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

and

JOHN H. REINBOLD; PATTI C. BOWLAN; ROBERT SHELBY; SHAWN BIBLE; CONNIE GILLIAM,
Defendants

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

REPLY BRIEF OF APPELLANT

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Oral Argument Requested

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INTRODUCTION

The Tennessee Billboard Act's exception for on-premises signs is not content based; the distinction it draws hinges on the location of the sign, not its content. Plaintiff's contrary position—that the exception is content based merely because its application might require someone to read the sign—relies on a misreading of the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This Court's sister circuits have rejected that position, and this Court should do the same. This Court should also reject plaintiff's factually inaccurate and legally irrelevant assertions that the on-premises exception has the practical effect of discriminating in favor of commercial speech. Under plaintiff's radical view, the government could not prohibit *any* commercial speech without allowing *all* noncommercial speech. That is not what the First Amendment requires. This Court should hold that the Billboard Act's on-premises exception is a content-neutral regulation of speech that survives intermediate scrutiny under *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987).

Even if this Court finds the on-premises exception content based, it should still uphold the Billboard Act because it survives strict scrutiny. The Act, including the on-premises exception, is narrowly tailored to the State's compelling interests in public safety, aesthetics, and compliance with its constitutional obligations. Other than erroneously asserting that the State has forfeited it, plaintiff completely ignores

the latter interest. But when the State's interest in safeguarding the rights of property owners and their tenants to communicate through the unique medium of on-premises signs is considered—as it must be—it is clear that the on-premises exception is the only way for the State to achieve its compelling interests.

ARGUMENT

I. THE EXCEPTION FOR ON-PREMISES SIGNS IS NOT CONTENT BASED.

A. The On-Premises Exception Does Not Depend Entirely on Content.

Plaintiff's argument that the Billboard Act's exception for on-premises signs[1] is content based fundamentally misconstrues *Reed*. According to plaintiff, *Reed* holds that a regulation of speech is necessarily content based if its application requires officials to read the sign. Appellee's Br. 8. But that is not the holding of *Reed* or any of the precedents on which it relies.

Reed simply clarifies that a law that draws content-based distinctions on its face is content based, even if it has a content-neutral justification. *See* 135 S. Ct. at

[1] Plaintiff concedes that the district court's final order and judgment were based solely on the on-premises exception. Appellee's Br. 3 n.3. Although plaintiff asserts that this Court alternatively could affirm the district court based on the directional-sign exception, he never presents an argument that the exception is content based or fails scrutiny. And for good reason: plaintiff lacks standing to challenge that exception because his Crossroads Ford billboard exceeds the more stringent size limitations applicable to directional signs, Tenn. Comp. R. & Regs. 1680-02-03-.05(1)(a), and is therefore not similarly situated to signs that would otherwise qualify for the directional-sign exception, *cf. Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).

2228-29. The Ninth Circuit had determined that the town's sign ordinance was content neutral because it was not "based on disagreement with the message conveyed, and its justifications . . . were unrelated to the content of the sign." *Id.* at 2227-28 (internal quotation marks and alterations omitted). *Reed* faulted the lower court for "skip[ping] the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Id.* at 2228. "[A]n innocuous justification," the Court clarified, "cannot transform a facially content-based law into one that is content neutral." *Id.*

Reed did not, however, change the test for determining, under that "crucial first step," *id.*, whether a regulation is content based on its face. *Reed* cited the longstanding test that a speech restriction is facially content based when it "depend[s] entirely on the communicative content of the sign." *Id.* at 2227; *see Boos v. Barry*, 485 U.S. 312, 318 (1988) (restriction "depend[ed] entirely upon whether . . . picket signs [we]re critical of the foreign government"); *Ark. Writers' Project*, 481 U.S. at 229 (magazine's tax status "depend[ed] entirely on its *content*"); *Carey v. Brown*, 447 U.S. 455, 461 (1980) (permissibility of residential picketing was "dependent solely on the nature of the message being conveyed"); *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("operative distinction" between permitted and prohibited speech was "the message on a picket sign").

Plaintiff maintains that the on-premises exception is content based because its application depends at least in part on a billboard's content. Appellee's Br. 8. But the mere fact that one must *read* a sign to apply a regulation does not mean that the regulation restricts speech based on its content. A content-based speech restriction treats speech differently based on its topic or message. The ordinance at issue in *Reed* suffered from precisely this flaw: signs inviting people to certain events, such as church services, were treated differently from signs designed to influence an election, which were treated differently from other ideological signs. *See Reed*, 135 S. Ct. at 2225-27; *see also id.* at 2231 ("[A] speech regulation is content based if the law applies to particular speech because of the *topic* discussed or the *idea or message* expressed." (emphasis added)).

The on-premises exception, by contrast, treats signs with the very same content differently depending solely on where the signs are located. For example, signs inviting people to an event would be allowed if the advertised event were located on the same premises as the sign, but not if the event were located elsewhere. And ideological signs on a particular topic would be allowed if the topic related to an activity occurring on the same premises as the sign, but otherwise not.

Plaintiff contends that the on-premises exception "falls afoul of *Reed*'s central example" involving signs related to John Locke. Appellee's Br. 10 (citing *Reed*, 135 S. Ct. at 2227). But whether the three signs used in that example would be

treated differently from one another under the on-premises exception in fact depends solely on the location of the signs. The sign for a Lockean "book club," a Lockean political candidate, and a Lockean "ideological view" are all subject to the general requirements of the Billboard Act unless any one of them is located on property where related activities are occurring.

