NO. 05-6343

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRIME MEDIA, INC.,
Plaintiff-Appellant,

v.

CITY OF BRENTWOOD, TENNESSEE
Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Tennessee
at Nashville

BRIEF OF AMICI AMERICAN PLANNING ASSOCIATION, APA-TENNESSEE CHAPTER, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, SCENIC AMERICA, INC., AND SCENIC TENNESSEE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

Prime Media, Inc.

v.

City of Brentwood, Tennessee

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, American Planning Association, APA-Tennessee Chapter, International Municipal Lawyers Association, Scenic America, and Scenic Tennessee
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Signature of Counsel

January 25, 2006
Date

6CA-1

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

Amicus curiae, the American Planning Association (APA), is a nonprofit public interest organization with headquarters in Washington, D.C. It has no corporate subsidiaries.

Amicus curiae, the Tennessee Chapter of the APA (APA-Tennessee Chapter"), is a chapter and affiliate of the American Planning Association. It has no corporate subsidiaries.

Amicus curiae, International Municipal Lawyers Association ("IMLA"), is a nonprofit nonpartisan professional organization whose 1,400 members include local governments of all kinds, state municipal leagues, and attorneys who represent local governments.

Amicus curiae, 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.

Scenic Tennessee is an affiliate of Scenic America, Inc. It has no corporate subsidiaries.

These amici have a common interest in preserving the well-established constitutional authority of state and local governments to adopt and enforce

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

SUMMARY OF LEGAL ARGUMENT

Dozens of billboard suits are now pending in many circuits. In virtually all of these cases, a threshold issue is whether the billboard company plaintiff has standing to challenge local rules of law that do not apply to its own activities. This Court's decision will address this crucial issue. Because of this persuasive and pervasive effect, amici believe it is necessary to show how this case fits into a broader context, as one example of a national pattern. The pattern has been repeated endlessly over the last few years, in many dozens of cases, in which billboard companies follow a similar "script" in their wide ranging attacks on the entirety of local sign regulations.

Amici ask this Court to close what one federal court has described as a "Pandora's Box." Florida Outdoor Adver., LLC v. City of Boynton Beach, 182 F. Supp. 2d 1201, 1206 (S.D.Fla. 2001):

> Billboard companies, some knowing full well what local ordinance and/or regulatory requirements are, make applications to construct billboards in excess of the size and location requirements contained in such ordinances/regulations. When, as expected, the permits are denied, the companies then file constitutional challenges of the sort presented in this case.

Id. This Court is confronted with what Judge King described as "an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking to strike down such ordinances as entirely void." National Advertising Co. v. City of Miami, 287 F. Supp. 2d 1349, 1356 (S.D.Fla.

2003), rev'd on other grounds, 402 F.3d 1329 (11th Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3260 (U.S. Oct. 14, 2005).[1] Judge King astutely pointed out that "[t]hrough these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being." Id. at 1357. By attempting to bring down sign codes in their entirety, the billboard companies seek *carte blanche* to build any permanent structure, anywhere they want, whenever they want.

This practice imposes extraordinary burdens on the federal judiciary and local governments, for the purpose of nullifying unquestionably content-neutral and constitutional size and location restrictions. Like other federal courts, this Court has affirmed that the First Amendment allows municipalities to ban billboards and to limit the size and location of such imposing structures.[2] Thus,

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[1] On appeal, the City of Miami argued (and a panel of the Eleventh Court agreed) that the District Court should have dismissed the billboard company's suit at an earlier point, when an amendment to the law mooted the claims. See National Advertising Co., 402 F.3d at 1332-1333. This decision, however, does nothing to undermine the correctness of the District Court's characterization of this "ever-increasing" and disturbing "trend".

[2] Prime Media, Inc. v. City of Brentwood, Tennessee, 398 F.3d 814, 818 (6th Cir. 2005). See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 787, 806-807, 104 S.Ct. 2118, 2130 (1984) (in Metromedia v. City of San Diego, 453 US 490, 512 (1981), "seven Justices explicitly concluded that this interest [avoiding visual clutter] was sufficient to justify a prohibition of billboards"), see Metromedia, 453 U.S. at 507-508, 510-12 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL,

Prime Media and similar billboard companies are unable to invalidate the size and location rules of law directly by establishing that the rules ignored by the billboard companies are unconstitutional. Instead, the billboard companies attempt to do so by attacking completely different rules elsewhere in a local government's sign code. These separate regulations are not applicable to their billboard permit submissions. However, the billboard plaintiffs try to persuade the courts to use imperfections in the sign codes that have no effect on their permit applications to topple the entire sign code, including the constitutional billboard bans or size and location rules. The end result the billboard plaintiffs seek is a handful of very profitable billboard permits.

The billboard companies' strategy rests on a fundamental misunderstanding of the role of federal courts. Rather than satisfying the mandatory standing requirements arising from Article III, the companies completely ignore them. Instead, they treat the phrase "First Amendment overbreadth" as the magic words they merely have to utter in order to open the courthouse doors for a full attack on

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JJ.)("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"); Id., at 552 (STEVENS, J., dissenting in part); Id., at 559-561 (BURGER, C.J., dissenting); Id., at 570 (REHNQUIST, J., dissenting); City of Cincinnati v. Discovery Network, 507 U.S. 410, 425 n.20 (1993). See also Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111, 1115 (9th Cir. 2003), cert. denied sub nom. Regency Outdoor Adv., Inc. v. Riverside County, California, 540 U.S. 1111 (2004); and Harp Adver. Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290 (7th Cir. 1993) (upholding constitutionality of size and other dimensional restrictions on billboards).

any aspect of a sign code. Pursuant to their theory, it does not matter if the particular provisions they challenge have interfered in any respect with what they propose to do. The overbreadth doctrine should not be abused in a manner that makes it possible for a plaintiff to nullify and make a mockery of the Article III standing requirements.

