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' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The City of Neenah's lengthy, complex sign code imposes countless restrictions that vary based on a sign's content. Four City residents and taxpayers filed this lawsuit seeking declaratory and injunctive relief against this ordinance. In a federal lawsuit challenging the same ordinance, a district court recently issued a temporary injunction against the City because the ordinance is content based and thus subject to strict scrutiny.

This Court should reach the same conclusion and further hold that the City failed to satisfy strict scrutiny. More simply, this Court may conclude that the City failed to adequately develop its arguments to satisfy its burden of proof, even under intermediate scrutiny. The City was required to present evidence to satisfy intermediate scrutiny, but it has not done so.

This Court should thus grant summary judgment to the plaintiffs pursuant to Wis. Stat. § 802.08(6). Alternatively, the plaintiffs request the opportunity to file their own motion for summary judgment and supporting briefs to more fully develop their arguments.[1]

[1] This brief refers to the City of Neenah as "the City" and refers to the City's sign code as "the Ordinance."

ARGUMENT

I. This lawsuit is justiciable.

"To obtain declaratory relief, a justiciable controversy must exist." *Fabick v. Evers*, 2021 WI 28, ¶ 9, 396 Wis. 2d 231, 956 N.W.2d 856. A lawsuit is justiciable when four requirements are met: (1) "a claim of right is asserted against one who has an interest in contesting it"; (2) the controversy is "between persons whose interests are adverse"; (3) a party seeking declaratory relief has "a legal interest in the controversy"; and (4) the relevant issue is "ripe for judicial determination." *Id.* (citation omitted). The third requirement refers to "standing." *Id.* ¶ 11.

Here, the City seems to dispute all four requirements, especially standing. Its arguments are baseless because it misunderstands taxpayer standing and declaratory judgment actions.

A. The Minks and Novaks have standing to pursue this lawsuit.

Standing to sue "is construed liberally" in Wisconsin. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. When standing is challenged, courts "take the allegations in the complaint as true and liberally construe them in the plaintiff's favor." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 18, 275 Wis. 2d 533, 685 N.W.2d 573.

Our supreme court "has been disposed toward finding" taxpayer standing. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988). Parties have used taxpayer standing to challenge "a variety of governmental activities accompanied by expenditure of public moneys." *Thompson v. Kenosha Cnty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974).

To have taxpayer standing, a plaintiff need only allege "that the [government] has spent, or proposes to spend, public funds illegally." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994). Even the mere threat of pecuniary loss establishes taxpayer

standing. *Fabick*, 2021 WI 28, ¶ 11 n.5. A taxpayer suffers a pecuniary loss whenever the government spends public funds illegally. *City of Appleton*, 142 Wis. 2d at 879. An expenditure of public funds is illegal if it is made pursuant to an unconstitutional law. *See, e.g.*, *id.* ("If the statute were unconstitutional the county's expenditure of funds [pursuant to the statute] would be illegal."). Indeed, an allegation of pecuniary loss to taxpayers is implied when a taxpayer alleges a law is unconstitutional. *See Tooley v. O'Connell*, 77 Wis. 2d 422, 438–39, 253 N.W.2d 335 (1977); *Thompson*, 64 Wis. 2d at 679–80. Even "infinitesimally small" expenditures "suffice to sustain a taxpayer suit." *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993).

Here, the Minks and Novaks have taxpayer standing. The City does not dispute that the Minks and Novaks pay taxes to the City. (*See* R. 13:2.) The Minks and Novaks thus need only "allege illegality in order to have standing." *Kaiser*, 99 Wis. 2d at 360. They have done so. (R. 2:8–18.) The City does not deny that it spends taxpayer money printing and mailing "notice of violation" letters to enforce the Ordinance. In fact, the City previously sent a "notice of violation" to plaintiff Gail Minks, alleging that a yard sign of his violated the Ordinance. (R. 14.) The City also recently sent "notice of violation" letters to other City residents, alleging their signs violated the Ordinance. *See, e.g.*, Olivia Acree, NBC 26, "Neenah residents are fighting back against Shattuck yard sign violations" (Jan. 20, 2023), https://www.nbc26.com/neenah/neenah-residents-are-fighting-back-against-shattuck-yard-sign-violations. This expenditure of taxpayer money enforcing an unconstitutional ordinance creates taxpayer standing for the Minks and Novaks.

