No. 10-1937

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NEIGHBORHOOD ENTERPRISES, INC., SANCTUARY IN THE ORDINARY, and JIM ROOS,

Plaintiffs/Appellants,

v.

CITY OF ST. LOUIS and ST. LOUIS BOARD OF ADJUSTMENT,

Defendants/Appellees.

Appeal from the United States District Court for the Eastern District of Missouri (St. Louis)-Honorable Henry Edward Autrey, District Court Judge

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APPELLANTS' BRIEF (CORRECTED)

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This case concerns the extent to which a municipality may use its sign regulations to shut down protests of the municipality's policies. Appellants Neighborhood Enterprises, Sanctuary In The Ordinary, and Jim Roos (together, "Sanctuary") painted a mural reading "End Eminent Domain Abuse" on one of their buildings that the City of St. Louis ("City") threatened to take by eminent domain. The City cited Sanctuary for displaying an "illegal sign" and stated that it needed a permit for the mural. Sanctuary applied for a permit, which the City denied. The St. Louis Board of Adjustment ("Board") upheld the denial.

Sanctuary filed this case in state court challenging the constitutionality of the Board's decision and the provisions of the City's sign code on which the decision was based. The City and Board removed the case to federal court.

The parties filed cross motions for summary judgment. On March 29, 2010, the district court denied Sanctuary's motion and granted that of the City and Board. The court entered judgment the same day. Sanctuary now appeals.

Sanctuary requests 30 minutes (15 minutes per side) for oral argument because this case presents significant free speech and equal protection issues under the U.S. and Missouri Constitutions. Its resolution will bear on the fundamental right of all citizens in this Circuit to communicate regarding the important public policy issues that affect them.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eighth Circuit Local Rule 26.1A, Appellants Neighborhood Enterprises, Inc., and Sanctuary In The Ordinary certify that they have no parent corporation and no publicly-held corporation owns 10% or more of their stock.

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Basis for District Court's Subject Matter Jurisdiction

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331, because this action arose under the Constitution and laws of the United States. The district court also had original jurisdiction pursuant to 28 U.S.C. § 1343, because this action involves claims brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The district court had supplemental jurisdiction over Sanctuary's state law claims pursuant to 28 U.S.C. § 1367.

Basis for Court of Appeal's Jurisdiction

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this appeal because it is taken from a final decision of a district court of the United States.

Filing Dates Establishing Timeliness of Appeal

On March 29, 2010, the district court filed its Opinion, Memorandum and Order denying Sanctuary's motion for summary judgment and granting that of the City and Board. The court entered judgment the same day. Sanctuary timely filed a notice of appeal on April 26, 2010.

Assertion that Appeal is from a Final Order or Judgment

This appeal is taken from a final judgment and is therefore immediately appealable. The district court's Judgment and its Opinion, Memorandum and

Order disposed of all remaining claims pending before the court in Case No. 4:07-cv-01546-HEA.

II. STATEMENT OF THE ISSUES

1. Did the district court err in holding that the City's sign code, and the City and Board's application of that code to Sanctuary's mural, did not violate constitutional guarantees of free speech?

Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995).

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005).

Lusk v. Village of Cold Spring, 418 F. Supp. 2d 314 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 475 F.3d 480 (2d Cir. 2007).

Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

U.S. CONST. amends. 1 & 14.

MO. CONST. art. I, § 8.

2. Did the district court err in holding that the sign code provisions applied to Sanctuary's mural were content-neutral and therefore subject only to intermediate scrutiny?

Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995).

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005).

Lusk v. Village of Cold Spring, 418 F. Supp. 2d 314 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 475 F.3d 480 (2d Cir. 2007).

Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

U.S. CONST. amends. 1 & 14.

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3. Did the district court err by engaging in speculation and conjecture to support the asserted governmental interests in traffic safety and aesthetics when the City and Board stipulated there was no evidence to support those interests?

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (plurality).

Horina v. City of Granite City, 538 F.3d 624 (7th Cir. 2008).

Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007) (en banc).

Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002).

U.S. CONST. amends. 1 & 14.

MO. CONST. art. I, § 8.

4. Did the district court err in holding that leaflets and off-site billboards are adequate alternatives to an anti-eminent domain abuse protest mural painted on a building threatened by eminent domain abuse?

City of Ladue v. Gilleo, 512 U.S. 43 (1994).

Goward v. Minneapolis, 456 N.W.2d 460 (Minn. Ct. App. 1990).

Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002).

U.S. CONST. amends. 1 & 14.

MO. CONST. art. I, § 8.

5. Did the district court err in holding that the City's sign permit requirement is not a prior restraint of speech, even though the City and Board stipulated that they have no policy to guide the determination of whether something is a "sign" requiring a permit or, instead, an exempted item, such as a "work of art"?

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

City of St. Louis v. Kiely, 652 S.W.2d 694 (Mo. Ct. App. 1983).

U.S. CONST. amends. 1 & 14.

MO. CONST. art. I, § 8.

6. Did the district court err in holding that the City's discriminatory treatment of political signs based on geographic location is permissible under the Equal Protection Clause?

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

U.S. CONST. amend. 14.

7. In reviewing the Board of Adjustment's administrative decision under Mo. Rev. Stat. § 89.110, did the district err in refusing to reach constitutionality of the sign code provisions on which that decision was based?

Platte Woods United Methodist Church v. City of Platte Woods, 935 S.W.2d 735 (Mo. Ct. App. 1996).

Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965).

Hart v. Bd. of Adjustment, 616 S.W.2d 111 (Mo. Ct. App. 1981).

Mo. Rev. Stat. § 89.110.

III. STATEMENT OF THE CASE

This case is a free speech and equal protection challenge to efforts by the City of St. Louis and the St. Louis Board of Adjustment to suppress speech regarding the City's long history of eminent domain abuse. Specifically, the City and Board relied on vague and content-based provisions in the City's sign code to require, then deny, a permit when Sanctuary In The Ordinary—a non-profit, low-income housing provider—sought to display a mural protesting the City's eminent domain practices.[1]

Along with its founder, Jim Roos, and property manager, Neighborhood Enterprises, Sanctuary In The Ordinary[2] filed this action in state court challenging the permit denial and the sign code provisions on which the denial was based. They asserted federal and state constitutional claims pursuant to 42 U.S.C. § 1983 and the Missouri Declaratory Judgments Act, Mo. Rev. Stat. § 527.010, and also

[1] The City's Land Clearance for Redevelopment Authority (LCRA) issued its own denial of Sanctuary's sign permit application. Sanctuary filed a separate action challenging that denial, but the district court dismissed the action. This Court reversed, holding that "the LCRA had no authority to deny the plaintiffs' sign permit." *Neighborhood Enters., Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008). On remand, the parties settled.

