NO. 08-20701

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RTM MEDIA, L.L.C.

Appellant

v.

CITY OF HOUSTON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS IN CIVIL ACTION NO. 4:07-cv-02944

BRIEF OF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, HOUSTON NORTHWEST CHAMBER OF COMMERCE, AMERICAN PLANNING ASSOCIATION, SCENIC AMERICA, INC., SCENIC TEXAS, INC. AND SCENIC HOUSTON

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Fifth Circuit No. 08-20701

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following interested persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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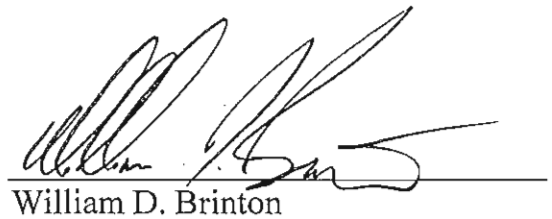

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Amicus curiae, International Municipal Lawyers Association ("IMLA"), is a nonprofit, professional organization of over 2500 local government entities.

Amicus curiae, Texas Municipal League (TML), is a non-profit association of 1,100 incorporated cities and provides legislative, legal, and educational services to its members.

Amicus curiae, Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties.

Amicus curiae, Houston Northwest Chamber of Commerce, is an association of approximately 700 member businesses and organizations and serves the northwest quadrant of Harris County, which is predominantly located in the extraterritorial jurisdiction (ETJ) of the City of Houston.

Amicus curiae, American Planning Association (APA), is a nonprofit, public interest organization representing more than 38,500 professional planners nationwide, with headquarters in Washington, D.C.

Amicus curiae, Scenic America, Inc., is a national nonprofit conservation organization that protects the natural beauty and the distinctive character of this nation's communities.

Amicus curiae, Scenic Texas, Inc. ("Scenic Texas"), is a Texas nonprofit corporation that promotes policies that preserve, protect and enhance scenic beauty in Texas.

Amicus curiae, Scenic Houston, is a Texas nonprofit chapter of Scenic Texas and works to eliminate visual blight and promote enhanced design standards for public projects in the Houston area.

Amici curiae are concerned with attempts to overturn established precedent governing the constitutional parameters for the regulation and prohibition of billboards, also known as offsite commercial signs/offsite advertising signs. Billboard developers are targeting local governments to overturn local sign regulations that prohibit new billboards. There are financial rewards for a developer willing to ignore local permitting requirements and erect large, imposing advertising structures on the landscape. These tactics will continue unabated unless there are clear decisions from the appellate courts. This amicus brief begins with an overview of the regulation of billboards and then follows that regulation subsequent to the decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). The brief then focuses on the difference between the newsracks considered in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), from billboards at issue in this and similar cases. This decision will have a significant impact on local governments within the Fifth Circuit.

SUMMARY OF ARGUMENT

Billboards by their very nature are perceived as an aesthetic harm because of their intrusive qualities. It cannot be denied that outdoor advertising signs tend to interrupt what would otherwise be the 'natural' landscape as seen from the highway. As early as 1932, the Supreme Court noted that advertisements of this sort are constantly before the eyes of observers on the streets, to be seen without the exercise of choice or volition on their part. The unique problems posed by billboards received increasing judicial scrutiny over the following years as aesthetics emerged as an important value. In 1954, the Supreme Court recognized that the values represented by the public welfare were aesthetic as well as monetary and that legislatures had the power to determine that communities should be beautiful. The problems posed by billboards became a national issue with the enactment of the Highway Beautification Act of 1965 (the "HBA"). While the HBA does not *directly* regulate billboards, the Act and its subsequent regulations established *minimum* standards for regulation of these structures that states were encouraged to follow. The most effective means of billboard regulation remains at the local government level.

The regulation of billboards at the municipal level first drew the attention of this Court in *E. B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. dismissed*, 400 U.S. 805 (1970). The adverse effects of

non-accessory billboards were acknowledged to be a problem for aesthetics and traffic safety.

