NO. 08-6058

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIDWEST MEDIA PROPERTY, LLC, CHEWL'S HOSPITALITY, INC., PIERCEFIELD CORPORATION AND OLMSTEAD ENTERPRISES, INC.

Plaintiffs-Appellants,

v.

CITY OF ERLANGER, KENTUCKY AND
CITY OF FT. WRIGHT, KENTUCKY,

Defendants-Appellees.

On appeal from the United States District Court for the Eastern District of Kentucky, Northern Division at Covington

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

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AMERICAN PLANNING ASSOCIATION AND SCENIC AMERICA, INC. make the following disclosure:

1. Are said amici curiae subsidiaries of a publicly owned corporation? **NO**

   If answer is YES list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **NONE**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

   If the answer is yes, list the identity of such corporation and the nature of the financial interest: **NONE**

William D. Brinton

March 12, 2009
Date

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STATEMENT CONCERNING THE IDENTITIES 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. and 46 regional chapters. It has no corporate subsidiaries.

Amicus curiae International Municipal Lawyers Association ("IMLA") is a nonprofit nonpartisan professional organization whose 2,500 members include local governments of all kinds, state municipal leagues, and attorneys who represent local governments.

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

These amici have a common interest in preserving the well-established constitutional authority of state and local governments to adopt and enforce restrictions on billboards and the size of sign structures. The amici also have a common interest in preserving the constitutional system of separation of powers and checks and balances. 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, vested rights and the First Amendment.

SUMMARY OF LEGAL ARGUMENT

This appeal is a continuation of a series of legal challenges to the billboard and sign restrictions of local municipalities, by which sign companies seek to exploit weaknesses in city regulations. Challengers typically ignore content-neutral size limitations that independently prohibit their signs. Recent appellate decisions have focused on both the constitutional and prudential limits on standing. Many of these cases have highlighted the lack of "redressibility": if a challenge would not result in relief due to size restrictions then the claims are not redressible, and thus the federal court is without jurisdiction. Such was the case on appeal.

To evade the redressibility hurdle, billboard developers often suggest that such size limitations are only *post-hoc* rationalizations, which should be ignored by the courts. Alternatively, billboard developers seek to attack the very foundation for sign regulations by asserting that the rules have no purpose whatsoever, thereby attempting to upend the *entirety* of the sign regulations including content-neutral size limitations. This is such a case. Finally, when the sign regulations have been modified during the course of litigation, billboard developers often attempt to ignore state property laws on vested rights. While any injunctive relief requested (applicable only if there is standing) may have mooted by new regulations, any claim for actual damages depends upon whether the billboard plaintiff had gained vested rights under state law. Kentucky, like many other states, does not afford a

vested right in the absence of substantial expenditure of monies in good faith reliance on government action, such as the issuance of a permit or the actual construction of the structure. The law of vested rights is the ultimate thorn in the side of practitioners of the "billboard shakedown" scheme. In an effort to circumvent this obstacle and to secure a substantial award of attorneys' fees, plaintiffs assert an entitlement to "nominal" damages to lay the foundation for a fee claim. Such attempts have been rejected because Supreme Court precedent requires fundamental change in the legal relationship between the parties. This requirement cannot be met because the plaintiff is no closer to having its billboard(s) erected than it was at the onset of this litigation.

LEGAL ARGUMENT

I. MIDWEST MEDIA'S SUIT IS PART OF A CONTINUING ASSAULT ON THE RIGHTS OF COMMUNITIES TO PROHIBIT BILLBOARDS AND TO LIMIT OVERSIZED SIGNS AND SIGN STRUCTURES.

Municipalities and counties seeking to regulate visual clutter for aesthetic and safety reasons have been increasingly subject to a well-orchestrated attack designed to exploit the courts' "protective instincts" with regard to the First Amendment. The litigation extends to lawsuits filed from Florida to California. *See, e.g., Midwest Media Prop., LLC v. Symmes Twp.,* 503 F.3d 456, 464 (6th Cir. 2007), *rehearing en banc denied,* 512 F.3d 338 (6th Cir. 2008), *cert denied,* 128 S.Ct. 2486 (2008); *Get Outdoors II, LLC v. City of San Diego,* 506 F.3d 886, 893 (9th Cir. 2007); and *Lockridge v. City of Oldsmar*, 273 Fed. Appx. 786, 788, 2008 WL 926399, *2 (11th Cir. April 7, 2008).

