STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

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

Plaintiffs,

Case No. 23-CV-258

v.

CITY OF NEENAH,

Defendant.

PLAINTIFFS' BRIEF SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The City of Neenah was sued twice last year over its highly restrictive sign code. Last April, a federal district code issued a temporary injunction against Neenah after concluding that the sign code "likely" violated the First Amendment right to free speech.[1] Then, in August, this Court issued a temporary injunction to block Neenah from enforcing its sign code while this lawsuit proceeded. (R. 39.)

After Neenah received those setbacks, Neenah's city attorney wrote a memorandum to the mayor and plan commission, urging revisions to the sign code. (Ex. 1.)[2] The city attorney conceded that "[t]he City's sign code, as it's existed since 1977, includes several sections clearly violating the principles of [*Reed v. Town of Gilbert*, 576 U.S. 155 (2015)]." (Ex. 1.) The city attorney stated that under *Reed*, "[s]ign regulations must be content neutral and only be regulated by their size (height and area), location (location within a district and location on a property), or sign construction (material)." (Ex. 1.)

Neenah repealed and recreated its sign code on October 4, 2023, but it did not fix many of the unconstitutional aspects. Contrary to the city attorney's candid memorandum, the new version of the sign code does not merely regulate signs by their size, material, and location within a district or on a property. Instead, the sign code still heavily restricts the ability of Neenah residents and businesses to use signs to express their views and advertise their services. The sign code still bans commercial advertising on vehicles and trailers parked within view of a street. In fact, in some

[1] *Florek v. Bedora and City of Neenah*, No. 23-C-122, 2023 WL 2808313, at *5 (E.D. Wis. Apr. 6, 2023). The Minks and Novaks previously filed a courtesy copy of the *Florek* decision. (R. 18:5–15.)

[2] Exhibit 1 is a copy of the city attorney's memorandum, which is also available at page 24 of the agenda packet for the Neenah Common Council meeting on October 4, 2023, https://www2.ci.neenah.wi.us/committees.nsf/0/1def8379ffc271d58625899e004d7a27/$FILE/A%20231004%20CC%20Packet.pdf.

ways, this ban is even more sweeping under the new version of the ordinance than under the prior version. The sign code still bans any sign that directs a reader to a different location, so-called "off-premises signs." The sign code also still largely restricts residential properties to having just one portable yard sign—and it generally requires those signs to be removed after 30 days. Finally, the sign code still has unduly vague standards for when a sign permit is required and may be issued.

This Court should declare those restrictions unlawful. Many courts around the country have struck down similar restrictions on signs for violating the First Amendment. This Court should follow their lead.[3]

STATEMENT OF THE CASE

Four Neenah residents and taxpayers—Gail and Margaret Minks ("the Minks") and Gary and Kim Novak ("the Novaks")—filed this declaratory judgment action in April 2023 to challenge the legality of Neenah's sign code. (R. 2.) The Minks and Novaks filed a motion for a temporary injunction and supporting brief in May 2023. (R. 18; 19.) Neenah filed a motion for summary judgment, and the parties filed briefs on that motion. (R. 29; 30; 35; 37.)

At a decision hearing on August 24, 2023, this Court denied Neenah's motion for summary judgment because this lawsuit presented a justiciable controversy. (*See* R. 39.) The Court also issued a temporary injunction against Neenah's enforcement of the sign code. (R. 39.)

On September 26, 2023, Neenah's city attorney urged the mayor and the plan commission to recommend that the common council repeal and recreate the sign code. (Ex. 1.) The city attorney conceded that "several sections" of Neenah's sign code "clearly violat[ed]" United States Supreme

[3] This brief refers to the City of Neenah as "the City" or "Neenah" and refers to the City's sign code, which was adopted in October 2023, as "the Ordinance." To be clear, the Minks and Novaks challenge only the Ordinance that was adopted in October 2023; they no longer challenge the prior version of Neenah's sign code. Shortly after Neenah amended its sign code in October 2023, the Minks and Novaks amended their complaint to challenge only the new version of the sign code. (R. 53; *see also* R. 68.)

Court precedent. (Ex. 1.) The city attorney stated that governments may regulate signs only with respect to "size (height and area), location (location within a district and location on a property), or sign construction (material)." (Ex. 1.)

On October 4, 2023, the Neenah Common Council voted to repeal and recreate the sign code. (Ex. 2.)[4] Some of the changes to the sign code appeared to be in direct response to this lawsuit.[5] Specifically, the sign code no longer bans "offensive" signs on athletic-field fences and no longer has a pre-election time limit for political campaign signs.[6]

On October 16, 2023, the Minks and Novaks filed a motion to amend their complaint to reflect Neenah's revisions to its sign code. (R. 47.) The Minks and Novaks filed a proposed first amended complaint on November 2, 2023. (R. 53.) After the issue was fully briefed, the Court granted the motion, thus accepting the first amended complaint for filing. (R. 68.) Neenah filed an answer to the first amended complaint on January 23, 2024. (R. 69.)

After a status conference on February 7, 2024, the Court issued the following schedule: the Minks and Novaks may file a motion for summary judgment and supporting brief by March 8, Neenah may file a response brief by April 8, and the Minks and Novaks may file a reply brief by

[4] Exhibit 2 is a copy of the minutes for the Neenah Common Council's October 4 meeting, which minutes are available at https://www2.ci.neenah.wi.us/committees.nsf/638cebc9ae6dfc22862575ef0068e7f9/39b6b38a4c2bed0486258a470053fdad/$FILE/M%2020231004%20CC.pdf.

[5] The prior version of the sign code is record item number 15. The current version of the sign code, as adopted in October 2023, is record item number 48. The current version of the sign code is also available at pages 25–45 of the agenda packet for the Neenah Common Council meeting on October 4, 2023, https://www2.ci.neenah.wi.us/committees.nsf/0/1def8379ffc271d58625899e004d7a27/$FILE/A%2020231004%20CC%20Packet.pdf. A redlined version, which shows the October 2023 changes to the sign code, is filed along with this brief as Exhibit 3 and is available at pages 46–66 of that agenda packet.

