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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0233p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-6238

[Filed September 11, 2019]

WILLIAM HAROLD THOMAS, JR.,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CLAY BRIGHT, Commissioner of Tennessee	)
Department of Transportation,	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:13-cv-02987—Jon Phipps McCalla,
District Judge.

Argued: January 30, 2019

Decided and Filed: September 11, 2019

Before: COLE, Chief Judge; BATCHELDER and
DONALD, Circuit Judges.

COUNSEL

ARGUED: Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, for Amici Curiae. **ON BRIEF:** Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, Allen Dickerson, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, Kannon K. Shanmugam, A. Joshua Podoll, WILLIAMS & CONNOLLY LLP, Washington, D.C., Ilya Shapiro, CATO INSTITUTE, Washington, D.C., Braden H. Boucek, BEACON CENTER OF TENNESSEE, Nashville, Tennessee, Timothy Sandefur, GOLDWATER INSTITUTE, Phoenix, Arizona, Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Amici Curiae.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Under Tennessee's Billboard Act, anyone intending to post a sign along a Tennessee roadway must apply to the Tennessee Department of Transportation (TDOT) for a

permit, unless the sign falls within one of the Act's exceptions. This case presents a constitutional challenge to the Act, based on the "on-premises exception" for signs relating to the use or purpose of the real property (premises) on which the sign is physically located, typically signs advertising the activities, products, or services offered at that location.

William Thomas owned a billboard on an otherwise vacant lot and posted a sign on it supporting the 2012 U.S. Summer Olympics Team. Tennessee ordered him to remove it because the State had denied him a permit and the sign did not qualify for the exception, given that there were no activities on the lot to which the sign could possibly refer. Thomas sued, claiming that this application of the Billboard Act violated the First Amendment. The district court held the Act unconstitutional because the on-premises exception was content-based and thus subject to strict scrutiny, failed to survive strict scrutiny, and was not severable from the rest of the Act. We affirm, recognizing that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), overruled our existing circuit precedent on this issue in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987).

I. BACKGROUND

A. Tennessee's Billboard Act

In 1965, Congress enacted the Federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131, which sought to "promote the safety and recreational value of public travel, and to preserve natural beauty." *Id.* The HBA conditions ten percent of a State's federal

highway funds on the State's maintaining "effective control" of signs within 660 feet of an interstate or primary highway, *id*. at § 131(b), meaning the State must limit signage to (1) "directional and official signs and notices," (2) "advertising [for] the sale or lease of property upon which [the sign is] located," (3) "advertising [for] activities conducted on the property on which [the sign is] located," (4) "landmark[s] . . . or historic or artistic significance," or (5) "advertising [for] the distribution by nonprofit organizations of free coffee." *Id*. at § 131(c). The State may also, with U.S. Department of Transportation approval, permit signs in areas zoned industrial or commercial. *Id*. at § 131(d).

In order to comply with the HBA and ensure full federal funding, Tennessee enacted the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Ann. (T.C.A.) § 54-21-101, *et seq*. The Billboard Act parallels the HBA in most relevant respects and prohibits all outdoor signage within 660 feet of a public roadway unless expressly permitted by TDOT permit. *Id*. § -103. But the Act also provides exceptions under which certain signs may be posted without permit, including an exception for signage "advertising activities conducted on the property on which [the sign is] located." *Id*. § -103(3). This is referred to as the "on-premises exception" and corresponds to the HBA's third limitation. Under the Act's implementing regulations:

> A sign will be considered to be an on-premise[s] sign if it meets the following requirements:

> (a) Premise[s] - The sign must be located on the same premises as the activity or property advertised.
>
> (b) Purpose - The sign 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. (T.C.R.R.) § 1680-02-03-.06(2). The regulations elaborate further:

> The following criteria shall be used for determining whether a sign has as its purpose [] the identification of the activity located on the premises or its products or services, . . . rather than the business of outdoor advertising.
>
> (a) General
>
> 1. Any sign which consists solely of the name of the establishment is an on-premises sign.
> 2. A sign which identifies the establishment's principle [sic] or accessory product or services offered on the premises is an on-premises sign.
> 3. An example of an accessory product would be a brand of tires offered for sale at a service station.

(b) Business of Outdoor Advertising

1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle [sic] activity, it shall be considered the business of outdoor advertising and *not an on-premises sign*. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.

2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is *not an on-premises sign*. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating 'Skeet Range Here,' or 'Dog Kennels Here.' The on-premises activity would only be the skeet range or dog kennels.

T.C.R.R. § 1680-02-03-.06(4) (emphasis added; alteration of "premise" to "premises" throughout). So, to recap, and to be a bit more specific, the sign must (1) be physically located on the same "premises" (real property) as the activity being advertised on the sign,

and must (2) have as its purpose the identification of that activity occurring on the premises, or the products or services provided by that activity on the premises, not the purpose of advertising generally or advertising an activity, product, or service occurring elsewhere.

Finally, we would be remiss if we did not acknowledge that, by all indications, the Act was intended to, and routinely does, apply to only commercial speech, namely, advertising. But in this case, Tennessee applied the Act to restrict speech conveying an idea: "non-commercial speech" that was not advertising nor commercial in any way, but might be labeled "patriotic speech."

B. State Court Litigation

In 2006, Thomas—the owner of over 30 billboards in Tennessee—applied to the TDOT for a permit to erect a billboard on a vacant lot, hereinafter referred to as the "Crossroads Ford billboard," on which he would display a commercial advertisement. TDOT denied the application but Thomas constructed the Crossroads Ford billboard and posted his sign anyway. TDOT sued in the Tennessee state court, claiming that Thomas was in violation of the Billboard Act and also arguing that the Crossroads Ford billboard could not satisfy the on-premises exception because it was located on a vacant lot with no on-premises activity whatsoever.

The state trial court found "substantial evidence of selective and vindictive enforcement against [Thomas]," including emails from TDOT employees working in concert with a competitor of Thomas's to "defeat" him, and unsolicited emails sent from TDOT

employees to advertisers on Thomas's other billboards suggesting that his billboards were illegal and that associating with Thomas would reflect "negatively" on them. The court granted a temporary restraining order forbidding TDOT from enforcing the Billboard Act against Thomas's Crossroads Ford billboard until further notice. Thomas subsequently obtained a billboard permit from the Memphis and Shelby County (Tenn.) Office of Construction Code Enforcement but did not obtain a state permit from TDOT. He used the Crossroads Ford billboard for commercial advertising until 2012. Meanwhile, TDOT had appealed the decision and the Tennessee Court of Appeals vacated the judgment and remanded the case, instructing the trial court to hear Tennessee's requests for relief. *State ex rel. Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 608 (Tenn. Ct. App. 2010).

By 2012, Thomas had stopped posting commercial advertising on the Crossroads Ford billboard and instead had posted a message about free speech, which he later changed to "Go USA!," imposed on a large American flag, in support of the USA Olympic Team in the 2012 Summer Games. On remand, the state trial court found that this, the conveyance of an idea, was not commercial advertising, and was excepted from TDOT's authority to enforce the Billboard Act. TDOT again appealed and the Tennessee Court of Appeals again reversed, reiterating that, "[u]nless [the sign] fits within one of the exceptions named in the Act, if he does not have a State billboard permit, [Thomas] is not allowed to erect a billboard[,] [p]eriod[,] . . . [r]egardless of what message is displayed on the Crossroads Ford site billboard." *State ex rel. Dep't of Transp. v. Thomas*,

2014 WL 6992126 at *7 (Tenn. Ct. App. Dec. 11, 2014) (editorial mark, quotation marks, and citation omitted).

On remand, Thomas relied on the district court's opinion here, which was proceeding simultaneously, to persuade the state trial court to reinstate its original order (in his favor), but the Tennessee Court of Appeals again reversed, holding that "the 2017 [f]ederal [d]istrict [c]ourt [r]uling does not represent a change in controlling law for purposes of the law of the case doctrine," and this time reassigning the case to a different trial judge. *State ex rel. Dep't of Transp. v. Thomas*, 2019 WL 1602011, at *8 (Tenn. Ct. App. Apr. 15, 2019). Thus, state proceedings are ongoing.

C. Federal Court Litigation

In 2013, Thomas sued in federal court, alleging that the Billboard Act was an unconstitutional restriction of speech in violation of the First Amendment. The district court ultimately agreed, quoting and relying on *Reed*, 135 S. Ct. at 2222, for the proposition that "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." *Thomas v. Schroer*, 248 F. Supp. 3d 868, 871 (W.D. Tenn. 2017) (quotation and editorial marks omitted). The district court explained that, under the Act, "the only way to determine whether a sign is an on-premise[s] sign, is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located," *id*. at 879 (quotation marks and record citation omitted), so the Act "is a content-based regulation that

implicates Thomas's noncommercial speech," *id.* at 878. This required strict scrutiny, which the Act "does not survive," *id.*, because Tennessee's asserted interests are not compelling, *id.* at 881-82, nor is the Act narrowly tailored to achieve them, *id.* at 885. The court held the Billboard Act unconstitutional as applied to the Crossroads Ford billboard sign. *Id.*

Thomas moved to expand the relief he sought, asking the district court to permanently enjoin Tennessee from enforcing the Billboard Act against *all* signs or at least against *all of his* signs. Thomas argued that his challenge had been both facial and as-applied, but the court held that it was only as-applied and Thomas had not justified an expansion of the relief sought. *Thomas v. Schroer*, No. 13-cv-02987, 2017 WL 6489144, at *1 (W.D. Tenn. Sept. 20, 2017) ("On March 31, 2017, the [c]ourt found the Billboard Act, as applied to Thomas's non-commercial messages on his Crossroads Ford sign, a violation of the Free Speech provision of the First Amendment of the United States Constitution."); *see also id.* at *7 ("Upon review of the record, it is clear that [Thomas] has not alleged the Billboard Act is unconstitutional in all its applications, or even unconstitutional as to a substantial number of applications."). The court permanently enjoined Tennessee from enforcing the Billboard Act against Thomas's Crossroads Ford sign. *Id.* at *10.

At the same time, Tennessee had moved the court to reconsider its holding that the Billboard Act was not severable. The court denied the motion, finding that there was no clear or prudent line at which to sever, *id.* at *5, and nothing in the Act said that it was severable,

as is required for severability under Tennessee law, or that the Tennessee legislature would have enacted it without the unconstitutional portions, *id*. at *3. Thus, the court declined to save the Act's commercial or off-premises aspects by severing the on-premises exception, and instead left that for the Tennessee legislature.[1] *Id*. at *5. Thomas resumed commercial advertising on his Crossroads Ford billboard and Tennessee appealed the judgment here.

II. ANALYSIS

Tennessee appeals the district court's holding that the Billboard Act, as effectuated by the on-premises exception, is an unconstitutional restriction of Thomas's non-commercial speech at the Crossroads Ford billboard location. We review de novo a district court's decision on the constitutionality of a State statute, including whether the statute satisfies the applicable level of scrutiny. *Assoc. Gen. Contr. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000).

A. Exceptions as Restrictions

The restriction here is based on an exception to a regulation, which makes the exception—the *denial of the exception*, actually—the restriction. This posture does not change our analysis.

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[1] The district court's rulings reflect an apparent inconsistency: on one hand, the Act was not severable and entirely unconstitutional, but on the other hand, the court limited its as-applied holding to Thomas's non-commercial speech on his Crossroads Ford billboard. Whatever the practical effects, this does not affect our analysis in this appeal.

Textually, the Billboard Act is a blanket, content-neutral prohibition on any and all signage speech except for speech that satisfies an exception; here, the on-premises exception. In this way, Tennessee favors certain content (i.e., the excepted content) over others, so the Act, "on its face," discriminates against that other content. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011). The fact that this content-based aspect is in the *exception* to the general restriction, rather than the restriction itself, does not save it from this analysis. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from [speech restrictions] may not be based on content alone, and may not be justified by reference to content alone."); *see City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (the notion that the exceptions to a restriction of speech may be insufficiently expansive "is firmly grounded in basic First Amendment principles").

B. Severability

The district court held that the Billboard Act was not severable, and Tennessee has not challenged that holding in this appeal. We will not *sua sponte* address the merits of that issue.

Tennessee had argued to the district court that the non-commercial, on-site exception was severable from the remainder of the Act, particularly the commercial or off-site applications, and, after losing that argument, moved the court to reconsider, which the court denied:

> [T]he [c]ourt declines (1) to find the Billboard Act's provisions concerning outdoor advertising severable as to the challenged provisions or

> (2) to sever the non-commercial application of those provisions. The Billboard Act does not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech.

Thomas, 2017 WL 6489144, at *4. But Tennessee did not raise severability here, in either its briefing or during oral argument. We do not decide issues or arguments that are not directed to us, nor do we make or assume them on behalf of litigants. *See Gradisher v. City of Akron*, 794 F.3d 574, 586 (6th Cir. 2015). Therefore, we will not disturb the district court's determination that the Act, as applied in this case, is unconstitutional inasmuch as the on-premises exception is not severable from it, and that "it is for the Tennessee State Legislature—and not this [c]ourt—to clarify the Legislature's intent regarding the Billboard Act in the wake of *Reed*." *Thomas*, 2017 WL 6489144, at *5.

C. Content-Based Restrictions

The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech. Although we discuss this at length, this is neither a close call nor a difficult question. If not for Tennessee's proffered disputes, we would label this "indisputable."

When a case implicates a core constitutional right, such as a First Amendment right, we must determine the level of scrutiny to apply based on whether the restriction is content-based or content-neutral. *Reed*,

135 S. Ct. at 2226-27. Because Thomas's challenge to the Act concerned only non-commercial speech ("Go USA!") and this appeal stems from the district court's as-applied holding, we necessarily confine the analysis here to non-commercial speech and need not consider the commercial-speech doctrine. And, as just explained, the provision is not severable.

Under the First Amendment, the State may regulate certain aspects of speech but has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Content-based regulations are "presumptively unconstitutional" and analyzed under strict scrutiny. *Reed*, 135 S. Ct. at 2226. Content-neutral regulations of non-commercial speech need only survive intermediate scrutiny. *Id*. at 2228.

Although "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task," *Turner Broad. Sys. Inc., v. FCC*, 512 U.S. 622, 642 (1994), the Supreme Court has provided several means for doing so. As applicable here, a law regulating speech is facially content-based if it "draws distinctions based on the message," *Reed*, 135 S. Ct. at 2227; if it "distinguish[es] among different speakers, allowing speech by some but not others," *Citizens Unite v. Federal Election Comm'*, 558 U.S. 310, 340 (2010); or if, in its application, "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women*

Voters, 468 U.S. 364, 383 (1984)) (quotation marks omitted).[2]

The Billboard Act's on-premises exception allows a property owner to avoid the permitting process and proceed to post a sign without any permit, so long as the sign is "advertising activities conducted on the property on which [the sign is] located." T.C.A. § 54-21-103(3). The enabling regulation specifies that the sign must be "located on the same premises as the activity" and "have as its purpose [the] identification of the activity[,] products[,] or services [offered on that same premises]." T.C.R.R. § 1680-02-03-.06(2). Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose.

The Supreme Court has made plain that a purpose component in a scheme such as this is content-based: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*." *Reed*, 135 S. Ct. at

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[2] The Court has also recognized that some laws "though facially content-neutral, will be considered content-based," *Reed* 135 S. Ct. at 2227, such as if the law "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the prohibited speech] conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (quotation marks omitted). Because the Billboard Act is facially content-based, however, we need not proceed to these other means in this analysis.

2227 (emphasis added). Clearly, this regulatory scheme requires Tennessee officials to assess the meaning and purpose of the sign's message in order to determine if the sign violated the Act. *See McCullen*, 573 U.S. at 479. To digress a bit, a sign written in a foreign language would have to be translated (and interpreted) before a Tennessee official could determine whether the on-premises exception would apply or the sign violated the Act. There is no way to make those decisions without understanding the content of the message. More to the point here, Tennessee's own agent confirmed at trial that officials would be "looking at the content of [the] sign to make [a] determination whether it's on-premises or off-premises." That makes the Billboard Act—via the on-premises exception—content based. "[A] regulatory scheme [that] requires a municipality to examine the content of a sign to determine which ordinance to apply . . . appears to run afoul of *Reed*'s central teaching." *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 604 (6th Cir. 2017) (quotations omitted).

Moreover, under this scheme, to determine whether a violation has occurred, the Tennessee official not only "examines the content of the *message* that is conveyed," *see McCullen*, 573 U.S. at 479 (emphasis added), but must also identify, assess, and categorize the activity conducted at that location and determine whether the content of the message sufficiently relates to that activity, product, or service. *See* T.C.R.R. § 1680-02-03-.06(2). The examples provided in the Tennessee regulations are relatively straightforward: a sign on a service station advertising a brand of tires versus one advertising a brand of cigarettes. *Compare* -.06(4)(a)(3)

with (b)(1). And the present case is hardly more difficult, given that the Crossroads Billboard is on a vacant lot. But what if this sign, with its "Go USA!" and American flag referencing the Summer Olympics were posted on a U.S. Olympic Committee facility? Or on an unaffiliated athletic training facility, a retail store selling U.S. Olympic Team merchandise, an NBC station broadcasting the Games, a travel agency offering discount trips to London for the Games, a casino with wagering on Olympic events, an animal shelter that names each of the pets after an American Olympic athlete because that facilitates adoptions, or a Korean consulate attempting to extend diplomatic good will? Which of these activities, products, or services falls satisfactorily within the meaning, function, or purpose of the sign so as to meet the exception? More importantly, who decides? The Tennessee official decides.

This brings us back around to Tennessee's argument that *nothing* at the Crossroads Ford billboard location could satisfy the exception because *nothing* happens there; it is a vacant lot. But rather than render the scheme content-neutral, that redoubles the importance of the content of the message. Suppose the sign said: "vacant lot, lots of vacancy," "free air—stop and enjoy some," or "fill wanted." Those messages might or could be the lot's activities, products, or services.

Tennessee contends that the Billboard Act's on-premises exception is not content-based because the operative distinction is "between signs that are related to the property on which they are located and those

which are not . . . [meaning] the on-premise[s] exception distinguishes between signs based on their location, and not their content." That is, the content of the message is irrelevant; all that matters is its location—*signs can say whatever they want so long as they are in the correct location* But Tennessee's argument is specious: whether the Act limits on-premises signs to only certain messages or limits certain messages from on-premises locations, the limitation depends on the content of the message. It does not limit signs from or to locations regardless of the messages—those would be the (content-neutral) limitations that would fit its argument.

Even if Tennessee were correct, this "location" argument would simply trade one problem for another: instead of discriminating against the signs' messages, the Act would discriminate against the speaker. A law that allows a message but prohibits certain speakers from communicating that message is content-based. *See Turner*, 512 U.S. at 658 ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, [regulations] that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Tennessee cites language from *Reed*, 135 S. Ct. at 2227, that the law in question there "depend[ed]

entirely on the communicative content of the sign," for its argument that *Reed* means that a law is content-based only if it "depends entirely" on the content of a message. But that language was a factual statement describing the defendant's municipal code, not part of *Reed*'s analysis or holding. In any event, the Supreme Court has repeatedly held that laws combining content-based and content-neutral factors are nonetheless content-based. *See Mosley*, 408 U.S. at 98 (holding a law was content-based where it prohibited nonlabor-related picketing at a place of employment); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (same); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (holding a law was content-based where it prohibited speech critical of a foreign government within 500 feet of that government's embassy). In fact, in those cases, the Court used the same or similar "depends entirely" language to describe a necessarily content-based component even though it was combined with a content-neutral one. *See*, *e.g.*, *Boos*, 485 U.S. at 318 (holding that restriction "depends entirely upon whether [the] signs are critical of the foreign government"). The Act's on-premises exception employs a similar conjunctive binary of location and purpose: a sign must meet *both* prongs to qualify. Either can render the whole provision content-based.

