CASE NO. 20-5547

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L.D. MANAGEMENT COMPANY;
AMERICAN PRIDE IX, INC., dba Lion's Den Adult Superstore
Plaintiffs – Appellees

v.

JIM GRAY, in his official capacity as
Secretary Kentucky Transportation Cabinet
Defendant – Appellant

On Appeal from the United States District Court for the
Western District of Kentucky
(No. 3:18-cv-722)

BRIEF OF *AMICUS CURIAE* SCENIC KENTUCKY, INC. IN SUPPORT OF REVERSAL OF THE OPINION OF THE DISTRICT COURT

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INTRODUCTION

Amicus Curiae Scenic Kentucky, Inc. ("Scenic Kentucky") respectfully tenders this brief in support of the reversal of the *Order and Declaration, Memorandum Opinion,* and *Final Judgment* concurrently entered on April 24, 2020 by the U.S. District Court for the Western District of Kentucky in *L.D. Management Company et al. v Greg Thomas,* Civil Action No. 3:18-CV-722-JRW, finding and concluding that the Kentucky Billboard Act, KRS 177.830 through 177.890, and regulations promulgated by the Kentucky Transportation Cabinet thereunder at 603 KAR 10:002 and 603 KAR 10:010 are unconstitutional both facially and as applied.

STATEMENT OF COMPLIANCE WITH FRCP 29(a)(2)

FRCP 29 governs the filing and content of an *amicus* brief before this honorable Court, and requires, among other things, at FRAP 29(a)(2) that such a brief may be filed only by leave of court or if the brief states that all parties have consented to it filing. Counsel for *Amicus Curiae* Scenic Kentucky states that he has consulted with counsel for all parties, and that they have graciously consented to the filing of this *amicus* brief.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

FRAP 29(a)(4) requires that an amicus brief must contain a disclosure statement "like that required of the parties by Rule 26.1[.]" Pursuant to FRAP 29(a)(4) and consistent with the requirements of FRAP 26.1, Scenic Kentucky makes the following disclosure:

1. Scenic Kentucky is a non-profit corporation incorporated under the laws of the Commonwealth of Kentucky.

2. Scenic Kentucky is an affiliate of Scenic America, which is a national 501(c)(3) nonprofit organization, and which is not a publicly owned corporation.

3. Scenic America neither controls, is controlled by, or is under common control with Scenic Kentucky. Scenic America provides no funding for Scenic Kentucky, which is managed by a Board of Directors, independently of Scenic America.

4. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

FRAP 29(a)(4)(D) requires a concise statement of the identity of the *amicus curiae*, its interest in the case, and the source of its authority to file.

Scenic Kentucky, Inc. is a non-profit corporation incorporated under the laws of the Commonwealth of Kentucky, whose mission is to "preserve, protect, and enhance the scenic and aesthetic character of Kentucky's communities and roadsides" as well as to "help citizens and elected officials take charge of their communities' futures – how they want their commonwealth to look and how to achieve a vision." Scenic Kentucky "advocates for local, state and federal laws that help protect and enhance natural beauty and distinctive community character" including advocating to reduce billboard blight in Kentucky, keep Kentucky's highways and byways scenic, promote context sensitive highway solutions to protect communities and our landscapes from roads that destroy scenic beauty, and to ensure mitigation of the visual impact of telecommunication towers.

The specific interests that Scenic Kentucky has in this case are scenic and aesthetic interests in upholding the constitutionality of Kentucky's Billboard Act with respect to regulation of commercial outdoor advertising devices.

The filing of this *amicus curiae* brief on behalf of Scenic Kentucky was authorized by the President of the Board of Directors for that organization, Marlene Grissom, who is authorized to do so by the organization's by-laws. FRAP 29(a)(4)(E) requires, for parties other than the United States or its officer or agency or a state, a statement that indicates whether a party's counsel authored the brief in whole or in part, whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and identification of any person—other than the amicus curiae, its members, or its counsel— that contributed money that was intended to fund preparing or submitting the brief.

In accordance with FRAP 29(a)(4)(E), Scenic Kentucky states that this brief was authored by Thomas FitzGerald, and no funds were contributed by either Scenic Kentucky or by counsel, or by any other person or entity, specifically intended to fund the preparation or submittal of this brief. Mr. FitzGerald is employed by the Kentucky Resources Council, a nonprofit 501(c)(3) organization incorporated under the laws of the Commonwealth of Kentucky, and providing *pro bono* legal representation to individuals, organizations, and local governments on environmental and energy-related matters. The Board of Directors of the Kentucky Resources Council does

not determine whether representation will be provided in any individual case, nor does it exert any influence on the representation provided by staff.

SUMMARY OF ARGUMENT

The District Court erred in its analysis in the subject action. The speech displayed on the Appellees' advertising device in question here is purely commercial, and as such, the Appellant's regulation of the Appellees' commercial outdoor advertising device is subject to intermediate scrutiny as detailed in *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*, 447 U.S. 557 (1980) and its progeny, and not the strict scrutiny applied by the District Court. Under intermediate scrutiny, Kentucky's Billboard Act and corresponding regulations are constitutional and Appellant's regulation of the Appellees' commercial outdoor advertising device in accordance with those statutes and regulations is proper. Even if this Court finds that parts of the Kentucky Billboard Act are unconstitutional, the lower court erred in failing to sever the constitutional parts of the Act as required by Kentucky law.

ARGUMENT

I. The Lower Court Erred in Employing a Content-Based Analysis and Failed to Consider Binding Precedent and the Proper Standard for Analyzing Commercial Speech.

In applying the "content based" test, the District Court erroneously utilized a strict scrutiny standard intended to protect political and religious ideas from discrimination, rather than the test appropriate for measures such

as the Kentucky Billboard Act as applied to commercial outdoor advertising. This case does not involve "censorship," nor does it involve advancement or impingement on ideology. It involves the permissibility of a statutory framework for regulation of outdoor advertising devices that, in this instance, affects the location and anchoring of a sign acknowledged to be promoting a commercial business. The commercial speech test applies in this instance and, under the authority of *Metromedia v. City of San Diego*, 453 U.S. 155 (2015) and fully consonant with the distinctions drawn and reconfirmed in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), the Kentucky Billboard Act and regulations are constitutional.

The fundamental flaw in the lower court's analysis is that while it recognized the speech at issue to be commercial speech[1], it ignored the decades of First Amendment jurisprudence in the commercial speech regulation context, including case law specific to outdoor advertising devices. Instead the court relied on two inapposite cases involving noncommercial speech as support for applying an improper and irrelevant analysis of content, concluding that the regulations at issue are content-

[1] "That's the whole point of the billboard: Lion's Den wants to advertise its location to drivers, and its "Exit Now" message does just that." Memorandum Opinion, at 2.

based restrictions because the legality of the sign "depends on what the sign says." The lower court's analysis is wholly at odds with U.S. Supreme Court precedent considering government restrictions on commercial speech, including cases directly on point in the billboard advertising context. First, the lower court's reliance on *Reed v. Town of Gilbert* and *Thomas v. Bright* was inappropriate. While *Thomas v. Bright* assessed the constitutionality of Tennessee's Billboard Act and its implementing regulations, this Court made clear that *Thomas* was limited to the issue of whether the Act unconstitutionally infringed on *non-commercial* speech. *Thomas,* 937 F.3d 721, 729 (2019). The lower court's application of strict scrutiny and analysis of whether the restriction is content-neutral ignores the admonition in *Thomas* that the analysis there was confined solely to non-commercial speech. *Id.* The *Thomas* court stated that it did not consider the commercial speech doctrine, which indicates that the Court understood the commercial speech doctrine to be different than the test that was applied in *Thomas. Id*. Since the case at bar involves only commercial speech, *Thomas* is inapplicable and the lower court's reliance on it is misplaced.

This is further apparent, given that *Thomas* relied heavily on *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), another case which also involved non-commercial speech. *Reed* holds that content-based restrictions are

subject to strict scrutiny and content-neutral restrictions are subject to lesser scrutiny. *Reed, supra*, at 172. *Reed* did not address commercial speech and did not overrule Supreme Court precedent that less strict standards should be applied to commercial speech. *Reed, supra* at 178 (J. Breyer, concurring).

While the Supreme Court has applied strict scrutiny in a handful of recent commercial speech cases because the restrictions at issue in those cases *were* content-based, the Court has also declined to apply strict scrutiny in a number of cases where the restriction had a public purpose and was not intended to suppress differing viewpoints. *See, e.g. Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *cf. Reed*, 576 U.S. at 183-84 (J. Kagan, concurring) ("Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws . . . ." The concern with content-based restrictions is that regulating the subject matter of speech may have the intent or effect of favoring some ideas over others and "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." There is no ideology or discrimination of ideas in the case at bar that would justify employing a strict scrutiny analysis. Nor is the regulation at issue content-based, but

rather addresses location relative to public highways and compliance with safety standards regarding affixation of the device.

Further, the Supreme Court has recognized the difficulty in "applying the broad principles of the First Amendment to unique forms of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) (citing cases where the court addressed various forms of expression). The Supreme Court has recognized in dealing with various venues of expression in the First Amendment context that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Id.* at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). To that end, the court specifically addressed the appropriate standard for dealing with the law of billboard advertising in the First Amendment context in *Metromedia. Id.* at 501 ("We deal here with the law of billboards."). Thus, the Court's specific jurisprudence relating to a specific form of expression in any case trumps the cases relied upon by the lower court, which either do not address commercial speech or apply a strict scrutiny analysis to a content-based restriction in a forum far removed from the billboard regulation context.

This case involves a difference in regulatory requirements for signs advertising businesses that are located off-site. The restrictions have

nothing to do with the viewpoint of the sign or what is being advertised, but merely with whether the sign is located on the business premises or not. As Appellant's Brief outlines, it is the commercial speech test in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n* that applies and which has continued to be utilized by both this Court and the Supreme Court despite the holdings in *Reed*, *Sorrell*, and similar cases. 447 U.S. 557 (1980). *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) the seminal case addressing billboard advertising in the First Amendment context, employed this test, and the analysis in those two cases are the applicable precedent that should have been followed by the lower court. Instead, the lower court failed to mention either case at all.

In *Metromedia*, the opinion of Justice White, joined by Justices Stewart, Powell, and Marshall, explained that extension of First Amendment protections to commercial speech was a fairly recent development, and that "we … have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Id. at 506*, quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1976) at 456. Upholding the on-premise exception with respect to commercial

speech is one of those instances and applying a "content based" analysis as was done by the lower court to elevate judicial review of the regulation of commercial speech to strict scrutiny blurs this distinction recognized by both the U.S. Supreme Court and this Court.

II. The District Court Erred With Respect To The Severability Issue

The District Court erred as a matter of law in holding that the portion of the Kentucky Billboard Act that it found unconstitutional was not severable from the remaining provisions of Kentucky's law. In declaring the entire Kentucky Billboard Act to be unconstitutional as applied and facially, the lower court misapplied controlling law and ignored the clearly stated policy of the Kentucky General Assembly with respect to its enactments.

First, the lower court confused the jurisprudence governing the severability of provisions of *federal* legislation, with the distinct issue of the severability of provisions of laws passed by individual states. The "modern severability doctrine" upon which the lower court relied is wholly inapplicable here, as are those cases in which a federal court is tasked with determining whether a provision of a *federal* law is severable from the whole. *See, e.g. Murphy v. NCAA*, 138 S.Ct. 1461 (2018) (assessing whether parts of the federally enacted Professional and Amateur Sports Protection Act found to be unconstitutional can be severed from the

remainder of the Act). This is a case involving a challenge to state law, and the Kentucky General Assembly has explicitly indicated its intention with respect to how a reviewing court should resolve the question of severability when parts of a state law are found to be unconstitutional. *See, United States v. Ford*, 184 F.3d 566, 582-83 (6th Cir. 1999) (applying KRS 446.090 to determine whether a Kentucky gambling statute was separable from its unconstitutional provisions).

KRS 446.090 provides in full:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

KRS 446.090.

The lower court's analysis should have begun with a presumption that the remaining provisions of the Kentucky Billboard Act *not* at issue in the case before it *are* constitutional and should remain in force.

Guided by KRS 446.090, the Kentucky Billboard Act does not provide that its provisions are not severable. The question then becomes whether the

remaining parts of the Kentucky Billboard Act are so inseparable from the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part. In engaging in this analysis, the court is confined to the language of the statute unless the statute is determined to be ambiguous. *Louisville/Jefferson County Metro Gov't v. Metro Louisville Hospitality Coalition*, 297 S.W.3d 42, 46 (Ky App. 2009).

In this case, the remaining parts of the Kentucky Billboard Act are *not* "so inseparable," but in fact stand on their own and effectuate the purposes of the Act. The brief review of the Act provided in the Appellant's opening brief underscores that irrespective of whether an exemption for on-premise advertising remains a viable component of the Act, the broadly remedial purposes of the Act remain intact and in furtherance of legitimate governmental purposes.

Kentucky adopted the statutes and regulations governing advertising devices for the following purposes:

> (1) to provide for maximum visibility along interstate highways…; (2) to prevent unreasonable distraction of operators of motor vehicles; (3) to prevent confusion with regard to traffic lights, signs or signals or otherwise interfere with the effectiveness of traffic regulations; (4) to preserve and enhance the natural scenic beauty or the aesthetic features of the aforementioned interstate highways…; and (5) to promote maximum safety, comfort and well-being of the users of said highways.

KRS 177.860(1)-(5).

Kentucky enacted the statutes and regulations governing outdoor advertising devices in order to comply and be consistent with the requirements set out in the federal Highway Beautification Act, which is codified at 23 U.S.C. § 131(a)-(t).

The issue in this case are two regulations promulgated pursuant to KRS 177.860 that disallowed the location of the Lion's Den advertising device within the highway right-of-way because it was not on Lion's Den's premises but instead on leased property, was not securely fixed to the ground, was a mobile structure, and because Lion's Den had failed to obtain a permit. The decision in this case was limited to the question of the constitutionality of a distinction drawn in the state law and regulation that would ostensibly allow the device were it on the premises of Lion's Den because the regulations provide an exception for on-premises advertising.

The Kentucky Billboard Act contains numerous provisions that have nothing to do with this issue, and which are not so structured that they rest upon or are dependent on the validity of the provisions at issue in the case below. For example, KRS 177.863 regulates outdoor advertising devices outside the right of way and in urban or industrial zones but adjacent to a highway, imposing content-neutral restrictions on signage intended to

support the stated goals of the Act. Advertising devices in disrepair, not securely affixed to a substantial structure, or which advertise illegal activity are prohibited, the spacing and sizing of devices is regulated, and allowable lighting of devices is prescribed. KRS 177.867 governs the eminent domain power of the state to remove advertising devices and KRS 177.890 authorizes the commissioner of highways to enter into certain agreements with the U.S. Secretary of Transportation. None of these provisions are dependent upon or inseparable from restrictions on advertising devices in the highway right-of-way.

In addition, the Act goes about its purpose of ensuring safety and aesthetics by restricting advertising devices near highways. One way it does this is to restrict all devices within the 660-foot right of way. If the Court found that certain exceptions are unconstitutional, the restriction on location of devices in the right-of-way itself still accomplishes the purposes of the Act by ensuring that offending advertising devices are not placed within the highway right-of-way.

The Kentucky Court of Appeals recognized this principle in the context of a county public health ordinance in the case *Louisville/Jefferson County Metro Gov't v. Metro Louisville Hospitality Coalition*. 297 S.W.3d 42 (Ky App. 2009). That case involved a challenge to Louisville/Jefferson

County's "Smoke Free Law," which made a specific exemption for the Churchill Downs. *Id.* at 43. The circuit court found that the exemption was unconstitutional and struck the ordinance in its entirety. *Id.* On appeal, the reviewing court looked to the stated purpose of the ordinance, which was to promote public health, and concluded that removing the offending Churchill Downs exemption from the ordinance would still result in the remainder of the ordinance serving its purpose of promoting public health. *Id.* at 47. The court found that the remaining provisions of the ordinance were capable of standing on their own and being executed with the deletion of the unconstitutional provision. *Id.*

This is a case in which the offending portion of the Act is also an exemption and the statutes, without the exemption, still accomplish the purposes of the Act. As noted by this Court in *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), billboard laws are intended to regulate of a form of commercial communication. ("[W]e 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.") *Id.* at 726. There are numerous provisions of the Act that are unrelated to the exemption and which stand on their own, whether an exemption exists for advertising devices in the right-of-way or not. Over the Act's history,

certain provisions have been found to be unconstitutional and yet the Act still stands. *See, e.g. Flying J Travel Plaza v. Transportation Cabinet, Dep't of Highways,* 928 S.W.2d 344 (Ky. 1996)(Holding unconstitutional KRS 177.863(4)(a) and a Kentucky regulation prohibiting commercial speech but allowing time, temperature, and weather information on on-premise signage). The fact that provisions of the Act have been judicially severed by Kentucky courts and that the remainder of the Act continues to function and accomplish its purpose is further evidence that the provisions of the Act are not so interconnected that the unconstitutionality of one provision requires striking the entirety of the Act. Indeed, while holding KRS 177.863(4)(a) to be unconstitutional, the Supreme Court of Kentucky noted that "[a]n examination of KRS 177.863 reveals that the statute has much to recommend it. It indeed advances legitimate governmental interests." *Flying J Travel Plaza, supra,* at 349.[2]

[2] With respect to the lower court's holding that Kentucky had failed to provide proof of its interests, the statute itself provides the purposes of the Act. The Kentucky Court of Appeals, in upholding the Kentucky Billboard Act in the case of *Moore v. Ward,* 377 S.W. 881 (1964), rejected the proposition that the court should entertain evidence questioning the validity of the concerns that the Act sought to address. "Legislative motive, understanding or inducement are not on trial, and it is not the function of the courts to reappraise legislative reasons or to weigh evidence with respect thereto." *Moore v. Ward*, 377 S.W. 881, 883 (1964).

The District Court, while noting the existence of KRS 446.090, failed to apply the statute, and instead relied solely on this Court's decision in *Thomas v. Bright*. Yet this Court in *Thomas* did not independently assess the question of the severability of the on-premises/off-premises signage issue under Tennessee's billboard law, since as this Court noted, "[t]he 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." *Thomas*, at 729. Whether, in fact, the lower court in *Thomas* was correct that Tennessee law requires a statute to state whether it is intended to be severable or not, has no bearing on the intent of the Kentucky General Assembly with respect to how the remainder of a *Kentucky* statute should be treated if a portion thereof is determined to be unconstitutional.

III. Kentucky's Failure to Raise Severability as a Defense Below Does Not Prohibit This Court From Reviewing the Failure Of The Lower Court To Follow Kentucky Law Concerning Severance

The lower court was correct that the state did not raise the issue of severability as a defense to this lawsuit or in its summary judgment briefing.[3] That fact, however, does not excuse the lower court from

[3] Scenic Kentucky could find no indication that either party below raised or addressed the severability issue before the lower court, nor that the court, prior to

complying with Kentucky law when it *sua sponte* addressed severability. Kentucky law presumes statutes are constitutional and presumes that statutes are severable. KRS 446.090; *Delahanty v. Commonwealth*, 558 S.W.3d 489, 506 (Ky. App. 2018) ("any analysis regarding a statute's constitutionality must begin with one basic presumption: the statute is constitutional.")

The prohibition against raising an issue before the appellate court that was not raised as an issue in the trial court is intended to assure that the trial court has an opportunity to rule on the question since an appellate court is limited to ruling on decisions of a trial court. Where, as here, the trial court ruled on the issue *sua sponte* when neither party before it had briefed the issue, that doctrine does not apply. The District Court ruled on the issue of severability, and that issue is properly before this Court for review.

CONCLUSION

WHEREFORE, for the foregoing reasons the *Amicus Curiae* Scenic Kentucky respectfully requests this Court reverse the Order and Declaration and Final Judgment of the district court and enter Judgment in favor of the Appellant.

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entering summary judgment on that issue *sua sponte*, provided either party notice or an opportunity to brief the issue of severability as contemplated in FRCP 56.

Respectfully submitted,

/s/ *Thomas FitzGerald*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limit of FRAP 29(a)(5) in that it is less than one-half the maximum length authorized by the rules for the Appellant's principal brief.

I hereby certify also that this brief complies with the word limits of FRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by FRAP 32(f), this brief contains 3,783 words, well below half of the applicable type-volume limitation of 13,000 for a principal brief under FRAP 32.

/s/ *Thomas FitzGerald*
Thomas FitzGerald, Esq.
Kentucky Resources Council, Inc.

Dated: September 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September 2020, I electronically filed the foregoing brief of the *Amicus Curiae* Scenic Kentucky, Inc. through the CM/ECF system with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit. To the undersigned's knowledge all counsel of record are registered users with the CM/ECF system through which they will receive notice of the electronic filing.

/s/ *Thomas FitzGerald*
Thomas FitzGerald, Esq.
Kentucky Resources Council, Inc.