2DCA No. B260074

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

LAMAR CENTRAL OUTDOOR, LLC,

Petitioner and Respondent,

v.

CITY OF LOS ANGELES,

Defendant and Appellant.

Appeal from the Los Angeles Superior Court
Honorable Luis Lavin, Joanne O'Donnell, Judges

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF LOS ANGELES AND [PROPOSED] BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The American Planning Association and the International Municipal Lawyers Association know of no person or entity that has an interest in the outcome of this proceeding within the meaning of Rule 8.208(e) of the California Rules of Court.

Respectfully submitted,

Dated: November 19, 2015

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUDGE

As authorized by California Rules of Court, Rule 8.200(c), the American Planning Association ("APA") and International Municipal Lawyers Association ("IMLA") hereby apply to file an *amicus curiae* brief in support of Respondent City of Los Angeles ("City").

The 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 level. The 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 planners, elected officials, and citizens in 46 regional chapters, working in the public and private sector to formulate and implement planning, land-use, and zoning regulations, including the regulation of signs. The APA has long educated the nation's planning professionals on 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 appropriate sign regulation in state and federal courts across the country.

IMLA is a non-profit, professional organization of over 2,000 local governments, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission includes advancing the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local

governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Members of the APA and IMLA are actively involved in enforcing and crafting sign codes in their communities. The superior court decision in this case is fundamentally at odds with common-sense, commonplace sign regulations found in nearly every state. The decision declares unconstitutional the City's distinction in its sign ordinance between off-site signs (that is, billboards) and on-site signs, despite the fact that the constitutionality of such a distinction has been well-established not only in California but in nearly every state for over three decades. Therefore, if this Court were to affirm the decision below, it would encourage billboard companies to disregard or seek to strike down sign code provisions that are prevalent throughout the nation. The fact that the superior court based its decision on the California Constitution does not curb its potential negative impact, because many other states also contain comparable language in free-expression clauses in their respective constitutions. Therefore, in order to protect the ability of members of these amici to adopt and enforce their sign codes, they respectfully seek this Court's permission to participate as amici curiae, seeking reversal of the decision below.

Respectfully submitted,

Dated: November 19, 2015

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SUMMARY OF LEGAL ARGUMENT

Going where no court in California, state or federal, has ever gone before, the superior court declared unconstitutional a commonplace approach to sign regulation, under which advertising-for-hire (often referred to as "billboards," "off-site" or "off-premises" signage) is regulated more restrictively than "on-site" or "on-premises" signage. If allowed to stand, the decision below would take away an essential tool that communities rely on to control the proliferation of distracting and unnecessary commercial advertising. The decision below is not mandated by either the First Amendment (as authoritatively construed by the U.S. Supreme Court) or the liberty-of-speech clause of the California Constitution, article I, section 2(a) (as authoritatively construed by California's appellate courts). The decision below should be vacated.

LEGAL ARGUMENT

I. THE COURT SHOULD NOT ABOLISH THE CENTURY-OLD AUTHORITY OF COMMUNITIES TO TREAT BILLBOARDS DIFFERENTLY THAN OTHER FORMS OF SIGNAGE.

Under the superior court's reasoning,[1] the California Constitution requires the City of Los Angeles to be no more restrictive of the ability of a billboard company to put up yet another sign-for-hire along Interstate 405 than it is of the ability of a newly-built store to put its name on a new sign above its front door. But the court's reasoning rests on two erroneous conclusions, namely, that (1) any attempt to distinguish between off-site and

[1] *Lamar Central Outdoor LLC v. City of Los Angeles* (Super. Ct. L.A. County, Oct. 14, 2014, No. BS142238).

on-site signs is forbidden content-based discrimination, and (2) the City's past permissiveness and the fact that a billboard can display commercial or noncommercial messages render the city's longstanding regulations unconstitutional.

If the superior court's decision is affirmed, whether on the basis of the state Constitution or the U.S. Constitution, it will have the inevitable effect in the nation's most populous state of forcing communities to either de-regulate signage or adopt broader provisions that will likely remove opportunities for expressive conduct through signage in California. Neither effect is mandated by the state's Constitution, let alone by the First Amendment to the U.S. Constitution. Neither is necessary. Both should be avoided.

Because these amici appreciate the need for communities to continue to make common-sense distinctions when striking a careful balance between the interests of free expression through signage and the distraction and blight that can accompany an overabundance of it, they urge the Court to reverse the decision below.

A. The authority of communities to treat billboards differently than other signs runs deep in the constitutional jurisprudence of this nation and this state.

Through a series of decisions between 1911 and 1949, the U.S. Supreme Court repeatedly rebuffed efforts of companies in the advertising business to strike down as unconstitutional local laws that regulated their for-hire signage more restrictively than other forms of signage. (*Fifth Ave. Coach Co. v. City of New York* (1911) 221 U.S. 467; *Packard v. Banton* (1924) 264 U.S. 140, 144; *Bradley v. Public Utilities Commission*

(1933) 289 U.S. 92, 97; *Railway Express Agency v. People of State of New York* (1949) 336 U.S. 106.)