The subsequent efforts in the early 1970s of a California city to completely rid itself of billboards eventually came before the Supreme Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). The *Metromedia* decision consisted of five separate opinions, but one principle clearly emerged: offsite commercial billboards could be prohibited--provided that an overall sign regulatory scheme did not effectively foreclose all noncommercial speech. Seven Justices supported this holding.

In subsequent opinions of the Supreme Court, the guidance of *Metromedia* was clearly set forth for local governments everywhere. Commercial offsite billboards may be totally prohibited. The 1993 decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), did not change a local government's power to prohibit offsite commercial billboards while leaving open sufficient avenues for the display of noncommercial speech. The unique nature of the problems posed by offsite commercial billboards had been clearly recognized through the *accumulated* common-sense judgments of local lawmakers.

Unlike commercial newsracks that serve as dispensing devices for printed material and that have no established history of being visually intrusive or having other adverse impacts, billboards already had a long history of posing problems to

urban and rural landscapes by the time of the adoption of the Houston Sign Code in 1980.

The "reasonable fit" for a prohibition on billboards (non-accessory advertising signs) has been repeatedly recognized in the appellate decisions in federal and state courts throughout the United States and in Texas. The City of Houston's prohibition on offsite commercial billboards is constitutional under *Metromedia* and its progeny.

ARGUMENT

I. THE REGULATION OF BILLBOARDS ADVANCES AESTHETICS AND TRAFFIC SAFETY.

In 1932 the Supreme Court observed: "Billboards . . . are in a class by themselves. . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), quoting *State v. Packer Corp.*, 297 P. 1013, 1019 (Utah 1931). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

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

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

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

In the 1960s the problems posed by billboards led to the passage of the Highway Beautification Act of 1965, 23 U.S.C. § 131, *et seq.*[1] Commentators of all political persuasions bemoaned the diminution of beauty across the country. Stewart Udall observed at the time that we live "in a land of vanishing beauty, of increasing ugliness, of shrinking open spaces, of an overall environment diminished daily by noise, pollution and blight."[2] William F. Buckley, Jr. labeled billboards as "acts of aggression" against which "the public is entitled, as a matter of privacy, to be protected."[3] A former advertising executive declared: "Nor is it possible for you to escape, the billboard inflicts itself unbidden upon all but the blind or the recluse." Howard Luck Gossage, Is There Any Hope for Advertising?, at 113 (Kim Rotzoll, Jarlath Graham and Barrows Mussey eds., University of Illinois Press 1986).

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1 For a history of the HBA, see Albert, Craig J., *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification, 48* Univ. of Kansas Law Review 463 (April 2000).

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

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

Because 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." *Metromedia*, 453 U.S. at 502 (J. White for plurality), quoting *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 870 (1980) (emphasis added).[4] This unique set of problems has led city councils, planners, landscape architects, conservationists, and beautification advocates across the country to adopt national policy positions. The policy of the American Society of Landscape Architects states:

> The American Society of Landscape Architects urges the control and/or removal of existing billboards, the regulation of new billboards so that the visual quality of their surroundings is not diminished, and the strong local regulation of remaining signage, including on-premise signs.

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

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

> Many local governments have determined that billboard controls are necessary to protect and preserve the beauty, character, economic and aesthetic value of land and to protect the safety, welfare and public health of their citizens. ... Policy 7. APA National and Chapters support continuation and strengthening of Federal and state legislation that allows control by local governments over the placement of new billboards.

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

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[5] See http://www.asla.org/members/publicaffairs/publicpolicy.html (visited March 3, 2009) (emphasis added).

[6] See http://www.planning.org/policyguides/billboards.html (visited March 3, 2009). See also The Sierra Club Conservation's Conservation Policy on "Visual Pollution" at http://www.sierraclub.org/policy/conservation/visual.asp. (last visited on March 3, 2009) ("The Sierra Club opposes the proliferation of outdoor off-premise advertising (billboards) and endorses legislative and other actions at the federal, state, and local levels to strengthen prohibitions against billboard proliferation"); Scenic America, Inc.'s Seven Principles for Scenic Conservation, Principle V, at http://www.scenic.org (last visited on March 3, 2009) ("prevent mass marketing and outdoor advertising from intruding on the landscape or community appearance . . . produce dramatic and immediate results in the scenic character of our landscape by banning the construction of new billboards and strictly regulating existing billboards").