Tennessee also argues that an otherwise content-based law is content-neutral if the State's justifications for that law are content-neutral, relying on *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 590–94 (6th ir. 1987), in which we considered a similar challenge to Kentucky's identical billboard law and held that it was not content-based because Kentucky's justifications were content-neutral. But *Reed* established that the

State's justifications or motivations are relevant only if the law appears facially content-neutral:

> 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. . . . That is why we have repeatedly considered whether a law is content-neutral on its face *before* turning to the law's justification or purpose.

Reed, 135 S. Ct. at 2228 (quotations and citations omitted). In fact, *Reed* criticized the same argument Tennessee makes now: "The Court of Appeals . . . misunderstand[s] our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content-based on its face. That is incorrect." *Id.* Rather, while "a content-based purpose may be sufficient" to transform a facially content-neutral law into one that is content-based, "an innocuous justification cannot transform a facially content-based law into one that is content-neutral." *Id.* (citation omitted). Simply put, *Reed* overruled *Wheeler*, which is no longer good law.

Finally, Tennessee would have us reconstruct the *Reed* decision by engaging in a form of speculative vote-counting. All nine Justices joined the judgment in *Reed*, but three concurred in the judgment only, with Justice Kagan opining that she would have applied intermediate scrutiny, *id.* at 2238 (Kagan, J.), and three concurred in Justice Alito's "few words of further explanation," in which he identified some examples of state regulations that would not be content-based,

including one for "[rules distinguishing between on-premises and off-premises signs." *Id*. at 2233 (Alito, J.). Tennessee pounces on this example and contends that the three Justices who joined Justice Alito would find an on/off-premises distinction content-neutral, as would the three who joined Justice Kagan—ergo, six of the nine Justices would find an on/off-premises distinction content-neutral. The district court appropriately made quick work of this argument:

> This Court agrees 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 off-premise[s] sign as any sign within 500 feet of a building is content-neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in *Reed*. The Court declines such a reading. Justice Alito's exemplary list of "some rules that would not be content-based" ought to be read in harmony with the majority' holding. [] Read in harmony with the majority, Justice Alito's concurrence enumerates an 'on-premises/off-premises' distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor.

Thomas, 248 F. Supp. 3d at 879. There might be many formulations of an on/off-premises distinction that are content-neutral, but the one before us is not one of them.

Tennessee's Billboard Act contains a non-severable regulation of speech based on the content of the message. Applied to Thomas's billboard, it is, therefore, a content-based regulation of non-commercial speech, which subjects it to strict scrutiny. *See Reed*, 135 S. Ct. at 2226–27.

D. Strict Scrutiny

For a content-based restriction of non-commercial speech to survive strict scrutiny, the State must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation omitted). Because the on-premises exception is not severable from the Billboard Act, we must consider the Act as a whole and analyze both Tennessee's interests and precisely how Tennessee has tailored the Act to achieve those interests.

1. Compelling State Interests

Tennessee proffers three "compelling state interests" public aesthetics, traffic safety, and safeguarding the constitutional rights of property owners. Tennessee furthers its interests in aesthetics and traffic safety through enforcement of the Billboard Act and the Act's general prohibition of signage. Tennessee pursues its interests in safeguarding the constitutional rights of property owners through the Billboard Act's exceptions, including the on-premises exception.

In *Reed*, 135 S. Ct. at 2231, the Court "assum[ed] for the sake of argument that [aesthetic appeal and traffic

safety] are compelling governmental interests." In *Wagner*, 675 F. App'x at 607, we decided to "follow the Court's example in *Reed* and assume without deciding that [aesthetic appeal and traffic safety] are sufficiently compelling."

But the Supreme Court has repeatedly found a State's interest in public aesthetics to be only "substantial" (rather than compelling), which is the interest level of intermediate scrutiny. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425–29 (1993). Tennessee concedes that no court has ever found public aesthetics to be a *compelling* interest and presents no persuasive arguments for finding that it is, but nonetheless urges us to break new ground. We decline to do so.

Traffic safety presents a different scenario. In the Fourth Amendment context, the Supreme Court has recognized a compelling interest in "highway safety," *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (upholding a Massachusetts "implied consent" law for breathalyzer tests), and we have done likewise, *see Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 479–80 (6th Cir. 1991) (upholding an Ohio law requiring public bus drivers to submit to randomized drug tests). But neither the Supreme Court nor this court has issued any such holding in the First Amendment context. We would, again, be breaking new ground and decline to do so.

As an aside, the Court has held elsewhere (under intermediate scrutiny) that the State must show that its justifications for a restrictive law are "genuine [and]

not hypothesized or invented *post-hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, we have persuasive evidence that Congress in enacting the HBA, and in turn Tennessee in enacting the Billboard Act, were motivated almost exclusively by aesthetic, not public safety, concerns. *See Brief for the Buckeye Institute as Amicus Curiae in Support of Appellee*, pgs. 4–11. Moreover, exceptions "diminish the credibility of the government's rationale for restricting speech in the first place." *Gilleo*, 512 U.S. at 52. The Billboard Act's ready exceptions, *see* T.C.A. §§ 54-21-103(4)-(5); -104; -107, undermine Tennessee's professed concern for traffic safety by allowing significant commercial signage that serves Tennessee's economic interests, which Tennessee concedes are not compelling. And, we note that, despite "[a]ssuming for the sake of argument," that traffic safety is a compelling interest, the Court in *Reed*, 135 S. Ct. at 2231-32, nonetheless concluded that restrictions on non-commercial signs were not "justified by traditional safety concerns."

Finally, Tennessee argues that it has a compelling interest in safeguarding the constitutional rights of business and property owners, namely their First Amendment rights, through the on-premises exception to the Billboard Act. It is undoubtedly true that State's interest in complying with its constitutional obligations is compelling. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Thomas concedes this point but objects to Tennessee's raising the argument here, protesting that Tennessee forfeited the issue by not raising it clearly to the district court. We agree—and Tennessee admits—that Tennessee could have done a better job of

addressing this issue to the district court, but we proceed as if Tennessee sufficiently raised the issue and preserved it for appeal. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009).

2. Narrowly Tailored

To establish that a law regulating or restricting speech is narrowly tailored, "the Government carries the burden of showing that the challenged regulation advances the Government's [compelling] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quotation omitted). While the regulation need not be perfectly tailored, the State's burden is not carried if the regulation "provides only ineffective or remote support" of the claimed compelling interest. *Greater New Orleans*, 527 U.S. at 188 (quotation omitted).

In *Metromedia*, 453 U.S. at 503, the Court addressed a billboard ordinance similar to Tennessee's Billboard Act. Under that ordinance:

> a sign advertising goods or services available on the property where the sign is located is allowed; [but] a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; [and] non-commercial advertising, unless [relating to the premises], is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most non-commercial messages.

Id. Finding the ordinance unconstitutional as applied to non-commercial speech, a divided court rendered a four-Justice plurality opinion, a two-Justice concurrence in the judgment only, and three separate dissents, each agreeing with different aspects of the plurality opinion or concurrence. *Id*. Later, in another First Amendment challenge to a sign ordinance, the Court affirmed both the plurality and concurrence as "two analytically distinct grounds for challenging the constitutionality of [an ordinance] regulating the display of signs." *Gilleo*, 512 U.S. at 50.

The first ground is if the law is overinclusive. *Metromedia*, 453 U.S. at 521-39 (Brennan, J., concurring in the judgment only). A content-based law regulating speech is overinclusive if it implicates more speech than necessary to advance the government's interests. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). "[S]uch provisions are subject to attack on the ground that they simply prohibit too much protected speech." *Gilleo*, 512 U.S. at 51. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980); *see also Jamison v. Texas*, 318 U.S. 413, 416 (1943) (holding invalid the total prohibition of handbills on the public streets); *Martin v. City of Struthers*, 319 U.S. 141, 145–149 (1943) (holding invalid the total prohibition of door-to-door distribution of literature); *but see City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding a total prohibition of signage attached to utility poles). To survive an

overinclusiveness challenge, the State must both meet the requisite tailoring requirements and "leave open ample alternative channels for communication" of the affected speech. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The second ground is if the law is underinclusive. *Metromedia*, 453 U.S. at 512-17 (White, J., plurality). This type of challenge is generally appropriate when a regulation functions "through the combined operation of a general speech restriction and [selected] exemptions." *Gilleo* 512 U.S. at 51. Such a law is problematic "because its exemptions discriminate on the basis of the signs' messages." *Id.* By picking and choosing which subjects or speakers are exempted, the government may "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank v. Bellotti*, 435 U.S. 765, 785 (1978). The underinclusiveness of a law can be cured by either eliminating the exemptions such that all speech is treated equally or expanding the exemptions to include more protected speech. *See Metromedia*, 453 U.S. at 513-15 (plurality).

Although Thomas makes both overinclusiveness and underinclusiveness arguments, his challenge is more appropriately one of underinclusiveness. Most obviously, the Billboard Act's "operation of a general speech restriction and [selected] exemptions" clearly lends itself to such an examination. *See Gilleo*, 512 U.S. at 51. Notably, the ordinance in *Metromedia* would have required the removal of long-standing billboards and the parties jointly stipulated that billboards had long been "an effective medium of communication" and

"other forms of advertising [were] insufficient, inappropriate, and prohibitively expensive." *Metromedia*, 453 U.S. at 525-26 (concurrence). Those stipulated facts were central to the concurrence's finding that an overinclusiveness challenge was the "appropriate analytical framework to apply." *Id.* at 525. That dynamic is not present here—indeed there is no broad reliance interest at stake nor does Thomas argue, or Tennessee concede, that billboards are necessary media for non-commercial speech.

Because, as applied in this case, the exception is the restriction, we must consider whether the exception is sufficiently expansive to save constitutionally protected speech from the Act's effective prohibition. *See Metromedia*, 453 U.S. at 520. If not, then the "exemptions discriminate on the basis of the signs' messages," and the Act is an underinclusive restriction on speech. *See Gilleo*, 512 U.S. at 51. We find the Act underinclusive in two ways.

First, the Act discriminates among non-commercial messages on the basis of content. Consider a hypothetical. A crisis pregnancy center erects a sign on its premises that says: "Abortion is murder!" Such a sign would presumably qualify for the on-premises exception because the message is related to the activities, goods, and services at the center. But may the property owner next door, who provides no services related to abortion, erect a sign that says: "Keep your laws off of my body!"? Under the Billboard Act, no. Two identically situated signs about the same ideological topic—one sign/speaker/message is allowed; the other is not.

By favoring on-premises-related speech over speech on but unrelated to the premises, the Billboard Act "has the effect of disadvantaging the category of non-commercial speech that is probably the most highly protected: the expression of ideas." *Ackerley Commc'ns. of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st. Cir. 1996). That Tennessee favors speech related to the premises—intentionally or not—"does not justify prohibiting an occupant from displaying its own ideas. . . . Although the [State] may distinguish between the relative value of different categories of commercial speech, the [State] does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 513-15 (plurality). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive [the State's] *ad hoc* balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

The Billboard Act is underinclusive also because it discriminates against *non-commercial* speech on but unrelated to the premises while allowing on-premises *commercial* speech. Consider another scenario. A pet store that sources its dogs from a notorious puppy mill erects a sign on its premises that says: "We have the most dogs around—and can always pump out more! Come get one!" Such a sign would presumably qualify for the on-premises exception because the message is related to the on-premises commercial activity of the pet store. But may the property owner across the street, who offers no services regarding animals, erect an otherwise identical sign that says: "Puppy Mills are

Animal Cruelty!"? Under the Billboard Act, no. Yet, in this instance, the speech that would be allowed is unsettling commercial advertising while the speech prohibited is non-commercial protest. This contradicts established First Amendment caselaw, which "ha[s] consistently accorded non-commercial speech a greater degree of protection than commercial speech." *Metromedia*, 453 U.S. at 513 (plurality).

> Insofar as the [State] tolerates billboards at all, it cannot choose to limit their content to commercial messages; the [State] may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.

Id. (plurality). That Tennessee allows some so-called "on-premises non-commercial speech" does not save it from this conclusion.

> The rule against content discrimination forces the government to limit all speech—including speech the government does not want to limit—if it is going to restrict any speech at all. By deterring the government from exempting speech [that] the government prefers, the Supreme Court has helped to ensure that [the] government only limits any speech when it is quite certain that it desires to do so.

Rappa v. New Castle County, 18 F.3d 1043, 1063 (3d Cir. 1994). By placing a burden "more heavily on ideological than on commercial speech" the Billboard

Act represents "a peculiar inversion of First Amendment values." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15-16 (1st Cir. 1980) (finding Maine billboard law underinclusive of non-commercial speech).

Our review of the record and the language of the Billboard Act leads to one more inescapable conclusion: the on-premises exception is tailored to promote Tennessee's economic interests. Of all possible speech, the on-premises exception allows for signage that communicates messages that encourage commercial patronage. Tennessee argues that this is sufficient First Amendment protection—*property owners can choose to say whatever they want, so long as their messages relate to the activities, goods, or services at the premises*—which reminds us of Henry Ford's famous quip about options for the original Model T: "Customers can choose any color they want, so long as it is black." That there is some overlap between what the on-premises exception allows and what property owners may choose to communicate does not mean that Tennessee is safeguarding its citizens' First Amendment rights. Because the Billboard Act is "hopelessly underinclusive," it is not narrowly tailored to further a compelling interest and thus is an unconstitutional restriction on non-commercial speech. *See Reed*, 135 S. Ct. at 2231.

E. Tennessee's Policy Arguments

Tennessee also presses two policy concerns as if they were legal arguments. First, Tennessee urges us to pay special attention to the practical distinction between billboards and signs, and include that in our

analysis. The Billboard Act and its attendant regulations cover all signs near public roadways regardless of whether those signs are situated on the ground, mounted on business or residential buildings, or affixed to billboard bases. The Act also regulates billboard bases as structures, imposing certain size, spacing, lighting, and safety requirements. Tennessee complains that it will not be able to enforce these content-neutral regulations of billboard bases if we affirm the district court. Second, Tennessee complains that if the on-premises exception is unconstitutional, then it is henceforth powerless to regulate even commercial signage.

As the district court explained, these are problems for the Tennessee Legislature, not the courts. *Thomas*, 2017 WL 6489144, at *5. Indeed, in the wake of *Reed*, state legislatures and municipal governments have begun to preemptively cure their signage regulations to satisfy the First Amendment. *See, e.g.,* Indianapolis, Ind. Code § 734 (Amended, Nov. 30, 2015); Ind. Code § 734-501(b) (amending definitions of on-premises, off-premises, and advertising signs to clarify that the limitations "[do] not apply to the content of noncommercial messages"); *Geft Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion, Ind.*, 187 F. Supp. 3d 1002, 1009 (S.D. Ind. 2016) (noting that the city brought its regulations "into compliance with *Reed*"); *see also* Tex. Transp. Code § 391.031, Tex. S.B. 2006, 85th Leg., ch. 964 (S.B. 2006), §§ 6, 7, 33(3), eff. June 15, 2017 (changing the prohibition from "outdoor advertising" to only "commercial signs").

Tennessee is free to regulate the erection and attributes of billboard bases—and all other content-neutral aspects of signs—provided that it does so without unconstitutional reference to the content of the signage affixed to those billboard bases. Nothing in this opinion disturbs that longstanding principle, which the Court affirmed in *Reed*, 135 S. Ct. at 2232. But Tennessee's policy considerations are irrelevant to the constitutional matter before this court.

III. CONCLUSION

The district court determined that the Tennessee Billboard Act, as effectuated here by its non-severable on-premises exception, is a content-based regulation of free speech that cannot survive strict scrutiny and is, therefore, unconstitutional. For the reasons stated in the district court's opinions and those elaborated upon herein, we find that we agree and must AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE MEMPHIS DIVISION

CIVIL ACTION NO. 2:13-CV-02987

[Filed February 27, 2018]

WILLIAM H. THOMAS, JR.,	)
	)
Plaintiff,	)
	)
v.	)
	)
JOHN SCHROER, COMMISSIONER of TENNESSEE DEPARTMENT OF TRANSPORTATION, in his official Capacity,	)
	)
Defendant.	)
	)

ORDER FINDING AS MOOT DEFENDANT'S MOTION TO STAY, REFERRING MOTION TO STRIKE TO MAGISTRATE JUDGE, AND GRANTING MOTION TO WITHDRAW AS ATTORNEY

Before the Court are three motions: Defendant John Schorer's Motion to Stay Judgment Pending Appeal (ECF No. 384), Plaintiff William H. Thomas, Jr.'s

Motion to Strike Affidavits and Exhibits Attached to Schorer's Motion to Stay (ECF No. 392), and George Fusner's Motion to Withdraw as Attorney for William H. Thomas, Jr. (ECF No. 399).

I. Schorer's Motion to Stay Judgment

Schorer seeks a stay of the Court's judgment pending appeal "to the extent the Court intended that judgment to preclude the State from enforcing the Billboard Act with respect to outdoor advertising *other than* Plaintiff's Crossroads Ford billboard." (ECF No. 385, PageID 7741 (emphasis original).) The Court has considered the motion and has determined that it is moot, and therefore cannot be granted or denied.

As recited in the controlling Complaint, Thomas's suit challenged the constitutionality of the Billboard Act as applied to two of his billboards. (Pl.'s Second Am. Compl., ECF No. 45, PageID 580.) After Thomas prevailed at trial on the Crossroad Ford billboard, the Court crafted injunctive relief commensurate with the scope of the injury: the State of Tennessee was enjoined from removing or seeking removal of Thomas's Crossroads Ford sign pursuant to the Billboard Act. (Judgment, ECF No. 377.) The Court emphasized that the injunction extends *only* to the Crossroads Ford sign; the injunction does not even reach Thomas's other signs. (Order on Remedies, ECF No. 374, PageID 7208-10.) The State of Tennessee, therefore, is not precluded from enforcing the Billboard Act with respect to outdoor advertising other than the Crossroads Ford billboard. Schorer's motion seeks to stay enforcement of relief that the Court did not grant. Accordingly, the motion is DENIED AS MOOT.

II. Thomas's Motion to Strike Affidavits

This motion is hereby REFERRED to the assigned Magistrate Judge for determination. The affidavits were not necessary to the Court's determination that Schorer's motion is moot, and were not relied upon in reaching that conclusion.

III. Fusner's Motion to Withdraw as Attorney

The Court has considered this motion and finds it well-taken. In light of the motion, the procedural posture of the case, and Thomas's appearance *pro se* in this matter, the motion is GRANTED. George Fusner is hereby terminated as counsel in the above-captioned case.

SO ORDERED, this 27th day of February, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 13-cv-02987-JPM-cgc

[Filed October 6, 2017]

WILLIAM H. THOMAS, JR.,

Plaintiff,

v.

JOHN SCHROER, Commissioner of the Tennessee Department of Transportation in his official capacity,

Defendant.

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Plaintiff William H. Thomas, Jr.'s Complaint, filed December 17, 2013 (ECF No. 1); the issues in this case having been tried and an advisory jury having rendered a verdict in favor of Defendant the State of Tennessee (ECF No. 329); the Court having entered the Order & Memorandum Finding Billboard

Act an Unconstitutional, Content-Based Regulation of Speech (ECF No. 356); Defendant John Schorer having filed a Rule 54(b) motion to reconsider the Court's ruling that the Tennessee Billboard Act is not severable (ECF No. 371); the Court having denied that motion (ECF No. 375); and all other matters in the case having been decided,[1]

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Court's Order Finding Billboard Act an Unconstitutional, Content-Based Regulation of Speech (ECF No. 356), the State of Tennessee and its agents are hereby enjoined from removing or seeking removal of Plaintiff William H. Thomas, Jr.'s Crossroads Ford sign pursuant to the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tennessee Code Annotated §§ 54-21-101, et seq. Thomas's other requests for relief have been denied or are now moot. (See ECF No. 374 at PageIDs 7211, 7216, 7218.)

