IN THE

Supreme Court of New Jersey

No. A-40-14 (075207)

E&J EQUITIES, LLC, *a New Jersey limited liability company,*	**CIVIL ACTION**
Plaintiff-Petitioner,	ON APPEAL FROM THE APPELLATE DIVISION, SUPERIOR COURT, DOCKET NO. A2432-12
v.	*Before*: CLARKSON FISHER, P.J.A.D., MARIANNE ESPINOSA, J.A.D., *and* ELLEN KOBLITZ, J.A.D.
BOARD OF ADJUSTMENT OF THE TOWNSHIP OF FRANKLIN,	
Defendant-Respondent.	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SOMERSET COUNTY, DOCKET NO. L-1526-10.
	Before: PETER BUCHSBAUM, J.S.C.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

Amicus American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of Plaintiff-Petitioner E & J Equities, LLC.

ACLU-NJ urges reversal of the final decision of the Appellate Division in this matter upholding the constitutionality of Franklin Township Ordinance No. 3875-10 (2010), which provides in pertinent part:

> No sign or portion thereof shall rotate, move, produce noise or smoke, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any sign or portion thereof have any electronic, digital, tri-vision or other animated characteristics.

Ordinance No. 3875-10 therefore imposes a blanket ban on all digital multiple message billboards.

In this brief, ACLU-NJ focuses particularly on the proper evidentiary and procedural burdens, both under the United States and New Jersey Constitutions, placed upon a governmental entity when it enacts a law that—although ostensibly content neutral—nevertheless by its terms imposes significant limitations on the effective ability to engage in expressive and community activity protected under the First Amendment of the United States Constitution and Article 1, ¶6 of the New Jersey Constitution.

Amicus recognizes that the burden on the government under intermediate scrutiny applied to "time, place or manner"

limitations on speech is not so onerous as that required under strict scrutiny for a content-based restriction on speech. Indeed ACLU-NJ does not argue that, as a matter of law, it would be theoretically impossible under any and all circumstances for a government entity to justify even a categorical ban on electronic billboards.

But for such a broad proscription to be upheld, there must be a sufficient record for the government entity—here the Franklin Township Council—to make a reasonable and sincere assessment of: (1) the significance and actual existence of the legitimate governmental interest at stake, (2) the necessity of such a broad measure as an outright ban on electronic billboards, rather than less drastic provisions, and (3) the availability of adequate alternative means of communication. Such a record is necessary not only to show that Franklin Township has discharged its primary obligations under constitutional norms but also so that the courts can perform a competent and independent assessment of the record and, thus, discharge their proper role in engaging in judicial review.

Here, as even the Appellate Division observed in the opening words of its opinion, the record suggests that the actual driving force behind the inflexible nature of Ordinance No. 3875-10 was a general concern, and perhaps impatience, over possible exposure to legal liability due to perceived

inconsistencies in existing legislation, rather than any actual and documented concern either over "aesthetics" or highway safety. Creating a "one size fits all" proscription against expressive activity as a prophylactic measure against hypothetical legal claims of an indeterminate nature is hardly the type of narrow tailoring required to justify actual intrusions on interests protected by the First Amendment.

ARGUMENT

I. THE TOWNSHIP OF FRANKLIN HAS ESTABLISHED NEITHER THE EXISTENCE OF AN ACTUAL THREAT TO SAFETY CAUSED BY ELECTRONIC BILLBOARDS, NOR THAT ITS ORDINANCE IS NARROWLY TAILORED.

"When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." Schad v. Mt. Ephraim, 452 U.S. 61, 68, 101 S.Ct. 2176, 2183, 68 L.Ed. 2d 671 (1981). Here, on its face, Ordinance No. 3875-10 prohibits a wide range of communications conveyed by signs that "rotate, move, produce noise or smoke, display video or other changing imagery, automatically change, or be animated or blinking," or that "have any electronic, digital, tri-vision or other animated characteristics."[1] The ban on electronic billboards is not

[1] The 48-foot by 14-foot electronic panels proposed by E&J Equities in this case would display static images in eight-second intervals without scrolling, flashing, or animation. Nevertheless, they are proscribed by the terms of the ordinance since they "automatically change" and apparently also might have

limited by time or place—it is categorical. The ordinance therefore clearly impinges on the right of free speech, albeit in a way that does not refer directly to the content of that speech, and therefore must at least satisfy the intermediate level of scrutiny described in Schad.

A. The Township Of Franklin Bears the Burden of Establishing a Reasonable Factual Basis that Ordinance 3875-10 Advances a Substantial Governmental Interest and Is No More Expansive Than Necessary in Advancing That Interest.

In the context of content neutral limitations on speech, the courts have often applied intermediate scrutiny under the rubric of "time, place and manner" restrictions. See generally, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065 82 L.Ed. 2d 221 (1984); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 211880, L.Ed. 2d 772 (1984). "[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Clark, supra, 468 U.S. at 308. See also, Besler v. Bd. of Educ. of West Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 570 (2010).

"electronic" and "digital characteristics," although the precise meaning of those terms is not completely understood by Amicus.

Even under intermediate scrutiny as applied under federal jurisprudence, however, the burden remains on the government to establish the actual existence of a problem to be solved.

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."
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> Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed. 2d 497 (1994) (Kennedy, J., announcing judgment of Court) (quoting Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434, 1455 (D.C. Cir. 1985)).

