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IN THE SUPREME COURT OF FLORIDA

NAEGELE OUTDOOR ADVERTISING CO., INC., ET AL.,

Petitioners,

vs.

CITY OF JACKSONVILLE, FLORIDA, ET AL.

Respondents.

Case No. 83,734

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT 1

I. THE DISTRICT COURT OF APPEAL ERRED BY REVERSING THE CIRCUIT COURT AND FAILING TO APPLY THE DUE PROCESS STANDARDS SET FORTH IN FLORIDA EAST COAST RAILWAY CO. V. STATE TO THIS CASE 1

II. PETITIONERS COMPLIED WITH THE STANDARDS WHICH ENTITLE THEM TO RELIEF UNDER FLORIDA EAST COAST RAILWAY 2

A. Petitioners Exercised Due Diligence in Initiating Their Judicial Challenge Before the City's Sign Regulations Became Effective 2

B. Due Diligence Did Not Require Petitioners to Petition the Circuit Court to Toll the Accrual of Penalties Before the City Actually Began Enforcement 9

III. PETITIONERS ACTED WITH DUE DILIGENCE, ESPECIALLY IN LIGHT OF THE CITY'S ENACTMENT OF A SEEMINGLY ENDLESS STRING OF SUCCESSIVE ORDINANCES DURING THE DELAY PERIOD 12

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

CASES: **Page(s)**

Bhoola v. City of St. Augustine Beach, 588 So.2d 666 (Fla. 5th DCA 1991) 8

Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976) 7

City of Coral Springs v. Florida National Properties, Inc., 340 So.2d 1271 (Fla. 4th DCA 1976) . . 11

Danish Health Club, Inc. v. Town of Kittery, 562 A.2d 663 (Me. 1989) 6

David v. City of Dunedin, 433 So.2d 304 (Fla. 2d DCA 1985) 8

Davis v. Wilson, 190 So. 716 (Fla. 1939) 11

Ex Parte Young, 209 U.S. 123 (1908) 5, 11

Florida East Coast Railway Co. v. State, 79 Fla. 66, 83 So. 708 (Fla. 1920) . . . . passim.

Gulf Colorado & Santa Fe Railway v. Texas, 246 U.S. 58 (1918) 6

National Advertising Co. v. Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992) 7-9

Patrick Media Group v. City of Clearwater, 836 F. Supp. 833 (M.D. Fla. 1993) 8-9

St. Louis, Iron, Mountain and Southern Railway v. Williams, 251 U.S. 63 (1919) 6

United States v Pacific Coast European Conference, 451 F.2d 712 (9th Cir. 1971) 5

Wadley Southern Railway Co. v. Georgia, 235 U.S. 651 (1915) 1,2,4,5

CONSTITUTIONAL PROVISIONS:

Art. I, § 4, Fla. Const. 14

OTHER AUTHORITIES:

City of Jacksonville Charter, Section 23.06 9

Jacksonville Ordinance Code Section 320.416(b)(1) 10

Jacksonville Ordinance Code Section 326.209 11

Ord. 86-1523-871 13

Ord. 88-254-107 13

Ord. 89-459-244 13

Ord. 91-59-148 14

Ord. 91-462-235 14

Ord. 91-756-352 14

Ord. 92-159-80 14

Ord. 92-264-286 14-15

I. THE DISTRICT COURT OF APPEAL ERRED BY REVERSING THE CIRCUIT COURT AND FAILING TO APPLY THE DUE PROCESS STANDARDS SET FORTH IN FLORIDA EAST COAST RAILWAY CO. V. STATE TO THIS CASE

The sole issue raised by this appeal is whether the First District Court of Appeal erred when it failed to use the analytic framework promulgated by this Court in Florida East Coast Railway Co. v. State, 79 Fla. 66, 83 So. 708 (Fla. 1920), and reversed the order of the Circuit Court which had tolled the imposition of penalties of more than two hundred and thirty thousand dollars per day against Petitioners during the pendency of the litigation. Instead, the District Court of Appeal held that there can be no relief from the accrual of massive fines during the pendency of the litigation and that such relief " . . . depends on who prevails on the questions that comprise the merits of the lawsuit." [A: 32 at 10] This holding simply fails to address whether Petitioners are entitled, under the doctrine of constitutional tolling promulgated by the United States Supreme Court in Wadley Southern Railway Co. v. Georgia, 235 U.S. 651 (1915), and by this Court in Florida East Coast Railway, to judicial relief from the accrual of massive penalties while testing the validity of the governmental regulation which gives rise to the penalties at issue.

