NO. 05-56366

==========

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GET OUTDOORS, II, L.L.C.,
PLAINTIFF-APPELLANT,
V.
CITY OF SAN DIEGO, CALIFORNIA
DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE LEAGUE OF CALIFORNIA CITIES, SCENIC AMERICA, INC., AND SCENIC CALIFORNIA

William D. Brinton (FL Bar No. 242500)
Cristine M. Russell (FL Bar No. 0157406)
Ruth A. Holmes (FL Bar No. 0118915)
Rogers Towers, P.A.,
1301 Riverplace Boulevard, Suite 1500, Jacksonville, Florida 32207-1811
Telephone: (904) 398-3911
Facsimile: (904) 396-0663

John M. Baker (Reg. No. 174403)
Robin M. Wolpert (Reg. No. 0310219)
Greene Espel, P.L.L.P.
200 S. Sixth Street, Suite 1200, Minneapolis, MN 55402
Telephone: (612) 373-0830
Facsimile: (612) 373-0929

Attorneys for Amici Curiae American Planning Association, International Municipal Lawyers Association, the League of California Cities, Scenic America, Inc., and Scenic California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Other Authorities

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

Amicus curiae, the American Planning Association (APA), is a nonprofit public interest organization 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, League of California Cities, is an association of 476 California cities. It has no parent corporations, affiliates, or subsidiaries that have issued shares to the public.

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 California, is a California 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.

These amici have a common interest in preserving the well-established constitutional authority of state and local governments to adopt and enforce restrictions on the size, location, and nature of billboards. How this Court resolves the questions before it will have a direct impact on whether state and local governments will continue to have the ability to exercise such authority, or whether those powers may be negated through misguided interpretations of the doctrines of standing, overbreadth, and the First Amendment. Amici also have a common interest in preserving the constitutional system of separation of powers and checks and balances.

SUMMARY OF LEGAL ARGUMENT

Dozens of billboard suits are now pending in many circuits. In virtually all of these cases, a threshold issue is whether the billboard company plaintiff has standing to challenge local rules of law that do not apply to its own activities. In this case, Get Outdoors' lack of standing to challenge unrelated sign regulations was thoroughly briefed before the District Court, and was analyzed by that Court in a correct and sensible manner. The District Court's analysis should be affirmed. Disturbing it would impose extraordinary burdens on the federal judiciary and local governments.

The question of standing arises in such cases because cities can constitutionally restrict the size and location of billboards, and for that reason billboard companies must seek a less direct route to nullify such restrictions. Billboard companies attempt to secure standing to complain about imperfections in sign codes unrelated to the reasons their sign applications were denied. They do so in the hope that a court will find enough wrong with a City's sign code to bring the entire code down, including the constitutional size and location rules.

Billboard companies' attempts to litigate the constitutionality of sign code sections that do not apply to them rest on a fundamental misunderstanding of the role of federal courts. Properly applied, the First Amendment overbreadth doctrine focuses on the constitutionality of the legal rules that actually apply to the

Plaintiff's present or future conduct, rather than on the constitutionality of rules that govern conduct that the plaintiff did not engage in, did not seek to engage in, and was not about to engage in. This distinction is not only necessary to honor the causation requirement for Article III standing, but also to honor the fundamental principles behind the overbreadth doctrine.

Moreover, Get Outdoors' strategy rests on an out-of-date view of the willingness of federal courts to facially invalidate an entire ordinance or statute. Even if the sign code contains constitutional defects, Get Outdoors grossly overestimates the ability of a federal court to nullify the entire sign code on that basis. As the United States Supreme Court unanimously demonstrated earlier this year, federal courts have remarkably little power to exercise the functional equivalent of a veto over laws that contain a mixture of constitutional and unconstitutional provisions.

Get Outdoors seeks to attack provisions contained within comprehensive sign regulations that are not content-based. The government's purpose is the controlling consideration in determining content neutrality in speech cases. The isolated provisions within the comprehensive set of regulations attacked by Get Outdoors do not regulate viewpoint or control the subject matter of debate. There is nothing to indicate that these regulations are seeking to impermissibly censor speech or limit the free expression of ideas.

