Case No. 17-6238

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR.

Plaintiff/Appellee,

vs.

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

Defendant/Appellant.

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

BRIEF *AMICUS CURIAE* OF THE GOLDWATER INSTITUTE SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Goldwater Institute, a nonprofit corporation organized under the laws of Arizona, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Rule 29(a) Statement

Counsel for all parties received timely notice of the intent to file the brief and consented in writing to its filing. Therefore, pursuant to Federal Rule of Appellate Procedure 29(a)(2), a motion for leave to file is not necessary.

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Interest of *Amicus Curiae*

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

GI devotes substantial resources to defending the vital constitutional principle of freedom of speech. Relevant here, GI attorneys successfully represented plaintiffs challenging speech bans in *Reed v. Purcell*, No. CV10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), and *Wickberg v. Owens*, No. 3:10-cv-08177-JAT (D. Ariz. filed Sep. 20, 2010; resolved Apr. 12, 2011). GI has also litigated and won important victories for other aspects of freedom of speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012), *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), and has appeared frequently as *amicus curiae* in federal courts in free speech cases. *See, e.g.*, *Janus v. AFSCME* (U.S. Supreme Ct. No. 16-1466, pending); *Minnesota Voters Alliance v. Mansky* (U.S. Supreme Ct. No. 16-1435, pending); *Contest Promotions, LLC v. City and County of San Francisco* (U.S.

Supreme Ct. No. 17-1152, pending); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert denied*, 136 S. Ct. 480 (2015).

GI's policy paper, *Heed* Reed,[1] has garnered much attention in Arizona and beyond. GI has litigated to protect First Amendment rights against city sign-code restrictions like the ones at issue here. *Covers Plus, et al. v. City of Chandler*, No. CV2016-014097, Ariz. Super. Ct. (filed Aug. 15, 2016; resolved Sep. 12, 2017)[2]; *Shearer, et al. v. City of Scottsdale*, No. 2:16-cv-04337-SPL, D. Ariz. (filed Oct. 5, 2016; resolved Aug. 1, 2017). The questions in this case involving distinctions between offsite and onsite, or commercial versus noncommercial signs, were also center stage in those cases.

Amicus believes its litigation experience and policy expertise will aid this Court in consideration of this case. Counsel for *amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

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[1] Jared Blanchard & Adi Dynar, *Heed* Reed: *Goldwater Institute's Guideposts for Amending City Sign Codes*, goo.gl/dY1Y4a.

[2] goo.gl/nrYATS.

Summary of Argument

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court held that if an enforcement officer must "read the sign" to determine if it is permitted or prohibited, then the sign-code provision is "content based on its face" and presumptively invalid. *Id.* at 2226–27. In Tennessee, an enforcement officer must go further. She must (1) read the sign, (2) investigate both the "primary" and "incidental" activities conducted on the premises, and (3) investigate property ownership in the vicinity of the sign, to determine whether a particular billboard is freely allowed, permitted, or banned. This is because the Tennessee Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code §§ 54-21-101–123, draws a commercial–noncommercial, onsite–offsite distinction and further subcategorizes onsite signs into those relating to the primary or incidental activity conducted there. *See* Tenn. Code §§ 54-21-103, -104, -107. Each of these distinctions the Billboard Act draws offends the First and Fourteenth Amendments.

This Court should affirm the decision below because the questions presented here truly get no other answer: the Billboard Act offends the First and Fourteenth Amendments because it draws distinctions based on a sign's content, and none of the purported governmental interests offered by Tennessee come anywhere close to meeting the applicable strict scrutiny test.

Argument

In *Reed*, the Supreme Court made clear what should have been obvious: any restriction on speech triggered by the *content* of that speech is by definition a content-based speech restriction, and therefore presumptively invalid under the First Amendment. The conclusion by the court below, that the Billboard Act is "an unconstitutional, content-based regulation of speech," *Thomas v. Schroer*, 248 F. Supp. 3d 868, 871 (W.D. Tenn. 2017), is therefore inevitable, given that the Billboard Act imposes different rules on signs based on their content: treating them differently if they communicate commercial or noncommercial messages, and whether those messages relate to onsite or offsite activity, and whether that activity is "primary" or "incidental." The Billboard Act fails on step one of the *Reed* test: it is content-based on its face and therefore must meet strict scrutiny.

