FOURTH CIRCUIT DOCKET NO. 04-1148

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TRINITY OUTDOOR, L.L.C.,

Appellant

v.

CITY OF ROCKVILLE, MARYLAND,

Appellee

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

BRIEF OF AMICI CURIAE SCENIC AMERICA, INC., AMERICAN PLANNING ASSOCIATION, SCENIC MARYLAND, INC. AND APA-MARYLAND CHAPTER IN SUPPORT OF DEFENDANT/APPELLEE CITY OF ROCKVILLE AND AFFIRMANCE OF JUDGMENT

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ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 04-1148 Caption: Trinity Outdoor, L.L.C. v. City of Rockville, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Scenic America, Inc. who is amicus,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   [ ] YES [X] NO
2. Does party/amicus have any parent corporations?
   [ ] YES [X] NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
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   [ ] YES [X] NO
   If yes, identify entity and nature of interest:

5. Is party a trade association?
   [ ] YES [X] NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

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William J. Gurtz
(signature)

May 24, 2004
(date)

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
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No. 04-1148 Caption: Trinity Outdoor, L.L.C. v. City of Rockville, Maryland

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William J. Sumter
(signature)

May 24, 2004
(date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Scenic Maryland, Inc. who is amicus,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   [ ] YES [X] NO
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6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

(signature) (date) May 24, 2004

CORPORATE DISCLOSURE STATEMENT

Amicus curiae, Scenic America, Inc. ("Scenic America") is a national nonprofit conservation organization that is based in Washington, D.C. and incorporated in the State of Pennsylvania. It has no corporate subsidiaries.

Amicus curiae, Scenic Maryland, Inc. ("Scenic Maryland"), is a Maryland nonprofit corporation. It has no corporate subsidiaries. Scenic Maryland is an associate 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-Maryland Chapter, is a chapter of the American Planning Association. It has no subsidiaries.

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PRELIMINARY STATEMENT AND NOTICE CONCERNING DEFINITIONS, REFERENCES AND ABBREVIATIONS

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

Jt.App.	Joint Appendix
Dkt._.Item-_	Docket No. and Item No.
Rockville	City of Rockville
Sign Ordinance	Rockville City Code, Chapter 25 (Zoning and Planning), Chapter XI (Signs), in effect at the time of Trinity Outdoor, L.L.C.'s applications to erect billboards
Trinity	Trinity Outdoor, L.L.C.
Trinity-Brief	Appellant's Initial Brief
Zoning Code	Rockville City Code, Chapter 25 (Zoning and Planning), in effect at the time of Trinity Outdoor, L.L.C.'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. Scenic Maryland, Inc. is a Maryland 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 are minimized. APA-Maryland Chapter is the Maryland affiliate of the APA and promotes growth management, comprehensive planning, and sound land development regulations in Maryland.

Amici curiae are concerned with the increasing number of facial challenges to the entirety of local sign ordinances. This litigation trend began several years ago and has now expanded to cities and counties across the nation. This amicus brief addresses three recurring subjects common to such suits: content-neutrality, severability and standing.

The first 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. Directional signs, directory signs, real estate (sale, lease or rent) signs, street address signs, identification 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.

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

The third recurring issue is standing. Article III standing requires actual injury. There are also prudential limitations and the application of the overbreadth exception still requires 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 satisfy the overbreadth exception.

This decision will have a significant impact on local governments within the Fourth 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 challenges for land-use planning and development. The same is true for oversized signs, so tall or large that they dwarf all other signs and structures.

In what has been described as an ever-increasing trend, billboard companies have been targeting communities for the erection of permanent steel billboard structures that are far larger in height and size (usually 672-square feet) than otherwise allowed. The billboard 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 lifespan of modern steel structures, 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 classification of certain sign-types and its exemptions from permitting for other sign-types are impermissibly content-based. However, a closer examination of these classifications and exemptions

demonstrate that they are not based upon *viewpoint*, but are based upon the informational function served by the sign-type, e.g., directional signs, directory signs, real estate (for sale, lease or rent) signs, identification 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. Rockville's Sign Ordinance was not rendered unconstitutional through its common-sense and logical method of classifying signs by their function for purposes of regulation and for exempting certain sign-types from permitting.

