IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CV-00504

WILLIAM DAVID BOWDEN, Plaintiff, v. TOWN OF CARY, Defendant.	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff William David Bowden ("Mr. Bowden"), angry at Defendant Town of Cary ("Town of Cary" or "Town") for its treatment of him in another matter, painted a protest sign on the side of his own house. The simple sign reads, "Screwed by the Town of Cary." The Town has claimed that Mr. Bowden's sign violates the Town's sign ordinance, and it threatens to fine Mr. Bowden hundreds of dollars a day if he does not remove the sign. By doing so, the Town is attempting to suppress core political speech directed at the Town, speech that is embarrassing to the Town, by resort to a lengthy sign ordinance that is indefinite and draconian. The First Amendment is designed to protect citizens against exactly that type of abuse, and the sign ordinance as applied to Mr. Bowden is unconstitutional.

UNDISPUTED FACTS

For several years, Mr. Bowden has been engaged in a dispute with the Town of Cary over water runoff from a road project. Specifically, Mr. Bowden claims that the Town's repaving and later widening of Maynard Road, which raised the road several feet where it passes in front of his house, have caused water runoff that has damaged his home. [Ex. A pp. 30-86 (Deposition of William David Bowden).][1] Mr. Bowden has repeatedly complained to the Town about the flooding at his home and repeatedly requested that the Town take various actions to remedy the flooding. [Ex. A pp. 30-86.]

As a result of what Mr. Bowden deems to be a lack of adequate resolution of the dispute, Mr. Bowden hired a sign painter to paint a protest sign on the front of his house on Friday, July 31, 2009. [Verified Compl. ("Compl.") ¶ 11.] The protest sign states, "Screwed by The Town of Cary," in pink and orange letters. [Compl. ¶ 12; Ex. A p. 105.] The letters range from about 14" tall to about 21" inches tall and the sign is about fifteen feet long at its widest. [Ex. A pp. 22-23; Ex. B (photos of the sign).]

Just hours after the sign was painted, the Town of Cary hand-delivered to Mr. Bowden a "Notice of Zoning Violation." [Ex. C pp. 12-18 (Deposition of Mike Bajorek); Ex. D (the notice).] The July 31, 2009 Notice of Zoning Violation stated that Mr. Bowden's residence "is in violation of the Town of Cary Sign Ordinance Section 9.3.2(S), Residential Signs." [Ex. D.]

In fact, the "Sign Ordinance" is a general term referring to various parts of the Town's twelve-chapter Land Development Ordinance ("LDO"), which governs all

[1] The exhibits referenced in this brief are attached to the motion for summary judgment.

aspects of land development and control in the Town. Five chapters are relevant in this case and to signs generally: Chapter 1 outlines general provisions, Chapter 3 outlines permitting procedures, Chapter 9 is entitled "Signs" and provides the substantive regulations at issue here, Chapter 11 details the enforcement mechanisms, and Chapter 12 provides definitions and rules of construction. [Ex. E (Chapter 1); Ex. F (Chapter 3); Ex. G (Chapter 9); Ex. H (Chapter 11); Ex. I (Chapter 12).] This brief refers to the sign-related provisions of these chapters collectively as the "Sign Ordinance."

The Sign Ordinance is lengthy, detailed, and restrictive. The Town's own designee admitted in a deposition that, "We have strong regu – sign regulations. It's one of the things that Cary is known for, so as compared to other communities, maybe they are more restrictive." [Ex. J p. 66 (Deposition of Town of Cary).] The Town even issued a policy statement in 2005 recognizing that "[t]he Town has intentionally adopted extremely restrictive regulations on signs in both residential and nonresidential areas...." [Ex. K.] That policy statement also describes the Town's desire to prevent certain "overly enthusiastic individual[s]" from expressing their messages too boldly. [Ex. K.] The Town has a long history of extremely restrictive sign ordinances, reflecting the Town's reputation as a place concerned about conformity and accord. [Ex. J pp. 87-92.] Likewise, the Town's "Land Use Plan," "Community Appearance Manual," and "Design Guidelines" reveal a similar insistence on uniformity. [Ex. J pp. 93-94, 101.]

The provision quoted by the July 31, 2009 Notice of Zoning Violation, Section 9.3.2(S), states in relevant part:

Residential signs shall be allowed, provided that:

(1) Such signs shall not exceed five square feet per side in area and 42 inches in height.
(2) There shall be not more than two residential signs on any site containing only a single dwelling unit.
...

[Ex. G.] The first paragraph was highlighted in the July 31, 2009 Notice of Zoning Violation, apparently indicating that Mr. Bowden's sign violated the Sign Ordinance because it was a "Residential Sign" that was too large. The Notice of Zoning Violation also advised Mr. Bowden of the following:

> **Corrective Action Required: Please remove all non-compliant signage that is painted on the side of your house and bring your property into compliance as outlined in 9.3.2(S) of the LDO. Failure to bring your property into compliance within 72 hours of receipt of this notice may result in additional enforcement measures including the issuance of civil citations. Once the signage is removed, please contact Brent Reck, Town of Cary Zoning Compliance Supervisor at (919) 621-3254 to close this violation.**

[Ex. D (emphasis in original).] The notice also advised Mr. Bowden of the following:

> The Town of Cary Sign Ordinance fine structure for illegal signs is as follows:
>
> -One hundred dollars ($100.00) **per sign**, per day for the first day of violation.
> -Two hundred fifty dollars ($250.00) **per sign**, per day for the second day of violation.
> -Five hundred dollars ($500.00) **per sign**, per day for the third day of violation, and for each day thereafter that the sign ordinance is being violated.

