No. 17-6238

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR.,

Plaintiff-Appellee,

v.

JOHN SCHROER, Commissioner,
Tennessee Department of Transportation,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTRODUCTION AND SUMMARY

The United States submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2) to protect its interests in highway safety and aesthetics, which are furthered through the sign regulations set forth in the federal Highway Beautification Act, implementing regulations, and related state laws. The government has a strong interest in ensuring that these provisions are correctly interpreted and subjected to appropriate First Amendment review.

The display of signs has long been subject to regulation at the federal, state, and local levels. In order to "protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty," the federal Highway Beautification Act establishes criteria for States to maintain "effective control" of signs displayed near designated highways. 23 U.S.C. § 131(a)-(b). The Act generally prohibits the display of signs within 660 feet of or visible from a highway, but it makes limited exceptions for signs consistent with the government's interests in traffic safety and aesthetics and as necessary to protect other important interests. *Id.* § 131(c).

This case concerns the constitutionality of the Tennessee Billboard Regulation and Control Act (Billboard Act), which provides for effective control of outdoor signs as required by federal law. Consistent with the Highway Beautification Act, the Billboard Act generally precludes the display of signs along designated highways, but it

allows signs that provide information about the property on which they are located. Tenn. Code Ann. §§ 54-21-103(2)-(3), 54-21-104(a) (West 2017).

This Court has previously upheld an on-premises exception of this type as a content-neutral regulation that is narrowly tailored to further important government interests. *See Wheeler v. Commissioner of Highways*, 822 F.2d 586, 590 (6th Cir. 1987). Although *Wheeler* predates the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), *Reed* did not purport to upset settled doctrine, and thus *Wheeler* remains valid and controlling. Indeed, three of the six Justices in the *Reed* majority joined a separate opinion underscoring that "[r]ules distinguishing between on-premises and off-premises signs" are content-neutral regulations not subject to strict scrutiny. *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring). Rules of this type distinguish among signs based on their connection to the property on which they are located, not the message they convey. And they are narrowly tailored to serve important government interests. *See Wheeler*, 822 F.2d at 595. The Court should thus uphold the on-premises exception in the Tennessee Billboard Act as a permissible, content-neutral regulation of speech. Even if the exception were subject to strict scrutiny, moreover, it would withstand review under that standard.

STATEMENT

A. Federal and State Regulation of Highway Signs

1. The federal Highway Beautification Act of 1965, Pub. L. No. 89-285, §§ 101, 131, 79 Stat. 1028, 1028, limits the display of signs near certain federally funded highways in order to "protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a). The Act conditions ten percent of a State's federal highway funds on the State's "effective control of the erection and maintenance . . . of outdoor advertising signs, displays, and devices." *Id.* § 131(b). "Effective control" generally means that signs may not be visible from or located within 660 feet of a designated highway. *Id.* § 131(b). But the Act makes limited exceptions for signs consistent with the government's interests in safety and aesthetics, and those necessary to vindicate other important rights, including (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conducted on the property on which they are located"; (4) landmark signs, or signs of "historic or artistic significance the preservation of which would be consistent with the purposes of" the Act; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." *Id.* § 131(c); *see also id.* § 131(f). In some instances, regulations implementing the Highway Beautification Act limit the number of on-premises signs that a property owner may display consistent

with these exceptions. 23 C.F.R. § 750.105(a). Separate provisions govern the display of signs in commercial and industrial areas. *See* 23 U.S.C. § 131(d). Every State, including Tennessee, has enacted provisions consistent with these statutory requirements and implementing regulations. *See* 23 C.F.R. § 750.705(h), (j).

2. The Tennessee Billboard Regulation and Control Act of 1972, Tenn. Code Ann. § 54-21-101 *et seq.* (West 2017), imposes effective controls on roadside displays as outlined in the Highway Beautification Act. State law generally prohibits the display of signs within 660 feet of and visible from a highway, unless the speaker first obtains a permit. *See id.* § 54-21-104(a). Excepted from that prohibition are signs advertising the sale or lease of property on which they are located, and those advertising activities conducted on the property. *Id.* § 54-21-103(1)-(3). To fall within that exception, state law requires that a sign "must be located on the same premises as the activity or property advertised," and it "must have as its purpose (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising." Tenn. Comp. R. & Regs. § 1680-02-03-.06. This exception applies equally to commercial and noncommercial on-premises activities. RE 356, Page ID # 6913.

