INSTITUTE FOR FREE SPEECH

July 13, 2018

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: Notice of Supplemental Authority for *William Thomas, Jr. v. John Schroer, et al*, No. 17-6238

Dear Ms. Hunt:

Pursuant to F.R.A.P. 28(j), Appellee William Thomas respectfully advises this Court of the ruling in *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, 585 U.S. ____ (2018) ("*NIFLA*").

In holding that the challenged notice requirements violate the First Amendment, the *NIFLA* Court demonstrated that *Reed*'s strict scrutiny applies to all content-based regulations of speech: small signs in waiting rooms, flyers and handouts, emails, and—specifically—"billboard" advertisements. Slip Op. at 3, 5, 19.

Moreover, *NIFLA* shows that, except perhaps for commercial speech, strict scrutiny applies regardless of the context the government asserts to justify a content-based law. California's law applied only at statutorily-defined locations. But the Court took no notice of the law's limited geographical context. It instead simply held that the law was "a content-based regulation" that controlled and altered the content of the plaintiffs' speech. *Id.* at 7, 12.

Indeed, the Court rejected attempts to introduce contextual variables, which would include distinctions based upon location or speaker, in order to defeat strict scrutiny. California had argued that such scrutiny was inappropriate because its regulation reached only speech by regulated professionals. But the Court stated that it was "reluctant to mark off new categories of speech for diminished constitutional protection," "especially" where "content-based restrictions" are involved. *Id.* at 8 (citation omitted) (internal quotation marks omitted). Giving the government power to create categories of diminished protection—through licensing, permitting, or other regulatory requirements—would give it "unfettered power to reduce a group's First Amendment rights … a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* at 14 (internal quotation marks omitted).

Finally, the Court noted that a law is unduly burdensome even under

"deferential review" when its control over content would "'effectively rule[] out' the possibility of having … a billboard in the first place." *Id*. at 17, 19.

Thus, *NIFLA* supports Mr. Thomas's understanding of *Reed* and the unconstitutionality of the Tennessee Billboard Act, as applied to Mr. Thomas's noncommercial billboard speech.

Respectfully submitted,

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Encl. *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, 585 U.S. ____ (2018)

CC: All counsel of record