Severability. The heightened problems posed by the proliferation of billboards and oversized signs have led many legislative bodies to prohibit billboards (off-site signs) altogether and place limitations on the height, size, and/or location of signs. Such prohibitions and limitations are especially suited to being saved through the application of severability principles. Rockville's Zoning Code included sign regulations that (a) prohibited billboards (off-site signs) and (b) limited the size of freestanding identification 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 only invalid clauses and permitting the remainder to stand. The restrictions contained within the sign regulations set forth

in Rockville's Zoning Code could clearly stand alone under Maryland law if other provisions were stricken.

Standing. Until recently, the issue of standing to mount these facial challenges had 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 remain intact under any reasonable application of severability principles. Without actual injury, there is no standing to mount a facial challenge under Article III of the U.S. Constitution. There was no such standing here.

Also, there are still prudential limitations to a party's standing to assert the rights of third parties under the overbreadth exception. 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 Trinity, that are imagined only through the artful play of semantics.

The issue of standing has recently been the dispositive factor when courts have closely examined challenges similar to the one here. Trinity's challenge is remarkably similar to facial challenges presented by Granite State Outdoor Advertising, Inc. ("Granite") in Florida, all of which failed due to a determination that Granite lacked the requisite standing under Article III.

Public welfare. 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. The prohibition and limitations on billboards and oversized sign structures are uniquely suited to severability. Such prohibitions and limitations should be upheld whenever possible. Further, the requisite standing to engage in mounting facial challenges to local land development regulations must be carefully scrutinized, lest the beauty of our environment be lost for generations.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL IN FAVOR OF ROCKVILLE SHOULD BE AFFIRMED.

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

Trinity argues that Rockville's sign regulations discriminate against different types of commercial and non-commercial speech on the basis of *content* through the separate categorization of different sign types, e.g., real estate signs, directional signs, directory signs, street address signs, etc. Trinity makes a similar argument to the separate sign regulations pertaining to political signs. These arguments are superficial and ignore the fact that sign regulations are part of the City's required comprehensive planning and zoning controls. It is the policy of the State of Maryland that the orderly "development and use of land" requires comprehensive regulation through the implementation of "planning and zoning controls." Md. Code, Art. 66B, Sec. 4.01(a)(1). State law provides that planning and zoning controls "shall" be implemented by local government. Id. at Sec. 4.01(a)(2).

In implementing planning and zoning controls to promote the health, safety, morals, or general welfare of the community, a local legislative body may regulate and restrict, for trade, industry, residences, and other purposes, the following:

(i) The height, number of stories, and size of buildings and other structures;
(ii) The percentage of a lot that may be occupied;
(iii) Off-street parking;
(iv) The size of yards, courts, and other open spaces;
(v) The density of population; and
(vi) The location and use of buildings, signs, structures and land.

Md. Code, Art. 66B, Sec. 4.01(b)(1) (emphasis supplied). The principal purpose of local planning and zoning regulations codified in Rockville's Zoning Code, at Article XI (Signs) §§25-456 thru §25-471, is not to regulate the *content* of signs and related structures, but to regulate their use (time, place and manner) as they relate to the orderly development and use of land.

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 12-14) and decisions of other Circuits suggest precisely the opposite. See, e.g., Messer v. City of Douglasville, 975 F.2d 1505, 1511 (11th Cir. 1992), cert. denied 508 U.S. 930 (1993)[1]; Lavey v. City of Two

[1] 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.

Rivers, 171 F.3d 1110, 1115, n.17 (7th Cir. 1999).[2]

In arguing that exemptions based upon subject matter are content-based restrictions meriting strict scrutiny review, Trinity relies upon its interpretation of the Supreme Court's plurality decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). See Trinity-Brief at p.49. In Metromedia, the Supreme Court 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

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[2] 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.

was unconstitutional,[3] the four justice plurality opinion written by Justice White focused on the exemptions, noting that the exemption for onsite signs was unconstitutional because it limited the content of such signs to commercial messages, thus favoring commercial speech over noncommercial speech. The plurality also took issue with the twelve exemptions, noting that such exemptions from the general blanket prohibition were problematic. Id. at 515.

