ELEVENTH CIRCUIT DOCKET NO. 03-15593-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL ADVERTISING COMPANY,

Plaintiff/Appellant

v.

CITY OF MIAMI,

Defendant/Appellee

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF AMICI CURIAE SCENIC AMERICA, INC., AMERICAN PLANNING ASSOCIATION, CITIZENS FOR A SCENIC FLORIDA, INC. AND APA-FLORIDA CHAPTER IN SUPPORT OF DEFENDANT/APPELLEE CITY OF MIAMI AND AFFIRMANCE OF JUDGMENT

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National Advertising Company v. City of Miami
Eleventh Circuit No. 03-15593-DD

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:

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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, Citizens for a Scenic Florida, Inc. ("Scenic Florida"), is a Florida nonprofit corporation. It has no corporate subsidiaries. Scenic Florida is an affiliate of Scenic America.

Amicus curiae, the American Planning Association, is a nonprofit public interest organization based in Chicago, Illinois. It has no corporate subsidiaries.

Amicus curiae, APA-Florida Chapter, is a chapter of the American Planning Association. It has no subsidiaries.

NOTE: This Amicus Brief is filed with the consent of both Appellant and Appellee.

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PRELIMINARY STATEMENT AND NOTICE CONCERNING DEFINITIONS, REFERENCES AND ABBREVIATIONS

The district court consolidated the action below, Case No. 01-CV-3039, with a separate action between the same parties, Case No. 02-CV-20556, which is pending as a separate appeal in No. 03-15516-GG in this Court. As a result, citations to the record below are to the dockets in both cases. Amici curiae will follow the general approach taken in Appellant's Initial Brief, to wit: Reference to the docket and page number in Case No. 01-CV-3039 is by "D1/(entry number):(page)" and to the docket in Case No. 02-CV-20556 is by "D2/(entry number)/(page)."

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

City-Brief:	Answer Brief of City of Miami in Case No. 03-15593-DD
Miami:	City of Miami
National:	National Advertising Company
Nat-Brief:	Appellant's Initial Brief in Case No. 03-15593-DD
Zoning Code:	City of Miami's Zoning Ordinance in effect at the time of National's applications to erect billboards

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. Citizens for a Scenic Florida, Inc. ("Scenic Florida") is a Florida 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. APA-Florida Chapter is the Florida affiliate of the APA and promotes growth management, comprehensive planning, and sound land development regulations in Florida.

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 three recurring subjects common to such suits: content-neutrality, severability and standing. In the companion appeal (03-15516-GG) ("National II"), amici curiae separately address the subject of vested rights under Florida law.

One 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 second recurring issue is the severability of billboard restrictions and content-neutral limitations on free-standing signs. The severability issue is often interwoven into consideration of the issue of standing. Billboard prohibitions, as well as height and size limitations for free-standing signs, are by their nature severable, absent extraordinary circumstances not present here.

A third recurring issue is standing. Article III standing requires actual injury. 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 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 esthetic 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 what has been described at the district level as an "ever-increasing trend" (Judge King) of a "now familiar strategy" (Judge Middlebrooks), billboard companies 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 consequences for a local community are significant and long lasting.

Content-neutrality. This litigation strategy is based in part upon assertions that a municipality's standard exemptions from permitting for certain sign-types are impermissibly content-based. However, a closer examination of these permitting exemptions demonstrate that the exemptions 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. The City of Miami's Zoning Code was not rendered unconstitutional through its common-sense and logical method of classifying signs by their function for purposes of exempting certain sign-types from permitting.

Severability. Severability clauses are a legislative body's way of expressing its intent that each part of an enactment stand or fall on its own merits. The unique problems posed by the proliferation of oversized billboards have led many legislative bodies to either prohibit billboards altogether or, alternatively, to place limitations on the height, size, and/or location of signs. Given the fact that the "law of billboards" has evolved into "a law unto itself," such prohibitions or limitations are uniquely suited to being saved through the application of the principles of severability.

The City of Miami's Zoning Code included sign regulations that limited billboards to certain zones, and placed other limitations on the height and size of freestanding signs. Courts are obligated to impose a saving interpretation of an otherwise unconstitutional law so long as it is "fairly possible" to interpret

the law in a manner that renders the law constitutionally valid. This judicial obligation requires a court to sustain the constitutionality of a law whenever possible by severing invalid clauses and permitting the remainder of the legislation to stand. The restrictions contained within the sign regulations set forth in the City of Miami's Zoning Code could clearly stand alone under Florida law even if other provisions were stricken.

