

**“BETWEEN BEAUTY AND BEER SIGNS”:<sup>1</sup>  
WHY DIGITAL BILLBOARDS VIOLATE THE LETTER AND  
SPIRIT OF THE HIGHWAY BEAUTIFICATION ACT OF 1965**

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*To the left, the Wendy’s, like a gingerbread house from a child’s  
nightmare. To the right, the Burger King, like a highway restroom  
that sells hamburgers. And everywhere, the billboards and neon, the  
strip malls and parking lots, urging us to look here, here, no here,  
drive up, drive thru and, remember, drive safely.<sup>2</sup>*

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1. 111 CONG. REC. 26,274 (1965) (statement of Rep. John Blatnik) (“All of these qualities are being tested today as we determine the fate of the Highway Beautification Act. I am tempted to say that the choice before us is between beauty and beer signs, but perhaps that would be unfair; and it would obscure the most important aspect of the bill—the Federal grants to States for scenic improvements which will transform our barren roadsides into places of charm and beauty.”).

2. Dan Barry, *A Place Just Like Every Other Place. Only Not.*, N.Y. TIMES, Dec. 23, 2007, at A28.

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## INTRODUCTION

LED<sup>3</sup> billboards, giant digital television screens that display a continually changing series of brightly colored advertisements,<sup>4</sup> are proliferating at a dramatic rate nationwide.<sup>5</sup> This high-tech version of traditional “paper and paste” promotion<sup>6</sup> increased more than twofold from 2007 to 2010<sup>7</sup> and now accounts for about 2,400 of the 400,000 total billboards on U.S. roadways.<sup>8</sup> With this trend continuing, experts estimate that digital billboards will eventually

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3. “Light emitting diodes, commonly called LEDs, are . . . tiny light bulbs that fit easily into an electrical circuit. . . . [and] are illuminated solely by the movement of electrons in a semiconductor material . . . .” Tom Harris & Wesley Fenlon, *How Light Emitting Diodes Work*, HOWSTUFFWORKS, <http://www.howstuffworks.com/led.htm> (last visited Feb. 17, 2012).

4. Phil Pitchford, *The Signs, They are A-Changin’; Digital Billboards are the Trend in Outdoor Advertising, But Do Their Big-Screen Visuals Distract Inland Drivers?*, PRESS ENTERPRISE, Dec. 24, 2007, at A01.

5. See, e.g., Frank Ahrens, *Digital Billboards That Turn Your Head; New Ads Put Up Big Numbers and Rouse Critics*, WASH. POST, May 3, 2007, at D01 (discussing the growth of digital billboards in the United States); Ken Leiser, *Digital Billboards: Bright or Blight?*, ST. LOUIS POST-DISPATCH, Dec. 26, 2010, at D1 (discussing a proposal by the city of St. Louis to cap the number of digital billboards allowed in the city to those already in existence); Louise Story, *Digital Billboard Up Ahead: New-Wave Sign or Hazard?*, N.Y. TIMES, Jan. 11, 2007, at C1 (“There are currently about 400 digital signs across the country. But within 10 years, as many as a fifth of all billboards – or about 90,000 – may be converted . . . .”).

6. *Digital Billboards Today*, OUTDOOR ADVER. ASS’N OF AM., <http://www.oaaa.org/UserFiles/file/Legislative/Digital/DigitalBillboardsToday.pdf> (last visited Feb. 17, 2012) [hereinafter *Billboards Today*].

7. Larry Copeland, *More Communities Banning ‘Television on a Stick’; Outdoor Digital Ads that Change Constantly Called Driver Distraction*, USA TODAY, Mar. 23, 2010, at 4A.

8. *Billboards Today*, supra note 6.

number “tens of thousands,” representing up to 15 percent of outdoor inventory.<sup>9</sup> As a result of industry consolidation, three corporations—CBS Outdoor, Clear Channel Outdoor, and Lamar Advertising—account for nearly 60 percent of all outdoor advertising revenue.<sup>10</sup>

Along with their growth, digital billboards have become the target of bitter legal turf wars<sup>11</sup> that pit sign operators, landowners, and advertisers vying to exploit a lucrative, untapped revenue source against municipalities, conservation groups, and safety organizations struggling to limit driver distraction,<sup>12</sup> control visual blight,<sup>13</sup> and preserve scarce resources.<sup>14</sup> In fact, the field is so rife with growing conflict that planning experts view digital billboards as “the next battleground” for outdoor advertising litigation.<sup>15</sup>

Traditional billboards have been debated for decades, but digital technology has significantly raised the stakes. First, LED billboards command far more profits because multiple advertisers rent a single space—when Clear Channel converted seven static billboards to digital signs, revenue grew from \$300,000 to \$3 million in just one year.<sup>16</sup> Second, digital billboards attract far more attention thanks to their rotating, neon messages,<sup>17</sup> which elates advertisers but worries others who believe the displays put drivers at risk.<sup>18</sup> Third, LED displays are far more intrusive to communities because they are

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9. Matt Richtel, *Roadside Marquee*, N.Y. TIMES, Mar. 2, 2010, at B1.

10. Ahrens, *supra* note 5.

11. See Story, *supra* note 5.

12. See M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877, 1878 (2005); Ahrens, *supra* note 5.

13. Calo, *supra* note 12; Anthony Schoettle, *Digital Dispute Erupts; Lawrence, Billboard Firms Tangle with County Planners*, IND. BUS. J., Dec. 15, 2008, at 1.

14. A 2010 study found that large LED billboards used between 61,000 and 323,800 kilowatt hours of electricity annually, at a cost of between \$8,300 to \$44,400; the average U.S. home uses about 11,000 kilowatt hours at a cost of approximately \$1,500. Gregory Young, *Illuminating the Issues: Digital Signage and Philadelphia's Green Future*, PUBLIC VOICE FOR PUBLIC SPACE, 4 (Dec. 17, 2010), [http://www.publicvoiceforpublicspace.org/images/stories/pdfs/digital\\_signage\\_final\\_dec\\_17\\_2010.pdf](http://www.publicvoiceforpublicspace.org/images/stories/pdfs/digital_signage_final_dec_17_2010.pdf). Digital displays use more energy in hot weather, which requires air conditioning units, and draw the most energy during times of peak demand. *Id.* at 3.

15. Story, *supra* note 5; see JERRY WACHTEL, VERIDIAN GRP., A CRITICAL, COMPREHENSIVE REVIEW OF TWO STUDIES RECENTLY RELEASED BY THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA 2 (2007) [hereinafter CRITICAL REVIEW], available at <http://roads.maryland.gov/oos/finalreport10-18-gja-jw.pdf> (reviewing two studies that address the impact of digital billboards on driver performance and traffic accidents).

16. *Billboards in the Digital Age: Unsafe (and Unsightly) at any Speed*, SCENIC AM. (2007), [http://www.scenic.org/storage/documents/unsafe\\_and\\_unsightly.pdf](http://www.scenic.org/storage/documents/unsafe_and_unsightly.pdf) (last visited Apr. 1, 2012) [hereinafter *Digital Age*].

17. See YOUNG, *supra* note 14, at 11.

18. See Ahrens, *supra* note 5.

visible day and night.<sup>19</sup> “When the sun goes down, you can’t ignore it,” explained one parent about a new digital sign overlooking his once-serene neighborhood.<sup>20</sup> “All this illumination comes into the house. My 7-year-old, when she sits at the dining room table, is forced to watch these ads. It’s just not right.”<sup>21</sup>

State and municipal land use law regulates many billboards across the country,<sup>22</sup> but the Highway Beautification Act of 1965 (“HBA”)<sup>23</sup> exclusively controls signs along the Interstate Highway System and the former Federal-aid primary highway system.<sup>24</sup> The HBA, enacted by the Johnson administration “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty,”<sup>25</sup> mandates states to provide for “effective control” of billboards<sup>26</sup> by negotiating federal-state agreements (“FSA” or “FSAs”) that define acceptable standards for billboard size, spacing, and lighting in that state.<sup>27</sup> Through this scheme, the HBA limits construction of new billboards<sup>28</sup> and provides for removal of preexisting signs that violate a state’s FSA standards.<sup>29</sup> The Federal Highway Administration (“FHWA”) is responsible for ensuring that states comply with federal

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19. William M. Welch, *Neighbors Hope to Pull Plug on Signs; Say Digital Billboards Ruin Quality of Life, are Safety Risk*, USA TODAY, Sept. 5, 2007, at 3A.

20. *Id.*

21. *Id.*

22. See *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (“While signs are a form of [protected] expression . . . they pose distinctive problems that are subject to municipalities’ police powers. [They] take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation [of their physical characteristics].”).

23. Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified as amended at 23 U.S.C. § 131 (2006)).

24. § 131(a). The Interstate Highway System is formally known as the Dwight D. Eisenhower National System of Interstate and Defense Highways. *Dwight D. Eisenhower National System of Interstate and Defense Highways*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP. (last updated Mar. 14, 2012), <http://www.fhwa.dot.gov/programadmin/interstate.cfm> [hereinafter *Eisenhower*]. In New Jersey, it includes roads like I-78, I-80, I-95, and I-287. *FHWA Route Log and Finder List*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP. (last updated Apr. 6, 2011), <http://www.fhwa.dot.gov/reports/routefinder/table3.cfm> (table of Interstate routes in each of the fifty states, the District of Columbia, and Puerto Rico). The Federal-aid highway primary system, with respect to the HBA, refers to roads that were part of that network as of June 1, 1991. § 131(t). The designation is no longer used; for a detailed discussion about the changes to the primary system, see Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 465 n.2 (2000).

25. § 131(a).

26. § 131(b).

27. § 131(d).

28. § 131(c).

29. § 131(e).

requirements in administering their agreements.<sup>30</sup>

Since most states executed their FSAs in the early 1970s, courts resolving billboard disputes have had more than forty years to interpret the codified standards, often in the context of constitutional challenges to the agreements.<sup>31</sup> Today, courts face a new challenge—interpreting those standards in light of digital technology unimagined when the HBA was enacted.<sup>32</sup> Until recently, no published case had addressed the lawfulness of digital billboards under the HBA. However, in November 2011, the Arizona Court of Appeals decided *Scenic Arizona v. City of Phoenix Board of Adjustment*, invalidating respondent American Outdoor’s digital billboard permit on the grounds that the proposed “billboard’s lighting violates the Arizona Highway Beautification Act” (“AHBA”), the state’s codification of the FSA it negotiated in 1971.<sup>33</sup>

As part of the case, amici curiae Sierra Club and Scenic America petitioned the court to determine whether the permit violates the AHBA’s rules barring “intermittent” lights.<sup>34</sup> They contended, in support of appellant, that by issuing the permit the board of adjustment ignored thirty years of precedent in which the state

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30. See 49 C.F.R. § 1.48(c)(11) (2010); OSPREY GRP., CONFLICT ASSESSMENT: FEDERAL OUTDOOR ADVERTISING CONTROL PROGRAM 5 (2007) [hereinafter CONFLICT ASSESSMENT], available at <http://www.fhwa.dot.gov/realestate/oaconf.pdf> (“The HBA established Federal government control of outdoor advertising along over 300,000 miles of highways. This network includes Interstate Highways, National Highways and various other highways constructed with Federal funding. States were required to develop Federal-state agreements and then to administer their programs in a manner consistent with Federal law and regulations . . .”).

31. See *Lamar Adver. of Montgomery, Inc. v. State Dep’t of Transp.*, 694 So. 2d 1256, 1258-59 (Ala. 1996) (rejecting sign operators’ argument that a billboard in an agricultural area was allowed under the Alabama Highway Beautification Act’s “business area” exception); *Ala. Highway Dep’t v. Stuckey’s/DQ of Grand Bay, Inc.*, 613 So. 2d 333, 335-36 (Ala. 1993) (rejecting highway department’s argument that replacing vandalized billboard was “erecting a new billboard” under state Highway Beautification Act); *Yarbrough v. Ark. State Highway Comm’n*, 539 S.W.2d 419, 421, 423 (Ark. 1976) (rejecting sign owners’ claim that state Highway Beautification Act requirements violate property, due process, and equal protection rights); *Tex. Dep’t of Transp. v. Barber*, 111 S.W.3d 86, 106 (Tex. 2003) (holding that Texas Highway Beautification Act did not violate sign owner’s First Amendment rights).

32. CONFLICT ASSESSMENT, *supra* note 30, at 16 (“The HBA and, subsequently, most Federal-state agreements did not anticipate the technological changes now occurring in the outdoor advertising industry.”).

33. *Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*16 (Ariz. Ct. App. Nov. 17, 2011); see Brief for Appellant at 1-2, *Scenic Ariz., Inc. v. City of Phx. Bd. of Adjustment*, No. 1 CA-CV 09-0489 (Ariz. Ct. App. Oct. 20, 2009) [hereinafter Brief for Appellant].