B. The City's justiciability arguments are meritless.

Citing federal case law, the City asserts that the Minks "do not have standing as required by U.S. Const. Art. III, § 2 cl. 1." (R. 30:3, 5, 7.) But the U.S. Constitution's "limitation on federal court jurisdiction" does "not apply to Wisconsin courts." *Chenequa*, 2004 WI App 144, ¶ 14 n.7.

"Federal law on standing is not binding in Wisconsin." *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342. The Minks and Novaks must satisfy *state-law* requirements for standing because they brought this lawsuit in state court.

Tellingly, the City spends only four sentences arguing against taxpayer standing—even though the complaint relies exclusively on taxpayer standing. In making its undeveloped argument, the City cites *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189. (R. 13:4.) But the plaintiff in *Lake Country* lacked standing because it did "*not* claim any pecuniary loss or other form of damage or injury." *Lake Country*, 2002 WI App 301, ¶ 14. By contrast, the Minks and Novaks alleged in their complaint that they and other City taxpayers "are injured on an ongoing basis because of the Ordinance" and that "the City will unlawfully spend taxpayer funds enforcing the Ordinance provisions that are challenged in this complaint." (R. 2:4–5.) *Lake Country* is thus inapplicable here.

The City asserts that "[t]he mere existence of the City of Neenah's Sign Code is not sufficient basis for the Minks to claim standing." (R. 30:5.) True, but an "alleged unlawful expenditure of public funds, if otherwise sufficient to survive a motion to dismiss, *is* sufficient to support taxpayer standing." *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 17, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131. The Minks and Novaks have standing because they allege that the City will unlawfully spend taxpayer money enforcing its unconstitutional Ordinance. (R. 2:4–5.)

The City also argues that the Minks and Novaks must face penalties for violating the Ordinance before they may sue. (R. 30:4–8.) But plaintiffs may bring a declaratory judgment action to challenge the "constitutional validity" of legislation "without subjecting themselves to forfeitures or prosecution." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 41,

244 Wis. 2d 333, 627 N.W.2d 866 (citation omitted). Moreover, the requirements for standing are relaxed in the First Amendment context. Litigants may claim that a law facially restricts protected speech or gives overbroad discretion to decision makers, even if the law in question does not apply to the litigants' conduct. *See, e.g.*, *State v. Stevenson*, 2000 WI 71, ¶ 12, 236 Wis. 2d 86, 613 N.W.2d 90; *Sauk Cnty. v. Gumz*, 2003 WI App 165, ¶ 16 n.6, 266 Wis. 2d 758, 669 N.W.2d 509. Because the Minks' and Novaks' claims implicate the First Amendment, they easily have taxpayer standing to raise these facial challenges.

The City argues this lawsuit is not ripe because the Minks and Novaks are not in violation of the Ordinance. (R. 30:4.) But facial "challenges to ordinances are generally ripe the moment the challenged ordinance is passed." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211.

The City also argues that the Minks' claims are moot because the Minks removed their yard signs that allegedly violated the Ordinance. (R. 30:4.) But this lawsuit is a taxpayer action that challenges the facial validity of the Ordinance, not a lawsuit about specific yard signs on the Minks' property. A lawsuit challenging an ordinance's legality is *not* moot when, as here, the ordinance "is currently in effect and affects the [plaintiffs]." *Town of Delton v. Liston*, 2007 WI App 120, ¶ 7 n.7, 301 Wis. 2d 720, 731 N.W.2d 308. Here, the Ordinance is currently in effect, and it affects the Minks and Novaks as taxpayers because "any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *City of Appleton*, 142 Wis. 2d at 879 (citation omitted). The Minks' and Novaks' facial challenge to the Ordinance on behalf of the City's taxpayers is not moot.

