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Tennessee Billboard Act Violates First Amendment, Says Sixth Circuit

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In a big win for noncommercial outdoor speakers and a loss for LBJ enthusiasts, the Sixth Circuit issued a major First Amendment decision striking down Tennessee's Billboard Regulation and Control Act. Judge Batchelder's unanimous opinion (Donald and Cole joining) in *Thomas v. Bright* held that the law's on/off-premises distinction represents an unconstitutional content-based abridgment of speech that cannot survive strict scrutiny.

The Tennessee Billboard Act, enacted in 1972 to comply with the Federal Highway Beautification Act (and reap the road-building rewards of "cooperative federalism"), required all signage within 600 feet of a public roadway to be authorized under a Tennessee Department of Transportation permit. The Act provided an exception—common in billboard law—for "on-premises" signs, which allowed signage "advertising activities conducted on the property on which [the sign] is located" to be posted permit-free.

William Thomas owned a billboard on an otherwise vacant lot and posted a "GO USA!" sign on it in support of the 2012 U.S. Olympics Team. Tennessee denied Thomas a permit and ordered him to remove the sign: it could not qualify for the off-premises exception, because Gabby Douglas was presumably not springing doubles on that vacant Tennessee lot.

(Just in case you doubted the import of billboard law, a longtime hobby horse for the SixthCircuitAppellateBlog.com, this appeal drew a murderer's row of elite appellate advocates: former Alito clerk Sarah Campbell from the Tennessee SG's office, former Stevens clerk Lindsey Powell for DOJ, First Amendment expert Eugene Volokh of UCLA Law and The Volokh Conspiracy, former Assistant SG and #appellatetwitter maven Kannon Shanmugam, and leading legal intellectuals Ilya Shapiro of Cato and Robert Alt of the Buckeye Institute. The Learned Sixth did not lack for First Amendment firepower here.)

The Sixth Circuit agreed with Thomas that the billboard act is unconstitutional under the Supreme Court's most recent sign decision in *Reed v. Town of Gilbert.* The panel ruled Tennessee's law is intolerably underinclusive because it discriminates between on-premises and off-premises non-commercial messages on the basis of their content. The opinion's hypo starkly illustrated the conundrum:

A crisis pregnancy center erects a sign on its premises that says: "Abortion is murder!" Such a sign would presumably qualify for the on-premises exception because the message is related to the activities, goods, and services at the center. But may the property owner next door, who provides no services related to abortion, erect a sign that says: "Keep your laws off of my body!"? Under the Billboard Act, no. Two identically situated signs about the same ideological topic – one sign/speaker/message is allowed; the other is not.

By “favoring on-premises-related speech over speech on but unrelated to the premises,” the panel concluded, “the Billboard Act has the effect of disadvantaging the category of non-commercial speech that is probably the most highly protected: the expression of ideas.” Because the Billboard Act is “hopelessly underinclusive” and “not narrowly tailored to further a compelling interest,” the court deemed the Act an unconstitutional restriction on non-commercial speech.

This is a string that commercial-speech lawyers had been tugging on for some time. How much local, state, and federal billboard law it unravels (and there is a lot of it) is a judicial line-drawing exercise worth watching.

For now, the ball is in the state legislature’s court: the panel accepted the district court’s determination, not challenged on appeal, that the on-premises exception was not severable from the rest of the Act.