Standing. Until recently, the issue of standing of billboard companies to mount these facial challenges has been overlooked. Standing is a threshold matter and requires an actual injury. An actual injury to a billboard company is not present when the prohibition or restrictions can be saved and preserved through application of a zoning code's severability clause. Without actual injury, there is no standing to mount a facial challenge. There was no such standing here.

Also, there are prudential limitations to a party's standing to assert the rights of third parties in overbreadth cases involving non-commercial speech. Billboard companies advance the notion that in the absence of a "substitution clause" (allowing noncommercial speech to appear wherever commercial speech appears), an entire ordinance is rendered unconstitutional. This ignores the practical reality that those ordinances that may lack a specific "substitution clause" are not necessarily construed or interpreted to preclude the substitution

of a noncommercial message for a commercial message. While it may be prudent to clarify or codify actual practice, the absence of a "substitution clause" does not automatically render an ordinance unconstitutional and it certainly does not suggest that the prudential limitations should be ignored. Prudential limitations require both a *real* threat and a *substantial* threat to noncommercial speech. Such real and substantial threats must not be hypothetical threats such as those raised by National, that are imagined only through the artful play of semantics.

Public policy. Once erected, modern steel structures can be expected to remain a permanent blight on the landscape. Scenic beauty and the public welfare are being increasingly sacrificed for monetary gain. As the law of billboards has evolved into a "law unto itself," the prohibition and limitations on billboards and oversized sign structures are uniquely suited to severability and such clauses should be upheld whenever possible. Further, the requisite standing to engage in mounting facial challenges to local land development regulations should be carefully scrutinized, lest the beauty of our environment be lost for generations.

ARGUMENT

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

A. MIAMI'S SIGN REGULATIONS DO NOT IMPERMISSIBLY DISCRIMINATE ON THE BASIS OF CONTENT.

National argues that Miami'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., real estate signs, development signs, weather flags, address signs, warning signs, directional signs, etc. National makes a similar argument to the separate sign regulations pertaining to political signs. These arguments are superficial and largely ignore the fact that sign regulations are part of the City's *land development regulations* that are mandated by state law. See Section 163.3202(2)(f), Florida Statutes; Chapter 85-55, Sec. 14, Laws of Florida. Under Florida's Local Government Comprehensive Planning and Land Development Regulation Act,[1] each county and each municipality must develop and submit for review a comprehensive plan and must adopt land development regulations that implement the comprehensive plan. Section 163.3202(1), Florida Statutes. The mandatory local land development regulations shall at a minimum regulate signage in

[1] Chapter 163, Part II, Florida Statutes. See Section 163.3161(1), Florida Statutes: "This part shall be cited as the 'Local Government Comprehensive Planning and Land Development Act.'"

addition to other aspects of land development. See Section 163.3202(2)(f), Florida Statutes. The purpose of the regulations is not to regulate the content of signs, but the time, place and manner of their use as they relate to land development.

It is crucial to note at the outset 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 12-15) and decisions of this and other Circuits suggest precisely the opposite. See, e.g., Messer v. City of Douglasville, 975 F.2d 1505, 1511(11th Cir. 1992)[2]; Lavey v. City of Two Rivers, 171 F.3d 1110, 1115, n.17 (7th Cir. 1999).[3]

In arguing that exemptions based upon subject matter are content-based restrictions meriting strict scrutiny review, National 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

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[2] 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.

[3] 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.

evaluated San Diego's sign 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 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,[4] the four justice plurality opinion written by Justice White focused on the exemptions, noting that the exemption for onsite

[4] 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 as "There 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.").

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 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.[5] 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 subject matter, as opposed to *viewpoint*, must also be subject to strict scrutiny review.[6]

The Supreme Court's subsequent decision in Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), 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

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[5] 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.

[6] 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 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.

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. Onsite/offsite distinctions are not content-based distinctions that require strict scrutiny. Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 814 (9th Cir. 2003).[7] See also E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1153-1155, cert. dismissed 400 U.S. 805 (1970).[8]

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[7] "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).

[8] In upholding the permissible distinction between the onsite-offsite signs, 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." E. B. Elliott, 425 F.2d at 1425.