[Ex. D (emphasis in original).]

Between August and November of 2009, Assistant Town Manager Mike Bajorek, who is responsible for enforcing the Sign Ordinance, personally came to Mr. Bowden's house several times, asking Mr. Bowden what it would take for him to remove the sign.

[Ex. A pp. 28; 115; Ex. C pp. 20-23.] Mr. Bowden stated that he had no intention of taking down the sign as long as the underlying dispute remained unresolved, explaining that he had finally gotten the Town's attention and that the attention would go away if the sign was removed. [Compl. ¶ 21; Ex. A p. 87.] During this time, Mr. Bowden also gave several radio, television, and print interviews regarding the sign. [Ex. A pp. 87-105; Ex. L (copies of articles regarding the sign).]

On November 12, 2009, the Town issued another Notice of Zoning Violation. [Ex. M (the notice).] The November 12, 2009 Notice of Zoning Violation relied on entirely different provisions of the Sign Ordinance: Section 9.3.2(X)(2)(a)1, which controls "Wall Signs – Residential/Institutional," and 9.8.3(B), which controls appropriate "Sign Colors." Section 9.3.2(X)(2)(a)1 provides in relevant part:

> Wall signs shall be allowed on residential/institutional properties provided that:
>
> (a) Single-family residential units (either attached or detached) in zoning districts or planned developments designated for such use shall be permitted one wall sign, provided that
>
> 1. Such sign shall not exceed two square feet in area.

[Ex. G.] Section 9.8.3(B) provides:

> All signage shall utilize the same building colors as shown on an approved site plan, and may have one additional color not found on the site plan. The use of high intensity fluorescent pigments is prohibited.

[Ex. G.] Mr. Bowden's sign violates these provisions because it is a wall sign that exceeds two square feet and because it uses "high intensity fluorescent pigments...." The November 12, 2009 Notice of Zoning Violation also stated: "Please understand that your

failure to follow these LDO requirements will leave the Town with no other choice than to pursue additional enforcement measures including, but not limited to, issuing civil citations—something we're sure no one would like to see happen." [Ex. M.] The notice included another summary of the applicable fines, as described above. [Ex. M.] Finally, attached to the notice was the Town's policy statement regarding political signs. [Ex. K.]

Mr. Bowden filed this lawsuit on November 19, 2009. On February 25, 2010, the Town amended the Sign Ordinance in two relevant respects. [Ex. N (blackline of the changes).] First, the Town removed the provision stating that all signs not expressly permitted by Chapter 9 were prohibited. Second, the Town removed the provisions rendering these two things as "signs" that were "exempt" from Chapter 9: "Works of art with no commercial message, except for approved murals in the Town center" and "Holiday decorations with no commercial message displayed between November 15 and January 15." Instead, the amended ordinance, in the definitions section of Chapter 12, now provides that "public art" and "holiday decorations" "shall not be considered signs subject to [Chapter 9]...." [Ex. N.] The effect is the same. When this brief refers to the "Sign Ordinance," it refers to the ordinance as recently amended.

ARGUMENT

This case involves the two types of speech most jealously protected by the First Amendment: political speech and speech on private property. As courts have long held, "core political speech" is at the heart of the First Amendment and enjoys heightened protection. *E.g., Arlington County Repub. Committee v. Arlington County*, 983 F.2d 587, 593 (4th Cir. 1993) (noting that "speech on public issues occupies the highest rung of the

hierarchy of First Amendment values and is entitled to special protection" (internal quotations and citations omitted)). Moreover, the political speech at issue here is not related to some topic distanced from the government trying to suppress the message; rather, the speech at issue directly criticizes the government that wants to muzzle the speaker. Of course, the fact that Mr. Bowden used the word "screwed" is irrelevant—although it suggests that the Court should be wary of attempts to forbid such alleged "vulgarities." *See Cohen v. Cal.*, 403 U.S. 15, 25 (1971) (holding that the First Amendment does not except profanity from protection, overturning defendant's conviction for wearing jacket with "Fuck the Draft" written on it, and noting that "one man's vulgarity is another man's lyric").[2] Furthermore, Mr. Bowden's speech occurs not on public property but on his own private property. As the United States Supreme Court has held, the First Amendment has particular force in such a situation. *See City of Ladue v. Gilleo*, 512 U.S. 43, 54, 58 (1994) (holding that "[a] special respect for individual liberty in the home has long been a part of our culture and law [citations omitted]; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there" and that signs on residential property are "a venerable means of communication that is both unique and important" (emphasis in original). First Amendment protection is at its apex in this case.

[2] In any event, the word "screwed" is neither profane nor vulgar in the year 2010.

I. THE SIGN ORDINANCE IS A CONTENT-BASED REGULATION THAT FAILS STRICT SCRUTINY.

A. The Sign Ordinance is Content-Based.

The first question in this case is whether the Sign Ordinance is content-based or content-neutral. *See Turner Broad. Sys., Inc.* v. FCC, 512 U.S. 622, 642 (1994); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 432 (4th Cir. 2007). Here, there are several aspects of the Sign Ordinance itself that require the Town to inquire about content:

- "Public art" is exempted. [Ex. N.]
- "Holiday decorations" are exempted. [Ex. N.]
- Signs erected by the government (or a quasi-governmental agency) are exempted. [Ex. G. § 9.2(H).][3]
- Flags are allowed, but the "Principles of Interpretation" following the provision states: "The intent of this provision is to allow and even encourage the installation and use of flags for patriotic purposes, where such flags relate to the principal building on the site, but at the same time to discourage the use of flags at entrances or along street frontages as 'attention attracting devices.'" [Ex. G. § 9.3.2(H).]

