

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SCENIC AMERICA, INC.
1785 Massachusetts Ave., N.W., Washington, DC 20036

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION,
1200 New Jersey Ave., S.E., Washington, DC 20590,

RAY LAHOOD, in his official capacity as
Secretary of Transportation,
1200 New Jersey Ave., S.E., Washington, DC 20590,

FEDERAL HIGHWAY ADMINISTRATION,
1200 New Jersey Ave., S.E., Washington, DC 20590,

VICTOR MENDEZ, in his official capacity as
Federal Highway Administrator,
1200 New Jersey Ave., S.E., Washington, DC 20590,

Defendants.

Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Scenic America, Inc. (“Scenic America”) seeks declaratory and injunctive relief against Defendants United States Department of Transportation (“USDOT”), Federal Highway Administration (“FHWA”), and their respective officials (collectively, “Defendants”) for promulgating a legislative rule without the

procedures required under the Administrative Procedure Act, 5 U.S.C. § 553, the Highway Beautification Act, 23 U.S.C. § 131, and its implementing regulations, 23 C.F.R. §§ 750.704(b), 750.705(b).

2. As prescribed under the Highway Beautification Act, FHWA and the vast majority of states entered into agreements in the 1960s and 1970s that codify customary practices related to size, lighting, and spacing of billboards and prohibit off-premise, as opposed to point-of-sale, advertising signs with “flashing,” “intermittent,” or “moving” light or lights near federal highways, including commercial electronic variable-message signs (“CEVMS” or “digital billboards”).
3. On September 25, 2007, FHWA issued a memorandum entitled “Guidance on Off-Premise Changeable Message Signs” (“2007 de facto rule”) that reversed these long-standing prohibitions on digital billboards near federal interstate and federal aid primary highways (“federal highways”).
4. Shielded by the 2007 de facto rule change, advertising companies have constructed and operated new digital billboards featuring commercial advertising displayed intermittently thousands of times a day that shine day and night into citizens’ backyards and bedrooms, put the public at risk of car crashes caused by driver distraction, and mar the beauty of America’s countryside and communities.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; the Highway Beautification Act (“HBA”), 23 U.S.C. § 131; and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

6. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391(e)(1) because Defendants reside in the District of Columbia.

PARTIES AND STANDING

7. Scenic America is a nonprofit membership organization incorporated in Pennsylvania. Through advocacy, education and technical assistance, Scenic America seeks to preserve and improve the visual character of America's communities and countryside. It promotes responsible city planning, scenic easements for open spaces, tree conservation, the undergrounding of overhead utility wires, and billboard reduction efforts. For over twenty years, Scenic America also has sought to build a national conservation movement that protects the nation's roadways from billboard blight and its associated environmental impacts.
8. The laws of Pennsylvania and Scenic America's articles of incorporation, bylaws, and Board of Directors authorize it to bring this action on behalf of itself and its members.
9. Scenic America members include individuals concerned about scenic conservation and individuals adversely affected by the proliferation of commercial billboard blight. Scenic America members also include its affiliate organizations and their members.
10. Scenic America's more than thirty affiliate organizations are devoted to preserving and improving the visual character of particular states and regions across the United States.
11. Scenic America and its members depend on public participation in the government decision-making process to advance their shared interest in combating visual pollution, including billboard blight.

12. Scenic America and its members depend on access to timely and accurate information to implement programs and activities that help preserve and improve the visual character of communities and the countryside.
13. In failing to follow procedures required under the APA and the HBA before issuing the 2007 de facto rule, Defendants have caused ongoing procedural and informational harm to Scenic America and its members by depriving them of an opportunity to influence public policy related to digital billboards and denying them access to information about the safety, economic, and aesthetic impacts of CEVMS on communities across the country.
14. Defendants' 2007 de facto rule has drained and is continuing to drain the resources of Scenic America and its affiliates and has impaired and is continuing to impair their activities.
15. Before FHWA issued the 2007 de facto rule, Scenic America and its affiliates did not expend substantial resources combating off-premise digital billboards.
16. The 2007 de facto rule, which authorizes federal officials to approve state laws and procedures that permit digital billboards, has caused Scenic America and its affiliates to pursue costly strategies to oppose their proliferation, including training their members to combat a larger number of CEVMS; educating state and local decision makers about the safety, economic, and aesthetic issues that CEVMS pose; and challenging individual CEVMS in court or seeking judicial review of state statutes or regulations.
17. The 2007 rule has impaired Scenic America's and its affiliates' effectiveness in combating billboard blight. The 2007 de facto rule lifts FHWA's historical

prohibition on off-premise digital signs throughout the United States. As a result, outdoor advertising companies have increasingly applied for and received permits to construct and operate new digital billboards which change advertising, on average, every four to eight seconds. Consistent with their shared mission, Scenic America and its affiliates have challenged the flood of new digital billboard permits and permit applications in court or in local government hearings. But since 2007, despite these efforts, digital billboards have proliferated across the United States.