34. Brief for Sierra Club & Scenic America, Inc. as Amici Curiae Supporting Appellant at 4-7, *Scenic Ariz., Inc. v. City of Phx. Bd. of Adjustment*, No. 1 CA-CV 09-0489 (Ariz. Ct. App. filed May 6, 2010) [hereinafter Sierra Club Brief], available at [http://www.scenic.org/storage/documents/CA-CV\\_09-0489\\_Amicus\\_Brief.pdf](http://www.scenic.org/storage/documents/CA-CV_09-0489_Amicus_Brief.pdf).

consistently barred electronic billboards pursuant to an FSA that the billboard industry repeatedly tried, but failed, to overturn.<sup>35</sup> Amicus Clear Channel Outdoor, one of the world's largest billboard operators,<sup>36</sup> argued in support of respondent that digital signs are consistent with federal, state, and local law.<sup>37</sup> The court agreed with Scenic Arizona, holding that "a digital billboard uses intermittent lighting" barred under the AHBA.<sup>38</sup>

Interpreting "intermittent," a word left undefined in the HBA and in all state FSAs, was key to the case and will be the focus of similar disputes that are likely to arise in the future. Thus, although *Scenic Arizona* involved primarily state law, the decision could have far-reaching implications in other states as well.<sup>39</sup>

This Note argues that digital billboards violate both the letter and the spirit of the HBA. Part I provides a brief history of federal billboard regulation, the highway system, and the HBA, including its goals, requirements, and effect on sign control. Part II introduces the current issues in the digital billboard debate, including financial, safety, and aesthetic dimensions, as well as driving forces behind related lawsuits. Part III then surveys the language used in FSAs across the country and reveals the FHWA's pivotal role in interpreting those agreements. Finally, Part IV argues that digital billboards violate the statutory requirements of most FSAs and the legislative intent behind the HBA, and that the FHWA's policy reversal did not comply with requirements of the Administrative Procedure Act ("APA"). Finally, this Note concludes that the FHWA and states must properly regulate digital billboards to protect the general public and to preserve natural beauty as mandated by the HBA.

## I. FEDERAL BILLBOARD REGULATION AND THE DEVELOPMENT OF THE HIGHWAY BEAUTIFICATION ACT OF 1965

### A. General Sign Regulation in the 1900s

Controversy has almost always followed billboards because of their strong visual impact on their surroundings.<sup>40</sup> In the early part

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35. *Id.*

36. See Ahrens, *supra* note 5.

37. Brief for Clear Channel Outdoor, Inc. as Amicus Curiae Supporting Appellee at 3-5, *Scenic Ariz., Inc. v. City of Phx. Bd. of Adjustment*, No. 1 CA-CV 09-0489 (Ariz. Ct. App. filed June 7, 2010) [hereinafter Clear Channel Brief], available at [http://www.scenic.org/storage/documents/10-06-09\\_CCO\\_Amicus\\_Brief\\_NO\\_CA-CV\\_09-0489\\_-\\_Scenic\\_Arizona\\_Inc.\\_an\\_Arizona\\_corporation\\_.pdf](http://www.scenic.org/storage/documents/10-06-09_CCO_Amicus_Brief_NO_CA-CV_09-0489_-_Scenic_Arizona_Inc._an_Arizona_corporation_.pdf).

38. *Scenic Ariz.*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*16.

39. *Scenic Ariz. v. City of Phoenix: Background Information*, SCENIC AM., [http://www.scenic.org/storage/documents/Scenic\\_Arizona\\_v.\\_City\\_of\\_Phoenix.pdf](http://www.scenic.org/storage/documents/Scenic_Arizona_v._City_of_Phoenix.pdf) (last visited Feb. 17, 2012) [hereinafter *Background*].

40. David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 J. L. & POL. 171,

of the century, signs multiplied out of control,<sup>41</sup> creating a “tragedy of the commons”<sup>42</sup> in which an overabundance of signs depleted the visual impact of each one.<sup>43</sup> Eventually, some groups tried to ban billboards or at least regulate their location and appearance.<sup>44</sup> Billboard proponents formed the Outdoor Advertising Association of America (“OAAA”), which lobbies to protect sign industry interests.<sup>45</sup> New Jersey advertisers battled a rising state billboard tax, prompting a newspaper editorial to note that the tax was “little enough [compared to] the wholesale way the billboard companies plaster up the countryside.”<sup>46</sup>

Sign operators and landowners sued in state and federal courts, claiming that billboard regulations violated Fifth Amendment private property rights.<sup>47</sup> Some courts agreed early on<sup>48</sup> but later upheld increasingly broad regulation<sup>49</sup> based on state police power over morality, health, and safety concerns.<sup>50</sup> Courts began considering aesthetics as a secondary reason to regulate, reflecting a backlash in popular opinion of Americans who had grown tired of the “unsightliness and unchecked proliferation” of signs.<sup>51</sup> In 1954, in *Berman v. Parker*, the Supreme Court validated the use of state police power to promote aesthetic values alone, finding that “the

172-73 (2007).

41. *Id.* at 181-82.

42. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968) (“Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.”).

43. Jacob Loshin, Note, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 *ENVIRONS ENVTL. L. & POL’Y J.* 101, 118 (2006).

44. Burnett, *supra* note 40, at 173.

45. *Id.* at 224; see *History of Outdoor*, *OUTDOOR ADVER. ASS’N OF AM.*, <http://www.oaaa.org/about/HistoryofOutdoor.aspx> (last visited Apr. 1, 2012) (detailing the rise of outdoor advertising and the origins of the OAAA).

46. Curtis Leeds, *Billboards Were Issue in County 75 Years Ago*, *HUNTERDON COUNTY DEMOCRAT*, May 1, 2008, at B1.

47. Burnett, *supra* note 40, at 173.

48. *City of Atlanta v. Dooly*, 74 Ga. 702, 707 (1885) (finding that city’s razing of billboard on private land was an “unauthorized and wanton invasion of private rights”); *City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905) (“Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.”), *overruled by State v. Miller*, 416 A.2d 821, 824-25 (N.J. 1980).

49. Burnett, *supra* note 40, at 195.

50. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (“We have recognized that state interests in traffic safety and esthetics may justify zoning regulations for advertising.”); *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919) (“[B]illboards properly may be . . . prohibited . . . in the interest of the safety, morality, health and decency of the community.” (internal quotation marks omitted)).

51. Burnett, *supra* note 40, at 183, 212-13.

public welfare is broad and inclusive.”<sup>52</sup>

*B. Creation of the Federal Interstate System*

Road construction was historically a local government duty,<sup>53</sup> which resulted in a random road network created by “accidents of history and habit, politics and necessity.”<sup>54</sup> A major problem was disparity in road conditions between urban and rural areas; the “Good Roads Movement,” backed by cycling enthusiasts, helped convince the public to accept taxation needed to finance better roads.<sup>55</sup> In 1891, New Jersey became the first state to fund road improvements, a milestone in U.S. highway history, by spreading the cost between the state, counties, and landowners.<sup>56</sup>

These changes helped kindle a national concept of roads.<sup>57</sup> The Office of Road Inquiry, an early predecessor to the FHWA,<sup>58</sup> was formed in 1893 to consider a national road system.<sup>59</sup> Twelve years later, it was reorganized into the Office of Public Roads,<sup>60</sup> a permanent organization eventually tasked with overseeing the Federal-Aid Road Act of 1916 (the “Act”),<sup>61</sup> the nation’s first national highway policy.<sup>62</sup>

The Act established a new partnership in which the federal government would give states input and funding for their road construction plans.<sup>63</sup> Each state would retain control over building and maintaining roads on the condition that it maintained a highway

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52. *Berman v. Parker*, 348 U.S. 26, 33 (1954); see Albert, *supra* note 24, at 468 n.6.

53. FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., *AMERICA’S HIGHWAYS: 1776–1976*, at 6 (1977) [hereinafter *AMERICA’S HIGHWAYS*].

54. Albert, *supra* note 24, at 473.

55. *AMERICA’S HIGHWAYS*, *supra* note 53, at 41-42.

56. *Id.* at 43 (“New Jersey . . . became the second State, after Massachusetts, to establish a State highway organization.”).

57. See *id.* at 44 (“The State-aid principle, in various forms, spread slowly to other states after New Jersey and Massachusetts had shown the way.”). Other factors included the need for improved mail delivery, the popularity of the automobile, and the 1907 Supreme Court decision in *Wilson v. Shaw*, 204 U.S. 24 (1907), which permitted Congress, under its power to regulate interstate commerce, to build interstate highways. Richard F. Weingroff, Fed. Highway Admin., U.S. Dep’t of Transp., *Federal-Aid Road Act of 1916: Building the Foundation*, PUBLIC ROADS, Summer 1996 [hereinafter *Building the Foundation*], available at <http://www.fhwa.dot.gov/publications/publicroads/96summer/p96su2.cfm>.

58. *About the New Jersey Division Office*, FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., <http://www.fhwa.dot.gov/njdiv/about.htm> (last modified Sept. 9, 2011).

59. *AMERICA’S HIGHWAYS*, *supra* note 53, at 44.

60. *Id.* at 52.

61. Federal-Aid Road Act of 1916, Pub. L. No. 64-156, 39 Stat. 355 (repealed by 23 U.S.C. §§ 101, 202, 204, 205 (1999)).

62. Weingroff, *supra* note 57.

63. Albert, *supra* note 24, at 472-73. The federal contribution would be 30% to 50% of cost. *AMERICA’S HIGHWAYS*, *supra* note 53, at 86.

agency to administer the federal funds.<sup>64</sup> Although the Act was considered a success by some,<sup>65</sup> various states, especially those with weak highway departments and little money, were only able to improve intrastate roads instead of completing a fully constructed interstate highway.<sup>66</sup> To resolve this issue, Congress adopted a 1921 Amendment<sup>67</sup> requiring that states use the matching funds mostly on interstate mileage.<sup>68</sup>

The 1920s were the golden age for roads, but the Great Depression forced the federal government to divert funds to other causes.<sup>69</sup> However, the late 1930s brought growing pressure upon the government for a bona fide national highway system<sup>70</sup> and, with it, additional amendments to the Act that continued to bring a highway system closer to realization.<sup>71</sup>

These events culminated in the Federal-Aid Highway Act of 1956,<sup>72</sup> which authorized construction of a 41,000-mile National System of Interstate and Defense Highways (“Interstate” or “Interstate System”), funded predominantly by the federal government through a self-financing Highway Trust Fund.<sup>73</sup> The main goals were to link every U.S. city in an effort to aid industrial development and defense, and to encourage recreational driving.<sup>74</sup> Today, the Interstate System is comprised of approximately 46,876 miles of limited-access highways, with one still-in-progress interchange between I-95 and the Pennsylvania Turnpike.<sup>75</sup>

### C. Advertising Control on the Interstate System

As construction of the Interstate System began, new roads built

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64. AMERICA’S HIGHWAYS, *supra* note 53, at 86.

65. *See id.* at 87 (“[T]he regulations were not greatly changed for years afterward, even though the Act itself was very considerably amended.”).

66. *Id.* at 106.

67. Federal-Aid Highway Act of 1921, Pub. L. No. 67-87, 42 Stat. 212 (codified as amended in scattered sections of 23 U.S.C.).

68. AMERICA’S HIGHWAYS, *supra* note 53, at 108.

69. Richard F. Weingroff, Fed. Highway Admin., U.S. Dep’t of Transp., *From 1916 to 1939: The Federal-State Partnership at Work*, PUBLIC ROADS, Summer 1996, available at <http://www.fhwa.dot.gov/publications/publicroads/96summer/p96su7.cfm>.

70. Richard F. Weingroff, U.S. Dep’t of Transp., *Federal-Aid Highway Act of 1956: Creating the Interstate System*, PUBLIC ROADS, Summer 1996, available at <http://www.fhwa.dot.gov/publications/publicroads/96summer/p96su10.cfm>.

71. *See Eisenhower*, *supra* note 24.

72. Federal-Aid Highway Act of 1956, Pub. L. 84-627, 70 Stat. 374 (codified as amended in scattered sections of 23 U.S.C.).

73. *Eisenhower*, *supra* note 24.

74. Albert, *supra* note 24, at 474.

75. *Frequently Asked Questions*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., <http://www.fhwa.dot.gov/interstate/faq.htm> (last visited Apr. 1, 2012) [hereinafter *FAQ*].

to connect cities also cut through the landscape.<sup>76</sup> Billboard opponents vigorously renewed their efforts to ban or restrict highway signs, but this time they made the issue a national one.<sup>77</sup> Congress was forced to consider the possibility of imposing federal regulation<sup>78</sup> because the Interstate System, by its very nature of limited access, created a captive audience that was the perfect advertising target.<sup>79</sup>

The resulting legislation arrived two years later as the Federal-Aid Highway Act of 1958,<sup>80</sup> which through a provision known as the “Bonus Act,” offered a financial incentive to states that voluntarily agreed to regulate billboards along the Interstate System.<sup>81</sup> Debates during the hearings, including testimony by FHWA officials, convey that those involved were strongly focused on furthering aesthetic values as the main, and possibly only, rationale for billboard regulation.<sup>82</sup> Yet, while the amendment’s aim was new, it embraced something old—a long-established partnership in which states performed required road-related work financed, in part, by the federal government.<sup>83</sup>

Under the Bonus Act, states that agreed to control billboards bordering the Interstate System pursuant to national standards by June 30, 1965, were entitled to “a bonus of one-half of one percent of the highway’s cost of construction.”<sup>84</sup> To comply, states agreed to regulate billboards “within six hundred and sixty feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of right-of-way.”<sup>85</sup> Municipalities were authorized to use land-use powers, like amortization, to remove signs; states could rely on eminent domain powers, like the right to purchase negative easements, to

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76. Loshin, *supra* note 43, at 128.