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

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[3] **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.").

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.[4] 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.[5]

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[4] 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.

[5] The resulting uncertainties of these undecided issues were noted by Cordes, supra, and by Jules B. Gerard in his article "Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part III: Zoning Aesthetics: Chapter 5: The Takings Clause and Signs: Election Signs and Time Limits." 3 Wash. U.J.L. & Pol'y 379 (2000).

The Supreme Court'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 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 place 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.[6]

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[6] Unlike the ordinance in Ladue, Rockville's Sign Ordinance allows signs in windows and no permit is required. The allowable window signs are only subject

In its decision, however, the Court noted that cities face challenges on both ends of the spectrum in regulating the display of such signs: they may restrict too little speech; or they may restrict 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

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to the limitation that they not take up more than twenty (20) percent of the area of the window unit. Dkt.1.Item-1.Sec.25-457(3).

[7] "There is no support in *Metromedia* for the proposition that the on-site/off-site distinction *itself* places an impermissible content-based burden on

Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1153-1155 (5th Cir.), cert. dismissed 400 U.S. 805 (1970).[8]

The Eleventh Circuit confronted this precise question in Messer, supra, where it upheld a City ordinance that prohibited "off-premises billboards." Id. at 1509. The 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, the 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, Rockville's Sign Ordinance exempts certain signs, such as street address

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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.

signs, home occupation signs, real estate (sale, lease and rent) signs, and political from *permitting* requirements. See Dkt.1.Item-1 at Sec.25-465(1)d., Sec.25-465(4)a., Sec.25-465(4)c., Sec.25-471(1) and (2). Small signs in windows (occupying 20% or less of the window unit) as well as traffic signs are exempt altogether from regulation and permitting. See Dkt.1.Item-1 at Sec.25-457(3) and (4). The ordinance does not exempt any sign based on *viewpoint*. Additionally, certain signs, such as real estate for-sale signs, must be 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, 213 F.Supp.2d 1312, 1328 (M.D.Fla. 2002) (hereinafter "Granite II-A"), aff'd in part and rev'd in part on other grounds, 351 F.3d 1112 (11th Cir. 2003) (hereinafter "Granite II-B"), reh'g and reh'g en banc denied, ___

[9] See North Olmstead Chamber of Commerce v. City of North Olmstead, 86 F.Supp.2d 755, clarification denied 108 F.Supp.2d 792 (N.D. Ohio 2000), and National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), cert. denied 498 U.S. 852 (1990), which are relied upon by Trinity here.

F.3d ___ (11th Cir. February 18, 2004), pet. for cert. filed ____ USLW ____ (May 18, 2004) (No. 03-1564).

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 their information function (i.e., directional 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 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 real estate signs, street address signs, directional signs, and onsite identification 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 II-A, 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).

Trinity's suggestion that the classification or exemptions of sign-types based upon subject matter render the sign ordinance unconstitutional would lead to absurd results. First, the entirety of Rockville's Sign Ordinance would be rendered invalid by virtue of the fact that Rockville has exempted certain signs, such as residential for-sale signs, from its permitting requirements based upon the Supreme Court's mandate that such signs be allowed. See Linmark, 431 U.S. at 91-98. Such a result would place local governments in an impossible predicament. If courts were to adopt Trinity'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 or exclude, for instance, street address signs, real estate signs, traffic signs, or even political signs, from permitting requirements, its entire ordinance could be subject to the type of facial challenges lodged here.

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, directional signs, identification signs, home occupation signs, etc.), then following Trinity'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 be 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. Trinity seeks to place local governments in an impossible constitutional conundrum. See Judge Moody's extensive discussion of "The 'Catch-22' of Sign Regulations" in Granite II-A, 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 are part of comprehensive planning and zoning controls directed by state law. Md. Code, Art. 66B, Sec. 4.01. Limiting the size and/or height of freestanding sign structures or prohibiting billboards (off-site signs) are clearly land development regulations that have nothing to do with speech-licensing. Similarly, classifying signs by their function for purpose of regulating their height, size, number, and location is not unconstitutional discrimination. As U.S. District Judge James Moody recently stated, "[t]his should not, on its own, render an ordinance unconstitutional." 213 F.Supp. at 334.