Amici urge this Court to affirm the district court's dismissal of all of Prime Media's remaining claims in this lawsuit because Prime Media did not have Article III standing to assert them. In the alternative, if this Court expands Prime Media's standing under Article III to litigate code sections that do not apply to it, this Court should still direct the dismissal of Prime Media's suit because in this setting (and similar cases), any unconstitutional overbreadth is not "real and substantial" when compared to the sign code's plainly legitimate sweep. Osborne v. Ohio, 495 U.S. 103, 112, 110 S.Ct. 1691, 1697 (1990); see also Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112, 1118 (11th Cir. 2003), cert. denied, 125 S.Ct. 48 (2004) (stressing that speculative and hypothetical injury will not confer standing).[3]

[3] "Regardless of the scope of the law that forms the denominator of the fraction here, the numerator of potential invalid applications is too small to result in a finding of substantial overbreadth." Virginia v. Hicks, 539 U.S. 113, 125, 123 S.Ct. 2191, 2200 (2003) (Souter, J., concurring).

LEGAL ARGUMENT

I. PRIME MEDIA'S SUIT IS PART OF A NATIONAL EPIDEMIC OF SUITS DESIGNED TO CIRCUMVENT COMMUNITIES' LAWFUL RIGHT TO LIMIT THE SIZE AND LOCATION OF BILLBOARD 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.[4] The technique has been described as follows:

> The [billboard] plaintiffs in these cases have followed the same script: negotiate leases with private property owners in a jurisdiction with outdated sign regulations; apply for multiple billboard permits, knowing that they will be denied due to noncompliance with the regulations; immediately sue the agency to invalidate the ordinance on unrelated grounds based on precedent from other federal circuits and non-sign law cases; and, finally, attempt to convince the court to order issuance of permits for billboards in otherwise prohibited or restricted locations, or negotiate a similar deal with the victim agency in exchange for a waiver of an attorney's fees claim.

Donald M. Davis, *Avoiding the Sign Code Shakedown: A Checklist of Basic Provisions*, 27 Public Law Journal No. 1, published by the State and Local Government Section of the State Bar of California, Winter 2004. See Exhibit B, attached hereto.

[4] In the past few years more than one hundred (100) cases of this kind have been filed, most by the same attorney. For a list of the majority of the known cases filed in the last few years, see Exhibit A attached hereto.

Billboard companies are using this strategy on a mass-production scale. As Federal District Court Judge Thomas Whelan has observed:

> The Court notes that such conduct [lawsuits challenging sign ordinances] is consistent with the litigation strategy repeatedly employed by Plaintiff's counsel of record, E. Adam Webb. According to the Atlanta Journal Constitution: '[g]ive out the billboards or he'll take you to court, revving up the First Amendment like a dentist's drill – and digging out space for more signs.' So far he's sued 25 cities in Georgia, and has cases pending in Cobb County, Atlanta and Fulton County.

Get Outdoors v. City of El Cajon, Ct. File No. 03:03cv437, docket entry 24 at p. 3, n.1 (S.D. Cal. Oct. 6, 2003) (quoting Matt Kempner, *Lawyer Fights for Billboards*, The Atlanta Journal Constitution, July 23, 2003, at A.1).

The First Amendment of the United States Constitution provides, "[c]ongress shall make no law abridging... the freedom of speech." Neither the House nor the Senate debates illuminate the meaning of the First Amendment beyond these simple words. Constitution of the United States: Analysis & Interpretation, 92d Cong; 2d. Sess., Senate Document 92-82 (1973), at p. 936. One can only marvel at the legal odyssey that has brought local governments from those simple and eloquent words of the Constitution, penned before billboards were imagined, to the legal argument Prime Media and other billboard plaintiffs have asked this Court and other courts across the nation to accept.

Billboard plaintiffs have consistently urged courts to override legitimate aesthetic and safety concerns raised by the local governments. The billboard

plaintiffs allege that they are attempting to liberate themselves, and third party plaintiffs not before the court, from draconian speech restrictions. However, a Florida court recently 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).

In the highly prolific similar cases recently filed in the Sixth and Eleventh Circuits, and elsewhere, the complaints are drafted in such a way as to invoke the courts' protective instincts regarding First Amendment issues. However, these cases are not about asserting the rights of ordinary citizens attempting to speak on various issues. Billboards mean big money for whoever wins a permit.[5]

As a well-respected federal district court judge has recognized, "the courts play an essential role in drawing viable constitutional lines between government regulations and an individual's right to exercise his First Amendment freedoms.

[5] When billboard permits are extracted from local governments through litigation they are routinely sold by the plaintiffs to large billboard companies like Eller Media n/k/a Clear Channel Outdoor. See Granite State Outdoor Adver. Inc. v. City of Clearwater, Florida ("Clearwater"), 213 F. Supp. 2d 1312, 1316 (M.D. Fla. 2002), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003).

Nonetheless, plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." National Advertising Co. v. City of Miami, 287 F. Supp. 2d at 1356 (per James Lawrence King., J).[6]

The success or failure of these sign code suits does not turn entirely on whether a court grants billboard companies standing to adjudicate irrelevant rules. Such suits can also fail if the billboard companies cannot demonstrate that the provisions they attack are unconstitutional, or that any unconstitutional provisions may not be severed out. Size and height rules are independently enforceable. See footnote 2, supra. Yet the billboard companies' standing theory, where successful, imposes the greatest burden on the judiciary and creates the greatest intrusion on principles of federalism and separation of powers. Granting the functional equivalent of third party standing to billboard companies fundamentally redefines the relationship between the courts and the law. The answer to the standing question will decide whether a court is resolving a concrete dispute, or auditing dozens of irrelevant aspects of an entire chapter of a local government code. In

[6] It is worthwhile to recall Justice Rehnquist's famous observation in Metromedia: "In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." Metromedia, 453 U.S. at 569, 101 S.Ct at 2924 (Rehnquist, J., dissenting).

most cases of this kind, the analysis the billboard companies urge the court to engage in purely advisory analysis, because the case can and should be decided only on the constitutionality of a ban on new billboards or the separate enforceability of size and height rules (provisions directly applying to the plaintiff before the court). Significantly, the prospect that Prime Media's suit must fail on the merits, or that the restrictions on its proposed signs will be severable, should not distract this Court from its paramount consideration of enforcing the standing requirements so as to curb these abuses.