77. *Id.*

78. Burnett, *supra* note 40, at 206.

79. Albert, *supra* note 24, at 481. Limited access occurs where drivers can enter and exit the Interstate System only at designated spots, which separates long-distance traffic from local traffic, and allows for high-speed travel. *Id.*

80. Federal-Aid Highway Act of 1958, Pub. L. 85-381, 72 Stat. 89 (codified as amended in scattered sections of 23 U.S.C.).

81. Loshin, *supra* note 43, at 129.

82. Albert, *supra* note 24, at 474.

83. *Id.* at 481.

84. *The Bonus Program*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., <http://www.fhwa.dot.gov/realestate/oacprog.htm#BONUSPR> (last modified Jan. 3, 2012) [hereinafter *Bonus Program*]. The twenty-three participating states, all of which must still comply with the Bonus Act, are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

85. § 131(a).

keep billboards at bay.<sup>86</sup>

The Bonus Act included lenient exceptions for categories of signs that are open to wide interpretation, including ones “designed to give information in the specific interest of the traveling public.”<sup>87</sup> But the exception most favorable to sign proponents permits billboards promoting “activities being conducted at a location within twelve miles of the point at which such signs are located.”<sup>88</sup> This allows businesses to put up an unlimited number of billboards within that mileage and bars only signs advertising other activities.<sup>89</sup>

Critics of these exceptions considered the Bonus Act to be a failure,<sup>90</sup> and even supporters admitted that it was seriously flawed.<sup>91</sup> At the same time, some believed the Bonus Act furthered billboard control by setting national standards for the very first time and stemming the growth of designated commercial zones by exempting only areas that had been so zoned as of September 1959.<sup>92</sup> Only twenty-three states successfully completed agreements by the expiration date,<sup>93</sup> and although \$44 million has been distributed to date, there are no federal funds to cover \$10 million in outstanding claims.<sup>94</sup> In the end, the carrot dangling in front of the states was simply too small compared to the strength of the billboard lobby.<sup>95</sup> One billboard opponent remarked that

the billboard lobby “shrewdly puts many legislators in its debt by giving them free sign space during election time, and it is savage against the legislator who dares oppose it. It subsidizes his opposition, foments political trouble in his home district, donates

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86. *Bonus Program*, *supra* note 84. Under amortization, a locality may permit a preexisting billboard to remain in place for a reasonable time as a nonconforming use, even though it violates a new sign ordinance. Albert, *supra* note 24, at 491-92. This amortization period allows the operator/landowner to recoup the initial investment, and relieves the municipality from having to pay for a compensable taking when the sign is removed. *Id.* at 492.

87. Albert, *supra* note 24, at 484 (quoting § 1, 72 Stat. at 904 (codified as amended at 23 U.S.C. § 131(a)(4)) (1965)).

88. *Id.* (quoting § 1, 72 Stat. at 904 (codified as amended at 23 U.S.C. § 131(a)(3)) (1965)).

89. *Id.*

90. See LEWIS L. GOULD, *LADY BIRD JOHNSON AND THE ENVIRONMENT* 140 (1988) (“All states were not included, certain areas of the highway system were exempted from control, and setting the control area 660 feet from the roadway encouraged the creation of ‘jumbo’ billboards.”); Albert, *supra* note 24, at 489-90 (“The law was ill-suited to the problem of billboard control alongside the interstate system and did not at all address the problem of billboards along the nation’s other highways . . .”).

91. GOULD, *supra* note 90, at 140.

92. Charles F. Floyd, *Billboard Control Under the Highway Beautification Act—A Failure of Land Use Controls*, 45 J. AM. PLAN. ASS’N 115, 115-16 (1979).

93. Loshin, *supra* note 43, at 130.

94. *Bonus Program*, *supra* note 84.

95. See Loshin, *supra* note 43, at 130.

sign space to his opponents and sends agents to spread rumors among his constituents.”<sup>96</sup>

Although the Bonus Act was successfully renewed in 1961 and 1963,<sup>97</sup> for the most part, the federal government ignored its shortcomings until the next administration adopted the cause as its own.<sup>98</sup>

*D. The Highway Beautification Act of 1965*

Public enthusiasm for billboard control once again grew, this time buoyed by the personal support of President Lyndon B. Johnson’s First Lady, Lady Bird Johnson.<sup>99</sup> In his first State of the Union address, Johnson introduced his “Great Society” domestic agenda, which focused on bettering Americans’ lives through social policies, including many promoting conservation and highway beauty.<sup>100</sup> In a subsequent address, he admitted that the Bonus Act had not worked as intended and vowed to address billboard control through legislation, calling for Congress to “mak[e] our roads highways to the enjoyment of nature and beauty [so that] we can greatly enrich the life of nearly all our people in city and countryside alike.”<sup>101</sup>

The fact that the President wanted roads to “respect the communities through which they pass”<sup>102</sup> seemed odd for a politician who had once been considered a friend to the billboard industry.<sup>103</sup> Yet, he pushed for a total ban on billboards in noncommercial areas within 1000 feet of the Interstate System; states would carry out the plan using their land-use powers, and receive federal financial help where amortization was not possible.<sup>104</sup> The billboard lobby, aiming to be unregulated, or at least compensated for losing what it viewed

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96. *Id.* (quoting CATHERINE GUDIS, BUYWAYS: BILLBOARDS, AUTOMOBILES, AND THE AMERICAN LANDSCAPE 221 (2004)); *see also* GOULD, *supra* note 90, at 139 (“The billboard industry enjoyed great influence on Capitol Hill . . . . Opposition from local operators could imperil a reelection.”).

97. GOULD, *supra* note 90, at 140.

98. *See* Albert, *supra* note 24, at 490 (discussing how the Johnson Administration adopted highway beautification as a cause starting in 1965).

99. GOULD, *supra* note 90, at 141.

100. *See* Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 1 (Jan. 4, 1965); Albert, *supra* note 24, at 475, 490.

101. Special Message to the Congress on Conservation and Restoration of Natural Beauty, 1 PUB. PAPERS 155, 159 (Feb. 8, 1965); *see* Albert, *supra* note 24, at 475; Loshin, *supra* note 43, at 130.

102. Albert, *supra* note 24, at 476.

103. *See* GOULD, *supra* note 90, at 140 (mentioning that then Senator Lyndon B. Johnson was praised for being “most helpful” in the passage of the Federal-Aid Highway Act of 1958).

104. Albert, *supra* note 24, at 491. Amortization was important for states to afford the program. *Id.* at 491-92.

as a right, argued that the proposed rules would cause economic harm, shift signs to secondary roads, and keep important information from tourists.<sup>105</sup> Antbillboard activists asserted that freedom from advertising was the controlling property right involved.<sup>106</sup>

The final legislation differed substantially from Johnson's initial proposal—not surprising since it was drafted with significant influence from the OAAA<sup>107</sup> and little input from those who favored billboard control.<sup>108</sup> At first blush, the language of the HBA appears strong, mandating that states provide, through federal-state agreements,<sup>109</sup>

for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system.<sup>110</sup>

As discussed *supra*, states are not only required to control new billboards<sup>111</sup> but also required to remove preexisting ones that violate a state's FSA.<sup>112</sup> States that fail to comply face a mandatory 10% reduction in Federal-aid highway funds.<sup>113</sup>

However, a number of factors weakened the impact of the HBA. First, the HBA drafters carried over language from the Bonus Act that brought with it similar exceptions, but more significantly, they added a new provision allowing billboards “whose size, lighting and spacing [are] consistent with customary use.”<sup>114</sup> Thus, instead of creating national sign standards, the Secretary of Transportation (the “Secretary”) was required to negotiate an agreement with each state based on what was customary at the time.<sup>115</sup> The Bureau of Public Roads prepared a model agreement aligned with the HBA's goals, but after it was altered in response to opposition, the final agreement was drafted by the FHWA with significant OAAA

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105. *Id.* at 492-93.

106. *Id.* at 493 (“[T]he traveling public—has a right . . . to see that a rule of reason prevails as to the extent to which private citizens, for private business purposes, use the public highways as a medium of advertising.”).

107. GOULD, *supra* note 90, at 147-50; Albert, *supra* note 24, at 494.

108. GOULD, *supra* note 90, at 150-51.

109. 21 U.S.C. § 131(d).

110. § 131(b).

111. *Id.*

112. § 131(e).

113. § 131(b). States receive appropriated federal-aid highway funds from the Highway Trust Fund. § 104(a)(1).

114. § 131(d).

115. *See* Floyd, *supra* note 92, at 116.

involvement.<sup>116</sup> The government's position was further eroded by a 1968 amendment to the HBA that shifted the customary use determination from a negotiation with the states to a decision made solely by the local zoning authority, allowing states to essentially avoid the HBA regulations.<sup>117</sup>

A second factor was the failure of the HBA's drafters to include any height restrictions, which led to sign operators building towering billboards just outside of the 660-foot buffer.<sup>118</sup> But the third, and perhaps most notable factor, was Congress' elimination of the amortization scheme, forcing states to comply with a compensation requirement.<sup>119</sup> As a result, billboard operators may choose to maintain nonconforming signs for five years, the time period in most states that sufficiently amortizes the sign's value,<sup>120</sup> and then collect additional compensation when the sign is removed as required by the HBA.<sup>121</sup> In essence, the owner gets paid twice.<sup>122</sup> The OAAA regards amortization as unfairly harming the financial expectations of landowners and depriving them of their property's full use.<sup>123</sup>

The President, who believed that the OAAA agreed with his concept of broad regulation,<sup>124</sup> expressed his disappointment in the final legislation at the signing:

This bill does not represent everything that we wanted. It does not represent what we need. It does not represent what the national interest requires. But it is a first step, and there will be other steps. For though we must crawl before we walk, we are going to walk.<sup>125</sup>

Today, critics disagree over the HBA's effectiveness, just as they did with the Bonus Plan.<sup>126</sup> On the one hand, states are free to set

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116. *See id.* at 116-117.

117. *See* § 131(d) (amended 1968) ("Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement . . ."); Albert, *supra* note 24, at 498-99.

118. *Highway Beautification Act of 1965*, FED. HIGHWAY ADMIN, U.S. DEP'T OF TRANSP., <http://www.fhwa.dot.gov/realestate/oacprog.htm#HBA> (last modified Jan. 3, 2012) [hereinafter *Highway Beautification*].

119. *See* GOULD, *supra* note 90, at 196 (mentioning that jumbo signs were erected past the 660 feet mark); *see also* Burnett, *supra* note 40, at 207 (mentioning that the HBA required "just compensation" for the removal of any signs and failed to impose any size or height restrictions").

120. Albert, *supra* note 24, at 495-96.

121. *See* 23 U.S.C. § 131(g) (2006); Albert, *supra* note 24, at 495-96.

122. *See* Albert, *supra* note 24, at 495-96.

123. *Outdoor Advertising from A-Z*, OUTDOOR ADVERTISING ASS'N OF AM. 3 (Mar. 2011), <http://www.oaaa.org/UserFiles/file/Legislative/GeneralInformation/A-ZMarch2010Final.pdf> [hereinafter *A-Z*].

124. GOULD, *supra* note 90, at 167.

125. Remarks at the Signing of the Highway Beautification Act of 1965, 2 PUB. PAPERS 1072, 1074 (Oct. 22, 1965); Albert, *supra* note 24, at 498.

126. Burnett, *supra* note 40, at 207.

more stringent standards,<sup>127</sup> and some have gone so far as to completely ban billboards, including digital ones.<sup>128</sup> On the other hand, the consequences of its provisions, as discussed *supra*, have led one critic to deem the HBA “a statute at war with itself.”<sup>129</sup>

Perhaps the most telling evidence of the HBA’s success or failure is the position taken by the two opposing sides. The OAAA, which generally opposes billboard regulation, proclaims that the HBA “has stood the test of time” and resulted in the removal of more than “127,000 legal nonconforming compensable signs.”<sup>130</sup> Scenic America, which favors regulatory control of signs, has deemed the HBA “a broken law” that not only permits billboards to be built too easily but forces “taxpayers to pay the polluter to stop polluting.”<sup>131</sup>

## II. THE DIGITAL BILLBOARD DEBATE

### A. *The Financial Stakes*

The use of digital technology in outdoor advertising has broadened the billboard debate as the two sides battle over whether FSA restrictions on certain types of lighting should reach to and prohibit digital signs. There is a great deal at stake for the winners and losers, even more than what exists regarding static billboards.

Digital proponents like the OAAA are driven by the potential for skyrocketing profits.<sup>132</sup> Although the initial outlay for a digital billboard can be five times that for a static<sup>133</sup> display—roughly \$250,000 (and dropping) versus \$50,000, respectively—operators can quickly recoup the difference because they sell the same space to multiple advertisers for up to \$5,000 monthly, depending on a billboard’s location.<sup>134</sup> A digital display can typically support six advertisers with messages that change every six to eight seconds, or more than 10,000 times daily.<sup>135</sup> Landowners favor the technology as well, because they benefit from billboard lease payments.<sup>136</sup>

Moreover, advertisers are demanding the digital technology just as much as the sign operators themselves.<sup>137</sup> For those with

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127. *FAQ*, *supra* note 75.

128. *Id.*; Copeland, *supra* note 7.

129. Albert, *supra* note 24, at 465.

130. *A-Z*, *supra* note 123, at 18, 20.

131. *HBA: A Broken Law*, SCENIC AM., <http://www.scenic.org/billboards-a-sign-control/highway-beautification-act/115-a-broken-law> (last visited Apr. 25, 2012).