LEGAL ARGUMENT

I. THIS COURT SHOULD REJECT GET OUTDOORS' INVITATION TO IGNORE ARTICLE III'S LONGSTANDING REQUIREMENTS

"'The province of the court,' as Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), 'is, solely, to decide on the rights of individuals.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992). 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. (describing the factors that meet "the irreducible constitutional minimum of standing"). These limits are particularly important in constitutional cases, because a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988). Allowing a litigant to finesse some or all of these requirements "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

As the Supreme Court has repeatedly recognized, these standing requirements apply to facial and as-applied challenges under the First Amendment. See Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988) (explaining that to facially challenge the constitutionality of a statute on overbreadth grounds the plaintiff must "establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action.....'"); Sec'y of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 958 (1984) (a plaintiff's ability to invoke overbreadth standing depends upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case" (emphasis added)). Cf. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 233-235 (1990) (declining to review claim that certain adult business ordinance provisions violated the First Amendment, because those provisions did not apply to the plaintiffs). As the Seventh Circuit noted when rejecting the standing of a First Amendment plaintiff, "[a] litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast." Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998).

The question of standing arises in such cases because cities can constitutionally restrict the size and location of billboards,[1] and for that reason billboard companies must seek a less direct route to nullify such restrictions. Amici recognize that Article III permitted Get Outdoors to adjudicate the constitutionality of those rules of law that caused the City to deny its applications. Indeed, had Get Outdoors demonstrated any immediate interest in engaging in any other conduct forbidden by some other rule of law, Get Outdoors might also have been able to establish standing to adjudicate that rule as well. But Get Outdoors may not adjudicate the constitutionality of other rules of law, because those rules have not caused it to suffer any injury-in-fact. The essential "causation" element of Article III standing is not present under these circumstances.

---

[1] Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003), cert. denied sub nom. Regency Outdoor Adv., Inc. v. Riverside County, California, 540 U.S. 1111 (2004). See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 787, 806-807 (1984) (in Metromedia v. City of San Diego, 453 US 490, 512 (1981), "seven Justices explicitly concluded that this interest [avoiding visual clutter] was sufficient to justify a prohibition of billboards"), see Metromedia, 453 U.S. at 507-508, 510-12 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL, JJ.)("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"); Id., at 552 (STEVENS, J., dissenting in part); Id., at 559-561 (BURGER, C.J., dissenting); Id., at 570 (REHNQUIST, J., dissenting); City of Cincinnati v. Discovery Network, 507 U.S. 410, 425 n.20 (1993). See also Prime Media, Inc. v. City of Brentwood, Tennessee, 398 F.3d 814, 818 (6th Cir. 2005); and Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290 (7th Cir. 1993) (upholding constitutionality of size and other dimensional restrictions on billboards).

The District Court correctly recognized that "under Plaintiff's theory, the exception to the standing requirements would swallow the constitutional rule." Get Outdoors II, L.L.C. v. City of San Diego, 381 F. Supp. 2d 1250, 1260-61 (S.D. Cal. 2005), appeal docketed, No. 05-56366 (9th Cir. Sept. 16, 2005). Such an approach would contradict American Booksellers and Munson, where Article III standing requirements were applied to facial and overbreadth claims under the First Amendment.

A. Allowing a proper "overbreadth" attack is reconcilable with Article III's causation requirement, while Get Outdoors' claims are not proper "overbreadth" attacks, and are not reconcilable with Article III.

The overbreadth doctrine properly allows a plaintiff to attack the constitutionality of a restriction on his or her own conduct, without the need to "demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)). Thus, in an appropriate First Amendment overbreadth claim, a plaintiff whose conduct is regulated by a rule of law is permitted to challenge the constitutionality of **that particular rule of law** regardless of the fact that a more circumscribed version of that rule of law could be applied in a constitutional fashion to prohibit that plaintiff's conduct. See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV.

1, 37 (1981) (the overbreadth doctrine is based on "the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule.")

Conversely, if a rule of law does not apply to what Get Outdoors proposed or intended to do, then that rule did not burden Get Outdoors. Thus, the "conventional principle" behind overbreadth can have no application. "The 'injury in fact' requirement means that a plaintiff has overbreadth standing to challenge only a provision to which it is subject or which may indirectly injure its business." Covenant Media of California, L.L.C. v. City of Huntington Park, California, 377 F. Supp. 2d 828, 830 n.2 (C.D. Cal. 2005). See also 4805 Convoy v. City of San Diego, 183 F.3d 1108, 1111 (9th Cir. 1999); Advantage Media, LLC v. City of Eden Prairie, 405 F. Supp. 2d 1037, 1041-42 (D. Minn. 2005), appeal docketed, No. 06-1035 (8th Cir. Jan. 4, 2006). As the Seventh Circuit held in Harp, 9 F.3d at 1292, a plaintiff who applied to erect an unlawfully large billboard lacked standing to argue that the city's ban on off-premises signs discriminated against non-commercial speech.