Plaintiff also incorrectly construes *Reed* as holding that "the government cannot avoid strict scrutiny under the first step of the content neutrality test by adding supposedly objective factors to sign laws." Appellee's Br. 13. *Reed* found the town's ordinance content based not because it required consideration of a sign's content *in addition* to content-neutral factors, but because the restriction did not *turn* on content-neutral elements at all. The ordinance was not speaker based because "[t]he restrictions for political, ideological, and temporary event signs appl[ied] equally no matter who sponsor[ed] them." *Reed*, 135 S. Ct. at 2230. And the ordinance was not event based because it depended on what *kind* of event was occurring. *Id.* at 2231. The "operative distinction," *Mosley*, 408 U.S. at 95, in the ordinance was the content of the message displayed on the sign. *Reed* therefore provides no support for plaintiff's view that a sign regulation is facially content based if it may require officials to *read* the sign. The inquiry required by *Reed* is whether the "operative distinction," *Mosley*, 408 U.S. at 95, in the speech restriction is the content of the message displayed on the sign.

Reading a sign to apply the on-premises exception, moreover, does not implicate concerns about enforcement discretion that animate the First Amendment's disfavor of content-based regulations. The on-premises exception looks only to whether a sign's message relates to activities being conducted on the property, not to whether any activities are "core," Appellee's Br. 18, to an entity's mission or beliefs.

In this as-applied challenge, for example, there was no question that the Crossroads Ford sign did not qualify for the on-premises exception because it was displayed on undeveloped property that was not for sale or lease and on which no activities were occurring.[2] It is plaintiff's proposed alternative of exempting all noncommercial signs from regulation that would require regulators to parse fine distinctions between commercial and noncommercial speech. *See* Goldwater Br. 13.

[2] The district court rejected plaintiff's equal protection claim because there was no evidence that the State had treated plaintiff's billboard differently from similarly situated signs. SJ Order, R. 233, PageID #4192. Plaintiff did not appeal that decision. The chancery court findings cited repeatedly by plaintiff were held "void and of no effect" on appeal because the chancery court lacked subject matter jurisdiction. *See* State Decisions, R. 164-5, PageID #2371-73. Although the chancery court recently issued an order erroneously reasserting jurisdiction, it did not (as plaintiff contends, Appellee's Br. 3 n.2) reinstate its earlier findings but only granted plaintiff permission to make a request to that effect. See March 20 Order, *State ex rel. Comm'r of Dep't of Transp. v. Thomas*, No. CH-07-0454-1 (Shelby Ch. Ct. Mar. 20, 2018) (attached as Exhibit A). The State intends to seek an interlocutory appeal of that order.

Justice Alito's concurring opinion in *Reed* makes clear that a regulation is not content based solely because its application may require reading a sign. Justice Alito enumerated as examples of rules "that would not be content based" under the majority opinion rules "distinguishing between on-premises and off-premises signs," as well as "[r]ules imposing time restrictions on signs advertising a one-time event." *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring). As plaintiff concedes, Appellee's Br. 24, because Justice Alito (and the two other Justices who joined his opinion) joined the majority opinion without qualification, this Court should interpret the two opinions consistently. *Cf. United States v. Skinner*, 690 F.3d 772, 779-80 (6th Cir. 2012) (explaining majority opinion by reference to concurring opinion authored by Justice who joined majority). Given that both an exception for on-premises signs and a rule restricting signs advertising a one-time event may require officials to read the sign, plaintiff's interpretation of the *Reed* majority opinion must be rejected.

Moreover, as explained in the State's opening brief, Appellant's Br. 28-29, Justice Alito plainly was referring to precisely the kind of on-premises exception at issue here. That exception is longstanding and ubiquitous in federal, state, and local sign regulation. *See* Outdoor Advertising Ass'n Br. 6-7. There is no evidence that any government employs the novel "on-premises exceptions" conjured up by the district court and plaintiff's amici. *See* Volokh Br. 11-12.

Plaintiff is similarly mistaken that the only sign regulations that escape strict scrutiny are those that could be applied "even if [the sign were] covered by a tarp." Appellee's Br. 14. One could not apply a rule restricting signs advertising a one-time event without reading the sign to see what was being advertised. The ordinance in *Reed* treated signs advertising certain *kinds* of events, such as church services, differently from those advertising other kinds of events. A regulation that treats all event-based signs equally—like the on-premises exception, which treats all on-premises signs equally—is not content based despite the fact that the regulator might need to read the sign. *See Act Now to Stop War and End Racism Coal. v. District of Columbia*, 846 F.3d 391, 406 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 334 (2017). And if the "tarp" test were the proper inquiry, then plaintiff's own proposed alternative of exempting all noncommercial speech would also violate it, since it too would require regulators to read the signs.

Plaintiff incorrectly claims that *Wheeler* and other pre-*Reed* cases upholding on-premises exceptions were rendered entirely obsolete by *Reed*. Appellee's Br. 27-29. In fact, the post-*Reed* cases that plaintiff seeks to distinguish on the ground that they involved only commercial speech or regulations outside the sign context, *see id.* at 29-33, well illustrate that lower courts have generally construed *Reed* in a manner that achieves consistency among the majority opinion, Justice Alito's concurring opinion, and earlier precedent. *See, e.g.*, *Act Now*, 846 F.3d at 406

(upholding event-based distinction in light of Justice Alito's concurring opinion).[3] In particular, this Court's sister circuits have specifically rejected plaintiff's argument that *Reed* adopted an "'officer must read it' test as [the] proper content-neutrality analysis." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 & n.2 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017); *see also March v. Mills*, 867 F.3d 46, 60-62 (1st Cir. 2017), *cert. denied*, --- S. Ct. ---, No. 17-689 (Apr. 16, 2018); *Act Now*, 846 F.3d at 404-06.