II. THIS COURT SHOULD REJECT PRIME MEDIA'S INVITATION TO IGNORE ARTICLE III'S LONGSTANDING REQUIREMENTS.

"'The province of the court,' as Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), 'is, solely, to decide on the rights of individuals.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 576, 112 S.Ct. 2130 (1992). That is why a plaintiff cannot adjudicate an alleged imperfection in a statute or law unless that flaw has caused that plaintiff to suffer (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." Id. 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 particularly important in constitutional cases, because a "fundamental and longstanding principle of judicial restraint

requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S.Ct. 1319, 1323 (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, 102 S.Ct. 752, 759 (1982) (quoting United States v. SCRAP, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416 (1973)).

As the Supreme Court has repeatedly recognized, these standing requirements apply to facial and as-applied challenges under the First Amendment. See Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93, 108 S.Ct. 636, 642-643 (1988) (explaining that to facially challenge the constitutionality of a statute on overbreadth grounds the plaintiff must "establish at an irreducible minimum an injury in fact; that is, there must be some 'threatened or actual injury resulting from the putatively illegal action.....'"); Sec'y of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 958, 104 S.Ct. 2839, 2847 (1984) (a plaintiff's ability to invoke overbreadth standing **depends upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,'** and whether it can be expected satisfactorily to frame the issues in the case" (emphasis added)). Cf. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 233-235, 100 S.Ct. 596, 609-610

(1990) (declining to review claim that certain adult business ordinance provisions violated the First Amendment, because those provisions did not apply to the plaintiffs). As the Seventh Circuit noted when rejecting the standing of a First Amendment plaintiff, "[a] litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast." Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998).

Amici recognize that Article III permitted Prime Media to adjudicate the constitutionality of those rules of law that caused the City to deny its applications. Indeed, had Prime Media demonstrated any immediate interest in engaging in any other conduct forbidden by some other rule of law, Prime Media might also have been able to establish standing to adjudicate that rule as well. But Prime Media may not adjudicate the constitutionality of other rules of law, because those rules have not caused it to suffer any injury-in-fact. The essential "causation" requirement is not present under these circumstances. Indeed, the Courts have recognized this requirement in a number of recent cases. The First Amendment overbreadth doctrine, properly applied, does not sanction Prime Media's strategy. See Clearwater**,** 351 F.3d at 1117 (holding that the plaintiff cannot establish Article III standing because it suffered no "injury in fact").

Prime Media's Opening Brief suggests that it would have this Court declare a "First Amendment suit" exception to Article III that entitles it to attack any code chapter in its entirety simply by asserting that some portion of that chapter is "overbroad" in violation of the First Amendment. Such an approach would contradict American Booksellers and Munson, supra, at p. 10, where Article III standing requirements were applied to facial and overbreadth claims under the First Amendment. It would create an exception to Article III's requirements that swallows the whole rule:

> Here, the Plaintiff argues that the Court . . . instead should allow Plaintiff to challenge an entire Ordinance, without regard to whether Plaintiff was injured by a particular provision, or to whether the alleged harm can be redressed. However, the Court finds that under Plaintiff's theory, the exception to the standing requirements would swallow the constitutional rule. The Court therefore rejects Plaintiff's arguments and finds that Plaintiff cannot meet the Article III standing requirements because Plaintiff cannot meet its burden to establish the redressability and a causal connection.

Get Outdoors II, LLC v. City of San Diego, 381 F. Supp. 2d 1250, 1260-61 (S.D. Cal. 2005), appeal docketed, No. 05-56366 (9th Cir. Sept. 16, 2005).

Not every First Amendment facial attack **is** an overbreadth attack in the proper legal meaning of that term. Allowing a proper "overbreadth" attack is reconcilable with Article III's causation requirement, while Prime Media's claims are not proper "overbreadth" attacks, and are not reconcilable with Article III.

The overbreadth doctrine properly allows a plaintiff to attack the constitutionality of a restriction on his or her own conduct, without the need to "demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916 (1973) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121 (1965)). Thus, in an appropriate First Amendment overbreadth claim, a plaintiff whose conduct is regulated by a rule of law is permitted to challenge the constitutionality of **that particular rule of law** regardless of the fact that a more circumscribed version of that rule of law could be applied in a constitutional fashion to prohibit that plaintiff's conduct.

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

As one of the celebrated passages from the most frequently cited authority on overbreadth states, the overbreadth doctrine is based on "the conventional principle that any litigant may insist on not being burdened by a constitutionally

invalid rule." Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 37 (1981).[7] Prime Media may attack the constitutionality of those rules of law that "burden" it, even if a narrower version of those rules as properly pruned by the court could constitutionally restrict Prime Media's activity. In that setting, the challenged rule of law's "burden" on Prime Media's activity satisfies the causation element of standing, while bringing that challenge within the scope of the overbreadth doctrine's "conventional principle."

Conversely, if a rule of law does not apply to what Prime Media proposed or intended to do, then that rule did not burden Prime Media. Thus, the "conventional principle" behind overbreadth can have no application. "The 'injury in fact' requirement means that a plaintiff has overbreadth standing to challenge only a provision to which it is subject or which may indirectly injure its business." Covenant Media of California, LLC v. City of Huntington Park, California, 377 F. Supp. 2d 828, 830 n.2 (C.D. Cal. 2005). See also 4805 Convoy v. City of San Diego, 183 F.3d 1108, 1111 (9th Cir. 1999); Get Outdoors II, LLC v. City of San Diego, 381 F. Supp. 2d 1250, 1258 n.60; (S.D. Cal. 2005); Advantage Media, LLC v. City of Eden Prairie, ____ F. Supp. 2d ____, 2005 WL 3417276 (D. Minn. Dec.

[7] See George P. Choundas, *Comment, Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069, 1158 (1995) ("[Monaghan's] comprehensive treatment of overbreadth theory [is] popularly considered among the most authoritative").

13, 2005), appeal docketed, No. 06-1035 (8th Cir. Jan. 4, 2006). As the Seventh Circuit held in Harp, 9 F.3d at 1292, a plaintiff who applied to erect an unlawfully large billboard lacked standing to argue that the city's ban on off-premises signs discriminated against non-commercial speech. Cf. Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine,* 25 HOFSTRA L. REV. 1063, 1072 (1997) ("A holding that part of a statute is unconstitutional does not result in nullification of its valid parts. . . . Even when a Court has purportedly invalidated a statute in its entirety, that does not result in nullification of parts of a statute whose constitutionality was not at issue and passed upon.") For this reason, the overbreadth doctrine cannot be stretched far enough to authorize Prime Media to litigate the constitutionality of such rules.

The Supreme Court's willingness to grant standing to billboard companies in Metromedia v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981) does not undermine these principles. Before the U.S. Supreme Court, the plaintiffs in Metromedia only challenged the constitutionality of the regulations that applied to them. San Diego had adopted a prohibition on signs that was subject to thirteen exceptions. Id. at 494, 101 S.Ct. at 2885-2886. While it was the exceptions that made that prohibition unconstitutional in the eyes of a plurality of justices, id. at 514-16, 101 S.Ct. at 2896-2897, the fact that they were exceptions to the very rule of law that burdened the plaintiffs meant that the plaintiffs could challenge it under

the overbreadth doctrine and Article III. Since the reasons for allowing standing in Metromedia are not present here, Metromedia does not support Prime Media's position.[8]

Prime Media's misuse of the overbreadth doctrine also fails because the kind of First Amendment challenges found in billboard companies' typical suits are about enforcing a (particularly absolutist) notion of content-neutrality.[9] The heart of Prime Media's challenges to other portions of the City's sign ordinance are efforts to invalidate restrictions because the City has classified signs by function (such as traffic directional signs, temporary construction signs, warning signs, historic designation signs, no parking signs, ingress/egress signs, residential subdivision signs, and the like). Prime Media Op. Brf. at 13-27. It must be emphasized that Prime Media's claims are not the kind that must be resolved by

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[8] In Metromedia the billboard companies were trying to prevent the uncompensated amortization of existing billboards, see Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 854 (Cal. 1980) ("The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period.") However, this case, like many others, is an attempt to get permits for new billboards even though the U.S. Supreme Court has on three occasions sustained a complete ban on **new** billboards. See also Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095, 1098-1100 (9th Cir. 1997).

[9] As one District Court judge observed, "[t]his almost-conclusory mandate that an ordinance with a category or exception for a sign based on its content automatically makes the ordinance unconstitutional *per se* is the proverbial 'catch-22' confronting many cities and municipalities when they attempt to regulate signs in their communities." Clearwater, 213 F. Supp. 2d at 1325 n.21.

redrawing a statute with "the requisite narrow specificity." Broadrick, 413 U.S. at 612, 93 S.Ct. at 2916.

III. THIS COURT SHOULD NOT ADJUDICATE THE CONSTITUTIONALITY OF A RULE OF LAW IN THE ABSENCE OF A PARTY AFFECTED BY THAT RULE.

Prime Media contends that it should be entitled to attack the constitutionality of rules of laws that do not affect it, pretending to be a protector of the interests of hypothetical residents of the City who are not participants in this case. The question before the Court is essentially whether the constitutionality of other portions of a municipality's sign ordinance will be adjudicated in the presence, or in the absence, of one or more of the parties actually affected by that rule of law.

Cases of this type present a vivid example of why courts facing such suits should enforce the Article III standing requirements and thus reject Prime Media's approach. Prime Media's justification for permitting such challenges is largely based upon a hypothetical "chilling effect" on the conduct of third parties. That justification rests on a paternalistic assumption that the interests of those third parties are better served by allowing an unaffected stranger with no commonality of interests, such as Prime Media, to seek invalidation of such provisions, rather than by allowing the hypothetical affected parties to assert their own rights. For example, Prime Media's approach requires this Court to presume that adjudicating the constitutionality of the City's allowance of temporary holiday/seasonal

decorations, small bed and breakfast lodge signs in residential districts, temporary construction signs, etc., better serves the interests of third parties not before the court. Under circumstances in which the City could quite easily moot such a challenge by simply deleting the flexibility for these displays or sign-types and thereby foreclose even more expressive activity, it is especially presumptuous to believe that the decision of affected individuals not to sue needs to be overridden, and **at Prime Media's election**.

As Professor Lea Brilmayer has recognized, Article III standing requirements protect the rights of non-litigating third parties, by protecting them from the very real prospect that an unaffected plaintiff with its own agenda will establish a precedent that will hamper the affected parties' ability to protect their own interests. Lea Brilmayer, *The Jurisprudence Of Article III: Perspectives On The "Case Or Controversy" Requirement,* 93 HARV. L. REV. 297 (1979). At the outset of her article, Professor Brilmayer posed a hypothetical that is strikingly similar to the issue before this Court:

> To illustrate what the standing, ripeness, and mootness doctrines hold, imagine a citizen in a town that has recently enacted an ordinance prohibiting the posting of campaign signs on residential property. Assume he believes it is unconstitutional to restrict political expression this way, but has posted no campaign signs himself and therefore has not been prosecuted. In fact, he has no present interest in putting up a sign. He does, however, resent this ordinance. What can he do?

Brilmayer, supra, at 298-299. As part of her answer, she explained why allowing the unaffected plaintiff to sue does a disservice to those who are truly affected by the restriction:

> Because stare decisis, like res judicata, may have a binding effect, we should be reluctant to permit the concerned citizen to assert the legal rights of his neighbor who perhaps would like to post campaign signs. **We need to protect the neighbor's present and future interests; we do not want the concerned citizen to litigate abstract principles of constitutional law when the precedent established will govern someone else's first amendment rights**. Similarly, even if the concerned citizen has his own claim, we should insist that he state it with specificity so that no overly broad precedent will threaten the rights of persons in different positions.

supra, at 308 (emphasis added). The author asks, rhetorically:

> Isn't a traditional plaintiff better able vividly to illustrate the adverse effects of the complained-of activity? Isn't there a danger that by seeking to change the law too rapidly an ideological plaintiff will take greater risks by framing the issues in a broader, more controversial, manner?

supra, at 309 (footnote omitted). Professor Brilmayer concluded that the "easy" answer to the hypothetical was that the unaffected plaintiff's claim **would not** be permitted,[10] and that the rights and interests of the affected parties are better served by that outcome. She stressed:

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[10] Given billboard companies' current pattern of disregarding Article III, it is important to recall that Professor Brilmayer remarked, "[w]e would be unlikely, in practice, to encounter so easy a case as the hypothetical illustration at the outset of this paper. **No one would be likely to attempt litigation so clearly in violation of existing procedural requirements**." supra, at 315 (emphasis added).

> To abandon the case or controversy doctrines would be, in effect, to say that it is not important to find out who is personally affected and what their wishes are. **In the first amendment hypothetical, the doctrines mean that the citizen cannot initiate litigation on his neighbor's behalf without his neighbor's cooperation**. He cannot, more generally, assert the first amendment rights of the world at large without the cooperation of at least one member of the affected group.

supra, at 314 (emphasis added).

Although Prime Media is motivated by private financial interest rather than by ideology, it is indeed taking "greater risks by framing the issues in a broader, more controversial, manner." Id. at 309. This is significant because the Supreme Court has recognized that "the threshold for facial challenges is a species of third party *(jus tertii)* standing," City of Chicago v. Morales, 527 U.S. 41, 55 n.22, 119 S.Ct. 1849, 1858-1859 n.22 (1999), and third-party standing presumes that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." Singleton v. Wulff, 428 U.S. 106, 115, 96 S.Ct. 2868, 2874 (1976). In the recent litigation epidemic, the billboard companies attack the constitutionality of unrelated provisions with quantity, not quality, in mind. Because size and location restrictions are constitutional,[11] billboard companies have no choice but to convince the court to adopt an interpretation of the First Amendment that taints the

[11] See authorities cited in footnote 2, supra.

greatest number of provisions, because they need the entire regulatory regime to collapse from the weight of as many invalidated provisions as possible.

For any given sign regulation that was not applied to the billboard company's applications, but whose constitutionality it challenges, the billboard company has neither the incentive nor the briefing space to make a thorough constitutional challenge. Thus, it often mentions those provisions only in passing, as part of an absolutist accusation of content discrimination. Yet when Prime Media loses its adjudication of the constitutionality of such a provision, that outcome is *stare decisis* for any truly affected party's suit, impairing that party's interests without its consent or participation. Even if such suits do not reach a final judgment, giving Prime Media standing to attack unrelated provisions of the sign code is likely to **reduce** the amount of small-scale expressive activity in the community. This is because in the long run the easiest way for a local government to avoid a billboard company's broad interpretation of the concept of "content discrimination" is to regulate all signs more restrictively, as if they were billboards.

An exception to Article III designed to prevent chilled speech ultimately proves too much. Any requirement that places conditions or limitations on the ability of any plaintiff to attack the constitutionality of any rule would create the risk that some unconstitutional rule will remain on the books and chill someone's protected conduct. "The prophylactic concern with avoiding 'chilling effect'

drives an important element of First Amendment overbreadth doctrine, but does not constitute its whole." Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

IV. PRIME MEDIA'S EXPANSION OF THE OVERBREADTH DOCTRINE WOULD DEVOUR TOO MUCH OF ARTICLE III.

The U.S. Supreme Court has emphasized that "[i]n the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." Taxpayers for Vincent, 466 U.S. at 799, 104 S.Ct. at 2125-2126. Prime Media has no such sensitivity, as shown by its unwillingness to place any meaningful limitations on its supposed overbreadth exception. Rather than using overbreadth only as a last resort, Prime Media would use it as a **first** resort. "Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 485, 109 S.Ct. 3028, 3037 (1989). Even in the context of a First Amendment suit, Justice Black, one of the First Amendment's greatest protectors, recognized that "[p]rocedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal

courts in our constitutional plan." Younger v. Harris, 401 U.S. 37, 52, 91 S.Ct. 746, 754 (1971).

Before a court can fairly decide whether the overbreadth in a statute is "real and substantial in relation to its plainly legitimate sweep," it must separately consider each particular alleged constitutional infirmity, on the merits, to distinguish the overbreadth of a defendant's laws from the overstatement of a plaintiff's complaint. After a court concludes that the overbreadth is not "real and substantial" enough, it need not **declare** which provisions are overbroad. However, if the "real and substantial" overbreadth requirement is the only meaningful limit on a First Amendment plaintiff's use of overbreadth, then the Plaintiff's suit would still have imposed a pointless burden on the judiciary's precious time and resources.

Prime Media's approach will continually require courts to evaluate the constitutionality of laws in a factual vacuum, without the benefit of evidence indicating the effect, if any, of such provisions. As Professor Monaghan has noted, "a law cannot be evaluated ex ante, in a vacuum, as it sits on the statute books . . . . [The time] at which to determine whether any statute is facially defective is at the time and in the terms in which it is applied to a litigant." Monaghan, supra, at 16, 1981 Sup. Ct. Rev. at 28-29.

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

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

John G. Roberts Jr., *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1229-1230 (1993). By directing those without standing who seek to rewrite laws back to the legislative bodies that adopted them, the Court would validate its role and the role of local governments' elected officials:

> One of the features which most differentiates judicial from legislative decision-making, and makes it more sensitive to those who will be affected by the decision, is the fact that courts respond to requests of individuals whose personal rights are at stake. Surely it would be desirable to increase the involvement of affected groups in the legislative process. It is not that our judicial system is so perfectly just and sensitive, but rather that abandonment of these procedural limitations seems guaranteed to make things worse.

Brilmayer, supra, at 321.

CONCLUSION

Prime Media and its counterparts seek to litigate in the stratosphere of free speech theory on behalf of unknown, unidentifiable third parties. Despite the high-

minded posturing, their goal is on the ground: huge, multi-ton, permanent structures which do nothing but display advertising, blocking the public view, for decades.

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

Respectfully submitted this 25th day of January, 2006.

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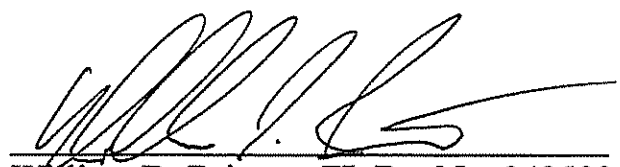

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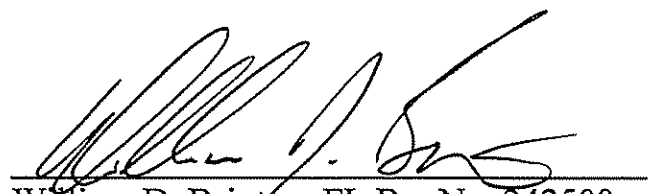

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MCLE SELF-STUDY

AVOIDING THE SIGN CODE SHAKEDOWN: A CHECKLIST OF BASIC PROVISIONS

*By Donald M. Davis, Esq.**

Although the past few years have not given rise to any major California or Ninth Circuit sign law cases,[1] that has not stopped outdoor advertising companies and their lawyers from mounting legal challenges against local sign regulations ("sign codes") that have not kept abreast of prior changes in the constitutional landscape. At least six Southern California cities have recently found themselves in federal court fending off what public lawyers have come to characterize as the "sign code shakedown."[2]

The plaintiffs in these cases have followed the same script: negotiate leases with private property owners in a jurisdiction with outdated sign regulations; apply for multiple billboard permits, knowing that they will be denied due to noncompliance with the regulations; immediately sue the agency to invalidate the sign code on *unrelated* grounds based on precedent from other federal circuits and non-sign law cases; and, finally, attempt to convince the court to order issuance of permits for billboards in the otherwise prohibited or restricted locations, or negotiate a similar deal with the victim agency in exchange for a waiver of an attorney fees claim.[3] The deficiencies alleged in these sign code shakedowns generally include: (1) failure to directly advance a substantial government interest; (2) favoring commercial speech over noncommercial speech; (3) undue burdening of fundamental methods of communication; (4) favoring particular groups or speakers; and (5) lack of adequate procedural safeguards.

A comprehensive review of every potential pitfall in drafting sign regulations is beyond the scope of this article.[4] However, every public lawyer and planner responsible for sign regulations should be aware of these five issues and ensure that they are adequately addressed.

I. STATEMENT OF PURPOSE

Most sign regulations are primarily directed at signage located on commercial properties. Because that signage typically contains a commercial message, the regulations must pass the intermediate scrutiny test ("Commercial Speech Test") established in Central Hudson Gas & Electric Corp. v. Public Service Comm'n.[5] Under that test, a local agency first must affirmatively demonstrate that its regulations: (1) seek to implement a substantial governmental interest; and (2) directly advance that interest.

Since most commercial signs are either affixed to buildings (e.g., a wall sign) or are free standing structures (e.g., monument signs, pylon signs and billboards), local agencies typically include sign regulations within their zoning regulations, and California law expressly deems them as such.[6] As with other structures, the primary concerns of local agencies with respect to signage involve the physical appearance of the sign and its placement. The United States Supreme Court has held as a matter of law that "traffic safety" and community "appearance" are "substantial government goals" that justify regulation of commercial signage.[7] While aesthetic and safety interests

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are inherent in virtually all sign codes, the regulations of a surprising number of local agencies still fail to explicitly recite any permutation of these interests. The result can be invalidation of the entire sign code.[8]

To avoid this scenario, the first section of every sign code or adopting ordinance should contain a statement of purpose that, at minimum, recites the agency's interests in community aesthetics and traffic safety as grounds for the regulations.[9] A recitation stating that the regulations are intended to advance community design and safety standards in related legislation, such as the general plan or adopted architecture guidelines, is also recommended.[10] So long as a sign code's statement of purpose delineates substantial interests in aesthetics and traffic safety, the agency does not have to make a factual showing that the sign regulations will in fact advance those interests in order to pass this part of the Commercial Speech Test.[11]

Nevertheless, to discourage the slight of hand utilized by sign code shakedown artists who can cite numerous cases where "tangible" evidence was required by courts (but for distinguishable government interests),[12] it is a good idea when adopting or amending a sign code to have planning staff prepare a report discussing how the regulations have resulted in, or with proper enforcement should result in, more attractive signage and an overall improvement of the local aesthetic environment. Such a report could include photographs of recent signage compared with older, nonconforming signs. Even the most jaundiced judicial eye should be able to see how the general movement away from billboard, pole or pylon signs towards low-profile monument and wall signs has reduced visual clutter and improved the aesthetics of communities.

Alternatively, the United States Supreme Court has approved the practice of a local agency relying on the reports or studies of another agency along with judicial precedent that it reasonably believes to be relevant when adopting regulations that attempt to address the "secondary effects" (i.e., aesthetics and traffic safety) of protected First Amendment conduct.[13] Therefore, if an agency lacks the resources to prepare an independent report on aesthetic or safety concerns,[14] consideration should be given to obtaining a report or study used by another jurisdiction, or at least citing in the adopting legislation some of the leading federal and state cases addressing relevant sign regulations.

II. EQUAL OPPORTUNITY FOR NONCOMMERCIAL SIGNS

Noncommercial speech has always been entitled to full First Amendment protection. On the other hand, the extension of First Amendment protections to purely commercial speech is a relatively recent development. It was not until 1975 that the United States Supreme Court declared that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection.[15] Since then, the court has afforded commercial speech a measure of First Amendment protection "commensurate" with its position in relation to other constitutionally guaranteed expression.[16]

Because commercial speech is not accorded equal status with noncommercial speech, sign regulations cannot favor commercial speech over noncommercial speech.[17] Unfortunately, many local agencies still have not incorporated into their sign codes the lessons learned by the cities of San Diego and Moreno Valley. The former sign codes of these respective cities were overbroad and therefore held constitutionally deficient in that they permitted onsite commercial messages, but, with a few limited exceptions, did not permit noncommercial messages, which are accorded a greater degree of protection.[18]

The sign codes of many local agencies continue to inadvertently end up with this same result by generally defining "sign" in a manner that favors commercial speech (e.g., "any device that is used: (1) to advertise enterprises, products, goods, services, or otherwise promote the sale of objects or identify objects for sale; (2) to identify, to direct, or to inform persons concerning enterprises, areas, entities, services, or dangers; or (3) to attract attention to the premises or other signs of a particular enterprise or entity"). Assuming that the same code also contains a provision that prohibits any "sign" not designated in the code, this flaw then pervades the entire regulatory scheme since the signs permitted under such code technically can say "All Sofas 10% Off" but not "Save The Whales."