132. *See* Ahrens, *supra* note 5.

133. The word “static” has historically been used to refer to traditional paper-and-paste billboards. *See id.*

134. Richtel, *supra* note 9.

135. *See id.*; Schoettle, *supra* note 13 (“[D]igital billboards can accommodate five to seven advertisers simultaneously.”).

136. *See A-Z*, *supra* note 123, at 16.

137. Schoettle, *supra* note 13.

something to sell, flexibility is a major benefit—digital messages can be changed instantly and remotely so that a brand new message can be run weekly or even daily, without the time-intensive manual labor required to change a traditional sign.<sup>138</sup> And as a result, sign operators will rent digital space for shorter periods of time than is the norm for static signs, allowing advertisers to avoid onerous, long-term contracts.<sup>139</sup>

Of course, all the flexibility in the world means little if the billboard fails to fulfill its mission: to sell product. Like an automated version of Hasbro's classic Lite-Brite toy,<sup>140</sup> digital billboards replace flat, static images with crisp, neon moving ones that visually grab a driver's attention in a way that a static billboard simply cannot.<sup>141</sup> As a Clear Channel Outdoor executive explained, "[W]e have the ultimate ability to withstand the whole challenge of consumer avoidance . . . . We're there 24-7. There's no mute button, no on-off switch, no changing the station."<sup>142</sup> And as the number of cars and driver gridlock grows, so does the value of the signage.<sup>143</sup>

### B. *The Issue of Driver Distraction*

However, it is precisely this type of high-tech hijacking that has led critics to call the digital billboard a "television on a stick" [that] give[s] drivers, many of them already calling and texting, yet another reason to take their eyes off the road."<sup>144</sup> Thus, to opponents of digital billboards, which include insurance companies, the light and movement on the large screens cause an unacceptable level of driver distraction that conflicts with the HBA's mandate to "promote the safety . . . of public travel."<sup>145</sup> In essence, they contend, digital billboards threaten driver safety because they *are* so difficult to

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138. *Id.* (highlighting that changing the message on a traditional billboard takes "seven or so days").

139. *See id.* ("We can do weekly or even daily specials for advertisers and we can do shorter-run contracts. It sure beats changing vinyl all the time.")

140. HASBRO, [http://www.hasbro.com/litebrite/en\\_US](http://www.hasbro.com/litebrite/en_US) (last visited Apr. 25, 2012).

141. *See* JERRY WACHTEL, VERIDIAN GRP., INC., SAFETY IMPACTS OF THE EMERGING DIGITAL DISPLAY TECHNOLOGY FOR OUTDOOR ADVERTISING SIGNS 146 (2009) [hereinafter SAFETY IMPACTS] ("[I]t is widely understood that bright lights and visual change can draw the eye to a stimulus that is brighter than the surroundings, and/or exhibits movement or apparent movement."); Richtel, *supra* note 9 (mentioning that digital billboards can take drivers' eyes off the road).

142. Ahrens, *supra* note 5.

143. *Id.*

144. Richtel, *supra* note 9.

145. *See* 23 U.S.C. § 131(a) (2006); Karen Farkas, *Those Flashy Digital Billboards are Attracting Eyes—and Nays: Critics Say They Are Too Distracting, but Industry Studies Say They Aren't*, PLAIN DEALER, Mar. 30, 2010, at A1; Copeland, *supra* note 7; Story, *supra* note 5.

ignore.<sup>146</sup> After all, says one critic, “If they weren’t distracting, they wouldn’t be doing their job.”<sup>147</sup>

Research into the trade-off between “the advertiser’s need to grab our attention and the actual safety implications of that attention capture” has produced conflicting results.<sup>148</sup> In 2007, the OAAA announced two industry-sponsored studies that it claimed conclusively proved that there is no link between traffic accidents and digital billboards,<sup>149</sup> which can be deemed “safety neutral.”<sup>150</sup> These studies were discussed in the media, putting pressure on government agencies to create or amend regulations to permit digital billboards.<sup>151</sup>

However, when traffic safety expert Jerry Wachtel peer reviewed the studies on behalf of the Maryland State Highway Administration, he found scientific flaws and concluded “that ordinance or code changes based on [the OAAA’s] findings is ill advised.”<sup>152</sup> Furthermore, as part of a 2009 report for the National Cooperative Highway Research Program, Wachtel noted “growing evidence that billboards can attract and hold a driver’s attention for the extended periods of time that we now know to be unsafe.”<sup>153</sup> While both sides argue over how long a typical driver looks at digital billboard, researchers acknowledge<sup>154</sup> the findings of the National Highway Traffic Safety Administration, which determined that distractions greater than two seconds “significantly increased individual near-crash/crash risk . . . relative to normal, baseline driving.”<sup>155</sup> Wachtel, however, contends that based on reliable studies and consistent results, the upper limit is actually less than two seconds.<sup>156</sup> Today, both sides await the results of an FHWA-directed study that is examining if, and for how long, drivers are distracted by digital billboards.<sup>157</sup>

### C. Visual Blight

Although driver safety is a primary focus of digital billboard

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146. See Farkas, *supra* note 145; Copeland, *supra* note 7; Story, *supra* note 5.

147. Copeland, *supra* note 7.

148. Story, *supra* note 5.

149. *Digital Billboards Today*, *supra* note 6.

150. *Traffic Safety*, OUTDOOR ADVER. ASS’N OF AM., <https://www.oaaa.org/legislativeandregulatory/issues/trafficsafety.aspx> (last visited Apr. 25, 2012).

151. CRITICAL REVIEW, *supra* note 15, at 2-3; see Schoettle, *supra* note 13.

152. CRITICAL REVIEW, *supra* note 15, at 28-29.

153. SAFETY IMPACTS, *supra* note 141, at 181.

154. Farkas, *supra* note 145.

155. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *THE IMPACT OF DRIVER INATTENTION ON NEAR-CRASH/CRASH RISK* xi (2006).

156. SAFETY IMPACTS, *supra* note 141, at 181.

157. Farkas, *supra* note 145.

opponents, visual blight and intrusiveness are also concerns, stemming from the HBA's mandate "to preserve natural beauty."<sup>158</sup> Historically, outdoor advertising has been the focus of most legal cases in which parties have sought to constitutionally protect activities deemed an eyesore by others aiming to improve aesthetics.<sup>159</sup> The term "visual blight" has been applied to outdoor signs of all types since *Members of City Council v. Taxpayers for Vincent*,<sup>160</sup> in which the Supreme Court upheld a sign ban challenged on First Amendment grounds, noting that "[h]ere, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself."<sup>161</sup>

Some argue that billboards cannot be labeled as visual blight in industrial areas where such signage is already tolerated,<sup>162</sup> but it seems problematic to assert that almost any sign, much less a neon-colored television screen, comports with the "natural beauty" to be preserved under the HBA. While some observers find digital billboards attractive,<sup>163</sup> the FHWA recognized more than thirty years ago that "[h]arsh visual contrast with the ambient environment is generally considered to be unaesthetic, as is a dense clustering of signs and sign structures."<sup>164</sup> Even a billboard operator has admitted that digital signs are not right for every location: "As powerful as this new medium is, I realize these signs can be bright and obtrusive . . . . I would feel uncomfortable with a plan to replace all the static billboards with digital billboards in this country. Times Square is not the appropriate landscape for Indianapolis."<sup>165</sup>

#### D. The Current Landscape

Municipalities are entitled to regulate billboards<sup>166</sup> for aesthetic and traffic-safety purposes.<sup>167</sup> Four states<sup>168</sup> and more than twelve

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158. See 23 U.S.C. § 131(a) (2006).

159. Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 225, 225 (2010).

160. *Id.* at 234-35.

161. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

162. Menthe, *supra* note 159, at 235.

163. See Ahrens, *supra* note 5.

164. JERRY WACHTEL & ROSS NETHERTON, FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., FHWA-RD-80-051, SAFETY AND ENVIRONMENTAL DESIGN CONSIDERATIONS IN THE USE OF COMMERCIAL ELECTRONIC VARIABLE-MESSAGE SIGNAGE 2 (1980).

165. Schoettle, *supra* note 13 (internal quotation marks omitted).

166. *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

167. *Id.*; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

168. Alaska, Hawaii, Maine, and Vermont have banned all billboards. *Communities Prohibiting Billboards*, SCENIC AM., <http://www.scenic.org/billboards-a-sign-control/tools-for-action/33-communities-prohibiting-billboards> (last visited Apr. 25, 2012).

major cities have banned digital signs; at least seven cities have suspended approvals.<sup>169</sup> Some localities have allowed the displays, but imposed conditions like reducing brightness<sup>170</sup> or removing static signs.<sup>171</sup> Others, however, have had a very different reaction. To entice sign operators into accepting agreeable terms for static-to-digital conversion, one county is looking at eliminating public hearings, thus quashing the public's right of face-to-face comment.<sup>172</sup> And a Florida mayor admitted to approving his town's first digital billboard, in part, to avoid a lengthy legal battle.<sup>173</sup>

New Jersey, second in population density only to the District of Columbia,<sup>174</sup> is a particularly lucrative target for billboard operators because more viewers mean greater profits.<sup>175</sup> With sixteen digital billboards already in place in New Jersey, and the number growing,<sup>176</sup> the state has such revenue potential that sign operators routinely sue municipalities on First Amendment grounds to try and strike down restrictive ordinances.<sup>177</sup> In this strategic move, known as the "sign code shakedown,"<sup>178</sup> billboard operators stake out

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169. Cities and local governments banning digital signs include: Amarillo, Austin, Dallas, Fort Worth, Galveston, and Houston, Texas; Denver, Colorado; Durham, North Carolina; Gilbert and Pima County, Arizona; Knoxville, Tennessee; Largo and St. Petersburg, Florida; and San Francisco, California. Copeland, *supra* note 7. Cities and local governments with moratoriums include: Los Angeles, California; Pinellas County, Florida; Minnetonka and Oakdale, Minnesota; St. Louis, Missouri; and San Antonio and El Paso, Texas. *Id.* Moratoriums are being considered in: Atlanta, Georgia; Michigan; and Minnesota. *Id.*

170. Story, *supra* note 5.

171. Rudolph Bush, *Council Urged to Let Digital Billboards Go Up*, DALL. MORNING NEWS, Oct. 2, 2010, at B1; Patrick Ferrell, *Digital Billboards to Get a Look, May Replace Some Older Signs: Will County Idea Would Limit Input from the Public*, CHI. TRIB., Nov. 3, 2010, at W4.

172. Ferrell, *supra* note 171.

173. Story, *supra* note 5.

174. *Resident Population Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-dens-text.php> (last visited Apr. 25, 2012).

175. See Schoettle, *supra* note 13, at 3 ("But Marion County, with its dense population and heavy commuter traffic, is the big prize, ad industry experts said.")

176. Kelly Nicholaides, *Digital Wave of the Future or Driver Distraction?*, NORTHJERSEY.COM (Aug. 4, 2011, 1:19 AM), [http://www.northjersey.com/news/126747223\\_east\\_rutherford\\_going\\_digital.html](http://www.northjersey.com/news/126747223_east_rutherford_going_digital.html).

177. *E.g.*, *Coastal Outdoor Adver. Grp. v. Twp. of Union*, 676 F. Supp. 2d 337, 339 (D.N.J. 2009), *aff'd*, 402 F. App'x 690, 692 (3d Cir. 2010); *Coastal Outdoor Adver. Grp. v. Twp. of E. Hanover*, 630 F. Supp. 2d 446, 447 (D.N.J. 2009), *aff'd*, 397 F. App'x 794, 796 (3d Cir. 2010); *CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd.*, 999 A.2d 1151, 1166 (N.J. Super. Ct. App. Div. 2010); *Elray Outdoor Corp. v. Bd. of Adjustment of Englewood*, No. A-4627-07T3, 2009 N.J. Super. Unpub. LEXIS 2378, at \*10 (N.J. Super. Ct. App. Div. Sept. 8, 2009).

178. *Coastal*, 402 F. App'x at 691 ("This case is the latest in a burgeoning line of cases in which a billboard company seeks to challenge the constitutionality of a local sign ordinance, otherwise known as the 'sign code shakedown.'").

locations to keep competitors at bay and make way for static signs that can one day be converted to more profitable digital displays.<sup>179</sup>

But more often, these are meritless suits brought only to force settlements on towns that cannot afford, even in the best economic times, to defend themselves against billboard corporations with deep pockets.<sup>180</sup> Given the enormous potential to capture digital viewers in New Jersey and current austere government policies, one can reasonably foresee that billboard operators will continue filing suits, and municipalities will be increasingly willing to settle. Thus, enforcement of existing billboard regulation will likely erode over time.

### III. INTERPRETING FEDERAL-STATE AGREEMENTS IN LIGHT OF DIGITAL BILLBOARD TECHNOLOGY

To explore how courts should determine the permissibility of digital billboards pursuant to FSAs, it is helpful to compare the specific language that would be subject to such interpretation.<sup>181</sup> Although many FSAs are similar, the wording in some agreements does vary considerably from the norm.