I. *Reed*'s step one resolves this case.

The commercial–noncommercial speech distinction, as well as the onsite–offsite and primary–incidental activity distinctions involved here, have proven impossible to administer, given that speech cannot be cleanly categorized as relating to commercial matters or not. *See* Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1230–36 (2004). Efforts to do so end by chilling speech in a manner that has been described as "abhorrent." *Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235,

1247 (11th Cir. 2015). The results of commercial speech cases have often been inconstant and led to an unintelligible doctrine whereby, for instance, the Yellow Pages are *not* commercial speech, despite the fact that they consist entirely of commercial advertisements, *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 956–65 (9th Cir. 2012)—whereas a political protest by a corporation that does not take the form of an advertisement *is* commercial speech. *See, e.g.*, *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 411–13 (D.C. Cir. 2012); *Kasky v. Nike, Inc.*, 45 P.3d 243, 27 Cal. 4th 939, 960–69 (Cal. 2002), *cert. dismissed sub nom.*, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003)

Reed provides a plain resolution to this problem, and this Court should adhere to its simple, bright-line rule: If an enforcement officer must "read the sign" to determine if it is permitted or prohibited, then the provision is "content based on its face" and presumptively invalid. *Reed*, 135 S. Ct. 2226–27.

Tennessee, instead, offers a tortured reading of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), to propose an inadministrable—and unconstitutional—rule that will continue to allow Tennessee to impose different rules on signs based on what they say.

A recent decision by the Texas Court of Appeals is a good example: the Texas Highway Beautification Act drew a distinction between commercial and noncommercial signs, onsite and offsite signs, and speech related to primary or incidental

onsite versus offsite activities, just as in this case. In *Auspro Enterprises, LP v. Texas Department of Transportation*, 506 S.W.3d 688, 699 (Tex. App. 2016),[3] the court observed: "In *Reed*'s wake, our principal issue here is not *whether* the Texas Highway Beautification Act's outdoor-advertising regulations violate the First Amendment, but *to what extent*." *Id.* at 691 (italicized). The court held two subchapters of the Act to be unconstitutional content-based restrictions on speech. *Id.* at 707.

The decision below answered the same question: "to what extent" is Tennessee's Billboard Act unconstitutional. The answer it gave—an answer this Court should affirm because it is the only possible answer to the question—was that the Billboard Act is unconstitutional in its entirety.

The Texas court found it difficult to reconcile *Metromedia* with *Reed*. Giving controlling weight to *Metromedia*, it said, "would present the risk of substituting one set of constitutional problems for another." 506 S.W.3d at 706. This statement is unsurprising. Categorizing speech as "commercial" or "noncommercial" in order to impose different constitutional standards on that speech (or on restrictions of that speech) is *itself* a content-based speech restriction, because it requires courts to read

[3] On April 6, 2018, the Texas Supreme Court granted review and dismissed the case as moot because the Texas Legislature overhauled the Texas Highway Beautification Act. The dismissal, therefore, was not because of its disagreement with the reasoning or conclusion reached by the court below. *Texas Dep't of Transp. v. Auspro Enter., LP*, No. 17-0041 (Tex. Supreme Ct. Apr. 6, 2018), *available at* goo.gl/MTodx3.

the content of the message being conveyed. Justice Brennan warned of just that in his concurrence in *Metromedia*: giving a code enforcement officer discretion to decide whether speech is commercial or noncommercial, he wrote, threatens "noncommercial speech in the guise of regulating commercial speech." 453 U.S. at 536–39 (Brennan, J., concurring).

Metromedia's five separate opinions never coalesced or converged on any single rationale. Thus, long before *Reed*, that case had been eroded to the point of unworkability and has been viewed as "ha[ving] little precedential effect." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1047 (3d Cir. 1994). *Reed* clarifies and makes plain the considerable confusion fomented under *Metromedia*.

