Case No. 09-2670

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Clear Channel Outdoor Inc., a Delaware corporation,

Appellee,

v.

City of St. Paul,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
District Court Civil No. 06-cv-3304 DWF/AJB
District Court Judge Donovan W. Frank

BRIEF OF AMICI AMERICAN PLANNING ASSOCIATION, MINNESOTA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, LEAGUE OF MINNESOTA CITIES, ASSOCIATION OF MINNESOTA COUNTIES, AND MINNESOTA ASSOCIATION OF TOWNSHIPS IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST

The American Planning Association ("APA") is a nonprofit public-interest and research organization founded in 1978 to advance the art and science of land-use, economic, and social planning at the local, regional, state, and national levels. APA, and its professional institute, the American Institute of Certified Planners, represent more than 43,000 practicing planners, officials, and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land use regulations. The organization has forty-six regional chapters representing all fifty states. The members of APA work for development interests as well as state and local governments, and they are routinely involved in comprehensive land use planning and its implementation through land use regulation. As an advocate for proper planning, the APA regularly files *amicus* briefs in cases of importance to the planning profession and the public interest that are before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts.

The Minnesota Chapter of the American Planning Association ("MnAPA") is a non-profit statewide organization of over 850 land use planning professionals, educators, local officials, and planning commissioners. MnAPA members engage in policy, infrastructure, and development planning and zoning on behalf of state and regional agencies, counties, cities, townships, educational institutional, and the

private sector. MnAPA members represent the front-line implementers of state and local land use regulations and rules balancing community and individual interests.

The Association of Minnesota Counties ("AMC") is a voluntary association of all 87 counties in the State of Minnesota organized pursuant to Minn. Stat. §375.163. The mission of AMC is to provide counties with support so that the counties may effectively perform the duties and responsibilities delegated to them by law. AMC works closely with the legislative, administrative and judicial branches of government on issues involving adoption, enforcement and modification of laws and policies that affect counties, and represents the position of counties before state and federal government agencies and the public.

The League of Minnesota Cities ("LMC") has a voluntary membership of 830 out of 854 cities in Minnesota. It represents the common interests of cities before courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The Minnesota Association of Townships ("MAT") is a nonprofit organization representing 1,785 out of 1,786 Minnesota townships. MAT provides research, training, legislative representation, and other services for its members.

Under Fed. R. App. P. 29, amici have sought permission to file this brief through a motion filed on September 22, 2009. Pursuant to an order issued October 9, 2009, that motion is pending before the panel that will consider the appeal on the merits.

SUMMARY OF LEGAL ARGUMENT

The District Court's decision disturbs the well-established deference of state and federal courts to state and local governments' adoption of restrictions on the physical characteristics of structures and uses (including signs), as well as this nation's constitutionally-mandated system of separated powers and checks and balances. Although the District Court's decision correctly recognized that the Plaintiff's state-law claim was governed by a rational basis test, the actual logic used by the District Court is far less deferential than a rational basis analysis (or even intermediate scrutiny applied to content-neutral sign regulations under the First Amendment). Moreover, an unexplained premise of the District Court's decision is that a law of general applicability is irrational if the legislative body that adopted it failed to articulate reasons in the legislative record in response to objections raised to it. That novel approach puts at risk of invalidation countless

local laws that were also adopted in the same fashion. The District Court's approach toward evaluating the validity of laws of general applicability is so troubling that the amici associations of cities, counties and townships all urge the Court to reverse it.

Amici do not have an aversion to the inclusion of a statement of purpose in a code or ordinance, as St. Paul has done in its sign code.[1] They do, however, have an aversion to the invalidation of local laws as irrational because those laws were not accompanied by contemporaneous reasons. An approach to applying the rational basis test that restricts the possible rationales to those that were articulated at the time the law was adopted tends to impose such a requirement, at the unacceptable cost of invalidating of a wide range of easily justifiable laws.