As the Fourth Circuit has held, a regulation of speech is content-based if it is not "*justified* without reference to the content of the regulated speech." *Covenant Media*, 493 F.3d at 432 (emphasis in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). By unambiguously referring to content, the Sign Ordinance—including a provision at issue here, the "public art" provision, as discussed later—is content-based.

[3] A regulation based on *who* can speak is also content-based. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir. 2005) (applying this principle in the sign ordinance context).

In fact, several courts have concluded that sign ordinances very similar to the Town's were content-based. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir. 2005) (concluding that sign ordinance exempting governmental signs, holiday lights and decorations, and similar categories was content-based, and noting disapprovingly that "a homeowner could plant a giant illuminated Santa Claus or a jack-o-lantern in his front yard, but not a figure of, say, the President or the Mayor"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1410 (8th Cir. 1995) (holding that prohibiting external illumination of political signs while allowing it for other signs was an unconstitutional content-based restriction, since "the message on the sign determines whether or not it may be externally illuminated"); *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993) (concluding that ordinance exempting governmental signs and other categories of signs was content-based); *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1333 (M.D. Fla. 2009) ("Yet in concluding that the Painting and the Banner were subject to the permit requirement or spatial constraints, Defendant necessarily examined their content and determined that neither was art work, a holiday decoration, or any other sign exempted under the Code. The City then declined to extend protections to Plaintiffs' First Amendment banner that would have been extended to a banner exclaiming 'Happy Holidays.'"); *McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659, 663 (N.D.W.Va. 2006) (finding that sign ordinance was content-based "since the Ordinance's temporal restrictions apply only to limited categories of signs based on what those signs say"); *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282, 293 (S.D.N.Y. 2002). In short, an ordinance that provides specific exemptions that

effectively discriminate on the basis of a sign's message, as is the case here, is content-based. *See City of Ladue*, 512 U.S. at 51 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-14 (1981)); *see also Turner Broadcasting System*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed therein are content-based.")

Mr. Bowden recognizes that the Fourth Circuit, in *Covenant Media*, 493 F.3d at 432-35, held that the "cursory examination" required to distinguish between certain types of signs—such as "directional or instructional signs," "memorial signs," or "commemorative signs" —in order to provide a different regulatory scheme for each type does not render an ordinance content-based. That is why Mr. Bowden does not claim that the Sign Ordinance is content-based merely because it provides for different regulations depending on whether a sign is a "yard sign," a "residential sign," a "wall sign," etc. But the Town's ordinance goes further by exempting "public art," "holiday decorations," and the like. This inquiry into content—particularly the inquiry into whether Mr. Bowden's sign is "art," which also involves vagueness problems, as explained below—renders the Sign Ordinance content-based.

To the extent that the Town argues that there is no evidence that it "targeted" initial or continued enforcement of the Sign Ordinance against Mr. Bowden because of his message, Mr. Bowden concedes that there is no direct evidence of that—no smoking gun email stating, "go fine Mr. Bowden because that sign is embarrassing the town government." However, there is circumstantial evidence of targeted enforcement that is sufficient to create a genuine issue of fact: 1) the fact that Mr. Bowden was given his first

notice of violation mere hours after the sign was put up; 2) the personal attention paid to Mr. Bowden and his sign by various people connected with the Town, including Mike Bajorek; 3) the Town's earlier-expressed paternalistic desire to corral the signs of "overly enthusiastic individual[s]"; 4) emails from a Town councilwoman complaining about the "vulgar" nature of the sign, seeking to "bring this to Council for discussion [the issue of] use of vulgar language on signs," and opining that "I don't think free speech covers vulgar language" and that "[t]he term 'screwed' is vulgar"; and 5) the sheer fact of the message itself and the probable response of any government to such a sign. [Ex. C pp. 12-18; Ex. K; Ex. O (emails from Councilwoman Jennifer Robinson).] Fortunately, however, this issue of fact is not *material* because whether the Sign Ordinance is content-based depends only on the words of the Sign Ordinance itself. *E.g., Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464, 473 (6th Cir. 1991) (noting that a prohibition that is content-based in its terms merits strict scrutiny, regardless of how it is enforced).[4] Even if the Town was robotically following the letter of the Sign Ordinance, it is the words of the ordinance itself that renders the ordinance content-based.

B. The Sign Ordinance Fails Strict Scrutiny.

Consequently, the Sign Ordinance provisions at issue, and the Town's demand that Mr. Bowden remove his sign, are content-driven restrictions on protected speech. Such content-based restrictions are presumed impermissible and must survive strict scrutiny. *E.g., Texas v. Johnson,* 491 U.S. 397, 412, 413(1989); *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *Covenant Media*, 493 F.3d at 432.

[4] In none of the other cases cited above that applied strict scrutiny was there evidence of targeted enforcement against the plaintiff.

