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EXECUTIVE DEPARTMENT
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To the Honorable, the City Council:

Included on my agenda for the meeting of July 29, 1996, Item #40, was a copy of our Petition for Rehearing and Suggestion for Rehearing En Banc filed with the court on July 24, 1996 in the case of Ackerley Communications of Massachusetts v. City of Cambridge, et al., First Circuit Court of Appeals #95-2324.

On August 14, 1996, the United States Court of Appeals for the First Circuit denied our that petition, and I am attaching a copy of the Order of the Court.

I have arranged for Attorney Peter Koff to be available to meet with the City Council in executive session at the meeting of September 16, 1996 to discuss these developments and address questions of further litigation strategy.

Very truly yours,

Robert W. Healy
City Manager

18-3001
10/1/96

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-2324

ACKERLY COMMUNICATIONS OF MASSACHUSETTS, INC.,
Plaintiff, Appellant,

v.

CITY OF CAMBRIDGE, ET AL.,
Defendants, Appellees.

BEFORE

Torruella, Chief Judge,
Coffin and Bownes, Senior Circuit Judges,
Selya, Cyr, Boudin, Stahl and Lynch, Circuit Judges.

ORDER OF COURT

Entered: August 14, 1996

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

WILLIAM H. NG, Clerk.

By JANICE M. O'NEIL
Chief Deputy Clerk

[Messrs. Berman, Broadley, Berman, Koff, Goldberg]

City of Cambridge

MASSACHUSETTS

In City Council

9/16

, 1996

Motion for Executive Session to ~~Settle~~ Discuss
Pending Litigation Regarding Billboards

YEA	NAY	ABSENT	PRESENT	
✓				V.M. Kathleen L. Born
✓				Ms. Henrietta Davis
✓				Mr. Francis H. Duehay
✓				Mr. Anthony Galluccio
✓				Mr. Kenneth E. Reeves
✓				Mr. Michael A. Sullivan
✓				Mr. Timothy J. Toomey, Jr.
✓				Ms. Katherine Triantafillou
✓				Mayor Sheila T. Russell

9 0 0 0
7:28



CITY OF CAMBRIDGE

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July 24, 1996

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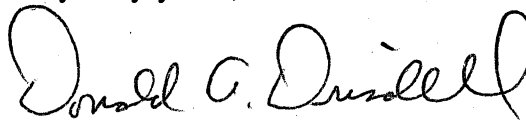
Re: *Ackerley Communications, Inc. v. City of Cambridge, et al., No. 95-2324,*
United States Court of Appeals for the First Circuit

Dear Mr. Healy:

I am transmitting a copy of our Petition for Rehearing and Suggestion for Rehearing In Banc, filed today with the First Circuit Court of Appeals. The City is not entitled as of right to such a rehearing, and in fact such rehearings are not often granted. It is our view, however, that the recent decision in this case presents questions of exceptional importance regarding the rights of cities and towns to enact meaningful, content-neutral sign control regulations which require the removal of nonconforming signs to the extent permitted by the state Zoning Act. We are hopeful that the full bench of the First Circuit Court of Appeals will agree to rehear the case which was recently decided by a three judge panel of the Court.

We will advise you of any further developments in this matter.

Very truly yours,


Donald A. Drisdell

12,680

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 95-2324

**ACKERLEY COMMUNICATIONS OF
MASSACHUSETTS, INC.,**
Plaintiff-Appellant,

v.

CITY OF CAMBRIDGE and ROBERT BERSANI,
as he is Acting Commissioner of Inspectional Services
in the City of Cambridge,
Defendants- Appellees.

**ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC**

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Dated: July 23, 1996

Attorneys for Appellees City of Cambridge and Robert Bersani

TABLE OF CONTENTS

STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 35.1 ii

STATEMENT OF THE CASE 1

 Introduction 1

 Nature of the Case 2

 Statement of the Relevant Facts 5

ARGUMENT 6

 The Panel Decision Improperly Sidestepped Application of the Supreme Court’s Test for Determining Whether the Cambridge Ordinance Is Content-Based or Content-Neutral 7

 The Panel Decision Erroneously Applied and Improperly Expanded the Rules for Evaluating the Constitutionality of Sign Regulations 9

 a. Misapplication of Metromedia’s Rules 9

 b. Misapplication of the City of Somerville “Past Speech” Rule 12

 The Panel Decision Misinterpreted the Ordinance 14

CONCLUSION 15

APPENDIX

 Excerpts from City of Cambridge Zoning Ordinance App. 1

 Memorandum and Order entered July 19, 1989 in Ackerley Communications of Massachusetts v. City of Somerville App. 5

STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 35.1

In accordance with Local Rule 35.1, counsel for petitioners state as follows:

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981);
City of Ladue v. Gilleo, 114 S.Ct. 2038 (1994);
City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993);
Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513
(1st Cir. 1989);
National Amusements, Inc. v. Town of Dedham, 43 F.3d 731 (1st Cir. 1995), *cert. denied*,
115 S.Ct. 2247 (1995);
John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980).

