Case No. 14-5195
NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Scenic America, Inc.,

Plaintiff-Appellant,

v.

United States Department of Transportation, Anthony Foxx, Federal Highway Administration, and Gregory Nadeau,

Defendants-Appellees,

and

Outdoor Advertising Association of America, Inc.,

Intervenor-Appellee.

CORRECTED BRIEF OF *AMICI CURIAE* THE AMERICAN PLANNING ASSOCIATION, THE GARDEN CLUB OF AMERICA, SIERRA CLUB, INC., AND THE INTERNATIONAL DARK-SKY ASSOCIATION, INC., IN SUPPORT OF PETITIONER AND REVERSAL OF JUDGMENT

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STATEMENT PURSUANT TO RULE 29(a), FED. R. APP. P.

All parties have consented to the filing of the brief of *amici curiae*. This statement is provided pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

CORPORATE DISCLOSURE STATEMENT

The following *amici curiae* are corporations. In accordance with Rule 29(c)(1), Federal Rules of Appellate Procedure, a disclosure statement like that required of parties by Rule 26.1 is provided below for each *amicus* that is a corporation.

Amicus Curiae The Garden Club of America – a non-profit organization – states that it has no parent corporations or any publicly held corporations that own 10% or more of its stock.

Amicus Curiae Sierra Club, Inc. – a non-profit organization – states that it has no parent corporations or any publicly held corporations that own 10% or more of its stock.

Amicus Curiae International Dark-Sky Association, Inc. – a non-profit organization – states that it has no parent corporations or any publicly held corporations that own 10% or more of its stock.

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GLOSSARY

AHBA	Arizona Highway Beautification Act
AR	Administrative Record
BPR	Bureau of Public Roads
CEVMS	Commercial Electronic Variable Message Signs
D.E.	Docket Entry
FHWA	Federal Highway Administration
FSA	Federal-State Agreement
GCA	The Garden Club of America
Guidance	FHWA September 25, 2007 Guidance Memorandum
HBA	Federal Highway Beautification Act
IDA	The International Dark-Sky Association, Inc.
JA	Joint Appendix
LED	Light Emitting Diode
OAAA	Outdoor Advertising Association of America, Inc.
USDOT	United States Department of Transportation

STATEMENT OF IDENTITY, INTEREST IN CASE AND SOURCE OF AUTHORITY TO FILE OF *AMICI CURIAE*

The following is submitted pursuant to Rule 29(c)(3), Federal Rules of Appellate Procedure.

Amici curiae[1] have common interests in the effective implementation of the federal Highway Beautification Act and observance of the "consistent with customary use" limitation on lighting that was a critical component of the HBA at the time of its passage and which limitation Congress declined to amend in 1978.

The International Dark-Sky Association, Inc. (IDA) is an educational, environmental non-profit association established in 1988. With more than twenty chapters in the United States and members in all fifty states, IDA's mission is to preserve and protect the nighttime environment and our heritage of dark skies through environmentally responsible outdoor lighting.

The American Planning Association (APA) is a non-profit, public interest research organization founded to advance the art and science of land use, economic and social planning at the local, regional, state, and national levels. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 43,000 practicing

[1] No party, counsel for any party, or anyone aside from *amici*, either authored any part of, or contributed any money toward the preparation or submission of, this brief. The foregoing statement is submitted in compliance with Rule 29(c)(5), Federal Rules of Appellate Procedure.

planners, elected officials and citizens in forty-six regional chapters, working in the public and private sectors to formulate and implement planning, land use and zoning regulations, including the regulation of signs. APA has long educated the nation's planning professionals on the planning and legal principles that underlie effective sign regulation through publications and training programs, as well as by filing numerous *amicus curiae* briefs in support of sign regulation in state and federal courts across the country.

The Garden Club of America (GCA) is a national non-profit leader in the fields of horticulture, conservation and civic improvement dedicated to preserving America's beauty and natural heritage for future generations. Founded in 1913, it is comprised of 200 member clubs with approximately 18,000 members throughout the country. The GCA has had a strong interest in conservation, roadway beautification, and the control of outdoor advertising along the nation's highways and byways, dating back to its earliest years.

The Sierra Club, Inc. is a national nonprofit organization dedicated, *inter alia*, to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has established policy positions on visual

pollution and billboards and opposes the proliferation of off-premise outdoor advertising signs and endorses legislative and other actions at the federal, state, and local levels to strengthen prohibitions against billboard proliferation.

ARGUMENT

This amicus brief focuses on the legal status of digital billboards using lighting to display alternating commercial messages adjacent to federal roadways in four-to-ten-second intervals. The issue may be stated succinctly: Were *commercial* messages displayed through intermittent lights every few seconds "customary" in 1965? The answer is an unequivocal "No."