[2] As noted above, this brief will refer to the Appellants collectively as "Sanctuary."

requested a writ of certiorari pursuant to Mo. Rev. Stat. § 89.110, which provides for judicial review of "illegal" board of adjustment decisions.

The City and Board removed the case to federal court, and the parties filed cross-motions for summary judgment. On March 29, 2010, the district court denied Sanctuary's motion, granted the City and Board's motion, and entered judgment to that effect. Sanctuary now appeals.

IV. STATEMENT OF THE FACTS

This case was resolved in the district court on stipulated facts and the administrative record from the proceeding before the Board of Adjustment.[3] The facts are as follows.

A. SANCTUARY PAINTS A MURAL PROTESTING THE CITY'S ABUSE OF ITS EMINENT DOMAIN POWER

Sanctuary In The Ordinary is a non-profit, low-income housing provider for persons in need in the St. Louis area. Its properties are managed by Neighborhood Enterprises, Inc., a self-supporting housing ministry that manages rental properties in St. Louis. (Joint Appendix (hereafter, "J.A.") 345-46, 358; *see also* J.A. 216, 217, 284.)

From 2000 to 2004, the City used eminent domain to acquire 24 buildings owned or managed by Sanctuary In The Ordinary or Neighborhood Enterprises.

[3] The stipulated facts are located at pages 345-55 of the Joint Appendix; the administrative record, at pages 54-298.

The buildings had housed 60 low-income apartments. The City took the buildings for private development. (J.A. 216-217, 220.)

Sanctuary and its tenants continue to face the threat of eminent domain for private development. Sanctuary In The Ordinary owns a residential building at 1806-08 S. 13th Street. It is located within the "Near Southside Redevelopment Area," a 219-acre area that the City has declared "blighted" under Missouri's Land Clearance for Redevelopment Law. (J.A. 346, 359; *see also* J.A. 214, 217, 220, 277-78, 289.) This "blight" declaration authorizes the City to use eminent domain to acquire properties within the area for private redevelopment. *See* Mo. Rev. Stat. § 99.420(4); § 99.320(3) & (10)(a); St. Louis, Mo., Ordinance 64831 § 8 & Ex. B § D(2) (Dec. 17, 1999). In early 2007, the City in fact notified Sanctuary that it intended to acquire this building for redevelopment. (J.A. 217, 220, 277-78.)

In March 2007, to protest the City's penchant for eminent domain abuse, Sanctuary, with tenant[4] approval, commissioned a mural for the building that the City sought to acquire. (J.A. 346, 359; *see also* J.A. 220, 277-78.) The mural, which contains the words "End Eminent Domain Abuse" inside a red circle and slash, was funded by the Missouri Eminent Domain Abuse Coalition

[4] One of the tenants is Jackie Ingram, a Sanctuary resident displaced by one of the earlier 24 condemnations. (J.A. 217, 284.)

("MEDAC")[5], a civic organization concerned about abusive eminent domain practices. The mural's design reflects a design used by MEDAC in its literature, buttons, and materials. (J.A. 346, 359; *see also* 270.) It is approximately 363 square feet in area and is visible from, among other areas, Interstates 44 and 55 and the Soulard Neighborhood. (J.A. 347, 359; *see also* J.A. 200, 218.)

B. THE CITY CITES SANCTUARY FOR ITS "ILLEGAL SIGN"

Promptly after Sanctuary's protest mural was completed, the City issued a citation declaring it an "illegal sign." The citation insisted that "[p]ermits must be acquired for signs of this type" and provided instructions explaining how to obtain a permit. (J.A. 347, 353, 359-60.) Consistent with the instructions, Sanctuary and Neighborhood Enterprises filed a permit application on May 14, 2007. (J.A. 347, 355, 360.)

The City's Zoning Administrator denied the permit on May 30, 2007, because it did not meet certain requirements of the City's Zoning Code.[6] (J.A. 347, 360; *see also* J.A. 196-99.) A subsequent explanation of the basis for denial stated that "[t]he wall face of the building on which the sign has been painted does not

[5] Plaintiff Jim Roos founded Sanctuary In The Ordinary and Neighborhood Enterprises and is a member of MEDAC. (J.A. 346, 358-59.)

[6] St. Louis's "Comprehensive Sign Control Regulations" are part of the City's Zoning Code. They may be found in the Joint Appendix at pages 127-139. Sanctuary refers to these regulations collectively as the "sign code."

have street frontage as defined in the Zoning Code, and is therefore not entitled to signage"; and that, "[i]n the 'D' zoning district[,] . . . [t]he maximum allowable square footage for any sign . . . is 30 sq.ft.; based on the diameter of the circular sign it is approximately 363 sq.ft. in area." (J.A. 347-48, 360-61; *see also* J.A. 200.) The Zoning Administrator's letter advised Sanctuary that it could appeal the denial to the Board of Adjustment, which Sanctuary did. (J.A. 348, 361; *see also* J.A. 195-96, 201-02.)

Before Sanctuary's appeal was heard, however, Alderman Phyllis Young—who had introduced the ordinance declaring Sanctuary's property "blighted" and authorizing eminent domain—wrote a letter "urg[ing] the Board . . . to uphold the . . . denial." She argued, "If this sign is allowed to remain then anyone with property along any thoroughfare can paint signs indicating the opinion or current matter relevant to the owner to influence passsersby with no control by any City agency. The precedent should not be allowed." (J.A. 209.)

The Board heard Sanctuary's appeal on July 11, 2007. (J.A. 348, 361.) Sanctuary argued that the City's sign code provisions were impermissibly content-based, in violation of the free speech protections of the U.S. and Missouri Constitutions. Sanctuary offered three examples of such content-based regulation:

- The sign code exempts from the definition of "sign"—and, thus, from the permit requirement and all other regulations pertaining to "signs"—numerous content-based categories, including "[n]ational, state, religious, fraternal, professional and civic symbols or crests" and "[w]orks of art."

(J.A. 348, 361; *see also* J.A. 270, 273-74; St. Louis, Mo., Rev. Code § 26.68.020(17).)

- The sign code lists some fourteen other, mostly content-based categories that, although considered "signs" under the code, are nonetheless exempt from the code's permit requirement. (J.A. 348, 361; *see also* J.A. 272-73; St. Louis, Mo., Rev. Code § 26.68.030.)

- That the sign code contains a "political sign" exemption for certain geographic zones of the city (not including Sanctuary's), which removes the permit requirement and allows political signs to be of *unlimited* size and location. (J.A. 348, 361; *see also* J.A. 274-75; St. Louis, Mo., Rev. Code § 26.68.050.)

Sanctuary argued that such content-based regulation is unconstitutional.

