INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session IV

The Writing on the Wall
The Law of Signs and Billboards

by

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IMLA

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THE WRITING ON THE WALL
THE LAW OF SIGNS AND BILLBOARDS
OCTOBER 19, 2009

WORKSHOP SESSION IV: BILLBOARDS
9:45 A.M.-11:15 A.M.

I. ABC's Of Sign Regulation And Sign Litigation.
   - A. Foundations: Regulation of Signs on Private Property
   - B. Trends in Nonconforming Use Law
   - C. Litigation Trends around the Country
   - D. Litigation Techniques and Strategies for Success

II. Hot Topic: The Public Forum Doctrine and Government Speech

III. Hot Topic: The Sign Code in the Digital Age: Regulatory Options

IV. Hot Topic: The Dos and Don'ts of Settlement Agreements: Preserving Future Regulatory Authority

I. ABC'S OF SIGN REGULATION AND SIGN LITIGATION

A. Foundations: Regulation of Signs on Private Property

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I. CONSTITUTIONAL FREEDOMS

A. First Amendment to the U.S. Constitution (1791)

Congress shall make no law respecting
[1] the establishment of religion, or
[2] prohibiting the free exercise thereof; or
[3] abridging the freedom of speech, or
[4] of the press; or
[5] the right of the people peaceably to assemble, and
[6] to petition the Government for redress of grievances.

The First Amendment is made applicable to state and local governments, *Schneider v. State*, 308 U.S. 147 (1939), through the Fourteenth Amendment (1868):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges and immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

B. State Constitutions

Virtually all state constitutions include provisions similar to the First Amendment, although the language often varies. States constitutions can provide an independent source of rights, and states are free to interpret their constitutions in a manner which gives greater protection to expression than does the U.S. Constitution. See: *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979), *Pruneyard v. Robins*, 447 U.S. 74 (1980). The Pruneyard doctrine has few followers in other states: see *Cross v. State*, 2004 WL 153560 *5, Tex.App.-ElPaso 2004. In many states the protections under the state constitution are coterminous with those under the federal charter.

II. WHICH HAT?

The validity of sign rules often turns on the rule maker's role or capacity.

A. Regulator of private property:
Linmark v. Willingboro, 431 U.S. 85 (1977) (real estate signs, on-site residential)
Metromedia v. San Diego, 453 U.S. 490 (1981) (billboards)

Lorillard Tobacco v. Reilly, 533 U.S. 525 (2001) (tobacco advertising)
Ladue v. Gilleo, 512 U.S. 43 (1994) (protest signs in residential areas)

B. Owner / manager / trustee of "traditional public forum" areas:
U.S. v. Grace, 461 U.S. 171 (1983) (sidewalks around U.S. Supreme Court)
U.S. v. Kokinda, 497 U.S. 720 (1990) (non-thoroughfare sidewalk was not TPF)
Boos v. Berry, 485 U.S. 312 (1988) (streets in embassy section of DC)
Frisby v. Schultz, 487 U.S. 474 (1988) (residential sidewalks)
Hill v. Colorado, 530 U.S. 703 (2000) (public sidewalk)

C. Owner of property or systems that are not "traditional public forum":
Heffron v. ISKCON, 452 U.S. 640 (1981) (religious solicitation at state fair)
Lehman v. Shaker Heights, 418 U.S. 298 (1977) (political ads in public trains)
Children of the Rosary v. Phoenix, 154 F.3d 972 (9th Cir. 1998) (municipal bus)
Page v. Lexington County School Dist. One, 531 F.3d 275 (4th Cir. 2008) (website)
Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000) (website)

D. Employer:
Garcetti v. Ceballos, 547 U.S. 410 (2006)
City of San Diego v. Roe, 543 U.S. 77 (2004)
Horstkoetter v. Dept. of Public Safety, 159 F.3d 1265 (10th Cir. 1998) (State could restrict political signs on police officer's front yard, as a term of employment)

E. Speaker on its own property or its own programs:
Pleasant Grove City UT v. Summum, 129 S.Ct. 1125 (2009) (city adopted private speech – Ten Commandments monument in city park; First Amendment did not apply)
People for the Ethical Treatment of Animals v. Gittens, 414 F.3d 23 (DC Cir. 2005) (city-sponsored public art project, with private participants)

F. Private parties / regulation by contract – statutory limits on sign bans; statutory protections of campaign / election signs.

III. THE *MOSLEY* PRINCIPLE: NO GOVERNMENT FAVORITISM

Modern sign law begins with *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972):

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing

is prohibited. The operative distinction is the message on a picket sign. **But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.**

* * *

There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley was issued before First Amendment protection had been extended to commercial speech; *Metromedia* (apparently) limits strict application of the *Mosley* principle to non-commercial speech. 453 U.S. 514.

IV. COMMERCIAL SPEECH AND NON-COMMERCIAL SPEECH

A. Definitions and Distinctions

Commercial speech is debate in the marketplace of goods and services - everyday advertising. Non-commercial speech is debate in the marketplace of ideas and social policy.

The courts have defined commercial speech as that which "proposes a commercial transaction," *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) or is "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 561 (1980).

Non-commercial speech is also known as "core speech," "classical free speech," "fully protected speech" and other similar terms. Most of it is religion and politics. Some cases indicate that full constitutional protection applies only when the subject is a matter of public concern. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004).

B. Development of the *Commercial Speech Doctrine*

"We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper ad for abortion services which were illegal where advertised but legal where offered. Held: the advertisement was protected).

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-61 (1976) (a ban on advertising prices for prescription drugs - unconstitutional).

Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977): Lawyer advertising. Commercial speech serves to inform the public of the availability, nature, and prices of products

and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.

Linmark Realty v. Willingboro, 431 U.S. 85 (1977): City law banning on-site residential "real estate for sale" signs was unconstitutional. No adequate alternative.

C. Categorization: Commercial or Non-Commercial?

Kasky v. Nike: Sport shoe company's PR campaign was alleged to have made false statements regarding labor conditions in its foreign factories. The paid announcements did not propose an economic transaction. California Court of Appeal (3-0) (93 Cal.Rptr.2d 854, 2000): the ads were part of a public dialogue on a matter of public concern, and thus were protected as non-commercial speech. California Supreme Court (4-3) (27 Cal.4th 939, 2002): The message is not removed from the category of commercial speech just because it is mixed with noncommercial speech. Even though the ads addressed a topic of public concern, the company was trying to protect its economic interests. The PR ads were commercial speech under both the federal and state constitutions. Cert. granted, 537 U.S. 1099 (2003); cert. dismissed as improvidently granted, 539 U.S. 654 (2003).

End result: case settled without final U.S. Supreme Court determination of category. The California Supreme Court ruling is precedential, at least in California state courts. The decision has essentially no following in other states. The Cal. Supreme decision has generated a huge body of academic commentary, almost all of which is highly critical.

1. Mixed Messages - intertwined

Riley v. National Federation of the Blind, 487 U.S. 781, 796 (1988) ("we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.")

Gaudiya Vaishnava Soc. v. San Francisco, 900 F.2d 1059, 1064 (9th Cir. 1990) (cert. denied 504 U.S. 914, 1992): "Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech."

2. Mixed Messages - "dominant purpose"

Mastrovincenzo v. City of New York, 435 F.3d 78 (2nd Cir. 2006): Where an [tangible] object's dominant purpose is expressive, the vendor of such an object has a stronger claim to protection under the First Amendment; conversely, where an object has a dominant non-expressive purpose, it will be classified as a "mere commercial good[ ]," the sale of which likely falls outside the scope of the First Amendment.

V. *CENTRAL HUDSON*: THE TEST FOR COMMERCIAL SPEECH REGULATION

A. A Test for Restrictions on Commercial Speech

Central Hudson Gas and Electric v. Public Service Comm'n, 447 U.S. 557 (1980). "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."

B. The *Central Hudson* four factor test:

The validity of a restriction on commercial speech depends on the following factors:
(1) "whether the expression is protected by the First Amendment," which requires the speech to "concern lawful activity and not be misleading";
(2) "whether the asserted governmental interest is substantial";
(3) "whether the regulation directly advances the governmental interest asserted"; and
(4) "whether [the regulation] is not more extensive than is necessary to serve that interest."

Ballen v. Redmond, 466 F.3d 736 (9th Cir. 2006), citing to *Central Hudson*, 447 U.S. at 566.

The fourth prong is not a "least restrictive means" requirement. It requires only a " 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' a means narrowly tailored to achieve the desired objective." *Board of Trustees SUNY v. Fox*, 492 U.S. 469, 475 (1989).

C. Actual advancement and reasonable fit

Cincinnati v. Discovery Network, 507 U.S. 410 (1993); contrast:
RTM Media v. Houston, 578 F.Supp.2d 578, 882 *et seq.* (SD TX (on appeal))

D. Evidence of Actual Advancement

Ackerley of the Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) ("As a matter of law Seattle's [billboard amortization] ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.")

Contrast: *Pagan v. Fruchey*, 92 F.3d 766 (6th Cir. 2007) (en banc, 15 judges split 8-7, majority holding that evidence of advancement is required.)

E. Criticism of *Central Hudson*

The concept of lower level protection for commercial speech and the *Central Hudson* test have long been criticized, primarily on the grounds that: 1) "speech is speech," 2) commercial advertising serves an information function which helps a capitalist, free market system work

efficiently; 3) most people care more about information on how to spend their money than they do about the great debates. A leading article: Kozinski & Banner, Who's Afraid of Commercial Speech?, 76 Va.L.Rev. 627, 641 (1990).

In spite of the criticism, the Supreme Court has repeatedly rejected calls to abandon *Central Hudson. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001). Would a grant of cert in *Metro Lights v. Los Angeles*, 551 F.3d 898 (9th Cir. 2009), reopen the debate?

F. Third Category for Non-Debate Messages?

Besides the commercial and non-commercial categories, many signs merely provide functional information which is not part of any meaningful debate: identifying the museum, stating the speed limit, warning of high voltage, giving time and temperature. Some courts put such signs in the "noncommercial" category, while others look to whether the sign message is part of public debate. The courts have not reached consensus on this important question.

G. Conundrum: Exception for Time and Temperature

In general, courts are likely to invalidate a rule which states a general ban and then creates exceptions based on message content. *Metromedia*, 453 U.S. at 494, 514-515, *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006). However, courts are widely split on whether a general ban on moving images, with an exception for time and temperature (t&t) indicators, is constitutional. Cases addressing this issue: *Desert Outdoor v. Oakland*, 506 F.3d 798, 805 (9th Cir. 2007); *Chapin Furniture v. Town of Chapin*, 252 Fed.Appx. 566 (7th Cir. 2007); *La Tour v. Fayetteville, Ark.* (8th Cir. 2006); *Solantic v. Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005); *Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004); *Rutherford Management v. Columbus* (167 N.C.App. 806, 606 S.E.2d 459, 2005); *Williams v. Denver*, 622 P.2d 542 (Colo. 1981); *Flying J Travel Plaza v. Commonwealth of Kentucky Transportation Cabinet*, 928 S.W.2d 344 (Kentucky 1996).

Query: where is the debate in an accurate display of time and temperature? How and why is any meaningful debate affected in any way by a clock or thermometer? Or stock ticker?

H. When *Central Hudson* Does Not Apply

Several courts have held that when a given regulation does not make the commercial / non-commercial distinction, then *Central Hudson* does not apply; instead, the courts first ask if the regulation is content based. If yes, then strict scrutiny applies. If no, then "time place and manner" applies. *Solantic v. Neptune Beach*, 410 F.3d 1250, 1268-69 n. 5 (11th Cir.2005); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 386 (6th Cir. 1996); *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995).

VI. THE FOUNDATION CASE ON BILLBOARDS: *METROMEDIA*

Metromedia v. San Diego, 453 U.S. 490 (1981). The Court issued five dueling opinions which run over 90 pages in the annotated law books. The decision does not define the word

"billboard," and apparently uses it to mean any large sign, since there are references to both "on site billboards" and "off site billboards." The "rules" emerging from this "Tower of Babel" are:

A. *Metromedia* Rule One: Billboards May Be Banned (seven votes)

A city may completely ban billboards, permanent signs which display offsite commercial messages, so long as the ban does not discriminate against non-commercial speech. (Not decided: whether the gov't may impose a ban on billboards which display both commercial and non-commercial messages. Most lower courts say YES. *Covenant Media v. North Charleston*, 493 F.3d 421(4th Cir. 2007), *Get Outdoors v. San Diego*, 506 F.3d 886 (9th Cir. 2007).)

B. *Metromedia* Rule Two: No Favoring of Commercial Speech (four votes, plus two concurring, on very different reasoning)

The government may not favor commercial speech over non-commercial speech. Doing so inverts the hierarchy of First Amendment values, specifically the idea that commercial speech has lower protection. (While this is only a plurality holding, most lower courts treat it as controlling. But see *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994); contrast *Ackerley v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997).)

C. *Metromedia* Rule Three: No Favoring Certain Classes of Non-Commercial Messages (same 4-2 vote as on Rule Two)

The government may not give preferential sign display rights to certain classes of non-commercial speech (historical markers, *etc.*) while banning other classes. This is simply a restatement of the *Mosley* principle, above.

VII. MESSAGE SUBSTITUTION

Cities can avoid most (but not all) "*Metromedia* problems" (*i.e.*, "favoring commercial speech" and "favoring particular noncommercial message") by including a "message substitution" in the sign ordinance. That allows any noncommercial message to be substituted in place of any commercial message, or any other noncommercial message, on any legal sign structure. *Outdoor Systems v. Mesa*, 997 F.2d 604 (9th Cir. 1993), *Get Outdoors v. San Diego*, 506 F.3d 886 (9th Cir. 2007); see also: *Maldonado v. Morales*: 556 F.3d 1037 (9th Cir. No. 07-15535) (legislative remedy: California Business & Professions Code 5275 (no regulation of non-commercial, protected speech). But: message substitution does not solve all "favoring" problems; see *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2006), *Ackerley v. Cambridge*, 88 F.3d 33 (1st Cir. 1996).

VIII. FEDERAL HIGHWAY BEAUTIFICATION ACT / FREEWAY BILLBOARDS

A. Federal HBA: Statute: 23 U.S.C. § 131
Federal regs: 23 CFR part 750; incentive programs: 23 CFR 190.1; landscaped roads, 23 CFR 752.1

B. Constitutionality
Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987)

C. Failure of "effective control" means state can lose 10% of federal highway funds.
South Dakota v. Adams, 506 F.S. 50 (1980), affirmed 635 F.2d 698, cert denied 451 U.S. 984

D. Effect on local jurisdiction: local governments can enact more restrictive rules
Art Neon v. Denver, 488 F.2d 118 (1973), cert denied
Stearn v. County of San Bernardino, 170 Cal.App.4th 434 (2009)
Donnelly v. Baltimore, 370 A.2d 1127 (1977)
Scadron v. DesPlaines, 606 NE2d 1154 (1992)

E. Where are new billboards allowed?
United Outdoor v. Business, Transportation and Housing Agency, 44 Cal.3d 242 (1988)
Alper v. State, 621 P.2d 492 (NV 1980)

F. Scope
Ackerley v. Seattle, 602 P.2d 1177 (1979)

G. Adopt a Highway Programs
Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) *(KKK)*
San Diego Minutemen v. California Business Transp. and Housing Agency, 570 F.Supp.2d 1229 (2008)

H. Private Right of Action?
National Adv. v. Ashland OR, 678 F.2d 106 (9th Cir. 1982)

IX. IS THE REGULATION CONSTITUTIONAL?

A. Communicative and Non-Communicative Aspects of Signs

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs – just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs. *Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

B. The Medium Is NOT the Message

> We are not troubled by the fact that this reasoning runs counter to Marshall McLuhan's iconic dictum that 'the medium is the message.'. . . Whatever might have been its merits in its own pop cultural context, McLuhan's dictum is incompatible with the basic thrust of modern First Amendment law, in which distinctions based on content ('the message') are subject to a different mode of analysis than distinctions based on time, place, or manner ('the medium').

Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2002).

C. Is the Regulation "Content Neutral"?

The U.S. Supreme Court is inconsistent on the precise meaning of "content neutrality." Compare *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (the content conveyed determines if the speech is subject restriction) with *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) (real test is the government's intent as to censorship or favoritism.)

Legislator's sham purposes or secret intentions are generally irrelevant; the legislation must be judged on its face. *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977), *Chicago Board of Realtors v. Euclid*, 88 F3d 382 (6th Cir. 1996).

Some courts have applied the "just one look" or "pillar of salt" theory and held that if the government official must look at the message on the sign to determine which rules apply, then the rule is automatically "content based," and thus must satisfy the most demanding level of justification. *Foti v. Menlo Park*, 146 F.3d 629 (9th Cir. 1997). However, this view was rejected by the U.S. Supreme Court in *Hill v. Colorado* (a case involving protest signs):

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. **We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.**

530 U.S. 703, 704 (2000).

D. Problem: General Rule with Exceptions Based on Content

If the challenged law includes a general ban or restriction on a certain type of sign, and then creates exceptions which are defined by content, it will likely be deemed "content based." *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006) (ban on portable signs with message based exceptions; invalid; attorneys' fee award: $165K.) *Metromedia*, 453 U.S. at 512 *et seq.*

E. The Onsite / Offsite Distinction - Commercial

"Onsite" generally means that the message on the sign pertains to the use of the land on that same parcel. "Buy your new Ford" is onsite when mounted on the Ford dealership land, but "offsite" when mounted alongside the freeway three miles from the dealership.

The on-site / off-site distinction is used to create different regulations for store signs (which encourage locals to spend their money locally) and billboards (which often encourage locals to spend their money somewhere else).

Some argue that the onsite / offsite distinction is a form of content based regulation, requiring justification under the strict scrutiny standard. Most courts reject this view, stating that "onsite" or "offsite" is a location rule, not a message content rule, and that the difference results from the sign owner's decision. *Clear Channel Outdoor v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003), *Texas Dept. of Transportation v. Barber*, 111 S.W.3d 86 (2003).

F. On-Site / Off-Site - Non-Commercial Messages

Where is the location of an idea? Compare *Southlake Property Associates v. Morrow*, 112 F.3d 1114 (11th Cir. 1997) (an idea has no location, so all noncommercial messages must be considered onsite) with *National Advertising v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (non-commercial speech is onsite when located where some related activity occurs) and *Ackerley v. Cambridge*, 88 F.3d 33 (1st Cir. 1996) (similar to *City of Orange*).

G. The Special Case: Oregon.

The Oregon courts interpret the state's constitution so that neither the on-site / off-site distinction nor the commercial / non-commercial distinction can be made.

H. The TPM Test

When the regulation is deemed "content neutral," then it is usually analyzed as a "Time, Place and Manner" (TPM) rule.

Because the regulation of a medium of expression "inevitably affects communication itself," *Gilleo*, 512 U.S. at 48, the Court has subjected time, place and manner restrictions on speech to the following test: They "are valid provided:

> [1] [content neutral] that they are justified without reference to the content of the regulated speech,
> [2] that they are narrowly tailored
> [3] to serve a significant governmental interest, and
> [4] that they leave open ample alternative channels for communication of the information."

Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814 (6th Cir. 2005).]

I. Commercial Speech: The *Central Hudson* Test

When the challenged regulation affects only commercial speech, or commercial speech separately from non-commercial, then most courts apply the *Central Hudson* test, discussed above. The TPM rule and the *Central Hudson* test are both intermediate levels of scrutiny, and are highly similar in application.

J. Non-Commercial Speech

When a regulation is not content neutral, and affects non-commercial speech, then the constitutional test is "strict scrutiny," sometimes called "exacting scrutiny." The test is:

1. the burden is on the government to show that
2. the regulation is necessary
3. to serve a compelling state interest and
4. that the regulation is narrowly drawn to achieve that end.

Burson v. Freeman, 504 U.S. 191 (1992) is one of the few content-based cases to pass the "strict scrutiny" level of review. The majority found this test satisfied by the "compelling state interest" in reducing voter fraud and intimidation, and the "narrow tailoring" of the 100 foot zone (place) and the single day (time). Later cases increasing the buffer zone distance are inconsistent. See *Anderson v. Spear*, 356 F.3d 651, 662 (6th Cir. 2004).

K. Structure and Location rules

Courts routinely sustain rules about sign size, height, setback, illumination, density, spacing, orientation, and illumination, so long as they apply without discrimination as to message content. *Prime Media v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005). Such rules are independently enforceable, under severance (striking out the invalid parts and enforcing the remaining rules), even when the law contains some unconstitutional provisions, *Valley Outdoor v. County of Riverside*, 337 F.3d 1111 (9th Cir. 2003), *Covenant Media v. North Charleston*, 493 F.3d 421 (4th Cir. 2007).

L. Discretion

In general, a permit system that lacks objective standards for approval or denial is unconstitutional. *Desert Outdoor v. Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). Contrast: *Lamar Advertising v. Twin Falls Idaho*, 981 P.2d 1146 (1999).

Yet discretion is not necessarily fatal. When discretion is exercised as to location and architectural factors, rather than message content or graphic design, and the discretion is "sufficiently guided," most courts will approve. *Rodriguez v. Solis*, 1 Cal.App.4th 495 (1991). Discussion of how much guidance is enough, with survey of several relevant cases see: *World Wide Rush v. Los Angeles*, 563 F.Supp.2d 1132, 2008 WL 2477440, *3 (now pending at 9th Cir.).

X. RESIDENTIAL SIGNS

A. Political and Protest Signs

A city may not ban political and other non-commercial signs from residential areas. *Ladue v. Gilleo*, 512 U.S. 43 (1994). One federal judge interprets *Ladue* to mean cities must allow non-commercial messages on residences at all times. *Curry v. Prince George's County*, 33 F. Supp. 2d 447 (1999). However, reasonable TPM rules are permissible. See: *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976) (limits on size and number).

B. Commercial Signs

Most courts approve rules which forbid commercial signs in residential neighborhoods, even if they make exceptions for garage / yard sales and signs regarding "home based occupations." *Rochester Hills v. Schultz*, 592 N.W.2d 69 (Mich. 1999); *Jim Gall Auctioneers v. Coral Gables*, 210 F.3d 1331 (11th Cir. 2000) (city could prohibit advertising and conduct of commercial auctions in residential neighborhoods.)

C. REFS – Real Estate for Sale Signs

A city may not completely ban on-site "real estate for sale" signs in residential areas. *Linmark Realty v. Willingboro*, 431 U.S. 85 (1977). Some state statutes expand this principle to on-site or off-site, any kind of realty.

XI. POLITICAL, CAMPAIGN AND ELECTION SIGNS

See: Regulating Election Signs, Municipal Lawyer Magazine (July August 2008; published by IMLA.

Key cases: *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (complete ban on all signs on utility poles and guy wires: valid); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976) (limits on size and number); *Sussli v. San Mateo*, 120 Cal.App.3d 1 (1981) (city can ban all inanimate signs on public property); *Maguire v. American Canyon*, 2007 WL 708591, 2007 WL 1875972, 2007 WL 1875974 (2007) (display time limits - invalid); *G.K. Ltd. Travel v. Lake Oswego*, 436 F.3d 1064, 1067 (9th Cir. 2006) (display right turns on event – election – not message; valid); *Verilli v. Concord*, 548 F.2d 262 (9th Cir. 1977); *Whitton v. Gladstone*, 54 F.3d 1400 (8th Cir. 1995) (durational limit - invalid); *Arlington County Republic Party v. Arlington County*, 983 F.2d 587 (4th Cir. 1993) (limit on number of political signs per parcel - invalid); *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2006) (politicals allowed only in residential neighborhoods - invalid, despite "message substitution").

[End of Section A - Foundations: Regulation of Signs on Private Property]

B. Trends in Nonconforming Use Law

Robin Wolpert, Greene Espel

A. The Mounting Pressure for Digital Conversion

Digital technology permits the owner to rent a single billboard to multiple advertisers. A digital billboard can produce roughly ten times the revenue of a static billboard. For obvious reasons, there is mounting interest to convert static billboards into digital billboards.

B. Response to Pressure for Digital Conversion: Create Incentives for Removal of Static Billboards in Exchange for Permit to Convert to Digital

1. Minnetonka's "incentives" provision

Purposes and Findings:

Outdoor advertising signs do not need to serve the same way-finding function as do on-premises signs. Further, outdoor advertising signs are no longer allowed in the city, and there is no potential that they will proliferate. Finally, outdoor advertising signs are in themselves distracting and their removal serves public safety. The city is extremely limited in its ability to cause the removal of those signs. **This clause is intended to provide incentives for the voluntary and uncompensated removal of outdoor advertising signs in certain settings. This removal results in an overall advancement of one or more of the goals set forth in this section that should more than offset any additional burden caused by the incentives. These provisions are also based on the recognition that the incentives create an opportunity to consolidate outdoor advertising services that would otherwise remain distributed throughout the community.**

Criteria for issuance of an enhanced dynamic signage permit:

(1) "A person may obtain a permit for an enhanced dynamic display on one face of an outdoor advertising sign if the following requirements are met:"

(a) **The applicant agrees in writing to permanently remove, within 15 days after issuance of the permit, at least two other faces of an outdoor advertising sign in the city that are owned or leased by the applicant, each of which must satisfy the criteria of parts (b) through (d) of this subsection.** This removal must include the complete removal of the structure and foundation supporting each sign face. The applicant must agree that the city may remove the sign if the applicant does not timely do so, and the application must be accompanied by a cash deposit or letter of credit acceptable to the city attorney sufficient to pay the city's costs for that removal. The applicant must also agree that it is removing the sign voluntarily and that it has no right to compensation for the removed sign under any law.

(b) The city has not previously issued an enhanced dynamic display permit based on the removal of the particular faces relied upon in this permit application.

(c) **Each removed sign has a copy and graphic area of at least 288 square feet and satisfies two or more of the following additional criteria:**

(1) The removed sign is located adjacent to a highway with more than two regular lanes and with a general speed limit of 45 miles per hour or greater, but that does not have restrictions on access equivalent to those of an interstate highway;

(2) All or a substantial portion of the structure for the removed sign was constructed before 1975 and has not been substantially improved;

(3) The removed sign is located in a noncommercial zoning district;

(4) The removed sign is located in a special planning area designated in the 1999 comprehensive plan; or

(5) The removed copy and graphic area is equal to or greater than the area of the copy and graphic area for which the enhanced dynamic display permit is sought.

(d) If the removed sign face is one for which a state permit is required by state law, the applicant must surrendered its permit to the state upon removal of the sign. The sign that is the subject of the enhanced dynamic display permit cannot begin to operate until proof is provided to the city that the state permit has been surrendered.

(e) **The applicant must agree in writing that no dynamic displays will ever be used on one additional outdoor advertising sign that has a copy and graphic area of at least 288 square feet in size.** This agreement will be binding on the applicant and all future owners of the sign. If the sign is subsequently removed or destroyed and not replaced, the holder of the enhanced dynamic display permit is not required to substitute a different sign for the one that no longer exists.

The benefits of an enhanced dynamic display permit:

2) If the applicant complies with the permit requirements noted above, the city will issue an enhanced dynamic display permit for the designated outdoor advertising sign. **This permit will allow a dynamic display to occupy 100 percent of the potential copy and graphic area and to change no more frequently than once every eight seconds.** The designated sign must meet all other requirements of this ordinance.

C. Using Limits on the Expansion of Nonconforming Uses to Stop Digital Conversion: ***Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of City of Virginia Beach***, 645 S.E.2d 271 (Va. 2007)

The Virginia Supreme Court recently rejected the argument that an increase in the depth of a billboard was not an enlargement for purposes of the nonconforming use doctrine. In *Adams Outdoor,* the City of Virginia Beach's zoning regulation provided that "no nonconforming sign shall be structurally altered, enlarged, moved or replaced." 645 S.E.2d at 275. Adams Outdoor owned a lawful

nonconforming billboard and replaced a static face with an electronic message board. *Id* The Virginia Supreme Court upheld the decision of the circuit court that the installation of an electronic message board onto the existing nonconforming billboard enlarged the billboard in violation of the City's zoning ordinance. *Id* The Court reasoned that the electronic message board increased the depth and weight of the billboard, even though it did not increase the billboard's height, length, or the square footage of the advertising area. *Id* The Court explicitly rejected the argument offered by the billboard's owner that the billboard was not enlarged because the message board did not increase the square footage of the billboard's advertising area, observing that the square footage of the advertising area was not the controlling factor. *Id*

Contrast *Ex parte Lamar Advertising Co., Inc.*, 849 So.2d 928, 931 (Ala. 2002 (allowing conversion of a static sign face to a tri-vision sign face where the tri-vision sign "occupied the same physical space as the original sign occupied").

D. *Clear Channel Outdoor, Inc. v. City of Arden Hills*, District Court File No. 62-CV-07-3231 (Hon. Thomas Mott, Aug. 1, 2008), aff'd 2009 WL 119238 (Minn. App. Ap. 28, 2009).

a. Facts

Clear Channel installed an LED display on its nonconforming billboard that was over four times greater in depth and 447 cubic feet greater in volume than the static sign it replaced. Clear Channel did so without first notifying or obtaining the required permit from the City. Immediately after discovering what Clear Channel had done, the City informed Clear Channel that its actions were unlawful and directed it to remove the noncompliant features of the new sign and apply for a sign permit. The City later denied the application because Clear Channel, by its own admissions, had expanded the sign by increasing its depth and volume, in violation of the City's Sign Code.

b. Nonconforming Use Statute

Minn. Stat. § 462.357, subd. 1e (a) provides:

Any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, ***but not including expansion***.

c. District Court Decision

On appeal from that denial, district court upheld the City's action in all respects.

The court reasoned that Clear Channel's replacement of its static sign with the LED sign "expanded the entire sign and structure" and constituted an impermissible expansion under the state nonconforming use statute. Based on a plain reading of Minn. Stat. § 462.357, subd. 1e, which expressly allows

nonconformities to be continued through "improvement, ***but not including expansion***," (emphasis added) the court rejected the claim that Clear Channel had a property right to improve its nonconforming sign in a manner that also expanded it. The court declined to adopt Clear Channel's notion that the two-dimensional "footprint" of the LED sign was "virtually identical" to the static sign, so that there had been no expansion. The court also refused to adopt the approach urged by Clear Channel that would permit "de minimus" expansions because such an approach was contrary to the plain language of the nonconforming use law.

This decision was upheld on appeal by the Minnesota Court of Appeals without addressing the merits of the nonconforming use issue.

[End of Section B - Digital Conversion and the Mounting Pressure for Digital Signs]

C. Litigation Trends around the Country:

William D. Brinton

1. Billboard Companies Are Targeting the Alleged Absence of a Substantial Governmental Interest.

A state may legitimately exercise its police powers to advance aesthetic values. Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984); Berman v. Parker, 348 U.S. 26, 32-33 (1954) (the public welfare includes aesthetic values). Sign regulations are principally directed to sign-types that impact traffic safety and/or a community's appearance (aesthetics), both of which are substantial government interests.[1]

In a series of recent federal lawsuits, the plaintiffs have challenged the constitutionality of sign regulations on the grounds that the same lack a sufficient purpose clause. Quite often, the challenged regulations contain height, size, or other limitations on freestanding signs, and those content-neutral limitations will bar large sign structures. The existence of height, size or other restrictions means that a plaintiff will lack constitutional standing to attack billboard prohibitions inasmuch as a plaintiff's claims are not redressible. The claims are not redressible because a plaintiff cannot erect its proposed billboards due to these other content-neutral restrictions. See Maverick Media Group, Inc. v. Hillsborough County, Fla., 528 F.3d 817 (11th Cir. 2008); Midwest Media Prop., LLC v. Symmes Tp., 503 F.3d 456 (6th Cir. 2007); Covenant Media of South Carolina, LLC v. City of North Charleston, 493 F.3d 421 (4th Cir. 2007); Lamar Adver. of Penn, L.L.C. v. Pittman, 573 F.Supp.2d 700 (N.D.N.Y. 2008); Coastal Outdoor Adver. Group, LLC v. Township of East Hanover, --- F.Supp.2d ----, 2009 WL 1904324 (D.N.J.).