In *Fifth Ave. Coach*, the Supreme Court rejected the argument that New York City deprived businesses of equal protection merely by forbidding advertising wagons on the streets while allowing ordinary business wagons to exhibit business notices that were not used mainly for advertising. (*Supra*, 211 U.S. at pp. 483–84.) The court held that "[t]he distinction between business wagons and those used for advertising purposes has a proper relation to the purpose of the ordinance and is not an illegal discrimination." (*Id.* at p. 484.) Advertising one's own business is meaningfully different from selling ad space for some other, unrelated business.

Building on this decision, in *Packard* the Supreme Court elaborated on the constitutionality of regulating for-hire enterprises (in that case, private for-hire vehicles) more restrictively than "persons operating such vehicles for their private ends." (*Supra*, 264 U.S. at pp. 143–44.) "The streets belong to the public and are primarily for the use of the public in an ordinary way. Their use *for the purposes of gain is special and extraordinary* and, generally at least, may be prohibited or conditioned as the legislature deems proper." (*Id.* at p. 144, emphasis added; see also *Bradley*, *supra*, 289 U.S. at p. 97 ["In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business"].)

A few years later, the Supreme Court revisited the issue and rejected reasoning similar to that of the trial-court decision in this case. In *Railway Express*, *supra*, 336 U.S. 106, a delivery company sold space on the sides of its trucks for ads that were unconnected with its own business. New York City regulated the company under an ordinance similar to the one upheld in *Fifth Ave. Coach*, and the company fought that regulation all the way to the nation's high court, arguing that "one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck." (*Id.* at pp. 109–10.) The Supreme Court rejected the argument, without dissent, holding that "[t]he local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. . . . We cannot say that that judgment is not an allowable one." (*Id.* at p. 110.)

While none of these decisions rests squarely on the First Amendment — since constitutional protection for *commercial* speech would not be recognized for another 26 years[2] — these decisions are nevertheless significant: They illustrate how constitutional jurisprudence consistently distinguishes between offering signage space for hire and putting up signs for other reasons.

[2] First recognized in *Bigelow v. Virginia* (1975) 421 U.S. 809, 819 and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) 425 U.S. 748 (contrast with *Valentine v. Chrestensen* (1942) 316 U.S. 52, 54–55; *Breard v. Alexandria* (1951) 341 U.S. 622).

The Supreme Court's reasoning in these cases also illustrates that, when local governments are faced with the prospect of their already-crowded byways being used not simply for travel but to also pitch products and services to drivers and passengers, it is reasonable to focus additional regulation on those doing it for hire. As Justice Jackson wrote in his concurrence in *Railway Express*, "there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and *it is another thing to permit the same action to be promoted for a price*." (*Supra*, 336 U.S. at p. 116, emphasis added.)

B. Requiring cities to treat advertising-for-hire signs equally with all other signs will defeat important planning objectives, and ultimately reduce expression.

There is a compelling governmental interest in enabling drivers unfamiliar with an area to find their way easily and efficiently to their intended locations. As a practical matter, a law that prohibits businesses and citizens from appropriately identifying themselves on their own property could quickly lead to lost customers and visitors, wasted fuel, lost business revenues, and great frustration. Thus, "[o]n-premise signs perform a major role in the success of retailers and local economies in their capacity as identification, advertising, and wayfinding devices." (Marya Morris, "The Economic Context of Signs: Designing for Success," in *Context-Sensitive Signage Design*," at pp. 76, 95 (American Planning Association 2001).)

The same is not true for billboards. They are not essential to wayfinding; indeed, only a small fraction of them provide any meaningful wayfinding information. In the right context — such as in a downtown entertainment district like Times Square —

billboards can add to the sense of place. But in the wrong setting, they can serve as a needless source of driver distraction and blight. Accordingly, "[i]t has been long recognized that cities have indisputable interests in beautifying vital areas by limiting visual blight caused by advertising billboards." (*Rodriguez v. Solis*, (1991) 1 Cal. App. 4th 495, 513.)

For these reasons, the fact that most sign ordinances treat billboards less favorably than on-site signage should come as no surprise. Interpreting the California or U.S. Constitution to mandate that communities treat a new billboard just the same as a new on-site sign would indirectly and inevitably reduce the overall amount of expression because communities will respond to such a mandate by imposing greater restrictions on the size and locations of signage across the board, because few other approaches would be effective to prevent an invasion of new billboards.