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether the First Amendment permits a municipality to enact and, after a four-year "grace period," to enforce a content-neutral sign ordinance which requires removal of existing "off-site" outdoor advertising signs used to display both noncommercial and commercial messages.
2. Whether Massachusetts' long-standing, comprehensive state regulatory scheme for controlling outdoor advertising signs, an area which is properly left to state and local legislative and zoning judgments, has been significantly undermined by the panel decision which expands both the Metromedia rule and this Court's own "past speech" rule for evaluation of the constitutionality of the Cambridge sign ordinance.

STATEMENT OF THE CASE

Introduction. This petition for rehearing by the full Court presents questions of exceptional importance regarding the rights of cities and towns to enact meaningful, content-neutral sign control regulations which require removal of nonconforming billboards.¹ The panel decision is most unusual. Even though no provision of the City of Cambridge sign control ordinance itself, or the related state statute, was found to be unconstitutional, the City of Cambridge has been prohibited from requiring removal of billboards which have displayed both commercial and noncommercial messages simply because these billboards are not within the "grandfather" exemption of the state zoning law,²

From the narrow perspective of the City of Cambridge's present intention, and future ability, to enforce rational sign control zoning regulations which are consistent with the First Amendment *and* which enable the City to achieve its aesthetic goals, the panel decision is extremely troubling. By adoption of a unique approach for evaluation of municipal sign regulations which conflicts with the controlling Supreme Court precedents and previous decisions of this Court, the panel decision significantly complicates the district court's ability to apply an already-complex area of First Amendment law to the facts of this case.³

¹The term "billboard" is commonly used to describe an "off-site" outdoor advertising sign which is used to display a message advertising a product or service unrelated to the particular location of the sign. An "on-site" sign, on the other hand, carries a message which bears some relationship to the activities carried out on the premises where the sign is located. See the panel decision, slip op. at 2 n.1, *quoting*, Ackerley Communications of Massachusetts v. City of Somerville, 878 F.2d 513-514 n.1 (1st Cir. 1989).

²Mass. Gen. L. ch. 40A, § 6.

³The panel decision also misconstrues the ordinance. See petition at 14-15.

Viewed from the broader perspective that in the future district courts will be unable consistently to apply the panel decision, and that cities and towns (at least those in Massachusetts) no longer have clear rules to guide their enactment and enforcement of new sign control regulations, the panel decision poses significant, and exceptional, concerns which warrant rehearing by this Court in banc. In its July 11, 1996 decision the panel used a test for evaluation of the Cambridge ordinance which is squarely in conflict with the Supreme Court and First Circuit precedents; which will be difficult to apply in future cases; and which unnecessarily undermines the state's comprehensive, long-standing regulatory scheme for controlling outdoor advertising signs. Furthermore, the City believes that the panel decision creates such a stringent test that cities and towns now face, from a practical point of view, an impossible burden to meet in satisfying the panel's First Amendment approach.

Nature of the case. The action below was brought by Ackerley Communications of Massachusetts, Inc. ("Ackerley"), alleging that the City of Cambridge's June 1991 sign control ordinance violates the First Amendment.⁴ In September of 1995, more than four years after enactment of this zoning ordinance (and three months after the suit had been filed), the City's commissioner of inspectional services requested that Ackerley (and the owners of other nonconforming outdoor advertising signs) remove their signs within 90 days, based upon the results of a July 1995 field inspection. JA 123-130.

Ackerley then immediately moved for a preliminary injunction. Ackerley argued that the June

⁴Ackerley's complaint also alleged a Fifth Amendment takings claim, a claim which subsequently was brought by Ackerley in a new state court action and was not included in the preliminary injunction motion heard by the district court.

1991 ordinance, in combination with the Massachusetts zoning act, had an unconstitutional impact on existing nonconforming signs. Its two major arguments were that (1) the combined effect of the state zoning statute and the ordinance results in an unconstitutional preference for commercial messages over noncommercial messages in violation of Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981);⁵ and (2) the Cambridge ordinance does not materially advance the City's interest in aesthetics because nonconforming off-site signs are required to be removed but "physically identical" on-site signs are allowed to remain, along with many other non-conforming uses, and therefore the ordinance fails to satisfy the test of City of Cincinnati v. Discovery Network, Inc., ___ U.S. ___, 113 S.Ct. 1505, 1507-09 (1993). At oral argument on the preliminary injunction motion, and on a single page of Ackerley's reply memorandum submitted at that time, Ackerley for the first time asserted that the Cambridge ordinance also failed to comply with the "past speech" rule of City of Somerville.⁶