In order to evade the absence of constitutional standing due to such restrictions that otherwise prohibit the proposed placement of large billboards, plaintiffs have chosen to attack the underlying purpose of the entire regulatory scheme.

In an unpublished decision from 2006, the complete absence of any purpose at all (even one generic purpose such as a general health, safety and welfare clause) was fatal to the constitutionality of a county's sign regulations. Tinsley Media, LLC v. Pickens County, Ga., 203 Fed. Appx. 268, 2006 WL 2917561 (11th Cir. 2006) (unpublished), reh'g and reh'g en banc denied, 219 Fed.Appx. 976 (Table) ("no statement of purpose at all"). See also Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996), cert. denied, 522 U.S. 912 (1997); National Advertising Co. v. Town of Babylon, 703 F.Supp. 228, 235 (E.D.N.Y. 1988).

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[1] Typically, a local government first decides to what extent it will extend its police powers to regulate signage, and then identifies what sign-types it will prohibit. The allowed sign-types that remain for regulation are of two broad categories: temporary signs and permanent signs. Within each broad category, signs are usually classified by the function they serve, and permitting is usually required for permanent structures and sometimes required for some types of temporary signs.

Ordinarily, the expression of some purpose will be sufficient to leave the door open to extrinsic evidence to expand on the purpose of the regulations. In Dills v. City of Marietta, 674 F.2d 1377, 1381 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983), where an all-inclusive purpose was utilized ("to safeguard life, public health, property and welfare"), the Eleventh Circuit allowed a review of the record for evidence of the interest underlying the measure. Id. A local government may be able to produce evidence by way of affidavits, depositions, photographs, or otherwise to demonstrate the purposes the ordinance is intended to serve. See Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053, n. 8 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988).

Purpose clauses are often found at the beginning of a land use code, and are not repeated or expanded upon within the chapter pertaining to sign regulations. In the real world of land use law, an all-encompassing statement of purposes for the entirety of the code should suffice. Some courts, however, may be led astray by arguments that such a generic list of purposes is insufficient when it comes to sign regulations that impact free speech under the First Amendment. Local governments should consider setting forth in detail the purpose and intent for sign regulations either within the preamble(s) of an adopting ordinance or within the body of the ordinance itself, or preferably both. See Granite State Outdoor Advert., Inc. v. City of Clearwater, Fla., 213 F.Supp.2d 1312, 1316-17 and 1342-43 (M.D. Fla. 2002), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003), cert. denied, 543 U.S. 813 (2004); Seay Outdoor Advert., Inc. v. City of Mary Esther, Fla., 397 F.3d 943, 950 n. 5 (11th Cir. 2005).

In a recent federal appellate decision, Midwest Media Group, L.L.C. v. City of Erlanger, Kentucky, Slip Copy, 2009 WL 2488112 (6th Cir.), the Sixth Circuit held that "size and height restrictions advance a significant governmental interest in city aesthetics and traffic safety." The court held that the cities need not prove that this interest actually motivated their regulations' enactment. The court also noted that there was no suggestion of some impermissible purpose underling the cities' height and size restrictions.

As a result of not meeting the height and size criteria for freestanding signs in Erlanger and Fort Wright, Kentucky, which criteria were found to be constitutional as advancing a substantial governmental interest, the billboard challenger lacked standing to challenge the separate restrictions on billboards contained within the municipal codes. This decision mooted the question of whether or not there were significant governmental purposes for these limitations in their municipal codes.

2. Billboard Companies Are Targeting Exceptions that Undermine the Stated Purposes of Aesthetics and Traffic Safety in Prohibiting and Limiting New Billboards.

In several high profile cases involving the City of Los Angeles and the City of New York, there have been challenges to local sign controls resulting from exceptions created for outdoor advertising on public property, such as transit shelters. In 2006, the City of Los Angeles initially lost a decision, and the district court noted,

> The City cannot, on the one hand, preclude Plaintiff from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles.

Metro Lights, L.L.C. v. City of Los Angeles, 488 F.Supp.2d 927, 947 (C.D.Calif. 2006)

> In 2009, the Ninth Circuit reversed the lower court's decision, noting:
>
> The district court failed to account for the fact that the City's plan allowed it to supervise a more concentrated supply of offsite signage, which plausibly contributes to its interest in visual coherence as a part of aesthetic quality. This plausible explanation would seem to satisfy Metromedia's deferential review, even if the district court's criticism might have some appeal were we writing on a tabula rasa.

Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 912 (9th Cir. 2009)

On August 31, 2009, Metro Lights filed its petition for certiorari with the U.S. Supreme Court. The City of Los Angeles has been granted an extension until November 16, 2009 within which to file an opposition brief to jurisdiction. If jurisdiction is granted, this appeal will attract a host of amicus briefs.

3. Billboard Companies Are Turning to Challenges Under State Constitutions that May Provide More Protection than First Amendment of the U.S. Constitution.

Billboard companies have met with some success in targeting billboard provisions under the free speech clauses of state constitutions in a few states where the state constitutions have been construed to provide more rights than the U.S. Constitution's First Amendment.

A close review of the briefs and arguments presented in those cases has led to criticism as to the quality of the briefs and arguments presented and as to the lack of amicus briefing by local government organizations and other organizations that have had substantial experience in constitutional and land use issues.

While local governments may continue to win their own battles in state and federal appellate courts, they need to closely follow battles involving state agencies and billboard interests. Perhaps a quarterly conference call between state municipal leagues and/or state municipal lawyer organizations with the legal staffs of state departments of transportation and state attorney general offices would be well-advised.

4. Billboard Companies Are Targeting Cities for Digital/LED Billboards Relying upon Outdated Definitions, and/or Attempting to Trick Local Building Officials into Issuing Electrical or Other Permits and then Using those Permits to Convert an Existing Billboard to a Digital/LED Billboard.

In many jurisdictions, a sign structure and the accompanying sign face(s) are governed by up to three separate and distinct local laws: (1) a sign code, (2) a building code, and (3) an electrical code.

? In order to build or modify a permanent sign structure with one or more signs, one usually needs to obtain a sign permit under the governing sign code (often a chapter within an overall land use code). The requirement for a sign permit recognizes the fact that such a sign structure involves a use of land that impacts aesthetics, traffic safety, or a combination of both.

? Inasmuch as the erection of a permanent sign structure entails other safety considerations, a building permit is usually required. A building permit is issued only after review of a building permit application with accompanying construction drawings, soil borings and/or a site plan.

? If the sign face will have external or internal illumination, an electrical permit is usually required for similar safety reasons.

A digital billboard sign, LED billboard, offsite commercial electronic variable message sign (CEVMS), or the like, is materially different than a sign structure with a static sign face.

Building and other officials that deal with construction, electrical, development, and sign permits need to be on guard when it comes to plan submittals that involve conversions or erections of offsite digital/LED/CEVMS signs.

It is strongly recommended that these local officials be cautioned as to the national trend whereby an aggressive industry seeking to expand its digital sign inventories makes allegations of impropriety or mishandling on the part of local officials in connection with the application process.

[End of Section C - Litigation Trends around the Country]

D. Litigation Techniques and Strategies for Success:

William D. Brinton

1. Check to See If the Claims Are Redressible.

If a legal challenge is filed attacking the billboard provisions of a local ordinance, the first thing to do is to check whether the claims are redressible. Recent case law pertaining to the redressibility issue include: Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1292 (7th Cir. 1993); KH Outdoor, LLC v. Clay County, Fla., 482 F.3d 1299 (11th Cir. 2007); Covenant Media of South Carolina, LLC v. City of North Charleston, 493 F.3d 421 (4th Cir. 2007); Midwest Media Prop., LLC v. Symmes Tp., 503 F.3d 456 (6th Cir. 2007); Get Outdoors II, LLC v. City of San Diego, Calif., 506 F.3d 886 (9th Cir. 2007); Lockridge v. Oldsmar, 273 Fed. Appx. 786, 789 (11th Cir. 2008); Maverick Media Group, Inc. v. Hillsborough County, Fla., 528 F.3d 817 (11th Cir. 2008); Boulder Sign Co., LLC v. City of Boulder City, Nev., 281 Fed.Appx. 701 (9th Cir. 2008); Covenant Media of N.C. v. City of Monroe, 285 Fed. Appx. 30 (4th Cir. 2008). See also Lamar Adver. of Penn, L.L.C. v. Pittman, 573 F.Supp.2d 700 (N.D.N.Y. 2008); Coastal Outdoor Adver. Group, LLC v. Township of East Hanover, --- F.Supp.2d ----, 2009 WL 1904324 (D.N.J.).

2. Billboards Are a Separate Business Use of Property.

Most jurisdictions in the United States have zoning laws describing what uses may be made of lots and parcels within designated zones. The first question should be whether or not outdoor advertising is a permitted use as a matter of right within the zone in question.

A. Is More than One Use Allowed on a Parcel?

Another question is whether or not more than one use is allowed on a lot or a parcel in the zone in question. If there is already a permitted use in place, then a second use, such as an offsite billboard, would not be permitted.

B. Is There an Overall Height Restriction for Structures that Is Applicable to the Proposed Billboard Structure?

Another question is whether or not there is an overall height restriction on structures within a given zone or jurisdiction. An overall height restriction on structures may prohibit a tall billboard structure otherwise prohibited by sign regulations or other provisions.

C. Is the Parcel Nonconforming, and Is the Proposed Billboard an Expansion of a Nonconforming Use?

Another question is whether the addition of a billboard to a parcel might constitute the impermissible expansion of a nonconforming use already existing on the parcel. Often, this question relates to a parcel's size.

3. Do Not Wait to Adopt a New Ordinance that Removes Superfluous Provisions and Codified Constitutional Practices. Utilize Extensive Preambles to Address the Reasons and Purposes for Modification and Make a Record.

If a legal challenge attacking the billboard provisions of a local ordinance is filed, there may be provisions within the ordinance that are obsolete, superfluous, unenforceable, and there may also be perfectly legal practices that have been utilized but not codified. There may also be provisions that are arguably unconstitutional, while the billboard restrictions themselves are perfectly constitutional.

Do not wait to make changes or modifications to the code or, better yet, to adopt a new comprehensive code that continues the core height, size, setback and other provisions, but that also addresses perceived or problematic provisions. Also, it is wise to utilize extensive preambles to address the reasons and purposes for the modifications and to make a record as part of the adoption process.

Every sign ordinance should be reviewed for possible modification or replacement on a periodic basis, especially with the explosion of case law in this area. It will be far less expensive in the long run to keep sign codes up to date, thereby reducing a local government's vulnerability to lawsuits, than to pay the fees and costs associated with a potential suit.

4. Talk to the Experts that Are Familiar with the Tricks Used in the Sign Code Shakedown Scheme.

If you believe that your local government is being targeted for a lawsuit, the first thing to do is to talk to an expert in this area. The tricks that are used against local governments continue to morph, but there are attorneys in various parts of the country who have experience with these suits and schemes. A single phone call may make all the difference.

Several cases where there has not been advice and counsel by experts have led to disastrous results, especially where there is a published state or federal appellate decision against a local government.

[End of Section D - Litigation Techniques and Strategies for Success]
[End of Part I - ABC's of Sign Regulation and Sign Litigation]

II. HOT TOPIC: THE PUBLIC FORUM DOCTRINE AND GOVERNMENT SPEECH (Copyright 2009 Randal R. Morrison)

I. PUBLIC FORUM

Rules concerning private party expression while on government property are analyzed under the "public forum doctrine" rather than the *Metromedia* case. Speech by the government on its own property, and private speech adopted by the government, are subject to the governmental speech doctrine, which is, essentially, that the First Amendment does not apply to speech by the government.

A. Traditional Public Forum areas (streets, parks, sidewalks)

Traditional public forum - key cases: *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles – Not TPF), *Boos v. Berry*, 485 U.S. 312 (1988) (city streets - TPF), *Frisby v. Schultz*, 487 U.S. 474 (1988) (sidewalks in residential neighborhoods - TPF), *Hill v. Colorado*, 530 U.S. 703 (2000), *U.S. v. Grace,* 461 U.S. 171 (1983) (sidewalks around US Supreme Court building - TPF).

TPF status is determined by the nature of the area and cultural tradition; ownership is (at least theoretically) irrelevant. Example: *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114 (10th Cir., 2002): City sold land to church, retaining a pedestrian easement for public use. Church attempted to impose speech restrictions on its property. Held: Despite private ownership, the public sidewalk was still TPF, and the church could not impose speech restrictions. In a second transaction, the church purchased the pedestrian easement and converted the area into an ecclesiastical park. Held: the change in the physical nature of the area destroyed TPF status; the church may impose its speech restrictions on its property which is no longer TPF. *Utah Gospel Mission v. Salt Lake City*, 425 F.3d 1249 (10th Cir. 2005).

Even in traditional public forum areas, the government may require that all private party speech be hand-held or personally attended. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996), *Sussli v. San Mateo*, 120 Cal.App.3d 1 (1981), *Knights of Columbus, Council 94 v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001) (monuments in historic park. Would the outcome be different after *Pleasant Grove v. Summum*?).

The government can prohibit commercial activity in traditional public forum areas, *Lavery v. Laguna Beach*, 64 Fed.Appx. 23, 2003 WL 21206150 (9th Cir. 2003), but not creative or artistic activity, *Berger v. Seattle*, 569 F.3d 1029 (9th 2009) (balloon artist in city park), *Trebert v. New Orleans*, 2005 WL 273253 (US DC ED LA 2005) (photographer / artist in French Quarter).

B. Designated Public Forum

Christ's Bride Ministries v. Southeastern Pennsylvania Transportation Auth., 148 F.3d 242 (3rd Cir. 1998) (pattern of actual practice prevails over official policy statements).

C. Non-Traditional Public Forums ("Limited Public Forums")

These areas include every thing else owned or controlled by the government, *Packer v. Utah,* 285 U.S. 105 (1932): *Lehman v. Shaker Heights*, 418 U.S. 298 (1977) (commuter trains); *Hopper v. Pasco*, 241 F.3d 1067 (9th Cir. 2001) (interior of public library); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *DiLoreto v. Downy Unified School Dist.*, 196 F.3d 958 (1999) (fence at public school ballpark); *Children of the Rosary v. Phoenix*, 154 F.3d 972 (9th Cir. 1998) (public buses). But, if any noncommercial messages are accepted, most courts hold that all must be accepted. *Brown v. Caltrans*, 321 F.3d 1217 (9th Cir. 2003) (pedestrian freeway overpass was non-public forum; no preference for US and official flags).

See: Ames, Advertising in Transit Facilities - Municipal Lawyer Magazine, Mar-Apr 2008.

D. Categorical Treatment of Commercial Speech

The government can accept commercial messages on a categorical basis (*i.e.*, car dealers are okay but pawn shops are not). *Uptown Pawn and Jewelry v. City of Hollywood FL.*, 337 F.3d 1275 (11th Cir. 2003). However, within a category, viewpoint neutrality is still required.

E. Inviting private speech on government property, and then refusing specific messages:

DiLoretto v. Downy Unified School Dist., 196 F.3d 958 (9th Cir. 1999) ("booster program" for local sponsors of HS ballteam; school dist. could change policy and refuse all non-commercial messages, including Bible quotation)

Hopper v. Pasco, 241 F.3d 1067 (9th Cir. 2001) (avoiding controversy is not sufficent basis for refusing to display private art work in public library)

Kiesinger v. Mexico Academy and Cent. School, 427 F.Supp.2d 182 (ND NY 2006)

Seidman v. Paradise Valley Unified School Dist. No. 69, 327 F.Supp.2d 1098 (AZ 2004)

Fleming v. Jefferson County School Dist. R-1, 298 F.3d 918 (10th Cir 2002) (religious messages on Columbine memorials)

Lesson: announce admission criteria in advance, and apply the criteria strictly.

II. GOVERNMENT SPEECH

The government may express its own message on its own property or systems. The First Amendment does not apply to such speech. However, most if not all states have statutory restrictions on local governments taking public positions on ballot measures and elective candidacies.

A. *Pleasant Grove v. Summum*, 129 S.Ct. 1125 (2009).

City adopted private speech – Ten Commandments monument donated by private party; "forum analysis simply does not apply to the installation of permanent monuments on public property); Contrast other Summum cases decided by Tenth Circuit: *Summum v. Duchesne*, 319 FedAppx 753 (post- *Pleasant Grove*, 2009) (original decision: 482 F.3d 1263); *Summum v. City of Ogden*, 297 F.3d 995 (2002), *Summum v. Callaghan*, 130 F.3d 906 (1997).

B. *People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416 (DC Cir. 2005)

Washington DC sponsored, produced, organized and managed a public art project consisting of "party animals" (elephants and donkeys) throughout the city, placed on both private and public land. Private sponsorships, consisting of decorated animals, was invited. Held: City had announced "light and whimsical" theme in advance, and could refuse PETA's sponsored animal which was not compatible with the theme.

III. ELECTRONIC BILLBOARDS AND SIGNS: DIGITAL CONVERSION, AN INTRODUCTION

There are two sign industries:

A. Outdoor advertising: the billboard business displays general advertising for hire (a rental fee), typically on large, freestanding sign structures; the structures are permanent while the images change periodically, usually on a monthly or quarterly basis; off-site commercial advertisements normally account for 95-98% of billboard sales, with the remainder being non-commercial (politics, religion, etc.); off-site means that the goods or services advertised are not available on the same property; a billboard is a separate or principal use of land, not an accessory to some other principal use, such as a store;

B. Sign makers: sign shops design and fabricate custom signs; such signs are usually permanent in both physical nature and message; most customers are retail stores who use the signs as an accessory to the main use; stores display the signs for purposes of identification and location information; many store signs incorporate trademarks.

The two industries normally take separate paths in their relations with government. However, on the issue of electronic signs, they have similar goals: display technology which is visually attractive and easily changed, typically by a computer program. Such devices give a billboard company the ability to rent the same space to several advertisers at the same time; instead of renting the space for a month, they rent it by the second in a variation on the time share idea; this holds the potential for greatly increased revenue. Digital displays also give stores the ability to modify the image or message to fit the promotional theme of the day, with a change-over cost which is very small. When well done, digital displays are vastly more "eye catching."

Some elaborate electronic signs – *i.e.*, those in Times Square NYC or on the Las Vegas Strip – are essentially large-scale television screens with full motion video, and even accompanying sound, smoke or fumes. Digital display technology has advanced rapidly, and the costs of installing digital display units is dropping.

IV. Technology and Economics

Largest manufacturer in US: www. daktronics.com

Intro to technical terms:

http://www.daktronics.com/ProductsServices/Products/Digital-Billboards-Displays/Optimized-ITechnology/Pages/default.aspx

Economics: digital face will increase cash flow by at least 12 times:

Source: http://www.daktronics.com/Company/NewsReleases/Pages/Connect-Outdoor-Media.aspx

Text:

Connect Outdoor Media Chooses Daktronics Digital Billboard Technology

Independent Outdoor Advertising Company's First Digital Billboard Conversion Generating Extra Revenues

BROOKINGS, S.D. – Aug. 17, 2009 – Digital billboard manufacturer Daktronics Inc. (NASDAQ-DAKT) of Brookings, S.D., recently provided Connect Outdoor Media LLC., an

affiliate of Fusion Media Group, with a Valo® digital billboard display. Connect's first digital billboard conversion is located along US Hwy 259 North of Kilgore, Texas, and sees more than 21,000 vehicles pass by it per day.

"We anticipate generating at least 12 times the revenue we were generating before with a static billboard at this location," said Brent Waller, president partner of Connect Outdoor Media LLC. "Upgrading to digital changes the game."

Connect Outdoor Media serves Texas and Louisiana, offering clients quality billboard sites to meet their advertising goals for growing their business and brand. The company, like many other independent outdoor advertising firms, is experiencing success even during slowing advertising activity because they're investing while others are waiting.

"Let's face it; digital gives you the edge because it is so much more immediate and flexible." said Waller. "With a digital board in our inventory, our advertising base has greatly expanded with advertisers that would not be interested in traditional outdoor."

Waller also commented on the importance of daypart advertising. "Creating ads that are relevant to customers at a particular moment during the day is an absolute crucial element to this medium," said Waller. "When I speak with clients the first thing we go over is their advertising campaign. What are you going to do on an ongoing basis to keep the customer looking for what's next from your business?"

Outdoor advertising operators like Fusion Media and Connect Outdoor who choose Daktronics as their digital billboard supplier have little to worry when it comes to the reliability and sustainability of their investment. Daktronics provides outdoor companies with all the tools to be successful in the digital outdoor advertising business.

Ed Lastes, Fusion Media Group CEO, said they inevitably chose Daktronics because "the bottom line is that as a smaller company, we can't afford to make bad decisions," said Lastes. "Daktronics' company structure is simply much more organized than others when it comes to offering clients the full package. From their financial stability, end-user database, relationships with larger outdoor advertisers, an extensive service and support network, and their staying power as a leading provider of digital LED displays, there simply isn't another company that could come close to supporting us like Daktronics."

Daktronics digital billboards are designed to perform reliably 24/7. Daktronics product designs are tested in the company's Product Reliability Lab where they are pushed to their performance limits on temperature, humidity, and vibration. These results provide Daktronics' engineers valuable feedback to ensure the company produces a superior digital billboard product that provides years of dependable performance in any environment.

V. THE PUSH TO GO DIGITAL AND THE PUBLIC POLICY DEBATE

Both the billboard and sign maker industries are pushing government at all levels to allow digital signs. The main argument is, in essence: "don't lock us into the technology of the past; let

us use all modern tools to compete in a demanding economic marketplace. Our competitors are using dynamic displays, and we must answer in kind." Legislators at all levels of government are being lobbied and pressured to adopt permissive policies on electronic signs. In many states legislation is proposed to make digital conversion a matter of right. Proponents often say that digitals can be changed quickly, and thus can display "Amber Alerts."

But public resistance is growing. Many people fear that widespread use of electronic signs will have the cumulative effect of carnivalizing the public square, cheapening commercial districts with even more garish signs, and worsening "driver distraction." Few towns want to look like the Vegas Strip or Times Square.

> Outdoor advertising has turned our neighborhoods into pages from a magazine, destroying our streetscapes, shining lights into our apartments, disfiguring our landmarks, bombarding our senses. It has stolen our sense of community, blasting a cacophony of advertising messages that drowns out all other information. We can no longer enjoy a walk through our own neighborhood without these monster signs shouting at us from every corner. We are losing sleep at night because our bedrooms are lit up like Yankee Stadium. Our neighborhoods have become a nightmarish streetscape out of the movie Bladerunner, where every inch of every surface is covered in advertisements. The invasion of this advertising into every pore of our bodies and into every moment of our existence must be stopped.

Hearing Before the New York City Planning Commission 10-11 (Nov. 29, 2000), quoted in *Infinity Outdoor v. New York City*, 165 F.Supp.2d 403 (SD NY 2001).

Many developers of large scale shopping centers and sports facilities are now telling city councils, in effect: We can build this project, and give you the sales tax revenue and municipal prestige you want, only if we are allowed to have spectacular signage without restriction as to on-site or off-site, and with no restrictions on electronic signs (or any other display technology). Some of the developers view sign space rental as important as floor space rental.

Digital billboard proposals sometimes include a financial incentive to the city, whether as landlord collecting rent and / or a percentage rent, or as co-owner of the sign.

VI. HIGHWAY BEAUTIFICATION

The federal Highway Beautification Act (HBA) (Statute: 23 U.S.C. § 131; Regs: 23 CFR part 750) sets minimal standards for effective control of outdoor advertising signs near federally funded highways. But the burden of enforcement is placed upon the states, at the risk of losing up to 10% of federal highway funds. The statute allows on-site signs using "electronic processes":

> (c)(3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located . . .

23 USC 131(c)(3).

Each state enters into a contract with the Federal Highway Administration, called the "federal state agreement" (FSA) which details the manner in which the state will achieve "effective control." For such contracts:

> 23 USC 131(j) Provided, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder.

At the same time, the federal regs ban billboards using flashing lights:

> 23 CFR 750.108(c) No sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights.
> 23 CFR 750.108(e) No sign may be permitted which moves or has any animated or moving parts.

Even though it would seem that the "flashing, intermittent or moving lights" would ban electronic billboards, the staff of Federal Highway on September 25, 2007 issued a "guidance memo," available at http://www.scenic.org/pdfs/fhwyguidance.pdf, which says:

> Proposed [state] laws, regulations, and procedures that would allow permitting CEVMS [changeable electronic variable message signs] subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as those terms are used in the various FSAs [federal state agreements] that have been entered into during the 1960s and 1970s.
> * * *
> Available information indicates that State regulations, policy and procedures that have been approved by Divisions to date, contain some or all of the following standards:
> • Duration of Message - Duration of each display is generally between 4 and 10 seconds – 8 seconds is recommended.
> • Transition Time between messages is generally between 1 and 4 seconds – 1-2 seconds is recommended.
> • Brightness: Adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety of the motoring public.
> • Spacing between such signs not less than minimum spacing requirements for signs under the FSA [federal state agreement], or greater if determined appropriate to ensure the safety of the motoring public.
> • Locations - where allowed for signs under the FSA except such locations where determined inappropriate to ensure safety of the motoring public.

VII. SURVEY OF RECENT CASES

A. Total Ban on Changeable Image Signs

Naser Jewelers, Inc. v. City Of Concord, 513 F.3d 27 (1st Cir. 2008). City enacted total ban on
all "EMCs" (Electronic Message Centers), on-site and off-site, commercial and non-commercial. No exception for time and temp. Held: Valid as a time, place manner rule which served traffic safety and esthetics.

Carlson's Chrysler v. City of Concord, 938 A2d 69 (NH SC No 2006-362, Nov 8, 2007). Car dealer in Concord NH was denied permit to erect an electronic changeable copy sign on its property to replace an existing manually changeable sign. Held: The City need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics, . . . the trial court erred in substituting its judgment for that of the City's that prohibiting animated, flashing signs containing commercial advertising will 'enhance the appearance and aesthetic environment of the City' and 'improve traffic safety.' City's ban on moving image signs is valid.

Similar: Ban on flashing, moving, and portable signs was legitimate and constitutional. *Marras v. Livonia, Mich.*, ___ F.Supp.2d ___, 2008 WL 3843533 (ED Mich. No. 07-12562, 8/15/2008).

LaTour v. Fayetteville, 442 F.3d 1094 (8th Cir. 2006). CPA placed 21-letter changeable image sign in ofc. window. City law forbade any "sign which flashes, blinks, or is animated." Held: " the ubiquitous time and temperature signs allowed by the City do not pose identical concerns as signs that function similarly but that display messages that are more distracting. Allowing only time and temperature signs cannot be said to 'give one side of a debatable public question an advantage in expressing its views to the people' or allow the City to 'select the permissible subjects for public debate and thereby to control the search for political truth.'" The ban is valid.

B. Flashing Signs

Meredith v. Lincoln City OR, 2008 WL 4375591 (D OR Civ No. 03-6385-AA, 9/25/2008). Owner of legal but nonconforming billboard challenged City's denial of permits to add "electronic flashing display" to the sign. Held: City law prohibits structural changes to non-conforming signs, unless the sign is first brought into compliance with current law. Given the sign's location in a large vacant lot, that is not possible. A sign change is "structural" if the alteration modifies the size, shape or height of a sign structure or requires replacement of sign material with other non-comparable materials. The rule prohibiting structural change is content neutral and sufficiently justified.

C. Digital Conversion

LED Conversion: Billboard operator sought permit to convert existing, legal billboard to LED display, without changing the superstructure of the signs. City said signco's application was

incomplete and requested more information. 123 days later signco claimed the permit was "deemed approved" because the city had not taken formal action in the time required by state law. Held: The state law applies to residences and other structures that relate to them. A billboard is not an accessory structure to a dwelling unit. Conversion to LED display is not a right of modernization. City could demand CUP and site plan approval. *Lamar Adv v. Zoning Hearing Bd of Monroeville*, 939 A2d 994 (PA Commonwealth Ct., No 1117 CD 2007, Dec 17, 2007, reargument denied Feb 13, 2008).

LED Conversion: Georgia state law states that signs using "nonmechanical electronic multiple message signs" are permissible under certain circumstances. City denied signco's application to convert existing sign to LED display, as violating city law prohibiting "flashing, or blinking signs or signs using varying light intensity . . ." Held: City law grants the planning dept. total control over whether to require a permit, and leaves no guidance for this discretion; this creates the possibility of content-based discrimination. The city's sign code is an unconstitutional prior restraint on free speech. Signco is entitled to nominal damages, and the chance to prove it suffered actual damages for deprivation of its rights. *Lamar v. Marietta GA*, 538 FS2d 1366 (ND GA, No 1:07-cv-00764, Feb 25, 2008).

D. Conversion of Non-Conforming Sign

Owner of legal, non-conforming billboard converted display face to electronic message board; city ordered it removed based on a law forbidding structural alteration or enlargement of legal non-conformity. Signco's structural engineer said that addition of the electronic message board did "not increase the force in any structural element by more than [five percent]" and was not, therefore, " 'structural' as defined by the International Building Code. Held: the electronic message board added between 3,000 and 3,500 pounds to the weight of the billboard. While it did not increase the height, length, or the square footage of its advertising surface area, it did increase the depth. The addition of the message board "enlarged" the billboard in both dimension and weight, and was thus illegal. The illegality could not be cured by returning to the original display face. *Adams Outdoor v. Bd Zoning Appeals, Virginia Beach*, 645 SE2d 271 (VA No. 061272, June 8, 2007).

E. Electronic Sign for Church

City denied church's application for variance to rebuild existing sign, increasing size (by ten times the normal rule) and height (four times), and adding electronically changeable copy. Church challenged the denial on the basis of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Held: The Church has not been denied any use of a sign as a means of evangelism, but only the non-conforming use of a sign that cannot be as large and eye-catching as the church might desire. Denial of its variance burdens the Church's religious exercise, but not enough to to make any use of a sign for uplift and recruitment "effectively impracticable" or to compel the congregants to "violate [their religious] beliefs." The standard for an RLUIPA violation is not met; there was no error in denying the variance. *Trinity Assembly of God v. People's Counsel for Baltimore County*, 178 MdApp 232, 941 A2d 560 (MD App No 2840, Feb 6, 2008).

VIII. FRONTIER ISSUES: GOVERNMENT AS MARKET PARTICIPANT/ MONOPOLIST

A. *Metro Lights v. City of Los Angeles*

Facts: city entered into long-term street furniture / advertising deal with private party, and later adopted ordinance banning all new off-site advertising. Private company, in "small format outdoor" business, challenged.

