

# Highway to the Safety Zone: Why the Highway Beautification Act Should Be Repealed and Its Federal Oversight Power Transferred to the States

NATALIE L. ENGEL\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1142
II.	HISTORY OF THE OUTDOOR ADVERTISING INDUSTRY AND ITS FEDERAL OVERSIGHT .....	1145
	A. <i>Background of the Billboard Industry</i> .....	1145
	B. <i>Federal Aid Highways Act of 1958 (the Bonus Act)</i> .....	1146
	C. <i>The Highway Beautification Act of 1965</i> .....	1148
	1. <i>Lady Bird Johnson’s Influential Voice Inspires         Action</i> .....	1148
	2. <i>Three Overarching Components</i> .....	1150
	a. <i>Outdoor Advertising</i> .....	1150
	b. <i>Junkyards</i> .....	1150
	c. <i>Beautification of the Landscape</i> .....	1151
	3. <i>The Bonus Act’s Impact on HBA Enforcement</i> .....	1151
	4. <i>Effective Control Allowed for State Oversight with Federal         Control</i> .....	1152
	5. <i>Just Compensation</i> .....	1153
	6. <i>Amendments and Current State of Affairs</i> .....	1154
	a. <i>Amendments: 1965 to 1990</i> .....	1154
	b. <i>Current State of Affairs</i> .....	1156
III.	LEGAL CHALLENGES AND ANALYSIS .....	1157
	A. <i>Metromedia, Inc. v. City of San Diego</i> .....	1158
	B. <i>Reed v. Town of Gilbert</i> .....	1159
	C. <i>Thomas v. Bright</i> .....	1160
IV.	ANALYSIS OF POSSIBLE SOLUTIONS .....	1162
	A. <i>Extenuating Problems</i> .....	1162

---

\*J.D. Candidate, The Ohio State University Moritz College of Law, 2022; The University of Texas at Austin, B.S.W. 2018, B.S. 2019.

Special thanks to my family—and especially my parents, Edward and Sabrina, and brother, Matthew—and friends for their unwavering support, patience, and encouragement. Thanks to my mentors, Rebecca Gerbert, for her continued guidance and optimism, and Jay Payne, for helping inspire this Note. Finally, my thanks to the *Ohio State Law Journal* editors and executive team for their hard work and dedication in readying this Note for publication.

This Note is dedicated in loving memory of my grandmother and hero, Lee Zelikow, who taught me that my potential for greatness is unlimited, and to my grandfather and great-grandfather, Melvin and Edward W. Engel, whose legal careers, along with that of my father, inspired me to forge my own legal legacy. All errors are my own.

1. “On-Premises” Exception .....	1162
2. A Loophole Impacting Effectiveness .....	1163
3. Inadequate Digital Sign Regulation .....	1163
B. Government Interests .....	1164
C. Legislative Constraints .....	1166
D. Solution One: Amending the HBA .....	1167
1. Practicality.....	1167
2. Legal Problems .....	1168
3. Budgetary Problems .....	1169
E. Solution Two: Repeal the HBA .....	1170
1. A Novel Plan for Reshaping Regulatory Oversight .....	1170
2. A Tangible, Practical Plan for the Successful Transfer of Power .....	1172
3. Potential Flaws and Opposition .....	1174
V. CONCLUSION.....	1176

## I. INTRODUCTION

During his 1964 presidential campaign, former President Lyndon B. Johnson once observed, “If it’s beautifying they want, it’s beautifying they’ll get.”<sup>1</sup> The “beautifying” about which President Johnson spoke concerned the preservation of the United States’ natural landscape, which he sought to preserve and maintain primarily by establishing federal regulatory control over outdoor advertising, junkyards, and landscaping along federal highways.<sup>2</sup> Today, his preservation efforts are manifested mainly through the control of outdoor advertising. In 2021, there were roughly 343,000 to 450,000 billboards posted alongside the 47,000 miles of Interstate Highways in the United States.<sup>3</sup>

---

<sup>1</sup> Richard F. Weingroff, *Lady Bird Johnson’s I-95 Landscape-Landmark Tour*, FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/infrastructure/ladybird.cfm#1> [<https://perma.cc/V6NX-JSDT>].

<sup>2</sup> See *id.* See generally Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (2012) (codified in scattered sections of 23 U.S.C.) (noting the federal effort to establish regulatory control over three elements relevant to landscape preservation along federal highways).

<sup>3</sup> The term “highway” includes: “(A) a road, street, and parkway; (B) a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and (C) a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.” 23 U.S.C. § 101(a)(11). “Federal-aid Primary Highway means any highway on the system designated pursuant to 23 U.S.C. 103(b)” and “Interstate Highway means any highway on the system defined in and designated, pursuant to 23 U.S.C. 103(e).” 23 C.F.R. § 750.703(c)–(d) (2020) (referencing 23 U.S.C. § 103(b), (e)); 23 U.S.C. § 103(c);

This estimate accounts only for signs designated as big format outdoor displays, but leaves room for adjustment and consideration of other signage formats, like digital signs.<sup>4</sup> Big format outdoor displays describe what many would consider to be the “traditional billboard,” a subset of “outdoor advertising.”<sup>5</sup> “Outdoor advertising” is the terminology used to describe those signs regulated by the Highway Beautification Act of 1965 (the HBA) as well as an industry constantly evolving in congruence with the broader advertising industry to meet the needs of an ever-growing consumer-based society.<sup>6</sup>

The problem is that the outdoor advertising industry is regulated by outdated federal statutes meant to keep roadsides clear of unsightly distractions, when in

---

*Highway Finance Data Collection*, FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter1.cfm> [<https://perma.cc/T5DN-JA95>]; A. Guttman, *Number of Billboards in the United States from 2016-2020*, STATISTA (Apr. 28, 2021), <https://www.statista.com/statistics/686026/number-billboards-usa/> [<https://perma.cc/W2YC-MEB5>]; *HBA: Facts & Figures*, SCENIC AM., <https://www.scenic.org/sign-control/highway-beautification-act/facts/> [<https://perma.cc/H267-LSVL>].

<sup>4</sup> Guttman, *supra* note 3.

<sup>5</sup> Traditional billboards are often “constructed of wood and metal, upon which a printed sheet of paper or vinyl is glued.” Justin Johnson, *Billboard Advertising and Traditional Billboards*, HOUS. CHRON., <https://smallbusiness.chron.com/billboard-advertising-traditional-billboards-17832.html> [<https://perma.cc/8WAU-T7EN>]. These billboards tend to be large, “ranging in size from 12 by 24 feet to 14 by 48 feet,” and are only able to “portray one piece of advertising for an extended period of time.” *Id.*; see *History of Billboard Advertising*, BMEDIA, <https://www.bmediagroup.com/news/history-of-billboard-advertising/> [<https://perma.cc/9UWT-3DJR>] (noting that “billboards comprise 66% of the ‘out of home’ advertising market”); see, e.g., IND. DEP’T OF TRANSP., *GUIDE TO OUTDOOR ADVERTISING 6* (Mar. 2020), [https://www.in.gov/indot/files/INDOT\\_Guide\\_To\\_Outdoor\\_Advertising\\_2020.pdf](https://www.in.gov/indot/files/INDOT_Guide_To_Outdoor_Advertising_2020.pdf) [<https://perma.cc/GAG4-LA9J>] (describing the types of signs and notices that are and are not considered to be outdoor advertising according to the State of Indiana).

<sup>6</sup> See 23 U.S.C. § 131(a) (implying that billboards fall under the categorical umbrella of “outdoor advertising” when the statute references “outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system”). The Federal Highway Administration (FHWA) applies the term “outdoor advertising” to reference, “signs, displays, or devices . . . located within six hundred and sixty feet of the right-of-way” and those “located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way.” 23 U.S.C. § 131(c); *Worldwide Billboard and Outdoor Advertising Industry to 2030 - Identify Growth Segments for Investment - ResearchAndMarkets.com*, BUS. WIRE (Jan. 8, 2021), <https://www.businesswire.com/news/home/20210108005188/en/Worldwide-Billboard-and-Outdoor-Advertising-Industry-to-2030---Identify-Growth-Segments-for-Investment---ResearchAndMarkets.com> [<https://perma.cc/D6P2-XUPH>]; *The Endless Evolution of Outdoor Advertising*, VECTOR MEDIA, <https://vectormedia.com/evolution-of-outdoor-advertising/> [<https://perma.cc/DHG9-D6JA>]. See generally 23 C.F.R. § 750.703(i) (noting that a sign refers to “an outdoor advertising sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the Interstate or Primary Systems, whether the same be permanent or portable installation”).

fact, these statutes do more harm than good.<sup>7</sup> One could even argue that the regulations, enacted to clear unsightly junk, have effectively become junk themselves.<sup>8</sup>

This Note will argue that the regulatory power bestowed on the Federal Highway Administration (FHWA) by the Highway Beautification Act of 1965 and the Federal Aid Highway Act of 1958 (the Bonus Act) must be abolished in favor of allowing the states to conduct their own oversight. If these measures are not taken, the United States government risks the further alienation of American citizens' constitutional rights and continued waste of precious government time and taxpayer dollars.<sup>9</sup> To shed light on the necessity of these changes and where the problems began, a deeper understanding of the outdoor advertising industry's history and development is required. Digging into this history reveals an industry that began with painted signs and posters glued to walls and has since grown into a monolith, progressing far beyond the imagination of its creators.<sup>10</sup>

This Note explores the HBA, its history, and enforcement mechanisms to analyze the flaws in the existing system. Part II delves into the HBA's rich history, key components, subsequent amendments, inconsistent

---

<sup>7</sup> See, e.g., James Gordon, *Lights Out? New York City Under Pressure from 50-Year-Old Federal Highway Law to Remove Iconic Billboards from Times Square*, DAILY MAIL (May 6, 2015), <https://www.dailymail.co.uk/news/article-3070721/Could-lights-switched-Times-Square-New-York-City-pressure-federal-highway-law-adverts-come-down.html> [<https://perma.cc/CNH5-TA9K>]; see Weingroff, *supra* note 1. See generally *Shattered Dreams: The Beautification Campaign*, PBS, [https://www.pbs.org/ladybird/shattereddreams/shattereddreams\\_report.html](https://www.pbs.org/ladybird/shattereddreams/shattereddreams_report.html) [<https://perma.cc/TY82-7H2Y>] (noting that critics commented that “the [HBA] was so watered down by the time it passed that it did more harm than good to the landscape,” while Lady Bird Johnson’s team described their efforts as being successful in terms of amplified landscape beautification).

<sup>8</sup> See, e.g., Weingroff, *supra* note 1 (referencing President Johnson’s plan to “introduce legislation on effective control of billboards and ‘unsightly, beauty-destroying junkyards and auto graveyards along our highways’” and Lady Bird Johnson’s aim to control billboards “so people could see all these flowers”).

<sup>9</sup> “The FHWA spends countless hours ensuring that effective control is met in each state and addressing questions as the state [sic] maintain effective control requirements that were created in 1965 competing against today’s advancing technology.” Internal Memorandum, Fed. Highway Admin., Outdoor Advertising Control Legislative Proposal (Aug. 2, 2018) (on file with author) [hereinafter FHWA Outdoor Advertising Control]; see *A History and Overview of the Federal Outdoor Advertising Control Program*, FED. HIGHWAY ADMIN., [https://www.fhwa.dot.gov/real\\_estate/oac/oacprog.cfm#HISTORY](https://www.fhwa.dot.gov/real_estate/oac/oacprog.cfm#HISTORY) [<https://perma.cc/V56K-JDHG>] [hereinafter *A History and Overview*] (describing the first congressional attempt at regulating the outdoor advertising: the Bonus States Program, created by the Federal-Aid Highway Act of 1958).

<sup>10</sup> See *History of OOH*, OUT OF HOME ADVERT. ASS’N AM., <https://www.oaaa.org/AboutOOH/OOHBasics/HistoryofOOH.aspx> [<https://perma.cc/R644-BC7T>].

implementation, present state of enforcement, and potential limitations.<sup>11</sup> Part II goes on to address the outdoor advertising industry's history more generally, other federal regulatory efforts, and tells the story of the woman whose personal quest to preserve the natural, picturesque American landscape led to the passage of a historic law during a time when women were still far from being front and center on the political scene.<sup>12</sup> Part III looks to the HBA's legal challenges, spotlighting three cases that are critical to the discussion of future outdoor advertising regulation. Part IV proposes and weighs solutions and offers recommendations for next steps. Ultimately, this Note proffers that the best course of action is for the federal government to repeal the HBA and relinquish its oversight power to the states to control and regulate outdoor advertising and junkyards.<sup>13</sup>

## II. HISTORY OF THE OUTDOOR ADVERTISING INDUSTRY AND ITS FEDERAL OVERSIGHT

### A. *Background of the Billboard Industry*

The billboard industry is not a modern one.<sup>14</sup> In the United States, the billboard industry grew from an expansion of 1830s local advertising.<sup>15</sup> While the invention of the large format American poster, measuring fifty feet in length, revolutionized the possibilities of outdoor advertisements, the industry did not really explode until the 1850s and 1860s, when the opportunity first became available for companies to purchase advertising space on the sides of railcars.<sup>16</sup> The invention of Ford's Model T in 1908 led outdoor advertising along major

---

<sup>11</sup>The HBA's central components include the assertion of control on outdoor advertising and certain junkyards that are visible from federal highways, as well as the landscaping and scenic enhancement of federal-aid highways. *See* 23 U.S.C. §§ 131(a), 136, 319; *History of Billboard Advertising*, CAPITOL OUTDOOR, <https://www.capitoloutdoor.com/history-of-billboard-advertising/> [<https://perma.cc/D7EF-D6WW>].