Respondents' Answer Briefs apparently agree with Petitioners' position that this appeal is controlled by the analysis prescribed in Florida East Coast Railway and by other due process cases applying the doctrine of constitutional tolling, although they sharply disagree that Petitioners are entitled to relief from the City's enforcement actions while Petitioners' challenge is pending. Thus, Respondent, the Consolidated City of Jacksonville ("the City" or "Jacksonville"), in its Statement of the Case, summarizes the issues in this case as

follows: "This appeal involves the issue of whether Petitioners have been denied due process by the accrual of fines for failure to remove billboards. . . ." City's Brief at p. 3. Likewise, Respondent Capsigns, Inc. ("Capsigns") characterizes the issue here as ". . . whether the petitioners acted with 'due diligence' in seeking temporary injunctive relief on October 28, 1992 to toll the accrual of fines while challenging the validity of a Charter Amendment enacted on May 26, 1987." Capsigns' Brief at p. 3.

Florida East Coast Railway and Wadley make it clear that the Florida Constitution and the United States Constitution protect litigants (such as Petitioners) from the chilling effect of accrual of such massive fines during litigation on their constitutional right of access to the Courts to challenge legislative acts of government. This Court's decision in Florida East Coast Railway extended the protection of the Florida Constitution to litigants such as Petitioners.

> It is a denial of due process of law if such review can be affected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law.

Florida East Coast Railway, 83 So. at 715.

The First District clearly erred when it failed to review this appeal under the due process standards mandated by this Court in Florida East Coast Railway.

II. PETITIONERS COMPLIED WITH THE STANDARDS WHICH ENTITLE THEM TO RELIEF UNDER FLORIDA EAST COAST RAILWAY

A. Petitioners Exercised Due Diligence in Initiating Their Judicial Challenge Before the City's Sign Regulations Became Effective

Florida East Coast Railway requires a litigant seeking constitutional

tolling of penalties to (1) bring a challenge in good faith[1], and in (2) a non-dilatory manner. Respondents argue that Petitioners failed to proceed with "due diligence" in filing their suit, and thus are not entitled to have the imposition of any fine tolled during the pendency of this suit. Respondents concede that the City of Jacksonville specifically adopted a statutory scheme that accorded Petitioners a five year period before the conduct which gives rise to the fines at issue became a violation of the City's sign regulations. Respondents argue that, even though Petitioners may have filed suit as much as a year before they could have been in violation of the City's sign regulations, Petitioners' actions still did not satisfy Respondents' nebulous view of when suit should have been filed. Moreover, Respondents also argue that Petitioners should be found to have been dilatory because Petitioners did not seek temporary injunctive relief from the Circuit Court until the City began enforcement proceedings thereby actually subjecting Petitioners to the immediate threat of the imposition of penalties. This argument is addressed <u>infra</u>. at part B.

Petitioners Naegele, Newey and Loggins filed their initial complaint in this case on May 24, 1991, over one year before the <u>earliest</u> date that Petitioners' signs could have been in violation of any of Jacksonville's regulations and almost a year and a half before the City attempted to enforce its Ordinance Code against Petitioners' signs. Likewise, Petitioners Whiteco and Classic filed their initial complaint on May 26, 1992, also before their signs were in violation of any regulation

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[1] Respondents do not contest that Petitioners' challenge is made in good faith.

and more than four months before the City initiated its coercive enforcement actions against Petitioners' signs.

The cases cited by Respondents themselves demonstrate that this alone establishes that Petitioners were not dilatory under Florida East Coast Railway. In their Answer Briefs, Respondents argue that in Wadley, the United States Supreme Court found that penalties could be accrued when the petitioner railroad failed to judicially contest the Railroad Commission's new regulations until after the Railroad Commission, after informally delaying enforcement of the new regulations for ten weeks, enforced its new regulations against the railroad. Respondents thus argue that, since the Wadley Court held that ten weeks was "ample time" in which to bring suit, Petitioners not act with "due diligence" since they waited four years before filing suit contesting the validity of Jacksonville's sign regulations.

