RECENT DEVELOPMENTS IN SIGN REGULATION:

DETERRING AND DEFENDING FIRST AMENDMENT ATTACKS ON LOCAL SIGN CODES

Robin M. Wolpert
Greene Espel, P.L.L.P.
200 South Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830
rwolpert@gr-espel.com

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I. INTRODUCTION: THE NEW GENERATION OF LAWSUITS ATTACKING LOCAL SIGN REGULATIONS

A. The Dual Nature of Signs

1. Signs are physical structures used for communication.

2. The communicative features of signs implicate the First Amendment.

3. The physical characteristics of signs implicate the police powers of the government.

   a. Signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). Signs "pose distinctive problems" that have long been subjected to the "police powers" of states and cities. *Id.* "It thus is 'common ground that governments may regulate the physical characteristics' of signs and billboards in much the same way that 'they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.'" *Prime Media, Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814, 818 (6th Cir. 2005) (quotation and citation omitted); *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984), *Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

4. Reconciling the government's interest in regulating the physical and noncommunicative aspects of signs with the rights of free expression is the central issue in the field of sign regulation for city planners, attorneys, and courts.

B. The Landmark Decision *Metromedia, Inc. v. City of San Diego* and the "Tower of Babel"

1. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the U.S. Supreme Court addressed the constitutionality of San Diego's ordinance**.**

2. Features of the ordinance.

a. Prohibited all offsite signs, but contained certain exceptions.

b. Permitted onsite commercial signs but not onsite noncommercial signs.

3. A badly splintered Court produced five separate opinions.

4. Conclusions of the plurality:

a. By allowing onsite commercial signs but not noncommercial signs on the same site, the ordinance impermissibly discriminated in favor of commercial over noncommercial speech.

b. The exemptions for religious signs, historical signs, and temporary political signs impermissibly favored certain types of noncommercial speech over other types of noncommercial speech.

c. The City's regulation of commercial signs, including its differential treatment of onsite and offsite commercial advertising, was constitutionally permissible.

5. In his dissent, Justice Rehnquist lamented that "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." *See also Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (thoroughly analyzing the holdings in *Metromedia* and the divisions within the Supreme Court).

6. Under *Metromedia*, municipalities may constitutionally ban billboards and limit the size and location of such structures. *See Prime Media, Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814, 818 (6th Cir. 2005); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 806-807, 104 S.Ct. 2118, 2130 (1984) (in *Metromedia v. City of San Diego*, 453 US 490, 512 (1981), "seven Justices explicitly concluded that this interest [avoiding visual clutter] was sufficient to justify a prohibition of billboards"), *see Metromedia*, 453 U.S. at 507-508, 510-12 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL, JJ.)("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"); *Id.*, at 552 (STEVENS, J., dissenting in part); *Id.*, at 559-561 (BURGER, C.J., dissenting); *Id.*, at 570 (REHNQUIST, J., dissenting); *City of*

Cincinnati v. Discovery Network, 507 U.S. 410, 425 n.20 (1993). *See also Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1115 (9th Cir. 2003), *cert. denied sub nom.; Regency Outdoor Adv., Inc. v. Riverside County, California*, 540 U.S. 1111 (2004); *Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290 (7th Cir. 1993) (upholding constitutionality of size and other dimensional restrictions on billboards).

C. The New Generation of Lawsuits

1. The goal: to circumvent *Metromedia's* clear holding that size and location regulations, and outright bans on offsite signs, are constitutionally permissible.

2. The strategy: to topple an entire sign code, create a regulatory vacuum, and then obtain a court order approving sign applications for massive billboards. *See Granite State Outdoor Adver. Inc. v. City of Clearwater, Florida*, 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).

3. The technique.

   a. "The [billboard] plaintiffs in these cases have followed the same script: negotiate leases with private property owners in a jurisdiction with outdated sign regulations; apply for multiple billboard permits, knowing that they will be denied due to noncompliance with the regulations; immediately sue the agency to invalidate the ordinance on unrelated grounds based on precedent from other federal circuits and non-sign law cases; and, finally, attempt to convince the court to order issuance of permits for billboards in otherwise prohibited or restricted locations, or negotiate a similar deal with the victim agency in exchange for a waiver of an attorney's fees claim." Donald M. Davis, Avoiding the Sign Code Shakedown: A Checklist of Basic Provisions, 27 Public Law Journal No. 1, published by the State and Local Government Section of the State Bar of California, Winter 2004. *See also Florida Outdoor Advertising, LLC v. City of Boca Raton*, 266 F. Supp. 2d 1376, 1379 (S.D. Fla. 2003).

   b. "Billboard companies, some knowing full well what local ordinance and/or regulatory requirements are, make applications to construct billboards in excess of the size and

location requirements contained in such ordinances/ regulations. When, as expected, the permits are denied, the companies then file constitutional challenges of the sort presented in this case." *Florida Outdoor Adver., LLC v. City of Boynton Beach*, 182 F. Supp. 2d 1201, 1206 (S.D. Fla. 2001).