Even if *Metromedia* remains relevant, the *Metromedia* plurality's two rationales[4] do not even come into play under *Reed*'s step-one analysis. The "crucial first step" for this Court is to focus exclusively on "determining whether the law is *content neutral on its face*." *Reed*, 135 S. Ct. at 2228 (italicized). If it is not—if the law imposes different rules on signs, or apportions different punishments for violating the rule, or in any way differentiates between signs based on what those signs com-

[4] *Metromedia* plurality's first rationale is that "a statute that allowed *any* commercial speech could not prohibit *any* non-commercial speech," and its second rationale is that "distinctions within the category of non-commercial speech must be supported by a compelling state interest." *Rappa*, 18 F.3d at 1056.

municate—then that law is strictly scrutinized "*regardless* of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* (cleaned up; italicized). Under this analysis, as discussed below, the Billboard Act flunks on step one, which makes it unnecessary to analyze the Act under step two.

II. The Billboard Act fails under *Reed*'s step one.

A. Statutory framework and decision below

As relevant here, signs "advertising activities conducted on the property on which they are located" are exempt from the six-hundred-sixty feet setback and permit-and-tag requirements of the Billboard Act. Tenn Code. §§ 54-21-103(3), 54-21-107(1). And signs "advertising the sale or lease of property on which they are located" are also exempt from the permit-and-tag requirement of the Act. *Id.* § 54-21-107(2). Both of these exemptions create onsite–offsite and commercial–noncommercial[5] distinctions that are impossible to justify under any reading of the First Amendment.

[5] The Billboard Act does not define "commercial" or "noncommercial." *See* Tenn. Code § 54-21-102 (definition section). *Central Hudson* defined speech that "propos[es] a commercial transaction" or "expression related solely to the economic interests of the speaker and its audience" as "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–62 (1980). The court below, relying on *Bolger* and *National Endowment*, defined it as: (1) advertisements; (2) references to a specific product or service; and (3) speech with an economic motivation. 248 F. Supp. 3d at 877 (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66–67 (1983); *National Endowment for the Arts v. Finley*, 524

In addition, the rules issued by the Tennessee Department of Transportation ("TDOT") create a third, equally untenable, category of signs—signs relating to on-site *primary* activities and onsite *incidental* activities.[6] The rules give the example of "a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum." *Thomas*, 248 F. Supp. 3d at 873. Because the cigarettes or chewing gum are "incidentally sold in a vending machine on the property," TDOT does not consider these an "on-premise sign," but instead an "outdoor advertising" sign, to which the setback and permit requirements apply. *Id.* There are thus three distinctions relevant here:

(1) onsite versus offsite,

(2) within the category of onsite signs, there is a distinction between signs directing attention to the primary activity conducted on site, and those that direct attention to incidental activity conducted on site, and

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U.S. 569, 601 (1998)). *Thomas*, 248 F. Supp. 3d at 877. This definition of commercial speech—like all such definitions—is problematic, since it is content-based. This is particularly true of the third element, because "a great deal of vital expression" "results from an economic motive." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

[6] TDOT has issued rules explaining how to enforce the Billboard Act. The decision below discusses those rules. *Thomas*, 248 F. Supp. 3d at 873–74. As written, the primary or incidental *activity* conducted onsite or offsite need not be commercial. But the signs themselves are thought of as displaying either a commercial or a non-commercial message relating to that activity. The signs are permitted or prohibited depending on whether the *message* is commercial or noncommercial.

(3) a distinction between commercial and noncommercial messages, and within that distinction, also one between commercial messages about the sale or lease of the property on which it is located and all other commercial messages.

An overview of the Billboard Act, thus, looks like this:

<table>
<tr><th>Table 1</th><th>Commercial message, sale/lease</th><th>Commercial message, other</th><th>Noncommercial message</th></tr>
<tr><td>Onsite primary activity</td><td>Freely allowed</td><td colspan="2">Permit/tag required</td></tr>
<tr><td>Onsite incidental activity</td><td colspan="3" rowspan="2">Setback required
Permit/tag required</td></tr>
<tr><td>Offsite activity</td></tr>
</table>

In other words, only a sign that displays a *commercial message* that calls the reader's attention to the sale or lease of property is freely allowed. Such a sign can be alongside the right-of-way, and no permit or tag is required. But if a billboard owner wishes to convey a *noncommercial* message about an onsite primary activity, or a commercial message other than the sale or lease of the property, she must obtain a permit and tag. Still, such a sign can be alongside the right-of-way. If the billboard owner wishes to communicate a message about offsite activity or an onsite *incidental* activity, she must obtain a permit and tag, *and* the sign must be set back 660 feet from the right-of-way. Tenn. Code. § 54-21-103.