IT IS SO ORDERED, this 6th day of October, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

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[1] This does not preclude motions for attorney's fees pursuant to Federal Rule of Civil Procedure 54(d)(2).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 13-cv-02987-JPM-cgc

[Filed September 20, 2017]

WILLIAM H. THOMAS, JR.,)
)
Plaintiff,)
)
v.)
)
JOHN SCHROER, Commissioner of the)
Tennessee Department of Transportation)
in his official capacity,)
)
Defendant.)
)

ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER CONCERNING REMEDIES

Before the Court is Defendant John Schroer, in his official capacity as Commissioner of the Tennessee Department of Transportation ("TDOT"), (hereinafter "the State")'s Rule 54(b) Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not

Severable, filed May 17, 2017. (ECF No. 371.) Plaintiff William H. Thomas, Jr. ("Thomas") filed a response in opposition on May 22, 2017. (ECF No. 373.) Also before the Court is the issue of remedies in this action. (See ECF Nos. 360, 361, 363, 364, 365, 368, 370, & 372.) Thomas specifically requested injunctive relief, declaratory relief, attorneys' fees and costs, pre- and post-judgment interest, restitution of real property, reconsideration of the Court's quasi-immunity determination, and other additional relief. (ECF No. 360.) For the reasons stated below, the Court **DENIES** the State's Motion Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable, and **GRANTS** in part and **DENIES** in part Plaintiff's requests for remedies.

I. BACKGROUND

A. Factual Background

This action concerns First Amendment violations that occurred when agents of the State of Tennessee ("the State") sought to remove Plaintiff William H. Thomas's non-commercial billboard pursuant to the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tennessee Code Annotated §§ 54-21-101, *et seq*. (ECF No. 356.)

B. Procedural Background

On March 31, 2017, the Court found the Billboard Act, as applied to Thomas's non-commercial messages on his Crossroads Ford sign, a violation of the Free Speech provision of the First Amendment of the United States Constitution. (ECF No. 356.) The Court specifically found the Billboard Act's distinction

between on-premises/off-premises signs, T.C.A. §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2), constituted an unconstitutional content-based restriction on speech. The procedure and background preceding the Court's March 31, 2017 Order can be found at ECF No. 356 at PageIDs 6911-19. Following the March 31, 2017 Order, the Court entered an Order for Supplemental Briefing on the Issue of Remedies. (ECF No. 357.) The parties timely filed their briefs. (ECF Nos. 360, 365, 368.) Plaintiff also moved for attorney's fees and expenses accrued by his former counsel, Webb, Klase & Lemond, LLC on April 18, 2017. (ECF No. 361.) The State did not respond.

The Court held a Telephonic Status Conference on May 12, 2017 to discuss remedies. (Min. Entry, ECF No. 369.) After discussion of the issues raised in the parties' briefs, the Court granted the parties leave to file additional supplemental briefs and/or motions by May 17, 2017 and responses by May 22, 2017. (Id.) The parties made timely filings. (ECF Nos. 370-73.)

II. DISCUSSION

A. Motion to Reconsider Pursuant to Federal Rule of Civil Procedure 54

The State moves for the Court to reconsider its determination that the Billboard Act is not severable because the Court "did not consider whether the State should be allowed to continue enforcing the Billboard Act with respect to *commercial* speech." (ECF No. 371-2 at PageID 7173 (emphasis in original).) The State specifically contends that because Plaintiff brought an as-applied challenge, a severability analysis of the

Billboard Act is unnecessary. (Id. at PageID 7174.) Alternatively, if the severability analysis applies, the State argues the Billboard Act's provisions application to commercial speech should be severed from their application to non-commercial speech. (Id. at PageIDs 7174-75.) Plaintiff contends he brought a facial and not an as-applied challenge, and thus the State's first argument fails. (ECF No. 373 at PageID 7186.) Plaintiff further avers the Billboard Act is not severable because it not clear on the Billboard Act's face that the Tennessee legislature would have enacted it absent the unconstitutional provisions. (Id. at PageIDs 7187-89.)

A district court has the inherent power to reconsider, rescind, or modify an interlocutory order before entry of a final judgment. Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 118 Fed. App'x. 942, 945-46 (6th Cir. 2004) (citing Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th Cir. 1991)). Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, "any [interlocutory] order or other decision . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); see also Rodriguez v. Tenn. Laborers Health & Welfare Fund, 89 Fed. App'x. 949, 959 (6th Cir. 2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment."). "Traditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." Rodriguez, 89 Fed. App'x.

at 959. Parties may not use a motion for revision to "repeat any oral or written argument made by the movant in support of or in opposition to the interlocutory order that the party seeks to have revised." LR 7.3(c).

In this district, motions for revision of interlocutory orders are governed by Local Rule 7.3, which provides that "any party may move, pursuant to Fed. R. Civ. P. 54(b), for the revision of any interlocutory order made by that Court on any ground set forth in subsection (b) of this rule. Motions to reconsider interlocutory orders are not otherwise permitted." LR 7.3(a). Reconsideration of an interlocutory order is only appropriate when the movant specifically shows:

> (1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that in the exercise of reasonable diligence the party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order.

LR 7.3(b).

The State does not allege a material difference in fact or law that it failed to bring to the Court's attention despite the State's reasonable diligence, or that new facts or a change in law have occurred since

the Court's Order. Consequently, neither LR 7.3(b)(1) or (2) apply. It appears that the State contends there was "a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order." LR 7.3(b)(3). But the State fails on this ground as well because the argument that the Billboard Act is severable with respect to commercial speech was not presented to the Court prior to its March 31, 2017 Order. (See ECF Nos. 110, 163, 356.)

Accordingly, the Court **DENIES** the State's Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable (ECF No. 371). The Court, out of an abundance of caution, reiterates its finding below.

Typically, when a portion of a state law is found to be unconstitutional, the Court will sever that portion from the remaining constitutional portions of the law. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force ... or to sever its problematic portions while leaving the remainder intact. . . ."). In determining severability, "[f]irst, the Court seeks to avoid 'nullify[ing] more of a legislature's work than is necessary,' because doing so 'frustrates the intent of the elected representatives of the people.' For this reason where partial, rather than facial, invalidation is possible, it is the 'required course.'" Northland Family

Planning Clinic, Inc. v. Cox, 487 F.3d 323, 333 (6th Cir. 2007) (quoting Ayotte, 546 U.S. at 329). Second, "mindful that [the Court's] constitutional mandate and institutional competence are limited, [the Court] restrain[s] [itself] from rewriting state law to conform it to constitutional requirements even as [the Court] strive[s] to salvage it." Ayotte, 546 U.S. at 329 (internal alteration and quotation marks omitted). "[W]here the Court has established a bright line constitutional rule, it is more appropriate to invalidate parts of the statute that go beyond the constitutional line, whereas 'making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.'" Northland Family Planning Clinic, 487 F.3d at 333 (quoting Ayotte, 546 U.S. at 330). "Finally, the Court considers legislative intent, and inquires whether the legislature would prefer to have part of the statute remain in force." Id. "A court's conclusion that the legislature would have enacted a statute absent an unconstitutional provision must be based on evidence that is obvious on the 'face of the statute' . . . ; otherwise the court risks overstepping into functions reserved for the legislature." E. Brooks Books, Inc. v. City of Memphis, 633 F.3d 459, 466 (6th Cir. 2011) (quoting Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 466 (6th Cir. 1999)).

The second and third factors control. Turning first to the third factor, nothing indicates the Tennessee legislature would have enacted the Billboard Act without the unconstitutional provisions. Under Tennessee law, severance of unconstitutional portions of a statute is generally disfavored. Gibson Cty. Special

Sch. Dist. v. Palmer, 691 S.W.2d 544, 551 (Tenn. 1985) (citing Smith v. City of Pigeon Forge, 600 S.W.2d 231 (1980)). "Tennessee law permits severance only when '*it is made to appear from the face of the statute* that the legislature would have enacted it with the objectionable features omitted,'" Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 466 (6th Cir. 1999) (emphasis added) (citing State v. Harmon, 882 S.W.2d 352, 355 (Tenn. 1994)). "In determining whether a provision should be severed, the proper inquiry is whether the legislature "would choose, on the one hand, having no [Billboard Act] at all and, on the other, passing [the Billboard Act] without" subsections § 54–21–103(1) and §§ 54–21–107(a)(1)–(2). Memphis Planned Parenthood, Inc., 175 F.3d at 466. Moreover, the Tennessee Court of Appeals has specifically stated:

> The inclusion by the legislature of a severability clause in the statute is evidence of the legislature's intent that valid portions of the statute be enforced where the court determines that other portions are unconstitutional. State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994). However, there must be enough left of the statute "for a complete law capable of enforcement and fairly answering the object of its passage." Id. Further, "[w]here a clause is so interwoven with other portions of an act that we cannot suppose that the legislature would have passed the act with that clause omitted, then if such clause is declared void, it renders the whole act null." Id. (quoting Hart v. City of Johnson City, 801 S.W.2d 512, 517 (Tenn. 1990)).

Am. Chariot v. City of Memphis, 164 S.W.3d 600, 605 (Tenn. Ct. App. 2004). The General Assembly has approved severability by the enactment of a general severability statute, which provides:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the [C]ode would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid . . . .

Tenn.Code Ann. § 1–3–110 (2014). But "[t]his legislative endorsement of severability 'does not automatically make it applicable to every situation . . . .'" State v. Crank, 468 S.W.3d 15, 29 (Tenn. 2015) (quoting In re Swanson, 2 S.W.3d 180, 189 (Tenn. 1999)). Severability "cannot be used as a license 'to completely re-write or make-over a statute.'" Wells v. State, No. E201501715COAR3CV, 2016 WL 7009209, at *3 (Tenn. Ct. App. Dec. 1, 2016), appeal denied (Feb. 7, 2017) (quoting Crank, 468 S.W.3d at 29).

In the instant case, there is no indication that the General Assembly would have enacted the Billboard Act without subsections § 54–21–103(1) and §§ 54–21–107(a)(1)–(2), and there is no severability

clause in the Billboard Act. Moreover, the State does not argue that the Court should sever these subsections from the Billboard Act. Rather, the State argues that the subsections should remain in place, but the application of those subsections should be limited to commercial speech, severing only the State's ability to apply those subsections to non-commercial speech. (ECF No. 365 at PageID 7106.) In short, the subsections should remain enforceable as to only commercial speech. The State does not point to an express intent by the legislature in the Billboard Act in support of this separation, but contends that "[g]iven the significant federal funding that hinges on the State's regulation of outdoor advertising, the General Assembly no doubt would have preferred some billboard regulations to none." (ECF No. 365 at PageID 7108.)

The State also contends that there is "no indication[] that concerns about non-commercial speech were what prompted or induced the [Billboard Act's] legislation." (Id.) Yet, the State concedes that "the definition of 'outdoor advertising' in the Act is broad enough to reach both commercial and non-commercial speech. . . ." (ECF No. 365 at PageID 7108.) Moreover, the Billboard Act defines "Outdoor advertising" as "any outdoor sign, display, device, bulletin, figure, painting, drawing, message, placard, poster, billboard or other thing that is used to advertise or inform, any part of the advertising or informative contents of which is located within an adjacent area and is visible from any place on the main traveled way of the state, interstate, or primary highway systems." Tenn. Code Ann. § 54–21–102(12). This argument also directly

contradicts the State's previous argument that exempting non-commercial speech from regulation, and only regulating commercial speech, would not advance the State's interests because it would allow non-commercial signs to proliferate. (ECF No. 343 at PageIDs 6797-98.) Preventing billboard proliferation, the State argued, was central to the Billboard Act's function. (ECF No. 336 at PageIDs 6733-37.) Accordingly, the State's opportunistic argument that the Billboard Act's regulation of non-commercial speech did not induce its legislation is not persuasive.

Accordingly, the Court declines (1) to find the Billboard Act's provisions concerning outdoor advertising severable as to the challenged provisions or (2) to sever the non-commercial application of those provisions. The Billboard Act does not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech.

> [A] conclusion by the Court that the Legislature would have enacted the [Billboard Act] in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation. Probably that may be a reason why the doctrine of elision is not favored.

Davidson Cty. v. Elrod, 191 Tenn. 109, 112, 232 S.W.2d 1, 2 (1950).

Similarly, the Court considers the rejection of the same arguments regarding the Texas Highway

Beautification Act. Auspro Enterprises, LP v. Texas Dep't of Transportation, 506 S.W.3d 688, 702 (Tex. App. 2016). The Texas Court of Appeals' holding hinged on the second factor—restraint from rewriting law. The Texas Court held that finding the Texas billboard statute unconstitutional as applied to non-commercial speech did not permit the court to sever the statute's application to non-commercial speech while leaving its application to commercial speech in place. The Texas Court stated as follows:

> The Department's motion for rehearing asserts that our remedy is unnecessarily broad because it "prohibit[s] state regulations on commercial speech" that were not implicated in Reed or in the underlying facts of this case. The Department urges us to leave standing Subchapters B and C and sever only the State's ability to apply those subchapters to noncommercial speech.
>
> While we have acknowledged that Reed's holding seems to affect only restrictions of noncommercial speech, the plain language of the Texas Act defines "outdoor advertising" so broadly that the Act's restrictions on speech apply to both commercial and noncommercial speech. . . . Whatever the desirability of rendering a judgment that merely severs the Act's application to noncommercial speech, such a remedy would essentially rewrite the Act contrary to its plain language with no indication that the Legislature would have intended such a resulting regulatory scheme. Moreover, such a

> severance would present the risk of substituting one set of constitutional problems for another.
>
> Finally, we note that our opinion here does not hold that the State lacks the power to regulate billboards along Texas highways. Rather, our opinion holds that under Reed the Texas Highway Beautification Act's outdoor-advertising regulations and related Department rules are, as written, unconstitutional "content-based" regulations (as defined by Reed) of noncommercial speech because they do not pass strict-scrutiny analysis. The Legislature may see fit to amend the Act in an attempt to conform to Reed or to amend it such that it regulates only commercial speech within the applicable constitutional bounds. In short, it is for the Legislature, not this Court, to clarify its intent regarding the Texas Highway Beautification Act in the wake of Reed.

Auspro Enterprises, LP v. Texas Dep't of Transportation, 506 S.W.3d 688, 706–07 (Tex. App. 2016).

For the same reasons, the Court finds that in the instant case, it is for the Tennessee State Legislature—and not this Court—to clarify the Legislature's intent regarding the Billboard Act in the wake of Reed. Thus, the Court finds that the Billboard Act is not severable, either by severing the challenged provisions or by limiting the application of those provisions to only commercial speech.

B. Remedies

After upholding the determination that the Billboard Act is not severable, the Court now turns to the Plaintiff's remedies. In his original brief regarding remedies, Thomas requested injunctive relief, declaratory relief, attorneys' fees and costs, pre- and post-judgment interest, restitution of real property, reconsideration of the Court's quasi-immunity determination, and other additional relief. (ECF No. 360.) Thomas specifically requested that the Court convert the preliminary injunction as to his Crossroads Ford sign into a permanent injunction. (Id. at PageID 6960.) Thomas also requested a permanent injunction, enjoining enforcement of the Billboard Act against any of Thomas's billboards in Tennessee. (Id.) Thomas also sought declaratory relief, directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant, granting Thomas unrestricted access across the State of Tennessee's property for ingress and egress to his billboard with permit nos. 79-3056 and 79-3057, and directing the State notify all current state billboard permit holders that the Tennessee Billboard Act has been held unconstitutional in this proceeding and therefore the Tennessee Billboard Act will no longer be enforced. (Id. at PageIDs 6960-61.) Thomas further sought attorneys' fees and costs. (Id. at PageID 6961.) Specifically, Thomas sought such fees and costs associated with this lawsuit, those associated with his Crossroads Ford lawsuit in state court, and those associated with defending other state law suits based on the Billboard Act. (Id. at PageIDs 6993-95.)

After the May 12, 2017 status conference concerning remedies (Min. Entry, ECF No. 369), however, Plaintiff amended his request for relief. (ECF No. 370.) Thomas conceded that he cannot seek either attorneys' fees for litigation in state court or pre-judgment interest. (Id. at PageID 7165.) Thomas confirmed that he still seeks the above-referenced injunctive relief—converting the temporary injunction to a permanent injunction and enjoining the State from interfering with any of Thomas's existing billboards or his erection of billboards anywhere in the State of Tennessee—and declaratory relief—directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant. (Id. at 7161.) Thomas further contends he made a facial overbreadth challenge to the Billboard Act rather than an as-applied challenge, and that as a result, his relief should be more expansive than the relief available in an as-applied challenge. (Id. at PageIDs 7163-65.)

The State contends Plaintiff's Amended Complaint did not seek declaratory relief as to all of Plaintiff's billboards, but only as to his Crossroads Ford and Perkins Road signs containing non-commercial speech. (ECF No. 372 at PageIDs 7179-80.) The State further argues that Plaintiff did not request such relief in the pretrial order. (Id. at PageID 7180.) Additionally, the State contends that Plaintiff brought only an as-applied challenge, and even if he had brought both an as-applied and facial challenge, it would be imprudent for the Court to find the Billboard Act facially invalid if the Court found the Billboard Act invalid as-applied. (Id. at PageIDs 7181-82.) The Court first addresses whether Thomas sufficiently brought a facial rather

than as-applied challenge, and then addresses each claim of relief sought by Plaintiff.

1. Facial vs. As-Applied Challenges Under First Amendment

Despite not asserting a facial challenge in his original Complaint in 2013 (ECF No. 1), his Amended Complaint in 2014 (ECF No. 45), or in his motion for summary judgment (ECF No. 142-1 at PageID 1871 ("This Honorable Court is currently deciding whether the provisions of the Billboard Act under which Defendant Schroer acted regarding[] all the above stated properties are in fact unconstitutional.")), Plaintiff now contends he "has made a valid facial and as-applied challenge to the Tennessee Billboard Act based upon the First Amendment." (ECF No. 370 at PageID 7165.) Plaintiff asserts that he made a valid facial challenge when he "took issue with the Act's other exemptions," "challenged the Act's on-premises exemption" as content-based, and made "a facial challenge to the entire Act" in the pre-trial order. (Id. (emphasis in original).) Plaintiff then cites to authority pertaining to facial challenges and the overbreadth doctrine. (Id. at PageIDs 7163-64.)

As a threshold matter, the Court defines the parameters of facial and overbreadth challenges. A facial challenge can succeed only "by establishing that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (quotation marks and alteration omitted); United States v. Salerno, 481 U.S. 739, 745 (1987). An

overbreadth challenge, on the other hand, requires a showing that a "substantial number of [a statute's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." Wash. State Grange, 552 U.S. at 449 n.6 (quotation marks omitted). "The difference is between having to show that all applications of the statute are unconstitutional and having to show that a substantial number of them are. [An as-applied challenge] is still a difficult showing to make, and the burden of making it is on the challenger." United States v. Martinez, 736 F.3d 981, 991 (11th Cir. 2013) (Carnes, C.J., concurring), vacated on other grounds, Martinez v. United States, 135 S.Ct. 2798 (2015). Generally, courts strongly disfavor facial challenges:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008).

Upon review of the record, it is clear that Plaintiff has not alleged the Billboard Act is unconstitutional in all its applications, or even unconstitutional as to a substantial number of applications. In this way, Plaintiff has not met his burden. Nevertheless, the Court assesses whether Plaintiff's claim is as-applied or facial.