[6] Because of these two changes to the sign code, the Minks and Novaks dropped Claims Four and Eight from their initial complaint. (*See* R. 2:11–12, 17–18; *see also* R. 63:2 n.1.) They also dropped Claim Six from their initial complaint to avoid redundancy with Claim Seven. (*See* R. 2:13–17; *see also* R. 63:2 n.1.)

April 23. (R. 70.) The Court also scheduled a decision hearing for May 13, 2024. (R. 70.) The Minks and Novaks filed this principal brief pursuant to that scheduling order.

APPLICABLE LEGAL PRINCIPLES

"Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Premier Cmty. Bank v. Schuh*, 2010 WI App 111, ¶ 4, 329 Wis. 2d 146, 789 N.W.2d 388; *see also* Wis. Stat. § 802.08(2). The constitutionality of an ordinance is a question of law appropriate for summary judgment. *See Sauk Cnty. v. Gumz*, 2003 WI App 165, ¶ 8, 266 Wis. 2d 758, 669 N.W.2d 509. "The existence of a new or difficult issue of law does not, in and of itself, render the summary judgment mechanism inappropriate." *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 569, 297 N.W.2d 500 (1980).

The First Amendment prohibits a city from enacting ordinances "abridging the freedom of speech." *Reed v. Town of Gilbert*, 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).[7] Under the demands of the Free Speech Clause, an ordinance may be struck down even if it "may seem like a perfectly rational way to regulate signs." *Reed*, 576 U.S. at 171.

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.

[7] 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.

"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. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64.

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. "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). "Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169.

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 v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) (citation omitted).

SUMMARY OF ARGUMENT

I. Neenah bans "any sign or messaging device" on a vehicle or trailer parked on or within view from a street. This ban is unconstitutional because it is not narrowly tailored. In a similar case, the Wisconsin Court of Appeals struck down a city's ban on "For Sale" signs on vehicles parked on a street. Here, Neenah's ban is more sweeping and thus more plainly unconstitutional.

II. Neenah also bans any sign or billboard that directs the reader to a different location. This sweeping ban is also unconstitutional because it is not narrowly tailored. Although courts have upheld bans on billboards (*i.e.*, large, immobile, permanent structures), they have struck down bans that more broadly applied to any off-premises sign. This Court should follow that lead by concluding that Neenah's sweeping ban on off-premises signs is unconstitutional.

III. Neenah generally limits residential property to just one portable yard sign. This ban is subject to strict scrutiny because it is content based—certain signs are exempt from this limit, depending on their content. And this one-sign limit fails strict scrutiny because Neenah has no compelling interest in banning yard signs. Even if intermediate scrutiny applies, Neenah's one-sign limit fails that test because it is not narrowly tailored.

IV. Neenah also generally requires its residents to remove a portable yard sign within 30 days of posting it. Like the one-sign limit, this 30-day limit is subject to strict scrutiny because it is content based—certain signs are exempt from this duration limit, depending on their content. And this duration limit fails strict scrutiny because no compelling interest justifies it. Even if intermediate scrutiny applies, Neenah's 30-day limit fails that test because it is not narrowly tailored.

V. Neenah also requires its residents to obtain a permit before posting some signs. This permit requirement is an unconstitutional prior restraint on speech for two independent reasons. First, the permit requirement lacks narrow, objective, and definite standards. Second, the permit requirement is impermissibly content based because it treats commercial speech differently than non-commercial speech.

ARGUMENT

I. Neenah unconstitutionally bans speech on parked vehicles and trailers.

Neenah prohibits "within the City" any "[a]dvertising vehicle sign," which Neenah defines as "[a] vehicle, trailer, or other piece of movable equipment which contains any sign or messaging device, which is unlicensed and/or inoperable, and which is parked on a public right-of-way or in a location that is not an active worksite or in such a manner as to be seen from a public right-of-way." Ordinance § 24-107(9).[8] The Ordinance defines "sign" very broadly to mean "any object, device, display, structure, or part thereof, situated or visible from outdoors, which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, or location by any means, including words, letters, figures, designs, logos, symbols, fixtures, colors, illumination, or projected images." Ordinance § 24-3.

This ban on vehicle and trailer signs fails intermediate scrutiny and therefore is unconstitutional under the First Amendment.

A. Under intermediate scrutiny, Neenah must prove beyond a reasonable doubt that its restriction on speech is constitutional.

Under intermediate scrutiny, Neenah "has the burden to prove that the [ordinance] is constitutional beyond a reasonable doubt." *See Baron*, 2009 WI 58, ¶ 10. To do so, Neenah must prove that its sign code is "narrowly tailored to serve a significant governmental interest." *See Reagan Nat'l Advert.*, 596 U.S. at 76 (citation omitted). To be narrowly tailored for purposes of intermediate scrutiny, "the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Packingham v. North Carolina*, 582 U.S. 98, 106 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

[8] The Ordinance creates an exception in limited circumstances for "commercial vehicle[s]," an undefined term. Ordinance § 24.107(9)(a).

For purposes of 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 Neenah's ban on speech on parked vehicles and trailers is narrowly tailored to promoting traffic safety and aesthetics.

Under intermediate scrutiny, "a municipal ordinance regulating the display of signs" is *not* narrowly tailored if it is either under-inclusive or over-inclusive. *Gilleo*, 512 U.S. at 50. An under-inclusive 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 over-inclusive when "they simply prohibit too much protected speech." *Id.* at 51.