Billboard structures are intended to dominate the landscape wherever they are erected. Indeed, modern steel billboard structures may have useful lives of up to seventy years.[7] The adverse long-term consequences require no study, and "to hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism." *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 886 (1980), *partially rev'd on other grounds*, 453 U.S. 490 (1981).

There can be no doubt that billboards, in contrast to small newsracks that serve to dispense written material, have had a long history of regulation in this country. Four states have now prohibited billboards entirely, including Hawaii, Alaska, Maine and Vermont. The interest in aesthetics was so strong in Alaska that a statutory provision was enacted on March 4, 1999 through a statewide citizens' ballot initiative, providing: "It is the intent of the people of the State of Alaska that Alaska shall forever remain free of billboards." Alaska Statute §19.25.075. Interests in aesthetics have also led to initiatives restricting billboards at the local level. See, e.g., *Eller Media Co. v. City of Reno*, 59 P.3d 437 (Nev.

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[7] See Florida Legislature Office of Program Policy Analysis and Government Accountability, Special Review: Property Appraisers Use Cost Approach to Value Billboards; Guidelines Need Updating, Report No. 02-69, at 4 (December 2002) (available at http://www.oppaga.state.fl.us) (last visited on March 3, 2009).

2002); *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So.2d 750 (Fla. Dist. Ct. App. 1994), *approved* 659 So.2d 1046 (Fla. 1995).

II. NONACCESSORY SIGNS HAVE LONG BEEN RECOGNIZED AS VISUAL CLUTTER AND A DISTRACTION SUFFICIENT TO SUPPORT THEIR PROHIBITION.

A. THIS COURT RECOGNIZED THE PROBLEMS POSED BY OFFSITE ADVERTISING BILLBOARDS BEFORE *METROMEDIA*.

This Court has previously recognized the problems created by advertising billboards and the wisdom of regulating them in a way that distinguishes between whether the sign is an on premise sign or an off premise (non-accessory) sign.

In 1963 Metropolitan Dade County, Florida adopted an ordinance that generally prohibited all commercial outdoor advertising signs within six hundred feet of expressways in Dade County. This ordinance, as amended, was the subject of numerous challenges, including constitutional challenges for alleged due process and equal protection violations. Challenges such as these came before this Court in 1970.

In *E. B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. dismissed*, 400 U.S. 805 (1970), this Court upheld the constitutionally permissible distinction between the onsite and offsite (billboard) signs. The court noted that the classification was a reasonable one, and stated:

> [T]here is a real difference between the outdoor advertising activity that must necessarily be carried out on the premises where a business is located in order that it may identify itself and attract customers and

> outdoor advertising which is carried out as a business in itself and which conveys commercial messages unrelated to the other uses to which the premises may be devoted.

Id. at 1154. See also *Cusack Co. v. Chicago*, 242 U.S. 526, 529 (1917) (billboards are in a "class by themselves"). This Court 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." *Id.* at 1152.

This Court reviewed the history of billboard regulation in published decisions across the country, and provided observations as to the *unique nature of outdoor advertising* and *the nuisances fostered by billboards*. See *E.B. Elliott*, 425 F.2d at 1153). This Court specifically recognized that the prohibition and removal of the overall number of outdoor advertising signs would tend to *reduce the number of driver distractions and the number of aesthetic eyesores*:

> Moreover, the classification is reasonable in light of the purpose of Ordinance No. 63-26: the promotion of highway safety and highway beautification, in that *the removal of outdoor advertising signs* which are not related to the operation of a business on the premises on which they are located *will tend to reduce the overall number of outdoor advertising signs* and *thereby reduce the number of driver distractions and the number of aesthetic eyesores* along the expressways of Dade County. As was noted earlier, 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'. *Williamson v. Lee Optical of Okl., supra*, 348 U.S. at 489, 75 S.Ct. at 465.

Id. at 1154 (emphasis added).