<sup>12</sup>*See* Weingroff, *supra* note 1.

<sup>13</sup>This Note refers to junkyard regulation broadly, but it does so purely for the sake of brevity. The HBA specifically provides regulations that cover only those auto junkyards located outside of industrial areas and that are within 1,000 feet of controlled highways. *See* Junkyard Control and Acquisition, 23 C.F.R. § 751.3 (2020). Therefore, it is only these applicable junkyards to which this Note refers. *Id.*

<sup>14</sup>Johnson, *supra* note 5; *see also* *History of Billboard Advertising*, *supra* note 11 (noting that the billboard industry's history dates back to the early nineteenth century).

<sup>15</sup>*History of OOH*, *supra* note 10.

<sup>16</sup>The outdoor advertising industry really saw its first boom in 1850, when mass production allowed for greater ease in constructing advertisements along streets and railroads. *See A Brief History of the Billboard*, CITY SIGNS UTAH (Mar. 10, 2016), <https://citysignsutah.com/a-brief-history-of-the-billboard/> [<https://perma.cc/SFB8-5VRE>] [hereinafter *A Brief History*]. The 1850s granted the industry new opportunities, as for the first time, companies were able to purchase outdoor advertising space, beyond just that on the sides of railcars. *Id.*

roadways to become a “hot commodity.”<sup>17</sup> Companies like Kellogg and Coca-Cola began rolling out national advertising campaigns that used billboards to promote their enlarged marketing materials.<sup>18</sup> This boom led to the formation of outdoor advertising companies and a broader call for federal regulation of the expanding industry.<sup>19</sup>

### B. *Federal Aid Highways Act of 1958 (the Bonus Act)*

April 16, 1958 marked the first congressional attempt to federally regulate the outdoor advertising adjacent to “Interstate Highways” (the Interstate) through passage of the Bonus Act.<sup>20</sup> The Bonus Act created the Bonus States Program, which sought to connect the country by allocating \$26 billion to fund the construction of a 41,000-mile network of Interstate Highways that would span the nation.<sup>21</sup> The legislation provided that any state voluntarily agreeing to provide control of outdoor advertising adjacent to the Interstate in accordance with national standards codified in 23 C.F.R. § 750(A) would receive bonus funds equal to one-half of one percent of the highway’s cost of construction.<sup>22</sup> Participating states were required to use their respective state statutes to enforce control of outdoor advertising located “within six hundred and sixty feet of . . . the Interstate.”<sup>23</sup> Said control limited permissible signs to include only those that were directional or official, on-premises and specifically designating

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see *History of OOH*, *supra* note 10.

<sup>19</sup> Although outdoor advertising was not a novel concept, the placement of outdoor advertising signage installed alongside major roadways and highways and meant to attract the attention of passersby was a new development. See *A Brief History*, *supra* note 16. Increasing availability and affordability of motorized vehicles allowed the advertising industry to boom in ways previously unavailable. *Id.*

<sup>20</sup> Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89; Bonus Program, 23 C.F.R. § 1.35 (2020). The term “Interstate System” refers to the Dwight D. Eisenhower National System of Interstate and Defense Highways, which consists of those highways designed, located, and selected in accordance with Highway Beautification Act of 1965, 23 U.S.C. § 103(c)(1)(B)–(D). See S. REP. NO. 86-902, at 13 (1959); *History of OOH*, *supra* note 10. See generally *A History and Overview*, *supra* note 9 (noting that twenty-three states voluntarily chose to participate in the 1958 Bonus Act’s new Bonus States Program).

<sup>21</sup> See *The Interstate Highway System*, HISTORY, <https://www.history.com/topics/us-states/interstate-highway-system> [<https://perma.cc/JM8N-882W>]; *Congress Approves the Federal-Aid Highway Act*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Federal\\_Highway\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm) [<https://perma.cc/8NCZ-YF3N>].

<sup>22</sup> 23 C.F.R. § 1.35 (2020); see Federal-Aid Highway Act of 1958, Pub. L. No. 85-38, § 122, 72 Stat. 89, 96 (codified at 23 U.S.C. § 131(j)). See generally *A History and Overview*, *supra* note 9 (noting that the half of a percent bonus in federal highway funding inspired the nickname the “Bonus States Program,” as only those states adhering to the requirements were eligible to receive the supplemental funds).

<sup>23</sup> 23 U.S.C. § 131(d). Since the lettered paragraphs of Title I correspond to those in 23 U.S.C. § 131, this Note will refer to the subsections of Title I and section 131 interchangeably.

sale or lease activity, located within twelve “air miles” of the advertised activity, or placed in the “specific interest of the traveling public, i.e. historic sites, natural phenomena, naturally suited for outdoor recreation, and places for camping, lodging, eating, and vehicle service and repair.”<sup>24</sup> The Bonus States Program allowed for sign removal by localities by exercising their power of land use control and states by exercising their right of eminent domain, i.e., through the purchasing of negative easements.<sup>25</sup>

The Bonus States Program initially garnered participation from twenty-three states, and since 1958, the federal government has collectively paid \$44 million in “bonus” federal highway funds to compensate for the removal of nonconforming or illegally placed signs.<sup>26</sup> However, by the early 1980s, the program’s federal funds were dwindling.<sup>27</sup> Presently, no funds remain to reimburse the outstanding balance of over \$10 million from claims made by the remaining participants over the past forty years.<sup>28</sup> Therefore, it is unsurprising that some states have ceased their participation.<sup>29</sup> Twenty-three states remain enrolled today, but there is little to no incentive to induce their continued

---

<sup>24</sup> *A History and Overview*, *supra* note 9. The phrase “air mile” is internationally defined as being 6,076 feet or 1,852 meters. *How Many Statute Miles Are Equivalent to 100-Air-Miles?*, FED. MOTOR CARRIER SAFETY ADMIN. (May 4, 1997), <https://www.fmcsa.dot.gov/regulations/hours-service/how-many-statute-miles-are-equivalent-100-air-miles> [https://perma.cc/M2YR-F5LK].

<sup>25</sup> *A History and Overview*, *supra* note 9.

<sup>26</sup> The Bonus States Program’s original participants included California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See A History and Overview*, *supra* note 9.

<sup>27</sup> *See The Federal-Aid Highway Program: Hearings Before the Subcomm. on Transp. of the S. Comm. on Env’t and Pub. Works*, 99th Cong. 322–23 (1985) (statement of Elizabeth Seward Padjen, The American Institute of Architects, Comm’r of Design, Boston Society of Architects, and Member, Steering Committee, Urban Design and Planning Committee) [hereinafter Statement by Elizabeth S. Padjen]; *supra* note 26 and accompanying text.

<sup>28</sup> A General Accounting Office report issued in 1985 stated that, “[w]ithout additional funding . . . the 1965 act’s goal—to control outdoor advertising along federally funded interstate and primary highways—will not be accomplished.” *See* Statement by Elizabeth S. Padjen, *supra* note 27, at 322. In 1985, the General Accounting Office estimated that “the cost of acquiring the billboards that remain nonconforming under the federal removal program would be between one and two billion dollars.” Oliver A. Pollard III, *Billboard Removal: What Amount of Compensation Is Just?*, 6 VA. J. NAT. RES. L. 323, 324 n.13 (1987) (first citing U.S. GEN. ACCT. OFF., GAO/RCED-85-34, THE OUTDOOR ADVERTISING CONTROL PROGRAM NEEDS TO BE REASSESSED (1985); and then citing Charles F. Floyd, *Issues in the Appraisal of Outdoor Advertising Signs*, 51 APPRAISAL J. 422, 423 (1983)). These figures may, however, be an underestimation as they “reflect only the cost of removing signs within the scope of the Beautification Act,” and do not include “removal costs under local billboard regulations.” *Id.* at 324 n.13.

<sup>29</sup> *See A History and Overview*, *supra* note 9 (noting that Maine, Alaska, Hawaii, Vermont, and Rhode Island have all since ceased their participation in the Bonus States Program).

compliance with the program's strict requirements.<sup>30</sup> Despite its pitfalls, the Bonus States Program remains relevant to the conversation of shifting regulatory power because its enrolled states make up nearly half the country.<sup>31</sup> The Bonus States Program's ingenuity did lay the groundwork for the HBA,<sup>32</sup> but both continue to present numerous problems.

### C. *The Highway Beautification Act of 1965*

The HBA has a rich history and legacy deeply impacting American highways. The story of its inception is an inspiring tale of a woman whose dream became a legislative reality. In the fifty-plus years since that dream came true, numerous amendments have attempted to resolve the HBA's extenuating problems, but much improvement is still needed. The one bright spot is the HBA's enforcement mechanism, which forced states to conduct their own oversight while under federal management and laid a foundation upon which the smooth transfer of federal oversight power to the states could occur.

#### 1. *Lady Bird Johnson's Influential Voice Inspires Action*

In 1964, as she trekked across the United States with her husband's presidential campaign, Lady Bird Johnson complained incessantly to her husband about the unsightly auto junkyards and billboard advertising within view of the Interstate.<sup>33</sup> It was in large part Lady Bird's persistence that convinced President Johnson to take up the environmental cause.<sup>34</sup> Within mere weeks of renewing his oath of office, President Johnson sent a message to the newly inaugurated Congress stating that "[i]t would be a neglectful generation indeed, indifferent alike to the judgment of history and the command of

---

<sup>30</sup>The Bonus States Program's current participants are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See id.* These states are required to "adhere to the national standards and terms of the required bonus agreement," and those of the HBA, or risk incurring a ten percent reduction in federal highway funding. *Id.* The reward for dual enrollment is that although states are subject to more stringent standards under the Bonus States Program, they are also technically eligible to receive additional bonus funds. *Id.* A key flaw in this system, however, is that at present, no bonus federal funds are available to incentivize state compliance. *Id.*

<sup>31</sup>*See id.*

<sup>32</sup>*See id.*

<sup>33</sup>"[O]n September 17, 1964, the President told his audience that the auto junkyards they had seen during the campaign 'are driving my wife mad.' [Lady Bird] had speculated that if he lost the election, 'one of the advantages of getting defeated is to give her some time to get out and do something about cleaning up the countryside and these old junkyards along our beautiful driveways.'" Weingroff, *supra* note 1. President Johnson, however, preferred that he first win the election and then use the power it would bestow to develop national policy to address the problem. *See id.*

<sup>34</sup>*See id.*



principle, which failed to preserve and extend such a heritage for its descendants.”<sup>35</sup> His message also included a two-fold plan for beautifying American highways: the federal government must first “[e]nsure that roads themselves are not destructive of nature and natural beauty,” and second, “make [the] roads ways to recreation and pleasure.”<sup>36</sup> This landmark highway initiative signified more to President Johnson than just environmental preservation. In addition to highway beautification, his initiative sought to bolster public safety on American highways.<sup>37</sup>

This anecdote is notable for two reasons. First, public safety was purportedly a critical motivator to President Johnson in driving the HBA’s passage, but today, this government interest in safety is called into question when assessing the constitutionality of the HBA and its affiliates.<sup>38</sup> Second, Lady Bird Johnson was chiefly responsible for inspiring and achieving the policy push that led to the preservation and beautification of the Interstate.<sup>39</sup> She first pressed her husband to make the environmental reform a key initiative of his political agenda.<sup>40</sup> She then lobbied the wives of influential legislators, going so far as to take them on a bus tour of the Virginian countryside to show off the state’s beauty and the picturesque goal she envisioned for the landscape along the Interstate and throughout the United States.<sup>41</sup> Although this Note largely discusses the HBA in a negative light, the historic steps taken to ensure its enactment still deserve due credit. Lady Bird’s remarkable efforts took place at a time when women were often sidelined in politics and decision-making.<sup>42</sup> Despite many challenges, Lady Bird fought for the preservation and beautification of America’s natural landscape until tangible changes were made and the legislative proof bore her husband, the President’s, signature.<sup>43</sup>

---

<sup>35</sup> *Id.* President Johnson’s message communicated proposals whose coverage was extended to encompass cities, counties, pollution, rivers, and highways. *See id.* His specific vision for roads was that they become “highways to the enjoyment of nature and beauty.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> “[T]he erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.” 23 U.S.C. § 131(a).

<sup>38</sup> *Id.*; *see* Weingroff, *supra* note 1; *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (finding that even if traffic safety and aesthetic appeal were considered compelling state interests, the Code’s distinctions still remained underinclusive, therefore precluding their passage of the requisite standard of scrutiny and rendering them unconstitutional).

<sup>39</sup> Richard F. Weingroff, *How the Highway Beautification Act Became a Law*, FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/infrastructure/beauty.cfm> [<https://perma.cc/VB9C-GEGG>].

<sup>40</sup> *See* Weingroff, *supra* note 1.