In the alternative, Sanctuary argued that the mural did not require a permit because, as a "[w]ork[] of art" or "civic symbol[] or crest[]," it was exempted from the sign code's definition of "sign." (J.A. 348, 361; *see also* J.A. 269-72; St. Louis, Mo., Rev. Code § 26.68.020(17)(d) & (e).)

Notwithstanding Sanctuary's arguments, on July 25, 2007, the Board upheld the denial of a permit for Sanctuary's mural. (J.A. 348, 361.) After implicitly concluding that the mural was not an exempted "[w]ork[] of art" or "civic symbol[] or crest[]," and that it was therefore a "sign," the Board determined that the "size and location of the sign were in violation of the Zoning Code." (J.A. 348-49, 361-62; *see also* J.A. 58-61.) Specifically, the Board's "Conclusion of Law and Order" explained that the mural:

- "is located in Zone D";

- "is substantially larger than the footage allowed by the Zoning Code"; and

- "is located on the side of the building in contravention to the requirements of the Zoning Code."

(J.A. 348-49, 361-62; *see also* J.A. 60.) Presumably, the Board was referring to St. Louis, Mo., Code § 26.68.080(E)(2), which provides that signs in Zone D "shall not exceed thirty (30) square feet," and § 26.68.080(D), which imposes a "Maximum Number" of "[o]ne (1) sign for each front line of the premises."

C. SANCTUARY CHALLENGES THE CITY'S UNCONSTITUTIONAL SIGN CODE PROVISIONS

Sanctuary filed this action against the City and Board in state court, challenging the permit denial and the sign code provisions on which it was based. Sanctuary asserted federal and state constitutional claims pursuant to 42 U.S.C. § 1983 and the Missouri Declaratory Judgments Act, Mo. Rev. Stat. § 527.010. Specifically, Sanctuary asserted that:

- The sign code provisions, facially and as applied, violate the First Amendment to the U.S. Constitution and Article I, section 8, of the Missouri Constitution. (Counts I, II, IV, and V)

- The sign permit requirement effects an impermissible prior restraint in violation of the First Amendment and Article I, section 8. (Counts III and VI)

- The sign code provisions discriminate based on geographic zone in violation of the Equal Protection Clause of the Fourteenth Amendment. (Count VII)

(J.A. 18, 34-52.)[7]

Pursuant to Mo. Rev. Stat. § 89.110, Sanctuary also petitioned for a writ of certiorari—the state-law mechanism for securing judicial review of "illegal" board of adjustment decisions—on the grounds that the Board's decision violated free speech and equal protection guarantees. (J.A. 18, 25-34.)

The City and Board removed the case to the U.S. District Court for the Eastern District of Missouri, then moved to dismiss everything except the state-law petition for writ of certiorari. (Notice of Removal (Doc. 1-1) p. 1; Mot. to Dismiss (Doc. 29) p. 1.) The district court denied the motion. (J.A. 305, 306.)[8] Believing the case capable of resolution on summary judgment, the parties agreed to proceed on stipulated facts and the administrative record from the proceeding before the Board.

D. THE CITY AND BOARD PRODUCE NO EVIDENCE SUPPORTING THE GOVERNMENTAL INTERESTS PURPORTEDLY UNDERLYING THE SIGN CODE PROVISIONS

The City and Board stipulated that they had no evidence to support their sign regulations or to substantiate the "traffic safety" and "aesthetics" interests that

[7] These and subsequent references are to Sanctuary's First Amended Petition for Writ of Certiorari and Civil Rights Complaint for Declaratory and Injunctive Relief, which is reproduced at pages 18-53 of the Joint Appendix.

[8] The district court granted the motion insofar as it sought dismissal of the City's Building and Inspection Division as a defendant.

purportedly motivated the regulations. (J.A. 349, 362.) For example, the City and Board stipulated (and the district court found) that:

- "Neither the City nor Board of Adjustment possesses any reports, studies, memoranda, or other documents underlying, concerning, or supporting the regulation of outdoor signs in Chapter 26.68 of the St. Louis Revised Code." (J.A. 349, 362.)

- "Neither the City nor the Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect traffic safety." (J.A. 349, 362.)

- "Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect the aesthetics of the City or surrounding neighborhood." (J.A. 349, 362.)

- "Neither the City nor Board of Adjustment is aware of any traffic incidents in which any driver involved cited or mentioned Sanctuary's sign/mural, or any 'painted wall sign,' as contributing to such incident." (J.A. 349, 362-63.)

- "Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda discussing the impact of Sanctuary's sign/mural on the flow of traffic on any street or highway." (J.A. 350, 363.)

- "The City and Board of Adjustment have no internal memoranda or communications, and no communications to or from them, discussing the adoption or enforcement of the regulations of outdoor signs in Chapter 26.68 of the St. Louis Revised Code." (J.A. 350, 363.)

- "The City and Board of Adjustment have no minutes or transcripts of any City Board of Aldermen meeting, including any committee or subcommittee of such Board, concerning or relating to the

regulation of outdoor signs in Chapter 26.68 of the St. Louis Revised Code." (J.A. 350, 363.)

In addition to acknowledging the absence of evidence supporting the sign code provisions, the City stipulated that it has no written policy (other than the sign code itself) to guide the determination of whether an alleged "sign" falls within the exemptions for "[w]orks of art" or "civic symbols or crests":

- "The City has no written policy other than Chapter 26.68 of the Revised Code of the City of St. Louis for use in determining if a sign contains the 'symbol[] or crest[]'of a civic organization as those terms are used in St. Louis Rev. Code § 26.68.020(17)." (J.A. 350, 363-64.)

- "The City has no written policy other than Chapter 26.68 of the Revised Code of the City of St. Louis for use in determining if something is 'art' as that term is used in St. Louis Rev. Code § 26.68.020(17)(e)." (J.A. 350, 364.)

Thus, the case proceeded to summary judgment on the undisputed fact that the City and Board had no evidentiary support for their sign regulations and no written policy for use in assessing whether Sanctuary's mural—or any alleged "sign," for that matter—is an exempted "[w]ork[] of art" or "civic symbol[] or crest[]."

E. THE DISTRICT COURT ERRONEOUSLY RULES FOR THE CITY AND BOARD

The parties filed cross motions for summary judgment on March 16, 2009. (J.A. 334-38, 340-43.) On March 29, 2010, the district court denied Sanctuary's motion and granted the City and Board's. (J.A. 356-83.)

Confusing viewpoint discrimination with content-based regulation, the district court held that the sign code provisions are content-neutral because they were not adopted out of disagreement with the message that Sanctuary's mural conveyed. (J.A. 374-77.) Having concluded that the provisions are content-neutral, the court subjected them to only intermediate scrutiny. (J.A. 378.) In reviewing the provisions under that standard, the court ignored the City and Board's stipulation that there was no evidence to support the asserted "traffic safety" and "aesthetics" interests and instead engaged in speculation and conjecture to uphold the regulations. (J.A. 378-80.)