As enacted in 1965, the HBA required the states to enter into agreements with the federal government to establish effective control over outdoor advertising, particularly with respect to the size, *lighting* and spacing of new billboards. Effective control was to be *consistent* with *customary use* in each state. For example, lighting inconsistent with customary use would be proscribed by the FSAs.

Almost every state FSA prohibited the intermittent display of commercial messages through lights. The exceptions made for the display of messages using intermittent lights contemplated public service information, such as time, date, weather, temperature or similar noncommercial information. No FSA made an exception for the use of intermittent lights to display commercial messages. This was consistent with *customary use* in the states.

For more than thirty years, FHWA recognized that in nearly every state off-premise advertising signs could not use intermittent lighting except as

contemplated by the limited exceptions for public service information. This recognition was emphasized in a 1996 memorandum authorizing rotating *mechanical* signs: "In nearly all States, these signs *may still not contain* flashing, *intermittent*, or moving *lights*." JA 182 (emphasis supplied). The 1996 memorandum did not change, nor could it change, statutory lighting restrictions. Only lighting that was *consistent* with *customary use* was permitted.

The "consistent with customary use" limitation was a principal element of the HBA, but the agency charged with its implementation has now abandoned the same. In its 2007 Guidance Memorandum (Guidance), FHWA inexplicably interpreted the HBA to allow digital billboards to use intermittent lights to display commercial messages in eight second intervals.[2] Scenic America's position was that FHWA's supposed interpretation is so at odds with the HBA's "customary use requirement" as to justify invalidation of the Guidance. However, the district court missed this central question and focused instead on whether notice-and-comment rulemaking was required before FHWA could issue the "interpretive" Guidance.

[2] JA 535-538. Perhaps the explanation for this interpretation lies in its appeal to outdoor advertising companies. Eight seconds is reported to be the "perfect flip" to "maximize viewers and the message imprint." Sharpe, *infra*, at page 524, n. 228; *see also* Rick Romell, *Digital Billboards Light up Landscape, Signs Increase as Advertisers are Sold on Convenience*, Milwaukee J. Sentinel, Sept. 25, 2010, available at http://www.jsonline.com/business/103769174.html (visited Dec. 26, 2014).

The district court's dismissive approach to the question of "customary use" should be vacated.

Digital billboards are a recent technology, as the district court recognized. As such, the customary use requirement is an obstacle to FHWA's ability to interpret the HBA as generally permitting digital billboards. It is not difficult to understand that, because digital billboards did not exist when the HBA was enacted, they could not have constituted a "customary use." The very nature of those words requires that the contemplated use not only have existed, but with such prevalence as to have become *customary* along federal-aid highways.

There is simply no logic to any claim that a digital billboard displaying commercial messages that alternate every eight seconds because of changes in countless lights does not use intermittent lighting. The suggestion that a digital billboard is instead a static sign with a static message, which just happens to change to a different static message *every eight seconds* (ten thousand times each day), is absurd and verges on Orwellian double-speak.[3] Rather, billboards that incorporate such intermittent light(s) to display commercial messages are prohibited by the "consistent with customary use" limitation in nearly all FSAs.

[3] *See* Susan 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, 545 (2012) (noting that the billboard industry misuses the word "static" in a manipulative way).

The inclusion of this language in the HBA reflects the compromise, between different approaches to outdoor advertising control, reached in October 1965. Moreover, because the particular compromise that Congress struck in 1965 turns on whether a type of outdoor advertising use is "customary," FHWA does not have free reign to amend the HBA.

This case involves not only the word "intermittent' in the FSAs, but even more fundamentally the word "customary" as incorporated into the body of the HBA in October 1965. An analogous decision was reached by the Supreme Court in 2012 when the Court addressed "customary" modes of travel in determining the navigability of a river at the time of statehood. The word "customary" appears in the standard governing the navigability of rivers for the purpose of deciding whether the federal government has the power to regulate navigation on it, and whether the riverbed is federally-owned. For well over a century, the Supreme Court held that rivers are considered navigable for these purposes if "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in *the customary modes* of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871)(emphasis added); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

In *PPL Montana*, the Supreme Court held that the lower court "erred as a matter of law in its reliance upon the evidence of *present-day*, primarily recreational *use* of the" river in question because the standard required a "historical determination." 132 S. Ct. at 1233 (emphasis added), "If modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood." *Id.* at 1233-34.

The legal issue before this court is whether an agency can take action in direct contravention of a federal statute that it is charged to implement. *Amici curiae* urge the court to answer this question with respect to the rule of law as framed by the HBA (as enacted), which requires lighting to be "consistent" with a state's "customary use." The judgment below should be reversed.