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[1] St. Paul's sign code includes a "purpose" section. *See* St. Paul City Code §64.101 (recited in App. Brf. at 6-7). Amicus APA, and the undersigned, have encouraged local governments to formally include statements of purpose in their sign laws. *See, e.g.,* Daniel Mandelker, *Street Graphics and the Law*, 50 (APA 2004) (Street Graphics Model Ordinance); William D. Brinton, Randal M. Morrison, and Robin M. Wolpert, "Deterring and Defeating the Sign Code Shakedown: Best Practices for Drafting a Constitutional Sign Ordinance," MUNICIPAL LAWYER, January/February 2007, at 6-9. Such a statement of purpose is most valuable against a First Amendment challenge, in the face of an argument that strict scrutiny is appropriate (because the government's supposed interest is allegedly related to the suppression of speech, *see SOB, Inc. v. County of Benton,* 317 F.3d 856, 860 (8th Cir. 2003)), or when a rare court misapplies intermediate scrutiny. *See, e.g., Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County*, 738 F. Supp. 1431, 1433 (N.D. Ga. 1990). For the reasons set forth in this brief, statements of purpose and similar "best practices" are not needed to survive rational-basis scrutiny.

LEGAL ARGUMENT

I. LOCAL GOVERNMENTS HAVE AN UNQUESTIONABLE RIGHT TO CONTROL THE PHYSICAL CHARACTERISTICS OF BILLBOARDS.

Over forty-five years ago, the Minnesota Supreme Court recognized that "[a] city can unquestionably regulate, even stringently, the use, size, and position of business signs and advertising billboards." *Arcadia Development Corp. v. City of Bloomington*, 267 Minn. 221, 227, 125 N.W.2d 846, 851 (1964) (*"Arcadia I"*). Similarly, over ninety years ago the U.S. Supreme Court upheld the power of the City of St. Louis to place physical limitations on billboards, affirming the grant of a motion to dismiss a billboard company's suit that labeled such limits as "unreasonable" and claimed that they "will affect the plaintiff's business disastrously." *St. Louis Poster Advertising Co. v. City of St. Louis,* 249 U.S. 269, 273-74 (1919). And despite the U.S. Supreme Court's more recent recognition that billboards are a form of expressive conduct warranting intermediate or strict scrutiny, that Court, and others, have repeatedly affirmed that the First Amendment allows municipalities to restrict and even ban billboards. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984) (in *Metromedia v. City of San Diego*, 453 U.S. 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). Accordingly, "[i]t 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." *City of Ladue v. Gilleo,* 512 U.S. 43, 48 (1994).

In the face of such well-established legal authority, billboard companies have employed various strategies to undermine local laws that control the size of billboards. Under one strategy –which this Court, among many others, has thwarted – billboard companies seeking to erect unlawfully large signs invoked the overbreadth doctrine in an attempt to invalidate size limitations and other admittedly constitutional restrictions, by attacking the constitutionality of other unrelated provisions, in the hope that the court would invalidate a sign code in its entirety.[2] Under another strategy, sign companies have attempted to increase the

[2] *See, e.g., Advantage Media LLC v. City of Eden Prairie,* 456 F.3d 793, 803 (8th Cir. 2006); *Get Outdoors II, LLC v. City of San Diego, Cal.,* 506 F.3d 886, 891 (9th Cir. 2007); *Midwest Media Property LLC v. Symmes Township,* 503 F.3d 456, 461 (6th Cir. 2007); *Covenant Media of S. C., L.L.C. v. City of N. Charleston,* 493 F.3d 421, 430 (4th Cir. 2007); *Tanner Advertising Group, LLC v. Fayette County, Georgia,* 451 F.3d 777, 790-91 (11th Cir. 2006) (en banc); *Granite State*

physical space their signs occupy, without first obtaining a permit to do so, by claiming that the prior lawful nonconforming use doctrine entitles them to "improve" their signs in this fashion. Courts have rejected that strategy as well.[3]

The present case reflects a third strategy for circumventing a limitation on the growth of billboards. Clear Channel Outdoor ("Clear Channel") argued below that the validity of St. Paul's prohibition on billboard extensions must depend on whether the City Council adequately explained itself at the time that it voted, in the face of Clear Channel's criticism, to amend its City Code to add the ban. Such arguments have failed in other courts, even when presented as part of a First Amendment claim entitling the plaintiff to intermediate scrutiny. *See, e.g., Prime Media, Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814, 818 (6th Cir. 2005). Here, however, the District Court invalidated St. Paul's prohibition on this ground. It did so by borrowing principles of Minnesota law from decisions reviewing local governments' denials of applications for zoning requests, while disregarding the

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Outdoor Advertising, Inc. v. City of Clearwater, Florida, 351 F.3d 1112, 1117 (11th Cir.2003).

