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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' REPLY BRIEF SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

ARGUMENT 3

I. Neenah unconstitutionally bans speech on parked vehicles and trailers. 3

II. Neenah unconstitutionally bans off-premises signs. 6

III. Neenah unconstitutionally limits residential property to one portable yard sign. 8

A. Neenah's one-portable-sign limit is subject to, and fails, strict scrutiny. 8

B. If intermediate scrutiny applies to Neenah's one-portable-sign limit, it fails that test. 10

IV. Neenah unconstitutionally imposes a 30-day limit on portable yard signs. 11

A. Neenah's duration limit for portable yard signs is subject to, and fails, strict scrutiny. 11

B. If Neenah's 30-day limit for portable yard signs is subject to intermediate scrutiny, it fails that test. 12

V. Neenah's permit requirement is an unconstitutional prior restraint on speech. 13

A. First Amendment safeguards against prior restraints apply here. 13

B. Neenah's permit requirement is unconstitutional because it lacks narrow, objective, and definite standards. 15

C. Also, Neenah's permit requirement is unconstitutional because it is content based. 16

VI. Neenah's argument about facial challenges is meritless. 17

CONCLUSION 17

## ARGUMENT

Neenah has fallen far short of proving its sign code satisfies the First Amendment beyond a reasonable doubt. Neenah offers conclusory arguments without any substantive evidence. If that effort were sufficient, virtually any sign code would be constitutional. Courts, however, routinely strike down sign codes like Neenah's. This Court should follow their lead.

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

In defending its vehicle-sign ban, Neenah claims it may meet its burden under intermediate scrutiny by relying only on common sense. (R. 74:8.) Neenah is wrong. It must "present evidence to meet its burden of showing that the provisions [the Plaintiffs challenge] are narrowly tailored to meet a significant government interest." *See Sauk Cnty. v. Gumz*, 2003 WI App 165, ¶ 30, 266 Wis. 2d 758, 669 N.W.2d 509. Neenah may *not* "appeal to 'common sense' in the absence of evidence." *See id.* To justify vehicle-sign restrictions, a city must produce evidence. *See, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774–76 (6th Cir. 2007). The court of appeals implied as much in *City of Milwaukee v. Blondis*, 157 Wis. 2d 730, 731, 460 N.W.2d 815 (Ct. App. 1990), where the city "failed to meet its burden of showing" a ban on "For Sale" signs on vehicles was constitutional.

Neenah asserts that even if evidence were necessary, it had no opportunity to furnish any. (R. 74:8.) But Neenah *did* file an affidavit along with its response brief. (R. 75.) That affidavit was devoid of substance; it merely asserted that a copy of a case was attached. (R. 75.)

Even assuming a commonsense approach could suffice here, Neenah fails to show how common sense proves its vehicle-sign ban is narrowly tailored to any asserted interest. As for Neenah's first asserted interest—reducing clutter—Neenah simply states that signs are "designed to distract a person, and distractions contribute to visual clutter. No empirical evidence is necessary to establish such a simple concept." (R. 74:9.) But the Ordinance does not prohibit all signs, and

Neenah does not explain why the signs it selectively bans contribute any more to cluttered aesthetics than the signs it allows.

Neenah also asserts that vehicles with signs present safety hazards when parked on a road because they distract drivers. (R. 74:6.) But Neenah does not explain why vehicles with signs are any more distracting than vehicles without signs. Common sense counsels that a signless vehicle parked on the road poses the same physical danger to passing drivers.

But Neenah errs even further: it does not explain why a vehicle with a *prohibited* sign poses a greater danger than a vehicle with a *permitted* sign. For instance, the Ordinance allows small signs on cars. (*See* R. 74:9; Ordinance § 24-3.i.) But small signs can pose a greater danger to drivers than larger signs. Whereas larger signs can be read easily, small signs might require closer attention from a reader, creating more of a distraction.

