**IN THE COURT OF APPEALS**

**STATE OF ARIZONA**

**DIVISION ONE**

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| SCENIC ARIZONA, INC., an Arizona corporation; NEIGHBORHOOD COALITION OF GREATER PHOENIX, INC., an Arizona corporation,<br><br>Plaintiffs/Appellants,<br><br>vs.<br><br>CITY OF PHOENIX BOARD OF ADJUSTMENT, a municipal agency; AMERICAN OUTDOOR ADVERTISING, L.L.C., a Nevada limited liability company,<br><br>Defendants/Appellees. | NO. 1 CA-CV 09-0489<br><br>Maricopa County Superior Court No. LC2008-000497-001DT |

# BRIEF OF *AMICUS CURIAE*

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## INTEREST OF AMICUS CURIAE

Amicus Curiae Clear Channel Outdoor, Inc. ("CCO") is a global outdoor advertising company that has installed a number of digital faces pursuant to use permits issued by the City of Phoenix and plans to continue to apply for similar use permits to install digital faces on outdoor advertising signs in Arizona. As such, it has a direct interest in the outcome of this Appeal. In fact, eight of CCO's digital sign faces were challenged by a special action brought by the same Plaintiffs/Appellants involved here, in Maricopa County Superior Court, Case No. LC2008-000282. In that case, Superior Court Judge Paul J. McMurdie granted CCO's Motion to Dismiss the Plaintiffs' Amended Complaint for Statutory Special Action because he ruled that Plantiffs lacked standing to pursue their special action against CCO.

In that case, as here, Plaintiff/Appellants alleged neither that they lived, worked nor owned property anywhere near the signs in question and Judge McMurdie found that Plaintiffs had failed to show the requisite particularized harm, as required under A.R.S. § 9-462.06(K), to bring an appeal challenging the City of Phoenix Board of Adjustment's decision. These same Plaintiffs appealed Judge McMurdie's decision to this Court (NO. 1 CA-CV 09-0293), but later moved to dismiss their appeal after CCO filed its Answering Brief, affirming that they were content to abide by the trial court's judgment that they lacked standing.

If the Court of Appeals were to rule that Plaintiffs/Appellants have standing as aggrieved persons to challenge a Board of Adjustment permit decision merely because of their interest in aesthetics, it will subject not only outdoor advertising permits, but in fact, any zoning decision across Arizona, to attack by anyone who merely dislikes or otherwise objects to a lawfully permitted structure, regardless of whether the person has suffered any particularized harm. Additionally, should the Court determine that Appellants have standing (which is not the case), CCO has a direct interest in assisting the Court in its analysis of whether the billboard at issue is prohibited by state law – which it is not. Appellants have argued that the billboard violates the state outdoor advertising statute's prohibition on "intermittent" lights. However, state and federal regulators have both expressly stated that digital billboards, when operated with static images changing no more often than every eight seconds (as the display at issue here), are not "intermittent" lights and do not violate Arizona law. There is no authority to the contrary.

## SUMMARY OF ARGUMENT

What is at stake here is the ability of anyone – resident or non-resident – to file suit to reverse a city's zoning decision just because the person may, in his travels, see the permitted use – in this case a digital billboard – and dislike the way it looks. Affirming the trial court's grant of standing to the Plaintiffs/Appellants would open the door to innumerable lawsuits by any plaintiff to challenge every decision by a Board of Adjustment on any use permit, variance or other matter regardless of where they live, and would overrule clearly defined statutory limits on who can bring a challenge to a zoning board's decision under Arizona law.

The Superior Court's denial of the Motion to Dismiss for lack of standing filed by American Outdoor Advertising, L.L.C. ("American") should be reversed because Plaintiffs/Appellants Scenic Arizona, Inc. and Neighborhood Coalition of Greater Phoenix, Inc. (collectively, "Appellants") are not persons aggrieved by a decision of the Board of Adjustment (the "Board") and cannot allege the requisite particularized harm for standing, as expressly prescribed by Arizona statute. Appellants do not live or own property in proximity to the billboard in question, and cannot allege any damage that is different from, or greater than, any purported damage to the public at large. Appellants' allegations that they use Phoenix streets and highways and would avoid driving by the digital billboard face are simply insufficient. Further, their alleged concerns regarding aesthetics and safety are

precisely the types of general interests shared by the public that courts have repeatedly held do not constitute allegations of particularized harm.