In the face of persuasive circuit court precedent rejecting his interpretation of *Reed*, plaintiff urges this Court to find the on-premises exception content based because one state intermediate appellate court has reached that conclusion and state and local legislative bodies have amended their sign ordinances in the wake of *Reed*. But the state decision on which plaintiff relies suffers from the same flaws as the district court's decision, and, in any event, was recently vacated. *See Auspro Enters., LP v. Tex. Dep't of Transp.*, 506 S.W.3d 688 (Tex. Ct. App. 2016), *vacated by Tex. Dep't of Transp. v. Auspro Enters., LP*, No. 17-0041 (Tex. Apr. 6, 2018). And

[3] Plaintiff asserts that *Act Now* is "inapposite" because it "dealt with signs posted on public property, which implicates different interests than the billboards on private property at issue here." Appellee's Br. 31. Plaintiff's repeated suggestions that a different analysis should apply to sign restrictions on private property are entirely unsupported and wrong. The Supreme Court has never distinguished between private and public property in determining whether a regulation is content based, except in applying forum analysis. *See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803-06 (1985).

prophylactic attempts to avoid litigation by a handful of legislative bodies are hardly reason for this Court to adopt plaintiff's extreme interpretation of *Reed*.

Finally, a holding that the on-premises exception is content neutral would not create a "'location-based' loophole," Appellee's Br. 18, in First Amendment jurisprudence. Plaintiff analogizes the on-premises exception to the regulation at issue in *Mosley*. But the "operative distinction" in *Mosley* was not between speech next to a public school and speech at other locations; rather, it was the *further* distinction, based entirely on content, drawn by the exception for picketing *related* to school labor disputes. 408 U.S. at 95. The same can be said of the regulation in *Carey*, which generally prohibited picketing in residential locations but drew a further distinction between residential picketing on the subject of labor disputes and all other residential picketing. 447 U.S. at 461. Similarly, the speech restriction in *Boos* applied only near a foreign embassy, but drew a further, content-based distinction based on whether signs were critical of the foreign government. 485 U.S. at 318-19.

By contrast, the location-based distinction in this case—the on-premises exception—includes no additional distinction based "entirely on the communicative content of the sign." *Reed*, 135 S. Ct at 2227. The on-premises exception is therefore not content based.

B. The On-Premises Exception Is Not a Subtle Form of Content Discrimination.

Plaintiff next claims that, at the very least, the on-premises exception is a subtle form of content discrimination because it draws distinctions based on the "function or purpose" of speech, Appellee's Br. 10, or the speaker, *id.* at 21-22. But that argument fails because, to the extent the on-premises exception draws such distinctions, they too are content neutral.

The "subtle" forms of content discrimination with which the Court was concerned in *Reed*, 135 S. Ct. at 2227, are distinctions that are mere proxies for content or that clearly reflect a content preference. The government may not, for example, recast a content-based restriction on labor picketing as a restriction on picketing for the purpose of influencing a labor dispute or prohibit only employees and employers involved in a labor dispute from picketing.

It does not follow, however, that every speech regulation that draws distinctions in terms of purpose or speaker is content based. Take, for example, a law that prohibits "robocalls" but excludes from that prohibition calls to individuals with whom the caller has a preexisting relationship. Two circuits have rejected the argument that such an exception is content based under *Reed*, despite the fact that it arguably distinguishes among speakers and purposes. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304-05 (7th Cir. 2017) (exception "depend[ed] on the relation between the caller and recipient, not on what the caller propose[d] to say");

Gresham v. Swanson, 866 F.3d 853, 855-56 (8th Cir. 2017) (similar). Contrary to plaintiff's approach, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 135 S. Ct. at 2231-32; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994).

Plaintiff points to the Billboard Act's implementing regulations as evidence that the regulatory scheme impermissibly distinguishes based on its purpose. Appellee's Br. 11. But those regulations, like the statutory on-premises exception, ultimately turn on the *location* of the sign, not on its content. Whether a sign has as its purpose "the identification of the activity" occurring on the premises or the "sale or lease of the property on which the sign is located," Tenn. Comp. R. & Regs. 1680-02-03-.06(2)(b), hinges on the location of the sign. The "purpose" test found in the regulations is not a proxy for content.

To be sure, location requirements might constitute a subtle form of content-based discrimination when a law is so contrived as to reveal that it was intended to discriminate against a particular subject matter or viewpoint. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) (suggesting that a law "regulating 'oral protest, education, or counseling' within 100 feet of the entrance to any lunch counter" during the civil rights era would have been content based). But the on-premises exception is not that kind of law. Plaintiff cannot point to any identifiable category of speakers, topics, or viewpoints that the Billboard Act

prohibits. The best he can muster is that "[a] citizen may not erect a sign advocating a viewpoint unless she has a business or runs an organization with activities relating to the topic, or unless placing the sign will somehow 'build business.'" Appellee's Br. 21. Yet the Act places no limits on the kinds of individuals or entities who may display messages related to activities conducted on the premises. Nor does it limit the kinds of speakers who may display messages on legally permitted off-premises signs. It is thus not a speaker-based restriction at all, let alone one that is a subtle form of content discrimination.

Plaintiff's claim that the Billboard Act could "eliminate all or almost all speech about certain topics," Appellee's Br. 22, is both inaccurate, *see* pp. 15-16, *infra*,[4] and irrelevant to the content-based inquiry. At bottom, plaintiff's argument concerns whether the Act's general prohibition on unpermitted billboards in areas adjacent to Tennessee's interstate and primary highways leaves open adequate alternative channels of communication. This Court already answered that question in *Wheeler*, concluding that Kentucky's Billboard Act "le[ft] open ample alternatives for communication of non-commercial and commercial messages." 822 F.2d at 596; *see infra* Part II.A.

[4] Plaintiff's contention that "no one could put up a sign advocating for or against a bond measure," for example, is perplexing. Appellee's Br. 23. Anyone could do so on a permitted off-premises sign, and a wide array of businesses and organizations may conduct activities related to the various projects funded by bond measures.

Perhaps recognizing that the on-premises exception does not on its face discriminate against any subject matter or category of speakers, plaintiff contends, relying on *Metromedia*, that the exception is nevertheless content based because it has a disproportionate impact on noncommercial speech. Appellee's Br. 24-27. But, unlike the on-premises exception here, the on-premises exception in *Metromedia* on its face applied only to commercial advertising, and therefore clearly privileged commercial speech over noncommercial speech. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 495, 513 (1981) (plurality opinion). This Court has already rejected the argument that an on-premises exception that applies equally to commercial and noncommercial speech "has the practical effect of prohibiting noncommercial speech." *Rzadkowolski v. Vill. of Lake Orion*, 845 F.2d 653, 654 (6th Cir. 1988); *see also Wheeler*, 822 F.2d at 593-94.