18. Scenic America members suffer ongoing economic, aesthetic, recreational, and psychological harm from commercial digital billboards erected and operated near their homes, businesses, and properties, in their communities, and along the roadways they drive.
19. Digital billboards distract drivers, increasing the risk of car crashes involving Scenic America members.
20. The 2007 de facto rule has enabled state officials to permit the construction and operation of digital billboards that have injured Scenic America members, including its affiliate organizations.
21. Vacating the 2007 de facto rule will redress the injuries to Scenic America and its members. Without the 2007 de facto rule, digital billboards that injure Scenic America members would be subject to removal or an order to cease operating in a manner that violates the regulatory prohibition against intermittent lighting in billboard advertisements. If the court vacates the 2007 de facto rule, Scenic America and its affiliate members would spend fewer resources combating new digital billboards.

22. Defendant USDOT is a federal executive department responsible for implementation of the HBA. USDOT is a party to the federal-state agreements and promulgates federal regulations that govern state regulation of billboards. USDOT has its headquarters in Washington, DC.
23. Defendant Ray LaHood is the Secretary of Transportation for USDOT. Secretary LaHood is responsible for the administration, operations, and activities of USDOT, including oversight of FHWA. In his official capacity, Secretary LaHood resides in Washington, DC. Secretary LaHood is being sued in his official capacity only.
24. Defendant FHWA is the lead agency of USDOT for highway activities. FHWA, with authorization from USDOT, promulgates, and oversees compliance with, the federal regulations that govern state regulation of billboards. FHWA has its headquarters in Washington, DC.
25. Defendant Victor Mendez is the Administrator of FHWA. Administrator Mendez is responsible for the administration, operations, and activities of FHWA and its Divisions. In his official capacity, Administrator Mendez resides in Washington, DC. Administrator Mendez is being sued in his official capacity only.

LEGAL BACKGROUND

26. In 1965, Congress enacted the Highway Beautification Act (“HBA”) “to protect the public investment in such highways, promote the safety and recreational value of public travel, and to preserve natural beauty.” Pub. L. No. 89-285, 79 Stat. 1028 (1965) (codified at 23 U.S.C. § 131).
27. To fulfill this purpose, the HBA limited signs, displays, and devices to (1) directional and other official signs and notices, as described therein, (2) signs, displays and

devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located. *Id.* (codified at 23 U.S.C. § 131(c)).

28. To further fulfill this purpose, the HBA provided that the several States and the Secretary should establish by agreement requirements, consistent with prior customary use, for the size, lighting and spacing of signs, displays and devices.
29. Soon after the enactment of the HBA, the federal Bureau of Public Roads, which was then operating under the authority of the United States Department of Commerce, scheduled hearings in all fifty states to aid in determining customary use for size, lighting and spacing in each state. The purpose of the hearings was to gather all relevant information on which to base standards, criteria, rules, and regulations.
30. The USDOT was established by an act of Congress on October 15, 1966, and began operation on April 1, 1967. At that time the functions of the Bureau of Public Roads were transferred to FHWA.
31. On the basis of the information collected through the public hearing process, in the 1960s and early 1970s, each state negotiated a federal-state agreement (“FSA”) with USDOT to codify the state’s customary use with respect to the size, spacing, and lighting of signs erected along the federal highways.
32. The HBA’s customary use standard protected existing sign owners’ investments, and also informed the minimum level of regulation of billboards that each state would have to adopt going forward.
33. The typical lighting provision, contained in thirty FSAs, prohibits “[s]igns which contain, include, or are illuminated by any flashing, intermittent, or moving light or

lights . . . except those giving public service information such as time, date, temperature, weather, or similar information.”

34. The majority of the other FSAs prohibit flashing, intermittent, or moving lights to varying degrees on signs near federal highways with similar exceptions for noncommercial speech that serves a public purpose. None of the original FSAs indicate that such lighting is consistent with customary use.
35. The HBA states that “Federal-aid highway funds . . . shall be reduced” by 10% if a state fails to comply with any provision of its FSA or fails to exercise “effective control” over outdoor advertising.

FACTS

36. Digital billboards are electronic signs that change copy and images through remote control or automated process.
37. Digital billboards utilize light emitting diode (“LED”) lights to depict action, motion, light or color changes through motion video, electrical, or mechanical means.
38. LEDs function by alternately emitting light and ceasing to emit light as an electrical charge either moves across the LED or is absent.
39. On FHWA’s website, the agency concedes that it “historically considered that the prohibition of flashing, intermittent, or moving lights in the various State-Federal agreements applied to all off-premise CEVMS, regardless of message interval.”
40. On September 25, 2007, FHWA issued a memorandum, entitled “Guidance On Off-Premise Changeable Message Signs,” without engaging in notice-and-comment rulemaking and without developing new “agreement[s] between the several States and the Secretary.” The 2007 de facto rule newly excluded digital billboards from

FHWA's definition of "'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs," so long as the digital billboards do not change messages more frequently than once every four seconds and operate consistently with other new standards that the memorandum creates.

