NO. 06-1035

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ADVANTAGE MEDIA, L.L.C.,
APPELLANT,

v.

CITY OF EDEN PRAIRIE,
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, SCENIC AMERICA, INC., AND SCENIC MINNESOTA, INC.

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DEFINITIONS, REFERENCES AND ABBREVIATIONS

Amici curiae will use the following definitions, references and abbreviations in this Amicus Brief:

City:	City of Eden Prairie, Minnesota.
City-Brief:	Brief of Appellee City of Eden Prairie, Minnesota.
Dkt.__:	Citation to Document filed in the District Court.
ER:	Excerpts of Record
Advantage Media:	Advantage Media, L.L.C.
Advantage-Brief:	Brief of Appellant Advantage Media, L.L.C..
§11.70-__.__.(__)	References to Section 11.70-subdivision-paragraph of the City of Eden Prairie's Sign Code

STATEMENT CONCERNING THE IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

Amicus curiae, American Planning Association (APA), is a nonprofit, public interest organization representing more than 38,500 professional planners nationwide, with headquarters in Washington, D.C. It has no corporate subsidiaries.

Amicus curiae, International Municipal Lawyers Association ("IMLA"), is a nonprofit nonpartisan professional organization whose 1,400 members include local governments of all kinds, state municipal leagues, and attorneys who represent local governments.

Amicus curiae, Scenic America, Inc., is a national nonprofit conservation organization that is based in Washington, D.C. and incorporated in the State of Pennsylvania. It has no corporate subsidiaries. It is dedicated to preserving and enhancing this nation's scenic character.

Amicus curiae, Scenic Minnesota, Inc., is a Minnesota nonprofit public benefit corporation. It has no corporate subsidiaries. It is dedicated to promoting programs that preserve and enhance landscapes, streetscapes, and scenic road systems.

Billboard developers have implemented a litigation strategy that involves a facial challenge to the entirety of a community's sign regulations. The goal of this litigation scheme is to strike down all sign regulations in effect on the date the applications were submitted and denied, thereby creating a temporary regulatory vacuum and allowing developers to claim an alleged "vested right" to erect the billboards that are the subject of unapproved/denied applications regardless of the proposed billboards' height, size, or location. In order to accomplish this result, billboard developers frequently target minor problematic provisions within a broad sign ordinance. The targeted provisions are typically unrelated to the reasons that applications to erect billboards were denied in the first place.

Local governments have become increasingly plagued by these attempts to circumvent billboard regulations through challenges to completely unrelated provisions in a local government's sign regulations. This litigation strategy requires a completely improper, and even abusive, use of both the First Amendment and the limited overbreadth exception sometimes applied in the First Amendment Context.

For reasons more fully set forth herein, this decision will have a significant impact on local governments throughout the country.

SUMMARY OF ARGUMENT

Comprehensive 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. 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. Temporary signs with certain dimensional and durational criteria are usually allowed without a permit, absent legitimate regulatory concerns over enforcement and/or litter. Permanent signs that have a lasting impact on a community's appearance will frequently be subject to a permitting arrangement that protects sign owners by assuring that their investment in the erection of permanent sign-types is authorized while at the same time preserving the public interest by assuring that the long term appearance of the community will not be adversely impacted by unauthorized sign structures.

Within an overall comprehensive set of sign regulations, there is rarely an intent to censor speech, control viewpoint, or shape the subject of public debate. Some regulatory provisions have proved problematic in certain settings where "viewpoint" issues have been impacted by certain provisions, such as (i)

"American" flags, (ii) durational limits on temporary election signs before a campaign is concluded, or their number and manner of display, (iii) insufficient criteria for temporary special event signs, or (iv) when a prohibition on obscene messages is extended to "immoral" messages or other protected speech. However, such problematic provisions, if and when they occur, are subject to legitimate as-applied or facial challenges within the overall context of Article III standing requirements and proper judicial application of the facial overbreadth doctrine.

The facial overbreadth doctrine is a rarely utilized exception developed by the judiciary to protect the First Amendment rights of parties not before the Court. With increased frequency, however, outdoor advertising litigants have sought to utilize this rare exception as an instrument of commercial gain. To that end, various outdoor advertising companies have developed a strategy which seeks to utilize the overbreadth exception to overcome traditional standing requirements which would otherwise prevent them from attacking provisions of comprehensive sign ordinances which do not apply to them and under which they have suffered no harm. This strategy is part of a scheme to strike down the entirety of an ordinance so that no legal ordinance remains in place to prevent the erection of billboards or sign structures that otherwise exceed height and/or size requirements or contravene location criteria.

Such schemes must fail, however, when evaluated against recent admonitions of the Supreme Court with regard to standing. The Court has reiterated that plaintiffs must establish the core constitutional standing requirements, which require that there exist an actual case or controversy between the parties. To that end, a plaintiff must establish an injury-in-fact, a causal connection to that injury, and that the injury be redressible. In this case, Advantage failed to meet these core constitutional requirements.

The Supreme Court has also recently stated that the overbreadth doctrine is a narrow exception that should be rarely invoked. The Supreme Court has insisted that the alleged violations must be significant in relation to the plainly legitimate scope of the law at issue, and that most alleged constitutional deficiencies should be remedied through as-applied challenges. In this case, it is clear that application of the facial overbreadth exception is clearly inappropriate given the legitimate scope of the City's sign regulations through which it safeguards the beauty of the natural and built environment within the City.

