "is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*." *Id.* at 2227 (emphasis added).

Under that standard, the sign code was impermissibly content-based because "[t]he restrictions . . . that apply to any given sign . . . depend *entirely* on the communicative content of the sign." 135 S. Ct. at 2227 (emphasis added). To illustrate its point, the Court gave an example of three signs that the code would treat differently based entirely on content:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.

Id. Because "the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas," the regulation drew impermissible content-based distinctions. *Id.* Under the strict scrutiny applicable to content-based regulations, the Court concluded, the restriction on temporary directional signs could not survive. *See id.* at 2231-2233.

Justice Alito, joined by Justices Kennedy and Sotomayor—half of the six-Justice majority—filed a concurring opinion. *See* 135 S. Ct. at 2233. Justice Alito explained that content-based laws merit strict scrutiny "because

they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Id.* In particular, "[l]imiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo" and thus "may interfere with democratic self-government and the search for truth." *Id.*

At the same time, Justice Alito emphasized that governments are not "powerless to enact and enforce reasonable sign regulations." 135 S. Ct. at 2233. To illustrate the permissible bounds of sign regulation, he offered examples of "rules that would not be content based." *Id.* Among those were rules "distinguishing between the placement of signs on private and public property"; rules "distinguish[ing] between the placement of signs on commercial and residential property"; and, as especially relevant here, "[r]ules distinguishing between on-premises and off-premises signs." *Id.*

2. As Justice Alito's concurring opinion in *Reed* correctly suggests, the Billboard Act's distinction between on-premises and off-premises signs is not content-based. In the words of the majority opinion in *Reed*, on-premises and off-premises signs are not treated differently "because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. Instead, the distinction between those signs depends primarily on their location. Consider, for example, a McDonald's sign. Under the Billboard Act, such a sign could be posted on the premises of a McDonald's with no need for a permit. But the

same sign, with the same content, generally would require a permit if it were not on McDonald's property. The location, not the "idea or message expressed," is thus the predominant basis for the differential treatment. *Id.*

The *Reed* majority's Locke hypothetical illustrates the point. Under the Billboard Act, all three signs in the hypothetical would be treated the same, regardless of their content. The signs generally would require a permit unless they were on the premises of a Locke-related enterprise. If they were on the premises of a Locke museum, or the headquarters of a Lockean political candidate, or the meeting place of a Locke book club, they could be posted without restriction or any need for a permit. In other words, the signs would be treated differently under the Billboard Act primarily "because of" the signs' locations, not their contents. 135 S. Ct. at 2227.

The conclusion that the Billboard Act's distinction between on-premises and off-premises signs is not content-based is consistent with pre-*Reed* Supreme Court precedent. In *Metromedia, Inc.* v. *City of San Diego*, the Court considered the constitutionality of a San Diego billboard ordinance that drew a similar distinction between on-premises and off-premises signs. *See* 453 U.S. at 503. Although the Court ultimately held that the ordinance was unconstitutional on its face, a majority of the Court agreed that the distinction between on-premises and off-premises signs was permissible. *See id.* at 503-512 (plurality opinion); *id.* at 541 (Stevens, J., dissenting in part). That determination

was consistent with a series of earlier summary affirmances by the Court, in which the Court determined that similar distinctions between on-premises and off-premises signs did not present a substantial question under the First Amendment. *See id.* at 498-500 (collecting cases). *Reed* did not cite, much less explicitly overrule, *Metromedia*. The Supreme Court, like Congress, does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 468 (2001). Thus, when "a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," courts should "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted).

Consistent with *Metromedia*, the vast majority of lower courts to address on-premises/off-premises distinctions after *Reed*—including every federal court to have considered the issue except for the district court in this case—have held that such distinctions are not content-based. For example, in *Contest Promotions, LLC* v. *City & County of San Francisco*, Civ. No. 15-93, 2015 WL 4571564 (N.D. Cal. July 28, 2015), *aff'd*, 704 Fed. Appx. 665 (9th Cir. 2017), an advertising company challenged a city code allowing on-premises advertising only if it related to the "primary use" of the premises. *See id.* at *3-*4. The court concluded that the restriction was not content-based. *Id.* at *4.