<sup>41</sup> *See id.*

<sup>42</sup> *See* Ctr. for Am. Women & Pols., *History of Women in the U.S. Congress*, RUTGERS EAGLETON INST. POL., <https://cawp.rutgers.edu/history-women-us-congress> [<https://perma.cc/XZX8-NBNZ>].

<sup>43</sup> *See* Weingroff, *supra* note 1.

## 2. *Three Overarching Components*

The HBA established regulatory oversight over three components of highway beautification: outdoor advertising, junkyards, and highway landscaping.<sup>44</sup> This Note primarily addresses outdoor advertising because it is the HBA's main focus and most controversial component, but discussion of the other components is still relevant to the proposed solutions proffered herein.

### a. *Outdoor Advertising*

Today, the HBA's primary focus and the regulatory component most critical to this discussion is control of outdoor advertising.<sup>45</sup> The HBA compels states provide "effective control" over signs located within 660 feet of the Interstate or face a ten percent reduction in annual federal highway funding.<sup>46</sup> For the remaining Bonus States Program participants to continue receiving their bonus funds and avoid the HBA's penalty, simultaneous compliance is required.<sup>47</sup>

### b. *Junkyards*

Legend has it that Lady Bird's initial inspiration for her epic highway beautification campaign came from seeing an unsightly junkyard, Elwood Grimm's Auto Exchange, near the Interstate in Smithsburg, Maryland, on which she travelled to get to Camp David.<sup>48</sup> To her, these unattractive junkyards detracted from the scenic landscape visible from the Interstate.<sup>49</sup> The HBA attempted to solve this problem by requiring states to maintain effective control of all junkyards located outside of industrial areas and within 1,000 feet of

---

<sup>44</sup> 23 U.S.C. §§ 131, 136, 319.

<sup>45</sup> See generally *id.* (noting that the HBA's three regulatory components include outdoor advertising, auto junkyards, and highway landscaping efforts).

<sup>46</sup> *Id.* § 131(b), (d).

<sup>47</sup> See *A History and Overview*, *supra* note 9.

<sup>48</sup> Microsoft Teams Interview with Dawn Horan, Att'y Advisor, Fed. Highway Admin. Off. of Chief Couns. (July 8, 2020) [hereinafter Interview with Dawn Horan]. Compare TRACY MARTIN, HOW TO USE AUTOMOTIVE DIAGNOSTIC SCANNERS 194 (2015), with *Smithsburg, Maryland*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Smithsburg,\\_Maryland](https://en.wikipedia.org/wiki/Smithsburg,_Maryland) [<https://perma.cc/5L5T-TMP4>] (noting that while no publicized documentation exists of Lady Bird's rants, several documents available through the Lyndon Baines Johnson Library and Museum demonstrate her acknowledgement of the unsightliness of the Auto Exchange), and Lewis Benton Rinehart, GENI, <https://www.geni.com/people/Lewis-Rinehart/6000000122071617414> [<https://perma.cc/9UKY-MF7D>] (noting a Rinehart family legend wherein Lady Bird Johnson saw Elwood Grimm's Auto Exchange, and was so appalled by its appearance that she launched a new phase of her "Beautification Project").

<sup>49</sup> See Weingroff, *supra* note 1; MARTIN, *supra* note 48, at 194; Lawrence Wright, *Lady Bird's Lost Legacy*, N.Y. TIMES (July 20, 2007), <https://www.nytimes.com/2007/07/20/opinion/20wright.html> [<https://perma.cc/PV9X-V7WY>].

controlled highways.<sup>50</sup> Ironically however, since the HBA's enactment in 1965, Elwood Grimm's Auto Exchange has continually gone in and out of federal compliance without penalty.<sup>51</sup>

### c. *Beautification of the Landscape*

The final component, and one most important to Lady Bird's personal mission, was the maintenance of the natural scenic landscape along the Interstate.<sup>52</sup> The HBA provided scenic enhancement through federally funded landscaping, making it a popular feature of the law, especially among the states.<sup>53</sup> Although an original component of the HBA, the oversight power related to highway landscaping and beautification has since been delegated outside of the FHWA, which still oversees enforcement of the remaining two components.<sup>54</sup> Therefore, highway landscaping efforts will not be impacted by the proposed solutions herein.

### 3. *The Bonus Act's Impact on HBA Enforcement*

The HBA directed the states that did not opt into the Bonus States Program to work with the Secretary of Transportation to draft their own legislation in compliance with the HBA, that would ultimately be passed by each state's legislature.<sup>55</sup> Bonus States Program participants had already taken similar action with the Secretary of Transportation to become compliant with the Bonus Act's much stricter regulatory standards.<sup>56</sup> Compliance with the HBA required every state to have statutes containing fairly similar or the same provisions as that of the federal statute.<sup>57</sup> This requirement has given cause for numerous legal challenges because many of the states enforce similarly problematic

---

<sup>50</sup> See 23 C.F.R. § 751.9; *A History and Overview*, *supra* note 9; see, e.g., Outdoor Advertising Control Act of 1971, 36 PA. STAT. AND CONS. STAT. ANN. §§ 2718.101–115 (West 2012). See generally *Kegerreis Outdoor Advert. Co. v. Dep't of Transp.*, 157 A.3d 1033 (Pa. Commw. Ct. 2017); Outdoor Advertising Control Act of 1971, 36 PA. STAT. AND CONS. STAT. ANN. § 2718.104 (West 2012) (noting that “controlled highways” are those subject to control under the relevant state's Outdoor Advertising Control Statute, the Highway Beautification Act of 1965, or any other related state or federal statute).

<sup>51</sup> Interview with Dawn Horan, *supra* note 48.

<sup>52</sup> See *Beautification: A Legacy of Lady Bird Johnson*, NAT'L PARK SERV., <https://www.nps.gov/articles/lady-bird-johnson-beautification-cultural-landscapes.htm> [<https://perma.cc/RDD9-JSRF>].

<sup>53</sup> See *A History and Overview*, *supra* note 9.

<sup>54</sup> See Interview with Dawn Horan, *supra* note 48.

<sup>55</sup> *Id.*; *Federal/State Agreements Required by the Highway Beautification Act*, SCENIC AM., <https://www.scenic.org/sign-control/highway-beautification-act/federal-state-agreements/> [<https://perma.cc/8Z58-M8D9>] [hereinafter *Federal/State Agreements*].

<sup>56</sup> See generally Roger A. Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH. L. REV. 1295, 1297 (1973) (noting the requisite steps for states to become HBA compliant upon its passage).

<sup>57</sup> See *A History and Overview*, *supra* note 9.

provisions.<sup>58</sup> For Bonus States Program participants, adherence to both programs (the HBA and the Bonus Act) was necessary to continue reaping the benefits of one, without incurring the penalty of the other.<sup>59</sup>

#### 4. *Effective Control Allowed for State Oversight with Federal Control*

The HBA guaranteed states' compliance with federal enforcement practices by mandating they provide continuing "effective control."<sup>60</sup> This policy, now codified in 23 U.S.C. § 131(d), is explained as follows:

States must provide continuing "effective control" of outdoor advertising or be subject to a loss of 10 percent of their Federal-Aid highway funds. The States have established control procedures, usually through sign permit systems, inventories, and periodic surveillance of the controlled routes, in order to discover illegal signs and monitor other signs and areas controlled by the [HBA]. The States are required to take action under the provisions of State law to have any illegal signs expeditiously removed.<sup>61</sup>

The effective control mandate meant that while oversight as a whole remained in the hands of the federal government, states were charged with conducting state and local oversight via their corresponding statutes and ordinances and carrying out enforcement measures on the ground.<sup>62</sup> In a way, the federal government chose to act in a more supervisory role, as it dealt with bigger picture issues including enforcing fines for noncompliance and tasked

---

<sup>58</sup> See *infra* Parts III–IV for discussion of the HBA's problems and legal challenges. 23 U.S.C. § 131(b)–(g); *Sixth Circuit Rules Tennessee Sign Owner Can Keep "Patriotic" Billboard*, INST. FOR FREE SPEECH (Sept. 11, 2019), <https://www.ifs.org/news/sixth-circuit-rules-tennessee-sign-owner-can-keep-patriotic-billboard/> [<https://perma.cc/BRJ8-ZHNB>].

<sup>59</sup> See *A History and Overview*, *supra* note 9.

<sup>60</sup> 23 U.S.C. § 131(b); see 23 C.F.R. § 750.705 (2020).

<sup>61</sup> *A History and Overview*, *supra* note 9; see 23 U.S.C. § 131(d).

The allowed signs may be summarized as: (1) directional and official signs and notices; (2) signs, displays, and devices advertising the sale or lease of property upon which they are located; (3) signs, displays, and devices advertising activities conducted on the property on which they are located; (4) certain landmark signs lawfully in existence on October 22, 1965; and, (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system.

Internal Memorandum, Fed. Highway Admin., Federal Highway Administration's Interest in Constitutional Limits on Sign Regulation Presented in *Thomas v. Schroer* 2 (2018) (on file with author) (unpublished brief from the FHWA's Office of the Chief Counsel). See generally *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019), *aff'g* *Thomas v. Schroer*, 248 F. Supp. 3d 868 (W.D. Tenn. 2017) (noting that *Thomas v. Schroer* later became *Thomas v. Bright*), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam).

<sup>62</sup> See 23 U.S.C. § 131(b), (k).

the states to act as direct enforcers of the new law.<sup>63</sup> Through this measure and subsection (k), states were granted some limited power to shape their states' compliance with the HBA as they saw fit, so long as any modifications made were compliant with the HBA.<sup>64</sup>

The impact of the effective control mandate today is that state governments have participated in the regulatory enforcement efforts prescribed by the HBA for decades, proving their capability of handling such a responsibility were it to fall exclusively on them.<sup>65</sup> To stay compliant with the HBA, state governments allocated the necessary resources, both manpower and monetary, to handle continued regulatory efforts and are therefore equipped to handle any additional duties that may arise if the program becomes entirely state-run.<sup>66</sup> It is clear from these efforts that if states are charged with the complete oversight of outdoor advertising and junkyards, they will be adeptly prepared to handle the physical and financial burdens of such a responsibility.

### 5. *Just Compensation*

Finally, the HBA states that to conduct effective control, “just compensation” must be provided for the removal of nonconforming signs.<sup>67</sup> The 1965 Act reads:

- (g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—
  - (1) those lawfully in existence on the date of enactment of this subsection,
  - (2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and
  - (3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

- (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

---

<sup>63</sup> See *id.* § 131(k); Cunningham, *supra* note 56, at 1297 n.7 (citing ROSS DE WITT NETHERTON & MARION MARKHAM, HIGHWAY RSCH. BD., ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS PART II 48–49 (1966)).

<sup>64</sup> 23 U.S.C. § 131(k).

<sup>65</sup> See *A History and Overview*, *supra* note 9.

<sup>66</sup> See 23 U.S.C. § 131(k); FHWA Outdoor Advertising Control, *supra* note 9 (describing the devotion of resources by state-level Departments of Transportation (DOTs) “to administer the program and demonstrate they have the required effective control of these programs”); Cunningham, *supra* note 56, at 1332 (noting that the states worked with the Secretary of Transportation to enact state statutes that provided effective control in compliance with federal standards).

<sup>67</sup> See *A History and Overview*, *supra* note 9.

(B) The taking from the owner of the real property on which the sign, display, or device is located of the right to erect and maintain such signs, displays, and devices thereon.<sup>68</sup>

Just compensation ensures fairness and equity are not undermined as federal, state, and local governments seek to amplify regulation of outdoor advertising, which are largely under private ownership.<sup>69</sup> Despite the strong public policy reasoning behind requiring just compensation, the provision creates a loophole when considered in congruence with subsection (n) that erases much of the HBA's enforcement power, making oversight contingent on the continued appropriation of federal funds.<sup>70</sup> Subsection (n) provides:

No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment. Funds apportioned to a State under section 104 of this title shall not be treated for purposes of the preceding sentence as being available to the State for making such a payment except to the extent that the State, in its discretion, expends such funds for such a payment.<sup>71</sup>

In 1968, Congress's amendment to the HBA, which included subsection (n), diluted a great deal of the HBA's original enforcement power, but by the time Congress realized their error in judgement, it was the mid-1980s, and the damage was already done.<sup>72</sup> The debts owed to states were beginning to grossly outweigh the federal funds available to provide for their reimbursement.<sup>73</sup>

## 6. Amendments and Current State of Affairs

### a. Amendments: 1965 to 1990

In the more than fifty years since the HBA's passage, numerous amendments have modified its language, and non-legislative events occurred that further impacted its enforcement.

The Bonus Act garnered voluntary participation from twenty-three states in 1958, while the HBA required the participation of both Bonus Act volunteers

---

<sup>68</sup> 23 U.S.C. § 131(g) (1970); see *A History and Overview*, *supra* note 9.

<sup>69</sup> See *Lamar Advert. Co. v. Charter Township of Clinton*, 241 F. Supp. 2d 793, 800 (E.D. Mich. 2003); *Outdoor Legal: A City Must Pay Just Compensation if It Causes a Billboard to Come Down*, BILLBOARD INSIDER (Sept. 25, 2019), <https://billboardinsider.com/a-city-must-pay-just-compensation-if-it-causes-a-billboard-to-come-down/> [<https://perma.cc/8MTC-76WK>].