While the Appellants extol the benefits of billboards as a medium of communication, the fact is that offsite advertising has been repeatedly found to pose problems to traffic safety and aesthetics. In 1932 the Supreme Court observed: "Billboards . . . are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . 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 radio can be turned off, but not so the billboard or street car placard." *Packer Corp. v. Utah,*

285 U.S. 105, 110 (1932), quoting *State v. Packer Corp.*, 297 P. 1013, 1019 (Utah 1931). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

In 1954 the role of aesthetics was recognized in *Berman v. Parker*, 348 U.S. 26 (1954), wherein the Supreme Court unanimously observed:

> The concept of the public welfare is broad and inclusive ... [T]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

Id. at 33. See also *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 805 (1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values").

Commentators of all political persuasions have long bemoaned the diminution of beauty across the country. In 1964 Stewart Udall observed that 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."[1] In 1966 William F. Buckley, Jr. labeled billboards as "acts of aggression" against which "the public is entitled, as a matter of privacy, to be protected."[2] In 1986 a

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1 Stewart L. Udall, *Forward* to The Quiet Crisis, at viii (Avon Books 1964).

2 William F. Buckley, Jr., *The Politics of Beauty*, Esquire, July 1966, at 53.

former advertising executive declared: "Nor is it possible for you to escape, the billboard inflicts itself unbidden upon all but the blind or the recluse."[3]

Because the billboard is designed to stand out from its surroundings, "the billboard creates *a unique set of problems* for land-use planning and development." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (J. White for plurality), quoting *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 870 (1980) (emphasis added).[4] These problems have led city councils, planners, landscape architects, conservationists, and beautification advocates across the country to adopt national policy positions. The policy of the American Society of Landscape Architects states:

> 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.

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[3] Howard Luck Gossage, Is There Any Hope for Advertising?, at 113 (Kim Rotzoll, Jarlath Graham and Barrows Mussey eds., University of Illinois Press 1986).

[4] See *Infinity Outdoor, Inc. v. City of New York*, 165 F.Supp.2d 403, 409-410 (E.D.N.Y. 2001), noting testimony before the City Planning Commission: "'[o]utdoor advertising has turned our neighborhoods into pages from a magazine, destroying our streetscapes, shining lights into our apartments, disfiguring our landmarks, bombarding our senses. It has stolen our sense of community, blasting a cacophony of advertising messages that drowns out all other information." *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Justice Kennedy's concurring opinion) (speech can cause secondary effects unrelated to the impact of the speech on its audience, for example "a billboard may obstruct a view").

American Society of Landscape Architects, ASLA Public Policies, Public Affairs, Billboards pdf, Billboards (R1990, R2001).[5] The policy of the American Planning Association states:

> 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.

American Planning Association, Policy Guide on Billboard Controls, ratified by the Board of Directors, April 1997.[6] This policy recognizes that beauty is good for business as well as for community character.

Billboards dominate the public view wherever they are erected. The adverse long-term consequences require no study, and "to hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the

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[5] See http://www.asla.org/members/publicaffairs/publicpolicy.html (visited March 12, 2009) (emphasis added).

[6] See http://www.planning.org/policyguides/billboards.html (visited March 12, 2009). See also The Sierra Club Conservation's Conservation Policy on "Visual Pollution" at http://www.sierraclub.org/policy/conservation/visual.asp. (last visited on March 12, 2009); Scenic America, Inc.'s Seven Principles for Scenic Conservation, Principle V, at http://www.scenic.org (last visited on March 12, 2009) ("prevent mass marketing and outdoor advertising from intruding on the landscape or community appearance . . . produce dramatic and immediate results in the scenic character of our landscape by banning the construction of new billboards and strictly regulating existing billboards").

beauty of the environment is to succumb to a bleak materialism." *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 886 (1980), *partially rev'd on other grounds*, 453 U.S. 490 (1981).

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 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. Interests in aesthetics have also led to initiatives restricting billboards at the local level. *See, e.g., 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).

Many communities strive to improve their visual character, to reduce blight and to promote traffic safety prohibit billboards as part of zoning regulations. These regulations quite naturally place modest restrictions on the overall size of signs and sign structures. The Cities of Erlanger and Fort Wright, Kentucky are no different.