Trial court decisions: 488 FS2d 927 (2006; summary judgment to Pf); 2006 WL 4941839 (2006, denying damages).

Ninth Circuit: 551 F.3d 898 (9th Cir. 2009): city's ban on new off-site commercial signs on all private property while at same time allowing exception for signs on city's street furniture is valid. City can have a monopoly over a small segment of off-site commercial advertising market. Motion for rehearing / en banc denied.

B. Similar and related cases:

Clear Channel v. NYC, 608 FS2d 477 (SD NY 2009) (now on appeal to 2d Cir.) Related cases in SD CA: *World Wide Rush v. Los Angeles*, 563 FS2d 1132 (2008), 579 FS2d 1311 (2008), 605 FS2d 1088 (2009), *Community Redevelopment Ass'n dba Liberty Media v. Los Angeles*, 2009 WL 35352 (2009).)

C. Cert. petition filed August 31, 2009.

D. Does *Metro Lights* provide "safe harbor" for public / private partnerships in outdoor advertising? Watch for "Amber Alert" justification.

E. Can city operate its own "billboard farm" while forbidding private parties from erecting new billboards? Can city be a landlord for new billboards while forbidding private parties from putting new billboards on private land?

F. HBA: "guidance memo" from Fed Hiway: http://www.fhwa.dot.gov/realestate/offprmsgsnguid.htm

G. Sign Ordinance Amendment to Regulate Digitals

Most cities are either banning entirely or requiring a conversion permit with an "exchange" of ___ number of old signs going down before one digital (new or conversion) may go up. Conversion / exchange rates vary widely. See "B" above (industry press release suggests exchange rate of 12 to 1 is profitable for signco).

H. Looming Issue:

Can the city ban digital billboards (off-site commercial) while allowing onsite digitals? In *Metromedia*, part of the rationale for banning off-site commercial while allowing on-site commercial was the "periodically changing messages" of off-site billboards. In the digital sign age, does that rationale still apply? Does some other rationale apply?

IX. NEW FORMATS FOR OFF-SITE OUTDOOR

A. Tall Wall signs: *Beverly Blvd. v. West Hollywood* (9th Cir Nos 05-55961, 05-55970, 05-56384, 238 Fed.Appx. 210, 2007 WL 1649843), cert denied.

B. Sign Twirlers - see *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006)

C. "Spectacular signs" as part of major new commercial developments
Developers typically claim "the project won't pencil out without spectacular signage, with no restrictions as to on or off site messages"

D. Auto wraps; signs on boats or towed behind slow, low flying aircraft
Center for Bio-Ethical Reform v. Honolulu, 455 F3d 910 (9th 2006)

E. Mobile billboards (not new, but a growing segment) - *Showing Animals Respect and Kindness v. West Hollywood*, 166 Cal.App.4th 165 (2008).

[End of Part II - The Public Forum Doctrine and Government Speech]

III. HOT TOPIC: THE SIGN CODE IN THE DIGITAL AGE: REGULATORY OPTIONS

Robin Wolpert, Greene Espel

I. A FACTUALLY SUFFICIENT BASIS EXISTS TO LIMIT OR BAN DYNAMIC SIGNS: PUBLIC SAFETY AND AESTHETICS

A. Billboards Are Distracting—It is a Matter of Common Sense

Long before large LED signs appeared, courts recognized that billboards can distract drivers, and that cities can regulate (or even ban) billboards for that reason. "No empirical studies are necessary for reasonable people to conclude that billboards pose a traffic hazard, since by their very nature they are designed to distract drivers and their passengers from maintaining their view of the road." *Major Media of the Southeast v. City of Raleigh,* 621 F. Supp. 1446, 1450 (E.D.N.C. 1985).

In affirming the constitutionality of a flat ban on "electronic message center type signs," the City of Concord, New Hampshire's "legislative conclusion" that such signs are likely to prove distracting to drivers to the extent the signs are visible from roadways, thereby adversely affecting traffic safety, is hardly unreasonable, and would appear to be supported by common sense." *Nasar Jewelers, Inc. v. City of Concord, New Hampshire,* Civil No. 06-CV-400-SM at 9 (D.N.H. June 25, 2007) (citing *Chapin Furniture Outlet v. Town of Chapin,* 2006 WL 2711851, *4 (D.S.C. Sept. 20, 2006) ("Contrary to Plaintiff's contentions, the Town's judgment that flashing or scrolling signs constitute a traffic hazard and are inconsistent with the rural community aesthetic is not unreasonable")).

In affirming the *Concord* decision on appeal, the First Circuit stated that "[i]t is a given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous." *Naser Jewelers, Inc. v. City Of Concord, N.H.,* 513 F.3d 27, 35 (1st Cir. 2008) (citing *Chapin Furniture Outlet*). "Indeed, plaintiff's own witnesses stated that bypassers focus more on rapidly blinking electronic signs than static signs. This constitutes a greater hazard." *Id.*

As Judge Diana E. Murphy wrote for the Eighth Circuit in August 2006 regarding an attempt to install billboards that would have completely changed their display every six to ten seconds (though "trivision" technology rather than digital technology), "distracting roadside billboards of the type Advantage sought to erect could also pose real danger to both motorists and nearby pedestrians." **Advantage Media LLC v. City of Eden Prairie,** ***456 F.3d 793, 803 (8th Cir. 2006).***

B. Empirical Studies on Safety

Legitimate studies of sign safety (conducted and sponsored by those without a financial interest in a particular answer) form pieces of a broader puzzle. When fit together properly, these pieces support the conclusion that the replacement of static signs with frequently-changing dynamic signs can create an added safety hazard.

- ***There is reason to believe that billboards tend to distract drivers. There is reason to believe that dynamic billboards tend to distract drivers to a greater degree. Drivers are distracted to a dangerous degree if their eyes are diverted from a highway for even two seconds (or, when congestion may require braking, for ¾ of a second).***

- ***Certain types of dynamic signs can create "the Zeigarnik effect" – named for a human behavioral pattern. When a sign appears to present a visual story or message, a driver may be motivated, or even compelled, to watch the story through to completion.***

C. Aesthetics and Other Concerns

Sign regulation can and does involve values other than safety – such as aesthetic concerns (which are capable of cutting either way on this subject), communication, wayfinding, and creativity.

> As U.S. District Court Judge McAuliffe also concluded in *Nasar Jewelers,* "And, while taste and aesthetic sensitivity are debatable topics, it would seem well within the City's legitimate discretion to conclude that bright, colorful, electronic signs that change color and messages – or signs similar to those, are inconsistent with the aesthetic values the City seeks to promote." *Nasar Jewelers, Inc. v. City of Concord, New Hampshire,* Civil No. 06-CV-400-SM at 10 (D.N.H. June 25, 2007). A well-tred "middle path" –a general ban on signs that ch*ange, with a pub*lic information exception – is vulnerable to a First Amendment attack.

II. THE COST-BENEFIT ANALYSIS OF SIGN REGULATION

A. The Initial Assessment

Whether and how to regulate dynamic signs are discretionary policy choices. Those choices should be made in light of the local government's cost-benefit analysis of safety, aesthetics, planning, and other policy considerations and the legality of various regulations.

Picking the best policy for your community unavoidably involves the degree of risk-aversion, and aesthetic and policy preferences, of your elected officials.

Identifying a safety risk is just the beginning – cities must also consider how *averse* they are to that level of risk.

B. The Legality of Sign Regulation: The Risks of Carving Out Exceptions

A municipality may ban digital signs. See Naser Jewelers v. City of Concord, NH. Concord prohibited all "electronic message center type signs."

However, following the lead of federal and state laws, many communities have carved out exceptions to allow dynamic signs that present "public service

information," "electronic message centers," or signs owned by governments or non-profits. However, in the eyes of *some* judges:

1. A sign regulation is only as constitutional as its exceptions (Metromedia v. City of San Diego, 453 U.S. 490, 540 (1981) (plurality)), and

2. the constitutional requirement of content-neutrality should be taken literally, see Advantage Media LLP v. City of Hopkins, 379 F.Supp.2d 1030, 1040-41 (D. Minn. 2005) (Davis, J.); Clear Channel Outdoor, Inc. v. City of St. Paul, No. 02-1060 (DWF/AJB), 2003 WL 21857830 (D. Minn. Aug. 4, 2003) (Frank, J.), so that exceptions for dynamic signs displaying public service information may violate the requirement of content-neutrality because their enforcement depends on what a sign says.

3. Even when content-neutrality is established, exceptions allowing the government itself to "participate in the vice" complicate its ability to justify treating such signs as harmful. See Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995) (there was "little chance" that the speech restriction could have directly and materially advanced its aim, "while other provisions of the same Act directly undermined and counteracted its effects"); Lawson v. City of Kankakee, Ill., 81 F.Supp.2d 930, 934 (C.D.Ill. 2000) ("If the City were so worried that signs on terraces looked bad, it would not have chosen to place a sign there itself. Surely its own sign is no less unattractive than Plaintiff's.").

III. THE POLICY OPTIONS FOR REGULATING SIGNS

Local governments that have devoted the most attention to this subject recently have taken approaches that tend to fall within six discrete "modes" of regulation, ranging from an absolute or near-absolute prohibition of dynamic signs to encouraging dynamic signs.

A. Complete or Near-Complete Bans

1. Maple Valley, WA (2003): a complete ban

ORDINANCE NO. O-03-228, Amending Title 18 of the Maple Valley Municipal Code relating to signs

D. PROHIBITED SIGNS:

The following signs or displays are prohibited in all zones within the City.

* * *

3. Animated signs or displays;

* * *

6. Electronic changeable message signs,[2] except for temporary signs required by government agencies for road and street repairs, and similar activities. This prohibition includes, but is not necessarily limited to, signs which include animation, flashing, traveling, or scrolling messages or displays[3];

7. Flashing signs[4] or displays,;

* * *

12. Moving signs;

* * *

14. Festoons, pennants, or blinking lights;

2. Concord, NH (2007 revisions): Ttotal Ban on All Electronic Message Centers

Prohibits all signs that "appear animated or projected" or " are intermittently or intensely illuminated or of a traveling, tracing, scrolling, or sequential light type" or "contain or are illuminated by animated or flashing light." Code of Ordinances 28-6-7(h).

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[2] DEFINITIONS: * * * 24. Electronic Changeable Message Sign: An electronically activated sign whose message content or display, either whole or in part, may be changed by means of electrical, electronic or computerized programming. A sign or portion of a sign on which the message or display is an electronic indication of fuel price shall be considered an Electronic Changeable Message Sign. A sign on which the sole message or display is an electronic indication of time and/or temperature shall be considered an Electronic Changeable Message Sign. Drive-through Business/menu signs are not considered Electronic Changeable Message Signs.

[3] DEFINITIONS: * * * 72. Scrolling Displays: The vertical movement of a static message or display on an electronic changeable message sign.

[4] DEFINITIONS: * * * 29. Flashing Sign: A sign of which any portion of it changes light intensity, switches on and off in a constant pattern, or contains moving parts or the optical illusion of motion caused by use of electrical energy or illumination, with a display that appears for less than one and one-half consecutive seconds.

3. **St. Croix County, WI (June 19, 2007): A Ban With a Time-And-Temperature Exception**

   a. St. Croix County Code of Ordinances/Land Use and Development

   b. Findings of Fact (§17.65(A) (1) (a)(3, 7)):

      "Signs can create safety hazards that threaten the public health, safety or welfare. Such a safety threat is particularly great for signs that are structurally inadequate, or that may confuse or distract drivers or pedestrians, or that may interfere with official directional or warning signs."

      "With one narrow exception, only static signs (which change, if at all, only on rare occasions when they are repainted or covered with a new picture) constitute a customary use of signage in the County.[5] The only non-static signs that constitute a customary use of signge in the County are components of on-premise signs for which frequent changes are necessary for the purpose of updating numerical hour-and-minute, date, and temperature information. Such changes are unique because their accuracy depends upon their ability to frequently change, and because in their customary use such signs are apt to distract drivers or pedestrians to a dangerous degree than other types of non-static signs."

   Prohibitions (§ 17.65 (C) (3)):

   Signs and sign components and elements of faces of signs shall not flash, move, travel or use animation.

   Unless a sign's only illumination is external and uncolored, the following additional regulations shall also apply to that sign:

      No illuminated off-premises sign which changes in color or intensity of artificial light at any time while the sign is illuminated shall be permitted.

      No illuminated on-premises sign which changes in color or intensity of artificial light at any time when the sign is illuminated shall be permitted, except one for which the changes are necessary for the purpose of correcting hour-and-minute, date, or temperature information.

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[5] St. Croix County's findings regarding "customary use" have the intended effect of causing "non-customary use" signs that are adjacent to federal-aid highways to also violate the federal Highway Beautification Act, even if they are in a commercial or industrial zone. See 23 U.S.C. § 131 (d) ("Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.") and Wisc. Trans. R. 201.20 (5).

A sign that regularly or automatically ceases illumination for the purpose of causing the color or intensity to have changed when illumination resumes shall fall within the scope of the prohibitions of par. f. 1) and 2) above.

The scope of [this subsection's] prohibitions include, but are not limited to, any sign face that includes a video display, LED lights that change in color or intensity, 'digital ink,' and any other method or technology that causes the sign face to present a series of two or more images or displays.

4. Bloomington, MN (2006): Small Steps Short of a Full Ban

a. Bloomington Zoning Code §§ 19.66 and 19.100-108.

b. Findings (§ 19.100):

"With respect to electronic signs, including video display signs, the City Council finds that they are highly visible from long distances and at very wide viewing angles both day and night and are designed to catch the eye of persons in their vicinity and hold it for extended periods of time. If left uncontrolled, electronic signs, including video display signs, constitute a serious traffic safety threat." A set of enumerated reports and studies "reveal that electronic signs are highly distracting to drivers and that driver distraction continues to be a significant underlying cause of traffic accidents."

c. Prohibitions (§§ 19.66(b), and 19.108 (h) (4-6, 8)):

d. Billboards (i.e. advertising signs which have an area exceeding 150 square feet)) which utilize electronic display techniques-

must have a minimum duration of 20 minutes and must be a static display;

cannot move or appear to move;

cannot fluctuate in light intensity or use intermittent, strobe or moving light to create the illusion of movement;

are only permitted in certain commercial and industrial districts; and

must meet specified standards prohibiting non-instantaneous transitions, limiting brightness, and requiring dimmer controls.

Video display signs (i.e. a sign that changes its message or background in a manner or method of display characterized by motion or pictorial imagery, which may or may not include text and depicts action or a special effect to imitate movement, the presentation of pictorials or graphics displayed in a progression of frames which give the illusion of motion, but not including electronic changeable copy signs as defined below) that are not billboards-

must not be visible from residential property or from any motored way,

are excluded from residential, conservation and bluff protection zones; and

must be set back 100 feet from an abutting residential district and 35 feet from other electronic changeable copy signs.

Electronic graphic display signs (i.e. a sign or portion thereof that displays electronic, static images, static graphics or static pictures, defined by a small number of matrix elements using different combinations of LEDs, fiber optics, light bulbs or other illumination devices within the display area where the message change sequence is accomplished immediately or by means of fade, repixalization or dissolve modes) that are not billboards-

cannot change more frequently than every 20 minutes;

may be seen from a motored way, but must not be visible from residential property if within 150 feet;

are excluded from residential, conservation, and bluff protection zones; and

must be set back 100 feet from an abutting residential district and 35 feet from other changeable copy signs.

Electronic changeable copy signs (i.e. a sign or portion thereof that displays electronic, non-pictorial, text information in which each alphanumeric character, graphic, or symbol is defined by a small number of matrix elements using different combinations of LEDs, fiber optics, light bulbs or other illumination devices within the display area, but not including time-and-temperature signs as defined below) that are not billboards-

may include up to ten words of text, but not pictures;

cannot change more frequently than every 8 seconds (in a non-residential area), and every one hour in a residential area;

may be seen from a motored way, but must not be visible from residential property if within 150 feet;

may in theory appear in a residential zone, but not in a conservation or bluff protection zone;

must be set back 100 feet from an abutting residential district and 35 feet from other changeable copy signs.

Time and temperature signs (i.e. a sign which displays exclusively current time and temperature information) that are not billboards –

Cannot change more frequently than every 2 seconds;

No visibility or special setback limits; and

are excluded from residential, conservation, and bluff protection zones.

Minnetonka's Approach to Off-Premise Dynamic Displays: Citywide Permission to Operate, Under Distraction-Reducing and Proliferation-Reducing Cconditions

1. [in the criteria in subd. 4 for a monument identification sign], "7) message centers/time and temperature displays permitted but the maximum area for display is 50 percent of the potential copy and graphic area of the monument identification sign."

2. [in the prohibitions section], "revolving and moving signs except electronic message center/time and temperature display signs according to subdivision 4 and search lights according to subdivision 8," and "flashing, blinking or animated signs including but not limited to traveling lights or any other means not providing constant illumination except electronic message center/time and temperature display signs according to subdivision 4 and search lights according to subdivision 8."

3. The City's definition of "flashing sign" is very broad, extending the ban to signs on which illumination is not kept stationary or constant in intensity and color at all times when such sign is in use." §300.02 (117).

4. New subsection 14 ("Dynamic Displays")

   a) Findings. Studies show that there is a correlation between dynamic displays on signs and the distraction of highway drivers. Distraction can lead to traffic accidents. Drivers can be distracted not only by a changing message, but also by knowing that the sign has a changing message. Drivers may watch a sign waiting for the next change to occur. Drivers are also distracted by messages that do not tell the full story in one look. People have a natural desire to see the end of the story and will continue to look at the sign in order to wait for the end. Additionally, drivers are more distracted by special effects used to change the message, such as fade-ins and fade-outs. Finally, drivers are generally more distracted by messages

that are too small to be clearly seen or that contain more than a simple message. Time and temperature signs appear to be an exception to these concerns because the messages are short, easily absorbed, and become inaccurate without frequent changes.

Despite these public safety concerns, there is merit to allowing new technologies to easily update messages. Except as prohibited by state or federal law, sign owners should have the opportunity to use these technologies with certain restrictions. The restrictions are intended to minimize potential driver distraction and to minimize proliferation in residential districts where signs can adversely impact residential character.

Local spacing requirements could interfere with the equal opportunity to use such technologies and are not included. Without those requirements, however, there is the potential for numerous dynamic displays to exist along any roadway. if more than one dynamic display can be seen from a given location on a road, the minimum display time becomes critical. If the display time is too short, a driver could be subjected to a view that appears to have constant movement. This impact would obviously be compounded in a corridor with multiple signs. If dynamic displays become pervasive and there are no meaningful limitations on each sign's ability to change frequently, drivers may be subjected to an unsafe degree of distraction and sensory overload. Therefore, a longer display time is appropriate.

A constant message is typically needed on a sign so that the public can use it to identify and find an intended destination. Changing messages detract from this way-finding purpose and could adversely affect driving conduct through last-second lane changes, stops, or turns, which could result in traffic accidents. Accordingly, dynamic displays generally should not be allowed to occupy the entire copy and graphic area of a sign.

In conclusion, the city finds that dynamic displays should be allowed on signs but with significant controls to minimize their proliferation and their potential threats to public safety.

b) Regulations. Dynamic displays on signs are allowed subject to the following conditions:

1) Dynamic displays are allowed only on monument and pylon signs for conditionally permitted uses in residential districts and for all uses in other districts. Dynamic displays may occupy no more than 35 percent of the actual copy and graphic area. The remainder of the sign must not have the capability to have dynamic displays even if not used. Only one, contiguous dynamic display area is allowed on a sign face;

2) A dynamic display may not change or move more often than once every 20 minutes, except one for which changes are necessary to correct hour-and-minute, date, or temperature

information. Time, date, or temperature information is considered one dynamic display and may not be included as a component of any other dynamic display. A display of time, date, or temperature must remain for at least 20 minutes before changing to a different display, but the time, date, or temperature information itself may change no more often than once every three seconds;

3) The images and messages displayed must be static, and the transition from one static display to another must be instantaneous without any special effects;

4) The images and messages displayed must be complete in themselves, without continuation in content to the next image or message or to any other sign;

5) Every line of copy and graphics in a dynamic display must be at least seven inches in height on a road with a speed limit of 25 to 34 miles per hour, nine inches on a road with a speed limit of 35 to 44 miles per hour, 12 inches on a road with a speed limit of 45 to 54 miles per hour, and 15 inches on a road with a speed limit of 55 miles per hour or more. If there is insufficient room for copy and graphics of this size in the area allowed under clause 1 above, then no dynamic display is allowed;

6) Dynamic displays must be designed and equipped to freeze the device in one position if a malfunction occurs. The displays must also be equipped with a means to immediately discontinue the display if it malfunctions, and the sign owner must immediately stop the dynamic display when notified by the city that it is not complying with the standards of this ordinance;

C. Consolidating Advertising in a Few Well-Placed Synamic Signs

1. Minnetonka's "incentives" provision

Purposes and Findings:

Outdoor advertising signs do not need to serve the same way-finding function as do on-premises signs. Further, outdoor advertising signs are no longer allowed in the city, and there is no potential that they will proliferate. Finally, outdoor advertising signs are in themselves distracting and their removal serves public safety. The city is extremely limited in its ability to cause the removal of those signs. This clause is intended to provide incentives for the voluntary and uncompensated removal of outdoor advertising signs in certain settings. This removal results in an overall advancement of one or more of the goals set forth in this section that should more than offset any additional burden caused by the incentives. These provisions are also based on the recognition that the incentives create an opportunity to consolidate outdoor advertising services that would otherwise remain distributed throughout the community.

Criteria for issuance of an enhanced dynamic signage permit:

(1) "A person may obtain a permit for an enhanced dynamic display on one face of an outdoor advertising sign if the following requirements are met:"

(a) The applicant agrees in writing to permanently remove, within 15 days after issuance of the permit, at least two other faces of an outdoor advertising sign in the city that are owned or leased by the applicant, each of which must satisfy the criteria of parts (b) through (d) of this subsection. This removal must include the complete removal of the structure and foundation supporting each sign face. The applicant must agree that the city may remove the sign if the applicant does not timely do so, and the application must be accompanied by a cash deposit or letter of credit acceptable to the city attorney sufficient to pay the city's costs for that removal. The applicant must also agree that it is removing the sign voluntarily and that it has no right to compensation for the removed sign under any law.

(b) The city has not previously issued an enhanced dynamic display permit based on the removal of the particular faces relied upon in this permit application.

(c) Each removed sign has a copy and graphic area of at least 288 square feet and satisfies two or more of the following additional criteria:

(1) The removed sign is located adjacent to a highway with more than two regular lanes and with a general speed limit of 45 miles per hour or greater, but that does not have restrictions on access equivalent to those of an interstate highway;

(2) All or a substantial portion of the structure for the removed sign was constructed before 1975 and has not been substantially improved;

(3) The removed sign is located in a noncommercial zoning district;

(4) The removed sign is located in a special planning area designated in the 1999 comprehensive plan; or

(5) The removed copy and graphic area is equal to or greater than the area of the copy and graphic area for which the enhanced dynamic display permit is sought.

(d) If the removed sign face is one for which a state permit is required by state law, the applicant must surrendered its permit to the state upon removal of the sign. The sign that is the subject of the enhanced dynamic display permit cannot begin to operate until proof is provided to the city that the state permit has been surrendered.

(e) The applicant must agree in writing that no dynamic displays will ever be used on one additional outdoor advertising sign that has a copy and graphic area of at least 288 square feet in size. This agreement will be binding on the applicant and all future owners of the sign. If the sign is subsequently removed or destroyed and not replaced, the holder of the enhanced dynamic display permit is not required to substitute a different sign for the one that no longer exists.

The benefits of an enhanced dynamic display permit:

(2) If the applicant complies with the permit requirements noted above, the city will issue an enhanced dynamic display permit for the designated outdoor advertising sign. This permit will allow a dynamic display to occupy 100 percent of the potential copy and graphic area and to change no more frequently than once every eight seconds. The designated sign must meet all other requirements of this ordinance.

D. A Euclidean Approach: Allowing Flashy Signs in One or Two Zoning Overlay Districts:

1. Minneapolis, MN's "downtown opportunity billboard district"

The City's "Downtown 2010 Entertainment Policy" noted that the policy's goals would be furthered by steps to "create street level excitement in the Entertainment District. A successful urban entertainment district requires a street level environment that is visually exciting and that encourages pedestrian flow between various attractions."

Minneapolis City Code Section 544.90 (a) provides that "this section establishes the following Downtown Entertainment Billboard District:

(1) Downtown Entertainment Billboard District. The Downtown Entertainment Billboard District shall comprise the area bounded by the following streets: Commencing at the intersection of Sixth Street North and Hennepin Avenue, land that is south of Sixth Street North between Hennepin Avenue and Second Avenue North, east of Second Avenue between Sixth Street and Seventh Street North, north of Seventh Street North between First and Second Avenue North, First Avenue North between Seventh and Eighth Street North, Eighth Street North between First Avenue North, north of Eighth Street North between First Avenue North and Hennepin Avenue, and west of Hennepin Avenue between Sixth Street and Eighth Street North. Off-premise signs constructed in this district shall not be subject to the requirements of 544.60 and 544.70.

b. Minneapolis City Code § 544.20 (13). General provisions Flashing or animated off-premise signs, provides:

(1) Downtown Entertainment Billboard District. Flashing, blinking, and/or animated off-premise signs, including but not limited to traveling lights or other means not providing constant illumination, shall be permitted in the downtown entertainment billboard district.

(2) Downtown Entertainment Area. Flashing off-premise signs shall be permitted in this area provided the messages and/or imagery are displayed in a static manner for a minimum of eight (8) seconds. Animated off-premise signs shall be prohibited in the downtown entertainment area. The area consisting of those properties with frontage along the north side of Hennepin Avenue between Tenth Street and Fifth Street, and those properties with frontage along the south side of Hennepin Avenue between Ninth Street and Sixth Street shall be considered the downtown entertainment area for purposes of this section.

(3) Downtown Opportunity Billboard District. Flashing and/or blinking off-premise signs shall be permitted in the Downtown Opportunity Billboard District provided that outside the Downtown Entertainment Billboard District and Downtown Entertainment Area flashing signs containing changing written messages shall be limited to the news, weather, time or other public service message with a vertical dimension that shall not exceed two (2) feet.

(4) Limited Access Roadway Opportunity Billboard District. Flashing off-premise signs shall be permitted in this area, only on Interstate 94, north of Broadway, and on Interstate 35-W, north of Hennepin, provided (i) the messages and/or imagery are displayed in a static manner for a minimum of eight (8) seconds, and (ii) flashing signs shall be a minimum of two thousand five hundred (2,500) feet from any other off-premise flashing sign reading to the same directional traffic. The credits required pursuant section 544.60(c) for any flashing off-premises signs to be located in this area shall be demonstrated by the applicant to have been removed only from the area located north of the following: from the western boundary of the city along Broadway Avenue North (including signs on both sides of Broadway) thence to the northeasterly bank of the Mississippi River, thence along the northeasterly bank of the River to Interstate 94, thence following the northern boundary of the right-of-way of Interstate 94 to the easterly boundary of the city.

F. East Dundee, IL's Video Display Overlay District and Static Electronic Display Overlay District (2006)

James Carlini, one of the Trustees of the Village of East Dundee, has characterized sign ordinances as a "horse-and-buggy bridle on business," and has advocated that local governments should "turn on profits by turning on the lights." James Carlini, "Electronic Signs for Municipalities: Las Vegas or Lost Revenues?" Wisconsin Technology Network, online edition, 05/17/06.

In 2006, East Dundee amended its sign ordinance in the following respects:

> In the East Side Commercial Overlay District, "for new car dealerships, multi-tenant retail centers and amusement establishments only, the freestanding sign permitted" on a parcel "may contain a fully electronic message display consisting of words, symbols, figures or images that can be electronically or mechanically changed by remote or automatic means, including animated graphics and video, subject to the following: (a) the area of the electronic message shall not exceed 75 % of the sign area; and (b) the intensity of illumination and the movement of any illumination or the flashing, scintillating or varying of light intensity shall not constitute a traffic hazard as described in subsection 156.03(E)[6]." Ordinance No. 06-46, amending Code of Ordinances § 156.04 (E).

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[6] Under 156.03(E), "In order to assure traffic safety, no sign shall be erected, relocated or maintained in a manner as will, in the determination of the Building Official, (1) by reason of size, location, content, coloring or manner of illumination, obstruct the vision of drivers or obstruct or detract from the visibility or effectiveness of any traffic signal or control device on

In the Hilltop Commercial Overlay District, "for new car dealerships, multi-tenant retail centers and amusement establishments only, the freestanding sign may contain a static electronic message display capable of displaying words, symbols, figures or images that can be electronically or mechanically changed by remote or electronic means," subject to the same 75 percent limit and traffic hazard limit as signs in the other overlay district, plus a requirement that "each message on the sign shall be displayed for a minimum of 10 seconds," and "said messages shall change only through dissolve or fade transitions, or with the use of other subtle transitions and frame effects that do not have the appearance of moving text or images, but which may otherwise not have movement, or the appearance or optical illusion of movement, of any part of the sign structure, design or pictorial segment of the sign, including movement of any illumination or the flashing, scintillating or varying of light intensity." Ordinance No. 06-46, amending Code of Ordinances § 156.04 (F).

Everywhere else in the Village, "flashing signs" shall be prohibited, "moving, rotating, or animated signs or signs creating the illusion of movement shall be prohibited," and "illumination shall be constant in intensity and color, and shall not consist of flashing, animated, chasing, scintillating or other illumination conveying the sense of movement except for those signs that exhibit time and temperature . . ." Ordinance No. 06-46, amending Code of Ordinances § 156.03 (F) and (G)(5).

G. Cuyahoga Falls, OH (2003) Encouraging Certain Kinds of Dynamic Signs Through Regulation

Cuyahoga Falls' 2003 overhaul of its sign ordinance is characterized as an "outside the box" approach by the planning consultant who drafted it, John Gann of Gann Associates. Gann believed that "the best solution to temporary clutter is permanent signs with designed-in readerboards or electronic message centers. Temporary signs exist because businesses and other sign users have a legitimate need to display temporary messages. Doing this on a permanent panel that is physically part of and visually integrated with a good permanent sign may be the most compatible way to do this." Author's Answers to Questions about "Sign Control in Cuyahoga Falls: Regulating Outside the Box" (July 2003 Zoning News), available on the American Planning Association website.

§ 1147.03 (C): Displays prohibited:

d. Flashing signs.

f. Moving signs.

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streets and roads within the village; or (2) make use of words, phrases, symbols, lights or characters, in a manner as to interfere with, mislead or confuse traffic."

§ 1147.06.A: Rules for Special Signs: Changeable Sign Areas

"1. Sign Area Bonus for Inclusion in Permanent Sign. To meet the need businesses and organizations have for timely and variable sign messages and also to prevent the clutter that can be created by portable signs, the Permanent Sign Allowance of a property shall be increased as provided in Table 1147-4 if a changeable copy area or electronic message center, both as defined herein, of no less than 16 square feet is incorporated into a permanent non-portable Non-Surface Sign on the lot or building site."