B. Neenah's ban on signs on parked vehicles and trailers fails intermediate scrutiny.

In the highly analogous *Blondis* case, the Wisconsin Court of Appeals applied intermediate scrutiny and struck down a sign ordinance for being under-inclusive. There, the City of Milwaukee banned vehicles from displaying a "For Sale" sign if they were parked on a street. The court of appeals held this ban was not narrowly tailored because "For Sale" signs were no more distracting than other types of signs that were allowed under the ordinance, including "a yard sign, a porch sign, a sign on or in a window of a building, or a billboard sign on property adjacent to a highway." *Blondis*, 157 Wis. 2d at 736, 738.

Here, like the vehicle-sign ban in *Blondis*, Ordinance § 24.107(9) is not narrowly tailored because it is under-inclusive. Like the City of Milwaukee in *Blondis*, Neenah allows signs that are just as distracting—and likely more distracting—than a small sign on a parked vehicle or trailer. For example, Neenah allows 40-square-feet signs on athletic-field fences and 100-square-feet

temporary signs in new subdivisions. *See* Ordinance §§ 24-132(2)(a), 24-182(5)(c). The Ordinance also lists several categories of signs that are allowed without a time limit. Ordinance § 24-133. Moreover, the Ordinance allows ten-square-feet "For Sale" signs on properties. Ordinance §§ 24-182(5)(b), 24-183(5)(b). The Ordinance would also allow a six-square-feet portable yard sign stating "Car For Sale" for up to 30 days, yet a much smaller "For Sale" sign would be illegal if posted on certain parked cars or trailers that are visible from a street. *See* Ordinance §§ 24-107(9), 24-182(5), 24-183(5). Because "other distracting" types of signs are allowed, Neenah's ban on signs on parked vehicles and trailers is not narrowly tailored. *See Blondis*, 157 Wis. 2d at 738.

Indeed, in three respects, Neenah's ban on vehicle and trailer signs is even less narrowly tailored than the unconstitutional ordinance in *Blondis*. Again, in *Blondis*, a city violated the First Amendment by prohibiting "For Sale" signs on *vehicles* parked *on* a street. *Blondis*, 157 Wis. 2d at 732, 736–37. Here, Neenah's ban goes further by applying to (1) not just "For Sale" signs but "any sign or messaging device"; (2) not only vehicles but also *trailers or other pieces of movable equipment*; and (3) such implements that are parked on or *within view* of a street. *See* Ordinance § 24-107(9). This sweeping ban fails intermediate scrutiny because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *See McCullen*, 573 U.S. at 486 (citation omitted). This ban prohibits more speech than the unconstitutional ordinance in *Blondis* did.

This restriction on speech is fatally under-inclusive for another reason: it does not apply to moving vehicles. As one federal court explained when reviewing a ban on "For Sale" signs on parked vehicles, "The Court cannot fathom how a sign in a parked car is more dangerous than the same sign in 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). "In contrast, if a driver wishes to read a sign in a parked vehicle, and if road conditions permit, he can slow down or stop or even back up." *Id.* Here, because Ordinance § 24.107(9) applies to parked vehicles but not moving vehicles, it is not narrowly tailored for this reason as well.

Notably, Neenah "has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs." *Ballen v. City of Redmond*, 466 F.3d 736, 743 (9th Cir. 2006) (striking down a ban on portable signs for not being narrowly tailored). To satisfy intermediate scrutiny under the First Amendment, Neenah must present evidence. *See Gumz*, 2003 WI App 165, ¶ 30; *see also, e.g.*, *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (holding a sign ordinance restricting commercial speech was unconstitutional because "the City provided no evidence that the ordinance promotes [the City's] interests"). Here, Neenah presented no evidence with its motion for summary judgment, except for its own attorney's affidavit and attachments that are devoid of substance. (*See* R. 31.) A conclusory affidavit is insufficient to meet the government's burden of justifying a restriction on signs. *See, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 773 (6th Cir. 2007) (holding a conclusory affidavit was insufficient to justify a ban on "For Sale" signs on vehicles). Because Neenah has not proven that signs on parked vehicles or trailers are more dangerous than the types of signs that Neenah allows, Ordinance § 24.107(9) is under-inclusive and thus not narrowly tailored.

In other ways, Ordinance § 24.107(9) is *over*-inclusive. As noted above, sign restrictions are over-inclusive when they "prohibit too much protected speech." *Gilleo*, 512 U.S. at 51. Here, Ordinance § 24.107(9) prohibits far too much protected speech. As noted above, Neenah defines the word "sign" very broadly. *See* Ordinance § 24-3. In addition, the ban in Ordinance § 24-107(9)

applies to "any sign or messaging device" on certain parked vehicles or trailers that are visible from a street. Given these very broad terms, the Ordinance would ban a political bumper sticker or a "Jesus fish" bumper logo on certain parked vehicles and trailers—even when parked *in a garage* if they are visible from a street.

There is another reason why this ban is over-inclusive. Neenah may (and does) regulate certain aspects of signs, including size, lighting, and moving parts. *See Reed*, 576 U.S. at 173; *see also, e.g.*, Ordinance §§ 24-159(4), 24-107(6)–(7). Neenah also may (and does) ban "unsightly" signs and impose setback requirements for ground signs. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995); *see also* Ordinance §§ 24-82, 24-83, 24-182(4), 24-183(4). These permissible regulations should be adequate to protect Neenah's interests. Because Neenah has not proven otherwise, its ban on speech on parked vehicles and trailers is not narrowly tailored. *See Reed*, 576 U.S. at 173 (using similar reasoning); *Whitton*, 54 F.3d at 1408.

In short, under the binding precedent of *Blondis*, Ordinance § 24-107(9) is illegal. The Minks and Novaks are entitled to summary judgment on Claim One.

II. Neenah unconstitutionally bans off-premises signs.

"Off-premises signs" are "prohibited within the City." Ordinance § 24-107(2) & (intro.). "*Off-premises signs* means a sign, including billboard, which advertises goods, products, facilities, or services not necessarily on the premises where the sign is located, or directs persons to a different location from where the sign is located." Ordinance § 24-3.