I. The Bonus Act in 1958.

In 1958, the Eisenhower Administration proposed a limited program for outdoor advertising control. The program known as the Bonus Act was limited to new segments of the interstate highway system and applied to on-premise and off-premise advertising on the new segments. It provided a very small increment of additional highway funding in exchange for a state's entry into an agreement to control outdoor advertising on new interstates according to certain standards. *See* Pub. L. No. 85-767, 72 Stat. 885 (1958). Approximately half the states entered into

such agreements. 111 Cong. Rec. H26,250 (October 7, 1965) (statement of Rep. Fallon).

II. The Highway Beautification Act (HBA) in 1965.

In 1965 the federal government undertook a more ambitious approach toward highway beautification that functioned as a grant in aid program. With ten percent of a state's federal highway funding conditioned upon meeting the effective control provisions of an enactment known as the Highway Beautification Act (HBA). *See generally* Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 Kansas L.Rev. 463, 492-498 (April 2000).

In the fall of 1965, Congress heard concerns about the threats to the beauty of the Nation's highways. "An essential part of our national heritage is the beauty with which God endowed this continent. For too long we have stood aside while the manmade blights along our road system have become the vicious destroyers of this heritage." 111 Cong. Rec. S23,891 (September 15, 1965) (statement of Senator Dodd). "The public deserves protection of America's beauty." *Id.* "Amid the clutter of debate over billboards and junkyards, [we should] keep our eye on the principal purpose of this entire piece of legislation, which is the greater beautification of this land of ours." 111 Cong. Rec. H26,275 (October 7, 1965) (statement of Rep. Howard).

Spurred by these concerns, the Senate considered a bill (S. 2084) to provide for the scenic development of the federal-aid highway systems.[4] As proposed, the Senate bill provided that outdoor advertising signs would conform to national standards to be promulgated by the Commerce Secretary, which standards would contain provisions regarding the *lighting*, size and number of signs and such other requirements as may be appropriate to implement the bill. *See* 111 Cong. Rec. S24,141-42 (September 16, 1965). The "other requirements" in the Senate bill were not restricted in their scope, and could have included height and setback restrictions for billboards.

On October 7, 1965, the House debated the proposed legislation (*see* 111 Cong. Reg. H26,247-69, H26,272-322) focusing on the notion that the federal government was going to set standards for outdoor advertising control along federal roadways. Congressional allies of the outdoor advertising industry sought to defeat *national* standards and curtail any standards other than those for size, lighting and spacing. Through a classic legislative compromise, standards for other criteria such as height and setback were not included in the House measure, and any standards for size, *lighting* and spacing would have to be *consistent* with what was then *customary use* in the States. As in the Senate bill, outdoor advertising

[4] *See* S23,796-99 (September 14, 1965), S23,854, 23,868-92 (September 15, 1965), S23,892 (September 16, 1965).

would not proliferate beyond commercial and industrial areas, zoned or unzoned. This provision remained unchanged in the legislation as received from the Senate. However, the House compromise ensured that the industry would be able to keep the size, *lighting* and spacing that was then consistent with *customary use* in the States, and prevented the application of federal standards as envisioned in the Senate version of the bill.

Specifically, in his amendment, Rep. Tuten of Georgia added a comma after the word "spacing" followed by the language "**consistent with customary use**" in the first sentence of what would become 23 U.S.C. § 131(d) upon its enactment. The proposed amendment is italicized in bold below:

> In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing***, consistent with customary use*** is to be determined by agreement between the several States and the Secretary, may be erected and maintained…

See 111 Cong. Rec. H26,295 (October 7, 1965) (emphasis added). National standards were thereby taken off the table.

Rep. Tuten stated, "If we intend to conform to 'customary use' … let us word the bill accordingly." *Id.* Subsequently, a colloquy between Reps. Olsen and Wright made clear that Rep. Tuten's "customary use" clause was intended to apply to more than just billboard size. It was intended to apply to two other standards,

i.e., lighting and spacing. *See* 111 Cong. Rec. H26,296 (October 7, 1965).[5] The Tuten amendment was approved (111 Cong. Rec. H26,300) and the House passed its version of the bill the same day. *Id.* at H26,321-22 (October 7, 1965). The Senate accepted the House version of the bill with the "customary use" limitations rather than the originally envisioned national standards. *See* 111 Cong. Rec. S26,863 (October 13, 1965) (Senator Randolph supporting the "customary use" standards and noting that there were provisions for future public hearings). Thus, the HBA provided that only signs, displays, and devices that could be erected and maintained were those whose size, *lighting* and spacing were consistent with *customary* use to be determined by agreement between the several States and the Secretary.[6] The HBA was signed into law on October 22, 1965.

The HBA minimum standards did not preclude local governments from adopting *even stricter* outdoor advertising controls. *Libra Group, Inc. v. State*, 805 P.2d 409 (App.), *pet. rev. denied*, 813 P.2d 318 (1991).