The Houston Sign Code regulating outdoor advertising signs in the City of Houston was passed in 1980 long after *the unique nature* and *the nuisances* of outdoor advertising had been recognized as a problem and after this Court had specifically recognized that the removal of outdoor advertising structures would tend to reduce the number of driver distractions and the number of aesthetic eyesores. This Court's common-sense recognition that the reduction of off-premise billboards was in essence a reasonable fit for a community with aesthetic appearance goals has been recognized in state appellate decisions, such as *Eller Media Co. v. City of Houston*, 101 S.W.3d 668 (Tex.App.-Houston [1st Dist.], 2003), discussed *infra*; *Brown Outdoor Advertising, LLC v. Town of Prosper*, 2005 WL 1140343 (Tex.App.-Dallas 2005) (town could prohibit commercial billboards in its ETJ); *City of Houston v. Harris County Outdoor Advertising Ass'n*, 732 S.W.2d 42 (Tex.App.-Hous. [14 Dist.], 1987).

B. *METROMEDIA* AND THE SUBSEQUENT SUPREME COURT DECISIONS RECOGNIZE THE PRINCIPLE THAT OFFSITE COMMERCIAL BILLBOARDS MAY BE PROHIBITED.

In 1980, in connection with the regulation of commercial speech, the Supreme Court described a four prong test for the protection of commercial speech under the First Amendment.

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether

> the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 566 (1980). *Central Hudson*, as refined later in *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469 (1989), remains the standard for examining restrictions on commercial speech.

In 1981 in *Metromedia* the Supreme Court addressed the issue of whether off-site *commercial* billboards could be prohibited within the constraints of the First Amendment. "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," *Metromedia*, 453 U.S. 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.).

In *Metromedia*, however, the overall sign ordinance reached too far into the realm of protected speech to satisfy the First Amendment, *id.* at 521, as the Court found the regulations to be a general ban on signs carrying noncommercial advertising. *Id.* at 512-513. In contrast to San Diego, the City of Houston did not reach "too far" in its regulations and made allowances for purely noncommercial speech to be displayed. See Houston Sign Code §4619(c)[8]

In 1984, in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787 (1984), the Supreme Court *reaffirmed* the conclusion that a city's interest in avoiding visual clutter was sufficient to justify a prohibition on billboards. *Id.* at 807. The Supreme Court confirmed the powers of cities to protect their citizens from unwanted exposure to certain formats for expression, including offsite commercial billboards, and noted:

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[8] "The provisions of this section shall not be construed to require the removal of a structure that is *used exclusively and at all times* (except when there is no copy at all on the structure) for messages that do not constitute advertising, . . . because such a structure is not a 'sign' (either on-premise or off-premise), as that term is defined, for purposes of this chapter and is not subject to regulation under this chapter. A structure that is subject to regulation under this chapter may contain non-commercial messages in lieu of or in addition to any other messages, but the structure shall not be exempt from regulation as a sign under this chapter unless *used exclusively and at all times* as provided above for non-commercial messages." R.178 (emphasis added). See discussion *infra* at pages 22-29 that there is a "reasonable fit" for the prohibition on offsite noncommercial billboards even if there is an exclusion for a structure exclusively displays noncommercial speech.

> The Court of Appeals accepted the argument that a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located. A comparable argument was categorically rejected in *Metromedia*. In that case it was argued that the city could not simultaneously permit billboards to be used for onsite advertising and also justify the prohibition against offsite advertising on esthetic grounds, since both types of advertising were equally unattractive. The Court held, however, that the city could reasonably conclude that the esthetic interest was outweighed by the countervailing interest in one kind of advertising even though it was not outweighed by the other. [FN28]
>
> FN28. . . .
>
> ". . . San Diego has obviously chosen to value one kind of commercial speech--onsite advertising--more than another kind of commercial speech-- offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance--onsite commercial advertising--its interests should yield. We do not reject that judgment." *Id.*, at 512, 101 S.Ct., at 2895. . .

Id. at 801-811.

In 1993 in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), in upholding the Sixth Circuit's decision that struck down Cincinnati's categorical ban on commercial "newsracks," the Supreme Court observed that the distinction for commercial newsracks "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424 (emphasis in the original). In a footnote, Justice Stevens noted that the bases for the regulation of off-site advertising (commercial) billboards in *Metromedia* had no application to the

disparate treatment of newsracks in the case then before the Court. *Id.* at 425, n. 20. See discussion *infra* at pages 22-29 as to the impact of *Discovery Network* as to this case.

