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DECISION MAKING IN SIGN CODES: THE PRIOR RESTRAINT BARRIER

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Sign codes often contain discretionary decision making procedures. They may contain a permit requirement, may permit some signs only as conditional uses and may authorize hardship variances. Officials may also be allowed to waive or modify some regulations, such as setback requirements. More creatively, sign codes can authorize a design review for customized signs that meet design criteria. These discretionary decision making procedures raise free speech problems because they are prior restraints on free speech. This article discusses prior restraint problems raised by discretionary review procedures in sign codes. It next considers litigation strategies in federal court that allow attacks on discretionary review procedures in sign litigation. It then considers how municipalities can provide discretionary review procedures that meet prior restraint requirements.[1]

1. The Prior Restraint Doctrine

Prior restraint doctrine has a long history. Its purpose is to invalidate procedures that chill the exercise of free speech. Prior restraints are not unconstitutional per se, but there is a heavy presumption against constitutionality.[2] A prior restraint exists when a regulation prevents speech from occurring.[3] Suppression of speech can occur through review procedures that require the exercise of discretion. Permit, variance or other approvals that must be obtained before a sign can be displayed are examples. Speech is suppressed prior to the time an approval is granted.

A key issue under prior restraint doctrine is whether a discretionary review procedure confers unguided discretion without adequate standards. This cannot be tolerated. As the Supreme Court explained, the absence of standards makes it difficult to distinguish between a "legitimate denial of a permit and its illegitimate abuse of censorial power."[4] The Court added that "[w]ithout these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppress-

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ing unfavorable, expression." Finally, litigation by a plaintiff to contest a decision made in a discretionary procedure may be discouraged because litigation is difficult and subject to inherent delay.[5]

This problem can be illustrated by a typical case. Assume a provision in a sign code authorizing setback variances for on premise signs does not contain standards or authorizes a variance "in the public interest." This standard may well be invalid. A sign company that is denied a setback variance can attack this standard as applied to it because it authorizes unguided discretion, but this litigation can be time consuming and costly, as the Supreme Court indicated. The sign company may not sue.

2. Bringing a Facial Prior Restraint Attack Against a Sign Code: The Overbreadth Exception for Third Party Standing

Discretionary review procedures that violate prior restraint doctrine are open to a facial attack[6] strategy, however, that can avoid these problems.[7] This strategy requires a sign company that plans to put up signs, such as billboards.[8] It applies for permits, but the local government denies them because its sign code prohibits billboards. The sign company then brings suit in federal court in which it attacks the ordinance as applied to it through the permit denials. If the local government has not paid attention to how its discretionary review procedures are drafted, the sign company can also attack them facially because they fail prior restraint doctrine, in addition to making an as-applied attack against the denial of the permits. An example is a claim that discretionary review procedures do not contain adequate standards.

Additional dangers may then lurk. The plaintiff may convince the court the entire code is invalid because its remaining sections cannot be severed.[9] A nonseverability claim is especially potent if discretionary review procedures are invalidated, because they may be an integral part of the code. If the entire code is invalidated, the sign company can then claim a vested right to display its sign. It can argue the sign code was retroactively void and not in effect when it applied for its permit, so there was no basis for a permit denial.[10]

This strategy is daunting, but a barrier to a facial attack is apparent. The difficulty is the sign company brought an as-applied attack against the code, claiming the billboard prohibition is unconstitutional as applied to it. It also wants to bring a facial claim against discretionary review procedures in the text of the ordinance that were not applied to it. Ordinary rules of standing in federal court do not permit this facial claim, because a plaintiff cannot assert the rights of third parties not before the court.[11]

This is a prudential rule of standing the Supreme Court adopted, not a rule of standing compelled by Article III, the case and controversy clause of the constitution. Nevertheless, the prudential rule is a serious barrier that can prevent a sign company's facial attack on provisions of a sign code that were not applied to it.

There is an exception to prudential standing rules, however, that can allow a facial attack on code provisions that have not been applied to a plaintiff. Overbreadth doctrine allow a plaintiff to attack a law facially without showing it would benefit from a favorable result if the law it attacks was properly and narrowly drawn.[12] Provisions regulating political signs are an example. A sign company would not benefit from a constitutionally acceptable law that regulates political signs if it does not display such signs.