C. The Supreme Court's *Metromedia* decision deserves greater weight than it received below.

As the City and other amici have cogently explained, once the U.S. Supreme Court began to recognize First Amendment protection for commercial speech, billboard companies tried —and failed — to use their newfound protection to strike down laws treating for-hire signage (regulated as "off-site" signage) more restrictively than other signage. The decisive battle on this question occurred in *Metromedia v. City of San Diego* (1981) 453 U.S. 490. The San Diego ordinance, "as construed by the California Supreme Court," restricted "commercial or other advertising to the public" by limiting advertising that does not identify the site on which the sign is located or its owner or occupant, or

advertise the goods produced or services rendered on such property. (*Supra,* 453 U.S. at p. 503 [quoting *Metromedia v. City of San Diego* (1980) 26 Cal.3d 848, 856 n.2].)

The U.S. Supreme Court's plurality opinion — reflecting, on this point, the views of all but two of the nine justices[3] — reaffirms that constitutional protection for commercial speech does not require governments to equate commercial and noncommercial speech for First Amendment purposes. (*Metromedia*, *supra*, 453 U.S. at p. 505.) In reaffirming what the plurality called "the common sense and legal distinction between speech proposing a commercial transaction and other varieties of speech," the Supreme Court made it clear that "the former [commercial] could be forbidden and regulated in situations where the latter [non-commercial] could not be." (*Id.* at p. 506 [citing *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 379–81].) The Court did so, in part, to *protect* noncommercial speech from dilution that would result if the Court were to treat commercial and non-commercial speech equally:

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[3] In *Metromedia* at least seven justices explicitly concluded that cities could prohibit billboards, and at least a majority indicated that cities could do so without also banning on-site commercial signs. "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted," (*Metromedia, supra,* 453 U.S. at p. 512 [White, J. for plurality, joined by Stewart, Marshall, and Powell, JJ]); "a wholly impartial ban on billboards would be permissible" (*id.* at p. 533 [Stevens, J. dissenting in part]); "a legislative body can reasonably conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city" (*id.* at pp. 560–61 [Burger, J., dissenting]); "In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community" (*id.* at p. 570 [Rehnquist, J., dissenting]). As Justice Rehnquist would later note, in *Metromedia* "seven Justices were of the view that San Diego's safety and esthetic interests were sufficient to justify its ban on offsite billboard advertising." (*Cincinnati v. Discovery Network Inc.* (1993) 507 U.S. 410, 444 [Rehnquist, C.J., dissenting, joined by White and Thomas, JJ].)

> **To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.** Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

(*Id.* at p. 506 [quoting *Ohralik v. Ohio State Bar Assn*. (1978) 436 U. S. 447, 456], emphasis added.) Therefore, in determining the appropriate standard of review to apply to San Diego's distinction between on- and off-site signage, the Supreme Court did *not* embrace a test requiring content-neutrality, but instead found that the correct test was the four-part test used in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n* (1980) 447 U. S. 557, "for determining the validity of government restrictions on commercial speech, as distinguished from more fully protected speech." (*Metromedia*, at p. 507.)

Similar to the "for-hire" petitioners in *Fifth Ave. Coach* and *Railway Express Agency*, the billboard company in *Metromedia* attacked the San Diego ordinance's distinction between on-and off-site advertising, contending that "the city denigrates its interest in traffic safety and beauty and defeats its own case by permitting on-site advertising and other specified signs," and questioning "whether the distinction between on-site and off-site advertising on the same property is justifiable in terms of either esthetics or traffic safety." (*Metromedia*, *supra*, 453 U.S. at pp. 510–11.) The plurality opinion rejected the argument, responding that "[d]espite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the

distinction between off-site and on-site commercial advertising. [Footnote omitted.] We agree with those cases and with our own decisions in *Suffolk Outdoor Advertising Co. v. Hulse,* 439 U.S. 808 (1978); *Markham Advertising Co. v. Washington,* 393 U. S. 316 (1969); and *Newman Signs, Inc. v. Hjelle,* 440 U.S. 901 (1979)."[4] The *Metromedia* court explained:

> In the first place, **whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics**. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. [¶]
>
> **Second, the city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does on-site advertising**. *See Railway Express,* 336 U.S. at 110.
>
> Third, San Diego has obviously chosen to value one kind of commercial speech — on-site advertising — more than another kind of commercial speech — off-site advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that, in a limited instance — on-site commercial advertising — its interests should yield. We do not reject that judgment. **As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.** *See Railway Express, supra*, at 336 U. S. 116 (Jackson, J., concurring); *Bradley v. Public Utilities Comm'n,* 289 U. S. 92, 289 U. S. 97 (1933). It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. **Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.**

[4] The Supreme Court's footnote cited a series of eleven decisions since 1952 from state and federal appellate courts that upheld the constitutionality of the on-site versus off-site distinction. (*Metromedia, supra,* 453 U.S. at p. 511 n.17.)

(*Metromedia, supra*, 453 U.S. at pp. 511–12, emphasis added.) While the Supreme Court has held that cities cannot *arbitrarily* prohibit commercial speech while permitting noncommercial speech where the effects of both types are *identical* (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 425), it has never overruled that part of *Metromedia* that rejected the notion that a distinction between on- and off-site commercial signs is subject to strict scrutiny.