[3] *See, e.g., Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of City of Virginia Beach,* 274 Va. 189, 196, 645 S.E.2d 271, 275 (Va. 2007); *Clear Channel Outdoor, Inc. v. City of Arden Hills*, NO. 62-CV-07-3231, 2008 WL 3819230, at 7 (Minn. Dist. Ct. Aug. 01, 2008) (unpublished), *aff'd on other grounds,* No. A08-1388, 2009 WL 1119238 at *1 n.1 (Minn. Ct. App. April 28, 2009) (unpublished).

repeated refusal of Minnesota's appellate courts to apply those principles to general laws.

II. THE DISTRICT COURT DID NOT NEED TO LOOK BEYOND PRECEDENT AND LOGIC IN DECIDING THE RATIONALITY OF ST. PAUL'S BAN ON BILLBOARD EXTENSIONS.

The District Court recognized that billboard extensions "grab the public's attention . . . ." ADD.013.[4] Yet it invalidated as "irrational" a citywide prohibition on billboard extensions. When this Court applies the *correct test* for the rational basis standard, and gives effect to well-established law regarding billboard regulation, the rationality of St. Paul's law is immediately apparent.

The District Court itself recognized that a rational basis standard applied. ADD.006 ("'a city has broad discretion in legislative matters, and even if the city council's decision is debatable, so long as there is a rational basis, the courts do not interfere.'") ADD.012 ("the Court concludes that the City's argument that there was a rational basis for the passing of Ordinance 06-016 is not supported by the record."). As St. Paul's opening brief explains, Minnesota's appellate courts recognize that a rational basis standard, as applied to local ordinances, "merely requires the challenged legislation to be supported by any set of facts either known or which could be reasonably assumed." (App. Brf. at 19-22).

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[4] The District Court's sentence, in its entirety, stated: "Likewise, there is no doubt that Clear Channel has a very real property interest in its billboards, particularly in **billboard extensions that grab the public's attention** and generate revenue for Clear Channel." ADD.013 (emphasis added).

Past litigation has so clearly established the rationality of certain kinds of regulatory responses to billboards that modern appellate courts no longer expect it to be demonstrated; instead, such rationality is established by citation to precedent rather than on a case-by-case basis. The rationality of reducing distraction and visual blight by banning billboards or limiting their size or impact has become such a principle. The Supreme Court's plurality opinion in *Metromedia* explains why:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context . . . : "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Id. at 507-08 (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949)). Federal courts take the same approach to the relationship between regulating billboards and enhancing aesthetics. "It requires neither elaboration nor citation to say that an ordinance regulating billboards is likely to advance the objective of enhancing the beauty of a city, and that no less intrusive method would adequately protect the city's interest." *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir.1987).

The U.S. Supreme Court's decisions in *Metromedia, Members of the City Council of Los Angeles v. Taxpayers for Vincent*, and others "make it plain that

billboard regulations . . . advance a police power interest in curbing community blight and in promoting traffic safety." *Prime Media, Inc.*, 398 F.3d at 823 (upholding the constitutionality of size restrictions on billboards and criticizing a district court that placed too great a burden of justification on the municipality).[5] *See, e.g., City of Ladue,* 512 U.S. at 48 (signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."). In *Metromedia*, seven justices shared the conclusion that San Diego's "'interest in avoiding visual clutter' was sufficient to justify a prohibition of commercial billboards." *Ladue*, 512 U.S. at 50 (quoting *Taxpayers for Vincent*, 466 U.S. at 806-807). As this Court noted when rejecting an effort to force a Minnesota city to approve permits for billboards larger than that city's sign code permitted, "[d]istracting roadside billboards of the type Advantage sought to erect could also pose real danger to both motorists and nearby pedestrians." *Advantage Media,* 456 F.3d at 803.

