ELEVENTH CIRCUIT DOCKET NO. 04-16224-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANTAGE ADVERTISING, L.L.C.,

Plaintiff/Appellant

v.

CITY OF HOOVER,

Defendant/Appellee

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF AMICI CURIAE SCENIC AMERICA, INC., AMERICAN PLANNING ASSOCIATION, AND SCENIC ALABAMA, INC. IN SUPPORT OF DEFENDANT/APPELLEE CITY OF HOOVER AND AFFIRMANCE OF JUDGMENT

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

Attorneys for Amici Curiae Scenic America, Inc., American Planning Association, and Scenic Alabama, Inc.

ADvantage Advertising, L.L.C. v. City of Hoover
Eleventh Circuit No. 03-16224-EE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1-1-3, Amici Curiae state that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations meet the criteria stated in Eleventh Circuit Rule 26.1-1:

ADvantage Advertising, L.L.C.*

American Planning Association

Boardman, Esq., Mark S.

Boardman, Carr, Weed & Hutcheson, P.C.

Brinton, Esq., William D.

Carr, Esq., Clay R.

City of Hoover, AL

Danysh, Donald

DuPont, Dennis R.

Ivey, Gary M.

Lamar Advertising Company*

*On information and belief the Appellant is now a wholly-owned subsidiary of Lamar Advertising Company, a publicly-held corporation. The Appellant did not list itself or its parent company in its own Certificate of Interested Persons. There was no substitution of parties in the proceedings below.

Lott, Trey D.

Morrison, Mari

Nutter, Mike G.

Petelos, Tony

Proctor, Honorable R. David (Trial Judge)

Rogers Towers, P.A.

Scenic Alabama, Inc.

Scenic America, Inc.

Skelton, Brian

Smith, Gene

The Webb Law Group, L.L.C.

Webb, Esq., E. Adam

Wright, Jack

CORPORATE DISCLOSURE STATEMENT

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.

Amicus curiae, Scenic Alabama, Inc. ("Scenic Alabama"), is an Alabama nonprofit corporation. It has no corporate subsidiaries. Scenic Alabama is an associate of Scenic America.

Amicus curiae, the American Planning Association, is a nonprofit public interest organization with offices in Chicago, Illinois and Washington, D.C. It has no corporate subsidiaries.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

PAGES

CASES

CONSTITUTION

STATUTES AND ORDINANCES

OTHER AUTHORITIES

PRELIMINARY STATEMENT AND NOTICE CONCERNING DEFINITIONS, REFERENCES AND ABBREVIATIONS

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

Hoover:	City of Hoover, Alabama
ADvantage:	ADantage Advertising, L.L.C.
Zoning Code:	City of Hoover, Alabama's Zoning Ordinance in effect at the time of ADvantage's applications to erect billboards in Hoover

INTRODUCTION: IDENTITY OF AMICI CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY

Scenic America, Inc. is a national nonprofit conservation organization that protects natural beauty and the distinctive character of this nation's communities. Scenic Alabama, Inc. is an Alabama nonprofit corporation that promotes policies that preserve, protect and enhance scenic beauty. The American Planning Association ("APA") is a national nonprofit, educational research organization representing the nation's land-use professionals -- those charged with addressing the public's interest in how land is used and drafting regulations to ensure that the impacts of adverse land uses is minimized.

Amici curiae are concerned with the increasing number of *facial* challenges to the *entirety* of local sign ordinances. This litigation explosion began several years ago and is now plaguing cities and counties across this circuit and the nation. This amicus brief addresses several recurring subjects common to such suits: (a) the content-neutral distinction between onsite and offsite signs; (b) the inherent content neutrality of classifying signs by their function, as opposed to their viewpoint; and (c) the standing necessary to mount a *facial* challenge to sign regulations.

One recurring issue is whether the distinction between an onsite sign and an offsite sign (billboard) is an impermissible content-based distinction. The answer is clearly no. Offsite signs, commonly known as billboards, are a sign-type that is

distinguished from onsite signs by their function, and the prohibition of billboards is not an impermissible content-based distinction.