Based on the Supreme Court's clear recognition that the on- versus off-site distinction does *not* violate the First Amendment, the California Court of Appeal has upheld billboard regulations in Salinas and San Francisco, among other cities. (*City of Salinas v. Ryan Outdoor Advertising, Inc.* (1987) 189 Cal.App.3d 416; *City and County of San Francisco v. Eller Outdoor Adv.* (1987) 192 Cal.App.3d 643,650.) Like the U.S. Supreme Court in *Metromedia*, the state appellate court held that "[t]he fact that the ordinance allows all forms of 'onsite' advertising while prohibiting 'offsite' messages does not impermissibly infringe upon First Amendment freedoms. San Francisco's judgment that the public has a stronger interest in identifying goods, services or activities conducted directly on the premises warrants differing treatment between offsite and onsite advertising signs." (*City and County of San Francisco*, at p. 660; see also *City of Salinas*, at p. 432 ["such discrimination between off-site billboards and on-site billboards without reference to the contents of the message of the billboard has been stated by the California Supreme Court to be valid"].) Indeed, the Court of Appeal has expressly found that an on- versus off-site distinction is content-neutral. (*City and County of San Francisco*, at p. 661.)

Consistent with California appellate courts' recognition of the constitutionality of this distinction, the California Legislature has adopted one regulatory regime for outdoor advertising displays and structures that generally exempts on-site signs — the Outdoor Advertising Act, codified at Cal. Bus. & Prof. Code §§ 5200–486[5] —and a *different* regulatory regime for on-site advertising signs, codified at Cal. Bus. & Prof. Code §§ 5490–99.

Thus, the potential impact of the superior court's conclusion that the on- versus off-site distinction is unconstitutional goes well beyond city or county regulation: Unless this Court overturns the lower decision, the Court will invalidate a distinction that is the very foundation of the Legislature's approach to regulating signage.

D. The presence of a broadly-worded free-expression clause in the state's Constitution, by itself, cannot begin to justify the invalidation of such a fundamental power of communities.

The superior court sidestepped longstanding precedents, by choosing to rest its ruling on the state Constitution's liberty-of-speech clause. (Art. I, section 2(a).) It did so even though no California appellate court has ever construed the liberty-of-speech clause more broadly than the First Amendment in the context of signage. And it did so without pausing to consider, let alone to apply, the California Supreme Court's important limitations on recognizing a right under the state constitution that is broader than its counterpart under the U.S. Constitution.

[5] The general rule exempting on-site displays from the Outdoor Advertising Act is found in section 5272. (See also § 5274 [generally exempting on-site advertising displays located within a business center].)

True, the California Supreme Court has stated, in the abstract, that the constitutional right arising under liberty-of-speech clause is broader and greater than rights protected by the First Amendment (*Fashion Valley Mall, LLC v N.L.R.B.* (2007) 42 Cal.4th 850, 863.) But neither the state Supreme Court nor any other California appellate court has extended this "broader and greater right" so far as to invalidate a distinction under state or local sign law.

Instead, the California Supreme Court's decisions that acknowledge a broader speech right under the state Constitution deal with "quasi-public-forum" areas (such as common areas of shopping malls) that are beyond the First Amendment's reach (see *Robins v. Pruneyard Shopping Center* (1979) 12 Cal.3d 899, 910 [6]), and more recently, the court acknowledged a broader right in reviewing a novel type of "compelled speech" claim (*Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal.4th 329, 341).

Meanwhile, the court has also declined to "articulate a separate test for commercial speech under the state Constitution" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 969, as modified May 22, 2002), and rejected efforts to use the liberty-of-speech clause to create higher obstacles to recovery for defamation (*Brown v. Kelly Broad. Co.* (1989) 48 Cal. 3d 711, 746). Thus, as the Ninth Circuit has correctly observed, "[d]espite this greater expansiveness of speech rights [in other areas], article 1, section 2(a) tolerates

[6] California's appellate courts have trimmed back to the scope of the right first recognized in *Pruneyard*, so that it only extends to the functional equivalent of a traditional public forum, and does not extend to areas within individual commercial and retail establishments. (*Van v. Target Corp.* (2007)155 Cal. App. 4th 1375, 1384, 66 Cal. Rptr. 3d 497, 503.)

content neutral speech restriction commensurate with the First Amendment." (*Rosenbaum v. City & Cty. of San Francisco* (9th Cir. 2007) 484 F.3d 1142, 1167.)