Ackerley's motion for preliminary injunction was denied by the district court (Harrington, D.J.). JA 359-364. The district court concluded that the Cambridge ordinance makes a permissible distinction -- which is not content-based -- between on-site and off-site signs; that the ordinance, read in conjunction with the state statute, does not impermissibly favor commercial speech over

⁵This argument was based upon the factual assumption that Ackerley's nonconforming "off-site" outdoor advertising signs had been used, and at the time of the complaint were being exclusively used, for the display of noncommercial and public service messages; while the nonconforming "on-site" signs in Cambridge are primarily used to display commercial messages.

⁶In City of Somerville, this Court held that sign regulations which base the future right to speak upon "past speech" are unconstitutional under the First Amendment, which differs from the approach taken in Metromedia and its progeny and is not followed elsewhere.

noncommercial speech; and that the substitution clause in the Cambridge ordinance, which allows any permitted on-site sign to display any noncommercial message, satisfies the test of Metromedia. The district court did not address the "past speech" argument belatedly advanced by Ackerley.

On appeal, and without objection by the parties, the panel reached the merits of the First Amendment issue.⁷ The panel decision, after erroneously concluding that the effect of "the Cambridge scheme"⁸ is to permit only nonconforming messages related to the premises, concludes that the ordinance and state statute impermissibly distinguish among categories of noncommercial speech⁹ and unlawfully penalize "past speech" in violation of City of Somerville.¹⁰

⁷Although at oral argument the City agreed with the panel's suggestion that the Court reach the merits of the First Amendment issues, the City neither anticipated, nor reasonably could have expected, that the panel decision would embrace Ackerley's disputed claim that all of its Cambridge billboards have exclusively displayed noncommercial messages since enactment of the ordinance in June 1991.

⁸The panel decision treats the state law "grandfathering" provision as part of the Cambridge ordinance for purposes of its analysis (*see slip op.* at 7 n.6) and concludes in Part B of its discussion that the ordinance makes an unconstitutional distinction between nonconforming "on-site messages" and "off-site messages." *Id.* at 10-13. But in reaching that conclusion the panel decision does not consider the curative effects of the ordinance's substitution provision, the effect of which is discussed only in Part C of its opinion regarding the "past speech" rule.

⁹Although Ackerley had included in its complaint (JA 11-12, 14-15) allegations that § 6 of the state zoning act was unconstitutional, on appeal Ackerley abandoned this argument.

¹⁰Because the "past speech" issue was not even addressed by the district court, and was fully presented for the first time on appeal, this issue normally should not be considered by this Court, *see National Association of Social Workers v. Harwood*, 69 F.3d 622, 627-628 (1st Cir. 1995), a position taken by the City in its appellee brief at 20 n.21 but not discussed in the panel decision.

Statement of the relevant facts. Since 1984 the City of Cambridge has adopted two successively more-restrictive sign regulations, as amendments to its zoning ordinance, to control a proliferation in the number, height, and size of large signs which are detrimental to the City's interest in protecting and improving its aesthetic environment. Prior to enacting the 1991 ordinance, the City made a detailed field evaluation of the impacts of various off-site and on-site signs, concluding that in almost all cases the large, visually-intrusive off-site signs (such as those maintained by Ackerley) have significantly greater adverse aesthetic impacts. JA 275-278; 294-312.¹¹

Ackerley or its predecessor has maintained all of its 46 Cambridge outdoor advertising signs over the past 30 or more years primarily to display messages paid for by commercial advertisers, *see* JA 10, 45,¹² although these signs also carry messages of noncommercial organizations, public affairs groups, and candidates for political office. JA 45. Ackerley (or its predecessor) has repeatedly obtained and renewed permits from the Massachusetts Outdoor Advertising Board ("OAB") to erect

¹¹Although Ackerley asserted (JA 41) that its signs are, from the point of view of aesthetics, "physically identical" with the on-site signs which are permitted to remain, this claim was not supported by Ackerley in the record below and is explicitly contradicted not only by the words of the ordinance itself (JA 333), but also by the detailed report of the community development department completed prior to enactment of the ordinance. JA 292-312.

¹²This Court may take judicial notice of facts concerning the commercial advertising objectives of Ackerley's predecessor, John Donnelly & Sons, Inc., which were contained in a Supreme Judicial Court decision, John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 226 (1975):

Although off-premise signs are sometimes used for public service advertising, this activity can be considered only as incidental to Donnelly's primary function, the leasing of space for commercial or product advertising and not the dissemination of ideas or the communication of information.