This ban on off-premises signs is unconstitutional under the First Amendment. Intermediate scrutiny applies to a sign ordinance 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." *See Reagan Nat'l Advert.*, 596 U.S. at 71. Here, Neenah's ban on off-premises signs is subject to

intermediate, rather than strict, scrutiny. Neenah has failed to prove beyond a reasonable doubt that this ban survives intermediate scrutiny.

A. Neenah's ban on off-premises signs fails intermediate scrutiny.

To survive intermediate scrutiny, Neenah must prove that its ban on off-premises signs is "narrowly tailored to serve a significant governmental interest." *See Reagan Nat'l Advert.*, 596 U.S. at 76 (citation omitted). A sign ordinance can fail to be narrowly tailored if it is under-inclusive or over-inclusive. *See Gilleo*, 512 U.S. at 50–51.

Here, Neenah's ban on off-premises signs is unconstitutional for essentially the same reasons that its ban on vehicle signs is unconstitutional, as explained above. Because the Ordinance singles out off-premises signs for differential treatment, it is under-inclusive and thus not narrowly tailored. For example, the Ordinance allows real-estate signs, directional signs, and even wall signs that advertise *on*-premises businesses. *See, e.g.*, Ordinance § 24-182(1), (5) & (6); 24-183(1), (5) & (6); 24-133(8). The Ordinance also allows signs that would seemingly pose far greater safety and aesthetics concerns than a small off-premises sign, such as 40-square-feet signs on athletic-field fences and 100-square-feet signs in new subdivisions. *See* Ordinance §§ 24-132(2)(a), 24-182(5)(c).

Neenah's ban on off-premises signs is also *over*-inclusive. As explained above, Neenah may (and does) regulate the size of signs, impose setback requirements for ground signs, and ban floodlighted, moving, and unclean signs. *See* Ordinance §§ 24-159(4), 24-107(6)–(7), 24-82, 24-83, 24-182(4), 24-183(4). Neenah has not proven that these regulations are insufficient to protect its interests. Neenah's ban on off-premises signs is thus not narrowly tailored because it restricts more speech than necessary.

B. In analogous cases, courts have struck down bans on off-premises signs.

In one instructive case, a town prohibited "(1) off-site signs; and (2) billboards." *Park Outdoor Advert. of New York, Inc. v. Town of Onondaga, N.Y.*, 708 F. Supp. 2d 241, 244 (N.D.N.Y. 2010) (citation omitted). The federal district court held that "[t]he complete prohibitions on billboards and off-premises signs found in [the town's ordinance] are unconstitutional." *Id.* at 248. Applying intermediate scrutiny, the court reasoned that this ban was "not narrowly drawn to directly advance the [town's] asserted interests." *Id.* at 247. Specifically, the court explained that "prohibiting all off-site signs and billboards, throughout the [t]own, with no consideration for the area or its zoned uses is not 'narrowly drawn' to protect the broad interests of the [town] in preserving property values, maintaining aesthetics, and promoting health and safety by reducing distractions to those driving and walking by." *Id.* The court noted that "although it is arguable that a *billboard* prohibition may serve to reduce distractions to drivers due to its proximity to an interstate highway (although there is no evidence, such as a study, as to this), it cannot be said that prohibiting *all off-premises signs* in any way would" advance the town's asserted interests. *Id.* (emphases added).

The same reasoning applies here. Like the town in *Park Outdoor*, Neenah completely bans all off-premises signs and billboards throughout Neenah. Ordinance §§ 24-3, 24-107(2). To be clear, Neenah's ban on off-premises signs is *not* limited to billboards. Neenah bans *any sign* that is posted somewhere other than the location advertised on the sign. For example, the Ordinance would ban a Neenah resident from having a small window or wall sign on the outside of his house advertising his off-site business, such as a sign advertising his barber shop. It would also ban a pastor from having a small window or wall sign at his home urging people to attend his church. The Ordinance would *allow* that pastor to indefinitely post a window or wall sign—or temporarily

post a yard sign—conveying a *religious* message (such as "Jesus Saves"). Yet the Ordinance would *prohibit* a sign of the exact same size and location if it directed people to the pastor's church. There is no basis for this differential treatment. The Ordinance would also *allow* a person to have a wall sign, window sign, or temporary yard sign advertising his *in-home* barber shop—yet it would *prohibit* the exact same sign if it advertised an *off-site* barber shop. Those two signs could be identical, simply stating the barber shop's name and phone number, but their legality would depend on whether the barber operates his business in his home. This differential treatment is also inexplicable. Like the ban in *Park Outdoor*, Neenah's sweeping ban in Ordinance § 24-107(2) is unconstitutional because it is not narrowly tailored.

In another analogous case, the Georgia Supreme Court struck down an ordinance that banned off-premises signs. The court noted that the "ordinance evidences a hostility to signs in general and to commercial signs in particular. It commences with what is, in effect, a declaration that all signs are presumptively illegal throughout the county." *Fulton Cnty. v. Galberaith*, 647 S.E.2d 24, 27 (Ga. 2007). The county ordinance then exempted "various types of signs" from the ban. *Id.* at 28. The court held that the ordinance was not narrowly tailored because it had a "broad sweep." *Id.* The court distinguished *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which had upheld a ban on off-premises billboards. In *Metromedia*, "the ban on off-premises advertising applied only to what is commonly called a 'billboard, defined as a ' "large, immobile, and permanent structure" . . . designed to stand out and apart from its surroundings,' thus creating 'a unique set of problems for land-use planning and development.'" *Galberaith*, 647 S.E.2d at 27 (alteration in original) (quoting *Metromedia*, 453 U.S. at 502). The county ordinance at issue in *Galberaith* was "more extensive" because it applied to signs besides billboards. *Id.*