Unable to meet the applicable Arizona requirements for standing, Appellants mistakenly or incorrectly argue that they have standing by analogy to the "zone of interest" test used by federal courts, and federal case law. This test and case law do not apply because Appellants have brought suit pursuant to a specific Arizona statute that has specific standing requirements, namely, that the plaintiff be an "aggrieved person."

Because Appellants cannot force themselves into the Arizona aggrieved person standard, and federal case law likewise fails to support their standing argument, Appellants then attempt to convince the Court this is a rare exception when the Court should waive standing for matters of great public importance. No such matter exists here.

If, however, the Court nevertheless finds that Appellants have standing and addresses the merits of the case, it should find that the LED/digital display at issue is permitted by and consistent with federal, state and City of Phoenix law. Both federal and state regulators have concluded that when LED displays are operated to change static copy no more frequently than every eight seconds, they do not violate statutory prohibitions against "intermittent" lights. There are now more than fifty approved, off-premise LED/digital sign faces in Arizona. Appellants seek to

overturn the now long-standing, consistent interpretation of the Arizona Highway Beautification Act ("AHBA") (Ariz. Rev. Stat. §§ 28-7901-7915) in direct contravention of the relevant regulators and without any supporting authority. Appellants' attempts fall short.

## ARGUMENT

## I. APPELLANTS LACK STANDING TO BRING THEIR SPECIAL ACTION.

### A. A Person Must Be "Aggrieved By" A Board Decision In Order To Challenge The Decision.

The only persons with a right to seek judicial review of a decision of the Board are those who are "aggrieved by" a Board decision under A.R.S. § 9-462.06(K) and Arizona case law interpreting the "aggrieved person" requirement. *See Center Bay Gardens, L.L.C. v. City of Tempe*, 214 Ariz. 353, 358 ¶ 20, 153 P. 374, 379 (App. 2007) ("In Arizona, a person 'aggrieved' by a zoning decision of legislative body or board may appeal that decision by special action to the superior court.") (*citing* A.R.S. § 9-462.06(K) (1996)).

Arizona courts have interpreted the "aggrieved" standard to mean the plaintiff must "allege 'particularized harm' resulting from the decision."[1] *Center Bay*, 214 Ariz. at 358 ¶ 20, 153 P.3d at 379 (citing *Blanchard v. Show Low Planning and Zoning Comm'n*, 196 Ariz. 114, 118 ¶ 24, 993 P.2d 1078, 1082

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[1] An organization only has standing if it alleges particularized harm to particular members sufficient that the particular members would have standing to bring the action in their own name. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). Appellants put forth two members to attempt to demonstrate their alleged particularized harm: Mr. Barnes and Mr. Mayer. However, neither of these members alleged the necessary particularized harm to establish standing.

(App. 1999)).[2] A "particularized harm" means the alleged damage "must be peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Center Bay*, 214 Ariz. at 358 ¶ 20, 153 P.3d at 379 (citing *Blanchard,* 196 Ariz. at 118 ¶ 20, 993 P.2d at 1082); *see also Buckelew v. Town of Parker*, 188 Ariz. 446, 451, 937 P.2d 368, 373 (App. 1996), *rev. denied* (stating that the alleged damage "must be separate and distinct from the damage suffered by the general public") (citing *Armory Park*, 148 Ariz. at 5, 712 P.2d at 918).

### B. Appellants Are Not Persons "Aggrieved By A Decision Of The" Board And Therefore Lack Standing.

Appellants lack standing because they simply are not persons "aggrieved by a decision of the" Board; they have not alleged they suffered "particularized harm" resulting from the decision to grant American a permit for the digital billboard face.

#### 1. Appellants Cannot Allege A Particularized Harm Based On Proximity To The Billboard Face In Question.

Arizona courts have found plaintiffs alleged "particularized harm" where they allege they live or own property near the area affected by the Board's decision. In *Center Bay*, the plaintiffs bringing the special action pursuant to A.R.S. § 9-462.06(K) had properties directly across the street from the property to

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[2] Although *Blanchard* did not state it was an appeal under Section 9-462.06(K), the *Center Bay* court stated that the "aggrieved person" standard under the statute was essentially the same as the test set forth in *Blanchard*, *Buckelew* and related cases. *Center Bay*, 214 Ariz. at 358 ¶ 20 n.7, 496 P.3d at 379 n. 7.

which the City of Tempe granted certain variances and use permits. *Center Bay*, 214 Ariz. at 354 ¶ 2, 153 P.3d at 375. Specifically, the plaintiffs alleged they would suffer damage particular to themselves as a result of the variances and use permits for the adjacent property because of the "increase in the number of dwelling units per acre, the lack of setbacks and landscaping, the height of the proposed structure, and the apparent intent to change the character of the neighborhood through development like the proposed project." *Id.* at 355 ¶ 6, 153 P.3d at 376. Based on the alleged specific harms to the individual plaintiffs, and because the complained-of use permits and variances affected property directly across the street from the plaintiffs' properties, the Arizona Court of Appeals found the plaintiffs were persons aggrieved by the decision of the City of Tempe, and had standing. *Id.* at 360 ¶ 26, 153 P.3d at 381.