The Supreme Court has recognized that facial and as-applied challenges are not mutually exclusive or diametric constructs, because a First Amendment claim may plausibly have both characteristics. John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). In the claim at issue in John Doe No. 1 v. Reed, the plaintiffs averred that the public-records statute ("PRA") "violates the First Amendment as applied to referendum petitions." Id. at 194 (quoting Count I of the Complaint). The Court recognized that

> [t]he claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim [also] is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

Id. The Court then offered guidance on how—in the face of such duality—to determine which analytical construct is most appropriate for resolution of the underlying substantive claim. It began by observing that "[t]he label [i.e., facial or as-applied] is not what matters." Id. "The important point" is whether the "plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of the [ ]

plaintiffs." Id. The Court concluded that the plaintiffs' claim and relief reached beyond the plaintiffs' particular circumstances, where the plaintiffs sought in the claim at issue "an injunction barring the secretary of state 'from making referendum petitions available to the public,'" not just an injunction barring the public disclosure of the referendum petition involving them. Id. (quoting Count I of the Complaint). The Court concluded that, irrespective of the "label" that the plaintiffs attached to their claim, "[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach." Id.

In short, the expanse of the claim is dictated by the relief sought by the plaintiff. Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 522 (6th Cir. 2012) ("In this case, Plaintiffs label their claims as both facial and as-applied challenges to the Act, but because the 'plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs,' the claims that are raised are properly reviewed as facial challenges to the Act." (quoting John Doe No. 1 v. Reed, 561 U.S. at 194)); Showtime Entm't, LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014) (holding that facial standards apply, stating "[w]e understand the relief sought here to be the invalidation of the zoning bylaws, not merely a change in their application to Showtime[;] . . . . it is clear that this is a request that 'reach[es] beyond' the precise circumstances of Showtime's license application" (third alteration in original) (quoting John Doe No. 1 v. Reed, 561 U.S. at 194, 130 S.Ct. 2811)); Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 426 (5th Cir. 2014) ("[T]o categorize a challenge as facial or as-

applied we look to see whether the 'claim and the relief that would follow . . . reach beyond the particular circumstances of the [ ] plaintiffs.' If so, regardless of how the challenge is labeled by a plaintiff, '[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach.'" (second and third alterations in original) (citation omitted) (quoting John Doe No. 1 v. Reed, 561 U.S. at 194, 130 S.Ct. 2811)); Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott, 717 F.3d 851, 862 (11th Cir. 2013) ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature."); United States v. Supreme Court of New Mexico, 839 F.3d 888, 914 (10th Cir. 2016).

In the instant case, Thomas sought relief only concerning himself and his own signs. (ECF No. 45.) Specifically, the relief Thomas sought, in its entirety, is:

> (1) For this Court to find that the Defendants have violated [Plaintiff's] free speech rights;
>
> (2) For this Court to find that the Defendants have violated [Plaintiff's] equal protection rights;
>
> (3) For a declaration that [Plaintiff's] sign at Perkins Road was displaying on-premise, constitutionally protected speech that was exempt from the permitting requirements of T.C.A. § 54-21-104 and an order requiring Defendants to return said sign to Plaintiff;

> (4) For a prospective declaration that [Plaintiff's] sign at Crossroads Ford is displaying on-premise, constitutionally protected speech that is exempt from the permitting requirements of T.C.A. § 54-21-104;
>
> (5) For prospective injunctive relief preventing Defendants from continuing to pursue their Chancery Court action against [Plaintiff] until this matter is concluded;
>
> (6) For an award of such damages, including punitive damages against the Individual Defendants, as are authorized by law;
>
> (7) For an award against the Defendants, pursuant to 42 U.S.C. § 1988, of all reasonable costs and attorneys' fees incurred by Plaintiff in defending its constitutional rights;
>
> (8) For a trial by jury on any issue that should not be resolved by the Court as a matter of law; and
>
> (9) For such other and further relief as the Court may deem just and equitable.

(Id. at PageIDs 580-81.)

Without doubt, the relief sought by Plaintiff narrows his claim to an as-applied challenge. Accordingly, the Court declines to construe Plaintiff's claim as a facial challenge; not only did Plaintiff failed to satisfy his burden in bringing either a facial or

overbreadth claim, but he also failed to request relief beyond his particular circumstances.

Having concluded Plaintiff claim is as-applied and not facial, the Court turns to Plaintiff's remedies.

2. Injunctive Relief

Both parties have briefed the merits of Plaintiff's request for injunctive relief. However, the threshold issue is whether Plaintiff waived his claims for injunctive relief by failing to include those claims in the Joint Pretrial Order.

The State contends the injunctive relief sought by Thomas is overly broad, and that any injunctive relief should be limited to the Billboard Act's application to Thomas's non-commercial signs. (ECF No. 365 at PageID 7110.) Before determining whether Thomas's requested injunctive relief is overly broad, however, the Court addresses waiver and timeliness.

The Supreme Court has held that a final pretrial order supersedes all prior pleadings and controls the subsequent course of the action. Rockwell Int't Corp. v. U.S., 549 U.S. 457, 474 (2007). Accordingly, if a request for injunctive relief is not included in the final pretrial order, it is ordinarily deemed to be waived. Id. (citing Wilson v, Muckala, 303 F.3d 1207, 1215 (10th Cir. 2002)). See also Alexander v. Riga, 208 F.3d 419 (3rd Cir. 2000), cert. denied, 531 U.S. 1069 (2001) (holding that plaintiffs who sought injunctive relief in their complaint, but failed to raise the issue again until six days after the jury rendered a verdict, waived the claim); see Miami Valley Fair Hous. Ctr., Inc. v. Connor

Grp., No. 3:10-CV-83, 2015 WL 9582550, at *4 (S.D. Ohio Dec. 31, 2015).

In the instant case, Thomas did not request any injunctive relief in the pre-trial order. (See ECF No. 287.) Accordingly, the Court could find that Thomas has waived his right to injunctive relief in this matter. However, the Court does not find such a waiver as to the conversion of Thomas's temporary restraining order into a permanent injunction, because the failure to include such relief in the pre-trial order likely arises from mistake, and was not intentional. Moreover, the issue before the jury was the strict scrutiny inquiry, and not the case as a whole.

Nevertheless, the Court finds that Thomas's new request to enjoin the State from enforcing the Billboard Act as to any of Thomas's signs is untimely. Our sister courts reject untimely claims for injunctive relief. See Alexander v. Riga, 208 F.3d 419 (3rd Cir. 2000) (rejecting a claim for injunctive relief asserted after trial that was not included in the pretrial order as untimely); Carpet Group Intern. v. Oriental Rug Importers Ass'n, 2005 WL 3988699, at *8 (D. N.J. 2005), aff'd, 173 Fed. Appx. 178 (3rd Cir. 2006) (disallowing a petition to enjoin what the jury found to be anticompetitive conduct, because plaintiffs "did not assert their prayer for injunctive relief in the final pretrial order nor in the trial brief"); Florida v. Elsberry, 1985 WL 6278 (N.D. Fla. 1985) (holding that a plaintiff waived the request for injunctive relief in its complaint and amended complaint, where it did not reiterate that claim anywhere in the exhaustive

pretrial stipulation or mention it in any of the pretrial conferences or orders).

Even if the Court considered Thomas's request to enjoin the State from enforcing the Billboard Act as to any of Thomas's signs to be timely, the Court declines to grant such relief, because it is not narrowly tailored to the as-applied constitutional violation found in the instant case.

While district courts have broad discretion when fashioning injunctive relief, their powers are not boundless. "Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) (internal quotations omitted); see Missouri v. Jenkins, 515 U.S. 70, 88, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) ("[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation." (internal quotations omitted)). This is especially true in the as-applied challenge context, where both the inquiry and relief focus on the fact-specific harm. Ross v. Duggan, 402 F.3d 575, 583 (6th Cir. 2004) ("In an as-applied challenge, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation.") (citation omitted); Legal Aid Servs. of Oregon v. Legal Servs. Corp., 608 F.3d 1084, 1096 (9th Cir. 2010) ("An as-applied First Amendment challenge contends that a

given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity."). When evaluating an as-applied challenge, the court's inquiry and potential relief focuses only on the particular application challenged. Edenfield v. Fane, 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

Such a limit on injunctive relief is appropriate in light of the four-factor inquiry courts must balance before granting a permanent injunction:

> (1) that [Plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006) (citations omitted). Thomas has not met this burden. In fact, Thomas's briefs do not even address these factors, nor the appropriateness of permanent injunctive relief as to the application of the Billboard Act to any kind of sign in this case. Without a showing by Thomas of his entitlement to permanent injunctive relief, the court is unable to exercise its discretion in granting such relief. See Swaffer v. Cane, 610 F. Supp. 2d 962, 971 (E.D. Wis. 2009).

In sum, the Court finds that a permanent injunction is warranted against the enforcement of the Billboard

Act as to Thomas's Crossroads Ford sign. (See Order Granting Preliminary Injunction for Crossroads Ford Sign, ECF No. 163.) The Court finds that a permanent injunction against the enforcement of the Billboard Act as to any of Thomas's other signs is not warranted, as this injunctive relief is either waived or untimely, and even if not waived or untimely such an injunction constitutes impermissible relief under the as-applied challenge.

3. Declaratory Relief

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . ." 28 U.S.C. § 2201. The Federal Rules of Civil Procedure "govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201." Fed.R.Civ.P. 57. Accordingly, "the requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions;" thus, "the action is commenced by filing a complaint." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2768 (3ed.1998). In other words, "[a] request for declaratory relief is properly before the court when it is pleaded in a complaint for declaratory judgment. Requests for declaratory judgment are not properly before the court if raised only in passing, or by motion." Arizona v. City of Tucson, 761 F.3d 1005, 1010 (9th Cir. 2014) (citation omitted).

In the instant case, Thomas did not seek declaratory relief directing Commissioner Schroer to dismiss all non-final, pending litigation with prejudice at the cost of Defendant in his Amended Complaint. He is therefore precluded from seeking such relief now.

The declaratory relief sought in the Amended Complaint was two-fold: (1) a declaration that Plaintiff's "Perkins Road [sign] was displaying on-premise, constitutionally protected speech that was exempt from the permitting requirements of T.C.A. § 54-21-104 and an order requiring Defendants to return said sign to Plaintiff;" and (2) "that his sign at Crossroads Ford is displaying on-premise, constitutionally protected speech that is exempt from the permitting requirements of T.C.A. § 54-21-104." (ECF No. 45 at PageID 580.) These requests for relief are now moot in light of the Court's March 31, 2017 Order. (ECF No. 356.)

3. Attorneys' Fees and Costs

Thomas seeks costs and attorneys' fees under 42 U.S.C. § 1988. The State argues that Thomas's fees and costs "should be reduced accordingly based on the limited success that Plaintiff achieved." (ECF No. 365 at PageID 7716.)

a. Attorneys' Fees

In general, a prevailing party is entitled to costs, but not attorneys' fees. See Fed.R.Civ.P. 54(d). However, the Civil Rights Attorneys' Fees Awards Act of 1976, as amended, 42 U.S.C. § 1988, grants the court discretion to award reasonable attorneys' fees to the prevailing party in an action brought pursuant to 42

U.S.C. § 1983. A prevailing party is one that succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Farrar v. Hobby, 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (citation omitted) (interpreting 42 U.S.C. § 1988). Although the Court has not granted all the relief Plaintiff sought in this case, the Court considers Plaintiff to be the prevailing party under 42 U.S.C. § 1988(b), and will allow Plaintiff to seek reasonable attorneys' fees as part of its costs. See Green Party of Tennessee v. Hargett, 767 F.3d 533 (6th Cir. 2014); Woods v. Willis, 631 F. App'x 359, 364 (6th Cir. 2015) ("[T]he plaintiff must have 'been awarded some relief by the court,' resulting in the plaintiff receiving a 'judicially sanctioned change in the legal relationship of the parties.'"). Having found that Thomas is entitled to a permanent injunction preventing the enforcement of the Billboard Act as to the non-commercial messages displayed on his Crossroads Ford sign, Thomas is the prevailing party, and thus the Court finds that reasonable attorneys' fees are appropriate.

Thomas also seeks a "multiplier of the fee award because of Defendant's complete disregard of the Supreme Court's decision in Reed. . . ." (ECF No. 360 at PageID 6964.) Although the Court finds Thomas is entitled to fees, "multipliers, or fee enhancements to the lodestar calculation, are permissible [only] in some cases of 'exceptional success.'" Barnes v. City of Cincinnati, 401 F.3d 729, 745 (6th Cir. 2005) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)); see also Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 552 (2010) ("[E]nhancements may be awarded in 'rare' and

'exceptional' circumstances."). The party seeking to enhance attorney fees "bears the burden of showing that such an adjustment is necessary to the determination of a reasonable fee." Gonter v. Hunt Valve Co., 510 F.3d 610, 621 (6th Cir. 2007) (internal quotations and citations omitted). In fact, "a fee applicant seeking an enhancement must produce 'specific evidence' that supports the award." Perdue, 559 U.S. at 553. The Sixth Circuit Court of Appeals considers the same twelve factors[1] as it does in adjusting a lodestar award to determine the appropriateness of a fee enhancement in cases of exceptional success. Barnes v. City of Cincinnati, 401 F.3d at 745-46 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)) (affirming a 75% enhancement because the district court found that counsel could not be obtained without applying this multiplier); see also Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691,

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[1] The twelve factors are as follows:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) and awards in similar cases.

Paschal v. Flagstar Bank, FSB, 297 F.3d 431, 435 (6th Cir. 2002) (quoting Blanchard v. Bergeron, 489 U.S. 87, 91 n.5 (1989)).

697 (9th Cir. 1996) (noting that a 100% fee enhancement was appropriate in part because of the "likelihood that no other attorney . . . would have accepted the case"). In the majority of cases, the lodestar amount already reflects these factors within the Court's calculation of a reasonable hourly rate and hours billed. See Gonter, 510 F.3d at 621; Blum, 465 U.S. at 898. Accordingly, "an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. . . ." Perdue, 559 U.S. at 553. Nor should "the novelty and complexity of a case generally . . . be used as a ground for an enhancement because these factors presumably [are] fully reflected in the number of billable hours recorded by counsel." Id. (internal quotation marks and citations omitted). "[T]he quality of an attorney's performance generally should [also] not be used to adjust the lodestar [b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." Id. (internal quotation marks and citations omitted).

Despite the "strong presumption" that the lodestar figure is reasonable, the presumption may be overcome in the rare circumstances where the lodestar figure does not adequately take into account a factor that may be considered to determine fees. Id. at 554. The Supreme Court has set out three examples of such factors: (1) "the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value;" (2) "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" or (3) "an attorney's

performance involves exceptional delay in the payment of fees." Id. at 554-55.

In the instant case, Thomas has failed to produce 'specific evidence' that supports how this case rises to an exceptional level requiring a multiplier of the attorneys' fee award. Plaintiff's assertion that the State disregarded Reed has no impact under either a lodestar or multiplier analysis. Accordingly, the Court **DENIES** Thomas's request for a multiplier of the attorneys' fees award.

As to the attorneys' fees award, the only motion pending is by Webb, Klase & Lemond, LLC, Thomas's former counsel, filed on April 18, 2017. (ECF No. 361.) The State filed no response. Thus, the amount of attorneys' fees articulated by Webb, Klase & Lemond, LLC is not at issue before this Court because the State elected not to contest it. Nevertheless, based on a thorough review of the information and supporting documents before the Court, in conjunction with an analysis of the aforementioned lodestar factors, the Court finds that the hours expended and rates charged by Plaintiff's attorneys are reasonable, and expenses requested are recoverable. Accordingly, the Court **GRANTS** Thomas $83,322.50 in attorneys' fees accrued by Webb, Klase & Lemond, LLC. (See ECF No. 361-1 at PageID 6983.)

b. Costs

Fed. R. Civ. P. 54(d) creates a presumption that the cost of litigation will be awarded to the prevailing party

unless the Court finds otherwise, and 28 U.S.C. § 1920[2] sets forth the scope of costs that are properly recoverable. The only specific costs sought are those articulated by Webb, Klase & Lemond, LLC, Thomas's former counsel, in its Motion for Attorneys' Fees and Expenses. (ECF No. 361.) Finding the expenses include primarily filing fees, deposition transcript fees, copies, and postage, and that the proposed expenses are not opposed, the Court **GRANTS** Thomas $1,543.11 in costs accrued by Webb, Klase & Lemond, LLC. (Id. at PageID 6984.)

4. Post-Judgment Interest

Thomas also requests post-judgment interest. (ECF No. 360 at PageID 6965.) Title "28 U.S.C. § 1961(a) requires district courts to award post-judgment interest on all money judgments." Spizizen v. Nat'l City Corp., 516 Fed.Appx. 426, 432 (6th Cir. 2013) (emphasis added). As this Order awards only the attorneys' fees

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[2] 28 U.S.C. § 1920 states:

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

and costs expressed in Webb, Klase & Lemond, LLC's motion, the Court only grants post-judgment interest as those monetary awards. Accordingly, the Court **GRANTS** Thomas post-judgment interest to the monetary awards in this Order.

5. Restitution of Real Property

Thomas also requests "restitution of real property" (ECF No. 360 at PageID 6966), such as replacement and re-installation of billboards unrelated to this action at the State's cost (id. at PageID 6968). This request goes beyond the issues before this Court, and also goes far beyond the limits of Ex parte Young, 209 U.S. 123 (1908). Plaintiff cannot avoid Eleventh Amendment immunity by presenting his claim for relief as an equitable remedy. In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that the Eleventh Amendment barred the recovery of "equitable restitution" in the form of the retroactive release and payment of AABD (Aid to the Aged, Blind, and Disabled) benefits wrongfully withheld by the State of Illinois. The Supreme Court explained that the funds to satisfy such an award would inevitably be paid from the general revenues of the State of Illinois, not the pocket of the named defendants, and that such relief would run afoul of the Eleventh Amendment. Id. at 665. Responding to the argument that the award was in the form of "equitable restitution," the Supreme Court stated:

> We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice

> resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature. The Court's opinion in Ex parte Young hewed to no such line.

Id. at 666. The relief requested by Thomas is similar to the relief denied in Edelman. Thomas's relief necessitates that the costs derive from the state. Also, the relief would impermissibly provide retroactive relief, running afoul of the Eleventh Amendment. Thus, the Court **DENIES** Thomas's relief for restitution of real property.

3. Damages

Thomas also seeks damages, requesting the court revisit its determination that Schroer is entitled to qualified immunity (ECF No. 170). (ECF No. 360 at PageID 6969.) The Court construes Thomas's request to "revisit" as a motion for reconsideration. As stated above, reconsideration of an interlocutory order is appropriate only when the movant specifically shows:

> (1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that in the exercise of reasonable diligence the party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or

> dispositive legal arguments that were presented to the Court before such interlocutory order.

LR 7.3(b).

Thomas specifically seeks relief under LR 7.3(b)(2)—change of law occurring after the time of the order to be reconsidered. (ECF No. 360 at PageID 6969.) Thomas, however, fails to point to any change in law after the Court made its determination that Defendant Schroer was entitled to qualified immunity in its October 2, 2015 Order. (ECF No. 170.) Moreover, the Court finds that its March 31, 2017 Order does not affect its analysis of Schroer's qualified immunity. As stated in the Court's October 2, 2015 determination, "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted). Moreover, a constitutional right is clearly established if a reasonable person in the official's position would have known of the right. Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 263 (6th Cir. 2006). In fact, until March 31, 2017, no binding precedent existed that expressly addressed the constitutionality of the Billboard Act and the First Amendment issues raised by Thomas. Thus, the fact that the Court ultimately came to that conclusion in this case does not change the fact that Schroer would not have known of this right prior to the Court's order. Rather, the only binding precedent, which pre-dated Reed, seemed to support the contrary proposition. See Wheeler v. Comm'r of Highways, Commonwealth of

Ky., 822 F.2d 586 (6th Cir. 1987). Thus, the Court finds Schroer remains entitled to qualified immunity, and thus **DENIES** Thomas's construed motion to reconsider.