The City relatedly argues that the Minks fail the first justiciability requirement because the Minks removed their yard signs. (R. 30:4.) But that requirement is satisfied when, as here, "a 'right

is asserted against [a defendant] who has an interest in contesting it.'" *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶ 29, 393 Wis. 2d 1, 946 N.W.2d 17 (alteration in original) (citation omitted). The City plainly has an interest in contesting the Minks' First Amendment claims.

In sum, the Minks' and Novaks' claims are justiciable. The Minks and Novaks have taxpayer standing to seek declaratory relief regarding the facial validity of the Ordinance.

II. The City's restrictions on commercial speech, political campaign signs, and ground signs are unconstitutional.

As an initial matter, this Court may reject the City's arguments on the merits because courts "generally do not consider arguments that are inadequately briefed." *State v. Gee*, 2019 WI App 31, ¶ 39, 388 Wis. 2d 68, 931 N.W.2d 287. That rule applies with extra force here because "[c]onstitutional claims are very complicated from an analytic perspective, both to brief and to decide." *Cemetery Servs., Inc. v. Wisconsin Dep't of Regul. & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). As explained below, even if intermediate scrutiny applies here, the City still has the burden to satisfy that test beyond a reasonable doubt. To do so, the City must present evidence. *See Gumz*, 2003 WI App 165, ¶ 30. The City presented no evidence with its motion for summary judgment, except for its own attorney's affidavit and attachments that are devoid of substance.

The City's failure to produce evidence or adequately develop its arguments is reason alone to grant summary judgment to the Minks and Novaks. A party "may be entitled to summary judgment even though that party did not seek it." *Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 2, 318 Wis. 2d 488, 770 N.W.2d 727 (citing Wis. Stat. § 802.08(6)). When a party with the burden of proof fails to introduce evidence or develop its arguments, the opposing party is entitled to summary judgment. *See, e.g., id.* ¶¶ 24, 27; *Schreiner v. Wieser Concrete Prod., Inc.*, 2006 WI App 138, ¶¶ 12–13, 294 Wis. 2d 832, 720 N.W.2d 525. Because the City's summary judgment

materials utterly failed to prove beyond a reasonable doubt that the Ordinance is constitutional, the Minks and Novaks are entitled to summary judgment.

A. Government restrictions on speech, including signs, are generally unconstitutional.

The First Amendment prohibits a city from enacting laws "abridging the freedom of speech." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting U.S. Const., Amdt. 1). "[S]igns 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).[2]

If a law implicates the First Amendment, the law must pass "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. Under either test, the government "has the burden to prove that the [law] is constitutional beyond a reasonable doubt." *Id.* Government regulation of speech "must survive strict scrutiny if it is content based or intermediate scrutiny if it is content neutral." *Id.* ¶ 31.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (citation omitted). Content-based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163.

[2] The First Amendment's Free Speech Clause applies to municipalities by virtue of the Fourteenth Amendment. *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994). For readability, this brief refers only to the First Amendment although it relies on the Fourteenth Amendment as well.

To satisfy intermediate scrutiny, a content-neutral "restriction on speech or expression must be 'narrowly tailored to serve a significant governmental interest.'" *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) (citation omitted).

B. The City's restrictions on commercial speech, political campaign signs, and ground signs are subject to and fail strict scrutiny.