See also General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 168 (1935) (outdoor advertising is a business, the object of which is to hawk goods).

and maintain each of its signs,¹³ *see* the City's appellee brief at 22 & n.26. The OAB permits would not be necessary if Ackerley simply sought to use its signs for noncommercial messages.

The record does not contain any facts relative to what average percentage of Ackerley's 46 Cambridge signs have been used, at any one time, to display noncommercial messages. Ackerley has asserted, however, that as a state-wide average it uses its Massachusetts signs about 15% of the time for display of noncommercial and public affairs messages. JA 135. Subsequent to enactment of the June 1991 ordinance, Ackerley maintained that it has exclusively used its Cambridge signs for the display of noncommercial messages, *see* JA 137-138, an assertion which the City disputed below and is now the subject of active discovery. *See* the City's brief to the panel at 22 n.27.¹⁴

ARGUMENT

The panel decision stands for the proposition that a municipality may not enforce a content-neutral sign ordinance requiring removal of nonconforming off-site signs (which have been used to display both commercial and noncommercial messages) unless the municipality treats nonconforming on-site signs equally. In reaching that result, which directly conflicts with long-standing Supreme

¹³Under Mass. Gen. L. ch. 93, §§ 29-30, a permit from the OAB is *not* required either for the use of off-sign structures to display noncommercial messages or for the display of commercial on-site signs.

¹⁴To the extent the panel's decision was based upon its acceptance of these disputed facts, the City believes that the panel went too far in adopting factually unsupported and disputed assertions which are the subject of on-going litigation before the district court. *See, e.g.*, JA 154-240, where Ackerley's photographic records do not begin until 1993 and are incomplete. Ackerley has not justified, with supporting records, its claim that since June of 1991 its Cambridge signs (other than those on MBTA property) have displayed only noncommercial messages.

Court and First Circuit precedents, the panel made significant errors of law at three critical points in its legal analysis of the Cambridge ordinance: (1) the panel sidestepped application of the crucial first step in evaluation of whether the ordinance is content-neutral or content-based, the critical inquiry for determining the level of judicial scrutiny to apply to a restriction on speech,¹⁵ (2) the panel erroneously applied and expanded the specific rules applicable to sign regulations set out in Metromedia and this Court's decision in City of Somerville; and (3) the panel materially misconstrued the language and effect of the Cambridge ordinance, giving it an interpretation so significantly different than its plain meaning that the panel has created First Amendment issues which the ordinance specifically avoids.¹⁶

1. The Panel Decision Improperly Sidestepped Application of the Supreme Court's Test for Determining Whether the Cambridge Ordinance Is Content-Based or Content-Neutral.

The panel decision, although recognizing that the first step in evaluation of a restriction on speech is to determine the appropriate level of judicial scrutiny, nevertheless chose:

to sidestep that difficult question .. because we conclude that the Cambridge

¹⁵See the panel decision at 9-10, where the panel acknowledged that the normal first step in First Amendment analysis is to determine whether a restriction is content-based or content-neutral. See also National Amusements, Inc. v. Dedham, 43 F.3d 731, 736-738 (1st Cir. 1995), *cert. denied*, 115 S.Ct. 2247 (1995), where this Court discusses in some detail the factors which determine the level of judicial review in First Amendment speech regulation cases.

¹⁶The panel's conclusion that the ordinance favors on-site noncommercial messages related to the premises where the sign is located, and favors one class of speakers (Cambridge business and property owners), is without a factual basis. The substitution clause permits any permitted on-site sign to display *any* noncommercial message. Further, owners of signs inevitably control who can display messages displayed thereon, as Ackerley does with its outdoor advertising signs.

scheme suffers from two readily identifiable First Amendment flaws that bar its enforcement.

Slip op. at 9-10. By avoiding the determination as to what level of judicial inquiry to apply, however, the Court has substituted an unclear, and unjustifiably rigorous, judicial scrutiny which is inconsistent with the applicable tests for determining whether a restriction on speech is constitutional.¹⁷

Here the panel decision applied what amounts to a "double standard." It concluded that the ordinance itself does not make any content-based distinctions, which conclusion normally would have allowed the ordinance to receive only the standard or intermediate level of scrutiny. But at the same time the panel found a "content-based" distinction *in the state statute* between on-site signs and off-site signs. Slip op. at 16. *See also id.* at 4 (the combined effect of the local ordinance and the state law is to give protection only to signs which carry "onsite messages"); and at 10-14 (only "onsite messages" are protected.)¹⁸

With the notable exception of the City of Somerville case, this Court has customarily followed the Supreme Court's approach in determining the appropriate level of judicial inquiry in First Amendment speech cases. *See, e.g., National Amusements*, 43 F.3d at 736-738. This approach is still the correct one to follow. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), in

¹⁷The choice of what level of scrutiny to apply has obvious important ramifications on whether a speech regulation can withstand First Amendment analysis. If a regulation is content-neutral, it is more likely to survive the intermediate level of scrutiny than the rigorous review demanded for content-based restrictions.