Under Table 1147-4, the lawful surface area of a permanent sign – known as its "permanent sign allowance" – increases by 20 percent if "a changeable copy area or electronic message center is permanently part of a permanent non-portable sign conforming to 1147.06.A.

2. Single Electronic Message Center. Electronic message centers shall be allowed only on a single Permanent Sign per lot or building site.

3. Integration into Sign. Changeable copy areas and electronic message centers on permanent signs shall be part of the same sign panel as a non-changeable sign and shall be integrated into the face of such sign by use of a border or similar design treatment that provides a visual linkage to the rest of the sign.

4. Maximum Area. A changeable copy area or electronic message center, both as defined herein, shall be no more than 60 percent of the actual sign area of any permanent sign panel of which it is a part.

5. On Temporary or Portable Signs. No temporary or portable sign shall display a changeable copy area or electronic message center.

IV. AT THE "MICRO" LEVEL: RECURRING REGULATORY ISSUES FOR DYNAMIC SIGNS

A. Key Regulatory Issues

There are seven key regulatory issues regarding dynamic signs: (1) the appropriate duration of dynamic messages, (2) whether, and under what conditions, to permit motion, animation, and video messages, (3) the appropriate level of brightness of dynamic signs, (4) the appropriate placement and spacing of signs, (5) whether to treat on-site and off-site dynamic signs differently, (6) the appropriate size of dynamic signs, and (7) the appropriate text size for dynamic signs.

In assessing what regulatory options achieve their policy goals, local governments may consider the safety risks associated with dynamic signs and the costs and benefits of various regulatory options.

SRF Report for the City of Minnetonka: In connection with litigation regarding dynamic signs in the City of Minnetonka, SRF prepared a report for the City that reviewed selected safety studies, identified the safety risks associated with dynamic signs, and identified regulatory options.

B. Public Safety Risks

Dynamic billboards cause driver distraction and pose risks to public safety.

To assess the safety implications of dynamic and static signs, road safety scholars have examined (1) the relationship between static or dynamic signs and crash rates, (2) how drivers process information and limitations on their ability to process information, and (3) the factors contributing to driver distraction and the risk of crashes.

In general, the results of these studies indicate that dynamic billboards cause driver distraction and driver distraction causes traffic accidents. Dynamic billboards, with their ability to display high resolution color images and changing and moving images, capture the attention of drivers and capture the attention of drivers for longer periods of time than static signs. Indeed, the billboard companies design dynamic billboards precisely for the purpose of capturing the attention of the public and maximizing profitability. When drivers are looking at dynamic billboards, they are distracted and distracted drivers increase the risk of crashes and pose problems for road safety and traffic operations. Driver distraction alone can be the cause of accidents. In addition, driver distraction interacts with roadway conditions, driving environments, weather, and traffic conditions to cause accidents.

C. Regulatory options for duration of dynamic messages: what is the appropriate time interval between message changes?

The implications of duration for safety: prior research indicates that the duration of dynamic messages has implications for safety:

1. Glances of two seconds or greater double the risk of crashes or near crashes

2. Visual fixations on roadway signs decrease as route familiarity increases (but this decrease in visual fixations may not occur with signs that change messages)

3. Dynamic billboards attract more glances and longer glances than static signs and the length of those longer glances (greater than .75 seconds) is close to the minimum perception-reaction time required for a driver to react to a slowing vehicle

4. Signs with a visual story or message that carries for two or more frames are particularly distracting because drivers tend to focus on the message until it is completed rather than the driving task at hand

5. Due to a Zeigarnik effect (the psychological need to follow a task to its conclusion), the desire to see a message change or read a sequence of messages causes driver distraction and unsafe driving behavior like prolonged glances away from the road, slowing, and lane departure

Suggested regulatory goals and options

1. Minimize the Ziegarnik effect (the desire to see a message change) and the driver distraction associated with watching dynamic signs change by setting the duration of sign messages to minimize the number of new messages seen by drivers. This can be calculated based on the length of time a sign is visible for particular driver's speed, speed limits, and traffic volume. *See* SRF Report at A24-25.

2. Minimize the Ziegarnik effect by requiring a dark period between successive messages. *See* SRF Report at A24.

3. Prohibit flashing, spinning, revolving transition methods that are distracting. *See* SRF Report at A24.

4. Reduce driver distraction by prohibiting signs that require or induce drivers to watch a sign for several seconds, such as signs with visual stories, signs carrying messages that are delivered through a sequence of displays, flashing messages (or by limiting such signs to certain driving environments).

5. Reduce driver distraction by insuring that signs are conspicuous and legible.

D. Regulatory options for motion, animation, and video messages

The implications of motion, animation, and video messages for safety:
prior research indicates that:

1. Video and tri-vision signs attract more long glances than static and scrolling text signs

2. Video and scrolling text signs received the longest average glance duration

3. Video signs entering into a driver's line of sight directly in front of the vehicle are very distracting

4. Electronic signs with moving images contribute to driver distraction for longer intervals than electronic signs with no movement

5. Signs with a visual story or message that carries for two or more frames are particularly distracting because drivers tend to focus on the message until it is completed rather than the driving task at hand

6. Scrolling messages and sequences of messages increase driver distraction

7. Flashing messages require more time to read and more time to comprehend and require more of the driver's time and attention

Suggested Regulatory Goals and Options

1. Minimize driver distraction by prohibiting video, tri-vision, scrolling text, flashing signs, or any other type of motion in dynamic signs or restricting motion to signs located in certain driving environments.

2. Set a maximum motion time frame based on the length of time a sign is visible for particular driver's speed, speed limits, and traffic volume. See SRF Report at A24-25.

3. Reduce driver distraction by prohibiting signs that require or induce drivers to watch a sign for several seconds, including signs with visual stories, signs carrying messages that are delivered through a sequence of displays, flashing messages.

E. Regulatory Options for the Brightness of Dynamic Signs and External Illumination

The implications of brightness for safety: brightness can distract drivers and impair their ability to perform driving tasks. Previous research indicates that that the brightness of dynamic signs can temporarily blind a driver or prompt a driver to look away from the light. Newer sign technologies permit dynamic signs to respond to ambient light conditions, raising additional concerns about the adequacy of those changing brightness levels.

The challenges of brightness regulation: there is no objective definition of excessive brightness because the appropriate level of brightness depends on the environment within which the sign operates. Accordingly, it is difficult to establish a uniformly applicable measure of brightness for all dynamic signs. In addition, the instruments that are used to measure brightness in the field are currently very expensive and it is difficult to measure brightness in the field. For all these reasons, the enforcement of any brightness regulations is challenging.

Regulatory Options

1. City of Minnetonka: "No sign may be brighter than is necessary for clear and adequate visibility."

2. Prohibit brightness that impairs the vision of a driver or promotes driver distraction.

3. Prohibit brightness that interferes with traffic control devices.

F. Regulatory Options for Sign Placement and Spacing

The implications of sign placement and spacing for safety: previous research indicates that:

1. The number of advertising signs per mile (or road section) is positively associated with crash rates, i.e., the more advertising signs per mile (or road section), the higher the crash rate

2. Intersections containing advertising signs have a higher crash rate than those containing no advertising signs

3. Street level advertising signs are more distracting than raised advertising signs

4. The less conspicuous the sign, the higher the likelihood of an increased crash rate

5. Signs pose a safety hazard when they obstruct a driver's line of sight at an intersection, curve, or point of egress from an adjacent property or obstruct a driver's view of a traffic control device

6. Signs pose a safety hazard when they are located where heightened driver concentration is required (high pedestrian volume intersection) or when they are likely to be mistaken for a traffic control device or as an instruction to drivers

7. Signs with a visual story or message that carries for two or more frames are particularly distracting because drivers tend to focus on the message until it is completed rather than the driving task at hand

Challenges

1. Regulating sign spacing can be like starting a game of "musical chairs" because the ability of one company to put up a sign at one location can depend on whether another company has already put up a sign within the immediate vicinity.

2. This can create problems of equity because similarly situated property owners end up with different rights.

3. It can also create a "race" to engage in exactly the behavior that the local government is trying to regulate, because those who are first in the neighborhood to engage in the behavior are the least likely to be burdened by spacing requirements.

Suggested regulatory goals and options

1. To the extent that federal and state spacing requirements are not already applicable, establish minimum distances between dynamic signs and regulations regarding the sequencing of sign messages to insure that drivers are not visually overloaded and reduce the chances of creating an over-stimulated driving environment. Minimum distances can be calibrated based on the driving environment, traffic, speed, and distance.

2. Decline to supplement federal and state standards to promote fairness and avoid creating additional incentives to race to apply dynamic technology to existing static signs.

3. Limit or prohibit dynamic signs at intersections, in demanding driving environments, and in places where they obstruct a driver's view.

4. Limit or prohibit dynamic signs that resemble traffic control devices.

G. Regulatory Distinctions Between On-Site and Off-Site Signs

The safety implications of on-site and off-site signs: previous research does not indicate that on-site and off-site dynamic signs pose distinct safety risks that warrant differential regulatory treatment. However, because on-premises signs are more likely to serve wayfinding purposes, if on-premises signs are illegible or otherwise hard to see from a safe distance, there may be a risk that they are seen too late by drivers who are trying to find their way to a particular location, and who then engage in dangerous maneuvers and lane-changes to leave the road. Local governments need not view advertising and wayfinding as equally important goals, and for that reason may choose to adopt policies that benefit the use of signage for wayfinding while burdening its use purely for advertising.

Regulatory goals and options: local governments may choose to regulate all dynamic signs equally, without regard to whether they on-site or off-site dynamic signs. Local governments may still choose to regulate on-site and off-site signs differently even if they do not regulate on-site and off-site dynamic signs differently.

H. Regulatory Options for the Size of Signs

The safety implications of sign size: previous research indicates that dynamic signs pose safety risks primarily by distracting drivers. The size of signs or the size of the dynamic portion of signs may be distracting because the size is too big or too small. If the size is too small, then drivers must take more time to read the sign, diverting their attention from driving tasks. In addition, advertisers have an interest in frequent message changes and using sequenced messages on small signs, features that increase driver distraction. If the sign is too big, the attention of drivers may be captured for lengthy periods of time, diverting their attention from driving tasks. Overly large signs are also more likely to obstruct a driver's ability to see other things, which may include important traffic-control devices and signs.

Regulatory goals and options: there is no standard approach to regulating the size of signs, and there is no standard approach to regulating the size of dynamic signs or the size of the dynamic portion of the sign. Size limitations may be established that reduce river distraction based on the driving environment in which the sign is located, distance, and legibility goals.

I. Regulatory options for the text size of dynamic signs.

The safety implications of text size

1. Previous research indicates that the less legible the sign, the higher the likelihood of an increased crash rate. The preferred approach for highway signage is that sign text be 1 inch high to be readable from 30 feet away, and larger text is needed for signs to be legible at greater distances.

2. Sign associations have promulgated "best practices" standards for commercial on-premise signs, with a particular focus on legibility. Because there is generally a common interest between the sign industry and regulators in avoiding signage or text that is too small to be seen and understood in particular locations, those "best practices" standards can be a useful source of potential standards for text size in particular settings.

Regulatory goals and options: to increase legibility, reduce the time needed to read billboards, and reduce driver distraction, local governments can follow the preferred approach used for highway signage or calibrate the appropriate text size based on distance, the driving environment, and the desired legibility.

[End of Part III - The Sign Code in the Digital Age: Regulatory Options]

IV. HOT TOPIC: THE DO'S AND DON'TS OF SETTLEMENT AGREEMENTS: Preserving Future Regulatory Authority (Copyright 2009 William D. Brinton)

1. Do Not Settle What You Are Not Litigating.

A new problem confronting local governments stems from settlement agreements that pertain to issues that were never an issue in the underlying litigation, and that have long-term consequences for land use. The most stunning example of this problem has been the settlement of litigation involving the constitutionality of permit fees. Although the disputes only involved permit fees, the settlement agreements provided rights to convert hundreds of static billboards to digital billboards. Such settlements have led to new litigation and confusion among lawmakers as to how their local governments came to give up rights that were not in question in the litigation.

This trend is likely to continue, as billboard litigants have learned that they can obtain concessions that they would be hard pressed to obtain through the normal ordinance adoption process.

2. The Two Most Common Scenarios.

A. Where a Local Government Does Not Allow New Billboards.

1. Consider the Reasons Not to Settle.

There can be unforeseen consequences to a settlement. One consequence may be branding a local government as a target for further lawsuits if it is perceived as a government that will aquiesce if sued. A frequent tactic for many billboard plaintiffs is to sue for a certain number of billboards, knowing that it will not succeed in obtaining all of the proposed billboards, and then to settle for half that number. This will lead to copycat suits where a different billboard company (maybe with the same lawyer) will pursue the same tactic. Some local governments may mistakenly believe that securing a covenant not to sue in the future from the litigating plaintiff will provide protection, but this will have little impact where a government is branded as an easy touch.

Nearly every government that has stood its ground has not been forced to allow new billboards.

2. Settlement for Limited Duration.

Billboard plaintiffs are interested in money and the value that a billboard can bring as an asset to operate or trade. The value of a billboard remains high even if it has to be removed at the end of ten or fifteen years. Of course, the presence of an unwanted billboard structure on the landscape can have consequences for a much longer period of time. There is no reason why a billboard plaintiff will not settle for an arrangement where an unwanted billboard structure will eventually have to be removed.

3. Disgorgement Remedy.

Settlement agreements are often breached in later years, and local governments must go back to court to enforce the agreements. The reason for the breaches is usually money. When a new billboard is unlawfully erected or enhanced, or an existing billboard is not removed according to a settlement schedule, the noncompliance may be related to how much money can be generated by the breaching party after legal fees, modest fines, and the like. The solution is to have a disgorgement remedy as part of a settlement, or written into the law, so that any revenue received by the offending person or entity must be disgorged, either to the local government or otherwise. There should be no incentive for a party to breach an agreement.

4. Specific Performance.

This is relatively straightforward, but every settlement agreement should expressly provide the right of the local government to specific performance.

5. Attorneys' Fees If Future Legal Enforcement Action Is Required.

There should be a provision for the recovery of attorneys' fees if future legal enforcement action is required. This should be non-negotiable.

6. Removal of Other Billboards.

Settlement agreements may include provisions whereby other billboards must be removed as part of an overall settlement. These provisions should be quite specific, and provide for remedies if the removals do not occur as agreed and take into every imaginable contingency including changes in state law. Photographic inventories, taken at the time of settlement, can be very helpful.

7. Daily Fine.

In addition to the disgorgement provision, consider a daily fine that goes beyond simple disgorgement as among the remedies in the event of a breach.

8. Self-help Without Impairing or Limiting Any Other Remedy.

There should be a provision that expressly provides the local government to self-help, so to speak, for removal of a structure if it is not removed on the agreed-upon schedule without having to first go to court. As long as an illegal billboard remains standing and operating, it provides a revenue stream that entices continued unlawful behavior.

9. Binding on Successors and Assigns; Transfer Agreement.

A settlement agreement should expressly provide that it is binding upon successors and assigns, and a written acknowledgment of that provision by a successor or assignee should be a requirement every time the ownership of a structure under a settlement agreement is transferred or conveyed to a third party. There should be a recording of the settlement agreement in the official records so that there is additional notice of the settlement provisions.

10. Guaranty.

If a settling company is owned or controlled by a third party, there should be a guaranty of the settling party's obligations by the third party. The guaranty should run to all of the obligations of the settling party.

11. Incorporate into a Final Judgment.

A settlement agreement that has continuing obligations should be incorporated into a stipulated final judgment entered by the court, and thereafter recorded.

12. Enforcement Rights by Third Parties.

If there are third parties whose interests are aligned with the local government's interests, especially in connection with enforcement issues, consider inclusion of those third parties in the settling document or in connection with enforcement rights under the agreement. This could prove to be beneficial to local governments if and when agreements are breached down the road.

13. Waiver of Rights to Compensation for Removal or Takings of Billboard Structures for Public Improvements.

A local government should request a waiver of rights to compensation for the removal or takings of billboard structures for public improvements as part of any settlement agreement.

14. How State Law and the Federal Highway Beautification Act May Impact Settlement.

There are a multitude of ways that current or future state law, or the federal Highway Beautification Act, may impact a settlement agreement. Be sure that you are familiar with these current laws, and give careful consideration to what consequences may result from adverse changes in state law.

15. Impact of Billboard Reduction through Attrition.

Billboards do fall to attrition, with a minimum attrition rate of 1-½% to 2% per annum being typical. Be careful that attrition of unwanted billboards is not lost through

rebuild, cap, or relocation provisions. The City of Houston is a great example of the role of attrition over the years in improving urban blight.

B. Where Existing Billboard Inventory Is Impacted Through Required Removals.

1. The Settlement Agreement Should Include Color Photographs Of Every Site Where There Is a Billboard.

Given the track record of the industry in making unlawful changes or conversions to existing billboards after a settlement, it is critically important to have extensive color photographs of all billboard structures in place so that unlawful changes can be identified and proven and corrective action can be taken.

2. The Settlement Agreement Should Include an Exhibit Listing the Location and Features of Each Billboard Structure.

Every settlement agreement should have an exhibit listing each structure, along with the physical characteristics, date of construction, owner of the underlying real property and lot/parcel id, and other information that would be appropriate for future enforcement.

3. Annual Reporting of Inventory.

The billboard company should be required to provide an annual report of its inventory that can be compared with the previous year and the original settlement exhibit(s). This should be carefully reviewed and checked for compliance.

4. Photographs of Compliance.

As billboards are removed or altered to comply with a settlement arrangement, the billboard company should provide photographs showing proof of compliance.

5. Impact of Billboard Reduction through Attrition.

As mentioned above, attrition is a factor that works in favor of a local government. This should be tracked over time, as well.

3. The Biggest Don'ts.

A. Avoid "Cap And Replace" and "Cap and Trade" Provisions.

"Cap and Replace" or "Cap and Trade" provisions (capping the number of billboards and allowing their replacement) should be avoided. They can create a host of problems and unintended consequences. Any cap should be for a limited period of time and should in no way prohibit a continuing reduction of billboards. Members of the billboard industry

are using Cap and Replace provisions to build a minimum floor for a billboard inventory, and then billboard industry players are pursuing ways to increase that minimum floor to an ever-higher number. The result is an ever-increasing minimum number of billboards within a given jurisdiction to the surprise of citizens and elected officials alike. Any protection afforded to billboard inventories should always be temporary and for a specific purpose.

The best way to deal with the billboard problem is to halt new construction and find ways to accelerate the removal and reduction of existing billboards beyond normal attrition. Normal attrition through lease terminations or Acts of God (storms, etc.) usually results in the loss of 1% to 2% of billboard inventory per year. If a city stops new construction, the passage of time will result in fewer and fewer billboards.

B. Do Not Provide for an Agreement to Be in Perpetuity.

Never enter into an agreement in perpetuity that will allow a minimum number of billboards to be maintained in a jurisdiction. In the first place, especially in states where there is zoning, such agreements will be viewed as *ultra vires* absent some sort of enabling legislation. In the second place, it is just bad public policy to tie the hands of future planning commissions and legislative bodies. An agreement in perpetuity rewards potential gamesmanship and may even encourage illegal lobbying or other activities by precluding an elected body from reversing a mistake once made.

C. Avoid Trades of Old Billboards for LED/Digital Billboards.

LED/Digital Billboards are regarded in the scenic and planning communities as a more damaging assault on aesthetics and traffic safety than static billboards.

The introduction of an LED/Digital Billboard onto the landscape may have unintended long-term consequences. The mandatory removal of such a single such billboard in the future may well cost over $2-3 million today, and an ever-increasing sum in the future.

While gaining the immediate removal of older billboards is a laudable goal, it is a mistake if they will be substituted for even one Digital Billboard that may remain on the landscape for up to seventy (70) years or more. It is far more effective over time to follow the successful policy of halting construction of any new billboards and working on ways to accelerate the removal of older existing billboards.

By allowing LED/Digital Billboards (called television billboards by some) it is likely that one day a challenge will be made to regulations that otherwise preclude such signage by questioning the city's actual interests in aesthetics and traffic safety and thereby jeopardizing the regulation of signage.

D. Avoid a Situation Where a Local Government Receives Money for the Allowance of Billboards on Government Property, and thereby Creates Endless Potential for Future Equal Protection and First Amendment Claims by Competitors.

There is a new trend today whereby outdoor advertising companies are offering money to local governments to allow the placement of billboards on public property - essentially the same arrangement offered to owners of private property through leases or easements for the placement of billboards. If the former is allowed, and the latter prohibited, a local government faces challenges both on Equal Protection grounds and First Amendment grounds. A court is likely question why a billboard is more aesthetically pleasing if located on public property than on private property, or why a billboard on public property is less a threat to traffic or pedestrian safety than if located on private property.

Looking the other way when money is offered to a cash-strapped local government is the worst action a local government can take. It may well lead to the ultimate undoing of a city's sign regulations and provide a bottomless chasm of future litigation that will drain any economic benefit that might have been envisioned.

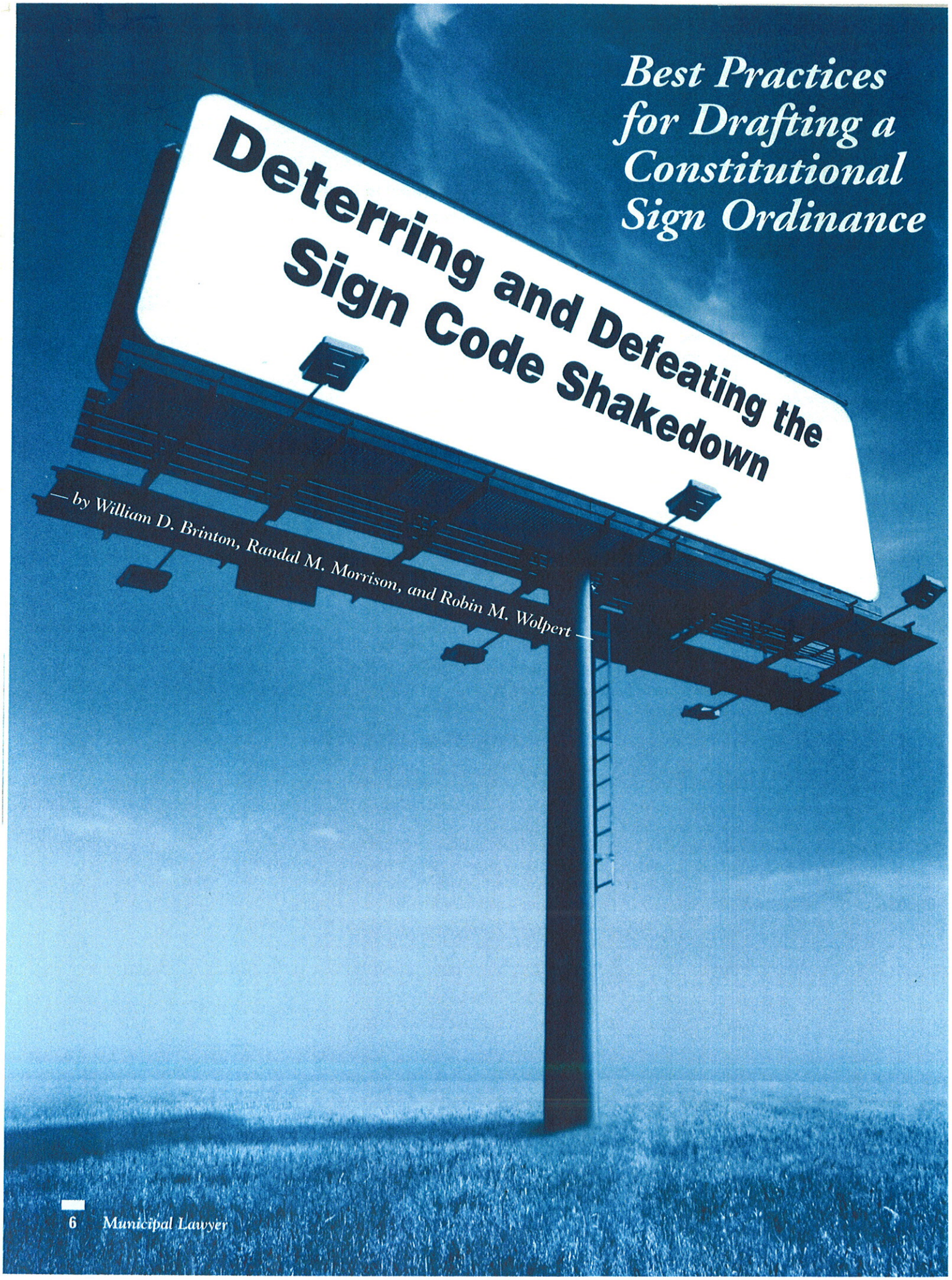
E. Avoid Allowing Large Offsite LED/Digital Signs (Billboards), and Thereby Jeopardizing Regulation of Smaller Onsite LED/Digital Signs.

With outdoor advertising companies aggressively threatening and bullying local governments to allow LED or Digital billboards, what happens to the regulations for onsite signs that prohibit or limit LED or Digital signs?

To the extent that a settlement agreement allows giant LED or Digital signs, a local government may face new legal challenges to its onsite sign regulations or other offsite sign regulations that do not allow such displays.

There are certainly arguments that may protect a local government from such challenges, but those challenges will be advanced nonetheless.

[End of Part IV - The Dos and Don'ts of Settlement Agreements]
[End of Presentation]



Deterring and Defeating the Sign Code Shakedown

Best Practices for Drafting a Constitutional Sign Ordinance

— by William D. Brinton, Randal M. Morrison, and Robin M. Wolpert —

The First Amendment is the foundation of individual liberty and self-government. It embodies the Nation's profound commitment to "uninhibited, robust, and wide-open" debate on public issues to promote the will of the people, prevent majority tyranny, and maximize individual self-development.[1]

Billboard plaintiffs, however, have turned these time-honored and revered constitutional principles on their head. They have done so through the phenomenon known as "the sign code shakedown."[2] The sign code shakedown is a litigation strategy designed to circumvent constitutionally permissible regulations of the size, height, and placement of signs by invalidating a city's entire sign code, so that the legitimate and constitutional restrictions that prohibit massive billboards are also rendered invalid.

The shakedown begins when a billboard plaintiff purposefully submits applications for massive billboards that fail to comply with constitutionally permissible limits on size, height, and placement, so that the applications will be denied. Once the applications are denied, the billboard plaintiff commences a lawsuit challenging the validity of a city's entire sign ordinance. The lawsuit, however, is not is based on provisions that have anything to do with the billboard plaintiff's applications or the basis of the decision to deny those applications. Instead, the billboard plaintiff finds a possible constitutional defect elsewhere in the sign code, and then "bootstraps" its lawsuit onto that unrelated provision. The billboard plaintiff's goal is to convince a court to strike down the entire ordinance based on that unrelated potential defect, overriding constitutionally permissible regulations that promote aesthetics and safety. If successful, the billboard plaintiff will obtain a window of opportunity in which there is no sign ordinance in effect, so that it can effectively erect any billboard it wishes, anywhere in a city.

The shakedown is designed to appeal to the courts' "protective instincts" regarding the First Amendment by demonstrating that the sign regulations at issue impose draconian speech restrictions on ordinary citizens. These cases, however, have very little to do with the rights of ordinary citizens attempting to engage in free speech and expression. Billboards mean big money for whoever wins a permit.[3] Many courts have seen through the sign code shakedown litigation strategy; one court astutely observed that "[t]hrough these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being."[4]

The shakedown begins when a billboard plaintiff purposefully submits applications for massive billboards that fail to comply with constitutionally permissible limits on size, height, and placement, so that the applications will be denied. Once the applications are denied, the billboard plaintiff commences a lawsuit challenging the validity of a city's entire sign ordinance.

Billboard companies are using the shakedown litigation strategy on a nationwide scale. One court recently took note of the proliferation of these lawsuits and the single attorney behind many of them:

> The Court notes that such conduct [lawsuits challenging sign ordinances] is consistent with the litigation strategy repeatedly employed by Plaintiff's counsel of record, E. Adam Webb. According to the *Atlanta Journal Constitution*: '[g]ive out the billboards or he'll take you to court, revving up the First Amendment like a dentist's drill—and digging out space for more signs.' So far he's sued 25 cities in Georgia, and has cases pending in Cobb County, Atlanta and Fulton County. With area officials getting wise to him and fixing their sign laws to withstand legal challenges, Webb's gone interstate, filing suits in Alabama, Florida, Tennessee, California and Connecticut.[5]

The mass production of the sign code shakedown threatens the legitimate safety and aesthetic interests of state and local governments. The purpose of this article is to introduce city attorneys to the field of sign law, and to highlight some best practices on how to draft a sign code that can deter and withstand the sign code shakedown. Although engaging in these best

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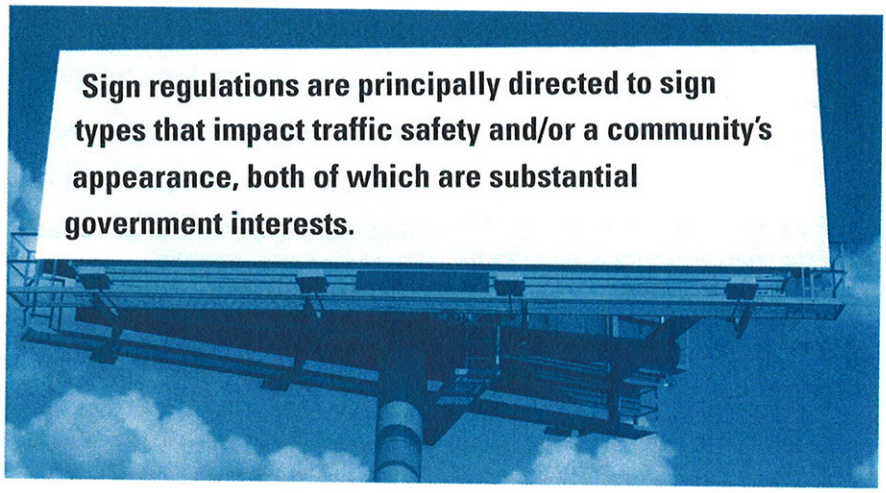
practices will not guarantee that your city won't become a target, these best practices can narrow the scope of any lawsuit and increase your chances of building the record you need to defeat the shakedown.

The Building Blocks of Sign Law: Aesthetics, Public Safety, and Content-Neutrality

Local governments have legitimate police power interests in aesthetics and safety that justify their regulation of the physical characteristics of signs and billboards. Signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."[6] Accordingly, local governments can constitutionally limit the size and location of signs, and, under certain circumstances, ban billboards altogether to advance their interest in curbing community blight and in promoting traffic safety.[7]

Although local governments can regulate the physical aspects of signs, such regulation has implications for free expression and speech. For this reason, local governments must regulate within the constitutional confines of the First Amendment—they must regulate the speech contained in signs in a "content-neutral" manner. The test for content-neutrality is whether the government is "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others,"[8] or whether the government has adopted a regulation of speech "because of disagreement with the message it conveys."[9] Content-neutral time, place, and manner regulations are constitutional when they (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve (3) a significant governmental interest, and (4) leave open ample alternative channels for communication of the information.[10] An ordinance is not content-based just because a government official must review the content of the sign to determine which provision of the ordinance applies.[11]



To further the content-neutral interests of public safety and aesthetics, local governments may, for example, limit the size and height of signs, impose setback requirements that regulate the distance between a sign and a street right-of-way, limit the number of signs per street front, and prohibit motion signs. Such limits are constitutionally permissible when they (1) are linked to the stated purpose of an ordinance in promoting the substantial governmental goals of safety and aesthetics, (2) leave open ample alternative modes of communication by permitting signs that satisfy the restrictions or by providing alternative methods of communication, and (3) do not burden substantially more speech than is necessary to further the government's legitimate interests.[12]

Certain provisions of sign regulations, however, might not pass the "content-neutrality" test. The following types of distinctions can be vulnerable to constitutional attack:

- Regulations setting durational limits on political campaign signs and real estate signs;
- Regulations that favor certain kinds of noncommercial speech;
- Exemptions to sign prohibitions based on the message or the identity of the speaker;
- Regulations that reserve the right to deny or approve a permit regardless of whether the application satisfies all specific requirements; and
- Approval procedures that give too much discretion to the regulating agency.