With virtually no analysis, the court also rejected Sanctuary's prior restraint claims. (J.A. 381-82.) The court ignored the unbridled discretion that city officials enjoy—a consequence of the (stipulated) fact that the City has no written policy to guide the determination of whether an object constitutes a "sign" requiring a permit or, rather, one of the items exempted from the definition of "sign," such as a work of art or a civic symbol or crest.

The district court also summarily dispensed with Sanctuary's equal protection claim. (J.A. 380-81.) The court asserted that the City and Board had "advanced rational bases for the restrictions." (J.A. 381.)

Finally, the district court rejected Sanctuary's petition for a writ of certiorari under Mo. Rev. Stat. § 89.110 to review the Board's decision. (J.A. 364-70.)

Notwithstanding Missouri case law to the contrary, the court suggested it had no jurisdiction to review the constitutionality of the regulation(s) on which the Board's decision was based. (J.A. 369.)

In this light, the district court entered judgment for the City and Board. (J.A. 384.) Sanctuary timely appealed. (J.A. 385.)

V. SUMMARY OF THE ARGUMENT

The district court erred in holding that the City and Board did not violate the U.S. and Missouri Constitutions when they attempted to suppress Sanctuary's mural protesting the City's abuse of its eminent domain power.

The sign code provisions on which the City and Board relied violate constitutional guarantees of free speech. The court erroneously concluded that these provisions are content-neutral, notwithstanding the fact that they are riddled with content-based exemptions and restrictions. In concluding they are content-neutral, and thus constitutional, the district court ignored the overwhelming body of case law holding virtually identical sign code provisions content-based; and badly conflated the concepts of content-based regulation and viewpoint discrimination.

Having erroneously concluded that the sign code provisions were content-neutral, the district court subjected them to only intermediate scrutiny rather than strict scrutiny, which should have applied given the sign code's content-based

nature. But the district court erred even in applying the lower level of scrutiny. It ignored the fact that the City and Board stipulated to a lack of evidence supporting the sign code provisions and instead engaged in speculation and conjecture to conceive of possible grounds on which the provisions *might* be justified. The First Amendment demands evidence, not conjecture, before a restriction on speech can be upheld. Thus, regardless of which standard applies—strict or intermediate scrutiny—the sign code provisions violate free speech protections.

The district court erred as well in holding that the sign code's permit requirement does not effect an unconstitutional prior restraint on speech. The City stipulated that it has no written policy to guide the determination of whether an object constitutes: (1) a "sign" requiring a permit; or, instead, (2) one of the items exempted from the definition of "sign" (and, thus, from the permit requirement), such as a work of art or a civic symbol or crest. A scheme that requires a permit to engage in speech cannot be upheld if the permitting authority is not bounded by precise and clear standards. Here, the City and Board have *no* standards—much less clear and precise ones. The permit requirement therefore violates constitutional protections against prior restraints of speech.

The district court erred again in upholding the City and Board's geographically-based discrimination against property owners in their ability to display political signs. While property owners in Zone D (Sanctuary's zoning

designation) must obtain a permit and are subject to size and location restrictions, property owners in other zoning designations may display political signs without a permit and with no restrictions on size or location. In upholding such discrimination, the district court erred, applying rational basis review when case law required the City and Board to prove, at a minimum, that the discriminatory treatment is narrowly tailored to serve a substantial governmental interest. The City and Board made no such showing, and the discriminatory treatment therefore violates the Equal Protection Clause.

Finally, the district court erred in refusing to issue a writ of certiorari and enter judgment for Sanctuary on its claims under Mo. Rev. Stat. § 89.110, a state-law mechanism for obtaining judicial review of "illegal" board of adjustment decisions. In resolving these claims, the district court declined to consider the constitutionality of the sign code provisions underlying the Board's decision, notwithstanding the fact that Missouri case law authorizes such review. Judgment should have been entered for Sanctuary on these claims, as well.

VI. ARGUMENT

A. STANDARD OF REVIEW

The appropriate standard of review for each issue in this appeal is *de novo*. First, this case was resolved on summary judgment, and this court reviews a district court's grant or denial of summary judgment *de novo*. *Myers v. Lutsen*

Mountains Corp., 587 F.3d 891, 892 (8th Cir. 2009). This includes summary judgment decisions concerning the constitutionality of municipal ordinances under the First Amendment and Equal Protection Clause. *See 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1113 (9th Cir. 1999); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004).

Likewise, "courts of appeals review the state-law determinations of district courts *de novo*." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 (1991); *In re Western Iowa Limestone, Inc.*, 538 F.3d 858, 862 (8th Cir. 2008). This includes a district court's summary judgment determinations regarding the constitutionality of municipal ordinances under state constitutional provisions, such as Article I, section 8, of the Missouri Constitution. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001). *De novo* review also applies to a district court's interpretation of state statutes, such as the district court's interpretation of the judicial review provisions of Mo. Rev. Stat. § 89.110. *See U.S. v. Dedman*, 527 F.3d 577, 584-85 (6th Cir. 2008); *U.S. v. Johnson*, 941 F.2d 1102, 1111 (10th Cir. 1991).

"When *de novo* review is compelled," as it is here, "no form of appellate deference is acceptable." *Salve Regina Coll.*, 499 U.S. at 238. That command is amplified in this case, because "[a]n appellate court's review . . . is unique in the context of a First Amendment claim." *Lowry ex rel. Crow v. Watson Chapel Sch.*

Dist., 540 F.3d 752, 758 (8th Cir. 2008). "[I]n cases raising First Amendment issues[,] . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

Thus, this Court owes no deference to the district court's decision. Rather, it should reverse the district court and grant judgment for Sanctuary if "the record, viewed in the light most favorable to [the City and Board], demonstrates that there is no genuine issue of material fact and [that Sanctuary] is entitled to judgment as a matter of law." *Myers*, 587 F.3d at 893; *see also* Fed. R. Civ. P. 56(c).

B. THE CITY'S SIGN CODE PROVISIONS IMPERMISSIBLY BURDEN FREE SPEECH

The sign code provisions that the City and Board relied on in attempting to suppress Sanctuary's protest mural are impermissible content-based restrictions that violate the First Amendment and Article I, section 8, of the Missouri Constitution.[9]

[9] Because the Missouri courts have not authoritatively addressed what differences, if any, there are between the free speech protections of the First Amendment and Article I, section 8, *see State v. Roberts*, 779 S.W.2d 576, 579 (Mo. 1989), Sanctuary will treat the federal and state claims as coextensive.