The trial court's reliance on *Beeman* is misplaced. The lower court's decision relies in part on the California Supreme Court's recognition in *Beeman* that the liberty-of-speech clause "expressly embraces all subjects." (*Lamar Central Outdoor LLC v. City of Los Angeles* (Super. Ct. L.A. County, Oct. 14, 2014, No. BS142238) at p. 11.**)** But that passage in *Beeman* does not render the Ninth Circuit's observation incorrect or out of date. One sentence later, the California Supreme Court states, "[h]owever, 'merely because our provision is worded more expansively and has been interpreted as more protective than the First Amendment . . . does not mean that it is broader than the First Amendment in all its applications.'" (*Supra*, 58 Cal.4th at p. 341 [quoting *Los Angeles All. For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 367], ellipsis in *Beeman*.) Citing "basic notions of judicial restraint," the *Beeman* considered and rejected the argument that the court should apply heightened scrutiny under the liberty-of-speech clause. (*Id.* at p. 346.)

Moreover, in California, as in several other states, the highest court has generally constrained its own ability (and, by implication, the ability of lower courts) to depart from U.S. Supreme Court precedent when interpreting state constitutional rights (including speech rights) more broadly. (See, e.g., *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 959.) California courts have articulated a limited set of factors that, if present, might warrant a departure from the scope of a federal right. These factors,

which date back to *People v. Teresinski* (1982) 30 Cal. 3d 822, 836–37, were described in *Gallo Cattle* as follows:

> The *Teresinski* opinion recites four categories of potential sources of such persuasive reasons [to depart]: [¶]
>
> (1) something "in the language or history of the California provision suggests that the issue before us should be resolved differently than under the federal Constitution" (*ibid.*); [¶]
>
> (2) "the high court `hands down a decision which limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion'" (*ibid.*); [¶]
>
> (3) there are vigorous "dissenting opinions [or] incisive academic criticism of those decisions" (*ibid.*); or [¶]
>
> (4) following the federal rule would "overturn established California doctrine affording greater rights."

(159 Cal.App.4th at p. 959 [quoting *Teresinski,* at p. 837].) These factors have counterparts in many other states. (*See, e.g., People v. Caballes* (Ill. 2006) 851 N.E.2d 26, 43; *Kahn v. Griffin* (Minn. 2005) 701 N.W.2d 815, 824; *State v. Gomez* (N.M. 1997) 932 P.2d 1, 7; *State v. Williams* (N.J. 1983) 459 A.2d 641, 653–59.)

The *Teresinski* factors serve an important role. They keep the law predictable for those who aspire to write constitutional laws and implement them in a constitutional way. They ensure that courts do not construe a state constitution as granting greater protection for individual rights unless certain types of "cogent reasons . . . exist" to do so (*People v. Monge* (1997) 16 Cal.4th 826, 844, *aff'd sub nom. Monge v. California* (1998) 524 U.S.

721)[7] — and so keep the state constitution from becoming a convenient but shortsighted way for a litigant to end-run a series of losses suffered under the U.S. Constitution.

The primary purpose of the *Teresinski* factors is to protect against the risk that established state constitutional rights will be diminished if the U.S. Supreme Court decides to cut back on existing protections of constitutional rights. That is because "[r]espect for our Constitution as 'a document of independent force' [citation omitted] forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter." (*Teresinski, supra,* 30 Cal.3d at p. 836 [*quoting People v. Pettingill* (1978) 21 Cal.3d 231, 248].)

But here, the right in question has *never* existed in California. It was *never* the law in California that billboards were constitutionally-entitled to be treated the same as on-site signage. In *Metromedia,* on the question of the on- versus off-site distinction, the U.S. Supreme Court did not limit rights established by an earlier precedent in a manner inconsistent with the spirit of an earlier opinion, or overturn established California doctrine affording greater rights. (Compare with *Teresinski, supra,* 30 Cal.3d at p. 836 [The issue before the U.S. Supreme Court "was one of first impression for that court; the decision did not overrule past precedent or limit previously established rights under the federal charter"].) While that part of the *Metromedia* decision was supported by seven of the nine U.S. Supreme Court Justices, the disagreement from Justices Brennan and

[7] As the California Supreme Court stated in *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 353, "[a]s early as 1938, we stated that 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.'" (Quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89.)

Blackmun on this point was hardly "vigorous." (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 959 ["vigorous"]; *Metromedia, supra,* 453 U.S. at p. 525–30.) Nor is there "incisive academic criticism" of the constitutionality of the on- versus off-site distinction in *Metromedia.* (*Gallo Cattle,* 159 Cal.App.4th at p. 959.) To the contrary, "the principles upon which it rests . . . are well established." (*Teresinski,* at p. 837.)

Teresinski and *Gallo Cattle* also leave open the possibility of a broader interpretation of the liberty-of-speech clause based on something 'in the language or history' of the provision *that suggests that the issue should be resolved differently than under the federal Constitution.*" (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 959, emphasis added.) While the phrasing of the state's clause is different from the First Amendment, and has its own history, nothing in that language or history is sufficient to support the superior court's departure in this case.