<sup>70</sup> See 23 U.S.C. § 131(g).

<sup>71</sup> *Id.* § 131(n) (amended 1992).

<sup>72</sup> See Statement by Elizabeth S. Padjen, *supra* note 27, at 323.

<sup>73</sup> See *id.*; *A History and Overview*, *supra* note 9.

and non-volunteers alike, beginning in 1965.<sup>74</sup> Since then, five states chose to take their regulation of outdoor advertising to the proverbial “extreme,” prohibiting the use of outdoor advertising for commercial purposes altogether.<sup>75</sup> The HBA has also undergone revisions via numerous amendments, the most recent of which was passed in 1995.<sup>76</sup> These amendments, while important, speak mainly to the HBA’s more constitutionally salient and uncontroversial

---

<sup>74</sup> See *A History and Overview*, *supra* note 9.

<sup>75</sup> See *id.* (noting that Maine, Alaska, Hawaii, Rhode Island, and Vermont all now prohibit the installation and use of outdoor advertising signs entirely in their respective states); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 6–7 (1st Cir. 1980), *aff’d*, 453 U.S. 916 (1981). Alaska “overwhelmingly voted to adopt statutes . . . and regulations . . . to ensure public safety and federal regulatory compliance, and preserve the state’s scenic beauty by minimizing outdoor advertising,” which became effective upon Alaska’s achievement of statehood in January 1959. Heather O’Claray, *Design and Construction Standards*, ALASKA DEP’T TRANSP. & PUB. FACILITIES, <http://dot.alaska.gov/stwddes/dcsrow/campaignsigns.shtml> [<https://perma.cc/7U53-6PEJ>]; ALASKA STAT. § 19.25.075-180 (2018); ALASKA ADMIN. CODE tit.17, § 20.005-010 (repealed 1997); ME. REV. STAT. ANN. tit. 23, § 1153 (West 1992); VT. STAT. ANN. tit. 10, § 495 (2018); HAW. REV. STAT. ANN. § 445-112 (West 2008). While these states banned the use of outdoor advertising for commercial purposes, some do allow outdoor advertising in the form of directional signs and informational postings. See, e.g., ALASKA STAT. § 19.25.105(a)–(e) (2018). See generally *Billboard Bans and Controls*, INST. FOR LOC. SELF-RELIANCE, <https://ilsr.org/rule/billboard-bans-and-controls/> [<https://perma.cc/G4UA-LHLD>] (noting that the four states known for their scenic beauty are those that banned billboards).

<sup>76</sup> See *A History and Overview*, *supra* note 9; see also Federal-Aid Highway Act of 1968, Pub. L. 90-495, 82 Stat. 815 (noting that the 1968 Act (1) required determinations of “customary use” for lighting, size, and spacing in commercial and industrial area signs to be more broadly accepted, (2) allowed the Bonus States Program participants to continue receiving federal compensation for dual compliance with it and the HBA, (3) noted that states receiving bonus payments would still be subject to the HBA’s ten percent penalty if found in violation of compliance, and (4) required the removal of nonconforming signs only if federal funds were available to provide just compensation); Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 123, 84 Stat. 1713, 1727–28 (establishing the Highway Beautification Commission); S. REP. NO. 93-1111, at 35 (1974) (noting that the 1970 Act: (1) permitted landmarks signs to be an allowed category of signage, (2) extended effective control to cover all signs with the purpose of their message being read from the controlled highway that were erected outside urban areas and visible from the main-traveled way, and (3) expanded the number of signs eligible for compensation prior to removal); H.R. REP. NO. 94-1017, at 51 (1976) (Conf. Rep.) (de-emphasizing landscaping and scenic enhancement efforts by getting rid of states’ ability to receive 100 percent federal funding); H.R. REP. NO. 95-1485, at 14, 17 (1978) (noting the 1978 Act: (1) allowed just compensation for the removal of signs lawfully erected, but not permitted under 23 U.S.C. § 131(t) and (2) permitted use of electronic variable messages on-premises signs in Bonus States); H.R. REP. NO. 102-404, at 11, 29 (1991) (noting the 1991 Act (1) prohibited the erection of new billboards on state designated scenic byways and (2) applied HBA compliance to all signs located on highways designated as the “Federal-aid primary” system as of June 1, 1991, and those designated as part of the National Highway System); S. REP. NO. 104-86, at 7–8 (1995) (noting an amendment to the scenic byways to permit the segmentation of non-scenic areas along state designated or federally approved scenic byways, provided the state’s determination is reasonable).

provisions, while simultaneously neglecting to address the bigger issues like the constitutionally questionable “on-premises” exception.<sup>77</sup> Consequently, the HBA’s language, as written, continues to be problematic.

b. *Current State of Affairs*

Despite its demure title, the congressional effort to beautify the Interstate is highly problematic and ineffective. Extensive federal time and funds have been allocated to an initiative that no longer produces its intended results.<sup>78</sup> Those resources could be better spent on more effective federal safety initiatives like campaigns to encourage seatbelt use or combat drunk driving. Although the HBA’s billboard regulations have likely saved lives by minimizing certain distractions inherently caused by billboards, their overall impact on safety pales in comparison to the number of lives saved by programs like the anti-distracted driving campaigns coordinated by the National Highway Traffic Safety Administration.<sup>79</sup>

Finally, the HBA’s outdated language is ill-equipped to properly regulate modern forms of outdoor advertising, like digital signs.<sup>80</sup> Without a substantial update, the HBA cannot serve one of its fundamental purposes, increasing

---

<sup>77</sup> See generally Susan C. Sharpe, “Between Beauty and Beer Signs”: *Why Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of 1965*, 64 RUTGERS L. REV. 515, 529 (2012) (noting the substantial problem digital signs pose to the HBA); David L. Hudson Jr., *Tennessee Billboard Law Violates First Amendment, 6th Circuit Panel Rules*, FREE SPEECH CTR. MIDDLE TENN. ST. UNIV. (Sept. 22, 2019), <https://www.mtsu.edu/first-amendment/post/348/tennessee-billboard-law-violates-first-amendment-6th-circuit-panel-rules> [<https://perma.cc/5JE4-UKU6>] (noting the questionable constitutionality of the on-premises exception in the Tennessee Billboard Act).

<sup>78</sup> See FHWA Outdoor Advertising Control, *supra* note 9.

<sup>79</sup> See John S. Decker et al., *The Impact of Billboards on Driver Visual Behavior: A Systematic Literature Review*, 16 TRAFFIC INJ. PREVENTION 234, 234 (2015); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., BUDGET ESTIMATES FOR FISCAL YEAR 2021 FOR THE COMM. ON APPROPRIATIONS 3 (2020), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fy\\_2021\\_nhtsa\\_congressional\\_justification.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fy_2021_nhtsa_congressional_justification.pdf) [<https://perma.cc/4ZDC-FSXP>] (noting that the National Highway Traffic Safety Administration (NHTSA) previously requested federal oversight over certain safety initiatives be given to the states for similar reasons as those offered in favor of allowing the states to regulate outdoor advertising); Ken Kline, *Traffic Safety: Government Communicates via OOH*, OUT OF HOME ADVERT. ASS’N AM. (Mar. 11, 2019), <https://specialreports.oaaa.org/trafficsafetyviaooh/> [<https://perma.cc/4CHM-6BD3>] (describing NHTSA’s use of billboards to reduce distractions on the road); *U Drive. U Text. U Pay.*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/campaign/distracted-driving> [<https://perma.cc/C8AV-FGZW>] (describing the importance of other safety initiatives put on by NHTSA).

<sup>80</sup> See JERRY WACHTEL, NAT’L COOP. HIGHWAY RSCH. PROGRAM, SAFETY IMPACTS OF THE EMERGING DIGITAL DISPLAY TECHNOLOGY FOR OUTDOOR ADVERTISING SIGNS FINAL REPORT 7 (Apr. 2009), <http://scenicwisconsin.org/public/resources/NCHRP.pdf> [<https://perma.cc/4P7Y-79HW>]; Sharpe, *supra* note 77, at 529.



public safety, and the federal and state agencies tasked with oversight will continue facing a barrage of costly, time-consuming legal battles.<sup>81</sup>

### III. LEGAL CHALLENGES AND ANALYSIS

As discussed, the HBA has faced its fair share of legal challenges. While the Bonus States Program has also come under fire, the criticism it faces is less consequential and comes primarily from the legislative body that enacted it in addition to the regulators charged with its oversight.<sup>82</sup> Conversely, the HBA's critiques often take issue with its listed exceptions, namely the "on-premises" or "on-site" exception, detailed in 23 C.F.R. § 750.709(d) and are derived from a much broader spectrum of voices.<sup>83</sup> Nearly forty years of Supreme Court jurisprudence exists on the single issue of the on-premises exception, and yet its proper application remains so unclear that additional federal guidance is often necessary to clarify how the exception's language should be interpreted.<sup>84</sup> One persisting issue with the exception is whether its varied treatment of on-premises and off-premises signs presents an unconstitutional barrier to free speech.<sup>85</sup>

The on-premises exception has and continues to present frequent obstacles to the exercise of free speech.<sup>86</sup> Since the Supreme Court first ruled in *Metromedia, Inc. v. City of San Diego* that the city's application of the on-premises exception was constitutional,<sup>87</sup> the HBA has been the source of copious litigious action in federal and state courts.<sup>88</sup> The following cases highlight critical issues with the HBA, and while they provide only a snapshot of the HBA's legal troubles, they are representations of the numerous legal

---

<sup>81</sup> See FHWA Outdoor Advertising Control, *supra* note 9.

<sup>82</sup> See generally Kerry Yoakum, *Why Congress Wants to Get Rid of the Bonus Act*, OUT OF HOME ADVERT. ASS'N AM. (Apr. 16, 2018), <https://specialreports.oaaa.org/bonusact/> [<https://perma.cc/L9HH-KD55>] (describing congressional discontent with the Bonus Act, but a reluctance to act).

<sup>83</sup> 23 C.F.R. § 750.709(d) (2020); see *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 494 (1981). While in *Metromedia* the Court refers to the offending exception as "onsite," the term applied more frequently in cases since *Metromedia* is "on-premises." See generally *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Thomas v. Bright*, 937 F.3d 721, 724 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam). For the sake of clarity, with exception given to the discussion of *Metromedia*, this Note will refer to the "onsite" or "on-premises" exception or exemption simply as the "on-premises" exception.

<sup>84</sup> See *Thomas v. Bright*, INT'L SIGN ASS'N, <https://www.signs.org/thomas> [<https://perma.cc/53R3-DD7G>]. See generally Virgil Pridemore, *Guidance on the Clarification of On-Property or On-Premise Advertising*, FED. HIGHWAY ADMIN. (July 15, 2015), [https://www.fhwa.dot.gov/real\\_estate/policy\\_guidance/onpremise\\_clarification\\_memo.cfm](https://www.fhwa.dot.gov/real_estate/policy_guidance/onpremise_clarification_memo.cfm) [<https://perma.cc/7T3Z-6ZES>] (describing agency guidance pertaining to the on-premises exception).

<sup>85</sup> See, e.g., *Metromedia*, 453 U.S. at 498; *Thomas*, 937 F.3d at 724; *Reed*, 135 S. Ct. at 2226; *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), *cert. granted*, No. 20-1029, 2021 WL 2637836 (U.S. Oct. 4, 2021).

<sup>86</sup> See, e.g., *Hudson Jr.*, *supra* note 77.

<sup>87</sup> See *Metromedia*, 453 U.S. at 512.

<sup>88</sup> See, e.g., *Thomas*, 937 F.3d at 724; *Reed*, 135 S. Ct. at 2226.

battles previously fought and those still to come if the status quo remains unchanged.

#### A. *Metromedia, Inc. v. City of San Diego*

In 1981, the Supreme Court's holding in *Metromedia* made waves when it ruled that the on-premises exception was constitutionally applied.<sup>89</sup> The case questioned the validity of San Diego's enforcement of an ordinance that prohibited the installation of "outdoor advertising display signs."<sup>90</sup> The ordinance offered two exceptions to the ban, one of which was for "on-site signs."<sup>91</sup> The issue was that while the ordinance permitted on-site advertising, all other forms of "commercial advertising and noncommercial communications using fixed-structure signs" were forbidden, unless they qualified under the other listed exception.<sup>92</sup> Petitioners argued that the on-site exception violated the First Amendment by restricting free speech because it required the city's evaluation of a sign's contents before determining whether it was permitted.<sup>93</sup> The Court disagreed and upon finding the ordinance's discrimination was content-neutral, applied intermediate scrutiny as its standard of review.<sup>94</sup> Ultimately, the Court held that San Diego's differential treatment of on-site and off-site signs could continue, citing the ordinance's furtherance of the city's substantial government interests in traffic safety and improving the city's visual

---

<sup>89</sup> See *Metromedia*, 453 U.S. at 512.

<sup>90</sup> "Advertising display sign" was not defined in the ordinance but was subsequently defined by the California Supreme Court to be any sign that "directs attention to a product, service or activity, event, person, institution or business." *Id.* at 494.