In response to this sort of unintended consequence, local agencies have found a simple solution – the "substitution clause." In essence, this provision states that any noncommercial message may be substituted for the copy of any commercial sign allowed under the sign code.[19] The Ninth Circuit has found a sign code containing a substitution clause to be "content neutral" because the provision allowed any sign that could be erected under the code to carry a noncommercial message, and therefore it did not restrict noncommercial speech more than commercial speech.[20] To avoid claims of favoritism towards commercial signage, all sign codes should contain a substitution clause or its functional equivalent.

III. TEMPORARY NONCOMMERCIAL SIGNS

A decade ago, the United States Supreme Court put local agencies on notice that it is unconstitutional for regulations to prohibit homeowners from displaying small, temporary signs with political or other noncommercial messages on their property.[21] The court noted that temporary yard or window signs carrying noncommercial messages are a cheap, convenient and fundamental form of communication that should not be entirely foreclosed.

Yet today, many sign codes fail to properly address this issue. As with favoritism towards commercial speech, this is typically a result of inadvertence. For example, a sign code may not specifically state that temporary political or noncommercial signs are permitted, particularly on residential property. Yet elsewhere, the code has a provision to the effect that "no sign is permitted except as expressly provided in this code." The net effect of this oversight is a ban on such temporary noncommercial signs. Alternatively, many sign codes allow temporary "campaign" signs (e.g.,"Vote for Candidate Sanchez"), but the narrow definition of this type of sign frequently and improperly precludes the posting of broader political or noncommercial messages such as "Stop Global Warming." Sign code drafters and reviewers should make sure that their codes provide opportunities for these minor but fundamental methods of communication, subject to whatever reasonable size, number and durational requirements the agency deems appropriate.[22]

IV. USE-BASED DISTINCTIONS

Litigants often allege that a sign code violates the Equal Protection Clause because certain businesses or groups are "favored" in the types of signage permitted. For example, a sign

code may allow larger signs for enterprises located inside a shopping center than it does for those located directly on a street. These types of allegations generally miss the mark, since such distinctions are not based on the message of the speaker but on the *use* of the property. To pass constitutional muster the agency must simply have a rational and legitimate basis for making these types distinctions.[23] In this case, the visibility of a store within a shopping center may be more affected by physical conditions such as distance due to surrounding parking lots and other set backs. Alternatively, certain types of establishments may have particular signage needs such as a "menu board sign" for a drive-through restaurant. By allowing a particular sign structure where it is needed as opposed to where it is not, a local agency is simply furthering its stated interest in reducing visual clutter and enhancing aesthetics. Neither the Ninth Circuit nor any California Court of Appeal has ever struck down a sign code on equal protection grounds and, based on a growing body of cases from other jurisdictions, it appears unlikely that a court would sustain such a challenge provided there is a rational basis for making such distinctions in the sign code.[24]

With respect to regulations that identify certain types of commercial signs by their content (e.g., "construction signs," "real estate signs," and "subdivision sales signs") such regulations should likewise not be found to run afoul of the Constitution. These provisions are not an attempt to censor speech or enforce regulations based on viewpoint.[25] In fact, such signs have no viewpoint, they merely relate to factual information.[26]

Still, many sign codes contain provisions that appear to lack a rational basis for allowing certain groups but not others a particular type of sign. Common examples involve signage for non-profit, charitable or religious institutions. Why should a church be permitted a "changeable copy sign" but not a hotel that has a conference center? Both uses involve assembly of persons for meetings or events. In these situations where the uses are similar, it is clearly preferable to regulate based on usage rather than the user. For instance, the sign code could provide that changeable copy signs are permitted for any property use where the assembly of a designated number of persons is permitted and occurs on a regular basis.[27] This achieves the desired result without appearing to single out certain groups for preferential treatment.

V. PROCEDURAL SAFEGUARDS

The failure to include a time limit for the processing of a sign application, or for the review of the denial of an application, has not been decided in the context of sign regulations by either the United States Supreme Court or the Ninth Circuit.[28] This dearth of authority has not stopped sign litigants from attempting to extend into the sign law realm "prior restraint principles" developed in other contexts. For example, the Ninth Circuit has held that a decision to issue or deny a permit for constitutionally protected expressive activities (e.g., erotic dancing) must be made within a "brief, specified and reasonably prompt period of time" and that a public entity must also provide for "prompt judicial review" of the denial of a permit.[29] Given that the law is unsettled in this area, and the fact that these types of procedural protections are commonplace for other sorts of permits, there is little reason for local agencies not to enhance the processing provisions of their sign codes to address these issues.[30]

A sign code that vests officials with "complete" discretion to deny a sign permit on the basis of ambiguous or overly subjective reasons is likely to be invalidated. For example, an ordinance that allowed the denial of a permit if the structure or sign will have a harmful or detrimental effect upon the "health or welfare of the general public" or the "aesthetic quality of the community," was found to grant "unbridled discretion" to city officials and violate the First Amendment.[31] This is because when a permit scheme is "completely discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government officials . . . distaste for the content of the speech."[32] However, conferral of discretion on officials does not render a regulatory scheme invalid *per se* under the First Amendment.[33] The fact that a permitting scheme vests *some* discretion in government officials does not lead to the conclusion that such discretion is "unfettered." The United States Supreme Court has upheld permit guidelines that allowed the reviewing officials "considerable discretion."[34] Moreover, the court has stated "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[35] Where grounds are reasonably specific and objective, and do not leave the decision "to the whim of the administrator," they will be upheld.[36]

How then to craft such criteria? To the extent possible, with the exception of certain inherently discretionary aesthetic issues such as colors or compatibility with adjacent structures, most approval criteria in a sign code should be "ministerial" type standards pertaining to size, height and illumination. There should also be language to the effect that the decision maker's determination is guided solely by the criteria set forth in the code, and that an application must be approved whenever the proposed sign conforms to the code.[37] This type of language, along with largely ministerial standards, should discourage claims that agency officials have unbridled discretion.