Furthermore, even if the government sustains its burden establishing the existence of a legitimate state interest, "the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Turner, supra, 512 U.S. at 665 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." Frisby v. Schultz, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed. 2d 420 (1988) (emphasis added). Moreover, as this Court has noted frequently, the language of Article I, paragraph 1, of the New Jersey Constitution is "more expansive . . . than that of

the United States Constitution." Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 629 (2000). "[W]here an important personal right is affected by government action, [our] Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." Right to Choose v. Byrne, 91 N.J. 287, 309 (1982) (quoting Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 43 (1976)). Thus, this Court has rejected the tiered scrutiny approach used by the United States Supreme Court, and instead employs a balancing test that weighs "the governmental interest in the statutory classification against the interests of the affected class." Planned Parenthood, supra, 165 N.J. at 630; see also, Robinson v. Cahill, 62 N.J. 473, 492 (1973).

In striking that balance, the Court considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). Especially under our state constitutional methodology, the Court should not simply take at face value the contention that any colorable rationalization for the State's action was in fact the actual reason for that action.

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the

> State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
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> Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003) (emphasis added) (quoting Robinson v. Cahill, 62 N.J. 473, 492 (1973)).

Thus, while legislative enactments, such as zoning ordinances, ordinarily enjoy the presumption of validity, if an ordinance directly impinges on a constitutionally protected right, such as free speech, "the presumption in favor of its validity disappears. Courts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights." Bell v. Stafford Twp., 110 N.J. 384, 395 (1988) (citing State v. Cameron, 100 N.J. 586, 592 (1985); Paton v. LaPrade, 469 F. Supp. 773, 778 (D.N.J. 1978)). As this Court stressed in striking down a municipal ordinance banning all outdoor billboards:

> Thus, an ordinance that substantially curtails freedom of expression clearly requires that the municipality shoulder the burden of proving its constitutional validity. The municipality must satisfactorily demonstrate a legitimate governmental interest that is to be served by the enactment and demonstrate a reasonable factual basis indicating that the regulation advances the governmental interest and is no more expansive than necessary in advancing that interest.

Bell, supra, 110 N.J. at 395 (emphasis added).

In the specific context of this case, the "time, place and manner" line of cases present the following issues:

1. Did the Township of Franklin provide a reasonable factual basis to support the conclusion that a substantial government interest would be served by the blanket ban on electronic billboards?
2. Did the Township of Franklin provide a reasonable factual basis to support the conclusion that a blanket ban on electronic billboards was no more expansive than necessary to achieve that substantial government interest?
3. Did the Township of Franklin provide a reasonable factual basis to support the conclusion that there were adequate alternative means of communication available to reach the intended audience despite the blanket ban on electronic billboards?

As demonstrated below, The Township of Franklin has failed on all three of these points, and, therefore, Ordinance 3875-10 must be struck down.

B. The Township of Franklin Has Not Established a Reasonable Factual Basis Establishing That a Ban on Electronic Billboards Would Serve a Government Interest.

Ordinance 3875-10 announced two purported governmental interests that it serves: 1) "to promote and preserve the scenic

beauty and character of the Township," and 2) "to provide for the safety and convenience of the public." Pa68. At the same time, the Ordinance attempts, Amicus believes unsuccessfully, "to recognize certain Constitutional rights relative to outdoor advertising." Ibid. Admittedly, both aesthetics and traffic safety can, in appropriate contexts, be considered significant governmental goals. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed. 2d 800 (1981). However, the record lacks sufficient evidence that demonstrates a ban of electronic billboards was necessary to further either of the Township's stated interests.

Indeed, according to a memorandum submitted to the Mayor and Town Council along with the draft ordinance, the Township Planning Board expressly stated that it had drawn no conclusions regarding the merits or disadvantages of electronic billboards. As the memorandum states:

> It should be noted that the Board spent a good amount of time discussing whether to permit LED billboards in the ordinance. In the end, the Board decided that it would be best to not permit LED billboards in the Ordinance. This was done because the Board felt that it did not have enough information or sufficient expertise to craft ordinance language to appropriately address LED billboards. The Board, however, did not make a determination whether LED billboards would be inappropriate.
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> Pa117-18 (emphasis added).

Similarly, minutes of the March 25, 2009, zoning board work session indicate that the board felt it did not have enough information to decide whether to ban electronic billboards, even after a professional planner, John Chadwick, presented on LED lighting:

> In March 25, 2009 Worksession Minutes, After Mr. Linnus gives a presentation along with retained Professional planner John Chadwick regarding the appropriateness of LED lighting] "After a very lengthy discussion it was unanimously agreed that the draft ordinance with some minor corrections would be submitted to the Township Council for their consideration. It was further agreed that the cover memo to the Council would clearly explain that while LED billboards are not being permitted, as per the Ordinance, that the Board did not make a specific determination that LED billboards were inappropriate. The board felt that they did not have enough information to make that determination.
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> Pa168.

Thus, the decision to ban electronic billboards was not based on particular circumstances in Franklin or studies about the impact of digital billboards on aesthetics or traffic safety. Indeed, the Board stated that it "did not make a determination whether LED billboards would be inappropriate." Franklin has therefore so-far failed to articulate how the unique characteristics of digital billboards, as opposed to static billboards, cause aesthetic harm and impact traffic safety.