Neenah also never disputes that the Ordinance allows signs that are more distracting to drivers than some signs it bans. For instance, large signs can stand in new subdivisions and athletic fields. *See* Ordinance §§ 24-132(2)(a); 24-182(5)(c). Common sense indicates those signs—so big and easy to spot—are more distracting to passersby than the vehicle signs the Ordinance bans.

As for Neenah's third justification—that the Ordinance preserves property values—the Plaintiffs have explained that this end on its own cannot justify speech-inhibiting ordinances. A city must first prove that "individual residents," who "have strong incentives to keep their own property values up," cannot do so without governmental regulation. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). Not only does Neenah fail to prove that this incentive is insufficient here; Neenah also fails to explain at all how its vehicle-sign ban affects property values.

Neenah's final asserted interest is to preserve public parking. On this score, the Ordinance is over-inclusive. Ordinance § 24-107(9) applies to "any sign or messaging device" on many

vehicles and trailers merely *visible* from a street. As a result, the Ordinance applies to vehicles and trailers on private property, such as a driveway. But these vehicles have no effect on the availability of public parking, so the Ordinance is over-inclusive when directed toward this interest.

Neenah is wrong on a number of additional points in its response brief. For instance, Neenah argues that the vehicle-sign ban is no different from a setback requirement, something that is legal under the First Amendment. (R. 74:6.) This argument is illogical: the Ordinance, as mentioned, regulates signs that are already set back—e.g., signs on vehicles parked in driveways, garages, and other private property. That aside, even if Neenah were correct that its vehicle-sign ban is nothing more than a setback requirement, that would not be enough to save the ban. The vehicle-sign ban in *Blondis* applied only to vehicles parked on a road, making that ban much more similar to a setback requirement than the vehicle-sign ban at issue here. *Blondis*, 157 Wis. 2d at 736. But the *Blondis* ordinance, despite this characteristic, still got struck down. *Id.* at 738.

Addressing the Plaintiffs' argument that Ordinance § 24-107(9) is overbroad, Neenah asserts that the provision applies only to commercial speech on commercial vehicles. (R. 74:9.) Neenah is wrong. To reach this conclusion, Neenah relies on the section's title, "Advertising vehicle sign." (R. 74:9.) But "titles are not dispositive" indicators of meaning. *State v. Lopez*, 2019 WI 101, ¶ 25, 389 Wis. 2d 156, 936 N.W.2d 125. Neenah fails to develop any argument beyond its appeal to the provision's title. Courts "will not address undeveloped arguments." *Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶ 180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768. And besides, the plain meaning of this provision supports the Plaintiffs' reading. In its first provision, Ordinance § 24-107(9) contains no limiting language. Then, in its subsequent provisions, it *exempts* commercial vehicles from its scope. Ordinance § 24-107(9)a. Taken together, these provisions indicate that all vehicles *except*

*for* commercial vehicles fall under the general ban. The plain meaning thus contradicts Neenah's hyper-narrow construction.

With that wide scope, Ordinance § 24-107(9) would ban a political bumper sticker or a "Jesus fish" bumper logo on many vehicles and trailers. (R. 72:12–13.) Yet Neenah asserts those things are "small signs," which are not banned. (R. 74:9.) Ordinance § 24-3(i) might exempt "signs less than one square foot," but Ordinance § 24-107(9) restricts "messaging devices" of any type or size. Political bumper stickers and Jesus fish convey messages, so they are messaging devices subject to the Ordinance.[1] The Ordinance would also apply to a political sign placed on the rear windshield of a parked vehicle if the sign were larger than one square foot.

Neenah tries to distinguish *Blondis* and *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076 (C.D. Cal. 2000), by arguing the ordinances in those cases banned only "For Sale" signs, while the Ordinance here bans far more. (R. 74:6–8.) But this difference does not render either case inapplicable. It shows the Ordinance here is more over-inclusive, and thus more impinging on speech, than the ordinances in *Blondis* and *Burkow*. In attempting to distinguish these cases, Neenah only shows how far beyond constitutional bounds its Ordinance strays.