4. Additional Relief

Finally, Thomas makes three additional requests: (1) a hearing to determine whether Defendant Schroer violated Thomas's First Amendment Rights by using a false affidavit by Richard Copeland when he knew Copeland had no legal authority to provide such affidavit based upon Ted Illsley's letter confirming the zoning and Thomas's authorization to use the Perkins Road sign structure; (2) a hearing on whether Thomas's constitutional rights of free speech and due process were violated when former Commissioner Nicely reversed and remanded Administrative Judge Hornsby's order of December 8, 2006; and (3) an additional remedy hearing before the Court on his offer of proof (ECF No. 262). (ECF No. 360 at PageID 6971.)

None of these requests are properly brought to the Court's attention, and/or these requests go far beyond the issues in this action. Thomas's first request forms the basis for an entirely separate action not before this Court. Thomas's second request names Commissioner Nicely, who is not named as a defendant in this action. Moreover, it appears any new claims against Commissioner Nicely's actions are time-barred. Finally, Thomas proffers no legal or factual reason the why a hearing on his offer of proof is necessary or permissible. The Court, therefore, **DENIES** these requests for additional relief.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** the State's Motion to Reconsider the Court's Ruling that the Tennessee Billboard Act is Not Severable, and **GRANTS** in part and **DENIES** in part Plaintiff's requests for remedies.

IT IS SO ORDERED, this 20th day of September, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 13-cv-02987-JPM-cgc

[Filed September 20, 2017]

WILLIAM H. THOMAS, JR.,

Plaintiff,

v.

JOHN SCHROER, Commissioner of the Tennessee Department of Transportation in his official capacity,

Defendant.

SUPPLEMENTAL JUDGMENT ON FEES

JUDGMENT BY COURT. This action having come before the Court on Plaintiff William H. Thomas, Jr.'s Motion for Attorney Fees, filed April 18, 2017 (ECR No. 361), and the Court having entered an Order awarding Plaintiff attorneys' fees, costs, and post-judgment interest (ECF No. 356). Accordingly, the State of Tennessee and its agents are hereby ordered to

pay Plaintiff's attorneys' fees in the amount of $83,322.50 and costs in the amount of $1,543.11, plus post-judgment interest on both fees and costs.

IT IS SO ORDERED, this 20th day of September, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 13-cv-02987-JPM-cgc

[Filed March 31, 2017]

WILLIAM H. THOMAS, JR.

Plaintiff,

v.

JOHN SCHROER, Commissioner of the Tennessee Department of Transportation in his official capacity,

Defendant.

ORDER & MEMORANDUM FINDING BILLBOARD ACT AN UNCONSTITUTIONAL, CONTENT-BASED REGULATION OF SPEECH

This action concerns alleged First Amendment violations that occurred when agents of the State of Tennessee ("the State") sought to remove Plaintiff William H. Thomas's non-commercial billboard pursuant to the Billboard Regulation and Control Act

of 1972 ("Billboard Act"), Tennessee Code Annotated §§ 54-21-101, *et seq*. For the reasons stated below, the Court finds the Billboard Act is an unconstitutional, content-based regulation of speech. United States Supreme Court authority compels this conclusion.

There exists an undeniable trend in Supreme Court cases to guard against regulations that selectively ban speech on the basis of its subject matter—e.g., content-based regulations. Police Department of Chicago v. Mosley, 408 U.S. 93 (1972). Distilling a pragmatic and constitutionally-valid definition for content-based regulations has evolved overtime. In the late 1980s, the Supreme Court looked to the governing body's intent to determine whether a regulation constituted a content-based regulation. Ward v. Rock Against Racism, 491 U.S. 781 (1989); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). In Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), however, the Supreme Court revisited its previous approach. Writing for the Court in Reed, Justice Thomas explained, "[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." Id. at 2222.[1]

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[1] Since Reed, which invalidated a municipal code that imposed different restrictions on outdoor signs based on the signs' message, courts have found regulations to be content based if the regulation targets or limits anyone seeking to engage in a specific type of speech. See, e.g., Champion v. Commonwealth, No. 2015-SC-000570-DG, 2017 WL 636420, at *3 (Ky. Feb. 16, 2017); Microsoft Corp. v. United States Dep't of Justice, No. C16-0538JLR, 2017 WL 530353, at *12 (W.D. Wash. Feb. 8, 2017); Brickman v. Facebook, Inc., No. 16-CV-00751-TEH, 2017 WL 386238, at *5

That content-based inquiry has now been further advanced by the Supreme Court's decision in Expressions Hair Design v. Schneiderman, No. 15-1391, 2017 WL 1155913, at *1 (U.S. Mar. 29, 2017), in which the Court remanded a case concerning a regulation that banned some forms of commercial speech for further examination to determine whether the regulation survives First Amendment scrutiny.

In the instant case, the regulation at issue – the Tennessee Billboard Regulation and Control Act of 1972, Tennessee Code Annotated §§ 54-21-101, *et seq.* – regulates both commercial and non-commercial speech by banning some forms of both on the basis of content and therefore does not survive First Amendment scrutiny.

(N.D. Cal. Jan. 27, 2017); Sweet Sage Café, LLC v. Town of N. Redington Beach, Florida, No. 8:15-CV-2576-T-30JSS, 2017 WL 385756, at *9 (M.D. Fla. Jan. 27, 2017); Indiana Civil Liberties Union Found.. Inc. v. Indiana Sec'y of State, No. 115CV01356SEBDML, 2017 WL 264538, at *4 (S.D. Ind. Jan. 19, 2017); Wagner v. City of Garfield Heights, No. 13-3474, 2017 WL 129034, at *6 (6th Cir. Jan. 13, 2017); Auspro Enterprises, LP v. Texas Dep't of Transportation, 506 S.W.3d 688, 700 (Tex. App. 2016) (finding Texas Highway Beautification Act regulations content based and unconstitutional); Thayer v. City of Worcester, 144 F. Supp. 3d 218, 233 (D. Mass. 2015); Browne v. City of Grand Junction, 136 F.Supp.3d 1276, Civ.Act.No. 14–cv–00809–CMA–KLM, 2015 WL 5728755 (D.Col. Sep. 30, 2015); Norton v. City of Springfield, 2015 WL 4714073 (7th Cir. 2015). Legislatures have also sought to amend regulations to withstand Reed's holding. See, e.g., Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016).

I. BACKGROUND

The Tennessee Department of Transportation ("TDOT") promulgates and enforces billboards and outdoor advertising signs under Tennessee's Billboard Regulation and Control Act of 1972, (the "Billboard Act"). (ECF No. 45 ¶ 13.) The State of Tennessee and TDOT also regulate billboards and outdoor advertising signs under to the Federal Highway Beautification Act of 1965, as amended. (Id. ¶ 14.)

The Federal Highway Beautification Act and the Billboard Act are designed to control the erection and maintenance of billboards and signs along the National Highway System. (See Exs. B, C, Bible Aff., ECF No. 166-2; SUF ¶ 33; Resp. to SUF ¶ 33.)) Regulated billboards and signs under the Billboard Act are subject to location and/or permit and tag restrictions, e.g., they may not be "within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems . . . without first obtaining from the commissioner a permit and tag." T. C. A. § 54-21-104(a). Some signs, however, may be exempted or qualify as exceptions under the Billboard Act's location and/or permit and tag restrictions. See T.C.A. §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2). For example, a billboard or sign is exempted from the six-hundred-sixty feet requirement if it qualifies as one of the following types of signs:

> (2) Signs, displays and devices advertising the sale or lease of property on which they are located;

> (3) Signs, displays and devices advertising activities conducted on the property on which they are located;
>
> . . . .

T.C.A. §§ 54-21-103(1)-(3). A billboard or sign is exempted from complying with the permit and tag restrictions if it falls into one of the following categories:

> (1) Those [signs] advertising activities conducted on the property on which they are located;
>
> (2) Those [signs] advertising the sale or lease of property on which they are located; and
>
> . . . .

T.C.A. §§ 54-21-107(a)(1)-(2).

In practice, State agents label signs the Billboard Act regulates as "off-premise" signs and label unregulated signs as "on-premise" signs. (See ECF No. 64 at PageID 917.) The State's agents use the following Rule to make their determinations:

> A sign will be considered to be an on-premise sign if it meets the following requirements.
>
> > (a) Premise – The sign must be located on the same premises as the activity or property advertised.
> >
> > (b) Purpose – The sign 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.

(ECF No. 46-6 at PageIDs 718-19 (quoting Rule 1680-02-03-.06(2); see also ECF No. 121 at 15-16.) Rule 1680-02-03-.06 further expands on the 'Purpose Test'

> [t]he following criteria shall be used for determining whether a sign has as its purpose (1) the identification of the activity located on the premises or tis products or services, or (2) the sale or lease of the property on which the sign is located rather than the business of outdoor advertising.
>
> (a) General
>
> 1. Any sign which consists solely of the name of the establishment is an on-premise sign.
> 2. A sign which identifies the establishment's principle or accessory product or services offered on the premises is an on-premise sign.
> 3. An example of an accessory product would be a brand of tires offered for sale at a service station.
>
> (b) Business of Outdoor Advertising
>
> 1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or

service advertised is only incidental to the principle activity, it shall be considered the business of outdoor advertising and not an on-premise sign. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.

2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is not an on-premise sign. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating "Skeet Range Here," or "Dog Kennels Here." The on-premise activity would only be the skeet range or dog kennels.

(c) Sale or Lease Signs

A sale or lease sign which also advertises any product or service not located upon and related to the business of selling or leasing the land on which the sign is located is not an on-premise sign. An example of this would be a typical billboard which states "THIS PROPERTY FOR SALE-

> SMITHS MOTEL; 500 ROOMS, AIR CONDITIONED, TURN RIGHT 3 BLOCKS AT MA IN STREET."

Rule of Tennessee Department of Transportation Maintenance Division, Control of Outdoor Advertising, 1680-02-03.06(4) (2008). Although the Billboard Act and the State's Rule reference "advertising" in the commercial context, the State contends the Billboard Act's regulations, exceptions, and exemptions apply with equal force to commercial and non-commercial messages. (See ECF No. 64 at PageID 917.)

Plaintiff Thomas's business involves posting outdoor advertising signs. (ECF Nos. 1 ¶ 11; 45 ¶ 11.) Thomas erects these signs on the various tracts of real property he owns throughout Tennessee. (ECF No. 45 ¶ 10.) Thomas's sign at issue in this case is located off Interstate-40 West in Memphis, Tennessee (hereinafter the "Crossroads Ford sign"). (Id. ¶ 21.) Thomas has posted various messages on this sign over the years. (Id.) For example, in 2012, he displayed an image of an American flag with Olympic rings, in support of that year's U.S. Olympic team. (ECF No. 38 ¶ 23.) Later that year, in the "beginning of fall," he "displayed content referencing the upcoming holiday season with a picture of an American Flag." (ECF No. 45 ¶ 24.) Thomas erected his Crossroads Ford sign without a permit. (ECF No. 46-6 at PageID 721 (citing Tennessee v. Thomas, 336 S.W.3d 588, 593 (Tenn. Ct. App. 2010).)

Since approximately 2006, the State has sought to remove Thomas's signs that did not comply with the Billboard Act—including the Crossroads Ford sign—through an ongoing enforcement action in

Chancery Court in Shelby County, Tennessee. (ECF Nos. 1 ¶¶ 62, 77; 45 ¶ 27; see ECF Nos. 96–1 at PageID 1399–1404; 46-2 – 46-5; see also Tennessee v. Thomas, 336 S.W.3d 588, 593 (Tenn. Ct. App. 2010).) In 2006, TDOT denied Thomas's permit and building application for his Crossroads Ford sign because it was less than 1,000 feet from a competitor's billboard. (ECF No. 166-1 at PageID 2595 (citing Thomas v. TDOT, 336 S.W.3d 588, 592 (Tenn. Ct. App. 2010).) Nonetheless, Thomas began construction on his Crossroads Ford sign in 2007, and TDOT then brought an enforcement action in March 2007. (Id.) In April and October of 2011, the State removed two of Thomas's outdoor advertising signs (the "Kate Bond" signs). (ECF No. 45 ¶¶ 33, 37; ECF No. 79 ¶¶ 33, 37.) Throughout 2012 and 2013, Thomas defended his signs in administrative proceedings before the Commissioner of TDOT. (See ECF Nos. 263-18—263-20.)

On March 25, 2013, Thomas filed an initial Complaint and Request for Declaratory Judgment. (Thomas v. Tennessee Department of Transportation, No. 2:13-cv-2185-JPM-cgc (W.D. Tenn. 2013), ECF No. 1.) Thomas sought relief under 28 U.S.C. § 1983 for violations of his First and Fourteenth Amendment rights under the United States Constitution. (Id. ¶ 3.) The Complaint also alleged Thomas's Crossroads Ford sign was entitled to First Amendment protection as a display of non-commercial speech. (Id. ¶ 39.) On July 24, 2013, TDOT filed a Motion to Dismiss the Complaint, alleging TDOT is immune from suit and that Thomas's claims fail to state a claim. (ECF No. 18.) Thomas sought to avoid TDOT's Rule 12(b)(1) and 12(b)(6) defenses by requesting leave to file an

Amended Complaint adding individual defendants. (See ECF No. 26.) On October 28, 2013, the Court dismissed Thomas's claims, based on TDOT's Eleventh Amendment immunity. (ECF No. 31 at PageID 180.) Thomas appealed (ECF No. 33), and on August 6, 2014, the Sixth Circuit Court of Appeals affirmed, holding that had Thomas named a state official in his or her official capacity, his claims would have survived dismissal (ECF No. 35 at PageID 204).

On December 17, 2013, while this first action was on appeal, Thomas filed his Complaint in this action, which named multiple Tennessee state officials in their official capacities. (Thomas v. Schorer et al, No. 13-2987 (W.D. Tenn.), ECF No. 1.) The Complaint alleged Thomas's Crossroads Ford sign was entitled to First Amendment protection as a display of non-commercial speech. (Id. ¶ 52.) Thomas filed an Amended Complaint on October 27, 2014. (See ECF Nos. 22, 34, 38, 45.) Thomas's Amended Complaint also argued that "in March of 2014, TDOT, through Commissioner Schroer, filed an action against Mr. Thomas in the Twentieth Judicial District Chancery Court for the State of Tennessee in retaliation for Mr. Thomas exercising his rights to petition this Court for redress of his grievances against Defendants." (ECF No. 45 ¶ 65.)

Thomas' initial fillings also included additional claims against the State: First Amendment, Retaliation, Equal Protection and Declaratory Judgment. (ECF Nos. 1, 45.) Following the Court's Order on the State's motion to dismiss, (ECF No. 170), and summary judgment (ECF No. 233), Thomas's only remaining claim is whether the removal of his

billboards under the Billboard Act violated his First Amendment rights. This Order concerns only this issue.

In October 2014, the State removed another of Thomas's outdoor signs (the "Perkins Road sign"), even though, according to Thomas, "[the] billboard was displaying exclusively on-premise, noncommercial content and therefore exempt from the permitting requirements of T.C.A. § 54–21–107(a)(1)." (ECF No. 45 ¶ 40; ECF No. 79 ¶ 40.)

On May 26, 2015, TDOT sent Thomas a letter stating that Thomas must remove the Crossroads Ford sign by June 26, 2015. (ECF No. 96–1 at PageID 1399.) Thomas also received a proposed order of judgment "declaring an unlawful billboard to be [a] public nuisance and granting permanent injunction for removal of the unlawful billboard," to be subsequently submitted in Chancery Court in Shelby County, Tennessee. (Id. at PageID 1401–03.)

On June 10, 2015, Plaintiff filed an Emergency Motion for Temporary Restraining Order ("TRO") to prevent Defendants from removing his Crossroads Ford sign. (ECF No. 96.) He also sought to enjoin Defendants from executing any judgments "resulting [from] or associated with the Crossroads Ford billboard sign until such time as a hearing can be held on the issues . . . ." (Id. at 1.) On June 11, 2015, Defendant opposed the TRO. (ECF No. 99.) On June 18, 2015, the Court held a Motion Hearing on TRO motion. (ECF No. 104.)

On June 24, 2015, the Court granted Thomas's TRO motion and ordered the State to "refrain from seeking

to execute on any judgments, orders, or other monetary judgments resulting from or associated with the Crossroads Ford billboard sign until such time as the Court deems it appropriate to lift the TRO." (ECF No. 110 at PageID 1464.) The Court found "a strong likelihood that multiple sections of the Billboard Act are facially content-based and subject to strict scrutiny under" Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015). (Id. at PageID 1455.) The Court also found "a strong likelihood that at least §§ 54-21-103(1)-(3) and §§ 54-21-107(a)(1)-(2) of the Billboard Act are unconstitutional." (Id. at PageID 1456.) On September 8, 2015, the Court granted a preliminary injunction. (ECF No. 163.)

The Court entered an Amended Scheduling Order on May 31, 2016 (ECF Nos. 170, 233) to reflect the narrowing of issues, and set a jury trial for September 12, 2016. (ECF No. 237.) The parties filed timely pretrial motions. (See ECF Nos. 280-86.)

On September 6, 2016, the Court entered an Order Regarding Defendants' Motion in Limine as to Money Damages (ECF No. 280). (ECF No. 301.) The Court stated that the jury would decide two issues: "(1) whether the State has a compelling interest that is furthered by the Billboard Regulation and Control Act of 1972 ("Billboard Act"), as set forth at Tennessee Code Annotated §§ 54-21-101 to -123 (2008); and (2) whether the Billboard Act is narrowly tailored to the State's interest." (Id. at PageID 5964.) The jury would not decide the ultimate constitutionality question. (Id.) The jury trial was then rescheduled to September 19, 2016. (Min. Entry, ECF No. 305.)

On September 9, 2016, Thomas filed a Written Objection to Allowing the Jury to Decide the Issues of "Compelling State Interest" and "Narrow Tailoring." (ECF No. 307.) On September 16, 2016, the Court entered an Order Concerning Plaintiff's Objection to the Jury Determining "Compelling Interest" and "Narrow Tailoring." (ECF No. 314.) The Court clarified the jury would serve as an advisory jury on the issues before them. (Id. at PageIDs 6140, 6146.)

A four-day, advisory-jury trial began on September 19, 2016. (Min. Entries, ECF Nos. 320-21, 322, 328.) Seven witnesses testified on behalf of the State: Paul Degges, Chief Engineer for TDOT; John Schroer, Commissioner of TDOT; Robert Shelby, retiree from the Highway Beautification Department at TDOT; John Carr, Assistant Commissioner of Administration at TDOT; Colonel Tracy Trott, highway patrol law enforcement officer; Jason Moody, Assistant Regional Traffic Engineer at TDOT; and Shawn Bible, Beautification Coordinator at TDOT. (See ECF No. 331.) On September 22, 2016, a jury found the State had a compelling interest, and that the Billboard Act was narrowly tailored to that interest. (ECF No. 329.) On the same day, Thomas filed a Rule 52 Motion for Verdict as a Matter of Law. (ECF No. 325.) The State responded in opposition on October 7, 2016. (ECF No. 336.) Thomas replied on October 21, 2016. (ECF No. 340.)

On October 26, 2016, the Court entered an Order Concerning Least Restrictive Means, ordering the parties to file supplemental briefing on the issue of

least restrictive means. (ECF No. 342.) Both parties timely briefed the issue. (ECF Nos. 343-44.)