The Ordinance bans much commercial speech on signs and greatly limits the duration and number of signs that residents may have on their property. On residential, commercial, and industrial property, the City bans signs that advertise off-premises businesses. Ordinance §§ 24-107(2), 24-132(8), 24-133(14); *see also* Ordinance § 24-3 (defining "*Off-premises signs*"). The City also bans commercial speech on parked vehicles and trailers that are visible from a public street. Ordinance § 24.107(10). The City limits residential properties to one ground sign. Ordinance §§ 24-182(1), 24-183(1), 24-132(8). Residential ground signs are generally subject to a 30-day limit: "[o]ne portable sign of six square feet or less may be displayed on a residential property for a period of 30 days within a 90-day period." Ordinance § 24-132(8). The City imposes a different time limit for political campaign signs, which "may be erected not earlier than the beginning of an election campaign period, as defined in Wis. Stats. § 12.04." Ordinance § 24-132(2)(a).

Strict scrutiny applies to all those restrictions because they are content based—and they fail strict scrutiny because they lack a compelling governmental interest.

In a separate lawsuit against the City, a federal district court recently held that "[t]he City's sign ordinance is a content-based restriction on speech and is therefore 'subject to strict scrutiny.'" *Florek v. Bedora and City of Neenah*, No. 23-C-122, 2023 WL 2808313, at *4 (E.D. Wis. Apr. 6, 2023) (quoting *Reed*, 576 U.S. at 164). "Accordingly," the court held, "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 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.*[3]

This Court should also conclude that the Ordinance is content based. It should further conclude that the Ordinance's restrictions on commercial speech, political campaign signs, and ground signs fail strict scrutiny because they are not justified by a compelling governmental interest. The City argues that traffic safety and aesthetics justify its sign restrictions. (R. 30:11–12.) But "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995). To the contrary, traffic safety and aesthetics "are not compelling governmental interests." *Id.* at 1409; *accord Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267–68 (11th Cir. 2005); *Collier v. City of Tacoma*, 854 P.2d 1046, 1054–55 (Wash. 1993).[4] The Minks and Novaks will now explain why strict scrutiny applies here.

Claim One. The City's ban on off-premises commercial signs is subject to strict scrutiny because it is content based. For example, the Ordinance allows off-premises signs advertising "yard, garage, rummage, estate or other similar sales." Ordinance § 24-132(5)(a). An ordinance is content neutral if "[a] given sign is treated differently based *solely* on whether it is located on the same premises as the thing being discussed or not." *Reagan Nat'l Advert.*, 142 S. Ct. at 1472–73 (emphasis added). That rule does not apply here because the Ordinance *allows* a residential property to display a portable sign advertising certain off-premises sales but *prohibits* such a sign from advertising an off-premises business. For example, the Ordinance allows a residential ground

[3] The Minks and Novaks previously filed a courtesy copy of the *Florek* decision. (R. 18:5–15.)

[4] Because the Ordinance provisions at issue are not narrowly tailored for purposes of intermediate scrutiny, as explained below, they also fail the narrow-tailoring requirement under strict scrutiny.

sign if it advertises a neighbor's rummage sale but not if it advertises a neighbor's business. *See* Ordinance § 24-132(5)(a) & (8). The City's general ban on off-premises commercial signs is content based because it is *not* based *solely* on a sign's location.

Claim Two. The City's ban on commercial speech on parked vehicles and trailers is also content based. For example, that ban does not apply to vehicle signs that convey political, philosophical, or religious messages—but it restricts vehicle signs that advertise products or direct people to a business. *See* Ordinance § 24.107(10). This restriction 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. Although this Ordinance provision restricts commercial speech, "a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny under *Reed*." *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 703 (6th Cir. 2020).

Claim Three. The City's one-ground-sign limit is also subject to strict scrutiny. A sign ordinance is content based if it has different rules for things like yard-sale signs, real-estate signs, and construction signs. *See Int'l Outdoor*, 974 F.3d at 707–08. 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. *Compare* Ordinance §§ 24-182(1), 24-183(1), 24-132(8), *with* Ordinance § 24-132(1), (3), (5), (9).