4. The lawsuit: Billboard plaintiffs challenge the constitutionality of two types of regulations in a municipal sign code—regulations that were the basis for the denial of the permit (the constitutional ban or size and location regulations) and regulations that were not the basis for the denial of the permit but which may be constitutionally suspect. Even though this second set of regulations had nothing to do with the billboard plaintiffs' sign permit applications, and even though the sign permit applications were not denied on the basis of this second set of regulations, the billboard plaintiffs try to persuade the courts to use possible constitutional deficiencies in this second set of regulations as the basis for invalidating the entire sign code, including the constitutional billboard bans or size and location rules.

D. The Implications of these Lawsuits for Separation of Powers, Federalism, and the First Amendment

1. **Separation of Powers:** Billboard plaintiffs are trying to turn the courts into roving auditors of state and local legislation by using regulations of noncommercial speech that have failed to injure billboard plaintiffs to nullify constitutional regulations of noncommercial and commercial speech, This expansion of judicial power beyond that established by Article III upsets the balance of power at the federal level and invites incursions by the judiciary into the legislative arena.

2. **Federalism:** The expansion of judicial power also intrudes on American federalism and constitutes a frontal assault on the core police powers of states and local governments to promote the health, safety, and welfare of its citizens.

3. **First Amendment:** Through these lawsuits, "advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being." *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349, 1357 (S.D. Fla. 2003).

II. THE TWO CORE FEATURES OF THE NEW GENERATION OF BILLBOARD LAWSUITS

A. Standing: Billboard plaintiffs contend that under the First Amendment overbreadth doctrine, they have standing to ask the courts to review any aspect of a sign code, regardless of whether the particular provisions challenged have interfered in any respect with what the billboard plaintiffs propose to do.

B. Content Neutrality: Billboard plaintiffs contend that an ordinance is content-based whenever a government official must review the content of the sign to determine which provision of the ordinance applies.

III. STANDING TO ASSERT A FACIAL OVERBREADTH CHALLENGE

A. The Billboard Plaintiffs' Argument on Standing

Billboard plaintiffs contend that they have overbreadth standing to challenge any provision in an ordinance based on the fact that some provisions of the ordinance (i.e., the constitutional size and location regulations) were applied to them. By making this argument, they seek to obtain standing to attack any provision in a sign ordinance, regardless of whether that provision had anything to do with the billboard company's proposed signs or activities and then convince a court that these provisions are facially overbroad and unconstitutional.

B. The Government's Argument on Standing

Government defendants argue that billboard plaintiffs have standing to challenge only a provision to which it is subject or which may indirectly injure its business.

C. The Three Doctrinal Obstacles to Billboard Plaintiffs' Standing Argument

1. Article III standing requirements

2. The presumption against facial overbreadth challenges

3. The exclusion of commercial speech from the protection of the overbreadth doctrine unless the company has engaged in a substantial amount of noncommercial advertising.

4. These longstanding doctrines designed to insure that the judicial power is separate and distinct from that of the legislature.

D. Article III Standing Requirements

1. A plaintiff first must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)).

2. There must be a causal connection between the injury and the conduct complained of-- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Id.*

3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.*

E. Article III Standing Requirements Apply to Plaintiffs Asserting Overbreadth Challenges

1. A plaintiff asserting a First Amendment overbreadth claim must fulfill the Article III standing requirements. *See Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-93 (1988) (explaining that to facially challenge the constitutionality of a statute on overbreadth grounds the plaintiff must "establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action.....'"); *Sec'y of State of Maryland v. Joseph H. Munson Co*., *Inc.*, 467 U.S. 947, 958 (1984) (a plaintiff's ability to invoke overbreadth standing *depends upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,'* and whether it can be expected satisfactorily to frame the issues in the case." (emphasis added)). *Cf. FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 233-34 (1990) (declining to review claim that certain adult business ordinance provisions violated the First Amendment, because those provisions did not apply to the plaintiffs); *Third Cong. Dist. Republican Party v. Klobuchar,* 381 F.3d 785, 791-92 (8th Cir. 2004) (applying *Lujan's* three-part test for Article III standing to a plaintiff asserting a First Amendment overbreadth challenge); *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998), ("A litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast.").