1. An inchoate interest in "aesthetics" cannot justify a blanket prohibition on a form of communication.

Perhaps "[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as an 'esthetic harm.'" Metromedia, supra, 453 U.S. at 510. However, "[e]ach method of communicating ideas is 'a law unto itself' and that must reflect the 'differing natures, values, abuses and dangers' of each method." Id. at 501. The question presented here is whether Ordinance 3875-10 presents any reasonable and objective basis to determine that electronic billboards, as opposed to static billboards, present a legitimate aesthetic harm that the Township can regulate. Aesthetics are, of course, inherently subjective. While apparently the members of the Township Council found digital billboards to be inherently aesthetically displeasing, other reports on public opinion differ. See, e.g., Charles R. Taylor & George R. Franke, Public Opinion towards Digital Billboards in the United States: An Analysis of Recent Polls 2 Advances in Advertising Research, 373-92 (2011) (reporting on study finding overall favorable American public opinion of digital billboards).

Mark Healy, Director of Planning of the Township, testified that the "brightness" or "crispness" of the disputed digital billboards would have a negative aesthetic impact. Pa415. While excessive brightness might be an aesthetic quality that is

objectively measurable, the Law Division found credible the uncontested testimony adduced by Plaintiff that the "proposed [digital] billboard would emit the same or less luminosity than a static billboard and would have minimal visual impact . . . given . . . the . . . industrial zone." E & J Equities, LLC v. Bd. of Adjustment of Franklin, 2013 N.J. Super. Unpub. LEXIS 68, 25 (Law Div. Jan. 4, 2013) (citing Pl.'s Trial Brief, p. 8; see also Pl.'s Appendix I-A and Appendix I-B). Healy's testimony on brightness therefore does not provide a reasonable factual basis establishing the negative impacts of digital billboards.

With regard to the "crispness" of high definition digital billboards—as compared, presumably, to the relative analog "blurriness" of traditional billboards with printed artwork—it is somewhat unfathomable what aesthetic standard such "crispness" offends. Declaring crispness to be less aesthetically pleasing than blurriness is similar to declaring Cubism more cognitively jarring than Impressionism. It may be so in the eye of the beholder, but imposition of such completely subjective tastes by the government is completely arbitrary.

Some measure of common sense is also called for in assessing the Township's claim of protecting aesthetic sensibilities. The digital billboard that E&J Equities proposed to erect would be located in an area that the Township had already zoned to permit similarly sized static billboards, in an

industrial district, adjacent to a large manufacturing facility, with land to the rear zoned for further large manufacturing or warehouse uses. The proposed electronic billboard was oriented to I-287.[2] While a residential development and a cemetery lie across the interstate highway, the closest home is approximately 500 feet away from the proposed sign.

The Township also expressed concern that an electronic billboard (again as opposed to a static billboard) would be inappropriate at a "gateway" to Franklin Township. Interstate 287 transects the extreme northern tip of Franklin Township, total area 46.86 square miles, for approximately two miles as it travels from Piscataway in the southeast to Bound Brook in the northwest, and there is an exit ramp at each end abutting the border with each of those municipalities. Again, the Township has failed to articulate, much less demonstrate, any non-arbitrary justification for prohibiting electronic billboards.

Regardless of Ordinance 3875-10, as a practical matter, only one electronic billboard could be located in the Township because of state regulations and other Township zoning ordinances. Franklin's general zoning laws only permit

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[2] The M-2 zone of Franklin Township approved for billboards is located on a stretch of I-287 that runs between Elizabeth Avenue and Davidson Avenue. See Zoning Map Franklin Township (Somerset Co.), Sept. 2010, available at http://38.106.5.145/home/showdocument?id=1250.

billboards in a 2,000 foot area, and NJDOT regulations require at least 3,000 feet between electronic billboards. Pa69, 74. The Township's planner testified at trial that "one digital billboard, by itself, was not likely to have any more of an impact on township aesthetics than a static billboard." Pa39. The record thus indicates that a ban on electronic billboards is unnecessary to achieve the Township's stated interest in aesthetic integrity.

More generally, courts should approach use of an ill-defined governmental interest in "aesthetics" in order to justify restrictions on speech with extreme caution. Without meaningful limitations, aesthetic justifications could permit the government to restrict almost any form of speech. In several other contexts, courts have struck down subjective justifications for limiting expression. For example, in State v. Miller, this Court struck down a zoning ordinance that restricted residential signs. 83 N.J. 402, 407 (1980). While the Court held that "a zoning ordinance may accommodate aesthetic concerns," id. at 409, but it did not automatically follow that aesthetic interests trump First Amendment rights, id. at 411. Instead, the Court found that when the government infringes on protected activity:

> [T]he courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs

> respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights to so vital to the maintenance of democratic institutions.
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> Miller, supra, 83 N.J. at 412 (quoting Schneider v. New Jersey, 208 U.S. 147, 161 (1939)).

As Justice Brennan noted in his concurrence in Metromedia, supra, only after the government can demonstrate "a comprehensive commitment"" to aesthetics in the impacted area should it be justified as a governmental interest justifying limitations on expressive activity. Supra, 453 U.S. at 531 (Brennan, J., concurring). As Justice Brennan further explained in his dissent in Members of City Council v. Taxpayers for Vincent:

> Because aesthetic judgments are so subjective, however, it is too easy for government to enact restrictions on speech for just such illegitimate reasons and to evade effective judicial review by asserting that the restriction is aimed at some displeasing aspect of the speech that is not solely communicative -- for example, its sound, its appearance, or its location. An objective standard for evaluating claimed aesthetic judgments is therefore essential; for without one, courts have no reliable means of assessing the genuineness of such claims.
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> 466 U.S. at 851-58 (Brennan, J., dissenting).

Franklin's Ordinance does exactly what Justice Brennan warned against—it imposes substantial restrictions on First Amendment rights based on unsubstantiated aesthetic interests.