<sup>91</sup> Signs designated as "onsite" or "on-premises" are defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." *Id.*

<sup>92</sup> *Id.* at 496. The twelve exceptions provided in San Diego's ordinance were "government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and '[t]emporary political campaign signs.'" *Id.* at 494-95.

<sup>93</sup> *Id.* at 498.

<sup>94</sup> *Metromedia*, 453 U.S. at 507.

To determine if any billboard is prohibited by the ordinance, one must determine how it is constructed, where it is located, and what message it carries. Thus, under the ordinance . . . [t]he occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most noncommercial messages.

*Id.* at 503.

appearance, without applying language that was overly broad.<sup>95</sup> *Metromedia* set a new precedent for the distinguished treatment of on-site and off-site signs; however, the degree to which that decision impacted other states' statutes remains debatable.<sup>96</sup>

## B. Reed v. Town of Gilbert

*Reed v. Town of Gilbert* challenged exceptions listed in the Land Development Code of Gilbert, Arizona (the Code).<sup>97</sup> Petitioners argued that certain provisions of the Code violated their First and Fourteenth Amendment rights under the United States Constitution.<sup>98</sup> Their challenge differed from *Metromedia* in that it took issue not with the Code's treatment of on-premises signs, but with other provisions that barred "temporary directional signage," "political signs," and "ideological signs," all of which are forms of temporary signs.<sup>99</sup> The Court agreed with the petitioners that Gilbert's restriction on speech under the challenged provisions was "content-based" not "content-neutral" and therefore needed to be reviewed under the strict scrutiny standard, a nearly impossibly high bar to meet.<sup>100</sup> Central to its ruling were the more stringent restrictions placed on those signs directing the public to a meeting of a nonprofit

---

<sup>95</sup> Had the San Diego ordinance not included any exceptions to the ban, such language would have been considered too broad and therefore failed the *Central Hudson* test. *Id.* at 508 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)). The *Central Hudson* test considers four elements: (1) whether the speech is that which concerns "lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Id.* at 507 (citing *Cent. Hudson*, 447 U.S. at 563–66).

<sup>96</sup> "[W]e again recognized the common-sense and legal distinction between speech proposing a commercial transaction and other varieties of speech." *Id.* at 506.

[The Highway Beautification] Act, like the San Diego ordinance, permits on-site commercial billboards in areas in which it does not permit billboards with noncommercial messages. However, unlike the San Diego ordinance . . . the federal law does not contain a total prohibition of such billboards in areas adjacent to the interstate and primary highway systems. . . . [S]uch billboards are permitted adjacent to the highways in areas zoned industrial or commercial under state law or in unzoned commercial or industrial areas. Regulation of billboards in those areas is left primarily to the States.

*Id.* at 515 n.20 (citations omitted).

<sup>97</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

<sup>98</sup> *Id.* at 2226.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2224, 2226–29. "Not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny." *Id.* at 2232 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)) (emphasis in original); see also *id.* at 2234 (Breyer, J., concurring) (explaining that strict scrutiny leads to "almost certain legal condemnation").

group or religious service than on those conveying other messages.<sup>101</sup> *Reed* marked the Court's first application of strict scrutiny review to a case involving the restriction of free speech on signs and is duly notable because of Justice Alito's concurrence, wherein he offered a noncomprehensive list of the rules that he believed should not be considered content-based, one of which was the distinction made between on-premises and off-premises signs.<sup>102</sup>

### C. *Thomas v. Bright*

Thirty-eight years after *Metromedia*, *Thomas v. Bright* saw the Sixth Circuit arrive at a notably different conclusion regarding Tennessee's application of an on-premises exception in its Billboard Regulation and Control Act (the Tennessee Billboard Act).<sup>103</sup> The court found the exception to be unconstitutionally restrictive and began its review by noting:

Textually, the Tennessee Billboard Act is a blanket, content-neutral prohibition on any and all signage speech except for speech that satisfies an exception; here, the on-premises exception. In this way, Tennessee favors certain content (i.e., the excepted content) over others, so the Act, "on its face," discriminates against that other content.<sup>104</sup>

While the federal government may legally engage in content-based discrimination on very rare occasions, such acts must be able to withstand strict

---

<sup>101</sup> *Id.* at 2232 (majority opinion) (ruling that the exceptions were "facially content based" and requiring they be held to a strict scrutiny, rather than intermediate). The Court found that the exceptions were "neither justified by traditional safety concerns nor narrowly tailored," meaning they could not pass muster, and as such were unconstitutional. *Id.*

<sup>102</sup> According to Justice Alito, the rules that should not be considered content-based are those (1) "regulating the size of signs," (2) "regulating the locations in which signs may be placed," (3) "distinguishing between lighted and unlighted signs," (4) "distinguishing between signs with fixed messages and electronic signs with messages that change," (5) "distinguishing between the placement of signs on private and public property," (6) "distinguishing between the placement of signs on commercial and residential property," (7) "distinguishing between on-premises and off-premises signs," (8) "restricting the total number of signs allowed per mile of roadway," or (9) "imposing time restrictions on signs advertising a one-time event." *Id.* at 2233 (Alito, J., concurring).

<sup>103</sup> *Thomas v. Bright*, 937 F.3d 721, 738 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam).

<sup>104</sup> *Id.* at 728 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–66 (2011)). "By favoring on-premises-related speech over speech on but unrelated to the premises, the [Tennessee] Billboard Act 'has the effect of disadvantaging the category of non-commercial speech that is probably the most highly protected: the expression of ideas.'" *Id.* at 736 (quoting *Ackerley Commc'ns of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996)).

scrutiny review.<sup>105</sup> The relevance of the *Thomas* outcome only grew when the court decided that the entire act, not just the offending exception, needed to pass a review under the highest standard.<sup>106</sup> The court's reasoning was thus: Tennessee chose not to raise severability as an issue in its appeal, so the appellate court felt it most appropriate to reiterate the lower court's holding that the on-premises exception was inseverable from the original act.<sup>107</sup> The reiteration of non-severability meant that the entire Tennessee Billboard Act was subject to strict scrutiny review, rather than just the offending exception.

The court's review of the Tennessee Billboard Act considered whether the State's interests were compelling and its language was sufficiently tailored to achieve these interests without infringing on other rights.<sup>108</sup> While one of Tennessee's interests was found to be sufficiently compelling, the court also noted two ways in which the exemption's language was underinclusive.<sup>109</sup> Ultimately, the court held that the Tennessee Billboard Act, "as effectuated . . . by its non-severable on-premises exception, [was] a content-based regulation of free speech that cannot survive strict scrutiny and is, therefore, unconstitutional."<sup>110</sup>

---

<sup>105</sup> Under the Tennessee Billboard Act, "a sign written in a foreign language would have to be translated (and interpreted) before a Tennessee official could determine whether the on-premises exception would apply or the sign violated the Act. There is no way to make those decisions without understanding the content of the message." *Id.* at 730. Therefore, the Sixth Circuit found the on-premises exception was a "content based regulation of free speech" and an "unconstitutional restriction on non-commercial free speech under First Amendment." *Id.* at 722. Strict scrutiny requires states to demonstrate that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 733 (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)); see also Hudson Jr., *supra* note 77; Ronald Steiner, *Compelling State Interest*, FREE SPEECH CTR. MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYC., <https://mtsu.edu/first-amendment/article/31/compelling-state-interest> [<https://perma.cc/CVT5-GZVQ>].

<sup>106</sup> See *Thomas*, 937 F.3d at 729.

<sup>107</sup>

Therefore, we will not disturb the district court's determination that the Act, as applied in this case, is unconstitutional inasmuch as the on-premises exception is not severable from it, and that "it is for the Tennessee State Legislature—and not this [c]ourt—to clarify the Legislature's intent regarding the Billboard Act in the wake of *Reed*."

*Id.*; see also Steiner, *supra* note 105.

<sup>108</sup> To pass muster under strict scrutiny, the Tennessee Billboard Act needed to demonstrate a furtherance of Tennessee's compelling interests, and that its language was sufficiently narrowly tailored, so as to not accidentally infringe on other rights. See *Thomas*, 937 F.3d at 733.

<sup>109</sup> *Id.* at 736 (noting the court found Tennessee Billboard Act's exception discriminated against both "non-commercial messages on the basis of content," and "*non-commercial* speech on but unrelated to the premises while allowing on-premises *commercial* speech").

<sup>110</sup> *Id.* at 738. "Insofar as the [state] tolerates billboards at all, it cannot choose to limit their content to commercial messages; the [state] may not conclude that the communication of commercial information concerning goods and services connected with a particular site is

The issue of the on-premises exception's constitutionality remains uncertain and will likely continue to face legal challenges. Nevertheless, *Thomas* and the Tennessee State Legislature's corrective action following the court's decision were significant and laid the foundation for this Note's proposed solutions, which aim to resolve the constitutionality issue as well as other challenges faced by the HBA and its affiliate state statutes.

#### IV. ANALYSIS OF POSSIBLE SOLUTIONS

The continuous legal challenges faced by the HBA make clear that corrective action is required to prevent future problems and legal challenges from arising. Such action could foreseeably include either: (1) fixing the HBA's litany of problems and requiring that states amend their corresponding statutes to reflect the updated standards, or (2) abolishing the HBA altogether and allowing the states to oversee and regulate outdoor advertising and junkyards. Neither solution provides an "easy fix" to the problem, but both offer steps forward. The viability of each must be weighed as one appears to offer states greater flexibility and autonomy, while the other slaps on a metaphorical bandage and may fail to provide a permanent solution. Also pertinent to this discussion is the recognition of the problems that these solutions aim to resolve and government interests motivating the HBA's future.

##### A. *Extenuating Problems*

This Note has previously illuminated some of the HBA's extenuating problems.<sup>111</sup> The three main outstanding issues are: (1) the "on-premises" exception's constitutionality and severability, (2) the lack of effectiveness due to the loopholes resulting from subsection (n) and there being insufficient federal funding to provide just compensation, and (3) the similar treatment of digital signs to that of traditional billboards.<sup>112</sup>

##### 1. *"On-Premises" Exception*

The "on-premises" exception, as discussed at length in Part III, remains one of the biggest legal obstacles to the HBA's success.<sup>113</sup> The debate regarding whether differential treatment of on-premises and off-premises signage is constitutional has fueled litigious skirmishes for decades, with *Thomas* and the recently affirmed case, *L.D. Management Company v. Gray* providing some of

---

of greater value than the communication of non-commercial messages." *Id.* at 737 (citing *Metromedia v. City of San Diego*, 453 U.S. 490, 513 (1981)).

<sup>111</sup> See *supra* Part III for discussion of the HBA's legal challenges.

<sup>112</sup> See *supra* Parts II.C.5-6., III for discussion of the critical issues hampering the HBA's success. See also 23 U.S.C. § 131(n).

<sup>113</sup> See *supra* Part III for discussion of the legal challenges related to the on-premises exception.

the latest updates.<sup>114</sup> Should the Supreme Court revisit the on-premises exception and find it to be unconstitutional and practically non-severable, that single provision could potentially unravel federal oversight of both outdoor advertising and junkyards. As such, consideration of this exception and its potential liabilities is essential to determining a practical and workable solution.

## 2. *A Loophole Impacting Effectiveness*

The HBA's ineffectiveness, as described in Part II, is a significant problem because without change, the HBA has little legal purpose. This is largely due to the insufficient federal funds creating an enforcement loophole and rendering the HBA largely ineffective with respect to its ability to regulate or remove nonconforming outdoor advertising.<sup>115</sup>

A substantial barrier to the HBA's effectiveness is the lack of federal funds to provide just compensation for the removal of nonconforming signs by state and local authorities. As stated, the HBA requires just compensation for the removal of nonconforming signs, and prescribes that seventy-five percent of those funds must come from the federal government.<sup>116</sup> Without these funds, removal of nonconforming signs is prohibited, rendering the HBA's regulatory power over outdoor advertising all but useless.<sup>117</sup> This financial barrier has long plagued the HBA and will continue doing so until the eradication of the provisional contingency requiring the availability of federal funds to contribute seventy-five percent of just compensation to permit removal of nonconforming signs. Otherwise, no matter the breadth or substance of amendments made to the HBA or its corresponding state statutes, the statutory language provided therein will remain largely unenforceable.

## 3. *Inadequate Digital Sign Regulation*

Currently, digital signs falling within the scope of the HBA's jurisdiction, those located within "660 feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System," receive the same treatment in most states as do traditional billboards.<sup>118</sup> While traditional and

---

<sup>114</sup> See *supra* Part III for discussion of recent legal challenges. See also *supra* note 103 and accompanying text; *Thomas v. Bright*, 937 F.3d 721, 729 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam); *L.D. Mgmt. Co. v. Gray*, 988 F.3d 836, 841 (6th Cir. 2021), *aff'g* *L.D. Mgmt. Co. v. Thomas*, 456 F. Supp. 3d 873 (W.D. Ky. 2020).

<sup>115</sup> See *supra* Part II.C.5 for further discussion of the loophole which impacts the HBA's effectiveness.

<sup>116</sup> See *supra* Part II.C.5 for further discussion of the just compensation provision.

<sup>117</sup> See 23 U.S.C. § 131(n).