C. THE CIRCUIT DECISIONS CONTINUE TO APPLY *METROMEDIA* TO UPHOLD PROHIBITIONS ON OFFSITE COMMERCIAL BILLBOARDS.

There is a clear difference between the regulation of commercial billboards and the regulation of small commercial newsracks that serve to dispense written material. These are different methods of communication, each with subtle legal distinctions, different histories as to the problems posed, and conflicting rights, values and interests. Before turning to how this Court and its sister courts have applied *Metromedia*, it is notable that these different methods were recognized more than twenty-five years ago.

In 1983 this Court in *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984), upheld restrictions on commercial speech involving liquor advertising against challenges by billboard companies and others. This Court noted the admonition that First Amendment cases should be analyzed separately based upon the particular medium involved and recognized that certain values, interests, and beliefs are transcendent, or accumulated common-sense to quote the *Metromedia* plurality.

> Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an

exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800 (1981); [citations omitted]. "The protection available for particular commercial expression turns on the nature both of the expression and of the government interests served by its regulation." *Central Hudson Gas, supra,* 447 U.S. at 563, 100 S.Ct. at 2350. . . .

* * *

There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. . . . The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are *transcendent.*

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. . . . In *Metromedia*, despite assertions that "the record is inadequate to show any connection between billboards and traffic safety" the judgment of the Court agreed with the "common-sense" belief of local lawmakers and other courts that billboards do pose substantial traffic safety hazards. 453 U.S. at 508-09, 101 S.Ct. at 2892-93. . . .

Id. at 748 (emphasis added).

In finding *Metromedia* both instructive and helpful, this Court concluded:

We conclude that the advertising ban is sufficiently justified to pass constitutional muster. . . . Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated, common-sense

> judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect. . . ."

Id. at 749-751 (emphasis added).

In 1987 this Court returned to a discussion of both *Metromedia* and *Dunagin* in *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). Determining that the critical inquiries were whether the ordinance prohibiting portable signs furthered San Antonio's interests and whether the restriction on speech was greater than was essential to the furtherance of those interests, this Court concluded that the district court had erred in finding that the ordinance would not further those aesthetic interests.

This Court referred to its previous discussion of *Metromedia* and found that, despite assertions that the record in *Metromedia* was inadequate to show any connection between billboards and traffic safety, the Supreme Court "agreed with the 'common-sense' belief of local lawmakers and other courts that billboards do pose substantial traffic safety hazards." *Id.* at 1108, quoting *Dunagin*, 718 F.2d at 749, n.8 (citing *Metromedia*, 453 U.S. at 508-09 (plurality)).

As to portable signs, for which there was not yet an accumulated judgment of local lawmakers as to either traffic safety (see *Metromedia*) or aesthetics, this Court in *Lindsay* weighed the evidence of the aesthetic interests along with "taking into account the need to accord deference to the judgment of the body charged with

the responsibility of making determinations about aesthetics." *Id.* at 1110. See also *Paradigm Media Group, Inc. v. City of Irving*, No. 3:01-CV-612-R, 2002 WL 1776922, at *6 (N.D. Tex.), *aff'd*, 65 Fed. Appx. 509 (5th Cir. 2003) (district court noting oft-quoted statements that in the accumulated, common-sense judgments of local lawmakers and many reviewing courts billboards were hazards to traffic safety and by their very nature could be perceived as an aesthetic harm).

The *Metromedia* lesson has been followed in a number of notable Circuit decisions. In *Ackerley Communications of Northwest v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997), the Ninth Circuit rejected the argument that *Metromedia* was no longer good law. The Ninth Circuit noted that the Supreme Court has continued to rely on its previous conclusion that a city's interest in avoiding visual clutter suffices to justify a prohibition on billboards. *Id.* Just last year, in *Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27 (1st Cir. 2008), the First Circuit upheld restrictions on electronic message centers (EMCs) and rejected the appellant's argument that the City of Concord had to perform studies to prove that the ban on EMCs in fact supports its stated interests. Similar to this Court's consideration of when certain values, interests, and beliefs are *transcendent*, or *accumulated common-sense,* the First Circuit looked to *Metromedia* in evaluating Concord's interests in traffic safety and community aesthetics and concluded that those

interests would be achieved less effectively without the ordinance's prohibition on EMCs.

