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 APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant respectfully requests this Court grant oral argument in this matter since this appeal presents an important issue regarding the constitutionality of Kentucky's statutory and regulatory scheme as such applies to commercial outdoor advertising devices.

STATEMENT OF JURISDICTION

The Appellees claim the Appellant violated the Appellees' constitutional rights as granted by the First and Fourteenth Amendments of the United States Constitution when the Appellant correctly applied KRS §§ 177.830 through 177.890[1], which is commonly referred to as Kentucky's "Billboard Act" (hereinafter "Kentucky's Billboard Act"), as well as the corresponding regulations, 603 KAR 10:002[2] and 603 KAR 10:010[3], to the Appellees' commercial outdoor advertising device. The Appellees also claim the aforementioned statutes and regulations are unconstitutional on their face and as applied.

Pursuant to 28 U.S.C. §1331, the United States District Court for the Western District of Kentucky (hereinafter "district court") had subject matter jurisdiction of this action. On April 24, 2020, the district court entered Final Judgment in favor of the Appellees. (Final Judgment, RE 39, Page ID # 551.) The Final Judgment effectuated the district court's rulings set out in the Order and Declaration similarly entered on April 24, 2020. (Order and Declaration, RE 38, Page ID # 543-550.) On May 21, 2020, the Appellant timely filed his notice appealing the Order and Declaration and Final Judgment of the district court. (Defendant's Notice of Appeal,

[1] Ky. Rev. Stat. Ann. §§ 177.830 – 177.890 (West 2020).
[2] 603 Ky. Admin. Regs. 10:002 (2020).
[3] 603 Ky. Admin. Regs. 10:010 (2020).

RE 47, Page ID # 579-580.) Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

This appeal concerns the district court's error in holding Kentucky's Billboard Act as well as 603 KAR 10:002 and 603 KAR 10:010 unconstitutional on their face and as applied to the Appellees' commercial outdoor advertising device.

This appeal also concerns the district court's error in permanently enjoining the Appellant from enforcing the aforementioned statutes and regulations against the Appellees' commercial outdoor advertising device.

STATEMENT OF THE CASE

I. Facts.

The Appellee, American Pride IX, Inc. dba Lion's Den Adult Superstore (hereinafter "Lion's Den"), operates a retail novelty store located just off of Interstate 65 in Upton, Kentucky. (Complaint, RE 1, Page ID # 3; Declaration of Pete Potenzi, RE 23-2, Page ID # 215-216.) The Appellee, L.D. Management Company (hereinafter "L.D. Management"), provides management services to Lion's Den. (Complaint, RE 1, Page ID # 2; Declaration of Pete Potenzi, RE 23-2, Page ID # 215-216.)

As part of the services provided by L.D. Management to Lion's Den, L.D. Management created a commercial outdoor advertising device to attract travelers

traveling on Interstate 65 to the Lion's Den retail store. (Complaint, RE 1, Page ID # 2-3; Declaration of Pete Potenzi, RE 23-2, Page ID # 215-216.) The commercial outdoor advertising device consists of a vinyl sign, where the sign displays the Lion's Den's logo and states "Lion's Den Adult Superstore Exit Now", riveted to the side of a trailer. (Complaint, RE 1, Page ID # 2-3; Declaration of Pete Potenzi, RE 23-2, Page ID # 215-216; Appellees' Responses to Interrogatories and Requests for Production of Documents, RE 21-3, Page ID # 132-133, 135-139; Photo of Advertising Device, RE 21-2, Page ID # 131.) The commercial outdoor advertising device is readily mobile since it is on wheels and can be moved by a semi-tractor in approximately 10 minutes. (Appellees' Responses to Interrogatories and Requests for Production of Documents, RE 21-3, Page ID # 135-139; Photo of Advertising Device, RE 21-2, Page ID # 131.)

L.D. Management placed the commercial outdoor advertising device on private property owned by Arlene and Scott Quinones-Neel. (Complaint, RE 1, Page ID # 2-3; Declaration of Pete Potenzi, RE 23-2, Page ID # 215-216; Appellees' Responses to Interrogatories and Requests for Production of Documents, RE 21-3, Page ID # 141.) On the Quinones-Neel property, the commercial outdoor advertising device is visible to travelers on the interstate. (*Id.*) Importantly, the commercial outdoor advertising device is within 660 feet of right-of-way for Interstate 65. (*Id.*) L.D. Management pays Arlene and Scott Quinones-Neel $300 monthly to place the

commercial outdoor advertising device on their property. (Appellees' Responses to Interrogatories and Requests for Production of Documents, RE 21-3, Page ID # 140.)

II. Procedural History.

L.D Management placed the commercial outdoor advertising device without notifying and/or seeking a permit from Kentucky Transportation Cabinet. (Appellees' Responses to Interrogatories and Requests for Production of Documents, RE 21-3, Page ID # 133-134.) Upon becoming aware of the Appellees' commercial outdoor advertising device, the Kentucky Transportation Cabinet notified the Appellees that the subject commercial outdoor advertising device was not properly permitted, could not be permitted since it was in violation of Kentucky's Billboard Act and 603 KAR 3:080[4], and needed to be removed. (Email of Mark McKenzie, RE 21-1, Page ID # 130).

The Appellees challenged Kentucky Transportation Cabinet's decision thereby triggering an administrative hearing. (Complaint, RE 1, Page ID # 7.) The hearing officer for the administrative hearing concluded that since the Appellees' commercial outdoor advertising device was mobile and not permanently affixed to the ground it failed to comply with Kentucky law. (Complaint, RE 1, Page ID # 7; Hearing Officer's Findings, RE 1-1, Page ID # 15-27.) The hearing officer also

[4] 603 Ky. Admin. Regs. 3:080. 603 KAR 3:080 set forth the regulations and standards for advertising devices before being superseded by 603 KAR 10:002; 603 KAR 10:010; and 603 KAR 10:021.

concluded he did not have subject matter jurisdiction over the constitutional challenges raised by the Appellees. (*Id.*) Based on these findings, the hearing officer recommended the administrative hearing be dismissed in favor of the Appellant. (*Id.*) The hearing officer's findings and recommendations were adopted in full and the administrative hearing was dismissed with prejudice against the Appellees. (Complaint, RE 1, Page ID # 7; Final Order, RE 1-1, Page ID # 12-14.)