¹⁸Use of the terms "onsite message" and "offsite message" in the panel decision adds further confusion. Prior to the panel decision, courts had consistently analyzed sign regulations by focusing on the differences in what kinds of messages can be displayed on "on-site" *signs* compared to "off-site" *signs*. *See, e.g., City of Somerville*, 878 F.2d at 513-514 n.1.

which the Supreme Court reversed this Court and held that Rhode Island's complete statutory prohibition against price advertising for alcoholic beverages was in violation of the First Amendment.¹⁹

Here by refusing to make the initial determination whether the ordinance is "content-neutral" and may, therefore, be reviewed under a less stringent standard of review, the panel decision denied the City of Cambridge an opportunity to prove that the ordinance satisfies the customary tests for evaluation of sign regulations.

2. The Panel Decision Erroneously Applied and Improperly Expanded the Rules for Evaluating the Constitutionality of Sign Regulations.

The panel reached its decision that the ordinance may not be enforced by erroneously applying and improperly expanding the First Amendment rules for evaluation of sign control regulations. The City of Cambridge respectfully believes that the panel decision is not a proper application of either Metromedia or City of Somerville for the following reasons.

a. **Misapplication of Metromedia's rules.** In Metromedia, the Supreme Court concluded that under the First Amendment a municipal sign regulation (1) may not, *at a particular location*, prefer commercial speech over noncommercial speech; and (2) may not allow some but not all types of noncommercial messages. 453 U.S. at 512-515. In reaching these basic First Amendment

¹⁹Subsequently the Supreme Court vacated the judgments in, and remanded for further consideration in light of 44 Liquormart, two Fourth Circuit cases which found municipal restrictions on the use of outdoor advertising signs for alcoholic beverage and tobacco advertisements to be valid under the First Amendment. See Penn Advertising/Baltimore v. Schmoke, 64 U.S. Law Week 3868 (July 1, 1996); Anheuser-Busch, Inc. v. Schmoke, 64 U.S. Law Week 3778 (May 20, 1996).

principles applicable to the distinctive medium of outdoor advertising, the Supreme Court accepted the common sense distinction between on-site signs and off-site signs, concluding that a municipal ordinance which favors on-site commercial messages over off-site commercial messages was permissible. 453 U.S. at 511-512.²⁰

This Court has also recognized that it is perfectly appropriate to make a distinction between on-site and off-site signs. See City of Somerville, 878 F.2d at 522,²¹ where the Court concluded that there is no First Amendment problem if a municipal sign regulation distinguishes between on-site and off-site commercial speech by allowing the former but prohibiting off-site commercial speech.²² See also John Donnelly & Sons v. Campbell, 639 F.2d 6, 13 (1st Cir. 1980), a pre-Metromedia case, in which this Court concluded that imposing restrictions on off-site signs, while allowing on-site signs which are "the least-aesthetically offensive," is not unfair.²³

²⁰The validity of this distinction was subsequently reaffirmed by the Supreme Court. See City of Ladue v. Gilleo, ___ U.S. ___, 114 S.Ct. 2038, 2042 & n.8. (1994); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

²¹See also pages 1-2, 4 of the First Circuit's Memorandum and Order, dated July 19, 1989, in the City of Somerville case, a copy of which is attached in an appendix to this petition.

²²In fact the City of Cambridge ordinance passes the three-part City of Somerville test, 878 F.2d at 522: the Cambridge ordinance lists four content-neutral criteria in § 7.18.1 to describe what nonconforming signs must be removed which are directly related to the City's aesthetic goals, the goals are justified by content-neutral reasons, and the criteria apply to all speakers who use the signs permitted to remain.

²³Numerous other Circuit decisions have also concluded that distinguishing between on-site and off-site commercial signs is perfectly proper. See, e.g., Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 610; Rappa v. New Castle County, 18 F.3d 1043, 1067 (3d Cir. 1994); Messer v. City of Douglasville, 975 F.2d 1505, 1509 (11th Cir. 1992); Rzadkowski v. Village of Lake Orion, 845 F.2d 653, 655 (6th Cir. 1988), quoting, Wheeler v. Commissioner of Highways,

The panel decision, however, takes the Metromedia "preference" rule and significantly expands it so that it has become a general rule that a local sign regulation must treat off-site signs used for commercial and noncommercial messages no differently than on-site commercial signs. This conclusion is a radical departure from Metromedia and City of Somerville, which limited application of the "preference rule" so that, *where a specific sign is permitted*, noncommercial messages have to be permitted if commercial messages are permitted. In addition, the panel decision unwisely compares the effect of the ordinance and state zoning law on "onsite messages" and "offsite messages," an approach which predictably led the panel to find that the Cambridge scheme makes an impermissible content-based distinction.