Billboard plaintiffs have consistently urged courts to override legitimate aesthetic and safety concerns raised by local governments. The billboard plaintiffs commonly allege that they are attempting to liberate themselves and third parties

from "draconian speech restrictions." However, a Florida court illuminated the strategy as follows:

> The now familiar strategy is to apply for a permit for erection of a billboard knowing full well that the permit will be denied under the city's existing sign ordinance but also aware that the ordinance is subject to legal attack. . . . Florida Outdoor has its own very commercial self-interest at stake. . . . the case is really about the use of the concept of vested rights to create a window of opportunity to build a large. . . and valuable billboard.'

Florida Outdoor Advertising, LLC v. City of Boca Raton, 266 F. Supp. 2d 1376, 1379 (S.D. Fla. 2003).

Most "sign code shakedown" complaints are drafted to arouse the courts' protective instincts regarding First Amendment issues. However, stripped of their self-righteous posturing, these cases are not about speech at all; they are about long term cash flows generated by renting out display space. These cases are not about asserting the rights of ordinary citizens attempting to speak on various issues. The success or failure of these sign code suits does not turn entirely on whether a court grants billboard companies standing. Yet the billboard companies' standing theory, where successful, imposes great burdens on the judiciary and intrudes on principles of federalism and separation of powers. In most cases of this kind, the billboard companies urge the court to engage in purely advisory analysis, even though the case should be decided only on the constitutionality of a ban on new billboards or the separate enforceability of size and height rules (provisions

applying directly to the Appellants before the court). This Court should see through the billboard company's "superficial sloganeering" 453 U.S. at 557 (Burger dissenting), and focus on standing to curb these abuses.

II. THIS COURT SHOULD REJECT MIDWEST MEDIA'S INVITATION TO IGNORE ARTICLE III'S REDRESSIBILITY REQUIREMENTS.

Erlanger's former sign regulations prohibited ground and pole signs that exceeded a maximum size. See Erlanger Zoning Ordinance, at former Art. XIV; ROA-Vol. 1, pages 955-962 Doc. 42, Appx. 3),[7] thereby promoting the city's visual character and preventing blight. *See* Erlanger Zoning Ordinance at Art. II; ROA-Vol. 1, page 1537; Doc. 70-2. As framed by Erlanger's former zoning regulations, there were thirteen separate classifications of signs. *See* Erlanger Zoning Code, at former Art. XIV, *supra*. Size and other physical characteristics were prescribed by sign type (flat, window, ground, pole, etc.). *Id.* Ground and/or pole signs (commonly referred to as freestanding signs), either single-faced or double-faced, were covered in eight of the thirteen classifications. *Id.* (Class C and Classes G-M)). The classifications were then tied to specific zoning districts. *Id.* at Article XIV, *supra*. The maximum size by zoning district varied from six

[7] The size restrictions for freestanding signs were retained in the current and amended sign regulations. See ROA-Vol. 1, at pages 978-985; Doc. 42, Appx. 5.

square feet to three hundred square feet. *Id.* These size limitations are summarized in the following table.

Zoning Code Section	Class	Structure Type (Ground or pole)	Maximum Size Limitation
§14.6.C	Class 3	Ground or pole	6 square feet
§14.6.D	Class 4	Ground	12 square feet
§14.6.G	Class 7	Ground or pole	90 square feet
§14.6.H	Class 8	Ground	25 square feet
§14.6.I	Class 9	Ground or pole	240 square feet
§14.6.A	Class 10	Ground	300 square feet
§14.6.J	Class 11	Ground or pole	270 square feet
§14.6.K	Class 12	Ground	15 square feet
§14.6.L	Class 13	Ground	50 square feet

Ft. Wright's former sign regulations also prohibited freestanding signs (ground and pole signs) that exceeded a maximum size. ROA-Vol. 1, pages 1294-1309; Doc. 42, Appx. 2.[8] Ft. Wright's zoning regulations promoted the city's visual character and prevention of blight. *See* Ft. Wright Zoning Ordinance at Art. II; ROA-Vol. 1, page 1538; Doc. 70-3. Twenty-one zones were organized into six separate groups providing for dimensional limitations by sign type (flat, window, projecting, façade, freestanding, etc. *See* Ft. Wright Zoning Code, at former Art. XIV, *supra.* Freestanding signs, either single-faced or double-faced, were addressed for each zone. *Id.* The maximum size varied from fifty square feet to two hundred twenty square feet. *Id.*

[8] The size restrictions for freestanding signs were retained in the current sign regulations. *See* ROA-Vol. 1, pages 1321-1337; Doc. 42, Appx. 6.

These size limitations are summarized in the following table.