E. The Oregon Supreme Court's 2006 decision interpreting the Oregon Constitution's "right to speak, write or print freely on any subject whatever" deserves less weight in this Court than received in the superior court.

Nearly ten years ago, in *Outdoor Media Dimensions Inc. v. Dept. of Transportation* (Or. 2006) 132 P.3d 5, the Oregon Supreme Court held that the almost universal distinction between on- and off-site signs violates that state's constitutional free-expression clause, because of that clause's reference to the "right to speak, write or print freely on any subject whatever." However, the decision did not catch on outside of Oregon. It was expressly rejected by a federal district court in Northern California as it

interpreted California's constitution. Judge Charles Breyer's view of Oregon's *Outdoor Media Dimensions* decision was stated concisely in this footnote:

> Plaintiffs also cite a single case from the Oregon Supreme Court to argue that the onsite/offsite distinction in Section 17.52.515 runs afoul of the liberty of speech clause. Opp'n at 24 (citing *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Or. 275, 132 P.3d 5, 18 (2006)). **The Court does not consider this case persuasive.** The Ninth Circuit has rejected the approach suggested by *Outdoor Media Dimensions*, explicitly recognizing that the onsite/offsite distinction is not content-based under the California Constitution. See *Vanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737, 747–48 (9th Cir.2011) (holding that offsite sign ban was a content-neutral restriction that was not facially invalid under California Constitution).

(*Citizens for Free Speech, LLC v. County of Alameda* (N.D. Cal., July 16, 2015, C14-02513 CRB) 2015 WL 4365439, at *16 n.29, emphasis added.)[8]

No court outside of Oregon, state or federal, had seen fit to travel Oregon's over-broad trail until the superior court issued its decision in this case. The failure of *Outdoor Media* to "catch on" nationally itself suggests the decision should not have received the weight given to it by the superior court below. The relevant language in the Oregon Constitution is not unique; it is similar to language in many other states' constitutions that were adopted in the mid-nineteenth century and thereafter. (See Note, *Freedom of*

[8] The next (and final) sentence of this footnote in the *Citizens for Free Speech LLC* decision contains an obvious error: "In the absence of any authority to the contrary, the Court does not [sic] consider the prohibition of 'offsite commercial messages' to be content-neutral under the California Constitution." (*Supra*, *16 n.29.) Based on every other part of the decision, it is clear that the court intended to have said that it "does consider" (rather than "does not consider") that prohibition to be content-neutral. (*Supra,* *16 ["the Court finds Section 17.52.515 to be content-neutral under the California Constitution"].)

Expression under State Constitutions, 20 Stan L. Rev. 318, 318 n.2 (1968) [constitutional free-speech provisions in 38 states are at least partially identical]; Note, *Free Speech, the Private Employee, and State Constitutions*, 91 Yale L.J. 522, 541 n.94 (1982); Note, *Private Abridgment of Speech and the State Constitutions*, 90 Yale L.J. 165, 180 n.79 (1980).) In addition, the distinction between on- and off-site signage is pervasive in state and local laws throughout the country, and billboard companies have not been shy in their efforts to make it less-pervasive. Thus, when one state's highest court extends its own, similar constitution to a pervasive type of regulation, and that court's holding is *not* followed outside of the state by *any* court for nearly a decade, it's a pretty clear sign that the decision lacks persuasive force. No one else bought it.

F. The U.S. Supreme Court's recent decision in *Reed v. Gilbert* does not require a different outcome.

While this appeal was pending, the U.S. Supreme Court held that a regulation of noncommercial speech in the Town of Gilbert, Arizona, which distinguished between ideological, political, and special-event signage, was content-based and thus unconstitutional. (*Reed v. Town of Gilbert* (2015) -- U.S. --, 135 S. Ct. 2218, 2227–30.) Despite the fact that the *Reed* case did not involve commercial speech, let alone billboards, Lamar's brief relies heavily on *Reed*. That reliace is misplaced.

In essence, Lamar tries to make something of the *Reed* majority's failure to expressly acknowledge established exceptions to the U.S. Supreme Court's general rules about content neutrality (in fields where content discrimination does *not* trigger strict scrutiny, including commercial speech). But as other courts have recognized, the

Supreme Court did not thereby abolish those exceptions. (*See, e.g., Contest Promotions, LLC v. City & Cnty. of San Francisco* (N.D. Cal. July 28, 2015) 2015 U.S. Dist. LEXIS 98520 [holding that *Reed* does not apply to commercial speech; the City's distinction between primary and non-primary business uses for certain signs (i.e., on- versus off-site) is subject only to intermediate scrutiny]; *Cal. Outdoor Equity Partners v. City of Corona* (C.D. Cal. July 9, 2015) 2015 U.S. Dist. LEXIS 89454, *26–27 [accord].)