Like the county ordinance in *Galberaith*, here the Ordinance sweeps too broadly and thus is not narrowly tailored. Like the county in *Galberaith*, Neenah bans *all* off-premises signs, not just large and immobile billboards. Neenah's Ordinance also displays "a hostility to signs in general and to commercial signs in particular." *See Galberaith*, 647 S.E.2d at 27. The Ordinance states, for example, that "[n]ormally [single- and two-family districts] do not allow signs." Ordinance § 24-182(intro.). It also states that high-density residence districts "are similar to both One- and Two-Family Districts in that signs are not normally allowed." Ordinance § 24-183(intro.). The Ordinance denigrates commercial signs in particular by asserting that they need more regulation than non-commercial signs. *See, e.g.*, Ordinance § 24-1(1)(h). Neenah's ban on off-premises signs, which is part of Neenah's general ban on signs, is unconstitutional.

Metromedia does not apply here because Ordinance § 24-107(2) prohibits any off-premises sign, not just billboards. This ban applies to virtually any sign, however small and wherever located, that directs a viewer to an off-site location. Other courts have recognized that *Metromedia* is limited to billboards. "*Metromedia* only established 'the law of billboards,' 453 U.S. at 501, and expressly recognized the inherently unique concerns in regulating billboards." *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 593 (4th Cir. 1993) (citation omitted). "[B]oth the plurality opinion and concurring opinion [in *Metromedia*] recognized the inherently unique qualities of billboards." *Id.* at 592 n.4. Importantly, the *Metromedia* Court "defin[ed] billboards as 'large, immobile and permanent structure[s].'" *Id.* at 593 (second alteration in original) (quoting *Metromedia*, 453 U.S. at 501, 502). In other words, "[t]he *Metromedia* Court began by limiting its holding to billboard advertising." *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 907 (9th Cir. 2009) (citing *Metromedia*, 453 U.S. at 501). "This distinction is significant because billboards are fixed, permanent structures that are more intrusive to community

aesthetics than portable sandwich boards" or other small signs. *Ballen v. City of Redmond*, 466 F.3d 736, 744 (9th Cir. 2006). *Metromedia* thus does not apply to small signs on residential property or signs on parked vehicles, for example. *See Arlington Cnty.*, 983 F.2d at 593 & n.5; *Pagan*, 492 F.3d at 774–75.

In short, Neenah's sweeping ban on off-premises signs is not narrowly tailored to achieving Neenah's asserted interests. Ordinance § 24-107(2) is thus unconstitutional. This Court should join *Galberaith* and *Park Outdoor* in striking down an overly broad ban on off-premises signs. The Minks and Novaks are entitled to summary judgment on Claim Two.

III. Neenah unconstitutionally limits residential property to one portable yard sign.

Neenah generally limits residential property to one portable yard sign. Ordinance §§ 24-182(5)(intro.), 24-183(5)(intro.). This one-sign limit violates the First Amendment under either strict or intermediate scrutiny.

A. Neenah's one-portable-sign limit is subject to, and fails, strict scrutiny.

There are two categories of speech restrictions that are content based and thus subject to strict scrutiny. *Reed*, 576 U.S. at 163–64. In particular, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Id.* at 166.

Under the first category, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64.

Under the second category, a facially-content-neutral government regulation of speech "will be considered content-based" if it "cannot be 'justified without reference to the content of the regulated speech.'" *Id.* at 164 (citation omitted). "Those laws, like those that are content based on their face, must also satisfy strict scrutiny." *Id.*

As relevant here, a sign ordinance is facially content based if it has different rules for such things as real-estate signs, directional signs, non-commercial signs, holiday decorations, and flags. *See, e.g.*, *Reed*, 576 U.S. at 164–65 (directional signs); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 707–08 (6th Cir. 2020) (directional signs, real-estate signs, non-commercial signs, holiday signs, and flags); *Camp Hill Borough Republican Ass'n v. Borough of Camp Hill*, 665 F. Supp. 3d 617, 631–32 (M.D. Pa. 2023) (holiday decorations and directional signs), *appeal filed* (April 21, 2023).

Here, Neenah's one-portable-sign limit is facially content based because it applies differently to holiday decorations, commercial signs, and flags. The Ordinance seemingly exempts holiday decorations and non-commercial flags from regulation altogether. *See* Ordinance § 24-3 (defining "*Sign*" and exempting holiday decorations, non-commercial flags, and other things). So, for example, the Ordinance seemingly *allows* a person to have an unlimited number of holiday-decoration portable signs in their yard, such as "Merry Christmas" signs. Yet the Ordinance would *ban* that person from having two or more portable yard signs that convey certain other messages (such as a sign that reads "End the War" next to a sign that reads "Support Our Troops"). Likewise, the Ordinance would seemingly limit a residential property to just one portable *commercial* flag while providing no limit to the number of *non-commercial* flags. *See id.* This differential treatment for holiday signs and non-commercial flags is facially content based. The City's one-portable-sign limit is therefore subject to strict scrutiny.

There is a second reason why this one-sign limit is content based: its preferential treatment for real-estate signs "cannot be 'justified without reference to the content of the regulated speech.'" *See Reed*, 576 U.S. at 164 (citation omitted). As noted, "strict scrutiny applies . . . when the purpose and justification for the law are content based," even if the law is facially content neutral. *Id.* at 166. As relevant here, the Ordinance states that "[w]hen a property is actively marketed for sale, an additional portable sign, not to exceed ten (10) square feet and six (6) feet in height shall be allowed. The sign shall be removed no more than thirty (30) days after the sale, rental or lease has been accomplished." Ordinance §§ 24-182(5)(b), 24-183(5)(b).