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[5] "This amendment deals with questions of lighting and questions of spacing, absolutely vital, I think, to the proper implementation of this bill." 111 Cong. Rec. H26,295 (October 7, 1965) (statement of Rep. Edmondson).

[6] In 1965, the Secretary was the Secretary of Commerce.

A. The "Customary Use" Limitation Was A Critical Component of HBA.

The HBA required effective signage control in large part by its focus on what was then *customary* use, for size, *lighting* and spacing. Nineteen months after its passage, and nearly one year after the conclusion of the last public hearings in the states (discussed in Argument Section II.B *infra*), Congress held hearings on what constituted "customary use." In an exchange with Transportation Secretary Boyd,[7] Congressman Wright[8] emphasized that the law clearly says "customary use" and that those provisions within Subsection 131(d) must be carried out:

> Mr. WRIGHT. . . . , I would direct your attention, *the law clearly says customary use*. Whether that is right or wrong I do not attempt to say, but I do believe I can say to you with some authority that in the absence on the floor of the House of subsection (d), this Highway Beautification Act of 1965 would not have passed the House. That is my opinion.
>
> Secretary BOYD. I believe you too.
>
> Mr. WRIGHT. Therefore, in fairness to our colleagues on the floor of the House, who considered and voted for the adoption of subsection (d), I think it must be carried out.

Hearings on H.R. 7797 Before the House Committee on Public Works, 90th Cong. 960-961 (May 2, 1967).

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[7] The Transportation Department was created in 1967 and the Secretary was elevated to a Cabinet position.

[8] Congressman Wright was a floor manager of the House bill in October 1965.

B. Section 303 of the HBA directed the Secretary of Commerce to hold Public Hearings in each State for the Purpose of Gathering Information on which to Base Standards and Criteria.

After the HBA's passage, public hearings were scheduled in state capitals across the country. *See* Notice of Public Hearings, Department of Commerce, Bureau of Roads, Highway Beautification, 31 Fed. Reg. 1162-1166 (January 28, 1966). HBA Section 303(a) provided in pertinent part:

> Sec. 303. (a) Before the promulgation of standards, criteria, and rules and regulations, necessary to carry out sections 131 and 136 of title 23 of the United States Code, the Secretary of Commerce shall hold public hearings in each State *for the purpose of gathering all relevant information on which to base such standards, criteria, and rules and regulations*.

Public hearings were scheduled for March 1, 1966 in the capitals of six states, and continued throughout the balance of March in the District of Columbia and the state capitals of twenty-three other states. *Id.* at 1162. Public hearings in April 1966 were scheduled in the state capitals of sixteen other states, leaving Puerto Rico and the remaining states for early May 1966. *Id.*

C. The 1966 Hearings Produced a Record of Then "Customary Use" in Most States as to Lighting for the Display of Outdoor Advertising Messages.

Following the public hearings, a report was prepared by the General Counsel of the federal Bureau of Public Roads (BPR), the predecessor to the FHWA. Lowell E. Anders, General Counsel, BPR, Department of Commerce, *Billboards in*

Commercial and Industrial Areas: Suggested Criteria for Agreement of Outdoor Advertising Control Under the Highway Beautification Act of 1965, Workshop on Highway Law, University of Colorado (July 12, 1966), D.E. 28-1, at pp. 43-58. The BPR estimated that approximately 8,000 people attended and 2,000 persons testified, and that 20,000 pages of testimony and 40,000 pages of exhibits were received. *Id.*

Before the public hearings were completed, a committee was set up to review criteria for size, *lighting*, and spacing permitted in commercial and industrial zones and areas. *Id.* at p. 48. The General Counsel stated that "*subsection 131(d) is the heart of the legislation* with respect to control of outdoor advertising." *Id.* at p. 44.

As to *customary* use for lighting, the General Counsel stated that the BPR's first *lighting* requirement would *prohibit* intermittent lights except those giving *public service information* such as time, date, temperature, weather or similar information. JA 111. The General Counsel reported industry spokesmen testified during the public hearings that it was *customary* in outdoor advertising to provide *public service information* on signs by the use of intermittent lights. *Id.* There was no indication whatsoever in the report that it was customary to display commercial messages by the use of intermittent lights. *See* D.E. 28-1, pp. 43-58.

III. The Federal-State Agreements (FSAs).

As noted above, Congress directed the Secretary of Commerce to gather information to develop standards. The Commerce Department, through the BPR, wasted no time in setting up the required public hearings to drill down into what was customary use, what was the standard practice.

However, the BPR's Report is not the end of the matter. It is what was reduced to writing in the FSAs that followed. Nearly all of the FSAs found common ground on their *customary use* standard for *lighting*. Intermittent lighting was prohibited except for limited public service information.[9] When the display of public service information was excluded from an FSA's prohibition on intermittent lighting, the excluded display included time, date and temperature. Not a single FSA referenced intermittent lighting being customary for the display of commercial messages.