Without the objective standards described by Justice Brennan, a free-wheeling inquiry into the "aesthetics" of a particular sign or display could quickly degenerate into the exercise of uncabined discretion that is inherently infected with the subjective biases of the deciding government officials. As the United States Supreme Court noted in Ward, supra, "[a]ny government attempt to serve purely esthetic goals by imposing subjective standards on acceptable sound mix on performers would raise serious First Amendment concerns.491 U.S. at 792, 109 S.Ct. at 2754, 105 L.Ed. 2d 661(1989) See also, Niemotko v. Maryland, 340 U.S. 268, 272, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951) (town committee's "limitless discretion" over park permits lacked "narrowly drawn limitations" to limit committee "absolute power"); Shuttlesworth v. Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 939, 22 L.Ed. 2d 162 (1969) (city parade ordinance unconstitutional because First Amendment rights were subject to arbitrary determinations by town officials). "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'"

Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 130 112 S.Ct. 2395, 2401, 120 L.Ed. 2d 101 (1992).

To the extent that it is theoretically possible to articulate a sufficiently objective and reliable standard of "aesthetics" to justify a time, place or manner regulation restricting speech, and then demonstrate a reasonable factual basis for application of that standard to the particular circumstances, the Township of Franklin has not done so here.

2. While the interest in traffic safety could be substantial, the Township of Franklin did not establish a reasonable factual basis that safety would be affected by a complete ban on electronic billboards.

Without doubt, the Township has a general interest in promoting traffic safety. But the Township has failed to provide a reasonable factual basis to show the Ordinance serves this end.

The articulated justification of traffic safety as the reason for the outright ban on all electronic billboards in Franklin Township must begin with the observation that the New Jersey Department of Transportation, with all its resources and expertise on traffic safety (particularly with regard to interstate highways in New Jersey that are directly under its purview), had already approved E&J Equities' application for an electronic billboard in Franklin Township. While it is true that the granting of such a state permit does not pre-empt local

zoning ordinances, the fact that NJDOT did not believe that an electronic billboard on an interstate highway presented a significant safety issue fairly raises the question of what superior knowledge and expertise the Township of Franklin possessed that supports its contrary determination? Or what unique characteristics exist on the brief two mile stretch of I-287 in Franklin Township that make digital billboards unsafe in Franklin Township, as compared to neighboring Piscataway which has two digital billboards a few miles away on I-287.[3]

The record is devoid of a basis on which to draw a conclusion. Indeed, the Township's own Planning Board was unable to determine an answer to this question, and it expressly stated that it did not have enough information to make a determination and specifically declined to decide whether "LED billboards were inappropriate." Pa168.

Multiple studies on digital billboards, on which the Township Council could have relied if it had chosen to do so, do exist. In 2009, the Federal Highway Administration (FHWA) of

[3] Outfront Media has two active digital billboards on I-287 in Piscataway; one approximately a half mile north of Exit 7 (a little over three miles from the M-2 zone in Franklin) and another approximately 500 feet north of Exit 6 (about four and a half miles from the M-2 zone). See Media Finder, Outfront Media, http://www.outfrontmedia.com/whereweare/pages/mediafinder.aspx (select "New Jersey" from dropdown menu to the right of "Units" and enter unit numbers "7065" and "7072" to show a map with their respective locations).

the U.S. Department of Transportation and the National Cooperative Highway Research Project (NCHRP) of the Transportation Research Board published complementary reports on the safety of digital billboards. The FHWA report made recommendations for future research into the safety impacts of digital billboards. See John A. Molino et al., Federal Highway Administration, FHWA-HRT-09-018, The Effects of Commercial Electronic Variable Message Signs (CEVMS) on Driver Attention and Distraction: An Update 2 (Feb. 2009). The specific objective of the NCHRP report was to "develop guidance for State Departments of Transportation and other highway operating agencies with respect to the safety implications of digital display technology." Jerry Wachtel, Transportation Research Board, NCHRP Project 20-7 (256), Safety Impacts of the Emerging Digital Display Technology for Outdoor Advertising Signs 4 (2009), available at http://www.azmag.gov/Documents/pdf/cms.resource/NCHRP_Digital_Billboard_Report70216.pdf. Both reports conducted extensive and critical review of relevant literature over the last three decades, and both reports acknowledged that, "despite years of research, there have been no definitive conclusions about the presence or strength of adverse safety impacts from CEVMS." Molino, supra, at 2 (emphasis added).

Despite acknowledging the absence of "comprehensive research-based answers," and recognizing the "complexity of the

issue and the number of factors involved," the NCHRP report pointed to a general trend among studies "demonstrating an adverse relationship between distraction and digital billboards" and identified a number of key factors that apparently are tied to the safety of digital billboards, such as message display duration, amount of information displayed, and display luminance. Wachtel, supra, at 145, 148, 151. Based on these findings, the report laid out a series of recommended interim guidelines to serve as a model for highway administrators until more conclusive research could be conducted. Id. at 145.

While some of these reports and studies were in existence when Ordinance 3875-10 was adopted, there is little indication in the record that the Franklin Township Council found them persuasive, or indeed whether it relied on them in any significant way. While as a general axiom of administrative law, courts owe deference to an administrative determination grounded on substantial evidence in the record, "the orderly process of judicial review requires that the grounds for the administrative agency's action be clearly disclosed by it." Monks v. N.J. State Parole Bd., 58 N.J. 238, 245 (1971) (citing SEC v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943)).