On October 31, 2018, the Appellees filed the subject action. (Complaint, RE 1, Page ID # 1-28.) The Appellees claim the Appellant violated the Appellees' constitutional rights as granted by the First and Fourteenth Amendments of the United States Constitution when the Appellant applied Kentucky's Billboard Act as well as the corresponding regulations 603 KAR 10:002 and 603 KAR 10:010 to the Appellees' commercial outdoor advertising device. (*Id.*) The Appellees requested the district court determine the aforementioned statutes and regulations unconstitutional on their face and as applied to the Appellees, permanently enjoin the Appellant from enforcing said statutes and regulations against the Appellees, and reverse the decision reached in the administrative hearing. (*Id.*)

The parties filed cross-motions for summary judgment on all claims presented in the subject action. (Appellant's Motion for Summary Judgment, RE 21, Page ID # 107-162; Appellees' Motion for Summary Judgment, RE 23, Page ID # 188-367.) The district court granted summary judgment in favor of the Appellees on all claims.

(Order and Declaration, RE 38, Page ID # 543-550.) A Final Judgment was entered effectuating the district court's Order and Declaration. (Final Judgment, RE 39, Page ID # 551.) The Appellant timely filed his notice appealing the Order and Declaration and Final Judgment of the district court. (Defendant's Notice of Appeal, RE 47, Page ID # 579-580.)

III. Relevant Statues and Regulations.

In Kentucky, the erection and/or placement of advertising devices within 660 feet of the right-of-way of an interstate is generally prohibited. Ky. Rev. Stat. Ann. § 177.841(1) (West 2020). An advertising device is defined as "any billboard, sign, notice, poster, display or other device intended to attract the attention of operators of motor vehicles on the [interstate] highways, and shall include a structure erected or used in connection with the display of any device and all lighting or other attachments used in connection therewith." Ky. Rev. Stat. Ann. § 177.830(5) (West 2020).

There are exceptions to this general prohibition. Ky. Rev. Stat. Ann. § 177.860 (West 2020). To fall within the exceptions, an advertising device must comply with the reasonable standards issued by the Department of Highways[5]. *Id.* The standards differ based on whether the advertising device is static or electronic,

[5] The Department of Highways is one of four departments within the Kentucky Transportation Cabinet.

where 603 KAR 10:010 applies to static advertising devices and 603 KAR 10:021 covers electronic advertising devices. 603 Ky. Admin. Regs. 10:010 (2020); 603 Ky. Admin. Regs. 10:021 (2020). A static advertising device is an "advertising device that does not use electric or mechanical technology to change the message…" 603 Ky. Admin. Regs. 10:002(1)(30) (2020). An electronic advertising device "is changed by an electronic or mechanical process or remote control, including rotating cubes, rotating vertical triangular slats, turning lights on and off, glow cubes, light emitting diodes, cathode ray tubes, and florescent discharge or other similar technology." 603 Ky. Admin. Regs. 10:002(1)(11) (2020).

The criteria which must be satisfied for a static advertising device that sits within 660 feet of right-of-way to be deemed legal depends on whether the static advertising device is off-premise, non-conforming, or on-premise. 603 Ky. Admin. Regs. 10:010 *et seq* (2020). Relevant here, an off-premise advertising device is an advertising device that either contains a message relating to an activity or product that is foreign to the site on which the advertising device and message are located or was erected by a company or individual for the purpose of selling advertising messages for rental income. 603 Ky. Admin. Regs. 10:002(1)(25) (2020).

An off-premise static advertising device located within 660 feet of right-of-way cannot be erected or remain in place if it has not been permitted. 603 Ky. Admin. Regs. 10:010(7) (2020). An off-premise static advertising device that

satisfies all criteria shall be permitted and determined to not be in violation of the general prohibition against advertising devices located within 660 feet of right-of-way. 603 Ky. Admin. Regs. 10:010(2) (2020). The general conditions an off-premise static advertising device must satisfy for permitting are detailed in 603 Ky. Admin. Regs. 10:010(1) (2020)[6]. Strictly prohibited conditions are set out in 603 KAR 10:010(1)(4) (2020). Included in the strict prohibitions is any advertising device that is "not securely affixed to a substantial structure permanently attached to the ground." 603 Ky. Admin. Regs. 10:010(1)(4)(d) (2020).

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." Ky. Rev. Stat. Ann. § 177.860(1)-(5) (West 2020). Furthermore, Kentucky enacted the statutes and regulations governing outdoor advertising devices in order to comply and be consistent with the requirements set

[6] The general conditions contained within the regulation reference the size, spacing and illumination restrictions set out in Ky. Rev. Stat. Ann. § 177.863 (West 2020).

out in the federal Highway Beautification Act, which is codified at 23 U.S.C. § 131(a)-(t).

SUMMARY OF THE 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. As such, the Appellant's regulation of the Appellees' commercial outdoor advertising device in accordance with the Kentucky Billboard Act and corresponding regulations 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, 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 said statutes and regulations is proper.

STANDARD OF REVIEW

A district court's decision regarding the constitutionality of a State statute, including whether the statute satisfies the applicable level of scrutiny, is a legal question to be reviewed de novo. *Thomas v. Bright*, 937 F.3d 721, 728 (6th Cir. 2019). In reviewing a district court's grant of a permanent injunction, this Court reviews the district court's factual findings under a clearly erroneous standard, its legal conclusions de novo, and the scope of the injunctive relief under an abuse of

discretion standard. *Am. Civil Liberties Union of Ky. v. McCreary County, Ky.*, 607 F.3d 439, 445 (6th Cir. 2010).

ARGUMENT

I. The Speech On Appellees' Outdoor Advertisement Device Is Purely Commercial.

The logo and message displayed on the Appellees' advertisement device is commercial speech since it falls "within the core notion of commercial speech-speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983); (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). In situations where there is a question as to whether the speech does not fit what is considered the core notion of commercial speech, the Supreme Court detailed three characteristics, that if present in some combination would constitute the speech as commercial. *Bolger*, 463 U.S. 60, 66-67 (1983). The three characteristics include: 1) the speech is an advertisement of some form; 2) the speech refers to a specific product; and 3) the speaker of the speech has an economic motivation. *Id.*

In the subject action, the speech displayed on the Appellees' advertisement device fits within the core notion of commercial speech since it seeks a commercial transaction between the Appellees and travelers on Interstate 65. Moreover, the speech on the Appellees' advertising device contains all three characteristics of commercial speech as detailed in *Bolger*. First, the speech of the Appellee is an

advertisement since the Appellees admittedly installed it for the purpose of attracting travelers and informing them of the Appellees' retail store. Second, the speech references a specific product since it contains the logo and name of the Lion's Den. Finally, the speech has an economic motivation as it tells travelers to "exit now" in an effort to direct travelers to the retail store, which will lead to a commercial transaction. Consequently, the speech on the Appellees' outdoor advertisement device is solely commercial.

II. Commercial Speech is Subject To Intermediate Scrutiny.

The district court erred in applying strict scrutiny to the Appellant's regulation of the Appellees' commercial outdoor advertising device. The district court's application of strict scrutiny pursuant to the opinion issued by the Supreme Court in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and the opinion issued by this Court in *Thomas*, 937 F.3d 721 was misplaced. Importantly, the *Reed* and *Thomas* cases are not applicable to the subject action since *Reed* and *Thomas* concern the regulation of non-commercial speech and this action deals solely with the regulation of commercial speech. The Supreme Court has always held that lesser protection is afforded to commercial speech than other constitutional guaranteed forms of expression. *Central Hudson*, 447 U.S., at 562-563.

In *Reed*, a church and its pastor posted temporary, non-commercial signs in order to communicate the time and location of its weekly services. 576 U.S. 155.

The church was cited for violating the town's sign code restrictions. *Id.* The church filed suit against the town claiming the town's citation of the church's non-commercial signs in accordance with the town's sign code regulations violated their constitutional free speech rights. *Id.* The Supreme Court agreed with the church and determined the town's regulation of the church's non-commercial signs to be unconstitutional since the regulations were content based and could not survive strict scrutiny. *Id.*

Like *Reed*, *Thomas* dealt solely with non-commercial speech. Tellingly, this Court explicitly stated that it was not addressing or considering commercial speech. 937 F.3d at 729. Relying on *Reed*, this Court ruled Tennessee's regulation of non-commercial speech on billboards was content based and could not survive strict scrutiny. *Thomas*, 937 F.3d 721.

The Supreme Court clearly charged lower courts to engage in intermediate scrutiny when analyzing the validity of government regulations on commercial speech. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995). In the seminal Supreme Court case regarding commercial outdoor advertising device, the Supreme Court applied intermediate scrutiny pursuant to *Central Hudson* when it analyzed and determined San Diego's ordinances regulating outdoor display signs were constitutional as to commercial speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

There is no indication the Supreme Court changed its charge regarding the application of intermediate scrutiny to commercial speech cases before or in *Reed*, 576 U.S. 155. First, the majority opinion in *Reed* makes no mention of *Central Hudson*. *Id.* Next, the concurring opinion of Justice Breyer indicates the Court continues to apply less strict standards to the regulation of commercial speech. *Id.*, at 176. Finally, the Supreme Court, since issuing the *Reed* opinion in 2015, has continued to recognize *Central Hudson* and intermediate scrutiny as the appropriate standard for reviewing constitutional challenges to the regulation of commercial speech. In a 2017 trademark case, the Supreme Court noted a dispute between the parties regarding "whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in Central Hudson." *Matal v Tam*, 137 S. Ct. 1744, 1763-1764 (2017). The Supreme Court concluded it did not need to resolve this dispute between the parties since the disparagement clause addressed in *Matal* could not withstand *Central Hudson* review. *Id.* Also in 2017, the Supreme Court remanded a case so a determination could be made by the lower courts regarding whether the regulation at issue was a valid commercial speech regulation under *Central Hudson*. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

Furthermore, this Court recently applied *Central Hudson's* intermediate scrutiny to a constitutional challenge to Ohio's regulations which prohibited health

care practitioners and their agents from directly soliciting business from victims of motor vehicle accidents or crime until 30 days after the incident that resulted in the injury to the victim. *First Choice Chiropractic, LLC v. DeWine*, Nos. 19-4092/20-3038, 2020 WL 4696676 (6th Cir. Aug. 13, 2020). Also notable is the fact other lower federal courts continue to apply *Central Hudson* and intermediate scrutiny in cases concerning the constitutionality of the government's regulation of commercial outdoor advertising devices. See e.g., *Contest Promotions, LLC v. City & Cty. of S.F.*, 874 F.3d 597, 601 (9th Cir. 2017); and *GEFT Outdoor LLC v. Consol. City of Indianapolis and Cty. of Marion, Ind.*, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016).

It is well settled that lower courts should continue to follow Supreme Court precedent unless told otherwise by the Supreme Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). As such, Courts should apply intermediate scrutiny in cases involving the regulation of commercial speech. Since the Appellee's advertising device only contains commercial speech, the Appellant's regulation of such is subject to *Central Hudson's* intermediate scrutiny.

III. Kentucky's Regulation of the Appellees' Commercial Outdoor Advertising Device Is Constitutional.

Central Hudson sets out a four part test to determine whether the government's regulation of commercial speech is valid. 447 U.S. at 563-566. First, for commercial speech to be entitled to constitutional protection it must not involve an unlawful activity or be misleading. *Id.* In this action, the Appellant is not claiming

the Appellees' commercial outdoor advertising device promotes an illegal activity or misleads the public.

Since the initial hurdle is not in play here, then the remaining portions of the *Central Hudson* test, which the government must demonstrate, are as follows: 1) the government's interest in regulating the commercial speech is substantial; 2) the government's regulation directly advances the government's asserted interest; and 3) the government's regulation is not more excessive than necessary to serve the government's asserted interest. *Id.*

A. Kentucky's Interests in Regulating Commercial Outdoor Advertising Devices are Substantial.

The purposes enumerated by the Kentucky General Assembly for the implementation of Kentucky's Billboard Act and corresponding regulations are substantial. Specifically, Kentucky's Billboard Act and corresponding regulations were passed in order "(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." Ky. Rev. Stat. § 177.850. These enumerated purposes certainly detail traffic safety and aesthetics as substantial government interests in

regulating commercial outdoor advertising devices visible from the interstate or within 660 feet of right-of-way.

As stated above, the seminal Supreme Court case regarding commercial outdoor advertising devices is *Metromedia*, 453 U.S. 490 (1981). In *Metromedia*, the Supreme Court conclusively took judicial notice that traffic safety and aesthetics are substantial government interests in the regulation of commercial outdoor advertising devices. 453 U.S. at 507-508. And, that "it is far too late to contend otherwise with respect to either traffic safety or esthetics." *Id.*, at 508 (citing other cases supporting such determination). Accordingly, Kentucky's similar stated reasons for regulating commercial outdoor advertising devices are substantial.

B. Kentucky's Regulations Directly Advance Kentucky's Stated Interests.

Kentucky's regulation of commercial outdoor advertising devices by the Kentucky Billboard Act and 603 KAR 10:002 and 603 KAR 10:010 directly advance Kentucky's enumerated purposes of traffic safety and aesthetics. The Supreme Court requires the government seeking to sustain restrictions on commercial speech to demonstrate that the harms it recites are real and the restrictions imposed by the government will alleviate said harms to a material degree. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); (citing *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)). Importantly, however, the Supreme Court does not require the government to provide empirical evidence to show the

harms are real and the corresponding regulations alleviate said harms to a material degree. *Lorillard*, 533 U.S. at 556; (citing *Went For It, Inc.*, 515 U.S. at 632). Finally, the Supreme Court has allowed governments to justify speech restrictions on history, consensus and simple commonsense. *Id.*

In *Metromedia*, the Supreme Court analyzed whether the city of San Diego's ordinances, which prohibited ***all*** off-premise commercial advertising display signs, but allowed on-premise advertising signs and twelve other specifically enumerated types of signs, were constitutional under *Central Hudson*. 453 U.S. 490. The San Diego ordinances defined an off-premise advertising sign to include: any sign identifying a use, facility or service not located on the premises where the sign is located; any sign identifying a product not produced, sold or manufactured on the premises where the sign is located; and any sign that advertises something that is generally conducted, sold, manufactured, produced or offered somewhere different from the premises where the sign is located. *Id.*, at 493 [n. 1]. San Diego enacted these ordinances for the stated purposes of eliminating hazards to pedestrians and motorists and to preserve and improve the appearance of the city. *Id.*, at 493.

A plurality of the Supreme Court concluded San Diego's ordinances restricting commercial outdoor display signs directly advanced the government interests of traffic safety and esthetics. *Id.*, at 508-510. In addressing the stated goal of traffic safety, the Supreme Court concluded there was sufficient evidence set out

in accumulated, common-sense judgments of local lawmakers and many reviewing courts which found advertising devices as real and substantial hazards to traffic safety. *Id.*, at 509. Notably, the Supreme Court made this determination despite the fact the Court along with the lower courts found the record to be meager regarding the connection between advertising devices and said devices harm on traffic safety. *Id.*, at 508-509.

As for the stated interest of aesthetics, the Supreme Court found "it is not speculative to recognize that billboards [commercial outdoor advertising devices] by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Id.*, at 510. The Supreme Court recognized aesthetic judgments are subjective and defy objective standards in finding San Diego's ordinances were a valid means for limiting the known esthetic harm caused by commercial outdoor advertising devices. *Id.* Moreover, the Supreme Court did not find any evidence that San Diego's ordinances, which worked as a ban on off-premise commercial advertising signs, sought to suppress speech. *Id.*

This Court held that the government can satisfy its burden of showing its regulation of commercial outdoor advertising devices directly advances the government's substantial interests of traffic safety by doing nothing more than relying on the Supreme Court's findings in *Metromedia.* *Bench Billboard Co. v. City of Toledo*, 499 F. App'x 538, 544-545 (6th Cir. 2012). In *Bench Billboard*, this

Court performed a *Central Hudson* analysis of the City of Toledo's ordinances, which restricted the use of specific words on commercial advertising on bus benches in the city since the use of such words might mislead or distract traffic. 499 F. App'x 538. The party challenging the constitutionality of the City of Toledo's ordinances alleged the City of Toledo failed to provide sufficient evidence to show the City of Toledo's goal of traffic safety was advanced by the ordinances. *Id.*, at 544-545. This Court disagreed with the challenging parties' assertion. *Id.* Instead, this Court found the required showing by the City of Toledo had already been established by the Supreme Court's findings in *Metromedia*. *Id.*

This Court's ruling in *Bench Billboard* is directly on point to the subject action. And, while the *Bench Billboard* Opinion dealt only with the stated government interest of traffic safety, the Court's reliance on the Supreme Court's findings in *Metromedia* regarding the stated goal of aesthetics would receive equal treatment here. Accordingly, the Appellant's burden of demonstrating the enumerated goals of traffic safety and aesthetics have been met in the subject action, as required by *Central Hudson*.

C. Kentucky's Regulations Are Not More Excessive Than Necessary to Carry Out Kentucky's Stated Interests.

Kentucky's regulation of commercial outdoor advertising devices through the Kentucky Billboard Act and 603 KAR 10:002 and 603 KAR 10:010 are not more excessive than necessary to advance Kentucky's enumerated purposes of traffic

safety and aesthetics. The Supreme Court clarified this element of the test so that the government need not show the regulations to be the least restrictive means conceivable. *Lorillard*, 533 U.S. at 556; (citing *Greater New Orleans*, 527 U.S. at 188 (1999)). Instead, the case law requires a reasonable fit between the government's restrictions and stated goals. *Lorillard*, 533 U.S. at 556; see also *Went For It, Inc.*, 515 U.S. at 632.

In *Metromedia*, a plurality of the Supreme Court found there to be little controversy that San Diego's ordinances, which prohibit all off-premise advertising signs, are no more excessive than necessary to achieve the city's goals of safety and the appearance of the city. 453 U.S. at 508. This conclusion was based on the Supreme Court's decision to give deference to the governing body that enacted the ordinances. *Id.* The Supreme Court held that if San Diego had a sufficient basis for concluding off-premise commercial advertising signs were traffic hazards and unattractive, then its ordinances banning such signs were a reasonable means for accomplishing the city's goals. *Id.* Finally, the Supreme Court reasoned that San Diego's restrictions were not more restrictive than necessary because the ordinances allowed on-site commercial advertising and some other specifically exempted signage. *Id.*

This Court relied upon the findings and reasoning outlined in *Metromedia* to conclude the City of Toledo's ordinances were not more extensive than necessary to

serve the government's interest of traffic safety. *Bench Billboard*, 499 F. App'x at 545. Citing *Metromedia*, this Court concluded the restrictions imposed by the City of Toledo were reasonable and the Court would not overrule the judgment of the City of Toledo. *Id.*

The application of the Supreme Court's reasoning and rulings in *Metromedia* and followed by this Court in *Bench Billboard* shows the scope of the restrictions contained in Kentucky's Billboard Act and corresponding regulations on commercial outdoor advertising devices fit with the enumerated purposes laid out by the Kentucky General Assembly. If anything, the restrictions contained in Kentucky's Billboard Act and corresponding regulations concerning off-premise commercial outdoor advertising devices do not go as far in restricting commercial speech as those determined by the Supreme Court to be reasonable in *Metromedia*. In *Metromedia*, the ordinances deemed constitutional by the Supreme Court were an across the board ban on off-premise commercial signs. By comparison, Kentucky's Billboard Act and corresponding regulations allow off-premise commercial advertising devices that are visible or within 660 feet of the interstate as long as said devices fit the outlined criteria detailed in the regulations and are permitted. Therefore, Kentucky's Billboard Act and corresponding regulations satisfy the final part of intermediate scrutiny.

CONCLUSION

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

Respectfully submitted,

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ADDENDUM

DESIGNATION OF COURT DOCUMENTS

L.D. Management Co., et al. v. Jim Gray, as Secretary of the Kentucky Transportation Cabinet

Case No. 3:18-cv-722 (W.D. Ky.)

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499 Fed.Appx. 538
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

BENCH BILLBOARD COMPANY, Plaintiff–Appellant,
v.
CITY OF TOLEDO, Defendant–Appellee.

No. 11–3166.
|
Sept. 10, 2012.

Synopsis

Background: Owner of courtesy benches, that generated revenue by advertising on backs of it benches, filed § 1983 action alleging that city's ordinance governing bus stop courtesy benches violated its rights to freedom of speech, equal protection, and due process. Following grant of summary judgment in favor of plaintiff on its challenge to two provisions of ordinance, 690 F.Supp.2d 651, plaintiff moved for attorney fees and costs. The United States District Court for the Northern District of Ohio, James G. Carr, J., 759 F.Supp.2d 905, granted motion, but in reduced amount, and plaintiff appealed.

Holdings: The Court of Appeals, Helene N. White, Circuit Judge, held that:

city ordinance that prohibited use of the words "stop," "look," "drive-in," "danger," and other words which might mislead or distract traffic on courtesy benches located close to street did not violate free speech rights of owner of benches;

provision of ordinance which required that trash receptacles be affixed to courtesy benches located on city sidewalks and that area around benches be kept free of ice, snow, litter and debris, as content-neutral regulation that was narrowly tailored to

address city's legitimate interest in ensuring pedestrian safety and litter-free streets;

owner of courtesy benches was not similarly situated to news rack owners, for purposes of mounting equal protection challenge to ordinance;

rational basis exists for ordinance's differential treatment of bench owner, as for-profit company that generated revenue by advertising on backs of benches, and taxpayer-funded public transportation company that provided bus benches as courtesy to its riders; and

district court did not abuse its discretion in reducing attorney fees sought based, not just on plaintiff's partial success, but on fact that its attorney billed in quarter-hour increments.

Affirmed.

***541** On Appeal from the United States District Court for the Northern District of Ohio.

BEFORE: SILER, DAUGHTREY, and WHITE, Circuit Judges.

Opinion

HELENE N. WHITE, Circuit Judge.

****1** Plaintiff–Appellant Bench Billboard Company (BBC) appeals the district court's grant of summary judgment in favor of the City of Toledo on BBC's First and Fourteenth Amendment claims challenging provisions of an ordinance regulating "courtesy benches." BBC also appeals the district court's grant of attorneys' fees in an amount lower than requested by BBC. We **AFFIRM in part** and **REVERSE in part.**

I.

BBC installs "courtesy benches" that display advertisements on their back-rests on

public property adjacent to city streets, particularly at or near bus stops. For many years, the City of Toledo (the City) issued permits for the placement of these benches near bus stops and other rights of way. In 2007, the Toledo City Council enacted Ordinance 59–07 (Ordinance), which amended Chapter 719 of the Toledo Municipal Code (Chapter 719). The ordinance's "Summary and Background" section states:

> The Courtesy Benches are a form of advertising for the bus bench companies, which also provide a needed service for the citizens of Toledo. The current ordinance specifies the permitting and placement of these structures along with some general guidelines but has no language regarding the maintenance, sanitation, and conditions of the permit. It is necessary to add specific provisions to the code in order to better enforce this chapter of the code.

(Ordinance, R. 29–1, at 8.) The ordinance sets forth procedures for the application, issuance, and revocation of permits, and allows the City's Commissioner of Building Inspection and Code Enforcement ("Commissioner") to revoke a permit for a violation of Chapter 719 and various other reasons, including a decision by the Commissioner that the bench is "prejudicial to the interests of the general public."

The ordinance amended Toledo Municipal Code Section 719.08 to add requirements regarding the appearance and placement of the benches. Under Section 719.08(a),

> No bench shall carry any political advertising or advertising of cigarettes, beer or intoxicating liquor, nor shall any advertisement or sign on any such bench display the words, "STOP," "LOOK," "DRIVE–IN," "DANGER," or any other word or words which might mislead or distract traffic.

(*Id.* at 10.) Under Section 719.08(e),

> All bus benches at all locations shall maintain a trash receptacle affixed to the courtesy bench. The receptacle shall be capable of allowing water and other liquids to pass through and shall be no smaller than 10 gallons nor larger than 32 gallons. The permittee is responsible to see that the trash receptacle is emptied on an as needed basis and that the area ten feet in diameter around the bus bench is maintained free of litter and debris.

(*Id.* at 10–11.) Section 719.08(c) requires, in relevant part, that,

> Benches shall be kept at all times in a neat, clean and usable condition and ice, snow, litter and debris shall be removed ***542** from the benches and the vicinity thereof in such a manner that each bench shall be accessible at all times.

****2** (*Id.* at 10.)

BBC owns 299 courtesy benches in Toledo. In February 2007, the City wrote letters to BBC and Affordable Bench Advertising Co. (Affordable Bench), another owner of courtesy benches, advising them that bench permits would be regulated under the new ordinance. When BBC sought to renew permits for its benches the following month, the City informed BBC that its benches did not comply with the ordinance and that its permits would not be renewed. The letter also informed BBC that its benches would be "subjected to removal."

Affordable Bench was granted permits for 267 benches, even though some of their benches did not comply with the ordinance because they did not have trash receptacles affixed to them. The Toledo Regional Transit Authority (TARTA), a publicly-owned-and-operated bus service, also places covered shelters containing benches at a number of its bus stops. Those shelters do not contain advertising and are not regulated by Chapter 719.

BBC brought suit against the City, challenging several provisions of the ordinance as violative of BBC's Free Speech and Equal Protection rights under the First and Fourteenth Amendments of the United States Constitution, and bringing a state law claim for tortious interference with economic relationships. After BBC and the City filed cross-motions for summary judgment, the district court granted partial summary judgment for BBC, ruling that the City's prohibition on political speech violated the First Amendment, and that the Commissioner's power to revoke permits for benches deemed "prejudicial to the interest of the general public" was unconstitutionally vague. The district court found that both provisions were severable from the remainder of Chapter 719 and enjoined the City from enforcing those portions of the ordinance. On BBC's remaining claims, the district court granted summary judgment for the City, ruling that the ordinance's ban on the use of the words "stop," "look," "drive-in," and "danger," and its requirements that trash receptacles be affixed to benches and emptied when necessary, and that benches be cleared of ice, snow, litter, and debris, did not violate BBC's constitutional rights.

