

No. 97-1127

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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

v.

CITY OF CAMBRIDGE and  
ROBERT BERSANI, in his capacity as  
Building Inspector of the  
City of Cambridge,  
Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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APPELLANT'S OPENING BRIEF

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**CORPORATE DISCLOSURE STATEMENT**

Ackerley Communications of Massachusetts, Inc., is a wholly owned subsidiary of Ackerley Communications, Inc.

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**APPELLANT'S OPENING BRIEF**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This challenge to the constitutionality of a municipal ordinance was brought in United States District Court for the District of Massachusetts under 42 U.S.C. § 1983; the district court had jurisdiction pursuant to 28 U.S.C. § 1331. Upon remand from this Court's decision in Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 34 (1st Cir. 1996), the district court entered final judgment on December 11, 1996, and a notice of appeal was filed on January 8, 1997. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

In a prior appeal in this case, this Court held that a provision of the zoning ordinance of the City of Cambridge, Massachusetts, is unconstitutional because it discriminates between categories of noncommercial speech and penalizes speakers on the basis of their past speech. On remand, the district court attempted to remedy the unconstitutionality by holding that the ordinance may not be applied to signs carrying off-site noncommercial messages, but may be applied to all other signs that display off-site messages. In this appeal, the following issue is presented for review:

Whether the district court's choice of remedy -- which led that court to rewrite the ordinance in a manner that is inconsistent with the legislative intent and that itself raises grave constitutional problems -- is correct.

**STATEMENT**

This appeal involves a challenge to the means by which the district court remedied constitutional defects in the City of Cambridge's zoning ordinance. After this Court held the ordinance unconstitutional, the district court attempted to save a portion of Cambridge's billboard regulation by effectively rewriting the ordinance, holding it inapplicable to a certain category of signs. Because this approach overstepped the proper judicial role -- and because it did so in a manner that both departed from the legislative intent and created a revised ordinance that itself is unconstitutional -- the decision below should be reversed.

**A. Nature of the Case**

This action was brought in the United States District Court for the District of Massachusetts; invoking 42 U.S.C. § 1983, the plaintiff challenged the constitutionality of a municipal ordinance. The district court refused to award preliminary injunctive relief, but this Court reversed, holding the ordinance unconstitutional. On remand, the district court declined to invalidate the unconstitutional portion of the ordinance, instead writing in an exception that precluded application of the ordinance in certain specified circumstances. This appeal followed.

**B. Statement of Facts**

1. Appellant, Ackerley Communications of Massachusetts, Inc. ("Ackerley"), has operated an outdoor advertising business in Massachusetts for more than 100 years. See Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33, 34 (1st Cir. 1996). As part of that business, Ackerley maintains 46 sign faces on 32 separate structures in the City of Cambridge, Massachusetts. Ibid. All of Ackerley's Cambridge signs have existed in their current locations for 30 years or more, and all are located in areas zoned for commercial or industrial uses. Ackerley JA 45.1/ These signs carry "off-site" or "off-premise" messages, i.e., messages unrelated to the properties on which the signs are located. See Ackerley, 88 F.3d at 34. Most of Ackerley's signs are located near signs owned by other

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1/ "Ackerley JA" refers to the joint appendix filed in Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, supra.

entities that display "on-site" or "on-premise" messages, which advertise businesses, goods, or services available at the properties on which the signs are located.<sup>2/</sup> Many of these signs with on-site messages are larger, higher, and more brightly illuminated than any Ackerley sign. Ackerley JA 44-45, 48.

For many years, Cambridge's zoning ordinance has regulated certain aspects of the size and location of outdoor signs. On June 10, 1991, the Cambridge City Council passed the amendment to its zoning ordinance that is at issue in this case. Ostensibly intended to advance the City's esthetic interests,<sup>3/</sup> the amended Cambridge ordinance, among other things, added a provision (Section 7.18.1) that required the removal by June 10, 1995, of all existing signs in Cambridge that fall into any of the following four categories: (1) signs located on rooftops; (2) free-standing signs in excess of 30 square feet; (3) wall

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<sup>2/</sup> As this Court has explained, "[a]n onsite sign carries a message that bears some relationship to the activities conducted on the premises where the sign is located. For example, an on-site sign may simply identify a business or agency ('Joe's Hardware' or 'YMCA'), or it may advertise a product or service available at that location ('Budweiser Beer' at Parise's Cafe or child care at the Lutheran Church)." Ackerley, 88 F.3d at 34 n.1 (citation omitted). In contrast, "[a]n offsite sign -- the category into which most billboards fit -- carries a message unrelated to its particular location." Ibid. Examples of off-site messages in Cambridge include rooftop signs on commercial buildings that advertise a political candidacy or the campaign against drunk driving. See, e.g., Ackerley JA 154, 196.

<sup>3/</sup> In fact, many proponents of the amendment advocated a ban on signs with off-site messages because they disapproved of various lawful products that the signs occasionally promoted, principally cigarettes and alcoholic beverages. Ackerley JA 46. As it happens, the use of Ackerley signs to advertise such products is quite limited, and Ackerley voluntarily refuses to permit such advertisements on signs near schools, churches, or parks. Ibid.

signs in excess of 60 square feet; and (4) projecting signs in excess of 10 square feet. See Ackerley, 88 F.3d at 34 & n.2.<sup>4</sup>/ All of Ackerley's signs -- as well as a substantially larger number of commercial signs that carry on-site messages -- fall into these categories. Id. at 34; Ackerley JA 44-45, 46-47, 47-48, 71-121.

Unlike most zoning ordinances, the Cambridge ordinance does not provide grandfather protection to existing signs. State law, however, does provide such protection to signs that display on-site messages. The Massachusetts Zoning Ordinance Enabling Act, Mass. Gen.Law ch. 40A, § 6, mandates grandfather protection for all nonconforming uses -- including signs -- that are in existence at the time a zoning ordinance is enacted or amended. But the enabling act excludes from such protection "billboards, signs and other advertising devices subject to [the jurisdiction of the Massachusetts Outdoor Advertising Board ("OAB")]."<sup>5</sup> Ibid. While signs that display off-site messages are subject to regulation by the OAB and therefore are denied grandfather protection by the Enabling Act, signs with on-site messages are exempt from OAB regulation by virtue of Mass. Gen. Law ch. 93, § 30, and accordingly are entitled to the grandfather protection conferred by the Act.<sup>5</sup>/ The net result of the Cambridge ordinance and the Massachusetts

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<sup>4</sup>/ The ordinance is reprinted in the addendum to this brief at pages A3-A19.