A second recurring issue is whether a regulatory classification of certain sign-types is content-neutral or impermissibly content-based. The answer hinges upon whether the classification is based upon the sign's function or, alternatively, upon the speaker's viewpoint. Traffic signs, for sale signs, street address signs, construction signs and the like are classified by their function, and have no viewpoint. Sign-types classified by their function are not impermissibly content-based where their classification has a rational basis related to that function.

A third recurring issue is standing. Article III standing requires a case or controversy evidenced by an actual injury in fact. Furthermore, prudential limitations to the narrow exception to the overbreadth doctrine require a real and substantial threat to First Amendment freedoms. The flood of facial challenges brought by billboard interests lack both (a) the requisite actual injury in fact and (b) the required *real* and *substantial* threat necessary to fit within the limited exception to the overbreadth doctrine where the noncommercial speech of non-parties is concerned.

This decision will have a significant impact on local governments within the Eleventh Circuit and throughout the United States.

SUMMARY OF ARGUMENT

Billboards by their very nature, wherever located and however constructed, can be perceived as an aesthetic harm. While other forms of advertising are ordinarily seen as a matter of choice, billboards are different. Billboards cannot be turned off or avoided. They are intrusive. They are designed to stand out and apart from their surroundings, creating a unique set of problems for land-use planning and development.

In a disturbing and ever-increasing trend,[1] billboard companies and developers have been targeting communities for the erection of giant (six-story tall) permanent steel billboard structures. Their strategy involves a *facial* attack on the *entirety* of a local government's sign regulations so as to escape the restrictions that would otherwise prohibit such structures from proliferating across a landscape. Given the fact that modern steel structures may last as long as seventy years, the adverse consequences for a local community are significant and long lasting.

Content-neutrality. This litigation strategy is based in part upon assertions (a) that the distinctions between off-site signs (billboards) and onsite signs are impermissible content-based distinctions and/or (b) that a municipality's standard permitting exemptions or classifications for certain sign-types are impermissibly

---

[1] See Florida Outdoor Advert., L.L.C. v. City of Boca Raton, 266 F.Supp. 2d 1376, 1379 (S.D.Fla. 2003).

content-based. However, a closer examination of these permitting exemptions demonstrate (a) that the distinctions between onsite and offsite signs and (b) the common permitting exemptions or classifications for certain sign-types are not based upon *viewpoint*, but are based upon the informational function served by the sign-type, e.g., traffic signs, directional signs, construction signs, real estate (for-sale) signs, and the like. The sign regulations here are land development regulations that are not concerned with censoring speech or controlling the subjects of public debate. Hoover's Zoning Code was not rendered unconstitutional through its common sense and logical method of prohibiting or classifying sign-types by their function.

Standing. Until recently, the issue of standing of billboard companies to mount these *facial* challenges had been overlooked. Standing is a threshold matter and Article III requires an actual injury in fact. Furthermore, prudential limitations to the narrow exception to the overbreadth doctrine require a real and substantial threat to First Amendment freedoms. The flood of facial challenges brought by billboard interests lack both (a) the requisite actual injury in fact and (b) the required *real* and *substantial* threat necessary to fit within the limited exception to the overbreadth doctrine where the noncommercial speech of non-parties is concerned.

Public policy. Once erected, modern steel structures can be expected to remain a permanent blight on the landscape. The scenic beauty and aesthetic values that are important to the public are being increasingly sacrificed for monetary gain. The prohibition and limitations on billboards (uniquely suited to severability) should be upheld whenever possible, and the requisite standing to mount facial challenges to local land development regulations should be carefully scrutinized, lest the beauty of our natural landscapes and communities be lost for generations.

ARGUMENT

I. THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE CITY OF HOOVER SHOULD BE AFFIRMED.

A. THE DISTINCTION BETWEEN ON-PREMISE SIGNS AND OFF-PREMISE SIGNS, COMMONLY KNOWN AS BLLBOARDS, IS A CONTENT-NEUTRAL DISTINCTION.