In fact, during the *Reed* oral argument, in response to a question from Justice Alito about the relevance of commercial speech, Reed's attorney specifically distinguished the proposed rule from the rule that applies to commercial speech, and he acknowledged for the court that U.S. Supreme Court jurisprudence clearly states that regulations on commercial speech should be treated differently.[9]

Moreover, the *Reed* decision did not purport to overrule *Metromedia*, which (unlike *Reed*) directly addressed and decided the constitutionality under the First Amendment of regulating off-site signs more restrictively than on-site signs. In holding out *Reed* as implicitly overruling *Metromedia*, Lamar overlooks the U.S. Supreme Court's principle that it does not overrule its own decisions by mere implication: "If a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." (*Agostini v. Felton* (1997) 521 U.S. 203, 237.) Here, "the case which directly

[9] Transcript of oral argument in *Reed v. Town of Gilbert*, Jan. 12, 2015, at 8–9, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-502_d1pf.pdf.

controls" an interpretation of the First Amendment in the off-site-commercial-sign context is *Metromedia.*

It is also important to note that three of the six justices in the *Reed* majority joined the separate concurrence of Justice Alito, which explicitly classified the on- versus off-site distinction as one that was *not* content-based: While "join[ing] the opinion of the Court," Justice Alito added "a few words of further explanation" — including a non-exhaustive list of "some rules that would not be content based[.]" (*Supra,* 135 S. Ct. at p. 2233 [Alito, J., concurring, joined by Kennedy and Sotomayor, JJ.].) One of the items on the list was "Rules distinguishing between on-premises and off-premises signs." (*Ibid.*) The Alito concurrence in *Reed* is akin to Justice Blackmun's concurrence in *National League of Cities v. Usery,* which was also written by a justice who joined in the court's opinion but who saw the value of providing an explanation of what they viewed as the limitations on the reach of the Court's opinion. (*Usery* (1976) 426 U.S. 833, 856 [Blackmun, J., concurring].) The Blackmun concurrence in *Usery* tended to temper the impact, in lower courts, of some of the most strident language in Justice Rehnquist's opinion for the Court. (*See, e.g., United Transp. Union v. Long Island R.R.* (2d Cir. 1980) 634 F.2d 19, 20.[10]

True, in *Reed,* the majority at times painted with a broad brush. But whatever motivated Justice Thomas to do so in writing for the Court, the *Agostini* principle against

[10]In this respect, Justice Alito's concurrence in *Reed* is also similar to the concurrence of Justice Powell in *Branzberg v. Hayes* (1972) 408 U.S. 665, 709, which Justice Powell described as a "brief statement to emphasize what seems to me to be the limited nature of the Court's holding," which he had joined. The D.C. Circuit then treated his concurrence as controlling in *United States v. Liddy* (D.C. Cir. 1972) 478 F.2d 586, 586.

overruling decisions by implication should apply even more forcibly in the *Reed* context, where the subject of commercial speech was not before the high court, and even the prevailing party readily acknowledged to the Court at oral argument that commercial speech should continue to be treated differently.

II. THE SUPERIOR COURT'S INTERPRETATION AND APPLICATION OF THE FOURTH PRONG OF THE *CENTRAL HUDSON* INTERMEDIATE-SCRUTINY TEST IS DEEPLY FLAWED, AND SHOULD BE EXPRESSLY REPUDIATED.

The superior court concluded that, in the alternative, even if this case were governed by the U.S. Supreme Court's intermediate-scrutiny test for commercial speech under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York* (1980) 447 U.S. 557, 566, the third and fourth prongs of that test favor Lamar. These amici disagree with the superior court's reasoning regarding both of those prongs, but its reasoning regarding the fourth prong warrants particular attention. If adopted by this Court, it would transform *Central Hudson* review from intermediate scrutiny (which is satisfied more often than not in the defense of sign regulations), into *impossible* scrutiny and would effectively insulate billboards from the kinds of regulations present in most modern communities.

A regulation fails the fourth prong of *Central Hudson* if it is "more extensive than is necessary to serve" the substantial governmental interest asserted in its defense. (*Supra,* 447 U.S. at p. 566.) In concluding that Los Angeles's regulation of billboards failed this test, the superior court used the following syllogism: First, a proposed new billboard would violate the City's regulation "even if it wanted to display offsite

commercial messages only 1% of the time." (*Lamar Central Outdoor LLC v. City of Los Angeles* (Super. Ct. L.A. County, Oct. 14, 2014, No. BS142238) at p. 16.) "That is, the Ban stifles otherwise protected speech in the guise of promoting traffic safety and visual esthetics." (*Ibid.*) Second, "at a minimum, when commercial and noncommercial or political messages are intertwined, City staff will have to determine if the message or messages are "predominantly commercial or noncommercial." However, 'making such determinations would entail a substantial exercise of discretion by a city's official, [and] presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." (*Ibid.* [citing *Metromedia*, *supra*, 453 U.S. at pp. 536–37].)