41. The 2007 de facto rule for the first time authorizes FHWA division administrators to approve state laws, regulations, and procedures that permit CEVMS with flashing, intermittent, or moving lights.
42. Digital billboards contain "flashing" lights because LEDs alternate between emitting light and emitting no light.
43. Digital billboards contain "intermittent" lights because LEDs alternate between emitting light and emitting no light.
44. FHWA has stated that a digital billboard "provides motion" by "present[ing] an image in apparent movement across the display" or by "transition[ing] between displays."
45. Digital billboards contain "moving" lights because they present images in apparent movement across a display or transition between displays.
46. The year following the promulgation of the 2007 de facto rule, there were an estimated 800 digital billboards in the United States along all roadways; about one year later, there were an estimated 1800 digital billboards. In 2012, there were an estimated 3600 digital billboards in the United States, an increase of almost 400% in just five years. Many of these billboards display commercial advertisements at rapidly changing intervals along federal highways.

47. CEVMS will remain in operation and outdoor advertising companies will continue to erect new CEVMS if the 2007 de facto rule remains in effect.

CLAIMS FOR RELIEF

Count 1: Defendants' 2007 de facto rule is a legislative rule promulgated without the procedures required by the APA.

48. Paragraphs 1-47 are incorporated herein by reference.
49. By issuing the 2007 de facto rule, Defendants reversed their historical interpretation of the HBA and its implementing FSAs to allow digital billboards to operate using flashing, intermittent, or moving lights along federal highways.
50. Because states that had previously been prohibited from allowing digital billboards, with flashing, intermittent, or moving lights may now permit them, the memorandum has created new legal rights and duties.
51. Therefore, the memorandum is a legislative and substantive rule.
52. In issuing the 2007 de facto rule, Defendants failed to publish a notice of proposed rulemaking in the Federal Register containing "a reference to the legal authority under which the rule is proposed" or "the substance of the rule," and Defendants did not allow "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments," in violation of section 553 of the APA. 5 U.S.C. § 553.
53. Accordingly, Defendants' issuance of the 2007 de facto rule is arbitrary, capricious, not in accordance with law, and without observance of procedure required by law, in violation of the APA. 5 U.S.C. § 706.

Count 2: Defendants' 2007 de facto rule violates the HBA because it creates a new lighting standard in every FSA without conforming to the procedures required under the HBA and its implementing regulations.

54. Paragraphs 1-53 are incorporated herein by reference.
55. Defendants violated the HBA and its implementing regulations by issuing the 2007 de facto rule containing new lighting standards for billboards without developing those standards "by agreement between the several States and the Secretary." 23 U.S.C. § 131.
56. Accordingly, Defendants' issuance of the 2007 de facto rule violates the HBA and its implementing regulations and is arbitrary, capricious, not in accordance with the law, and without observance of procedure required by law, in violation of the APA. 23 U.S.C. § 131; 23 C.F.R. §§ 750.704(b), 750.705(b); 5 U.S.C. § 706.

Count 3: Defendants' 2007 de facto rule violates the HBA because it creates a new lighting standard in every FSA that is not consistent with customary use, as required under the HBA.

57. Paragraphs 1-56 are incorporated herein by reference.
58. The HBA requires that states and FHWA determine by agreement "size, lighting and spacing," standards for billboards which are "consistent with customary use."
59. FHWA and the states have entered into FSAs that prohibit along federal highways all signs, including digital billboards, which feature flashing, intermittent, or moving lights, precisely because those signs are, and have been since the enactment of the HBA, inconsistent with customary use.
60. The 2007 de facto rule allows digital billboards—signs with flashing, intermittent, and moving lights—despite the customary prohibition on such advertising.

61. Hence, the 2007 de facto rule establishes lighting standards that are inconsistent with customary use, in violation of the HBA.
62. Accordingly, Defendants' actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 553, and the HBA, 23 U.S.C. § 131, and the HBA's implementing regulations, 23 C.F.R. §§ 750.704(b), 750.705(b).

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that this Court:

- (1) Declare, pursuant to 28 U.S.C. § 2201, that Defendants have violated the APA and the HBA;
- (2) Vacate the 2007 de facto rule;
- (3) Award Plaintiff attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (4) Award Plaintiff all other relief the Court deems just and proper.

DATED: 1/22/13

Respectfully submitted,

/s/ Thomas Gremillion
Thomas Gremillion, Staff Attorney
(D.C. Bar No. 1005864)
Hope Babcock, Director
(Fed/D.C. Bar No. 14639)
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
Phone: 202-662-9535
Fax: 202-662-9634

Counsel for Scenic America