As the name itself demonstrates, a billboard extension causes a billboard to become larger. Billboard extensions literally (if not figuratively) "stick out." See APP.024 (photo of extension from Clear Channel brief below). Since it is already a

[5]As the Supreme Court also explained in *Metromedia*, "[n]or 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 with respect to either traffic safety or esthetics." 453 U.S. at 507-508 (internal citation omitted).

matter of established law that billboards distract and contribute to blight, and undisputed that billboard extensions cause billboards to become larger, logic alone is sufficient to demonstrate that a prohibition on billboard extensions can rationally further those legitimate local goals. As the First Circuit reasoned when affirming the constitutionality of a flat ban on digital billboards:

> **It is given** that a billboard can constitute a traffic hazard. **It follows** that [electronic message centers], 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) (emphasis added).

III. RATIONAL-BASIS REVIEW OF A CITYWIDE LAW CANNOT REQUIRE THE CITY TO HAVE *ARTICULATED* REASONS IN SUPPORT OF THAT LAW AT THE TIME OF ITS ADOPTION.

The District Court held that "Code § 64.301(a) is unenforceable as a matter of law because the record is void of any articulated reasons by the City for its enactment of the ordinance." ADD.012. The District Court erred in heightening its rational-basis standard, by focusing on whether the *record* contained reasons *articulated* by *the City* for the law's adoption.

As St. Paul itself ably demonstrates in its opening brief, Minnesota's appellate courts have repeatedly refused to require city councils, county boards, or town boards to adopt findings or reasons when they make law. (App. Brf. at 18-22). The Minnesota Court of Appeals has made it clear that, when a city adopts or

amends a law of citywide application, it is not required by Minnesota law to articulate its reasons. *See, e.g., Arcadia Dev. Corp. v. City of Bloomington,* 552 N.W.2d 281, 285 (Minn. Ct. App. 1996) ("*Arcadia II*"); *Concept Props., LLP v. City of Minnetrista,* 694 N.W.2d 804, 817 (Minn. Ct. App. 2005) (holding, in response to a challenge to a comprehensive land-use plan, that "municipalities generally are not required to articulate reasons for enacting an ordinance").

The amici add two important observations. First, the District Court's contemporaneous articulated reasons requirement is so burdensome that federal courts have refused to require it as part of the *intermediate* scrutiny that is constitutionally required under the First Amendment. The fact that such a requirement is out-of-place even under intermediate scrutiny helps to demonstrate that it is totally out-of-place in rational basis scrutiny. Second, by extending a requirement of *contemporaneous* justification to ordinary local lawmaking, the District Court decision it puts at risk of invalidation countless other zoning ordinances and other local laws, which were lawfully adopted under the principles reaffirmed in *Arcadia II* and *Concept Properties,* and are easily justified.

A. Not even the First Amendment would have required St. Paul to have explained why a total prohibition on extensions serves the City's goals.

One way to demonstrate how far the District Court strayed from rational-basis analysis is to show that such scrutiny is considered inappropriate even in

cases where a higher degree of scrutiny is mandated based on the First Amendment. Federal courts, applying intermediate scrutiny to First Amendment challenges to laws governing advertising, have nevertheless refused to require governments to rely upon explanations given at the time of adoption to show that the law serves a legitimate purpose.[6]

For example, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), involving a First Amendment challenge to a statutory restriction on advertising, the Supreme Court noted that "the Government does not purport to rely on justifications for the statute offered during the 19th Century." However, the Court allowed the government to advance "interests that concededly were not asserted when the prohibition was enacted into law." *Id.* It explained that "this reliance is permissible **since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve.**" *Id.* (emphasis

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[6] The District Court failed to give appropriate weight to the purpose statement in the St. Paul Sign Code, even if such statement predated the adoption of the ban on billboard extensions. For example, in *Get Outdoors II LLC*, the Ninth Circuit explained in 2007 that the "significant interest" element of intermediate scrutiny is satisfied simply based on the kind of language found in the purpose statement in St. Paul's sign code:

> The City has stated that the purpose of its sign code is "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City." SDMC § 142.1201. **That is all our review requires to prove a significant interest.**

Get Outdoors II, 506 F.3d at 894 (citing *Ackerley Commc'ns of the Northwest v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir.1997)).

added). Based on that excerpt from *Bolger*, the Fourth Circuit recently rejected a claim that a town's sign ordinance violated the First Amendment because it did not include a clause setting forth the purpose the restriction was intended to serve. *Covenant Media of South Carolina LLC v. Town of Surfside Beach,* 321 Fed. Appx. 251, 254 (4th Cir. 2009).