Finally, plaintiff cites *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988), for the proposition that "merely treating noncommercial and commercial speech equally is not constitutionally sufficient." Appellee's Br. 26. Read in context, that case simply acknowledges that a government cannot escape strict scrutiny by applying a regulation to both commercial and noncommercial speech. Contrary to plaintiff's radical view, Appellee's Br. 25-26, *Metromedia* does not hold that a regulation that exempts *any* commercial speech must exempt *all*

noncommercial speech, even that which is not similarly situated for purposes of the exemption.

II. THE BILLBOARD ACT AND ITS EXCEPTION FOR ON-PREMISES SIGNS SATISFY BOTH INTERMEDIATE AND STRICT SCRUTINY.

A. *Wheeler*'s Application of Intermediate Scrutiny Controls This Case.

In *Wheeler*, this Court held that the on-premises exception in Kentucky's Billboard Act, which is materially indistinguishable from the on-premises exception at issue here, survived intermediate scrutiny. 822 F.2d at 594-96. As plaintiff acknowledges, Appellee's Br. 52, that holding controls this case and is binding on a panel of this Court. *See United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014).

Nothing in *Reed* or any subsequent decision of this Court casts doubt on *Wheeler*'s application of intermediate scrutiny. Plaintiff contends that the Billboard Act fails to leave open alternative channels of communication because it "may limit a sign like Mr. Thomas's to a handful of locations in the State—where Olympic athletes might chance to train." Appellee's Br. 51. But that is inaccurate. Plaintiff's messages may be displayed, among other places, on property where related activity occurs (e.g., sports bars showing Olympic events), on any legal off-premises sign, and in areas not regulated by the Billboard Act. *See Wheeler*, 822 F.2d at 596. Plaintiff's reliance on *Metromedia* ignores the factual differences between the

Billboard Act and the "city-wide ban" at issue in *Metromedia* and, for that reason, was expressly rejected in *Wheeler*. *See id.*

B. The State's Interests Are Compelling.

In its opening brief, the State described with particularity its compelling interests in the Billboard Act and the on-premises exception. Appellant's Br. 9-12, 38-40. Plaintiff's lone argument in response is that the Supreme Court has never *held* these interests to be compelling. Appellee's Br. 34. That argument is incorrect with respect to the State's interests in public safety and safeguarding constitutional rights. And it provides no affirmative support for plaintiff's position.

Public Safety: As the State has already explained, both the Supreme Court and this Court have held that the government has a compelling interest in public safety, including the safety of public roadways. Appellant's Br. 39-40 (citing cases); *see also* U.S. Amicus Br. 14-15. Plaintiff's contention otherwise both confuses First Amendment doctrine and mischaracterizes precedent.

First, plaintiff argues that the interest in public safety is "patently[] insufficient" because it is "outside [of the] list" of the "'few historic and traditional categories' of speech where 'content–based restrictions . . . have been permitted,'" such as "obscenity." Appellee's Br. 34 (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). That argument conflates what constitutes a "compelling interest" with *categories* of unprotected speech and directly contradicts the Supreme Court's

recognition of compelling interests "outside [the] list" plaintiff proposes. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (compelling interest in safeguarding "public confidence in the integrity of the judiciary"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (compelling interest in "protecting the physical and psychological well-being of minors").

Second, plaintiff argues that "the Supreme Court has never considered" public safety on roadways a compelling interest. Appellee's Br. 34. That assertion is belied by the precedents cited in the State's opening brief. Appellant's Br. 39-40. It also misleadingly suggests that the Court has held that traffic safety is *not* a compelling interest. But *Metromedia*, like *Reed* and the other cases on which plaintiff relies, merely found it *unnecessary* to address whether public safety is a compelling interest. *See Reed*, 135 S. Ct. at 2231; *Metromedia*, 453 U.S. at 507-08 (plurality opinion). Moreover, despite plaintiff's attempt to explain it away, Appellee's Br. 35 n.17, the Court's statement in *Reed* that "a sign ordinance narrowly tailored *to the challenges of protecting the safety of pedestrians, drivers, and passengers* . . . might well survive strict scrutiny," is difficult to harmonize with plaintiff's contention that public safety is not a compelling interest. 135 S. Ct. at 2232 (emphasis added).

Finally, plaintiff accuses the State of "conjur[ing]" precedent holding that public safety is a compelling interest because that precedent did not involve sign regulation specifically. Appellee's Br. 35. But the Supreme Court's approach is not

so myopic; it has frequently looked to other factual and constitutional contexts to establish that a governmental interest is compelling. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (relying on Sixth Amendment precedent to find interest compelling for First Amendment purposes); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (relying on First Amendment precedent to find interest compelling for equal protection purposes); *Burson v. Freeman*, 504 U.S. 191, 199-200 (1992) (plurality opinion) (relying on cases involving ballot restrictions to find interests compelling for purposes of speech restrictions).