Strict scrutiny is "the most exacting scrutiny." *Turner Broadcasting System*, 512 U.S. at 642. To survive strict scrutiny, the government must show that the restriction is necessary to serve a compelling governmental interest. *E.g., Perry*, 460 U.S. at 45; *Goulart v. Meadows*, 345 F.3d 239, 248 (4th Cir. 2003). The requirement that a restriction on speech be "necessary" to serve to purported state interest requires that the regulation be the least restrictive alternative available. *E.g., Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Sable Communications of Cal., Inc.* v. FCC, 492 U.S. 115, 126 (1989).

The Town of Cary can provide no evidence to demonstrate that its Sign Ordinance and its application to Mr. Bowden are necessary to serve a compelling state interest and embody the least restrictive alternative available. Presumably the asserted interests are traffic flow and safety and ensuring a consistent and pleasing aesthetic scheme, the two interests commonly associated with sign ordinances. *E.g., Solantic*, 410 F.3d at 1267 (examining these two asserted interests). The preface to the Sign Ordinance suggests as much, listing as "Purposes" of the ordinance, among other things: "To maintain and enhance the pleasing look of the Town...", "To minimize the possible adverse effects of sign on nearby public and private property", and "To improve pedestrian and traffic safety...." [Ex. G.] Neither of these interests are compelling as presented (in the abstract), and the Sign Ordinance is not necessary to achieve those ends.

The courts analyzing whether traffic safety and aesthetics are sufficient to save a content-based sign ordinance uniformly reject the idea that the abstract assertion of "traffic safety" and "aesthetics" are compelling government interests. *See Members of*

the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816-17 (1984) (concluding that aesthetics was a mere "substantial government interest"); *Metromedia*, 453 U.S. at 507-08 (1981) (plurality opinion) (concluding that aesthetics and traffic safety were mere "substantial government interests"); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1233-34 (11th Cir. 2006) (in case regarding sign ordinance, concluding that "[t]he City's interests in aesthetics and traffic safety are substantial but they are not compelling for present purposes"); *Solantic*, 410 F.3d at 1267 ("[T]he sign code is not narrowly tailored to accomplish the City's asserted interests in aesthetics and traffic safety, nor has our case law recognized those interests as 'compelling.'"); *Dimmit*, 985 F.2d at 1570 ("The deleterious effect of graphic communication upon visual aesthetics and traffic safety, substantiated here only by meager evidence in the record, is not a compelling state interest of the sort required to justify content based regulation of noncommercial speech."); *Complete Angler*, 607 F. Supp. 2d at 1334 ("While interests in aesthetics and traffic safety may be substantial, they are not *per se* so compelling as to justify content-based restrictions on signs.") This makes sense, lest every government becomes able to save an otherwise unconstitutional statute simply by confecting an abstract interest like these. This seems particularly true with the interest in aesthetics, a necessarily vague concept with no universal meaning. *See Metromedia*, 453 U.S. at 510 ("Esthetic judgments are necessarily subjective, defying objective evaluation."); *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) ("We have no doubt that the application of the term 'aesthetically pleasing' will substantially vary from individual to individual, for 'what is

contemptuous to one...may be a work of art to another.' *Smith v. Goguen*, 415 U.S. 566, 573 (1974)."). Even if the interest in aesthetics is spun as an interest in property values (or, as the Town puts it, "adverse effects of signs on nearby public and private property"), the interest is still abstract and cannot seriously be called "compelling" for purposes of the First Amendment; to the extent that the Town argues that Mr. Bowden's sign is "ugly" (and, although the Town won't say it, because it uses the word "screwed"), therefore depressing property values, that argument is simply is an attempt to give "aesthetics" more weight than the courts and the First Amendment give it.

Even if those purported interests were compelling, the Sign Ordinance is not narrowly tailored to either of those interests. Presuming that the Town could explain (for the first time, in this litigation) how the Sign Ordinance generally furthers the asserted interests, it still could not explain how the content-based exemptions do so. Looking at the exemptions for, say, "public art" and government signs, it is clear that "public art" and government signs could cause just as many traffic problems and be just as ugly as outlawed signs. *See Beaulieu*, 454 F.3d 1219, 1234 ("Even if the City's interests were compelling, the sign ordinance is not narrowly tailored. The ordinance abstractly recites its interests in aesthetics and traffic safety without explaining how the regulations further those interests generally, or how its discrimination in favor of real estate signs promotes those interests specifically."); *Solantic*, 410 F.3d at 1267 ("The problem is that the ordinance recites those interests [in aesthetics and traffic safety] only at the highest order of abstraction, without ever explaining how they are served by the sign code's regulations generally, much less by its content-based exemptions from those regulations."); *Dimmitt*,