For even deferential judicial review to be meaningful, the agency must state its reasons for its action grounded in the

factual record. In re Authorization for Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 595 (App. Div. 2004). "The only rational way in which a court can accomplish the limited task thus imposed upon it is to examine why . . . the agency acted, and knowing that, to examine the record as a whole for substantial credible evidence supporting the conduct." Drake v. Dep't of Human Servs. Div. of Youth & Family Servs., 186 N.J. Super. 532, 536 (App. Div. 1982). "[E]ven the best record will be unavailing unless we can also discern the use to which it was put by the factfinder." Id. at 538.

This requirement is a matter of substance, not a mere technicality. It is not sufficient for an agency merely to state conclusions. See, N.J. Bell Tel. Co. v. Commc'n Workers of Am., 5 N.J. 354, 375 (1950). And "the courts may not accept appellate counsel's post hoc rationalizations for agency action; . . . an agency's discretionary order can be upheld, if at all, on the same basis articulated in the order by the agency itself." Burlington Truck Lines v. United States, 371 U.S. 156, 168-69, 83 S.Ct. 239, 246, 9 L.Ed. 2d 207 (1962).

Although these principles were established ordinarily in the context of an agency acting in a quasi-judicial capacity, and here the Township Council is acting in a legislative capacity, this Court has cautioned that "such labels as quasi-adjudicative and quasi-legislative have limits to their

usefulness. . . . Importantly, the labels do not result in a meaningful difference in the role played by judicial review of administrative determinations. The "core value[] of judicial review of administrative action is the furtherance of accountability." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 384-85 (2013).

As Justice Kennedy warned in Turner Broadcasting, supra, in order to justify a restriction such as the one at issue here, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 512 U.S. at 664. Given the demonstrable lack of any genuine articulation by the Township Council of its reasoning as to why electronic billboards actually present any appreciable incremental risk to safety (as distinct from any other billboard), the rote recitation in Ordinance 3875-10 that its purpose is "to provide for the safety and convenience of the public" is insufficient to justify a complete ban.

C. The Township of Franklin Has Not Established a Reasonable Factual Basis that a Complete Ban on Electronic Billboards Is No More Expansive Than Necessary to Achieve a Substantial Government Interest.

Since the Township Council did not articulate with any specificity the precise nature of its safety concerns concerning electronic billboards, it goes without saying that it did not

establish a "reasonable factual basis indicating that the regulation advances the governmental interest and is no more expansive than necessary in advancing that interest." Bell, supra, 110 N.J. at 395. The Planning Board's startling admission that it "did not have enough information or sufficient expertise to craft ordinance language to appropriately address LED billboards" (Pa168) amounts to a concession that ordinance 3875-10 was not narrowly tailored. If the Township did not have enough information or expertise, , then it was under an obligation to acquire it before enacting a complete ban on electronic billboards.

In the absence of such a record, we are left to conjecture on why the Township Council thought that less restrictive measures were inadequate. Driver distraction caused by changing displays might possibly have been of concern. Nevertheless, neither the NCHRP report nor the FHWA report advocated an outright ban on digital billboards, and they did not indicate that such a regulation would be appropriate. On the contrary, the NCHRP report made broad recommendations about modest limitations on the operation of digital billboards. For example, the report recommends that the minimum acceptable display duration for any given digital billboard should be calculated based on the distance from which on can see that billboard over the speed limit on that stretch of roadway.

Wachtel, supra, at 146. Similarly, the report recommends that "operating authorities should establish minimum longitudinal spacing requirements for [digital billboards] such that an approaching driver is not faced with two or more . . . displays within his field of view at the same time." Id. at 158. In short, the report demonstrates that electronic billboard constraints can be narrowly tailored without resorting to an outright ban on the medium.

Thus, because Franklin has completely foreclosed the use of an entire medium, the Court should not find Franklin's Ordinance narrowly tailored to its stated interests. In fact, the record suggests that there are less intrusive ways to serve the Township's stated interests. For example, as the Law Division noted, Franklin Township's Ordinance could regulate the brightness of electronic billboards so that they "emit the same or less luminosity than a static billboard." E & J Equities, LLC, 2013 N.J. Super. Unpub. LEXIS 68, 25 (N.J. Super. Ct. Law Div. 2013). The Township also could minimize the number of times a sign changes messages, by requiring that each display last even longer than the eight seconds required by NJDOT. See N.J.A.C. § 16:41C-11.1(a)(3).

Finally, the Township could regulate the size of electronic billboards just as it does with static billboards. See Township of Franklin Ordinance 3875-10 § 112-53.1(C)(2). However, the

Township has failed to explain why these or other less intrusive restrictions would be inadequate. Nor has the Township articulated why a ban is the only way to achieve its stated interests. Because the Township has banned all electronic billboards without addressing less burdensome ways of regulating them, the Ordinance is not narrowly tailored to Franklin Township's stated interests.

It is true that federal jurisprudence does not require that the challenged restriction be "the least restrictive means" of advancing a legitimate government interest. Ward, supra 491 U.S. at 798-99. But contrary to the Appellate Division's suggestion that the subsequent decision in Ward had implicitly overruled this Court's opinion in Bell, E&J Equities, 437 N.J. Super. at 515, this Court has consistently established a more stringent level of judicial review under the State Constitution over restrictions on important individual rights, and would be free to maintain that enhanced standard regardless of changes in federal jurisprudence. Indeed, when this Court noted in Bell, supra, that "this constitutional approach [by the United States Supreme Court in Metromedia] conforms to our own," 110 N.J. at 393, it was signaling that it also was invoking the authority of New Jersey's particular jurisprudence.