ARGUMENT

I. COMPREHENSIVE SIGN REGULATIONS IN GENERAL.

In the First Amendment arena, regulations that implicate speech run the gamut from those directed to "pure speech" to those directed to concerns other than speech itself. Comprehensive sign regulations are principally concerned with aesthetics and traffic safety.[1]

In many jurisdictions, sign regulations are classified as land development regulations. Such comprehensive sign regulations are not used as speech-licensing or censorship schemes but are chiefly concerned with the development of land and the visual appearance of land in a variety of zoning settings (residential, commercial, industrial, and the like). Most comprehensive sign regulations follow a traditional and well-established approach.

Exemptions and exceptions. A local governing body will first decide to what extent to exercise its police power to regulate signage. What is a "sign" for purposes of extending the police power in this realm of regulation? Given the fact that the ordinary definition of a "sign" includes a broad variety of communication mechanisms and symbols, a local government will ensure that its police power

[1] See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 444, (2002) (Kennedy, J., concurring) (noting that speech can cause secondary effects unrelated to the impact of the speech on its audience, for example, a "billboard may obstruct a view").

does not overreach and include within its regulatory purview such items or devices as 'art,' 'holiday decorations,' 'traffic control devices,' 'grave markers,' 'building cornerstones,' etc. These devices or items are either excluded from the comprehensive sign regulation code or exempted from sign permitting requirements. Simply put, there is ordinarily no reason for a local government to extend its police power to regulate such items or devices, and their exclusion or exemption does not implicate a desire to favor certain viewpoints or to fashion the subject matter of public debate. Rather, it reflects an attempt to regulate as little as possible.

Prohibited or Limited Sign-Types. A local government will exercise the police power to prohibit or limit certain permanent sign-types based upon location criteria (e.g., off-site or non-accessory signs,[2] roof signs, projecting signs), distracting attributes (e.g., motion signs), as well as physical or placement criteria (e.g., height, size-area, minimum setback, spacing).

[2] Off-site or non-accessory signs, commonly known as "billboards," are a sign-type that is distinguished from on-site signs by function and location, and the prohibition of billboards or limitations on the physical characteristics of permanent off-site signs are not impermissible content-based distinctions. See Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 814-815 (9th Cir. 2003); Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988), reh'g denied, 485 U.S. 944 (1988).

The most common prohibited or restricted sign-type is the permanent off-site or non-accessory sign, commonly known as a billboard. The Supreme Court has recognized the unique problems that this sign-type poses to local land use planners. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (White, J., plurality opinion).[3] Many communities prohibit permanent off-site non-accessory signs (billboards) altogether, while other communities allow permanent billboard structures subject to height, size, and location limitations. In 2004, and for many years beforehand, Eden Prairie prohibited non-accessory signs (billboards). The American Planning Association (APA) and the American Society of Landscape Architects (ASLA) have adopted specific policies that address billboard controls given the interest in protecting and preserving the beauty, character, economic and aesthetic value of land, and improving visual quality.[4] Censorship and viewpoint-control play no role whatsoever in these policies.

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[3] See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806-807 (1984) (summarizing Metromedia: "[t]here the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition on billboards").

[4] American Planning Association, Policy Guide on Billboard Controls, ratified by the Board of Directors, April 1997, http://www.planning.org/policyguides/billboards.html (visited April 3, 2006); American Society of Landscape Architects, ASLA Public Policies, Public Affairs,

Regulated Signs. After a local government decides what devices its comprehensive sign regulatory system will not encompass and what sign-types will be prohibited or limited, the local government must then decide on how to control the "signs" that it will regulate under its police power. These initially fall into two types: temporary signs and permanent signs.

Temporary signs. There are a wide variety of temporary signs. Generally, temporary signs are classified or categorized by the function that they serve. Temporary sign-types may include but are not limited to: (i) temporary real estate signs (for sale, for lease, and for rent); (ii) temporary construction signs (usually identifying a site where there is an active building permit and construction underway); (iii) temporary grand opening signs for new businesses that function to identify the existence of a new business for a short duration following its initial opening; (iv) temporary campaign/election signs (sometimes inappropriately labeled "political signs")[5] that function to identify support for ballot issues or candidates for elected office during the period prior to the election; (v) temporary special event signs (such as an annual county fair, a homecoming celebration for a

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Billboards (pdf) (R1990, R2001), http://asla.org/members/publicaffairs/publicpolicy.html (visited April 3, 2006).

[5] See Gerard, Jules B., "Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part III: Zoning Aesthetics: Chapter 5: The Takings Clause and Signs: Election Signs and Time Limits." 3 Wash. U.J.L. & Pol'y 379, 380 (2000).

national guard unit, or other seasonal or occasional events) that identify or provide directions to an upcoming or current public or semi-public event. The latter two temporary sign-types, *temporary campaign/election signs* and *special event signs*, have been associated with a variety of potential constitutional problems that have produced and are continuing to produce uneven outcomes.

Permanent Signs. Temporary signs are tied to short-term events and function to provide an important informational function that may be uniquely suited to temporary signage. Permanent signs, however, are associated with the long-term development of land and will have a long-lasting impact on a community's aesthetics. The character of the zoning district and/or the property use will impact the sign's characteristics, such as (a) the height, (b) the size-area (dimensions or square-footage), (c) the type of freestanding sign (pole or monument), (d) its setback (distance from roadways and/or buildings), (e) the number of freestanding signs per lot/parcel, and (f) the spacing between freestanding signs. The placement of "permanent" sign structures on land impacts the aesthetic development of a community in material ways.