## II. Neenah unconstitutionally bans off-premises signs.

Neenah argues *Park Outdoor Advertising of New York, Inc. v. Town of Onondaga*, 708 F. Supp. 2d 241 (N.D.N.Y. 2010), is not persuasive because that case "improperly" required evidence. (R.74:10.) But the case that Neenah cites merely stated that one particular type of evidence—a study—was not necessary. *Adirondack Advert., LLC v. City of Plattsburgh*, No. 8:12-CV-1684, 2013 WL 5463681, at *6 n.4 (N.D.N.Y. 2013). The court there did *not* assert that no

[1] The Ordinance also fails to recognize that some types of bumper stickers promote safety, such as "Student Driver" stickers, "Baby on Board" stickers, or "How's My Driving" stickers that enable the public to report unsafe driving. Restricting these bumper stickers works against Neenah's safety interest, further showing that Neenah's vehicle-sign ban is over-inclusive.

evidence whatsoever is required. *Park Outdoor Advertising* and *Adirondack Advertising* are therefore consistent with the Plaintiffs' argument here because the Plaintiffs do not assert that Neenah must put forward a study to justify its Ordinance. They assert only that Neenah must put forward evidence of some sort to meet its burden, which Neenah has not done.

Neenah also tries to distinguish *Fulton County v. Galberaith*, 647 S.E.2d 24 (Ga. 2007), by arguing the ordinance there prohibited commercial *and* non-commercial speech.[2] (R. 74:11.) Neenah argues its off-premises-sign ban is limited to commercial speech. (R. 74:11.) Even if Neenah's ban were so limited, it would still not be narrowly tailored. And it is not limited to commercial speech. "Off-premises signs" include those "direct[ing] persons to a different location from where the sign is located." Ordinance § 24-3. This broad definition includes non-commercial signs—like an off-premises sign directing readers to a library for a book club or to a park for a child's birthday party. *Galberaith* is therefore persuasive and directly on-point here.

Neenah also asserts that athletic-field signs, real-estate signs, and wall signs are distinguishable from off-premises signs. It claims those allowable signs are "self limited," whereas off-premises signs can excessively proliferate, causing visual clutter. (R. 74:11.) Neenah does not recognize that these "self limited" signs can also proliferate excessively. True, "only so many signs can be displayed at an athletic field" and "100 square-foot signs are only allowable on a new real estate that is being developed." (R. 74:11.) But athletic complexes and developing properties can be limitless. Thus so too can athletic-field signs, real-estate signs, and wall signs.

In conclusory fashion, Neenah argues that permissible directional signs are "hardly a distraction" and therefore the Ordinance is not under-inclusive. (R. 74:12.) It is unclear how a

[2] Neenah also calls the Plaintiffs' reliance on *Galberaith* "misguided" because the case is from Georgia. (R. 74:11.) But the Plaintiffs merely cite and discuss the case for its persuasive value (R.72:16), which they are permitted to do. *See Russ ex rel. Schwartz v. Russ*, 2007 WI 83, ¶ 34 n.9, 302 Wis. 2d 264, 734 N.W.2d 874.

directional sign is any less distracting than an off-premises sign—a type of directional sign. Neenah has failed to prove its off-premises-sign ban is not under-inclusive.

Neenah suggests that *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), and *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), support its off-premises-sign ban. (R. 74:12.) Neenah is wrong. *Central Hudson* did not involve an off-premises-sign ban. In *Reagan*, the Court held that the City of Austin's off-premises-sign ban was facially content neutral, so it remanded for the federal appeals court to determine whether the ordinance had a content-based purpose and, if not, whether it satisfied intermediate scrutiny. *Reagan*, 596 U.S. at 76–77. These cases do not relieve Neenah of its burden to prove its off-premises-sign ban is constitutional.

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

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

As explained, strict scrutiny applies to Neenah's one-sign limit on portable yard signs for two reasons: it is facially content based, and it has a content-based purpose. (R. 72:18–20.)