B. Factual Background

Plaintiff William H. Thomas, Jr., owns multiple properties in Tennessee on which he displays billboards as part of his business. RE 356, Page ID # 6913. In

2006, the Tennessee Department of Transportation denied plaintiff a permit for a proposed billboard at a location referred to as Crossroads Ford, citing a state-law requirement that billboards generally must be spaced at least 1,000 feet apart. RE 356, Page ID # 6914. Had the proposed sign fallen within the Billboard Act's on-premises exception, it would not have been subject to state-law permitting and spacing requirements. *See* Tenn. Comp. R. & Regs. § 1680-02-03-.05. Notwithstanding the State's denial of a permit, plaintiff erected the Crossroads Ford billboard and has for the past decade displayed a variety of messages, which plaintiff alleges are "exclusively noncommercial" and "convey [his] thoughts and ideas." RE 45, Page ID # 563. For example, in 2012 plaintiff displayed a sign depicting an American flag with the Olympic rings "as a show of support for the U.S. Olympic team." *Id.* The State has initiated a variety of enforcement actions against plaintiff based on his failure to comply with the requirements of the Billboard Act. *See* RE 356, Page ID # 6914-16.

C. Procedural Background

Plaintiff filed suit against the Commissioner of the Tennessee Department of Transportation and other officials in December 2013, alleging violations of his First Amendment rights. In May 2015, the Tennessee Department of Transportation directed plaintiff to remove the Crossroads Ford sign, and plaintiff sought a temporary restraining order. *See* RE 356, Page ID # 6916. The district court granted plaintiff's motion, concluding that multiple sections of the Billboard Act were likely

unconstitutional. RE 110, Page ID # 1447, 1454-56. The court later converted the temporary restraining order into a preliminary injunction. RE 163, Page ID # 2259.

Following an advisory-jury trial, in which the jury found that the Billboard Act is narrowly tailored to serve a compelling state interest, *see* RE 356, Page ID # 6918, the district court on March 31, 2017, held that the law violates the First Amendment, RE 356, Page ID # 6922. The court first concluded that the on-premises exception is content based and thus subject to strict scrutiny. The court acknowledged that "it is possible for a restriction that distinguishes between off- and on-premises signs to be content neutral. For example, a regulation that defines an [on]-premise sign as any sign within 500 feet of a building is content neutral." RE 356, Page ID # 6923. But the court held that where an exception's application "hinges on the content of the message," as by requiring a sign to concern activity on the site where the sign is located, the exception is not content neutral. RE 356, Page ID # 6923, 6925. The court rejected the State's argument that the applicability of the Billboard Act's on-premises exception turns on the location of a sign, rather than its content. RE 356, Page ID # 6923.

To withstand strict scrutiny, a regulation of speech must be the least restrictive means of furthering a compelling government interest. RE 356, Page ID # 6926. Applying that framework, the district court first held that the State's interests in safety and aesthetics are not compelling. "Not only are such general and abstract interests

generally not considered so compelling as to justify content-based sign restrictions," the court concluded, "they are unrelated to the distinction between signs with on-premises-related content versus other messages." RE 356, Page ID # 6931. The court further held that, even if those interests were compelling, there is no evidence that the on-premises exception is narrowly tailored to further those interests. RE 356, Page ID # 6932. The court faulted the rule for being both over- and under-inclusive, noting that it "would absolve large, ostentatious on-premises signs that are closely placed together . . . while regulating small, muted off-premises signs." RE 356, Page ID # 6941. And it concluded that the State could further its interests through other, less restrictive means, such as a rule governing the size or spacing of signs, RE 356, Page ID # 6946-47, 6951, or an exception generally allowing for the display of signs by property owners, RE 356, Page ID # 6948. Because the court concluded that the on-premises exception was not severable from the Billboard Act, it held the entire law unconstitutional. RE 356, Page ID # 6952 & n.12.

ARGUMENT

On-Premises Exceptions Remain a Constitutional Means of Regulating Speech After *Reed v. Town of Gilbert*.

A. Rules distinguishing between on-premises and off-premises signs are content neutral.

Rules distinguishing between on-premises and off-premises signs have consistently been held to be content neutral as long as they apply equally to

commercial and noncommercial activities. More than thirty years ago, this Court considered a First Amendment challenge to a Kentucky law closely analogous to the rule at issue here. *See Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987). The Kentucky Billboard Act generally prohibited the erection or maintenance of signs within 660 feet of a highway, but it made an exception for signs identifying activities conducted on site. *See id.* at 587-88. After determining that the exception treated signs about commercial and noncommercial activities alike by requiring in each instance a certain nexus to the property on which the sign was located, *id.* at 590, the Court held that the Kentucky law was content neutral, *id.* at 594-95.