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[9] This is the case with at least 43 FSAs. *See* FSAs for Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. Such provisions are not included in the FSAs for the District of Columbia, Puerto Rico, Hawaii, Idaho, Michigan, Minnesota, New Hampshire, and West Virginia. Maine prohibits intermittent lights without exception.

By the end of 1967, FSAs had been reached in five states: Vermont (AR971-979), Hawaii (AR594-597), Virginia (AR980-990), Connecticut (AR533-542) and Maine (AR680-689).[10] The 1967 FSAs for Vermont, Virginia, and Connecticut each prohibited any sign that contained or included any intermittent light, except those giving public service information such as time, date, temperature, weather or similar information. The typical FSA stated:

> LIGHTING
> Signs may be illuminated, subject to the following *restrictions*:
>
> 1. Signs which contain, include, or are illuminated by any flashing, *intermittent*, or moving light or lights are *prohibited*, except those giving *public service information* such as time, date, temperature, weather, or similar information.

Id. (emphasis added). The FSAs signed by Vermont, Virginia, and Connecticut were consistent with the broad findings on *lighting* that followed the public hearings in the spring of 1966.

Maine's FSA (AR680-689) was signed on December 27, 1967, but included *no exceptions* from the prohibition on the display of intermittent lighting to display messages, even for the occasional change in the display of temperature or the once per day change of the date.

[10] Hawaii had no billboards. Hawaii's FSA referred to its Bonus Act agreement and state law.

In the first half of 1968, more states signed FSAs, including Utah (AR943-954), Maryland (AR690-698), Alaska (AR489-495), Delaware (AR543-551) and New York (AR815-825). Each was consistent with the same broad findings published by the BPR General Counsel and each contained the same restrictions and prohibitions as the Vermont, Virginia, and Connecticut FSAs. California's FSA was similarly restrictive: "signs shall not include … intermittent … lights except that part necessary to give public service information such as time, date, temperature, weather or similar information." *See* AR512-521.

Ohio prohibited advertising devices with intermittent light or lights except those giving public service information such as time, date, temperature, weather or similar information, except in business districts. AR851-865 (Ohio FSA). *Id.* Inside business districts there were no limitations on intermittent message displays. The FSAs continued to be negotiated and executed into the early 1970s.

IV. In 1978 Congress Rejected the Amendment of 23 U.S.C. Section 131(d) to Allow Electronic Signs.

Under certain circumstances, the legislative failure of efforts to give an agency certain authority is meaningful in determining whether a court should treat such authority as if it had already been bestowed. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-48 (2000). In 1978, the U.S. House of Representatives included a controversial amendment to 23 U.S.C.

§131 in a transportation bill, but a similar provision was not included in the companion transportation bill that was passed by the U.S. Senate.

The *proposed* amendment to Section 131(d), if passed by Congress, would have added at the end of Section 131(d):

> Nothing in this section shall authorize the Secretary to prohibit the use of any sign, display, or device which may be changed by electronic processes or by remote control in any commercial or industrial area (whether zoned or unzoned) subject to this subsection.

See 124 Cong. Rec. H30,724 (September 21, 1978); H.R. Rep. No. 95-1485 (August 11, 1978), at 17, *reprinted in* 1978 U.S.C.C.A.N. 6575, 6593.

The House further proposed the following to accompany the above proposed amendment:

> The Secretary of Transportation shall make such revisions in agreements entered into with States under section 131 of title 23, United States Code, relating to the control of outdoor advertising in any commercial or industrial area (whether zoned or unzoned) as may be necessary to carry out the amendments made by [the above-quoted proposed amendment.].

Id.

On the House floor, it was argued that allowing such signage for off-premise signs was a *very drastic altering* of the *current law*. 124 Cong. Rec. H31,064 (Representative Kostmayer) (September 22, 1978).

On the Senate floor, it was noted that it was an *entirely different matter* to allow electronic signs for billboards (off-premise signs). *See* 124 Cong. Rec. S26,917-18 (Senator Jackson)(August 18, 1978).

The House amendment to Section 131(d) did not survive a Conference Committee,[11] and there was no amendment to Section 131(d) in the Surface Transportation Assistance Act of 1978, Pub. L. 95-599, 92 Stat. 2689 (1978), as it was finally passed.

V. The Prior Guidance for Mechanically Rotating Slats (Tri-Visions) Did Not Change the Prohibition on Intermittent Lighting.