985 F.2d at 1570 ("Moreover, these asserted interests [in aesthetics and traffic safety] clearly are not served by the distinction between government and other types of flags; therefore, the regulation is not narrowly drawn to achieve its asserted end.") In more concrete terms, the Sign Ordinance does not explain why it applies its restrictions to some signs (Mr. Bowden's) while exempting others. Surely a huge, flashing Christmas, Hanukkah, Valentine's Day, or Fourth of July sign (an exempted "holiday decoration") or a similar "Town of Cary" government sign (also exempted) would cause just as many traffic and aesthetic problems, if not more, than a simple wall sign that was ten square feet and therefore illegal. *E.g., Solantic*, 410 F.3d at 1267. ("The code does not, however, explain...why a moving or illuminated sign of the permissible variety -- for example, a sign depicting a religious figure in flashing lights...-- would be any less distracting or hazardous to motorists than a moving or illuminated sign of the impermissible variety -- for example, one depicting the President in flashing lights....Likewise, a homeowner could not erect a yard sign emitting an audio message saying, 'Support Our Troops,'...but the government would be free to erect an equally distracting -- and presumably unsafe -- sign emitting the audio message, 'Support Your City Council,' since governmental signs are completely exempt from regulation...."); *id.* ("[W]e are unpersuaded that a flag bearing an individual's logo (which is not exempt from regulation), is any less aesthetically pleasing than, say, a flag bearing the logo of a fraternal organization (which is exempt from regulation under § 27-580(3)). Nor is it clear to us that a government-authorized sign reading, 'Support Your City Council' in flashing lights...or a religious sign reading, 'Support Your Church'...degrades the City's

aesthetic attractiveness any less than a yard sign reading, 'Support Our Troops' in flashing lights.). Likewise, the Sign Ordinance, exemptions aside, allows certain signs of a size that would cause just as significant traffic and aesthetic "problems" as large wall signs on a house. [Ex. G § 9.3.2(B)(4) (signs advertising agricultural products, up to 16 square feet, by permit only); § 9.3.2(G)(1) (directory signs, up to 16 square feet, by permit only). Put simply, strict scrutiny requires a much tighter fit between means and ends than that provided by the Town's Sign Ordinance.[6]

Furthermore, the evidence surrounding Mr. Bowden's sign in particular highlights the weakness between the asserted interests and the Sign Ordinance. In response to Mr. Bowden's interrogatories regarding any actual traffic problems related to his sign, the Town stated only that it was aware of second-hand accounts in the media of people slowing down to view the sign. [Ex. P.] In response to a document request regarding any traffic problems caused by the sign, the Town simply produced those second-hand accounts. [Ex. P.] In deposition questioning on this topic, the Town's designee admitted that there was no evidence of any traffic problems other than these second-hand reports. [Ex. J p. 62.]

Regarding aesthetics, there is evidence that certain citizens of Cary, including a neighbor of Mr. Bowden's, have made general complaints about the sign. [Ex. A pp.142-43.] There is no concrete evidence that property values have fallen because of the sign.

[6] When it comes to the fact that the Sign Ordinance prohibits illumination of residential wall signs like Mr. Bowden's, but allows illumination of most other types of signs, the distinction makes no sense. When Mr. Bowden asked the Town what the reason for the distinction was, the designee testified: "I'm not – I don't know. It's what's in the ordinance." [Ex. I pp. 59-60.]

Of course, there is evidence that other Cary citizens and neighbors have expressed support for Mr. Bowden and his sign, and Mr. Bowden believes that the majority of people who have expressed their opinion to him about the sign have been in support. [Ex. Q (emails containing comments from citizens in support of Mr. Bowden); Ex. R (selected comment from citizen, in response to Town of Cary sign survey, in support of Mr. Bowden); Ex. S (letter sent to Mr. Bowden in support); Ex. A p. 143.] No one denies that Mr. Bowden and his sign are contentious—but then the First Amendment is designed to protect exactly such speech, not innocuous speech or speech with which everyone agrees. The Town cannot get around that fact by blithely claiming that Mr. Bowden's sign upsets some people and harms nearby properties. The First Amendment does not countenance such a "heckler's veto." *See Reno v. Aclu*, 521 U.S. 844, 880 (U.S. 1997) (striking down statute because individuals opposed to the speech at issue could effectively censor the speech by complaining).

II. EVEN IF THE SIGN ORDINANCE WERE CONTENT-NEUTRAL, IT DOES NOT SURVIVE INTERMEDIATE SCRUTINY.

Even if this Court were to find that the Sign Ordinance provisions at issue in this case and their application to Mr. Bowden were content-neutral, the restrictions still do not survive intermediate scrutiny. To justify a content-neutral regulation, the government must demonstrate that the regulation has been narrowly tailored to serve a significant government interest and that it has left open "ample alternative channels of communication." *E.g.*, *City Council of Los Angeles*, 466 U.S. at 812. In order for a regulation to be "narrowly tailored" under intermediate scrutiny, the government need not have eliminated all less restrictive alternatives. Nevertheless, the regulation must not

"burden substantially more speech than is necessary to further the government's legitimate interests." *Bd. of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469, 478-79 (1989) (citing *Ward,* 491 U.S. at 799). Rather, what is required is a "fit" between the objective of the regulation and the means chosen to accomplish that objective. The "fit" need not be perfect, but it must be reasonable; that is to say, the objective and the means must be "in proportion." *Fox*, 492 U.S. at 480; *Arlington County Repub. Committee*, 983 F.2d at 595.

While traffic and aesthetic concerns may be substantial government interests in the abstract, the Fourth Circuit has held that lack of "specific aesthetic and traffic problems" in a given case strongly suggests that a sign ordinance violates intermediate scrutiny. *Arlington County Repub. Committee*, 983 F.2d at 594. In this case, as described above, there is no evidence of any specific traffic problems. Furthermore, as described above, the paltry evidence of specific "aesthetic problems" is insufficient—both in amount and as a principled basis for justifying the Sign Ordinance's restriction on free speech.

