STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

GAIL MINKS, MARGARET MINKS, GARY NOVAK, and KIM NOVAK,

Plaintiffs,

v.

CITY OF NEENAH,

Defendant.

Case Type: Declaratory Judgment
Case Code: 30701
Case No. 23-CV-258

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

The Defendant City of Neenah ("City") has a lengthy, complex ordinance titled "Signs" ("Ordinance"), which imposes countless rules and exceptions that vary based on a sign's content. Four City residents and taxpayers (collectively, "Plaintiffs") filed this lawsuit seeking declaratory and injunctive relief against the Ordinance. In a federal lawsuit challenging the same ordinance, a district court recently issued a temporary injunction against the City because its sign ordinance is likely illegal. This Court should do the same.

ARGUMENT

I. This Court should temporarily enjoin the City from enforcing the Ordinance.

A. In a First Amendment case, whether to issue a temporary injunction hinges on the merits.

"A circuit court may issue a temporary injunction if: '(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.'" *Serv. Emps. Int'l Union, Loc. 1 v.*

Vos, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). Because even a brief loss of First Amendment freedoms is an irreparable injury for which damages are not an adequate remedy, "the likelihood of success on the merits will often be the determinative factor." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (citation omitted). The temporary-injunction "analysis begins and ends with the likelihood of success on the merits of the [First Amendment] claim." *Higher Soc'y of Indiana v. Tippecanoe Cnty.*, 858 F.3d 1113, 1116 (7th Cir. 2017) (alteration in original) (citation omitted).

B. Government restrictions on speech are generally unconstitutional.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting U.S. Const., Amdt. 1). It is well-established that "signs are a form of expression protected by the Free Speech Clause" of the First Amendment. *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

If a law implicates the First Amendment, the government has the burden of proving that the law "passes either strict or intermediate scrutiny to be deemed constitutional." *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34. Government regulation of speech "must survive strict scrutiny if it is content based or intermediate scrutiny if it is content neutral." *Id.* ¶ 31. Under either test, the government "has the burden to prove that the [law] is constitutional beyond a reasonable doubt." *Id.* ¶ 10.

C. The Plaintiffs meet the requirements for a temporary injunction because they are likely to succeed on the merits of their claims.

The Plaintiffs raised eight claims against the City, alleging that its sign ordinance is unconstitutional in several respects. (R. 2:8–18.) Those claims are likely to succeed.

Indeed, a federal district court recently issued a temporary injunction against the City regarding its enforcement of the same ordinance at issue here.[1] The district court concluded that "[t]he City's sign ordinance is a content-based restriction on speech and is therefore 'subject to strict scrutiny.'" *Florek v. Bedora*, No. 23-C-122, 2023 WL 2808313, at *4 (E.D. Wis. Apr. 6, 2023) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015)). The court reasoned that "[d]epending on the sign's content, under the sign ordinance, some signs require permits while others do not." *Id.* "Sections 24-132 and 24-133 regulate the 23 categories of signs that do not require permits. Section 24-132 lists nine different content-based sign classifications and imposes different regulations as to the size and time of display." *Id.* "While signs falling within the 14 categories listed in § 24-133 have various size restrictions depending on the sign's content, they are not subject to any time limitations for display. In addition, § 24-132(8) imposes more stringent restrictions on portable signs for residential properties than signs conveying other messages." *Id.*

"Accordingly," the district court concluded, "the City has the burden to show that the sign ordinance's content-based regulations are narrowly tailored to serve compelling governmental interests." *Id.* at *5. Applying the standard for issuing a temporary injunction, the district court held that the plaintiffs were "likely to succeed on the merits of their claim that the sign ordinance is an unconstitutional content-based regulation of speech." *Id.* The court thus issued a temporary injunction to prevent the City from enforcing its sign ordinance against the plaintiffs regarding their yard sign at issue. *Id.* at *6.

This Court should reach the same conclusion and also issue a temporary injunction. A brief overview of the Plaintiffs' eight claims will shore up their likelihood of success on the merits.

[1] A copy of this federal district court decision is included as an exhibit with the Plaintiffs' motion for a temporary injunction.

Claim One. The City bans "off-premises" business signs on residential, commercial, and industrial property. Ordinance §§ 24-107(2), 24-132(8), 24-133(14). That ban is subject to strict scrutiny because it is content based. An ordinance is subject to strict scrutiny where, as here, it would differentiate between a sign "directing the public to church" services and a sign conveying a different message. *See Reed*, 576 U.S. at 164. For example, the Ordinance allows "[s]igns used to advertise yard, garage, rummage, estate or other similar sales" if they are placed "within four blocks or 1,000 feet of the property." Ordinance § 24-132(5)(a). But it generally prohibits signs that advertise off-premises "goods, products, facilities, or services." *See* Ordinance § 24-3 (defining "Off-premises signs"). Because the City's ban on off-premises business signs is subject to strict scrutiny, it is likely illegal. At any rate, that ban is likely illegal even if it is subject to intermediate scrutiny. Even under that test, the City must prove "beyond a reasonable doubt" that this ban is constitutional. *See Baron*, 2009 WI 58, ¶ 10.