Likewise, in *Blanchard*, the Arizona Court of Appeals made very clear that proximity is *the* important factor in determining whether a plaintiff is a person aggrieved by a government decision affecting property. There, the City of Show Low approved certain zoning to allow the construction of a Wal-Mart Supercenter Store. *Blanchard*, 196 Ariz. at 115-16 ¶ 1, 993 P.2d 1079-80. Plaintiffs who owned land within approximately 750 feet of the rezoned parcel had standing. *Id.* at 118 ¶¶ 22-24, 993 P.2d at 1082. Parties that owned land 1,875 feet south of the rezoned parcel, did not. *Id.* at 118 ¶ 21, 993 P.3d at 1082. Again, this ruling was

based on the alleged particularized harm.

Similarly, in *Buckelew*, the plaintiff alleged he bordered the complained-of RV park, and that the activities at the park interfered with his enjoyment of his property due to noise, littering, threats of violence, fire and health hazards, raw sewage and other disturbances from the park. 188 Ariz. at 452, 937 P.2d at 374. Such allegations presented assertions of damages that were more substantial than that sustained by the public at large, and therefore sufficed to allege the plaintiff was an aggrieved person under A.R.S. § 9-462.06(K). *Id.*

Appellants admit their members do not live within 1,875 feet (or within any number of miles for that matter) of the American billboard in question, and also admit the billboard is located in an industrial/commercial area. (*See* Appellants' Consolidated Answering Brief on Cross-Appeal/Reply Brief on Appeal ("Appellants' Answering Brief") p. 5; American's Consolidated Answering Brief pp. 10, 18.) Unable to meet the standard for proximity under established Arizona law, Appellants instead attempt to convince this Court that because they might drive near the billboard in question and are concerned about the aesthetics of the area and highway safety, this is sufficient to allege standing. They allege that members of the Appellants use the streets and highways on which the American billboard face at issue is located, and that such use of the streets, plus their concerns regarding safety and aesthetics, constitutes a harm that is "at least more

substantial" than the harm to the general public. (Appellants' Answering Brief pp. 6, 13.)

Even if this Court was to consider Appellants' allegations regarding its members driving on Phoenix roadways near the billboard face in question as true (which it should not), such factual allegations clearly do not constitute particularized harm under applicable law. Nowhere in the Appellants' Answering Brief is there any citation to a case where a court found standing based on a plaintiff driving by an allegedly affected area. In *Blanchard*, the property owner living 1,875 feet from the rezoned property would likely have had to drive by the affected property. But the court did not find she had standing because she would have to see the Wal-Mart from the road. In this highly mobile world, expanding standing to anyone who may drive by an affected property would eliminate the particularized harm requirement: anyone in Arizona, even visitors from outside the state, could challenge a Board decision under the absurdly permissive standard urged by Appellants.[3]

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[3] Any finding to the contrary would open a Pandora's box of cases that could be litigated in the Superior Courts and Appellate Courts of Arizona. Every decision by the Board of Adjustment on any use permit, variance or other matter would be subject to challenge by any person who uses the streets and highways of Phoenix – clearly an absurd result. Not only would this impose an unreasonable burden on Arizona's already strained judicial resources, but it would also undermine what is, at its core, a local issue.

### 2. Appellants' Allegations Of Aesthetic And Safety Concerns Do Not Confer Standing.

Appellants' argument that what makes their alleged injuries particular are that they are concerned about impairment of aesthetics and highway safety from the billboard face in question, likewise fails. While it can be said that every driver is concerned about safety, and that the public in general is concerned about aesthetics, such general concerns *are not* sufficient to confer standing. *Blanchard* makes this very clear: evidence regarding general harm to the area in the form of increased traffic and noise was not sufficient to allege a particularized palpable injury sufficient to confer standing. 196 Ariz. at 118 ¶ 21, 993 P.2d at 1082; *see also Center Bay*, 214 Ariz. at 358-59 ¶ 20, 153 P.3d at 379-80 ("General economic losses or general concerns regarding aesthetics in the area without particularized palpable injury to the plaintiff are typically not sufficient to confer standing."); *Perper v. Pima County*, 123 Ariz. 439, 440-41, 600 P.2d 52, 53-54 (App. 1979) (ruling that alleged general concerns regarding increased traffic and noise, decreased property values and altered residential atmosphere and scenery did not constitute "damage peculiar to" the plaintiff as required for standing; rather they were "only general economic and aesthetic losses"). Here, Appellants' alleged safety, aesthetic and economic concerns are no different than the generalized concerns regarding traffic, noise and residential atmosphere in *Blanchard* and *Perper* that the Court found were insufficient to allege the different or greater

injury required for standing.