Nor is a city required, by intermediate scrutiny, to explain how its chosen level of regulation serves its goals. In *Prime Media v. City of Brentwood,* a federal district court in Tennessee had invalidated under the First Amendment a 120-square-foot area limit and a six-foot height limit on billboards, after requiring the defendant city to "explain how or why billboards which are six feet high are more [perhaps less] threatening to safe driving or the beauty of Brentwood than billboards which are slightly taller or even much taller," and requiring it to explain "how or why signs with sign face sizes of more than 120 square feet cause more danger to drivers or detract more from the aesthetics of the City than signs with smaller sign face sizes." 398 F.3d at 822. Because that logic imposed a "stringent duty of calibration" that came "perilously close to a least-restrictive-means test," the Sixth Circuit reversed:

> While the district court and Prime Media have acknowledged that a least-restrictive-means test does not govern this inquiry, the analysis of the district court on this issue comes perilously close to being just that. See D. Ct. Op. at 9-10 ("Defendant does not explain how or why billboards which are six feet high are more [perhaps less] threatening to safe driving or the beauty of Brentwood than billboards which are slightly taller or even much taller.... Neither has Defendant shown how or why signs with sign face sizes of more than 120 square feet cause more danger to drivers or detract more from the aesthetics of the City than signs with smaller sign face sizes."). **Contrary to this analysis, the question is not whether a municipality can "explain" why** a 120-square-foot limitation "detract[s] more from the aesthetics of the City than signs with smaller sign face sizes"; it is whether the regulation is "substantially broader than necessary to protect the City's interest in eliminating visual clutter" and advancing traffic safety. *Taxpayers for Vincent,* 466 U.S. at 808, 104 S.Ct. 2118 (emphasis added). *Cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) ("[T]he case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.' ") (quoting *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), among other cases).

Prime Media, Inc., Id. (emphasis added). The Sixth Circuit further explained why "such demanding review" is too intrusive:

> While Prime Media is right to insist that governments be forced to weigh the costs and benefits of regulating speech and be forced to do so more rigorously than in other areas of legislation, **we do not think the Supreme Court's cases (or our own) impose such a stringent duty of calibration-at least in the context of a content-neutral time, place and manner restriction.** It is enough here that billboards, all agree, cause visual blight and interfere with traffic safety and that these dimensional restrictions have ameliorated the problems the government sought to address since 1999, when the law went into effect. **To ask the City to justify a size restriction of 120 square feet over, say, 200 square feet or 300 square feet would impose great costs on local governments and at any rate would do little to improve our ability to review the law-because any further explanation assuredly would contain the kind of aesthetic and subjective judgment that judges are not well-equipped to second guess.** Better, in our view, to save such demanding review for situations where the regulation is not content-neutral, where it does not leave ample alternative channels for communication because it is (or nearly is) a complete ban, or where the "broad sweep of the regulations" themselves show that the government did not reasonably weigh the costs and benefits of regulating speech. *Lorillard*, 533 U.S. at 561, 121 S.Ct. 2404. At any rate, this is not such a regulation.

Id. at 823-24 (emphasis added). Where, as in this setting, Minnesota law simply requires "rationality," and does not require a "reasonable fit" to pass muster, it was even less appropriate for the District Court to impose the same kind of burden of "explanation" on St. Paul.

B. The District Court's unexplained premise that a zoning law is irrational whenever the adopting jurisdiction failed to articulate reasons in the record puts at risk of invalidation countless similar laws throughout the state.

The City lost below because it did not foresee in 2006 that in 2009 a court would require the City to have articulated *in 2006* its justification when adopting

an ordinary zoning law. For local governments in Minnesota, the implications of the District Court's approach are staggering.