Claim Two. The City prohibits commercial speech on parked vehicles and trailers that are visible from a public street. Ordinance § 24.107(10). That ban is content based because its applicability hinges on the topic discussed or the idea or message expressed. For example, this provision does not restrict vehicle signs that convey political, philosophical, or religious messages. This provision is "content-based discrimination" because it "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter." *See Reed*, 576 U.S. at 156. This provision is likely illegal under strict scrutiny—or even under intermediate scrutiny. Indeed, the Wisconsin Court of Appeals held that a city ordinance violated the First Amendment by prohibiting "For Sale" signs on parked vehicles. *City of Milwaukee v. Blondis*, 157 Wis. 2d 730, 734–38, 460 N.W.2d 815 (Ct. App. 1990). The same conclusion applies here.

Claim Three. The City limits residential properties to one ground sign. Ordinance §§ 24-182(1), 24-183(1), 24-132(8). A sign ordinance is content based and thus subject to strict scrutiny if it has different rules for things like yard-sale signs, real-estate signs, and construction signs. *See, e.g.*, *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 707–08 (6th Cir. 2020). Here, the City's one-ground-sign limit is content based because it does not apply to certain signs, including construction signs, certain real estate signs, signs advertising yard sales, and signs within or near an athletic field. *See* Ordinance § 24-132(1), (3), (5), (9). Because strict scrutiny applies, this one-sign limit is likely illegal. It is also likely illegal under intermediate scrutiny. In an analogous case, a federal appellate court applied intermediate scrutiny and held that a county's *two*-sign limit violated the First Amendment. *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 594–95 (4th Cir. 1993). The City's *one*-sign limit is even more plainly unconstitutional.

Claims Four and Five. The City places a pre-election time limit on when political campaign signs may be displayed, and it allows portable grounds signs on residential property only for 30 days within a 90-day period. Ordinance § 24-132(2)(a) & (8). These time limits are likely illegal. Indeed, "the overwhelming majority of courts that have reviewed sign ordinances imposing durational limits for temporary political signs tied to a specific election date have found them to be unconstitutional." *Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A.*, 733 N.E.2d 1152, 1157 (Ohio 2000). The same conclusion applies here. These two time limits are content based because certain other signs (such as construction signs) have different time limits while some signs (such as directional signs and "no trespassing" signs) have no time limits whatsoever. *See* Ordinance §§ 24-132, 24-133. Claims Four and Five are likely to succeed under strict scrutiny—or even under intermediate scrutiny if that test applies, given the City's high burden of proving constitutionality beyond a reasonable doubt.

Claims Six and Seven. The Ordinance bans persons from posting signs "without first obtaining a sign permit for each sign as required by this chapter." Ordinance § 24-27. This permit requirement is unconstitutionally vague and an unconstitutional prior restraint on speech. An unconstitutionally vague regulation "is one which operates to hinder free speech through the use of language which is so vague as to allow the inclusion of protected speech in the prohibition or to leave the individual with no clear guidance as to the nature of the acts which are subject to punishment." *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 656, 292 N.W.2d 807 (1980). A permitting scheme is an unconstitutional prior restraint on speech if it gives unbridled discretion to the decision maker or fails to specify a time limit for deciding whether to issue a permit. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–26, 228 (1990).

Here, the Ordinance provides inadequate guidance as to when a sign requires a permit. The Ordinance states that "[s]ome signs are strictly temporary in nature, others are intended to communicate and direct, and not used to identify a business or for advertising. Still others are so small that they are not obtrusive and will not affect the public welfare. Such signs will not require a sign permit . . . ." Ordinance § 24-131. That definition is impermissibly vague. For example, every sign is "intended to communicate," yet the Ordinance indicates that a permit is not required for a sign that is intended to communicate. The permitting requirement's vagueness gives unbridled discretion to City officials. In addition, the Ordinance contains no time limit for a permitting decision. For either reason, the permitting scheme is likely illegal.

Claim Eight. The City prohibits "[s]igns within athletic fields, or within immediate proximity thereof" if they "are . . . found to be offensive." Ordinance § 24-132(9)f. That ban is likely illegal. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself

offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)). Besides banning protected speech, Ordinance § 24-132(9)f. is unconstitutionally vague. The term "offensive" is an impermissibly vague standard because it fails to provide adequate notice and gives unbridled discretion to a decision maker. *See, e.g.*, *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995).

In sum, because the Plaintiffs are likely to succeed on the merits of their claims, they satisfy the criteria for obtaining a temporary injunction.

CONCLUSION

This Court should temporarily enjoin the City from enforcing the provisions of its sign ordinance that are at issue in this case.

Dated this 12th day of May 2023.

Respectfully submitted,

Electronically signed by
Scott E. Rosenow

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