Wheeler explained that the Kentucky law's equal treatment of signs concerning commercial and noncommercial activities distinguished the case from *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality). The Supreme Court in that case held that, although distinctions between on-site and off-site advertising are generally consistent with the First Amendment, the exception in that case was unconstitutional because it elevated commercial messages over noncommercial ones, and it differentiated among types of noncommercial speech based solely on the message conveyed. *Id.* at 512-15. "Unlike the restriction at issue in *Metromedia*, the on-premises exception in [*Wheeler*] [wa]s not limited to commercial speech" and did not distinguish among noncommercial messages. *Wheeler*, 822 F.2d at 593. Rather, the

Kentucky ordinance "permit[ted] any non-commercial signs as long as they relate[d] to an activity on the premises," making the rule content neutral. *Id.*

Like the law at issue in *Wheeler*, the on-premises exception in the Tennessee Billboard Act applies to any sign that identifies the primary activities conducted on a property or advertises the sale or lease of the property. Tenn. Code Ann. § 54-21-103(2)-(3). Tennessee has confirmed that, under that exception, "[n]on-commercial and commercial speech are treated alike." *Wheeler*, 822 F.2d at 594; *see* RE 356, Page ID # 6949. In this case, as in *Wheeler*, whether a particular sign falls within the exception turns on the sign's relationship to the property on which it is located, rather than the content of the sign. *See Wheeler*, 822 F.2d at 590.

Wheeler remains valid and controlling notwithstanding *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). *Reed* did not purport to overturn settled precedent or invalidate a broad swath of longstanding rules. In explaining what it means for a law to be content based, the *Reed* Court referenced familiar principles and precedents, *see id.* at 2227-31 (citing, *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972)), many of which this Court cited in *Wheeler*, 822 F.2d at 589-94 (same). The Supreme Court's application of these decisions should not be understood to have radically altered this area of First Amendment doctrine.

Reed in any event concerned a very different type of law than those at issue here and in *Wheeler*. The ordinance in *Reed* generally prohibited the display of outdoor signs anywhere in town in the absence of a permit, but it exempted twenty-three categories of signs from that requirement, and it subjected those signs to different rules based solely on what they said. *See Reed*, 135 S. Ct. at 2224. For example, the maximum size of a sign and the period for which it could be displayed varied substantially depending on whether the sign's message was ideological, political, or event-related. *See id.* at 2224-25. The ordinance made a sign's message the only consideration in determining which rule applied. Because "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign," the Supreme Court held them content based. *Id.* at 2227; *see also Wagner v. City of Garfield Heights*, 675 F. App'x 599 (6th Cir. 2017) (per curiam) (holding unconstitutional a sign ordinance similar to the one in *Reed*). Unlike the ordinance in *Reed,* the narrow exception at issue here and in *Wheeler* does not turn solely on what a sign says, and *Reed* should not be understood to call *Wheeler* into doubt.

Justice Alito's concurring opinion in *Reed* confirms that rules containing on-premises exceptions should continue to be viewed as content neutral after the Court's decision in that case. 135 S. Ct. at 2233 (Alito, J., concurring). The concurrence, which was joined by two other members of the *Reed* majority, emphasizes that the Court's holding in that case does not render governments "powerless to enact and

enforce reasonable sign regulations." *Id.* "Properly understood, [the] decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." *Id.* at 2233-34. To illustrate that point, the concurrence provides a non-exhaustive list of content-neutral criteria that may be used in sign regulation without implicating strict scrutiny. Among those examples are "[r]ules distinguishing between on-premises and off-premises signs." *Id.* at 2233.

Exceptions of this type turn on whether a sign has a particular nexus to the property on which it is located. Tennessee's on-premises exception does not allow or disallow signs based solely on what they say, but rather based on the relationship between the sign and the subject property. Indeed, knowing what a sign says is not enough to know whether the rule applies. The crucial consideration that determines the applicability of such exceptions is the relationship between the sign and the property on which it is displayed. It is thus the sign's connection to the property, and not the substance of its message, that determines whether it is subject to regulation. *See Wheeler*, 822 F.2d at 591 (concluding that "the [Kentucky] Billboard Act and regulations are concerned with the place of the signs," rather than their content). The required nexus is a content-neutral consideration. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1067 (3d Cir. 1994) (concluding that a similar on-premises exception was content neutral because it "merely establishe[d] the appropriate relationship" between a sign and its location).

Although officials may need to consider a sign's message to determine whether it has a sufficient relationship to the relevant property, that requirement does not serve to make the exception content based. Courts and officials often examine the content of a communication to determine the speaker's purpose, and "[a] law is not considered content based simply because [one] must look at the content of an oral or written statement in order to determine whether a rule of law applies." *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (quotation marks omitted). *Reed* did not alter this basic principle. Since that decision, the courts of appeals have continued to hold that the fact that an official may need to consult a sign's message is not determinative of whether the law is content based. *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) ("an officer's inspection of a speaker's message is not dispositive on the question of content neutrality"); *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir.), *cert. denied*, 138 S. Ct. 334 (2017) ("the fact that [government] officials may look at what a [sign] says to determine whether it" is subject to regulation "does not render the . . . rule content-based").