BBC then moved for an award of attorneys' fees under 42 U.S.C. § 1988(b), as the prevailing party in a 42 U.S.C. § 1983 action. The district court granted that motion, but awarded less than the amount requested by BBC. After the district court granted summary judgment for the City on BBC's remaining claims, BBC timely appealed.

II.

This Court reviews *de novo* a district court's grant of summary judgment. *ACLU of Ky. v. Grayson Cnty.*, 591 F.3d 837, 843 (6th Cir.2010). Summary judgment is proper where no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In reviewing a grant of summary judgment, this Court draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

A.

****3** BBC first argues that the district court erred in concluding that the ban on the use of the words "stop," "look," "drive-in," "danger," and other words that might ***543** mislead or distract traffic, did not violate BBC's First Amendment rights.

"Billboards and other visual signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected." *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir.2005). But unlike oral speech, such signs "take up space and may obstruct views, distract motorists ... and pose other problems that legitimately call for regulation." *Id.* (citing *City of Ladue v. Gilleo,* 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994)). The parties agree that the ordinance's ban on certain words on courtesy bench advertisements constitutes a content-based restriction on commercial speech, which is accorded less protection than other constitutionally guaranteed expression. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The Supreme Court has set out a four-part inquiry to determine whether such restrictions violate the First Amendment:

> At the outset, we must [(1)] determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether [(2)] the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [(3)] determine whether the regulation directly advances the governmental interest asserted, and [(4)] whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343. The City carries the burden of justifying the restriction it

seeks to impose. *Edenfield v. Fane,* 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (invalidating as unconstitutional a state rule prohibiting CPA's from engaging in direct, personal solicitation of potential clients). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770–71, 113 S.Ct. 1792.

The parties agree that the speech regulated is lawful and not misleading. BBC concedes that traffic safety is a recognized governmental interest, but argues that the City cannot establish a substantial governmental interest in traffic safety because "it has not regulated signage on and around its right of ways in a manner that would allow it to assert that the four words prohibited by Section 719.08(a) are more distracting than other signage and therefore unsafe." (BBC Br. at 14.) Further, BBC argues that the ordinance's failure to regulate advertisements on other structures on or abutting its sidewalks, or to regulate advertisements on courtesy benches that do not contain the prohibited words, renders the ordinance so underinclusive that it does not directly advance the City's stated interests.

****4** However, so long as the ordinance directly advances a government's substantial interests and is drawn narrowly, the fact that it is underinclusive does not render the interests insubstantial or the ordinance otherwise violative of the First Amendment. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 511, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (concluding that a ban on outdoor advertising signs directly advanced the stated objectives of traffic safety and aesthetics, and that fact was not altered because the ordinance exempted "on site" signs that are located at the business being advertised). As the Supreme Court noted in *Metromedia,* a city may believe that certain types of advertising ***544** "present[ ] a more acute problem" than other types of advertising, and may decide that in "limited instance [s] ... its interests should yield." *Id.* at 511–12, 101 S.Ct. 2882.

BBC also argues that the City has not met its burden to "come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan v. Fruchey,* 492 F.3d 766, 771 (6th Cir.2007) (citing *Edenfield,* 507 U.S. at 770–72, 113 S.Ct. 1792). In *Pagan,* the ordinance at issue prohibited the parking of vehicles on streets with the purpose of displaying them for sale. *Id.* at

769. The city asserted an interest in traffic safety and aesthetic concerns, but its only evidence that the regulation directly advanced those goals was the police chief's affidavit containing a "conclusory articulation of governmental interests," which we deemed "simple conjecture" that was "of exactly the type deemed insufficient by the Supreme Court in *Edenfield*." *Id.* at 773. In determining whether the city had carried its burden, we declined an invitation to adopt a standard of "obviousness" or "common sense," instead requiring "*some* evidence to establish that a speech regulation addresses actual harms with some basis in fact." *Id.* at 774 (emphasis in original).

Notably, however, we recognized that such a showing was established in *Metromedia*, where a plurality of the Supreme Court noted the frequency with which local governments had placed—and courts had upheld—restrictions on billboards. *Id.* at 774–75 (citing *Metromedia*, 453 U.S. at 509, 101 S.Ct. 2882). Drawing on that history of billboard regulation, the Supreme Court concluded, "[w]e likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia,* 453 U.S. at 509, 101 S.Ct. 2882. Thus, in the context of outdoor billboard regulation, "*Metromedia* looked to its own substitute for the sort of evidence *Edenfield* requires—the collective judgment of many legislative and judicial decisionmakers." *Pagan,* 492 F.3d at 775.

In *Pagan,* on the other hand, no similar substitute existed to "support [ ] the conclusion that restrictions placed on 'For Sale' signs posted on vehicles address concrete harms or materially advance a governmental interest." *Id.* BBC contends that this case is like *Pagan* because the City has not offered evidence such as "studies, reports, surveys or even complaints" to establish that the prohibited words are distracting or misleading. (BBC Br. at 16.) The only evidence the City has offered to establish that the ordinance advances its stated goals is the Commissioner's deposition testimony that he finds the signs distracting.[1] However, the City argues, and the district court found, that this case is governed by *Metromedia,* because "[t]he rationale—the risk of distracting drivers—for permitting local governments to regulate billboards for traffic safety purposes is the same for bench billboards. That risk justifies the regulation's prohibition ***545** against use of certain words...." (Order, R. 44, at 18–19.)

[1] In response to questions from

> opposing counsel, Commissioner Zervos testified that he would find each of the prohibited words distracting. He also testified that, in comparison with other signs that appear along roads generally, "[w]hen one considers that these are on courtesy benches in an urban environment, where traffic is more stop and go as opposed to suburban or rural areas, a distraction in the latter cases is minute, but in an urban area, where bus stops and bus transits are required, they are far more dangerous." (Zervos Dep., R. 30, at 56–57.)