Appellants' argument that they have invested time and effort in opposing billboards also does not confer standing. It is clearly established that a person's or group's vocational interest in a matter does not confer standing.[4] *Home Builders Ass'n of Central Arizona v. Kard,* 219 Ariz. 374, 378 ¶¶ 18-19, 199 P.3d 629, 633 (App. 2008), rev. denied (finding that home builders' association failed to allege standing for monetary or injunctive relief because they did not sufficiently allege harm to any particular members, and could not "rely on a vocational or special interest in home-building costs to justify standing"). As support, Home Builders cited *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976), which states:

> Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. . . . Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail.

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[4] Appellants' argument that they suffered harm because the Board "ignored the legislation" is untenable. *See* Appellants' Answering Brief p. 15. Appellants present no evidence that the Board "ignored the legislation" (although Appellants do not state what "legislation" they are referencing, it can be presumed from their Answering Brief (at p. 2) that they are referencing the Arizona Highway Beautification Act). In fact, the Board relied on statements by both federal and state regulators interpreting the legislation. [*See generally* R.25, at pp. 13, 23.] Nor do Appellants provide any authority that particularized injury can stem from a governing body, in its discretion, disagreeing with a member of the public.

(internal citations omitted). Of note, the Home Builders Court also referred to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566-67 (1992), which rejected the "vocational nexus approach" that would allow anyone with a professional interest in endangered animals to allege they were appreciably harmed by a project affecting some portion of that species with which the person had no particular concern. 219 Ariz. at 378 ¶ 18, 199 P.3d at 633.

It is clear that Appellants' concerns about highway safety and aesthetics are just the sort of general concerns shared by the public in general that do not constitute a particularized harm. Home Builders held that the type of allegations that Appellants made—the dedicating of time and effort to lobbying for their safety and aesthetic interests—do not elevate these general concerns to particularized harms. Accordingly, the allegations about the time Appellants' members spent lobbying regarding outdoor advertising cannot satisfy standing.

Appellants assert that if the Court determines they have not sufficiently pled standing, the Court should hold an evidentiary hearing. (See Appellants' Answering Brief p. 19.) However, such a hearing would be futile. Even taking the allegations in the Plaintiffs' Complaint as true, there is simply no question of fact to resolve below regarding standing. It is undisputed that Appellants do not live near the billboard face in question. As a matter of law, Appellants' asserted safety, aesthetic and economic concerns do not confer standing. Appellants' reliance on

Blanchard for their argument that an evidentiary hearing should be held is misplaced, as the trial court heard evidence in that case regarding the merits of the complaint and the motions to dismiss pursuant to stipulation of the parties. 196 Ariz. at 116 ¶ 9, 993 P.2d at 1080. No such stipulation is present here and no such hearing is necessary. Therefore, no evidentiary hearing is merited or appropriate.

### C. The Federal Zone of Interest Test Does Not Apply.

Appellants simply ignore the fact that the leading applicable Arizona standing cases—Center Bay, Blanchard and Buckelew—do not discuss or allow for any zone of interest test. Nevertheless, Appellants assert they have standing because they allegedly are within the zone of interest that the Highway Beautification Act of 1970 was intended to protect. (Appellants' Answering Brief p. 17.) A "zone of interest" test is inapplicable because: (1) it is a federal test for prudential standing applied once a party has already alleged a sufficient personal stake by meeting the requirements of constitutional standing, which Appellants have not done; and (2) Arizona courts have not adopted the test to grant standing where no sufficient personal interest exists under A.R.S. § 9-462.06(K).

The "zone of interest" test is from *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 154 (1969), where the Court held that once plaintiffs had already demonstrated particularized injury, they must also establish they have prudential standing, meaning that "the interest sought to be

protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Such "broadening of the categories of injury that may be alleged in support of standing" does not mean the Court abandoned the requirement that the plaintiff "must himself have suffered an injury." *Simon*, 426 U.S. at 38-39 (emphasis added) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). The zone of interest test is not, as Appellants imply in their Answering Brief, an alternative way to establish standing. It is an additional test, required by federal courts, in addition to the requirement that the plaintiff assert an Article III personal interest. Id.