The fact that the broader requirement established by the Billboard Act is plainly a content-neutral regulation subject to intermediate scrutiny underscores the appropriateness of applying the same level of scrutiny to the Act's limited exceptions. The narrow rule allowing on-premises signs is speech-promoting, and it would seem

to invert our First Amendment values if an otherwise valid, content-neutral restriction were found constitutionally wanting because the law allowed a narrow exception for signs at specific locations as necessary to protect the important interests of property owners and the traveling public.

B. The on-premises exception withstands scrutiny.

Because the on-premises exception is content neutral, it is subject to intermediate scrutiny, and this Court has already held that exceptions of this type are narrowly tailored to further substantial government interests. *See Wheeler*, 822 F.2d at 595. An exception for signs identifying activities conducted on site furthers the government's interest in traffic safety by assisting motorists in identifying their surroundings and locating needed services. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 n.20 (1993) (noting that onsite signs serve the "public interest in guiding potential visitors to their intended destinations"). The exception is also consistent with the government's aesthetic interests because such signs are limited in number, *see* 23 C.F.R. §750.105(a); Tenn. Code Ann. § 54-17-109, and will typically be integrated with the use to which the property is already being put, *see Wheeler*, 822 F.2d at 595 ("The addition of a sign on an existing building . . . is only incremental damage to the environment; a sign erected on a site with no buildings creates a new insult to the countryside.").

As the State explains, the on-premises exception additionally furthers the government's interest in ensuring that property owners have ample channels for communicating information about activities on their own premises that could not as effectively be conveyed through other means. *See* Br. 46-47. Signs identifying on-premises activity are a uniquely important means of expression for property owners, and the exception is necessary to avoid imposing a highly burdensome disability on those owners whose property happens to be adjacent to a highway. *See Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Rappa*, 18 F.3d at 1064.

On-premises exceptions of this type would also withstand strict scrutiny were that the appropriate level of review. The *Reed* Court remarked that "[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny." *Reed*, 135 S. Ct. at 2232. Tennessee's on-premises exception is narrowly tailored to further those compelling safety interests, as contemplated by *Reed*.

In holding that the law at issue does not withstand strict scrutiny, the district court erred at the outset by concluding that the government's interest in traffic safety is not a compelling one. *See* RE 356, Page ID # 6931. The Supreme Court has recognized a "compelling interest in highway safety," albeit in a different context. *Mackey v. Montrym*, 443 U.S. 1, 19 (1979). And this Court has similarly recognized for

other purposes "that the safe operation of public transportation systems is a compelling governmental interest." *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 479-80 (6th Cir. 1991) (collecting cases); *see Cole v. City of Memphis*, 839 F.3d 530, 539 (6th Cir. 2016), *cert. denied* 137 S. Ct. 2220 (2017). Given that the interest in traffic safety involves the protection of life and limb, it is plainly of the highest order and should be considered compelling for purposes of this analysis.[1]

With respect to tailoring, the on-premises exception responds precisely to the government's interest by allowing a narrow category of speech that directly addresses the needs of the traveling public. Signs relating to local buildings and businesses assist travelers in identifying their surroundings and locating services essential to travel. *See Discovery Network*, 507 U.S. at 425 n.20. A motorist unable to find gas, lodging, or automotive services may be imperiled. And a driver uncertain of his surroundings may choose to consult a map or phone while driving, thereby creating a risk to himself and others. The on-premises exception is the least restrictive means of making necessary information available to motorists, and is narrowly tailored to

[1] At least two courts of appeals have suggested that the interests of traffic safety and aesthetics "have never been held to be compelling." *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 737-38 (8th Cir. 2011); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). But, as noted above, this Court and the Supreme Court have recognized traffic safety as a compelling interest in other contexts.

provide travelers with essential information without allowing additional signs that would undercut the government's stated interests.

As the State notes in its opening brief, *see* Br. 46-47, the exception is also narrowly tailored to ensure that property owners have ample channels for communicating messages that could not be imparted with the same force through other means. On-premises signs are a uniquely effective means of conveying certain messages. *See Linmark*, 431 U.S. at 93 (noting that "[t]he alternatives" to on-site communications "are far from satisfactory"); *Rappa*, 18 F.3d at 1064 (noting that "there is no other means of communication that can provide equivalent information" about on-premises activity). And the government has a compelling interest in protecting the important rights inherent in property ownership. The on-premises exception is precisely tailored to further the First Amendment rights of property owners interested in providing information about their property, and to avoid imposing a unique burden on certain owners merely because their property is adjacent to a designated highway. The Court should uphold this narrow, commonsense exception to Tennessee's broader, and unquestionably content-neutral, rule for promoting the safety and aesthetic value of its highways.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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MARCH 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Rules 29(a)(5) because it was prepared in a proportionally spaced typeface in 14-point font and contains 3,937 words.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL