No. 17-6238

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
The Honorable R. Guy Cole Jr.
Case No. 2:13-cv-02987

Brief of Marion B. Brechner First Amendment Project and Pennsylvania Center for the First Amendment as Amici Curiae in Support of Plaintiff-Appellee

Eugene Volokh*
Scott & Cyan Banister
First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

* Counsel thanks Tyler Hastings, Cheannie Kha, and Dustin Lushing, UCLA School of Law students who worked on the brief.

RULE 26.1 DISCLOSURE STATEMENT

Amici curiae are projects at public universities, University of Florida and the Pennsylvania State University, and have no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

All parties have consented to the filing of this *amici* brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF *AMICI CURIAE*[1]

The Marion B. Brechner First Amendment Project in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and educational activities benefiting scholars, students and the public. The Project's scholarly and educational interest in filing this brief is to bring to the Court's attention important First Amendment principles on the critical distinction between content-based and content-neutral regulations of speech at issue in this case. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

---

[1] No party or party's counsel authored this brief in whole or in part, or contributed money intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. For over fifteen years, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

SUMMARY OF ARGUMENT

The district court correctly applied *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to hold that Tennessee's Billboard Act is facially content-based (and, in turn, that it cannot pass strict scrutiny). *Reed* used a hypothetical to illustrate that the ordinance in that case was content-based: "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." *Id.* at 2227. The same two signs, placed on the property where the hypothetical book club would meet, would likewise be treated differently under the Tennessee Bill-

board Act because the election is not "conducted on the property on which [the sign is] located," Tenn. Code § 54-21-107 (1).

The Billboard Act is also content-based under *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014), which held that a regulation is content-based if "enforcement authorities" must "'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 2531 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). It is impossible to enforce the Billboard Act without reading the content of the message on the sign.

The Billboard Act also privileges commercial speech over non-commercial speech. A "for sale" sign, for instance, is allowed on an undeveloped plot of land; so is a sign saying "firewood for sale," if the firewood is being sold on the property. Political and ideological signs, on the other hand, are not allowed, because there is no political or ideological activity on the undeveloped plot. That is unconstitutional under *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513-15 (1981) (plurality op.). (*Metromedia* upheld certain content distinctions among commercial messages, but rejected

such distinctions for noncommercial messages, *id.*) And while Justice Alito's concurrence in *Reed* stated that a distinction between on-premises and off-premises is constitutional, his view is best understood as distinguishing between signs posted by property owners on their own premises (on-premises), and signs leased out by the property owners to other speakers (off-premises). Indeed, such a reading of the concurrence is necessary because Justice Alito joined the majority opinion, under which the state's reading of the on-premises/off-premises distinction would be unconstitutional.

ARGUMENT

I. The Billboard Act is content-based

A. The Billboard Act is content-based under *Reed* and *McCullen*

Under *Reed v. Town of Gilbert,* the Billboard Act is a content-based speech restriction because it regulates billboards "based on [their] communicative content." 135 S. Ct. 2218, 2226 (2015). In *Reed*, the Court concluded that an ordinance was facially content-based because "[i]t defines 'Temporary Directional Signs' on the basis of whether a sign conveys the message of directing the public

to church or some other 'qualifying event.'" *Id.* at 2227. The statute in this case is likewise content-based because it regulates signs based on their "function or purpose" and draws distinctions "based on the message a speaker conveys." *Id.* Signs "advertising activities conducted on the property on which they are located," Tenn. Code § 54-21-107(a), are unrestricted, while other signs are restricted.

The Billboard Act is also content-based under *McCullen v. Coakley*, which held that a regulation is content-based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." 134 S. Ct. 2518, 2531 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). In *McCullen*, the Supreme Court concluded that a law banning people from standing within 35 feet of an abortion clinic entrance was not content-based because it could be enforced without considering the speaker's message. Yet if the law had instead stated that people within 35 feet of a building could only discuss activities related to that building, then the state would have indeed had to examine each

speaker's message, making the law content-based. The Billboard Act is content-based for the same reason.