The one-sign limit is facially content based because, for example, it would allow a homeowner to display two "Merry Christmas" holiday signs but would prohibit him from displaying a "Support Our Troops" sign next to an "End the War" sign. (R. 72:19.) Neenah does not really dispute this point. Neenah suggests that a homeowner could combine the messages of "Support Our Troops" and "End the War" onto a single sign, but Neenah does not dispute that the Ordinance would generally prohibit a homeowner from simultaneously displaying both of these yard signs. (R. 74:13–14.) Neenah confusingly argues that "holiday decorations and flags are not exemptions in the Ordinance, rather, they are not considered 'Signs' at all for purposes of the Ordinance." (R. 74:13–14.) Neenah thus does not dispute that the Ordinance allows a homeowner

to simultaneously display multiple holiday yard signs. "Unrefuted arguments are deemed conceded." *State v. Verhagen*, 2013 WI App 16, ¶ 38, 346 Wis. 2d 196, 827 N.W.2d 891. Neenah thus tacitly concedes that the one-sign limit is facially content based.

The one-sign limit is also content based because its purpose is to allow residential property that is for sale to have a "For Sale" sign *in addition to* any other yard sign. (R. 72:20.) Neenah concedes that the Ordinance allows for-sale properties to have an additional yard sign because "the sign has a function of alerting an individual that the property is for sale/rent/etc." (R. 74:19–20.) Neenah thus effectively concedes that the one-sign limit has a content-based purpose.

Neenah argues that the one-sign limit is *facially* content neutral, reasoning that "nowhere in [Ordinance] §§ 24-182 or 24-183 is there any discussion on the content of the signs that may be displayed." (R. 74:14.) But the one-sign limit is facially content based because it treats holiday signs and flags differently than other signs, and its exemption for properties that are for sale has a content-based purpose. For each reason, strict scrutiny applies.

Neenah's one-paragraph argument applying strict scrutiny is conclusory and falls far short of meeting this "stringent standard." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018). To satisfy strict scrutiny, a regulation "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The regulation must be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end." *State v. Baron*, 2009 WI 58, ¶ 45, 318 Wis. 2d 60, 769 N.W.2d 34 (citation omitted). Neenah has not cited any authority for the notion that its "interest of protecting its citizens and its property value" is compelling enough to satisfy strict scrutiny. (R. 74:15.) Rather, courts have held that things like traffic safety are not compelling enough to justify content-based sign codes. (R. 72:21.) Nor has Neenah shown that its one-sign limit is the least restrictive means of achieving its interests.

Neenah claims that "a property is allowed additional means of expression." (R. 74:15.) But the existence of other avenues of expression says nothing about whether Neenah's one-sign limit is necessary and the least restrictive means available.

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

In trying to distinguish *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), Neenah incorrectly asserts that "political speech is not affected in any way" by the one-sign limit. (R. 74:16.) Outside of an election campaign, though, the Ordinance generally bans Neenah residents from having more than one political sign in their yard, such as a "Support Our Troops" sign next to an "End the War" sign. Neenah does not really refute this point, as explained above. (*See also* R. 72:19; 74:14.) Neenah further argues that the court in *Arlington County* incorrectly required the government to introduce "empirical evidence." (R. 74:16.) But the court did not refer to "empirical evidence." Instead, the court held that the county had not met its burden of proof under intermediate scrutiny. Neenah bears the burden of proof here, even under intermediate scrutiny. Indeed, Neenah concedes that it has "the burden of proof to establish that the Ordinance is constitutional." (R. 74:29.) Neenah failed to prove that its one-sign limit is constitutional, just like Arlington County failed to prove its two-sign limit was constitutional.

Neenah disputes that "setback and size requirements are enough to address Neenah's traffic and aesthetic concerns" (R. 74:17), but it does not prove that those restrictions are inadequate.