The Court has explained the reason for the overbreadth exception. Statutes regulating free speech must be narrowly drawn, and based on a considered legislative judgment that requires free expression to give way to other compelling social needs.[13] When there is a danger of chilling free speech, the social interest in having a regulation challenged in court outweighs the concern that courts should avoid constitutional adjudication.[14] Overbroad, standardless statutes are an example of an overbroad regulation subject to a facial attack under the overbreadth exception.[15] Overbreadth doctrine is thus driven by the same concerns that motivate prior restraint doctrine; it protects free speech by broadening standing to allow facial attacks on laws that may violate the free speech clause.

There are objections to overbreadth standing despite these concerns. As one commentator noted, "[t]he principal attacks suggest that when federal courts employ overbreadth to facially invalidate statutes, they may exceed their constitutional authority by allowing facial challenges by parties not directly affected by the statute, unnecessarily decide constitutional questions, compromise federalism principles, violate the separation of powers, and interfere with the prerogatives of policymakers to address important social problems."[16] This is a serious complaint, met to some extent by limits the Court has put on overbreadth standing. It is to be employed "sparingly and only as a last resort,"[17] and a court must decide "whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal."[18]

3. Constitutional Standing to Sue as a Limit on Overbreadth Challenges

The overbreadth doctrine is an exception only to the Court's prudential rules of standing. Recall that standing doctrine has a constitutional as well as a prudential element. Constitutional standing to sue has three "irreducible minimum"

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requirements. A plaintiff must show it has suffered an injury in fact that is concrete and particularized, actual or imminent and not conjectural or hypothetical. She must show causation by showing a causal link that can fairly trace her injury to the challenged action. Finally, she must show redressability by showing it is likely rather than speculative that a favorable decision will redress her injury.[19]

A hypothetical case can test these constitutional standing requirements. Assume a sign company applies for permits to build three billboards on interstate highways. The local government refuses to issue the permits because its sign code prohibits commercial billboards at these locations. The sign company then brings suit in federal court attacking the prohibition as a free speech violation. The sign code contains size and height limits that also prohibit the display of the billboards, but the sign company does not comply with these limits and does not attack them. Other provisions in the sign code may facially violate the free speech clause. Some authorize messages with specific content, such as a provision authorizing the display of political signs. The sign company does not display political signs. Another code provision authorizes the zoning board of adjustment to approve billboards as a conditional use in the downtown redevelopment district, but the criteria for approving these conditional uses are vague and may violate prior restraint doctrine. None of the sign company's applications were for billboards in the downtown redevelopment district, and it does not intend to apply for sign permits in this district.

4. Overbreadth Standing for Substantive Provisions in Sign Codes

The sign company, in addition to its as-applied case against the denial of its permit, would like to use overbreadth doctrine to challenge those provisions in the code facially that may be a free speech violation. Constitutional standing requirements can prevent this, especially the redressability requirement.[20] How the courts apply constitutional standing doctrine depends on whether the code provisions challenged facially are substantive or procedural.

In the hypothetical case the plaintiff probably cannot attack the substantive provisions in the code facially that do not apply to it, such as the provision for political signs. The problem is that success in its as-applied attack on the billboard permit denial will not succeed. The code provision prohibiting commercial billboards is not a free speech violation.[21] The sign company does not comply with and has not attacked the provision restricting size and height, and even if it did attack this requirement it does not violate the free speech clause.[22] Even assuming a court held the billboard prohibition unconstitutional, the sign company still cannot obtain a permit because its signs are too large and too tall under the code. For this reason the sign company does not have constitutional standing because it does not have an injury that is redressable under the code. It violates only substantive provisions that apply to it but are constitutional.

A leading case adopting this view is the Seventh Circuit decision in Harp Advertising III v. Village of Chicago Ridge.[23] A sign company challenged the sign code, but even success on this claim would not allow it to put up its sign because it exceeded size limits adopted by the village; the sign company did not challenge this provision. Neither did the sign company indicate it would be willing to put up a smaller sign that would comply with the sign code.

The court denied standing. Though recognizing the rules that permit an overbreadth challenge, these rules had not "elided" the rules of standing. The plaintiff's injury was not redressable because an injunction against the sign code would not allow the plaintiff to put up its sign.[24] The village could block it by enforcing the valid size restriction ordinance already "on the books." Nor had the sign company indicated it would put up a sign that complied with the code's size limits.