In the process of local lawmaking, including text amendments to zoning ordinances, contemporaneous findings are the exception, not the rule. That is particularly the case in smaller cities, counties and townships. The refusal of Minnesota's appellate courts to impose such a requirement when requested to do so in decisions such as *Arcadia II* and *Concept Properties* may account for that practice. Moreover, such an approach presumes that legislators can not only agree about the terms of a new law, but will also agree about the justifications for it. But the process of legislating in city councils, county boards, and township boards has this in common with state legislatures and with the U.S. Congress: the focus is appropriately on adopting the best rule of law and not on reaching agreement regarding the reasons why it is the best rule of law.

St. Paul's inability to provide to the District Court a verbatim record of the dialogue from the lawmaking process, as a substitute for contemporaneous findings, is hardly unusual. Many of the laws that cities, counties and townships must enforce today were adopted years ago. The permanent legislative history of those laws usually includes the minutes of council or board meetings. However, those minutes tend to focus on *what* the legislative body was doing, instead of making a complete record of the reasons given for each element of each such law.

While some local governments cablecast (or even webcast) their meetings, the recordings are rarely transcribed, and are not retained forever. Indeed, the General Records Retention Schedule for Minnesota Cities promulgated by the Minnesota Department of Administration provides that recordings of a city council meeting need only be retained for three months after the minutes of that meeting were approved.[7] Recordings of county board meetings need only be retained for one year after the minutes of that meeting were approved.[8]

If this Court declines to overturn the District Court's analysis, it will make the efforts of local governments to enforce their laws vulnerable to a new kind of attack. Those attacks can then be premised on the inability of local officials to find a suitable justification for those laws in their legislative history. Moreover, when local laws are challenged and reversed years after they are enacted, it can undermine local comprehensive planning efforts and the public's ability to rely on those plans and standards. To preserve the enforceability of local laws, the Court must reverse the District Court's analysis below.

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[7] General Records Retention Schedule for Minnesota Cities, p. 5, available from the Minnesota Department of Administration website at http://www.mnhs.org/preserve/records/retentionsched.html .

[8] Minnesota County General Records Retention Schedule – Administration, p. 2, available from the Minnesota Department of Administration website at http://www.mnhs.org/preserve/records/retentionsched.html

IV. THE REMAINDER OF THE DISTRICT COURT'S LOGIC IS UNCOMFORTABLY CLOSE TO THE LOGIC OF STRICTER SCRUTINY.

The District Court's opinion elaborated in other ways regarding the supposed deficiencies in the record before the City Council. However, when those criticisms are examined closely, it is even clearer that the District Court was employing the logic of stricter scrutiny, rather than a proper rational basis analysis.

A. The District Court's criticism that "there was simply no discussion on the need for a total prohibition on billboard extensions."

The District Court observed that "in sum, there was simply no discussion on the need for a total prohibition on billboard extensions." ADD.012. However, modern rational-basis analysis is not about *need.* In order for a law to survive that most deferential level of scrutiny, local governments are not required to believe, let alone state, that the law is *necessary. See, e.g., Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-88 (1955) (Oklahoma law survives rational-basis scrutiny even though the law "may exact a needless, wasteful requirement in many cases. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *American Network, Inc. v. Washington Utilities and Transp. Com'n*, 776 P.2d 950, 961 (Wash. 1989) (lower court's requirement that a government provide a

determination of necessity is a form of strict scrutiny, "inappropriate under the 'rational basis' test").

B. The District Court's criticism that "the only reference to a study on the issue is from Councilmember Benanav, but he does not provide the study or summarize its contents."

This aspect of the District Court's logic assumes, incorrectly, that a "study" was needed to make the proposed new law rational. It was not. As the Minnesota Court of Appeals has concluded when upholding the downzoning of property:

> The city could rationally have concluded there was an excess of B-3 property in the area. **The city need not conduct a study in order to meet this minimal burden; it may rely on its general knowledge of the area.** In a relatively small community, city officials have the experience, competence, and capacity to measure the impact of zoning decisions on the community without relying on expert witnesses to determine whether or not the use is in harmony with the general purpose and intent of the city plan.

Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. Ct. App. 1988).