B. ROCKVILLE'S BILLBOARD RESTRICTIONS AND SIZE LIMITATIONS ON FREESTANDING SIGNS WERE SEVERABLE.

There is a strong common law presumption that legislative bodies generally intend invalid enactments to be severed, if possible. Annapolis Road v. Anne Arundel County, 113 Md.App. 104, 130, 686 A.2d 727, 740 (Ct. Spec. App. 1996). See also State of Maryland v. Burning Tree Club, Inc., 315 Md. 254, 297, 554 A.2d 366, 387 (Ct. App. Md. 1989), cert. denied 493 U.S. 816 (1989). Unless the excision of the unconstitutional portion of a statute renders the same meaningless or there is any evidence of a legislative intent not to sever, severability will be inferred under Maryland law. Lucky Ned Pepper's Ltd. v. Columbia Park and Recreation Association, 64 Md.App. 222, 494 A.2d 947, 951 (Ct.App.Md. 1985).

The presumption of severance applies to local ordinances and applies even in the absence of an express clause declaring the drafter's intent that the enactment be severed if a portion is found to be invalid. Board of Supervisors of Elections of Anne Arundel County v. Smallwood, 327 Md. 220, 608 A.2d 1222, 1234 (1992). See also, Anne Arundel County v. Moushabek, 269 Md. 419, 430, 306 A.2d 517, 523 (1973); Cities Service Co. v. Governor, 290 Md. 553, 575, 431 A.2d 663, 676 (1981); O.C. Taxpayers v. Mayor and City Council of Ocean City, 280 Md. 585, 600, 375 A.2d 541, 550 (1977); and City of Baltimore v. Stuyvesant Ins. Co., 226 Md. 379, 174 A.2d 153, 158-159 (1961). In Stuyvesant Ins. Co., the court held

that it was the duty of a court to separate the valid from the invalid provisions of an ordinance, so long as the valid portion is dependent and severable from that which is void, and that this duty applies notwithstanding the fact that an ordinance contained no severability clause. Id.

Rockville's City Code and Zoning Code (included as part of the City Code) each have severability clauses. See Rockville City Code, Ch. 1 (General Provisions), Sec.1-13; Rockville City Code, Ch. 25 (Zoning and Planning), Sec.25-4 (both available at http://www.rockvillemd.gov/government/citycode.htm).

Furthermore, in addition to this general presumption under Maryland law, it is a settled principle that when the dominant purpose of an enactment may largely be carried out notwithstanding the enactment's partial invalidity, courts will generally uphold the valid portions as severable and enforce them. Smallwood, 608 A.2d at 1235. See also McQuillen, Municipal Corporations, *Validity and Construction of Ordinances*, §20.65.

In the case at bar, the prohibition on billboards in Rockville was clear. Only onsite signs were permitted. See Rockville City Code, Chapter 25, Sec. 25-461(3); Jt.App.46-47. More importantly, the only freestanding signs that are allowed in

commercial and industrial districts are freestanding[10] identification[11] signs that are subject to the following content-neutral size (maximum area) limitations:

Zoning District	Size (maximum area)	Sign Ordinance	Jt.App.
C-1 Zone	50 square feet	Sec. 25-468(3)	Jt.App.51
C-2 Zone	100 square feet	Sec. 25-468(2)	Jt.App.50
RPC Zone	100 square feet	Sec. 25-468(2)	Jt.App.50
I-1 Zone	50 square feet	Sec. 25-468(4)	Jt.App.52
I-2 Zone	50 square feet	Sec. 25-468(4)	Jt.App.52
I-3 Zone	100 square feet	Sec. 25-469(2)	Jt.App.55
I-4 Zone	50 square feet	Sec. 25-468(4)	Jt.App.52

Trinity sought to erect freestanding signs that would be 672 square feet in size (more than six times the maximum size allowed for any freestanding sign anywhere). Jt.App.50-51, 52, 55. Under Sec.25-468 and Sec.25-469 of the Sign Ordinance, the only allowable freestanding signs in Rockville's commercial and industrial districts were limited to sizes (maximum areas) no greater than 100 square feet (C-2, RPC, and I-3 Zones) or no greater than 50 square feet (C-1, I-1, I-

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[10] A *freestanding sign* means "any sign standing on its own foundation or supporting structure mounted on any fence or wall which is not an integral part of a building." Dkt.1.Item-1 at Sec.25-1 (definition of *Sign, freestanding*).