1. The City's Sign Code Provisions Are Content-Based

The sign code provisions at issue are content-based. In concluding otherwise, the district court erred in two fundamental respects. First, it ignored the overwhelming body of case law holding substantially identical sign code provisions to be impermissibly content-based. Second, it confused the concepts of content-based regulation and viewpoint discrimination, erroneously concluding that the sign code was content-neutral because it was not viewpoint-based.

a. Sign Code Provisions Like The City's Are Routinely Considered Content-Based

A sign regulation is content-based if it makes "distinctions" based "on the content or message conveyed by the sign." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404 (8th Cir. 1995). Under the City's sign code, the content or message conveyed by an object dictates every aspect of regulation pertaining to it—from the applicable size and location restrictions, to whether a permit is required, to whether the object is even considered a "sign" in the first place.

Indeed, the City's sign code is content-based at its very core—that is, at the definition of "sign" itself. That definition begins:

> "Sign" means any object or device or part thereof situated 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, symbols, fixtures, colors, motion illumination or projected images.

St. Louis, Mo., Rev. Code § 26.68.020(17).[10] The definition section, however, proceeds to absolve a number of content-based categories of speech from *any* regulation by exempting them from the definition of "sign":

> Signs do not include the following:
>
> a. Flags of nations, states and cities, fraternal, religious and civic organization[s];
>
> b. Merchandise, pictures of models of products or services incorporated in a window display;
>
> c. Time and temperature devices;
>
> d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
>
> e. Works of art which in no way identify a product.

Id. Thus, a political protest mural containing the words "End Eminent Domain Abuse" is a "sign" subject to permitting, regulation, and restriction, while a mural of the same size, in the same location, containing instead a "professional [or] civic symbol[]" or a "work[] of art" escapes regulation completely.

[10] This portion of the definition is content-based: An enforcement officer, after all, must examine a would-be sign's content to determine whether it is used to "advertise, identify, display, direct or attract attention to an object, person, institution, organization, business product, service, event, or location." The real trouble, however, lies in the second half of the definition—the exemptions.

Other municipalities have adopted sign codes riddled with nearly identical exemptions and courts, including this one, have struck them down as impermissibly content-based. For example, the following exemptions were found to impermissibly discriminate based on content:

- "Flags and insignia of any government, religious, charitable, fraternal, or other organization." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1257, 1264, 1268-69 (11th Cir. 2005).[11]

- "[W]indow merchandise displays which are changed on a regular basis." *Bonita Media Enters.*, 2008 WL 423449, at *7, *9.

- "[S]igns . . . telling the time or temperature." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514, 515 (1981) (plurality).[12]

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[11] *See also Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 n.2, 249 (9th Cir. 1988) ("[f]lags of the national or state government; or not more than three flags of nonprofit religious, charitable or fraternal organizations"); *Clear Channel Outdoor, Inc. v. Town Bd.*, 352 F. Supp. 2d 297, 301, 309-10 (N.D.N.Y. 2005) ("flag, pennant or insignia of any nation or association of nations or of any state, city or other political unit, or of any political, charitable, educational, philanthropic, civic, professional, or like campaign, drive, movement or event"); *Bonita Media Enters. v. Code Enforcement Bd.*, No. 2:07-cv-411-FtM-29DNF, 2008 WL 423449, at *7, *9 (M.D. Fla. Feb. 13, 2008) (unpublished) ("flags or insignias of 'governmental, religious, charitable, fraternal or other nonprofit organizations'"); *City of Lakewood v. Colfax Unlimited Ass'n, Inc.*, 634 P.2d 52, 58 n.6, 69-70 (Colo. 1981) ("[f]lags of nations, or an organization of nations, states, cities or fraternal, religious or civic organizations").

[12] *See also King Enters., Inc. v. Thomas Twp.*, 215 F. Supp. 2d 891, 905, 910-12 (E.D. Mich. 2002) ("[s]igns which electronically display only the time and temperature . . ., provided the frequency of message change is not less than five (5) seconds"); *Bonita Media Enters.*, 2008 WL 423449, at *7, *9 ("signs which state the time and temperature"); *Desert Outdoor Adver., Inc. v. City of Oakland*, 506 F.3d 798, 804 & n.6 (9th Cir. 2007) (declining to review district court's decision that "exception for time and temperature displays . . . imposed an unconstitutional, content-based restriction on noncommercial speech"); *Coral Springs Street Sys.*,

- "National, state, religious, fraternal, professional or civic symbols or crests." *City of Lakewood*, 634 P.2d at 58 n.6, 69-70.[13]

- "[P]ermanent ground sign[s] indicating upcoming church activities and times of services." *Whitton*, 54 F.3d at 1404.[14]

- "Art work." *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1331, 1333-34 (M.D. Fla. 2009).

The common problem in these cases was clear: "[T]he exemptions require[d] City officials to examine . . . content . . . to determine whether the exemption[s] applie[d]." *Desert Outdoor Adver.*, 103 F.3d at 820. Thus, "by any commonsense understanding of the term," *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), the exemptions were content-based.

Two recent cases are particularly illustrative of the content-based nature of the City's exemptions. The first is *Lusk v. Village of Cold Spring*, 418 F. Supp. 2d 314, 318 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 475 F.3d 480 (2d Cir.

Inc. v. City of Sunrise, 371 F.3d 1320, 1347 & n.23 (11th Cir. 2004) (opining that exemption for "time-and-temperature" signs "may be unconstitutional"). *But see La Tour v. City of Fayetteville*, 442 F.3d 1095 (8th Cir. 2006) (holding, by a divided panel with no majority opinion, that a city's policy of not enforcing a facially-neutral ban of any "sign which flashes, blinks, or is animated" against time-and-temperature signs did not render the ban content-based as applied).

[13] *See also supra* note 11 and accompanying text.

[14] *See also McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659, 670, 673-75 (N.D. W. Va. 2006) ("[s]igns associated with churches and similar places of worship, not exceeding ninety-six square feet").

2007), involving a property owner who was cited after posting signs outside his home protesting a nearby development. 418 F. Supp. 2d at 318. Similar to Sanctuary, the property owner was cited for failing to obtain a permit for the signs and for violating a 32-square-foot size restriction. *Id.* at 318, 322. As here, the municipality's definition of "sign" contained an exemption for "flags, badges or insignia of any governmental agency or any civic, charitable, religious, patriotic, fraternal or similar organization." *Id.* at 322.

The property owner "challenge[d] as unconstitutional the fact that his political signs [we]re subject to the permitting and other requirements . . ., while the 'flag, badge or insignia of any governmental agency or any civic, charitable religious, patriotic, fraternal or similar organization' [was] not subject to those requirements, because [it was] excluded from the definition of the word 'sign.'" *Id.* at 321-22. The court concluded that the exemption and, therefore, the definition itself were impermissibly content-based. *Id.* at 323. In that light, it held not just the permit requirement and size restriction, but the entire chapter of regulations to which the definition of "sign" pertained, unconstitutional. *Id.* at 324 & n.1.