The panel decision is patently unfair to the City of Cambridge. The panel has effectively prohibited the City from enforcing its ordinance because of what it concluded is a "content-based" distinction in the state law. But in drawing that conclusion, the panel did not take account of the effect of the ordinance's substitution clause, which allows any permitted sign to display "any noncommercial message" in addition to any other message. JA 342. The City of Cambridge, which four years ago carefully followed the Metromedia rules and the City of Somerville rule, now finds that the panel decision has yet again changed the underlying legal analysis and misread the City's own ordinance. Especially in the field of zoning controls, where state and local regulations affecting property rights must be carefully considered prior to adoption, cities and towns will likely find it impossible to chase the "moving constitutional targets" continually being raised as outdoor

822 F.2d 586, 591 (6th Cir. 1987).

advertising companies such as Ackerley earnestly try to protect their signs.²⁴

Lastly, the City suggests that the panel decision inappropriately relied on the fact that the Cambridge sign report emphasizes the preference given to nonconforming on-site signs over nonconforming off-site signs. *See slip op.* at 11. Given the need, expressed in City of Somerville, that a sign regulation offer a rational aesthetic justification for any distinction among what types of signs are protected, *see* 878 F.2d at 521-522, it was perfectly proper -- and arguably necessary -- for the city to include these findings in its ordinance.²⁵

b. Misapplication of the City of Somerville “past speech” rule. This Court in City of Somerville held that a sign regulation which bases the future right to speak *solely* on the past content of speech creates a severe penalty against “past speech” and is inconsistent with the First

²⁴The City of Cambridge also notes that another effect of the panel decision is to throw into doubt the validity of the state’s regulatory scheme under which unpermitted off-site outdoor advertising signs are considered a nuisance subject to removal. *See* Mass. Gen. L. ch. 93, § 30A; John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 361 Mass. 756-758 (1971). Obviously the integrity of that scheme is important to cities and towns such as Cambridge which will be deprived of their ability, as provided in the regulatory takings decision of Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2899-2902 (1992), to rely on “the nuisance exception” created by state law to defeat Fifth Amendment regulatory takings claims.

²⁵*See also* City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1514-1516 (1993), a decision relied upon by Ackerley before the district court to support its argument that the exemption for nonconforming on-site signs and other nonconforming uses shows that the ordinance does not achieve the City’s aesthetic objectives. Given the burdens faced by municipalities in this area of First Amendment analysis to justify limitations on the free exercise of speech, the Cambridge ordinance properly finds that on-site signs, which are protected by the state law, serve the public interest since these signs identify businesses or occupants of premises. JA 333.

Amendment.²⁶ As originally framed in City of Somerville, the “past speech” rule seemed to apply only to the unusual situation where the eligibility for exemption under the ordinance itself was the *types of messages displayed before* the ordinance was adopted, a mechanism which this Court found to distinguish among speakers in a manner which had the potential to cause a significant chilling effect on future speech and which bore no relationship to aesthetics. Id. at 519-522.

The panel decision in this case, however, has extended the City of Somerville “past speech” rule so that *any* distinction among the *types of nonconforming signs* which receive protection against removal is an improper “content-based” distinction which can not be justified. The panel thus read City of Somerville too broadly and by so doing has subjected the City of Cambridge ordinance to an entirely novel rule, the effect of which is to invalidate an entire state regulatory scheme. Nothing in logic, or in City of Somerville, warrants that harsh result.

Under the panel’s approach, the City of Cambridge is caught in an irreconcilable bind between two inconsistent First Amendment approaches. Metromedia allows a municipality to distinguish between on-site and off-site signs as long as commercial messages are not given preference at a particular location. But City of Somerville, at least as applied in the panel decision, prohibits this very distinction on the grounds its depends upon “past speech.” Even if the City of Somerville approach may have been appropriate under the facts of that ordinance, when applied, as here, as a

²⁶In clarifying that its decision in City of Somerville did not mean that existing nonconforming billboards are entitled to remain in the future if used to display noncommercial messages, this Circuit saw no First Amendment problem with limiting future use of off-site billboards for noncommercial messages by means other than the offensive content-based “past speech” requirement in the Somerville ordinance. See Memorandum and Order entered July 19, 1989, a copy of which is included in the Appendix to this petition.

general rule the City of Somerville approach is unworkable and totally inconsistent with Metromedia.