[11] An *identification sign* means "a sign which carries only the name and/or logo or trademark of one (1) business, place, organization, building or person it identifies." There is no overt distinction between whether the identification is for a commercial or noncommercial purpose. Dkt.1.Item-1 at Sec.25-1 (definition of *Sign, identification*).

2, and I-4 Zones). The size limitations were clearly content-neutral. Trinity's applications were properly denied due to maximum size limitations.

In addition, Trinity's applications were for billboards that by their very nature - wherever located and however constructed - can be perceived as an "esthetic harm." Metromedia, 453 U.S. at 510. The law of billboards is essentially a "law unto itself" given the unique problems[12] posed by the noncommunicative aspects of this medium. Id. at 501 (White, J.). A total prohibition on all billboards is permissible. See Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986), cert. denied 479 U.S. 1102 (1987); Georgia Outdoor Advertising v. City of Waynesville, 833 F.2d 43, 45-46 (4th Cir. 1987). See also Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997).

The 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 II-A, 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.

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[12] "[B]ecause it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development." Id. at 502 (White, J.).

1102 (1987); Tahoe Regional Planning Authority Agency v. King, 233 Cal.App.3d 1365, 1407-1408, 285 Cal.Rptr. 335, 360-361 (Cal.App. 3 Dist. 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 Adv., Inc. v. Riverside County, 124 S.Ct. 1087 (2004); National Adv. Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988). The 100-square foot size limitation on freestanding signs in Rockville's Sign Ordinance would be saved (sustained) and upheld under any logical application of severability under Maryland law.[13]

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

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[13] Assuming arguendo that the term *identification* in the phrase "freestanding *identification* sign" was somehow deemed to be an impermissible content-based distinction (i.e., regulating the *viewpoint* of the speaker), the term *identification* could easily be severed so as to save the 100-square foot size limitation on freestanding signs.

> 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 admonition has not escaped the attention of Maryland courts. See Stuyvesant Ins. Co., supra, 174 A.2d at 159.

Judge Cardozo's admonition on the duty "to save" should not be lost when 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).

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

In Granite II-B, the billboard challenger was unable to overcome Section 3-1806.B.1 of the Clearwater Code that (like the comparable provisions of the Rockville Sign Ordinance) limited the maximum allowable area and height of freestanding signs. 351 F.3d at 1115. It was under this provision that Granite's eight permits to erect signs were all denied. Granite suffered no injury regarding any other provision of the Clearwater Code. Granite's constitutional challenge to Sec. 3-1806.B.1 failed because the area and height restrictions on freestanding

signs were content-neutral and gave no discretion to the permitting authority. Id. at 1117. Granite lacked the requisite standing to advance its facial challenges. Trinity's scheme, like Granite's scheme, must fail.

Trinity's facial challenge hinges upon its standing to invalidate the entire code. See Dkt.1.Counts I-X, XII and XIV. By reason of the content-neutral size limitations on freestanding signs in the commercial and industrial zones, Trinity has no "actual injury" and no standing. Granite II-B, 351 F.3d at 1116-1117.

Trinity argues that the district court erred in determining that Trinity lacked standing to mount a facial challenge to those sign regulations that pertain to noncommercial speech. 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. Trinity Outdoor Wildlife Federation, 497 U.S. 871 (1990). Disregarding the issues of registration and licensing discussed in the district court's order, Trinity lacked standing to mount a facial challenge for more basic reasons as set forth in the recent Granite trilogy. The Granite trilogy dealt with three ill-fated and nearly identical lawsuits against the City of St. Petersburg, the City of Clearwater, and the City of St. Pete Beach. See Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2003) (hereinafter "Granite I"), rehearing denied en banc, ___ F.3d ___ (11th Cir. Dec. 29, 2003), pet. for cert. filed, 72 USLW 3644 (Mar. 29, 2004)

(No. 03-1386); Granite II-A and Granite II-B; and Granite State Outdoor Advertising, Inc. v. City of St. Pete Beach, 2004 WL 792736 (M.D.Fla. Jan. 13, 2004) ("Granite III"), appeal dismissed (11th Cir. April 5, 2004) (No. 04-10691). See also Granite State Outdoor Advertising, Inc, v. Town of Orange, Conn., 303 F.3d 450 (2d Cir. 2002).