2. Billboard plaintiffs contend that they satisfy the standing requirements because the size and location regulations were applied to them and were the basis for the denial of the permit applications. This theory of standing, however, conflicts with case law, such as *Harp Adver. Illinois, Inc. v. Vill. Chicago Ridge, Illinois,* 9 F.3d 1290 (7th Cir. 1993) (discussed immediately below), indicating that "the 'injury in fact' requirement means that a plaintiff has overbreadth standing to challenge only a provision to which it is subject or which may indirectly injure its business." *Covenant Media v. City of Huntington Park,* 377 F. Supp. 2d 828, 830 n.2 (C. D. Cal. 2005); *4805 Convoy v. City of San Diego*, 183 F.3d 1108, 1111 (9th Cir. 1999).

3. In *Harp Adver. Illinois, Inc. v. Vill. Chicago Ridge, Illinois,* 9 F.3d 1290 (7th Cir. 1993), the Seventh Circuit held that a Plaintiff who applied to erect an unlawfully large billboard lacked standing to argue that the city's ban on off-premises signs discriminated against non-commercial speech.

   The Court stated: "Harp Advertising confronts a deeper problem. It lacks standing to challenge either the sign code or the zoning code, because it could not put up its sign even if it achieved total victory in this litigation. [citation omitted] Harp's proposed billboard would measure 20 by 60 feet. Yet village ordinance § 4-5-10-3(A) provides that no sign may have a face exceeding 200 square feet. Harp does not contest the validity of this ordinance; its proposed billboard, six times as large as Chicago Ridge allows, therefore will never appear. This litigation is irrelevant . . . An injunction against the portions of the sign and zoning codes that it has challenged would not let it erect the proposed sign; the village could block the sign simply by enforcing another, valid, ordinance already on the books. . . . Harp Advertising wanted to put up a 1,200 square foot sign; for all we can tell, it has no interest in erecting anything smaller anywhere in the United States, let alone a sign of 199 square feet in Chicago Ridge, Illinois. It therefore lacks standing." *Id.* at 1291-93.

   Harp precludess an overbreadth challenge where a plaintiff challenges the constitutionality of the size restrictions it failed to follow and that challenge fails.

4. The billboard plaintiffs' theory of standing is not reconcilable with Article IIII.

In *Get Outdoors v. City of San Diego,* 381 F. Supp. 2d 1250, 1260-61 (S. D. Cal. 2005), the Court stated that if a billboard company could challenge an entire ordinance, without regard to whether it was injured by a particular provision or to whether the alleged harm can be redressed, "the [overbreadth] exception to the standing requirements would swallow the constitutional rule."

Other courts have observed that relaxing the standing requirements in the manner proposed by billboard plaintiffs "would convert the judicial process into 'no more than a vehicle for the vindication of the value interest of concerned bystanders.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1973). A billboard plaintiff must therefore show that the provisions it challenges as overbroad may indirectly injure *its* business and that *it* is subject to the provisions it challenges.

5. The Eleventh Circuit is presently divided on this question, and its last word is yet to come. In 2003 one panel of that court held that a billboard company lacks standing to challenge billboard regulations other than those upon which the city relied in rejecting its application, and Plaintiff's counsel's efforts to obtain en banc and Supreme Court review of that holding failed. *Granite State Outdoor Advertising Inc. v. City of Clearwater,* 351 F.3d 1112 (11th Cir. 2003), reh'g and reh'g en banc denied (11th Cir. 2004), *cert. denied*, 125 S.Ct. 48 (Oct. 4, 2004). However, a different panel of the same court has more recently explicitly disagreed with the precedent established by the *Clearwater* panel, reaching the opposite conclusion. *Tanner Advertising Group L.L.C. v. Fayette Co.,* 411 F.3d 1272, 1275-76 (11th Cir. 2005). With explicitly conflicting decisions of different panels on the same issue, *en banc* review was granted in *Tanner.*

F. The Presumption Against Facial Overbreadth Challenges

1. The presumption against overbreadth challenges reflects the concern that a party bringing an overbreadth challenge may not be an appropriate party to represent the interests of the absent parties who are affected by the ordinance and that it is best to adjudicate the constitutionality of a rule in the presence of a party affected by that rule. In other words, a billboard company that proposes to build billboards for commercial gain may not be the appropriate proxy

holder for the interests of all persons whose expression may be limited elsewhere in an ordinance.