Similarly, federal courts have rejected the notion that studies are necessary to satisfy intermediate scrutiny under the First Amendment. As the First Circuit recently held when upholding Concord, New Hampshire's flat ban on digital signs:

> NJI argues that Concord must perform studies to prove that the ban on EMCs in fact supports its stated interests. **Concord was under no obligation to do such studies or put them into evidence.** Justice Brennan suggested the need for such evidence in his concurring opinion in *Metromedia*, but seven justices rejected his position. *Metromedia*, 453 U.S. at 521, 528, 101 S.Ct. 2882 (Brennan, J., concurring); *see also Outdoor Sys. Inc. v. City of Lenexa*, 67 F. Supp. 2d 1231, 1238 (D. Kan. 1999) ("Relying on Justice Brennan's concurring opinion in *Metromedia*, plaintiff claims that the City has the burden to come forward with evidence which demonstrates that billboards actually impair traffic safety and the beauty of the environment. Plaintiff ignores the fact that seven Justices rejected Justice Brennan's analysis in this regard.").

Naser Jewelers, Inc., 513 F.3d at 35 (emphasis added). *See also Ackerley Commc'ns of the Northwest,* 108 F.3d at 1099-1100 ("As a matter of law Seattle's 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."). Indeed, earlier this year, Appellee Clear Channel lost on this point, when complaining that New York City had "failed to present any study linking a ban on billboards to improvements in traffic safety or aesthetics." *Clear Channel Outdoor, Inc. v. City of New York,* 608 F. Supp. 2d 477, 503 (S.D.N.Y. 2009). The court answered that "[c]ourts dealing with billboard regulation, however, have routinely found that aesthetics and traffic safety are valid reasons to restrict billboard placement, even without further studies backing the efficacy of the regulation." *Id.* "No study is required to prove what the eye can readily detect." *Id.* at 513.

C. The District Court's criticism that "the City's argument concerning heightened distractions as traffic hazards is belied by the fact that both the Planning Commission and Zoning Committee supported a permitting ordinance, as opposed to a prohibition ordinance."

The District Court recognized that the City had made an argument that billboard extensions created a heightened traffic hazard, but concluded that the argument is "belied by the fact that both *the Planning Commission and Zoning Committee"* supported a permitting ordinance rather than a prohibition. ADD.012 (emphasis added). This troublesome logic is at odds with representative governance, and with the meaning of "rational basis," even under the somewhat heightened scrutiny applied to decisions on zoning applications, and the intermediate scrutiny applied under the First Amendment.

On at least three different occasions, when addressing the application of a rational basis standard to a zoning decision, the Minnesota Supreme Court has treated "conflicting opinions" as a reason to *defer* to the decision, rather than as a reason to invalidate it. In *State, by Rochester Ass'n of Neighborhoods v. City of Rochester,* as in this case, the city council failed to follow the planning commission's recommendation, and that fact was invoked when challenging the ordinance. 268 N.W.2d 885, 889 (Minn. 1978). The Minnesota Supreme Court, however, took the opposite approach:

> In *Beck v. City of St. Paul*, 304 Minn. 438, 448, 231 N.W.2d 919, 925 [1975], and *Sun Oil Co. v. Village of New Hope*, 300 Minn. 326, 334, 220 N.W.2d 256, 261 [(1974)], we said:
>
> > "Even where the reasonableness of a zoning ordinance is debatable, **or where there are conflicting opinions as to the desirability of the restrictions it imposes** * * * , it is not the function of the courts to interfere with the legislative discretion on such issues."

Rochester Ass'n of Neighborhoods, 268 N.W.2d at 888 (emphasis added). As one appellate court in Florida observed:

> Although the zoning board and division of planning had both recommended approval of the petition, the commission was not required to follow the recommendations of those advisory bodies. **In fact, those differences of opinion may sometimes furnish an indication that the matter is fairly debatable.**

Broward County v. Capeletti Bros., Inc., 375 So.2d 313, 316 (Fla. Ct. App., 4th Dist. 1979) (emphasis added). Florida's approach is the norm. As a leading treatise on land-use law observes, "[u]nless otherwise provided by statute or ordinance, a legislative body has virtually untrammeled discretion as to whether to accept or reject a planning board's recommendation on a rezoning." 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 39:19 at 39-38 (4th ed. 2009).