The cases follow Harp when the facial overbreadth attack is substantive, and when a plaintiff's claim is not

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redressable because other provisions of the code prevent the display of its sign even if it wins its as-applied lawsuit against the permit denial.[25] This is strong precedent, but there are exceptions, as in a later Seventh Circuit adult use case.[26] The plaintiff challenged provisions in a zoning ordinance that explicitly prohibited adult uses, but another provision prohibited the plaintiff's adult use because it prohibited all commercial uses in its zoning district. The court granted standing because the plaintiff challenged this provision as well as the provision that explicitly prohibited adult uses. Because the plaintiff would be entitled to his use if the court found the second ordinance was unconstitutional, the court held he had a redressable injury.

Plaintiffs can use this strategy in sign code cases, such as cases where the local government denies a billboard permit, by attacking size and height and other sections of the code that prohibit the billboard as well as the section that prohibits billboards directly. The injury is redressable because the plaintiff will be entitled to its billboard if the court holds both provisions invalid. Success on the merits against any of these provisions may be improbable, but probable success on the merits is not necessary because a ruling on standing is separate from a ruling on the merits.[27] A plaintiff that uses this strategy to get standing can also attack other provisions in the code facially that do not apply to it, such as discretionary review procedures. There may also be cases where a plaintiff who attacks a primary ban on billboards meets the secondary requirements, such as size and height requirements, so that success in a suit against the primary ban on billboards will be redressable.[28]

Another exception to the rule against third party standing is the case in which a provision of a sign code is applied to a plaintiff, and the courts allow the plaintiff to attack that provision facially as applied to others. An Eleventh Circuit case, KH Outdoor, LLC v. Trussville,[29] is an example. The local government denied the plaintiff a billboard permit under provisions of the ordinance that restricted the location of these signs. Other sections defined a billboard to include only commercial speech and prohibited all signs not permitted by the code. In combination these sections prohibited noncommercial billboards, and the court allowed the plaintiff to attack all of these sections facially as applied to noncommercial signs. It then concluded the code discriminated improperly against noncommercial speech.

There are also cases in which a plaintiff has a redressable claim because a local government has taken action against it, and success in its litigation will terminate that action. In a Ninth Circuit case, Desert Outdoor Advertising v. City of Moreno Valley,[30] for example, a city brought a prosecution against sign companies to remove illegal signs. The court held this prosecution allowed the companies to meet all three elements of constitutional standing, including redressability, and they were allowed to bring a facial attack against the permit provision in the sign code.[31]

5. Overbreadth Standing for Procedural Provisions in Sign Codes

A plaintiff may also want to bring a facial overbreadth claim against discretionary review procedures in a sign code, even though these procedures have not been applied to it. A plaintiff can get standing to make such a claim in two ways. Making a redressable claim against a substantive provision of the code allows it also to make a facial attack against its procedural provisions. A plaintiff can also make a redressable claim against procedural provisions without having to show it was injured by those provisions as applied to it, and without making a redressable substantive claim.

The Supreme Court explained in City of Lakewood v. Plain Dealer Pub. Co.[32] There it held a threat of prior restraint provides the injury in fact required for constitutional standing. The plaintiff sued when the city adopted an ordinance giving the mayor the authority to grant or deny applications for annual newsrack permits. Instead of applying for a permit, the plaintiff brought suit challenging the permit ordinance as facially unconstitutional. The Court granted standing:

> [O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge.[33]

There is redressable injury, if only by nominal damages.[34]

Under this rule, a key issue in deciding whether a plaintiff has standing for a facial challenge to decision making procedures is whether it is "subject to" the law. Most sign codes contain a sign permit requirement that includes application, review and approval procedures. A plaintiff has standing if it made use of and was "subject to" these procedures to make an application that was denied by the local government.[35] It is also "subject to" these procedures because it will have to reapply for a permit if its litigation against the code is successful. Sign codes may also contain variance, conditional use and other decision making procedures. It should be enough that a plaintiff is eligible for and could obtain a permit or other approval under any of

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these procedures, even though it has not previously done so. It is "subject to" these procedures because they are in the code.