2. The courts have imposed extraordinary requirements for a facial attack on the constitutionality of a local ordinance. A judicial declaration that a law is unconstitutionally overbroad is "manifestly, strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The U.S. Supreme Court has recognized that "facial challenges are best when infrequent" and are "especially to be discouraged." *Sabri v. United States*, 124 S.Ct. 1941, 1948 (2004). "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. "[f]acial adjudication carries too much promise of "premature interpretatio[n] of statutes" on the basis of factually bare-bones records. . . . Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts. . . . Accordingly, we have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Id*. *See also Third Cong. Dist. Republican Party*, 381 F.3d at 791 (quoting *Sabri* with approval in affirming dismissal of First Amendment overbreadth claim).

3. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent,* 466 U.S. at 800. "Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Board of Trustees of the State Univ. of New York v. Fox,* 492 U.S. 469, 485 (1989).

4. The courts require "real" and "substantial overbreadth." A court must examine the statute's plainly legitimate sweep, and turn back the challenge unless the statute is overbroad, and the degree of any overbreadth is not only real, but substantial. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (quotation omitted); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 865 (8th Cir. 2003).

5. A billboard plaintiff has the burden of demonstrating that any overbreadth in the ordinance is not "substantial" when "judged in

relation to the [ordinance]'s plainly legitimate sweep." *Osborne,* 495 U.S. at 112 (quotation and citation omitted).

6. In challenging provisions that were never applied to it, a billboard plaintiff must also demonstrate that it is an appropriate representative of the interests not represented in court. "[T]he threshold for facial challenges is a species of third party *(jus tertii)* standing," *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), and third-party standing presumes that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff,* 428 U.S. 106, 115 (1976).

7. A billboard plaintiff may not be an effective proponent of the rights of noncommercial speakers as the speakers themselves would be. Someone who posts a yard sign or flies a Greenpeace flag has a particular message to convey and seeks to convey it for free. A billboard company, by contrast, has no message of its own, but rather seeks to erect structures at locations it deems most profitable, and to hire out the new space as a commodity. The economic interests of the third parties may be adverse to the economic interests of the billboard company because the easier it is to deliver a message on your own front yard, the less likely it is that citizens will need to pay a billboard company to post it. In addition, by urging a very broad interpretation of the concept of "content discrimination," a billboard plaintiff is just as likely to reduce the amount of small-scale expressive activity in the community, because the easiest way in this setting for a city to avoid that interpretation is to regulate more signs as if they were billboards.

G. Commercial Speech and the Overbreadth Doctrine

1. Billboard plaintiffs' theory of standing confronts a third obstacle—the courts have recognized that "commercial speech does not warrant the protection of the overbreadth doctrine." *Excalibur Group, Inc. v. City of Minneapolis,* 116 F.3d 1216, 1225 (8th Cir. 1997); *Fox,* 492 U.S. at 481. ("[A] statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground – our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators.") The reason is that "the profit motive is thought to be sufficiently compelling to enable such speech to withstand the chilling effect of an overbroad statute." *Excalibur,* 116 F.3d at 1225. (quoting *Garner v. White,* 726 F.2d

1274, 1277 (8th Cir. 1984)). Thus, overbreadth challenges to the regulation of commercial speech may be subject to dismissal.

2. "[T]he Supreme Court has permitted a commercial billboard company to assert a facial overbreadth challenge to an ordinance only where the company also engaged in a '*substantial amount* of noncommercial advertising.'" *Nat'l Adver. Co. v. City of Miami.,* 287 F. Supp. 2d 1349, 1358 (S,D, Fla. 2003) at 1358 (emphasis in original) (quoting *Metromedia,* 453 U.S. at 504). *See also Action Outdoor Adver. JV L.L.C. v. Town of Shalimar, Fla*, 377 F.Supp.2d 1178, 1185-86 (N.D. Fla. 2005). Where a billboard company has no track record of noncommercial advertising, and its business plan makes it unlikely that it would engage in a "substantial amount of noncommercial advertising" if its sign permits were granted, this prerequisite is not satisfied.