"The distinction between primary versus non-primary activities," the court explained, "is fundamentally concerned with the location of the sign relative to the location of the product which it advertises"; as a result, the provision at issue, "unlike the law in *Reed*," "does not single out specific subject matter or specific speakers for disfavored treatment." *Id.* (internal quotation marks and alterations omitted). The court explained that there is "no danger that the challenged law will work as a prohibition of public discussion of an entire topic," because "one store's non-primary use will be another store's primary use." *Id.* at *4 (internal quotation marks omitted).

Other courts considering on-premises/off-premises distinctions have reached the same result. *See*, *e.g.*, *ArchitectureArt, LLC* v. *City of San Diego*, 231 F. Supp. 3d 828, 839 (S.D. Cal. 2017); *Geft Outdoor*, 187 F. Supp. 3d at 1016-1017; *Citizens for Free Speech, LLC* v. *County of Alameda*, 114 F. Supp. 3d 952, 968-969 (N.D. Cal. 2015); *Lamar Central Outdoor, LLC* v. *City of Los Angeles*, 199 Cal. Rptr. 3d 620, 629 (Ct. App. 2016); *but see Auspro Enterprises, LP* v. *Texas Department of Transportation*, 506 S.W.3d 688, 696-701 (Tex. App. 2016) (holding that a Texas law limiting the time during which political signs could be displayed was content-based, stating in dicta that on-premises/off-premises distinctions could be considered content-based), *briefs on the merits requested*, No. 17-41 (Tex. 2017).

3. The district court erred in reaching a different conclusion. It began by observing that, "[a]fter *Reed*, if a sign's application hinges on the content of the message, it is content based." Order, R. 356, PageID 6925. The district court believed that the Billboard Act's on-premises/off-premises distinction qualified as content-based because "[t]he only way to determine whether a sign is an on-premise sign is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located." *Id.* at 6923 (internal quotation marks omitted). As a result, the district court held that the Billboard Act's provisions drawing the on-premises/off-premises distinction were subject to strict scrutiny and invalid. *See id.* at 6925, 6952. The district court dismissed Justice Alito's concurring opinion in *Reed*, insisting that it would conflict with the majority opinion if it were read to suggest that an on-premises/off-premises distinction like the Billboard Act's were valid. *See id.* at 6923.

The district court thereby misinterpreted *Reed*. As discussed above, under *Reed*, a regulation is content-based if it treats different signs differently "because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. The distinction, in other words, must "depend *entirely* on the communicative content of the sign." *Id.* (emphasis added). The facts of *Reed* illustrate the point. The code at issue in *Reed* explicitly distinguished among signs

based on their *subject matter*: political campaign signs were treated differently from signs directing people to a church service, and both were treated differently from signs conveying non-commercial ideological messages. *Id.* at 2224. What the sign said, in other words, was the *entire basis* for the distinction; the distinction did not primarily turn on where the speech took place.

The same was true in the other cases the district court cited to support its analysis. For example, in *Central Radio Co.* v. *City of Norfolk*, 811 F.3d 625 (4th Cir. 2016), the court held that a distinction between religious and secular flags and emblems was content-based. *See id.* at 633. In that case, as in *Reed*, the distinction rested entirely on the "topic discussed or the idea or message expressed." 135 S. Ct. at 2227. This Court's decision in *Wagner* v. *City of Garfield Heights*, 675 Fed. Appx. 599 (6th Cir. 2017) (per curiam), is of a piece. That case addressed a provision of the City of Garfield Heights's sign code that governed temporary signs on residents' private property. The code generally allowed residents to erect signs "measuring less than twelve square feet in surface area on their lawns." *Id.* at 601. But signs conveying certain content—including, as relevant in *Wagner*, signs of a "political nature"—were "subject to additional, more restrictive rules." *Id.* (internal quotation marks omitted). This Court explained that the City of Garfield Heights's restriction on signs of a "political nature" "applies to particular speech because of the topic discussed." *Id.* at 607 (internal quotation marks omitted). As a result,

the Court concluded, "*Reed* commands that it be subject to strict scrutiny." *Id.* (citing 135 S. Ct. at 2227).