At the very least, whether under federal or New Jersey jurisprudence, in order to find that a measure is narrowly

tailored, the government should at least articulate in more than a conclusory way why a lesser measure than a complete ban on electronic billboards would not suffice to address its interests. In order to do so, however, the Township would first be required to articulate what those interests are. Absent both of those articulations, there is no basis upon which this Court can engage in meaningful judicial review, and on that basis alone the ordinance should be invalidated.

D. The Commercial Speech Doctrine Does Not Apply in this Case.

The Appellate Division, E & J Equities v. Board of Adjust., 437 N.J. Super. 490, 552 (App. Div. 1948),stated that the "burden of proving a 'substantial government interest' is not a heavy one," citing Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 270-71 (1998), which, however, seems to be at odds with this Court's opinion in Bell. E&J Equities v. Board of Adjust., 437 N.J. Super. 490, 552, (App. Div. 2014) (citing Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 270-71 (1998). But inspection of the full opinion in Hamilton Amusement Ctr. reveals why the Appellate Division's reliance is misplaced. The full quote from the opinion reads: "Both the United States Supreme Court and this Court have held that the government does not have a heavy burden to satisfy the substantial governmental interest prong of the Central Hudson standard." 156 N.J. at 270-71 (emphasis added). Thus, Hamilton Amusement Ctr., supra,

was referring to the four-pronged test governing regulation of commercial speech described in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

It is well recognized that the Constitution "accords lesser protection to commercial speech than to other constitutionally guaranteed expression." Id. at 563; see also, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (commercial speech afforded "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"). It is for that reason, however, that the Appellate Division's reliance on commercial speech cases, and the lesser standard that they impose, was an erroneous application of constitutional doctrine. Here, Ordinance 3875-10 enacts a total ban on electronic billboards. It is not limited to commercial speech, nor does it seek to regulate commercial speech qua commercial speech. It bans all electronic billboards, regardless of whether the message on that billboard solicited a commercial transaction, supported a candidate for political office, encouraging state-wide enthusiasm for Rutgers joining the Big 10,[4] proclaimed the existence or the non-existence of God,[5]

[4] See "Rutgers B1G Signage Placed Around State," http://skcom.rutgers.edu/news/release.asp?prID=15002#.VUEnWIu25UQ (June 4, 2014).

[5] See "Godly message replaces atheist billboard near Lincoln Tunnel," available at **http://www.examiner.com/article/godly-**

encouraged immigrants to fill out the census forms,[6] or encouraged awareness about the alleged genocide of Armenians 100 years ago.[7] Thus, as this Court observed with the ordinance at issue in Bell, supra, "it reasonably appears from the record that the curtailment effected by the ordinance would apply to both commercial forms of expression as well as noncommercial speech, which could include political expressions. Because noncommercial speech is implicated, the burden of overcoming the charge of constitutional invalidity is particularly strenuous." 110 N.J. at 395 (citations omitted).

The Appellate Division's characterization of this Court's opinion in Bell as applying the Central Hudson commercial speech doctrine, 437 N.J. Super. at 507-08, is simply inaccurate. Bell mentions Central Hudson in passing in a footnote, and then only to describe how the plurality opinion in Metromedia applied Central Hudson to a billboard ordinance—but, only to the extent that it regulated commercial speech. Bell, supra, 110 N.J. at 392 n.5. Bell, supra, then emphasized that in Metromedia,

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message-replaces-atheist-billboard-near-lincoln-tunnel (December 24, 2010).

[6] See, "Community leaders urge immigrants to fill out census forms," available at **http://www.nj.com/news/index.ssf/2010/04/post_152.html** (Apr. 04, 2010).

[7] See "Armenian Genocide Billboard in New Jersey," available at http://horizonweekly.ca/news/details/65750 (April 15, 2015).

"[w]hile the billboards were used primarily for commercial advertising, they were also used to communicate a broad range of noncommercial social and political messages." Id. at 392. And thus this Court accurately observed that the Metromedia plurality "struck down the ordinance because of its restrictive impact on non-commercial speech." Id. at 393. To the extent, therefore, that the Appellate Division relied on the more relaxed constitutional standards concerning government regulation of commercial speech, its analysis was fundamentally flawed.

II. THE TOWNSHIP OF FRANKLIN HAS NOT ESTABLISHED A REASONABLE FACTUAL BASIS THAT THERE WERE ADEQUATE ALTERNATIVE MEANS OF COMMUNICATION AVAILABLE TO REACH THE INTENDED AUDIENCE DESPITE THE BLANKET BAN ON ELECTRONIC BILLBOARDS.

The Township's ban on electronic billboards also fails the third prong of the test for time, place and manner restrictions—the availability of adequate alternate means of communication. See Clark, supra, 468 U.S. at 293; see also Besler, supra, 201 N.J. at 570.

In City of Ladue v. Gilleo, the Supreme Court first acknowledged that the use of signs raises "problems that legitimately call for regulation" because "[u]nlike oral speech, signs take up space and may obstruct views, distract motorists, [and] displace alternative uses for land." 512 U.S. 43, 48, 114 S.Ct. 2038, 2041, 129 L.Ed. 2d 36 (1994). Despite the facial

validity of these concerns, the Court struck down a town ordinance that prohibited the use of residential signs for anything other than "for sale" signs, "residence identification" signs, or safety warnings. Id. at 45. According to the Court, the restrictions were invalid because the City "almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages." Id. at 54. The Court further explained that even though "prohibitions foreclosing entire media may be" content neutral, "the danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech." Id. at 55.