> We give some respect to "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia,* 453 U.S. at 509, 101 S.Ct. 2882 (plurality opinion). It is given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous.

Id. at 35.

In addition to Circuit decisions in *Krochalis* and *Naser*, the prohibition of offsite commercial billboards or advertisements has consistently been upheld and recognized by the federal appellate courts throughout the country following *Metromedia*. Second Circuit: *Long Island Bd. of Realtors, Inc. v. Incorp. Village of Massapequa Park*, 277 F.3d 622, 627 (2d Cir. 2002) (offsite commercial advertisements on residential property); *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 99 (2nd Cir. 1998); *National Advertising Company v. Town of Niagara*, 942 F.2d 145, 157-158 (2nd Cir. 1991). Third Circuit: *Riel v. City of Bradford*, 485 F.3d 736, 753 (3rd Cir. 2007) (where appellate court found that sign ordinance did not have a "reasonable fit problem" similar to the one at issue in *Discovery Network*) ("all that the City has burdened is . . . off-site commercial signs"). Fourth Circuit: *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 173-174 (4th Cir. 1988) ("we have affirmed summary

judgments upholding against first amendment challenge the constitutionality of ordinances prohibiting off-premise commercial billboards") ("'aesthetics alone is a sufficient justification' for this type of police power regulation"). Seventh Circuit: *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114-1115 (7th Cir. 1999). Eighth Circuit: *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 695 (8th Cir. 1996). Tenth Circuit: *Nat'l Adver. Co. v. City and County of Denver*, 912 F.2d 405, 408-411 (10th Cir. 1990). Eleventh Circuit: *Southlake Property Associates, Ltd. v. City of Morrow, Ga.*, 112 F.3d 1114, 1117-1119 (11th Cir. 1997), *cert. denied*, 525 U.S. 820 (1988) (wherein the Eleventh Circuit noted that noncommercial speech is inherently an on site message).

III. THE CITY OF HOUSTON'S PROHIBITION OF OFFSITE COMMERCIAL BILLBOARDS IS A REASONABLE FIT BY THEIR VERY NATURE AND UNDER THE ACCUMULATED COMMON-SENSE OF LOCAL LAWMAKERS.

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Supreme Court addressed an ordinance that was not crafted in any way whatsoever to deal with any problem with newsracks. As the Court noted:

> The ordinance on which it [the City] relied was an outdated prohibition against the distribution of any commercial handbills on public property. *It was enacted long before any concern about newsracks developed.*

Id. at 417 (emphasis added). The apparent purpose of the ordinance was "to prevent the kind of visual blight caused by littering, rather than *any harm*

associated with permanent, freestanding dispensing devices." *Id.* (emphasis supplied).

The commercial newsracks at issue in *Discovery Network* were described as free-standing "dispensing machines measuring three feet high, three feet wide, and eighteen inches deep," that comprised a dispensing box for written material. See Brief of Petitioner's Appellate Brief in *Discovery Network*, 1992 WL 540586, at *7. In examining the "reasonable fit" of Cincinnati's prohibition, the Sixth Circuit denigrated the City's claims, noting that the benefit gained by the City was "miniscule," and holding that the ordinance could not be justified by the "paltry gains" in both safety and beauty. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 471 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993). The Sixth Circuit observed that "a regulation establishing color and design limitations" would satisfy the concern over aesthetics for newsracks. *Id.*

The lack of a reasonable fit between the City of Cincinnati's purported interests and the prohibition of commercial newsracks obviously has no bearing whatsoever on the reasonable fit between the City of Houston's interests and the prohibition of new offsite commercial billboards. Houston's interests in aesthetics cannot be met by painting billboards with any particular color, nor can Houston's interests in safety issues be addressed in this manner inasmuch as billboards are

designed to attract the attention of passing drivers away from the roadway. See *E.B. Elliott*, 425 F.2d at 1154 (referring to billboards as "driver distractions").