The manner in which these provisions are enforced is the *source* of the chilling effect on speech, and an understanding of how an enforcement officer could use or abuse her discretion in categorizing signs is essential to understand why the blend of

commercial–noncommercial, onsite–offsite, and primary–incidental activity distinctions *on their face* differentiate between speech based on its content. The court below discussed that and reached the correct conclusion. *Thomas*, 248 F. Supp. 3d at 878–894.

B. The onsite–offsite distinction

Tenn. Code §§ 54-21-103(3), 54-21-107(1), create an onsite–offsite distinction: signs "advertising activities conducted on the property on which they are located" are exempt from the setback and permit-and-tag requirements. Consider how a Billboard Act enforcement officer will go about enforcing this onsite–offsite distinction with regard to the following hypothetical sign located on the property of a gun range:

> Ask Me How Guns Save Lives #ParklandStrong
>
> John Doe's Gun Range

At first blush this[7] might seem to advertise the gun range's activity conducted on its property. But to make that determination, the enforcement officer must "read the sign," "draw[ ] distinctions based on the message a speaker conveys," *Reed*, 135 S. Ct. at 2226–27, and inquire into the activity conducted on the property on which

[7] This hypothetical is drawn from the facts of *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. App. 2014), although that pre-*Reed* case did not address whether the challenged law was a content-based restriction.

the sign is located, to learn whether the sign is "advertising activities conducted on the property on which [the sign is] located." Tenn. Code § 54-21-107(1).

Thus the rules would be different depending on whether the sign is on the property of a bookstore, or a museum adjacent to the gun range, or on the property of a shopping center of which the gun range is only one of a dozen tenants. If the sign is classified as an *onsite* sign, it does not have to meet the setback and permit-and-tag requirement. But if it is classified as an *offsite* sign, then both of those requirements become applicable. Without reading the sign and conducting further investigation into property boundaries and what activities go on where, *with respect to the content of the information on the sign*, it is impossible to tell whether these signs fit the definition of *onsite* sign—and, consequently, what rules apply to the sign. In short, the law treats signs differently based on the message the sign communicates.

C. The commercial–noncommercial distinction

Only signs "advertising the sale or lease of property on which they are located" are exempted from the permit-and-tag requirement. Tenn. Code § 54-21-107(2). This means that any *commercial* message that does not involve conveying the message that a property is available for sale, or lease, or rent, *is* subject to the permit-and-tag requirement. And all *noncommercial* messages are subject to the permit-and-tag requirement.

But how does an enforcement officer determine whether the message is commercial or noncommercial? *Reed* concluded that if the enforcement officer must read the sign to make that determination, then the provision is content based *on its face*. *Reed*, 135 S. Ct. at 2228. A message like "Ask Me How Guns Save Lives #ParklandStrong" is easily classified as *noncommercial* on the property of a gun range, a bookstore, or any other property. It conveys the speaker's viewpoint on a current event and invites debate and discussion on the topic, without reference to *any* commercial transaction.

On the other hand, perhaps it *is* a commercial message—because a business may view this as an inducement for people to enter their store to voice approval or disapproval. The business owner could view this as good for business.[8] The sign could be viewed as "expression related solely to the economic interests of the speaker," and thus within the commercial-speech definition of *Central Hudson*. 447 U.S. at 561. In *Kasky*, 27 Cal. 4th 939, the California Supreme Court ruled that a

[8] Bookstores often do this. Parnassus Books in Nashville, for example, states on its blog that it seeks to work as "a vital part of Nashville's community through good times and bad"—a gathering place "that celebrates different points of view (and yes, in different I include the free and respectful exchange of political points of view that are not my own)." *Notes From Ann: Shelter*, Musing About Books, Nov. 15, 2016, goo.gl/cfuEqv.

political statement by a corporation defending itself from charges of improper business activities constituted commercial speech simply because it might encourage consumers to purchase the company's products.