Businesses and institutions in commercial or industrial districts will require some type of on-site identification or accessory sign that functions to identify who or what they are; such signage is usually accommodated by both freestanding signs (pole and/or monument signs) and wall signs, and may also be accommodated in

certain situations by other sign-types such as canopy signs. Certain institutional or quasi-public uses, such as schools, religious institutions, movie theaters, may require additional sign-types that function to provide announcements of activities or events.

Certain commercial uses involve one or more drive-through lanes with menus displayed for vehicle occupants to place an order, and such uses necessarily involve additional signage known as drive-through menus signs. Certain commercial uses involve the sale of petroleum or related products (gasoline, diesel, etc.) at self-service islands and pumps, and the additional signage may be necessary for the operation of such islands and pumps. Certain commercial, industrial, institutional and public or quasi-public uses may require low-to-ground enter and/or exit signs to accommodate both vehicular and pedestrian safety concerns, and balance those safety concerns with aesthetic concerns re height, size, number, and other qualifying features.

Warning signs (temporary and permanent). Certain sign-types such as warning or danger signs may include both temporary and permanent signs. Warning signs function to warn of danger or hazard associated with a location. Such warning signs are common across both urban and rural landscapes. Permanent warning or danger signs are associated with buried underground cables, underground gas or electric lines, high voltage locations, railroad crossings, and

the like. Examples of temporary warning signs are 'no trespassing,' 'danger, bad dog,' 'no skateboarding,' 'sidewalk closed,' and the like. Warning or danger signs serve an important function and are unique to the location or property on which they are displayed or posted, and can only be described by the function that they serve. See Granite State Outdoor Advertising, Inc. v. City of Clearwater ("Granite State/Clearwater"), 213 F. Supp. 2d 1312, 1333 (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, 125 S.Ct. 48 (2004).

Permitting for Allowed Sign-types. As noted above, sign-types are (i) exempt from regulation where the local government has made an informed and rational decision not to extend its police power to regulate certain signs or sign-types, (ii) prohibited within a jurisdiction, often because of their physical or locational characteristics, or (iii) allowed with or without express sign permitting. The need for a sign permit is ordinarily tied to whether permitting is necessary for enforcement or other practical purposes. Different considerations apply based upon whether the signs are temporary or permanent.

Temporary signs usually do not require a permit because their presence is usually for very brief durations. Permitting for such temporary signage may also prove impractical depending upon resources available to administer such a program. Regulatory criteria will usually provide sufficient guidance vis a vis the

height, size, setback, number, and the like; and, if those criteria are not complied with, there is usually an enforcement mechanism that can effectively operate to address violations. On some occasions, a jurisdiction may require some form of permitting for temporary "special event" signage that are likely to pose problems (such as clean-up).

Permanent signs, due to the physical characteristics (height, size, setback, etc.) and permanency on the landscape, make it important that the local government have a mechanism in place to ensure that permanent structures meet the criteria for their physical and location characteristics *before* such structures are fabricated, constructed and erected. Such a permitting mechanism also aids the person or entity that will own the sign structure by providing a method that ensures that the expenditure of money associated with the erection of a permanent sign structure will not be wasted by erecting an illegal structure and then having to remove it afterwards. Certain smaller permanent signs, such as nameplates, street address signs, small warning signs (high voltage, buried gas line, etc.), and low-profile enter/exit signs do not have the same need for permitting.

The permitting for permanent sign structures is not a regulatory censorship scheme or speech-licensing scheme. While the erection of permanent structures on

which sign messages will later be displayed (posted)[6] may implicate the First Amendment, the permitting of permanent signs and sign structures is principally oriented to the function served by the sign device, but the permitting is not an effort (a) to censor, (b) to regulate a particular viewpoint, or (c) to control the subject matter of debate. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The 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 government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); Members of the City Council for the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance.

[6] In its pleadings, Advantage frequently engages in a game of semantics to cloud the factual setting. The most frequent, and obnoxious, word-play is referring to its effort to simply "post a sign." It paints itself as a small company that merely seeks permission to "post a sign." In the context of signage, the term "to post" means "to affix" or "to display." However, Advantage wants to construct permanent multi-ton steel structures that will be seven- or eight-stories tall, and that will dominate the landscape for generations. According to a recent government study, modern steel structures can have a normal lifespan up to seventy years. See Florida Legislature Office of Program Policy Analysis and Government Accountability, Special Review: Property Appraisers Use Cost Approach to Value Billboards; Guidelines Need Updating, Report No. 02-69, at 4 (December 2002) (available at http://www.oppaga.state.fl.us).

There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral--indeed it is silent--concerning any speaker's point of view"); Hill v. Colorado, 530 U.S. 703, 719-723 (2000) (discussing Ward and noting that there the regulation "places no restrictions on - and clearly does not prohibit - either a particular viewpoint or any subject matter that may be discussed by a speaker"). See Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1440-1448 (N.D.Ill. 1991), affirmed, 989 F.2d 502 (Table), 1993 WL 64838 (7th Cir. 1993) (discussing content-neutrality).