Claim Four. The City's pre-election time limit for political campaign signs is also content based. A law that restricts "only political speech" is content based even if it imposes "no limits on the political viewpoints that could be expressed." *Reed*, 576 U.S. at 169. A sign ordinance is thus content based if it imposes different time limits depending on the subject matter on any given sign. *See, e.g.*, *City of Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52, 58 (N.D. Cal.

1982); *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144, 1148 (E.D.N.Y. 1977); *Collier*, 854 P.2d at 1054. Here, the pre-election time limit is content based because it applies only to signs that discuss a certain topic—specifically, "signs on behalf of candidates for public office or measures on election ballots." Ordinance § 24-132(2)(a). That time limit does not apply to signs that convey a different message, including construction signs, real-estate signs, and subdivision signs. Ordinance § 24-132(1), (3), (6)d. The pre-election time limit is content based.

Claim Five. The City's general 30-day time limit for ground signs is also content based. A sign ordinance is content based if it "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter." *Reed*, 576 U.S. at 169. Content-based time limits are one form of differential treatment that trigger strict scrutiny. *See id.* at 159–61, 164–65. Here, the 30-day limit in Ordinance § 24-132(8) is content based because its applicability hinges on the message conveyed or topic mentioned on a sign. Certain 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. The 30-day limit thus applies to any ground sign unless its content triggers a different time limit in Ordinance § 24-132 or a time-limit exemption in Ordinance § 24-133. For example, the 30-day limit would apply to a residential ground sign that reads "Support Our Troops," but a "Parking in Rear" directional ground sign could stay up forever.

In short, the Ordinance's restrictions on commercial speech, political campaign signs, and residential ground signs are unconstitutional. Those restrictions are subject to strict scrutiny because they are content based. They fail strict scrutiny because they lack a compelling interest.

C. If intermediate scrutiny applies here, the City's restrictions on commercial speech, political campaign signs, and ground signs are still unconstitutional.

If this Court concludes that any of the Ordinance's restrictions on commercial speech, political campaign signs, and residential ground signs is *content neutral*, then that restriction is subject to intermediate scrutiny. Even under that test, the City "has the burden to prove that the [ordinance] is constitutional beyond a reasonable doubt." *See Baron*, 2009 WI 58, ¶ 10.

Under intermediate scrutiny, "traffic safety is a substantial interest." *City of Milwaukee v. Blondis*, 157 Wis. 2d 730, 737, 460 N.W.2d 815 (Ct. App. 1990). Aesthetic interests can be substantial, too. *See Gilleo*, 512 U.S. at 50. The question is thus whether the Ordinance's restrictions at issue are narrowly tailored to promoting traffic safety and aesthetics.

"[A] municipal ordinance regulating the display of signs" is unconstitutional when it is either underinclusive or overinclusive. *Gilleo*, 512 U.S. at 50. An underinclusive ordinance "restricts too little speech because its exemptions discriminate on the basis of the signs' messages." *Id.* at 50–51. *Id.* at 51. Such exemptions "diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52. Sign restrictions are overinclusive when "they simply prohibit too much protected speech." *Id.* at 51.

Here, the Ordinance's restrictions on commercial speech, political campaign signs, and residential ground signs are both over and underinclusive. They are thus not narrowly tailored.

Those Ordinance provisions are overinclusive because they restrict more speech than necessary. For example, the City regulates the size of signs, imposes setback requirements, and generally bans flashing, moving, floodlighted, damaged, and unclean or dilapidated signs. *See, e.g.*, Ordinance §§ 24-132, 24-107(7)–(8), 24-82, 24-83, 24-182(4), 24-183(4), 24-184(5). Content-neutral provisions like those ones are permissible. *See Reed*, 576 U.S. at 173; *Whitton*, 54 F.3d at 1408. Those content-neutral provisions should be adequate to protect safety and aesthetics,

and the City has not proven otherwise. The Ordinance provisions at issue are thus not narrowly tailored. *See Whitton*, 54 F.3d at 1408 (using similar reasoning).