<sup>118</sup> 23 C.F.R. § 750.101(a)(2) (2020); see *Johnson, supra* note 5 (noting the FHWA's permittance of digital billboards along roads, provided the digital signs do not include text or images that scroll or flash, as these could present a hazard to drivers on the roadways).

digital signs qualify similarly under the HBA, applying the exact same regulatory standards to both may be imprudent because they present different problems.<sup>119</sup> For example, traditional outdoor advertising is blatantly visible only during the daylight hours, due to the HBA's lighting standards.<sup>120</sup> This means they are normally intrusive only during daylight hours.<sup>121</sup> Conversely, digital signs include bright neon lights that can be intrusive and harmful to residents around the clock.<sup>122</sup> These bright lights can impact the ability of nearby residents to sleep, cause general distractions, and present a never-ending intrusion to the environment.<sup>123</sup> Advocates have called for developing new standards to address the unique problems posed by digital signs, however beyond a few localities imposing outright bans on digital signs, little else has occurred to further bolster their regulation.<sup>124</sup> Digital signs are additionally important because as a subset of outdoor advertising, they are significantly more lucrative than traditional billboards and are growing in popularity among advertisers.<sup>125</sup> Therefore, any legislative attempt to enforce or strengthen restrictive regulations specifically on digital signs is likely to face a steep uphill battle.

### B. Government Interests

The HBA was designed to “protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.”<sup>126</sup> As such, keeping in mind the government's interests in public safety and scenic preservation is relevant to discussing possible avenues for the HBA's future.

---

Until the 2011 ruling in *Scenic Arizona v. City of Phoenix Board of Adjustment*, no published cases existed to decipher how digital billboards should be interpreted within the context of the HBA's regulations. Sharpe, *supra* note 77, at 519; *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 268 P.3d 370, 387 (Ariz. Ct. App. 2011) (invalidating the respondent's digital billboard permit on the grounds that the proposed billboard's lighting violated the Arizona Highway Beautification Act).

<sup>119</sup> “Digital billboards are illuminated signs that have more in common with television than with a standard sign.” Joe Scott, Review of the Application and Regulation of Electronic Signage in the Town of Prescott Valley and Other Recommended Amendments 4–5 (Dec. 7, 2011) (unpublished manuscript), [http://pvaz.granicus.com/MetaViewer.php?view\\_id=&clip\\_id=814&meta\\_id=36733](http://pvaz.granicus.com/MetaViewer.php?view_id=&clip_id=814&meta_id=36733) [<https://perma.cc/2W8Q-6PQK>]; see 23 U.S.C. § 131(d).

<sup>120</sup> See Sharpe, *supra* note 77, at 518.

<sup>121</sup> See *id.* at 517–18.

<sup>122</sup> E.g., *id.* (citing William M. Welch, *Neighbors Hope to Pull Plug on Signs: Say Digital Billboards Ruin Quality of Life, Are Safety Risk*, USA TODAY, Sept. 5, 2007, at 3A).

<sup>123</sup> See *id.*

<sup>124</sup> See *id.* at 532–34.

<sup>125</sup> See *id.* at 529; *Digital Billboards Today*, OUT OF HOME ADVERT. ASS'N AM. (2018), [https://oaaa.org/Portals/0/Public%20PDFs/Policy%20Issue%20Briefs/Digital%20Billboards%20Today\\_2018.pdf](https://oaaa.org/Portals/0/Public%20PDFs/Policy%20Issue%20Briefs/Digital%20Billboards%20Today_2018.pdf) [<https://perma.cc/2WBS-HVYA>].

<sup>126</sup> 23 U.S.C. § 131(a).



The FHWA was originally charged with oversight of the HBA because, in part, the legislation was designed to bolster public safety.<sup>127</sup> This public safety interest, however, is an insufficient justification for maintaining the status quo because billboard regulation does little to further public safety.<sup>128</sup> The HBA's lack of enforcement and outdated provisions can largely be blamed for this, but truthfully, the HBA's main focus has always been on preserving and beautifying the Interstate, not public safety.<sup>129</sup> While the HBA does offer some minor safety measures, primarily via regulation of sign lighting, size, and spacing,<sup>130</sup> the benefits garnered from these regulations do not outweigh the significant costs.<sup>131</sup> Further, the lack of enforcement on digital signs is detrimental to both of the government's interests, public safety and scenic landscaping beautification. Digital signs are more distracting than traditional billboards and are interminable disruptions to the landscape.<sup>132</sup> While fewer drivers may be

---

<sup>127</sup> See *A History and Overview*, *supra* note 9 (noting the HBA's stated purpose was "to promote the safety and recreational value of public travel, and to preserve natural beauty"); *Federal/State Agreements*, *supra* note 55 (describing the negotiations conducted between the FHWA and states beginning in June 1967).

<sup>128</sup> See *A History and Overview*, *supra* note 9 (listing the limited measures put in place that have had a significant impact on public safety); see also *Thomas v. Bright*, 937 F.3d 721, 734 (6th Cir. 2019) (indicating that the motivation behind the HBA's enactment was not to further an interest in bolstering public safety), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam).

<sup>129</sup> "We have persuasive evidence that Congress in enacting the HBA . . . [was] motivated almost exclusively by aesthetic, not public safety, concerns." *Thomas*, 937 F.3d at 734 (citing Brief for the Buckeye Institute as Amicus Curiae in Support of Appellee at 4–11, *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) (No. 17-6238)); see Weingroff, *supra* note 1; *HBA: A Broken Law*, SCENIC AM., <http://www.scenic.org/billboards-a-sign-control/highway-beautification-act/115-a-broken-law> [<https://perma.cc/8LHX-6LXG>].

<sup>130</sup> See 23 C.F.R. § 750.704(b) (2020).

<sup>131</sup> See Tom Kenworthy, *How the Highway Beautification Act Went by the Boards*, WASH. POST (Feb. 24, 1987), <https://www.washingtonpost.com/archive/politics/1987/02/24/how-the-highway-beautification-act-went-by-the-boards/8ed2fcb6-9f68-40a1-9773-e9f86e337eae/> [<https://perma.cc/T5HW-MQ9V>] (noting a 1985 study by the General Accounting Office that found "172,000 remaining signs were illegal or nonconforming. Removing the 124,000 nonconforming signs erected before the [HBA] would cost about \$427 million, the GAO said, a daunting prospect because federal funding had shrunk to \$2 million in fiscal 1984").

<sup>132</sup> See Sharpe, *supra* note 77, at 517–18; Tania E. Dukic, Christer Ahlstrom, Christopher Patten, Carmen Kettwich & Katja Kircher, *Effects of Electronic Billboards on Driver Distraction*, 14 TRAFFIC INJ. PREVENTION 469, 475 (2013) (noting that digital signs caused study participants to become distracted notably longer than did traditional signs); see also Maggie Angst, *Billboard Industry vs. Public Will: Who Will Win the Battle Over Digital Signs in San Jose?*, MERCURY NEWS (Feb. 16, 2021), <https://www.mercurynews.com/2021/02/15/billboard-industry-vs-public-will-who-will-win-the-battle-over-digital-signs-in-san-jose/> [<https://perma.cc/5BUQ-G2P3>] (noting opponents of a San Jose ordinance argued that "new digital signs offer no public benefit and would negatively affect surrounding wildlife, create light and visual pollution and lead to a loss of San Jose's aesthetic character").

distracted by traditional billboards thanks to the HBA, if the system remains unchanged, other more pressing safety campaigns like anti-distracted driving campaigns, that could profoundly benefit from the funding and manpower traditionally allotted to oversee the HBA's enforcement and determine state compliance, will suffer.<sup>133</sup> Moreover, the HBA, premised on Lady Bird Johnson's vision to preserve the country's natural landscape, is not fulfilling its beautification goal due in part to the great disruption posed to the environment by digital signs.<sup>134</sup> Furthermore, highway landscaping is no longer under the FHWA's purview, meaning beautification and preservation efforts will not be impacted by the proposed solutions.<sup>135</sup>

### C. Legislative Constraints

The *Thomas* decision invalidated Tennessee's ordinance with respect to its unconstitutional differentiated treatment of on-premises signs, and consequently, the state needed to either amend the offending ordinance or risk incurring significant federal fines for noncompliance.<sup>136</sup> While these fines have not been stringently enforced for forty years, state governments, like that of Tennessee, are likely to still be wary of relaxing oversight if doing so could even possibly jeopardize future federal funds.

Per the court's recommendation in *Thomas*, Tennessee looked to its state legislature to clarify their intent "regarding the Billboard Act in the wake of *Reed*."<sup>137</sup> The Tennessee Legislature engineered a legislative fix, passing House Bill 2255, which severed the unconstitutional on-premises exception from the Tennessee Billboard Act.<sup>138</sup> This move directly contradicted the district court's belief that the exception was non-severable,<sup>139</sup> but nonetheless severing the

---

<sup>133</sup> See, e.g., *Distracted Driving*, NAT'L TRAFFIC HIGHWAY SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/distracted-driving> [<https://perma.cc/5BQK-4EDL>].

<sup>134</sup> See *supra* notes 127–128 and accompanying text.

Though the word beautification makes the concept sound merely cosmetic, it involves much more: clean water, clean air, clean roadsides, safe waste disposal and preservation of valued old landmarks as well as great parks and wilderness areas. To me . . . beautification means our total concern for the physical and human quality we pass on to our children and the future.

*Beautification: A Legacy of Lady Bird Johnson*, *supra* note 52. "First we shape our buildings, and then they shape us.' The same is true of our highways, our parks, our public buildings, and the environment we create. They shape us." *Id.* (citing Lady Bird Johnson, quoting Winston Churchill and expanding upon his thoughts).

<sup>135</sup> Interview with Dawn Horan, *supra* note 48.

<sup>136</sup> *Thomas v. Bright*, 937 F.3d 721, 737–38 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam).

<sup>137</sup> *Thomas*, 937 F.3d at 729 (citing *Thomas v. Schroer*, 248 F. Supp. 3d 868, 873 (W.D. Tenn. 2017)).

<sup>138</sup> H.B. 2255, 111th Gen. Assemb. (Tenn. 2020).

<sup>139</sup> *Thomas*, 937 F.3d at 729 (citing *Thomas v. Schroer*, 248 F. Supp. 3d 868, 873 (W.D. Tenn. 2017)).

exception from the Tennessee Billboard Act allowed Tennessee to remedy their noncompliance with the HBA.<sup>140</sup>

Similar legislative action as that taken in Tennessee could be utilized nationally by states facing similar issues, but perhaps it might be better to not only fix the problematic provisions stemming from the HBA but also those less obvious problems requiring change, such as updating regulations for digital signs. Although this may sound overly burdensome, making changes one at a time, as was done in Tennessee, neglects to remedy the other outstanding issues.<sup>141</sup> Tennessee was able to work around the severability issue via legislative action, but if in the future the Supreme Court finds similarly to the Sixth Circuit,<sup>142</sup> the entire HBA could be threatened. In that case, resolution is unlikely to be as simple as it was in Tennessee. Fixing these extenuating problems now, rather than risking further future legal action, is the best and most proactive solution.

#### D. *Solution One: Amending the HBA*

The first solution proposes that Congress amend the HBA to resolve the previously discussed issues. After the federal statute is amended, states may need to amend their own statutes to reflect any mandatory changes not already fitting within the existing legal framework. Under this proposal, the FHWA's duty to monitor states' compliance and each state's responsibility to enforce the HBA by means of effective control will both remain unchanged.

##### 1. *Practicality*

Amending the HBA to reflect the stated issues is possible, albeit neither practical nor probable. On the surface, this solution may seem to be an easy fix, but in reality, the contrary is true, in addition to posing significant long-term problems. Amending the HBA may provide an outlet by which to fix all the discussed complications, but then issues are likely to arise pertaining to enforcement. Subsection (k) of the HBA provides that, “[s]ubject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a state from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.”<sup>143</sup> Subsection (k) grants the states greater freedom in shaping their statutes, and in doing so, supersedes the HBA's ability to enact sweeping changes that could be quickly

---

<sup>140</sup> See Petition for Writ of Certiorari at 30, *Thomas v. Bright*, 141 S. Ct. 194 (2020) (No. 19-1201), 2020 WL 1811293, at \*30.

<sup>141</sup> See generally Tenn. H.B. 2255; Cunningham, *supra* note 56, at 1309 (describing how the HBA's amendments, including subsection (n), have not always had their intended impact upon enactment).

<sup>142</sup> Petition for Writ of Certiorari, *supra* note 141, at 16–17.

<sup>143</sup> 23 U.S.C. § 131(k).

implemented nationwide.<sup>144</sup> Therefore, not only will the HBA need amendments, so too will states' statutes to reflect any mandatory changes not already codified by the states. Amending up to forty-six state statutes, one-by-one, to reflect these new amendments will likely be cumbersome and time-consuming. Furthermore, politics and varied state legislative schedules may thwart the fruition of any immediate progress. Suffice it to say, however, these will serve only as delays, not unscalable obstacles. Although not a simple solution, amending the HBA is possible, albeit fraught with numerous potential sticking points. The notion of this solution being an easy fix is even further complicated, however, by the steps required for the HBA's future enforcement.

## 2. Legal Problems

For this solution to work, after Congress resolves the logistical issues inherent with amending both the HBA and up to forty-six state statutes, it will next need to look to the legal impact of the changes proposed.