The best practices set forth below identify these and other possible pitfalls, and provide guidance on how to draft an ordinance that should withstand constitutional scrutiny.

Best Practices for a Constitutional Sign Code

A. Statement of Purpose and Intent in Enacting a Sign Code

As we have seen, sign regulations are principally directed to sign types that impact traffic safety and/or a community's appearance, both of which are substantial government interests. However, when a sign ordinance fails to describe the purpose and intent to be served—either within the ordinance itself or within the adopting document—a challenge may be directed to the constitutionality of the entirety of those regulations. Accordingly, it is a best practice for a sign ordinance to contain a statement of purpose and intent.

A statement of purpose and intent should be linked to the two purposes for which states and municipalities may legitimately exercise their police powers—aesthetic values and public safety.[13] A city should include an expansive description of the purposes and intent.[14] Without a statement of purpose and intent, there is a danger that the mere absence of any purpose will be fatal to the entire ordinance.[15]

The absence of a statement of purpose and intent is not necessarily con-

stitutionally fatal—in the absence of a description of the purpose, some courts have ruled that it may be supplied through extrinsic evidence.[16] Establishing the purpose using that extrinsic evidence in court, particularly long after the ordinance was adopted, poses problems of proof that can be avoided by having a statement of purpose in the ordinance. Sign ordinances that omit a purpose and intent section should be readopted with the purpose and intent clearly spelled out. The sign regulation of the City of Clearwater, Florida, provides a good example of an appropriate statement of intent and purpose.[17]

B. Message Substitution Clauses and the Problem of Favoring Commercial Speech Over Noncommercial Speech

Sign regulations may not favor commercial speech over noncommercial speech. Noncommercial speech—debate in the marketplace of ideas—is at the core of the First Amendment, and thus, enjoys the highest level of protection. A limited degree of protection for commercial speech—debate in the marketplace of dollars—was first extended to commercial speech in the mid 1970s.[18] Courts have not clarified the constitutional status of messages that are merely informative and not part of any debate, such as a stop sign or a "Danger, Beware of Dog" sign.

In *Metromedia, Inc. v. San Diego*,[19] a City of San Diego sign ordinance imposed a general ban on all signs, and then selectively granted exemptions from the ban. A plurality of the United States Supreme Court held that this particular scheme was unconstitutional because it had the effect, in certain locations, of allowing only commercial messages.[20] Since that result favored commercial over noncommercial speech and inverted the First Amendment's hierarchy of values, the sign law was unconstitutional on that point. The plurality also identified another type of undue favoring: picking and choosing between various types of noncommercial speech.[21] This is an application of the content-neutrality rule that government may not restrict expression by message, ideas, subject matter, or content.[22]

It is all too easy to draft a sign ordinance that inadvertently creates a scheme that some courts could view as favoring commercial speech. This can occur when political or election signs are subject to removal bonds or size limits that are more restrictive than other temporary signs, permitting fees not required of other temporary signs, or sponsor identification rules.[23] Some courts strike down ordinances that grant any sort of superior display right for construction signs or for specified classes of temporary signs.[24]

A "message substitution" provision can eliminate most claims of both types of "undue favoring"—commercial over noncommercial messages, and topical distinctions within noncommercial messages. In its simplest form, the message substitution clause merely says that anywhere any sort of message is allowed on a sign, a noncommercial message may be substituted. A leading case on this point is *Outdoor Systems v. City of Mesa*,[25] in which the U.S. Court of Appeals for the Ninth Circuit held that such a provision had the effect of making the entire sign ordinance subject to analysis under the highly deferential "time, place, and manner" standard.

The court in *Get Outdoors II, LLC v. City of Chula Vista*[26] quoted the following substitution provision from a city which has separate regulatory and propriety chapters:

> Subject to the land owner's consent, a noncommercial message of any type may be substituted for any duly permitted or allowed commercial message or any duly permitted or allowed noncommercial message; provided, that the sign structure or mounting device is legal without consideration of message content. Such substitution of message may be made without any additional approval or permitting. This provision prevails over any more specific provision to the contrary within this chapter. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over noncommercial speech, or favoring of any particular noncommercial message over any other noncommercial message. This provision does not create a right to increase the total amount of signage on a parcel, nor does it affect the requirement that a sign structure or mounting device be properly permitted.[27]

It should be noted that a few courts have found message substitution to be insufficient to solve the problem of favoring commercial over noncommercial speech.[28] Nevertheless, a message substitution clause is a best practice, as its presence should permit an ordinance to withstand constitutional attack by eliminating the effect of provisions favoring commercial over noncommercial speech, or provisions making topical distinctions within noncommercial speech.

Even though every sign ordinance should have a message substitution provision, there are reasons to restrict its application to the regulation of private property and traditional public fora (e.g., streets, parks, sidewalks). Indeed, a sign ordinance drafter should consider splitting the local sign law into two chapters—one regulatory, the other proprietary. In this way, the government can preserve the flexibility available under the public forum doctrine. A highly instructive case on the issue is *Children of the Rosary v. Phoenix*.[29] This concept of splitting the local sign law into two chapters allows the government, when setting policies for signs on its own property that are not within the "traditional public forum" category, to refuse certain categories of commercial speech.[30] Furthermore, the government may refuse all noncommercial messages while accepting commercial ads, even though that is completely contrary to the *Metromedia* rule of "no favoring of commercial speech."[31] However, as to noncommercial speech, the rule appears to be "all or none," even in non-traditional public fora.[32]

One additional restriction is that the message substitution provision should not allow for the substitution of

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offsite commercial messages in place of onsite commercial messages, as that can lead to the conversion of store signs into "advertising for hire" or "general advertising" signs. (The onsite/offsite distinction is discussed further below). In addition, the substitution provision should authorize only a change of message; if a change of *structure* is also involved, then the structural rules, including permits and compliance with relevant building codes, must be followed.

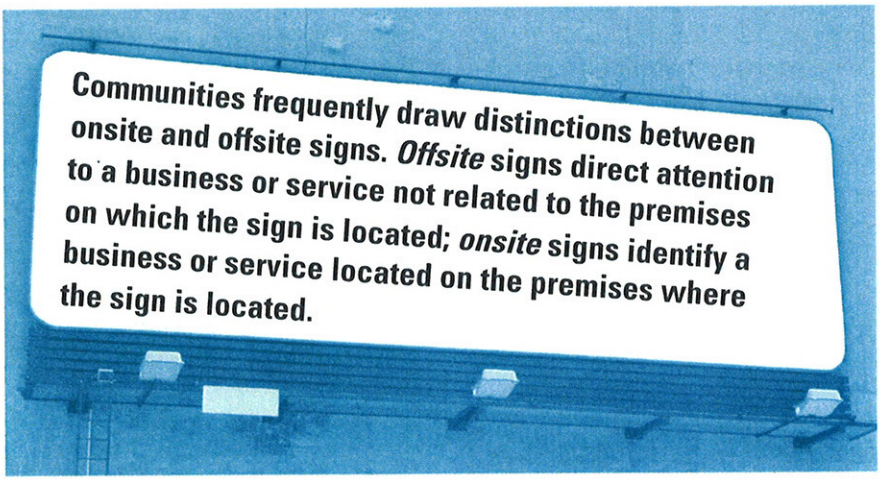
In sum, it is a best practice for a sign ordinance to contain a message substitution provision. Although such a provision is not bullet-proof, a well-drafted message substitution provision, in combination with restricting the onsite /offsite distinction to commercial messages only,[33] will overcome most claims of "favoring commercial speech" or "favoring particular noncommercial messages."

C. *Onsite / Offsite*

Communities frequently draw distinctions between onsite and offsite signs. *Offsite signs* direct attention to a business or service not related to the premises on which the sign is located; *onsite signs* identify a business or service located on the premises where the sign is located. Courts have frequently held that cities may constitutionally draw distinctions between onsite and offsite signs.[34] This is particularly the case when the distinction between offsite and onsite signs does not favor commercial messages over noncommercial messages,[35] and when such distinctions are not motivated by a disagreement with the message the sign conveys.[36]

The onsite / offsite distinction serves the policy interest of many communities in banning outdoor advertising. Inasmuch as billboard advertising (widely referred to as outdoor advertising) is recognized as a distinct business operation—much like dry cleaners, mini-storage facilities, fast-food restaurants, automobile repair facilities, and the like—some zoning regulations specifically prohibit outdoor advertising as a permissible land use within most, or even all, zoning districts, or will allow the business of outdoor advertising as a permissible land use only within a single zoning district, subject to certain dimensional and locational criteria.[37] Such zoning code provisions are usually complementary with a separate sign ordinance that also governs signage in general. Most zoning ordinances allow accessory (onsite) sign structures. The business of billboard advertising involves a non-accessory (offsite) use. On many commercial and industrial parcels, the operation of a billboard is a second and distinct business activity; it is not an accessory use.

Under the U.S. Constitution, the federal courts have been generally consistent in holding that the onsite / offsite distinction is permissible.[38] New challenges, however, are now being advanced under state constitutions. Although such challenges have generally not been successful, it is a best practice to check whether there is any controlling precedent under state law that would bar an onsite / offsite distinction.[39] If not, then the best practice is to explicitly state that the onsite / offsite distinction is applicable only to commercial messages, because this avoids the problem of identifying the location of an idea.[40]



D. *Procedural Safeguards*

The concept of content-neutrality not only extends to the substantive regulations contained in a sign code, but also extends to the *process* by which sign codes are implemented and enforced. Accordingly, even if an ordinance regulates signs in a content-neutral manner, it can still run afoul of the content-neutrality principle if it gives an official discretion in its implementation, because the ordinance, in practice, could result in improper distinctions based on the content or message of the sign.

If the substantive regulations are content-neutral, the permitting scheme needs to contain adequate standards to guide officials in making their decisions and render such decisions subject to judicial review.[41] By contrast, if the substantive regulations are content-based, the permitting scheme must contain the following specific procedural safeguards: (1) specific time limits on the initial decision-making process, and (2) provisions for a "prompt judicial *determination* of the applicant's legal claim," as opposed to merely prompt judicial review.[42]

When a court is convinced that a sign ordinance confers "unbridled discretion" in a permit process, the law—or at least its permitting provisions—will be invalidated.[43] This does not mean that all discretion is fatal. Courts have approved discretion when it is limited to architectural, locational, and structural factors.[44] A well-drafted sign ordinance provides narrow, objective standards for permits, and ideally reduces the process to ministerial decisions.[45] For potentially discretionary approvals, such as variances or special or conditional use permits, the better practice is to limit discretion to "non-communicative aspects."

A detailed history of the "procedural safeguards" requirements for the licensing of expression is found in

Thomas v. Chicago Park District.[46] Those requirements, as stated in *Thomas*, are: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."[47] The relevance of the *Thomas* case to sign ordinances is carefully analyzed in the later case of *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*[48]

Based on *Thomas* and *Granite State*, the careful drafter of a sign ordinance will include: (1) narrow, objective standards which do not turn on the content of the message; (2) specified, reasonable time limits for each stage of the approval process, including internal appeals; (3) a statement that conforming applications will be granted; (4) maintenance of the status quo during any approval or appeal process; and (5) judicial review of any denied permit. This last element may be provided by state codes of civil procedure.[49]

E. Severance

The sign code shakedown is predicated on the idea that a constitutional defect in a sign code can render the entire code invalid. One way to stop the shakedown and the effect of a constitutional defect in the code is to include a severability clause in the code itself. A severability clause is a legislative body's way of expressing its intent that each part of its enactment stands or falls on its own merits. A severability provision creates a presumption that each part of the ordinance is, in fact, severable by furnishing the assurance that the legislative body would have enacted the unaffected portions of the ordinance without the provision found to be invalid. The presence of a severability clause, with the resulting presumption that each part of an enactment is severable, has often sustained prohibitions on billboards, even if all other sign code provisions are invalid.[50]

In recent years, some cities have added a specific severability provision to their codes that makes it clear the intent is to save those provisions that prohibit billboards, even if all other provisions fail judicial review. One such example is the provision of the Town of Orange Park, Florida:

(d) *Severability of prohibition on billboards*. If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word of this Article and/or any other code provisions and/or laws are declared invalid or unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the declaration of such unconstitutionality shall not affect the prohibition on billboards as contained herein.[51]

F. Political (Temporary Election) Signs

Most sign ordinances contain special rules for the temporary election signs that flood the landscape every election season. The concept of content neutrality, coupled with the preferred constitutional status of noncommercial speech in the marketplace of ideas (particularly speech related to elections), mean that the regulation of political signs must follow certain constitutional requirements. Such signs cannot be totally banned;[52] likewise, durational limits on display times before an election are almost always invalidated.[53] Size and height rules are rarely a problem on their own,[54] but courts have invalidated limits like one political sign per property[55] or two political signs on a residential property.[56] However, a Tennessee law that created a 100-foot "campaign free" zone around polling places on election day was upheld in *Burson v. Freeman*.[57] Anti-anonymity rules, which require the identification of the sign sponsor, are risky.[58] Some cities have chosen to regulate election signs not as a distinct class, but simply as one variety of noncommercial speech, or simply as a temporary sign, and most courts that have considered this approach have approved.[59]

G. Total Ban on Billboards

A city's interest in avoiding visual clutter is sufficient to justify a prohibition on billboards. This was the conclusion reached by seven of the nine justices of the U.S. Supreme Court in *Metromedia, Inc. v. City of San Diego*.[60] This conclusion was reaffirmed by the Court in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*.[61] The restriction on the erection of commercial billboards, however, can be confused through semantics when it comes to defining a billboard, or in construing a billboard regulation to be directed toward noncommercial speech. Generally, however, sign regulations are rarely interpreted so as to preclude a noncommercial message from being substituted for a commercial message on an existing billboard. This common practice is often codified through the adoption of a substitution clause, discussed previously.

Although billboards can be banned under certain circumstances, it is doubtful that temporary real estate signs can be banned. In *Linmark Associates, Inc. v. Township of Willingboro*,[62] the U.S. Supreme Court held that a city may not completely ban onsite real estate "for sale" signs in residential neighborhoods. Some state statutes, like California's Civil Code, extend this rule to apply to all real property, whether the sign is on- or off-site.[63]

Conclusion

To deter and defeat the sign code shakedown, it is important to review your sign ordinance for constitutional defects and take action to revise your code. The best practices identified here will help to insulate your code from constitutional attack and, if you are sued, help defeat the attack in litigation. A second article in this series will appear in a future edition of the *Municipal Lawyer*, and will address the key litigation strategies designed to defeat the sign code shakedown in court.

Notes

1. New York Times Co. v. Sullivan, 376 U.S. 254, 269-71 (1964).

2. A Florida court recently identified the strategy as follows: "The now familiar strategy is to apply for a permit for erection of a billboard knowing full well that the permit will be denied under the city's existing sign ordinance but also aware that the ordinance is subject to

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Sign Code Shakedown

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legal attack...Florida Outdoor has its own very commercial self-interest at stake....the case is really about the use of the concept of vested rights to create a window of opportunity to build a large...and valuable billboard." Florida Outdoor Adver., LLC v. City of Boca Raton, 266 F. Supp. 2d 1376, 1379 (S.D. Fla. 2003). *See also* Donald M. Davis, *Avoiding the Sign Code Shakedown: A Checklist of Basic Provisions*, 27 Public Law Journal No. 1 (Winter 2004), published by the State and Local Government Section of the State Bar of California.

3. When billboard permits are extracted from local governments through litigation, they are routinely sold by the plaintiffs to large billboard companies. *See* Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla., 213 F. Supp. 2d 1312, 1316 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F. 3d 1112 (11th Cir. 2003).

4. Nat'l Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349, 1356 (S.D. Fla. 2003), *rev'd on other grounds*, 402 F. 3d 1329 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1318 (2006).

5. Get Outdoors, LLC v. City of El Cajon, No. 03-56925 (S.D. Cal. Oct. 6, 2003) docket entry 24 at p. 3, n.1 (quoting Matt Kempner, *Lawyer Fights for Billboards*, The Atlanta Journal Constitution, July 23, 2003, at A.1), *sua sponte* stay affirmed in unpublished decision, Get Outdoors II, LLC v. City of El Cajon, 97 Fed. Appx. 172 (9th Cir. 2004).

6. City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

7. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08, 510-12 (1981).

8. Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 811, 817 (1984).

9. Hill v. Colorado, 530 U.S. 703, 719 (2000).

10. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

11. *Hill*, 530 U.S. at 719-21.

12. *See, e.g., Hill*, 530 U.S. at 703-04; Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F. 3d 1278 (11th Cir. 2003).

13. *Taxpayers for Vincent*, 466 U.S. at 805 (1984); Berman v. Parker, 348 U.S. 26, 32-33 (1954) (the public welfare includes aesthetic values).

14. *See* Granite State Outdoor Adver., Inc. v. City of Clearwater, 213 F. Supp. 2d 1312, 1342-43 (M.D. Fla. 2002), *aff'd in part and rev'd in part*, 351 F. 3d 1112 (11th Cir. 2003), *cert. denied*, 125 S.Ct. 48 (2004).

15. *See* Tinsley Media, LLC v. Pickens County, Ga., No. 05-12324, 2006 WL 2917561 (11th Cir. Oct. 12, 2006) (ordinance did not contain even an all-inclusive statement of purpose); *but see* People v. Target Adver., Inc., 708 N.Y.S.2d 597, 601-03 (N.Y. Crim. Ct. 2000) (requirement for "extrinsic evidence" misplaced if city is not offering a justification that contravenes an enactment's "obvious purpose"). *See also*, Adams Outdoor Adver. of Atlanta, Inc. v. Fulton County, 738 F. Supp. 1431 (N.D. Ga. 1990); and Bell v. Stafford Township, 541 A.2d 692, 698-99 (N.J. 1988).

16. Dills v. City of Marietta, 674 F. 2d 1377, 1381 (11th Cir. 1982); Nat'l Adver. Co. v. Town of Babylon, 703 F. Supp. 228, 235 (E.D.N.Y. 1988). *See also*, Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F. 3d 814 (9th Cir. 1986).

17. Clearwater, Fla., Community Development Code, Sec. 3-1802 (2006).

18. A four-point test for constitutionality of restrictions on commercial speech—a variety of intermediate scrutiny—was formalized in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557 (1980).

19. 453 U.S. 490 (1981).

20. *Id.* at 511-15.

21. *Id.* at 514-15.

22. *See also*, Police Dept. of City of Chicago v. Mosley, 408 U.S. 95 (1972). *Metromedia* limited the strict application of the *Mosely* rule to noncommercial speech, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514-15 (1981).

23. Beaulieu v. City of Alabaster, 454 F.3d 1219, 1232 (11th Cir. 2006) (permit not required for real estate "for sale" sign, but required for political sign); Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985), Sugarman v. Vill. of Chester, 192 F. Supp.2d 282, 297 (S.D. N.Y. 2002), Christensen v. City of Wheaton, No. 99 C 8426, 2000 WL 204225 (N.D. Ill. Feb. 16, 2000).

24. *Id.*

25. 997 F. 2d 604 (9th Cir. 1993).

26. 407 F. Supp.2d 1172 (S.D. Cal. 2005).

27. *Id.* at 1174 (citing Chula Vista, Cal., Zoning and Specific Plans, chap. 19 (July 8, 2003)).

28. *See* Beaulieu v. City of Alabaster, 454 F.3d 1219 (11th Cir. 2006) (attorney running for judgeship should not have to cover up part of her permanent law office sign in order to display a temporary political sign); Ackerley Communications of Mass. v. City of Cambridge, 88 F. 3d 33, 38-39 (1st Cir. 1996) (substitution applied only to exempted signs, and had the effect of punishing past speech).

29. 154 F.3d 972 (9th Cir. 1998) (An anti-abortion organization sued the City, alleging that the City's standards for accepting advertising on municipal buses violated the First Amendment. The City's policy was a general standard regulating access to the forum. The court held the bus advertising panels were nonpublic fora and that the standard was not a facade for viewpoint discrimination, noting that "as compared to the applicable level of scrutiny when the government acts as a proprietor, the level of scrutiny is higher when the government is using its sovereign power to impose criminal penalties to deprive citizens of their liberty for expressing certain views." *Id.* at 981). *See also*, DiLoreto v. Downy Unified Sch. Dist., 196 F. 3d 958 (1999), Hopper v. Pasco, 241 F. 3d 1067 (9th Cir. 2001), PETA v. Gittens, 414 F. 3d 23 (D.C. Cir. 2005).

30. Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275 (11th Cir. 2003) (City could refuse specified categories of "low caliber" commercial advertising, while accepting others.)

31. Lehman v. Shaker Heights, 418 U.S. 298 (1977) (candidate cards on public transportation system); DiLoreto v. Downy Unified Sch. Dist. Bd. of Educ., 196 F. 3d 958 (9th Cir. 1999) (school district could refuse paid ads for Bible quotes while accepting "booster" ads).

32. *See, e.g.*, AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F. 3d 1 (1st Cir. 1994), Christ's Bride Ministries, Inc. v. Southeastern Penn. Trans. Auth., 148 F. 3d 242 (3rd Cir. 1998).

33. *See* Southlake Prop. Assocs., Ltd. v. City of Morrow, 112 F. 3d 1114 (11th Cir. 1997).

34. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043, 1067 (3d Cir. 1994); Messer v. City of Douglasville, 975 F. 2d 1505, 1509-11 (11th Cir. 1992); Wheeler v. Ky. Comm'r of Highways, 822 F.2d 586, 589-90 (6th Cir. 1987).

35. Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F. 3d 810, 813-14 (9th Cir. 2003).

36. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-92 ("[t]he principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys"). The fact that a government official must review the content of the sign to determine which provision of the ordinance applies does not render the ordinance content-based. Hill v. Colorado, 530 U.S.703, 719-21 (2000); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F. 3d 1278, 1282 (11th Cir. 2003) (an ordinance is content-neutral even though the administrator applying it views the content of a sign to ascertain if it pertains to an off-premises activity).

37. *See, e.g.*, Town of Orange Park, Fla. Code art. VII (2006) (dimensional and locational restrictions).

38. *See, e.g., Clear Channel Outdoor Inc.*, 340 F. 3d at 814; Coral Springs Street Sys., Inc. v. City of Sunrise, 371 F. 3d 1320, 1344 (11th

Cir. 2004) (following the earlier *Southlake Property* decision holding that noncommercial messages are inherently onsite); Southlake Prop. Assocs., Ltd. v. City of Morrow, Ga., 112 F. 3d 1114, 1117-19 (11th Cir. 1997) (onsite/offsite distinction was reasonably clear and straightforward in the commercial speech context; ordinance interpreted as viewing all noncommercial speech as onsite); *Wheeler*, 822 F. 2d at 591; Nat'l Adver. Co. v. City of Chicago, 788 F. Supp. 994, 997-98 (N.D. Ill. 1991); *cf.* Ackerley Communications of Mass., Inc., 88 F.2d 33, 36-37 (1st Cir. 1996) (suggesting that the onsite/offsite distinction is a content-based one, but not deciding that "difficult question"). *See also*, E.B. Elliott Adver. Co. v. Metro. Dade County, 425 F. 2d 1141, 1151 (5th Cir. 1970) (upholding onsite / offsite distinction was upheld against an equal protection claim).

39. *See* Immaculate Conception Corp. v. Iowa Dept. of Transp., 656 N.W.2d 513, 517 (Iowa 2003) (onsite / offsite distinction is not content-based, as the "statute regulates signage by location, a distinction having nothing to do with content."); Texas Dept. of Transp. v. Barber, 111 S.W. 3d 86, 93 (Tex. 2003); Burns v. Barrett, 561 A. 2d 1378 (Conn. 1989) (upholding onsite / offsite distinction as permissible time, place, and manner regulation and holding that the regulation was based on location, not content). *Compare* Outdoor Media Dimensions, Inc. v. Dept. of Transp., 132 P.3d 5 (Or. 2006) (onsite / offsite distinction is invalid under state constitution). *See also*, Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 467 S.E.2d 875 (Ga. 1996).

40. *Contrast* Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 247 (9th Cir. 1988) (court refuses to interpret the onsite/offsite distinction as applying only to commercial speech) with Southlake Prop. Assocs. v. Morrow, 112 F. 3d 1114, 1117-18 (11th Cir. 1997) (court concludes ideas have no location, so the distinction applies only to commercial speech).

41. Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

42. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 778 (2004) (emphasis in original; quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227-28 (1990)).

43. Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996), City of Mobile v. Weinacker, 720 So.2d 953 (Ala. Civ. App. 1998).

44. *See, e.g.*, Lamar Corp. v. City of Twin Falls, 981 P.2d 1146 (Id. 1999), Rodriguez v. Solis, 1 Cal. App. 4th 495 (Cal. Ct. App. 1991).

45. Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835 (Colo. 1978).

46. 534 U.S. 316 (2002).

47. *Id.* at 321 (citing Freedman v. Maryland, 380 U.S. 51 (1965)).

48. 213 F. Supp.2d 1312, 1331(M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F. 3d 1112 (11th Cir. 2003); Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F. 3d 1278, 1282 (11th Cir. 2003) ("the lack of time limits is constitutionally acceptable"). *See also*, Get Outdoors II, LLC v. City of San Diego, 381 F. Supp.2d 1250, 1269 (S.D. Cal. 2005).

49. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781-82 (2004). For an example of a state statute, see CAL. CIV. PROC. CODE § 1094.8 (West 2006).

50. *See* Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003), *cert. denied sub nom.* Regency Outdoor Adver., Inc. v. Riverside County, Ca., 540 U.S. 1111 (2004). *See also*, Major Media of Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446, 1454 (D.C. N.C. 1985), *affirmed*, 792 F.2d 1269 (4th Cir. 1986); Tahoe Reg'l Planning Agency v. King, 233 Cal.App.3d 1365, 1407-08 (Cal. Ct. App. 1991); Town of New Market v. Battlefield Enter., Inc., 8 Va. Cir. 96, 1984 WL 276226 at *5, *7 (Va. Cir. Ct. 1984). *See also*, Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla., 213 F. Supp.2d 1312, 1326-27 (M.D. Fla. 2002).

51. TOWN OF ORANGE PARK, FLA. CODE art. VII, Sec. 7.34.00 (2006).

52. Peltz v. City of South Euclid, 228 N. E. 2d 320 (Ohio 1967), Matthews v. Needham, 764 F. 2d 58, 60 (1st Cir. 1985); City of Ladue v. Gilleo, 512 U.S. 43 (1994).

53. Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995) (thorough discussion), John Donnelly & Sons v. Campbell, 639 F. 2d 6 (1st Cir. 1980), Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 733 N.E.2d 1152 (Ohio 2000), City of Lakewood v. Colfax Unlimited Assoc., Inc., 634 P.2d 52, 63 (Colo. 1981). Durational limit cases are collected in Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) and Outdoor Sys., Inc. v. Lenexa, 67 F. Supp.2d 1231 (Kan. 1999) (also discussing a requirement of removal after an election). For a rare case approving durational limits, see Town of Huntington v. Estate of Schwartz, 313 N.Y. Supp.2d 918 (N.Y. Dist. Ct. 1970).

54. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), Davis v. Green, 665 N.E.2d 753 74 (Ohio Ct. App. 1995).

55. Dimas v. Warren, 939 F. Supp. 554 (E.D. Mich. 1996).

56. Arlington County Republican Comm. v. Arlington County, Va., 983 F. 2d 587 (4th Cir. 1993).

57. 504 U.S. 191 (1992).

58. McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995).

59. *See, e.g.*, G.K. Ltd. Travel v. City of Lake Oswego, 436 F. 3d 1064, 1077 (9th Cir. 2006), Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994), City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. Ct. App. 1992), Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972) (original ordinance, which held political signs to same standards as temporary signs and increased the display rights to 60 days before an election, upheld); *but see* Intervine Outdoor Adver., Inc. v. City of Gloucester City Zoning Bd., 674 A.2d 1027 (N.J. Super. Ct. App. Div. 1996) (ordinance that treated all noncommercial signs equally but still favored commercial messages invalid).

60. 453 U.S. 490, 507-08, 510-12 (1981) (opinion of Justice White, joined by Justices Stewart, Marshall, and Powell, noting: "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"); *Id.*, at 552 (Justice Stevens, dissenting in part); *Id.*, at 559-61 (Chief Justice Burger, dissenting); *Id.* at 570 (Justice Rehnquist, dissenting).

61. 466 U.S. 787, 806-07 (1984) (in *Metromedia*, "seven Justices explicitly concluded that this interest [avoiding visual clutter] was sufficient to justify a prohibition of billboards"). *See also*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 n.20 (1993); and Ackerley Communications of Northwest Inc. v. Krochalis, 108 F. 3d 1095, 1098-99 (9th Cir. 1997).

62. 431 U.S. 85 (1977).

63. CAL. CIV. PROC. CODE §713 (West 2006). Major cases on real estate signs include Long Island Bd. of Realtors, Inc. v. Vill. of Massapequa Park, 277 F.3d 622 (2d Cir. 2002), Cleveland Area Bd. of Realtors v. City of Euclid, 88 F. 3d 382 (6th Cir. 1996) and Eastern Bergen County Bd. of Realtors v. Borough of Fort Lee, 720 F. Supp. 51 (D.N.J. 1989). ML

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Regulating Election Signs

— by Randal R. Morrison —

The periodic flood of election signs will soon be upon us. Even though most of these signs display only names, symbols, and slogans and contain little, if any, meaningful debate, the courts view them as "classic" or "core" or "pure" free speech, entitled to the highest level of protection under the First Amendment. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," noted the court in *Eu v. San Francisco Cty. Democratic Central Committee*.[1] This article discusses the degree and manner in which election, political, and candidate signs can be regulated within constitutional limits.

Choosing the Topic of Debate

Can election signs be regulated as a distinct class? Any law that regulates election-oriented signs as a distinct class runs the risk of being subjected to strict scrutiny because it is not content-neutral, or being invalidated for "choosing the subject of debate"[2] or favoring one type of noncommercial speech over others.