Under the lower court's syllogism, it would be unconstitutional under *Central Hudson* to prohibit the construction of new billboards that may be used for either commercial or noncommercial speech, even though that prospect is intrinsically present for all billboards. That is because, in the superior court's view, prohibiting billboards that could also be used for noncommercial speech stifles noncommercial-speech opportunities, and differentiating between billboards based on the "predominance" of the commercial-speech use involves an exercise of discretion that also "presents a real danger of curtailing noncommercial speech." (*Lamar Central Outdoor LLC v. City of Los Angeles* (Super. Ct. L.A. County, Oct. 14, 2014, No. BS142238) at p. 16.) Under that interpretation of prong four, a simple mention, by the applicant, that its proposed new billboard might also be used for non-commercial speech would put the regulating community in a position where permitting the billboard construction is the only

constitutional option. This cannot be, and it isn't. The superior court's interpretion is wrong.

If the superior court's interpretation of prong four were correct, the billboard company in *Metromedia* would have succeeded, not failed, in its attack on San Diego's on- versus off-site distinction. Yet in *Metromedia,* a clear majority of justices believed that it was constitutional **under *Central Hudson*** for a community to adopt a general prohibition on new billboards, and that "[t]his is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." (*Metromedia, supra,* 453 U.S. at p. 511 [plurality].) "There is no support in *Metromedia* for the proposition that the on-site/off-site distinction itself places an impermissible content-based burden on noncommercial speech. We have relied on *Metromedia* to uphold sign ordinances that distinguish between on-site and off-site signs when that distinction does not also prevent the erection of onsite noncommercial signs." (*Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles* (9th Cir. 2003) 340 F.3d 810, 814.)

Ironically, the sole case that the superior court cites in support of its interpretation of the *Central Hudson*'s fourth prong was *Metromedia.* Quoting with approval from pages 536 and 537, the lower court states that "making such determinations would entail a substantial exercise of discretion by a city's official [and] presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." **(***Lamar Central Outdoor LLC v. City of Los Angeles* (Super. Ct. L.A. County, Oct. 14, 2014, No. BS142238) at p. 16.) But the language that the superior court quotes from *Metromedia* in that passage, does not appear in the plurality opinion in *Metromedia* at all;

it appears exclusively in Justice Brennan's opinion concurring only with the judgment. (*See Metromedia*, *supra*, 453 U.S. at pp. 536–37 [Brennan, J., concurring in judgment: am ordinance that permits a governmental unit to determine, in the first instance, whether speech is commercial or non-commercial "entail[s] a substantial exercise of discretion by a city's official" and therefore "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech"].) Moreover, in this portion of Justice Brennan's concurrence, he did not purport to interpret or apply *Central Hudson.* To the contrary, he argued that the Court should have employed "the tests [that the Supreme] Court has developed to analyze content-neutral prohibitions of particular media of communication." (*Ibid.*) Only in an earlier footnote of his opinion did Justice Brennan even mention *Central Hudson* — and did so without mentioning the test. (*Id.* at p. 534 n. 2.)

In this respect, the superior court's application of *Central Hudson*'s prong four is the path *not* chosen by the U.S. Supreme Court in *Metromedia*; rather, it is an approach so severe that it attracted the support of only two justices (apparently for other reasons, because they made no effort to interpret or apply that prong of *Central Hudson*). The fact that the California Supreme Court cited this part of the Brennan concurrence, in passing, in its severability analysis on remand does not elevate the concurrence in significance. (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 190.)

Moreover, the superior court's fear of applying an off- versus on-site distinction is misguided. While it is possible to imagine hypothetical situations in which the distinction is not easily applied, that possibility has not discouraged courts from routinely upholding

its constitutionality in the commercial-speech context all over the country, all the time. As the California Court of Appeal recognized in *City of Salinas, supra*, 189 Cal.App.3d at pp. 429–30, the commercial versus noncommercial distinction is constitutional even though "an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct . . . ." The court added that "such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area." (See also *Outdoor Media Group, Inc. v. City of Beaumont* (9th Cir. 2007) 506 F.3d 895, 904 [in the rare event where it is necessary for a municipal official to distinguish between off- and on-site signage, the distinction is "sufficiently clear to guide this discretion"].) The Eleventh Circuit has summarized this cogently:

> This onsite–offsite distinction is reasonably clear and straightforward in the commercial speech context. The site of a commercial activity can usually be recognized without difficulty. Whether a sign bearing a commercial message is offsite, therefore, is readily ascertainable. Such signs are prohibited. This the Constitution allows.

(*Southlake Prop. Associates, Ltd. v. City of Morrow, Ga.* (11th Cir. 1997) 112 F.3d 1114, 1117.)

CONCLUSION

The judgment of the superior court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the brief used a proportionally spaced Times New Roman typeface, 13-point, and that the text of the brief contains 8,784 words according to the word count provided by Microsoft Word, as required by California Rules of Court Rule 8.204(c)(1).

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