Neenah's concern about the possibility of "dozens" of yard signs is a red herring. (R. 74:17.) Because "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, Neenah cannot just assume that residents would have dozens of yard signs if its

one-sign limit were invalidated. Besides, the issue here is not about how many yard signs Neenah must allow; the issue is whether Neenah's *one-sign limit* is constitutional. It is not.

Neenah suggests that "handing out fliers, posting online," and "clothing" are adequate alternatives to yard signs. (R. 74:18.) They are not. (*See* R. 72:21–22, 25.) "Residential 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." *Gilleo*, 512 U.S. at 57. "Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate." *Id.* "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.* Neenah has failed to prove beyond a reasonable doubt that its one-sign limit is constitutional.

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

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

As explained, strict scrutiny applies to Neenah's 30-day limit on portable yard signs for two reasons: it is facially content based, and it has a content-based purpose. (R. 72:23–24.)

The 30-day limit is facially content based because it does not apply to directional signs, holiday signs, and non-commercial flags. (R. 72:23–24.) Under *Reed v. Town of Gilbert*, 576 U.S. 155, 164–65 (2015), this exemption for directional signs alone requires strict scrutiny. (R. 72:23–24.) Neenah does not dispute this point. (*See* R. 74:18–21.) Indeed, Neenah seems to concede that directional signs do not have a time limit. (R. 74:21.) "Unrefuted arguments are deemed conceded." *Verhagen*, 2013 WI App 16, ¶ 38. Neenah thus tacitly concedes that strict scrutiny applies to the 30-day limit because it exempts directional signs.

The differential treatment for holiday signs and non-commercial flags also requires strict scrutiny. (R. 72:23–24.) Neenah repeats its confusing argument that "holiday and non-commercial flags are not exempted from the Ordinance, but rather, they are not considered 'Signs' as defined by Ordinance § 24-3." (R. 74:18.) Crucially, Neenah does *not* dispute that the 30-day limit does not apply to holiday signs and non-commercial flags. Neenah thus implicitly concedes this point. It does not develop a coherent argument for avoiding strict scrutiny.

Strict scrutiny applies to the 30-day limit for yet another reason: it has a content-based purpose. The Ordinance allows a for-sale residential property to have an *additional* yard sign for more than 30 days. This exemption's purpose is to allow a "For Sale" sign. (R. 72:24.) Neenah concedes the Ordinance allows for-sale properties to have an additional yard sign *for over 30 days* because "the sign has a function of alerting an individual that the property is for sale/rent/etc." (R. 74:19-20.) Neenah thus effectively concedes that the 30-day limit has a content-based purpose.

Neenah's argument applying strict scrutiny is conclusory, so Neenah falls short of meeting its demanding burden. (*See* R. 74:20–21.) Neenah argues the 30-day limit satisfies strict scrutiny "for the same reasons" its one-sign limit does. (R. 74:20.) That argument fails for the reasons explained above. Neenah cites no authority showing its generic interests in safety and aesthetics are compelling—because courts have held that those interests are *not* compelling. And Neenah has not shown that the 30-day limit is the least restrictive means to promote those interests.

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

Applying intermediate scrutiny, Neenah argues that the 30-day limit for portable yard signs involves "event-related restrictions." (R. 74:21.) But the general 30-day limit is not tied to any event. *See* Ordinance §§ 24-182(5), 24-183(5).

In an effort to distinguish the cases on which the Plaintiffs rely, Neenah incorrectly suggests the 30-day limit does not apply to political signs. (R. 74:21.) The general 30-day limit has no exemption for political signs. *See* Ordinance §§ 24-182(5), 24-183(5). (And if it had such an exemption, that content-based distinction would be another reason for applying strict scrutiny.)

Neenah claims the Plaintiffs "do not dispute" that Neenah can regulate "aesthetics and safety of its citizens." (R. 74:21.) Not quite. The Plaintiffs recognize that content-neutral sign restrictions comply with the First Amendment *only* when *narrowly tailored* to promote those interests. (R. 72:10.)