Neither is it important that the plaintiff cannot put up its sign because its as-applied attack against sections of the code under which it was denied a permit will not be successful. Recall that standing to sue does not depend on success on the merits. A plaintiff should have standing to attack procedural provisions even though it cannot obtain a permit because its sign is not permitted by the sign code.[36]

This point was made clear in a Second Circuit case. The court held "[t]hat [plaintiff] Lamar only sought permits for those signs that were larger than the size allowed, however, is of little consequence; Lamar need not have first sought and been denied any permit prior to filing a facial challenge."[37] Nor did the plaintiff lack standing because it had not previously submitted requests for a permit. Other cases agree with this decision.[38] As the Sixth Circuit held, the "prior restraint constitutes a concrete and particularized actual injury in fact."[39] This injury in fact provides the basis for standing to attack procedural provisions that violate prior restraint principles. Whether a plaintiff will succeed on the merits is another matter.

Some cases incorrectly take a contrary view. A Ninth Circuit case[40] refused to grant standing to attack procedural provision when the city denied the plaintiff's permits under code provisions that were substantively constitutional. Neither the plaintiff's lawsuit nor its actions in the case showed an intent to file applications that complied with code requirements. The plaintiff could not show it would ever genuinely be threatened by an unconstitutional prior restraint arising out of the code's procedural provisions. Other decisions are sympathetic to this view.[41] They are inconsistent with the Supreme Court's standing rules in prior restraint cases when a plaintiff attacks procedural provisions in a sign code.

6. Drafting Sign Codes to Avoid Prior Restraint Problems

The possibility that courts will allow facial claims against decision making procedures in sign codes requires careful attention to how these procedures should be drafted, and what procedures these codes should contain. When a sign code includes discretionary review procedures, the legitimacy of the criteria adopted to carry out these reviews is especially critical. This problem comes up under adult use ordinances, which also regulate uses subject to the free speech clause and may contain conditional use and other discretionary approval requirements.

Criteria for discretionary review procedures in adult use ordinances have received extensive attention in the cases. Results vary, but courts invalidate broad criteria commonly used when free speech is not at issue, such as a requirement that an adult use must not "detrimentally affect" neighborhood uses.[42] Only ministerial and objective criteria are tolerated. An example is a Supreme Court case approving licensing criteria for adult uses, such as whether an applicant is underage, provides false information, had a license revoked or suspended within the prior year, or operated an adult business determined to be a "public nuisance."[43] Some courts are more generous when reviewing criteria adopted for discretionary reviews in adult use ordinances, and will approve a neighborhood compatibility standard because adult use ordinances are adopted to prevent adverse secondary effects on neighborhoods.[44]

Neither do the sign code cases tolerate broadly-stated standards. Sign codes containing objective criteria are upheld.[45] Criteria that are less than objective or not ministerial are struck down, such as the criteria considered in Desert Outdoor Advertising v. City of Moreno Valley, a Ninth Circuit case.[46] The ordinance provided a permit would issue only if a sign "will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses." The court held the ordinance contained "no limits" on the discretion of city officials, gave them unbridled discretion in applying the criteria, and held that "City officials can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community."

Local governments drafting discretionary review procedures for sign codes must take these decisions into account. Some discretionary review procedures are not needed, and sign codes especially should not contain variance and conditional use provisions. Careful drafting of what signs are permitted and what signs are not will avoid the need for conditional uses.[47] If a variance provision is included, it should be restrictive. This is the approach taken in Street Graphics and the Law, published by the American Planning Association, which describes the content of an effective and defensible sign code and contains a model ordinance. The model ordinance authorizes variances only from height and setback requirements, and recommends that the variance vary not more than 25% from code requirements.[48]

Design review is one discretionary procedure that deserves consideration. It can allow the approval of creative signs that do not meet code requirements but are an aesthetic improvement on these requirements. The model ordinance in Street Graphics and the Law authorizes a design review process called a Program for Graphics. This option provides a "creative incentive" for two or more owners who plan to display signs to make "a unified visual statement

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that integrates the design of street graphics with the design of the building on which they will be displayed and with the surrounding area."[49] Criteria in the model ordinance require signs in a Program for Graphics to be compatible "with the theme, visual quality and overall character of the surrounding area." They must also be "[a]ppropriately related in size, shape, materials, [lettering, color, illumination] and character to the function and architectural character of the building or premise on which they will be displayed, and ... compatible with existing adjacent activities." The terms in brackets are optional.