FHWA's prior guidance documents from 1990[12] and 1996[13] on the subject of commercial electronic variable message signs and changing message signs, respectively, involved *mechanically* changing slats known as tri-visions. Tri-vision signs did not *contain* or *include* lights. These two previous guidance documents recognized the distinction as to these devices. They simply did not involve light or lights as set forth in the FSAs. When placing the 1990 and 1996 memoranda side by side, and reviewing each, the conclusion is clear.

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[11] *See* House Conf. R. No. 95-1797 (October 14, 1978), at 91-92 *reprinted in* 1978 U.S.C.C.A.N. 6705-6706 (adopting Senate provision for Electronic signs as Conference substitute).

[12] JA 163.

[13] JA 182.

In the 1996 memorandum, the FHWA stated:

> Changeable message signs are acceptable for off-premise signs, regardless of the type of technology used, if the interpretation of the State/Federal agreement allows such signs. *In nearly all States, these signs may still not contain* flashing, *intermittent*, or moving *lights*.

JA 182 (emphasis added). The 1996 memorandum made it clear that FHWA still adhered to *customary use* as incorporated into the FSAs; of course, Congress had rejected an attempt to amend Subsection 131(d) to allow intermittent lights.[14]

Just before the Guidance's release, FHWA Headquarters employee Robert Black attempted to craft the illusion that the Guidance was consistent with the 1996 Memo. JA 533. The effort smacks of a sham. On September 24, 2007 FHWA's Robert Black sent an email to FHWA's Gloria Shepherd and other top staff, forwarding his edits just hours before the Guidance's release. Mr. Black is candid in his email and reveals that he had "tried" to "tie" the Guidance (CEVMS memo) to the 1996 memo "more" so that it is "seen as" the natural "evolution" of the 1996 policy. But try as he might to make something appear to be "seen as" the evolution of a document from 1996 pertaining to *mechanically* changing slats, the Guidance still ran afoul of the HBA's *customary use* provisions on lighting, as the

[14] The 1978 Congressional history [discussed in the Section IV above] appears on the FHWA website. *See* FHWA, A History and Overview of The Federal Outdoor Advertising Control Program (http://www.fhwa.dot.gov/realestate/oacprog.htm (last visited December 28, 2014).

vast majority of the FSAs prohibited intermittent lighting for messages, with the only exceptions (if any) being for public service information.

VI. FHWA Headquarters Chose to Ignore the HBA's "Consistent With Customary Use" Mandate When It Issued the 2007 Guidance Memorandum ("Guidance").

In the face of a plea on August 7, 2007 from FHWA Kentucky Division Administrator that sought action grounded in the integrity of the letter and intent of the law (*see* AR437), FHWA Headquarters chose a different path - expanding customary use to permit CEVMS. The chosen path was not without internal controversy at FHWA Headquarters, as Point of Contact Catherine O'Hara shared her judgment with other Headquarters personnel that "any illuminations which go on or off more than once a day are intermittent lights." JA518. Given the public service exceptions for a change in the date -- besides a change in the time or the temperature -- her position was logical. Indeed, this position was followed not only by the State of New York, but by the State of Arizona for more than three decades in applying the language found in its 1971 FSA[15] which derived from the 1970 Arizona Highway Beautification Act (AHBA).

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[15] AR496-502.

VII. The 1971 Arizona FSA and Arizona's "Customary Use" That Prohibited Intermittent Lighting

Several years after the public hearings, the state of Arizona enacted a state highway beautification act. The Arizona Highway Beautification Act's restrictions on lighting were very similar to those found to be customary throughout the United States in the months following the passage of the HBA.

As codified in May 1970, Arizona's statutory limitations restricted intermittent lighting "excepting that part necessary to give public service information such as time, date, weather, temperature or similar information." Ariz. Session Laws 1970, Ch. 214, § 1, at Ch. 7, art. I, § 18-713.A.5.[16] In the same legislation, the Legislature authorized the Arizona Highway Commission to enter into an agreement with the U.S. Secretary of Transportation to ensure effective control over outdoor advertising consistent with the HBA. *See* Ariz. Session Laws 1970, Ch. 214, § 1, at Ch. 7, art. I, § 18-716.

On November 17, 1971, the Arizona FSA was signed. The FSA provided a prohibition on lighting identical to the language incorporated into the 1970 Session Law. The only exceptions were limited to public service information such as time, date, weather, temperature or similar information. As was the case with all FSAs, there were no exceptions for commercial messages.

[16] This statutory prohibition continued until May 2012. *See* Ariz. Rev. Stat. § 28-7903(A)(4).

