

August 17, 2009

VIA E-MAIL ONLY

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Re: August 17, 2009 Decision by the U.S. Sixth Circuit in Midwest Media, L.L.C., et al. v. Cities of Erlanger and Ft. Wright, KY

Dear Amici:

I am pleased to follow up on my July 31, 2009 letter that shared my observations of the oral arguments on Thursday, July 30, 2009. As you will recall, the amici were granted permission to participate in the oral arguments before the U.S. Sixth Circuit and I expected a decision before the end of November. It turns out that the turn around time was twelve (12) business days.

Today, the Sixth Circuit affirmed the district court's decision in a three-page unpublished opinion (attached). Mr. Morrison has submitted the same to Westlaw. I hope to discuss with appellees' counsel the possibility that they may request publication of the opinion, and I strongly recommend that we support any such request.

The Sixth Circuit rejected the appellants' assertion that the lack of a specific statement of purpose was fatal when it came to the height and size of signs. The opinion noted, "[s]ize and height restrictions advance a significant government interest in city aesthetics and traffic safety," and observed:

"Time, place, and manner" speech regulations survive First Amendment scrutiny if 1) they are content-neutral, 2) they are narrowly tailored 3) to serve a significant government interest, and 4) "they leave open ample alternative channels for communication of the information." *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005). Restrictions on the size and height of signs, such as those established by the defendant cities, satisfy this test. *Id.* at

819-24.

That the cities' sign ordinances lack applicable statements of purpose does not establish grounds for reversal. Size and height restrictions advance a significant government interest in city aesthetics and traffic safety. *Id.* at 820-21. The cities need not prove that this interest actually motivated their regulations' enactment. See *Jobe v. City of Catlettsburg*, 409 F.3d 261, 268 (6th Cir. 2005) (upholding a content-neutral speech regulation that included no statement of purpose and whose original, motivating purpose the city's mayor did not know).

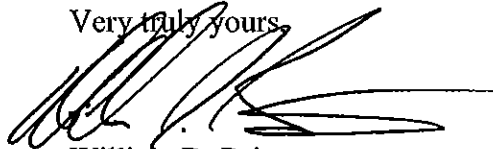
The plaintiffs have not suggested that some impermissible purpose underlies the cities' size and height restrictions. Where there is "no claim . . . that [the city] has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself[.]" we will not suspect "an impermissible purpose." *Metromedia, Inc. v. City of S.D.*, 453 U.S. 490, 510 (1981).

(Emphasis in bold added.)

This was a great opinion for local governments, planners, scenic advocates, businesses, and for advocates of plain common sense. The opinion trumps the billboard industry's tactic in the current game wherein the shakedown scheme incorporates an attack on the purposes of sign regulations. When it comes to the height and size of signs, this line of attack will now fail in the Sixth Circuit. Although there were applicable statements of purpose within the overall Code and enabling statutes, the opinion dispenses with an unnecessary level of proof when it comes to such a common sense understanding of the governmental interests involved.

As you will recall from my July 31 letter, Judge Gilman asked the appellants' counsel E. Adam Webb whether there were any Sixth Circuit decisions that had previously addressed the substantial purpose issue. Mr. Webb replied, "No." This decision builds on the prior precedent of the Sixth Circuit and is particularly helpful in its brevity in addressing the new line of attack. Without expressly saying so, the panel held that the attack on the purpose provision lacked merit and therefore the appellants lacked standing to make the other constitutional challenges.

Very truly yours,



William D. Brinton

c: Randal Morrison, Esq.
John M. Baker, Esq.
Cristine M. Russell, Esq.
Ms. Rachel Cocciolo

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 09a0570n.06

No. 08-6058

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Aug 17, 2009
LEONARD GREEN, Clerk

MIDWEST MEDIA PROPERTY, LLC; et)
al.,)
)
Plaintiffs - Appellants,)
)
v.)
)
CITY OF ERLANGER, KENTUCKY, and)
CITY OF FORT WRIGHT, KENTUCKY,)
)
Defendants - Appellees.)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

Before: GILMAN, COOK and FARRIS,* Circuit Judges.

FARRIS, Circuit Judge.

Plaintiff Midwest Media Property is a company that erects and operates advertising signs. The two defendant cities denied Midwest's sign applications in 2005 on the grounds that the proposed signs violated city ordinances prohibiting signs that promoted businesses not located on the premises where the sign was located. Midwest challenged the off-premises restrictions, which the cities have

* The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation

since repealed. The district court nevertheless granted summary judgment to the cities on the ground that the proposed signs also violated the cities' size-and-height ordinances and thus could have been denied on that basis. For that reason, the court concluded that Midwest had suffered no redressable injury. Midwest has appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

“Time, place, and manner” speech regulations survive First Amendment scrutiny if 1) they are content-neutral, 2) they are narrowly tailored 3) to serve a significant government interest, and 4) “they leave open ample alternative channels for communication of the information.” *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005). Restrictions on the size and height of signs, such as those established by the defendant cities, satisfy this test. *Id.* at 819–24.

That the cities’ sign ordinances lack applicable statements of purpose does not establish grounds for reversal. Size and height restrictions advance a significant government interest in city aesthetics and traffic safety. *Id.* at 820–21. The cities need not prove that this interest actually motivated their regulations’ enactment. *See Jobe v. City of Catlettsburg*, 409 F.3d 261, 268 (6th Cir. 2005) (upholding a content-neutral speech regulation that included no statement of purpose and whose original, motivating purpose the city’s mayor did not know).

The plaintiffs have not suggested that some impermissible purpose underlies the cities' size and height restrictions. Where there is "no claim . . . that [the city] has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself[,]” we will not suspect “an impermissible purpose.” *Metromedia, Inc. v. City of S.D.*, 453 U.S. 490, 510 (1981).

AFFIRMED.