Hoover's Zoning Code Section 7.0 prohibits certain signs in all areas of the City. Section 7.0(D) expressly prohibits billboards (off-premise signs) as a sign-type:

> [o]ff-premise billboards and signs which direct attention to a business, commodity, service, entertainment or attraction sold, offered, or existing elsewhere than upon the same property upon which such sign is displayed.

A city can certainly prohibit the erection of billboards. There is no question in this regard. While few principles could be derived from the five opinions in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), one principle was quite clear, a city's interest in avoiding visual clutter was sufficient to justify a prohibition on billboards.[2]

---

[2] See Members of City Council 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"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 and 444 (1993).

In E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970), cert. dismissed 400 U.S. 805 (1970),[3] the Fifth Circuit upheld the constitutionally permissible distinction between the onsite and offsite signs. The court noted that the classification was a reasonable one. Id. at 1153-1154.

> [T]here is a real difference between the outdoor advertising activity that must necessarily be carried out on the premises where a business is located in order that it may identify itself and attract customers and outdoor advertising which is carried out as a business in itself and which conveys commercial messages unrelated to the other uses to which the premises may be devoted.

Id. at 1154.

The Fifth Circuit observed that "it cannot be denied that outdoor advertising signs tend to interrupt what would otherwise be the 'natural' landscape as seen from the highway, something that the American public has a right to see unhindered by *billboards*, whether the view is untouched or ravished by man." Id. at 1152 (emphasis supplied).

Recognizing the aesthetic harm caused by the presence of billboards across their urban and rural landscapes, four states have now prohibited billboards entirely, including Hawaii, Alaska, Maine and Vermont. The interest in aesthetics was so strong in Alaska that a statutory provision was enacted on March 4, 1999

---

[3] See Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (adopting as precedent for the Eleventh Circuit the body of law of the old Fifth Circuit prior to September 30, 1981).

through a statewide citizens' ballot initiative, providing: "It is the intent of the people of the State of Alaska that Alaska *shall forever remain free of billboards.*" Alaska Statute §19.25.075 (emphasis added).

Interests in aesthetics have also led to citizen initiatives restricting billboards at the local level. See Eller Media Co. v. City of Reno, 59 P.3d 437 (Nev. 2002); City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So.2d 750 (Fla. Dist. Ct. App. 1994), approved 659 So.2d 1046 (Fla. 1995). As one appellate court ruled two decades ago:

> We find it hard to conceive that our constitutional founders believed that visual blight and ugliness were a fundamental aspect of our national heritage or that our state and local governments were to be powerless in protecting the beauty and harmony in our human as well as our natural environments.

Cumberland County v. Eastern Federal Corp., 48 N.C.App. 518, 524, 269 S.E.2d 672, 676, review denied 301 N.C. 527, 273 S.E.2d 453 (1980).

Justice Brandeis observed in 1932:

> *Billboards*, street car signs, and placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in the street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the *billboard* thrust upon them by all the arts and devices that skill can produce. *In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard* or street car placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (emphasis supplied). See also Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974). As Justice White observed for the plurality in Metromedia, "because it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems *for land-use planning and development*." 453 U.S. at 501 (emphasis added).

In recent years, this billboard problem has led organizations like the APA and the American Society of Landscape Architects (ASLA) to adopt strong Policy Statements regarding billboards:

> Many local governments have determined that *billboard controls* are necessary to protect and preserve the beauty, character, economic and aesthetic value of land and to protect the safety, welfare and public health of their citizens. ... Policy 7. APA National and Chapters support continuation and strengthening of Federal and state legislation that allows control by local governments over the placement of new *billboards*.

See American Planning Association, Policy Guide on Billboard Controls, ratified by the Board of Directors, April 1997, http://www.planning.org/policyguides/billboards.html (visited May 9, 2005) (emphasis added).

> The American Society of Landscape Architects urges the control and/or removal of existing *billboards*, the regulation of new *billboards* so that the visual quality of their surroundings is not diminished, and *the strong local regulation of remaining signage*, including *on-premise signs*.

See American Society of Landscape Architects, ASLA Public Policies, Public Affairs, Billboards pdf, Billboards (R1990, R2001), http://www.asla.org/members/publicaffairs/publicpolicy.html (visited May 9, 2005) (emphasis added).

The onsite/offsite distinctions are not content-based distinctions that require strict scrutiny. Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992) (an off-premise billboard prohibition was *viewpoint* neutral; prohibition not based upon the *viewpoint* of the speaker, but upon the location of the sign); Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 814 (9th Cir. 2003) (on-site/off-site distinction is not an impermissible content-based regulation).[4] See also 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 on-site/off-site distinction is constitutionally permissible); National Advertising Co. v. City of Chicago, 788 F. Supp. 994, 997-98 (N.D.Ill. 1991) (the distinction is not aimed toward the suppression of an idea or a *viewpoint*); Immaculate Conception Corp. v. Iowa Dept. of Transp., 656 N.W.2d 513, 516-517 (Iowa 2003) (statute

---

[4] "There is no support in Metromedia the proposition that the on-site/off-site distinction *itself* places an impermissible content-based burden on noncommercial speech." Clear Channel, 340 F.2d at 814 (emphasis in the original).

does not differentiate based on *viewpoint*; statute regulates signage by location, a distinction having nothing to do with content).

B. THE CLASSIFICATION OF SIGN-TYPES BY THEIR FUNCTION IS NOT AN IMPERMISSIBLY CONTENT-BASED DISTINCTION IN THE ABSENCE OF THE REGULATION OF VIEWPOINT.

ADvantage argues that Hoover's sign regulations discriminate against different types of non-commercial speech on the basis of *content* through the separate categorization of different sign–types, e.g., construction signs, warning signs, instructional signs, real estate (for sale/rent) signs, etc. ADvantage makes a similar argument to the separate sign regulations pertaining to political signs. These arguments are superficial and ignore the fact that sign regulations are part of Hoover's comprehensive Zoning Code implementing its land use plan.

Land use plans and zoning regulations typically incorporate sign regulations. In some states, all jurisdictions are mandated to have sign regulations included in their land development regulations. See Section 163.3202(2)(f), Florida Statutes; Chapter 85-55, Sec. 14, Laws of Florida (Florida's Local Government Comprehensive Planning and Land Development Regulation Act). The purpose of the regulations is not to regulate the content (viewpoint) of signs, but the time, place and manner of their use as they relate to land development.

It is crucial to note that the Supreme Court has never held that exemptions from sign permitting requirements, even those based upon the subject matter, are

content-based per se. In fact, more recent decisions of the Supreme Court (discussed infra at pages 14-20) and decisions of this and other Circuits suggest precisely the opposite. See, e.g., Messer, 975 F.2d at 1511[5]; Lavey v. City of Two Rivers, 171 F.3d 1110, 1115, n.17 (7th Cir. 1999).[6]

In arguing that exemptions based upon subject matter are content-based restrictions meriting strict scrutiny review, ADvantage relies upon its interpretation of the Supreme Court's plurality decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). In Metromedia, the Supreme Court evaluated San Diego's ordinance which permitted onsite commercial advertising but contained a blanket prohibition on all offsite billboards as well as all onsite noncommercial messages. The ordinance contained twelve exemptions from this general blanket prohibition including: religious symbols, public service signs, temporary political signs, and "For Sale" signs. While a majority of the Court determined that San Diego's ordinance was unconstitutional, the Court could not come to a majority

---

[5] The Douglasville code exempted from permitting requirements: one real estate "for sale" sign per property frontage, one bulletin board located on religious, public, charitable or educational premises, one construction identification sign, and directional traffic signs containing no advertisements. Id.

[6] The Two Rivers code exempted from permitting: construction signs, government signs, house number and name plate signs, interior signs, memorial signs and plaques, "no trespassing" or "no dumping" signs, public notice signs, political signs, real estate signs, vehicular signs, and neighborhood identification signs. Id.

consensus as to the basis for its decision, instead issuing five opinions: a four justice plurality, a two justice concurrence in result only as to noncommercial speech, and three separate dissents.

While the two justice concurrence noted that an outright ban on billboards was unconstitutional,[7] the four justice plurality opinion written by Justice White focused on the exemptions, noting that the exemption for onsite signs was unconstitutional because it limited the content of such signs to commercial messages, thus favoring commercial speech over noncommercial speech. The plurality also took issue with the twelve exemptions, noting that such exemptions from the general blanket prohibition were problematic. Id. at 515.

The specific danger noted by the plurality was in allowing the government to choose the "permissible subjects for public debate." Id. However, the plurality did

---

[7] Seven of the nine justices agreed that there could be a total prohibition on billboards. "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them," id. at 508 (White, J. for plurality); "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted," id. at 512 (White, J. for plurality); "a wholly impartial ban on billboards would be permissible," id. at 533 (Stevens, J.); "a legislative body can reasonably conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city," id. at 560-561 (Burger, J.); "In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community," id. at 570 (Rehnquist, J.). See also Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 806-807 (1984) (summarizing Metromedia).

not separately analyze the exemptions that were purportedly concerned with choosing "subjects for public debate" from those that were merely informational. The plurality went on to clarify, however, that "the exceptions do not create the infringement, *rather the general prohibition does.* But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." Id. at 520 (emphasis added).

The dissents criticized this reasoning noting that the ordinance was *viewpoint* neutral and that this neutrality was sufficient to render the exemptions content neutral. Id. at 562 (Burger, C.J., dissenting); id. at 570 (Rehnquist, J. dissenting); id. at 541-42 (Stevens, J., dissenting in part). Thus, the plurality opinion was not a majority opinion of the Court *and* was limited to exemptions from the outright blanket prohibition.[8] The plurality did not address exemptions from permitting requirements. The Court's Metromedia plurality decision left two questions unanswered: (1) whether and to what extent cities may exempt certain categories of speech from sign regulation; and (2) whether exemptions based upon

---

[8] In fact, five justices in Metromedia would not have ruled out some content distinctions. See dissenting opinions 453 U.S. at 541-42, 562, and 570 and concurrence, id. at 532. (Brennan, J., concurring). See also Cordes, Mark, "Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection," 74 Neb.L.Rev. 36, 83 (1995); Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994), noting that because of the special reasoning of the five opinions in Metromedia, the Court was unable to set forth a governing standard.

subject matter, as opposed to *viewpoint*, must also be subject to strict scrutiny review.[9]

The Supreme Court's subsequent decision in Taxpayers for Vincent suggests that an ordinance need only be subject to strict scrutiny review if it regulates a particular *viewpoint*: "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Id. at 804. As the Eleventh Circuit has noted, the Court's Vincent decision held the sign ordinance at issue to be *viewpoint* neutral:

> For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. 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 test of the ordinance is neutral–indeed it is silent–concerning any speaker's point of view . . .

Vincent, 466 U.S. at 804 (internal citations omitted), as quoted in Messer, supra, 975 at 1509. Significantly, in Vincent, the Court acknowledged that the ordinance also contained two exemptions for government signs, which it did not review. 466 U.S. at 817, n.34.

---

[9] The resulting uncertainties of these undecided issues were noted by Cordes, supra, and by Jules B. Gerard in his article "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 (2000).

The Supreme Court returned to, but did not resolve, the exemption issue in City of Ladue v. Gilleo, 512 U.S. 43 (1994), where it retreated from the plurality reasoning in Metromedia. In the Ladue case, the city prohibited homeowners from displaying any signs except residential identification, safety hazard, and "For Sale" signs. Businesses, churches, and a few other organizations were allowed to display signs forbidden to homeowners. Id. at 45. The plaintiff in Ladue sought to post a small (8 ½" x 11") sign in her home window in order to protest the Persian Gulf War. Id. The City attempted to justify its general, widespread prohibition of signs on the justification of preserving aesthetic value. Id. at 47-48.

The Court began by noting that while signs are a form of expression protected by the First Amendment:

> [T]hey pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.

Id. at 48. The Court assumed, without deciding, the validity of the crucial argument put forth by the city, that the exemptions were free from impermissible "content or viewpoint discrimination." Id. at 52. The Court nevertheless went on to find the ordinance unconstitutional for two reasons. Id. First, it noted that even if treated as a neutral time, place, and manner regulation, the exemptions "diminished the credibility" of the City's aesthetics claim. Id. at 52. The Court also determined that the ordinance simply prohibited too much speech without

leaving open ample alternatives of communication because the homeowner was left with no viable alternative to communicating her anti-war sentiments. Id. at 54-55.

In its decision, however, the Court noted that cities face challenges on both ends of the spectrum: they may restrict too little speech if exemptions are based on the content of the signs; or they may be overly broad, restricting too much protected speech. Id. at 51. The Court did not preclude the possibility that a system of exemptions utilizing the proper balance might well be constitutional: "Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs (whether political or otherwise) . . . We are not confronted here with mere regulations short of a ban." Id. at 59, n. 17.

Significantly, where the Metromedia four justice plurality determined that exemptions from an outright prohibition would be unconstitutional, the Ladue court declined to affirm this reasoning, and in fact sidestepped the issue altogether. Thus, there has never been a majority ruling from the Supreme Court that exemptions are unconstitutional per se. Moreover, the Court has certainly not determined that a mere exemption from *permitting* requirements (as opposed to an outright prohibition) is problematic.

The Eleventh Circuit confronted this precise question in Messer, supra, where it upheld a City ordinance that prohibited "off-premises billboards." 975 F.2d at 1509. This Court determined that the ordinance was "view-point" neutral even though it contained exemptions for real estate "for sale" signs, construction identification signs, directional traffic signs, and one bulletin board located on religious, public, charitable or educational premises. Id. at 1511-12. In concluding that such exemptions did not run afoul of the First Amendment, this Court noted that the exemptions were not exemptions from a general ban but were mere exemptions from permitting requests. Id. at 1513. The decision went on to hold that the exemptions did not favor commercial over noncommercial speech even though they contained exemptions for real estate and construction signs.

Additionally, as the Third Circuit has noted, when there is a significant relationship between the content of particular speech and a specific location as its use, the state can exempt it from a general ban on speech having that content so long as the state did not make this distinction in an attempt to *censor* certain *viewpoints* or to *control issues for public debates*. Rappa v. New Castle County, 18 F.3d 1043, 1065 (3rd Cir. 1994). Thus, a local government can justify certain subject matter signs based on their information function (i.e., construction or traffic signs) or their function to better convey information relevant to a particular site (i.e., address signs). Id. In so holding, the Court implicitly recognized that the

purpose in enacting a particular exemption is significant. This reasoning was also applied by the Supreme Court in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (the district court's finding of "predominant intent" was more than adequate to establish the city's pursuit of its zoning interests was unrelated to the "suppression of free expression"). Moreover, signs which are relevant to a particular location, such as warning signs, street signs and construction signs, are uniquely important means of communicating information that cannot be communicated in any other way. See Cordes, 74 Neb. L.Rev. at 87. See also Granite State Outdoor Adver. Co. v. City of Clearwater ("Granite-Clearwater"), 213 F.Supp.2d 1312, 1333-1334 (M.D.Fla. 2002), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003), reh'g and reh'g en banc denied, 97 Fed.Appx. 908, 2004 WL 385620 (11th Cir. Feb. 18, 2004), cert. denied, 125 S.Ct. 48, 72 USLW 3733, 73 USLW 3196, 73 USLW 3206 (U.S. Oct. 4, 2004). See also Memorandum Opinion (Doc. 56) at pp. 16-36 in Granite State Outdoor Advert., Inc. v. City of St. Petersburg, Fla. ("Granite-St. Petersburg"), Case No. 8:01cv2250 (M.D. Fla. Oct. 18, 2002), aff'd in part and rev'd in part on other grounds, 348 F.3d 1278 (11th Cir. 2003), reh'g and reh'g en banc denied, 90 Fed.Appx. 390, 2003 WL 23190914 (11th Cir. Dec 29, 2003) (Table, No. 02-16433), cert. denied, 124 S.Ct. 2816, 159 L.Ed.2d 247, 72 USLW 3644, 72 USLW

3740 (U.S. June 7, 2004); and Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L. Rev. 2482 (1990).

ADvantage's argument that exemptions based upon subject matter render the sign ordinance unconstitutional would lead to absurd results. First, Hoover's entire set of sign regulations would be rendered invalid by virtue of the fact that Hoover has exempted certain signs, such as real estate signs, from its permitting requirements based upon the Supreme Court's mandate that such signs must be allowed. See Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 91-98 (1977). Such a result would place local governments in an impossible predicament. Moreover, if courts were to adopt ADvantage's view, then all signs based upon subject matter, no matter how far removed that subject matter is from a particular *viewpoint*, must be subject to strict scrutiny review. Thus, if a city attempts to exempt, for instance, construction signs, warning signs, real estate signs, and traffic signs from permitting requirements, its entire ordinance would be subject to the type of facial challenge lodged here. Taken to its logical conclusion, this application of strict scrutiny to such signs leaves a city with no ability to regulate signage at all.

There is no question that certain signs (e.g., 'for sale' signs, political signs) are constitutionally protected and that a city may, therefore, not prohibit these signs outright. However, if a city attempts to allow some leeway (i.e., traffic signs,

construction signs, warning signs, etc.), then following ADvantage's argument, it must allow all signs or be faced with the allegations (and possible lawsuits) that it regulates speech based upon content. This would force it to choose between substantial community interests, such as safety, business identification, and directional signs, and its ability to regulate signage at all – an absurd result and one completely incompatible with the Supreme Court's statement that sign regulation poses a distinctive problem best left to resolution by the local government's police powers. See Ladue, 512 U.S. at 48. ADvantage's solution would leave local governments with no ability to regulate signage, a traditional state function, and in fact would place them in an impossible constitutional conundrum. See Judge Moody's extensive discussion of "The 'Catch-22' of Sign Regulations" in Granite-Clearwater, 213 F.Supp.2d at 1328-1334, and in Granite-St. Petersburg at pp. 16-29.

Finally, it must be recognized that the issues here do not involve a *speech-licensing scheme*, but involve land development regulations that are principally concerned with the number, size, height and placement (location) of sign structures and sign-types. The obvious purpose of such regulations involves safety

considerations and the aesthetics[10] (order) of Hoover. Prohibiting billboards (off-site signs) is clearly a land development regulation. It is not a speech-licensing scheme. Classifying signs by their function is not unconstitutional discrimination. As Judge Moody stated, "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. . . . This should not, on its own, render an ordinance unconstitutional." Granite-Clearwater, 213 F.Supp. at 334; see also, Granite-St. Petersburg, at 29.

C. ARTICLE III STANDING AND OVERBREADTH JURISPRUDENCE PRECLUDES A FACIAL CHALLENGE.

In Granite-Clearwater, the Eleventh Circuit offered a crucial clarification to the overbreadth principle however, noting that "[t]he overbreadth doctrine, however, is not an exception to the *constitutional* standing requirements." Granite-Clearwater, 351 F.3d at 1116, citing Bischoff v. Osceola County, Fla., 222 F.3d 874, 884 (11th Cir. 2000). The Eleventh Circuit's clarification is completely adherent to the Supreme Court's holdings on this same issue. The Supreme Court has consistently held that while prudential requirements on standing, which are judicially created, may be relaxed under some circumstances, the requirements of

---

[10] The aesthetics of a community are related to harmony and order, as opposed to disorder and clutter.

Article III can never be waived or ignored, and that a plaintiff seeking to make an overbreadth challenge must first demonstrate an *injury in fact*. See e.g. Virginia v. American Bookseller Ass'n, 484 U.S. 383, 392-93 (1988); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). In discussing various exceptions to the prudential limitation on standing, the Supreme Court noted: "Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975).

In this case the District Court, like this Court in Granite-Clearwater[11] and consistent with the Supreme Court's recent decisions, determined that there was only one section of the applicable code that the billboard company suffered an alleged injury and that said section was content-neutral. Both decisions were entirely consistent with the Supreme Court's prior decisions with respect to the constitutional requirement that a plaintiff demonstrate an actual injury in fact.

On June 16, 2003, the Supreme Court issued its opinion in Virginia v. Hicks, 539 U.S. 113 (2003). In Hicks, issued five months prior to the Eleventh Circuit's Granite-Clearwater decision, the Supreme Court admonished that over-application

---

[11] See also Douglas Outdoor Advertising Co. of Georgia, Inc. v. Cherokee County, Ga., 2004 WL 1598814 (N.D. Ga.), affirmed ___ F.3d ___ (11th Cir. 2005) (Table No. 054-14146).

of the facial overbreadth doctrine results in "substantial social costs." Id. at 119. The Supreme Court noted that even the "chilling effect" of a law which is actually overbroad, "cannot justify prohibiting all enforcement of that law--particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" Id. The Supreme Court went on to re-affirm that a law's overbroad application to protected speech must be "substantial" before it is invalidated:

> To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, . . . , before applying the "strong medicine" of overbreadth invalidation . . . .

Id. (internal citations omitted).

Consistent with this recent admonition, the Granite-Clearwater decision has put an end to a pervasive misapplication of the overbreadth doctrine within the Eleventh Circuit that has caused the very sort of "substantial social costs" noted by the Supreme Court in 2003 in Hicks.

II. CONCLUSION.

Once erected, modern steel structures[12] can be expected to remain a permanent blight on the landscape. The scenic beauty and aesthetic values that are important to the public are being increasingly sacrificed for monetary gain. We live "in a land of vanishing beauty, of increasing ugliness, of shrinking open spaces, of an overall environment diminished daily by noise, pollution and blight." Stewart L. Udall, *Forward* to The Quiet Crisis, at viii (Avon Books 1964). The prohibition and limitations on billboards (uniquely suited to severability) should be upheld whenever possible, and the requisite standing to mount *facial* challenges to local land development regulations should be carefully scrutinized, lest the beauty of our natural environment be lost for generations.

For the reasons set forth herein, the district court's summary final judgment in favor of Hoover should be affirmed.

---

[12] Unlike their wooden predecessors, modern steel billboard structures are claimed to have useful lives of 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).

RESPECTFULLY SUBMITTED this 9th day of May 2005.

ROGERS TOWERS, P.A.

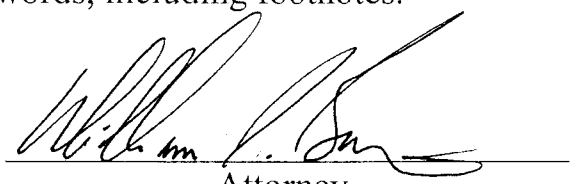
By _____

William D. Brinton
Florida Bar No. 0242500
Cristine M. Russell
Florida Bar No. 0157406
1301 Riverplace Boulevard, Suite 1500
Jacksonville, Florida 32207-1811
(904) 398-3911
(904) 396-0663 (Facsimile)

ATTORNEYS FOR AMICI CURIAE,
SCENIC AMERICA, INC., AMERICAN
PLANNING ASSOCIATION, AND
SCENIC ALABAMA, INC.

FRAP 32(a)(7)(B) CERTIFICATE OF COMPLIANCE

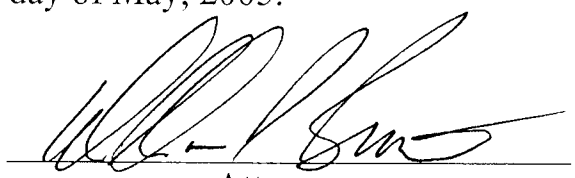
I HEREBY CERTIFY that the foregoing brief complies with the type and volume limitation specified in Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 5,602 words, including footnotes.



Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that an original and six copies of the foregoing were furnished to the U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303, (2) that two copies of the foregoing were furnished to E. Adam Webb, Esq., The Webb Law Group, L.L.C., 2625 Cumberland Parkway, S.E., Suite 220, Atlanta, Georgia 30339, and (3) that two copies of the foregoing were furnished to Mark S. Boardman, Esq. and Clay Carr, Esq., Boardman, Carr, Weed & Hutcheson, P.C., 400 Boardman Drive, Chelsea, Alabama 35043, all by Federal Express or U.S. Mail, this 9th day of May, 2005.



Attorney