The state also errs in claiming that it is "unnecessary to examine the content of the sign" when the sign is posted on undeveloped land. State Br. 32. Under the Billboard Act, a "For Sale" sign on that land would be allowed, but a "For Trump" sign would not be. Indeed, the Billboard Act favors commercial speech over non-commercial speech on undeveloped land, a result that is unconstitutional under *Metromedia*, 453 U.S. at 513 (plurality op.).

B. The Billboard Act restricts discussion of certain topics

The state argues that "[t]he Billboard Act's exception for on-premises signs does not single out any subject matter for prohibition or disfavored treatment; any topic may be discussed as long as it is related to the property on which it is located." State Br. 32. But actually, some topics may not be discussed near highways, because no property within that area happens to be used for an activity that involves that topic.

A sign commenting on China's policy towards Tibet would likely be forbidden throughout the area, unless some organization

that conducts activities related to this particular issue happens to be located near a Tennessee highway. The same is true of many other topics that deal with issues unrelated to Tennessee property, such as foreign policy matters, broad political questions (e.g., "Abolish the Electoral College"), or beliefs that are unpopular and thus have little or no property devoted to them (e.g., religious beliefs that are unrepresented by local houses of worship).

On the other hand, signs advertising local restaurants, or signs promoting popular religions, could be placed in many locations. Such content-based distinctions are unconstitutional, because the "government must afford all points of view an equal opportunity to be heard." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96, (1972).

C. Restrictions that "hinge . . . on the relationship between [a message] and the location where it is displayed" are content-based

The state argues that, under *Reed*, a restriction is content-based only if "it 'depend[s] *entirely* on the communicative content' of the speech," State Br. 33, and that a restriction is not "entirely" based on content when it "hinges . . . on the relationship between

[the] message [on a sign] and the location where it is displayed." *Id.* at 35. But this is inconsistent both with the *McCullen* principle, *see* Part I.A, and with *Carey v. Brown*, 447 U.S. 455 (1980), and *Boos v. Barry*, 485 U.S. 312 (1988).

In *Carey*, the Court struck down as content-based a restriction on residential picketing that had an exception for "peaceful picketing of a place of employment involved in a labor dispute." 447 U.S. at 460 (internal quotation marks omitted). It cannot "be seriously disputed," the Court held, "that in exempting from its general prohibition only the 'peaceful picketing of a place of employment involved in a labor dispute,'" the law "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* (The exemption had been authoritatively interpreted as only exempting speech "related to the ongoing labor dispute." *Id.* at 460 n.4.)

But like the Billboard Act, the law in *Carey* did not "'depend[] *entirely* on the communicative content' of the speech," State Br. 33, and instead "hinge[d] . . . on the relationship between [the] message [on a sign] and the location where it is displayed," *id.* at

35: The law turned on a combination of content and location, by restricting labor speech because it was "related to the ongoing labor dispute" that was itself related to the home being picketed. Yet the Court recognized that the law was content-based, *Carey*, 447 U.S. at 460 n.4; this Court should do the same for the Billboard Act.

Likewise, in *Boos*, the Court struck down as content-based a law that forbade displaying, "within 500 feet of a foreign embassy, . . . any sign that tends to bring the foreign government into 'public odium.'" 485 U.S. at 312 (citation omitted). Enforcement authorities there had to consider both whether the sign was within 500 feet of an embassy and whether the content of the sign brought the foreign government into public odium. Again, akin to the Billboard Act, the law did not "'depend[] *entirely* on the communicative content' of the speech," and instead "hinge[d] . . . on the relationship between [the] message [on a sign] and the location where it is displayed," State Br. at 35: The law turned on a combination of content and location, by restricting speech because

it was critical of the country that had an embassy near the location where the speech was displayed.