<sup>5</sup>/ That provision exempts from OAB regulation all "signs or other devices \* \* \* which advertise or indicate either the person occupying the premises in question or the business transacted thereon, or advertise the property itself or any part thereof as for sale or to let and which contain no other advertising matter \* \* \*."

statute was that signs with off-site messages in Cambridge (including all of Ackerley's signs) were to be removed because they are nonconforming uses under the ordinance (and are unprotected by the Enabling Act), while nonconforming signs that bear on-site messages could remain (because they receive grandfather protection under the Act). See Ackerley, 88 F.3d at 34.

This distinction between signs carrying off-site and on-site messages was intentionally drawn by the City; the City Council regarded signs carrying off-site messages as the target of the amended ordinance. As this Court noted, "a comprehensive report prepared in connection with the revised ordinance reveals that [billboards] are the city's most pressing concern" and "[b]illboards typically carry offsite messages." Ackerley, 88 F.3d at 35. See id. at 35 n.5. The report thus labeled "off-premises signs \* \* \* a special case" (Ackerley JA 292) and specifically identified Ackerley's signs as ones that should be targeted for removal. See id. at 294-312. In contrast, Cambridge officials were assured repeatedly during the zoning amendment process that the Enabling Act would preserve signs with on-site messages. Id. at 260, 268. Indeed, the June 4, 1991, report of the Cambridge Planning Board, whose findings were incorporated in the ordinance (at § 7.11.1(I)), specifically stated that "Chapter 40A uniquely denies grandfather protection to non-conforming off-premises signs, a protection granted to every other category of non-conforming use"; the Planning Board recommended approval of the ordinance because it

required removal only of "off-premise non-conforming signs." Ackerley JA 268.

As this Court accordingly observed,

Cambridge officials recognized the limited nature of the grandfather provision, and, indeed, endorsed its preference for onsite signs, finding: "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."

Ackerley, 88 F.3d at 34-35, quoting Zoning Ordinance § 7.11.1(F). To satisfy "First Amendment requirements" (see Ackerley JA 257), however, the amended ordinance included a so-called "substitution provision," which provides (in § 7.17) that "[a]ny sign permitted under this Article may contain, in lieu of or in addition to any other copy, any noncommercial message." The substitution provision, in combination with the rule providing grandfather protection only to signs carrying on-site messages, meant that "[o]nly those speakers whose signs displayed onsite messages on the day of the ordinance's enactment [were permitted to] substitute noncommercial messages for the previous ones." Ackerley, 88 F.3d at 38.

2. Since the effective date of the ordinance in June 1991, Ackerley has carried exclusively noncommercial messages on its signs in Cambridge. Ackerley, 88 F.3d at 34.<sup>6/</sup> Cambridge nevertheless demanded

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<sup>6/</sup> These messages included election campaign signs for candidates for the City Council and County Commissioner, artwork created by Cambridge students, promotion of a Cambridge literacy program, information regarding a Cambridge voter registration drive, advertisements for  
(continued...)

that Ackerley remove all of its 46 signs in the City because they display off-site messages. At the same time, Cambridge did not seek the removal of any of the more than 100 nonconforming signs in the City that display on-site commercial messages, even though many of these signs are physically indistinguishable from Ackerley's. Ackerley responded by bringing this suit in United States District Court for the District of Massachusetts under 42 U.S.C. § 1983, arguing that the Cambridge ordinance violates the First Amendment.<sup>7/</sup> The district court rejected Ackerley's claim.

This Court reversed. Ackerley v. City of Cambridge, *supra*.<sup>8/</sup> The Court began by noting that, viewed "[i]n 'commonsense' terms," the distinction drawn by the Cambridge ordinance "surely is content-based because determining whether a sign may stay up or must come down requires consideration of the message it carries." 88 F.3d at 36 n.7. The Court also observed that "most content-based restrictions are presumptively invalid \* \* \* and subject to strict scrutiny." *Id.* at 36 (citations omitted). The Court nevertheless found it unnecessary to

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6/(...continued)

community fundraising events, and a wide range of public service messages. Ackerley JA 138-139. Typically, approximately 15% of Ackerley's signs around the State are used to display noncommercial and public service messages. See Ackerley, 88 F.3d at 39.

7/ Ackerley also complained that the ordinance deprives it of its property without just compensation, in violation of the Fifth Amendment. That claim is not at issue in this phase of the case.

8/ Although the case reached this Court on appeal from the district court's denial of Ackerley's request for preliminary injunctive relief, this Court elected to resolve the dispute on the merits because the issue presented was a purely legal one that did not require further factual development. Ackerley, 88 F.3d at 35.

address the "difficult question" whether the on-site/off-site distinction triggers strict scrutiny because it determined that the ordinance suffered from two other "readily identifiable First Amendment flaws that bar its enforcement." Id. at 37.

First, the Court found that the ordinance draws a line "between two types of noncommercial speech -- onsite and offsite messages. \* \* \* The only signs containing noncommercial messages that are exempted are those relating to the premises on which they stand." 88 F.3d at 37 (footnote omitted). The Court held this distinction unconstitutional because "the First Amendment does not permit Cambridge to value certain types of noncommercial speech more highly than others." Ibid. (footnote omitted). Second, the Court determined that, under the ordinance's substitution provision, "[o]nly those speakers whose signs displayed onsite messages on the day of the ordinance's enactment may substitute noncommercial messages for the previous ones." Id. at 38. This approach was impermissible because "the grandfathering benefit is conferred in content-based terms that have no aesthetic justification and effectively penalizes a category of speakers based on their prior choice of message." Id. at 39.

Turning to the question of remedy, the Court noted that "it is possible to construct a justifiable, content-neutral grandfather provision that will advance the city's 'dual objectives of eliminating most billboards while giving substantial protection to onsite signs.' \* \* \* A grandfather provision could, for example, exclude from grandfathering all signs over a certain square footage on the ground

that the larger the sign, the greater the aesthetic harm." 88 F.3d at 39-40 (citation omitted).<sup>9/</sup> The Court went on to state:

The Cambridge ordinance contains a severability provision stating that, in the event some portion of it is declared invalid, it is the City's intent that the remainder of the ordinance continue in full force and effect. We do not in this decision rule unlawful any particular section of the ordinance. Rather, because the constitutional problem stems from the interplay of the ordinance and the state provision, we hold only that Cambridge may not require removal of signs displaying commercial messages based on their exclusion from exemption under the state provision.