Street Graphics and the Law is cautionary about the validity of these criteria, but the cases have upheld similar requirements. In G.K. Ltd. Travel v. City of Lake Oswego,[50] for example, the Ninth Circuit upheld similar criteria and distinguished its Moreno Valley case discussed earlier. Under the Lake Oswego sign code, the city could deny permits only when a sign did not comply with reasonably specific size and type criteria or was not compatible with the surrounding environment. Reference to the surrounding environment and the "compatibility" requirement were explicitly defined. Officials could look only at the proposed sign's relationship "with other nearby signs, other elements of street and site furniture and with adjacent structures." In determining whether the sign was compatible, the code instructed permitting officials to consider a limited and objective set of criteria such as "form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering." Additionally, the code required that most permit applications must be processed within 14 days of receipt of the application, instructed applicants on what they should include in the application, and allowed an appeal to the city council.[51] This is an example of detailed criteria that can authorize a defensible design review process that meets prior restraint principles. The court was satisfied the sign code contained appropriate standards "cabining" the administrator's discretion.

7. Conclusion

Discretionary review procedures in sign codes raise important free speech problems. Unless carefully drawn, criteria for these procedures are invalid as prior restraints on speech. Sign companies can bring lawsuits in federal court in which they can attack these procedures facially, even if they have not been injured by these procedures. Local governments need to review their sign codes carefully and revise any discretionary review criteria that may be vulnerable as a prior restraint on speech.

NOTES

1. For discussion of free speech law as applied to sign regulation, see Daniel R. Mandelker, Sign Regulation and Free Speech: Spooking the Doppelganger in Trends in Land Use Law from A to Z, ch. 3 (Patricia E. Salkin, ed. 2001); Randal Morrison, Sign Regulation in Protecting Free Speech and Expression: First Amendment and Land Use Law, Daniel R. Mandelker & Rebecca L. Rubin, eds. 2002).
2. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, 43 L. Ed. 2d 448, 1 Media L. Rep. (BNA) 1140 (1975).
3. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448, 1 Media L. Rep. (BNA) 1140 (1975) (a prior restraint gives "public officials the power to deny use of a forum in advance of actual expression").
4. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771, 15 Media L. Rep. (BNA) 1481 (1988).
5. Prior restraint requirements, other than a requirement for adequate standards, are not clear. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) , the Court, interpreting its earlier decision in *Freedman v. State of Md.*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, 1 Media L. Rep. (BNA) 1126 (1965), held that "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." A later case, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), then held that time limits are required only if a regulation is not content neutral. See *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla.*, 348 F.3d 1278 (11th Cir. 2003). *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004), applied the prompt judicial review requirement of FW/PBS to an adult licensing ordinance. It held that statutory procedures for judicial review are adequate if the courts are sensitive to the need to prevent first amendment harms and act accordingly. See *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421, 435 (4th Cir. 2007), cert. denied, 128 S. Ct. 914, 169 L. Ed. 2d 731 (U.S. 2008) (time limits not required for content neutral sign ordnance).
6. A facial attack against a code claims it is unconstitutional in any circumstance in which it can be applied.
7. For detailed discussion of this strategy, see John M. Baker & Robin M. Wolpert, The Modern Tower of Babel: Defending the New Wave of First Amendment Challenges to Municipal Billboard and Sign Regulations, Planning & Environmental Law, Vol. 58, No. 10, at 3 (2006).
8. A billboard is an off-premise sign that usually advertises products or services not sold on the premises but may also carry noncommercial messages.
9. *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 149 (2d Cir. 1991) (deleting 11 provisions would make the ordinance look like a "gutted building"); *World Wide Rush, LLC v. City of Los Angeles*, 2008 WL 2477440 (C.D. Cal. 2008) (severing sign ban exceptions would upset "policy balance" city attempted to achieve). But see *Midwest Me-*

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dia Property, L.L.C. v. Symmes Tp., Ohio, 503 F.3d 456, 465 (6th Cir. 2007) (size and height restrictions severable). Severability is a question of state law. There is a longstanding presumption in favor of severability. *Kimbrough v. U.S.*, 128 S. Ct. 558, 577, 169 L. Ed. 2d 481 (U.S. 2007).