Therefore, the irreducible requirements for constitutional standing remain: (1) the party must have "suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) that the injury must be "fairly trace[able] to the challenged action of the defendant"; and (3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted); *Natural Res. Def. Council v. U.S. E.P.A.*, 542 F.3d 1235, 1244 (9th Cir. 2008). It is only in addition to these Article III standing requirements that courts apply the zone of interest test as a means of limiting jurisdiction by prudential considerations. Id. (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

Just as the "zone of interest" test is not an alternative test for constitutional standing in federal courts, Arizona courts have not adopted the zone of interest test as a basis for granting standing absent an alleged particularized harm. Appellants' citation to *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 557 P.2d 532 (1976) is misguided. There, the court did not adopt the zone of interest test. Rather, it merely mentioned the test in a discussion about how municipalities are free to adopt their own standards governing who has standing to appear before them so long as due process requirements are met. Id. at 606, 557 P.2d at 538.

In that case, a lender with a deed of trust on a property sought from the town an extension of a use permit for the property. Id. at 604, 557 P.2d at 536. The town refused the lender's application, in part, because it said the lender had only equitable, and not legal, title to the property. Id. The Arizona Supreme Court found that the lender, with its interest in preserving the property that secured the loans and contractual right to do so under the Deed of Trust, had a sufficient personal stake in the outcome of the use permit decision to have "standing" to appear before the town commission and counsel. Id. at 607, 557 P.2d at 539.

Nowhere in *Town of Paradise Valley* did the Court adopt the zone of interest test for standing in Arizona courts, nor did that case involve the aggrieved person standard of A.R.S. § 9-462.06(K). The Court did, however, require the lender to have a "personal stake" in order to have standing. Id.; see also *City of Scottsdale v.*

*McDowell Mountain Irrigation and Drainage Dist.*, 107 Ariz. 117, 121-22, 483 P.2d 532, 536-37 (1971) (finding that the City of Scottsdale had standing pursuant to statute as a "person affected" by the decision of a board of supervisors because in addition to being within the zone of interest of the statute, the city alleged real and immediate interests that would be affected by the decision); *City of Douglas v. City of Sierra Vista*, 21 Ariz. App. 71, 72, 515 P.2d 896, 897 (App. 1973) (requiring appellant to allege a sufficient "personal stake in the outcome of the controversy" and stating that, arguendo, even if the appellant had done so, appellant still lacked standing because it was not within the zone of interests to be protected by the First Amendment right to petition). The zone of interest test is simply inapplicable and does not confer standing on Appellants.

## II. FEDERAL CASE LAW ON STANDING IS ALSO INAPPLICABLE.

The leading Arizona cases addressing standing to bring a special action challenging a zoning decision—Center Bay, Blanchard and Buckelew—do not apply federal standing requirements. Rather, they properly focus on whether, under Arizona law, the plaintiffs pleaded injury peculiar to themselves, or at least more substantial than those suffered by the community at large, to be persons aggrieved by the decision of a board of adjustment. Center Bay, 214 Ariz. at 358 ¶ 20, 153 P.3d at 379; Blanchard, 196 Ariz. at 118 ¶¶ 19-24, 296 P.2d at 1082; Buckelew, 188 Ariz. at 451-52, 937 P.2d at 373-74. In *Armer v. Superior Ct. of*

*Arizona, In and For Pima County*, 112 Ariz. 478, 479, 543 P.2d 1107, 1108 (1975), the Arizona Supreme Court stated that federal standing cases, including *Sierra Club v. Morton*, 405 U.S. 727 and *Association of Data Processing Service Organization, Inc.*, 397 U.S. 150, were "not controlling in the instant action in the Arizona courts" where the question was whether, "as a matter of Arizona law, respondents had standing in the trial court to bring a special action in the nature of a mandamus" under a statute allowing a "party beneficially interested" to bring an action. Standing to seek judicial review of the Board's decision regarding use permits only is granted by statute, A.R.S § 9-462.06(K), and therefore federal case law regarding standing has no application here. Appellants improperly ignore this fact.