Ordinance 3875-10 is likewise overbroad. "[T]he question of overbreadth 'is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far.'" State v. Borjas, 436 N.J. Super. 375, 388-389, (App. Div. 2014) (citing Town Tobacconist v. Kimmelman, 94 N.J. at 85, 125 n.21,(1983). "'The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the [S]tate's interests.'" Ibid. As a consequence of this overbreadth, the Ordinance shuts down several types of speech, including: government public service announcements for Amber and Silver

alerts, emergency weather, fugitive alerts, and information by nonprofit organizations about social services. See infra pp. 33-34.

Electronic billboards are unique, displaying colorful, design-rich messages to a large number of people traveling through a particular location. No other form of communication can replace the flexible messaging digital billboards allow. Advertising in the form of posters, murals, bulletins, and billboards is an increasingly important medium by which both commercial and noncommercial organizations reach their target audiences. See Lopez-Pumarelo & Bassell, The Renaissance of Outdoor Advertising: From Harlem to Hong Kong, 24 Am. J. of Business 33, 33 (2009).

Over the last decade, outdoor advertising (also referred to as "out-of-home" advertising or "OOH") has experienced a renaissance driven mostly by advancements in advertising technology and changes in consumer behavior. See ibid. Within this growing field, billboard advertising is, by far, the most important medium, accounting for sixty-six percent of all OOH advertising revenue in 2014. See OOH Revenue by Format, Outdoor Advertising Association of America, http://www.oaaa.org/ResourceCenter/MarketingSales/Factsamp;Figures/Revenue/OOHRevenuebyFormat.aspx (last visited Apr. 15, 2015).

The resurgence of outdoor advertising is largely

attributable to innovations in advertising technologies, such as the digitization of billboards. See Lopez-Pumarelo, at 33.

A. The Speed with Which Electronic Billboard Displays Can Be Changed Makes Alternative Means of Communication Inadequate.

An assessment of whether there are adequate alternative means of communication requires an understanding of the unique aspects of digital billboards compared to conventional static billboards. Foremost among those differences is the speed and efficiency with which displays can be changed.

Digital billboards use color display technology to exhibit hi-fidelity images on self-illuminating screens. See Wachtel, Transportation Research Board, NCHRP Project 20-7 (256), Safety Impacts of the Emerging Digital Display Technology for Outdoor Advertising Signs 8 (2009), available at http://www.azmag.gov/Documents/pdf/cms.resource/NCHRP_Digital_Billboard_Report70216.pdf. Typically, digital billboards display several messages in rotation, with each message receiving six to eight seconds of screen time per rotation. See Digital Billboards, Outdoor Advertising Association of America, https://www.oaaa.org/OutofHomeAdvertising/OOHMediaFormats/DigitalBillboards.aspx.

Digital billboards represent a significant improvement over older technologies because digital billboard users can reach target audiences with pinpoint accuracy by controlling both the times during which their message will be active and the precise

contents of their message at any given time. New messages are uploaded remotely and can be changed in real-time by the billboard operator. See Anne C. Osborne & Renita Coleman, Outdoor Advertising Recall: A Comparison of Newer Technology and Traditional Billboards, 30 J. of Current Issues & Res. in Advertising 13, 21 (2008). These unique features give advertisers an economical means of targeting their audiences with pinpoint timing and tailored messages.

For example, an advertiser can target individuals from a particular town or region of the state during their commute to and from Manhattan with a message of special interest to that audience. See Lopez-Pumarejo, supra at 36 (discussing how digital billboards can target groups of commuters). Similarly, digital billboards are capable of so-called "trigger advertising," whereby a message is posted in response to a pre-determined event or condition. See Outdoor Advertising Association of America, Innovation on Display: OOH and the Social Media Ecosystem 5, 2013, https://www.oaaa.org/Portals/0/Public%20PDFs/OAAA_SocialEco%20Brochure.pdf.

Trigger advertising has been used in non-commercial contexts, in addition to commercial contexts, in furtherance of important public service needs. For example, this feature has been used by FEMA's Integrated Public Alert & Warning System to dispense vital information in the wake of natural disasters.

See Federal Emergency Management Agency, The Integrated Public Alert and Warning System: Get Alerts, Stay Alive (July, 2013), http://www.fema.gov/media-library-data/20130726-1922-25045-4009/ipaws_general_presentation.pdf. This use of digital billboards is particularly relevant here because I-287 is an emergency evacuation route for the entirety of Somerset County. See New Jersey Transportation Authority, Making Connections: Somerset County's Circulation Plan Update, 44 (June 2011), https://www.co.somerset.nj.us/planweb/learn/pdf/Draft%20Final%20Plan%20%286-29-11%29.pdf.

The National Center for Missing & Exploited Children has used digital billboards as part of its AMBER Alert Program. See Amber and Wireless Emergency Alerts, The National Center for Missing and Exploited Children, *available at* http://www.missingkids.com/AMBER/WEA. And the FBI has created a program called the Digital Billboard Initiative to warn the public about fugitives suspected of hiding within specific geographic areas. Digital Billboard Initiative: Catching Fugitives in the Information Age, Federal Bureau of Investigation, (Dec. 24, 2014), http://www.fbi.gov/news/stories/2014/december/digital-billboard-initiative/digital-billboard-initiative. Within one year of launching its Digital Billboard Initiative, digital billboards directly led to the capture of fourteen fugitives. Digital Billboards: What a Difference a

Year Makes, Federal Bureau of Investigation, (Jan. 30, 2009), http://www.fbi.gov/news/stories/ 2009/january/billboards_013009. More recently, the FBI used this program to post images of Dzhokhar Tsarnaev onto digital billboards in the Boston area after the Boston Marathon bombing in order to alert and inform the public. Peter J. Sampson, Digital Billboards Aid FBI in Hunt for Top Criminals, Northjersey.com, (Sep. 30, 2013), http://www.northjersey.com/ news/digital-billboards-aid-fbi-in-hunt-for-top-criminals-1.644446.