Zoning Code Section	Zone	Structure Type	Maximum Size Limitation
§14.6.A	CO	Freestanding	50 square feet
§14.6.B	R-1, R-2, R-3	Freestanding	50 square feet
§14.6.C	PUD, RCP, MHP, PO-3	Freestanding	per Dev. Plan
§14.6.D	CC, NC, OP, PO, PO-2, IP	Freestanding	90 square feet
§14.6.E	NSC, SC, I-1, I-2	Freestanding	150 square feet
§14.6.F	HC, HOC, LHS	Freestanding	220 square feet

In the zoning regulations of both cities, the maximum size limitations for freestanding signs were tailored to each zoning district, taking into account the character of the zoning district and serving to "facilitate orderly and harmonious development." *See* Erlanger and Ft. Wright Zoning Ordinances at Art. II; ROA-Vol. 1, pages 1537-1538; Doc. 70-2 and Doc. 70-3. Such limitations exist to promote "the visual or historical character" of each city. Establishment of maximum sizes for *permanent* sign structures prevents blight. Without rules, signs soon become a visual shouting match.

As the district court noted, the signs the Appellants proposed to erect within Erlanger and Ft. Wright violated the independent size limitations of the former ordinances. ROA-Vol. 1, at page 1512; Doc. 64, page 7 of 9. The district court further noted that the applications proposed signs that exceeded the limitations set forth by the former regulations. *Id.* Thus, consistent with *Symmes Township*, the district court determined that the claims failed to meet the redressibility

requirement for constitutional standing, and granted the Appellees' motion for summary judgment. ROA-Vol. 1, at pages 1506-1513; Doc. 64.

"'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). Thus, 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.* 504 U.S. 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 crucial 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)).

In *Symmes Township* this Court kept a litigant from finessing the third prong of Article III. This Court's January 20, 2008 decision in *Symmes Township* was recognized in the Eleventh Circuit's May 22, 2008 decision in *Maverick Media Group, Inc. v. Hillsborough County, Fla.*, 528 F.3d 817 (11th Cir. 2008). In *Maverick* the Eleventh Circuit surveyed the circuit courts and noted that the Fourth, Sixth (*Symmes Township*), Seventh, Eighth and Ninth Circuits had all rejected similar challenges based upon the redressibility prong of Article III standing. *Id.* at 820-821 ("[t]his approach has been endorsed by several of our sister circuits"). The Court further observed:

> In concluding that the plaintiff did not have standing, we necessarily concluded that damages-just as sign permits-are unavailable to the plaintiff whose sign applications may be denied under an alternative, unchallenged provision of an ordinance. See also *Get Outdoors II*, 506 F.3d at 894 (nominal damages unavailable to plaintiff whose applications deniable under alternate provision of ordinance).

Id. Separate size limitations on freestanding signs preclude the type of challenge that these Appellants have mounted against Erlanger and Ft. Wright. Standing requirements apply to both facial and as-applied challenges under the First Amendment. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988).

In *Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290, 1292 (7th Cir. 1993), the Seventh Circuit held that 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, because the proposed signs violated independently valid rules on size and height. Relaxing standing requirements would degrade the responsibility of local legislators to uphold the Constitution. *See* John G. Roberts Jr., *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1229-1230 (1993). By directing those without standing who seek to rewrite laws back to the legislative bodies that adopted them, the Court validates the separate roles of the judicial and legislative branches. *See* Lea Brilmayer, *The Jurisprudence Of Article III: Perspectives On The "Case Or Controversy" Requirement*, 93 HARV. L. REV. 297, 321 (1979).

In his report, the Appellants' purported expert anticipated that there might be an issue of severability. ROA-Vol. 1, at pages 986-987. In resolving any issue as to content-neutrality, Erlanger and Ft. Wright added message substitution clauses. ROA-Vol. 1, at pages 250 (Erlanger) and page 226 (Ft. Wright); Doc. 42, Appx. 5, at §14.1.H (Erlanger); Appx. 6, at §14.1.H (Ft. Wright).. This certainly cured any purported flaw that might have existed by the use of the phrase "and shall be only business or identification" in describing the sign classifications. However, the same result could be achieved by the severance of the phrase "and shall only be business or identification" thereby confirm and make it clear that noncommercial speech and commercial speech would be treated the same. Indeed, the sign

regulations contain an additional severability clause within the new sign regulations themselves in addition to the severability provisions in Article VI of the Zoning Code. ROA-Vol. 1, at pages 251 (Erlanger) and page 228 (Ft. Wright); Doc. 42, Appx. 5, at §14.1.R (Erlanger); Appx. 6, at §14.1.R (Ft. Wright).