Yet all the Justices treated this content-related-to-location distinction as content-based. *Boos*, 485 U.S. at 319-20 (lead op.); *id.* at 337-38 (Brennan, J., concurring in part and concurring in the judgment); *id.* at 338 (Rehnquist, C.J., dissenting) (endorsing the D.C. Circuit majority in that case, *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), which recognized that the law was content-based, *id.* at 1468-69). The Billboard Act is likewise content-based.

D. The desire to protect effective on-premises communication does not keep the Act from being content-based

The state defends the Act as justified by the "interest in facilitating and safeguarding the First Amendment rights of its businesses and property owners," State Br. 40. But of course the Act only facilitates and safeguards certain speech of businesses and property owners, and not other speech. The distinction embodied within the Act, it appears, rests on a judgment that speech related to the property is particularly valuable. And indeed, a sign for local lodging may be more immediately helpful to a weary traveler than a sign praising John Locke.

But the judgment that speech of a certain content has more value cannot suffice to justify a content-based restriction, or to make the restriction content-neutral. The Court has "reject[ed] [the] proposition" that certain speech is "more deserving of First Amendment protection" than is speech on "other issues," *Carey*, 447 U.S. at 466. "Although the [government] may distinguish between the relative value of different categories of commercial speech, the [government] does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 514 (plurality op.). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

II. This Court should interpret Justice Alito's concurrence in *Reed* consistently with the majority opinion

Justice Alito, in his concurrence in *Reed*, gives a distinction "between on-premises and off-premises signs" as an example of a con-

tent-neutral restriction. 135 S. Ct. at 2233 (Alito, J., concurring). Yet Justice Alito fully joined the majority opinion, and his concurrence should thus be read consistently with the majority. The best way to do so is to understand his proposed distinction as distinguishing between signs that contain the speech of the premises owner (on-premises) and signs that are rented out by the owner to third parties (off-premises).

Such a distinction is indeed content-neutral, and can be applied without having to examine the content of the sign. And the distinction reflects a familiar judgment that property owners' own use of their premises can be treated differently than their renting out their property to off-premises speakers.

Justice Jackson's concurrence in *Railway Express Agency, Inc. v. N.Y.*, 336 U.S. 106, 116 (1949), offers a good illustration of this judgment. In that case, New York City barred companies from selling ads on their trucks to other companies, but let companies advertise their own businesses on their own trucks. Justice Jackson held that this distinction did not violate the Equal Protection Clause: "[I]t is one thing to tolerate action from those who act on

their own and it is another thing to permit the same action to be promoted for a price." *Id*. Likewise, people's ability to display their own speech on their own property (and especially their residential property, to which sign laws generally apply) is seen as especially important: "Most Americans would be understandably dismayed . . . to learn that it was illegal to display from their window an 8-by 11-inch sign expressing their political views." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). A choice to restrict signs but to exempt a property owner's own speech would distinguish based on the same content-neutral judgment about the importance of people's right to convey their own views on their own property, rather than based on the content of the speech.

This content-neutral interpretation of "on-premises" and "off-premises" is consistent with the *Reed* majority (because it does not consider the content of the message), and with *McCullen* (because it does not require enforcement authorities to examine the message). *See supra* Part I.A. The State's interpretation of "on-premises" and "off-premises," on the other hand, is content-based and contradicts the majority opinion in *Reed*, because it requires

examining the message to see if it relates to activities on the property.

CONCLUSION

The Act is content-based because it distinguishes speech based on its content, and requires enforcement authorities to examine the content to decide whether people can place up messages on their own property. Under both *Reed* and *McCullen*, a regulation that restricts a sign promoting a political cause but allows a "For Sale" sign is content-based. And a reasonable interpretation of Justice Alito's concurrence in *Reed* does not contradict this conclusion, which stems from the *Reed* majority that Justice Alito joined. The Act must therefore be subject to strict scrutiny, which it cannot pass, for reasons given in the District Court's opinion.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

Dated: April 11, 2018

s/ Eugene Volokh
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

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

Dated: April 11, 2018

s/ Eugene Volokh
Attorney for *Amici Curiae*