10. The courts apply state law to decide whether rights have vested, and these claims may not succeed. *Tanner Advertising Group, L.L.C. v. Fayette County, GA*, 451 F.3d 777 (11th Cir. 2006) (Georgia); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004) (Florida, and explaining when a vested right exists).
11. *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), is a leading land use case adopting this principle.
12. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) (overbreadth doctrine thus allows "attacks [sic] on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity").
13. See *U.S. v. Williams*, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (U.S. 2008). *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), is a leading case recognizing overbreadth standing.
14. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).
15. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (citing cases).
16. Alan K. Chen, Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose, 38 Harv. C.R. C.L. L. Rev. 31, 43 (2003).
17. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). See also *Sabri v. U.S.*, 541 U.S. 600, 609-610, 124 S. Ct. 1941, 158 L. Ed. 2d 891, 5 A.L.R. Fed. 2d 821 (2004) ("we have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence").
18. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). Discussion of this limitation did not appear in the sign cases discussed in this article, and it has seldom been applied by federal courts.
19. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 34 Env't. Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913 (1992).
20. For a case holding contra, see *National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991), relying on a footnote in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11, 101 S. Ct. 2882, 69 L. Ed. 2d 800, 16 Env't. Rep. Cas. (BNA) 1057, 11 Envtl. L. Rep. 20600 (1981), stating that "we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Metromedia* allowed a plaintiff engaged in noncommercial and commercial advertising to attack provisions of the ordinance affecting noncommercial speech, over a dissent by Justice Stevens. *Action Outdoor Advertising JV, L.L.C. v. Town of Shalimar, Fla.*, 377 F. Supp. 2d 1178 (N.D. Fla. 2005), criticized *Ft. Lauderdale* and similar cases because in none of these cases had the plaintiff engaged in noncommercial advertising. See also *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349 (S.D. Fla. 2003), rev'd on other grounds, 402 F.3d 1329 (11th Cir. 2005), cert. denied, 546 U.S. 1170, 126 S. Ct. 1318, 164 L. Ed. 2d 48 (2006) ("defies logic" to interpret *Metromedia* footnote as granting standing to commercial advertisers to raise claims by noncommercial advertisers). Also following *Metromedia: National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990); *Gannett Outdoor Co. v. City of Pontiac*, 1989 U.S. Dist. LEXIS 18090 (E.D. Mich. Aug. 17, 1989). See also *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456, 466 (6th Cir. 2007) (dissenting opinion would apply *Metromedia* and grant standing).
21. Total bans on commercial billboards are upheld. *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999). A ban on noncommercial billboards may be struck down. *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (not enough that both types of speech are treated equally). See *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 804 (9th Cir. 2007) (ordinance did not apply to noncommercial speech).
22. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006), cert. denied, 127 S. Ct. 156, 166 L. Ed. 2d 38 (U.S. 2006).
23. *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290 (7th Cir. 1993).
24. The court distinguished other cases where standing was conferred though redress was not certain if plaintiff prevailed, such as *Clements v. Fashing*, 457 U.S. 957, 962, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982) (person may challenge laws blocking his candidacy for election to public office without establishing that voters would elect him).
25. *Maverick Media Group, Inc. v. Hillsborough County, Fla.*, 528 F.3d 817 (11th Cir. 2008); *Lockridge v. City of Oldsmar*, 273 Fed. Appx. 786 (11th Cir. 2008); *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886 (9th Cir. 2007); *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456 (6th Cir. 2007); *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421 (4th Cir. 2007), cert. denied, 128 S. Ct. 914, 169 L. Ed. 2d 731 (U.S. 2008); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343 (6th Cir. 2007); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006) (plaintiff also failed to show causation);*Granite State Outdoor Advertising, Inc., v. City of Clearwater, Fla.*, 351 F.3d 1112 (11th Cir. 2003); *Bill Salter Advertising, Inc. v. City of Brewton, Ala.*, 486 F. Supp. 2d 1314 (S.D. Ala. 2007) (reviewing cases). See also accord *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006) (festival permit).