Id. at 40. The Court then remanded the case for further proceedings consistent with its opinion.

3. On remand, Ackerley took the position that it was impossible to cure the ordinance's constitutional defect through severance of a portion of Section 7.18.1 because, as this Court had observed, severing "any particular section" of the provision would not eliminate the First Amendment violation. Instead, Ackerley argued that the district court should invalidate Section 7.18.1 in its entirety, allowing the City Council to enact a new provision that would best effectuate the City's purposes. (In the interim, Section 7.18.1 would be severed from the remainder of the ordinance, which would remain in force and would govern the placement of new signs in the City.) Cambridge, however, asserted that this Court already had resolved the remedial question, maintaining that this Court's opinion directed the district court to enter an order enjoining only the removal of nonconforming signs that

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<sup>9/</sup> The Court noted that "the content-based grandfathering derives from state law. Relief from this disability is beyond the scope of this court's power in this case. Any change in state law probably must be left to the workings of the political process." 88 F.3d at 39.

carry noncommercial messages. Opp. of City of Cambridge to Plaintiff's Mot. for Entry of Final Judgment 4-6. The district court evidently agreed with this argument; without explanation, the court's judgment enjoined Cambridge from "requiring the removal of signs displaying non-commercial messages based on their exclusion from exemption under Mass.Gen.L. ch. 40A, § 6." Add. 1. The district court did not address Ackerley's argument that this limited injunction improperly rewrote the ordinance, was inconsistent with the City Council's intent, and imposed a remedy that was itself unconstitutional.

#### **SUMMARY OF ARGUMENT**

A. The approach taken by the district court in this case was fundamentally flawed. Portions of Section 7.18.1 cannot be saved by severing the unconstitutional elements of the provision; while "[a] severability clause requires textual provisions that can be severed" (Reno v. ACLU, No. 96-511(U.S. Sup. Ct. June 26, 1997), slip op. 37), Section 7.18.1 cannot be rendered constitutional by striking out particular provisions or particular words. Instead, the district court in essence added words of limitation to Section 7.18.1 by declaring that the provision's blanket terms could not be applied to signs displaying commercial messages. This approach, however, cannot be reconciled with the settled rule that courts lack the power to "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work

beyond the power and function of the court." Hill v. Wallace, 259 U.S. 44, 70 (1922).

B. The decision below should be set aside even if courts are free to read limitations into otherwise unconstitutional legislation under a severance analysis. First, as redrafted by the district court, Section 7.18.1 plainly does not further the intent of the Cambridge City Council; while the provision was intended to eliminate particular signs, the remedy devised by the district court will not require (or be demonstrably likely to lead to) the elimination of any of those signs. Second, the district court's remedy fundamentally alters the nature of the provision, changing an ordinance that eliminates signs for esthetic reasons into one that has no effect on esthetics but regulates the content of messages. And third, the remedy imposed by the district court -- which requires the City to determine whether particular messages are commercial or noncommercial -- raises a host of administrative and enforcement problems that are not addressed in the ordinance and surely were not anticipated (or sought) by the City Council.

C. Section 7.18.1 as redrawn by the district court remains unconstitutional; at a minimum, the district court's approach raises serious constitutional problems that should be avoided by invalidating the provision in its entirety. While the First Amendment obligates the City to show that its regulation of commercial speech will in fact materially advance the municipal goals, the modified Section 7.18.1 does not require the elimination of a single sign and therefore does

not advance the City's interest in esthetics at all. The district court's remedy also runs squarely afoul of the rule that bars the government from discriminating against commercial and in favor of noncommercial speech when "the distinction bears no relationship whatsoever to the particular interests that the city has asserted." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424 (1993) (emphasis in original). And the Supreme Court's most recent decisions suggest that regulations of commercial speech that are not designed to protect the integrity of the commercial marketplace are subject to strict scrutiny, a form of review that Section 7.18.1 cannot possibly survive.

D. This Court's initial opinion in this case did not mandate use of the remedy imposed by the district court. In declaring that "we hold only that Cambridge may not require removal of signs displaying noncommercial messages" (88 F.3d at 40), it appears that the Court was describing the limited nature of its substantive holding and describing the constitutional limits imposed upon Cambridge by the First Amendment. It is most unlikely that the Court also meant this statement to resolve, without discussion or analysis, the difficult constitutional questions posed by the district court's choice of remedy. If anything, the opinion seems to assume that Section 7.18.1 was being invalidated in its entirety: the Court took pains to describe the remedial options available to the City on remand. In any event, there is no basis for concluding that the Court meant to decide the complex remedial

questions presented by this case in the manner chosen by the district court.

#### **ARGUMENT**

The district court took it upon itself to rewrite Cambridge's zoning ordinance, transforming a regulation that was designed to eliminate signs in the interest of esthetics into one that has no impact on the number of signs in the City but that regulates the content of the messages displayed on those signs. In doing so, the court overstepped the judicial role, intruding into matters of policy that properly are the province (subject to constitutional constraints) of the legislature. The court's error, moreover, has tangible consequences: it left Cambridge with an ordinance that the City did not enact, that does not advance the stated municipal goals -- and that suffers from serious constitutional defects. The court should have avoided these difficulties by invalidating Section 7.18.1 in its entirety, leaving it to the City Council to decide the City's response to the limits imposed upon its regulatory authority by the First Amendment.<sup>10/</sup>

**A. The District Court Erred In Writing A Limitation Into Section 7.18.1 Of The Ordinance**

1. In holding Section 7.18.1 inapplicable to a limited category of signs but enforceable against other signs, the district court

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<sup>10/</sup> Issues of severability involve questions of law and accordingly are reviewed de novo. See, e.g., National Advertising Co. v. Town of Niagara, 942 F.2d 145, 148-151 (2d Cir. 1991); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 557 (2d Cir.), cert. denied, 498 U.S. 852 (1990).

evidently viewed the remedy sought by Cambridge as a species of severance; the court endeavored to delete the unconstitutional portion of Section 7.18.1 while leaving the remainder intact. This approach, however, was fundamentally flawed. As the Supreme Court very recently held, “[a] severability clause requires textual provisions that can be severed.” Reno v. ACLU, No. 96-511 (U.S. Sup. Ct. June 26, 1997), slip op. 37. See Baird v. Bellotti, 450 F. Supp. 997, 1005 n.10 (D. Mass. 1978) (three judge court) (Aldrich, J.) (“[s]everability is a process of striking out, not of insertion or rewriting”). Yet this Court correctly recognized in its prior decision in this case that Section 7.18.1 cannot be rendered constitutional by striking particular provisions or particular words. Instead, to reach the result it did, the district court was forced, in essence, to add words of limitation to Section 7.18.1 by declaring that the provision’s otherwise blanket terms could not be applied to signs displaying noncommercial messages. This approach cannot be reconciled with the settled rule that courts “‘will not rewrite a ... law to conform it to constitutional requirements.’” Reno, supra, slip op. 39 (citation omitted).