Indeed, to be effective, most sign regulations follow the traditional approach of classifying and categorizing sign-types by the function they serve for purposes of exemption, exceptions, and overall regulation. Indeed, there is no other practical approach to effective sign regulation. The common-sense application of Ward was most recently demonstrated in G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006), where a wide-ranging challenge to the regulation of various sign types was asserted to be impermissibly content-based. The Ninth Circuit rejected the absolutist approach. In addressing the different temporal regulations for real estate signs and political signs, for example, the Ninth Circuit stated:

> Such exemptions indicate the City's recognition that during certain times, more speech is demanded by the citizenry because of the event

> (e.g., a real estate transaction or election) but the City does not limit the substance of this speech in any way. The exemption for temporary signs does not manifest the City's desire to prefer certain types of speech or regulate signage by its content. Therefore, this exemption, too, is content neutral.

Id. at 1077-1078 (emphasis added).[7] The logical, common-sense approach in applying Supreme Court precedent was explained in Granite State/Clearwater:

> What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations on signage and make exceptions for distinctions required by law (i.e., for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (i.e., warning or construction signs). For example, there is simply no other way to make an exemption or classify a for sale sign as a for sale sign without reading the words "For Sale" on the sign, or classifying a sign as a warning sign without reading the words "Warning Bad Dog" on the sign. In many cases, this classification raises the "red flag" of an impermissible "content-based" regulation. *See Metromedia*, 453 U.S. at 565, 101 S.Ct. 2882 (Burger, J. dissenting) (referring to differentiating among topics and 'noncontroversial things' and "conventional" signs such as time-and-temperature signs, historical markers, and for sale signs).
>
> Hence, in looking at the general principles of the First Amendment as the Court did in *Taxpayers for Vincent*, the real issue becomes whether the distinctions or exceptions to a regulation (as well as any areas of government discretion) are a disguised effort to control the free expression of ideas or to censor speech. Common

[7] Likewise, for the same reasons, the Ninth Circuit held that provisions exempting public signs, signs for hospital or emergency services, and railroad signs from a permitting and fee process did not render the regulations impermissibly content-based. Id. at 1076.

> sense and rationality would dictate that the only method of distinguishing signs for purposes of enforcing even content-neutral regulations, such as number, size or height restrictions, is by their message . . . In rendering its opinion today, this Court focuses on whether the government regulation is trying to impermissibly censor speech or limit the free expression of ideas.

213 F. Supp. 2d at 1333-1334 (emphasis supplied). See also Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida ("Granite State/St. Petersburg"), 348 F.3d 1278, 1281 (11th Cir. 2003), cert. denied, 124 S.Ct. 2816 (2004), ("government's objective in regulating speech is the controlling consideration").

Similar observations were made in National Advertising Company v. City of Miami, Florida, 287 F. Supp. 2d 1349 (S.D.Fla. 2003), rev'd on other grounds, 402 F.3d 1329 (11th Cir. 2005), cert. denied, ___ S.Ct. ____, 2006 WL 385630, 74 USLW 3463, 74 USLW 3471 (Feb. 21, 2006) (No. 05-492).

> There is no question that First Amendment precedent, including *Metromedia,* clearly establishes the general rule that the government cannot 'regulate speech in ways that favor some viewpoints or ideas at the expense of others.' *Taxpayers for Vincent,* 466 U.S. at 804, 104 S.Ct. 2118. However, this general rule is not applicable in cases where 'there is not even a hint of bias or censorship in the [c]ity's enactment or enforcement of [the] ordinance.' *Id.* This is particularly true where '[t]he text of the ordinance is neutral-indeed it is silent-concerning any speaker's point of view ....' *Id.*

Id. at 1376 (emphasis supplied).

Here, the City's Sign Code does not seek to regulate speech because of disagreements with the messages conveyed, or to control or limit topics for public debate and discussion. The Sign Code is content-neutral. However, the foregoing

background is critically important when addressing Article III's injury-in-fact requirement and the application of the overbreadth doctrine, both from functional and policy standpoints.

II. ARTICLE III.

"'The province of the court,' as Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803), 'is, solely, to decide on the rights of individuals.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992). Article III requires a case or controversy.

A. ARTICLE III'S MANDATORY REQUIRMENTS.

That is why a plaintiff cannot adjudicate an alleged imperfection in a statute or law unless that flaw has caused that plaintiff to suffer (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." Id. at 560. Some standing requirements are merely prudential, but these three are mandatory. Id. The Supreme Court has warned against allowing circumvention of these mandatory requirements. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982).

B. ARTICLE III'S REQUIREMENT THAT THE INJURY BE CONCRETE AND PARTICULARIZED.

In a recent billboard case, the Eleventh Circuit identified the three constitutional requirements for standing that must be satisfied as: (1) an injury in fact, meaning an injury that is concrete and *particularized*, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. Granite State/Clearwater, 351 F.3d at 1116.