3. The Panel Decision Misinterpreted the Ordinance.

Lastly, the panel decision makes a number of critical mistakes in its interpretation of the ordinance, mistakes which obviously influenced the panel's First Amendment conclusions about the ordinance. For example, the panel concluded that the ordinance draws a line between on-site and off-site noncommercial *messages*,²⁷ valuing more highly noncommercial messages related to the premises and, therefore, giving protection based on the messages which are favored. See panel decision at 10-12.²⁸ In fact, the substitution clause in the ordinance explicitly allows any permitted *sign*, such as the nonconforming on-site signs protected by the state statute, to display "any noncommercial message."

As a second example, the panel decision erroneously construed the ordinance to determine eligibility for exemption *based upon the nature of the on-site messages displayed on the day of enactment* of the ordinance. See slip op. at 13-14. In fact, the ordinance does not base any exemption upon the contents of any particular *message* on any particular day. The nonconforming

²⁷The panel decision mistakenly states that "[t]he only signs containing noncommercial messages that are exempted are those relating to the premises on which they stand, which inevitably will mean signs identifying nonprofit institutions." Slip op. at 11. See also slip op. at 13 ("Only those speakers whose signs displayed onsite messages ... may substitute noncommercial messages for the previous ones.") In fact, it is certain types of *signs*, not messages, that are exempted; and the on-site signs which are exempted by state law may display "*any* noncommercial message." (emphasis added). See ordinance § 7.17 (JA 342).

²⁸Similarly, the panel decision mistakenly states that "[t]he only signs containing noncommercial messages that are exempted are those relating to the premises on which they stand, which inevitably will mean signs identifying nonprofit institutions." Slip op. at 11. In fact, it is certain types of signs, not messages, that are exempted; and the on-site signs which are exempted by state law may display any noncommercial message.

signs exempted by the state zoning statute are protected as nonconforming structures because these signs are not regulated by the OAB and, accordingly, the state law prohibits Cambridge from applying the more stringent provisions of the 1991 sign ordinance to these signs. Furthermore, the signs which are exempted are protected because of their status as signs which do not need OAB permits under the state's long-standing regulatory scheme, an objective and readily-ascertainable standard which is not based on the content of any particular message.²⁹

CONCLUSION

For the reasons stated above, the City of Cambridge respectfully submits that rehearing should be heard in banc; that the parties should be provided an opportunity to submit supplemental briefs to the full Court; and that this matter should be set down for reargument before the full Court.

**CITY OF CAMBRIDGE and
ROBERT BERSANI, as he is Acting
Commissioner of Inspectional Services,**

By their attorneys,

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Arthur J. Goldberg / PK

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(617) 951-9980
Dated: July 23, 1996

²⁹Given that § 7.18.1 requires certain nonconforming signs to be removed only four years after the signs became nonconforming, application of the "past speech" rule seems particularly inappropriate. Ackerley had ample time to change the nature of its signs to conform to the prospective restrictions of the ordinance, a situation completely different than that in City of Somerville.

APPENDIX

ARTICLE 7.000 SIGNS AND ILLUMINATION

- 7.10 SIGNS
- 7.20 ILLUMINATION
- 7.30 SEVERABILITY

(i) SIGNS*Findings and Purpose***(ii) Findings**

This Article is based upon the following findings:

- A. The City of Cambridge has been and is now taking appropriate action, through exercise of its zoning and other municipal authority, to improve the aesthetics and physical appearance of the City by means including the regulation of signs.
- B. The regulation of signs is necessary in order to preserve and enhance the substantial governmental interests of the City of Cambridge in its natural, scenic, historic, cultural, and aesthetic qualities.
- C. There is a substantial governmental interest in enhancing the physical appearance of all parts of the City of Cambridge, including residential, commercial, and industrial areas.
- D. Regulating signs will improve the City's appearance; make the City's commercial, residential, and industrial areas more attractive for commercial and residential uses and commercial development; and enhance the economic climate of the City.
- E. The regulations set forth in this Article will directly advance the public interest in aesthetics and other qualities of life by preserving and enhancing the appearance of residential, commercial and industrial buildings and areas; preserving and enhancing the appearance of public streets, parks and other public properties; and minimizing the intrusiveness of sign structures.
- F. Nonconforming off-premise signs, which traditionally have been used primarily to advertise commercial goods and services not available on the same premises, have a significantly greater adverse aesthetic impact than on premises signs because of their larger sizes, greater heights, less attractive appearances, and/or more intrusive locations.
- G. The public interest is served by use of signs by businesses and services to identify their premises, or the products or services there available, or to display noncommercial messages.
- H. The City finds that it is in the City's interest to require removal of certain nonconforming signs after the grace period provided by Section 7.18 has expired.

- I. The City in enacting this ordinance does hereby adopt the findings, conclusions, and recommendations of the Planning Board in its report dated March 7, 1991.