The Supreme Court has long held that, even where legislation contains a severance clause, courts lack the power to “dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court.” Hill v. Wallace, 259 U.S. 44, 70 (1922). Thus, addressing a proposed remedial approach identical to the

one taken by the district court in this case, the Court declared:

"The proposed [remedy] is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. \* \* \* The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Id. at 70-71, quoting United States v. Reeves, 92 U.S. (2 Otto) 214, 221 (1875). Applying this principle, the Supreme Court has eschewed remedies that "require[] it to tamper with the text of the statute, a practice we strive to avoid." United States v. Treasury Employees, 513 U.S. 454, 478 (1995) (footnote omitted).

This reluctance to write limitations into the statutory text is grounded on powerful considerations relating to judicial competence and constitutional policy. As the Supreme Court "long ago explained" and recently reaffirmed,

"[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

Reno, slip op. 39 n.49, quoting Reese, 92 U.S. (2 Otto) at 221. At the same time, "judicial rewriting of statutes would derogate [the legislature's] 'incentive to draft a narrowly tailored law in the first place.'" Id. at 39 n.50 (citation omitted). And most obviously, the judicial addition of limitations to statutes that contain none involves a "'serious invasion of the legislative domain.'" Id. at 39, quoting

Treasury Employees, 513 U.S. at 479 n.26.

The courts of appeals have taken this guidance to heart, holding consistently that “[l]ong established principles of federal law \* \* \* dictate against courts inserting limitations in order to rescue otherwise invalid statutes.” Roe v. Casey, 623 F.2d 829, 837 (3d Cir. 1980). “Courts generally do not add words of limitation to statutes because they are aware of the dangers of intruding on the legislative function.” Eubanks v. Wilkinson, 937 F.2d 1118, 1125 (6th Cir. 1991). Indeed, courts have held that, “[e]ven if the [legislature’s] purpose for the law were clear, such an overhaul is for the [legislature] to do. It is not properly within th[e] federal Court’s jurisdiction to do what amounts to legislative work.” Revere National Corp. v. Prince Georges County, 819 F. Supp. 1336, 1351 (D. Md. 1993). Accord, e.g., Valley Family Planning v. State of North Dakota, 661 F.2d 99, 102 (8th Cir. 1981); Jackson v. City of Charlottesville, 659 F. Supp. 470, 477 (W.D. Va. 1987), *aff’d in part and vacated in part on other grounds*, 840 F.2d 10 (4th Cir. 1988).

It therefore should come as no surprise that both the Supreme Court and federal courts of appeals have held, in First Amendment cases that in relevant respects are identical to this one, that courts cannot read exceptions into unconstitutional enactments; instead, the courts held those enactments invalid in their entirety. In Treasury Employees, for example, the Supreme Court struck down a statute that barred federal employees from receiving honoraria for speeches or writings, even where the speeches or writings had no nexus to the employee’s job.

513 U.S. at 470-477. In doing so, the Court rejected the government's argument that the statute should be upheld as applied "to situations in which a nexus is present." Id. at 477. The Court explained:

[O]ur obligation to avoid judicial legislation \* \* \* persuades us to reject the Government's \* \* \* suggestion -- that we modify the remedy by crafting a nexus requirement for the honoraria ban. We cannot be sure that our attempt to redraft the statute to limit its coverage to cases involving an undesirable nexus \* \* \* would correctly identify the nexus Congress would have adopted in a more limited honoraria ban. \* \* \* We believe the Court of Appeals properly left to Congress the task of drafting a narrower statute.

Id. at 479. The Court therefore declined to "draw[] one or more lines between categories of speech covered by an overly broad statute" (id. at 479 n.26) -- the very sort of line-drawing engaged in by the district court here.

Similarly, in National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2d Cir.), cert. denied, 498 U.S. 852 (1990), the Second Circuit addressed municipal ordinances that prohibited the display of off-premises messages on signs. The district court held the ordinances unconstitutional insofar as they applied to signs bearing noncommercial messages. Like the court below in this case, however, the district court in Town of Babylon refused to invalidate the ordinances in their entirety; instead, the court simply enjoined the defendant cities from enforcing their ordinances against signs with noncommercial messages. See id. at 553-554. Applying federal law, the Second Circuit held this remedy inadequate, explaining that "[t]he district court had to rewrite

the \* \* \* ordinances substantially in order to save them, a practice which is decidedly disfavored." Id. at 557.<sup>11/</sup>

2. The general rule that courts will not write exceptions into legislation applies with special force in this case because the challenge here is to a municipal rather than a federal enactment. "When a federal court deals not with a federal statute but with a state statute, its task is further complicated. A federal court must always be aware of federalism concerns that arise whenever it deals with state statutes." Eubanks, 937 F.2d at 1125. "The interests of federalism and comity dictate conservatism in imposing [a federal court's] interpretive views on state statutes." National Advertising Co. v. Town of Niagara, 942 F.2d 145, 151 (2d Cir. 1991). Cf. Freedman v. Maryland, 380 U.S. 51, 60 (1965).