On November 23, 2016, Amici Curiae National League of Cities, International Municipal Lawyers Association, Tennessee Municipal Attorneys Association, International City/County Management Association, Scenic America, Inc., Scenic Tennessee, Inc., Tennessee Conservation Voters, League of Women Voters of Knoxville/Knox County, Trees Knoxville, Keep Knoxville Beautiful, City of Knoxville, Tennessee Chapter of the American Planning Association, and Tennessee Federation of Garden Clubs, Inc. (collectively, "Movants")'s filed a Motion for Leave to File the Brief of Amici Curiae. (ECF No. 346.) On November 30, 2016, Thomas opposed. (ECF No. 347.) Because the amicus brief sought to address standing and the differentiation between on- and off-premises signs, both of which the parties did not adequately brief, the Court granted the Motion for Leave to File the Brief of Amici Curiae (ECF No. 346) on December 7, 2016. (ECF No. 348.) The Court granted in part Thomas's request to respond to the standing issue, which Thomas timely briefed. (ECF Nos. 352, 354.)[2]

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[2] The Amicus Brief challenges Thomas's standing by claiming his First Amendment claim is time-barred. Even if Thomas's First Amendment claim is time-barred, it would be "grossly unfair to allow [Thomas] to go to the expense of trying a case only to be met by a new defense after trial" that has not been raised by the State and lacks evidentiary development. Bradford–White Corp. v. Ernst & Whinney, 872 F.2d 1153 (3d Cir. 1989) (holding that defendant waived statute of limitations defense when it raised issue in the answer but failed to attempt to establish this affirmative defense before or at trial), cert. denied, 493 U.S. 993 (1989). Thus, the

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 52

Federal Rule of Civil Procedure 52 provides,

> [i]n an action tried . . . with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

Fed.R.Civ.P. 52(a)(1). In the instant case, the Court makes its findings of fact and conclusions of law following the advisory jury's verdict below.

B. First Amendment Protection: Commercial Versus Non-Commercial Speech

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This language generally prohibits any laws that regulate or restrict expression based on content: "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

Court declines to grant *sua sponte* summary judgment in favor of the State. See Grand Rapids Plastics, Inc. v. Lakian, 188 F.3d 401, 407 (6th Cir. 1999).

Not all speech is equally protected. "[T]he degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech." Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 65 (1983). The government may impose stricter regulations on commercial speech than on non-commercial speech. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). A statement is commercial speech when (1) it is an advertisement; (2) it refers to a specific product or service; and (3) the speaker has an economic motivation for making it. Bolger, 463 U.S. at 66–67 ("The combination of all these characteristics . . . provides strong support . . . that the [speech at issue is] properly characterized as commercial speech."). Non-commercial speech, on the other hand, involves ideological, political, religious, artistic, or scientific speech. National Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998).

C. Content-Based Restrictions

In 2015, the Supreme Court held that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 135

S. Ct. at 2227. Content–based regulations are those that "cannot be 'justified without reference to the content of the regulated speech'" and those that were "adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." Id. at 2230. Signs that could be regulated in a content-neutral manner include "size, building materials, lighting, moving parts, and portability." Id. at 2232.

The ordinance invalidated in Reed distinguished "temporary directional signs, political signs, and ideological signs." Id. Courts have thus narrowed Reed's applicability to non-commercial rather than commercial speech regulations.[3] In short, a court strictly scrutinizes content-based restrictions of non-commercial speech, but "regulations on commercial speech [whether] content-based or content-neutral,

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[3] See, e.g., CTIA–The Wireless Ass'n v.City of Berkeley, 139 F.Supp.3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, . . . and nothing in its recent opinions, including Reed, even comes close to suggesting that that well-established distinction is no longer valid."); Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198 n. 3 (9th Cir.2016); RCP Publ'ns Inc. v. City of Chicago, No. 15 C 11398, 2016 WL 4593830, at *4 (N.D.Ill. Sept. 2, 2016). The Second Circuit has done the same in a summary order. Poughkeepsie Supermarket Corp. v. Dutchess Cty., 648 Fed.Appx. 156, 157 (2d Cir. 2016); Timilsina v. West Valley City, No. 2:14-cv-00046-DN-EJF, 2015 WL 4635453, at *7 (D. Utah Aug. 3, 2015).

[would be subject to] intermediate scrutiny. . . ." PHN Motors, LLC v. Medina Twp., 498 F. App'x 540, 544 (6th Cir. 2012) (unpublished opinion); see also Lone Star Security & Video, Inc. v. City of L.A., 827 F.3d 1192, 1198 n.3 (9th Cir. 2016). Some regulations, however, implicate both commercial and non-commercial speech.

When a content-based regulation affects both commercial and non-commercial speech, the speech's nature determines the appropriate level of scrutiny. PHN Motors, 498 F. App'x at 543–44 (applying intermediate scrutiny because speech at issue was commercial); cf. Southlake Prop. Associates, Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1116–17 (11th Cir. 1997) ("To the extent that the ordinance regulates noncommercial speech, it must withstand a heightened level of scrutiny.").

Since Reed, some local governments have begun redrafting content-based, sign-related ordinances to apply solely to commercial speech. Courts find these amended ordinances comply with Reed. See, e.g., Geft Outdoor LLC v. Consolidated City of Indianapolis, No. 1:15-cv-01568-SEB-MJD, 2016 WL 2941329, *1-2 (S.D. Ind. May 20, 2016).

For the reasons stated below, the Court finds it must apply strict scrutiny to the Billboard Acts because it is a content-based regulation that implicates Thomas's non-commercial speech. The Court then finds that the Billboard Act does not survive strict scrutiny; and thus, the Billboard Act is unconstitutional.

III. ANALYSIS

A. The Billboard Act Is Subject to Strict Scrutiny Because It Is a Content-Based Regulation that Implicates Thomas's Non-Commercial Speech

In this action, the Billboard Act is subject to strict scrutiny because it is a content-based regulation that implicates the non-commercial speech Thomas displayed on his Crossroad Fords sign.

The State contends that the Billboard Act is content neutral. (ECF No. 336 at PageID 6718 n. 1.) While on its face the Billboard Act articulates potentially content-neutral restrictions—on-premises versus off-premises—the restrictions under the Billboard Act hinge on content.

In his concurring opinion in Reed, Justice Alito described the off-premises/on-premises distinction as content neutral. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring). This Court agrees 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 off-premise sign as any sign within 500 feet of a building is content neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in Reed. The Court declines such a reading. Justice Alito's exemplary list of "some rules that would not be content based" ought to be read in harmony with the majority's holding. Id. Read in

harmony with the majority, Justice Alito's concurrence enumerates an "on-premises/off-premises" distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor.

The State previously argued the Billboard Act is content neutral because "it is entirely based on location or placement of the signs. An on-premises sign is one that is on the premises of an establishment, whereas an off-premises sign does not have a premises as such. It is logical to distinguish between the two by reference to place." (ECF No. 118 at 6.) But as the Court determined in its June 24, 2015 Order, "[t]he only way to determine whether a sign is an on-premise sign, is to consider the content of the sign and determine whether that content is sufficiently related to the 'activities conducted on the property on which they are located.'" (ECF No. 110 at 8 (quoting § 107(a)(1)).) Shawn Bible, Beautification Coordinator at TDOT, confirmed the State's use of "a premises test and a purpose test. Is it on the premises it is supposed to be on? And is its purpose advertising what's happening there or that business is informing." (ECF No. 334 at PageIDs 6634:24-25 – 6635:1-2.) Bible also conceded that a sign "has to have some words on it to connect it to the premises. . . . So [the State is] looking at the content of [the] sign to make [a] determination whether it's on premises or off premises. . . ." (Id. at PageID 6663:12-21.)

The statutes' language, the State's rules, and the State's actions as to Thomas's non-commercial messages on his Crossroads Ford sign further compel a finding that the Billboard Act is content based. The

Billboard Act imposes location, permit, and tag requirements on signs, unless they qualify as an exception or exemption. The language of the Billboard Act requires one to assess the sign's content to determine if it is exempt. Signs that advertise activities conducted or the sale/lease of the property on which they are located are exempted from the location, permit, and tag requirements. T.C.A. §§ 54-21-103(1)-(3), 54-21-107(a)(1)-(2). In practice, the State also uses a two-step inquiry knowns as the "premise and purpose test," which requires that the sign's content identify an activity/sale/lease on the property where the sign is located before it qualifies for exemption. (ECF No. 46-6 at PageIDs 718-19 (quoting Rule 1680-02-03-.06(2)). In other words, first, the sign "has to be on that property where the activity is taking place . . . ." (ECF No. 121 at PageID 1523 (testimony of Shawn Bible, Beautification Coordinator, TDOT).) Second, the sign "has to be advertising or speaking up for the things going on there at that premise." (Id. at PageIDs 1523-24.) The State contends that Thomas's previous displays on his Crossroads Ford sign, like "an American flag with the Olympic rings" (ECF No. 45 at PageID 563), did not "fall within the well-established guidelines in the Rule" (ECF No. 46-6 at PageID 719; see also ECF No. 46-6 at PageID 721). The State, therefore, seeks to remove Thomas's Crossroads Ford sign because it is displayed without a permit. (ECF Nos. 17 ¶ 27; 79 ¶ 27.) In short, the State argues that Thomas's sign must be regulated because its non-commercial message does not "speak[] up for the things going on there at that premise." (Test. Shawn Bible, Beautification Coordinator at TDOT, ECF No. 121 at PageIDs 1523:10-1524:11.) Thus, the statute's language, the State's rules, and the State's

reasoning support a finding that the Billboard Act is content based.

After Reed, if a sign's application hinges on the content of the message, it is content based. For example, in Cent. Radio Co. Inc. v. City of Norfolk, Va., the Fourth Circuit Court of Appeals held a city regulation that

> exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems . . . [and] exempted 'works of art' that 'in no way identif[ied] or specifically relate[d] to a product or service,' but [ ] applied to art that referenced a product or service. . . was content-based because it applied or did not apply as a result of content, that is, 'the topic discussed or the idea or message expressed.'

811 F.3d 625, 633 (4th Cir. 2016) (quoting Reed, 135 S.Ct. at 2227). Likewise, in the instant case, the applicability of the on-premises sign exemption depends on the sign's content, i.e. the content must concern activity on the site where the sign is located. (See ECF No. 46-6 at PageIDs 718-19 (quoting Rule 1680-02-03-.06(2)). Even "though [the on-premises/off-premises distinction appears] facially content neutral, [it ultimately] cannot be 'justified without reference to the content of the regulated speech,'" and thus is a content-based regulation. Reed, 135 S. Ct. at 2222.

In the instant case, the Billboard Act is subject to strict scrutiny because, while it regulates both commercial and non-commercial speech, the language at issue is the non-commercial message(s) in Thomas's

Crossroads Ford sign. The State concedes that the Billboard Act's on-premises/off-premises provisions apply to both commercial and non-commercial speech and that "[a] message can [ ] be commercial or non-commercial as long as there is some connection." (ECF Nos. 64 at PageID 917, 344 at 10.) There is no question that Thomas's Crossford Sign displaying an American flag and Olympic rings is non-commercial speech. (See ECF No. 45 at PageID 563.) Because the Billboard Act is a content-based regulation that applies to both commercial and non-commercial speech, and because the nature of the speech at issue is non-commercial, the Billboard Act must survive strict scrutiny to be found constitutional. See PHN Motors, 498 F. App'x at 543–44.

B. The Billboard Act Does Not Survive Strict Scrutiny

Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Reed, 135 S.Ct. at 2231. Even if the government's interests are compelling, "it is the rare case in which a speech restriction withstands strict scrutiny." Id. at 2236 (Kagan, J., concurring in the judgment) (citing Williams–Yulee v. Fla. Bar, ––– U.S. ––––, 135 S.Ct. 1656, 1666 (2015)). If a less restrictive alternative for achieving that interest exists, the government "must use that alternative." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." Id. at 816.

For the reasons stated below, the Billboard Act fails under strict scrutiny. The Court first finds that the State's interests are not compelling, but even if they were, the Court finds the Billboard Act is not narrowly tailored to the those interests.

1. The State's Interest Are Not Compelling

The State sets out "six compelling State interests: Driver Safety, Promote Recreational Value of Public Travel, Promote Tourism, Promote Economic Development, Protect Investments in Public Highways and Preserve Scenic Beauty." (ECF No. 336 at PageID 6720.) First, the State contends that "if there were no Billboard Act, and billboards were allowed to proliferate, that would lead to further distraction and could cause more accidents." (Id. at PageID 6721.)

Second, the State argues that "[t]he Billboard Act engenders [ ] recreational travel by helping keep the roads more driver friendly and scenic." (Id. at PageID 6725.) The State does not offer proof, however, that the Billboard Act actually influences recreational travel.

Third, the State asserts "that billboards and other signs detract from the natural beauty that visitors say that they travel to and within Tennessee to see." (Id. at PageIDs 6726-27.) Yet the State admits it has no statistical evidence that the Billboard Act influences tourism. (Id.)

Fourth, the State argues that "how the roadways in Tennessee *look* plays an important part in attracting new businesses to the State." (Id. at PageID 6727 (emphasis added).) The State's bases this argument

entirely on testimony from "Commissioner Schroer, a businessman and entrepreneur himself, who is familiar with the business industry and the needs of businesses in Tennessee" and believes "attractive roads [are] critical to economic development." (Id. at PageID 6737.) Commissioner Schroer's testimony offers little in terms of statistical or differential analysis documenting an actual link between "attractive roads" verses, for example, "good roads" and economic development.[4] Rather, Commissioner Schroer's testimony correlates the maintenance and building of roads, sans reference to aesthetics, with transportation to and from Tennessee businesses.[5] Moreover, because

[4] When asked if he conducted an independent study as to how roadways impact business recruitment to Tennessee, Commissioner Schroer states,

> You know, the best way I can answer that is, having talked to executives of companies that come to the State of Tennessee, they're very clear that what we did helped them make a decision to come to Tennessee. So, you know, that's as independent as I think I need is from the company themselves, telling me how important our capital investment was when they're making a decision to come to Tennessee.

(Trial Tr., ECF No. 333 at PageID 6392:11-19.)

[5] Commissioner Schroer testified,

> I can say as an example, in 2015 about 167 businesses relocated to the State of Tennessee with about a $5.5 billion investment. . . . [T]ransportation has a huge part of that and that almost all of those deals, those businesses that come in the State of Tennessee have some need of transportation. And often times it's just the interstate system itself, they want to get their goods and

Commissioner Schroer is a fact witness and not an economic expert (ECF No. 270 ¶ 5), and because his opinion testimony on how roadway aesthetics influence economics would require specialized knowledge, his testimony is impermissible lay opinion. Fed. R. Evid. 701(c) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."). The Court, therefore, finds Commissioner Schroer's testimony unpersuasive and unsupportive of the State's position that the Billboard Act ensures more attractive roads and those attractive roads are critical to economic development.

Fifth, the State discusses the public investment in the building and maintenance of the roads. (ECF No. 336 at PageIDs 6727-28.) Yet the State does not establish that the Billboard Act directly impacts this public investment, and merely repeats that "[o]f course the major concern is safety of the motoring public. . . . In fact, safety is the key asset in a roadway. . . . The State takes care to have signs that are appropriately

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> products to wherever they are going. But many times they also need a road to their business to their factory or whatever it is, and we provide those as part of our process. . . . Volkswagen as an example has a huge plant in Chattanooga, and we spent over $30 million to open an interchange. . . . Academy Sports located a $1.7 million or million square feet facility in Cookeville, Tennessee that we are providing both an interchange and an access road from the interchange into their facility.

(Trial Tr., ECF No. 332 at PageIDs 6344:2-25 – 6345:1-4.)

spaced and not clutters [sic] because sign clutter can lead to distracted driving." (Id. at PageID 6728.)

Sixth, the State argues that "[p]rotecting and preserving the natural scenic beauty is [ ] a compelling interest for the State of Tennessee." (Id. at PageID 6729.)[6]

Despite presenting six seemingly separate arguments, the State's position can be distilled into two concepts. First, the State's tourism, recreation, economic development, and scenic beauty arguments all hinge on roadway aesthetics. Second, the State's driver safety and public investment arguments all hinge on traffic safety. In short, the State contends that the Billboard Act prevents the proliferation of billboards, which, in turn, improves (1) aesthetics and (2) traffic safety. Neither of these arguments, however, constitutes a compelling interest.

Although the Sixth Circuit has held that aesthetics and highway safety are substantial or significant

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[6] Although not listed as a compelling interest, the State also mentions federal funding, and argues that although "the need to continue Federal funding may not be a 'compelling' State interest, it is at the least a legitimate interest that, along with the compelling interests that the State proved, shows the [sic] Tennessee has a compelling State interest (or interests) in the Billboard Act." (Id. at PageID 6731.) This Court previously found that federal funding is irrelevant to the strict scrutiny analysis. (ECF No. 315 at PageID 6154.) Other courts agree with this finding: "[T]he desire to secure a [State's] funding is, of course, not a compelling interest that would justify the suppression of . . . First Amendment speech. . . ." Villejo v. City of San Antonio, 485 F. Supp. 2d 777, 783 (W.D. Tex. 2007).

governmental interests, Wheeler v. Comm'r of Highways, Com. of Ky., 822 F.2d 586, 589 (6th Cir. 1987); Hucul Advert., LLC v. Charter Twp. of Gaines, 748 F.3d 273, 278 (6th Cir. 2014); Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814, 821 (6th Cir. 2005), neither the Sixth Circuit nor the Supreme Court has held that these interests are compelling under strict scrutiny. Wagner v. City of Garfield Heights, No. 13-3474, 2017 WL 129034, at *6 (6th Cir. Jan. 13, 2017) ("We will follow the Court's example in Reed and assume without deciding that these interests are sufficiently compelling."); see Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2223 (2015). Some courts have found neither aesthetics nor traffic safety constitute compelling interests. Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 738 (8th Cir. 2011); cf. Dimmitt v. City of Clearwater, 985 F.2d 1565, 1569–70 (11th Cir. 1993) (finding that the evidence fell short of establishing a compelling state interest in visual aesthetics and traffic safety that would justify content-based regulation of noncommercial speech); McCormack v. Twp. of Clinton, 872 F.Supp. 1320, 1325 n. 2 (D.N.J. 1994) (noting that "while courts certainly have recognized states' and municipalities' interests in aesthetics and safety, no court has ever held that these interests form a compelling justification for a content-based restriction" of non-commercial speech). "[T]he promotion of tourism and business has [also] never been found to be a compelling government interest for the purposes of the First Amendment." McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 189 (D. Mass. 2015) (citing Pottinger v. City of Miami, 810 F.Supp. 1551, 1581 (S.D. Fla. 1992)).

In previous rulings, the Supreme Court has made it clear that

> content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar, including advocacy intended, and likely, to incite imminent lawless action . . . obscenity . . . defamation . . . speech integral to criminal conduct . . . so-called 'fighting words,' . . . child pornography . . . fraud . . . true threats . . . and speech presenting some grave and imminent threat the government has the power to prevent.

United States v. Alvarez, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012) (internal quotation marks omitted). The compelling interests underlying these categories are similar: the government has a compelling interest in regulating content that is false, criminal and/or provokes crime, or lawless.

The Supreme Court also mandates that the government's compelling interest must be related to the speech-based distinctions the regulation makes. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991) (concluding that the disparate treatment of storytelling criminal speech was completely unrelated to the State's compelling interest in ensuring that crime victims were compensated from the fruits of the crimes committed against them and that any interest the State might have had in imposing such a content-based disincentive on speech was not compelling); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S.

575, 586 (1983) (holding that the State's compelling interest in raising tax revenue through taxation did not justify selective taxation of the press since such interest was altogether unrelated to the press/nonpress distinction); Carey v. Brown, 447 U.S. 455, 467-69 (1980) (finding that the State's compelling interest in preserving privacy by banning residential picketing did not justify a selective ban on nonlabor picketing since the interest was unrelated to the labor/nonlabor distinction).