In Granite State/Clearwater, Granite State's applications were denied under a code provision [Div.18, §3-1806.B.1] that set height and size limitations for permanent freestanding signs. Granite State mounted an as-applied challenge and facial challenge as to that provision, as well as a facial challenge to a host of provisions that did not affect it. Because Granite State had suffered an actual injury from application of that provision [§3-1806.B.1], the Eleventh Circuit concluded that it had standing to make a facial challenge through the overbreadth doctrine insofar as that provision impacted the noncommercial speech interests of third parties. Granite State failed, however, in both the as-applied and facial challenges because the limitations in that provision were content-neutral and did not give unfettered discretion to the city. Moreover, because Granite State personally suffered no injury or harm under any other provision of Division 18, the Eleventh Circuit held that Granite State did not have standing to mount facial challenges to those other provisions. The Eleventh Circuit concluded that an injury

under one provision of a comprehensive regulatory scheme did not open the door to an attack on unrelated provisions that posed no actual or imminent injury to the plaintiff. 351 F.3d at 1117. Only when a provision causes or poses actual or imminent injury to a plaintiff, will that plaintiff have standing to raise the noncommercial speech interests of third parties as to that provision. Of course, such a plaintiff must have the requisite interest in noncommercial speech to raise the noncommercial speech interest of third parties. Metromedia, supra, 453 U.S. at 504.[8]

C. THE CITY'S SIGN CODE PROVISIONS THAT CAUSED ADVANTAGE'S CONCRETE AND PARTICULARIZED INJURY.

In February 2004, Advantage initiated[9] the "now familiar strategy" described the previous year by a federal court in Florida:

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[8] It has been standard in similar cases for the plaintiff to allege an interest in both commercial and noncommercial speech. Often, these allegations go unchallenged. Advantage's false allegation of an interest in noncommercial was not unchallenged by Eden Prairie.

[9] See also complaints filed in similar federal suits: Advantage Media, L.L.C. v. City of Hopkins, Case No. 0:04-cv-4959-MJD-JGL (12-08-2004) (D.Minn.) (Doc. 1); Advantage Advertising, L.L.C. v. City of Hoover, Alabama, Case No. 02-cv-1998 (8-15-2002) (N.D.Ala.) (Doc. 1); Advantage Advertising, LLC v. City of Pelham, AL, Case No. 2:02cv2017 (8-20-2002) (N.D.Ala.) (Doc. 1); Get Outdoors II, LLC v. City of San Diego, CA, Case No. 3:03cv1436 (7-21-2003) (S.D.Calif.) (Doc. 1) Prime Media, Inc. v. City of Brentwood, TN, Case No.3:02cv1034 (10-28-2002) (M.D.Tenn.) (Doc. 1); Granite State Outdoor Advertising, Inc. v. City of St. Pete Beach, FL, et al., Case No. 8:02cv331 (2-22-2002) (M.D.Fla.) (Doc. 1); Granite State Outdoor Advertising, Inc. v. Zoning Board of Stamford, CT, City of Stamford, CT, et al., Case No. 3:00cv1253 (07-03-

> 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 legal attack.

Florida Outdoor Advertising, LLC v. City of Boca Raton, 266 F. Supp. 2d 1376, 1379 (S.D.Fla. 2003) (emphasis added). Advantage submitted applications to erect permanent multi-story steel billboard structures in the City that were prohibited under the City's sign code. E.P.App. 180-218 (Applications). The applications were incomplete in several respects. The City made inquiry to obtain the omitted information and then denied the applications. E.P.App. 223-224, 227-253. Advantage had applied to erect sign structures ranging in height up to 80-feet and for sign faces ranging in size up to 672-sf per side. Permanent non-accessory signs (off-site signs, billboards) were prohibited in all zoning districts. All fourteen applications exceeded the content-neutral height and size-area requirements for free-standing signs in commercial and industrial districts.[10] The applications also failed to meet other content-neutral requirements not specifically challenged by Advantage.

In summary, Advantage's applications failed to comply with the thirteen bulleted provisions described below. These were the provisions that caused

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2000) (D.Conn.) (Doc. 1); Granite State Outdoor Advertising, Inc. v. Planning & Zoning Board of Milford, CT, City of Milford, CT, et al., Case No. 3:00cv1834 (09-26-2000) (D.Conn.) (Doc. 1).

[10] See Table attached hereto as Exhibit A.

Advantage's concrete and particularized injury (the inability to erect permanent multi-story steel structures).

§11.70-3. General Provisions Applicable to All Districts.

- §11.70-3.A.1 (prohibition on non-accessory signs)
- §11.70-3.C (prohibition on motion signs)
- §11.70-3.M (limitation on the maximum size of multi-faced signs)
- §11.70-3.X (limitation on the spacing between signs)

§11.70-4. District Regulations.
4.B Commercial Districts: N-Com, C-Com, C-Hwy, C-Reg-Ser, C-Reg.

- §11.70-4.B.1.(a) (limitation on the maximum size-area of free-standing signs in commercial zoning districts)
- §11.70-4.B.1.(e) (minimum setbacks for free-standing signs in commercial zoning districts)
- §11.70.4.B.1.(f) (limitation on the maximum height of free-standing signs in commercial zoning districts)
- §11.70-4.B.1.(g) (limitation on the maximum size of the sign base for free-standing signs in commercial zoning districts)

§11.70-4. District Regulations.
4.D Industrial Districts: I-2, I-5, I-GEN

- §11.70-4.D.1.(a) (limitation on the maximum size-area of free-standing signs in industrial zoning districts)
- §11.70-4.D.1.(b) (limitation on the number of free-standing signs per street front in commercial zoning districts)
- §11.70-4.D.1.(e) (minimum setbacks for free-standing signs in industrial zoning districts)
- §11.70-4.D.1.(f) (limitation on the maximum height of free-standing signs in industrial zoning districts)
- §11.70-4.D.1.(g) (limitation on the maximum size of the sign base for free-standing signs in industrial zoning districts)

Within the Plaintiff's Complaint (Dkt.1), the Plaintiff's Cross Motion for Partial Summary Judgment (Dkt.60), and the Plaintiff's Memorandum of Law in

Support of Its Cross-Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Dkt.61), only the first of the thirteen listed provisions was challenged by Advantage. See Dkt.61, at p. 12. In its Order (Dkt.80) that is the subject of this appeal, the District Court observed:

> . . . plaintiff's billboard applications were denied in part or in whole based on insufficient setback, rotating features and excessive size, sign base, height and density, but plaintiff does not specifically challenge the validity of those restrictions in the sign code.

Dkt.80, at p. 9; 405 F. Supp. 2d at 1042 (emphasis added). By ignoring the remaining twelve of the thirteen provisions that were the cause of the plaintiff's actual injury, the plaintiff has an insurmountable problem with the third prong of constitutional standing, i.e., redressibility. The third prong's requirement of redressibility cannot be trumped by challenging provisions that have caused no concrete and particularized injury to the plaintiff (thereby avoiding the first prong)

As to the challenge to §11.70-3.A.1, the content-neutral prohibition on non-accessory signs (billboards), it has long been established that municipalities may prohibit billboards. See Taxpayers for Vincent, supra, 466 U.S. at 806-807; City of Cincinnati v. Discovery Network, 507 U.S. 410, 425 n.20 (1993). Advantage's as-applied challenge to that provision fails.

D. THE CITY'S SIGN CODE PROVISIONS THAT DID NOT CAUSE ADVANTAGE A CONCRETE AND PARTICULARIZED INJURY.

Unwilling to offer a challenge to the validity of the provisions addressing minimum setback, rotating features (motion signs), sign size-area sign height, sign base, and other location or dimensional criteria for the proposed permanent multi-story steel structures, the Plaintiff has focused on provisions that caused Advantage no concrete and particularized injury. Among the provisions challenged are:

- §11.70-3.H (temporary political signs). Dkt.61-1, p.13; Advantage-Brief, pp.41-42.
- §11.70-3.I (temporary construction signs). Dkt.61-1, p.13; Advantage-Brief, p.42.
- §11.70-3.J (temporary project signs). Dkt.61-1, p.13; Advantage-Brief, p.42.
- §11.70-3.K (temporary single property signs). Dkt.61-1, p.13; Advantage-Brief, p.42.
- §11.70-3.L (flags). Dkt.61-1, p.21.
- §11.70-3.T (directional signs for churches, schools and publicly owned land/buildings). Dkt.61-1, p.14.
- §11.70-3.EE (temporary help wanted signs). Dkt.61-1, p.13; Advantage-Brief, p.42.
- §11.70-3.GG (menu board signs). Dkt.61-1, p.13; Advantage-Brief, p.42.
- §11.70-5.D (exemptions for signs erected by governmental units, public school districts or non-profit organizations)). Dkt.61-1, p.14.

As discussed above in connection with Granite State/Clearwater, supra at pages 18-19, an injury under one provision of a comprehensive code does not open the door to attack unrelated provisions that pose no actual or imminent injury to a plaintiff.

III. IF THE OVERBREADTH DOCTRINE IS TO BE INTERPRETED SO BROADLY AS TO ALLOW A LITIGANT TO FACIALLY CHALLENGE (ON BEHALF OF THIRD PARTIES) PROVISIONS THAT HAVE NOT CAUSED THE

ACTUAL LITIGANT ANY INJURY, THERE IS NO EFFECTIVE LIMITING PRINCIPLE TO THE OVERBREADTH DOCTRINE CONSISTENT WITH CONTROLLING SUPREME COURT PRECEDENT.

There would be no limits to overbreadth if an applicant barred by one provision (or even several provisions) of a comprehensive set of regulations could then use that injury-in-fact to attack provisions that have caused no injury to the applicant. The untenable nature of this argument is demonstrated by the following example:

If individuals reading this brief case were to apply for a permit to erect a 1,000-foot tall permanent billboard (non-accessory/off-site sign) structure with a 2,000-square foot sign face in the backyard of their residence, it can reasonably be predicted that the permit application would be denied under whatever sign regulations are then in effect in their city or county. The hypothetical applicants have thereby suffered an injury-in-fact. This injury cannot possibly open the door for such an applicant to then attack the entirety of a sign ordinance under the overbreadth doctrine. If this scheme does open the door for such facial attacks, the "actual case or controversy" provision of Article III of the U.S. Constitution is nullified. The federal courts would effectively be turned into "roving commissions" to pass on the legality of every sign ordinance in every city, town, county, borough, parish, and village in America, whenever and wherever a billboard company wanted to erect and construct more billboard structures.

Typically, a billboard challenger will target certain problematic provisions, some of which have resulted in uneven or contradictory results wherever and whenever they are litigated. The billboard challenger will also target exemptions or exceptions, arguing if any one exemption or exception is "content-based" then the severability (elimination) of the exemption or exception will result in more restrictions on speech. The challenger will thus argue that the entirety of the comprehensive sign code has to be stricken. This type of unlimited gamesmanship, without regard to the "injury-in-fact" requirement, would open an unending floodgate of litigation.

A. THE THREAT TO LOCAL GOVERNMENTS.

In recent years, several district courts have had the opportunity to closely scrutinize the sign industry's tactics in challenging local signs codes. Leading into an extensive analysis on the topic, one district court stated:

> Many courts, like this one, and many commentators, are concerned that local governments have been placed in a tenuous and near impossible position in drafting a constitutional or content-neutral sign ordinance. *See, e.g.,* Cordes, Mark, "Sign Regulation After *Ladue:* Examining the Evolving Limits of First Amendment Protection," 74 Neb. L.Rev. 36 (1995); Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L.Rev. 2482 (1990).

Granite State/Clearwater, 213 F. Supp. 2d at 1333 (emphasis supplied).

There is a veritable constellation of published decisions involving sign regulations and these decisions are, unfortunately for local governments,

inconsistent. Professional planners and land use professionals in the legal community are often left to wonder what they can do in order to provide some assurance that each and every provision of an ordinance will survive a legal challenge, and whether the failure of a particular provision would necessarily entail the collapse of the entire regulatory code whose principal raison d'etre is aesthetics and traffic safety (not censorship and viewpoint control).

In Granite State/Clearwater, Granite State cited to more than twenty-five (25) different provisions of the ordinance and advanced the argument that they were impermissibly content-based. The district court disagreed and found the sign regulations to be largely content-neutral and, on that basis, rejected Granite State's prior restraint challenge. Granite State/Clearwater, 213 F. Supp. 2d at 1324. On appeal, this Court noted that time limits were not categorically required when the regulatory scheme is "content-neutral," and upheld the district court's holding that Granite State lacked standing to attack the lack of time limits in the Clearwater Code. Clearwater, 351 F.3d at 1117-1118. Similar claims were advanced and rejected in Granite State/St. Petersburg, and the Eleventh Circuit determined that the St. Petersburg sign ordinance was "content-neutral." 348 F.3d at 1282.[11]

[11] The entirety of the Clearwater Sign Ordinance (§§ 3-1801 through 3-1807), referenced in the Eleventh Circuit's was previously published at 213 F. Supp. 2d at 1342-1350. The entirety of the St. Petersburg Sign Ordinance (§§16-666 through 16-713) was App.1 to the St. Petersburg District Court Opinion. See

Contra Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005) (determining substantially similar provisions to be impermissibly content-based). In 2003, in St. Petersburg, the Eleventh Circuit held:

> Clearly, whether *Freedman* or *Thomas* controls here depends upon whether the City's sign ordinance is content-based or content-neutral. The government's objective in regulating speech is the controlling consideration. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989). More specifically, if the government's reasons for regulating speech have nothing to do with content, then the regulation is content-neutral. *Id.; see also Messer v. City of Douglasville,* 975 F.2d 1505, 1509 (11th Cir. 1992) (stressing that location-based regulation is not content-based regulation).

348 F.3d at 1281. The Eleventh Circuit noted, "We will not, however, address hypothetical constitutional violations in the abstract." Id. at 1282.

Still, the "near impossible position" in which local governments have been placed when it comes to drafting a sign ordinance remains a problem.[12] Granite State/Clearwater, 213 F. Supp. 2d at 1333. See Cordes, Mark, "Sign Regulation

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Memorandum Opinion, St. Petersburg, Case No. 8:01cv2250 (M.D.Fla. October 11, 2002) (Doc.56).

[12] These predicaments were illustrated when the City of Covington, Georgia was sued several years ago and thereafter revised its ordinance with the assistance of the sign company's lawyer as part of a settlement arrangement. Following a new suit against the City of Covington through the services of the very same lawyer, but on behalf of a different billboard company, the lawyer's response was reported to be: "he's sure that he made good legal suggestions to Covington, but more recent court rulings made the ordinance unconstitutional now." See "Lawyer Fights for Billboards," Atlanta Journal-Constitution (July 28, 2003); and Answer filed on February 24, 2003 (Doc.5, Third Defense, p. 20) in Lamar Advertising Company v. City of Covington, 1:03-cv-00152-WBH (N.D.Ga.).

After Ladue: Examining the Evolving Limits of First Amendment Protection," 74 Neb.L.Rev. 36, 87 (1995). But that problem should not be exploited through misuse and abuse of the overbreadth doctrine.

B. OVERBREADTH CHALLENGES, THAT INVITE JUDGMENTS ON FACT-POOR RECORDS, ARE RESERVED FOR EXTREME CIRCUMSTANCES.

Overbreadth challenges invite judgments on fact-poor records. Sabri v. United States, 541 U.S. 600, 124 S.Ct. 1941, 1948 (2004). Justice Souter's concern over "fact-poor" records is right on point when it comes to comprehensive sign codes. Facial overbreadth challenges can lead to extreme or sometimes absurd hypotheticals that have no basis in actual application or fact, and invite wild speculation that may be divorced from the real world of sign regulation. Consider a typical ploy by a billboard company pursuing this emerging scheme. A plaintiff billboard company files a multi-count complaint (usually twelve or more counts) legally challenging nearly every provision of a comprehensive sign regulation, with dozens of separate sections being evaluated under a variety of legal theories, and with multiple defenses to each count involving a mixture of vested rights, damages, redressibility, ripeness, mootness (on some occasions), and factual disputes involving contested allegations. Rather than focusing on the provision(s) that caused the "injury-in-fact," the local government must be ready to address

hundreds of issues that involve provisions that have never been applied to and are inapplicable to the plaintiff.

The overbreadth doctrine is a narrow exception to the prudential standing limitations and applies in First Amendment cases involving non-commercial speech. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Billboard companies and billboard developers have been manipulating their cases with semantics and word-play to manufacture the appearance of dangers that do not exist or that can be best handled through as-applied challenges by those who actually sustain an "injury in-fact" as to an ordinance provision.

The Supreme Court has long-since cautioned that courts must measure the portion of the restricted speech against the law's plainly legitimate application. Id. The Supreme Court's recent decisions display an increased recognition that as-applied challenges are the normal and appropriate remedy, and that facial overbreadth challenges are to be reserved for limited and *extreme circumstances*. See, e.g., Virginia v. Hicks, 539 U.S. 113, 124 (2003) (holding that the trespass policy at issue could not "fall" by reason of the overbreadth doctrine unless the policy, taken as a whole, was substantially overbroad and noting that any applications of the loitering policy that violate the First Amendment can be remedied through as-applied challenges); Thomas v. City of Chicago Park, 534 U.S. 316 (2002) (provision of content-neutral permitting scheme which might

allow park district to waive permit requirements would be an abuse that must be dealt with "if and when a pattern of unlawful favoritism appears"); City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 784 (noting that individuals denied licenses "remain free to raise special problems of undue delay in individual cases as the ordinance is applied").

Taking into consideration the Supreme Court's proportionality requirement, the comprehensive sign regulations are clearly an inappropriate subject for broad facial overbreadth challenges. Accordingly, this Court should uphold the district court's holding that Advantage did not have standing to mount a facial overbreadth challenge to the entirety of the City's sign regulations.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the appellee's brief, this Court should uphold the district court's final judgment in favor of the City.

RESPECTFULLY SUBMITTED this 5th day of April 2006.

ROGERS TOWERS, P.A.

By _____

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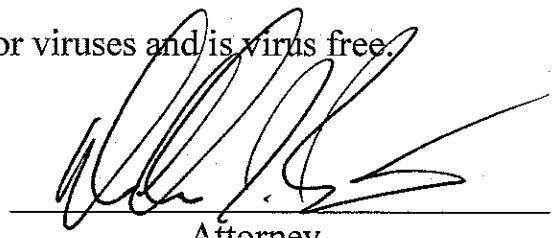
I HEREBY CERTIFY that the foregoing brief complies with the type and volume limitation specified in Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 6,798 words, including footnotes. The CD containing the brief has been scanned for viruses and is virus free.



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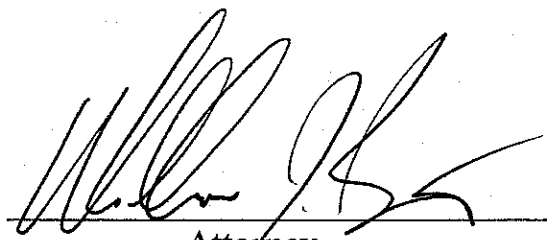

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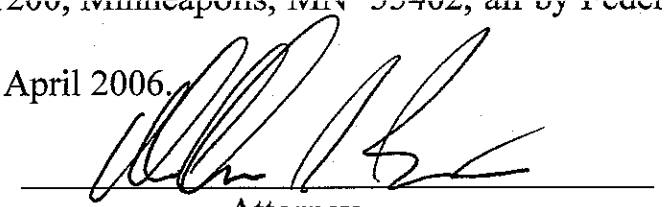
I HEREBY CERTIFY (1) that an original and ten copies of the foregoing brief along with a digital virus-free version of the brief were furnished to the U.S. Court of Appeals, Eighth Circuit, Thomas F. Eagleton Courthouse, Room 24.329, 111 South 10th Street, St. Louis, MO 63102, (2) that two copies of the foregoing brief along with a digital virus-free version of the brief were furnished to E. Adam Webb, Esq., and G. Franklin Lemond, Jr., Esq., The Webb Law Group, L.L.C., 2625 Cumberland Parkway, S.E., Suite 220, Atlanta, Georgia 30339, (3) that two copies of the foregoing brief along with a digital virus-free version of the brief were furnished to John M. Baker, Esq. and Robin M. Wolpert, Esq., Greene Espel, P.L.L.P., 200 S. Sixth Street, Suite 1200, Minneapolis, MN 55402, all by Federal Express or U.S. Mail, this 5th day of April 2006.



Attorney

Table re Applications' Height and Size

Location-Address (Zoning)	Applications: Height Size	Code: Height Limit Size Limit	Code Sections For Height Limit For Size Limit
15801 W. 78th St. (Industrial-Gen.)	70-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
15801 W. 78th St. (Industrial-Gen.)	50-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
13160 Pioneer Trail (Industrial-Gen.)	70-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
7921 Eden Prairie Rd. (Industrial-Gen.)	60-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
7901 Fuller Rd. (Industrial-Gen.)	80-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
12150 Technology Rd. (Industrial-Gen.)	80-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
12290 Technology (Industrial-Gen.)	50-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(a)
12290 Technology Rd. (Industrial-Gen.)	80-feet 672-sf	8-feet 50-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
12615 Valley Vw. Rd. (Comm-Reg.-Ser.)	60-feet 672-sf	20-feet 80-sf	§11.70-4.B.1.(f) §11.70-4.B.1.(b)
15195 Martin Drive (Industrial-Gen.)	80-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(a)
6566 Flying Circle Dr. (Industrial-Gen.)	70-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
6566 Flying Circle Dr. (Industrial-Gen.)	70-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(b)
10100 Crosstown Cir. (Industrial-Gen.)	20-feet 160-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(a)
10100 Crosstown Cir. (Industrial-Gen.)	80-feet 672-sf	8-feet 80-sf	§11.70-4.D.1.(f) §11.70-4.D.1.(a)

Exhibit A