This argument completely misconstrues Wadley. There, the Supreme Court barred the railroad's petition for a tolling of penalties because the railroad completely failed to initiate its own independent challenge of the Railroad Commission's new regulations. Instead, the railroad only asserted the invalidity of the new regulations as an affirmative defense after the Railroad Commission had sued the railroad to enforce compliance. There is nothing in the Wadley decision which supports Respondents' contention that there is a separate "ample opportunity" test in addition to the "due diligence" test. As Wadley makes clear, the Supreme Court was concerned about whether the railroad had an "ample opportunity" to contest the validity of the regulation since there was no formal intervening period prescribed by the regulation;

the Georgia regulation went into effect immediately and penalties began to accrue. Wadley requires that in those distinct circumstances, not present here, a party must nonetheless be accorded "ample time" to initiate suit contesting the regulation before it is enforced in order to insure that due process has not been violated. The test established by the Supreme Court in Wadley, as well as Ex Parte Young, 209 U.S. 123 (1908), is that, in order for penalties to be tolled, suit must be brought before enforcement has commenced, unless that is impossible because the regulation in question becomes effective immediately after adoption. Indeed, in United States v Pacific Coast European Conference, 451 F.2d 712 (9th Cir. 1971), the Ninth Circuit makes this clear. "[I]f the [Wadley Southern Railroad] had availed itself of its right to judicial review of the order, no penalty could be asserted, at least not until adjudication was complete." Pacific Coast European Conference, 451 F.2d at 718.

This Court's decision in Florida East Coast Railway involves these very same policy concerns with the punitive impact of regulations that become effective immediately. There, as in Wadley, the Florida Railroad Commission had promulgated certain rate regulations that went into effect immediately and the railroad was thrown into immediate violation, and the railroad raised the invalidity of the regulation as an affirmative defense. However, this Court found that the circumstances were distinguishable from those in Wadley because the Florida East Coast Railway was statutorily precluded from directly challenging the regulation, and could only test its validity by asserting that challenge as an affirmative defense. Florida East Coast Railway,

83 So. at 715. Thus, in Florida East Coast Railway, this Court held that the railroad had acted with due diligence by asserting the invalidity of the regulation as an affirmative defense since that was the only means accorded to it by the legislature to challenge the government. But in this case, the City of Jacksonville did in fact legislate a specific statutory "window of opportunity" before its sign laws became effective. The City now argues that despite this, Petitioners should nonetheless be held to some other unspecified shorter time frame.

Likewise, Respondents have misapplied the other cases they rely upon to support their contention that Petitioners failed to pursue their remedies in the Circuit Court with due diligence. In St. Louis, Iron, Mountain and Southern Railway v. Williams, 251 U.S. 63 (1919), and Gulf Colorado & Santa Fe Railway v. Texas, 246 U.S. 58 (1918), the United States Supreme Court refused to enjoin the imposition of certain penalties for noncompliance with railroad rate regulations. But the Court's denial in both of these cases was again based on the fact that the respective petitioners had completely failed to challenge the validity of these regulations until after the government had sued to enforce its penalties. Similarly, Danish Health Club, Inc. v. Town of Kittery, 562 A.2d 663 (Me. 1989), which concerned the validity of a municipal licensing law that incorporated a 90 day delay before unlicensed business would be in violation of the law, is easily distinguishable. There, the Supreme Court of Maine upheld the accrual of penalties against the plaintiff because the plaintiff did not challenge the validity of that ordinance until a month after the statutory 90 day delay period had expired. That is clearly not what occurred in the

instant case where all Petitioners judicially challenged the Jacksonville sign ordinance prior to the expiration of the delay period.

The decision in Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976), also supports Petitioners' position. There, the tobacco companies had previously agreed to the provisions of a binding Federal Trade Commission order in which they specifically conceded the jurisdiction of the Commission and the validity of the statute under which penalties were being accrued. Brown & Williamson, 527 F.2d at 1117. The only question presented on appeal was whether the tobacco companies would be subject to penalties for engaging in advertising practices that violated the Commission's earlier final order. The Second Circuit held that penalties could not be enjoined because the validity of that earlier order had already been resolved by the parties and was not subject to further challenge. Id. at 1119-1120. Again, the circumstances in this case are distinct, since Petitioners sought a tolling order during the pendency of their challenge to the validity of a regulation, and not in the context of a subsequent enforcement action brought after the validity of the regulation was already established.