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. There are 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 II-B, 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. See also Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 228 (4th Cir. 1997) ("must continue to exist at every stage of review"); Gilles v. Torgensen, 71 F.3d 497, 500 n.1 (4th Cir. 1995) ("parties cannot confer justiciability").

The *prudential* limitations generally limit a party to asserting only its own rights and not raising claims of third parties. Burke v. City of Charleston, 139 F.3d 401, 405 (4th Cir. 1998). 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 II-A, 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 II-A, 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,* are missing in the current flood of billboard litigation.

In connection with the appeals process for permit denials, there is no standing to challenge the same where an applicant like Trinity suffers no injury through that process. See Granite II-B, 351 F.3d at 1117; Granite III, at *3. Furthermore, a sign ordinance as a location-based regulation is content-neutral (viewpoint-neutral) and time limits *per se* are not required. See Granite I, at 1281-1282; Granite II, at *3, n.13.

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.[14] 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.

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[14] 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.

In addressing the new litigation strategy being waged by the billboard industry, U.S. District Judge James Lawrence King correctly noted that while courts must fiercely protect the ability to freely express ideas and opinions, they must not allow advertising companies to "manipulate courts' visceral need to protect the First Amendment" and "transform the proverbial First Amendment shield . . . into a sword." National Advertising Co. v. City of Miami, 287 F.Supp.2d 1349, 1357 (S.D.Fla. 2003), appeal docketed, No. 03-15593-DD (11th Cir. Oct. 23, 2003).

II. CONCLUSION.

Rockville's categorization of sign-types was not content based. Any constitutional infirmities in Rockville's Zoning Code were severable from the rest of that code, and certainly severable from the constitutionally-permissible prohibition on billboards (off-site signs) and content-neutral limitations on the size-area (maximum of 100 square feet) of freestanding sign structures in Rockville's Zoning Districts. The foregoing prohibition and content-neutral size limitations are easily saved through application of severance principles. 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 court's duty to save. Finally, Trinity lacked standing under Article III of the U.S. Constitution to mount its facial challenges inasmuch as it suffered no actual injury, and lacks the requisite standing for

application of the overbreadth exception inasmuch as the purported threat to noncommercial speech was neither real nor substantial. For these reasons, the district court's judgment in favor of the City of Rockville should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of May 2004.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1148 **Caption:** Trinity Outdoor, L.L.C. v. City of Rockville, Maryland

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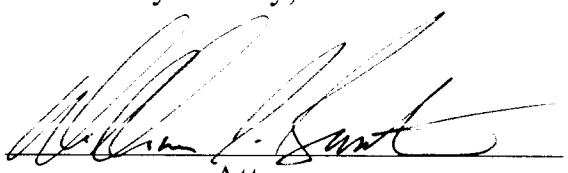
Dated: May 24, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that an original and twenty-five copies of the foregoing were furnished to the U.S. Court of Appeals, Fourth Circuit, 1100 E. Main Street, 5th Floor, Richmond, Virginia 23219, (2) that two copies of the foregoing were furnished to E. Adam Webb, Esq., Webb & Porter, L.L.C., 2625 Cumberland Parkway, S.E., Suite 220, Atlanta, Georgia 30339, Atlanta, Georgia 30339, Attorneys for Appellant Trinity Outdoor, L.L.C., and (3) that two copies of the foregoing were furnished to Paul T. Glasgow, Sr., Esq. and Samantha M. Williams, Esq., Venable, Baetjer & Howard, LLP, 1 Church Street, Suite 500, Rockville, Maryland 20850, Attorneys for Appellee City of Rockville, Maryland, all by Federal Express or U.S. Mail, this 24th day of May, 2004.



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