The opinion noted that the "removal of outdoor advertising signs which are not related to the premises on which they are located will tend to reduce the overall number of driver distractions and the number of aesthetic eyesores along the expressways of Dade County." Id. at 1154.

The Eleventh Circuit confronted this precise question in Messer, supra, where it upheld a City ordinance that prohibited "off-premises billboards." Id. 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.

The exemptions at issue in this case are similarly *viewpoint* neutral. As in Messer, Miami's Zoning Code exempts certain signs, such as construction, warning (safety), and real estate signs, from *permitting* requirements. (D1/94:368-372.) The ordinance does not exempt any sign based on viewpoint. Additionally, certain signs, such as real estate signs, are exempted based upon the Supreme Court's mandate that such signs *must* be allowed. See e.g. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 91-98 (1977). The Supreme Court has repeatedly stated that signs may be regulated.

It has also clarified that certain signs, even if based upon subject matter, must be allowed. Judge Moody recently described and rejected the "Catch-22" that a few decisions[9] have actually imposed on local governments. See Granite State Outdoor Adver. Co. v. City of Clearwater ("Granite-Clearwater"), 213 F.Supp.2d 1312, 1328 (M.D.Fla. 2002), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003).

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, 18 F.3d at 1065. Thus, a local government can justify certain subject matter signs based on the 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. at 1065. 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

[9] See North Olmstead Chamber of Commerce v. City of North Olmstead, 856 F.Supp.2d 755 (N.D. Ohio 2000), and National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir. 1990), which are relied upon by National here.

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-Clearwater, 213 F.Supp.2d at 1333-1334; and Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L. Rev. 2482 (1990).

National's argument that exemptions based upon subject matter render the sign ordinance unconstitutional would lead to absurd results. First, Miami's entire Zoning Code would be rendered invalid by virtue of the fact that Miami 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, 431 U.S. at 91-98. Such a result would place local governments in an impossible predicament. Moreover, if courts were to adopt National'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 National'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. National'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.

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. Land development regulations that regulate signage have been mandatory since 1985 under Florida's Local Government Comprehensive Planning and Land Development Regulation Act, discussed supra at pages 8-9.

The obvious purpose of such a mandate involves the aesthetics of Florida's cities and counties. In fact, the policy of conserving and protecting scenic beauty was incorporated into the state constitution in 1968. See Article II, Section 7(a), Florida Constitution. Prohibiting billboards (off-site signs) in certain zoning districts or limiting the size and/or height of freestanding sign structures are clearly land development regulations that have nothing to do with the licensing of speech. Similarly, classifying signs by their function for purpose of regulating their height, size, number, and location 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." 213 F.Supp. at 334.

B. MIAMI'S BILLBOARD RESTRICTIONS AND FREE-STANDING SIGN LIMITATIONS (HEIGHT AND SIZE) WERE SEVERABLE.

A severability clause is a legislative body's way of expressing its intent that each part of its enactment stand or fall on its own merits. A severability provision creates a presumption that each part of the ordinance is in fact severable by furnishing the assurance that the legislative body would have enacted the unaffected portions of the ordinance without the provisions found to be invalid. Miami's Zoning Code had a severability clause. See Zoning Code at §2403 (D1/94:667). Considerable weight is generally accorded to the presence of such a clause. McQuillen, Municipal Corporations, *Validity and Construction of Ordinances*, §20.65.

The whole law will be held to be invalid only when the void portion of the law is so interrelated and connected with the valid portion that the valid portion cannot be separated without destroying the legislative body's intention in enacting the law. Id. In the case at bar, the prohibition on billboards in Miami's Restricted Commercial Zones (the C-1 Zones) was clear. Only onsite signs were permitted. Moreover, freestanding signs could not exceed one hundred (100) square feet in size nor twenty-five (25) feet in height. The sign regulations for the C-1 Restricted Commercial districts provided:

C-1 Restricted Commercial.

* * *

Sign regulations:

Onsite signs only shall be permitted in these districts, subject to the following requirements and limitations. . . .

* * *

5. Ground or freestanding signs limited to one (1) sign structure . . . for each establishment or for each fifty (50) feet of street frontage. . . . Permitted sign area shall be cumulative, but no sign surface shall exceed one hundred (100) square feet. Maximum height limitation shall be twenty (20) feet . . . from the crown of the nearest adjacent local or arterial street, . . . provided, however, the zoning administrator at his discretion may increase the measurement of the crown by up to five (5) feet to accommodate unusual or undulating site conditions.