Additionally, the Sign Ordinance is not narrowly tailored to the asserted interests of traffic safety and aesthetics. As described above, the Sign Ordinance exempts certain signs, and allows certain other signs, that would cause traffic and aesthetic "problems" at least as great as those caused by a ten-square-foot, illegal wall sign. If the Town *really* is concerned about traffic and aesthetics, it would have—and must have—assured that the Sign Ordinance serves those interests more directly.

Finally, even if the Sign Ordinance were narrowly tailored to substantial interests and there was some evidence of "specific traffic and aesthetic" problems, the Sign Ordinance as applied to Mr. Bowden would still be unconstitutional because it does not leave open ample alternative means of communication. As an initial matter, it is important to remember that the alternative channels must be *adequate*—meaning channels that allow the speaker to effectively reach his intended audience. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) ("The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." (internal quotations and citations omitted)); *City of Coeur D'Alene*, 262 F.3d 856, 866 (9th Cir. 2001). In the context of residential signs, this means that the alternative channels must allow the speaker to effectively communicate with motorists and those on foot. *See Verrilli v. Concord*, 548 F.2d 262, 265 (9th Cir. 1977); *State v. Miller*, 416 A.2d 821, 828 (N.J. 1980) ("The size limits [on residential signs], if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech."). This is especially true for someone like Mr. Bowden, who lives on a road that sees much vehicular traffic but little foot traffic. [Ex. U (Affidavit of William David Bowden).]

Visibility aside, to allow effective communication, the alternative channels must also allow a message reasonably similar to the intended message, even though by definition a message in an "alternative" channel will be somewhat different than the same message in the intended channel. *E.g., Ladue*, 512 U.S. at 54; *Miller*, 416 A.2d at 828

(analyzing the impact of sign dimensions on the meaning of the message). In the context of residential signs, even if a small sign were readable upon close inspection if a motorist or pedestrian happened to notice it, the message from a large bright sign would obviously be quite different than that of the small sign. In other words, a 2'x2' sign saying "FUCK THE GOVERNMENT" in black paint is different than an 8'x8' sign saying "FUCK THE GOVERNMENT" in orange paint, even to a viewer who happens to see both.[7]

Finally, the alternative channels must not be overly difficult to pursue. *See Arlington County Repub. Committee*, 983 F.2d at 595 (concluding that alternative channels, including "speeches in public places, door to door and public canvassing, distributing handbills, appearing at citizen group meetings, advertising, posting signs in local businesses and automobiles, and posting two signs at private residences" were not adequate alternatives to posting multiple signs on private property because they required too much "involvement" and "expense"). This is especially true in the residential sign context, where the Supreme Court has held that residential signs are:

> an unusually cheap and convenient form of communications. Especially for persons of modest means or limited mobility, a yard or window sign may have no

[7] When it comes to the traffic and aesthetic concerns that underlie sign ordinances, there is inherent tension between the fact that alternative channels must allow effective communication and the fact that the government desires to mitigate the traffic and aesthetic "problems." In other words, any alternative to a banned residential sign must be sufficiently visible to motorists and pedestrians passing by—yet presumably the more visible it is, the more that the original traffic and aesthetic "problems" will remain. Likewise, any alternative to a banned residential sign must allow for communication of a message reasonably similar to that which the speaker intended to convey with the banned sign—yet presumably the more similar it is, the more that the original traffic and aesthetic "problems" will remain. No court has squarely addressed this tension. But what is clear is this: if the proffered alternative weakens and waters-down the speech to a significant degree, it is not an adequate alternative.

> practical alternative. 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 or not participating in some public debate.

Ladue, 512 U.S. at 57. Notably, residential signs are especially important if they "react to a local happening or express a view on a controversial issue" because they "both reflect and animate change in the life of the community." *See id.* at 54. Together, *Ladue* and *Arlington County Republican Committee* make clear that an "alternative" to a residential sign must be a different type/size of physical sign on the same property.

In short, any alternative to Mr. Bowden's current sign must: 1) be sufficiently visible to motorists and pedestrians; 2) communicate roughly the same message as his current sign; and 3) be something that Mr. Bowden can quickly, easily, and cheaply install on his property. Unfortunately, there is no such alternative in this case.

The Town's Sign Ordinance has a "substitution of messages" clause, which provides that any sign allowed under the ordinance may contain, in lieu of the prescribed message, any non-commercial message, as long as the sign complies with the size, height, area, and other requirements of the ordinance. [Ex. G § 9.17.] The question thus becomes: what kind of signs could Mr. Bowden place on his property that could express his message of extreme displeasure with the Town? First, the Sign Ordinance flatly disallows many types of signs on residential properties. [Ex. G § 9.3.1 (window signs, suspended/projecting signs, menu boxes, marquees, home occupation signs, menu boards, barber poles, sandwich boards, umbrellas, accessory building signs).] Second, the Sign Ordinance allows certain other types of signs on residential properties, but Mr. Bowden

cannot take advantage of those provisions because his property does not include a feature required for the sign. [Ex. G § 9.3.1 (verandah signs, building markers, directory signs, changeable copy signs, awning signs, subdivision identity signs, principal ground signs, religious institutional signs).] Third, the Sign Ordinance allows certain other types of signs on residential properties on which Mr. Bowden could substitute his message, but the signs are allowed only temporarily or only for odd periods of time, due to their normal purpose, and thus are inapt here. [Ex. G § 9.3.1 (temporary signs, political signs, construction/renovation/improvement signs, yard sale signs, off premise real estate open house signs, real estate signs, agricultural signs).]