The District Court's logic gives far too little weight to the role of elected lawmakers. Zoning enabling statutes in Minnesota and nearly every other state make elected officials the ultimate authority to adopt or amend local zoning laws. "Insofar as zoning ordinances are concerned, it has frequently been held that what best furthers public welfare is a matter primarily *for determination of the*

legislative body concerned[.]" *Beck,,* 304 Minn. at 448, 231 N.W.2d at 925 (quoting *State ex rel. Howard v. Village of Roseville,* 244 Minn. 343, 347, 70 N.W.2d 404, 407 (1955)) (emphasis added). *See also Metromedia,* 453 U.S. at 509 ("We likewise hesitate to disagree with the accumulated, common-sense judgments *of local lawmakers* and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.")(emphasis added). When the District Court discredited the rationality of the legislative action of St. Paul's legislative body by reference to an inconsistent recommendation of subordinate committees, it violated this most fundamental principle.

Perhaps the District Court was concerned that the City Council chose a blanket prohibition, rather than the less-restrictive approach of permitting favored by the Planning Commission. Yet the U.S. Supreme Court's *Metromedia* decision makes it clear that a blanket prohibition is easier, not harder, to justify. As the Supreme Court observed in *Metromedia*, "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508 (plurality opinion). Moreover, "the fact that a regulation bans a particular medium does not mean that the ordinance is not narrowly tailored." *Naser Jewelers, Inc.,* 513 F.3d at 36.

V. IF THE COURT AFFIRMS THE DISTRICT COURT'S CONCLUSION THAT A RATIONAL JUSTIFICATION FOR THE LAW MUST BE PRESENT IN THE RECORD, IT SHOULD DIRECT THE DISTRICT COURT TO REMAND THE CASE TO THE CITY COUNCIL FOR FINDINGS.

At a minimum, a need for a city to have articulated contemporaneous reasons when adopting a law was not well established; *Arcadia II, Concept Properties,* and similar decisions from Minnesota's appellate courts prove at least that much. Under these circumstances, if the Court were to affirm the District Court's logic under which it concluded that the record was insufficient to demonstrate the rationality of the law, it should not invalidate the law (or even require a trial),[9] but should instead direct the District Court to remand the case to the City Council for findings. Any other approach presumes that the District Court's role in the lawmaking process is greater than it really is.

The Minnesota Supreme Court found that a remand for findings was appropriate most recently in *In re Stadsvold,* 754 N.W.2d 323 (Minn. 2008), where the county board "did not have the benefit of" the Supreme Court's articulation of a test for "practical difficulties" as required by the applicable variance statute. *Id.* at 332. "Therefore, remand is required to allow the Board to consider the Stadsvold's variance application in light of our holding that applications for area

[9] While amici believe that a remand for findings by the Council is a more appropriate solution than a trial, even a trial would be more appropriate than nullification of the law under these circumstances.

variances are to be considered using the 'practical difficulties' standard . . . ." *Id.* *Cf. Earthburners, Inc. v. County of Carlton,* 513 N.W.2d 460, 463 (Minn. 1994) ("where, as here, the board has failed to discharge its responsibilities in connection with this application, we are compelled to offer it the opportunity to do so and to develop a record to allow meaningful appellate review.").

CONCLUSION

Amici American Planning Association, the Minnesota Chapter of the American Planning Association, the League of Minnesota Cities, the Association of Minnesota Counties, and the Minnesota Association of Townships respectfully request the Court to consider the guidance stated above in evaluating this appeal. Consistent with that guidance, amici respectfully suggest that the Court reverse the District Court's invalidation of St. Paul's prohibition of extensions, and direct the District Court to uphold its authority under Minnesota law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C) and 8TH CIR. L.R. 28A(c), the undersigned certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7). The brief was prepared Microsoft Word for Vista, which reports that the brief contains 6,499 words, excluding items listed in FED. R. APP. P. 32(a)(7)(B)(iii). The diskette containing the brief has been scanned for viruses and is virus free.