Both cities embraced the use of severability if needed to uphold effective sign regulations. *See Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 950-951 (11th Cir. 2005). Indeed, there is a judicial obligation that requires the courts to sustain the constitutionality of an act whenever possible by severing invalid clauses and permitting the remainder of an act to stand. *See Roberts v. Atlantic Oil Producing Co.*, 295 F. 16, 17-18 (6th Cir. 1924); *City of Pineville v. Farrow*, 273 S.W.2d 56, 58 (Ky. 1954). *See also Scheinberg v. Smith*, 659 F.2d 476, 481, *reh'g denied*, 667 F.2d 93 (5th Cir. 1981); *Duke Power Co. v. South Carolina Tax Com'n*, 81 F.2d 513, 517 (4th Cir. 1936); *Link v. Receivers of Seaboard Air Line Ry. Co.*, 73 F.2d 149, 153 (4th Cir. 1934); *International Food & Beverage Systems v. City of Ft. Lauderdale*, 794 F.2d 1520, 1527 (11th Cir. 1986); *Smith v. Paulk*, 705 F.2d 1279, 1285, n.5 (10th Cir. 1983).

III. THERE WAS A STATED PURPOSE BEHIND THE LIMITATIONS ON THE MAXIMUM SIZE OF PERMANENT SIGN STRUCTURES.

Kentucky provides for Planning and Zoning in Chapter 100 of the Kentucky Revised Statutes. Land use management through zoning regulations is authorized

within the Planning and Zoning Chapter at KRS Sections 100.201-.216. Kentucky specifically empowers local governments to enact "zoning regulations." K.R.S. 100.203. *See also* K.R.S. 100.201(2) (providing for the enactment of permanent land use regulations that promote health, safety and general welfare, that facilitate orderly and harmonious development and the visual or historic character of a planning unit). Zoning regulations must contain a text which lists the types of zones which may be used and the regulations which may be imposed in each zone which must be uniform throughout the zone. K.R.S. 100.203(1). As part of the zoning regulations, cities and counties are granted the express authority to regulate *the size, width, height, bulk, location of structures, buildings and signs*. K.R.S. 100.203(1)(b). Erlanger and Ft. Wright adopted such zoning regulations.

Kentucky specifically provides that every court of Kentucky shall take judicial notice of any regulation adopted pursuant to K.R.S. Chapter 100. K.R.S. 422.015. The prior and current Erlanger and Ft. Wright zoning regulations specifically provided that they were enacted "in pursuance of the authority of Kentucky Revised Statutes (K.R.S. 100.201-100.991)." *See* Article II, Section 2.0 Authority, Erlanger Zoning Ordinance, and Article II, Section 2.0 Authority, Ft. Wright Zoning Ordinance; ROA-Vol. 1, pages 1537-1538; Doc. 70-2 and Doc. 70-

3. The judicial notice would include the severability provisions at Article VI of the Erlanger Zoning Ordinance[9] and Article VI of the Ft. Wright Zoning Ordinance.[10]

Erlanger and Ft. Wright set forth the purpose of their zoning regulations in Article II, Section 2.1, of their respective Zoning Ordinances. *Id.* Those purposes describe as concerns more than just the public health, safety and welfare of the cities, specifically stating that the zoning regulations as set forth in each Zoning Ordinance had been prepared "to facilitate orderly and harmonious development and the visual or historical character" of each city and "to prevent blight." *Id.*

> **SECTION 2.1 PURPOSE:** *The zoning regulations and districts, as herein set forth have been prepared* in accordance with the adopted comprehensive plan *to promote the public* health, *safety*, morals, and *general welfare of the city, to facilitate orderly and harmonious development and the visual or historical character of the city*, and to regulate the density of population and intensity of land use in order to provide for adequate light and air. *In addition, this ordinance has been prepared* to provide for vehicle off - street parking and loading and/or unloading space, as well as to facilitate fire and police protection, and *to prevent* the overcrowding of land, *blight,* danger, and congestion in the circulation of people and commodities, and the loss of life, health, or property from fire, flood, or other dangers. The zoning regulations and districts, as herein set forth, are also employed to *protect highways*, and other transportation facilities, public facilities, including schools and public grounds, the central business district, natural resources and other specific areas of the city which need special protection by the city.