### A. Even If Federal Standing Requirements Applied, Appellants Cannot Meet Those Standards.

Not only do Appellants not meet the Arizona definition of a "person aggrieved by a decision of the" Board, even if federal case law regarding standing somehow were to apply (which it does not, see Section I supra), Appellants cannot meet the federal constitutional standing requirements either. Under *Lujan*, plaintiffs must allege an "injury in fact." 504 U.S. at 560; see also Section III.A supra, setting forth the constitutional requirements for standing. Under federal law, a generalized injury that is alleged to be suffered by any member of the public at large is an insufficient basis for standing. Rather, a plaintiff "must somehow

differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense. In other words, the alleged injury 'must affect the plaintiff in a personal and individual way.'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (quoting *Lujan*, 504 U.S. at 560 n.1). *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1283 (1st Cir. 1996) made this distinction very clear: someone who is an environmentalist who wants to protect the environment, "which presumably everybody has an interest in doing," does not demonstrate a particularized injury.

Appellants have failed to show that their alleged "injuries" of being concerned about safety and aesthetic beauty near the billboard face in question, and allegedly deciding to take other routes to avoid the billboard face, meet this threshold requirement of a particularized injury. The cases cited by Appellants actually demonstrate this very point. (Appellants' Answering Brief p. 12.) In each case, the court found that plaintiffs sufficiently alleged a distinct and particularized injury by specifically alleging that they used the affected area for recreation in a distinct way different from other persons in the state, and that their ability to use the area would be eliminated or severely reduced due to the challenged activity. For example, in *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 967 (9th Cir. 2006), one member of the plaintiff association stated that he had spent a great deal

of time in the affected area, using it for hiking, camping, swimming and taking pictures. He went into detail about how he would not be able to participate in such recreational activities if the mining projects were approved. Id. Such allegations were sufficient to allege an injury-in-fact that was different from how every other person in the state would be affected by the mining. See id.[5]

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[5] *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 182-83 (2000) (after plaintiffs averred that they used the affected river for recreation and would be afraid to continue living near and using the river if the defendant was permitted to pollute the water, the Court held this was an alleged injury in fact because the "'aesthetic and recreational values of the area will be lessened' by the challenged activity.") (quoting *Sierra Club*, 405 U.S. at 735) (emphasis added); *Salmon Spawning & Recovery Alliance v. United States Customs and Border Protection*, 532 F.3d 1338, 1334 (Fed. Cir. 2008) (finding standing because plaintiffs alleged that their members went to the habitat areas for the endangered salmon for recreation and attempted to observe the spawning salmon, and would not be able to do so if the government failed to prevent the importation of certain salmon) (emphasis added); *Natural Res. Def. Council v. EPA,* 489 F.3d 1364, 1371 (D.C. Cir. 2007) (members of the petitioning organizations lived near the facility and had to cut back on their outdoor activities due to the alleged pollution, and the Court found that their alleged harms were particularized, and not shared equally by every person in the state) (emphasis added); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 691, 693 (9th Cir. 2007) (stating that allegations by an individual that he recreated in certain national forests and had plans to return to make return visits on specific dates was sufficient to allege a non-speculative, concrete and particular injury with regard to an inability to participate in a procedural appeal process for projects planned for national forests) (emphasis added); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (finding that company that was located 250 miles away from the proposed mines and failed to allege any other substantive concrete injury did not have standing, as opposed to plaintiffs in other cases who differentiated themselves from the public as a whole by alleging they used a threatened area for recreation) (emphasis added); *Dubois*, 102 F.3d at 1282-83 (in detailing his recreational activities and how they would be curtailed, the plaintiff differentiated his alleged harm from the general effect the ski area

Such showing of particularized harm is absent here. Appellants merely allege that they use Phoenix roadways where the signs are located. Such possible roadway use is not a different use than any other drivers in the state.[6] Appellants' asserted interests in safety and aesthetics are precisely the concerns that *Dubois* has made clear do not demonstrate a particularized injury. As such, even under the inapplicable federal standing case law, Appellants have not alleged the requisite injury in fact.

### B. This Matter Is Not an Exceptional Case Meriting Waiver of Standing.

Appellants' final argument, that they deserve standing because no one else with standing has challenged American's digital billboard face, is without merit. It ignores the tenet that if courts did not require a particularized injury in-fact, the judicial process would be transformed into "no more than a vehicle for the

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expansion would have on any other state resident).