3. Billboard plaintiffs must demonstrate that the "overbreadth is not only real, but substantial as well." They must therefore show that the alleged overbreadth is actually chilling protected expression. *SOB*, 317 F.3d at 864-65 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112 (1990)) (rejecting the plaintiff's overbreadth challenge because plaintiff could not demonstrate that the alleged overbreadth in fact resulted in chilled expression). In *SOB,* the Eighth Circuit rejected the efforts of a business to invoke the overbreadth doctrine based on a hypothetical situation in which the County's ordinance could be construed to extend to protected conduct. *Id.* The effort failed because the plaintiff could not show that the hypothetical situation was likely to actually occur in the County, and because the official responsible for enforcement of the law submitted an affidavit disclaiming any intention to enforce the law in that hypothetical setting. *Id.* The law enforcement official's affidavit was significant because, "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Id.* at 865 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 5 (1982)).

H. A Note on Severability

1. The significance of severability to the billboard plaintiffs' strategy

The strategy of bringing an overbreadth challenge to sections of an ordinance that were never applied to the billboard plaintiffs for the purpose of bringing the entire ordinance down requires a court to

conclude that the unconstitutional provisions are not severable from the remaining parts of the ordinance. Should a court conclude that portions of a sign ordinance are unconstitutional, the question of whether the entire ordinance should be struck depends on (1) the existence and strength of the ordinance's severability clause and (2) state law governing severability.

2. When a federal court is called upon to invalidate a local ordinance, the severability of the constitutional portions of the ordinance is governed by state law. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988).

3. An example of an especially strong and clear severance clause is contained in the City of Eden Prairie, Minnesota's City Code. Under that clause, everything in an ordinance – without exception –must be severed from any invalid portion:

   "Every chapter, section, subdivision, paragraph or provision of the City Code shall be, and is hereby declared, severable from every other such chapter, section, subdivision, paragraph or provision; and if any part or portion of any of them shall be held invalid, it shall not affect or invalidate any other chapter, section, subdivision, paragraph or provision." § 1.05.

   Unlike some severability clauses, this clause includes no exceptions based on the interdependency of clauses or relationship of one clause to another.

4. State law analysis

   In deciding whether invalid portions should be severed, the legislative body's intent is paramount. See *Chapman v. Comm'r of Revenue,* 651 N.W.2d 825, 836 (Minn. 2002). When a severance provision demonstrates that a city council intends the ordinance to remain in effect without any offending provisions, a court is unlikely to strike the entire ordinance. *See Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68, 73 (2d Cir. 1996) ("By including Section 7, which provides that '[t]he invalidity of any Section or provision of this Local Law shall not invalidate any other Section or provision thereof,' the Board indicated that it intended that the ordinance be enforced without Section 5."). Depending on the content of the severability clause, a refusal to sever the invalid portions of the ordinance would defeat the purposes set forth in the sign ordinance, because, in the absence of an ordinance, none of the

stated objectives of the sign ordinance would be accomplished. Even if a court were to consider the interrelationship of the valid and invalid sections of the law, it should leave all valid portions in place when (a) the remaining provisions are not "so essentially and inseparably connected" with the constitutionally invalid provision that the "legislature would [not] have enacted the remaining provisions" without the offending provision and (b) the sign ordinance is complete and capable of being executed without any constitutionally invalid provisions. See *State v. Miner*, 556 N.W.2d 578, 583 (Minn. Ct. App. 1996). To do otherwise would contradict and undermine the express intent of the city and would require a court to substitute its judgment for that of the city in violation of separation of powers.

IV. CONTENT NEUTRALITY

A. The Absolutist View of Content Neutrality Advanced by Billboard Plaintiffs

At the core of the facial attack brought by billboard plaintiffs is a concept of "content discrimination" that is broader than that presently employed by U. S. Supreme Court. Billboard plaintiffs claim that an ordinance is content-based whenever a government official must review the content of the sign to determine which provision of the ordinance applies. This concept of content-neutrality conflicts with Supreme Court precedent.

1. *Taxpayers for Vincent*

In *Taxpayers for Vincent*, the Supreme Court held that the Los Angeles ordinance banning the placement of signs on light poles and similar objects was "content neutral," 466 U.S. at 811 and 817, even though the Ordinance exempted plaques "commemorating an historical, cultural, or artistic event, location, or personality," and house number signs, *Id*. at 791 n.1. The Supreme Court refused to adopt a literal concept of "content-neutrality," but instead asked whether the government was "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." *Id*. at 804.