Neenah's purpose for allowing for-sale properties to have an "additional" yard sign is content based. The only conceivable purpose for this exception is to allow a for-sale property to have a "For Sale" sign even if that property already has another portable yard sign. Indeed, the prior version of the Ordinance explicitly allowed a residential property to have one or two real-estate signs in addition to one portable yard sign.[9] (*See* R. 15:10–11.) Although this exception might be facially content neutral now, it has a content-based purpose under *Reed*, 576 U.S. at 164.[10]

Strict scrutiny thus applies to Neenah's one-portable-sign limit for two independent reasons: it is facially content based, and its purpose is content based. Under strict scrutiny, a

[9] "In interpreting an ordinance, the rules of statutory construction apply." *Schroeder v. Dane Cnty. Bd. of Adjustment*, 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999). When interpreting a statute, courts may consider prior versions of the statute to ascertain its plain meaning. *Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶ 8, 344 Wis. 2d 278, 822 N.W.2d 491.

[10] Although this case does not challenge Neenah's exception for an "additional" sign at a for-sale property, that exception is still relevant when determining whether the general one-portable-sign limit is content based. "[W]hen determining whether a provision is content neutral, the court may look beyond the challenged portions of the regulation." *Camp Hill Borough Republican Ass'n v. Borough of Camp Hill*, 665 F. Supp. 3d 617, 631 (M.D. Pa. 2023), *appeal filed* (April 21, 2023). The United States Supreme Court followed that analytical approach in *Reed*. *Id.*

content-based restriction on speech "must be the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478.

Neenah's one-portable-sign limit fails strict scrutiny at the outset because Neenah has not identified any compelling government interest. Notably, traffic safety and aesthetics "are not compelling governmental interests." *Whitton*, 54 F.3d at 1409; *accord Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267–68 (11th Cir. 2005); *Deida v. City of Milwaukee*, 176 F. Supp. 2d 859, 869 (E.D. Wis. 2001); *Collier v. City of Tacoma*, 854 P.2d 1046, 1054–55 (Wash. 1993).

Because Neenah's one-portable-sign limit fails strict scrutiny, the Minks and Novaks are entitled to summary judgment on Claim Three.

B. If intermediate scrutiny applies to Neenah's one-portable-sign limit, it fails that test.

Neenah's one-portable-sign limit fails intermediate scrutiny if that test applies here. As noted earlier, "signs are a form of expression protected by the Free Speech Clause" of the First Amendment. *Gilleo*, 512 U.S. at 48. "Communication by signs and posters is virtually pure speech." *Arlington Cnty.*, 983 F.2d at 593. Homeowners may "express their views by posting political signs in their yard," for example. *Id.* at 595.

As the Supreme Court has observed, "residential signs have long been an important and distinct medium of expression." *Gilleo*, 512 U.S. at 55. "Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community." *Id.* at 54. "Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes." *Id.* at 55. "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or

picture by other means." *Id.* at 56. "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *Id.* at 58 (citation omitted).

Consistent with the Supreme Court's "reverence for residential signs" in *Gilleo*, "many other courts . . . have struck down bans on yard signs," including limits on the number of allowable signs. *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 390 (6th Cir. 1996) (citing *Arlington County* and other cases).

Arlington County is highly instructive here. In that case, the court held that a county ordinance's "two-sign limit violated the First Amendment." *Arlington Cnty.*, 983 F.2d at 595. The court "assume[d] for purposes of analysis that [the challenged ordinance] provisions are content neutral" and thus applied intermediate scrutiny. *Id.* The court concluded that the county's two-sign limit on yard signs was not narrowly tailored because the county could have promoted traffic safety by regulating signs' design, condition, and distance from the street. *Id.* The court also noted that "[p]rivate property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." *Id.* at 594 (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984)).

Here, for the same reasons, Neenah's one-portable-sign limit in Ordinance §§ 24-182(1) and 24-183(1) is unconstitutional. This one-sign limit restricts speech more—and thus offends the First Amendment even more—than the *two*-sign limit in *Arlington County* did. As discussed earlier, Neenah protects its interests in traffic safety and aesthetics by regulating the size of signs, imposing setback requirements for ground signs, and banning floodlighted, moving, and unclean signs. *See* Ordinance §§ 24-159(4), 24-107(6)–(7), 24-82, 24-83, 24-182(4), 24-183(4). And "individual 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 Minks and Novaks are entitled to summary judgment on Claim Three. Neenah's one-portable-sign limit is subject to and fails strict scrutiny. Even if intermediate scrutiny applies, the one-portable-sign limit fails that test because it is not narrowly tailored.

IV. Neenah unconstitutionally imposes a 30-day limit on portable yard signs.

Neenah generally imposes a duration limit on portable yard signs, allowing them to be posted in residential districts for only 30 days within a 90-day period. Ordinance §§ 24-182(5), 24-183(5). That time limit is unconstitutional under either strict or intermediate scrutiny.

A. Neenah's duration limit for portable yard signs is subject to, and fails, strict scrutiny.

As noted above, 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." *See Reed*, 576 U.S. at 169. Content-based time limits are one form of differential treatment that triggers strict scrutiny. *See id.* at 159–61, 164–65. In other words, a sign ordinance is content based if it imposes different time limits based on the subject matter of 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. And, more generally, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Reed*, 576 U.S. at 166.

Here, the 30-day limit in Ordinance §§ 24-182(5) and 24-183(5) is facially content based because its applicability hinges on the message conveyed or topic mentioned on a sign. Again, a sign ordinance is content based if it has different rules for such things as directional signs, flags,

non-commercial signs, and holiday decorations. *See, e.g.*, *Reed*, 576 U.S. at 164–65 (directional signs); *Int'l Outdoor*, 974 F.3d at 707–08 (directional signs, non-commercial signs, holiday signs, and flags). Neenah exempts several categories of signs from any time limit, including directional signs on residential property. *See* Ordinance §§ 24-133, 24-182(6), 24-183(6). And, as noted above, Neenah also exempts things like holiday signs and non-commercial flags from any time limits. *See* Ordinance § 24-3 (defining "*Sign*" and exempting holiday decorations, non-commercial flags, and other things). The 30-day limit in Ordinance §§ 24-182(5) and 24-183(5) is content based and thus subject to strict scrutiny because certain signs are exempt from this duration limit based on their content.