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[9] See Erlanger Official Zoning Ordinance at Art. VI (Severability Clause) at http://www.friendshipcity.com/docs/Zoning_Ordinance.pdf (last visited March 12, 2009).

[10] See Ft. Wright Official Zoning Ordinance at Art. VI (Severability Clause) at http://www.nkapc.org/fort-wright.html (last visited March 12, 2009).

Id. (emphasis added).

Erlanger and Ft. Wright adopted, as part of the purposes for their zoning regulations, inclusive of Article XIV, the promotion of not just the public safety and general welfare, but also (1) the facilitation of orderly and harmonious development and visual character and (2) the prevention of blight. Kentucky identifies the *size* and *height* of structures and signs within the scope of its enabling provisions. *See* Kentucky Statutes, Chapter 100 (Planning and Zoning), Section 100.201-.216 (Land Use Management), at Section 100.203(1)(b) (discussed above). These concerns have been recognized for many years.

In *Sun Oil Co. v. City of Madison Heights*, 199 N.W.2d 525 (Mich. Ct. App. 1972), the common-sense connection between the dimensions of freestanding signs and concerns over public safety and blight were linked.

> A municipality may make reasonable regulations on the use of signs. [Citation omitted.] This includes *limitations on size and height.* [Citation omitted.] . . .
>
> * * *
>
> While safety of the roads is primarily a police responsibility, the creation of a traffic hazard is a valid consideration on which to base certain parts of a zoning ordinance. [Citations omitted.] To prevent such a hazard, a municipality may limit *a sign's dimensions* along its thoroughfares in exercising its police powers. . . .
>
> * * *

> In addition to protecting the public safety, Madison Heights has sought to protect the aesthetic well-being of its citizens. The latter is a valid part of the public welfare. . . .
>
> The modern trend is to recognize that a community's aesthetic well-being can contribute to urban man's psychological and emotional stability. . . . Madison Heights has determined that its citizens' well-being will be served best by preventing the visual pollution which occurs when high-rise signs dot major thoroughfares. It has sought to do this by limiting the height of free-standing signs within its boundaries.
>
> . . . We agree with the City of Madison Heights that there is a difference between rural and urban areas. What services drivers expect to find at exit ramps in rural and urban areas is a debatable question. There is little question, though, that there is a greater chance of creating a visual blight in an urban setting. If, in fact, the ordinance made provision for businesses which allegedly need high-rise signs to attract expressway traffic, the record indicates that there is a good possibility that a forest of signs would soon exist. . . .
>
> . . . However, when aesthetics is a valid consideration in zoning, a municipality may regulate the manner of advertising so that it better blends into the environment which the community seeks to preserve. As long as the restrictions do not amount to a taking of property, it is perfectly proper for Madison Heights to regulate the height of free-standing signs in its effort to protect public safety and the community's general welfare.

Id. at 528-530 (internal citations omitted). As the *Sun Oil* decision recognized in 1972, limitations on the size and height of freestanding signs bears a substantial relationship to advancing visual character and reducing blight. The size limitations on freestanding signs in the Erlanger and Ft. Wright Zoning Ordinances, at former Article XIV, certainly bore a substantial relationship to the objects set forth in K.R.S. 100.201(2) and 100.203(1) and (1)(a). *See Adams v. City of Richmond*, 340

S.W.2d 204, 205 (Ky. 1960) (test was whether or not ordinance bore any substantial relation to objects set forth in purpose of zoning regulations for cities).

IV. APPELLANTS HAVE NO DAMAGES BECAUSE THEY NEVER OBTAINED VESTED RIGHTS AS DEFINED BY KENTUCKY LAW.

The Appellants followed the now familiar strategy in setting up their lawsuit scheme against these municipalities. Appellant Midwest Media submitted a single application to Erlanger in a trial run on or about August 22, 2005, which was promptly denied on August 31, 2005 (ROA-Vol. 1, page 925, ¶¶ 4-5; Doc. 57-2 at ¶¶ 4-5); then Midwest Media submitted seven additional applications on October 14, 2005; these were promptly denied on October 25, 2005 (*id.*, at ¶¶ 6-7; Doc. 57-2 at ¶¶ 6-7); finally, on December 8 and 14, 2005, Midwest Media filed four more applications, which were promptly denied on January 5, 2006. *Id.*, page 926 at ¶¶ 8-10; Doc. 57-2 at ¶¶ 8-10. Midwest submitted five applications to Ft. Wright on November 23, 2005; these were denied on December 6, 2005. *Id.*, page 995, at ¶¶ 4-5; Doc. 58-2 at ¶¶ 4-5. In neither city did Appellants pursue internal appeals. Instead Appellants filed their lawsuits against Ft. Wright and Erlanger on February 1, 2006 and February 9, 2006, respectively. New sign regulations were adopted in Erlanger and Ft. Wright on March 7, 2006. The size limitations for freestanding signs remained the same. Appellants did not challenge the new sign regulations

that, like the former sign regulations, precluded the erection of the proposed, oversized 672-square foot freestanding signs.