Finally, it is difficult to perceive how Respondents' reliance on National Advertising Co. v. Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992), advances their position. National Advertising is a statute of limitations case in which an outdoor advertising company brought suit to challenge the validity of Raleigh, North Carolina's sign regulation more than a month after the expiration of that ordinance's 5 1/2 year statutory delay period, and after the Fourth Circuit had

already ruled on the validity of the same regulation in a case brought by another outdoor advertising company during that delay period. The circumstances in this appeal are completely different since all of the Petitioners filed suits challenging the validity and constitutionality of the Jacksonville sign regulations before the expiration of the sign regulation's delay period. Moreover, Respondent Jacksonville's attempt to portray National Advertising as a constitutional tolling case is manifestly incorrect. Rather, the issue in National Advertising was whether summary judgment should be granted to the City of Raleigh on the basis that the takings claims were time barred under North Carolina's three year statute of limitation, National Advertising, 947 F.2d at 1161, and whether the First Amendment claims, which cannot be subject to a statute of limitations, had, nonetheless, already been adjudicated in the earlier challenge. Id. at 1168-69. The dicta from the National Advertising decision quoted in the City's Answer Brief (City's Brief at 32-33) pertains to the outdoor advertising company's delay in bringing suit within a specific statute of limitation period[2] and has absolutely nothing to do with the due process policy issues raised by this appeal.[3]

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[2] Petitioners have challenged the sign regulations as being void ab initio. This type of challenge can be brought at any time. See, e.g., David v. City of Dunedin, 473 So.2d 304 (Fla. 2d DCA 1985) (challenge brought seven years after enactment of sign regulation); Bhoola v. City of St. Augustine Beach, 588 So.2d 666 (Fla. 5th DCA 1991) (involving two jurisdictional issues and fundamental constitutional rights).

[3] Moreover, in Patrick Media Group v. City of Clearwater,
(continued...)

B. Due Diligence Did Not Require Petitioners to Petition the Circuit Court to Toll the Accrual of Penalties Before the City Actually Began Enforcement

Respondents, perhaps realizing that their "due diligence" argument is fatally flawed because all Petitioners filed their complaints at a time when their signs were lawful, advance an alternative argument that Petitioners failed to act with due diligence because they did not petition the Circuit Court for a temporary tolling order until after the delay period expired and the City first sought enforcement against them. Respondents cite no support for this argument. In essence, Respondents urge the Court to adopt a rule requiring a litigant to seek preliminary relief from coercive penalties before the City imposes them, or even seeks to do so.

The City had two options available to it for enforcing penalties against Petitioners after the sign regulations became effective. Under Article 23.06 of the City Charter, the City could enforce its Charter only by bringing a civil action and seeking a judgment imposing the $500 per sign per day penalty against a party that had failed to remove its outdoor advertising structures by the deadline. [A:

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[3](...continued)
836 F. Supp. 833 (M.D. Fla. 1993), the United States District Court for the Middle District of Florida specifically rejected the National Advertising court's statute of limitations analysis. In Patrick Media, the District Court held, in a case involving a seven year amortization period, that Florida's four year statute of limitations, codified at Section 95.11, F.S.A., did not bar the plaintiff-outdoor advertising company's cause of action because that cause of action ". . . did not accrue with the passage of the ordinance, but instead accrue from the time the relevant state authorities render a final decision regarding the future of the property." 836 F. Supp. at 837.

30 at 207-208] Alternatively, the City could enforce its Ordinance Code by following certain specific administrative procedures. It was only in late September of 1992 that the City set in motion the administrative procedures required before it could impose penalties under the Ordinance Code.[4]

Section 320.416(b)(1) of the Jacksonville Ordinance Code required the City's Building and Zoning Inspection Division to first determine the lawful status of each sign within the City. The Division was then further required to post on each sign that it determined to be in violation of the Ordinance Code a prominent day-glow orange notice that the sign violated the City's sign regulations and that it must be brought into compliance or removed within 30 days of the date it was posted or that penalties would be imposed and the sign would be forcibly removed by the City. Section 320.416(b)(1) also required that a separate written notice be sent directly to the owner of the sign and to the owner of the land upon which the sign was located notifying them of the violation. The code also required that both the posted and mailed notices must inform the recipient of their rights to request a hearing. On September 18, 1992, the City began sending notices of violation to Petitioners and landowners. The City subsequently posted the requisite notices on many of Petitioners' outdoor advertising structures threatening the imposition of penalties if the signs were