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26. *North Ave. Novelties v. City of Chicago*, 88 F.3d 441 (7th Cir. 1996).
27. *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421 (4th Cir. 2007), cert. denied, 128 S. Ct. 914, 169 L. Ed. 2d 731 (U.S. 2008).
28. *Lamar Advertising of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365 (2d Cir. 2004); *Roma Outdoor Creations, Inc. v. City of Cumming, Ga.*, 2008 WL 2332870 (N.D. Ga. 2008) (but officials took 150 days to act on the applications and exploited discretion provided by the code to arbitrarily deny the applications).
29. *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261 (11th Cir. 2006) .
30. *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). See also *Solomon v. Gainesville*, 763 F.2d 1212 (11th Cir. 1985) (prosecution for display of sign).
31. The Court explained in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (no departure from rule that litigant can only vindicate his own constitutional rights when statutes unconstitutional as applied to its conduct but also unconstitutional on their face).
32. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771, 15 Media L. Rep. (BNA) 1481 (1988).
33. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756-757, 108 S. Ct. 2138, 100 L. Ed. 2d 771, 15 Media L. Rep. (BNA) 1481 (1988) (citations omitted).
34. *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), applied in *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421 (4th Cir. 2007), cert. denied, 128 S. Ct. 914, 169 L. Ed. 2d 731 (U.S. 2008).
35. *Roma Outdoor Creations, Inc. v. City of Cumming, Ga*., 2008 WL 2332870 (N.D. Ga. 2008); *The Lamar Co., L.L.C. v. City of Marietta, Ga.*, 538 F. Supp. 2d 1366, 1372 (N.D. Ga. 2008) ("Lamar as a permit applicant is subject to that alleged grant of unbridled discretion.").
36. Indeed, this may provide the basis for a futility exception to the need to apply for a permit. *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996).
37. *Lamar Advertising of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 374 (2d Cir. 2004).
38. *Covenant Media Of SC, LLC v. City Of North Charleston*, 493 F.3d 421 (4th Cir. 2007), cert. denied, 128 S. Ct. 914, 169 L. Ed. 2d 731 (U.S. 2008); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343 (6th Cir. 2007); *Café; Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274 (11th Cir. 2004) (ordinance a restraint on speech in advance of its occurrence because it required permit prior to erecting any new billboard); *Lamar Advertising Co. v. City of Douglasville, Georgia*, 254 F. Supp. 2d 1321 (N.D. Ga. 2003) . See also *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006) (allowing procedural challenge without discussion of standing); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996).
39. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) (quotation marks omitted), citing *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071, 1074, 1994 FED App. 0146P (6th Cir. 1994).
40. *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 895 (9th Cir. 2007).
41. *Lockridge v. City of Oldsmar*, 273 Fed. Appx. 786 (11th Cir. 2008) (overbreadth doctrine is not exception to constitutional standing doctrine); *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006) (festival permit; court agrees with plaintiff's argument that it has standing because it applied for permits and future applications would be subject to procedural regulations); *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112 (11th Cir. 2003) (complaint of lack of time limits does not create Article III standing because plaintiff's applications decided within a reasonable time on day of submission, so no injury). See also *Advantage Advertising, LLC v. City of Hoover*, Ala, 200 Fed. Appx. 831 (11th Cir. 2006) (plaintiff not subject to ordinance because billboards prohibited and did not allege it would construct signs permitted).
42. *Amici v. New Castle County*, 553 F. Supp. 733 (D. Del. 1982). See also *Lady J Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) (cases showing virtually any amount of discretion beyond merely ministerial is suspect; standards must be precise and objective); *Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000), as amended on denial of reh'g, (July 26, 2000); Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law & Litigation § 6.31 (2008 ed.); Daniel R. Mandelker, Land Use Law § 6.57 (5th ed. 2003) (discussing cases).
43. Thomas, in *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) (license may also be denied if applicant is not authorized to do business in the state, has not timely paid taxes, fees, fines, or penalties, or has not obtained a sales tax license). See also T*homas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) (approving objective standards for park permit).
44. *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121 (7th Cir. 2001) (liquor license for tavern with erotic entertainment; city is only trying to "zone [these uses] out of areas in which neighbors object to the presence of a strip joint").
45. *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798 (9th Cir. 2007) (Whether denial of a variance "would deprive the applicant of privileges enjoyed by owners of similarly zoned property;" whether a variance constitutes a "grant of special privilege;" whether the variance allows the applicant to engage in conduct otherwise forbidden by the city; "practical difficulty" and "unnecessary hardship" defined in in terms of "unique physical or topographic circumstances or conditions of design"); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006) (authority to request additional information for application relating to "kind, size, material, construction, and location" of proposed signs); *Norton Outdoor Advertising, Inc. v. Pierce Township*, 2007 WL 1577747 (S.D. Ohio 2007) (denial of

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permit, e.g., that seeks to put more than one sign on a lot or when proposed sign is more than thirty feet in height).