Safeguarding First Amendment Rights: Plaintiff concedes that the State has a compelling interest in "complying with its constitutional obligations." Appellee's Br. 36.[5] His only real argument in response is his inaccurate assertion that the State failed to raise this interest below. *Id.* To the contrary, the State argued both in its response to plaintiff's dispositive Rule 52 motion and in subsequent briefing that

[5] Plaintiff suggests that the State's interest in "facilitating and safeguarding the First Amendment rights of its businesses and property owners" is somehow distinct from its interest in "complying with its constitutional obligations," Appellee's Br. 36, but those interests are one and the same. And plaintiff's argument that "privileging the speech of business owners and organizations—as opposed to all other Americans—carries with it different constitutional concerns," Appellee's Br. 37, is irrelevant to whether the State has a compelling interest in complying with its constitutional obligations. In any event, it is well settled that on-premises signs carry different constitutional implications because they constitute a uniquely effective medium of communicating information related to the property. Appellant's Br. 45-46; p. 21, *infra*.

plaintiff's proposed alternatives would be inconsistent with "property owners' right to advertise the actual use of the premises" and cited as support this Court's statement in *Wheeler* that "the right to advertise an activity [conducted] on-site is inherent in the ownership or lease of the property." Resp. to Rule 52 Mot., R. 336, PageID #6740 (quoting *Wheeler*, 822 F.2d at 591); *see also* Least Restrictive Means Briefing, R. 344, PageID #6800. The State thus preserved the argument for appeal. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) (litigant must only "state the issue with sufficient clarity to give the court and opposing parties notice that it is asserting the issue").[6]

The fact that the State asserted this compelling interest in the context of narrow tailoring below does not preclude the State from framing the argument differently on appeal. *Wayne Cnty. Neighborhood Legal Servs.*, 971 F.2d at 3. Indeed, it is not surprising that the State advanced this argument in the context of narrow tailoring given that this particular interest is focused only on an *exception* to the challenged speech restriction, not the speech restriction itself.

Aesthetics: Unlike the State's interest in public safety, neither the Supreme Court nor this Court has determined whether aesthetics is a compelling state interest.

[6] Even if this Court were to agree that the State did not preserve this argument, this Court could still consider it because it is "purely [an issue] of law" and "does not depend on the factual record below." *Wayne Cnty. Neighborhood Legal Servs. v. Nat'l Union Fire Ins. Co.*, 971 F.2d 1, 3 n.2 (6th Cir. 1992).

But that of course does not establish that aesthetics is *not* a compelling interest. The State's interest in preserving the natural beauty of its numerous scenic roadways and natural vistas is both substantial—as precedent establishes—and compelling. Appellant's Br. 10-11, 42.

C. The Billboard Act and Its On-Premises Exception Are Narrowly Tailored to the State's Compelling Interests.

To satisfy strict scrutiny, a law need not "be perfectly tailored." *Williams-Yulee*, 135 S. Ct. at 1671 (internal quotation marks omitted). Instead, it must "advance[] the State's compelling interest[s]" and "do[] so through means narrowly tailored to avoid unnecessarily abridging speech." *Id.* at 1666.

The State has satisfied its burden of demonstrating that the Billboard Act is narrowly tailored to its compelling interests. Appellant's Br. 44-55. Any inquiry into whether the on-premises exception—as opposed to the Billboard Act as a whole—is narrowly tailored must consider the unique and context-sensitive nature of on-premises signs. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) ("[S]trict scrutiny *does* take relevant differences into account—indeed, that is its fundamental purpose[.]" (internal quotation marks omitted)). Whether the unique nature of on-premises signs is considered as part of the compelling interest analysis or simply as a constitutional boundary that any proposed less restrictive alternative may not breach, it is a factor that is not only

relevant, but dispositive, of the narrow tailoring inquiry. Plaintiff wholly ignores this factor.

As the State explained in its opening brief, on-premises signs are not similarly situated to off-premises signs for expressive purposes. Appellant's Br. 45-47; *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *Metromedia*, 453 U.S. at 511-12 (plurality opinion); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977); *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1064 (3d Cir. 1994) (recognizing that often "there is no other means of communication that can provide equivalent information"). The on-premises exception recognizes and furthers this constitutional principle by *allowing* signs that display messages about activities being conducted at the same location as the sign. Plaintiff never responds to, let alone contests this principle.[7]

Plaintiff does not address the unique nature of on-premises expression. Instead, he merely recycles the arguments countenanced by the district court to conclude that the on-premises exception is not narrowly tailored. But as the State explained in its opening brief, each of these arguments lacks merit, particularly when

[7] Indeed, as one of plaintiff's amici acknowledges, "people's ability to display their own speech on their own property . . . is seen as especially important." Volokh Br. 13.

understood in light of the constitutional principles underlying the on-premises exception. Appellant's Br. 48-55.

Privileging commercial or noncommercial speech: Plaintiff contends that privileging commercial speech over noncommercial speech and privileging on-premises noncommercial speech over other noncommercial speech does not advance the State's interests, Appellee's Br. 40, but this argument rests on a factually inaccurate assumption.[8] The Billboard Act, including the on-premises exception, does not distinguish between commercial and noncommercial speech. Order on Constitutionality, R. 356, PageID #6913, 6926. It distinguishes only between on-premises signs and off-premises signs.[9]

In an attempt to undermine that distinction—which applies to both commercial and noncommercial speech—plaintiff argues that the "State has failed to show that purely ideological speech is any more distracting or aesthetically displeasing than ideological speech tied in some way to a business or organization."

[8] As explained at pp. 15-16, *supra*, the on-premises exception does not have the practical effect of favoring commercial speech over noncommercial speech or of favoring certain topics, viewpoints, or speakers either. And plenty of alternative avenues of communication remain available for messages that do not qualify for on-premises treatment. *See* p. 15, *supra*. Plaintiff's assertion that the Act "restricts discussion about some topics altogether," and "skews the debate—favoring some viewpoints over others," Appellee's Br. 41-42, is therefore factually incorrect.

[9] Contrary to the contention of plaintiff's amicus, Goldwater Br. 10-12, all on-premises signs—whether commercial or noncommercial—are exempt from the permitting requirement. *See* Tenn. Code Ann. § 54-21-107(1)-(2).

Appellee's Br. 40. But the State and the United States have already explained how on-premises signs differ from off-premises signs for purposes of the State's interests in public safety and aesthetics, and the same differences apply with respect to on-premises and off-premises signs containing ideological speech. Appellant's Br. 48-49; U.S. Amicus Br. 15; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 n.20 (1993); *Wheeler*, 822 F.2d at 595; *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 13 (1st Cir. 1980). Moreover, unlike a sign containing an ideological message unrelated to activities occurring on the premises, a sign containing ideological speech related to activities occurring on the premises cannot be as effectively communicated in another location. Appellant's Br. 45-46. Those distinctions justify the differential treatment of on-premises and off-premises signs.