In the instant case, the Court finds the State's interests in aesthetics and traffic safety are not compelling interests. Not only are such general and abstract interests generally not considered so compelling as to justify content-based sign restrictions, but also, they are unrelated to the distinction between signs with on-premises-related content versus other messages. Also, in practice this distinction undermines the State's interests. As discussed above, no binding authority supports the State's compelling interests of aesthetics and traffic safety. These interests also fall short of what the Supreme Court has deemed appropriate for content-based-restrictions. Thus, the Court finds the State's aesthetic and traffic safety interests are not compelling enough to justify content-based restrictions.

The State has also failed to establish that its interests are related to the Billboard Act's content-based restriction. The provisions at issue here concern the distinction between signs with content concerning on-premises-related activity versus other messages. The State fails to establish how this specific distinction

relates to traffic safety and aesthetics. For example, the State's expert witness on traffic safety, Colonel Tracy Trott, testified that "the number of crashes related to distraction and the number of injury crashes related to distraction are definitely on an upward trend." (Trial Tr., ECF No. 333 at PageID 6483:10-11.) This "upward trend," however, occurred while the Billboard Act was in full force. Also, the statistics Colonel Trott relied on do not reference billboards or signs as causes for distracted driving or distracted driving accidents. Colonel Trott also opined that a proliferation of billboards would likely aggravate distracted driving issues. (Id. at PageID 6488:7-17.) Notably, Colonel Trott does not suggest that signs whose content concerns on-premises-related activity pose a greater or less driving distraction than other signs; rather, he suggests that signs with more content and signs outside the driver's field of vision may create greater distractions. He specifically states that signs are "less distracting [when] they're usually in your field of vision that you're using to drive with" and signs that need "to be read or deciphered or retained" would be potentially more distracting than signs that evoke instant recognition, i.e. "I would know the golden arches for McDonald's or BP for gasoline, I know that that facility sits at the bottom of that sign; and it's a very quick glance and back to the road." (Id. at PageIDs 6488:22-24, 6503:20-25.)

The State's civil engineering and human factors engineering expert, TDOT Transportation Specialist Jason Moody, also failed to establish how the on-premises/off-premises distinction relates to the State's traffic safety interest. (See ECF Nos. 270 ¶ 6.) Moody

merely opined that the placement of signs "directly adjacent to a roadway" may "draw attention. If you can't view them for enough to read the message properly, that could cause you to turn your head to read the full message." (Id. at PageID 6546:20-23.) Moody also testified that billboards are generally

> spaced parallel with the road, turned perpendicular to the road so that drivers can see them. They're at the back of the right-of-way, but they're at the edge of the cone of vision. So, that's why you see them using such -- they're not in the primary cone or the cone right in front where we place our signs. So, the text has to be much larger to be read. They're usually behind our right-of-way.
>
> Q: Based on your learning and experience, tell us whether billboards are a factor in the area of distracted driving.
>
> A: Yes.

(Id. at PageIDs 6545:17-23, 6546:1.) Moody, like Colonel Trott, does not opine on whether signs with on-premises-related activity content are more or less distracting than other messages. Although Moody's and Colonel Trott's testimony establishes that billboards generally distract drivers, and that the State may have a compelling interest in curtailing all billboards, their testimony fails to establish how the Billboard Act's on-premises/off-premises distinction is related to the State's interest in traffic safety.

Similarly, the State has failed to establish how its interest in aesthetics is related to the Billboard Act's

on-premises/off-premises distinction. The State's witness John Carr, Assistant Commissioner of Administration for the Department of Tourist Development, testified that "[t]ouring and sightseeing, visiting historic sites, going to some of the parks" are some of the primary scenic activities visitors come to Tennessee enjoy. (Trial Tr., ECF No. 333 at PageID 6444:7-9.) Carr, however, does not discuss whether signs with messages that do not concern on-premises activity impact aesthetics. Shawn Bible, Beautification Coordinator at TDOT, testified that zoning, rather than a distinction between on-premises versus off-premises signs, ensures that there are not "billboards blocking the beautiful rural views or hanging over residences." (ECF No. 334 at PageID 6640:17-25.)

The State also provides no further evidence that the distinction at issue relates to its aesthetic interest. The State merely states "the Billboard Act engenders [ ] recreational travel by helping keep the roads more driver friendly and scenic." (ECF No. 336 at PageID 6725.) While the Billboard Act as a whole may result in more scenic roads, no evidence establishes that the Billboard Act's on-premises/off-premises distinction relates to the State's aesthetic interest.

In practice, the Billboard Act's on-premises/off-premises distinction may undermine the State's interests. For example, a small sign with muted colors that says "Knowledge is Power" off of 1-40 would require a permit and tag, and compliance with the six-hundred-sixty (660)-foot restriction. Conversely, a large sign with loud colors that states "This property is for sale. Right here. This one. The one this sign is on. Look

at this sign. Look at this property," would require no permit or tag, and could be placed closer to another sign and the roadway. The exempted "for sale" sign that is bigger, brighter, contains more words, and closer to another sign and road would certainly be a distraction and eye-sore under the State's evidence. The regulated "Knowledge is Power" sign, on the other hand, would be less of either. Thus, the Billboard Act's on-premises/off-premises distinction undermines the State's articulated interests.

In sum, the State's aesthetic and traffic safety interests are not so compelling as to justify content-based sign restrictions, because they are unrelated to the Billboard Act's on-premises/off-premises distinction, and because, in practice, the Billboard Act's on-premises/off-premises distinction undermines the State's interests.

Despite finding that the State's interests are not compelling, the Court will assume the State's interests are compelling and turn to whether the Billboard Act is narrowly tailored to the State's compelling interests.

2. The Billboard Act Is Not Narrowly Tailored to the State's Compelling Interests

A law regulating speech is not narrowly tailored if it fails to advance the government's interests; the law is also not narrowly tailored if it is either under- or overinclusive, and is not the least restrictive means among available, effective alternatives. See Reed, 135 S.Ct. at 2231–32; Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105,

121–23 (1991); Burson v. Freeman, 504 U.S. 191, 207 (1992); Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004).

For the reasons stated below, the Court finds that even if the State's interests were compelling, the Billboard Act is not narrowly tailored to achieve those interests.

i. Advancing the State's Compelling Interests

The State argues that the Billboard Act advances all of its compelling interests. (ECF No. 336 at PageID 6732.) The State contends that the Billboard Act's restrictions are fourfold: "location (zoning), spacing, size and lighting." (Id.) The State argues that these four restrictions render the Billboard Act narrowly tailored because

> a proliferation of billboard would be detrimental to driver safety[;] . . . would be a blight on the landscape and mar the . . . scenic beauty, promoting recreational travel and promoting tourism[;] . . . cause more distraction . . . [that] lead to more crashes, and then road congestion[;] . . . negatively impact economic development and quality of life . . . [and] negatively impact the investment in safety. . . .

(Id. at PageIDs 6733-37.)

The State confuses the issues. The present issue is whether the Billboard Act's exemption and exception provisions are narrowly tailored to the State's compelling interests. The State's argument, however,

refers to the Billboard Act generally and relies on a hypothetical, unproven negative. Without proof, the State contends that without the Billboard Act there would be a proliferation of billboards. Assuming a proliferation of signs would occur without the Billboard Act, the State has failed to establish how the provisions at issue—T.C.A. §§ 54-21-103(1)-(3), 54-21-107(a)(1)-(2)—advance the State's compelling interests. Specifically, the State has not shown how a distinction between on-premises and off-premises signs advances aesthetics and traffic safety.

The State attempts to justify the on-premises/off-premises distinction in four ways: First, the State argues that "[o]n-premise signs enhance safety by helping drivers locate relevant businesses and activities." (Id. at PageID 6740.) Second, the State contends "[t]he impact on aesthetics [by on-premises signs] is minimal because the signs are already integrated with the current land use." (Id.) Third, the State asserts that "[o]n-premise signs are inherently self-regulating . . . [because] [o]wners of businesses do not want to spend valuable real estate putting up a number of signs – that space is better utilized for the business itself." (Id. at PageID 6741.) Fourth, off-premises signs are "designed to draw your attention away from the road to read the message displayed on the billboard or sign . . . they use colorful pictures and other distractions to draw your attention . . . [and thus] [t]hey serve to distract, not protect." (Id. at PageID 6742.)[7] The Court addresses each argument in turn.

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[7] The State presented these four arguments to support the proposition that the Billboard Act is not underinclusive. The Court

First, the traffic-safety evidence the State proffers relates to distracted driving, and the State has not established that on-premises signs are less distracting than off-premises signs. The opposite may be true. On-premises signs are not subject to permit, tag, and location restrictions, they may be more distracting than an off-premises sign. Second, there is no evidentiary support for the State's proposition that on-premises signs have less of an impact on aesthetics than off-premises signs. If the sign's content concerns activity on the premises, the premise owner may make as many signs as he chooses and he may make them as ostentatious as he chooses. Third, the State's conclusory assertion that business owners do not want to put up numerous signs is speculative and lacks evidentiary support. (See id. at PageID 6741.) The assertion would certainly not be true for many firework vendors.[8] Fourth, the fundamental purpose of all signs,

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finds, however, that these arguments also speak to whether the Billboard Act's exemption and exception provisions advance the State's compelling interests.

[8] It is common knowledge in the court's jurisdiction that firework vendors signs are often numerous and flashy. See Fed. R. Evid. 201(b)(1) ("[T]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . is generally known within the trial court's territorial jurisdiction."); see also ECF No. 150 at PageID 2134-35 ("COURT: You have seen those big signs when you're coming out of Chattanooga where you have got the signs about fireworks -- is it in Alabama? MS. JORDAN: Yes, yes. I have seen -- definitely seen those, yes. COURT: Isn't that Sign in Tennessee? MS. JORDAN: I believe that it is. I honestly don't know. I know what you're talking about, I know what you're referring to, I don't know whether that's in Tennessee or not, but

regardless of content, is "to draw your attention away" from the current task "to read the message displayed on the billboard or sign."[9] By the State's logic, this would mean all signs "serve to distract, not protect." Accordingly, this argument does not justify the Billboard Act's on-premises/off-premises sign distinction. The Court is unpersuaded that the Billboard Act advances the State's compelling interest, and finds the on-premises/off-premises distinction actually undermines the State's articulated interests in practice.

The Court, therefore, finds the provisions of the Billboard Act at issue do not advance the State's compelling interests. The Court need not inquire further. If the Billboard Act does not advance the State's compelling interests, it is not narrowly tailored and thus is unconstitutional. For completeness, however, the Court will also consider whether the Billboard Act is overinclusive or underinclusive, and the least restrictive means.

ii. Overinclusive

A law regulating speech is overinclusive if it implicates more speech than necessary to advance the government's interest(s). Simon & Schuster, 502 U.S.

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it's definitely on I-24 and is -- yeah, there's several of those. There's one in particular that I can —")

[9] Shawn Bible, Beautification Coordinator at TDOT, when asked "would you agree that the purpose of a billboard sign is to express meaning or content to someone?" testified, "yes." (ECF No. 334 at PageID 6657:14-17.)

at 121–23. For example, in Simon & Schuster, the law at issue required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account and made available to the victims of the crime and the criminal's other creditors. 502 U.S. at 108. The Supreme Court held that the law was a "significantly overinclusive" means of ensuring that victims are compensated from the proceeds of the crime, and therefore the law was not narrowly tailored. Id. at 121, 123. Describing the reach of the statute, the Supreme Court stated:

> Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen . . . a nearly worthless item as a youthful prank, the [government entity] would control his entire income from the book for five years, and would make that income available to all of the author's creditors. . . .

Id. at 123. That is, the statute applied to a wide range of literature that would not enable a criminal to profit while a victim remained uncompensated. Because the law covered far more material than necessary to accomplish its goals, the Supreme Court held that the statute was vastly overinclusive and therefore not narrowly tailored. Id.

The State argues the Billboard Act is not overinclusive because it "does not regulate content." (ECF No. 336 at PageID 6737.) The Court disagrees that the Billboard Act does not regulate content. The Billboard Act is a content-based regulation, as the application of the exemption and exception provisions

hinges on the sign's content. It is also at least arguable that the Billboard Act is overinclusive. At the center of the State's interests is the desire to limit highly distracting signs that impede traffic safety and diminish aesthetics. While the Billboard Act regulates off-premises signs that are highly distracting, it also regulates off-premises signs that are not highly distracting. For example, an off-premises sign that mimics the "Hollywood" sign in Los Angeles, California in enormous size[10] and is located off an Interstate regulated by the Billboard Act in Tennessee would be regulated to the same extent as a small, off-premises sign, located in the same place that stated, "Donate Winter Coats at the YMCA. Exit 13." In practice, the Billboard Act is likely overinclusive. Even assuming the Billboard Act is not overinclusive, however, the Court finds it is underinclusive.

iii. Underinclusive

An underinclusive law regulates less speech than necessary to advance the government's interest(s). Florida Star v. B.J.F., 491 U.S. 524, 540 (1989); cf. Burson, 504 U.S., at 207, 112 S.Ct. 1846 ("The First Amendment does not require States to regulate for problems that do not exist."); see also Wagner v. City of Garfield Heights, No. 13-3474, 2017 WL 129034, at *6 (6th Cir. Jan. 13, 2017) (finding that a law limiting the

[10] Pursuant to Federal Rule of Evidence 702(b)(2), the Court takes judicial notice of Los Angeles Historic-Cultural Monument No. 111 "Hollywood Sign & land underneath." Historic-Cultural Monument List: City Declared Monuments by Planning Community (Feb. 2017), http://preservation.lacity.org/commission/designated-historic-cultural-monuments.

size of political signs was underinclusive as to the city's aesthetic and traffic safety interests, because the display of larger, non-political signs would counteract those interests). For the reasons stated below, the Court finds the Billboard Act is underinclusive, as it regulates less speech than necessary to advance the State's allegedly compelling interests.

The State argues that the Billboard Act is not underinclusive because on-premises/off-premises distinctions are content-neutral regulations under Supreme Court precedent and do not favor one message over another under Sixth Circuit precedent. (ECF No. 336 at PageIDs 6739-40 (citing Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978); Metro-Media, Inc. v. City of San Diego, 453 U.S. 490, 508-12 (1981); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806-07 (1984); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 (1993); Reed v. Town of Gilbert, 135 S.Ct. 2218, 2233 (2015) and Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987).) The State also sets out the four arguments discussed above: (1) "[o]n-premise signs enhance safety by helping drivers locate relevant businesses and activities" (ECF No. 336 at PageID 6740); (2) "[t]he impact on aesthetics [by on-premises signs] is minimal because the signs are already integrated with the current land use" (id.); (3) "[o]n-premise signs are inherently self-regulating . . . [because] [o]wners of businesses do not want to spend valuable real estate putting up a number of signs" (id. at PageID 6741); and (4) off-premises signs are "designed to draw your attention away from the road to read the message displayed on the billboard or

sign . . . [and thus] [t]hey serve to distract, not protect" (id. at PageID 6742). For the reasons stated below, the Court finds the Billboard Act is underinclusive, as it regulates less speech than necessary to advance the State's compelling interests.

The State's content-neutral argument is baseless; although it is possible for an on-premises/ off-premises regulation to be content neutral, the Court finds the Billboard Act's on-premises/off-premises distinction is content based because the distinction under the Billboard Act's provisions hinges on the sign's content. The State's remaining arguments fail to sufficiently disprove that the Billboard Act is underinclusive by regulating less speech than necessary to advance the State's interests.

The Court's reasoning in the instant case mirrors the Sixth Circuit's reasoning in Wagner v. City of Garfield Heights, No. 13-3474, 2017 WL 129034, at *6 (6th Cir. Jan. 13, 2017). In Wagner, the Sixth Circuit used Reed's analysis to hold that a sign ordinance "that expressly limits political signs to six square feet, but permits other kinds of temporary signs to be twice that size" was underinclusive, because the city "offer[ed] no rationale for why political signs, as opposed to a signs advertising local businesses, mar the city's aesthetic appeal in such a way as to merit an arbitrarily smaller size restriction." Id. at *6. Similarly, in the instant case, the State has "offer[ed] no rationale for why [signs displaying non-premises-related content], as opposed to [signs displaying on-premises-related content] mar the [State's] aesthetic appeal in such a way as to merit an arbitrary [permit, tag, and location]

restriction." Id. As discussed above, the Billboard Act's exemption and exception provisions would absolve large, ostentatious on-premises signs that are closely placed together from the permit, tag, and location requirement while regulating small, muted off-premises signs. See Part III.B.1. Moreover, the State's conclusory arguments that on-premises signs "are already integrated with the current land use" (ECF No. 336 at PageID 6740), and that business owners avoid displaying multiple signs (id. at PageID 6741) lack evidentiary support and merit. Aesthetics are not measured by how relevant the sign's content is to the on-premises activity. One can easily anticipate a scenario where a business chooses to display many obnoxious signs advertising its activity—e.g., firework vendors. Significantly, the State presents no evidence that business owners choose to limit the number of signs on their property. Therefore, the Court finds that the Billboard Act regulates less speech than necessary to advance the State's aesthetic interests.

This finding is supported by the Sixth Circuit Court of Appeal's holding in Wagner. In that post-Reed case, the Circuit Court of Appeals held that the city "'similarly has not shown that limiting temporary [political] signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not.'" Id. (quoting Reed, 135 S. Ct. at 2232.) The same reasoning is applicable in this case. The State "'has not shown how [instituting permit, tag, and location requirements for signs displaying non-premises-related content] is necessary to eliminate threats to traffic safety, but that [having the same requirements] for other types of signs is not.'" Id. The State's argument

that on-premises signs "help[] drivers locate relevant businesses and activities" (ECF No. 336 at PageID 6740) does not establish why on-premises signs are not subject to permit, tag, and location requirements. These requirements would not change the sign's content, so it would maintain its helpful purpose. Also, the State's assertion that off-premises signs are "designed to draw your attention away from the road to read the message displayed on the billboard or sign . . . [and thus] [t]hey serve to distract, not protect" (id. at PageID 6742) is nonsensical, as all signs are designed with this purpose. This argument, therefore, does not establish why it is necessary to regulate off-premises signs and not on-premises signs to eliminate threats to traffic safety. Thus, the Billboard Act regulates less speech than necessary to advance the State's traffic-safety-related interests.

For the reasons stated above, the Court finds the Billboard Act is underinclusive, as it regulates less speech than necessary to advance the State's allegedly compelling interests.

iv. Least Restrictive Means

The Court finds that the provisions at issue are not narrowly tailored because they are not the least restrictive means by which the State may further its interests. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. . . . To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (internal citations omitted); see also McCullen

v. Coakley, 134 S. Ct. 2518, 2530 (2014); Bible Believers v. Wayne Cty., Mich., 805 F.3d 228, 248 (6th Cir. 2015), cert. denied, 136 S. Ct. 2013 (2016). "[T]he challenged regulation [must be] the least restrictive means among available, effective alternatives." Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004).

The Court ordered the parties to brief the issue of least restrictive means. (ECF No. 342.) Thomas posits eight alternative means that he argues would advance the State's allegedly compelling interests. (ECF No. 343.) First, Thomas suggests that the Billboard Act regulate only commercial speech. (Id. at PageID 6787.) Second, Thomas proposes a regulation limiting sign size, regardless of content. (Id. at PageID 6788.) Third, Thomas suggests a spacing restriction for all signs, regardless of content. (Id. at PageID 6789.) Fourth, Thomas proposes a regulation that would allow property owners to display any sign on their property, regardless of content. (Id. at PageID 6790.) Fifth, Thomas proposes distinguishing between signs based on whether they are placed on public rights-of-way or on private property. (Id. at PageID 6790.) Sixth, Thomas posits creating a provision that allows "non-commercial speech [to] be displayed anywhere commercial speech is permitted." (Id. at PageID 6791.) Seventh, Thomas suggests requiring all signs, regardless of content, to be placed a minimum distance apart from one another. (Id.) Eighth, Thomas proposes restricting all signs to specific presentation characteristics, e.g., size, lights, colors, font size, electronic messages, or moving parts. (Id. at PageID 6791.)