This principle has particular relevance here because the district court's approach finds no support in Massachusetts law. Massachusetts courts will strike out provisions (or particular words) of an invalid statute when doing so accords with legislative intent. See, e.g., Murphy v. Commissioner of Industrial Accounts, 418 Mass. 165, 169, 635 N.E.2d 1180, 1183 (1994). But the Supreme Judicial Court has emphatically declared that it will not perform "major surgery" to save an

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<sup>11/</sup> These decisions, of course, stand in sharp contrast with cases where unconstitutionality may be cured by severing a particular element of the legislation rather than by rewriting it. That was true, for example, in Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 522 (1st Cir. 1989), where the Court invalidated an unconstitutional grandfather provision, leaving the remainder of the ordinance intact. See also, e.g., Reno, slip op. 37-38.

invalid statute (ABCD, Inc. v. Commissioner of Public Welfare, 378 Mass. 327, 338, 391 N.E.2d 1217, 1223 (1979)) and will not engage in "conjecture to say what, if any, alternative the Legislature would have adopted" when an enactment is invalid as written. Mayor of Boston v. Treasurer and Receiver General, 384 Mass. 718, 726, 429 N.E.2d 691, 695 (1981). The district court's attempt to write a limitation into Section 7.18.1 therefore cannot be reconciled with controlling principles recognized by the federal and Massachusetts courts.

**B. The District Court's Remedy Changes The Nature Of Section 7.18.1 And Departs From The Legislative Intent**

The district court's remedy accordingly is insupportable on its face as an attempt to rewrite the ordinance. But the decision below should not be upheld even if courts are free to impose limitations on otherwise unconstitutional ordinances by applying a form of severance analysis. Under such a severance inquiry, a court must consider "the intent of the enacting legislature." Commonwealth of Massachusetts v. Secretary of HHS, 899 F.2d 53, 76 (1st Cir. 1990), vacated on other grounds, 500 U.S. 949 (1991). See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124, 1136-1137 (1st Cir. 1984). And under Massachusetts law -- which controls the severance inquiry in this case<sup>12/</sup> -- the court cannot "speculat[e] as to the Legislature's intent" (ABCD, Inc., 378 Mass. at 339, 391 N.E.2d at

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<sup>12/</sup> Federal courts look to state law in determining the severability of state and local legislation. See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 376 (1986); Rappa v. New Castle County, 18 F.3d 1043, 1072 (3d Cir. 1994).

1223); “[i]f the court is unable to know whether the Legislature would have enacted a particular bill without the unconstitutional provision, it will not sever the unconstitutional provision, but will strike the entire statute.” Murphy, 418 Mass. 169, 635 N.E.2d at 1183 (citation omitted). See Mayor of Boston, 384 Mass. at 725, 429 N.E.2d at 695; Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 129, 224 N.E.2d 414, 416 (1967). For several reasons, the district court’s approach fails that test here.13/

First, the ordinance as redrafted by the district court quite plainly does not further the intent of the Cambridge City Council. There is no doubt about the purpose of Section 7.18.1: as this Court noted in Ackerley, the provision was designed to eliminate particular signs that are owned by Ackerley and that display off-site messages. See pages 6-7, supra. But the remedy devised by the district court will not lead to the elimination of any of those signs, all of which now display noncommercial messages.14/ In these circumstances, where

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13/ That the ordinance has a severance clause is not dispositive. Courts should not “treat a severability clause as an invitation from the legislature to write whatever statute [they] can fashion from the constitutional remnants as augmented by [their] imagination.” National Advertising Co. v. Town of Niagara, 942 F.2d at 148. See Reno, slip op. 39 n.49 (“[a] severability clause is ‘an aid merely; not an inexorable command’”). Of course, it is undisputed that Section 7.18.1, if invalidated in its entirety, may be severed from the remainder of the Cambridge zoning ordinance.

14/ At oral argument, the district court suggested that Ackerley might eventually remove its noncommercial messages and dismantle its signs if it is not permitted to display commercial advertisements. J.A. 74-76. But the record contains absolutely no support for that speculation. Ackerley has, after all, continued to display noncommercial messages on all of its Cambridge signs during the more six years since the  
(continued...)

the modified ordinance contributes not a whit to the esthetic goals that motivated enactment of the regulation, the court "cannot say that the [City Council] would have enacted the same [ordinance]" with an exemption for signs displaying noncommercial messages "if it had known [that an ordinance without such an exemption was] illegal." Mayor of Boston, 384 Mass. at 725, 429 N.E.2d at 695. The Court accordingly "would be engaging in legislating [it]sel[f]" were it to preserve the truncated ordinance drafted by the district court. Ibid.

Second, "[t]he radical dissection necessary for this [severance] would leave [the ordinance] with little resemblance to that intended by the \* \* \* legislature." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 764-765 (1986). The City Council enacted a provision designed to advance esthetic goals by eliminating particular signs; as redrafted by the district court, Section 7.18.1 has no effect on esthetics but regulates the content of the messages displayed on those signs. That remedy "eviscerates the guiding intent of the regulation[] and completely changes [its] meaning. This [the court] cannot do." Commonwealth of Massachusetts, 899 F.2d at 76. See Eubanks, 937 F.2d at 1125 ("courts do not want to

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14/(...continued)

enactment of Section 7.18.1. Moreover, as Ackerley noted during argument below, it maintained noncommercial messages on all of its signs in Somerville, Massachusetts, for five years during the pendency of litigation about the constitutionality of that municipality's sign ordinance. J.A. 75.

be in the position of 'creat[ing] a program quite different from the one the legislature actually adopted'" (quoting Sloan v. Lemon, 413 U.S. 825, 834 (1973)); Board of Natural Resources v. Brown, 992 F.2d 937, 949 (9th Cir. 1993) (severance improper where "[t]he regulatory regime contemplated by [the statute] would be altered significantly").

That is particularly so because there is absolutely no reason to believe that the City Council would have favored the display of noncommercial over commercial messages on Ackerley's signs had it known that the signs could not be removed. The City Council did not express a general preference for noncommercial over commercial speech; as this Court has noted, the City's quite different "'dual objectives [were] eliminating most billboards while giving substantial protection to onsite signs.'" Ackerley, 88 F.3d at 39 (citation omitted).<sup>15/</sup> Indeed, that the propagation of noncommercial speech was not a concern of the City Council is proven by the prospective operation of the ordinance, which does not permit construction of new signs that display only

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<sup>15/</sup> To be sure, to satisfy constitutional requirements, the City Council did permit the substitution of off-site noncommercial messages for otherwise permitted on-site messages on other signs. See page 7, supra. But the City Council, of course, pointedly did not allow that sort of substitution of noncommercial messages on Ackerley's signs. In this setting, where the City Council recognized an exception for noncommercial speech in a different provision of the ordinance, "[w]e can reasonably infer that the omission of a similar exception in [Section 7.18.1] was deliberate." Valley Family Planning, 661 F.2d at 102. That the City Council was unconcerned with the commercial/noncommercial distinction is not surprising; it targeted signs displaying off-site messages on the theory that they "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." Section 7.11.1(F). Those considerations do not vary at all with the commercial or noncommercial character of the messages displayed on the signs.

noncommercial messages. At a minimum, "[t]here is nothing in the record to indicate what course [the City] would choose to follow \* \* \* and [the court is] not free to substitute [its] speculation for the judgment of the duly constituted officials of the [City]. This court should refrain from acting on a 'matter which properly requires the exercise of policy judgment by the legislature.'" Roe, 623 F.2d at 837 (citation omitted).