Another particularly instructive case is last year's *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326 (M.D. Fla. 2009). It involved bait-and-tackle shop owners who were cited after commissioning a mural for the side of

their shop. The purpose of the mural, which covered most of the western wall of the shop, was to "educate the public about the endangerment of game fish found in the local habitat." *Id.* at 1329. Like Sanctuary, the owners were cited for failing to obtain a sign permit for the mural and for exceeding the applicable size limit. *Id.* at 1329-30, 1331. And as here, the municipality's sign code contained an exemption for "[a]rt work," which the code defined as "drawings, pictures, symbols, paintings or sculpture which do not identify a product or business and which are not displayed in conjunction with a commercial, for profit or nonprofit enterprise." *Id.* at 1331.

The shop owners challenged the sign code as an impermissible content-based restriction on their political speech. *Id.* at 1333-34. Specifically, they argued that the exemption for "[a]rt work" was content-based and that the exemption, in turn, infected the permit requirement and size restrictions. *Id.* at 1133-34 & n.11. The court agreed, holding that city officials "necessarily examined . . . content" in determining whether or not the exemption for "[a]rt work" applied to the mural. *Id.* at 1331, 1333. Thus, the court enjoined the city from applying the permit requirement and size restriction to the mural. *Id.* at 1336.

The result of *Lusk* and *Complete Angler* should apply here, where virtually identical exemptions are in play. The exemptions—including those for "[w]orks of art" and "[n]ational, state, religious, fraternal, professional and civic symbols or

crests"—render the entire definition of "sign" content-based. *See Nat'l Adver. Co.*, 861 F.2d at 249 ("Because the exceptions to the restriction . . . are based on content, the restriction itself is based on content."). The content-based definition of "sign," in turn, infects the regulations premised on that definition, including the size, "front line," and permit requirements that Sanctuary's mural was found to violate. *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) ("Because the entire ordinance is bottomed on this definition, it is unconstitutional."); *Lusk*, 418 F. Supp. 2d at 324 ("[B]ecause Chapter 134 defines the word 'sign' as it does, the regulations on the posting of 'signs' set forth in that Chapter are unconstitutional, and plaintiff is entitled to an injunction against the enforcement of Chapter 134 in its entirety.").

The problem with the City's sign code, however, is not limited to the content-based definition of "sign" and the regulations premised on that definition. Other portions of the sign code independently discriminate based on content. For example, Section 26.68.030 lists some fourteen categories that, although considered "signs" under the code, are nonetheless exempted from the sign code's permit requirement. Nearly *all* the categories are content-based. *See* St. Louis, Mo., Rev. Code § 26.68.030.

One of the categories of "signs" exempted from the permit requirement is "political signs." *Id.* § 26.68.030(H). The exemption is of no avail to Sanctuary,

however, because, in yet another layer of content-based regulation, the exemption applies only to "election . . . related" signs. *Id.* Signs that comment on government policy, such as Sanctuary's mural (or signs reading "No Iraq War," "Support Our Troops," *etc.*), are *not* exempted. Such regulations, which distinguish between election-related signs and political signs unrelated to an election, have been routinely struck down as impermissibly content-based. *E.g.*, *Solantic*, 410 F.3d at 1264-65 (holding exemption for political signs "related to elections, political campaigns, or a referendum" was impermissibly content-based); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 787 (N.D. Ohio 2004) (holding unconstitutional a regulation limiting "political" signs to those referring to a "political contest"); *Goward v. Minneapolis*, 456 N.W.2d 460, 465-66 (Minn. Ct. App. 1990) ("We hold that the exception for campaign-related signs renders the ordinance content-based."); *see also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (noting that the "assertion that 'Jesus Saves,' that 'Abortion is Murder,' that every woman has the 'Right to Choose,' or that 'Alcohol Kills,'" is entitled to the same constitutional protection as "Roland Vincent-City Council").

To make matters worse, even the "political signs" that Section 26.68.030(H) *does* exempt from the permit requirement are subject to size, quantity, durational, and other limits that are more restrictive than those applicable to other exempted

signs. *Compare* St. Louis, Mo., Rev. Code § 26.68.030(H) (political signs) *with id.* § 26.68.030(J) (subdivision signs) *and id.* § 26.68.030(E) (decorations). As this Court and others have held, regulations that impose greater time, place, or manner restrictions on political signs than on commercial or other types of non-commercial signs are impermissibly content-based. *Whitton*, 54 F.3d at 1403-09 ("We agree with the district court that § 25-45, containing the durational limitations which are applicable only to political signs, is a content-based restriction."); *Solantic*, 410 F.3d at 1265 (holding restrictions on political signs content-based and noting that "a large neon arrow receives more favorable treatment under the sign code than a political sign"); *Outdoor Sys., Inc. v. City of Merriam*, 67 F. Supp. 2d 1258, 1269 (D. Kan. 1999) ("Nearly every court to address the issue has held that the government interest in aesthetics and safety is insufficient to justify a durational restriction on political signs in residential districts.").

In short, the City's sign code is content-based at its core—the definition of "sign." In turn, the regulations premised on that definition—including the permit, size, and "front line" restrictions applied to Sanctuary's mural—are also content-based. Were that not enough, the sign code compounds those problems with layer upon layer of additional content-based regulation, such as the permit exemption for election-related political signs. The district court was thus wrong in holding the sign code content-neutral.

b. The District Court's Erroneous Conclusion That The Sign Code Is Content-Neutral Resulted From Its Conflation Of Content-Based Regulation And Viewpoint Discrimination

Notwithstanding overwhelming case law to the contrary, the district court held that the sign code provisions are content-*neutral*. In so holding, "the district court seems to have confused content-based regulation with viewpoint discrimination." *Mesa v. White*, 197 F.3d 1041, 1045 n.4 (10th Cir. 1999). In essence, it concluded that a regulation is only content-based if it discriminates based on *viewpoint*—that is, if it regulates speech "'because of disagreement with the message it conveys.'" (J.A. 375 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *see also* J.A. 377 ("The evidence does not support a conclusion that the City—by allowing flags[,] crests, works of art—is favoring or disfavoring any message."); J.A. 375-76 ("[T]he evidence does not support a finding that the restrictions prohibit signs in excess of thirty square feet in Zone D with frontage because the City favors or disfavors any message a citizen might want to convey by use of such a sign.").)

Whether the City's sign code discriminates based on viewpoint is admittedly a close—or, at least, closer[15]—issue. That it discriminates based on *content* is not close at all; it is clear.