2. *Hill v. Colorado*

In *Hill,* the Court upheld a criminal statute intended to protect family planning clinic patients, that prohibited persons from knowingly approaching within eight feet of another person, without that person's consent, "for the purpose of . . . engaging in oral protest,

education, or counseling with such other person." In reaching this conclusion the Supreme Court held that references to "oral protest, education, or counseling" were content-neutral. 530 U.S. at 723-24. The Court stated, 530 U.S. at 721:

> 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."

Instead, "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*." *Id.* at 719 (emphasis added) (quoting *Ward,* 491 U.S. at 791).

3. Additional Authority

a. In *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001), the Supreme Court noted that "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech *on the basis of the ideas or views expressed* are content based." (Emphasis added) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-643 (1994)).

b. In *Erie v. Pap's A.M.*, 529 U.S. 277, 293-96 (2000), the Court reasoned that "the regulation is still properly evaluated as a content neutral restriction because the interest in combating the secondary effects associated with those clubs is *unrelated to the suppression of the erotic message conveyed* by nude dancing." (Emphasis added). "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broad.,* 512 U.S. at 643. (citing *Taxpayers for Vincent*, 466 U.S. at 804).

c. In *Veneklase v. City of Fargo,* 248 F.3d 738, 741, 743 (8th Cir. 2001) (en banc) (per curiam), every judge on the Eighth Circuit agreed that a Fargo residential picketing ordinance was content-neutral even though the definition of "picketing" turned in part on whether the activity was "for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief." *F*ollowing *Hill,* the *en banc* court explained that "[w]e reject the argument that because an inquiry might be necessary to determine whether a person is picketing, the ordinance therefore is content-based." *Id.* at 745. Relying upon the definition of "content neutral" in *Ward,* the Eighth Circuit explained that it "cannot be said that the ordinance was adopted because of any disagreement with the message conveyed by the picketers." *Id*.

4. The Test for Content Neutrality

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

b. In determining whether an ordinance is content-based or content-neutral, "[t]he principal inquiry … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

c. In the context of time, place, and manner scrutiny, the requirement that a regulation be narrowly tailored does not mean that it must be the least restrictive or least intrusive means of accomplishing the government's goal. *Ward*, 491 U.S. at 798. Nor does it mean that a regulation is invalid simply because a court concludes that the government interest could be adequately served by some less restrictive alternative. *Id*. at 799. Rather, the "narrowly tailored" requirement means that the regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

5. Size and Location Regulations are Content-Neutral

a. Regulations of the size and location of signs are routinely upheld as constitutionally permissible, content-neutral, time, place, and manner regulations. *See Prime Media,* 398 F.3d at 821; *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1115 (9th Cir. 2003); *Granite State Outdoor Adver., Inc. v. Zoning Bd. of the City of Stamford*, 38 Fed. Appx. 680, 683 (2d Cir. 2002); *Nichols Media Group, LLC v. Town of Babylon*, 365 F.Supp.2d 295, 311 (E.D.N.Y. 2005); *Douglas Outdoor Adver. of Georgia v. Cherokee County, Georgia*, No. 1:03-CV-1677, 2004 WL 1598814 at * 5 (N. D. Ga., July 13, 2004) (not reported).

b. Stated Purpose of the Regulation: Ordinances whose stated purpose is to promote public safety and aesthetics are deemed content-neutral. *See Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1282 (11th Cir. 2003) (holding that the ordinance at issue was content-neutral because its stated purpose was to promote uniformity, preserve aesthetics, and foster safety).

c. Safety and Aesthetics are Substantial Government Interests, *Metromedia*, 453 U.S. at 507-08 (plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals. It is far too late to contend otherwise"); *Taxpayers for Vincent*, 466 U.S. at 806 ("[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression").

d. *Metromedia*, 453 U.S. at 507-08 (plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals. It is far too late to contend otherwise"); *Taxpayers for Vincent*, 466 U.S. at 806 ("[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression").

e. Alternative Channels of Communication. Size, height, and placement regulations leave open ample alternative communication because they permit signs that satisfy the

height, size, and placement restrictions, *Prime Media*, 398 F.3d at 819, and because there are many other avenues available.