Third, the district court's remedy raises a host of administrative and enforcement problems that are not addressed in the ordinance and surely were not anticipated -- or sought -- by the City Council. Under the district court's approach, whether a sign may stay is determined by whether its message is characterized as commercial or noncommercial. Yet making that distinction is a complex and constitutionally questionable enterprise; the Supreme Court has emphasized "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." Discovery Network, 507 U.S. at 419. The ordinance, however, provides no mechanism for determining whether a particular message is commercial or noncommercial, does not indicate who is responsible for making that determination, offers no criteria by which the determination may be made, and fails to explain how determinations that are made may be challenged. The district court thus has redrawn the ordinance in a manner that "carries with it the potential for invidious discrimination of disfavored subjects" as the City approves or disapproves messages on particular signs (id. at 423-424

n.19) and invites expensive litigation over the disagreements that are sure to arise about the characterization of particular messages.<sup>16/</sup>

There is every reason to question whether the City Council would have chosen to open this can of worms had it known that the ordinance as enacted had a constitutional defect.<sup>17/</sup> As redrawn, the ordinance must "be enforced on a case-by-case basis, which may not be in accordance with the intentions of the drafters, who originally enacted a comprehensive statute." Jackson, 659 F. Supp. at 477. The district court's grafting of a commercial/noncommercial distinction onto an ordinance that makes no provision for drawing that line also results in a regulation that is not "capable of being administered in a fair, coherent, and equitable manner." Town of Niagara, 942 F.2d at 151. And the district court's approach creates a raft of difficult and controversial administrative problems for a City that may wish to avoid

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<sup>16/</sup> As we noted in the reply brief filed in our first appeal (at 4 n.3), the City already has taken issue with Ackerley's characterization of the messages on certain of its signs as noncommercial. See also Cambridge Reh'g Pet. 6 & n.14 (Cambridge disputes Ackerley's statement that it has displayed only noncommercial messages on its signs since the effective date of the ordinance, a question that "is now the subject of active discovery").

<sup>17/</sup> To be sure, the substitution provision now in the ordinance draws a distinction between commercial and noncommercial speech. See also Section 7.16.13 (permitting signs that display noncommercial messages and are not larger than 10 square feet). But it is doubtful that much controversy will arise under that provision; in fact, the record does not reflect any use of the substitution provision in Cambridge.

them. Severance is impermissible in these circumstances.

Indeed, the California Supreme Court reached just that conclusion in perhaps the leading decision in this area, Metromedia, Inc. v. City of San Diego, 649 P.2d 903 (Cal. 1982), on facts that were virtually identical to those here. The case involved a San Diego ordinance that, with some exceptions, banned all signs that displayed off-site messages. The United States Supreme Court held the ordinance unconstitutional because aspects of the ban discriminated against noncommercial speech; the Supreme Court then remanded the case to the state courts for the formulation of a remedy, noting that "the California court may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptible to this treatment." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 521-522 n.26 (1981) (emphasis added). The California Supreme Court, however, concluded that it was unable to perform that sort of "drastic surgery" on the San Diego ordinance. 649 P.2d at 908.

In language that is fully applicable here, the California court explained:

The principal objection to severance \* \* \* is that it is doubtful whether the purpose of the original ordinance is served by a truncated version limited to commercial signs. Since the effect of such an ordinance would depend on the extent to which persons were willing to purchase billboard space for noncommercial advertising, it would offer no assurance that a substantial number of billboards, or any particular billboard, would be removed \* \* \* . Such an ordinance, moreover, would require the city to police the content of advertising messages and would compel it to distinguish commercial from noncommercial speech -- an extremely difficult task, and one which presents serious constitutional problems.

649 P.2d at 908. The court thus found severance inappropriate because it "would be inconsistent with the language and original intent of the ordinance" and would "leave the city with an ordinance different than it intended, one less effective in achieving the city's goals, and one which would invite constitutional difficulties in distinguishing between commercial and noncommercial signs." *Id.* at 909. The court therefore invalidated the ordinance in its entirety, leaving it to the city to craft a new regulation that would best serve its purposes. The same approach should be taken here.

**C. Section 7.18.1 Remains Unconstitutional Even As Redrawn By The District Court**

There is an additional reason, suggested by the California Supreme Court in *Metromedia*, for striking Section 7.18.1 in its entirety: the ordinance as redrawn by the district court remains unconstitutional. At a minimum, the district court's approach "raise[s] independent constitutional concerns whose adjudication is unnecessary to decide this case." *Treasury Employees*, 513 U.S. at 479. And "[i]t would hardly make sense to sever unconstitutional provisions if what remains \* \* \* is itself unconstitutional." *Revere National Corp.*, 819 F. Supp. at 1349. This consideration -- the imperative of avoiding a remedy that is itself constitutionally problematic -- provides a compelling argument in favor of setting aside the district court's remedy and invalidating Section 7.18.1.

1. a. The ordinance as redrafted by the district court cannot withstand scrutiny under the First Amendment. The Supreme Court has set out a four-part test to govern the regulation of commercial speech:

[1] For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, [the Court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the Court] must determine [3] whether the regulation directly advances the governmental interest asserted and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980). The Court more recently has emphasized that the third prong of this test "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." \* \* \* [T]his requirement [is] critical." Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (emphasis added) (citation omitted). See, e.g., 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1509-1510 (1996) (opinion of Stevens, J.); id. at 1522 (O'Connor, J., concurring in the judgment); Edenfield v. Fane, 507 U.S. 761, 770-773 (1993).