The Supreme Court's willingness to grant standing to billboard companies in Metromedia v. City of San Diego, 453 U.S. 490 (1981) does not undermine these principles. Metromedia involved an effort to remove billboards that were lawfully erected, but became illegal through an amendment to the San Diego City Code. Before the U.S. Supreme Court, the plaintiffs in Metromedia only challenged the

constitutionality of the regulations that applied to them. San Diego had adopted a prohibition on signs that was subject to thirteen exceptions. Id. at 494. While it was the exceptions that made that prohibition unconstitutional in the eyes of a plurality of justices, id. at 514-16, the fact that they were exceptions to the very rule of law that burdened the plaintiffs meant that the plaintiffs could challenge it under the overbreadth doctrine and Article III. Since the reasons for allowing standing in Metromedia are not present here, Metromedia does not support Get Outdoor's position.

II. GET OUTDOORS' EXPANSION OF THE OVERBREADTH DOCTRINE WOULD DEVOUR TOO MUCH OF ARTICLE III

The U.S. Supreme Court has emphasized that "[i]n the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 787, 799 (1984). Get Outdoors has no such sensitivity. Rather than using overbreadth only as a last resort, Get Outdoors would use it as a **first** resort. "Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 485 (1989). Even in the context of a

First Amendment suit, Justice Black, one of the First Amendment's greatest protectors, recognized that "[p]rocedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal courts in our constitutional plan." Younger v. Harris, 401 U.S. 37, 52 (1971).

Get Outdoors' approach will continually require courts to evaluate the constitutionality of laws in a factual vacuum, without the benefit of evidence indicating the effect, if any, of such provisions. As Professor Monaghan has noted, "a law cannot be evaluated ex ante, in a vacuum, as it sits on the statute books . . . . [The time] at which to determine whether any statute is facially defective is at the time and in the terms in which it is applied to a litigant." Monaghan, supra, 1981 Sup. Ct. Rev. at 28-29.

Finally, allowing overbreadth to devour so much of the standing requirements would degrade the responsibility of local legislators to uphold the Constitution. As John G. Roberts, Jr. (now Chief Justice Roberts) recognized:

> [S]tanding -- like other doctrines of judicial self-restraint -- compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution. By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution. Far from an assault on the other branches, this is an insistence that they are supreme within their respective spheres, protected from intrusion -- however welcome or invited -- of the judiciary.

John G. Roberts Jr., *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1229-1230 (1993).

III. THE COURT MAY DECIDE, NOW, THAT IF A RULE OF LAW IN THE SIGN CODE IS CONSTITUTIONAL, GET OUTDOORS MUST FOLLOW IT

Get Outdoors' argument rests on a false premise – that the overbreadth doctrine should give a plaintiff standing to request a court to nullify both constitutional rules and unconstitutional rules within the same ordinance or code. "A holding that part of a statute is unconstitutional does not result in nullification of its valid parts. . . . Even when a Court has purportedly invalidated a statute in its entirety, that does not result in nullification of parts of a statute whose constitutionality was not at issue and passed upon." Alfred Hill, The Puzzling First Amendment Overbreadth Doctrine, 25 HOFSTRA L. REV. 1063, 1072 (1997). The overbreadth doctrine should not be abused in a manner that makes it possible for a plaintiff restricted by constitutional rules to nullify the effect of those rules.

Get Outdoors' analysis of several questions – such as the redressability requirement of standing, and the question of severability – overestimates the authority of a federal court, considering a facial attack, to strike down an entire statute.[2] Most recently, Justice O'Connor set forth those limitations in Ayotte v.

[2] Because Get Outdoors' theory of redressability rests on a false view of judicial power, this Court can and should recognize that fallacy now. As a decision relied upon by Get Outdoors notes, "some courts have addressed the issue of severability prior to determining whether a plaintiff has standing." Lamar Adver. of Penn., L.L.C. v. Town of Orchard Park, 356 F.3d 365, 375 n.13 (2d Cir. 2004) (citing INS v. Chadha, 462 U.S. 919, 931-36 (1983), and Contractors Ass'n, Inc. v. City of Philadelphia, 6 F.3d 990, 996-98 (3d Cir.1993) ("Severing statutes

Planned Parenthood of Northern New England, 126 S. Ct. 961 (2006). Writing for a unanimous court, Justice O'Connor synthesized the principles the Court had articulated in facial attacks arising under various constitutional amendments, including many arising under the First Amendment.[3] She explained the Supreme Court's preference "to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." Id. at 967 (citations omitted). She then outlined "[t]hree interrelated principles:"

- "First, we try not to nullify more of a legislature's work than is necessary, for we know that 'a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" Ayotte, 126 S. Ct. at 967-68 (quoting Regan, 468 U.S. at 652). "Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a "statute may … be declared invalid to the extent that it reaches too far, but otherwise left intact.'". Id. at 968 (quoting Brockett, 472 U.S. at 504).

- "Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewriting state law to conform it to constitutional requirements' even as we strive to salvage it.'" Ayotte, 126 S. Ct. at 968 (quoting American Booksellers

---

to limit standing promotes the twin goals of avoiding unnecessary constitutional adjudication and sharpening the presentation of the issues.")). See Appellant's Brief at 26 (citing Orchard Park).

[3] The Court in Ayotte drew heavily upon First Amendment overbreadth decisions such as United States v. Treasury Employees, 513 U.S. 454, 479, n. 26 (1995), Am. Booksellers Assn., Inc., 484 U.S. at 397; Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985), Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion), and United States v. Grace, 461 U.S. 171, 180-183 (1983). Ayotte, 126 S. Ct. at 967-68.

Assn., Inc., 484 U.S. at 397). The Court further observed that "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." Ayotte, 126 S. Ct. at 968 (quoting Treasury Employees, 513 U.S. at 479 n.26).

- "Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' [citations omitted] After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" Ayotte, 126 S. Ct. at 968.[4]

Get Outdoors' lawsuit ignores the Supreme Court's repeated recognition that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a "statute may … be declared invalid to the extent that it reaches too far, but otherwise left intact.'". Id. at 968 (quoting Brockett, 472 U.S. at 504). Billboard laws do not "reach[] too far" when they restrict the size and location of billboards, so any theory of severability or redressability (for purposes of standing) that presumes a court will invalidate those restrictions should be rejected. Second, Get Outdoors has failed to demonstrate that a court could only cure the alleged constitutional defects by re-writing the statute, or that any exception needed to render the sign code constitutional falls would contradict the intent behind the sign

[4] While Ayotte is not a First Amendment suit, that is a distinction without a difference. One of the first U.S. Courts of Appeals to consider its scope has treated Ayotte as authority in a First Amendment overbreadth case. See Borzych v. Frank, 2006 WL 488451 at *3 (7th Cir. March 2, 2006) (following Ayotte in an overbreadth case).

code. Thus, the principles set forth in Ayotte demonstrate why this Court appropriately lacks the power to redress Get Outdoors' only injury – the denial of its applications.[5]

IV. THE DISTINCTIONS THAT GET OUTDOORS ATTACKS AS FORBIDDEN "CONTENT DISCRIMINATION" ARE COMMONPLACE RESPONSES TO RACICAL PROBLEMS

Get Outdoors' attack on the City's sign regulations is based on the false assumption that such regulations are the product of motives or systems that offend First Amendment principles. To the contrary, comprehensive sign regulations are not used as speech-licensing or censorship schemes. Instead, they are principally concerned with aesthetics and traffic safety.[6] Placed in their proper perspective, the distinctions in the City's sign regulations are commonplace responses to practical problems rather than forbidden content discrimination.

In developing sign regulations, a local government body is chiefly concerned with the development of land and the visual appearance of land in a variety of settings (residential, mixed-use, commercial, industrial, agricultural, and the like).

---

[5] Get Outdoors' notion that it can obtain a damages award and attorneys' fees – even if the denial of its applications was constitutional – if imperfections existed elsewhere in the sign ordinance, mistakenly presumes that a party can receive damages under Section 1983 for injuries caused by *constitutional* activity. The Court should recognize this flaw in Appellants' logic now, as part of its rejection of Get Outdoors' theory of redressability.

[6] See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 444, 122 S.Ct. 1728, 1739 (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").

Different types of signs perform distinct functions, and thus obtain distinct treatment. Most comprehensive sign regulations follow a traditional and well-established approach.

Exemptions and exceptions. A local governing body will first decide whether, and to what extent, it should exercise its police power to regulate signage. Items or devices such as 'art,' 'holiday decorations,' 'traffic control devices,' 'grave markers,' or 'building cornerstones' are usually excluded from the comprehensive sign regulation code or exempted from sign permitting requirements, or may not even be considered as signs at all. Because there is ordinarily no reason for a local government to extend its police power to regulate such items or devices, 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 Sign-Types. A local government will exercise the police power to prohibit or limit certain permanent sign-types based upon locational criteria (e.g., off-site signs,[7] number of freestanding signs per lot, spacing, and setbacks),

[7] Offsite signs, commonly known as "billboards," are a sign-type that is distinguished from onsite signs by function and location, and prohibitions of billboards (or limitations on the physical characteristics of permanent off-site signs) are not impermissible content-based distinctions. See Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 814-815 (9th Cir. 2003). See also Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992);

placement criteria (e.g., roof signs and projecting signs), physical attributes (e.g., flashing signs, animated signs, and revolving signs), and limitations on certain sign-types by other physical or placement criteria (e.g., sign height and size).

The most common prohibited or restricted sign-type is the permanent off-site (billboard) sign.[8] Many communities prohibit permanent off-site signs altogether, while other communities allow permanent off-site signs subject to height, size, and locational limitations. These regulations reflect the interest in protecting and preserving the beauty, character, economic and aesthetic value of land, and improving visual quality.[9] Again, censorship and viewpoint-control play no role whatsoever in these policies.

Regulated Signs. After a local government decides what devices its comprehensive sign regulatory system will not encompass and what sign-types will

---

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).

[8] The Supreme Court has recognized the unique problems that this sign-type poses to local land use planners. See Metromedia, 453 U.S. at 510 (White, J., plurality opinion). See also Taxpayers for Vincent, 466 U.S. at 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").

[9] American Planning Association, Policy Guide on Billboard Controls, ratified by the Board of Directors, April 1997, http://www.planning.org/policyguides/billboards.html (visited March 7 2006); American Society of Landscape Architects, ASLA Public Policies, Public Affairs, Billboards (pdf) (R1990, R2001), http://asla.org/members/publicaffairs/publicpolicy.html (visited March 7, 2006).

be prohibited or limited, it 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. Temporary signs are tied to short-term events and function to provide an important informational function that may be uniquely suited to temporary signage. Generally, temporary signs are classified or categorized by the function that they serve. The five most common sign-types are: (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")[10] that function to identify support for ballot issues or candidates for elected office during the period prior to the election; and (v) temporary special event signs (such as an annual county fair, a homecoming celebration for a national guard unit, or other seasonal or occasional

[10] 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).

events) that identify or provide directions to an upcoming or current public or semi-public event.

Permanent Signs. The placement of "permanent" sign structures on land impacts the aesthetic development of a community. Accordingly, the regulation of permanent signs reflects the community's interest in the long-term development of the land and other aesthetic considerations. The character of the zoning district and the property use will determine the sign's permissible 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 or parcel, and (f) the spacing between freestanding signs. Businesses and institutions in commercial or industrial districts will require some type of onsite identification sign that functions to identify who or what they are. Such signage is usually accomplished by both freestanding signs (pole or monument signs) and wall signs, and may also be accomplished 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 such as bulletin board signs that function to provide announcements of activities or events.

Warning signs (both temporary and permanent). Certain warning signs may include both temporary and permanent signs. Warning signs function to warn of

danger or hazard associated with a location. Permanent warning signs are associated with public utilities, such as buried underground cables, underground gas or electric lines, high voltage locations, and the like.

Permitting for Allowed Sign-types. The purpose of a sign permit to aid the local governing body in the enforcement of sign regulations. The permitting for temporary and permanent sign structures is not a regulatory censorship scheme or speech-licensing scheme designed to (a) censor, (b) regulate a particular viewpoint, or (c) control the subject matter of debate.

Usually, temporary signs 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. On some occasions, a jurisdiction may require some form of permitting (with or without fees) for temporary "special event" signage that pose recurring problems (such as the need for widespread sign clean-up after a large special event).

Permanent signs can create problems that are expensive and difficult to fix. Thus, it is essential for the local governments to have a mechanism in place to ensure *before* permanent signs are erected that such structures will meet the legal criteria for their physical and locational characteristics. 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. However, the same need for pre-construction review and approval may not exist for certain smaller permanent signs, such as nameplates, street address signs, small warning signs, and low-profile enter/exit signs.

Summary. Local governing bodies exercise their police power to regulate signs for purposes of aesthetics and traffic safety. In drawing these distinctions and requiring permitting for such signs, these governments are not establishing speech-licensing or censorship schemes. Rather, they are simply recognizing that different types of signs perform distinct functions and require distinct regulations to further the community's interest in land use planning.

V. THE SUPREME COURT HAS HELD THAT THE GOVERNMENT'S PURPOSE IS "THE CONTROLLING CONSIDERATION" IN DETERMINING CONTENT-NEUTRALITY IN SPEECH CASES

In Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Supreme Court addressed whether municipal noise regulations were impermissibly content-based or content-neutral under the First Amendment. The Supreme Court held: "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Id. at

791 (emphasis supplied). In making the inquiry, the Supreme Court held, "The government's purpose is the controlling consideration." Id. (emphasis added).

The importance of the Ward decision was reinforced in Hill v. Colorado, 530 U.S. 703 (2000). In Hill, the Supreme Court addressed a decision involving a buffer zone for protestors.

The district court had held:

> [T]he statute permissibly imposed content-neutral "time, place, and manner restrictions" that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication. Relying on Ward v. Rock Against Racism, [internal citation omitted], he noted that "'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.'" He found that the text of the statute "applies to all viewpoints, rather [than] only certain viewpoints," and that the legislative history made it clear that the State had not favored one viewpoint over another.

Id. at 710-711 (emphasis added).

The Supreme Court noted that four state court opinions had upheld the validity of the statute by concluding that it was a content-neutral time, place, and manner regulation, and that all four decisions had found support for their analysis in Ward. In light of that fact, the Supreme Court determined that it was appropriate to comment on the content-neutrality of the statute, and stated:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [internal citation omitted] The Colorado statute passes that test for three independent reasons. . .

> . Second, it was not adopted "because of disagreement with the message it conveys."

Id. at 719 (emphasis added).

The Supreme Court rejected the plaintiffs' argument that by simply having to look at the content of an oral or written statement to enforce or apply a regulation, a regulation is transformed into a content-based regulation. The Supreme Court explained, "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." Id. at 721.

In Hill, the Supreme Court pointed out that the "regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." The Supreme Court cited to its holding in Carey v. Brown, 447 U.S. 455, 462, n. 6 (1980), where the Court stated that the First Amendment's hostility to content-based regulation "extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." By reference to "subject matter," the Supreme Court was clearly addressing efforts to control or limit the subject matter of debate or discussion of a topic, but it was not invalidating laws that merely recognize the distinct function of sign-types such as enter/exit signs, time/temperature signs, seasonal produce signs in an agricultural zoning district, and the like.

The Supreme Court noted that the Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from Carey because the Colorado statute

> places no restrictions on-and clearly does not prohibit - either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.

Id. at (emphasis added).

VI. THIS COURT'S RECENT DECISION IN *G.K. LTD. TRAVEL* PROPERLY REJECTS THE PLAINTIFF'S ABSOLUTIST APPROACH TO THE REQUIREMENT OF CONTENT-NEUTRALITY

This common-sense application of Ward was most recently applied in 2006 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. This Court rejected the absolutist approach requested in this case by Get Outdoors. In addressing the different temporal regulations for real estate signs and political signs, this Court 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).

Likewise, for the same reasons, this Court held that provisions exempting "public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs" from a permitting and fee process did not render the regulations impermissibly content-based. The logical, common-sense approach in applying Supreme Court precedent taken by this Court in G.K. Ltd. Travel was also explained in 2002 in Granite-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 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).[11]

Similar claims were recently advanced and rejected by the Eleventh Circuit in Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida ("Granite-St. Petersburg"), 348 F.3d 1278 (11th Cir. 2003), cert. denied, 124 S.Ct. 2816 (2004), and the Eleventh Circuit determined that the St. Petersburg sign ordinance was "content-neutral." 348 F.3d at 1282.[12] In 2003, in Granite-St. Petersburg, the Eleventh Circuit held:

> 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).

---

[11] In Granite-Clearwater, Granite 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's prior restraint challenge. Granite-Clearwater, 213 F. Supp. 2d at 1324. On appeal, the Eleventh Circuit noted that time limits were not categorically required when the regulatory scheme is "content-neutral," and upheld the district court's holding that Granite lacked standing to attack the lack of time limits in the Clearwater Code. Granite-Clearwater, 351 F.3d at 1117-1118.

[12] The entirety of the St. Petersburg Sign Ordinance (§§16-666 through 16-713), referenced in the 2003 decision, was App.1 to the Granite-St. Petersburg District Court Opinion. See Memorandum Opinion, St. Petersburg, Case No. 8:01cv2250 (M.D.Fla. October 11, 2002) (Doc.56).

> We will not, however, address hypothetical constitutional violations in the abstract.

348 F.3d at 1281, 1282 (emphasis supplied).

Similar observations were made in National Advertising Company v. City of Miami, Florida, 287 F. Supp. 2d 1349, 1376 (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) (emphasis supplied):

> 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.* . . .

Like the Town of Lake Oswego, the City of San Diego's sign regulations have not sought 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. Get Outdoors seeks to have this Court undertake a constitutional audit of a 168-page comprehensive code and then speculate as to how isolated provisions might or might not be problematic, but Get Outdoors cannot prevail in the end if this Court follows the decisions in Taxpayers for

Vincent, Ward and Hill, and the most recent Ninth Circuit precedent of G.K. Ltd. Travel.

CONCLUSION

Foreclosing this particular plaintiff from using the overbreadth doctrine to demand a judicial "audit" of the entire sign code does not insulate that code from legitimate attack. It simply means that the participants in an adjudication of those provisions will be those actually injured by the alleged infirmities, and will thus be in a better position to express their own interests, and to better assist the court to reach the most appropriate decision.

Respectfully submitted,

Dated: March 8, 2006.

GREENE ESPEL, P.L.L.P.
John M. Baker, Reg. No. 174403
Robin M. Wolpert, Reg. No. 310219
200 S. Sixth Street, Suite 1200
Minneapolis, MN 55402
Telephone: (612) 373-0830
Facsimile: (612) 373-0929

-and-

ROGERS TOWERS, PA.

By_____
William D. Brinton, FL Bar No. 0242500
Cristine M. Russell, FL Bar No. 0157406
Ruth A. Holmes, FL Bar No. 0118915
1301 Riverplace Blvd., Suite 1500
Jacksonville, Florida 32207-1811
Telephone: (904) 398-3911
Facsimile: (904) 396-0663

Attorneys for Amici Curiae, American Planning Association, the International Municipal Lawyers Association, the League of California Cities, Scenic America, Inc., and Scenic California

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(A)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE NO. 05-56366

I certify that:

☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: March 8, 2006.

By: _____
William D. Brinton
Attorney for Amici Curiae, American Planning Association, International Municipal Lawyers Association, League of California Cities, Scenic America, Inc., and Scenic California

CERTIFICATE AND PROOF OF SERVICE BY EXPRESS MAIL

Case Name: Get Outdoors, II, L.L.C. v. City of San Diego. Case No.: 05-56366

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 and not a party to the within action; my place of employment and business address is 1301 Riverplace Boulevard, Suite 1500, Jacksonville, Florida 32207-1811.

On March 8, 2006, I served the interested parties in the aforesaid action with:

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, SCENIC AMERICA, INC., AND SCENIC CALIFORNIA IN SUPPORT OF DEFENDANT/APPELLEE CITY OF SAN DIEGO AND AFFIRMANCE OF JUDGMENT

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at Jacksonville, Florida, for delivery by Express Mail, with postage thereon fully prepaid. There is delivery service by United States Mail, Express Mail, at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

E. Adam Webb, Esq.
Matthew C. Klase, Esq.
The Webb Law Group, L.L.C.
2625 Cumberland Parkway, S.E.,
Suite 220
Atlanta, Georgia 30339

Randal Morrison, Esq.
Sabine & Morrison
P.O. Box 531518
San Diego, California 92101

Michael J. Aguirre, Esq.
Office of the City Attorney
1200 Third Avenue, Suite 110
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2006, at Jacksonville, Florida.

_____
William D. Brinton