In *Thomas*, the court concluded that practicably, the on-premises exception could not be severed, immediately rendering the Tennessee Billboard Act unconstitutional, with respect to its application of the on-premises exception in the case.<sup>145</sup> This matter, however, has only been settled in the Sixth Circuit via *Thomas* and *L.D. Management*, as the Supreme Court recently declined to hear *Thomas* on appeal.<sup>146</sup> Should the Supreme Court revisit the on-premises exception and find it both unconstitutional and non-severable, the second proposed solution will be the only viable option. Given the growing number of cases questioning the on-premises exception's constitutionality,<sup>147</sup> thought ought to be given to simply opting for the second solution, even if just as a precautionary measure. Further, regardless of a Court ruling on the on-premises exemption, the first solution neglects to provide a clear remedy to the HBA's biggest problem, insufficient federal funding.

---

<sup>144</sup> *See id.*

<sup>145</sup> *See Thomas v. Bright*, 937 F.3d 721, 738 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020) (per curiam).

<sup>146</sup> *Id.*; *L.D. Mgmt. Co. v. Gray*, 988 F.3d 836, 841 (6th Cir. 2021), *aff'g* *L.D. Mgmt. Co. v. Thomas*, 456 F. Supp. 3d 873 (W.D. Ky. 2020).

<sup>147</sup> *Compare Thomas*, 937 F.3d at 729 (noting the court found an on-premises exception applicable to commercial and non-commercial speech alike made it content-based), *and L.D. Mgmt. Co.*, 988 F.3d at 839 (noting the court found "no material difference" existed between the on-site and off-site laws, and "[p]erhaps for that reason, the Commonwealth conceded . . . that the Kentucky Act regulated speech based on its content"), *and Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696, 699, 710 (5th Cir. 2020) ("We hold that the on-premises/off-premises distinction is content based and fails under strict scrutiny"), *cert. granted*, No. 20-1029, 2021 WL 2637836 (U.S. Oct. 4, 2021), *with Clear Channel Outdoor, Inc. v. Dir., Dep't of Fin.*, 247 A.3d 740, 759 (Md. 2021) (noting that the court found the "distinction between on-premises signs and off-premises signs in a regulatory or tax law does not discriminate on the basis of content and therefore does not trigger heightened scrutiny under the First Amendment").

### 3. Budgetary Problems

The truly fatal flaw with this solution is the lack of federal funds. The HBA requires the federal government to be able to pay seventy-five percent of just compensation for nonconforming sign removal, or else removal is prohibited.<sup>148</sup> Without removal power, the HBA is left with little to no enforcement power, arguably rendering its regulatory powers useless. Therefore, in the HBA's current state, those federal funds are the lynchpin to this first solution's success. The dire need for federal funds is also this solution's fatal flaw because those appropriated dollars ran dry in the 1980s,<sup>149</sup> and it is unlikely more will be appropriated in the near future given the lack of reallocation in over three decades.<sup>150</sup> The ongoing worldwide pandemic further dampens the chances federal funds will be appropriated in the foreseeable future.<sup>151</sup> While the HBA can technically hold states accountable for enforcement by threatening to cut their annual federal highway appropriations,<sup>152</sup> it is unclear whether this threat is sufficient enough to motivate states to conduct enforcement without a guarantee of federal contribution. This problem also cannot be resolved by amending the HBA to remove the just compensation provision. In all likelihood, the Court would interpret the removal of privately owned signs without just compensation, even if done to promote the government's interest in public safety, as being a taking in violation of the United States Constitution's Fifth Amendment.<sup>153</sup> While this solution has merit, it is impractical to implement. Unless Congress can quickly find a way to fund the HBA and fix its problems, neither of which are likely given its history and lack of substantive changes in the past thirty years,<sup>154</sup> the HBA must be abolished. The next solution proposes just that, and advocates for giving the states regulatory authority over outdoor advertising and junkyards.

---

<sup>148</sup> See *supra* Part II.C.5 for further discussion of just compensation and the funding schema.

<sup>149</sup> *U.S. Highway Beautification Program Is in Trouble*, N.Y. TIMES (Mar. 8, 1979), <https://www.nytimes.com/1979/03/08/archives/us-highway-beautification-program-is-in-trouble.html> [<https://perma.cc/W6B4-R48S>].

<sup>150</sup> "Only \$10.7 million remained available from previous appropriations as of May 31[,] 1985, and the administration has not requested any new funding since FY 1982." Statement by Elizabeth S. Padjen, *supra* note 27, at 458.

<sup>151</sup> *Cf. HBA: A Broken Law*, *supra* note 129. See generally Richard Kogan & Paul Van de Water, *Rising Federal Debt Should Not Shortchange Response to COVID-19 Crisis*, CTR. ON BUDGET & POL'Y PRIORITIES (2020), <https://www.cbpp.org/sites/default/files/atoms/files/5-21-20bud.pdf> [<https://perma.cc/YNB3-LM5D>] (discussing the rising federal debt coupled with COVID-19 relief efforts).

<sup>152</sup> 23 U.S.C. § 131(b).

<sup>153</sup> See U.S. CONST. amend. V.

<sup>154</sup> See *A History and Overview*, *supra* note 9 (describing the HBA's amendments since 1965).

### E. *Solution Two: Repeal the HBA*

The best solution is to repeal the HBA altogether and instead allow the states to regulate outdoor advertising and applicable junkyards as they deem appropriate. This solution is both practical and tangible, giving states the freedom to shape outdoor advertising regulation to best fit their needs. To accomplish this, Congress will need to repeal the HBA, thereby removing the FHWA's regulatory authority over outdoor advertising and junkyards, to allow the states to amend their state statutes as they see fit, without falling out of compliance and risking the loss of any federal funds. This solution, which provides the greatest opportunity for successful regulation, is also the most practical course of action.

#### 1. *A Novel Plan for Reshaping Regulatory Oversight*

A complete overhaul of the highway beautification program established by the HBA is critically needed to ensure the proper enforcement and regulation of outdoor advertising and junkyards. This overhaul, to be most effective, must see the states take over the federal government's regulatory duties in this area. This solution is practical, tangible, and fairly novel in its approach to handling the HBA's plethora of recurring issues.

This Note is not the first to suggest that immediate change is urgently needed.<sup>155</sup> There has been some discussion among legal scholars and federal government officials regarding solutions to a few of the problems discussed herein, including regulation of digital signs.<sup>156</sup> These past conversations have largely focused on adjusting single elements of the HBA, rather than attempting to cure the whole system.<sup>157</sup> For example, one legal scholar argued that the application of the HBA's regulatory mechanisms on digital signs, as applied in the same way as they are to traditional billboards, was unconstitutional, and instead argued in favor of amplifying regulatory oversight of digital signs.<sup>158</sup> Another scholar argued that the *Reed* decision renders the HBA unconstitutional, due to its application of the on-premises exception.<sup>159</sup> FHWA officials have also spoken up, calling primarily for the removal of the Bonus States Program.<sup>160</sup> No actions were taken to further any of the aforementioned

---

<sup>155</sup> See Yoakum, *supra* note 82; Sharpe, *supra* note 77, at 529.

<sup>156</sup> See Yoakum, *supra* note 82.

<sup>157</sup> See *id.*; Sharpe, *supra* note 77, at 529.

<sup>158</sup> See generally Sharpe, *supra* note 77 (arguing for greater restrictions on digital signs).

<sup>159</sup> Emily Jessup, *When Free Coffee Violated the First Amendment: The Federal Highway Beautification Act After Reed v. Town of Gilbert*, 16 FIRST AMEND. L. REV. 73, 75, 86-94 (2017).

<sup>160</sup> "As part of the 1991 reauthorization process, [the Federal Highway Administration] proposed and supported the repeal of the Bonus Act, but Congress elected to focus on refining other aspects of the HBA. Thus, the Bonus Act remains in effect." Yoakum, *supra* note 82.

proposals, so this discussion remains timely and topical. While many of these previous proposals put forth good ideas that may be helpful, they propose solutions too narrow to gain serious enough traction to effectuate real change on the national level. The HBA created a major federal program<sup>161</sup> that is unlikely to go away quietly without a fight from an abundance of lobbyists and concerned citizens. Therefore, fixing one problematic element at a time is too inefficient and costly an endeavor to entertain when in reality, the entire HBA is long overdue for a serious upgrade. Tackling this matter, all at once and with the right strategy in place, could enable the concentrated efforts and support of the states, FHWA, and general proponents to overshadow any backlash drummed up by naysayers.

Only once has a similar proposal calling for the HBA's complete abolition been made.<sup>162</sup> However, this proposal was never made public by the FHWA, nor was action taken after the initial legislative proposal was drafted.<sup>163</sup> The lack of action could be attributed to this solution at first appearing to be a wild theory unlikely to take off or be popular with the mainstream, but first impressions can be deceiving. Despite it being a massive undertaking to repeal and replace a monumental federal statute with up to forty-six newly updated state statutes, the states are prepared to handle the task before them,<sup>164</sup> and the FHWA will be better off conceding this regulatory power to the states. Due to the effective control mandate imparting over fifty years of enforcement experience on the states, they have long been ready and able to take over regulatory control of outdoor advertising and junkyards.<sup>165</sup> The states must be permitted to make this transition to ensure the continued legacy of Lady Bird and President Johnson's dream for safe highways that provide onlookers with a glimpse into America's picturesque natural beauty. The states are ready. All they need is one last grant of permission.

This solution is also great because it gives states the discretion to impose stronger environmental policies, if they so choose, like adopting more stringent regulations for outdoor advertising and junkyards. For those states for whom the environment is not a top priority, it also provides them with the autonomy to open their economies up to further involvement in and investment from the outdoor advertising industry by decreasing regulatory standards. States will be free to decide for themselves how they want to handle matters directly impacting their state, without needing to give up much in return.

---

<sup>161</sup> *See id.*

<sup>162</sup> FHWA Outdoor Advertising Control, *supra* note 9.

<sup>163</sup> *Id.*

<sup>164</sup> *See supra* Part II.C.4 for further discussion of how the effective control measures effectuated by the HBA and its affiliate state statutes have prepared states to take on the burden of handling their own independent oversight.

<sup>165</sup> "Each state has developed their own set of compliance requirements using Federal minimums and is responsible for administering the outdoor advertising program in that state or risks a 10% reduction in Federal funds otherwise apportioned by 23 U.S.C. 104." *See* FHWA Outdoor Advertising Control, *supra* note 9.

Additionally, this solution is efficient in terms of saving time and money. It allows federal taxpayer dollars to be better spent on initiatives that produce greater societal impact, especially in terms of public safety.<sup>166</sup> This plan eliminates the federal government's need to constantly pay lawyers to defend the HBA.<sup>167</sup> Finally, it will save federal government officials a great deal of time that could be better allocated to more impactful programs.<sup>168</sup> According to an FHWA legislative proposal, "eliminating the Federal requirements and oversight would also reduce decision-making time and allow for a more streamlined program administration in the state [departments of transportation] by allowing them to administer the program as it best fits their state needs."<sup>169</sup> This solution provides states with the opportunity to take regulatory oversight of outdoor advertising and junkyards into their own hands, which is likely to lead to fewer legal challenges in the future.

## 2. *A Tangible, Practical Plan for the Successful Transfer of Power*

Abolishing the HBA in favor of state-run oversight may appear somewhat extreme to some, but the extenuating legal challenges that state and federal departments of transportation (DOTs) combat in defense of the HBA and the extenuating problems the HBA has created are significant and burdensome. The on-premises exception exemplified in *Metromedia, Thomas, L.D. Management, and Reagan National Advertising of Austin v. City of Austin* is just one of the many challenges brought against the HBA and its practical application.<sup>170</sup> Therefore, given that the HBA's combination of logistical and legal problems are more burdensome than any meager benefits it may produce, replacing the HBA with state-run oversight is the most practical and fitting solution.

This solution's practicality is first exemplified by states already having the enforcement infrastructure in place to make this transition fairly seamless. Due to the effective control mandate, states were already forced to restructure their

---

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> *Id.*

<sup>170</sup> *See, e.g.,* *People ex rel. Dep't of Transp. v. Naegle Outdoor Advert. Co. of Cal.*, 698 P.2d 150, 151 (Cal. 1985) (challenging state regulation of outdoor advertising on Indian reservation land); *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 268 P.3d 370, 371–72 (Ariz. Ct. App. 2011) (challenging and clarifying the HBA's interpretation and treatment of digital billboards); *Files v. Ark. State Highway & Transp. Dep't*, 925 S.W.2d 404, 405 (Ark. 1996) (challenging the Arkansas DOT's authority to review commercial zoning decisions related to outdoor advertising to determine their validity); *Stuckey's Stores, Inc. v. O'Cheskey*, 600 P.2d 258, 260–61 (N.M. 1979) (challenging the constitutionality of the New Mexico HBA's exercise of police power and potential constitutional infringement on due process of law and freedom of speech); *Vermont v. Brinegar*, 379 F. Supp. 606, 615 (D. Vt. 1974) (challenging the HBA's ten percent reduction in federal highway aid, levied for a state's failure to provide effective control over outdoor advertising, on the grounds that it violated the Tenth Amendment of the United States Constitution).



budgets and hire personnel to enable the successful enforcement of the HBA and its corresponding state statutes.<sup>171</sup> The staff of state DOTs already have training in conducting HBA regulatory enforcement sufficient to take on any additional duties.<sup>172</sup> This training should prepare them for any changes born from the additional latitude that this plan provides. Overall, this solution should not change much for the states because they already conduct regular oversight.<sup>173</sup> While this proposal will hopefully lead to stronger enforcement opportunities through the removal of existing loopholes, such as that created by subsection (n), any decision to alter the degree of enforcement will be left up to the states to decide. With this infrastructure already in place, states will be able to host the regulatory duties currently overseen by the FHWA and enforced by the states, without applying copious additional stress on state governments or overly burdensome pressure on states' budgets.<sup>174</sup> Admittedly, some additional funds will likely be needed to compensate for the seventy-five percent contribution to just compensation that will no longer be provided by the federal government. That is an issue, but one which can be solved. The underlying point is that states having this pre-existing infrastructure will significantly ease the transition of power from federal control to state.<sup>175</sup> They will not need to build a new regulatory system from scratch, but instead can use the existing framework to effectuate enforcement, as a platform upon which to craft a new regulatory system that works best for each state's individual goals and interests.