Neenah repeats its suggestion that alternative methods of communication, such as "hand out leaflets," are adequate. (R. 74:22.) That argument fails under *Gilleo*. *See supra* at 11.

Ultimately, Neenah has failed to prove beyond a reasonable doubt that its 30-day limit does not burden substantially more speech than necessary. Notably, Neenah has not proven that its other rules—such as setback requirements, bans on floodlighted and moving signs, and size restrictions—are inadequate to protect its interests in safety and aesthetics.

**V. Neenah's permit requirement is an unconstitutional prior restraint on speech.**

Neenah argues that its permit requirement for signs is not subject to the prior-restraint doctrine and, if it is, it satisfies constitutional requirements. Neenah is wrong on both fronts.

**A. First Amendment safeguards against prior restraints apply here.**

For two reasons, the prior-restraint doctrine applies to the Ordinance's permit requirement. First, the prior-restraint doctrine applies to commercial and non-commercial speech. Second, the Ordinance's permit requirement is not limited to commercial speech.

Turning to the first point, Wisconsin case law recognizes that the First Amendment protects commercial speech from prior restraints. In *Gumz*, an ordinance's "prohibition against advertising,

promoting, and selling tickets before a license is issued" was an invalid prior restraint. *Gumz*, 2003 WI App 165, ¶ 2. In *Blondis*, an ordinance imposed an unlawful "prior restraint restriction against . . . commercial activities." *Blondis*, 157 Wis. 2d at 737. Safeguards against prior restraints can apply even when "the government action at issue is the review of an applicant's qualifications for a business operating license." *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 105, 604 N.W.2d 870 (Ct. App. 1999). Because First Amendment safeguards still apply in that context, they necessarily also apply to prior restraints on a business's protected commercial speech.

Likewise, "[s]ome [federal] circuits have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech." *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (collecting cases); *see also, e.g.*, *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985) (noting the First Amendment protects against prior restraints "[w]ith respect to commercial and noncommercial speech alike"); *In re Mirant Corp.*, 334 B.R. 787, 792 (Bankr. N.D. Tex. 2005) (noting "a prior restraint on speech—even commercial speech—would ordinarily be offensive to the First Amendment of the Constitution").

Neenah cites *Central Hudson*, 447 U.S. at 561, and *City of Austin*, 142 S. Ct. at 1472, but those cases do not hold that the prior-restraint doctrine is inapplicable to commercial speech.

Neenah heavily relies on *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686 (6th Cir. 2022), but that case is distinguishable. *Kenjoh* was about qualified immunity. A qualified-immunity analysis requires a court to ask whether a constitutional right is "clearly established" in a certain jurisdiction. *Id.* at 693–94. In *Kenjoh*, the court held that Sixth Circuit cases did not clearly establish that the prior-restraint doctrine applies to commercial speech. *Id.* at 694. The present case is starkly different. For one thing, it is not in the Sixth Circuit. For another, it does not involve a

qualified-immunity analysis. To the extent the *Kenjoh* court suggested that the prior-restraint doctrine does not apply to commercial speech, it was wrong for the reasons stated above.

Even if the prior-restraint doctrine does not apply to commercial speech, it still applies to Neenah's permit requirement for signs. Neenah incorrectly assumes that its permit requirement applies only to commercial speech. Ordinance § 24-27 indicates that the permit requirement applies to "any sign." Likewise, Ordinance § 24-131 states that a permit is "not" required for any sign that (among other things) is "intended to communicate non-commercial speech" or is "not used to identify a business or for advertising." Removing the double negative, the Ordinance generally *requires* a permit for a sign that communicates commercial speech, identifies a business, or is used for advertising. But an advertisement is not necessarily commercial speech, *see Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983), and neither is a business's name, *see, e.g.*, *Kalman v. Cortes*, 723 F. Supp. 2d 766, 793 (E.D. Pa. 2010). Instead, commercial speech is narrowly defined as "speech that does no more than propose a commercial transaction." *Harris v. Quinn*, 573 U.S. 616, 648 (2014). Because Neenah's permit requirement applies to both commercial and non-commercial speech, the prior-restraint doctrine applies here.