#### A. *Current FSA Lighting Provisions*

Pursuant to the HBA, all fifty states executed FSAs between 1967 and 1972<sup>182</sup> and codified them into state law.<sup>183</sup> Each agreement designates “customary use” standards that may not be exceeded with respect to billboard size, spacing, and lighting.<sup>184</sup> These standards, which were based on what was then “custom” in the particular state, are aimed at furthering the HBA’s goal of containing signs to commercial areas and protecting other areas from encroachment by off-premise advertising.<sup>185</sup>

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179. See Sue Sharpe, *Union Twp. Targets Billboards*, HUNTERDON CNTY. DEMOCRAT, Nov. 1, 2007, at A6; Sue Sharpe et al., *Huge Billboards Proposed*, HUNTERDON CNTY. DEMOCRAT, Oct. 11, 2007, at A1; Lillian Shupe, *Billboard Firm Sues Lebanon over New Ban*, HUNTERDON CNTY. DEMOCRAT, Oct. 1, 2010, at A6.

180. See *Fast FAQs: Sign Code Shakedown*, SCENIC AM., [http://www.scenic.org/storage/documents/Fast\\_FAQs\\_Sign\\_Code\\_Shakedown.pdf](http://www.scenic.org/storage/documents/Fast_FAQs_Sign_Code_Shakedown.pdf) (last visited Apr. 25, 2012).

181. Alaska, Hawaii, Maine, and Vermont, which have banned all billboards, are omitted from this comparison. See *Communities Prohibiting Billboards*, *supra* note 168.

182. *Highway Beautification Act Primer*, OUTDOOR ADVER. ASS’N OF AM., <http://www.oaaa.org/legislativeandregulatory/hbaprimer.aspx#8> (last visited Apr. 25, 2012). Vermont and Rhode Island were the first states to execute agreements, and Texas was the last. *Id.*

183. See, e.g., ARIZ. REV. STAT. ANN. § 28-7903 (prohibiting outdoor advertising).

184. *State/Federal Agreements—Terms*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., <http://www.fhwa.dot.gov/realestate/oacprog.htm#TERMS> (last modified Jan. 3, 2012) [hereinafter *Agreements*].

185. See CONFLICT ASSESSMENT, *supra* note 30, at 19; *Agreements*, *supra* note 184.

The majority of FSAs prohibit billboards that have “any flashing, intermittent, or moving light(s),” except for certain, limited public service information exceptions.<sup>186</sup> However, the HBA itself contains no reference to specific types of lighting.<sup>187</sup> Acknowledging that statutory construction will likely play an important role in courts interpreting the agreements, parties to the digital billboard debate have focused heavily on the language in section 1, especially on the word “intermittent.”<sup>188</sup> This Note will do the same.

New Jersey is representative of the majority of states—thirty other FSAs contain the same, or virtually the same, wording:<sup>189</sup>

Signs may be illuminated, subject to the following restrictions:

1. Signs which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights are prohibited, except those giving public service information such as time, date, temperature, weather, or similar information.
2. Signs which are not effectively shielded as to prevent beams or rays of light from being directed at any portion of the traveled ways of the Interstate or Federal-aid primary highway and which are of such intensity or brilliance as to cause glare or to impair the vision of the driver of any motor vehicle, or which otherwise interfere with any driver's operations of an motor vehicle are prohibited.
3. No sign shall be so illuminated that it interferes with the effectiveness of, or obscures an official traffic sign, device, or signal.<sup>190</sup>

On its face, this provision allows intermittent lighting only

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186. *Agreements, supra* note 184.

187. *See* 23 U.S.C. § 131 (2006).

188. *See, e.g.,* Joseph Popiolkowski, *Digital Billboards Get Green Light*, STATELINE.ORG (Dec. 3, 2007), <http://www.stateline.org/live/details/story?contentId=260259> (“[Scenic America] thinks the FHWA’s tacit approval of digital billboards is a flagrant violation of the Highway Beautification Act - especially the law’s prohibition of ‘intermittent’ lights on billboards.”).

189. States with lighting provisions similar to New Jersey are: Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming; Connecticut and Utah agreements are also similar but omit section 3 of the New Jersey FSA. *See Outdoor Advertising Control*, FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., <http://knowledge.fhwa.dot.gov/cops/rex.nsf/home?OpenForm&Group=OutdoorAdvertisingControl&tab=REFERENCE&start=1> (to view each FSA, find desired state on p. 1 or 2, then click on appropriate download link) (last updated Apr. 25, 2012).

190. DEPT OF TRANSP., AGREEMENT WITH STATE OF NEW JERSEY FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL-AID PRIMARY SYSTEM, 12-13 (Dec. 29, 1971)[hereinafter NEW JERSEY AGREEMENT], *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/552159EB0321D67F852572050054A52D/\\$FILE/NJ1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/552159EB0321D67F852572050054A52D/$FILE/NJ1965.PDF).

where it provides information of a public service nature; for example, a bank sign displaying the temperature.<sup>191</sup> Furthermore, the language contemplates concern for driver safety, especially with respect to glare that could distract a driver or cause a driver to confuse the sign with a traffic control mechanism.<sup>192</sup>

The FSAs for the remaining twenty states contain bits and pieces of the language above, but they are difficult to categorize given certain idiosyncrasies. Some are at least slightly less restrictive than New Jersey's agreement.<sup>193</sup> For example, section 4 of Iowa's FSA appears identical to New Jersey's section 3 but then potentially expands the public service exception by adding the words "not limited to" before "time."<sup>194</sup> Alabama's FSA language mirrors Iowa's but at the same time tightens up the exception by replacing the general phrase "and similar information" with the more specific designation of "news."<sup>195</sup>

West Virginia's FSA contains no public service exception at all, making it appear more strict than New Jersey's agreement.<sup>196</sup> However, it does not include the word "moving," and more significantly, prohibits only "rapid flashing, intermittent light or lights," leaving room to permit flashing, intermittent lights that a court determines are not *rapid*.<sup>197</sup> The FSAs for California and Nevada differ from New Jersey's by not prohibiting "flashing" lights and substituting the words "except that part" for "except those giving" under the public service exception.<sup>198</sup>

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191. *See id.*

192. *See id.*

193. Because New Jersey's agreement contains language reflected in the majority of the states' FSAs, this Part uses New Jersey as a baseline.

194. DEP'T OF TRANSP., AGREEMENT WITH STATE OF IOWA TO CONTROL OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL-AID PRIMARY SYSTEM 8 (Apr. 20, 1972), available at [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/90E8D8F88D8C48D685257205004103E0/\\$FILE/IA1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/90E8D8F88D8C48D685257205004103E0/$FILE/IA1965.PDF).

195. DEP'T OF TRANSP., AGREEMENT WITH STATE OF ALABAMA FOR CARRYING OUT NATIONAL AND STATE POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL PRIMARY SYSTEM 4 (Mar. 23, 1972) [hereinafter Alabama Agreement], available at [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/F017007FFC8219D0852572040063F9F3/\\$FILE/AL1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/F017007FFC8219D0852572040063F9F3/$FILE/AL1965.PDF).

196. DEP'T OF TRANSP., AGREEMENT WITH STATE OF WEST VIRGINIA 9 (Jan. 6, 1969), available at [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/11C0F948D38411E385257205005C0830/\\$FILE/WV1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/11C0F948D38411E385257205005C0830/$FILE/WV1965.PDF).

197. *See id.* (emphasis added).

198. DEP'T OF TRANSP., AGREEMENT WITH STATE OF CALIFORNIA FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 8 (Feb. 15, 1968), available at [http://knowledge.fhwa.vdot.gov/cops/rex.nsf/All+Documents/D849A5FC5D9335218525720400669249/\\$FILE/C](http://knowledge.fhwa.vdot.gov/cops/rex.nsf/All+Documents/D849A5FC5D9335218525720400669249/$FILE/C)

Three states seem to categorically exempt a large group of digital billboards—those already standing—by introducing section 1 with the words “[s]igns shall not be erected,”<sup>199</sup> rather than “erected or maintained”<sup>200</sup> or similar language referring to existing signs. Kansas’s and Oklahoma’s FSAs, whose lighting provisions mirror each other, bar “revolving” lights in addition to the types prohibited in New Jersey.<sup>201</sup> However, they also exempt “steadily burning lights in configuration of letters or pictures” and expand the public service exception because “but not limited to” appears before “time.”<sup>202</sup> Minnesota, which forbids only “flashing” lights, similarly broadens the public service exception by adding the words “without limited generally of the foregoing” before “time.”<sup>203</sup>

Three other states, while restricting billboards old and new, appear rather permissive. Ohio, like New Jersey, prohibits “flashing, intermittent, or moving light or lights” and allows a public service exception, but it completely and uniquely exempts signs in “business districts.”<sup>204</sup> Although this phrase is defined in the agreement, a

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A1965.PDF; DEP’T OF TRANSP., AGREEMENT WITH STATE OF NEVADA FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 5 (Oct. 27, 1998), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/2D262808383CACEC852572050051C76A/\\$FILE/NV196599.pdf](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/2D262808383CACEC852572050051C76A/$FILE/NV196599.pdf) (Nevada’s 1998 agreement replaced the original 1972 version).

199. DEP’T OF TRANSP., AGREEMENT WITH STATE OF KANSAS FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 11 (Apr. 3, 1972) [hereinafter KANSAS AGREEMENT], *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/3301A1694CE056AE8525720500413063/\\$FILE/KS1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/3301A1694CE056AE8525720500413063/$FILE/KS1965.PDF); DEP’T OF TRANSP., AGREEMENT WITH STATE OF MINNESOTA FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 7 (Nov. 18, 1971) [hereinafter MINNESOTA AGREEMENT], *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/CC4790E81B4F1AEB8525720500452B7B/\\$FILE/MN1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/CC4790E81B4F1AEB8525720500452B7B/$FILE/MN1965.PDF); DEP’T OF TRANSP., AGREEMENT WITH STATE OF OKLAHOMA FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 6 (Apr. 14, 1972) [hereinafter OKLAHOMA AGREEMENT], *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/35808B388CA3CFC78525720500588028/\\$FILE/OK1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/35808B388CA3CFC78525720500588028/$FILE/OK1965.PDF).

200. See ALABAMA AGREEMENT, *supra* note 195, at 4.

201. KANSAS AGREEMENT, *supra* note 199, at 11; OKLAHOMA AGREEMENT, *supra* note 199, at 6.

202. KANSAS AGREEMENT, *supra* note 199; OKLAHOMA AGREEMENT, *supra* note 199, at 11.

203. MINNESOTA AGREEMENT, *supra* note 198, at 7.

204. DEP’T OF TRANSP., AGREEMENT WITH STATE OF OHIO FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 12 (June 26, 1968), *available at*

court could interpret it more loosely than the “commercial” area recognized in every FSA.<sup>205</sup> Idaho narrowly bars only lighting that contains “any red or blinking intermittent light, likely to be mistaken for a warning or danger signal.”<sup>206</sup>

Arizona’s lighting provision, reviewed in *Scenic Arizona*, is also very narrow as written, prohibiting signs “displaying any red, flashing, blinking, intermittent, or moving light or lights likely to be mistaken for a warning or danger signal, excepting that part necessary to give public service information such as time, date, weather, temperature or similar information.”<sup>207</sup> Because there is no comma after “lights,” a judge could reasonably interpret “likely to be mistaken” as modifying “light or lights,” which would, in effect, loosen the restriction.<sup>208</sup> However, the *Scenic Arizona* court, noting the ambiguity, concluded that the language bars intermittent light “without regard to whether the display is likely to be mistaken for a warning or danger signal” because any other interpretation would offend the AHBA’s legislative intent.<sup>209</sup>

The four remaining states represent both ends of the spectrum. New Hampshire and Rhode Island, whose lighting provisions are extremely permissive, merely bar illumination that runs afoul of section 2 of New Jersey’s lighting provisions.<sup>210</sup> Michigan’s FSA is

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[http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/DB6D06FCD256B8CB852572050055E13C/\\$FILE/OH1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/DB6D06FCD256B8CB852572050055E13C/$FILE/OH1965.PDF).

205. *See id.* at 3-7.

206. DEP’T OF TRANSP., AGREEMENT WITH STATE OF IDAHO FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY 12 (June 2, 1971), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/8EBD324B736712FC85257204006C5C3D/\\$FILE/ID1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/8EBD324B736712FC85257204006C5C3D/$FILE/ID1965.PDF).

207. DEP’T OF TRANSP., AGREEMENT WITH STATE OF ARIZONA FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY 5 (Nov. 18, 1971), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/EA656ABFE7AA5E608525720400660423/\\$FILE/AZ1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/EA656ABFE7AA5E608525720400660423/$FILE/AZ1965.PDF).

208. *Id.*

209. *Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*14 (Ariz. Ct. App. Nov. 17, 2011).

210. *Compare* DEP’T OF TRANSP., AGREEMENT WITH STATE OF NEW HAMPSHIRE FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY 9-10 (June 2, 1971), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/62649A8DC8D1B91B8525720500527558/\\$FILE/NH1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/62649A8DC8D1B91B8525720500527558/$FILE/NH1965.PDF), *and* DEP’T OF TRANSP., AGREEMENT WITH STATE OF RHODE ISLAND FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 5 (July 13, 1972), *available at* <http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/81C4E0B8>

silent regarding “intermittent” lights and instead limits signs with “changing illumination” to incorporated areas of more than 35,000 people when “consistent with customary usage in [that] area.”<sup>211</sup> Oregon’s agreement, amended in 2002, seems the most restrictive of any state—it includes all of New Jersey’s prohibitions, further bans “revolving” and “rotating” lights, and wards off possible ambiguity by specifically excluding traffic control mechanisms.<sup>212</sup>

Through examining the language of all fifty FSAs, it becomes clear that most states, in setting customary use standards, intended to restrict intermittent lighting at some level or another. However, with the term left undefined, courts resolving digital billboard disputes must decide whether intermittent should mean what existed then, such as floodlights shining intermittently on a static billboard, or what exists today, electronic messages that change intermittently or at the very least appear to do so.