Second, although the HBA has been amended and modernized since 1965,<sup>176</sup> its provisions still do not account properly for states' needs on an individual level, nor those of the evolving outdoor advertising industry, which now includes digital signs.<sup>177</sup> The states will finally be able to fully customize their outdoor advertising and junkyard regulations based on their state's particular needs, without constraint from federal regulatory standards imposed by the HBA and FHWA. While currently the states do have some degree of flexibility to enact stricter regulations than those provided in the HBA, any modifications still must align with the HBA's overall framework. This plan will provide the states with total and complete freedom to establish, maintain, and enforce their own regulatory oversight guidelines.

---

<sup>171</sup> See 23 U.S.C. § 131(b); FHWA Outdoor Advertising Control, *supra* note 9; see also *supra* notes 60–64 and accompanying text.

<sup>172</sup> See FHWA Outdoor Advertising Control, *supra* note 9 (describing the devotion of resources by state DOTs to “administer the program and demonstrate they have the required effective control of these programs” and FHWA’s role in “oversee[ing] the programs by developing and providing training and technical assistance”).

<sup>173</sup> See 23 U.S.C. § 131(c) (describing effective control measures required of each state).

<sup>174</sup> See FHWA Outdoor Advertising Control, *supra* note 9.

<sup>175</sup> See *id.*

<sup>176</sup> See *supra* note 76 and accompanying text.

<sup>177</sup> See generally 23 U.S.C. § 131.

### 3. Potential Flaws and Opposition

Although this solution is compelling, it would be remiss to ignore potential flaws and opposition simply for the sake of argument. It is undeniable that this solution will face strong opposition, but the benefits of making the switch to state-run oversight will significantly outweigh the political and logistical hurdles it may need to circumvent. Opposition will surely hail from Scenic America and possibly from the Out of Home Advertising Association of America (OAAA).<sup>178</sup>

For decades, Scenic America has fought for tougher billboard restrictions to be added to the existing regulations pertaining to outdoor advertising.<sup>179</sup> Abolishing the HBA and allowing states to enact their own statutes free of federal constraints may lead to the tougher restrictions sought by Scenic America.<sup>180</sup> There is also the potential for regulations to be loosened, which is why Scenic America is likely to oppose this change, but their opposition should not impede the ultimate implementation or success of this important solution.

The OAAA, representing the collective voice of the outdoor advertising industry, whose interests center on the monetary value of existing signs and economic impact of any regulatory changes, may also express opposition.<sup>181</sup> Opening the floodgates to allow for additional sign installation will probably

---

<sup>178</sup> In 1981, in response to the possibility of the HBA being repealed by the Stafford Bill (S. 1548), the OAAA drafted a deregulation amendment (Section 121) which was added to the House's proposed highway bill, H.R. 6211. See *Industry Efforts to Scuttle Beauty Bill Defeated*, NAT'L COAL. NEWS (Nat'l Coal. To Pres. Scenic Beauty, Media, Pa.), Jan. 1983, at 1, 1, <https://www.scenic.org/wp-content/uploads/2020/06/1983-01-The-National-Coalition-News-Vol2-No.1.pdf> [<https://perma.cc/WE45-CPNH>]. The House passed H.R. 6211 with Section 121 included, despite the addition facing severe opposition from environmentalists, press, and the Senate. *Id.* While ultimately H.R. 6211 was passed by the Senate, Section 121 was withdrawn in December 1982 during the House-Senate conference session. *Id.*; see also Sharpe, *supra* note 77, at 529 (citing *Outdoor Advertising from A-Z*, OUTDOOR ADVERT. ASS'N AM. 3 (Mar. 2011), <https://oaaa.org/Portals/0/Public%20PDFs/A%20to%20Z.pdf> (on file with the author)); FHWA Outdoor Advertising Control, *supra* note 9.

<sup>179</sup> See, e.g., Margie Sollinger, Hope Babcock & Cristina Stella, *Scenic America Petition for Rulemaking*, SCENIC AM. 2 (Feb. 23, 2010), <https://www.scenic.org/wp-content/uploads/2019/09/sa20petition20for20rulemaking1.pdf> [<https://perma.cc/DZD6-BFJS>]; Brief for Outdoor Advertising Association of America, Inc. as Intervenor-Defendant-Appellee at 13, *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42 (D.C. Cir. 2016) (No. 14-5195), <https://www.scenic.org/wp-content/uploads/2019/09/dot20brief20court20of20appeals1.pdf> [<https://perma.cc/NLG2-8ZSH>]; Brief for Sierra Club & Scenic Am., Inc. as Amici Curiae Supporting Appellant at 4-7, *Scenic Ariz., Inc. v. City of Phx. Bd. of Adjustment*, 268 P.3d 370 (Ariz. Ct. App. 2011) (No. 1 CA-CV 09-0489), [https://www.scenic.org/wp-content/uploads/2019/09/10-06-09\\_CCO\\_Amicus\\_Brief\\_NO.\\_CA-CV\\_09-0489\\_-\\_Scenic\\_Arizona\\_Inc.\\_an\\_Arizona\\_corporation\\_.pdf](https://www.scenic.org/wp-content/uploads/2019/09/10-06-09_CCO_Amicus_Brief_NO._CA-CV_09-0489_-_Scenic_Arizona_Inc._an_Arizona_corporation_.pdf) [<https://perma.cc/82MM-PUM2>].

<sup>180</sup> While the author favors stronger regulation of outdoor advertising and the furtherance of promoting the natural beauty of the American landscape by limiting the outdoor advertising industry's erection of new billboards, she also recognizes that such a decision should be left up to the states.

<sup>181</sup> See *Outdoor Advertising from A-Z*, *supra* note 178, at 17.

lower the value of existing signs because the supply will likely exceed current demand.<sup>182</sup> Provided that current enforcement efforts tend to be fairly relaxed, the OAAA may oppose any proposals calling for the further limitation of billboards generally or greater enforcement of their removal.<sup>183</sup> Despite this, the OAAA's possible opposition should not automatically bar these changes from being made or indicate that they are short sighted. Instead, considering potential pushback means these issues are being fully scrutinized.

Finally, opposition may come from those who feel that the HBA should remain a federal mandate to guarantee that states meet certain environmental protection standards. This fear is valid, however strict federal enforcement of HBA compliance was all but halted some thirty to forty years ago.<sup>184</sup> Additionally, the states were given limited autonomy to draft their state statutes via subsection (k) and have retained this ability to amend their statutes for many decades with little change in policy.<sup>185</sup> This means that significant changes in scope or severity are unlikely to occur at the state-level when they take over.<sup>186</sup> Abolition of the HBA in favor of state regulation would allow states to enact even greater environmental protections, if they so desire, but does not mandate such action. The expanded regulation or deregulation of outdoor advertising will be a decision left entirely up to the states. Hopefully, those who seek to add additional regulations will help balance out any who look to strip them away.

In terms of flaws, this solution presents two that require discussion: time and money. Just as with the first solution, amending upwards of forty-six state statutes will be no simple task. First, these states do not all function on the same timeline in terms of their legislative processes, so enacting this change may be extremely time consuming.<sup>187</sup> Further, additional time will be required to get congressional approval for the HBA's removal and to transition the program from federal control to state DOTs. Obtaining said approval will need to either be done concurrently with or be completed prior to beginning legislative efforts on the state level. Although a great deal of time may be required to work out all the necessary logistics and pass new laws across the nation, the imposition that time may pose will still in no way be inhibitive of this solution's overarching success.

---

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> "In the 1980's, the HBA program was less aggressively implemented. The HBA required States to remove nonconforming billboards if Federal funds were available for acquisition, but Congress did not appropriate such funds after 1981." Internal Memorandum, Fed. Highway Admin., Eliminate the HBA Bonus Act (May 2, 2017) (on file with author).

<sup>185</sup> 23 U.S.C. § 131(k).

<sup>186</sup> *See HBA: A Broken Law*, *supra* note 129.

<sup>187</sup> The Texas Legislature only meets for five months every two years. *See, e.g., Frequently Asked Questions*, TEX. HOUSE REPS., <https://house.texas.gov/resources/frequently-asked-questions/> [<https://perma.cc/RC2X-2GGX>]. *See generally* Telephone Interview with Christine Vanderwater, Former Legis. Aide to Tex. State Representative Phil Stephenson (Feb. 15, 2021) (noting that in Texas, a piece of proposed legislation may see multiple state legislative sessions come and go before successfully becoming law).

The one flaw that may prove detrimental is the potential for financial strain on state budgets. Federal funds are currently required by law to constitute the vast majority (seventy-five percent) of just compensation costs associated with removing nonconforming signs.<sup>188</sup> This plan requires states to quadruple their current contributions toward this effort.<sup>189</sup> Given state budgets are already tight under normal circumstances, and are even more severely constrained due to the COVID-19 pandemic, appropriating funds to pay for nonconforming sign removal may not be immediately feasible nor at the top of the priority list for a state's discretionary budget.<sup>190</sup> With that said, states' freedom to draft their own regulations may provide the opportunity to decrease the immediate need for additional funding. If a state loosens restrictions, for example, their need for additional funding to provide just compensation will be considerably lower than for a state that increases regulation, since looser regulations will likely require less enforcement. States can also delay payment or provide alternatives to cash payments, such as through bonds. By giving states this proposed autonomy they will be able to shape this element of the regulations to meet their own unique needs.

Despite its flaws and potential opposition, this proposed solution is the optimal choice to solve the HBA's plethora of troubles. This solution is sensible, tangible, economical, and efficient. Although some may argue that the HBA provides uniform regulation and oversees important safety measures for drivers, without regular enforcement, the program is ultimately a waste of taxpayer dollars and federal efforts.<sup>191</sup> This solution is inexpensive and will allow states to decide the best plan of action for regulating outdoor advertising and junkyards within their individual state. Overall, the positive reasons to shift oversight to the states significantly outweigh its potential downsides.

## V. CONCLUSION

The HBA's limitations, reoccurring legal challenges, and lack of enforcement in congruence with the fact that states have the pre-existing infrastructure to handle oversight makes clear that the transfer of federal

---

<sup>188</sup> See 23 U.S.C. § 131(g).

<sup>189</sup> *Id.*

<sup>190</sup> “[I]n an era of tight state budgets in the United States, some state legal systems may be reaching the breaking point.” Edward J. Imwinkelried, *The Form of Reform: Revisiting the Choice Among a Creed, a Code, and a Catalogue*, 13 FRONTIERS L. CHINA 21, 25 (2018); see Elizabeth McNichol & Michael Leachman, *States Continue to Face Large Shortfalls Due to COVID-19 Effects*, CTR. ON BUDGET & POL’Y PRIORITIES (July 7, 2020), <https://www.cbpp.org/research/state-budget-and-tax/states-continue-to-face-large-shortfalls-due-to-covid-19-effects> [<https://perma.cc/B9Z9-MJBK>].

<sup>191</sup> See Kenworthy, *supra* note 131; see also FHWA Outdoor Advertising Control, *supra* note 9 (“State DOTs and FHWA [sic] spend a great deal of administrative time on the outdoor advertising control programs. . . . [T]his proposal would be a cost savings by eliminating all Federal programmatic burdens and administrative costs associated with this program as well as relieve the State DOTs of Federal oversight”).

regulatory oversight power over outdoor advertising and junkyards to the states is the best solution. Doing so will give the federal DOT leeway to judiciously spend its time on more impactful safety initiatives. Equally important, states will have the freedom to decide how to conduct oversight for outdoor advertising and junkyards within their borders. The existing model is not working and amending the HBA on the federal level is not the most workable option. Therefore, a new system must take root. The cases cited demonstrate that the HBA's legal challenges are far from over. The recent *Thomas* decision could inspire free speech advocates nationally to challenge their respective local and state ordinances in an effort to induce a circuit split so that the Supreme Court will be compelled to revisit the constitutionality and severability questions related to the on-premises exception. The proactive transfer of oversight power to the states will allow for better regulation of outdoor advertising and junkyards, while simultaneously saving taxpayer dollars and furthering the high ideals that inspired this landmark legislation from the start.