****5** The district court correctly concluded that the ordinance in this case is materially indistinguishable from that in *Metromedia*. In both cases, the statutes seek to regulate outdoor advertisements intended to attract—and distract—the attention of drivers. That bench billboards are generally much smaller than overhead billboards is of little relevance because they are positioned much closer to passing traffic. Accordingly, the City met its burden at the third prong of the *Central Hudson* inquiry by relying on the Supreme Court's finding in *Metromedia* that "the accumulated, common-sense judgments" of local lawmakers and reviewing courts have established that "billboards are real and substantial hazards to traffic safety." 453 U.S. at 509, 101 S.Ct. 2882. That finding may substitute for the independent quantum of evidence that the City would otherwise have to put forth to establish that its regulatory regime addresses a concrete harm, *Pagan*, 492 F.3d at 775, and therefore we need not decide whether the City would have met its burden to do so.

Under the fourth *Central Hudson* prong, "the relevant question is whether the speech restriction is narrowly tailored; that is, we must determine whether the speech restriction at issue is more extensive than is necessary to serve the asserted interests." *Pagan*, 492 F.3d at 771 (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (internal quotation marks omitted)). The

tailoring inquiry "does not require a 'least restrictive means' analysis." *Id.* (citing *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 556, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)). But there must be a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective." *Id.* (citing *Lorillard Tobacco,* 533 U.S. at 556, 121 S.Ct. 2404 (alteration omitted)).

BBC argues that this prong is not met because the choice of the words "stop," "look," "drive-in," and "danger" is arbitrary and underinclusive. BBC does not argue that the ordinance is overinclusive. As in *Metromedia,* however, the ordinance reflects the City's reasonable decision that bench advertisements containing words that are misleading or distracting present a more acute problem than other kinds of advertisements, and we will not reject that judgment. *Metromedia,* 453 U.S. at 512, 101 S.Ct. 2882. The ordinance is "not more extensive than is necessary" to serve the interest of traffic safety. Accordingly, we find that the ordinance's prohibition on the use of the words "stop," "look," "drive-in," "danger," and other words that might mislead or distract traffic on courtesy benches, does not violate BBC's Free Speech rights under the First Amendment.

B.

BBC next challenges as violative of its First Amendment rights the ordinance's requirements that a trash receptacle be affixed to each bench and that the area around each bench be kept free from ice, snow, litter, and debris.

****6** "Time, place, and manner" restrictions such as these "are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored [3] to serve a significant governmental interest, and [4] that they leave open ample alternative channels for communication of the information." *Prime Media,* 398 F.3d at 818 ***546** (citations omitted).[2]

[2] BBC asserts without elaboration or support that the district court should have analyzed the ordinance's bench maintenance regulations under the four-part intermediate

> scrutiny test under *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. However, BBC does not argue that these requirements regulate purely commercial speech of the sort governed by *Central Hudson*. *See Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 386 (6th Cir.1996) (*Central Hudson* test is inappropriate for ordinance that applies to both commercial as well as non-commercial speech). In any event, the test for time, place, and manner restrictions is "substantially similar" to the test articulated in *Central Hudson*. *See Prime Media*, 398 F.3d at 824 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)).

Here, the ordinance's provisions regarding bench maintenance meet this test. BBC does not dispute that the provisions are content-neutral, that the City's asserted interests in ensuring pedestrian safety and aesthetics are significant, *see Metromedia*, 453 U.S. at 507–08, 101 S.Ct. 2882, or that the restrictions leave open ample alternative channels for communication of information, *see Prime Media*, 398 F.3d at 819 (holding that billboard regulations "leave open ample alternative communication because they permit billboards that satisfy the height and size restrictions ... and do not affect any individual's freedom to exercise the right to speak and to distribute literature" in the area regulated).

Finally, a regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation," and it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* The government entity "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance

its goals," but "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 819–20 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799–800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

BBC argues that the City has not pointed to evidence that the courtesy benches are the cause of the litter, ice, or snow. BBC also notes that the City could not quantify the number of complaints that it received from the public regarding litter around the area of the benches. Further, BBC argues that the regulation is underinclusive because the public will continue to litter at TARTA bus shelters and other locations, a harm which the ordinance will not alleviate. Finally, BBC asserts that if it is forced to comply with the ordinance, it will be cost-prohibitive for BBC to continue operating in Toledo, thus rendering the ordinance a *de facto* ban on an entire class of constitutionally-protected speech.

Despite these objections, the district court was correct in finding that the regulations are narrowly tailored. In the absence of the ordinance, the City's interests in ensuring pedestrian safety and litter-free streets would be achieved less effectively. *Prime Media,* 398 F.3d at 819. City officials testified that they received several complaints regarding the condition of courtesy benches and the area around the benches. The fact that the City chose regulations that address its stated interests in some respects and not others does not render the ordinance insufficiently tailored. *See Prime Media,* 398 F.3d at 821 (noting that this Court has previously found that "an incomplete (yet content- ***547** neutral) ban nonetheless directly advanced legitimate interests") (citing *Wheeler v. Comm'r of Highways, Com. of Ky.,* 822 F.2d 586, 595 (6th Cir.1987)). BBC's argument that the ordinance is effectively a ban on an entire class of constitutionally-protected speech, because BBC would find it cost-prohibitive to operate under the ordinance, is also unavailing. BBC cites *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 430, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), for the proposition that "Toledo has basically enacted an Ordinance that bans "a whole class of Constitutionally-protected speech." (BBC Br. at 24.) However, in that case, Cincinnati ordered the removal of plaintiff's newsracks from sidewalks under a sweeping ordinance that banned from "any public place" the distribution or sale of "commercial handbills," defined broadly as any printed or written matter that advertised merchandise or directed attention to a business or for-

profit event. *Id.* at 414, 113 S.Ct. 1505. In holding the ordinance unconstitutional, the Supreme Court, utilizing the standards set forth in *Central Hudson* for content-based commercial speech, found that the regulation bore "no relationship *whatsoever* " to the asserted interests of safety and aesthetics. *Id.* at 424, 113 S.Ct. 1505. Here, on the other hand, the ordinance is content-neutral, the regulation is narrowly-tailored to the City's asserted interests, and the ordinance at issue is not nearly as sweeping as a total ban on written commercial speech in public.[3]

[3] BBC cites no authority for the proposition that its own inability to operate profitably under the ordinance renders the ordinance a *de facto* ban on an entire class of constitutionally-protected speech of the sort addressed in *Discovery Network*, 507 U.S. at 430, 113 S.Ct. 1505. Nor does the record show that the ordinance is so burdensome as to render courtesy benches impossible to provide, as at least one other company, Affordable Bench, has begun complying with the ordinance by attaching trash receptacles to its benches.

****7** Accordingly, we conclude that the ordinance's requirements that trash receptacles be affixed to benches and that the area around benches be kept free of ice, snow, litter, and debris, do not violate BBC's First Amendment rights.

C.