There is another reason why the City's restrictions at issue are overinclusive: "[I]ndividual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods." *Gilleo*, 512 U.S. at 58. "Residents' self-interest diminishes the danger of the 'unlimited' proliferation of residential signs . . . ." *Id.* The City has not proven that residents' self-interest is an insufficient prophylactic. This point further confirms that the Ordinance restricts more speech than necessary.

The Ordinance is also underinclusive. The Ordinance bans *off*-premises business signs, yet it allows a wide variety of signs, including yard-sale signs, "no trespassing" signs, and directional signs. *See, e.g.*, Ordinance §§ 24-132, 24-133. In addition, the Ordinance bans commercial speech on parked vehicles and trailers that are visible from a street, yet it allows such vehicles to display *non*-commercial messages and even allows *moving* vehicles to display commercial messages. These bans are baseless. A sign on a parked car is not more dangerous than the same sign on a moving car; "indeed, there is a greater likelihood that a passing motorist will avert his eyes to read a sign posted in a moving vehicle." *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076, 1081 (C.D. Cal. 2000). Likewise, a vehicle sign that reads "Joe's Plumbing, LLC" is not more dangerous than a vehicle sign conveying a political message. Nor is a yard sign advertising an off-premises barber shop more dangerous than a directional sign stating "Barbershop Parking Behind House."

The same problems apply to the Ordinance's two time limits at issue. The City generally requires a portable residential ground sign to be removed after 30 days, and the City bans political campaign signs from being erected before the start of an election campaign period. Ordinance § 24-132(2)(a) & (8). By contrast, several types of ground signs (such as directional signs and "no

trespassing" signs) have no time limits whatsoever. *See* Ordinance § 24-133. Still other types, such as construction signs and real-estate signs, have time limits that can far exceed 30 days. *See* Ordinance § 24-132(1) & (3). The City has not shown that certain portable ground signs (such as a "Support Our Troops" sign) or political campaign signs are more dangerous than the types of signs with more-liberal time limits or no time limit. The time limits in Ordinance § 24-132(2)(a) & (8) are underinclusive and thus not narrowly tailored.

The one-ground-sign limit for residential property is underinclusive for similar reasons. Several types of signs—including construction signs, certain real estate signs, and yard-sale signs—do not have a one-sign limit. *See, e.g.*, Ordinance § 24-132(1), (3), (5), (9). The City has not shown that two "Support Our Troops" signs would endanger the public any more than two real-estate signs would.

Many courts have struck down ordinance provisions like the ones at issue here. Tellingly, the City has not cited case law upholding similar ordinance provisions.

In *Blondis*, a city banned vehicles from displaying a "For Sale" sign if they were parked on a street. The Wisconsin Court of Appeals held that ban was not narrowly tailored because "For Sale" signs were no more distracting than other types of signs that were *allowed* under the ordinance. *Blondis*, 157 Wis. 2d at 736. Here, the City's ban on vehicle advertisements goes much further by applying to *any* commercial advertisement on any vehicle parked *within view* of a street. *See* Ordinance § 24.107(10). The Ordinance would, for example, ban a plumber from parking his work van in his driveway if the van advertised his plumbing company and was visible from a public street. Because this advertising ban goes further than the one struck down in *Blondis*, it is also illegal.

Time limits on signs "have been repeatedly declared unconstitutional," too. *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000); *see, e.g.*, *Curry v. Prince George's Cnty.*, 33 F. Supp. 2d 447, 454–55 (D. Md. 1999) (holding that cities may not impose durational limits on yard signs). And "the overwhelming majority of courts" have struck down time limits on political campaign signs, specifically. *Painesville Bldg. Dep't v. Dworken & Bernstein Co., L.P.A.*, 733 N.E.2d 1152, 1157 (Ohio 2000); *see, e.g.*, *Orazio*, 426 F. Supp. at 1149 (holding "no time limit on the display of pre-election political signs is constitutionally permissible under the First Amendment"). The City's pre-election time limit and 30-day limit in Ordinance § 24-132(2)(a) and (8) are unconstitutional.