The redrawn ordinance plainly fails this test. As we have shown, the modified Section 7.18.1 does not require the elimination of a single sign and therefore will not advance the City's interest in esthetics at all. The City cannot circumvent this problem by imagining that Ackerley eventually will choose voluntarily to dismantle its signs

if it is unable to display commercial messages (see note 14, supra); accepting that contention "would require [the court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." 44 Liquormart, 116 S. Ct. at 1510 (opinion of Stevens, J.), quoting Edenfield, 507 U.S. at 770.

Moreover, even if Section 7.18.1 as redrawn by the district court ultimately did lead to the elimination of some of Ackerley's signs, it is impossible to say on the current record that the ordinance would advance the City's interest in esthetics "to a material degree" because it would leave in place many other large and unsightly signs. In addition to the Ackerley signs that display noncommercial messages, the redrawn ordinance would leave undisturbed a substantially greater number of large signs that display on-site messages, as well as many other nonconforming uses. Yet there is no meaningful esthetic difference between the signs affected by the ordinance and the many other signs that are permitted to remain. Indeed, some of those latter signs are actually larger than Ackerley's signs, a significant number are displayed on rooftops, and many are located in the same vicinity as Ackerley's signs. See pages 3-4, supra.<sup>18/</sup> With this visual clutter remaining, the City cannot be said to have carried its burden of showing that the redrawn ordinance will make a material contribution to

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<sup>18/</sup> In its prior opinion in this case, this Court noted that the City's own sign report, while labeling Ackerley's signs the most obtrusive, also recognized that "'many on-premise signs are of course disappointing' and 'can at times be too large, too high, too visually loud.'" 88 F.3d at 38 n.12.

Cambridge's esthetics. See Discovery Network, 507 U.S. at 418 (ban on commercial newsracks for esthetic purposes invalidated because it had "only a minimal impact on the overall number of newsracks on the city's sidewalks").

It should be added that Ackerley has not yet had an opportunity to develop a full factual record on this point. Ackerley's motion for a preliminary injunction presented purely legal issues, reserving for trial the fact-intensive question whether the ordinance materially advances the City's goals. In its appeal from denial of the preliminary injunction, Ackerley again advanced only purely legal arguments, while noting that its fact-based First Amendment claims relating to the efficacy of the ordinance could not "be definitively resolved without further factual development." No. 95-2324, Br. 31 n.19. This Court's decision to rule for Ackerley on the merits appeared to make that factual development unnecessary. The district court, however, has now upheld the redrawn ordinance -- an ordinance that is manifestly less effective than the ordinance as originally drafted -- without permitting the development of a factual record on the effectiveness of Cambridge's regulation.<sup>19/</sup> If this Court is otherwise inclined to affirm the district court's judgment, it accordingly would be appropriate to remand the case for the development of a factual record bearing on the question whether the ordinance materially advances the City's

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<sup>19/</sup> Ackerley identified this issue before the district court on remand, noting Cambridge's failure to show that a "proposed regulatory scheme which will require the removal of no signs will substantially and materially advance Cambridge's aesthetic interest." Rep. Mem. in Support of Mot. for Summary Judgment 8.

goals; otherwise, the ordinance will have been upheld without any court ever having addressed this aspect of Ackerley's First Amendment challenge.<sup>20/</sup>

b. The redrawn ordinance also is unconstitutional for a distinct but closely related reason: its discrimination between commercial and noncommercial speech does not establish "the 'fit' between [the City's] goals and its chosen means" that is required by the third and fourth prongs of the Central Hudson test. Discovery Network, 507 U.S. at 428. In this respect, this case is identical to Discovery Network.

There, the Supreme Court invalidated a Cincinnati regulation, ostensibly designed to further the city's interest in esthetics and traffic safety, that required the removal of newsracks used to distribute commercial fliers while permitting newspaper newsracks to remain in place. See id. at 413-414. Observing that commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks" (id. at 425), the Court reasoned that "the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." Id. at 424 (emphasis in original). The Court accordingly held that, "[b]ecause the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty

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<sup>20/</sup> Cambridge asserts that Ackerley's signs are not physically similar to signs that display on-site messages. See Cambridge Reh'g Pet. 5 & n.11. This assertion, of course, simply points up the existence of a factual dispute that must be resolved to settle the First Amendment issue in the case.

concluding \* \* \* that the city has not established the 'fit' between its goals and its chosen means that is required by [the First Amendment]." Id. at 428. In doing so, the Court explicitly rejected the contention that "visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for these problems" (id. at 426-427); "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, [the Court was] unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is sufficient justification for its selective and categorical ban on newsracks dispensing commercial handbills." Id. at 428.

That holding is dispositive here. Cambridge does not (and plainly could not) contend that there is any meaningful esthetic difference between a sign that displays a commercial message and that same sign when it displays a noncommercial message. Yet that is the very distinction drawn by Section 7.18.1 as redrafted by the district court: although designed to advance municipal esthetics, the ordinance now allows a sign to remain if it says "Vote for Joe" while requiring the same sign's removal if it reads "Eat at Joe's." Because this distinction has "no relationship whatsoever" to the City's goals, it is unconstitutional.

Indeed, the Third Circuit reached just that conclusion in Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). That court -- like the district court in this case -- considered remedying the unconstitutionality of a sign regulation by crafting an injunction that would allow the provision to "ban much offsite commercial speech while allowing all non-commercial speech." Id. at 1074 n.54. But Judge Becker, writing for the Third Circuit, rejected that approach, concluding that "the likely constitutionality of such an injunction has been significantly undermined by Discovery Network." Ibid. The court explained: "it seems fairly clear after Discovery Network that it is unconstitutional to ban commercial speech but not non-commercial speech -- at least absent a showing that the commercial speech has worse secondary effects." Ibid. The Third Circuit therefore invalidated the challenged provision in its entirety. See id. at 1074.