Those cases stand in stark contrast to this one. In each, the restriction depended on what message the sign conveyed. In *Central Radio,* the question was whether the message was religious or secular. 811 F.3d at 633. In *Wagner*, the question was whether the message was political. 675 Fed. Appx. at 607. On-premises/off-premises distinctions, by contrast, turn primarily on where the signs are located, not on what they say. Indeed, signs displaying the exact same content may be treated differently under the statute, depending on their location. That distinction, primarily, turns on *where* speech takes place, not what is said. As a result, it is not content-based within the meaning of *Reed*. 135 S. Ct. at 2233 (Alito, J., concurring); *see also, e.g.*, *Geft Outdoor*, 187 F. Supp. 3d at 1017 n.2 (noting that the on-premises/off-premises distinction "primarily relates to the location of the sign, which is a content-neutral factor").

4. If allowed to stand, the district court's decision would have breathtaking doctrinal and practical implications. To begin with, affirming the district court's ruling would work a fundamental change in First Amendment jurisprudence. Under the district court's reasoning, any regulation that required *any* consideration of a sign's contents would automatically be subject to strict scrutiny. *See* Order, R. 356, PageID 6922-6926. That cannot be, and

is not, the law. To take an example that the district court acknowledged, "the classification of speech [as] commercial and noncommercial is . . . a content-based distinction." *Id.* at 6945 n.11 (quoting *CTIA–Wireless Association* v. *City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015)). Under the district court's reasoning, therefore, all regulations that apply to commercial speech would be subject to strict scrutiny. But "nothing in [the Supreme Court's] recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction [between commercial and non-commercial speech] is no longer valid." *CTIA*, 139 F. Supp. 3d at 1061 & n.9. Quite the contrary, courts after *Reed* routinely apply intermediate scrutiny, not strict scrutiny, to regulations of commercial speech. *See Contest Promotions, LLC* v. *City & County of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017); *Geft Outdoor*, 187 F. Supp. 3d at 1016 (collecting cases).

The district court's sweeping interpretation of *Reed* would also have striking practical consequences by calling into question the continued validity of an enormous swath of regulations across the country. That includes the HBA, which makes on-premises/off-premises distinctions. And it includes state and municipal ordinances in every State in this circuit, and indeed virtually every State in the country. It is impossible to predict how States and municipalities would react to that uncertainty. But they would necessarily face

the difficult choice of restricting all outdoor advertising, or facing the substantial costs of litigating the particular provisions of their outdoor-advertising regulations. That is strong and unnecessary medicine. But it is the inevitable consequence of the decision below.

This Court should not, and cannot, allow the decision below to stand. It should correct the district court's erroneous interpretation of *Reed* and hold that, by distinguishing between on-premises and off-premises signs, Tennessee's Billboard Act does not thereby violate the First Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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FEBRUARY 2, 2018

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 6th Cir. R. 32 because it contains 4548 words, excluding the parts of the brief exempted by Fed. R. App. P. 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) and because it has been prepared in a proportionally spaced typeface in 14-point font.

S/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

FEBRUARY 2, 2018

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for amici curiae and a member of the Bar of this Court, certify that, on February 2, 2018, a copy of the attached Brief of the Outdoor Advertising Association, Inc., the Outdoor Advertising Association of Kentucky, the Outdoor Advertising Association of Michigan, the Outdoor Advertising Association of Ohio, and the Outdoor Advertising Association of Tennessee as Amici Curiae Supporting Appellant was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM