NO. 05-56374

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GET OUTDOORS, II, L.L.C.,
APPELLANT,

v.

CITY OF LEMON GROVE, CALIFORNIA
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, CALIFORNIA STATE ASSOCIATION OF COUNTIES, SCENIC AMERICA, INC., AND SCENIC CALIFORNIA

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## STATEMENT CONCERNING DEFINITIONS, REFERENCES AND ABBREVIATIONS

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

| | |
|---|---|
| City: | City of Lemon Grove, California. |
| City-Brief: | Brief of Appellee City of Lemon Grove, California. |
| Dkt.__: | Docket Entry in District Court. |
| AER-___: | Appellant's Excerpts of Record. |
| Get Outdoors: | Get Outdoors, II, L.L.C. |
| Get-Brief: | Brief of Appellant Get Outdoors, II, L.L.C. |
| SER-___: | Appellee's Supplemental Excerpts of Record. |

## STATEMENT CONCERNING THE IDENTIFY 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 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, California State Association of Counties (CSAC), is a non-profit corporation. 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.

Amici have a common interest in preserving the Constitutional separation of powers framework. Moot cases fail to meet the important requirement that courts only consider active cases or controversies. The federal courts are being abused by billboard developers seeking to use the First Amendment as a sword for achieving financial gain to the detriment of the nation's landscapes. How this Court resolves the issues of mootness, as interrelated with the legal principles of vested rights and damages, will determine whether federal courts can observe their limited role within the Constitutional separation of powers framework or be lured into issuing advisory opinions where there is no active case or controversy.

## SUMMARY OF LEGAL ARGUMENT

Dozens of billboard suits are now pending in many circuits. In many of the pending cases, an issue of mootness arises through one or more amendments to land development regulations (sign regulations) prior to any vested right being acquired to erect permanent multi-story multi-ton steel billboard structures.

A case or controversy is moot (a) where a legislative enactment removes the alleged problematic provision, (b) where there is no proof of intent to reenact the former problematic provision, and (c) where the challenger has acquired no vested right under applicable state law to erect permanent multi-story steel structures. There are no actual damages in the absence of a vested right to the issuance of permits under state law to erect such structures. There is no entitlement to nominal damages in the absence of a violation of procedural due process or an absolute, fundamental, substantive right. An earlier decision of a California district court misapprehended the law on mootness and failed to correctly apply California law on vested rights, and the decision should be officially disapproved.

The district court correctly ruled that it lacked subject matter jurisdiction.

## LEGAL ARGUMENT

### I. GET OUTDOORS'S CLAIMS ARE MOOT.

For federal courts to function within their sphere of constitutional authority, the resolution of the issue of mootness is essential. North Carolina v. Rice, 404 U.S. 244, 246 (1971). See also Hall v. Beals, 396 U.S. 45, 48 (1969). In rejecting a recent billboard challenge as moot, the Eleventh Circuit pointed out:

> Federal courts are courts of limited jurisdiction. Under our Constitutional separation of powers framework, it is essential that all three branches of government strictly observe the limitations on their proper dominion. Thus, out of respect for their limited role within our government, federal courts have long refused to issue advisory opinions. Additionally, we have repeatedly held that moot cases fail to meet the important requirement that courts only address active cases or controversies.

National Advertising Company v. City of Miami ("National-Miami"), 402 F.3d 1329, 1333 (11th Cir. 2005), cert. denied, ____ S.Ct. ___, 2006 WL 385630. 74 USLW 3463, 74 USLW 3471 (Feb 21, 2006) (No. 05-492).

Where a challenged law is substantially amended or repealed, a case may be mooted. Lewis v. Continental Bank Corp., 494 U.S. 472, 474 (1990); Burke v. Barnes, 479 U.S. 361, 363 (1987); Princeton University v. Schmid, 455 U.S. 100, 103 (1982); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972).

As this Court noted, the substantial amendment or repeal of a law is different than mere "voluntary" cessation of a challenged activity. Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1509 (9th Cir. 1994). If the substantial amendment-modification or repeal is a mere sham taken in bad faith, then obviously evidence

of bad faith will bar a finding of mootness. This was the case in City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289, n. 11 (1982), where a local government expressly announced its intention to re-enact the challenged provision; however, such bad faith is rare.

In recent years in a series of similar billboard cases, federal appellate courts have not found any credible evidence of an express intent by local governments to readopt the repealed provisions. See National-Miami, 402 F.3d at 1333 (voluntary cessation doctrine inapplicable); Seay Outdoor Advertising, Inc. v. City of Mary Esther, Florida, 397 F.3d 943, 947-948 (11th Cir. 2005) (voluntary cessation doctrine inapplicable); Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320, 1332-1333 (11th Cir. 2004) (voluntary cessation doctrine inapplicable); Lamar Advertising of Penn, L.L.C. v. Town of Orchard Park, New York, 356 F.3d 365, 375-376 (2nd Cir. 2004) (voluntary cessation doctrine not applicable); Granite State Outdoor Advertising, Inc. v. Town of Orange, Connecticut, 303 F.3d 450, 451-452 (2nd Cir. 2004) (voluntary cessation doctrine inapplicable).

In Town of Orange, the Second Circuit noted that there was no reason to think that the Town had any intent of returning to the prior regulatory regime having revised its regulations through proper procedures. 303 F.3d at 451-452. In voluntary cessation cases, a defendant asserting mootness has the burden to show the unlikelihood that the conduct will recur, and that burden can then be met by

showing changes that are permanent in nature. When the initial burden has been met by showing changes that are permanent in nature (such as a legislative enactment) that forecloses a reasonable chance of reoccurrence [see, e.g., Tandy v. City of Wichita, 380 F.3d 1277, 1291 (10th Cir. 2004)], a plaintiff then has the burden to come forward and show affirmative evidence that the matter is not moot.

In National-Miami, the Eleventh Circuit explained:

> However, once the repeal of an ordinance has caused our jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot. Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of secret intentions.
>
> [The plaintiff] is also incorrect in suggesting that we should focus on the City's motivation in amending the code. The City's purpose in amending the statute is not the central focus of our inquiry nor is it dispositive of our decision. Rather, the most important inquiry is whether we believe the City would re-enact the prior ordinance. Again, there is no evidence in this case suggesting any risk that the City of Miami has any intention of returning to its prior course of conduct.

402 F.3d at 1334 (emphasis supplied).

In Get Outdoors, II, L.L.C. v. City of Chula Vista, 407 F.Supp.2d 1172 (S.D.Calif. 2005), appeal docketed Case No. 05-56696 (9th Cir. Nov. 9, 2005), the district court stated that it was not appropriate "in the absence of evidence to the contrary, to second guess the motives of a legislative body in amending or modifying an ordinance that may represent an effort to correct potential constitutional deficiencies in that particular law." Id. at 1179.

## II. GET OUTDOORS HAS NO "VESTED RIGHT" UNDER STATE LAW AND THEREFORE NO CLAIM TO COMPENSATORY DAMAGES.

Get Outdoors alleges, "Plaintiff would have collected substantial revenue on a monthly basis from the signs for which it requested permits. Plaintiff is entitled to an award of actual damages resulting from this lost revenue." Dkt. 1, ¶89. However, it is not messages that Get Outdoors requested permission to display. Get Outdoors applied for permits to erect multi-story steel billboard structures in the City. After the construction of these structures, Get Outdoors would then display advertising messages on the faces of the structures and then collect revenue from the advertisers.

Get Outdoors states that its damage claim for the lost revenue from future advertising displays on multi-story steel structures yet to be erected keeps the case from being declared moot. Get Outdoors cites a number of cases that are outside the context of the present case. For example, Get Outdoors cites Powell v. McCormack, 395 U.S 486 (1969). However, in Powell, the damage claim was for back pay that had accrued during the 90th Congress when plaintiff Adam Clayton Powell was not seated due to an allegedly unconstitutional House resolution. Therefore, the compensatory damage claim for the actual injury - already sustained by the plaintiff - was not mooted by his seating in the 91st Congress. Id. at 495-500.

Get Outdoors also cites Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). However, in Fulton Corp., the damage claim was for a refund of a state intangible tax of $10,844 that had already been paid by the plaintiff under an allegedly unconstitutional state law. The compensatory damage claim for this injury was not mooted by the subsequent repeal of that law. Id. at 328. In these contexts, it is readily apparent how a claim for damages survives subsequent events because an injured plaintiff had already sustained a compensable injury.

Get Outdoors seeks damages pursuant to 42 U.S.C.A. §1983 (civil action for deprivation of rights). Redress under Section 1983 is accorded to a party who is "injured."[1] Absent an injury, no redress is available. Get Outdoors's alleged

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[1] Section 1983 provides: "Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Emphasis supplied.)

injury hinges upon whether it had secured a vested right under state law to erect eight multi-story steel billboard structures before the ordinance amendment.[2] Absent a vested right to build eight multi-story steel structures, there is no compensable injury and therefore no damages. Get Outdoors simply ignores the vested right issue, which is the *sine qua non* to its damage claim against the City.

A similar claim for damages was rejected in Town of Orchard Park, supra at p. 3. In Town of Orchard Park, the Second Circuit held that Lamar Advertising fundamentally confused the point:

> Finally, we disagree with Lamar's contention that the controversy over the original ordinance remains alive because Lamar incurred [alleged] certain damages under the pre-amended version of the ordinance that it should still be permitted to recoup. . . . [W]e find no merit to Lamar's assertion that it obtained vested rights under the pre-amended version of the ordinance. Although in *Babylon* we cited the possibility that the plaintiff obtained vested rights as another reason for not finding the case moot, there we were concerned about potential vested rights "under state law" that "might have" accrued "in the interim" between the district court's issuance of an injunction and the enactment of any curative amendments. [Citation.] Lamar fundamentally confuses the point by arguing that its case is not moot because the pre-amended ordinance infringed upon its first amendment rights and that those rights vested to it directly under the Constitution. While a party may avert mootness of its claim if it demonstrates that, prior to the amendment it accrued certain property

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[2] The billboard structures would be permanent multi-ton steel structures between four to eight stories tall (45-feet to 85-feet tall), embedded several stories below ground in concrete and rebar. See SER 49J, consisting of the structural calculations and technical-construction drawings associated with the off-site sign (billboard) permit applications at SER49A, SER49B, SER49C, SER49D, SER49E, SER49F, SER49G, and SER49H.

> rights or fixed expectations protected under state law, Lamar has failed to make any such showing here.

356 F.3d at 378-379 (emphasis supplied).

In determining that no damage claim kept the matter from becoming moot, the Second Circuit concluded that Lamar Advertising had failed to demonstrate that it had accrued certain property rights or fixed expectations (i.e., that it had obtained vested rights under New York law). The Second Circuit stated:

> Nor can we agree that if Orchard Park's original ordinance had in fact been unconstitutional all along that Lamar obtained vested rights because it should have been able to erect its signs in the absence of a lawful ordinance that would have kept it from so doing. *Cf. Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849, 694 N.Y.S.2d 788, 792-93 (3d Dep't 1999) (rejecting plaintiff's claim that it had vested rights in a permit after the lower court ruled invalid provision that formed the basis for government's denial of the permit). No rights in the construction of signs or to the receipt of permits necessarily would have vested absent some detrimental reliance on Lamar's part.

356 F.3d at 379, n. 19 (emphasis supplied).

In Preble Aggregate, Inc. v. Town of Preble, 263 A.D.2d 849, 694 N.Y.S.2d 788 (3d Dep't. 1999), cited by the Second Circuit, the New York appellate court described what it would take to establish a claim to vested rights under New York law, holding:

> [The] plaintiff did not demonstrate vested rights where it failed to show that it had effected substantial changes and incurred substantial expenses to further development pursuant to a legally issued permit [citations] or that its activities in furtherance of its pursuit of the required permits-notwithstanding the existence of the Local Law-were such that enforcement of the amended law would be inequitable.

263 A.D.2d at 851-852, 694 N.Y.S.2d at 792-793.

The law in California is even stricter as to what will establish a vested right. A party has a vested right only after the permit has issued and only after the party has performed substantial work and incurred substantial expense in reliance on the permit. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 791, 132 Cal. Rptr. 2d 386, 553 P.2d 546 (1976); Davidson v. County of San Diego, 49 Cal.App.4th 639, 646, 56 Cal. Rprt. 2d 617 (1996). See also Outdoor Media Group v. City of Beaumont, 374 F.Supp.2d 881, 885-886 (C.D.Calif. 2005), appeal docketed, No. 05-56620 (9th Cir. October 27, 2005). In Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 552, 103 Cal. Rptr. 2d 447 (2001), the court determined that there was no vested right until a valid building permit, or its functional equivalent, has been issued and "the developer has performed substantial work and incurred substantial liabilities in good faith reliance on the permit." 86 Cal. App. 4th at 552. Soft costs, such as expenditures for engineers, consultants and lawyers in connection with obtaining approvals, are not the type of hard costs required in California as a basis for recognizing a vested right to proceed with development. Id. There is no evidence that Get Outdoors incurred any hard costs whatsoever.

If Get Outdoors can trump the absence of a vested right by substituting a damage claim in its place, then the law of vested rights in this context is meaningless. Whether erected billboard structures providing Get Outdoors with a

future revenue stream, or multi-story steel structures that Get Outdoors can sell to a third party for millions of dollars, or a damage claim represented by a sum of money reduced to present money value (substituted for the absence of the multi-story steel billboards that it cannot erect), the end result is the same for Get Outdoors. Money – and a lot of it. According to a recent government study, modern steel structures can have a normal lifespan of up to seventy years.[3]

Get Outdoors's success depends upon this Court ignoring the fact that Get Outdoors had no vested right under state law to construct the multi-ton steel billboard structures, and therefore no compensable damage claim. This Court should reject Get Outdoors's attempt to fundamentally confuse the absence of a vested right to erect multi-ton steel billboard structures with any surviving claim to compensatory damages for injury occasioned by the absence of such a vested right.

In its opening brief, Get Outdoors cites the published decision in Horizon Outdoor, L.L.C. v. City of Industry, California, 228 F.Supp.2d 1113 (S.D.Calif. 2002). Get-Brief at pp. 32, 34, 35, 41, and 42. Horizon Outdoor, L.L.C. is a company that was both formed and owned by Horizon Outdoor, L.L.C.'s own

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[3] 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).

counsel (also Get Outdoors's counsel), E. Adam Webb.[4] The Horizon Outdoor decision in 2002 cited two district court decisions out of Florida in 2000 and 2001[5] for the proposition that Horizon Outdoor, L.L.C. had obtained vested rights:

> Based on the law in existence at the time the permit applications were submitted, Plaintiffs have obtained vested rights to post signs. *See e.g. Boynton Beach*, 182 F.Supp.2d at 1213 (where plaintiff filed permit applications under challenged sign code, plaintiff had obtained vested rights); *Wilton Manors*, 2000 WL 33912332 at *6 (where no valid ordinance existed at the time the plaintiff filed its permit applications, the court found that plaintiff's rights had vested).

228 F.Supp.2d at 1121.

However, in 2004, the Eleventh Circuit concluded that the decisions in Boynton Beach and Wilton Manors had "misapprehended Florida law" on the subject of vested rights. Coral Springs Street Systems, Inc, v. City of Sunrise, 371 F.3d 1320, 1340 (11th Cir. 2004). The Eleventh Circuit stated:

> We . . . reject the suggestion that vested rights may be created under Florida law in the absence of equitable estoppel, detrimental reliance, or bad faith. To the extent some district court opinions have found otherwise, *see Fla. Outdoor Adver., L.L.C. v. City of Boynton Beach*, 182 F.Supp.2d 1201, 1209 (S.D.Fla. 2001); *Wilton Manors St. Sys. v.*

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[4] See Doc. 27, App. 23, Parts 1-3 (Deposition of Adam Webb in Horizon Outdoor, L.L.C. v. City of Gardena, CA, at pp. 7-8, 40-42, Exhibits 2 and 3), in KH Outdoor, L.L.C. v. Manatee County, Florida, United States District Court, Middle District of Florida, Tampa Division, Case No. 8:04-cv-01953-JSM-TGW. Mr. Webb was initially a 40% owner of Horizon Outdoor, L.L.C. and later became the sole owner when the other two owners renounced their ownership interest in Horizon Outdoor, L.L.C. Id. at p. 10.

[5] Florida Outdoor Adver., L.L.C. v. City of Boynton Beach, 182 F.Supp.2d 1201 (S.D.Fla. 2001), and Wilton Manors St. Sys. v. City of Wilton Manors, 2000 WL 33912332 (S.D.Fla. 2000).

*City of Wilton Manors*, 2000 WL 33912332, at *5 (S.D.Fla. 2000), we conclude that they have misapprehended Florida law on this subject.

371 F.3d at 1340 (emphasis supplied).

To the extent that Horizon Outdoor continues to be cited in an ongoing assault on the sign regulations of local governments, amici curiae join in appellee's request that this erroneous decision be officially disapproved. City-Brief at pp. 50-53. As one district court warned "plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." National Advertising Co. v. City of Miami, 287 F. Supp. 2d 1349, 1356 (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).

## III. GET OUTDOORS IS NOT ENTITLED TO NOMINAL DAMAGES.

Get Outdoors is not entitled to nominal damages. Court must award nominal damages "only when certain absolute rights are violated -- for instance, the right to procedural due process." Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Florida, 348 F.3d 1278, 1283 (11th Cir. 2003), cert. denied, 124 S.Ct. 2816 (2004). Here, like St. Petersburg, there was no violation of an "absolute right."

Contrast Get Outdoors's situation here where permits were denied to erect future permanent multi-story steel billboard structures with the actual and immediate chilling of a plaintiff's speech in Trewhella v. City of Lake Geneva, Wisconsin, 249 F.Supp.2d 1057 (E.D.Wis. 2003):

> On November 25, 2000, Plaintiff Long was standing in a public right of way in front of a Planned Parenthood clinic in the City of Lake Geneva demonstrating against abortion. Lake Geneva Police Sergeant Fritz . . . ordered him to cease and desist. Long obeyed the order and left the area.