In *Police Dept. of Chicago v. Mosley*,[3] the U.S. Supreme Court considered an ordinance prohibiting picketing within 150 feet of a school, with an exception for the peaceful picketing of any school involved in a labor dispute. The Court held that the "central problem" with the ordinance was that it regulated permissible picketing in terms of the subject matter: "The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[4]

Some municipalities have addressed this concern by including election signs within broader classes, like "temporary signs," or "signs displaying noncommercial messages, such as political, campaign or election signs."[5] Several courts have approved this approach.[6] The "choosing the topic" problem can usually be avoided by adding a "message substitution" provision to the ordinance, allowing the sign owner to change the display face on an existing legal sign to any variety of noncommercial message.[7] While message substitution avoids many problems, it is not a panacea. For example, when a lawyer ran for an elective judgeship and displayed a political sign in support of her candidacy at her office, the court held that she should not have to cover up her law office sign in order to display a campaign sign.[8]

Banning Signs

City-Wide Bans. Municipal laws banning all, or nearly all, election signs have been consistently struck down by the courts. A leading case is *Peltz v. City of South Euclid*,[9] in which the Ohio Supreme Court invalidated, under both the state and federal constitutions, an ordinance prohibiting all political signs within the city. As the court explained,

> [a] municipality is not powerless to enact and enforce reasonable regulations directed against those responsible for littering the streets or private property. It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters. It may not, on the other hand, enforce a wholesale prohibition against them.[10]

Public Property and Traditional Public Fora. The U.S. Supreme Court has held that a city can completely prohibit the posting of signs on utility poles.[11] However, there is an important distinction between "posting" signs and "holding" them. In *Sussli v. City of San Mateo*,[12] a court upheld an ordinance that prohibited all "inanimate modes" of posting (leaving behind) signs on public property. *Sussli* is supported by several federal appellate decisions holding that, even in traditional public fora, the government may require that noncommercial signs or displays be hand-held or personally attended.[13] Such rules, however, must operate in a content-neutral manner, at least as to

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noncommercial speech.[14] Hand-held protest signs cannot be completely banned from a sidewalk connected to a main pedestrian circulation system,[15] whether it surrounds the U.S. Supreme Court building, or is owned by a church or a casino.[16] In the few states that follow the theory in *PruneYard Shopping Center v. Robins*[17] (i.e., that privately-owned regional shopping centers are traditional public fora), the same rule presumably applies. In areas that are government-owned but not traditional public fora, the government may ban all noncommercial messages while accepting commercial ads,[18] but if any noncommercial messages are allowed, most courts require that all be allowed.[19]

Residential Properties. In *City of Ladue v. Gilleo*,[20] the U.S. Supreme Court held that a municipality could not prohibit residential window signs protesting the first Iraq war, a conclusion also reached by earlier appellate courts.[21] However, reasonable "time, place and manner rules" (such as a limit on the display area) can be imposed.[22] The *City of Ladue* principle does not apply when the government imposes a "no political sign" rule on an employee in furtherance of an important governmental purpose, such as assuring the public that police officers are politically neutral.[23] In another case, dealing with a non-government entity's attempt to regulate its residents' ability to campaign, a New Jersey court held that the State constitution's guarantee of free expression was an affirmative right that could sometimes be applied against private parties; nonetheless, the court upheld the restrictive sign rules of a private homeowners' association.[24] A few states do override homeowners' or condo association rules banning political signs.[25] The Supreme Court of Washington recently held that a public housing project could not completely ban signs on individual residents' doors in an apartment building.[26]

Any law that regulates election-oriented signs as a distinct class runs the risk of being subjected to strict scrutiny because it is not content-neutral, or being invalidated for "choosing the subject of the debate" or for favoring one type of noncommercial speech over others.

Other Private Property. The Supreme Court's plurality in *Metromedia, Inc. v. City of San Diego* held that, when regulating signs on private property, a local government cannot favor commercial over noncommercial speech.[27] Thus, in any location where any commercial message may be displayed on a sign, an equal display right must be available for all noncommercial messages.

Limits on Size, Height and Number

"Time, place and manner" rules have been upheld provided that they operate in a content-neutral manner, are reasonable, and leave open alternative avenues for expression.[28] In *Baldwin v. Redwood City*,[29] the U.S. Court of Appeals for the Ninth Circuit upheld a 16-square-foot size limit on individual signs and an 80-square-foot cumulative total area for all signs; however, area limits that applied to individual candidates or issues were found not to be sufficiently justified.[30] Similarly, the U.S. Court of Appeals for the Fourth Circuit has invalidated a rule that limited the number of political signs to two per resident.[31] If a size or height rule applies only to political signs, or grants superior display rights to commercial messages, it will likely fail judicial review.[32]

Duration Rules

Many ordinances impose a time limit on the display of election signs. This issue has been litigated many times. Cases on durational limits for political signs are listed in *Collier v. City of Tacoma*[33] and *Outdoor Systems, Inc. v. City of Lenexa*.[34] In all but a couple of aberrant cases,[35] such time limits have been struck down.[36] Sometimes, the courts find the fatal flaw is the fact that other temporary signs are not so time-limited;[37] in other cases, favoritism of commercial speech results in the invalidation. For example, in *Whitton v. City of Gladstone*,[38] the U.S. Court of Appeals for the Eighth Circuit found a sign ordinance impermissibly favored commercial speech, after comparing a 90-day display time for temporary construction signs with a 30-day limit for political signs. However, in *Brayton v. City of New Brighton*,[39] the court upheld an ordinance that allowed a resident to post one noncommercial opinion sign on his or her property at any time, and additional noncommercial signs for each candidate and issue during the election season. This did not violate the First Amendment because, during the campaign season, a resident was not limited to political speech, but could put up as many noncommercial opinion signs as there were issues and ballots.[40]

Removal Requirements

One case addressed a county ordinance that imposed durational limits with respect to political campaign signs posted by individuals on private property: posting campaign signs more than 45 days before an election was prohibited, and the signs of an unsuccessful candidate had to be removed within ten days after a primary. The court held that insofar as the ordinance imposed durational limitations on the posting of political campaign signs at private homes, it unconstitutionally impinged upon First Amendment rights, noting:

> A few courts have held that regulations requiring removal of signs following an election, as opposed to pre-election posting limitations, are permissible .... The problem with

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> these decisions is [that] they fail to consider when the post-election period ends and the next pre-election period begins. If an individual wishes to promote a candidate, the candidate's cause, or both by posting a sign on residential property several months or years before the next political election, the logic of [*City of Ladue v. Gilleo*] would certainly seem to permit it.[41]

Permits, Registrations, Fees, and Removal Bonds

Rules that impose special permit, registration, fee, or removal bond requirements on election signs are almost always invalidated,[42] unless such rules apply without regard to content and do not constitute a special tax or burden on expression.[43] Content-neutral laws may not be selectively enforced—for example, by requiring the removal of campaign signs advocating one particular point of view.[44]

Mandatory Disclosure of Sponsorship

In *McIntyre v. Ohio Elections Commission*,[45] the U.S. Supreme Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature, finding that political campaigners had a right to speak anonymously. Post-*McIntyre*, the U.S. Court of Appeals for the Ninth Circuit has invalidated similar statutes.[46] However, a state can validly require the production of photo identification as precondition of voting.[47]

Signs Near Polls

In *Burson v. Freeman*,[48] a plurality of four justices (plus one concurring in the judgment) of the U.S. Supreme Court upheld a Tennessee statute that banned the solicitation of votes and the display of campaign materials within 100 feet of an entrance to a poll on election day. However, subsequent cases dealing with increases to such "buffer zones" are inconsistent.[49]

The Supreme Court's plurality in *Metromedia, Inc. v. City of San Diego* held that, when regulating signs on private property, a local government cannot favor commercial over noncommercial speech. Thus, in any location where any commercial message may be displayed on a sign, an equal display right must be available for all noncommercial messages.

Staying Out of Trouble

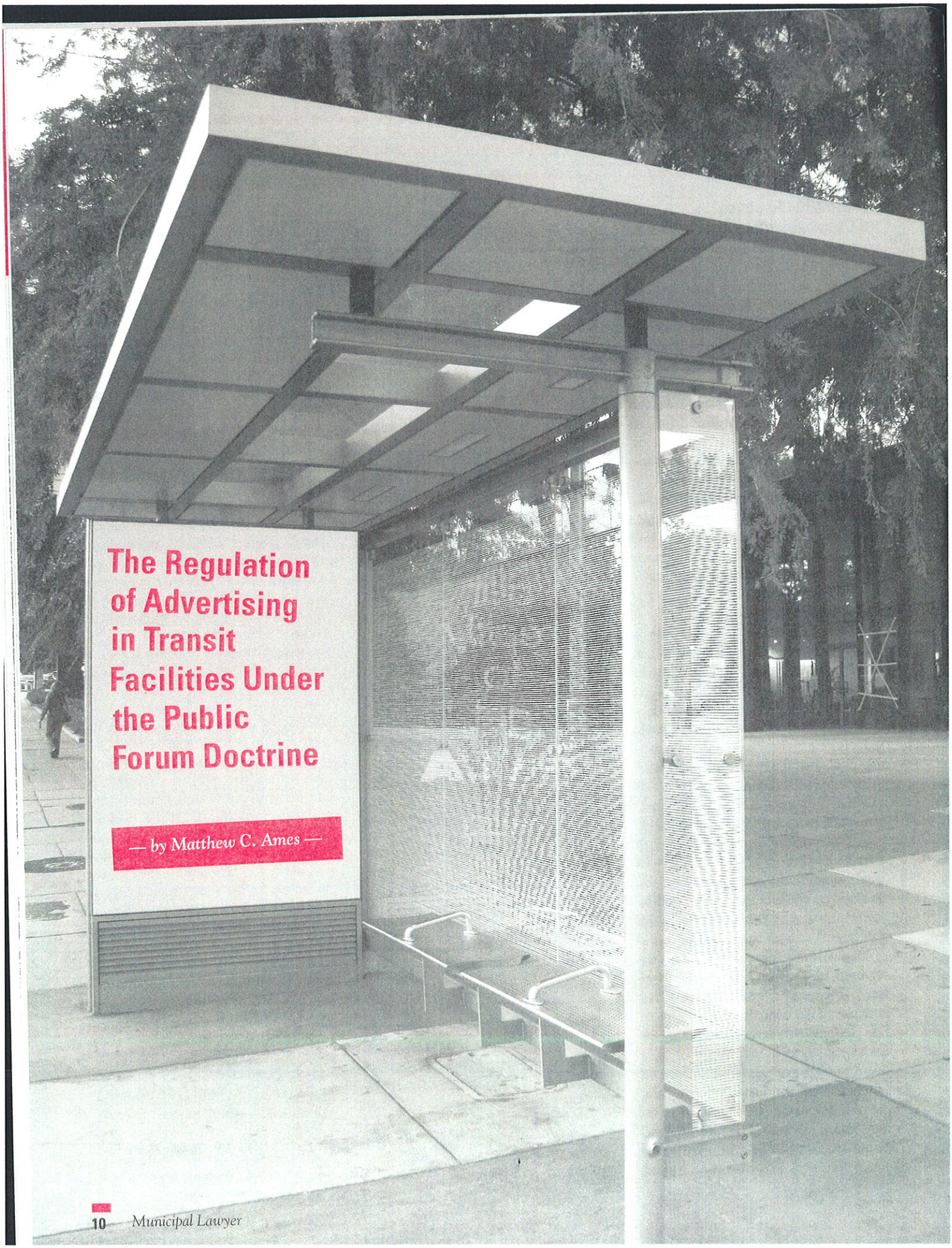
In summary, here's a checklist of recommendations for municipal lawyers in dealing with sign regulations:

- Avoid the "choosing the topic of debate" issue by eliminating rules that apply exclusively to election signs; instead, regulate "temporary signs" (defined by structural characteristics) or "temporary signs displaying noncommercial messages."
- Allow all properties to display a reasonable amount of noncommercial messages at all times; if this area limit is increased for a stated period before and after an election, it should qualify as a "time, place and manner" rule.
- Do not place limits on the number of signs per property or the "number of signs per candidate or proposition."
- Do not ban hand-held or personally attended signs with noncommercial messages on sidewalks, streets or parks.
- Purge local laws of any provisions that apply exclusively to election signs and require special permits, registration, fees, removal bonds or the mandatory disclosure of sponsorship.
- Make sure the sign ordinance contains an adequate "message substitution" provision.
- In addition to the display area available under "message substitution," allow a defined area for the display of noncommercial messages only, at all times, and on all properties.

Notes

1. 489 U.S. 214, 223 (1989).
2. Maguire v. City of American Canyon, No. C-06-05681 JCS, 2007 WL 1875974, *12 (N.D. Cal. 2007); *see also* Brazos Valley Coalition for Life, Inc. v. City of Bryan, 421 F.3d 314, 323 (5th Cir. 2005) (challenger argued that, under prior sign code, it was unclear if abortion protest signs came within the definition of political sign).
3. 408 U.S. 92 (1972).
4. *Id.* at 95. *Mosley* was decided before First Amendment protection was extended to commercial speech. The four-vote plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981) cited to *Mosley* and limited its principle to noncommercial messages. *See also*, Arizona Life Coalition Inc. v. Stanton, 515 F. 3d 956 (9th Cir. 2008).
5. *See, e.g.*, The City of Newport Beach, Cal. guidelines, *Restrictions on the Display of Temporary Political Signs*, at http://www.city.newport-beach.ca.us/ClerkNotices/Election2006/SignGuidelines.pdf.
6. G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1077 (9th Cir. 2006), Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. App. 1994), Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. 1992), Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972) (upholding original ordinance, which held political signs to same standards as temporary signs and increased the display rights to 60 days before an election); *but see*, Intervine Outdoor Adver., Inc. v. Gloucester City Zoning Bd., 674 A.2d 1027(N.J. Super. Ct. App. Div. 1996) (invalidating ordinance that treated all noncommercial signs equally but still favored commercial messages).
7. Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 608 (9th Cir. 1993), Get Outdoors II, LLC v. City of Chula Vista, 407 F. Supp.2d 1172, 1174 (S.D. Cal. 2005); *see also* Get Outdoors II, LLC v. City of San Diego, 506 F. 3d 886, 890 (9th Cir. 2007).
8. Beaulieu v. City of Alabaster, 454 F. 3d 1219 (11th Cir. 2006).
9. Peltz v. City of South Euclid, 228 N.E.2d 320 (Ohio 1967).
110. *Id.* at 324. *See also*, Matthews v. Town of Needham, 764 F.2d 58, 60 (1st Cir. 1985), Runyon v. Fasi, 762 F. Supp. 280 (D. Haw. 1991), Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972), People v. Middlemark, 420 N.Y.S.2d 151 (N.Y. Dist. Ct. 1979).
11. Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); *see also*, Frumer v. Cheltenham Twp., 709 F.2d 874 (3d Cir. 1983), City of Seattle v. Mighty Movers, Inc., 96 P.3d 979 (Wash. 2004), Johnson v. City and County of Philadelphia, No.08-1748, 2008 WL 1776417 (E.D. Pa. Apr. 16, 2008).
12. Sussli v. City of San Mateo, 120 Cal. App.3d 1 (Cal. Ct. App. 1981).

13. In *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996), the Seventh Circuit counted eight votes from *Capitol Square v. Pinette*, 515 U.S. 753 (1995), for the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." *Accord*, Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F. 3d 25 (1st Cir. 2001); Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001).
14. Gerritsen v. City of Los Angeles, 994 F. 2d 570, 579 (9th Cir. 1993) (approving a general ban that made an exception for real estate signs on city property). However, the exception for real estate signs is arguably in conflict with *Ballen v. City of Redmond*, 466 F. 3d 736 (9th Cir. 2006); *but see* Rappa v. New Castle County, 18 F.3d 1043, 1065 (3d Cir. 1994) (content-based exceptions may be justified by site relevance).
15. U.S. v. Kokinda, 497 U.S. 720 (1990); State v. Carr, 215 Or. App. 306 (Or. Ct. App. 2007) (walkway between school and sidewalk not a traditional public forum); Carr v. City of Hillsboro, 497 F. Supp. 2d 1197 (D. Or. 2007); Parks v. City of Columbus, 395 F.3d 643, 649 (6th Cir. 2005).
16. U.S. v. Grace, 461 U.S. 171 (1983) (U.S. Supreme Court building), First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002) (sidewalk owned by church), Venetian Casino Resort, LLC v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937 (9th Cir. 2001) (sidewalk owned by casino).
17. 447 U.S. 74 (1980); Fashion Valley Mall, LLC v. N.L.R.B., 172 P.3d 742 (Cal. 2007). For a list of states that have followed *Prune-Yard* and those which have declined to do so, *see* Cross v. State, No. 08-03-00283-CR, 2004 WL 1535606 (Tex. Ct. App. July 8, 2004).
18. Lehman v. City of Shaker Heights, 418 U.S. 298 (1977), Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), DiLoreto v. Downy Unified School Dist. Bd. of Educ., 196 F. 3d 958 (9th Cir. 1999).
19. Brown v. Cal. Dept. of Transp., 321 F.3d 1217 (9th Cir. 2003), Christ's Bride Ministries, Inc. v. SEPTA, 148 F. 3d 242 (3d Cir. 1998), AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transit Auth., 42 F. 3d 1 (1st Cir. 1994). *See also*, Matt Ames, *The Regulation of Advertising in Transit Facilities Under the Public Forum Doctrine*, MUNICIPAL LAWYER, March-April 2008, at 10.
20. 512 U.S. 43 (1994).
21. Matthews v. Town of Needham, 764 F. 2d 58, 59 (1st Cir. 1985).
22. Kroll v. Steere, 759 A.2d 541 (Conn. App. Ct. 2000).
23. Horstkoetter v. Dept. of Public Safety, 159 F.3d 1265 (10th Cir. 1998); *compare* Kansas Judicial Review v. Stout, 519 F.3d 1107 (10th Cir. 2008) and Bauer v. Shepard, No. 3:08-CV-196-TLS, 2008 WL 1994868 (N.D. Ind. May 06, 2008) (both concerning limits on campaigns by candidates for elective judgeships).
24. Committee For a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007).
25. *See, e.g.*, MD. CODE ANN., REAL PROP., § 11-111.2, 11B-111.2 (West 2008).
26. Resident Action Council v. Seattle Housing Auth., 174 P.3d 84 (Wash. 2008).
27. 453 U.S. 490, 513 (1981).
28. Tierney v. City of Methuen, 12 Mass. L. Rptr. 340 (Mass. Super. 2000); *see also* Candidates' Outdoor Graphic Service v. City and County of San Francisco, 574 F. Supp. 1240 (N.D. Cal. 1983).
29. 540 F. 2d 1360 (9th Cir. 1976).
30. *Id.* at 1369, *but see* Coffey v. Fayette County, 631 S.E.2d 703 (Ga. 2006).
31. Arlington County Republican Comm. v. Arlington County, 983 F. 2d 587, 593-94 (4th Cir. 1993).
32. Verrilli v. City of Concord, 548 F. 2d 262, 265 (9th Cir. 1977) (political signs in single- family residential areas were limited to one sign of four square feet and a 64-square-foot limit applied to campaign headquarters; both rules were unconstitutional); Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274, 1290 (11th Cir. 2004) (size limit on political signs was 1/17 that of commercial signs; invalid).
33. 854 P. 2d 1046 (Wash. 1993).
34. 67 F. Supp. 2d 1231 (D. Kan. 1999).
35. Huntington v. Estate of Schwartz, 63 Misc. 2d 836, 313 N.Y.S.2d 918 (N.Y. Dist. Ct. 1970) (provision exempting political signs for a period of 42 days before an election within city's police power); Ross v. Goshi, 351 F. Supp. 949 (D.C. Haw. 1972) (original version of ordinance, which held political signs to the same standards as temporary signs and increased political signage rights 60 days before election, upheld).
36. *Collier*, 854 P.2d 1046 (Wash. 1993) (60-day limit was not narrowly tailored); John Donnelly & Sons v. Campbell, 639 F. 2d 6, 15 (1st Cir. 1980) (three weeks was not enough time to publicize a campaign); Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A., 733 N.E.2d 1152 (Ohio 2000) (17 days before election); McCormack v. Twp. of Clinton, 872 F. Supp. 1320 (D.N.J. 1994) (ten days before and three days after the event); City of Antioch v. Candidates Outdoor Graphic Service, 557 F. Supp. 52 (D.C. Cal. 1982) (60-day time limit for outdoor political signs, but not commercial signs); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 63 (Colo. 1981) (durational limits on all ideological signs "sweeps too broadly"); Van v. Travel Info. Council, 628 P.2d 1217 (Or. Ct. App. 1981) (60 days before an election; special treatment based on content; decision rested on both federal and state constitutions); Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (D.C. N.Y. 1977) (political wall signs limited to six weeks before election, while commercial wall signs were not similarly limited); Farrell v. Teaneck Twp., 315 A.2d 424 (N.J. Super. Ct. Law. Div. 1974) (city "failed to demonstrate to what degree, if at all, an ordinance which allowed a restricted type of sign for a limited period prior to elections would precipitate a decline in property values"); Knoeffler v. Town of Mamakating, 87 F. Supp.2d 322 (S.D.N.Y. 2000) (durational limits on political signs were unconstitutional); Christensen v. City of Wheaton, No. 99 C 8426, 2000 WL 204225 (N.D. Ill. 2000); Maguire v. City of American Canyon, No. C-06-05681 JCS, 2007 WL 1875974 (N.D. Cal. 2007) (90-day time window meant that political speech was banned for three-fourths of the year), Bell v. Baltimore County, No. CCB-07-305, 2008 WL 1953475 (D. Md. Mar. 31, 2008) (45 days before election; attorney's fee award: $67,789.50).
37. City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. Ct. 1992) (the phrase "such as election signs" was used as an example only; the limit applied to all temporary signs regardless of content. *Contrast* Intervine Outdoor Adv., Inc. v. City of Gloucester City Zoning Bd., 674 A.2d 1027 (N.J. Super. Ct. App. Div. 1996) (time limits applied to specified types of noncommercial signs but did not apply to commercial signs).
38. 54 F.3d 1400, 1404-05 (8th Cir. 1995).
39. 519 N.W.2d 243 (Minn. Ct. App. 1994).
40. *Id.* at 246.
41. Curry v. Prince George's County, 33 F. Supp.2d 447, 455 fn10 (D. Md. 1999). This dictum illustrates the wisdom of allowing a defined area for expression of noncommercial messages, at all times and on all properties, *in addition* to message substitution.
42. Baldwin v. Redwood City, 540 F. 2d 1360 (9th Cir. 1976), Verrilli v. City of Concord, 548 F.2d 262, 264 (9th Cir. 1977), *Curry*, 33 F. Supp. 2d at 455, Bella Vista United v. City of Philadelphia, No. Civ.A. 04-1014, 2004 WL 825311 (E.D. Pa. April 15, 2004). *See also*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999) and Watchtower Bible and Tract Soc'y of New York v. Village of Stratton, 536 U.S. 150 (2002).
43. *Baldwin*, 540 F. 2d at 1371; Riel v. City of Bradford, 485 F. 3d 736 (3d Cir. 2007).
44. Bondar v. D'Amato, No. 06-C-109, 2008 WL 906129 (E.D. Wis. Mar. 31, 2008).
45. 514 U.S. 334 (1995).
46. WIN v. Rippie, 213 F. 3d 1132 (9th Cir. 2000), A.C.L.U. of Nevada v. Heller, 378 F. 3d 979 (9th Cir. 2004).
47. Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (April 28, 2008).
48. 504 U.S. 191 (1992).
49. For a review of the rulings on various "buffer zones," see *Anderson v. Spear*, 356 F. 3d 651, 662 (6th Cir. 2004). ML



The Regulation of Advertising in Transit Facilities Under the Public Forum Doctrine

— by Matthew C. Ames —

As every law student knows, applying First Amendment doctrines to particular factual circumstances can be a vexing task. The rules governing the regulation of advertising in transit facilities are no exception. This article outlines the application of the public forum doctrine to the regulation of advertising in transit facilities, with particular attention to *Ridley v. Massachusetts Bay Transportation Authority*,[1] a case that is particularly notable because it illustrates, in sharp relief, the difficulties faced by both the courts and transit authorities in addressing these issues.

Advertising and the Public Forum Doctrine

The U.S. Supreme Court has addressed the treatment of advertising on public buses in a now-venerable decision, *Lehman v. City of Shaker Heights*.[2] In that case, the Court ruled that a prohibition on political advertising on city buses did not violate the First Amendment. The advertising spaces on the city's buses were deemed to be part of a "commercial venture," and the city was entitled to restrict the kinds of advertising it accepted in order to protect that commercial interest.[3]

The Court has not returned to the subject of advertising in transit facilities since *Lehman*. The lower courts, however, have ruled in a broad range of advertising cases, typically applying the "public forum doctrine" adopted by the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[4] *Perry* dealt with access to a school system's internal mail system, but it is compatible with the logic of *Lehman*, and one can see the outlines of the *Perry* public forum doctrine in the language of *Lehman*. Seven circuits have applied the *Perry* test to the regulation of advertising in at least one decision.[5]

The public forum doctrine divides public property into three categories: traditional public fora, designated public fora, and non-public fora. A traditional public forum is a place that "[has] immemorially been held in trust for use of the public, and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[6] Not all public property is open to the public for every purpose, however, and the First Amendment does not guarantee access to property simply because it is owned by the government.[7] A designated public forum, therefore, is property that the government has intentionally opened to allow for public discourse.[8] A non-public forum is public property that is neither a traditional public forum, nor one designated as a public forum.

How a forum is categorized is critical because a government has much more latitude in regulating the use of a non-public forum. A court will uphold restrictions on speech in a traditional public forum or a designated public forum only if the restrictions are "narrowly drawn to achieve a compelling [governmental] interest."[9] In a non-public forum, on the other hand, the courts will uphold restrictions so long as they are reasonable in light of the purposes served by the forum, and are not aimed at the viewpoint of the speaker.[10]

Applying the Public Forum Doctrine

The first step in applying the public forum doctrine is defining the forum, which requires a consideration of the nature of the access sought by the speaker—i.e., the classification of an entire subway station or airport is not relevant when the speaker only wants access, for purposes of displaying advertising, to prescribed locations.[11]

The second step is to determine the type of forum.[12] Under *Lehman*, there is little question that advertising spaces are not traditional public fora, so the issue becomes whether the government has created a designated public forum, or whether the space in question remains a non-public forum. The Supreme Court has held that a government cannot designate a public forum simply through inaction.[13] To determine whether a designated public forum has been created, the courts usually examine two factors: "the policy and practice of the government with respect to the underlying property," and "the nature of the property and its compatibility with expressive activity."[14] As a practical matter, only the first factor usually matters, because advertising is clearly an expressive activity and advertising spaces have been set aside for that purpose.

In particular cases, a court will look, first, to any regulations or guidelines used by the government to determine where an advertisement is acceptable. The court will consider the testimony of relevant officials and other evidence,[15] but it stands to reason that the first thing a court will expect to see is a pre-existing regulation or written policy. Another factor the court will consider includes the actual process used to evaluate advertising content or otherwise guide decision-making by the transit authority. For example, in *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*,[16] the U.S. Court of Appeals for the Seventh Circuit found that the transit authority had created a public forum in its advertising spaces because it had "no system of control," and access to advertising spaces was "virtually guaranteed to anyone willing to pay the fee."[17] Further, it was clear that decisions were based on the subjective judgment of transit officials.[18]

The court will also closely analyze past practices. Here, consistency in enforcement is critical. In *Christ's Bride*

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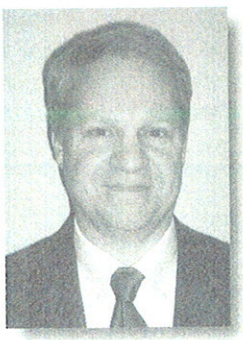

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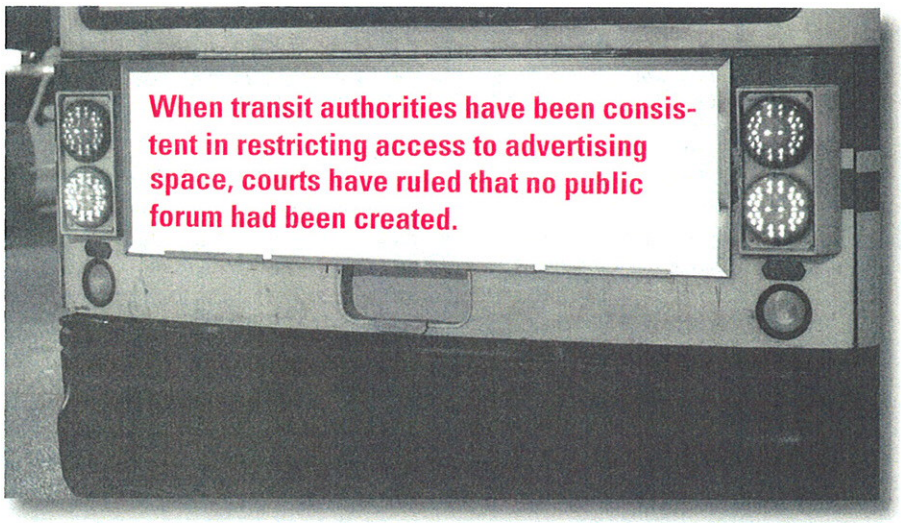
Ministries, Inc. v. Southeastern Penn. Trans. Auth.,[19] the court found that the authority, SEPTA, had created a designated public forum because "SEPTA has no longstanding practice prohibiting ads like [the appellant's]; nor does it have any policy pursuant to which the ads were removed. SEPTA's past practice, instead, is to include such ads."[20]

On the other hand, when transit authorities have been consistent in restricting access to advertising space, courts have ruled that no public forum had been created. For example, in *Children of the Rosary v. City of Phoenix*,[21] the U.S. Court of Appeals for the Ninth Circuit found that the City "consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising. The City has not designated the advertising space on the exterior of its buses as a place for general discourse . . . ."[22]

Once a court has categorized the forum, it will test the restriction under the standard applicable to that forum. If a court finds a designated public forum has been created, it can be expected to strike down the restriction. Few regulations will be found narrow enough, and few government interests compelling enough, to survive strict scrutiny. Accepting political or public issue advertising in itself is usually sufficient to create a designated public forum.[23]

If the space is found to be a non-public forum, a restriction is substantially more likely to be upheld because courts will uphold advertising restrictions in non-public fora that are "reasonable" and not based on the viewpoint of the speaker.[24] Whether a policy is "reasonable" depends on "an examination of both the governmental interest and the particular forum's nature and function."[25] The courts have recognized numerous legitimate governmental interests, including: (1) raising revenue;[26] (2) promoting an appearance of neutrality;[27] (3) public safety;[28] (4) avoiding offending transit patrons;[29] and (5) avoiding the promotion of illegal activity.[30]



Deciding whether a transit authority is discriminating based upon viewpoint can be especially difficult and confusing: almost any examination of content can be said to discriminate on that basis. For this reason, transit authorities have tried to limit their examination of content by adopting prohibitions aimed at specific categories of advertising, such as the ban on political speech in *Lehman*, or the ban on advertising by pawnshops in issue in *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*.[31] Even such categorical standards can still be difficult to implement if a specific advertisement is ambiguous in nature, or can be viewed or interpreted differently using another perspective.[32] This is especially true for advertisements with public policy or political overtones; advertisements for purely commercial products are less likely to raise concerns about viewpoint discrimination.