3. Wholly apart from the intermediate scrutiny accorded regulations of commercial speech under the Central Hudson test, recent Supreme Court decisions suggest that distinctions such as the one drawn by the revised Cambridge ordinance must be subjected to strict First Amendment scrutiny. Discovery Network makes clear that the redrawn ordinance's line between commercial and noncommercial messages, "by any commonsense understanding of the term, \* \* \* is 'content-based'"; "whether any particular [sign] falls within the ban is determined by the content of the" message it displays. Discovery Network, 507 U.S. at 429. See National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 738 (1st Cir.), cert. denied, 115 S. Ct. 2247 (1995). This Court

therefore has explained that, under Discovery Network, "even when a municipality passes an ordinance aimed solely at the secondary effects of protected speech (rather than at speech per se), the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers for reasons unrelated to the legitimate interests that prompted the regulation." Ibid. Other courts have applied this insight to the municipal regulation of signs. See, e.g., Whitten v. City of Gladstone, 54 F.3d 1400, 1404, 1406 (8th Cir. 1995); Burkhart Advertising, Inc. v. Auburn, 786 F. Supp. 721, 731-732 (N.D. Ind. 1991).

The more difficult question is whether this content-based discrimination triggers strict scrutiny.<sup>21/</sup> The Supreme Court expressly left that issue open in Discovery Network, finding it unnecessary to decide whether regulations of commercial speech are subject to strict scrutiny when they are not designed to prevent commercial or other harms caused by the particular content of the regulated speech (such as regulations of false advertising). 507 U.S.

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<sup>21/</sup> In its initial opinion in this case, this Court recognized that the ordinance's original on-site/off-site distinction "surely is content-based because determining whether a sign may stay up or must come down requires consideration of the message it carries." 88 F.3d at 36 n.7. The Court nevertheless reserved judgment on whether strict scrutiny was appropriate, noting that several courts, including the Third Circuit in Rappa, had found the on-site/off-site distinction to be content-neutral "for the purpose of determining the correct standard [of review]." Ibid. But Discovery Network expressly held that the rather different distinction drawn by the district court here -- that between commercial and noncommercial speech -- cannot be regarded as content-neutral. See 507 U.S. at 429-430. Indeed, although Rappa approved the on-site/off-site distinction (see 18 F.3d at 1065), it acknowledged that Discovery Network made it "unconstitutional to ban commercial speech but not non-commercial speech." Id. at 1074 n.54.

at 416 n.11. More recently, in 44 Liquormart, three Justices concluded that strict scrutiny of commercial speech regulations is appropriate when the state restricts nonmisleading commercial speech "for reasons unrelated to the preservation of a fair bargaining process." 116 S. Ct. at 1507 (Stevens, J., joined by Kennedy and Ginsburg, JJ.). See also id. at 1506-1507 (Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.) ("'special care' should attend the review" of regulations "'that entirely suppress commercial speech in order to pursue a nonspeech related policy'"). The other Justices did not reach the issue.

In these circumstances, the line drawn by the district court is, at best, constitutionally questionable. Although the issue has not been definitively resolved, Supreme Court authority suggests that the redrawn ordinance would be subject to strict scrutiny. And such scrutiny plainly would be fatal to the ordinance: "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling." City of Gladstone, 54 F.3d at 1408. See Ackerley, 88 F.3d at 36 (addressing ordinance as originally written, "even Cambridge seems to acknowledge that, if this traditional content-based inquiry applies, its ordinance would fail"). If it is not impermissible now, the distinction drawn by the district court thus "could turn out to be unconstitutional after the Supreme Court settles the law. Discretion would seem the better part of valor in this area of the law." Eubanks, 937 F.2d at 1127.

**D. This Court's Initial Opinion In This Case Did Not Resolve The Remedial Question Presented Here**

As against all of this, Cambridge made a single argument below: that this Court already has settled the remedial question in this case. In making this argument, the City focused on this statement at the end of the Court's opinion: "we hold only that Cambridge may not require removal of signs displaying noncommercial messages based on their exclusion from exemption under the state [grandfather] provision." 88 F.3d at 40. The City (and, apparently, the district court) read this statement to direct entry of a judgment that goes no farther than barring enforcement of Section 7.18.1 against signs that display noncommercial messages. The City's argument, however, is premised on a plain misreading of this Court's opinion.

In fact, the language cited by the City -- "we hold only that Cambridge may not require removal of signs displaying noncommercial messages" -- is most naturally read as a statement of the limited nature of the Court's substantive holding and as a description of the constitutional limits imposed upon the City by the First Amendment. In contrast, it seems most improbable that this language also was meant to settle remedial issues. For one thing, the question of remedy was not briefed or argued to this Court. For another, the Court expressly left open the constitutionality of content-based sign regulations; similarly, while Ackerley argued (Op. Br. 31 n.19) that the ordinance might be found unconstitutional on remand because it did not materially advance the City's purposes, that point that was not addressed by the Court. It hardly seems likely that the Court would have chosen to

implicitly resolve both of these difficult constitutional issues through its choice of remedy.

Indeed, the Court's opinion seems, if anything, to assume that its decision invalidated Section 7.18.1 in its entirety, with the formulation of a revised ordinance left to the City Council. The Court thus flatly declared, in summarizing its holding, that the First Amendment flaws in Section 7.18.1 "bar its enforcement." 88 F.3d at 37. In addition, under the heading "remedial option," the Court acknowledged that its holding "puts Cambridge in a peculiar position because the content-based grandfathering derives from state law," explained that state law could be changed through "the political process," and noted that "it is possible to construct a justifiable, content-neutral grandfather provision that will advance the city's 'dual objectives of eliminating most billboards while giving substantial protection to onsite signs.'" Id. at 39 (citation omitted). By offering this guidance -- and by then concluding its opinion with the limited summary of its holding that is relied upon by Cambridge -- the Court appeared to be indicating how the City might respond to the invalidation of Section 7.18.1. But certainly, nothing here suggests that the Court meant to resolve itself, without argument or discussion, the complex remedial questions presented by this case.

It should be added that invalidation of Section 7.18.1 would leave Cambridge with a fully functioning sign ordinance, which includes eleven pages of detailed restrictions governing the size and placement of various types of signs in the City. These provisions have been very

effective in promoting the City's goals by restricting the construction of new signs. And if Cambridge wants an ordinance that distinguishes between commercial and noncommercial messages, it would be a simple enough matter for the City Council to enact such a provision -- something that it did not do in the five-month period between this Court's decision and the entry of judgment by the district court. For the district court to take that step itself, however, departed from the judicial role in a manner that was not required by this Court's decision. The judgment below therefore should be set aside.

#### CONCLUSION

The district court should be instructed to enter a judgment invalidating Section 7.18.1 of the Cambridge Zoning Ordinance in its entirety.

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