Miami's Zoning Code at §401 (emphasis added). (D1/94:128.)

The presence of a severabilty clause, with the resulting presumption that each part of an enactment is severable, has often sustained prohibitions on billboards, or size and height limitations, even if other provisions are invalid. See Granite-Clearwater, 213 F.Supp.2d at 1326-1327. See also Major Media of Southeast, Inc. v. City of Raleigh, 621 F.Supp. 1446, 1454 (E.D.N.C. 1985), affirmed 792 F.2d 1269 (4th Cir. 1986), cert. denied 479 U.S. 1102 (1987); Tahoe Regional Planning Authority Agency v. King, 233 Cal.App.3d 1365, 1407-1408 (1991); Town of New Market v. Battlefield Enterprises, Inc., 8 Va. Cir. 96, In Chancery No. 2192, 1984 WL 276226 at *5, *7 (Va.Cir.Ct. 1984);

Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111 (9th Cir. 2003), cert. denied sub nom Regency Outdoor v. County of Riverside, 124 S.Ct. 1087 (2004); National Adv. Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988).

In Granite-Clearwater, supra, the district court rejected a billboard company's attempt to strike down an entire sign ordinance. The court noted that the preference for severance was particularly strong in cases where there was a severability clause. 213 F.Supp. 2d at 1326. The court severed portions of the ordinance while sustaining and saving portions that prohibited the erection of eight 65-foot high 672 square-foot billboard signs. Id. at 1319. The court stated:

> Courts have noted that the existence of a severability clause carries with it a "presumption" that the legislative authority would have enacted the remaining provisions and that the preference for severance is "particularly strong in cases containing a severability clause."

Id. at 1326-1327.

In Major Media, supra, the district court faced a constitutional challenge to Raleigh's entire sign ordinance. The district court concluded that the city council members would have prohibited off-site signs (billboards) even if no other sign provisions were adopted, citing the ordinance's severability clause, and held that there was no constitutional prohibition against regulating off-premise signs while failing to regulate on-premise signs. 621 F.Supp. at 1454.

In rejecting the billboard company's arguments, the district court reasoned:

> Plaintiff argues that despite this language, defendant would never have enacted an ordinance relating only to off-premise signs. However, such a severability clause carries the presumption that the legislative authority *would have* enacted the remaining provisions. . . .
>
> . . . it is clear that the Raleigh City Council intended that all valid provisions of its sign ordinance should continue to remain in effect even if other portions are declared invalid.

Id. at 1454 (emphasis added).

In addition to the reported federal court decisions in Granite-Clearwater and Major Media, the severance principles have been applied to uphold billboard prohibitions in notable state court decisions in Virginia and California, where courts gave great weight to the presence of a severability clause.

In Town of New Market, supra, a constitutional challenge was made to New Market's entire sign ordinance. The Town showed that the invalid provisions could be severed and that the Town's restrictions on off-site signs (billboards) could remain. Significantly, the court noted that the prohibition of billboards in all districts "demonstrates not only a clear intent but a provision which could be executed independent of the other sections, if invalid." 1984 WL 276226 at *7, n.6. (emphasis added).

The Virginia court also observed:

> I believe a successful severance can be made of the invalid portion dealing solely with on-premise signs. I believe the Town Council would have taken the 'half a loaf' of the prohibition of off-premise signs if it could not have its 'whole loaf' of all those signs and on-premise signs with narrow restrictions as to commercial and non-commercial on-premise signs.

Id. at *7 (emphasis added).

In Tahoe Regional Planning Authority, supra, in applying the severance principle to uphold the TRPA's restrictions on billboards, the appellate court stated, "the limitation of the ordinance to commercial activity does no more than formalize TRPA's original intent and its current practice." 233 Cal.App.3d at 1408. The court added that it was clear that TRPA would prefer limitation of its ordinance over its total invalidation, citing to the ordinance's severability provisions. Id. at 1408-1409.

The governing principle – what sensible legislators would do – was expressed long ago in Judge Cardozo's "classic statement" of the governing principles and the duty "to save":

> The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots. (230 N.Y. p 60, 129 N.E. p. 207). . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert. When all the world can see what sensible legislators in such a contingency would wish that we

> should do, we are not to close our eyes as judges to what we must perceive as men.

Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920), cert. denied 256 U.S. 702 (1921) (emphasis added).

Judge Cardozo's classic statement that "we are not to close our eyes as judges to what we must perceive as men" is particularly applicable to the efforts by local governments across the country that are striving to reduce the visual blight that oversized billboard structures bring to their streets and highways. Judge Cardozo's admonition on the duty "to save" should not be lost today where, in the words of the late Stewart L. Udall, more than 40 years ago, 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).

Miami's prohibition on billboards and over-sized freestanding signs can be saved even if the other provisions are unconstitutional and severed from the Zoning Code. National concedes that its standing hinges upon the invalidity of the entire code. (Nat-I-Brief at pp. 40 and 52-n.96.) If the billboard prohibition and the content-neutral size-height limitations in C-1 Zones are saved through the proper application of the principles of severance, then National has no

"actual injury" and no standing. Granite-Clearwater, 351 F.3d at 1116-1117. See further discussion in Part C, below.

C. NATIONAL LACKS STANDING UNDER ARTICLE III AND UNDER THE PRUDENTIAL LIMITATIONS THAT GOVERN THE OVERBREADTH DOCTRINE.

National argues that the district court erred in determining that National lacked standing to mount a facial challenge to those sign regulations that pertain to noncommercial speech. (Nat-I-Brief, at pp. 36-46). A standing determination involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. Warth v. Seldin, 422 U.S. 490, 498 (1975); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

The *constitutional* inquiries assess: "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III." Id. The three *constitutional* requirements for standing: "(1) an injury in fact, meaning an injury that is concrete and *particularized*, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and 3) a likelihood that the injury will be redressed by a favorable decision." Granite-Clearwater, 351 F.2d at 1116 (emphasis in the original). These constitutional requirements are jurisdictional; and therefore must be considered as a threshold matter, regardless of whether the parties or the court below have

done so. Id. at n.3; Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1272 (11th Cir. 2003).

The *prudential* limitations generally limit a party to asserting only its own rights and not raising claims of third parties. A narrow exception to the *prudential* limitations is the "overbreadth doctrine" that applies in First Amendment cases involving non-commercial speech. This doctrine permits third party standing when a statute is applied constitutionally to a litigant but might be unconstitutionally applied to third parties not before the court. Id. However, the "slender exception to prudential limits on standing . . . does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact." Birschoff v. Osceola County, Fla., 222 F.3d 874, 884 (11th Cir. 2000); Bordell v. General Electric Company, 922 F.2d 1057, 1061 (2d Cir. 1990).

In recent years, billboard companies have sought to turn the limited facial overbreadth exception to prudential standing "on its head." Granite-Clearwater, 213 F.Supp. 2d at 1326, n.21. The Supreme Court has determined that the overbreadth exception is "manifestly strong medicine" to be used "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); see also Granite-Clearwater, 213 F.Supp. 2d at 1322. There must be a "realistic danger" that the challenged provision will "significantly compromise"

recognized First Amendment protections of third parties not before the court. Vincent, 466 U.S. at 801 (1984). These two requirements for application of the overbreadth exception, i.e., that the danger be both *real* and *substantial,* is missing in the current flood of billboard litigation.

In the case before this court, like dozens of other billboard cases winding their way through the judicial system, the danger is neither *real* nor *substantial.* Billboard companies and developers are manipulating their cases with semantics and word-play to manufacture the appearance of a danger that does not exist.[10] These word-play schemes are reminiscent of the oft-quoted criticism of the modern art of advertising: "The art of advertising is making whole lies out of half truths." Peter, Laurence J., Peter's Quotations: Ideas for Our Time 43 (1977) (quoting Edgar A. Shoaff). As Chief Justice Burger cautioned: "The billboard industry's superficial sloganeering is no substitute for analysis." Metromedia, 453 U.S. at 557.

In addressing the new litigation strategy being waged by the billboard industry, Judge King correctly noted that while courts must fiercely protect the ability to freely express ideas and opinions, they must not allow advertising

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[10] In Florida Outdoor Advert. LLC v. City of Boca Raton, 266 F.Supp. 2d 1376 (S.D. Fla. 2003), Judge Middlebrooks noted that in considering the advertising companies "theoretical" claims of commercial speech being favored over noncommercial speech in the ongoing series of billboard lawsuits, "there seems to be no history of Florida cities applying these [sign] ordinances to ban noncommercial speech." Id. at 1379. Judge Middlebrooks had it exactly right.

companies to "manipulate courts' visceral need to protect the First Amendment" and "transform the proverbial First Amendment shield . . . into a sword," and that courts "must vigilantly reject arguments intended to pervert that Amendment's primary purpose." (D1/160:9-10).