The 1970 enactment of §§ 18-711, et seq. was continued in 1972 with only minor amendments. *See* Ariz. Session Laws, 1972, Ch. 17, § 3. In 1972, § 18-713.A.2 was deleted, and § 18-713.A.5 was renumbered as § 18-713.A.4, and the comma after the term "intermittent" was deleted. The Arizona FSA did not change. In 1973, and again in 1995, the provisions regulating outdoor advertising were moved, without substantive changes. *See* Ariz. Session Laws 1973, Ch. 146, § 69; Ariz. Session Laws 1995, Ch. 132, § 69. The prohibition on intermittent lighting remained the same. The 1995 Law provided:

> 28-7903 Outdoor Advertising Prohibited
>
> A. Outdoor advertising shall not be placed or maintained adjacent to the interstate, secondary or primary systems at the following locations or positions or under any of the following conditions, or if the outdoor advertising is of the following nature:
>
> * * *
>
> 4. If it is visible from the main traveled way and displays a red, flashing, blinking, intermittent or moving light or lights likely to be mistaken for a warning or danger signal, except that part necessary to give public service information such as time, date, weather, temperature or similar information.

This continued to be the law in Arizona and was at issue in *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268 P.3d 370 (Ariz. Ct. App.), *appeal denied* (Ariz. August 28, 2012).

VIII. The One State Court to Adjudicate This Matter Concluded that Digital Billboards Violated Customary Use.

On September 24, 2007, as discussed above, as Robert Black admittedly "tried" to tie the draft Guidance to the prior 1996 memorandum, he was facing a tough time at FHWA Headquarters. On the eve of the release of the Guidance, he explained his difficulty with the term intermittent and that he was still "playing" with it.[17]

> I am having a tough time with coming up with a clear way to define the term "intermittent" (used in all or most Fed/State agreements). I am still playing with it, and any suggestions are welcome. I do think we need some explanation. The scenic organizations are going to hit us hard on that point, and *any lawsuits might turn on that word*.

JA 533 (emphasis added).

As it turned out, Mr. Black was correct that lawsuits might turn on that word. Of course, a key to the FSAs was the HBA language that FSA standards

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[17] The pressure on the agency to "play" with the word intermittent may be explained by the enforcement efforts in New York. The FHWA New York Division Administrator had pointed out in 2005 to the NYDOT Chief Operating Officer that *no ambiguity exists in this wording*. JA 261-262 (which followed prior correspondence as to the same illegally operated billboard in Syracuse displaying messages every seven seconds [*see* JA 260]). However, at FHWA Headquarters in 2007, when addressing New York Congressman Higgins on the subject of the Syracuse CEVMS billboard, the FHWA Administrator appended a personal handwritten note on May 2, 2007 to Congressman Higgins with an exclamation mark, "Brian … We are ready to work this issue with NYDOT!" JA 410. Prior to the flip-flop in the GM, the FHWA New York Division had "required the CEVMS to change only once a day." AR403.

must be "consistent with customary use" and the accompanying HBA mandate for public hearings to be held for the purpose (discussed at Section II.B, below) to of gathering information for the standards. The record developed for *lighting* demonstrated what was then *customary use* in the States.

In *Scenic Arizona* the appellants challenged a hearing officer's decision that upheld the issuance of a permit for a digital billboard that would have a minimum display time of eight seconds for each image. The appellants argued that the permit violated the AHBA. The appellate court reversed the lower court's decision on the merits because the billboard constituted intermittent lighting and intermittent lighting was not allowed under the AHBA. The pertinent part of the AHBA was as stated in Section VII, *supra*. *See also Scenic Arizona,* 268 P.3d at 377, quoting A.R.S. § 28–7903(A) (1998) (emphasis omitted).

The Arizona court noted that there had been legislative attempts in 2003 and 2005 to change the AHBA to specifically allow digital billboards. *Scenic Arizona*, 268 P.3d at 377, 384-85. Those two legislative attempts failed. *Id.* at 377. The appellate court noted ADOT's previous position was that the AHBA prohibited digital billboards, and that the ADOT had then abandoned that position in 2008. *Id.* at 381.

The Arizona court found that it could not defer to the ADOT's interpretation of the AHBA because of its conflict with "the plain meaning of the statute," stating

> Thus, the lack of formality and the inconsistency with which ADOT has approached the issue persuade us that ADOT's interpretations of the statute are not entitled to judicial deference. Therefore, we are left with the plain meaning of the statute, which, as discussed supra ¶ 22, does not permit digital billboards.

268 P.3d at 382.

In reaching its decision in favor of Scenic Arizona, the appellate court ruled that its conclusion was consistent with the 1971 Arizona FSA, as well as the AHBA and the HBA.

> In sum, the conclusion we reach here is consistent with the AHBA, the Agreement, and [the federal HBA]. *We emphasize that we are interpreting the law as it has existed for over forty years.* Our decision confirms that neither the legislature nor ADOT has formally addressed the effects of substantial technological changes relating to the operation and use of off premises outdoor advertising displays. Because we hold that a digital billboard uses intermittent lighting and is therefore prohibited by the AHBA, the use permit was granted in violation of state law and is therefore invalid.