Overinclusive or Underinclusive: Plaintiff repeats the district court's conclusions about the overinclusiveness and underinclusiveness of the Act. The State has explained why these are without merit. Appellant's Br. 49-51. In particular, plaintiff does not even venture to explain how the on-premises exception—which does not restrict speech but *permits* more speech—is an overinclusive speech restriction. And, contrary to plaintiff's argument, "the First Amendment imposes no freestanding underinclusiveness limitation." *Williams-Yulee*, 135 S. Ct. at 1668 (internal quotation marks omitted). Instead, "[u]nderinclusiveness can . . . reveal that a law does not actually advance a

compelling interest" or favors a particular speaker or viewpoint. *Id.* But that is not the case here. The on-premises exception applies equally to all speakers and viewpoints and directly advances the State's interest in safeguarding expressive rights.

Plaintiff urges this Court to hold that the State must either restrict more speech by subjecting on-premises signs to the same restrictions as off-premises signs or must exempt all signs displaying noncommercial messages, thus undermining entirely the State's interests in safety and aesthetics. Appellee's Br. 42-43. The First Amendment does not require such a choice. *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 822 (6th Cir. 2005).

D. The On-Premises Exception Is the Least Restrictive Means of Achieving the State's Compelling Interests.

As the State explained in its opening brief, all of the purportedly less restrictive alternatives that the district court found would be equally effective in advancing the State's interests suffer a fatal flaw: they undermine entirely the State's interest in safeguarding the expressive rights of property owners and their tenants to communicate through the unique medium of on-premises signs. Appellant's Br. 51-53. Rather than explain how his alternatives would advance that compelling interest, plaintiff merely argues that the alternatives—all of which are *more* restrictive of speech—would advance the State's interests in safety and aesthetics. But because none of the proposed alternatives would allow the State as effectively to balance its

compelling interests in safety and aesthetics with its equally compelling interest in safeguarding expressive rights, none is a viable alternative. *Id.*

Despite the district court's conclusion that the alternative of exempting all noncommercial speech "may be less effective" than the Billboard Act, Order on Constitutionality, R. 356, PageID #6945, plaintiff argues that this is the "best alternative." Appellee's Br. 47.[10] The Court need look no further than the facts of this case to reject that alternative. As one of plaintiff's amici admits, an exemption for noncommercial speech would be "impossible to administer," given the difficulty of classifying speech as noncommercial or commercial, and arguably "'content based on its face' and presumptively invalid" under *Reed*. Goldwater Br. 4-5 (quoting *Reed*, 135 S. Ct. at 2226-27).

Plaintiff asserts that this alternative would "exempt[] noncommercial *signs*" and leave "on-premise commercial *signs*" free from regulation. Appellee's Br. 48 (emphasis added). But a "sign" itself is not inherently "commercial" or "noncommercial." A sign is a "large, immobile, and permanent" structure on which

[10] Contrary to plaintiff's contention that he need only "point to a less-stringent method of *advancing* a compelling interest," Appellee's Br. 46 (emphasis added), his proposed alternatives must be "*at least as effective in achieving*" the State's interests, *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (emphasis added) (internal quotation marks omitted). The question is thus not whether exempting all noncommercial speech from regulation would render the Billboard Act completely ineffective, but rather whether that proposed alternative would be *as effective* as the current regulatory scheme.

messages are displayed. *Metromedia*, 453 U.S. at 502 (plurality opinion) (internal quotation marks omitted). The *message* displayed on the sign may be commercial or noncommercial.

And the message on the sign can be changed rapidly. In this case, plaintiff's unpermitted sign, displaying a commercial message, was slated for demolition because it violated the Act. State Decisions, R. 164-5, PageID #2368. So he changed the message to a noncommercial one and brought this suit on that basis. *Id*. After the district court held the Act unconstitutional *solely* based on its application to the *noncommercial* message on plaintiff's sign, Order on Constitutionality, R. 356, PageID #6925-26, plaintiff resumed displaying *commercial* advertising. *See* Exhibit B.[11]

A regulatory scheme subject to such cat-and-mouse manipulation is not a less restrictive means of advancing the State's interests. Such a regime would undermine

[11] Exhibit B contains two photographs of plaintiff's Crossroads Ford billboard taken by a State attorney on February 2 and April 14, 2018, and an accompanying affidavit. This Court may take judicial notice of the photographs; the content displayed on the Crossroads Ford billboard is a fact that is not "subject to reasonable dispute" because it is "generally known" within this Court's jurisdiction—indeed, it was on display to the public—and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"—i.e., the sworn statement of an officer of the State and of this Court. Fed. R. Evid. 201(b)(1); *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012). The State could not have presented these facts to the district court because plaintiff did not change the content of his billboard until after the district court's judgment. *Cf. Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 501 (6th Cir. 2017), *petition for cert. filed* (U.S. Dec. 21, 2017).

the State's interests by severely compromising its ability to enforce the Billboard Act. Plaintiff offers—and can offer—no response to this fundamental problem.

CONCLUSION

The State respectfully requests that this Court reverse the judgment of the district court and remand with instructions to enter judgment in favor of the State.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Sarah K. Campbell
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April 18, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)((iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

April 18, 2018

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendant-Appellant and a member of the Bar of this Court, certify that, on April 18, 2018, a copy of the Reply Brief of Appellant and accompanying exhibits was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

Exhibit A

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS,
SHELBY COUNTY

STATE OF TENNESSEE, ON RELATION OF THE COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION, FOR AND ON BEHALF OF SAID DEPARTMENT,	DOCKET NO. CH-07-0454-1
Plaintiff,	On Remand from Supreme Court of Tennessee
	No. W2008-00853-SC-R11-CV
VS.	
WILIAM H. THOMAS, JR., a resident of Shelby County, Tennessee,	
Defendant.	