In essence, transit authorities have two choices. The first is to adopt standards that minimize official discretion and describe, with as much specificity as possible, the types of advertising that will be rejected or permitted, and then actively enforce the standards. The second option is to designate advertising spaces as a public forum and accept the fact that attempts to reject particular advertisements will probably fail. The more discretion an agency seeks to retain, the more likely it is that a restriction will be found to violate the First Amendment.[33] Conversely, the more specifically a restriction is defined, the more likely it will be upheld.[34]

A Case Study: *Ridley v. MBTA*

Ridley v. Massachusetts Bay Transportation Authority[35] involved the consolidated appeals in two cases where the district court upheld the rejection, by the transit authority (MBTA), of advertising proposed for display in the Boston subway system. One case involved three advertisements by a group called Change the Climate and promoting the reform of marijuana laws; the other concerned an advertisement asserting that certain named religions were "false religions."[36] In a 2-1 decision, the U.S. Court of Appeals for the First Circuit affirmed the district court's rejection of the religious ad, but reversed as to the marijuana ads. The dissenting judge would have allowed all of the ads to run.[37]

The majority in *Ridley* began by applying standard forum analysis. It found that the MBTA advertising spaces were a non-public forum based on a review of the authority's policy, and its practices in enforcing the policy.[38] The MBTA's guidelines banned specific categories of advertising, including political campaign ads, tobacco products, and ads depicting firearms or graphic violence; they also prohibited obscenity, profanity, nude images, false or misleading commercial speech, libel, or copyright-infringing speech.[39] Particularly relevant were the prohibitions on ads that promoted the use of unlawful goods or services or the commission of unlawful conduct, and material that "demean[ed] or disparage[d] an individual or group of individuals."[40] The court held that the

adoption of these guidelines demonstrated the MBTA's intent not to create a public forum.[41] Further, the MBTA's enforcement of the policy supported this conclusion, as the evidence indicated the authority had rejected at least 17 advertisements in the preceding five years.[42] The court also ruled that one or more instances of erratic enforcement were not enough to create a public forum.[43]

The First Circuit next considered whether the MBTA had discriminated against a particular viewpoint with respect to each kind of advertisement at issue, and whether the restrictions were reasonable in light of the purpose of the forum. The MBTA had argued that the three marijuana advertisements had been banned because they promoted the use of an illegal product, and the government had a particular interest in protecting children from such speech. The first ad depicted a teenage girl with a caption that read, in part: "Marijuana is NOT cocaine or heroin. Tell us the truth." The second featured a woman depicted as saying: "I've got three great kids. ... I don't want them to smoke pot. But I know jail is a lot more dangerous than smoking pot." The third ad showed two policemen, with a caption indicating it was a waste of police resources to arrest people for marijuana offences "when real criminals are on the loose."[44]

MBTA officials testified that they believed these ads had the effect of promoting illegal drug use because the ads suggested that drug use was acceptable and not a "real" crime. The court, however, ruled that the advertisements were designed to raise questions or promote debate about the policies underlying marijuana laws, and concluded that the true reason for the rejection was that the MBTA disagreed with the idea that the drug laws should be reformed. As a result, the court concluded that the MBTA had engaged in viewpoint discrimination.[45] It also held that rejecting the ads was unreasonable in light of the purpose of the forum. The court's reasoning is unclear, but it appears that the court simply disagreed with the MBTA's judgment that the advertisements would actually promote drug use.[46]

Turning to the religious advertisement that was also in dispute and applying the same tests, the First Circuit reached the opposite conclusion. The MBTA had approved two earlier ads from the same organization, although not without controversy.[47] The rejected advertisement contained the following text:

> The Bible teaches that there is only one religion. There are no scriptures in the Bible that teach that God set up the Catholic religion, the Baptist religion, the Pentecostal religion, the Jehovah's Witness religion or the Muslim religion. These religions are false.[48]

The court concluded that the MBTA's prohibition on demeaning or disparaging speech was viewpoint-neutral because it applied to all advertisers equally: no advertiser was allowed to use demeaning speech, and all were allowed to describe themselves in positive terms.[49] Moreover, the guidelines were not intended to censor religious beliefs; instead, they were designed to "to maintain a certain level of decorum in all advertisements."[50] In the absence of any evidence that the MBTA had ever approved an advertisement that contained "demeaning" or "disparaging" content, the First Circuit held that the restriction and its application were viewpoint-neutral.[51] Further, it found that the MBTA's regulatory scheme was reasonable, because rejecting the ad promoted the MBTA's interests in maximizing revenue and in "maintaining a safe and welcoming environment."[52]

Justice Torruella, dissenting in *Ridley*, rejected the majority's analysis of the religious ad, arguing that the "demeaning or disparaging" standard was too vague to be constitutional, regardless of the proper classification of the forum.[53] However, analyzing the religious ad under the lens of forum analysis, he concluded that the MBTA had actually created a designated public forum, largely through inconsistent enforcement over a period of many years[54] —a finding contrary to the majority's conclusion on this issue. Observing that "religious belief is quintessentially a matter of viewpoint,"[55] Justice Torruella pointed out that the MBTA had earlier allowed religious advertising, but had rejected the advertisement at issue specifically because of its content.

Conclusion

Although public forum analysis is a useful tool, *Ridley* is a perfect illustration of the uncertainty that transit authorities face if a dispute reaches the courts. The contrast between the majority's treatment of the marijuana and religious advertisements on the one hand, and the contrast between the majority's and the dissent's analysis of the religious ad, demonstrate how readily the facts of a case can be interpreted to support sharply different conclusions. Decisions regarding individual advertisements, whether made by administrative officials or by the courts, are often highly subjective. Transit agencies should seek to reduce that subjective element by making their advertising guidelines as narrow, specific, and categorical as possible.

Notes

1. 390 F.3d 65 (1st Cir. 2004).
2. 418 U.S. 298 (1974).
3. *Id.* at 303-04.
4. 460 U.S. 37 (1983).
5. *See, e.g.*, Ridley v. Mass. Bay Transp. Auth., 390 F3d 65 (1st Cir. 2004); New York Magazine v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998); Christ's Bride Ministries, Inc. v. Southeastern Penn. Transp. Auth., 148 F. 3d 242 (3d Cir. 1998); United Food & Comm'l Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F. 3d 341 (6th Cir. 1998); Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); Children of the Rosary v. City of Phoenix, 154 F. 3d 972 (9th Cir. 1998); Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275 (11th Cir. 2003).
6. *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).
7. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).
8. Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985).
9. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).
10. *Cornelius*, 473 U.S. at 809-10.
11. *Id.* at 801. The classification of an entire facility might be relevant if the advertiser sought to place ads at locations of its own choosing. The cases, however, typically involve plac-

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ing advertising only in locations designated by the transit authority.
12. Some decisions have suggested that transit facilities are analogous to streets and sidewalks and, therefore, should be considered traditional public fora. In *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992), however, the U.S. Supreme Court ruled that an airport was a non-public forum. Since *Lee*, the courts have consistently ruled that transit facilities are non-public fora. *See, e.g.*, Air Line Pilots Ass'n, Int'l v. Dept. of Aviation, 45 F. 3d 1144 (7th Cir. 1995).
13. *Cornelius*, 473 U.S. at 802. A mere assertion by the government that particular property is a non-public forum is insufficient, because such a rule would effectively allow the government itself to declare its restrictions constitutional. *See, e.g.*, New York Magazine v. Metro. Trans. Auth., 136 F. 3d 123, 129-30 (2d Cir. 1998).
14. *Air Line Pilots*, 45 F. 3d at 1152.
15. *See, e.g.*, Ridley v. Mass. Bay Transp. Auth., 390 F. 3d 65, 82-85 (1st Cir. 2004).
16. 767 F. 2d 1225 (7th Cir. 1985).
17. *Id.* at 1232.
18. The transit authority accepted public-issue advertising but claimed to decline "controversial" public-issue advertising under its policy. However, it maintained "no written standards to guide those who must apply this controversiality bar," and rejections were based on its officials' subjective beliefs as to the content being controversial. The court described the policy's application as dependent on a series of events that could "only be described as whimsical." *Id.* at 1230.
19. 148 F. 3d 242 (3d Cir. 1998).
20. *Id.* at 255. *See also*, Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F. Supp. 2d 1320, 1326 (N.D. Ga. 2000).
21. 154 F. 3d 972 (9th Cir. 1998).
22. *Id.* at 978. *See also*, Park Shuttle N Fly, Inc. v. Norfolk Airport Auth., 352 F. Supp. 2d 688, 705 (E.D. Va. 2004).
23. United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth., 163 F. 3d 341, 355 (6th Cir. 1998) ("Acceptance of political and public issue advertisements…signals a willingness…to open the property to controversial speech.").
24. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
25. Air Line Pilots Ass'n, Int'l v. Dept. of Aviation, 45 F. 3d 1144, 1159 (7th Cir. 1995).
26. *See, e.g.*, *Children of the Rosary*, 154 F. 3d at 979; Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F. 3d 1275, 1281 (11th Cir. 2003).
27. Children of the Rosary, 154 F. 3d at 979.
28. *Id.*
29. United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth., 163 F. 3d 341, 356-57 (6th Cir. 1998) (policy held unconstitutional on other grounds).
30. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 85 (1st Cir. 2004).
31. 337 F. 3d 1275 (11th Cir. 2003) (challenge to the City's policy of not allowing pawnshops to advertise on bus benches).
32. One example is the ads at issue in *Ridley*, where ads on marijuana use were interpreted to be political (aimed at law reform) rather than promoting the use of illegal substances.
33. *See, e.g*, Christ's Bride Ministries, Inc. v. Southeastern Penn. Transp. Auth., 148 F. 3d 242, 255 (3d Cir. 1998) (right to reject for any reason unconstitutional); *United Food & Commercial Workers Union*, 163 F. 3d at 356-58 (prohibition on "controversial" ads unconstitutional).
34. *See, e.g.*, *Uptown Pawnshop & Jewelry, Inc.*, 337 F. 3d at 1281 (regulation prohibiting advertisement of specific types of business, including pawnshops, upheld).
35. 390 F. 3d 65 (1st Cir. 2004).
36. *Id.* at 72-73, 74-75.
37. *Id.* at 109.
38. *Id.* at 77-78, 82.
39. *Id.* at 75.
40. *Id.*
41. *Id.* at 78.
42. *Id.*
43. *Id.*
44. *Id.* at 73.
45. *Id.* at 89. There was also some evidence that the authority had previously permitted ads that discouraged illegal drug use. *Id.* at 85.
46. In doing so, the court pointed to the fact that Change the Climate's ads reflected "core political speech that is critical of existing governmental policy." *Id.* at 86. Further, it referred to evidence that the real reason for rejecting the ads "was actually distaste for Change the Climate's viewpoint;" and evidence that the rejection did not actually serve its purported justification, protecting children. *Id.* at 87-88.
47. *Id.* at 73-74. The court found the third ad was distinguishable from the other two, as it "went a vitriolic further step and directly demeaned a number of religions, by calling them false." *Id.* at 92. The court also rejected the argument that because the MBTA accepted the first two ads, it was required to accept the third. *Id.* at 91-92.
48. *Id.* at 74-75.
49. *Id.* at 91.
50. *Id.* at 92.
51. *Id.* at 92-93.
52. *Id.* at 93.
53. *Id.* at 96-97.
54. *Id.* at 108 ("the MBTA's policy and practice regarding its advertising space, and the nature of that space as created and managed by the MBTA, demonstrates an intent by the MBTA to create a designated public forum").
55. *Id.* at 100. ML

ORDINANCES *continued from page 23*

Local communities and lenders have both been hit hard by the exponential increase in the foreclosure rate in the United States. Communities will have to find novel ways to combat the fallout—from increased blight and its secondary effects to the decreasing tax revenue from nearby homes—and local government attorneys should expect to be in the middle of a very long battle.

Notes

1. *See* http://www.americandialect.org.
2. Sara Lane, *Foreclosure Fallout: Renters Forced Out of Lost Homes*, CNN.com, Nov. 30, 2007, at http://www.cnn.com/2007/US/11/30/willis.rentervictims/index.html?iref=newssearch.
3. Baltimore v. Wells Fargo Bank, N.A., et al., No. L08CV-062 (D. Md. filed Jan. 8, 2008); Cleveland v. Deutsche Bank Trust Co., et al., No. CV-08-646970 (Ct. C.P., County of Cuyahoga, filed Jan.10, 2008). The Baltimore complaint is posted at http://www.ci.baltimore.md.us/news/press/0108/Complaint%20Draft%20(FINAL)%2012%2020%2007.pdf.
4. *Cleveland*, at 20-21.
5. *Id.*
6. Fair Housing Act, 42 U.S.C. § 3604 (West 2007).
7. *Id.*
8. *See* Nationwide Mut. Ins. v. Cisneros, 52 F. 3d 1351 (6th Cir. 1995); Hargraves v. Capital City Mortg. Corp., 140 F. Supp.2d 7 (D.D.C. 2000); NAACP v. American Family Mut. Ins., 978 F. 2d 287 (7th Cir. 1992).
9. *See Hargraves*, 140 F. Supp.2d at 20; Honorable v. Easy Life Real Estate System, 100 F. Supp.2d 885, 892 (N.D. Ill. 2000); Clark v. Universal Builders Inc., 501 F. 2d 324, 328 (7th Cir. 1973); Jackson v. Okaloosa County, 21 F. 3d 1531, 1543 (11th Cir. 1994).
10. *Baltimore*, *supra* note 3 at 15.
11. *Id.* at 4.
12. *Id.* at 17 (2005-2006 statistics; similar statistics are available for 2000-2004 and the first half of 2007).
13. *Id.* at 26.
14. *Id.* at 31. ML

REGULATING ELECTRONIC BILLBOARDS AND SIGNS

Teleconference co-sponsored by IMLA and Strafford Publications

December 11, 2008

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I. INTRODUCTION

There are two sign industries:

A. Outdoor advertising: the billboard business displays general advertising for hire (a rental fee), typically on large, freestanding sign structures; the structures are permanent while the images change periodically, usually on a monthly or quarterly basis; off-site commercial advertisements normally account for 95-98% of billboard sales, with the remainder being non-commercial (politics, religion, etc.); off-site means that the goods or services advertised are not available on the same property; a billboard is a separate or principal use of land, not an accessory to some other principal use, such as a store;

B. Sign makers: sign shops design and fabricate custom signs; such signs are usually permanent in both physical nature and message; most customers are retail stores who use the signs as an accessory to the main use; stores display the signs for purposes of identification and location information; many store signs incorporate trademarks.

The two industries normally take separate paths in their relations with government. However, on the issue of electronic signs, they have similar goals: display technology which is visually attractive and easily changed, typically by a computer program. Such devices give a billboard company the ability to rent the same space to several advertisers at the same time; instead of renting the space for a month, they rent it by the second in a variation on the time share idea; this holds the potential for greatly increased revenue. Digital displays also give stores the ability to modify the image or message to fit the promotional theme of the day, with a change-over cost which is very small. When well done, digital displays are vastly more "eye catching."

Some elaborate electronic signs – *i.e.*, those in Times Square NYC or on the Las Vegas Strip – are essentially large-scale television screens with full motion video, and even accompanying sound, smoke or fumes. Digital display technology has advanced rapidly, and the costs of installing digital display units is dropping.

II. THE PUBLIC POLICY DEBATE

Both the billboard and sign maker industries are pushing government at all levels to allow digital signs. The main argument is, in essence: "don't lock us into the technology of the past; let us use all modern tools to compete in a demanding economic marketplace. Our competitors are using dynamic displays, and we must answer in kind." Legislators at all levels of government are being lobbied and pressured to adopt permissive policies on electronic signs. In many states legislation is proposed to make digital conversion a matter of right.

But public resistance is growing. Many people fear that widespread use of electronic signs will have the cumulative effect of carnivalizing the public square, cheapening commercial districts with even more garish signs, and worsening "driver distraction." Few towns want to look like the Vegas Strip or Times Square.

> Outdoor advertising has turned our neighborhoods into pages from a magazine, destroying our streetscapes, shining lights into our apartments, disfiguring our landmarks, bombarding our senses. It has stolen our sense of community, blasting a cacophony of advertising messages that drowns out all other information. We can no longer enjoy a walk through our own neighborhood without these monster signs shouting at us from every corner. We are losing sleep at night because our bedrooms are lit up like Yankee Stadium. Our neighborhoods have become a nightmarish streetscape out of the movie Bladerunner, where every inch of every surface is covered in advertisements. The invasion of this advertising into every pore of our bodies and into every moment of our existence must be stopped.

Hearing Before the New York City Planning Commission 10-11 (Nov. 29, 2000), quoted in *Infinity Outdoor v. New York City*, 165 F.Supp.2d 403 (SD NY 2001).

> Compare:
> http://www.buffalonews.com/home/story/492066.html ("Television-style billboards coming to WNY roadways.")
>
> http://www.mediacritica.net/courses/771/laible.pdf ("Changeable Message Signs: A Technology Whose Time Has Come.")

Many developers of large scale shopping centers and sports facilities are now telling city councils, in effect: We can build this project, and give you the sales tax revenue and municipal prestige you want, only if we are allowed to have spectacular signage without restriction as to on-site or off-site, and with no restrictions on electronic signs (or any other display technology). Some of the developers view sign space rental as important as floor space rental.

California Governor Schwarzenegger is seeking federal approval to convert the state's "road condition / Amber alert" signs on freeways into revenue generators, under a contract with a private outdoor advertising company, who would modify the signs and sell commercial advertising on them, when they are not needed for road information. Such a program holds the potential to increase government revenue without additional taxation. See:

http://articles.latimes.com/2008/sep/24/local/me-signs24, and
http://www.scenic.org/pdfs/Scenic%20America%20on%20California%20proposal%20to%20commercialize%20right%20of%20way.pdf

Digital billboard proposals sometimes include a financial incentive to the city:

http://clblegistar.longbeach.gov/attachments/b3e6eaa9-f834-43e1-ad65-b84f303e224c.pdf

III. HIGHWAY BEAUTIFICATION

The federal Highway Beautification Act (HBA) (Statute: 23 U.S.C. § 131; Regs: 23 CFR part 750) sets minimal standards for effective control of outdoor advertising signs near federally funded highways. But the burden of enforcement is placed upon the states, at the risk of losing up to 10% of federal highway funds. The statute allows on-site signs using "electronic processes":

> (c)(3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located . . .

23 USC 131(c)(3).

Each state enters into a contract with the Federal Highway Administration, called the "federal state agreement" (FSA) which details the manner in which the state will achieve "effective control." For such contracts:

> 23 USC 131(j) Provided, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder.

At the same time, the federal regs ban billboards using flashing lights:

> 23 CFR 750.108(c) No sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights.
> 23 CFR 750.108(e) No sign may be permitted which moves or has any animated or moving parts.

Even though it would seem that the "flashing, intermittent or moving lights" would ban electronic billboards, the staff of Federal Highway on September 25, 2007 issued a "guidance memo," available at http://www.scenic.org/pdfs/fhwyguidance.pdf, which says:

> Proposed [state] laws, regulations, and procedures that would allow permitting CEVMS [changeable electronic variable message signs] subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as

those terms are used in the various FSAs [federal state agreements] that have been entered into during the 1960s and 1970s.

* * *

Available information indicates that State regulations, policy and procedures that have been approved by Divisions to date, contain some or all of the following standards:

• Duration of Message - Duration of each display is generally between 4 and 10 seconds – 8 seconds is recommended.

• Transition Time between messages is generally between 1 and 4 seconds – 1-2 seconds is recommended.

• Brightness: Adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety of the motoring public.

• Spacing between such signs not less than minimum spacing requirements for signs under the FSA [federal state agreement], or greater if determined appropriate to ensure the safety of the motoring public.

• Locations - where allowed for signs under the FSA except such locations where determined inappropriate to ensure safety of the motoring public.

The FHWA memo has produced considerable controversy and commentary. Some examples:

http://www.mediabuyerplanner.com/2007/10/02/us-dot-issues-memo-allows-for-digital-billboard-construction/

http://www.fhwa.dot.gov/realestate/offprmsgsnguid.htm

http://www.oaaa.org/legislativeandregulatory/digital/factsvsmyths.aspx

http://lawoftheland.wordpress.com/2007/10/05/fhwa-issues-guidance-on-digital-billboards/

http://www.scenic.org/pdfs/ppdigitalbillboards.pdf

IV. CASE STUDY: *NASER JEWELERS V. CONCORD NH*

Presentation by Charles P. Bauer, Gallagher, Callahan & Gartrell, 214 N. Main Street, P.O. Box 1415, Concord NH 03302, bauer@gcglaw.com. Tel.: 603.228.1181.

V. SURVEY OF RECENT CASES

A. EMC. Car dealer in Concord NH was denied permit to erect an electronic changeable copy sign on its property to replace an existing manually changeable sign. Held: The City need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics, . . . the trial court erred in substituting its judgment for that of the City's that prohibiting animated, flashing signs containing commercial advertising will 'enhance the appearance and aesthetic environment of the City' and 'improve traffic safety.' City's ban on moving image signs is valid. *Carlson's Chrysler v. City of*

Concord, 938 A2d 69 (NH SC No 2006-362, Nov 8, 2007).

B. Flashing Signs. Owner of legal but nonconforming billboard challenged City's denial of permits to add "electronic flashing display" to the sign. Held: City law prohibits structural changes to non-conforming signs, unless the sign is first brought into compliance with current law. Given the sign's location in a large vacant lot, that is not possible. A sign change is "structural" if the alteration modifies the size, shape or height of a sign structure or requires replacement of sign material with other non-comparable materials. The rule prohibiting structural change is content neutral and sufficiently justified. *Meredith v. Lincoln City OR*, 2008 WL 4375591 (D OR Civ No. 03-6385-AA, 9/25/2008).

C. Flashing Signs. Ban on flashing, moving, and portable signs was legitimate and constitutional. *Marras v. Livonia, Mich.*, __ F.Supp.2d __, 2008 WL 3843533 (ED Mich. No. 07-12562, 8/15/2008).

D. LED Conversion: Billboard operator sought permit to convert existing, legal billboard to LED display, without changing the superstructure of the signs. City said signco's application was incomplete and requested more information. 123 days later signco claimed the permit was "deemed approved" because the city had not taken formal action in the time required by state law. Held: The state law applies to residences and other structures that relate to them. A billboard is not an accessory structure to a dwelling unit. Conversion to LED display is not a right of modernization. City could demand CUP and site plan approval. *Lamar Adv v. Zoning Hearing Bd of Monroeville*, 939 A2d 994 (PA Commonwealth Ct., No 1117 CD 2007, Dec 17, 2007, reargument denied Feb 13, 2008).

E. LED Conversion: Georgia state law states that signs using "nonmechanical electronic multiple message signs" are permissible under certain circumstances. City denied signco's application to convert existing sign to LED display, as violating city law prohibiting "flashing, or blinking signs or signs using varying light intensity . . ." Held: City law grants the planning dept. total control over whether to require a permit, and leaves no guidance for this discretion; this creates the possibility of content-based discrimination. The city's sign code is an unconstitutional prior restraint on free speech. Signco is entitled to nominal damages, and the chance to prove it suffered actual damages for deprivation of its rights. *Lamar v. Marietta GA*, __ FS2d __, 2008 WL 696683 (ND GA, No 1:07-cv-00764, Feb 25, 2008).

F. Conversion to Electronic Display: Owner of legal, non-conforming billboard converted display face to electronic message board; city ordered it removed based on a law forbidding structural alteration or enlargement of legal non-conformity. Signco's structural engineer said that addition of the electronic message board did "not increase the force in any structural element by more than [five percent]" and was not, therefore, " 'structural' as defined by the International Building Code. Held: the electronic

message board added between 3,000 and 3,500 pounds to the weight of the billboard. While it did not increase the height, length, or the square footage of its advertising surface area, it did increase the depth. The addition of the message board "enlarged" the billboard in both dimension and weight, and was thus illegal. The illegality could not be cured by returning to the original display face. *Adams Outdoor v. Bd Zoning Appeals, Virginia Beach*, 645 SE2d 271 (VA No. 061272, June 8, 2007).

G. Electronic Sign for Church: City denied church's application for variance to rebuild existing sign, increasing size (by ten times the normal rule) and height (four times), and adding electronically changeable copy. Church challenged the denial on the basis of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Held: The Church has not been denied any use of a sign as a means of evangelism, but only the non-conforming use of a sign that cannot be as large and eye-catching as the church might desire. Denial of its variance burdens the Church's religious exercise, but not enough to to make any use of a sign for uplift and recruitment "effectively impracticable" or to compel the congregants to "violate [their religious] beliefs." The standard for an RLUIPA violation is not met; there was no error in denying the variance. *Trinity Assembly of God v. People's Counsel for Baltimore County*, 178 MdApp 232, 941 A2d 560 (MD App No 2840, Feb 6, 2008).

VI. BANS OR SPECIAL RULES ON PARTICULAR PHYSICAL TYPES

A. Danger of content based exceptions: see *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006)

B. The Exception for Time & Temperature

1. Judicial Split. Courts are widely split on whether a general ban on moving images, with an exception for time and temperature (t&t) indicators, is constitutional. *Desert Outdoor v. Oakland*, 506 F.3d 798, 805 (9th Cir. 2007) ("Severing the exception for time and temperature displays did not cause § 1501 to restrict more speech. Since noncommercial speech is not covered under § 1501 at all, eliminating the exception had no actual impact on the legality of time and temperature displays under that ordinance"), *Chapin Furniture v. Town of Chapin*, 252 Fed.Appx. 566 (7th Cir. 2007) (revised ordinance removed exception for t&t; case moot), *La Tour v. Fayetteville, Ark.* (8th Cir. 2006) (ban on flashing, blinking and animated signs was valid, even though city admitted the rule was not enforced against time and temp indicators), *Solantic v. Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) (t&t was among many content based exceptions; entire ordinance invalid), *Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004) (court severed t&t and other exceptions, scattered throughout the code, to save it), *Rutherford Management v. Columbus* (167 N.C.App. 806, 606 S.E.2d 459, 2005) (apparently approving an exception for "time, temperature and other public information"), *Williams v. Denver*, 622

P.2d 542 (Colo. 1981) (t&t were excluded from definition of sign; ordinance valid); *Flying J Travel Plaza v. Commonwealth of Kentucky Transportation Cabinet*, 928 S.W.2d 344 (Kentucky 1996) (exception for t&t: "the state has chosen to allow some noncommercial messages to be displayed, and it must allow all noncommercial messages within the time frame to be displayed"); *Bonita Media v. Collier County (FL) Code Enforcement*, 2008 WL 423449 (MD FL No 2:07-cv-411, (Feb 13, 2008) (The charging sections ban moveable image signs but make exception for time and temperature and barber poles; signco is likely to prevail; the county is preliminarily enjoined from enforcing these provisions

2. Other Physical Types:

   a. Signs on boats. *Ex parte Walter*, 829 So.2d 186 (AL 2002)

   b. Signs towed behind aircraft. Compare *Center for Bio-Ethical Reform v. Honolulu,* 455 F.3d 910 (9th Cir 2006) (no FAA pre-emption) with *Banner Advertising v. People of Boulder*, 868 P.2d 1077 (CO 1994) (complete FAA pre-emption)

   c. Portable signs. *Lindsay v. San Antonio*, 821 F.2d 1103 (5th Cir. 1987); *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006)

   d. Pole signs. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006)

   e. Neon. *Wallace v. Brown County Area Plan Com'n,* 689 N.E.2d 491 (IN App 1998) (neon ban - valid); *State v. Calabria, Gillette Liquors*, 301 N.J.Super. 96, 693 A.2d 949 (NJ Sup. 1997) (neon ban - invalid)

   f. Size and Height Rules. *Prime Media v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005), *Valley Outdoor v. County of Riverside*, 337 F.3d 1111 (9th Cir. 2003), cert. denied sub nom. *Regency Outdoor v. County of Riverside*, 540 U.S. 1111 (2004)

   g. Sign trucks: *Showing Animals Respect and Kindness v. West Hollywood*, 166 Cal.App.4th 815 (Cal.App., 9/9/2008), *Railway Express Agency v. New York City*, 336 U.S. 106 (1949) [commercial speech case decided before that class was granted First Amendment protection], *Fifth Avenue Coach v. New York City*, 221 U.S. 467 (1911)

VII. PREVENTIVE LAW

A. If a constitutional challenge is looming, move quickly. Far too many sign ordinances contain unconstitutional provisions. Avoid the severance argument if possible.

B. Review the sign ordinance. Think like a plaintiff's lawyer. Can you find an example of favoring commercial speech? Favoring one kind of non-commercial message over another? No time limit for decision on sign permits? Unbridled discretion? Does the on-site / off-site distinction apply to non-commercial speech? See *Southlake Property Associates v. Morrow*, 112 F.3d 1114 (11th Cir. 1997).

C. Review the nightmare cases: *North Olmsted Chamber v. City of North Olmsted*, 86 FS2d 755 (ND OH 2000), *Desert Outdoor v. Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), *Café Erotica v. St. Johns County*, 360 F.3d 1274 (11th Cir. 2004), *Solantic v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), *Ballen v. Redmond*, 466 F.3d 736 (9th Cir. 2006).

D. Message Substitution. Any sign ordinance which makes a distinction between commercial and non-commercial speech, or between on-site and off-site messages, should contain a message substitution provision. See: *Outdoor Systems v. Mesa*, 997 F.2d 604 (9th Cir. 1993), *Get Outdoors v. San Diego*, 506 F.3d 886 (9th Cir. 2007), *Get Outdoors v. City of Chula Vista*, 407 F.S.2d 1172 (SD CA 2005) (quoting the author's typical text); *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2006). Note: in Oregon, the on-site / off-site and commercial / non-commercial distinctions both violate the state constitution.

VIII. KEEP CURRENT

The author publishes The Sign Regulation / Public Forum Bulletin, a national newsletter that summarizes, in digest style, the latest court rulings. A few past issues are on the website. It is free, usually two issues per year, and distributed only by email. Subscriber email addresses are not shared with any other group. Register at: www.signlaw.com.

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No.

IN THE

Supreme Court of the United States

METRO LIGHTS, L.L.C.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 31, 2009

QUESTIONS PRESENTED

1. Whether this Court should resolve a circuit conflict on the precedential effect, if any, and meaning of its fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), with respect to First Amendment constraints on governmental regulation of commercial signs.

2. Whether Los Angeles' selective and underinclusive ban on commercial signs violates the First Amendment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Metro Lights, L.L.C. states that substantially all of its assets, including this lawsuit, were purchased by a privately held Delaware limited liability corporation, Metro Fuel, L.L.C., in August 2006. No publicly held corporation owns 10% or more of petitioner's stock.

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INTRODUCTION

There are few areas of this Court's First Amendment jurisprudence in greater need of clarification than the analysis applicable to governmental regulation of commercial speech in general, and governmental regulation of commercial signs in particular. When this Court last visited this area of the law almost thirty years ago in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), it was unable to produce a majority opinion. Since then, the Court's commercial speech jurisprudence has evolved significantly, and subsequent cases have firmly embraced the tenet that underinclusive regulations violate the First Amendment because they undercut the justification for restricting speech in the first place.