This leaves five types of signs that Mr. Bowden could use: an identification sign, an incidental sign, a residential sign, flags, and a wall sign that complied with the two-square-foot size limitation.[8] These are inadequate for several reasons. First, wall signs require a sign application and permit, an onerous process that requires an application, a delay of up to twenty days, and a $50 fee. [Ex. F § 3.16; Ex. T (sign permit application).][9] (Although the Town has not claimed that Mr. Bowden's wall sign violates the ordinance for lack of an application and permit, clearly it does.) Second, flags obviously require construction of a pole and creation of a flag, a task significantly more cumbersome that simply painting or placing a sign. If placing newspaper advertisements,

[8] It is possible to receive a variance to increase the size of the wall sign, but the standard variance conditions apply—the property is unique compared other properties, there can be no beneficial use of the property without the variance, etc.—that clearly do not exist in Mr. Bowden's case, or in the vast majority of cases. Furthermore, the variance application costs $300. [Appendix to Ex. M.]

[9] Many of the types of inapplicable signs in the previous paragraph also require an application and permit. [Ex. G § 9.3.1.]

distributing leaflets, and the like places too much burden on the First Amendment, *Arlington County Repub. Committee*, 983 F.2d at 595, *Ladue*, 512 U.S. at 57, then clearly so do applying for a wall sign permit and constructing a flagpole and flag.

So here is what Mr. Bowden can actually install without significant trouble:

- An "incidental sign" no more than two square feet.
- An "identification sign" no more than three square feet.
- Two "residential signs" no more than five square feet each.

Of course, none of these signs can have "high intensity colors or fluorescent pigments...." [Ex. G § 9.8.3.] Hence the fundamental question is whether three small signs in dark colors with the message "Screwed by the Town of Cary" constitute a sufficient alternative to the large bright wall sign as it currently exists. They do not. First, small, dark signs simply aren't as visible to motorists or passers-by, especially on a street like Mr. Bowden's where there is fast-moving traffic and few pedestrians. [Ex. U.] In fact, the "incidental" and "identification" signs would be functionally unreadable, and the residential sign would catch limited attention. With the three allowed signs, only a sliver of the people who currently see Mr. Bowden's sign would receive his message. Second, the message as communicated by three small, dark signs just isn't the same as the message communicated by the current sign. This Court need only ask itself, would Mr. Bowden have received the attention of local and national media had he had three small, dark signs stating "Screwed by the Town of Cary"? It is the size and color of his

sign that communicates to the viewer how angry Mr. Bowden is.[10] In simplest terms, five signs that are three square feet each are just not the same as one fifteen square foot sign. Mr. Bowden himself testified that the alternatives were wholly inadequate. [Ex. A pp. 109-11; 149-52.]

In the end, the Town of Cary's goal is clear: to avoid the "unseemly" nature of signs like Mr. Bowden's. To do so, it has crafted an ordinance that effectively neuters the power of such signs. In short, if the Sign Ordinance allows it, it's largely ineffective. So it is no surprise that the Sign Ordinance provides Mr. Bowden with no adequate alternatives for his speech.[11]

III. THE "PUBLIC ART" EXEMPTION IS UNCONSTITUTIONALLY VAGUE AND PROHIBITS ENFORCEMENT OF THE SIGN ORDINANCE HERE.

A statute or ordinance is unconstitutionally vague if what it prohibits is not clearly defined such that a person of ordinary intelligence can readily identify what is allowed and what is not. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 145 (4th Cir. 1993) ("A law is considered [unconstitutionally] vague if 'a person of normal intelligence must guess at its meaning and differ as to its application.'") (quoting *Connally v. General Constr.*, 269 U.S. 385, 391 (1926)). Not only do "vague laws...trap the innocent by not providing fair warning," but laws that fail to provide

[10] Moreover, to the extent that the three smaller signs would not draw as much media attention, Mr. Bowden's audience would be vastly reduced.

[11] This Court need not decide exactly how many signs of what particular size would need to be allowed to satisfy the First Amendment. It need only decide whether the three allowed signs as specified above are sufficient in this case. They are not.

explicit standards guiding their enforcement "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09.

The degree of specificity required varies, depending, for example, on whether the sanction for violating the statute or ordinance is criminal or civil. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982). The "most important factor affecting the [degree of] clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. If it does, "a more stringent vagueness test should apply" so that protected activity will not be chilled. *See id.* And among constitutional rights, the First Amendment demands the greatest specificity. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over [whether certain speech is allowed]."); *United States v. Morison*, 844 F.2d 1057, 1070 n.19 (4th Cir. 1988) (holding that the vagueness doctrine has "special bite" in the First Amendment context) (internal citations and quotations omitted); *Hickory Fire Fighters Assoc., etc. v. Hickory*, 656 F.2d 917, 925 n.8 (4th Cir. 1981) (holding that even a

municipal policy, not just a statute or ordinance, "has the potential to chill protected First Amendment activity in much the same way as does the threat of criminal sanctions").

Here, the original Sign Ordinance exempted "Works of art with no commercial message...." [Ex. G § 9.2.] None of those terms were defined. The amendments in February of 2010 removed that exemption, but the definitions section of Chapter 12 now defines "sign" to exclude such art:

> Sign – Any device, fixture, placard or structure, that uses any color, form, graphic, illumination, symbol, or writing to advertise, attract attention, announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public. The following shall not be considered signs subject to the regulations of Chapter 9 of this Ordinance: public art...."