Or the sign might relate to an *offsite* activity, say, if the bookstore owner or her family member also owns a gun range where they provide education and training about gun safety. Furthermore, even if this is classified as a commercial message—because it is not "advertising the sale or lease of property," Tenn. Code § 54-21-107(2)—the sign is subject to the permit-and-tag requirement. Thus, an enforcement officer is left with an absurd parsing situation where, if the "Property For Sale" message is combined with the #ParklandStrong message, then the sign is *not* subject to the permit-and-tag requirement, but if it just says #ParklandStrong, then it *is* subject to the requirement.

The Billboard Act is thus an attempt to straightjacket speakers into either one orthodox way of conveying a message (for example, the use of magic words "sale," "lease," or "rent"), or it forces speakers to convey a mixed message so that the permit-and-tag requirement will not apply. In other words, sign owners will be compelled to add non-material information to the sign or design it in such a way as to avoid the regulations. This works against the principal governmental interest the state claims to pursue—preventing driver distraction. Op. Br. at 9–10. And it chills speech by incentivizing arbitrary enforcement based on the implicit or assumed

value judgments of an enforcement officer who must classify each sign by reading it and conducting further investigations. Those are precisely the concerns that lead the Supreme Court to make absolutely clear in *Reed* that First Amendment strict scrutiny applies in any situation where the enforcement officer must inquire into the *content* of the message to determine what rules apply.

D. The primary activity versus incidental activity distinction

The Billboard Act's constitutional problems do not stop there. It has a third layer of distinctions that an enforcement officer must parse. She must decide whether the activity that a sign is communicating about is the primary activity that occurs at that location, or is only an incidental activity.

But although TDOT regulations purport to give instructive examples, *Thomas*, 248 F. Supp. 3d at 873–74, these rules are—like the commercial–noncommercial distinction itself, inherently subjective and lead to arbitrary outcomes. For example, a sign on the premises of a tailor shop that says "Veterans: Buy One Shirt Get One Free" cannot be classified as advertising *either* an incidental activity *or* the primary activity. If the discount is offered only to veterans, does the sign relate to the *primary* activity or merely an *incidental* activity of the tailor shop? *Discounts* are not the primary activity of any shop. Since discounts are therefore only incidental, the set-back and permit-and-tag requirements apply. But the sign offers a deal designed to get people to buy shirts—which is obviously the primary activity, which means only

the permit-and-tag requirement applies. What's more, if the sign said "Veterans: Buy One Shirt Get One Free. Store Closing on Veterans Day. Property for Sale," then *neither* the setback *nor* the permit-and-tag requirement applies.

But if the same shop displayed a sign that says "I ♥ Planned Parenthood," the rules become even more confusing. This could be interpreted as a commercial message, as in *Kasky*, *supra*, or as a noncommercial message that the store's owner feels strongly about, as in *Central Radio Co. v. City of Norfolk*, No. 2:12CV247, 2013 WL 11400866, at *5 (E.D. Va. May 15, 2013), *aff'd in part*, 811 F.3d 625 (4th Cir. 2016). The store owner may have wanted to raise money by renting out space on a billboard she owns to advertise a message she feels deeply about. Or she may think the statement will help her business by associating her products or services with a political viewpoint, or she may want to be personally identified with the message even if such association harms her business.

The point is that the risk of erroneous or arbitrary classification—and the resulting proscription of protected First Amendment speech—is high if an enforcement officer must not only read the sign, but also conduct further investigations as to the speaker's motive, in order to decide what rules apply. *This* is what Justice Brennan feared would happen under *Metromedia*.