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

Neenah's permit requirement is unconstitutional because Ordinance § 24-131—which explains what signs do not need a permit—contains vague and subjective language. Courts in several cases have struck down prior restraints that used similar language. (R. 72:29–30.) Neenah discusses those cases but offers no reason for distinguishing them. (R. 74:27–28.) This Court should follow those cases and declare Neenah's permit requirement unlawful.

Neenah cites other Ordinance provisions, but none of them salvage the unconstitutionally vague language in Ordinance § 24-131. None of those sections explain when a permit is required

or provide any definite standards for Neenah officials to apply. Ordinance § 24-28 simply states what content must be in a permit application; it does not provide any standards for Neenah officials to apply or clarify the vague language in section 24-131. Section 24-27 simply states that signs need a permit "as required by this chapter." Ordinance § 24-27. Section 24-31 merely states that a sign permit must be issued when, among other things, "the proposed sign is found to be in compliance with all appropriate laws and regulations of Neenah." Ordinance § 24-31. It provides no concrete standards. Neenah's general citations to Articles III, IV, V, VII, and VIII of the Ordinance also fail to uncover any definite standards. (*See* R. 74:28.)

Neenah argues its permit requirement is lawful because it allows applicants to appeal to the Zoning Board of Appeals. (R. 74:26, 28.) But appellate "review cannot substitute for concrete standards to guide the decision-maker's discretion." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 771 (1988). Concrete standards and the availability of appellate review are two *separate* requirements for a licensing scheme to satisfy the First Amendment. *City News & Novelty*, 231 Wis. 2d at 103–04. Even though the Ordinance's permit requirement allows for appellate review, it is unlawful because it lacks concrete standards.

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

A permit requirement for signs is unconstitutional if it has content-based exemptions, such as exemptions for non-commercial speech and holiday signs. *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 707–08 (6th Cir. 2020). Neenah's permit requirement exempts a sign that is "intended to communicate non-commercial speech." Ordinance § 24-131. And as Neenah seems to concede, the Ordinance does not apply to holiday signs at all. (R. 74:12–13, 18.) The Ordinance thus does not require a permit for holiday signs. The Ordinance's permit requirement is unconstitutional because it is "based on the content of the message." *See Forsyth Cnty. v.*

*Nationalist Movement*, 505 U.S. 123, 130 (1992). Neenah has not persuasively distinguished *International Outdoor* or shown that its permit requirement is content neutral. (*See* R. 74:24.)

**VI. Neenah's argument about facial challenges is meritless.**

Citing *United States v. Stevens*, 559 U.S. 460, 473 (2010), Neenah argues that the Plaintiffs must show that a "substantial number" of the Ordinance's applications are unconstitutional. (R. 74:29.) *Stevens* does not apply here because it involved the overbreadth doctrine, under which "broadly written statutes substantially inhibiting free expression should be open to attack even by a party *whose own conduct remains unprotected* under the First Amendment." *State v. Stevenson*, 2000 WI 71, ¶ 11, 236 Wis. 2d 86, 613 N.W.2d 90 (emphasis added). In *Stevens*, Stevens was charged with selling videos of dogfighting, in violation of a statute that banned the sale of videos depicting animal cruelty. *Stevens*, 559 U.S. at 464, 466. The Supreme Court allowed Stevens to bring a facial challenge to the statute because many of its applications (such as applying to hunting videos) would be unconstitutional, even though Stevens' dogfighting videos were not constitutionally protected speech. *See id.* at 472–77.

The present case is not like *Stevens*. The Plaintiffs are not challenging a prosecution by Neenah, nor have they engaged in unprotected speech.

**CONCLUSION**

This Court should grant the Plaintiffs' motion for summary judgment.

Dated this 23rd day of April 2024.

*Electronically signed by*

Scott E. Rosenow

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