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[4] Despite the fact that the Charter can only be enforced by filing suit, the City's notice of violation stated its intent to enforce both the Charter and the Ordinance Code administratively. After realizing its error, the City conceded that it could not administratively enforce the Charter.

not removed. Petitioners requested hearings for each sign that was posted and, on October 27, 1992,[5] a hearing was convened by a City hearings officer. On October 28, 1992, the very next day, Petitioners filed their motion for a temporary tolling order. Respondents argue that Petitioners did not proceed with due diligence because they did not file their motion for a tolling order until this juncture.

It does not require any speculation to envision what the City's response would have been if Petitioners had sought a tolling of penalties at some earlier unspecified time -- the City already set forth its position with clarity. In a Motion to Dismiss Naegele's Complaint, the City asserted that Naegele's entire action was not yet ripe for adjudication. Moreover, there can be little doubt that had Petitioners proceeded as Respondents suggest and sought constitutional tolling before the City had even elected whether it would seek judicial or administrative enforcement, the Circuit Court clearly would not have entertained such a request. Respondents' argument cannot be regarded seriously. See generally: Davis v. Wilson, 190 So. 716, 719 (Fla. 1939); and City of Coral Springs v. Florida National Properties, Inc., 340 So.2d 1271, 1272 (Fla. 4th DCA 1976).

The rule of law that emerges from the cases relied upon by Respondents supports the Petitioners' position. There is simply no doubt under this Court's decision in Florida East Coast Railway, or under applicable

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[5] The City was required to hold a hearing within ten days of Petitioners' request. See § 326.209 of the Jacksonville Ordinance Code. The City failed to do so, while claiming that the Petitioners were dilatory. Under an equitable analysis, the doctrine of "unclean hands" should preclude the City from doing so.

United States Supreme Court decisions in Ex Parte Young or Wadley, that Petitioners acted in good faith and with due diligence by filing their complaints contesting the validity of the City's sign regulations within the time period the City itself established before its regulations became effective, and well in advance of the time that the City commenced its enforcement of either of these laws.

Respondents' Answer Briefs fail to specify any ascertainable point in time that would have entitled Petitioners to relief under Florida East Coast Railway. Respondents' position is that Petitioners should be forced to choose between risking economic annihilation or abandoning their suit and submitting to a regulation that would expropriate much of their property and effectively destroy an entire protected medium for the dissemination of noncommercial and commercial speech within the City of Jacksonville -- a medium that has been in lawful existence for more than seventy years.

III. PETITIONERS ACTED WITH DUE DILIGENCE, ESPECIALLY IN LIGHT OF THE CITY'S ENACTMENT OF A SEEMINGLY ENDLESS STRING OF SUCCESSIVE ORDINANCES DURING THE DELAY PERIOD

This case differs from other constitutional tolling cases because the City affirmatively acted in a manner that impacts upon whether Petitioners acted with "due diligence." Beginning in 1987, the City continued to enact successive and often conflicting regulations which revised the sign regulations and revised, recodified, and further restricted those regulations again and again.

Even a short summary of these enactments conveys clearly the City's questionable manipulation of its legislative authority. Under such circumstances, the arguments advanced by Respondents in their

Answer Briefs questioning Petitioners' "due diligence" must be regarded as disingenuous.

The limited record before the Court in this interlocutory appeal shows that, just within the five year period between the enactment of Ordinance 86-1523 on March 26, 1987 and December, 1992, the date that this record ends, the Jacksonville City Council enacted nine separate revisions to its sign regulations including seven substantive revisions to the City's ordinances and one purported reenactment of Article 23 of the City Charter. In addition, during this same period, at the request of the City, the Florida legislature also enacted a special law readopting the entire City Charter, including the substance of a Charter Amendment enacted earlier during this period by the Jacksonville City Council.