249 F.Supp.2d at 1068.

The district court noted that the "actual chilling" of a plaintiff's exercise of his free speech rights - at the very moment when he was engaged in actual speech activities - constituted an injury sufficient to recover nominal damages. Id. In Trewhella, the district court held that the defendant City had "denied [the plaintiff] his right to speak on a matter of public interest" on November 25, 2000, for which

he had an absolute right to speak at that time, and as a consequence the plaintiff was entitled to nominal damages of one dollar. Id. at 1070.

This case concerns the right to erect permanent structures in the future on which messages may thereafter at some further date in the future be displayed. No "actual chilling" of an absolute right of free speech occurred here. In support of its position that the court erred in failing to award it nominal damages, Get Outdoors cites to three Supreme Court decisions (Get-Brief at p. 43), but all three pertain to the Supreme Court's requirement that nominal damages be awarded in "procedural due process cases.[6] This is not such a case. The three Ninth Circuit decisions (Get-Brief at pp. 43-44) all deal with types of absolute rights that are fundamental and substantive, but that are not present here either.[7]

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[6] In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court held that "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, [citations omitted], we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." Id. at 266 (emphasis added). See also Farrar v. Hobby, 506 U.S. 103, 112 (1992) (Carey v. Piphus obligates a court to award nominal damages when a plaintiff establishes the violation of a right to "procedural due process" but cannot prove actual injury), and Edwards v. Balisok, 520 U.S. 641, 645 (1997) (recognizing an entitlement to recover nominal damages for a §1983 claim involving a deprivation of "due process," citing Carey v. Piphus).

[7] See Nadell v. Las Vegas Metropolitan Police Department, 268 F.3d 924, 926-928 (9th Cir. 2001) (police officer's filing of misdemeanor battery charges against plaintiff in retaliation for her exercise of First Amendment rights); George v. City of Long Beach, 973 F.2d 706, 708 (9th Cir. 1992), cert. denied, 113

## CONCLUSION

This case is moot inasmuch as (a) there was a legislative enactment that addressed the alleged problematic provision, thereby distinguishing this case from a "voluntary cessation" case, (b) there was no proof of intent to repeal the legislative enactment, and (c) the challenger Get Outdoors acquired no vested rights under state law to erect the eight permanent multi-story multi-ton steel billboard structures in the City of Lemon Grove.

In the absence of a vested right to erect the eight permanent steel structures, Get Outdoors was not entitled to compensatory damages under 42 U.S.C.A. §1983. Get Outdoors was not entitled to nominal damages absent a procedural due process violation, or the violation of an "absolute" or fundamental/substantive right, also absent here. The district court correctly determined that it lacked subject matter jurisdiction. AER 43-54.

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S.Ct. 1269 (1993) (police officers' warrantless entry of plaintiff's house in violation of plaintiff's Fourth Amendment rights); Floyd v. Laws, 929 F.2d 1390, 1392 (9th Cir. 1991) (police chief's assault and false imprisonment of plaintiff in violation of her Fourth Amendment rights).

See also Gibeau v. Nellis, 18 F.3d 107, 108-110 (2d Cir. 1994) (correction officer's excessive use of force on December 2, 1988 while plaintiff was handcuffed and restrained in violation of plaintiff prisoner's Eighth Amendment rights); Madison County Jail Inmates v. Thompson, 773 F.2d 834, 841-842 (7th Cir. 1985) (county sheriff's imprisonment of plaintiffs under substandard conditions between October 19, 1979 and June 20, 1981 in violation of their Eighth Amendment rights).

The decision in Horizon Outdoor misapprehended the law on mootness and failed to correctly apply California law on vested rights. The decision should be officially disapproved.

Dated: March 29, 2006.

Respectfully submitted,

**ROGERS TOWERS, PA.**

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**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 29, 2006.

By: _____
William D. Brinton
Attorney for Amici Curiae, American Planning Association, International Municipal Lawyers Association, League of California Cities, California State Association of Counties, 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 Lemon Grove.

Case No.: 05-56374.

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 29, 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, CALIFORNIA STATE ASSOCIATION OF COUNTIES, SCENIC AMERICA, INC., AND SCENIC CALIFORNIA IN SUPPORT OF DEFENDANT/APPELLEE CITY OF LEMON GROVE 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.

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

Executed on March 29, 2006, at Jacksonville, Florida.

William D. Brinton