In this case, however, the Ninth Circuit insisted that *Metromedia* establishes binding law in the specific context of commercial sign regulations, and interpreted that case effectively to immunize selective bans of commercial signs from underinclusivity analysis. As the Ninth Circuit delicately put it, while this Court's subsequent cases "may seem to be in some tension" with *Metromedia*, "we are bound to follow the Supreme Court precedent most directly on point." Accordingly, the Ninth Circuit held that *Metromedia* foreclosed the First Amendment challenge to the commercial sign regulations at issue here as a matter of law.

This petition gives this Court an opportunity to clarify its commercial speech jurisprudence as it relates to the recurring and much-litigated issue of governmental regulation of commercial signs. The root of the problem lies in *Metromedia* itself. For

almost thirty years, the question of how to interpret and apply that splintered decision has bedeviled the lower courts, and the problem has only grown more acute as this Court's commercial speech jurisprudence has continued to evolve. The federal courts of appeals are in open and notorious disagreement over what, if anything, *Metromedia* means, with some courts holding that *Metromedia* establishes no binding law at all, and other courts (like the court below) holding that *Metromedia* not only establishes binding law but gives governments virtual *carte blanche* to restrict or ban commercial signs.

By declaring that its hands were tied by *Metromedia*, and that only this Court could revisit that decision, the Ninth Circuit invited this Court to do just that. Petitioner now respectfully asks this Court to accept that invitation, to dispel the confusion into which *Metromedia* has plunged the lower courts, governmental regulators, and regulated entities, and to reverse the Ninth Circuit's conclusion that the selective and underinclusive ban on commercial signs at issue here passes First Amendment muster.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 551 F.3d 898 and reprinted in the Appendix ("App.") at 1-34a. The district court's decision is reported at 488 F. Supp. 2d 927 and reprinted at App. 37-90a.

JURISDICTION

The Ninth Circuit rendered its decision on January 6, 2009, App. 1a, and denied a timely petition for panel rehearing and rehearing *en banc*

on April 16, 2009, App. 35a. On June 29, 2009, Justice Kennedy granted petitioner's application to extend the time within which to petition for certiorari until August 31, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT MUNICIPAL CODE PROVISIONS[1]

Los Angeles Municipal Code § 91.6205.11 (now codified as Los Angeles Municipal Code § 14.4.4(B)(11)) provides in pertinent part:

> **Prohibited Signs.** Signs are prohibited if they: ... [a]re off-site signs, ... except when off-site signs are specifically permitted ....

Los Angeles Municipal Code § 91.6203 (now codified as Los Angeles Municipal Code § 14.4.2) defines an "Off-Site Sign" as:

> A sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located.

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[1] While this case was pending in the Ninth Circuit, the Los Angeles City Council moved the Sign Ordinance from one part of the Municipal Code to another. This change had no substantive effect on the provisions at issue here. For ease of reference, this petition continues to refer to those provisions by the Municipal Code section numbers used by both the Ninth Circuit and the district court.

Los Angeles Municipal Code § 91.101.4 provides in pertinent part:

> The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction, except work located primarily in a public way ....

Los Angeles Municipal Code § 91.101.5 provides in pertinent part:

> The provisions of this Code shall not apply to any of the following: ...
>
> 8. Work in a public way ....

STATEMENT OF THE CASE

A. Factual Background

Petitioner Metro Lights, L.L.C. is a small advertising company that operates in several cities around the country, including respondent City of Los Angeles, California. App. 7a, 50-51a. Metro Lights posts commercial signs, typically four feet by six feet in size, on private property leased for that purpose. App. 50-51a.

In 2001, Los Angeles entered into a 20-year contract with a major advertising conglomerate, CBS (then known as Viacom Decaux LLC). App. 5a, 43-45a. Under that contract, the City gave CBS the exclusive right to post commercial signs on city-owned transit shelters along city streets (known as "Street Furniture") in exchange for payments amounting to at least $150 million. App. 45a. The commercial signs posted by CBS on the City's Street Furniture are similar in size and content to the commercial signs posted by Metro Lights. App. 52a,

69a, 78-79a (citing photographs reprinted at App. 91-92a).

Several months after entering into that lucrative agreement, Los Angeles amended its municipal Sign Ordinance to substantially restrict any other commercial signs within city limits. As amended, the Ordinance generally prohibits any new offsite commercial signs in the City. *See* L.A. Mun. Code § 91.6205.11 (now codified as L.A. Mun. Code § 14.4.4(B)(11)) (prohibiting "off-site signs, ... except when off-site signs are specifically permitted ...."). The Ordinance defines an "off-site sign" as "[a] sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located." L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2)). Although the Ordinance purports to be based on traffic safety and aesthetic concerns, *see* L.A. Mun. Code § 91.6201.2 (now codified as L.A. Mun. Code § 14.4.1), it creates two substantial exemptions that have no conceivable relationship to either traffic safety or aesthetics. First, the Ordinance exempts "work located primarily in a public way," which includes Street Furniture. *See* L.A. Mun. Code §§ 91.101.4, 91.101.5. Second, the Ordinance by its terms exempts all non-commercial signs. *See* L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2).

The amended Ordinance essentially shut Metro Lights out of Los Angeles. Indeed, beginning around December 2003, the City issued Metro Lights

numerous citations for violating the Ordinance. App. 7a, 39a, 51a.

B. Procedural History

In February 2004, Metro Lights filed this lawsuit against Los Angeles under 42 U.S.C. § 1983, asserting that the Ordinance violated its First Amendment rights and seeking declaratory and injunctive relief and damages. App. 7a, 38-42a. While the lawsuit was pending, Metro Lights sought a preliminary injunction against enforcement of the Ordinance, which the district court (Feess, J., C.D. Cal.) granted. App. 7a.

After limited discovery, the parties filed cross-motions for summary judgment. The district court, as relevant here, granted Metro Lights' motion. In a lengthy opinion, the court analyzed the Ordinance under the legal standard governing regulations on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). App. 37-90a. The court concluded that the Ordinance was far too underinclusive to "directly advance" the City's asserted interests in traffic safety and aesthetics in a narrowly tailored way. App. 68-85a. "The City cannot, on the one hand, preclude [Metro Lights] from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles." App. 76a. The court noted that the City had "many alternatives" that were more speech-friendly to accomplish its asserted objectives, including "[m]ost obviously, ... impos[ing] the same requirements on other private

advertisers as it did on [CBS]," *i.e.*, "the City could require that any advertisements meet certain specifications—including size and location—to promote the City's goals with regard to traffic safety and aesthetics." App. 84a.

The district court distinguished *Metromedia* as establishing only that an exemption for onsite commercial signs (*i.e.*, signs related to goods or services provided at the premises where the signs are located) did not render a general ban on offsite commercial signs unconstitutionally underinclusive. App. 82-84a. The Ordinance at issue here, the court explained, "goes well beyond the scheme addressed in *Metromedia*," because the Ordinance "purports to ban all off-site signs on private property," but through the exemption for Street Furniture "not only permits but appears to encourage their display on public property throughout Los Angeles." App. 83a (emphasis added); *see also id.* (noting that "the City's Sign Ordinance purports to, but does not, accomplish a complete ban and is instead pierced with a colossal exception"). Because the underinclusivity analysis in *Metromedia* was limited to the exemption for onsite commercial signs, the court declared, "*Metromedia* ... provides no support for the City's position in this case." App. 84a.

Los Angeles appealed, and the Ninth Circuit not only reversed the grant of summary judgment in Metro Lights' favor, but directed the entry of judgment in the City's favor as a matter of law. *See* App. 1-34a. According to the Ninth Circuit, *Metromedia* squarely foreclosed Metro Lights' First Amendment challenge to the Los Angeles Ordinance. *See* App. 16-33a. Unlike the district court, the Ninth

Circuit did not read *Metromedia* as limited to the question whether an exemption for onsite commercial signs renders a ban on offsite commercial signs unconstitutionally underinclusive. Rather, the Ninth Circuit read *Metromedia* far more broadly as effectively rejecting *any* underinclusivity challenge to a ban on offsite commercial signs. App. 18-27a.

In particular, the Ninth Circuit declared, "[t]he Court in *Metromedia* squarely faced an underinclusivity challenge to San Diego's law and rejected it." App. 24a; *see also* App. 20a ("*Metromedia* explicitly addressed an underinclusivity challenge."). While the panel acknowledged that "such challenge focused on the exclusion of onsite signs," the panel emphasized that "the [*Metromedia*] Court did note [an] exception for 'other specified signs' at the start of its substantive discussion," and "[m]ore importantly, nothing in its analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of a problem, binds its holding inextricably to the particular onsite-offsite distinction." App. 24a; *see also id.* at 25-26a ("[M]ost importantly, *Metromedia*'s ... emphasis on deference to legislative judgment, resounds quite clearly in this case. ... The *Metromedia* Court declined to overrule a legislative judgment [that a selective ban on commercial signs is effective] and so do we.").

By holding that *Metromedia* "compels" the conclusion that the Los Angeles Sign Ordinance passes First Amendment muster, App. 33a, the Ninth Circuit dismissed Metro Lights' case-specific underinclusivity arguments. Similarly, the court dismissed any efforts to square *Metromedia* with this

Court's subsequent caselaw. According to the Ninth Circuit, any "tension" or "inconsistency" between *Metromedia* and such subsequent commercial speech cases as *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), is immaterial. App. 19a, 27a. *Metromedia* "controls the outcome" here, the Ninth Circuit declared, App. 27a, because this case, like *Metromedia*, involves commercial signs. "[W]e are bound to follow the Supreme Court precedent most directly on point, ... 'leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Id.* (citing and quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); brackets omitted).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve A Circuit Conflict On The Precedential Effect, If Any, And Meaning Of *Metromedia* With Respect To First Amendment Constraints On Governmental Regulation Of Commercial Signs.

This Court should grant certiorari to resolve pervasive uncertainty over the meaning and scope of its splintered decision in *Metromedia*, and to clarify that governmental regulation of commercial signs, like governmental regulation of other forms of commercial speech, is subject to underinclusivity analysis under the First Amendment. As the district court noted, the Sign Ordinance at issue here is subject to a "colossal exception" for commercial signs from which the City itself stands to profit, App. 83a (referring to L.A. Mun. Code § 91.101.5)—not to

mention an equally sweeping exception for noncommercial signs, *see* L.A. Mun. Code § 91.6203. By holding that *Metromedia* forecloses Metro Lights' First Amendment challenge as a matter of law, the Ninth Circuit erred, and deepened a festering circuit conflict over the binding effect, if any, and meaning of that case.

As a threshold matter, it is important to underscore a point not disputed in this litigation, because it has been settled for at least a generation: commercial signs, like other forms of advertising, are a form of speech protected by the First Amendment. While some early precedents of this Court suggested that commercial speech is not entitled to First Amendment protection, *see, e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), this Court decisively repudiated that view in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-70 (1976). Since *Central Hudson*, this Court has applied a balancing test to analyze the constitutionality of governmental restrictions on commercial speech, considering [1] whether the speech is "lawful" and "not ... misleading," [2] whether the asserted governmental interest is "substantial," [3] whether the regulation "directly advances the governmental interest asserted," and [4] "whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

In *Metromedia*, this Court addressed a First Amendment challenge to a San Diego ordinance that generally prohibited both commercial and noncommercial signs throughout the city, but exempted onsite commercial signs. *See* 453 U.S. at 493-94 & nn.1, 2. This Court struck down the entire

ordinance as "unconstitutional on its face" under the First Amendment, *see id.* at 521 & n.26, but was unable to produce a majority opinion. Rather, *Metromedia* spawned no fewer than five separate opinions. A four-Justice plurality (White, J., joined by Stewart, Marshall, and Powell, JJ.) concluded that the ordinance was invalid as applied to noncommercial signs, but valid as applied to offsite commercial signs despite the exemption for onsite commercial signs. *See id.* at 498-521. Justice Brennan, joined by Justice Blackmun, concurred in the judgment invalidating the ordinance, but concluded that the ordinance was invalid as applied to both noncommercial and commercial signs. *See id.* at 521-40. Justice Stevens, Chief Justice Burger, and then-Justice Rehnquist each separately dissented on the ground that the ordinance was valid as applied to both commercial and noncommercial signs. *See id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting). Then-Justice Rehnquist lamented in his dissent that "[i]n a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (dissenting opinion).

Suffice it to say that this lament proved prophetic, and the lower courts have struggled mightily to determine what lesson, if any, to derive from *Metromedia*. The Third, Sixth, and Eleventh Circuits have responded to this uncertainty by holding that *Metromedia* establishes no binding law at all, because it did not yield a majority opinion or

any ascertainable legal principle. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261 (11th Cir. 2005) ("Because the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application."); *id.* at 1261 n.10 ("[T]here may be situations where [a fractured decision] does not yield any rule to be treated as binding in future cases. *Metromedia* presents just such a case.") (citations omitted); *Rappa v. New Castle County*, 18 F.3d 1043, 1054-61 (3d Cir. 1994) (holding that "*Metromedia* is ... a case" in which "no particular standard constitutes the law of the land, because no single approach can be said to the support of a majority of the Court"); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991) (noting that "[t]he [*Metromedia*] Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech," and declining to interpret *Metromedia* as establishing binding law with respect to restrictions on commercial speech), *aff'd*, 507 U.S. 410. Indeed, the Third Circuit in *Rappa* proceeded to craft its own First Amendment analysis for sign regulations, starting from first principles—including consideration of underinclusivity. *See* 18 F.3d at 1065; *see also id.* at 1080 (Alito, J., concurring) ("Until the Supreme Court provides further guidance concerning the constitutionality of sign laws, I endorse the test set out in the court's opinion.") (citations omitted).

In sharp contrast, however, other lower courts—including the Fourth, Eighth, Ninth, and Tenth Circuits—have held that *Metromedia* establishes

binding law, and interpret that decision to give governments virtual *carte blanche* to restrict or ban offsite commercial billboards and signs. *See, e.g.*, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) ("*Metromedia* allows a city to completely ban off-site commercial billboards."); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (relying on *Metromedia* to uphold "restrictions on off premises commercial signs"); *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) ("[W]e hold that *Metromedia* continues to control the regulation of billboards."); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610-11 (9th Cir. 1993) ("*Metromedia* remains the leading decision in the field, holding that a city, consistent with the *Central Hudson* test, may ban all offsite commercial signs."); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990) (applying *Metromedia* to reject underinclusivity challenge to commercial billboard regulations); *National Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (holding, based on *Metromedia*, that a city "may prohibit [commercial] billboards entirely in the interests of traffic safety and aesthetics"); *Georgia Outdoor Adver., Inc. v. City of Waynesville*, 833 F.2d 43, 45 (4th Cir. 1987) (relying on *Metromedia* to reject a challenge to a complete ban on commercial billboards); *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court ... determined in *Metromedia* ... that a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons.").

The upshot of these dueling lines of cases is that the federal courts of appeals are divided on the threshold question whether *Metromedia* establishes any binding law in the first place. This situation leaves governmental regulators and regulated entities (many of which, like petitioner, operate in multiple circuits) in a fog. The lower courts should not be condemned in perpetuity to trying to figure out what binding law, if any, the fractured *Metromedia* decision establishes. *Compare Solantic*, 410 F.3d at 1261 & n.10 (analyzing *Metromedia* under the analysis set forth in *Marks v. United States*, 430 U.S. 188, 193 (1977), and concluding that it establishes no binding law); *Rappa*, 18 F.3d at 1056-61 (same); *Discovery Network*, 946 F.2d at 470 n.9 (same) *with Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 n.14 (7th Cir. 1999) (concluding that *Metromedia* establishes binding law because Justice Stevens, although dissenting from the judgment, joined the discussion regarding commercial signs in the plurality opinion); *Outdoor Sys.*, 997 F.2d at 610-12 (same); *Ackerly*, 108 F.3d at 1099 & n.5 (concluding that *Metromedia* establishes binding law because "seven Justices agreed" that the challenged ordinance was not unconstitutionally underinclusive with respect to commercial signs); App. 16-17a n.9 (asserting that "[a] majority of the [*Metromedia*] Court *upheld* the constitutionality of the ban to the extent that it only prohibited commercial advertising") (emphasis added).

With all respect, those courts—like the Ninth Circuit—that have concluded that *Metromedia* establishes binding law regarding commercial signs have over-read that case. When this Court produces a fractured decision, the binding law, if any, is set

forth in "the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment.*" *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (emphasis added) (citing *Marks*, 430 U.S. at 193); *see also Marks*, 430 U.S. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.") (emphasis added; internal quotation omitted). Because, as noted above, the judgment in *Metromedia* was to invalidate the challenged ordinance in its entirety, the votes of the dissenting Justices (who would have upheld the ordinance in its entirety) do not establish binding law. That is why, although Justice Stevens joined the plurality's discussion of certain issues, *see* 453 U.S. at 541 (Stevens, J., dissenting in part), there is no opinion for the Court in *Metromedia* either in whole or in part.

In short, under *O'Dell* and *Marks*, the views of the dissenting Justices in *Metromedia* do not give that fractured decision any binding force. That is not to say, of course, that the views of the dissenting Justices in *Metromedia* necessarily lack persuasive force. To the contrary, this Court has looked to the views of the *Metromedia* dissenters in subsequent cases. *See, e.g.*, *Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). But those references do not magically imbue the views of the dissenting Justices in *Metromedia* with binding force. To the contrary, the *Ladue* Court confirmed that "the Court's *judgment* in *Metromedia*,

supported by two different lines of reasoning [*i.e.*, the plurality opinion and the opinion of Justice Brennan concurring in the judgment], invalidated the San Diego ordinance in its entirety." 512 U.S. at 49 (emphasis added). At the very least, there is no good reason to allow the circuit conflict on *Metromedia*'s binding effect on the lower courts, if any, to continue to fester.

And this case presents an especially good vehicle for addressing that issue, because the Ninth Circuit not only attributed binding force to the views of the *Metromedia* dissenters, but then proceeded to attribute a remarkably (and untenably) aggressive "holding" to the *Metromedia* "majority." App. 16-17a n.9, 17a, 18a, 21a, 22a, 24a. According to the Ninth Circuit, *Metromedia* rejected not only the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted onsite commercial signs, but also the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted twelve other categories of signs (including signs at public transit stops). App. 17a, 20-22a.

The Ninth Circuit acknowledged, with some understatement, that the underinclusivity challenge in *Metromedia* "*focused* on the exclusion of onsite signs," but insisted that "the Court did note the exception for 'other unspecified signs' at the start of its substantive discussion." App. 24a (emphasis added; quoting *Metromedia*, 453 U.S. at 511 (plurality opinion)). "More importantly," the Ninth Circuit then asserted, "nothing in [*Metromedia*'s] analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of

a problem, binds its holding inextricably to the particular onsite-offsite distinction." *Id.* Accordingly, the Ninth Circuit held that *Metromedia* foreclosed Metro Lights' underinclusivity challenge to Los Angeles' Sign Ordinance *as a matter of law*. App. 20-33a; *see also Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003) (holding that, under *Metromedia*, "it should not matter that [a restriction on commercial signs] is underinclusive").

That sweeping interpretation of *Metromedia* is untenable based not only on *Metromedia* itself but also on this Court's subsequent decisions. While it is certainly true that the San Diego ordinance at issue in *Metromedia* included several exemptions beyond the one for onsite commercial signs, *see* 453 U.S. at 495 n.3 (plurality opinion), the plurality opinion never addressed those additional exemptions in assessing whether the ordinance was unconstitutionally underinclusive. To the contrary, the plurality focused its underinclusivity analysis *solely* on the exemption for onsite commercial signs. *See id.* at 510-12 (plurality opinion). Given that the *Metromedia* plurality never addressed the underinclusivity implications of the other exemptions, it cannot be deemed to have resolved the matter one way or another. *See, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (same).

And if there were any room for doubt on this score, it should have been dispelled by this Court's subsequent decision in *Discovery Network*. The Court there specifically rejected the argument that *Metromedia* foreclosed underinclusivity challenges in the context of commercial speech. *See Discovery Network*, 507 U.S. at 425 n.20. Rather, the Court explained, a majority of the Justices in *Metromedia* had simply rejected the argument that a general ban on commercial signs was unconstitutionally underinclusive because it exempted onsite commercial signs. *See id.* Nothing in *Metromedia*, the *Discovery Network* Court emphasized, forecloses any and all *other* underinclusivity challenges to restrictions on commercial speech. *See id.* Thus, the *Discovery Network* Court itself proceeded to invalidate a restriction on commercial speech as underinclusive—there, a ban limited to commercial (as opposed to non-commercial) newsracks. *See id.* at 424-31; *see also Greater New Orleans*, 527 U.S. at 190-95 (invalidating a restriction on commercial speech as underinclusive).

Indeed, *Discovery Network* raised the possibility that the *Metromedia* plurality had erred by applying the *Central Hudson* analysis in the first place to a restriction on commercial speech that is not justified by reference to the commercial nature of the speech. "[I]f commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge

regulations on commercial speech." 507 U.S. at 416 n.11. In other words, commercial speech is subject to greater governmental regulation than non-commercial speech only insofar as such regulation relates to the commercial nature of the speech, and not when such regulation has nothing to do with the commercial nature of the speech (*e.g.*, regulations based on safety or aesthetics). *See id.*; *see also id.* at 435-38 (Blackmun, J., concurring); *Discovery Network*, 946 F.2d at 468-72 & n.9, *aff'd*, 507 U.S. 410. While this Court declined to resolve that issue in *Discovery Network*, since the regulations at issue there did not pass First Amendment muster even under *Central Hudson*, *see* 507 U.S. at 416 n.11, *Discovery Network* obviously casts an even greater pall over *Metromedia*'s precedential value.

As noted above, the Ninth Circuit did not even try to deny the "tension" or "inconsistency" between its interpretation of *Metromedia* and this Court's subsequent commercial speech precedents, including *Discovery Network* and *Greater New Orleans*. App. 19a, 27a; *see also Outdoor Sys.*, 997 F.2d at 610 (interpreting *Metromedia* to foreclose an underinclusivity challenge but noting that "we are somewhat uneasy" in light of *Discovery Network*). Instead, the Ninth Circuit simply declared below that its hands were tied by *Metromedia*, which it characterized as "the Supreme Court precedent most directly on point" because it also involved commercial signs. App. 27a. But nothing in *Metromedia* (or logic) suggests that an entirely different First Amendment analysis applies to governmental

regulation of commercial signs than to governmental regulation of other media of commercial speech.[2]

Thus, even assuming that *Metromedia* establishes any binding law at all, it certainly does not establish the proposition that restrictions on commercial signs are immune from underinclusivity analysis under the First Amendment, or that courts must (as the Ninth Circuit declared below) "exude[] deference," App. 24a, to such restrictions. *See, e.g.*, *Lavey*, 171 F.3d at 1114-16 & nn.14, 16 (holding that *Metromedia* established binding law, but interpreting *Metromedia* to require a "fit" between a regulation on commercial signs and a city's safety and aesthetic goals, and thereby entertaining an underinclusivity challenge); *Denver*, 912 F.2d at 408-10 (same). Certainly a restriction on commercial signs should not be subject to judicial deference in Los Angeles, California, *see* App. 24-29a, but not in

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[2] To be sure, the *Metromedia* plurality observed that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method," and that "[w]e deal here with the law of billboards." 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). But that observation simply reminds courts to be sensitive to the differences among media in applying generally applicable First Amendment principles; it does not direct courts to apply an entirely different analytical framework to each and every medium. Indeed, the *Metromedia* plurality itself analyzed the sign restrictions at issue there under the very same *Central Hudson* test that this Court later applied in both *Discovery Network* and *Greater New Orleans*. *Compare Metromedia*, 453 U.S. at 507-08 (plurality opinion) *with Discovery Network*, 507 U.S. at 416 & n.11; *Greater New Orleans*, 527 U.S. at 183-84.

Glendale, Ohio, *see, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774-78 (6th Cir. 2007) (*en banc*).

By holding that *Metromedia* compels the entry of judgment in Los Angeles' favor here as a matter of law, the Ninth Circuit inflated that "fractured, plurality opinion of dubious precedential value," *Tanner Adver. Group, L.L.C. v. Fayette County, Ga.*, 451 F.3d 777, 794 (11th Cir. 2006), beyond all bounds of principle and precedent. Certainly, this Court's other commercial speech cases in the years since *Metromedia* cannot be said to have "exude[d] deference" to governmental restrictions on commercial speech—to the contrary, those decisions have not hesitated to invalidate restrictions lacking the requisite "fit" to the governmental interests at stake. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371-77 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-67 (2001); *Greater New Orleans*, 527 U.S. at 188-95; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995); *Discovery Network*, 507 U.S. at 424-30.

Indeed, it is hard to see how a court could ever perform a meaningful underinclusivity analysis while "exud[ing] deference," App. 24a, to a governmental restriction on speech. The whole point of an underinclusivity challenge is to test the validity of the lines drawn by a speech regulator. To test those lines while at the same time "exud[ing] deference" to those very same lines is a contradiction in terms. *See* App. 19a (acknowledging that "the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network and Greater New Orleans*").

In sum, the decision below deepened a circuit conflict on whether *Metromedia* establishes any binding law at all, gave that decision an extraordinarily aggressive reading that places it on a collision course with this Court's other commercial speech precedents, and then concluded by declaring that only this Court can clean up the mess. App. 27a ("*Metromedia* ... controls the outcome" of this case, and "we are bound to follow the Supreme Court precedent most directly on point.") (citing *Rodriguez de Quijas*, 490 U.S. at 484). If ever there were a red flag that the time has come for this Court to revisit one of its precedents, this is it.

This Court can and should now revisit *Metromedia* to resolve the confusion that its splintered decision in that case has spawned over the past generation. *See, e.g.*, *Rappa*, 18 F.3d at 1061 n.28 (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 2006 B.Y.U. L. Rev. 473, 475 (2006) (noting that *Metromedia* "produced no majority opinion and consisted of five separate opinions that each suggested different lines of reasoning," thereby leaving "courts and governments seeking a clear rule to apply to billboard regulations [to] face a difficult constitutional quandary"); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 Mich. L. Rev. 1877, 1878 (2005) (noting that "[t]he jurisprudence of visual clutter is in a state of disarray," and that "[t]he synergy of

Metromedia and *Discovery Network* yields a dangerous path for any government actor seeking to reduce, but not completely eliminate, outdoor signs").

II. Los Angeles' Selective And Underinclusive Ban On Commercial Signs Violates The First Amendment.

Had the Ninth Circuit actually grappled with Metro Lights' First Amendment challenge to the Los Angeles Sign Ordinance at issue here, rather than holding that *Metromedia* forecloses that challenge as a matter of law, it would have been constrained to affirm the district court's judgment sustaining that challenge. As noted above, the Ordinance purports to be based on traffic safety and aesthetic concerns. *See* L.A. Mun. Code § 91.6201.2. But the Ordinance carves out a "colossal exception" that undercuts its constitutionality, App. 83a: it does not apply to the Street Furniture from which Los Angeles derives substantial revenues, *see* L.A. Mun. Code § 91.101.5, or for that matter to noncommercial signs, *see* L.A. Mun. Code § 91.6203.

Accordingly, the district court had little difficulty holding that the Ordinance violates the First Amendment. App. 68-85a. The Street Furniture program, as the court explained, undermines Los Angeles' asserted interest in traffic safety "since many of the Street Furniture advertisements, which are placed at street level, are designed precisely to attract the attention of all who pass by, including those driving automobiles whose attention would be better directed toward the operation of their motor vehicles." App. 69a; *see also id.* ("[T]he Street Furniture Program cannot be squared with the Sign Ordinance's stated purpose of promoting traffic

safety."). Thus, the court concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in traffic safety," App. 76a, much less in a narrowly tailored way, App. 82-84a.

Similarly, the district court held that the Street Furniture program undermines the City's asserted interest in aesthetics because "[t]he Sign Ordinance purports to protect the visual environment by eliminating all off-site signs from the City's public rights of way, while the Street Furniture Program simultaneously authorizes thousands of such signs to be posted throughout the City by [CBS]." App. 78a; *see also* App. 79a. ("[W]hat the City, through its Sign Ordinance, takes away from most commercial enterprises (for the stated purpose of protecting the visual environment), the City grants back to a single advertiser under the Street Furniture Program thereby perpetuating, rather than eliminating, off-site signage throughout the City."). Indeed, Metro Lights "present[ed] graphic evidence of this point in a photograph which compares a Metro Lights sign with a City bus shelter sign with exactly the same dimensions and the same advertising copy." App. 78-79a (citing photographs reprinted at App. 91-92a). "Though the signs themselves are indistinguishable, one sign falls within the ban while the other does not." App. 79a. The court thus concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in protecting the City's visual environment," App. 80a, much less in a narrowly tailored way, App. 82-84a.

At the end of the day, as the district court recognized, "'the operation of ... [the] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'" App. 72a (quoting *Greater New Orleans*, 527 U.S. at 190). "[T]he City's agreement with [CBS] tends to negate the very benefits—traffic safety and protection of the visual environment—that the Ordinance was designed to promote." App. 41a; *see also id.* (holding that the City cannot "use *Central Hudson* as a shield to defeat constitutional challenges to its Sign Ordinance while collecting revenue from a different media company engaged in conduct that appears, on its face, to violate the express terms and purposes of the Ordinance").

Notwithstanding the Ninth Circuit's suggestion to the contrary, the application of an underinclusivity analysis to billboard and sign regulations would in no way undermine the "deference" to which local governments are due on matters of traffic safety and aesthetics. Local governments are free to define their own safety and aesthetic interests. When they invoke those interests to justify a restriction on commercial speech, however, they must at a minimum be able to show that the restriction "directly advances" those interests, and "is not more extensive than is necessary" to serve those interests. *Central Hudson*, 447 U.S. at 566. Restrictions on speech that merely have "some impact" on the problem the government seeks to address do not satisfy this standard, *Greater New Orleans*, 527 U.S. at 189, especially where (as here) the government itself provides "simultaneous encouragement," *id.*, to those very problems.

In short, where a selective ban on commercial speech is grossly underinclusive, there is reason to be suspicious of the ban—especially where, as here, the government itself stands to profit financially by creating a valuable monopoly on commercial speech. The government cannot restrict speech in order to raise money, or abridge the First Amendment rights of some to enhance the value of others. Thus, while a city can certainly impose neutral and reasonable time, place, and manner restrictions on commercial signs, like other forms of speech (and indeed Los Angeles itself imposed just such restrictions until 2002), it cannot impose a selective and underinclusive ban on commercial speech. Indeed, as *Discovery Network* suggests, it is far from clear that restrictions on commercial speech are entitled to any greater deference than restrictions on noncommercial speech where, as here, they are justified not by reference to the commercial nature of the speech but instead by reference to other governmental interests like traffic safety and aesthetics. *See* 507 U.S. at 416 n.11.

"Deference," in other words, is not a code word for abdicating the judicial role in protecting free speech. *See, e.g.*, *Pagan*, 492 F.3d at 774-78 (rejecting city's argument, based on *Metromedia*, that court should uphold restriction on commercial speech by "defer[ring] to legislative judgments on matters of traffic safety and aesthetics"). Again, this point is hardly novel: it is the key lesson of such cases as *Discovery Network* 507 U.S. at 424-28, and *Greater New Orleans*, 527 U.S. at 188-95. The Ninth Circuit erred by refusing to apply that lesson here, and instead holding that *Metromedia* effectively carves out a "sign exception" to the First Amendment.

Neither that holding nor the Sign Ordinance at issue here should be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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