Severe restrictions on the number of allowable yard signs are also unconstitutional. In one instructive case, a federal appellate court applied intermediate scrutiny and held that a county's *two*-sign limit for residential property violated the First Amendment. *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 594–95 (4th Cir. 1993). The ordinance was not narrowly tailored because the county could have promoted traffic safety by regulating signs' design, condition, and distance from the street. *Id.* Here, the City's *one*-sign limit for residential property is even more plainly unconstitutional.

In sum, the Ordinance is not narrowly tailored to promoting any substantial governmental interest. The City has not shown that its restrictions on commercial speech, its one-ground-sign limit, or its time limits on residential ground signs are necessary. Those restrictions are not narrowly tailored because they are both over and underinclusive. Because those restrictions fail intermediate scrutiny, they are unconstitutional.

III. The Ordinance's permit requirement is unconstitutional.

Without clearly explaining when or whether a sign needs a permit, the City requires permits for signs. *See* Ordinance §§ 24-27, 24-159(3)(e). That permit requirement is unconstitutional because it is unduly vague and an unlawful prior restraint on speech.

A. The Ordinance's permit requirement is unconstitutionally vague.

An unconstitutionally vague regulation "leave[s] 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). In licensing cases, "[t]he vice of vagueness is particularly pronounced." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968).

Here, the Ordinance requires "a sign permit for each sign as required by this chapter," Ordinance § 24-27, but it fails to explain whether or when a permit is needed. The Ordinance indicates that a sandwich board sign requires a permit, *see* Ordinance § 24-159(3)(e), but it does not clearly explain when a permit is required. The Ordinance tries to explain when a permit is *not* required, but that explanation only exacerbates the vagueness problem. It 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. Presumably, every sign that does *not* fit those descriptions requires a permit.

The explanation-by-negative-implication in Ordinance § 24-131 is unduly vague. After all, every sign is "intended to communicate." *See* Ordinance § 24-131. Because signs that are intended to communicate do *not* require a permit, the Ordinance provides nothing but confusion on which signs need a permit. Phrases like "strictly temporary," "not obtrusive," and "public welfare" are inherently vague. And the Ordinance does not even clearly explain whether permits are required

for signs that are permissible under the Ordinance (e.g., "no trespassing" signs), for signs that would otherwise be impermissible (e.g., an off-premises business sign), or both. The permit requirement is too vague and thus unconstitutional.

B. The Ordinance's permit requirement is an unconstitutional prior restraint on speech.

The permit requirement in Ordinance §§ 24-27 and 24-131 is an unconstitutional prior restraint on speech because it gives unbridled discretion to government officials and contains no time limit for the government to issue or deny a permit.

An ordinance regulating First Amendment activities is unconstitutional unless the government proves "the constitutionality of that regulation beyond a reasonable doubt." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 104, 604 N.W.2d 870 (Ct. App. 1999) (citation omitted). And "there is a 'heavy presumption' against the validity of a prior restraint" on speech, such as a permitting requirement. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (citation omitted).

To satisfy the First Amendment, a licensing scheme "cannot place 'unbridled discretion in the hands of a government official or agency.'" *City News & Novelty*, 231 Wis. 2d at 104 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990)). In addition, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* (quoting *FW/PBS*, 493 U.S. at 226).

Here, under the first prong of the test from *City News & Novelty*, the Ordinance gives unbridled discretion to government officials to determine whether to issue a sign permit. Ordinance § 24-131 uses subjective and judgment-laden phrases, including "public welfare," "strictly temporary," and "not obtrusive." A permit requirement violates the First Amendment when, as here, it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion."