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR JUDGMENT CONSISTENT WITH RECENT RULING BY THE FEDERAL DISTRICT COURT FOR THE WESTERN DISTRICT

This matter came on to be heard by the Court on February 2, 2018 on the Defendant's Motion for Judgment Consistent with Recent Ruling by the Federal District Court for the Western District.

Based upon Defendants' motion and supporting legal arguments, the statements and presentation of Counsel for the State and Thomas appearing Pro Se, this Court makes the

following findings:

1. The history of this proceeding is quite lengthy and is set forth in detail in Defendant's Motion and in the Tennessee Court of Appeals' opinions in *State ex rel. Comm'r of Dep't of Transp.v. Thomas*, 336 S.W.3d 588 (Tenn. Ct.App. 2010). *perm. appeal denied* (Tenn. Nov. 18, 2010), and *State ex rel. Dep't of Transp. V. Thomas*, No. W2013-02092-COA-R3-CV, 2014 WL 6992126 (Tenn. Ct. App. Dec. 11, 2014) *perm. appeal denied* (Tenn. May 18, 2015).

2. On April 27, 2010, the Tennessee Court of Appeals issued an opinion holding, among other things, that this court lacked subject matter jurisdiction over the matters asserted by Defendant in response to the State's petition for injunctive relief and the Defendant's counterclaims. The Court of Appeals held that, under Tenn. Code Ann. § 4-4-104(a). § 4-5-322, and § 54-21-105, Defendant's defenses and counterclaims could only be raised in Davidson County Chancery Court.

3. On December 11, 2014, the Tennessee Court of Appeals issued an opinion reversing this Court's order of August 2, 2013. The Court of Appeals held that, in issuing that order, this Court had deviated from the law of the case in exercising jurisdiction over Defendant's somewhat novel First Amendment argument. The Court of Appeals held that this Court did not have subject matter jurisdiction to consider Defendant's First Amendment argument.

4. On September 8, 2015, the United States District Court for the Western District

of Tennessee Western Division in case 2:13-CV02987 issued an Order Granting Preliminary Injunction enjoining the Plaintiff/State from removing or seeking the removal of Defendant's Crossroads Ford billboard. The District Court found that Defendant/Thomas was likely to succeed on his claim that the Tennessee Billboard Act violates the First Amendment under the U.S. Supreme Court's recent decision in Reed v Town of Gilbert, 135 S. Ct. 2218 (2015).

5. On March 31, 2017, following a trial, the Federal District Court issued an order declaring that the Tennessee Billboard Act's exception for on-premises signs is a content-based regulation of speech that violates the First Amendment of the United States Constitution.

6. On September 20, 2017, the Federal District Court granted Defendant/Thomas a permanent injunction preventing the State of Tennessee from enforcing the Billboard Act as to Thomas's Crossroads Ford Billboard.

7. The Tennessee Supreme Court has held that the law of the case doctrine does not apply when the appellate court's prior decision "is contrary to a change in the controlling law" that occurred after the decision was issued. *Memphis Publ'g Co. v Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2D 303, 306 (Tenn. 1998).

8. This Court finds that the Federal District Court's order of March 31, 2017, finding the Tennessee Billboard Act unconstitutional constitutes a "change in the controlling law" such that the Tennessee Court of Appeals' prior opinions holding that this Court

lacks subject matter jurisdiction to consider Defendant's defenses and counterclaims is no longer the law of the case. In particular, the Federal District Court's order finding the Billboard Act unconstitutional in its entirety invalidated the Billboard Act's jurisdictional provision, Tenn. Code Ann. § 54-21-105(d).

9. The Federal District Court's order declaring the Tennessee Billboard Act unconstitutional has full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date the announcement of such rules of law. See James B. Beam Distilling Co. v Georgia, 501 U.S. 529 (1991).

10. This Court finds that, because the Tennessee Court of Appeals' prior opinions are no longer the law of the case, this Court may exercise jurisdiction over Defendant's defenses pursuant to 42 U.S.C. § 1983 to recover from the Plaintiff, State of Tennessee his legal fees and costs pursuant to further proceeding before this Court.

11. Once the Tennessee Billboard Act was declared unconstitutional in its entirety, the jurisdiction portion of the Act holding that exclusive jurisdiction loses exclusivity in Davidson County is likewise invalid.

12. This Court has jurisdiction over this matter and based upon retroactivity, this Court can reinstate its previous orders, including its order of February 12, 2008.

13. Once Thomas established that his U.S. Constitutional Rights have been violated by the State of Tennessee, the Tennessee Supreme Court has clearly recognized and held that he is entitled to recover his legal fees and costs incurred based upon 42 U.S.C. §

1983 and 1988. See *Bloomingdale's by Mail Ltd. V Huddleston, 848 S.W.2d. 52 (1992)*

WHEREFORE, this Court finds that the law of the case has changed from that set forth by the Court of Appeals in its December 11, 2014 opinion because the Tennessee Billboard Act has now been declared unconstitutional in its entirety by the honorable Judge Jon McCalla based upon the United States Supreme Court decision in Reed v Gilbert on June 18, 2015 and accordingly the order of the Court of Appeals no longer establishes the law of this case. Furthermore, the Defendant Thomas is entitled to present his request

IT IS SO ORDERED, ADJUDGED AND DECREED this 20th day of March, 2018.

Walter L. Evans
WALTER L. EVANS, ~~Chancellor~~

CERTIFICATE OF SERVICE

A TRUE COPY-ATTEST
Donna L. Russell, Clerk & Master
By _____ D.C. & M.