[Ex. N.] Chapter 12 defines "public art" as: "Items expressing creative skill or imagination in a visual form, such as painting or sculpture which are intended to beautify or provide aesthetic influences to public areas or areas which are visible from the public realm." [Ex. I § 12.4.] The Town's designee testified that there is no real difference between the terms "works of art" and "public art."[13] [Ex. J p. 38.]

On its face, the term "public art" is impermissibly vague. The definition adds nothing: any definition of art would include the requirements of "skill or imagination" accompanied by a desire to "beautify or provide aesthetic influences," with emphasis on the "or." Indeed, the Town's designee testified that the term was "broad." [Ex. J p. 38.] When asked who in the Town would determine whether something was "public art" or a sign, he testified: "Just collectively, the staff would – could conceivably be put in the

[13] That definition of "public art" existed before the amendments of February 2010 because that term was used elsewhere in the LDO. Consequently, the effect of the amendment was simply to substitute a pre-existing defined term for the art exemption.

position of making a determination whether something is or isn't." [Ex. J p. 38.] He admitted that there exist no criteria for making that determination. [Ex. J p. 38-39; 46.] When shown five images that could be "public art" (and if not classified as "public art," would clearly be considered "signs")—including the famous Obama poster from the 2008 election, a different version of that poster, and three other similar images—the designee admitted that he could not make a determination at the time, even given a specific context for display of the images. [Ex. J p. 41-45; 97-98; 103-04; Ex. V; Ex. W; Ex. X; Ex. Y; Ex. Z.] Moreover, he admitted that the Town would not expect that a citizen would be able to make that determination either. [Ex. J pp. 41-42.] That is an admission of legal vagueness.

The designee testified that he would expect a citizen to inquire of the Town in advance whether something was "public art" by seeking a formal determination, and pay the accompanying fee for that determination. [Ex. J pp. 42-44.] But that constitutes a *de facto* permitting process, a form of prior restraint that is deeply disfavored and must, among other things, contain "narrow, objective, and definite standards to guide the licensing authority...." *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008). Clearly there are insufficient standards to guide the *de facto* permitting process here.

Other courts construing similar terms have found those terms impermissibly vague under the First Amendment. *See Lytle v. Doyle*, 326 F.3d 463, 469 (4th Cir. Va. 2003) (find the term "loitering" too vague in a case involving an anti-loitering ordinance); *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (find the terms "aesthetically

pleasing" and "controversial" too vague in a case involving advertisements on public buses); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. Cal. 1996) (terms in sign ordinance like "detrimental to the welfare of the general public" and "detrimental to the aesthetic quality of the community or the surrounding land uses" were too vague to support licensing scheme). The term "public art" is unlike the one term that the Fourth Circuit has addressed, and found not to be too vague. *See National Advertising Co. v. Raleigh*, 947 F.2d 1158, 1169 (4th Cir. 1991) (finding "commercial" and "non-commercial" to be sufficiently defined because the Supreme Court has defined those terms).

Mr. Bowden's argument is not facile or facetious. The fusion between art and politics, especially in today's world, makes differentiating between the two extremely difficult. If his current sign is not "public art," would adding some stenciling of the mayor with horns make it so? What if he left the message as is but added in the background images of the Constitution and the Declaration of Independence? Mr. Bowden wants to express himself, and he is entitled to know how he can and cannot express his views of the Town. Right now, he has no idea.

Because Mr. Bowden's sign may be "public art," the Sign Ordinance cannot be enforced against him. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (if a statute is unconstitutionally vague, a federal court cannot provide a narrowing interpretation except for one previously formulated by the state or local government). Even if the Town were to remove that exemption, the Sign Ordinance could not be

enforced against him because it fails strict scrutiny and intermediate scrutiny as applied, as described above.

IV. THE COURT SHOULD ENTER A PERMANENT INJUNCTION AND AWARD NOMINAL DAMAGES AND ATTORNEYS' FEES.

For the reasons outlined above, the Town of Cary cannot constitutionally force Mr. Bowden to remove his sign. Because Mr. Bowden has no adequate remedy at law to enforce his rights, this Court should enter a permanent injunction against the Town enforcing the current Sign Ordinance against Mr. Bowden. *See Wilson v. Office of Civilian Health & Medical Programs of the Uniformed Servs.* (CHAMPUS), 65 F.3d 361, 364 (4th Cir. 1995) (outlining requirements for a permanent injunction). That is the standard remedy is such cases. Furthermore, Mr. Bowden is entitled to nominal damages. *See Covenant Media*, 493 F.3d at 429. Finally, this Court should award attorneys' fees in an amount to be proven later because, under 42 U.S.C. §§ 1983, 1988, attorneys' fees are awarded to prevailing civil rights plaintiffs "as a matter of course...." *See Unus v. Kane*, 565 F.3d 103, 127 (4th Cir. 2009).

CONCLUSION

The Town of Cary is allowed to enact a sign ordinance to preserve and reflect its values. And while it has latitude in doing so, the First Amendment guarantees that each citizen has a minimum right to express himself. The Town has violated that guarantee by trying to force Mr. Bowden to remove the sign on his property.

Respectfully submitted this 22nd day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22nd, 2010, I electronically filed the foregoing **Plaintiff's Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Mark R. Sigmon
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