46. *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996). See also *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006) (festival permit, exempting from the permitting requirement events that are "in major part initiated, financed, and executed by the City"); *Café; Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274 (11th Cir. 2004) (permits to be reviewed in accordance with Standard Building Code; no specific grounds for denial in Code); *The Lamar Co., L.L.C. v. City of Marietta, Ga.*, 538 F. Supp. 2d 1366 (N.D. Ga. 2008) (no standards in code, no requirement to grant permit).
47. A conditional use procedure is prior restraint that is presumptively unconstitutional.
48. Daniel R. Mandelker, Street Graphics and the Law 70, American Planning Association, Planning Advisory Rep. No. 527 (2004).
49. Daniel R. Mandelker, Street Graphics and the Law 70, American Planning Association, Planning Advisory Rep. No. 527 at 66-69 (2004).
50. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006), cert. denied, 127 S. Ct. 156, 166 L. Ed. 2d 38 (U.S. 2006).See also accord *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 904 (9th Cir. 2007) (requiring specific findings on proposed height in relation to freeway elevation, number and spacing of signs in area, and sign's height, design, and location in relation to its proposed use; signs to be "compatible with the style or character of existing improvements upon lots adjacent to the site," including incorporating specific visual elements such as type of construction materials, color, or other design detail); *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 981 P.2d 1146 (1999) (distinguishing Moreno; standards were that location and placement of sign will not endanger motorists ; that sign will not cover or blanket prominent view of structure or facade of historical or architectural significance; that sign will not obstruct views of users of adjacent buildings to side yards, front yards, or to open space; that sign will not negatively impact visual quality of a public open space; that sign is compatible with building heights of existing neighborhood and does not impose a foreign or inharmonious element to an existing skyline; and that sign's lighting will not cause hazardous or unsafe driving conditions for motorists). *World Wide Rush, LLC v. City of Los Angeles*, 2008 WL 2477440 (C.D. Cal. 2008), explains the Ninth Circuit cases and holds invalid a provision authorizing the adoption of specific plans for signs. and holds invalid a provision authorizing the adoption of specific plans for signs.
51. Summarizing from *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1083 (9th Cir. 2006), cert. denied, 127 S. Ct. 156, 166 L. Ed. 2d 38 (U.S. 2006).

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RECENT CASES

Town's discovery request for names of members of congregation in a RLUIPA challenge is granted subject to protective order.

Christ Covenant Church owns property in the Town of Southwest Ranches, Florida where its existing sanctuary and a smaller administrative building are located. The church wants to build a new facility to provide additional space for wedding receptions, community association meetings, church leadership meetings, family activities, and similar gatherings. Following a public meeting where citizens spoke out against the church, town officials denied the expansion request, citing lack of parking spaces.

The church sued, claiming the denial violated the Religious Land Use and Institutionalized Person Act, 42 U.S.C. § 2000cc ("RLUIPA"), the First and Fourteenth Amendments, and the Florida Religious Freedom Restoration Act of 1998 (Fla. Stat. 761.01 et seq.). When the church argued that the town's denial substantially burdened its religious exercise because church activities were already over-crowded and the denial would prevent the church from growing, the town sought names of members of the congregation in order to depose individual members and "test the veracity" of the church's claims. The church objected to the discovery request.

The federal district court granted the town's motion to compel, subject to a protective order. First, the town had to show that the requested discovery was relevant under Federal Rule of Civil Procedure 26(b). Since the church put its overcrowding into issue, the names of church members is relevant to the assertions of present overcrowding, but not relevant to the church's future plans for growth. Individual church members cannot be expected to know what the church's future plans might be. Thus, the town satisfied Rule 26(b)'s relevancy requirement.

Based on the vocal opposition to the church expressed at the public meeting, the court concluded the church met its burden that disclosure of its membership lists might chill its members' exercise of their First Amendment rights. Then the court asked whether the town had a compelling need for the requested discovery and used a balancing test to conclude that the town had demonstrated a compelling need for the names of the church members. However, that information would be subject to a protective order. The names would be disclosed only to the town's counsel, and could be used only for defending the town in this litigation. *Christ Covenant Church v. Town of Southwest Ranches*, 2008 WL 2686860 (S.D. Fla. 2008).

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