National claims that the lack of a so-called "substitution clause" dooms Miami's sign regulations. In other words, without an express provision that allows noncommercial speech to appear wherever commercial speech appears, National suggests that the perceived danger is sufficiently real and substantial so as to enable it to fit within the limited overbreadth doctrine to the prudential limitations. While amici would certainly encourage any governmental body to enact substitution clauses, the courts must consider the reality of an ordinance's interpretation through provisions that either implicitly allow such substitution of noncommercial messages for commercial messages, or that do not expressly prohibit the same, or that are interpreted to deem noncommercial speech to be onsite following this Court's opinion in Southlake Property Associates, Ltd. v. City of Morrow, 112 F.3d 1114 (11th Cir. 1997).

Billboard companies like National are unable to fit within the narrow overbreadth exception to prudential limitations where the "danger" is not proven both real and substantial. Finally, Article III requires actual injury, and where the prohibition on the erection of billboards or the limitations on

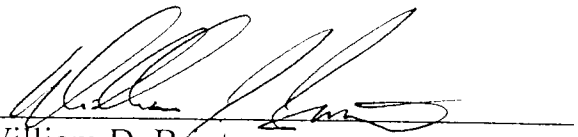
oversized free-standing sign structures can be severed and saved, there can be no actual injury sufficient to provide the requisite standing to National. As noted above, in supporting the application of severance, Judge Cardozo directed, "we are not to close our eyes as judges to what we must perceive as men." Amici urge this court not to close its eyes - either to the severability of the billboard and sign structure restrictions or to the requirement that the imminent danger to noncommercial speech be both real and substantial.

II. CONCLUSION.

The City of Miami's categorization of sign-types was not content based. Any constitutional infirmities in the Miami's Zoning Code were severable from the rest of that code, and certainly severable from the constitutionally-permissible prohibition on billboards ("onsite signs only") and content-neutral limitations on the size (100 square feet) and height (20/25 feet) of freestanding sign structures in Miami's Restricted Commercial Zone. The foregoing prohibition and content-neutral size-height limitations can certainly be saved. If the knife is to be used, it should be applied to the branches and not the roots. To do otherwise would be to ignore the express declaration of severability in the code, as well as the court's duty to save. Finally, National lacked standing under Article III of the U.S. Constitution inasmuch as it suffered no actual injury, and lacks the requisite standing under the prudential limitations controlling for an overbreadth claim inasmuch as the purported threat to the noncommercial speech of third parties was neither real nor substantial. For all of the foregoing reasons, the district court's summary final judgment in favor of the City of Miami should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of March 2004.

ROGERS TOWERS, P.A.

By 

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CERTIFICATE OF COMPLIANCE

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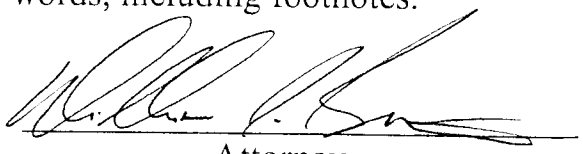

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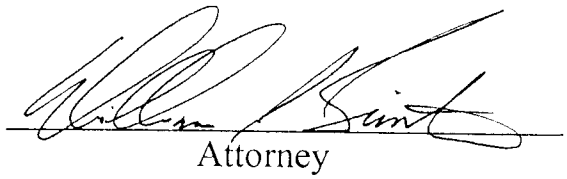
I HEREBY CERTIFY (1) that an original and six copies of the foregoing were furnished to the U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303, (2) that two copies of the foregoing were furnished to Carol A. Licko, Esquire, Hogan & Hartson L.L.P., Mellon Financial Center, 1111 Brickell Ave., Suite 1900, Miami, Florida 33131, and (3) that two copies of the foregoing were furnished to Thomas R. Julin, Esquire, Hunton & Williams, Mellon Financial Center, Suite 2500, 1111 Brickell Avenue, Miami, Florida 33131, all by Federal Express or U.S. Mail, this 12th day of March, 2004.



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