Id. at 387 (emphasis added). The court noted that if an image on a billboard changes every eight seconds, then the billboard's lighting *necessarily* is intermittent under the *plain meaning* of the statute. *Id.* at 378, 379. Following the decision, The Arizona Legislature amended the AHBA to allow the digital billboards, but it could not change customary use incorporated into the FSA. If there is to be a change in the customary use standard, the U.S. Congress must act; internal staff memos cannot invent uncustomary uses contrary to the letter and intent of the HBA.

X. The Prohibition on the Display of Commercial Messages Through Intermittent Lighting is "Consistent with Customary Use" and Is Easily Enforceable.

Missing from the 2007 Guidance is the recognition of the significance of a single exception from the prohibition on intermittent lights - for public service information. This exception is found in at least 43 of the FSAs.[18] The display of commercial messages is *not* public service information. There is not a single FSA that contains any exception for the display of *commercial* messages.

Furthermore, the HBA is the Highway *Beautification* Act. The notion that the Beautification Act's purpose would be served by federal standards that would allow 1,200-square foot devices spaced every one hundred feet along either side of the roadway is ludicrous. Within municipal commercial areas, a typical FSA like the 1967 Virginia FSA (AR980-990) allows, as minimum standards, billboards that are up to 1,200 square feet in area spaced as close as 100 feet apart, on both sides of the road and oriented in each direction. Would the government and the OAAA have this Court believe that it was *customary* in 1965 to allow giant television-like screens every one hundred feet to display different commercial messages every four to ten seconds? Would such lighting standards comport with the *customary* use written into the *Beautification* Act? The FHWA in its Guidance actually

[18] See footnote 9.

recommends the display of commercial advertisements to passing motorists every eight seconds to carry out the purposes enunciated in the HBA. The mind reels.

While states and local governments may set stricter standards than the minimum standards in the HBA, the HBA speaks in terms of *consistent with customary use* in 1965. Because digital billboards did not exist when the HBA was enacted, they could not have constituted a "customary use," because the very nature of those two words requires that the use not only have existed, but existed with such prevalence as to have become "customary" along federal-aid highways.

On the issue of enforcement, the State of Arizona enforced a prohibition on intermittent lights and limited any changes to once per day.[19] FHWA's New York Division noted that such a limitation was *easily enforceable* when referring to a rogue outdoor advertiser's display of different commercial messages every seven seconds. JA 261. The New York Division had required the CEVMS change only once a day.[20] AR403. Indeed, with exceptions for date, time, and temperature from the intermittent prohibition, limiting changes to once per day is logical. For

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[19] In an amicus brief in *Scenic Arizona*, Sierra Club and Scenic America pointed to ADOT's 2003 position that a sign which turned on at sunrise, which did not change message, and then turned off at midnight, did not fall within the prohibition on intermittent lights. *See* 2010 WL 2355939, at *23. *See also* Scenic Arizona's Opening Brief in *Scenic Arizona*, 2009 WL 4027501, at *12, n. 41.

[20] The Division Administrator at that time noted that "without question" the billboard along the interstate was "intermittent." *Id.*

example, the date does not change more than once per day. The FHWA Kentucky Division Administrator pled the month before the release of the Guidance for something other than a *soft position* from FHWA Headquarters. AR437. This plea was unheeded. While the Arizona courts considered the issue in *Scenic Arizona*, a Rutgers Law Review article concluded that digital billboards violated both the letter and spirit of the HBA.[21]

The article noted FHWA's recognition more than thirty years ago that "harsh visual contrast with the ambient environment is generally considered to be an unaesthetic" just as is "a dense clustering of signs and sign structures."[22] The obtrusiveness of devices[23] that operate like large television screens with changing commercial messages every few seconds is self-evident to all but the blind. HBA's purposes include promoting the recreational value of public travel and the preservation of natural beauty. The Guidance's uncustomary standards are a disservice to the HBA's purposes.

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[21] Sharpe, at p. 554.

[22] Sharpe at p. 532, quoting CEVMS Study by Wachtel and Netherton (D.E.31-1).

[23] 23 U.S.C. Subsection 131(d) refers to devices and extends outdoor advertising controls to devices. At issue here are intermittent light-emitting devices for the display of commercial messages akin to giant television screens aimed at traveling motorists. They are far from being even remotely consistent with *customary* use in any state in 1965. They cannot be *customary* as they did not exist in 1965.

Respectfully submitted December 30, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitations of Rule 32(a)(7), Fed. R. App. P. The brief contains 6,808 words.

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CERTIFICATE OF SERVICE

I, William D. Brinton, hereby certify that on December 30, 2014, I served copies of the Corrected Brief of *Amici Curiae* on the following parties by way of electronic mail (ECF):

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