[6] Furthermore, plaintiffs in these federal cases had standing because they attempted to view a natural resource or animal species, and alleged that observation would be harmed by the challenged activity. *E.g.*, *Salmon Spawning & Recovery Alliance*, 532 F.3d at 1348. Here, there is nothing that Appellants have alleged the digital billboard would deprive them of seeing. The actual billboard in question was an existing billboard. (Appellees' Answering Brief pp. 1-2.) The digital face was only recently added to the existing billboard. *Id.* Therefore, the billboard cannot possibly prevent Appellants from observing any natural resource. Appellants merely make vague allegations that the billboards adversely affect their aesthetic enjoyment of the streets and highways. (Appellants' Answering Brief p. 15.) Appellants do not state *what* aesthetic enjoyment they are allegedly enjoying now that they would be unable to enjoy if the billboard face is digital.

vindication of the value interests of concerned bystanders." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (citation omitted). In fact, it can be presumed that because those who live, work or own property near the sign have not suffered any injury in-fact no other challenges have been brought. Appellants no doubt have a passion for attempting to preclude the use and upgrade to digital technology, but such interests "no matter how passionate or sincere the interest and no matter how charged with public import the event—will not substitute for an actual injury." *United States v. AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992) (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Appellants' argument that the permitting process for billboards is different from all other government actions, because residents do not live near billboards and thus no one else would have standing, is directly opposed by *Valley Forge*, which states:

> [t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. . . . This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit.

454 U.S. at 489 (citation omitted).

Moreover, if the Arizona legislature feels that "billboards are different", then

it may enact a statute allowing persons such as Appellants to challenge billboard permitting. However, the statute under which Appellants have brought their special action only allows persons aggrieved by the decision of the Board to bring such actions, and Appellants do not meet this standard.

Finally, this matter in no way meets the very high threshold Arizona courts have set for allowing a case to proceed despite plaintiffs' lack of standing. Such cases may only proceed in "exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 25, 961 P.2d 1013, 1019 (1998). And, "[t]he paucity of cases in which [courts] have waived the standing requirement demonstrates both [the courts'] reluctance to do so and the narrowness of this exception." Id. In *Sears*, the Court declined to address issues regarding a gaming compact that raised no issues of great public importance or statutory interpretation. Id. at 72 ¶ 29, 961 P.2d at 1020. Likewise, in Home Builders Association of Central Arizona, the Court declined to waive standing requirements because the case involved a challenge to the details of administrative law, and did "not raise paramount concerns related to public safety" nor "fundamental constitutional questions." 219 Ariz. at 380 ¶ 29, 199 P.3d at 635.

The issue of digital billboards certainly is not a fundamental constitutional question, and Appellants do not allege any urgent, large public safety issue.

Billboards are not new. Highways are not new. And now, digital billboards are no longer new. With more than 50 digital faces permitted in Arizona, there have been no challenges other than those brought by Appellants. It would be improper to waive standing.

## III. AMERICAN'S DIGITAL BILLBOARD FACE DOES NOT VIOLATE THE AHBA.

If, and only if, the Court finds that Appellants have standing under A.R.S.§ 9-462.06(K) (or otherwise) and the Court must address the merits of the case, it should still rule in favor of American because the digital billboard face at issue does not violate the AHBA. Appellants have argued that American's sign violates the AHBA's prohibition against outdoor advertising visible from the main traveled way that "displays a red, flashing, blinking, intermittent or moving light or lights likely to be mistaken for a warning or danger signal...." A.R.S. § 28-7903(A)(4) (2010). The statute does not define "intermittent," but it is clear not only that the digital display at issue is not "intermittent" light pursuant to all the relevant regulatory authority, but that the statute only prohibits outdoor advertising that could be mistaken for law enforcement or public safety danger or warning signals.

Both federal and state regulators have concluded that LED displays, when operated so as to change static copy no more frequently than every eight seconds, do not violate the prohibition against "intermittent" lights under federal and state statutes. Indeed, the use permit issued by the City of Phoenix for this sign further

contains stipulations that ensure that the sign is operated in compliance with these criteria.

With the advent of the technology for off-premise digital displays such as the one at issue here, the Federal Highway Administration ("FHWA") issued a Memorandum on September 25, 2007 (the "2007 Memorandum") making its position regarding Electronic Variable Message Signs ("CEVMS") clear in order to give guidance to the states. [R.132.] The FHWA noted in the 2007 Memorandum that in a prior memorandum, dated July 17, 1996 (the "1996 Memorandum"), it found that tri-vision signs[7] (the latest technology at the time) did not violate the Federal Highway Beautification Act because the changeable messages were fixed for a reasonable time period and that "[e]lectronic signs that have stationary messages for a reasonably fixed time merit the same considerations." *Id.* The FHWA issued the 2007 Memorandum in order to "confirm and expand in the principles set forth in the 1996 Memorandum" due to the advances in technology from tri-visions to LED and other electronic message signs. *Id.*