Appellants do not claim that they incurred any costs or expenses in reliance upon the former sign regulations. They received no permits and erected no billboard structures in either city. They claim no fabrication costs or construction expenditures for the proposed billboard structures. Unlike situations where a structure already exists and there is governmental interference with the placement of a disfavored message, Appellants did not erect any structure on which to place any message in either Erlanger or Ft. Wright. A situation involving a nonexistent billboard structure is akin to a nonexistent sound stage where a concert or other performance might be given. If no sound stage exists, no concert can be scheduled and any nexus to an abridgment of speech by a future artist or performer simply invites conjecture and speculation. The issues here center on *land use management* regulations governing the size of permanent freestanding structures. Billboards intrude on, and block, the landscape for decades; that is true regardless of whatever messages might be placed on them. Modern steel billboard structures may have useful lives of up to seventy years.[11]

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[11] 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) (last visited on March 12, 2009).

The adoption of new sign regulations moots the claims for injunctive relief but does not necessarily moot out a damage claim *per se*. However, when a permanent structure, *i.e.*, a permanent improvement of real property on which a message would be temporarily affixed or displayed in the future *does not even exist*, then it is critical to examine the basis for a free speech damages claim. If a claimant had acquired a vested right to erect the permanent structure in the first place, then there may be a valid damage claim for which a trial would be necessary to quantify the amount. However, if the applicant had not acquired a vested right to erect the permanent structure, then there can be no damages when the damages would flow from lost income that would be paid by unknown *third parties* to display *their* messages. The issue of vested rights is always determined by state law. *Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 948 (11th Cir. 2005).

The most thorough discussion of vested rights in the context of a First Amendment claim where new billboards were sought is set forth in *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 134-1339 (11th Cir. 2004). The Eleventh Circuit clearly held that the absence of a vested right under state law is fatal to an equitable claim wherein a billboard company seeks to force the issuance of a permit to erect a billboard. A claim for consequential damages based upon the value of the erected billboard structure, however, is a substitute for the

billboard structure itself. The Ninth Circuit has rejected vested rights as a defense to a claim for damages for a First Amendment violation. *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007) (rejecting vested rights as a defense to an as-applied First Amendment challenge on a motion to dismiss). However, the Ninth Circuit utilized cautionary language that reiterated the inadequacy of the record to determine damages at that stage[12]:

> This case is before us on a motion to dismiss. The record is therefore not yet developed regarding the constitutionality of these restrictions. In addition, *we reiterate* that only Outdoor Media's damages claims survive the repeal of the Old Ordinance, and *"we cannot say whether this facial infirmity should enable [the plaintiff] to recover damages, as the record is inadequate at present to determine whether this infirmity was the cause of [the plaintiff's] harm." Coral Const. Co. v. King County*, 941 F.2d 910, 927 (9th Cir.1991). At this juncture, it is enough to recognize that Outdoor Media has sufficiently stated a claim that the Old Ordinance is facially unconstitutional and has alleged damages stemming from application of that ordinance. We therefore reverse the dismissal of this claim.

Id. at 906 (emphasis added). The Ninth Circuit noted that on an overbreadth challenge a plaintiff would be barred from collecting § 1983 damages which would only be available for violations of a party's *own* constitutional rights. *Id.* at 907,

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[12] In a dissenting opinion that may have proven prescient since the case is back before the trial court once again on cross motions, Judge Callahan believed that Outdoor Media was unable to establish that *it* [*OMG*] was injured by Beaumont's prior regulations impacting constitutionally-protected noncommercial speech. "Its application for conditional use permits did not contain the content of any messages. Indeed, message content was unknown when Outdoor Media applied for permits because it was yet to be determined by Outdoor Media's future lessees." *Id.* at 908.

quoting *Advantage Media, L.L.C. v. City of Eden Prairie*, 466 F.3d 793, 801 (8th Cir. 2006). The Ninth Circuit thus placed the focus on the plaintiff and on the damages, if any, that would flow from *the plaintiff's own* free speech rights being violated, not the speech rights of third parties.