CONCLUSION

It is perhaps not surprising that many sign codes continue to suffer from neglect given the sometimes conflicting court decisions, the clout of affected constituencies such as business owners, and the burdens imposed by state laws such as California's requirement that before a local agency can enact more restrictive regulations affecting on-site signs, the agency must: (1) inventory all illegal or abandoned on-site signs under its existing law and (2) hold a public hearing to review the inventory.[38] Therefore, if this article does not prompt local agencies to review their sign codes before they find themselves the victim of a sign code shakedown, perhaps some solace can be found in a recent decision reaffirming the ability of local government to moot lawsuits by amending the challenged regulations.[39]

ENDNOTES

1. In Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), the seminal decision regarding the regulation of signage, the United States Supreme Court emphasized that the broad principles of the First Amendment must be tailored to address the unique forum of expression: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." Id. at 501. The court subsequently observed: "While signs are a form of expression protected by the Free Speech Clause, they 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." City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994). As such, cases involving the regulation of signage ("sign law") cannot always be lumped together with other First Amendment cases such as those involving the regulation of adult businesses or the issuance of parade permits.

2. The affected jurisdictions include the cities of Chula Vista, Gardena, Industry, Lemon Grove, San Diego and South Gate. The term "sign code shakedown" was coined by Randal R. Morrison, Esq., who maintains a useful website devoted to sign law issues: signlaw.com.
3. See Granite State Outdoor Adver. v. City of Clearwater, 213 F.Supp.2d 1312 (M.D.Fla. 2002) and Granite State Outdoor Adv., Inc. v. Town of Orange, 303 F.3d 450 (2nd Cir. 2002). These cases involve the same Georgia-based attorney, E. Adam Webb, now of Porter & Webb L.L.C., who is behind the California cases referenced in note 2 above. See also Atlanta Journal Constitution, "Lawyer Fights For Billboards," July 28, 2003, Section A1 (available online at www.ajc.com/business/content/business/0703/28billboards.html.)
4. See Granite State Outdoor Adver., supra note 3 at 1328 (describing the task of drafting constitutional sign regulations as the proverbial "catch-22").
5. 447 U.S. 557 (1980) .
6. Cal. Gov.C. § 65850(b).
7. Metromedia, supra note 1 at 507-508. See also National Advertising Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988).
8. Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 819 n.2 (9th Cir. 1996) ("Had the City enacted the ordinance with a clear statement of purpose indicating the City's interest in eliminating the hazards posed by billboards to pedestrians and motorists and in preserving and improving its appearance, the City would have demonstrated that the ordinance sought to implement substantial governmental interests, and would thus have satisfied the first prong of the [Commercial Speech Test].")
9. See Santa Clarita Municipal Code ("SCMC") § 17.19.010. The SCMC is available online at www.santa-clarita.com/cityhall/admin/code/. The author recently assisted Santa Clarita in amending its sign regulations and they are cited here for reference purposes only.
10. SCMC § 17.19.010(B).
11. Metromedia, supra note 1 at 509-510 (refusing to second guess the "common-sense judgments of local lawmakers and of the many reviewing courts" that signs, particularly billboards, "are real and substantial hazards to traffic safety" and can constitute aesthetic harm). See also Ackerley Communications of Northwest v. Krochalis, 108 F.3d. 1095, 1097-1100 (9th Cir. 1997).
12. Such cases include Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (interest in protecting minors from tobacco products) and Edwards v. City of Coeur d'Alene, 262 F.3d 856 (9th Cir. 2001) (interest in minimizing potential physical violence in demonstrations by regulating hand-held objects).
13. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002).
14. Traffic studies are more difficult to develop. In Metromedia, the Department of Justice, as an amicus curiae, submitted as evidence a report prepared by the Federal Highway Administration: Wachtel, J. and Netherton, R.D, "Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage," U.S. Department of Transportation, Federal Highway Administration, Report No. FHWA/RD-80/051, June 1980. More recent studies include Bergeron, J., "An Evaluation of the Influence of Roadside Advertising on Road Safety," prepared for the Minstere des Transports, Government of Quebec, April 1996.
15. Bigelow v. Virginia, 421 U.S. 809, 825 (1975).
16. Lorillard, supra note 12 at 559. Just exactly how commensurate with noncommercial speech the protections for commercial speech must be remains in limbo following dismissal of certiorari this past term of Nike, Inc. v. Kasky, 123 S.Ct. 2554 (2003).
17. Metromedia, supra note 1 at 514; Desert Outdoor Advertising, supra note 8 at 819-20.
18. Metromedia, supra note 1; Desert Outdoor Advertising, supra note 8.
19. See SCMC § 17.19.040(C) and (D).
20. Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 612 (9th Cir. 1993)
21. City of Ladue, supra note 1 at 48.
22. See SCMC § 17.19.230; see also City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F.Supp. 52 (N.D. Cal. 1982) (striking down preliminary time period imposed on campaign signs); and Candidates' Outdoor Graphic Serv. v. City and County of San Francisco, 574 F.Supp. 1240 (N.D. Cal. 1983) (upholding 11-inch height restriction on campaign signs).
23. See generally Isbell v. City of San Diego, 258 F.3d 1108, 1116 (9th Cir. 2001).
24. See Granite State Outdoor Adver., supra note 3 at 1340; Infinity Outdoor, Inc. v. City of New York, 165 F.Supp.2d 403, 422-23 (E.D.N.Y. 2001); and Outdoor Media Dimensions, Inc. v. State of Oregon, 945 P.2d 614, 624-626 (1997).
25. See City of Los Angeles, supra note 13 at 449 (J. Kennedy concurring) (ordinance may identify speech based on content, but only as a shorthand for identifying the secondary effects).
26. See Granite State Outdoor Adver., supra note 3 at 1336.
27. See SCMC § 17.19.190(B).
28. See Outdoor Systems, Inc., supra note 20 at 613; Onsite Advertising Services v. City of Seattle, 134 F.Supp.2d 1210 (W.D.Wash. 2001).
29. Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998).
30. See SCMC §§ 7.19.060(C) and (D) and 17.19.260.
31. Desert Outdoor Advertising, supra note 8 at 818.
32. Young v. City of Simi Valley, 216 F.3d. 807, 819 (9th Cir. 2000).
33. Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989).
34. Id.
35. Id.
36. Thomas v. Chicago Park District, 534 U.S. 316, 324 (2002).
37. See SCMC § 17.19.060(D).
38. Cal. Bus. & Prof. C. § 5491.
39. Federation of Adver. Ind. Rep. v. City of Chicago, 326 F.3d 924 (7th Cir. 2003).

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