On March 11, 1987, the City, by enacting Ordinance 86-1523, first adopted an ordinance providing a five year period for the removal of a limited group of outdoor advertising structures principally within residential zones. [A: 9] Two months later, on May 26, 1987, the Charter Referendum sponsored by Capsigns was enacted requiring all outdoor advertising structures in the City, except those subject to federal regulation, to be removed by June 1, 1992. On March 22, 1988, Ordinance 88-254, was enacted. It established a new five year amortization period ending on March 30, 1993. [A: 10] Six months later, on September 30, 1988, the City recodified and readopted its entire Ordinance Code, including its sign regulations. [A: 11] Less than one year later, on July 5, 1989, the City enacted Ordinance 89-459, yet another comprehensive revision to its Ordinance Code, which included the first comprehensive

ordinance requirement that all outdoor advertising structures in every zone throughout the City must be removed. [A: 12]

On May 14, 1991, two weeks before Petitioner Naegele filed suit, the City Council enacted Ordinance 91-59, a law that repealed and reenacted the Jacksonville Zoning Code but which failed to prohibit outdoor advertising structures in two zones where they were previously excluded. [A: 13] On July 2, 1991, in a poorly veiled reaction to allegations made by Petitioners Naegele, Newey, and Loggins' Complaint, filed only thirty days earlier, that the City's sign regulations were in violation of Article I, § 4 of the Florida Constitution because they were not content neutral, the City Council enacted Ordinance 91-462 which purported to "clarify" when signs within Jacksonville are permitted to disseminate noncommercial speech under the Ordinance Code. [A: 20] On September 30, 1991, fully four years after the Charter Referendum was enacted and four months after Petitioners Naegele, Newey and Loggins filed their complaint alleging both substantive constitutional and procedural infirmities in the Charter Referendum, the City Council enacted Ordinance 91-756 which purported to readopt Article 23 of the Charter, but eliminated those provisions of the Charter Referendum that prohibited the City Council from legislating further with respect to outdoor advertising structures. [A: 15]

The City Council's Code revisions still did not end. On March 27, 1992, the City Council enacted Ordinance 92-159 which, under the guise of correcting a "scrivener's error," again substantively amended the definition of a "lawful nonconforming" sign under the Jacksonville Code. [A: 16] Finally, on May 18, 1992, <u>two weeks</u> before the expiration

of the June 1, 1992 deadline for the removal of lawful nonconforming signs, the City enacted Ordinance 92-264 which again changed the definition of a "nonconforming sign" and further specified that signs falling within this category must be removed ". . . no later than five years after March 11, 1987." [A: 17].

This extraordinary record of legislative action would severely compromise any potential plaintiff's ability to organize and pursue their case in an orderly manner. Yet against this background, Respondents argue that Petitioners were not diligent in filing their complaint or in seeking an order tolling the accrual of penalties at some unspecified point in time. Clearly, the City's conduct during its self-described "five year grace period" makes its argument that Petitioners waited too long before bringing suit evaporate. This Court should not reward the City for its tactics.

CONCLUSION

For all the reasons set forth above, this Court should hold that the constitutional tolling doctrine of Florida East Coast Railway requires an injunction against the imposition of excessive, confiscatory fines pursuant to the sign regulations while Petitioners avail themselves of their constitutional right to judicially test the constitutionality of the sign regulations. The decision of the District Court of Appeal should be reversed because of its failure to follow this Court's mandate in Florida East Coast Railway, and the cause remanded with directions to reinstate the temporary injunction against the imposition and accrual of fines by the City pursuant to the sign regulations entered by the trial court.

Respectfully submitted,

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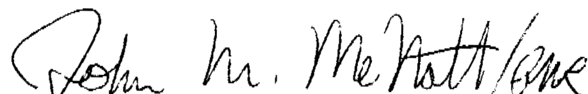

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Dated: November 30, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners has been furnished by U.S. Mail to **Tracey I. Arpen, Esquire,** Assistant General Counsel, 1300 City Hall, 220 East Bay Street, Jacksonville, Florida 32202; **Linda C. Ingham, Esquire**, 1200 Gulf Life Drive, Suite 800, Jacksonville, Florida 32207; and **William D. Brinton, Esquire**, 3200 Independent Square, Jacksonville, Florida 32202, this 30th day of November, 1994.