BBC argues that the ordinance violates its Equal Protection rights by treating BBC benches differently than benches at TARTA bus shelters and newsracks allowed on the City's sidewalks, neither of which are covered by the ordinance. Further, BBC argues that the law is being enforced differently with respect to benches owned by

another courtesy bench company, Affordable Bench.

The Equal Protection Clause prohibits states from making distinctions that either (1) burden a fundamental right, (2) target a suspect classification, or (3) intentionally treat one differently from others similarly situated without any rational basis for the difference. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir.2005). Where, as here, a plaintiff proceeds under the third theory, it must prove that it has been treated differently from similarly-situated individuals, and that the government's actions lacked any rational basis. *See Club Italia Soccer & Sports Org. Inc. v. Charter Twp. of Shelby, Michigan*, 470 F.3d 286, 298 (6th Cir.2006), *overruled on other grounds as recognized by Davis v. Prison Health Servs.*, 679 F.3d 433 (6th Cir.2012).

To establish that it was treated differently from similarly situated entities, BBC must demonstrate that it and the entities who were treated differently were similarly situated in all material respects. ***548** *See TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty., Ohio*, 430 F.3d 783, 789–90 (6th Cir.2005). The district court correctly found that BBC is similarly situated to other courtesy bench companies and to TARTA,[4] but not to newsracks, because unlike newsracks, the others provide "location[s] where people congregate while waiting for the bus, thereby potentially increasing the amount of litter present." (Order, R. 44, at 24.) In claiming that the district court erred in refusing to find BBC similarly situated to providers of newsracks, BBC argues that the "similarly situated" inquiry should refer to the form of advertising rather than the entities that own them. However, nothing in the district court's reasoning suggests that it examined only the characteristics of the owners of the advertising to the exclusion of the form of advertising. On the contrary, the district court's reasoning suggests that it took into account both the location and the form of advertising in determining that newsracks and benches, and thus the entities that place each in the public right of way, are not similarly situated for purposes of the Equal Protection Clause.

[4] BBC incorrectly asserts that the district court found that TARTA and BBC were not similarly situated. In fact, the district court held that they were similarly situated, but that the City's decision to treat TARTA and

> BBC differently had a rational basis.
> (*See* Order, R. 44, at 26.)

Under rational basis review, despite differential treatment of BBC and similarly situated entities, the regulation must be sustained "if *any* conceivable basis rationally supports it." *TriHealth,* 430 F.3d at 790. A defendant "need not offer any rational basis so long as this Court can conceive of one." *Club Italia Soccer & Sports Org.*, 470 F.3d at 299.

****8** The City asserts that the ordinance treats TARTA differently from BBC because the former is a taxpayer-funded public transportation system that incidentally provides benches at its bus stops for the benefit of its riders, whereas BBC is a for-profit advertising company. The district court correctly concluded that a rational basis exists for the differential treatment because, "[g]iven the importance of low-cost public transportation, the city rationally can impose lesser restrictions on the public operator of its transit system than on others not in the business of providing a similarly essential public service." (Order, R. 44, at 26–27.)

Further, a rational basis existed to issue permits to Affordable Bench because, unlike BBC, it had begun to comply with the ordinance by attaching trash receptacles to its benches. Although incomplete, Affordable Bench's efforts at compliance provide a rational basis for the City's differential treatment of Affordable Bench and BBC. Accordingly, BBC cannot establish an equal protection violation.

III. Attorneys' Fees

BBC claims that, in reducing its initial request for $132,532 in attorneys' fees, the district court erred in: (1) reducing attorneys' fees based on the litigation's partial success, (2) reducing attorneys' fees based on the unreasonableness of BBC's quarter-hour billing increments, and (3) reducing the fee award based on one attorney's affidavit describing his firm's assistance on the federal matter as "minimal." (BBC Br. at 29–32.) This Court reviews a district court's award of attorneys' fees under 42 U.S.C. § 1988 for an abuse of discretion. *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 302 (6th Cir.2008).

A. *Partial Success*

Where "a plaintiff has achieved only partial or limited success, the product ***549** of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). However, a court should not reduce attorney fees "based on a simple ratio of successful claims to claims raised." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir.1996). Where a plaintiff's claims for relief involve a common core of facts or are based on related legal theories, the lawsuit "cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff." *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933.

Here, BBC alleged three First Amendment violations, an Equal Protection claim, and a state-law claim for tortious interference with economic relationships, and prevailed on two First Amendment claims. Those claims were not all based on the same legal theories, as some of the provisions of the ordinance that BBC sought to strike down were upheld, while others were struck down. The district court accordingly found that BBC "received a 'good' but not an 'excellent' result in its § 1983 claims." (Order, R. 64, at 12.) Taking into account BBC's limited success and the fact that the unconstitutional provisions were severable, the district court decided to reduce the attorney fee award by 25% to reflect partial success. In making such a finding, we conclude that the district court did not abuse its discretion.

B. *Billing Increments*

****9** Although the City did not raise the issue with the district court, the district court made a further reduction in the attorneys' fees award on the basis that BBC's counsel, Mr. Holzapfel, kept his time records in quarter-hour increments, including for tasks that the district court believed were unlikely to occupy a full fifteen minutes of his time. BBC argues that the district court erroneously held that quarter-hour timekeeping is *per se* unreasonable. However, the district court noted that some courts have suggested billing in quarter-hour increments is not *per se* unreasonable, but nevertheless found such billing inappropriate in a § 1983 case because of its tendency to generate bills that are fifteen percent higher than bills based on tenth-of-an-hour billing increments. Accordingly, the district court split the difference and reduced counsel's hours by 7.5 percent. Because "[i]t remains for the district court to determine what fee is 'reasonable,' " *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933,

and the district court has discretion to reduce an award of fees "where the documentation of hours is inadequate," *id.*, the district court did not abuse its discretion in reducing the attorneys' fees awarded on the basis of quarter-hour billing increments.

C. *Fees of Toledo Counsel*

Finally, BBC asserts that the district court improperly eliminated 13.80 hours of attorneys' fees generated by local counsel Mr. Heywood by misconstruing his affidavit to conclude that those hours were not related to instant action. The City does not respond to or dispute this claim on appeal. Accordingly, we reverse the district court's reduction of attorneys' fees with respect to the 13.80 hours billed by local counsel Heywood.

IV. Conclusion

For the foregoing reasons, we **AFFIRM in part and REVERSE in part** the judgment of the district court.

All Citations

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed R. App. P. 32(f), this brief contains 4,792 words.

I also hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

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Dated: August 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2020, I electronically filed the foregoing brief of the Appellant 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.

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