In its response, the State contends that none of the alternatives proffered by Thomas would achieve the State's interests. (ECF No. 344 at PageID 6795.) The Court addresses, in turn, each of the alternatives in conjunction with the State's responses.

1. Non-Commercial/Commercial Distinction

First, the State contends that limiting the Billboard Act to only commercial speech "would be inherently content-based because it would require a review of the message, no matter the location, to determine whether it is in fact non-commercial" or commercial speech. (Id. at PageID 6797.) Additionally, the State argues, exempting non-commercial speech from regulation would not advance the State's compelling interests, as it would allow non-commercial signs to proliferate. (Id. at PageID 6798.) The State also takes issue with this proposal because "the State would have to constantly be on alert and watch the signs because there will be occasions where sign owners will place commercial messages on the signs, but then change to non-commercial content if caught, then revert back to commercial." (Id.)

The Court is unpersuaded by the State's argument that limiting the Billboard Act to only commercial speech would render the Billboard Act content based. Although this is an issue litigated in our sister courts,[11]

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[11] See, e.g., RCP Publications Inc. v. City of Chicago, No. 15 C 11398, 2016 WL 4593830, at *3 (N.D. Ill. Sept. 2, 2016) (evaluating regulation that distinguished between commercial and non-commercial speech); CTIA-The Wireless Ass'n v. City of Berkeley,

the Court declines to find that limiting the Billboard Act to only commercial speech would constitute a content-based regulation. Nonetheless, even if limiting the Billboard Act to commercial speech would render it a content-based regulation, its provisions would then be subject to a lower level of scrutiny. Under a less burdensome inquiry, a content-based regulation of commercial speech may be constitutional. Similar regulations have been found constitutional after Reed. See, e.g., Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana, 187 F. Supp. 3d 1002, 1007 (S.D. Ind. 2016) (finding constitutional an amended, on-premises/off-premises distinction that applied only to commercial speech). The State's contention that a non-commercial/commercial distinction would be more burdensome than the current on-premises/off-premises distinction is invalid. It is no more burdensome on the State "to constantly be on alert . . . [for when] sign owners [ ] place [off-premises] messages on the signs, but then change to [on-premises] content if caught, then revert back to [off-premises content]." (ECF No. 344 at PageID 6798.) The Court also finds that while a non-commercial/commercial distinction still advances the State's compelling interests, it may not do so to the same extent as the current on-premises/off-premises distinction, which applies to all speech. In short, a non-

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California, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015) ("Ironically, the classification of speech between commercial and noncommercial is itself a content-based distinction. Yet it cannot seriously be contended that such classification itself runs afoul of the First Amendment.").

commercial/commercial distinction may be less effective but not ineffective.

2. Sign Size

Second, the State argues that Thomas "lacks standing to assert an alternative that would require all signs to conform to the same size restrictions. . . . [Moreover, regulating size for all signs] would not help Plaintiff because the regulations preclude his sign no matter what size it is." (Id. at PageID 6799.) Both claims are groundless. The State's first claim that Thomas lacks standing to propose an alternative is without merit. Proposing an alternative to a challenged provision does not require standing. Thomas need only establish standing to challenge the Billboard Act's exemption and exception provisions, which he has. The Court is also unpersuaded by the State's second assertion that regulating all signs by size would be unbeneficial to Thomas. If the Billboard Act's on-premises/off-premises distinction was replaced with a size restriction, it is possible Thomas's Crossroad Ford sign would be exempt from the permit, tag, and location requirements, so long as its size complied with the restriction.

The Court finds that a size regulation, rather than an on-premises/off-premises distinction, would also further the State's compelling interests. A size regulation would apply to both commercial and non-commercial speech. A size regulation would also allow the State to further its traffic safety interest. For example, the State could require all signs greater than four square feet to abide by the Billboard Act's permit, tag, and location requirements. Although signs smaller

than four square feet could "proliferate," their size could be less distracting to drivers than bigger signs. Similarly, a size regulation would further the State's aesthetic interests because the smaller unregulated signs would make far less of a negative aesthetic impact than their larger counterparts. Furthermore, the Court does not find that a size regulation would be less effective than the current on-premises/off-premises distinction. Just as on-premises signs may proliferate, so long as their content relates to on-premises activity, so may signs that meet the size restriction. Thus, the Court finds that a size regulation constitutes a less restrictive means of advancing the State's interests.

3. Spacing

Third, the State argues that Thomas's proposal that all signs be spaced five hundred (500) feet apart would be too restrictive. (See ECF No. 344 at PageID 6799.) The State asserts that the current "spacing requirements [under the Billboard Act are as follows]: 1,000 feet on interstates, 500 feet on primary state routes not on the interstate system, and 100 feet on primary State routes within cities." (Id.) A blanket 500-foot restriction, the State argues, would prevent business owners from adequately indicating their business's whereabouts to drivers and deprive some, but not all, property owners of their right to erect a sign. (Id. at PageIDs 6800-01.) The Court does not agree with the State's reasoning, but finds that Thomas's specific 500-foot restriction is not an effective, less restrictive alternative.

A more nuanced spacing restriction, however, may constitute an effective, less restrictive alternative. For

example, the Billboard Act could be amended to have a spacing scheme that required 2,000 feet on interstates, 1000 feet on primary state routes not on the interstate system, and 200 feet on primary state routes within cities, along with a provision that allowed business or premises owners to erect additional signs if those signs were within 75 feet of an on-premises building. This amendment would limit the number of signs that could distract drivers or negatively impact aesthetics, while allowing business and organizations to display signs on their own property. The Court, therefore, finds that a spacing restriction constitutes as an effective, less restrictive alternative to the on-premises/off-premises distinction under the Billboard Act.

4. Exemption for Property Owners Erecting Signs

Fourth, the State contends that Thomas's "suggestion to allow property owners to put up signs on their own property without regard to zoning is the same as no regulation . . . [and] would do absolutely nothing to prevent proliferation. . . ." (Id. at PageID 6801.) The Court similarly finds that Thomas's suggestion would fall short of advancing the State's interests. Property owners would be allowed to place signs of any size, at any distance, and of any number without regulation, which would undermine the State's compelling interests. Thus, the Court finds an exemption for property owners is not an effective, less restrictive alternative.

5. Public/Private Property

Fifth, the State contends that Thomas's proposal to "treat" all public and private property signs the "same" is confusing, unless Thomas seeks to subject all signs to the Manual on Uniform Traffic Control Devices ("MUTCD"), T.C.A. § 54-5-108(b). (Id. at PageIDs 6801-02.) The State argues, however, that these restrictions would be overinclusive. (Id. at PageID 6802.) The Court agrees. The MUTCD provisions would regulate more speech than necessary to advance the State's interests; thus, treating all public and private signs the same would not serve as a less restrictive alternative. The Court notes, however, that an ordinance that exempted only signs that complied with MUTCD, while requiring that all other signs abide by the Billboard Act's permit, tag, and location requirements may be constitutional. See Ackerley Commc'ns of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33, 37 n.9 (1st Cir. 1996).

6. Permitting Non-Commercial Signs Wherever Commercial Signs are Permitted

Sixth, the State opposes Thomas's proposal that the Billboard Act permit non-commercial signs wherever commercial signs are permitted, because the State contends the Billboard Act already permits the erection of non-commercial signs wherever commercial signs may be erected. (Id. at PageID 6803.) Sixth Circuit precedent supports the State's argument. Wheeler v. Comm'r of Highways, Com. of Ky., 822 F.2d 586, 596 (6th Cir. 1987) (holding that a regulation allowing signs related to on-premises activity meant "[n]on-commercial and commercial messages are permitted

anywhere provided that an activity relating to the message is conducted on the premises."). The Court finds, however, that the Billboard Act's scheme also draws a line between two types of noncommercial speech—on-and off-premises messages. "This line has the effect of disadvantaging the category of noncommercial speech that is probably the most highly protected: the expression of ideas." Ackerley Commc'ns of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33, 37 (1st Cir. 1996). But with rare exceptions, the First Amendment does not permit the State to value certain types of noncommercial speech more highly than others, particularly when the speech disfavored includes speech, such as political speech, that is at the core of the First Amendment's value system. See id. For example, St. Jude Children's Research Hospital may display a sign relating to its cancer research or the annual St. Jude Memphis Marathon, but may not replace the content of that sign to say, "Vote for Referendum 72: providing housing to women and children of domestic abuse" or "Remember to Vote." Further, McDonalds may display its well-known golden arches, but may not display a sign that states, "Donate to your local library to promote and strengthen inner-city literacy." When posed with a similar scenario—where an on-premises Valero sign is changed from "Valero Honors Our Veterans. Valero." to "Valero. Public corruption. TDOT Com. Schroer and Shawn Bible are Corrupt Officials"—Shawn Bible, Beautification Coordinator at TDOT, testified:

> I don't know the answer. I would have to think about that. I'm not sure. You really need it to connect to the business to be an advertising.

> Valero wants people to think of them as good Americans and support veterans and they think that builds business. I wouldn't think this would be a message that you could legitimately say would build business.

(Trial Tr., ECF No. 334 at PageID 6675:16-24 (referring to Exhibit 4).) Although Valero Energy Company's business is energy, and not veteran services or political activism, the State's agents use a sign's non-commercial content to determine if the content concerns on-premises activity. But even if the business's name is displayed, aligning itself with the content on the sign, the State may still find the content does not convey on-premises-related activity. Bible testified that on-premises activity should "be a message that would could legitimately say would build business," appearing to require that the content must serve a commercial purpose. Thus, the Court finds that adding a provision that non-commercial signs may be permitted wherever commercial signs are permitted would likely be as restrictive as the current Billboard Act provisions, because the constitutional issue here arises from the distinction between on-premises, non-commercial speech and off-premises, non-commercial speech.

7. Minimum Distance Requirements

Seventh, the State argues that Thomas's minimum distance requirements for all signs fails for the same reasons his 500-foot distance requirement failed. (Id. at PageID 6804.) For the same reasons discussed above, the Court finds that a distance/spacing requirement

does constitute a less restrictive alternative to the on-premises/off-premises distinction.

8. Restricting Presentation Characteristics

Eighth, the State contends that Thomas "lacks standing to challenge" regulations pertaining to the size or other presentation characteristics. (Id. at PageID 6804.) As discussed previously, Thomas has standing to challenge the Billboard Act's on-premises/off-premises distinction. It is unnecessary for Thomas to establish standing for his proposals of less restrictive means to the on-premises/off-premises distinction. The State then argues that, "even if this Court were to find that the different size and presentation regulations were in fact improper, that would not help Plaintiff because the regulations preclude his sign no matter what size it is or what it looks like." (Id. at PageID 6805.) The State, once again, is confused. Thomas is not challenging size- or presentation-related regulations. He aims to propose a less restrictive alternative to the challenged on-premises/off-premises distinction that will also advance the State's interests. For example, an alternative regulation may require all signs, regardless of content, to be a particular size, use a particular font (or a set of fonts), be limited to a particular colors, face a particular direction, or stand at a particular height, etc. The Court finds that there are various content-neutral, presentation-related regulations that would be less restrictive than the Billboard Act's on-premises/off-premises distinction. These presentation-related regulations would also advance the State's interests.

Signs could be required to be within the driver's zone of vision, thus reducing distracted driving. A regulation could also require that signs be placed and sized in such a manner as to have less of an impact on aesthetics. The Court, therefore, finds that presentation-related regulations could constitute an effective, less restrictive alternative.

Having found multiple effective, less restrictive means that would further the State's compelling interests, the Court finds the Billboard Act is not the least restrictive means to further the State's allegedly compelling interests.

In sum, the Court finds that even if the State's interests were compelling, the Billboard Act's exemption and exception provisions are not narrowly tailored to achieve their purpose because they are underinclusive and do not constitute the least restrictive means available.

IV. CONCLUSION

For the reasons stated above, the Court finds the Billboard Act is an unconstitutional, content-based regulation of speech.[12]

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[12] The Court notes that if it were clear from the face of the statute that the Tennessee legislature would have enacted the Billboard Act with the unconstitutional on-premises/off-premises distinction omitted, the Court could sever the unconstitutional provisions while the Billboard Act's constitutional provisions stay in effect. See Thomas v. Schroer, 116 F. Supp. 3d 869, 877 (W.D. Tenn. 2015) (quoting Memphis Planned Parenthood, 175 F.3d at 466

IT IS SO ORDERED, this 31st day of March, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

(quoting State v. Harmon, 882 S.W.2d 352, 355 (Tenn. 1994)). The Court, however, is unpersuaded that the Billboard Act, as written, is severable in this manner. See id.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-6238

[Filed November 6, 2019]

WILLIAM HAROLD THOMAS, JR.,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CLAY BRIGHT, COMMISSIONER OF TENNESSEE DEPARTMENT OF TRANSPORTATION,	)
	)
Defendant-Appellant.	)
	)

O R D E R

BEFORE: COLE, Chief Judges; BATCHELDER and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX H

23 U.S.C. § 131.Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their

message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located,

(3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act.

Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

* * *

Tenn. Code Ann. § 54-21-103 (2017)

§ 54-21-103. Restrictions on outdoor advertising on interstate and primary highways.

No outdoor advertising shall be erected or maintained within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems in this state except the following:

(1) Directional or other official signs and notices including, but not limited to, signs and notices pertaining to natural wonders, scenic and historical attractions that are authorized or required by law;

(2) Signs, displays and devices advertising the sale or lease of property on which they are located;

(3) Signs, displays and devices advertising activities conducted on the property on which they are located;

(4) Signs, displays and devices located in areas that are zoned industrial or commercial under authority of law and whose size, lighting and spacing are consistent with customary use as determined by agreement between the state and the secretary of transportation of the United States; and

(5) Signs, displays and devices located in unzoned commercial or industrial areas as may be determined by agreement between the state and the secretary of transportation of the United States and subject to regulations promulgated by the commissioner.

Tenn. Code Ann. § 54-21-104 (2018)

§ 54-21-104. Permits and tags -- Fees.

(a) Unless otherwise provided in this chapter, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used, or maintained, any outdoor advertising within six hundred sixty feet (660') of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems without first obtaining from the commissioner a permit and tag.

* * *

Tenn. Code Ann. § 54-21-107 (2018)

§ 54-21-107. Exemptions.

(a) The following outdoor advertising are exempt from § 54-21-104:

(1) Those advertising activities conducted on the property on which they are located;

(2) Those advertising the sale or lease of property on which they are located; and

(3) Those that are official as established under authority of any statute or regulation promulgated with respect to the outdoor advertising.

(b) Any advertising structure existing along the parkway system by and for the sole benefit of an educational, religious or charitable organization shall be exempt from the payment of fees for permits or tags under § 54-21-104.

Tenn. Comp. R. & Regs 1680-2-3-.03 Criteria for the Erection and Control of Outdoor Advertising.

(1) Restrictions on Outdoor Advertising adjacent to Interstate and Primary Highways:

(a) Outdoor Advertising erected or maintained within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way are subject to the following restrictions:

1. Zoning:

Outdoor Advertising must be located in areas zoned for commercial or industrial use or in areas which qualify for unzoned commercial or industrial use. (See Definition 1680-2-3-.02, Paragraph 27)

(i) The following types of advertising signs are not restricted by the zoning criteria:

(I) Directional and other official signs and notices including, but not limited to natural wonders, scenic, and historic attractions, which are authorized or required by law.

(II) Signs, displays, and devices advertising the sale or lease of property on which they are located.

(III) Signs, displays, and devices advertising activities conducted on the property on which they are located. (See Rule 1680-2-3-.06 for detailed description of an on-premise sign)

* * *

Tenn. Comp. R. & Regs 1680-2-3-.06 On-premise Signs.

(1) General

Signs advertising the sale or lease of the property on which they are located and signs advertising activities conducted on the property upon which they are located are called "on-premise" signs. These are not required to be permitted as discussed in §1680-2-3-.03, 5. and 6., but are subject to the criteria listed below when determining whether a sign is an on-premise sign.

(2) Characteristics of an On-Premise Sign

A sign will be considered to be an on-premise sign if it meets the following requirements.

(a) Premise - The sign must be located on the same premises as the activity or property advertised.

(b) Purpose - The sign 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.

(3) Premises Test

The following criteria shall be used in determining whether a device is located on the same premises as the activity or property advertised:

(a) The premises on which an activity is conducted is determined by physical facts rather than property lines. Generally, it is defined as the land occupied by the buildings or other physical uses essential to the

activity including such areas as are arranged and designed to be used in connection with such buildings or uses.

(b) The following will not be considered to be a part of the premises on which the activity is conducted and any signs located on such land will be considered "off-premise" advertising.

1. Any land which is not used as an integral part of the principle activity. This would include but is not limited to, land which is separated from the activity, by a roadway, highway, or other obstructions and not used by the activity and extensive undeveloped highway frontage contiguous to the land actually used by a commercial facility even though it might be under the same ownership.

2. Any land which is used for, or devoted to, a separate purpose unrelated to the advertised activity. For example, land adjacent to or adjoining a service station, but devoted to raising of crops, residence, or farmstead uses or other than commercial or industrial uses having no relationship to the service station activity would not be part of the premises of the service station, even though under the same ownership.

3. Any land which is:

(i) at some distance from the principle activity, and

(ii) in closer proximity to the highway than the principle activity, and

(iii) developed or used only in the area of the sign site or between the sign site and the principle activity, and

(iv) occupied solely by structures or uses which are only incidental to the principle activity, and which serve no reasonable or integrated purpose related to the activity other than to attempt to qualify the land for signing purposes. Generally, these will be facilities such as picnic, playground, or camping areas, dog kennels, golf driving ranges, skeet ranges, common or private roadways or easements, walking paths, fences, and sign maintenance sheds.

(c) Narrow Strips

Where the sign site is located at or near the end of a narrow strip contiguous to the advertised activity, the sign site shall not be considered part of the premises on which the activity being advertised is conducted. A narrow strip shall include any configurations of land which is such that it cannot be put to any reasonable use related to the activity other than for signing purposes.

In no event shall a sign site be considered part of the premises on which the advertised activity is conducted if it is located upon a narrow strip of land:

1. Which is non-building land, such as swamp land, marsh land, or other wet land, or

2. Which is a common or private roadway, or

3. Held by easement or other lesser interest than the premises where the advertised activity is located.

Note: On-premise advertising may extend to fifty (50) feet from the principle activity as set forth above unless the area extends across a roadway.

(4) Purpose Test

The following criteria shall be used for determining whether a sign has as its purpose (1) the identification of the activity located on the premises or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the business of outdoor advertising.

(a) General

1. Any sign which consists solely of the name of the establishment is an on-premise sign.

2. A sign which identifies the establishment's principle or accessory product or services offered on the premises is an on-premise sign.

3. An example of an accessory product would be a brand of tires offered for sale at a service station.

(b) Business of Outdoor Advertising

1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle activity, it shall be considered the business of outdoor advertising and not an on-premise sign. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.

2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not

conducted on the premises, is not an on-premise sign. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating "Skeet Range Here," or "Dog Kennels Here." The on-premise activity would only be the skeet range or dog kennels.

(c) Sale or Lease Signs

A sale or lease sign which also advertises any product or service not located upon and related to the business of selling or leasing the land on which the sign is located is not an on-premise sign. An example of this would be a typical billboard which states "THIS PROPERTY FOR SALE---SMITHS MOTEL; 500 ROOMS, AIR CONDITIONED, TURN RIGHT 3 BLOCKS AT MA IN STREET."