Political campaigns too have been quick to recognize and capitalize on the benefits of digital billboards. Indeed, between the 2010 and 2012 election cycles, outdoor advertising increased by more than thirteen percent. See Ana Radelat, Billboard Bounce: Political Ad Spending Up 13% for Outdoor Media: New Tech Allows Campaigns to Better Target, Tailor Messages, Advertising Age, (March 10, 2014), http://adage.com/article/media/billboard-bounce-political-ad-spending-13-outdoor/292075/. Understandably, the use of targeted digital billboard messaging is particularly attractive to political candidates and advocacy groups because it can be significantly cheaper than producing and airing a regional television advertisement, and some commentators complain that television advertising is already "saturated" with political messages during campaign season. See ibid.

For example, with digital media, a political candidate's campaign ad could include a countdown to Election Day. A non-profit organization could incrementally report how much money a particular fundraising effort has raised as part of its plea for more contributions. Undoubtedly, creative people working for private companies, political campaigns, and non-profit organizations across the country have identified a multitude of other ways to use the unique properties of digital billboards to broadcast their ideas. The visibility and flexibility of digital billboard media make them completely unique; no other medium can send the same message to the same audience in the same way. Digital billboards are driving the growth of outdoor advertising. No other medium is capable of combining the visibility of outdoor advertising with the flexibility and accuracy of digital signage.

B. Digital Billboards Are More Economical than Traditional Printed Billboards.

Digital billboards are also more economical than traditional static billboards for two primary reasons: 1) screen time can be split among multiple advertisers; and 2) minimum rental periods can be substantially shorter. Traditional printed billboards are expensive to print and install and, thus, are typically mounted for a period of one month to one year. Ibid. Indeed, it is not unheard-of for a

traditional billboard to remain unchanged over several years. Radelat, supra 37.

In contrast, new messages or advertisements can be quickly and easily uploaded to digital billboards, making it feasible for advertisers to change their message more often. Ibid. This allows billboard users to rent space over shorter periods of time, making digital billboards more affordable for nonprofits or political campaigns that do not need or cannot afford to monopolize a traditional billboard for a one month minimum term. Ibid. In addition to the increased economy of digital billboards, the flexibility of the digital medium also allows the proponents of messages to control the timing and content of their messages to an extent never before possible with traditional printed billboards.

Similarly, because digital billboards are capable of supporting several customers at once, billboard owners can more easily accommodate charitable and public service messaging. For example, in this case, E & J Equities apparently planned to provide free and reduced cost screen time for public service announcements, local businesses, and nonprofits. See Pet'n for Cert. 17; Pa38, 338. Put another way, digital billboards expand the marketplace of ideas by enabling more speech and providing greater access to more speakers. See Cohen v. California, 403 U.S. 15, 24-25, 91 S.Ct. 1780, 1787-88, 29 L.Ed. 2d 284 (1971).

("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.").

C. Electronic Billboards Represent the Future of Outdoor Advertising.

The Township identified the following alternatives to some of these creative uses of digital billboards: (1) "NJDOT signs along I-287;" (2) "the Township's reverse 9-1-1 system;" (3) "'e-mail blasts' to Township residents;" (4) radio stations; and (5) newspapers. See Def.-Resp. Br. in Opp. to Cert. 14. None of these methods of communication can be considered an adequate alternative to billboards. First, three of the five forms of communication offered as alternatives to digital billboards are inaccessible to the general public. The NJDOT signs, reverse 9-1-1 system, and "e-mail blast" network are available only for state or town business, not commercial, political or social speech. Also, the Township's proposed alternatives ignore the unique communicative qualities of billboards. The plurality in Metromedia, supra, explained the importance of billboards:

> Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages. As Justice Clark, noted in his dissent below:

> The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.'
>
> [453 U.S. at 501 (quoting Metromedia, Inc. v. San Diego, 26 Cal. 3d 848, 888 (Cal. 1980) (Clark, J., dissenting)).]

Thus, billboards have long been recognized as a unique form of communication with broad commercial, social, and political applications. Although some alternative forms of media may also be used to broadcast commercial, social and political ideas, they are not a replacement for electronic billboards.

Because of these unique aspects of digital billboards, relegating those who would communicate through this unique medium to other modes, including static billboards, would deprive them of unique opportunities to communicate with their intended audience. Those alternative avenues of communication are therefore inadequate.

CONCLUSION

Validating a complete ban on an entire medium of communication, based on the conclusory *ipse dixit* statement that an ordinance is intended "to provide for the safety and convenience of the public," would give municipalities effective free rein to justify speech restrictions by mere incantation. The United States and New Jersey Constitutions require a more solid basis for such action. For the reasons expressed herein, Amicus Curiae ACLU-NJ respectfully urges this Court to reverse the judgment of the Appellate Division and reinstate the judgment of the Law Division that Ordinance 3875-10 is an unconstitutional infringement on the right to free speech.

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