There is nothing that comes close to an objective, bright-line rule to prevent an enforcement officer who has a personal disagreement with a particular business

or viewpoint from arbitrarily categorizing signs into one of the boxes in Table 1, *supra*, that make the sign subject to the setback, the permit-and-tag, or both, requirements. The consequences for the sign owner and speaker are chilling: not complying with the enforcement officer's whims is a "Class C misdemeanor," with *each day* constituting "a separate offense." Tenn. Code §§ 54-21-105(a)(3), 54-21-113.[9]

Justice Brennan voiced his "fear" that *Metromedia* would generate "ordinances providing the grist for future additions to" "a long line of cases" that have "consistently troubled th[e Supreme Court]," because that decision "creates discretion where none previously existed." 453 U.S. at 538 (Brennan, J., concurring). That is exactly what we see in the Act at issue here. Its onsite–offsite, commercial–noncommercial, primary–incidental activity distinctions, either alone or in tandem, make it impossible to conclude that the Billboard Act is content-neutral on its face.

All of these problems can be avoided by the application of ordinary property-law principles. If a bookstore owner, gun range owner, or owner of a strip of land adjacent to a highway right-of-way that already has a billboard wishes to rent out or provide for free her billboard for someone else's message, that is their right. So long as the speech is itself constitutionally protected, strict scrutiny should apply to any restriction of that sign that relates to the content of the message it conveys. *That* is

[9] Each count of a Class C misdemeanor conviction in Tennessee carries a sentence of not greater than thirty days' imprisonment, or a fine not exceeding $50, or both. Tenn. Code § 40-35-111(e)(3).

what a truly content-neutral provision looks like—it leaves people free to convey their own message (commercial or noncommercial) or someone else's messages.

The Supreme Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), confirms the continued validity of the property-rights approach, which many state courts have adopted. In *Fiesta Mall Venture v. Mecham Recall Committee*, 767 P.2d 719 (Ariz. App. 1989) (collecting cases), for example, the court followed that approach to conclude that a mall owner has the right to exclude a recall committee from soliciting signatures on private property. The converse is also true: nothing *precludes* such an owner from opening up her private property for someone else's speech. That rule also readily resolves the onsite–offsite issue presented here.

III. The Billboard Act fails to serve any of Tennessee's asserted interests, and in fact works against those interests.

Because the Billboard Act restricts speech, the state has the burden of justifying it. But the lack of nexus between its purported interests and the manner in which the Billboard Act regulates signs only underscores the flaws in Tennessee's position.

Take its interests in distraction-free driving to maintain public safety, esthetics, and effective communication. Op. Br. at 9–12. The absence of billboards can make driving *less* safe, because without billboards, motorists must often guess which exit to take for the amenities they seek. And a requirement which precludes a number of billboards leading up to a particular exit may also make driving less safe because

motorists may undertake dangerous maneuvers of multiple lane-changes or braking without warning to take a desired exit.

On the other hand, billboards can also contribute to driver alertness by breaking the monotony of driving without variety in visual stimulus. States routinely use their own billboards to break the monotony of cross-country driving, and thus keep drivers alert. Messages such as "Pokemon Go is a No-Go When Driving," "Luck of the Irish Won't Help if You Drive Drunk," "Trust the Force But Always Buckle Up," "Drive Hammered, Get Nailed," are common on many highways.[10]

Nor has the state shown that accidents on Tennessee's highways are attributable to billboards. In fact, billboards as a cause of vehicle crashes is conspicuously *absent* from the U.S. Department of Transportation's report to Congress, and the *lack* of traffic or directional signs/signals *is* identified as a factor in road accidents. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 059, NATIONAL MOTOR VEHICLE CRASH CAUSATION SURVEY: REPORT TO CONGRESS (July 2008).[11] If the Billboard Act's restrictions ever made any sense, they have outlived their usefulness, and may actually be contributing to making Tennessee's highways unsafe.

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10 *See* goo.gl/9XfzrM.

11 goo.gl/PXa16D.

Fortunately, *Reed*'s step-one analysis provides a straightforward solution. *Reed* provided a "commonsense" definition of "content based": "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." 135 S. Ct. at 2227.

Conclusion

This Court should affirm the decision below and strike down the Billboard Act as unconstitutional in its entirety.

Respectfully submitted this 11th day of April, 2018 by:

/s/ Timothy Sandefur
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,617 words.

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Dated: April 11, 2018

CERTIFICATE OF SERVICE

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