f. Height and Size Regulations are viewpoint-neutral and content-neutral because they regulate only the nonexpressive components of signs. *See Prime Media*, 398 F.3d at 819. A city may ban signs that exceed the height and size requirements because it believes that such signs are unattractive and constitute a traffic hazard. These height and size requirements directly advance a city's interest because smaller and shorter signs are less likely to cause traffic safety concerns or undermine the visual environment of the City. *Prime Media*, 398 F.3d at 822 (holding that size and height restrictions are narrowly tailored and directly advance the city's interest in aesthetics and safety). In doing so, a city is "eliminat[ing] the exact source of the evil it sought to remedy." *Taxpayers for Vincent*, 466 U.S. at 808. This is particularly the case when a billboard company applies to build a massive structure due to its great impact and visibility. Because the signs are designed for maximum distraction of the maximum number of persons, size and height requirements withstand constitutional scrutiny and constitute a valid time, place, and manner regulation.

6. The Off-Site/On-Sight Distinction

a. Off-site signs are typically defined as "[a] sign relating in its subject matter to, or which directs attention to, a business or profession, or to the commodity, service or entertainment not sold or offered upon the premises where such sign is located, or to which it is attached."

b. On-site signs are defined as "[a]n identification sign relating in its subject matter to or which directs attention to, a business or profession, or to the commodity, service or entertainment sold or offered upon the premises where such sign is located, or to which it is attached."

c. Courts have frequently held that cities may constitutionally draw distinctions between on-site and off-site signs. *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 Hwys.*, 822

F.2d 586, 589-90 (6th Cir. 1987). This is particularly the case when the distinction between off-site and on-site signs does not favor commercial messages over noncommercial messages, *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813-14 (9th Cir. 2003), or when noncommercial speech is exempt from the general restriction on off-site signs.

d. On-site/off-site distinctions pass "the principal inquiry in determining content neutrality" because they are not motivated *by a disagreement* with the message the sign conveys. *See Ward*, 491 U.S. at 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"). Nor are they motivated by a preference for one viewpoint over another. *Outdoor Systems, Inc. v. City of Clawson*, 686 N.W.2d 815, 820 (Mich. Ct. App. 2004); *Gannett Outdoor Co. of Michigan v. Troy*, 409 N.W.2d 719, 723 (Mich. Ct. App. 1986). The fact that the 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*, 530 U.S. at 719-21; *St. Petersburg,* 348 F.3d at 1282 (ordinance is content-neutral even though administrator applying it views content of signs to ascertain if it pertains to an off-premises activity).

e. In *Metromedia*, 453 U.S. at 511-12, the Supreme Court plurality (and dissenters) permitted cities to distinguish between on-site and off-site commercial advertising because such regulations are directly related to achieving the goals of traffic safety and aesthetics. The plurality stated that this holding was "not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." *Id.* "[T]he city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." *Id.* It is constitutionally permissible to value one kind of commercial advertising (on-site) over another kind of commercial speech (off-site advertising). *Id.* Even though on-site/off-site requirements may cause some commercial speech to be favored over other commercial speech, "*Metromedia* explicitly held that this disparity is allowed," and "explicitly rejects the argument"

that a city must produce evidence that off-site signs are harmful at all. *Nat'l Adver. Co. v. City of Miami,* 287 F. Supp. 2d 1349, 1368 (S.D. Fla. 2003).

f. A city's off-site regulation directly advances the City's substantial interest in public safety and aesthetics, because it provides relatively less favorable treatment to the kind of sign that, as noted in *Metromedia,* has "periodically changing content" and thus poses "a more acute problem than onsite advertising." *Metromedia,* 453 U.S. at 511-12. Moreover, because there are so many other avenues available for commercial speech and because the consequences of "non-accessory" sign status are relatively small, a city's distinction between accessory and non-accessory signs leaves open ample alternative channels of communication

g. Even if a city's restriction on off-site commercial signs is somehow viewed as a content-based restriction on speech, however, the restriction is a constitutionally permissible regulation of commercial speech because (1) the city has a substantial interest in regulating a billboard company's speech, (2) the city's regulations directly advance its interests, and (3) the regulations are no more extensive than is necessary to serve the asserted governmental interest. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64, 566 (1980). Off-site regulations directly advance the physical appearance of a city and public safety. Municipalities have a "weight, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806. But the distinctions are no more extensive than necessary, because any non-accessory sign can be an accessory sign, if it is simply erected on the parcel to which the sign relates. For these reasons, off-site regulations withstand scrutiny under *Central Hudson*