*B. The Federal Highway Administration’s Role in Enforcing the Highway Beautification Act*

The FHWA, today part of the U.S. Department of Transportation, has existed in concept for more than a century but did not take its current form until 1967.<sup>213</sup> The Washington, D.C.-based agency maintains a division office in each state that works with the respective highway agency to administer the federal-aid program.<sup>214</sup> Since the HBA’s birth, the FHWA has been in charge of implementing the statute through the Outdoor Advertising Control Program.<sup>215</sup>

In 1996, the FHWA released a memorandum (“1996

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30DED75D852572050059432F/\$FILE/RI1965.PDF, with NEW JERSEY AGREEMENT, *supra* note 190, at 12-13.

211. DEP’T OF TRANSP., AGREEMENT WITH STATE OF MICHIGAN FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY 4 (Mar. 30, 1972), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/F50C4D2FAD44E8518525720500435DFE/\\$FILE/MI1965.PDF](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/F50C4D2FAD44E8518525720500435DFE/$FILE/MI1965.PDF).

212. DEP’T OF TRANSP., AGREEMENT WITH STATE OF OREGON FOR CARRYING OUR NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL AID PRIMARY SYSTEM 5 (Dec. 20, 2002), *available at* [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/10F097A407612A5A852572050058B0F3/\\$FILE/ORAgreement12-20-02.pdf](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/10F097A407612A5A852572050058B0F3/$FILE/ORAgreement12-20-02.pdf) (The 2002 FSA replaced the initial 1971 version).

213. *See About the New Jersey Division, supra* note 58; *About FHWA*, FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., <http://www.fhwa.dot.gov/about> (last visited Apr. 25, 2011).

214. *About the New Jersey Division, supra* note 58.

215. CONFLICT ASSESSMENT, *supra* note 30, at 3.

Memorandum”)<sup>216</sup> regarding “tri-vision” billboards, which are large signs with triangular louvers that are timed to mechanically rotate and reveal one of three different advertising messages.<sup>217</sup> Before the advent of digital technology, tri-vision signs became popular because the “movement can act as an attention-getting feature that attracts the driver’s attention to the display.”<sup>218</sup> They are still in use today as a less expensive alternative to digital billboards.<sup>219</sup>

Historically, the FHWA had always interpreted the general category of off-premise, changeable message signs, which included tri-vision billboards, as subject to an FSA’s prohibition on “flashing, intermittent, or moving lights” regardless of how frequently the message was programmed to change.<sup>220</sup> Some states, however, began taking the position that tri-vision billboards were not bound by FSA lighting requirements, prompting the FHWA to “restate [its] position” in the 1996 Memorandum, which states in part:

[T]he importance of [FSAs] cannot be overstated. . . . [T]here have been many technological changes in signs, including changes that were unforeseen at the time the agreements were executed. While most of the agreements have not changed, the changes in technology require the State and FHWA to interpret the agreements with those changes in mind. Changeable message signs are acceptable for off-premise signs, regardless of the type of technology used, if the interpretation of the State/Federal agreement allows such signs. In nearly all States, these signs may still not contain flashing, intermittent, or moving lights.

The FHWA will concur with a State that can reasonably interpret the [FSA] to allow changeable message signs if such interpretation is consistent with State law. The frequency of message change . . . should be determined by the State.<sup>221</sup>

Thus, the FHWA clarified that, in spite of burgeoning new technology, the legality of any changeable message sign still ultimately rested on its permissibility under a reasonable interpretation of the state’s FSA and its compliance with state law. Furthermore, the FHWA reminded the states that most had not changed their FSAs to allow for intermittent lighting, which was

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216. Memorandum from Barbara K. Orski, Dir., Office of Real Estate Servs., Fed. Highway Admin., to Reg’l Adm’rs (July 17, 1996) [hereinafter 1996 Memorandum], available at [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/A6CEB01DB7EE07228525725E004F01A9/\\$FILE/071796.pdf](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/A6CEB01DB7EE07228525725E004F01A9/$FILE/071796.pdf).

217. See OFFICE OF SAFETY RESEARCH & DEV., FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., RESEARCH REVIEW OF POTENTIAL SAFETY EFFECTS OF ELEC. BILLBOARDS ON DRIVER ATTENTION AND DISTRACTION 4-5 (2001) [hereinafter SAFETY RESEARCH].

218. *Id.* at 5.

219. OR. DEPT OF REVENUE, BILLBOARD COST FACTORS 8-9 (2007), available at <http://www.oregon.gov/DOR/PTD/docs/303-418.pdf>.

220. *Agreements*, *supra* note 184.

221. 1996 Memorandum, *supra* note 216.

generally forbidden.

In 2005, as the digital billboard debate began brewing, the FHWA conducted a “Conflict Assessment” of its Federal Outdoor Advertising Control Program.<sup>222</sup> The final report, issued in January 2007, noted that “flashing, intermittent or moving lights to display animated or scrolling advertisements are not permissible, [even] though changeable message signs [were generally] allowed” and the FHWA had liberally allowed states to control new LED signs, including determining acceptable message-change frequency.<sup>223</sup>

However, eight months later, the FHWA appeared to change course when it released a new memorandum (“2007 Memorandum”) regarding Commercial Electronic Variable Message Signs (“CEVMS”), more commonly called digital billboards.<sup>224</sup> The memorandum, intended to provide guidance for interpreting FSAs with regard to the new, high-tech signs, states in part:

Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria [such as message duration, transition time, brightness, spacing, and location] do not violate a prohibition against “intermittent” or “flashing” or “moving” lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s.

. . . .

Changeable message signs, including Digital/LED Display CEVMS, are acceptable for conforming off-premise signs, if found to be consistent with the FSA and with acceptable and approved State regulations, policies and procedures. This guidance . . . is not intended to amend applicable legal requirements.<sup>225</sup>

Suddenly, the FHWA appeared to reverse its prior, consistent policy on changeable message signs, which now included digital and tri-vision billboards, as unlawful in states where FSAs bar intermittent lighting. Furthermore, the 2007 Memorandum disclosed that the 1996 Memorandum’s policy:

was premised upon the concept that changeable messages that were fixed for a reasonable time period do not constitute a moving sign. If the State set a reasonable time period, the agreed-upon

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222. CONFLICT ASSESSMENT, *supra* note 30, at 3-4. The assessment included “100 personal interviews, focus groups and public meetings in seven [major] cities, and over 1,800 comments in the Federal Register.” *Id.* at 3.

223. *Id.* at 16.

224. See Memorandum from Gloria M. Shepherd, Assoc. Adm’r for Planning, Env’t, and Realty, to Div. Adm’rs (Sept. 25, 2007) [hereinafter 2007 Memorandum], available at <http://www.fhwa.dot.gov/realestate/offprmsgnguid.htm>; FED. HIGHWAY ADMIN., U.S. DEPT OF TRANSP., THE EFFECTS OF COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNS (CEVMS) ON DRIVER ATTENTION AND DISTRACTION: AN UPDATE, Foreword (2009), available at [www.fhwa.dot.gov/realestate/cevms.pdf](http://www.fhwa.dot.gov/realestate/cevms.pdf).

225. 2007 Memorandum, *supra* note 224.

prohibition against moving signs is not violated. Electronic signs that have stationary messages for a reasonably fixed time merit the same considerations.<sup>226</sup>

In spite of the fact that this premise was never disclosed in the 1996 Memorandum, the FHWA concluded that a “reasonable time period” for message duration was four to ten seconds and deemed eight seconds as the recommended interval.<sup>227</sup> In 2010, a Clear Channel executive commented that “[e]ight seconds . . . is the perfect flip” to maximize viewers and the message imprint.<sup>228</sup>

#### IV. WHY COURTS SHOULD FIND DIGITAL BILLBOARDS IMPERMISSIBLE PURSUANT TO THE HBA AND MOST FSAS

##### A. *Digital Billboards Violate the Prohibition Against “Intermittent” Lighting.*

The word “intermittent” has become the statutory focus of the digital billboard controversy.<sup>229</sup> Since it is undefined in every FSA, courts should apply the traditional rules of statutory construction to determine its meaning within the context of federal and state law.<sup>230</sup> In applying these rules, the place to start is with “the language of the statute itself.”<sup>231</sup> However, the language must be interpreted in a way that advances the purpose of the statute.<sup>232</sup> If the plain meaning of the statute is not clear, courts will then look to its legislative intent.<sup>233</sup>

When a word critical to interpreting a statute is left undefined, courts look to other sections of the statute to see if the word is used elsewhere in a way that can help clarify its meaning.<sup>234</sup>

226. *Id.*

227. *See id.*

228. Rick Romell, *Digital Billboards Light up Landscape, Signs Increase as Advertisers are Sold on Convenience*, MILWAUKEE J. SENTINEL, Sept. 26, 2010, (internal quotation marks omitted), available at <http://www.jsonline.com/business/103769174.html>.

229. *See Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*7-8 (Ariz. Ct. App. Nov. 17, 2011); Popiolkowski, *supra* note 188.

230. *See YULE KIM*, CONG. RESEARCH SERV., 97-589, STATUTORY CONSTRUCTION: GENERAL PRINCIPLES AND RECENT TRENDS Summary (2008), available at [www.fas.org/sgp/crs/misc/97-589.pdf](http://www.fas.org/sgp/crs/misc/97-589.pdf) (“The Court frequently relies on ‘canons’ of construction to draw inferences about the meaning of statutory language.”).

231. *Id.* at 2.

232. *Id.*

233. *Id.* at 40 & n.228 (comparing *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154-55 (1932), which promotes the use of legislative intent, to *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994), which cautions against “cloud[ing] a statutory text that is clear”).

234. *Id.* at 2-3. As described by Justice Scalia,

Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory

“Intermittent,” however, is not only undefined in every FSA and associated state codification but also absent from the language of the HBA itself.<sup>235</sup> Yet, even though the HBA left states responsible for negotiating their customary use standards, the fact that most FSAs prohibit “intermittent” lighting strongly implies that states aimed to regulate this facet.

Searching other state and federal law for possible meanings of “intermittent” provides only limited help. In 2008, a Michigan district court reviewing a First Amendment sign challenge noted that a local ordinance defined a “flashing sign” as one that is “intermittently illuminated or reflects light intermittently from either an artificial source or from the sun, or any sign which has movement of any illumination such as intermittent, flashing, or varying intensity, or in which the color is not constant, whether caused by artificial or natural sources.”<sup>236</sup> Although the court focused on “flashing,” the ordinance does convey the logic of analogizing “flashing” to “intermittent,” and “intermittent” to a sign “in which the color is not constant.”<sup>237</sup> A 2006 Rhode Island Superior Court case offers similarly circular definitions; however, it cites to a 1920 decision where the Virginia Supreme Court observed for a train whistle that “‘intermittent’ . . . embodies . . . temporary discontinuance, interruption, cessation [and] pause.”<sup>238</sup>

Although these cases provide little guidance in conclusively defining “intermittent,” they do imply that the word is neither a term of art, nor has it been given a special meaning borrowed from another legal source.<sup>239</sup> Furthermore, although it is unlikely that the drafters of various FSAs contemplated digital billboards, the fact that they left “intermittent” undefined strongly suggests that they intended its ordinary meaning and presumed that meaning would not change.<sup>240</sup>

To determine a word’s ordinary meaning, courts often look to a

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scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

*Id.* at 2 (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (internal citations omitted)).

235. *See* 23 U.S.C. § 131 (2006).

236. *Marras v. City of Livonia*, 575 F. Supp. 2d 807, 815 (E.D. Mich. 2008).

237. *See id.*

238. *Pawtucket CVS, Inc. v. Gannon*, C.A. No. PC 05-0965, 2006 R.I. Super. LEXIS 33, at \*19 n.8 (R.I. Super. Ct. April 14, 2006) (quoting *Norfolk & W. R. Co. v. Simmons*, 103 S.E. 609, 612 (Va. 1920)).

239. *See KIM, supra* note 230, at 5-6 (discussing when a word or phrase is a “term of art”).

240. *See id.* at 16 (“In some cases, Congress intends silence to . . . signif[y] merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.”).

dictionary.<sup>241</sup> Webster's New World College Dictionary defines "intermittent" as "stopping and starting at intervals; pausing from time to time; periodic."<sup>242</sup> Black's Law Dictionary does not include the individual word but defines "intermittent sentence" as one "consisting of periods of confinement interrupted by periods of freedom."<sup>243</sup>

A digital billboard that changes messages by turning individual, colored diodes "on" and "off" is, by ordinary meaning, "intermittent."<sup>244</sup> In fact, regardless of the method by which the message changes, the image will appear to the driver as if it is "stopping and starting at intervals."<sup>245</sup> As argued in amicus by The Sierra Club in *Scenic Arizona*, "A sign that displays an illuminated message for eight seconds, then changes to display another illuminated message for another eight seconds, and so on throughout the day, is a sign that utilizes the quintessence of prohibited intermittent lighting."<sup>246</sup> Stated another way by a digital billboard critic, "Everyone knows what (intermittent) means. It means something that happens repeatedly over and over and over again. . . . You couldn't find a device that is more intermittent than a digital billboard."<sup>247</sup>

Yet, the billboard industry rejects the plain meaning of "intermittent," instead analogizing a digital sign to "a slide projector [that] shows one image after the next"<sup>248</sup> and characterizing it as displaying multiple "static" messages,<sup>249</sup> not "flashing lights."<sup>250</sup> In fact, a 2008 OAAA Webinar takes the position that the public fails to truly understand "what a digital billboard is" because it perceives such a sign as a television screen with "flashing, moving, blinking" lights.<sup>251</sup> Consistent with this stance, Clear Channel asserted in

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241. See *Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*7 (Ariz. Ct. App. Nov. 17, 2011); KIM, *supra* note 230, at 6 n.25 ("In the absence of a statutory definition, 'we construe a statutory term in accordance with its ordinary or natural meaning.'" (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994))).

242. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 745 (4th ed. 2005).

243. BLACK'S LAW DICTIONARY 1485 (9th ed. 2009).

244. See Kevin E. Fry, *Position Paper Regarding the Propriety of Permitting Digital Billboards on Interstate and Federal-Aid Highways Under the Highway Beautification Act*, SCENIC AM. 1-2 (July 5 2007), <http://scenic.org/storage/documents/ppdigitalbillboards.pdf> ("The Highway Beautification Act's unequivocal regulatory ban on flashing, intermittent, and changing lights is, per se, a ban on electronic signs.").

245. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY, *supra* note 242, at 745.

246. Sierra Club Brief, *supra* note 34, at 6.

247. Popiolkowski, *supra* note 188.

248. Richtel, *supra* note 9.

249. A-Z, *supra* note 123, at 15.

250. *Id.* at 11.

251. Bill Ripp, *OAAA Digital Lighting Webinar, July 15, 2008*, POWERSHOW, [http://www.powershow.com/view/1fbb2-OTJmN/OAAA\\_Digital\\_Lighting\\_Webinar](http://www.powershow.com/view/1fbb2-OTJmN/OAAA_Digital_Lighting_Webinar) (last

*Scenic Arizona* that “digital billboards, when operated with static images changing no more often than every eight seconds . . . are not ‘intermittent.’”<sup>252</sup>

The *Scenic America* court rejected this view, noting that respondent American Outdoor had “essentially conceded” that “[t]he lighting is not ‘constant’ . . . [B]ecause black light does not exist, any time the color black is part of an LED image, some of the LED lights have been turned off.”<sup>253</sup> The court further reasoned that

asserting that the continuous transitions of brightly lit images on the billboard are changes of “copy” ignores reality. What American Outdoor calls a change of “copy” is actually transition from one lighted image to the next lighted image. In this context, “copy” means . . . a change of lighted image. One cannot be separated from the other.

. . . The billboard uses multiple arrangements of lighting to display images that stop and start at regular intervals, which means it uses intermittent lighting.<sup>254</sup>

The OAAA’s association of “static” with a display that changes thousands of times a day is curious considering that the word has traditionally been used to signify paper-and-paste billboards.<sup>255</sup> According to the dictionary, “static” is defined as “unchanged, fixed, stable, steady, unchanging, changeless, unvarying, invariable, constant, consistent.”<sup>256</sup> Spinning words is nothing new, especially in advertising. But the billboard industry misuses the word “static” in a manipulative way, misleading the public to believe that a neon-lit message that changes every few seconds is no different than a paper message that does not. Even if a court were to construe a message as static for however many seconds it appears on the screen, the fact remains that the message does eventually change, and in the eyes of the viewer, that change is intermittent.

Of course, this view raises a line-drawing question with respect to the message interval; assuming arguendo that one deems an eight-second message as intermittent, what about a message that changes less frequently? At the extreme, one could argue that it makes no sense to call a digital billboard that changes once every twenty-four hours intermittent while a static billboard that gets manually repapered once a day would never be deemed so.

In 2007, a former *Scenic America* president indicated that a

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visited Apr. 25, 2012).

252. Clear Channel Brief, *supra* note 37, at 2.

253. *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*7 (Ariz. Ct. App. Nov. 17, 2011).

254. *Id.*

255. See Ahrens, *supra* note 5; Leiser, *supra* note 5.

256. WEBSTER’S NEW WORLD COLLEGE DICTIONARY, *supra* note 242, at 873.

message change interval of one time per hour could be acceptable.<sup>257</sup> But in 2010, the group proposed that twelve hours be the proper dividing line between a sign that is intermittent and one that is not.<sup>258</sup> Jerry Wachtel takes a more moderate view: since it is impossible to ensure that no driver will observe a message change, no matter how long the interval, choose a lower limit based on viewing distance and prevailing speed so that drivers are unlikely to see more than one transition.<sup>259</sup> This, in effect, would limit the tendency for drivers to stare at a message that they expect to change.<sup>260</sup>

*B. Digital Billboards Offend the Legislative Intent of the Highway Beautification Act.*

*i. Protecting Driver Safety*

Even if digital billboards are not deemed to be intermittent at all, or with respect to some minimum message interval, they are still impermissible under the HBA's broad legislative intent<sup>261</sup> and statutory mandate to effectively control outdoor advertising in the interest of safety and natural beauty.<sup>262</sup> As expressed by Representative John Blatnick during the U.S. House of Representative's debates leading up to the bill's enactment, "the larger public good embodied in highway beauty and highway safety must prevail over commercial exploitation."<sup>263</sup>

Indeed, safety was a driving force throughout the debates. One supporter focused on this aspect in commenting that "[t]he tremendous public investment in the highway system should not be impaired or destroyed by sign construction which detracts from highway purposes and adversely affects the public safety in the regular and proper use of such highways."<sup>264</sup> A subcommittee chairman who had worked on the bill further clarified "that the reference to 'safety' contained in the policy statement refers to

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257. Pitchford, *supra* note 4.

258. SCENIC AMERICA, SCENIC AMERICA PETITION FOR RULEMAKING 3 (2010) [hereinafter Scenic America Petition].

259. SAFETY IMPACTS, *supra* 141, at 146.

260. *Id.* ("[T]he Zeigarnik Effect suggests that drivers will be attracted to attend longer to a display whose message changes as they approach it, in an effort to 'complete' the viewing experience . . .").

261. *See* KIM, *supra* note 230, at 7 ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945))).

262. *See* 23 U.S.C. § 131(a) (2006).

263. 111 CONG. REC. 26,274 (1965) (statement of Rep. John Blatnik).

264. *Id.* at 26,277 (statement of Rep. Charles Vanik).

vehicular safety only.”<sup>265</sup> With regard to the proposed customary use standards, another House member noted that the Secretary of Commerce had previously stipulated that “lighting arrangements which clearly pose a highway safety problem should be curtailed.”<sup>266</sup>

The safety issue is even more relevant with respect to the digital billboards of today. As noted by Wachtel, LED signs are different because (1) “[t]he human eye is hard-wired to be drawn to the brightest objects in the scene and to those that display motion, or apparent motion”; and (2) digital displays “use both brightness and movement to capture attention.”<sup>267</sup> Yet, even while criticizing the studies cited by OAAA,<sup>268</sup> Wachtel recognizes the inherent difficulty in analyzing causation between digital billboards and driver distraction,<sup>269</sup> and in the end, takes issue not with the technology itself, but how it is used.<sup>270</sup> He concludes:

*IF* a DBB was set to a luminance level appropriate to the ambient environment in which it is viewed, *and IF* the DBB message change interval was such that no driver saw more than one such change, *and*

*IF* we ensured that location restrictions (e.g. interchange areas, horizontal curves, merges, lane drops, etc.) were truly enforced, *THEN* we should not be particularly concerned about safety impacts due to distraction.<sup>271</sup>

Moreover, while asserting that growing scientific evidence justifies prudent digital billboard restrictions, Wachtel observes that the standard of proof demanded by the billboard lobby—certainty that the signs cause accidents—may never be found, not because they are not a factor but because research methods are not sensitive enough to make the link.<sup>272</sup>

His further observation is persuasive: roadside advertising, unlike most other forms of driver distraction, “is something that we can control.”<sup>273</sup> His 2009 report concludes:

[W]e have rarely required proof of actual crash causation prior to

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265. *Id.* at 26,261 (statement of Rep. John Kluczynski).

266. *Id.* at 26,272 (statement of Rep. Jim Wright).

267. Jerry Wachtel, *Digital Billboards: What we Know Now*, SUBCOMMITTEE ON TRAFFIC ENGINEERING (SCOTE) 6 (June 16, 2009), [http://scote.transportation.org/Documents/08\\_JerryWachtelVeridianGroupDigitalBillboards.ppt](http://scote.transportation.org/Documents/08_JerryWachtelVeridianGroupDigitalBillboards.ppt) [hereinafter *What We Know*].

268. See CRITICAL REVIEW, *supra* note 15 (criticizing two studies released by the OAAA because of lack of peer review and questionable methods used to obtain the data).

269. SAFETY IMPACTS, *supra* note 141, at 5.

270. *What We Know*, *supra* note 267, at 10.

271. *Id.* at 11 (bullet points omitted).

272. SAFETY IMPACTS, *supra* note 141, at 182.

273. *What We Know*, *supra* note 267, at 5.

setting speed limits, restricting in-vehicle mobile telephone use, or even developing current billboard operational and location restrictions . . .

It is likely that those who feel that no guidance or regulations can be promulgated until we have clear proof of causality will continue to argue that there is insufficient information to take any action in this regard regarding roadside DBBs. But those who think that their job is to do what they can to enhance safety for the traveling public based upon the best available information, now have, in our opinion, access to a strong and growing body of evidence, including evidence from [billboard] industry supported research, that roadside digital advertising, attract drivers' eyes away from the road for extended, demonstrably unsafe periods of time.

States and local jurisdictions faced with permit applications or challenges to denied permits need to have a sound basis for their decisions. The research underway by FHWA as this is written may begin to provide specific, directed answers to assist these officials in their work. In the interim, these governmental agencies and toll road operators, faced with the need to make such decisions now have, in our opinion, a sufficient and sound basis for doing so.<sup>274</sup>

The uncertainty is aptly reflected in a comment about a new digital billboard by California commuter Richard Lewis: "I'm not distracted by it . . . I just hope the guy behind me isn't either."<sup>275</sup>

#### ii. Preserving Scenic Beauty

The focus on beauty was also apparent during the HBA hearings, with one supporter expressing his concern that:

[T]oo many of our roads are not pathways bordered by the panorama of America's magnificent natural beauty.

. . . [but instead] have been reduced to blighted corridors between billboards which obstruct the traveler's view and mock the glory of the countryside.

The creeping cancer of roadside advertising has made a huge and garish want-ad of many of our Nation's highways.<sup>276</sup>

Moreover, although legislators could likely not have foreseen today's technology, they expressed forward-thinking intent. Senator Dodd spoke of preserving "at least a portion of the national landscape for the millions who are born each year in America."<sup>277</sup> Representative Jim Wright warned that "we lie in grave danger of leaving to future generations no more relic or remembrance of our

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274. SAFETY IMPACTS, *supra* note 141, at 182.

275. Pitchford, *supra* note 4.

276. 111 CONG. REC. 23,891 (1965) (statement of Sen. Thomas Dodd); *see also* Sierra Club Brief, *supra* note 34, at 9.

277. 111 CONG. REC. 23,891.

time than the garish clutter symbolic of a crass commercialism.”<sup>278</sup> Even today, courts addressing the HBA emphasize the value of maintaining scenic vistas for the future.<sup>279</sup> In *Scenic Arizona*, the court specifically noted that although “safety considerations are an essential component of the AHBA[, they] do not override the beautification aspect of the legislation[, which] was to limit the proliferation of billboards.”<sup>280</sup>

It is reasonable to assume that the customary use standards negotiated by the states in furtherance of HBA goals referred to what was customary then, not what might exist one day in the future.<sup>281</sup> In other words, Congress intended to ensure that the agreed-upon standards, while providing for individual states’ needs through some permissible lighting exceptions, would control the rapidly growing billboard problem forever. Also, it is clear from the House debates that Congress meant for the customary use standards to apply to billboard lighting, not just their size and spacing.<sup>282</sup>

Courts may look to subsequent legislation to determine the intent of prior legislation.<sup>283</sup> Doing so here further demonstrates a conflict between digital displays and HBA policy. In 1978, Congress amended the HBA through the Surface Transportation Assistance Act to allow states that participate in the Bonus Act (“Bonus States”) to erect on-premise signs that could change messages<sup>284</sup> at “reasonable intervals.”<sup>285</sup> Prior to the amendment, Bonus States had been prohibited from having signs with “intermittent” lighting,<sup>286</sup> but Congress allegedly adopted the change in response to pressure by the billboard industry.<sup>287</sup>

However, discussions during the Senate debates emphasized

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278. 111 CONG. REC. 26,140 (1965).

279. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 220-21 (2006).

280. *Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*13 (Ariz. Ct. App. Nov. 17, 2011).

281. See *Sierra Club Brief*, *supra* note 34, at 15-16 (“Congress did not intend for the problems with outdoor advertising to get any worse than what was customary at the time of the adoption of the HBA.”).

282. See 111 CONG. REC. 26,295 (1965) (statement by Rep. Edmond Edmondson) (“But this amendment deals with questions of lighting and questions of spacing, absolutely vital, I think, to the proper implementation of this bill.”).