RTM Media's argument that the Houston Sign Code lacks a reasonable fit is based upon sheer speculation that the Sign Code is ineffective to the extent that it does not pertain to billboards where only offsite noncommercial messages are displayed. According to the Eleventh Circuit all noncommercial speech is onsite inasmuch as it expresses the viewpoint of the speaker on the site at which it is displayed. See *Southlake Property*, *supra*, 112 F.3d at 1117-1118 (11th Cir. 1997)[9]; *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1344 (11th Cir. 2004) (noncommercial messages are by definition onsite signs). If the Eleventh Circuit's interpretation is correct, then RTM's hypothetical is not even possible. If the Eleventh Circuit's interpretation is incorrect and it is *theoretically* possible to have an offsite noncommercial message, there is no logical basis to believe that this would preclude a reasonable fit between the City of Houston's interests and a regulatory scheme that reaches all other billboards (both those that display only commercial messages as well as those that display a mix of

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[9] "Locating the site of noncommercial speech, however, is fraught with ambiguity. . .Noncommercial speech usually expresses an idea, an aim, an aspiration, a purpose, or a viewpoint. Where is such an idea located? What is the site upon which the aspiration is found?" *Southlake*, 112 F.3d at 1118.

commercial and noncommercial messages). It is undisputed that RTM Media has displayed only commercial messages on the fifty-nine (59) billboard structures that it constructed in the City's ETJ. R.941. The City is unaware of any billboard that has ever displayed only noncommercial messages to the exclusion of commercial messages. S.R.37. According to the Outdoor Advertising Association of America's website, an off-premise sign is defined in the context of commercial messages, to wit: "A sign that advertises products or services that are not sold, produced, manufactured or furnished on the property where the sign is located."[10] Even when noncommercial speech has been mixed together with a display of commercial speech, the percentage of noncommercial speech has been *de minimis* in reported cases. See *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349, 1359 n. 26 (S.D. Fla. 2003), *rev'd*, 402 F.3d 1329 (11th Cir. 2005), *cert. denied,* 546 U.S. 1170 (2006) (noncommercial messages represented approximately 2% of billboard company's advertising); *Action Outdoor Advertising JV, L.L.C. v. Town of Shalimar, Fla.*, 377 F.Supp.2d 1178, 1186 (N.D.Fla. 2005) (offsite sign advertising business acknowledged to be 99% commercial and 1% noncommercial). Because of the respect given to the

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[10] See http://www.oaaa.org/marketingresources/industrystandards/outdoorterms.aspx#O.

common-sense judgments of courts and lawmakers alike, a prohibition on offsite commercial billboards, which provides the opportunity for purely noncommercial billboards to exist, cannot fail to achieve a reasonable fit between the ends and the means when it comes to both aesthetics and traffic safety.

It is no wonder that there was no "reasonable fit" between the City of Cincinnati's targeting of commercial newsracks for removal and the purported goals claimed by Cincinnati. Compare the inconsequential issue of commercial newsracks in *Discovery Network* to the long-established and accumulated judgments of local lawmakers, *repeatedly endorsed by appellate courts across the country*, that offsite commercial billboards are both a traffic safety issue and contribute in a significant way to blight and ugliness. There is no logical nexus to upend the lesson of *Metromedia* that communities can prohibit offsite commercial billboards as a "reasonable fit" to accomplish objectives of traffic safety or aesthetics, or both. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), Justice O'Connor described the test as a "reasonable" fit between the legislature's ends and the means chosen to accomplish those ends. *Id.* at 556.

First Amendment cases should be analyzed separately based upon the particular medium involved and with the recognition that certain values, interests, and beliefs are *transcendent*. As this Court observed in *Dunagin*, *supra*, certain values, interests, and beliefs are *transcendent* when it comes to a particular

medium. When it comes to offsite commercial billboards, the adverse impact on traffic safety is informed by accumulated common-sense, or the aesthetic harm is measured by their very nature, wherever located and however constructed. Of course, the City of Houston has repeatedly established this common-sense judgment in prior cases, and it does so again in this case. If just one non-accessory (offsite) commercial billboard is constructed in an urban or rural landscape, that alone is a sufficient consequence to establish a reasonable fit for prohibiting offsite commercial billboards absent compelling proof of an ulterior motive.