In addition to being facially content based, the 30-day limit in Ordinance §§ 24-182(5) and 24-183(5) has a content-based purpose. As discussed above, a residential property may have "an additional portable sign" if the "property is actively marketed for sale." Ordinance §§ 24-182(5)(b), 24-183(5)(b). That additional sign may remain posted indefinitely until "thirty (30) days after the sale, rental or lease has been accomplished." *Id.* That exception is content based because it "cannot be 'justified without reference to the content of the regulated speech.'" *See Reed*, 576 U.S. at 164 (cleaned up) (citation omitted). Neenah has only one conceivable purpose for allowing properties that are for sale to have an "additional" yard sign that exceeds the usual 30-day limit: to allow those properties to have a real-estate sign while they are for sale. Indeed, the prior version of the Ordinance explicitly exempted real-estate signs from the usual 30-day limit.[11] (R. 15:10.) Although this exception for real-estate signs might be facially content neutral now, it has a content-based purpose under *Reed*, 576 U.S. at 164.

[11] When interpreting an ordinance, a court may consider prior versions of the ordinance. *See supra* note 9. And when determining whether a challenged ordinance provision is content neutral, a court may look beyond the challenged provision. *See supra* note 10.

Strict scrutiny thus applies to Neenah's 30-day limit for two independent reasons: it is facially content based, and its purpose is content based. Under strict scrutiny, a content-based restriction on speech "must be the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S. at 478.

The 30-day limit in Ordinance §§ 24-182(5) and 24-183(5) fails strict scrutiny at the outset because Neenah has not identified any compelling government interest. *See supra* p. 21. This 30-day limit violates the First Amendment. The Minks and Novaks are thus entitled to summary judgment on Claim Four.

B. If Neenah's 30-day limit for portable yard signs is subject to intermediate scrutiny, it fails that test.

If intermediate scrutiny applies to Neenah's 30-day limit for portable yard signs, it fails that test. To be narrowly tailored under intermediate scrutiny, the government may not "burden substantially more speech than is necessary to further the government's legitimate interests." *See McCullen*, 573 U.S. at 486 (citation omitted). The Ordinance fails that test.

The United States Supreme Court has "acknowledged the unique place of yard signs in [*Gilleo*]." *City of Euclid*, 88 F.3d at 389. As noted above, "residential signs have long been an important and distinct medium of expression." *Gilleo*, 512 U.S. at 55. In addition, "[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.* at 57. "Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means." *Id.*

Consistent with the *Gilleo* Court's "reverence for residential signs," "many other courts . . . have struck down bans on yard signs," including time limits on signs. *City of Euclid*, 88 F.3d at

389–90 (collecting cases). In fact, "durational limits on signs have been repeatedly declared unconstitutional." *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000).

Although the Supreme Court in *Gilleo* struck down "a nearly total ban on residential signs," "the language of the Court's opinion leaves little room to argue that an extended durational ban on such signs, whether the message supports a cause or a political candidate, is any more acceptable." *Curry v. Prince George's Cnty.*, 33 F. Supp. 2d 447, 454 (D. Md. 1999). And although *Gilleo* allows cities to impose "size, shape and location restrictions upon campaign signs, they may not include durational ones." *Id.* at 454–55. The reasoning of *Gilleo* applies to extended durational limits on yard signs because such limits "are bans nonetheless." *Id.* at 455.

Here, the 30-day limit in Ordinance §§ 24-182(5) and 24-183(5) is unconstitutional. By allowing a portable yard sign on residential property for 30 days within a 90-day period, Neenah *bans* such signs for 60 days out of every 90 days. For two-thirds of the time, a Neenah resident is banned from displaying a small yard sign to convey his or her views on important social, economic, or political issues. Given the strong constitutional protection afforded to yard signs, this 30-day limit burdens substantially more speech than necessary.

The nature of the 30-day limit shows that it is not narrowly tailored to achieving traffic safety in particular. "Once political signs are allowed on a temporary basis, 'it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety.'" *Collier*, 854 P.2d at 1056 (quoting *Van v. Travel Info. Council*, 628 P.2d 1217, 1225 (Ore. Ct. App. 1981)). "It is apparent that other restrictions on outdoor advertising structures such as spacing, size and lighting requirements are more closely related to the promotion of safe driving conditions." *Van*, 628 P.2d at 1225.

That reasoning applies here. As noted earlier, Neenah regulates the size of signs, imposes setback requirements for ground signs, and bans floodlighted, moving, and unclean signs. *See* Ordinance §§ 24-159(4), 24-107(6)–(7), 24-82, 24-83, 24-182(4), 24-183(4). Portable yard signs on residential property are limited to six square feet. Ordinance §§ 24-182(5), 24-183(5). If such portable signs are compelling public hazards, it is unclear why Neenah would allow them at all, let alone allow them to be erected over and over again after being removed for 60-day periods. Motorists face a "universe of distractions" on city streets. *Baldwin v. Redwood City*, 540 F.2d 1360, 1370 (9th Cir. 1976). Small yard signs on residential properties are tiny specks in that universe.

Neenah's 30-day limit is not narrowly tailored to aesthetic interests, either. As noted above, "individual 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.* In addition, Neenah bans damaged and unclean signs. Ordinance §§ 24-82, 24-83. And the types of signs subject to the revolving 30-day limit (such as ideological signs or signs advertising an on-premises business) are "no greater an eyesore" than signs that are exempt from this 30-day limit (such as directional signs). *See Reed*, 576 U.S. at 172 (citation omitted).