7.11.2 Purposes

The purposes of this Article are to preserve and enhance the substantial interests of the City of Cambridge in the appearance of the City; to preserve and enhance the public interest in aesthetics; to preserve and increase amenities of the City; to control and reduce visual clutter and blight; and to carry out the authority conferred by General Laws Chapter 40A.

7.12 Applicability

No signs or advertising devices of any kind or nature shall be erected or maintained on any premises or affixed to the inside or outside of any structure to be visible from the outside of any structure except as specifically permitted in this Article 7.000.

7.13 Definitions

- 7.13.1 Sign. Sign shall mean and include any permanent or temporary structure, device, letter, words, model, banner, pennant, insignia, trade flag, or representation used as, or which is in the nature of, an advertisement, announcement, or direction and which is designed to be seen from the outside of a building.

7.13.2 Types of Signs:

- A. Free Standing Sign - A sign that is attached to or part of a completely self-supporting structure and which is not attached to any building or other structure.
- B. Projecting Sign - Any sign, other than a wall sign or free standing sign, that is attached to and projects from a building face. A projecting sign shall include marquee, canopy, and awning mounted signs.
- C. Wall Sign - Any sign affixed in such a way that its exposed face and all sign area is parallel or approximately parallel to the plane of the building to which it is attached. A wall sign shall be considered a projecting sign if the sign face projects more than twelve (12) inches from the face of the building. Wall signs shall include signs located on or behind the surface of windows.

7.13.3 Illumination:

- A. Natural - natural or ambient light.
- B. External - artificial illumination from a light source which provides light directly onto the sign face, or portions of the sign face, or its background, which light is then reflected back to the viewer.
- C. Internal - artificial illumination from a light source located behind the sign face and which transmits light through the sign face or portions of the sign face to the viewer. Exposed neon tubing and similar lighting shall be considered internal illumination.
- D. Indirect - placement of the artificial light device such that the source of light cannot be seen from a public way.

7.16.3 Application of Sign Frontage Formula

Where the total permitted area of all signs on a lot or building is determined by the product of the formula: sign frontage x one (1), one and one half (1.5), or two (2) sq. ft., the following rules shall apply.

- A. The total area of signs accessory to a ground floor establishment shall not exceed that determined by the application of the sign frontage formula to that ground floor establishment. Where two ground floor establishments occupy the same sign frontage the total permitted area of signs shall be shared equally by the two establishments.
- B. The total area of all signs on any single building wall shall not exceed that determined by the application of the formula to the sign frontage for that wall; provided, a wall having no sign frontage may share the sign area permitted on any wall of the building having sign frontage.

7.16.4 Sign Area For Lots Having No Buildings

In any district where the number or area of signs permitted on a lot is determined by the number of buildings located on said lot, one building shall be assumed to be present for the purposes of Section 7.10 for any use not contained within a building.

Where the total area of signs permitted on a lot is determined by the application of the sign frontage formula, a maximum of 30 sq. ft. of signs shall be permitted on any lot having no sign frontage.

7.16.5 Signs Permitted in Planned Unit Development Districts

The sign requirements of the base zoning district shall apply, except that when business, office or industrial uses are authorized by the Planned Unit Development special permit the requirements of Section 7.16.22 shall apply to those portions of the Planned Unit Development containing those uses, in lieu of the base district requirements.

7.17 Noncommercial Messages

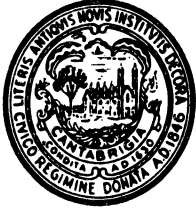
Any sign permitted under this Article may contain, in lieu of or in addition to any other copy, any noncommercial message.

7.18 Nonconforming Signs

7.18.1 Signs Required to be Removed

The following nonconforming signs shall be removed within four (4) years from June 10, 1991, or the first date that the sign became nonconforming, whichever is later:

- A. Signs located on rooftops.
- B. Free standing signs in excess of thirty (30) square feet in area.
- C. Wall signs in excess of sixty (60) square feet in area.
- D. Projecting signs in excess of ten (10) square feet in area.



40.

CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300
FAX. 349-4307

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

July 29, 1996

To The Honorable, The City Council:

Please find attached for your information a communication from Deputy City Solicitor Donald Drisdell, relative to a Petition filed with the First Circuit Court of Appeals regarding Ackerley Communications, Inc.

Very truly yours,

Robert W. Healy
City Manager

RWH/mec
attachment

Consent Agenda #40

S-45.8

Relative to a communication from the
City Solicitor's Office regarding
a Petition filed with the First
Circuit Court of Appeals concerning
Ackerly Communications, Inc.

In City Council July 29, 1996

Charter right was
exercised by
Councillor Toomey
9-9-96

Referred to 9-16-96 Executive
Session at 7:00 P.M.