283. KIM, *supra* note 230, at 44.

284. Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689 (codified as amended at 23 U.S.C. §§ 119, 146, 407 (2006)). This applied to variable message signs of that time, which differ from the digital billboards of today.

285. *Agreements*, *supra* note 184. Sign messages may be changed at “reasonable intervals by electronic process or by remote control” and provide “public service information” or “advertise activities conducted on the property on which they are located.” § 122 (c)-(d).

286. 23 C.F.R. § 750.108(c) (2006).

287. Fry, *supra* note 244, at 2.

that the change was limited to on-premise signs, not reaching to off-premise billboards.<sup>288</sup> In fact, two years later, the FHWA released a report on the safety of CEVMS and confirmed that the national standards for Bonus States still barred intermittent lights and that the FHWA still interpreted CEVMS as prohibited under that rule.<sup>289</sup> Thus, off-premise CEVMS were never exempted by the amendment. Even more enlightening is the fact that an alternate version of the amendment—one that would have allowed intermittent lighting not only on on-premise signs, but also on off-premise signs as well—was introduced, debated, and eventually defeated in the House.<sup>290</sup> Clearly, Congress had the opportunity to extend the change to off-premise signs but failed to do so, demonstrating that legislators intended to preserve the restrictions against intermittent lighting for off-premise signs.

*D. The FHWA's 1996 Memorandum Does Not Apply to Digital Billboards and its 2007 Memorandum Does Not Change Existing Law.*

The FHWA's 1996 Memorandum does not apply to digital billboards because tri-vision signs do not incorporate digital technology.<sup>291</sup> Therefore, even if it were somehow construed as allowing intermittent lighting, the memorandum cannot be used as a mechanism for states to avoid the process of formal FSA interpretation, which is required to gain approval for digital billboards.<sup>292</sup> Yet, the OAAA continues to claim that “[c]hangeable-message billboards have been authorized for more than a decade under a guidance memo issued by the FHWA in 1996.”<sup>293</sup> In doing so, the OAAA implies that the memorandum permitted digital billboards that did not exist at the time and was intended to regulate future technology. This is simply not the case, as shown by the fact that the memo specifically refers to “off-premise signs having panels or slats that rotate.”<sup>294</sup>

While the memorandum clearly states that tri-vision signs “may still not contain flashing, intermittent, or moving lights,”<sup>295</sup> today, FHWA's own website notes that CEVMS are subject to the ban on “flashing, intermittent, or moving lights” and that states must individually evaluate tri-vision signs, possibly with the help of court

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288. *Agreements*, *supra* note 184.

289. *See* WACHTEL & NETHERTON, *supra* note 164, at 17.

290. 124 CONG. REC. 31,064 (1978) (proposed by Rep. Kostmayer).

291. Fry, *supra* note 244, at 3.

292. *Id.*

293. *Facts vs. Myths*, OUTDOOR ADVER. ASS'N OF AM., <http://www.oaaa.org/legislativeandregulatory/digital/factsvsmyths.aspx> (last visited Apr. 26, 2011).

294. 1996 Memorandum, *supra* note 216.

295. *Id.*

interpretation.<sup>296</sup> Thus, no matter what, a state cannot get around the formal process.<sup>297</sup>

The 2007 memorandum explicitly recognizes that the guidance it promulgates does not change existing law and that states must continue to abide by their FSAs.<sup>298</sup> Thus, the FHWA's prior policy—that digital billboards are subject to the prohibition on intermittent lighting—remains in place. The “[m]emorandum did not and could not change existing” FSAs negotiated between the Secretary and various states;<sup>299</sup> in fact, the FHWA actually encouraged states to review and amend their FSAs if they wished to change state regulations pertaining to the HBA.<sup>300</sup> Thus, the FHWA not only made clear that the provisions of existing FSAs were still binding but also reminded divisions that a formal amendment process was required to change those agreements with respect to CEVMS.<sup>301</sup>

As discussed previously, virtually every state's FSA prohibits billboards with intermittent lighting, and to date, no state has amended its FSA to alter this requirement.<sup>302</sup> Although some states have adopted statutes or regulations permitting digital billboards,<sup>303</sup> doing so, or merely interpreting the ban on intermittent lighting as legally inapplicable to digital displays, is avoiding the HBA's federal requirement to effectively control billboards on federal-aid highways and should result in the loss of federal highway funds.<sup>304</sup>

*E. The FHWA Failed to Follow Administrative Procedure Act Requirements in Promulgating the 2007 Memorandum.*

Administrative agencies, including the FHWA, must abide by the Administrative Procedure Act (“APA”), which governs how they may create new regulations.<sup>305</sup> The main purposes of the APA are to

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296. *Agreements*, *supra* note 184. (“In deciding whether to allow off-premise signs using rotating slats, or CEVMS, the applicable State law and agreement should be interpreted on an individual State basis, and if applicable, with court interpretation.”).

297. 1996 Memorandum, *supra* note 216.

298. 2007 Memorandum, *supra* note 224.

299. Sierra Club Brief, *supra* note 34, at 37.

300. 2007 Memorandum, *supra* note 224 (“Divisions are strongly encouraged to work with their State in its review of their existing FSAs and, if appropriate, assist in pursuing amendments to address proposed changes relating to CEVMS or other matters.”).

301. *See id.*

302. *See supra* Part III.A.

303. *See, e.g.*, 43 TEX. ADMIN. CODE § 21.252 (2012).

304. Fry, *supra* note 244, at 4; *see Scenic Ariz. v. City of Phx. Bd. Of Adjustment*, No. 1 CA-CV 09-0489, 2011 WL 5593162, at \*15 (Ariz. Ct. App. Nov. 17, 2011) (citing *South Dakota v. Volpe*, 353 F. Supp. 335, 337-41 (D.S.D. 1973)) (noting *Volpe's* holding that the failure to properly codify the HBA meant the state lacked effective billboard control and was properly penalized by losing federal highway funds).

305. *See* 5 U.S.C. § 553 (2006); Jill Nylander, *The Administrative Procedure Act*,

“keep the public currently informed . . . provide for public participation . . . prescribe uniform standards for the conduct of formal rule making . . . and adjudicatory proceedings . . . [and] restate the law of judicial review.”<sup>306</sup> To fulfill these goals, the APA requires agencies to follow a process of public notice and comment with respect to rulemaking.<sup>307</sup>

In releasing the 2007 Memorandum under the umbrella of guidance, the FHWA instituted a sudden policy change that created a de facto administrative rule without following the required APA rulemaking procedures.<sup>308</sup> As the Court of Appeals for the Third Circuit has noted, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”<sup>309</sup> In the case quoted by the Third Circuit, *Paralyzed Veterans of America v. D.C. Arena, L.P.*, the Court of Appeals for the D.C. Circuit noted that an agency could not switch positions without notice and comment rulemaking where the agency’s new interpretation of a regulation was fundamentally different.<sup>310</sup>

Although the FHWA claimed to merely clarify issues previously discussed in its 1996 Memorandum,<sup>311</sup> the guidance effectively changed policy in a way that imposed new requirements on the states.<sup>312</sup> Whereas prior FHWA policy treated digital billboards as subject to FSA provisions prohibiting intermittent lighting, the 2007 guidance made clear that the agency no longer considered digital signs as intermittent so long as they were programmed to acceptable message interval length. Thus, prior to the new guidance, states wishing to bar such signs needed to take no action. However, the 2007 Memorandum imposed a requirement on states wishing to ban “digital billboards [to] . . . formally amend their laws or their FSAs to explicitly do so.”<sup>313</sup>

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MICH. BAR J., Nov. 2006, at 38-39, *available at* [www.michbar.org/journal/pdf/pdf4article1078.pdf](http://www.michbar.org/journal/pdf/pdf4article1078.pdf).

306. U. S. DEPT OF JUSTICE, ATT’Y GEN. MANUAL ON THE ADMIN. PROCEDURE ACT 9 (1947), *available at* [http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE\\_WORKS/AG01.HTM#A](http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE_WORKS/AG01.HTM#A).

307. *See* 5 U.S.C. § 553(c).

308. *See id.*

309. *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (quoting *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

310. 117 F.3d at 586.

311. 2007 Memorandum, *supra* note 224 (“The purpose of this memorandum is to provide guidance . . . concerning off-premises changeable message signs [located in areas subject to the HBA] . . . It clarifies the application of the . . . (FHWA) July 17, 1996, memorandum on this subject.”).

312. *Scenic America Petition*, *supra* note 258, at 11.

313. *Id.* at 12-13.

The billboard industry has argued that the 2007 Memorandum changed nothing and instead simply confirmed the FHWA's "longstanding policy, that static billboard displays are not flashing or intermittent."<sup>314</sup> Yet, the official FHWA policy during the years between memorandums was exactly the opposite of what the industry asserts. In fact, in *Scenic Arizona*, Clear Channel argued that "[t]he 2007 Memorandum states in no uncertain terms" that digital billboards with eight-second intervals *no longer* violate the law,<sup>315</sup> which implies that the new guidance changed prior policy that digital billboards, in fact, did violate the law.

In February 2010, Scenic America petitioned the FHWA to comply with the APA rulemaking procedures and formally define "[a] flashing or intermittent light [as one that] changes color . . . or that switches from on to off more frequently than once every twelve hours."<sup>316</sup> The petition also requests that "[a] moving light [be] defined as a light that moves or displays movement, even if only between static messages."<sup>317</sup> As part of its argument, the group contends that "[t]he 2007 guidance effectively deregulates digital billboards . . . [without] a reasoned analysis for a change in its course"<sup>318</sup> as required by *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, in which the Supreme Court found that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem."<sup>319</sup>

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court noted that its decision in *State Farm* did not stand for the proposition that all policy actions an agency must be justified, but stated that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."<sup>320</sup> The FHWA, in changing course by way of a purported guidance document, did exactly that.

#### CONCLUSION

Digital billboards have a place in our world—after all, only a

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314. *Facts vs. Myths*, *supra* note 288.

315. Clear Channel Brief, *supra* note 37, at 25-26.

316. Scenic America Petition, *supra* note 258, at 3.

317. *Id.*

318. *Id.* at 14.

319. 463 U.S. 29, 43 (1983).

320. 129 S. Ct. 1800, 1810-11 (2009).

rare visitor is left uninspired by the “big lights” of New York City.<sup>321</sup> Yet even in a metropolitan area where digital billboards draw appreciative crowds, courts have upheld limits imposed to preserve aesthetics and improve safety for the benefit of the general public.<sup>322</sup>

As demonstrated by the decision in *Scenic Arizona*, the Highway Beautification Act of 1965 is still relevant and not simply a quaint relic of a bygone era. Although the HBA failed to curb billboard blight as effectively as Congress intended, that intent still matters. This is especially true where a powerful lobby works to circumvent rules already in place and where the very agency tasked to safeguard these rules instead ignores their letter and intent.

If left effectively unregulated, digital billboards will not only permanently destroy what few scenic vistas that remain but also potentially put drivers at risk as sign operators push the limits of technology to vie for more viewers. It seems odd that legislators focus on the dangers of distracted driving with regard to cell phone use,<sup>323</sup> yet ignore the elephant on the side of the road that begs to capture the attention of drivers. This is especially so when the latter distraction is something the government can easily control with tools that it already has in place.

Society has become so quick to adapt to new technology that giant screens on the side of the road may seem no different from the latest phone or tablet device. But digital billboards are different because they present a greater potential to cause unsafe conditions on the road, while, at the same time, permanently destroying views that once gone, are gone forever. As one architect noted, “Billboards seek visual prominence and destroy long vistas and open spaces, and digital billboards do so even more.”<sup>324</sup>

A court need not consult a dictionary to know that digital signs violate the letter and spirit of the HBA, and the failure of the FHWA to do its part “to promote the safety and recreational value of public travel, and to preserve natural beauty”<sup>325</sup> has created an imbalance

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321. “New York, concrete jungle where dreams are made of; There’s nothing you can’t do; Now you’re in New York; These streets will make you feel brand new; Big lights will inspire you.” JAY-Z & ALICIA KEYS, *Empire State of Mind*, on THE BLUEPRINT 3 (RocNation 2009).

322. See *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 113 (2d Cir. 2010) (holding that a New York City zoning resolution was not an unconstitutional restriction on commercial speech because it was justified by the goal of protecting aesthetic appearance and maintaining traffic safety).

323. See Tara Parker-Pope, *A Problem of the Brain, Not the Hands: Group Urges Phone Ban for Drivers*, N.Y. TIMES, Jan. 13, 2009, at D5 (“In half a dozen states and many cities and counties, it is illegal to use a hand-held cellphone while driving . . .”).

324. Sam Butterfield, *Electronic Billboard Rules Would Restrict Locations, Limit Brightness; Ordinance Now Needs Approval from City Council* PITT. POST-GAZETTE, June 1, 2011, at B1.

325. 23 U.S.C. § 131 (2006).

of power that leaves the general public at a loss.<sup>326</sup> Unless legislators make digital billboard regulation the priority it should be, courts must uphold the laws that remain in place and properly penalize states that fail to comply. If they do not, we abandon our highways forever to want ads and turn our landscapes into “[a] place just like every other place. Only Not.”<sup>327</sup>

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326. Butterfield, *supra* note 324 (“Under the ordinance, digital signs will be able to flash . . . four times more than the initial draft of the bill would have permitted, and signs will be illuminated at brighter levels both during the day and at night than the first draft would have allowed.”).

327. Barry, *supra* note 2 (title).