In short, the 30-day limit fails intermediate scrutiny because it is not narrowly tailored. Neenah has other means available for promoting its asserted interests.

* * *

The Minks and Novaks are entitled to summary judgment on Claim Four. Neenah's 30-day limit for yard signs is subject to and fails strict scrutiny. Even if intermediate scrutiny applies, the 30-day limit fails that test because it is not narrowly tailored.

V. Neenah'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 for two independent reasons: it gives unbridled discretion to government officials, and it is content based.

A. Prior restraints on speech are generally unconstitutional.

If an "ordinance regulates First Amendment activities 'the burden shifts to the government to defend 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). The government thus has the burden of proving the constitutionality of a prior restraint on speech, such as a permit requirement that restricts speech. *See id.* at 103–04. "A prior restraint is any law 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Int'l Outdoor*, 974 F.3d at 697 (citation omitted).

"One obvious implication of [the First Amendment] is that the government usually may not impose prior restraints on speech." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). Indeed, "there is a 'heavy presumption' against the validity of a prior restraint" on speech, such as a permit requirement. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (citation omitted).

A prior restraint on speech "must meet certain constitutional requirements." *Forsyth Cnty.*, 505 U.S. at 130. As relevant here, a permit scheme "may not delegate overly broad licensing discretion to a government official." *Id.* Thus, "'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969)). A prior restraint on speech is unconstitutional if it "involves appraisal

of facts, the exercise of judgment, and the formation of an opinion." *Id.* (citation omitted). "Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Id.* at 130.

Here, Neenah's permit scheme fails those requirements. It is thus unconstitutional.

B. Neenah's permit requirement is unconstitutional because it lacks narrow, objective, and definite standards.

Neenah requires a permit for some signs: "It shall be unlawful for any person to erect, construct, relocate, enlarge or structurally modify any sign in the City, or cause the same to be done without first obtaining a sign permit for each sign as required by this chapter." Ordinance § 24-27. The Ordinance tries to explain when a sign permit is *not* required: "[c]ertain signs are generally temporary in nature, others are intended to communicate non-commercial speech or direct, and are not used to identify a business or for advertising. Still others are of such a nature as to not be obtrusive or otherwise negatively impact public welfare. Such signs do not require a sign permit, and as such are 'exempt'." Ordinance § 24-131.

Those standards are too subjective and indefinite to withstand constitutional scrutiny. Courts have repeatedly declared similar permit schemes unlawful. In *Shuttlesworth*, 394 U.S. at 150–51, the United States Supreme Court held that an ordinance conferred unbridled discretion when it required a city commission to issue a parade permit unless in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." In *International Outdoor*, 974 F.3d at 698, an ordinance's permit requirement for signs was unlawful because it "contained multiple vague and undefined criteria, such as 'public interest,' 'general purpose and intent of this Chapter,' 'adversely affect[ing],' 'hardship,' and 'practical difficulty.'" In another case, a permit requirement for signs was unlawful because it gave city

officials "discretion to deny a permit on the basis of ambiguous and subjective reasons," such as "whether a particular structure or sign will be harmful to the community's health, welfare, or 'aesthetic quality.'" *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818–19 (9th Cir. 1996).

Here, the Ordinance's permit requirement similarly uses ambiguous and subjective phrases, including "generally temporary," "not obtrusive," "negatively impact," and "public welfare." Ordinance § 24-131. This Ordinance provision—which tries to explain which signs do not need a permit—lacks narrow, objective, and definite standards. Instead, it requires a Neenah official to appraise facts, exercise judgment, and form an opinion. It is therefore unconstitutional. *See Forsyth Cnty.*, 505 U.S. at 131.

The Minks and Novaks are entitled to summary judgment on Claim Five for this reason.

C. Also, Neenah's permit requirement is unconstitutional because it is content based.

"To be constitutional, a prior restraint must be *content-neutral*, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Int'l Outdoor*, 974 F.3d at 697 (emphasis added) (citing *Forsyth Cnty.*, 505 U.S. at 130).

Because Neenah has the burden of proving that its permit scheme is constitutional, the Minks and Novaks will address the "narrowly tailored" and "ample alternatives" requirements in a reply brief if Neenah develops an argument on those requirements.

The more-straightforward requirement is content neutrality. As relevant here, a permit requirement for signs is content based if it treats commercial speech differently than non-commercial speech, such as by exempting non-commercial signs from the permit requirement. *See Int'l Outdoor*, 974 F.3d at 707–08; *see also GEFT Outdoor, LLC v. Monroe Cnty.*, 62 F.4th 321, 330 (7th Cir. 2023) (noting that the permit requirement in *International Outdoor* was unlawful

because it exempted non-commercial speech and certain other signs). A permit requirement can also be content based by treating flags differently from other signs. *See Int'l Outdoor*, 974 F.3d at 707–08.

Here, like in *International Outdoor*, Neenah's permit scheme is unlawful because it is content based. The Ordinance states that "signs do not require a sign permit" if they "are intended to communicate non-commercial speech or direct, and are not used to identify a business or for advertising." Ordinance § 24-131. This provision treats commercial speech differently than non-commercial speech. Relatedly, the Ordinance states that "[f]lags which do not contain a commercial message, commercial logo, or commercial colors" are *not* signs. Ordinance § 24-3. The Ordinance thus treats *commercial* flags as signs and requires permits for them (at least in some instances), while *non-commercial* flags are exempt from the permit requirement because they are not "signs." In this respect too, Neenah's permit requirement is content based and thus unlawful.

* * *

The Minks and Novaks are entitled to summary judgment on Claim Five for two independent reasons: (1) the Ordinance's permit requirement lacks narrow, objective, and definite standards; and (2) this permit requirement is content based.

CONCLUSION

This Court should grant the Minks' and Novaks' motion for summary judgment.

Dated this 7th day of March 2024.

Electronically signed by
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