In *Eller Media*, 101 S.W.3d at 675-676, the City of Houston offered a committee report as well as testimony from experts and others. The appellate court held that the City had met its burden of establishing that the Sign Code directly advanced its interests in reducing traffic accidents and improving the appearance of the City. *Id.* at 676. On the other hand, the billboard company argued that the City had not carried its burden under the fourth element of *Central Hudson* due to the *Discovery Network* decision. In a *de novo* review, the appellate court correctly concluded that the reasonable fit requirement was met:

> Eller Media's argument fails because the reasoning of the courts in *Discovery Network* does not apply to the distinction made in our case between off-premise and on-premise signs. On-premise signs serve important functions, including identifying the occupants of the premises and the nature of their businesses or services. The Supreme Court in *Metromedia* determined that cities may, with good reason, make different regulations for off-premise and on-premise signs,

> including prohibiting off-premise signs while permitting on-premise signs. *See Metromedia,* 453 U.S. at 512, 101 S.Ct. at 2895.

Id. at 677.

Because the City of Houston had gone no further than necessary to accomplish its purpose, the court found that the City satisfied the third and fourth prongs of *Central Hudson*. *Id.* at 678. Here, RTM Media argues that the City should go further than just prohibiting offsite commercial billboards (including those that may carry both commercial and noncommercial messages), but that the City should prohibit so-called offsite noncommercial signs that *never* carry any commercial message. In the absence of extending its ban to cover pure noncommercial speech, RTM Media argues that the City cannot meet the "reasonable fit" required by *Central Hudson.* When it comes to "the law of billboards,"[11] this argument is simply dead wrong.

In *Discovery Network*, the Supreme Court *repeatedly* emphasized that its holding was limited to *the facts of that particular case*. *Discovery Network*, 507 U.S. at 414 ("It explained that the 'fit' in this case was unreasonable"); at 416 (its analysis at least suggested that those standards [the standards set forth in *Central Hudson* and *Fox*] might not apply to the type of regulation at issue in this case");

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[11] See *Metromedia*, 453 U.S. at 501.

at 424 (for the purpose of deciding this case); at 424 ("Cincinnati's actions in this case run afoul of the First Amendment") ("in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted") (emphasis in the original); at 425 ("Neither of these bases [the two bases identified in *Metromedia*] has any application to the disparate treatment of newsracks in this case.").

The Court noted that the devices in question (the newsracks) play a significant role in the *dissemination* of protected speech in Cincinnati, but then stated:

> Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has *absolutely no bearing* on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required by our opinion in *Fox*.

Id. at 428 (emphasis supplied).

In a clear contrast to the dispensing devices at issue in *Discovery Network*, the issue here is one of "offsite" billboards that are in whole or in part "commercial" and therefore by definition are not accessory uses to the premises on which they are situated. Their prohibition has clear bearing on the interests asserted by the City - traffic safety and aesthetics.

IV. CONCLUSION.

The City of Houston's prohibition on offsite commercial billboards is constitutional as it meets the established nexus of advancing aesthetics as well as traffic safety.

RESPECTFULLY SUBMITTED this 7th day of March 2009.

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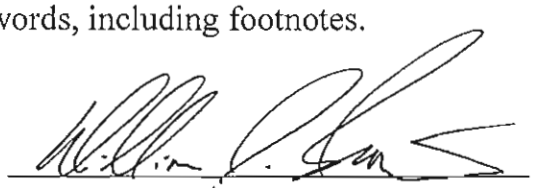
FRAP 32(a)(7)(B) CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type and volume limitation specified in Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 6872 words, including footnotes.



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CERTIFICATE OF SERVICE

I certify that an original and six copies of the above and foregoing were furnished to the U.S. Court of Appeals, Fifth Circuit, and that a true and correct copy of the above and foregoing was served on the following appellate counsel of record by Federal Express on this 7th day of March, 2009.

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