Midwest Media claims $2,775,000 in damages from Ft. Wright (ROA-Vol. 1, page 1072; Doc. 48-4, at page 4) and $4,680,000 in damages from Erlanger (*id.*, page 1079; Doc. 48-6, at page 11). Midwest's $7 million damage claim is based upon projected revenue it would receive in the future from unidentified *third parties* for messages that could be placed on seventeen billboard structures (thirty-four faces). Doc. 48-4 at page 4 and 48-6. at page 11.[13] Whether or not those permanent structures would ever be erected turned on whether or not the plaintiff had acquired a vested property right under state law to erect the structures. Clearly, these damage claims do not deal with the plaintiff company's *own* free speech rights, but with the monies to be received for displaying the speech of unknown and unidentified *third parties*. If there is no vested right to erect the permanent structures in the first place, then there can be no damages.

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[13] Landlords Olmstead Enterprises, Inc. and Piercefield Corp. claim damages from lost rental income at $833.33 and $1,250.00 per month, respectively. ROA-Vol. 1, pages 1068 and 1079. However, these damage claims are not related to an abridgement of *their* speech, or the speech of *their lessee*. These claims are tied to whether a vested property right existed sufficient to establish a lawful right to erect the structures in the first place from which rent might flow.

V. THE FIRST AMENDMENT PROTECTS EXPRESSION, NOT PROFIT.

Appellants' damages claims conflate free speech rights with economic rights. When a free speech case involves a media business the courts ignore the financial aspects of the business and focus on the expression involved. For example, in the legendary case on libel, *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), the high court held:

> The publication here . . . communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. . . . [W]e hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement. [internal citations omitted]

In *Warner Cable Communications v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *reh'g denied* 920 F.2d 13 (1990), *cert. denied* 501 US 1222 (1991), a private operator of a cable TV system asserted a First Amendment claim against a proposed city-owned cable TV system. The Eleventh Circuit rejected this claim, explaining:

> A City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the profitability of that speech. Such economic loss, however, does not constitute a first amendment injury. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of

> this ordinance upon freedom of expression." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 [] (1976) (Powell, J., concurring).

Id. at 638.

Many other cases apply the principle that the First Amendment does not protect economic interests. *AMSAT Cable v. Cablevision*, 6 F.3d 867, 871 (2nd Cir. 1993) ("Ending AMSAT's monopoly control over cable service in buildings it now serves may drive AMSAT out of business. But this does not give rise to a First Amendment claim"); *City of Renton v. Playtime Theaters*, 475 US 41, 54 (1986) ("[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices"); *The Pitt News v. Fisher*, 215 F.3d 354, 366 (3rd Cir. 2000) ("The fact that The Pitt News is a newspaper does not give it a constitutional right to a certain level of profitability, or even to stay in business at all).

CONCLUSION

The Appellants could not, and still cannot, satisfy the redressibility prong of constitutional standing. The size limitations for freestanding signs do not permit giant signs that are 672-square feet in size and drastically violate the reasonable size limits in Erlanger or Ft. Wright. The Appellants' attempt to characterize the zoning regulations as lacking any purpose tied to the size of signs and structures is frivolous. Even without the bar of redressibility to their claims, the Appellants'

claimed damages are not sought for any abridgement of *their* speech. The claimed damages are for the lack of an income stream for some future speech of unknown third parties on a permanent structure for which the Appellants lack a vested right to build under Kentucky law.

Respectfully submitted this 12th day of March, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(c) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(B).

The Brief has been prepared in proportional typeface using Times New Roman 14 point. Exclusive of the portions of the brief exempted by the Sixth Circuit Rule 32(a)(7)(B), the brief contains 6,546 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or copy of the work or line printout.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that an original and 6 copies of the foregoing were furnished to the U.S. Court of Appeals, Sixth Circuit, 524 Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202, (2) that two copies of the foregoing were furnished to E. Adam Webb, Esq., Webb Klase & Lemond, L.L.C., 1900 The Exchange, S.E., Suite 480, Atlanta, Georgia 30339, and (3) that two copies of the foregoing were furnished to Jeffrey C. Mando, Esq. and Mary Ann Stewart, Esq. 40 W. Pike Street, P.O. Box 861, Covington, KY 41012-0861 all by Federal Express or U.S. Mail, this 12th day of March, 2009.

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