William H. Thomas, Jr.
5160 Sanderlin Ave., Suite 1
Memphis, TN 38117

Linda J. Mathis
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Memphis, TN 38120

George G. Boyte, Jr.
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Jackson, TN 38301

Exhibit B

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

and

JOHN H. REINBOLD; PATTI C. BOWLAN; ROBERT SHELBY; SHAWN BIBLE; CONNIE GILLIAM,
Defendants

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

AFFIDAVIT OF GEORGE BOYTE

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, George Boyte, a member of the Bar of the State of Tennessee and a member of the Bar of this Court, after being duly sworn, state as follows:

1. I represent the Tennessee Department of Transportation ("TDOT") in the action brought by TDOT against William H. Thomas, Jr. in Shelby County Chancery Court in 2007 to seek the removal of Mr. Thomas's unpermitted billboard

at the Crossroads Ford site. *See State ex rel. Comm'r of Dep't of Transp. v. Thomas*, No. CH-07-0454-1 (Shelby Ch. Ct.).

2. Because of my involvement in that litigation, I am familiar with the location of Mr. Thomas's Crossroads Ford billboard near the Interstate 40/Interstate 240 interchange in Shelby County, Tennessee.

3. On February 2, 2018, I took the attached photograph of Mr. Thomas's Crossroads Ford billboard, which was displaying an advertisement for the 1st Jackpot Casino. The photograph accurately depicts the content of the billboard as of that date.

4. On April 14, 2018, I took the attached photograph of Mr. Thomas's Crossroads Ford billboard, which was displaying an advertisement for the 1st Jackpot Casino, the Hollywood Casino, and the Resorts Casino. The photograph accurately depicts the content of the billboard as of that date.

FURTHER THE AFFIANT SAITH NOT.

GEORGE BOYTE
Deputy Attorney General
Real Property and Transportation Division
Office of the Tennessee Attorney General

Sworn to and subscribed before
me this 18th day of April 2018.

NOTARY PUBLIC
My commission expires: March 8, 2021

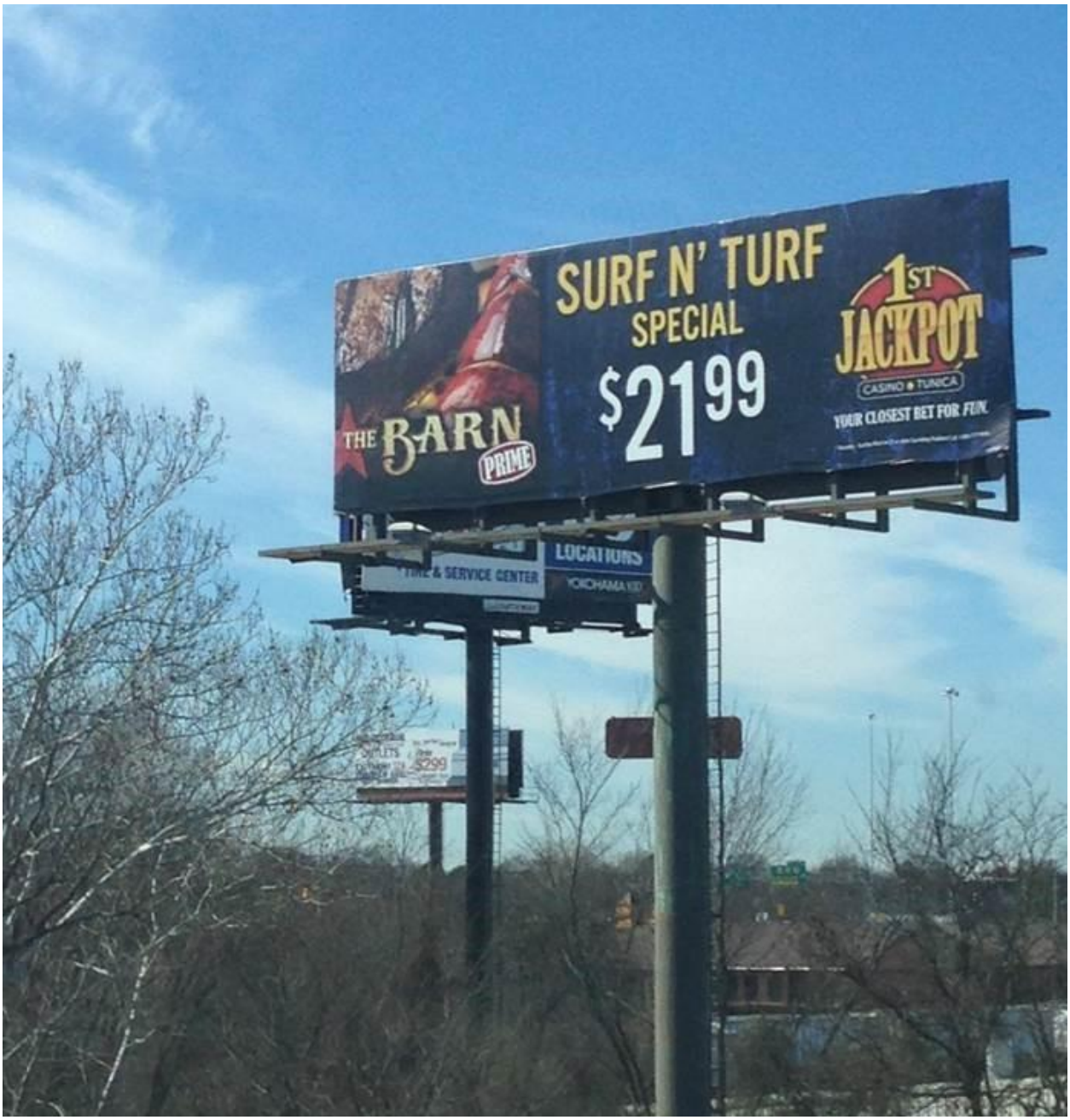
DAWN LENIGER
STATE OF TENNESSEE NOTARY PUBLIC
COUNTY OF DAVIDSON

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for Defendant-Appellant and a member of the Bar of this Court, certify that, on April 18, 2018, a copy of the Affidavit of George Boyte and accompanying photographs was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Sarah K. Campbell
SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

Photograph of Crossroads Ford billboard on February 2, 2018



Photograph of Crossroads Ford Billboard on April 14, 2018