The 2007 Memorandum states in no uncertain terms that state laws, regulations and procedures allowing CEVMS, when operated pursuant to certain criteria (including a duration of static images for at least 8 seconds), "do not violate

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[7] Tri-vision signs are signs that use mechanical means to rotate slats to display a total of three different advertisements.

a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various [Federal/State Agreements] that have been entered into during the 1960s and 1970s." *Id.* (emphasis added). The 2007 Memorandum summarizes guidelines for operation, including standards such as "[d]uration of each display is generally between 4 and 10 seconds – 8 seconds is recommended. . . ." *Id.* (emphasis added), as well as that the transition between messages be no more than two seconds and that brightness controls be used to adjust light level so that the signs are not "unreasonably bright."

Further, this Court has recognized "that an agency's interpretation of a statute that it implements is entitled to great weight." *Walgreen Ariz. Drug Co. v. Dept. of Rev.*, 209 Ariz. 71, 73, 97 P.3d 896, 898, ¶ 12 (App. 2004). Indeed, the Arizona Department of Transportation (the "ADOT"), charged with developing rules and regulations regarding signs, provided clarity to what constitutes "intermittent" under the AHBA in a letter dated January 16, 2008. [R.135.] The letter states: "[t]he State's outdoor advertising regulations do not prohibit signs that are capable of changing static copy through electronic means at a reasonable frequency... As we understand the proposed billboards will remain static with a change interval of 8 seconds." *Id.* Indeed, the ADOT stated it did not have any objection to the issuance of use permits by the City of Phoenix for such billboards. *Id.*

This history of interpretation demonstrates that the LED/digital display at issue is permitted by and consistent with federal, state and local law. Both federal and state regulators have concluded that LED displays, when operated so as to change static copy no more frequently than every eight seconds, do not violate the prohibition against "intermittent" lights under federal and state statutes.

Additionally, the fact that the City of Phoenix required American to obtain a use permit for advertising that uses "[i]ntermittent or flashing illumination or animation" (PZO § 705.2(A)(19)) does not mean that the sign at issue violates the AHBA's prohibition on "intermittent" lights. To the contrary, by concluding that this kind of display was "intermittent" under the Phoenix Zoning Ordinance, City regulators were able to impose the very stipulations on operation that would require the sign to be operated in accordance with the FHWA and ADOT guidelines – i.e. with static copy changes every eight seconds.

Finally, pursuant to the rules of statutory construction and *ejusdem generis*, "intermittent" should be interpreted consistent with the surrounding words and the clear intent of the statute. *See, e.g., In re Estate of Winn*, 214 Ariz. 149, 151 ¶ 8, 150 P.3d 236, 238 (2007); *State v. Barnett*, 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984). American's digital sign cannot be mistaken as a warning or danger signal any more than any static advertising.

The American digital sign, which is operated so as to change static images

not more frequently than every eight seconds, is not "intermittent" under the AHBA, and does not violate the AHBA's prohibition of "intermittent" lights. Further, it is not a light likely to be mistaken for a danger or warning sign. Appellants' request for an order reversing the permit decision must be denied.

## IV. CONCLUSION.

Amicus Curiae CCO requests that the Court of Appeals reverse the decision the of Superior Court denying American's motion to dismiss for lack of standing. In the unlikely event this Court finds the Appellants do have standing, then it should affirm the Superior Court's decision on the merits and conclude that American's digital billboard does not violate the AHBA.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

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## CERTIFICATE OF SERVICE

David E. Funkhouser III hereby certifies that on this7th day of June, 2010, he caused an Original and six copies of this Brief of *Amicus Curiae* to be filed with the:

Court of Appeals
Division One
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Two copies this Amicus Brief were served on the following parties by sending the copies via U.S. Mail to each of the following:

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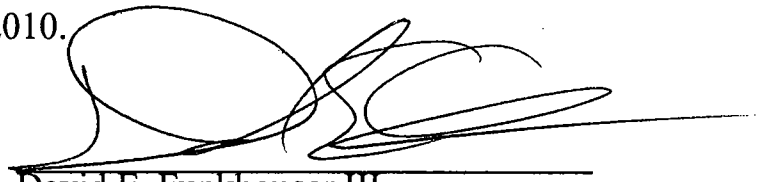
## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(b), ARCAP, I hereby certify that the attached *Amicus Curiae* uses proportionately spaced type of 14 points or more, is double-spaced using a Roman font, and contains 6,776 words in the principal text of the brief.

DATED this 7th day of June, 2010.



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