Forsyth Cnty., 505 U.S. at 131 (citation omitted). Indeed, the term "public welfare" is not an adequate guidepost for issuing a permit when the First Amendment is involved. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149–51 (1969).

Under the second prong of the test from *City News & Novelty*, the Ordinance is unconstitutional because it fails to provide a specific time limit for the issuance of a permit. The Ordinance merely states that a sign permit will be issued when an application is filed, fees are paid, and the sign is judged to comply with the City's laws. Ordinance § 24-31. The lack of a specified time period for reviewing a permit application and issuing a permit is constitutionally fatal. *See, e.g.*, *Solantic*, 410 F.3d at 1272.

The City argues that no time limit is required because the Ordinance is content neutral. (R. 30:13–14.) But, as explained above, the Ordinance is content based in several ways. And the City does not dispute that the First Amendment requires a specific time limit for issuing a permit if a restriction on speech is content based. *See, e.g.*, *Solantic*, 410 F.3d at 1270–71. The Ordinance's permit requirement is unconstitutional because it has no time limit for issuing a permit.

IV. The Ordinance's ban on "offensive" signs is unconstitutional.

Regarding "[s]igns within athletic fields, or within immediate proximity thereof," the City requires that such "[s]igns that are . . . found to be offensive . . . must be immediately removed upon the order of the City." Ordinance § 24-132(9)f. That requirement violates the First Amendment for three independent reasons.

First, the City's ban on "offensive" signs fails strict scrutiny. Whether a sign is offensive depends on its content, thus subjecting the City's ban on "offensive" signs to strict scrutiny. This ban fails strict scrutiny because it lacks a compelling interest. "[T]he fact that society may find

speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (alteration in original) (citation omitted). Because the City has not argued that this ban satisfies strict scrutiny, the City has failed to overcome that high hurdle.

Second, the City may not restrict speech by deeming it offensive. "[T]he 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) (citation omitted). The government may restrict offensive speech only "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 459 (alterations in original) (citation omitted). The City does not attempt to satisfy this test, either. The City instead asserts that "the term 'offensive' is synonymous with 'obscene.'" (R. 30:15.) But the Ordinance does not use the word "obscene." The City may amend its ordinance to replace the word "offensive" with "obscene." This Court may not amend the Ordinance by interpreting it contrary to its plain language.

Third, the City's ban on "offensive" athletic-field signs is unconstitutionally vague. A regulation is unconstitutionally vague if it includes "protected speech in the prohibition." *Princess Cinema*, 96 Wis. 2d at 656. Because offensive speech is constitutionally protected, *Simon & Schuster*, 502 U.S. at 118, the City's ban on "offensive" signs is facially unconstitutional.

Further, the City's ban on offensive signs is unduly vague because it lacks clear guidance. "An ordinance is unconstitutionally vague if 'it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic enforcement.'" *Guse v. City of New Berlin*, 2012 WI App 24, ¶ 5, 339 Wis. 2d 399, 810 N.W.2d 838 (citation omitted). The Ordinance fails both prongs of that test. Under the first prong, the term "offensive" does not give proper notice as

to what type of conduct or speech is proscribed. *See, e.g.*, *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995); *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983). Under the second prong, a policy regulating "offensive" conduct gives an "unrestricted delegation of power" to public officials. *See, e.g.*, *Dambrot*, 55 F.3d at 1184. For both reasons, Ordinance § 24-132(9)f. is unconstitutionally vague.

The City briefly asserts that the Minks and Novaks lack standing to challenge the City's ban on offensive signs. (R. 30:13.) They have standing for the reasons explained above.

CONCLUSION

This Court should deny the City's motion for summary judgment, grant summary judgment to the Minks and Novaks, declare that the Ordinance provisions at issue are unconstitutional, and permanently enjoin the City from enforcing them.

Dated this 30th day of June 2023.

Electronically signed by
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