[15] Sanctuary maintains that the sign code *does* discriminate based on viewpoint—for example, in its exempting only election-related political signs from the permit requirement. *See Goward*, 456 N.W.2d at 465 (holding that ordinance, "[b]y

"[N]either disagreement with content nor improper censorial motive is necessary for regulation of speech to be content based." *Mesa*, 197 F.3d at 1045 n.4. In fact, the Supreme Court has "expressly rejected the argument that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Discovery Network*, 507 U.S. at 429 (omission in original; internal quotation marks and citation omitted). Even the primary case relied on by the district court for its conclusion, *Turner Broadcasting System, Inc. v. FEC*, 512 U.S. 622 (1994), makes this point in a passage that the district court omitted: "[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases." *Id.* at 642-43. This Court has been equally clear in this regard. *See, e.g.*, *Whitton*, 54 F.3d at 1405 ("[T]he argument that a restriction on speech is content-neutral because it is viewpoint-neutral has been repeatedly rejected by the Supreme Court."); *City of Ladue v. Gilleo*, 986 F.2d 1180, 1184 n.5 (1993) ("We recognize that the ordinance is viewpoint neutral. But viewpoint neutrality does not render the statute content-neutral."), *aff'd*, 512 U.S. 43 (1994).

The district court offered an alternative, but equally unconvincing, argument for the supposed content-neutrality of the sign code: that it is "'justified without

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permitting campaign-related signs while banning signs on such political issues as abortion, taxes, and gun control," had "the effect of suppressing viewpoints critical of the government").

reference to the content of the regulated speech'"—specifically, by the City's "desire to promote traffic safety." (J.A. 377-78 (quoting *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1220 (8th Cir. 1997) (internal quotation marks omitted)).) But this argument has also been rejected by the Supreme Court. *See Discovery Network*, 507 U.S. at 429-430. As this Court explained in *Whitton*, "even if we agree with the City . . . that its restriction is 'justified' by its interest in maintaining traffic safety and preserving aesthetic beauty, we still must ask whether the regulation *accomplishes* the stated purpose in a content-neutral manner." *Whitton*, 54 F.3d at 1406.

Here, the sign code provisions applied to Sanctuary's mural do not accomplish their stated purposes in a content-neutral manner. After all, the City requires a permit for, and restricts the size and location of, a mural protesting its abuse of the eminent domain power, yet it absolves other *identically* sized and situated murals—for example, murals containing the Masonic crest, Papal coat of arms, American Bar Association symbol, or a "work of art," St. Louis, Mo., Rev. Code § 26.68.020(17)(d) & (e)—of *any* regulation whatsoever. *See Whitton*, 54 F.3d at 1407 ("Although Gladstone's justification for enacting the durational limitations was to curtail the traffic dangers which political signs pose and to promote aesthetic beauty, Gladstone has not seen fit to apply such restrictions to

identical signs displaying nonpolitical messages which present *identical concerns*.")

The district court discounted such discriminatory treatment, holding that "[b]ecause civic crests, works of art and flags are not the 'stuff' of public debate, there is no danger that the City—by exempting them from other categories of signs—will give one side of a debatable public question an advantage in expressing its views to the people." (J.A. 377 (internal quotation marks and citation omitted).) In other words, the district court held that the City may subject Sanctuary's mural to *greater* restrictions than apply to the exempted categories precisely because it is political speech concerning a "debatable public question." Such reasoning turns the First Amendment on its head: "If the First Amendment protects anything, it must protect statements that are critical of . . . actions undertaken by a government and affecting the public interest." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 919 F. Supp. 756, 763 (D. N.J. 1996).

In short, "[a] regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based regardless of its motivating purpose." *Serv. Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (internal quotation marks and citation omitted). The

district court was therefore wrong to conclude that the sign code provisions are content-neutral.

2. The City's Sign Code Provisions Fail Strict Scrutiny

A content-based regulation of speech is "presumptively invalid" and will only be sustained if the government meets its burden of proving that the regulation "advances a compelling state interest and is narrowly tailored to serve that interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 749, 763 n.14 (en banc).[16] The City and Board cannot meet their burden.

The City and Board have no compelling interest in forbidding Sanctuary's mural while treating other categories of speech more favorably or exempting them from regulation altogether. As this Court has recognized, the only interests that the City has identified—"traffic safety and aesthetics" (J.A. 349) —"have never been held to be compelling." *Whitton*, 54 F.3d at 1408; *see also Ladue*, 986 F.2d at 1182, 1184 (holding that interests in "protect[ing] the safety of residents" and "preserv[ing] the natural beauty of the community" are not compelling); *Midwest Media Property*, 503 F.3d at 477 ("[A]esthetic interests and public safety concerns . . . are insufficient to survive strict scrutiny.").

[16] Strict scrutiny is also appropriate because the sign code burdens core political speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

But even assuming traffic safety and aesthetics are compelling interests, the inquiry does not end there: The City and Board must also prove that the sign code provisions are "narrowly tailored to serve th[ose] interest[s]." *White*, 416 F.3d at 751. This requires proof that the sign code provisions are, among other things, the "least-restrictive alternative" for achieving the asserted interests and that they "actually advance[]" those interests. *Id.*

The City and Board cannot prove that the sign code provisions are the "least-restrictive alternative" for achieving their interests when they have stipulated that they possess no documents whatsoever "underlying, concerning, or supporting" the regulations. (J.A. 349, 362.) Nor can they prove that their regulations "actually advance[]" their purported interests in traffic safety and aesthetics: They have stipulated that they are not aware of any studies, reports, or memoranda showing that their regulations even *affect* traffic safety or aesthetics. (J.A. 349, 362.) The sign code provisions, therefore, are not narrowly tailored.

The sign code provisions fail the narrow-tailoring requirement for another reason: They are under-inclusive. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness [of a speech regulation] raises serious doubts about whether [the government] is, in fact, serving . . . the significant interests which [it] invokes . . . ."). A regulation is under-inclusive if it "leave[s] significant influences bearing on the interest unregulated." *White*, 416 F.3d at 751.

Here, the City treats Sanctuary's "End Eminent Domain Abuse" mural as a prohibited "sign," yet it allows—indeed, does not even consider to *be* a "sign"—a mural containing instead a professional crest, religious symbol, civic organization's flag, or a "work of art." *See* St. Louis, Mo., Rev. Code § 26.68.020(17)(a), (d), (e). Similarly, the City imposes a permit requirement on political signs carrying issue-oriented messages such as "End Eminent Domain Abuse," yet it exempts political signs related to elections. St. Louis, Mo., Rev. Code § 26.68.030(H).

The City and Board presented no evidence that Sanctuary's mural is any more of a threat to traffic safety and aesthetics than such exempted items. *See Whitton*, 54 F.3d at 1408; *Solantic*, 410 F.3d at 1268. If aesthetics can be compromised, and motorists distracted, by Sanctuary's mural—a dubious proposition and one the City and Board stipulated they have no evidence to support—then they may be "just as compromised, and . . . just as distracted, by displays of governmental, religious or charitable flags, badges and insignia." *Lusk*, 418 F. Supp. 2d at 324. Yet the City exempts such displays from *any* regulation.

"[T]he City has simply failed to demonstrate how [its] interests are served by the distinction it has drawn in the treatment of exempt and nonexempt categories of signs. Simply put, the sign code's exemptions are not narrowly

tailored to accomplish either the City's traffic safety or aesthetic goals." *Solantic*, 410 F.3d at 1268. They are therefore unconstitutional.

3. The City's Sign Code Provisions Do Not Survive Intermediate Scrutiny

Even if this Court concludes the district court was correct to review the sign code provisions as content-neutral time, place, or manner restrictions, the provisions still do not pass constitutional muster. Such restrictions are only valid if they survive intermediate scrutiny: that is, if they are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).[17] The sign code provisions do not satisfy that standard.

a. The City And Board Have The Burden To Prove The Sign Code Provisions Survive Intermediate Scrutiny

The district court erred in placing the burden on Sanctuary to prove the sign code provisions *fail* intermediate scrutiny, rather than on the City and Board to prove they *survive* it. (*E.g.*, J.A. 378 (holding that Sanctuary had "not convince[d] the Court that the City's stated reasons for its enaction of the restrictions are either false or unreasonable"). "When the Government restricts speech, the Government

[17] *But see BBC Fireworks, Inc. v. State Highway and Transp. Comm'n*, 828 S.W.2d 879, 882 n.2 (Mo. 1992) (suggesting same test may not be appropriate under Article I, section 8, of the Missouri Constitution).

bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

Moreover, meeting the government's burden requires actual evidence. The Supreme Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Government PAC*, 528 U.S. 377, 392 (2000).

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broad. Sys., 512 U.S. at 664 (plurality) (internal quotation marks and citation omitted); *see also Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 771-72 (8th Cir. 2008) ("Where first amendment rights are at stake, the Government must present more than anecdote and supposition." (internal quotation marks and citations omitted)).

Thus, courts routinely require the government to proffer actual, objective evidence to support restrictions on speech. *See, e.g.*, *Horina v. City of Granite City*, 538 F.3d 624, 633-34 (7th Cir. 2008) ("[T]he government must . . . proffer *something* showing that the restriction actually serves a government interest, and we have struck down time, place, and manner restrictions where the government failed to produce 'objective evidence' showing that the restrictions served the

interests asserted." (citation omitted)); *Pagan v. Fruchey*, 492 F.3d 766, 774 (6th Cir. 2007) (en banc) (rejecting "standard of 'obviousness' or 'common sense,' and "requir[ing] *some* evidence to establish that a speech regulation addresses actual harms with some basis in fact"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (holding government must "present . . . substantial supporting evidence of harm . . . before an ordinance that threatens protected speech can be upheld" (internal quotation marks and citations omitted)); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002) ("In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification.").

Here, the City and Board concede they possess no documentation whatsoever "underlying, concerning, or supporting the[ir] regulation of outdoor signs" (J.A. 349, 362.). Therefore, they cannot possibly meet their burden of proving that the sign code provisions applied to Sanctuary's mural are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293.

b. The Restrictions Applied To Sanctuary's Mural Do Not Serve A Significant Governmental Interest

The City and Board cannot prove that their regulations "serve a significant governmental interest." Even if the claimed interests in traffic safety and aesthetics are significant,[18] "merely invoking [them] is insufficient. The [City and Board] must also show that the proposed communicative activity endangers those interests." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004) (citation omitted).

Here, the City and Board proffered no evidence to substantiate the harm that Sanctuary's mural supposedly poses, nor could they have: They stipulated that they are not aware of "any studies, reports or memoranda discussing the impact Sanctuary's [mural] has on the flow of traffic," nor of "any traffic incidents in which any driver . . . mentioned Sanctuary's [mural], or any 'painted wall sign,' as contributing to [the] incident." (J.A. 349-50, 362-63.) The supposed problems posed by the mural are nothing more than unsupported conjecture, which is "*verboten* in the First Amendment context." *Horina*, 538 F.3d at 633. In the absence of actual evidence, the City and Board may not rely on traffic safety and

[18] *Compare Whitton*, 54 F.3d at 1408 (stating interests in traffic safety and aesthetics are significant) *with Goward*, 456 N.W.2d at 467 ("The Supreme Court has never held that aesthetic interests alone can constitute a governmental interest significant enough to override political speech *on property owned by the speaker*. We hold it cannot." (emphasis added)).

aesthetics interests to justify the sign code provisions. *See Pagan*, 492 F.3d at 774 (holding regulation of "for sale" signs unconstitutional "in the absence of evidence of concrete harm"); *Weinberg*, 310 F.3d at 1039 (holding peddling ban unconstitutional because city "provided no objective evidence that traffic flow on the sidewalk or street is disrupted when [plaintiff] sells his book"); *Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 567 (E.D. La. 2003) (enjoining enforcement of book vending ban because city "did not put on a single witness or any evidence to establish that book vending from a table would cause congestion or create a hazard for pedestrians"); *see also Entm't Software Ass'n*, 519 F.3d at 772 (holding video game regulation unconstitutional because government failed to "come forward with empirical support for its belief that 'violent' video games cause psychological harm to minors" (internal quotation marks and citation omitted)).

Notwithstanding this complete absence of objective evidence, the district court, on it own accord, conceived of three possible scenarios in which the mural *might* pose a threat:

- "Petitioner's sign contains small print which cites a website for more information. It *may* well be that travelers would become distracted attempting to record that website."

- "[T]he figure painted on the wall contains a slash through the words 'End Eminent Domain Abuse.' Like the website citation, travelers *may* become distracted trying to ascertain what was written underneath the slash."

- "Surrounding neighbors and passers-by *may* find a billboard sized painting on the side of a residential building aesthetically displeasing."

(J.A. 378-79 (emphasis added).)[19] The district court's exercise is precisely the kind of "conjecture" that the Supreme Court "ha[s] never accepted . . . as adequate to carry a First Amendment burden." *Nixon*, 528 U.S. at 392. Moreover, "[a] court's role is not to search for evidence that a party *could* have located and submitted but did not. Nor should a court base its decision on an evidentiary record of its own creation." *Pagan*, 492 F.3d at 775 n.7.

But even if Sanctuary's mural did somehow threaten governmental interests in traffic safety and aesthetics, the City and Board still failed to "produce 'objective evidence' showing that [their] restrictions *serve[]* th[ose] interests." *Horina*, 538 F.3d at 634 (emphasis added). The First Amendment requires "requires *some* evidence to establish that a speech regulation addresses" the harms asserted, *Pagan*, 492 F.3d at 774—that is, that the regulation "will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664 (plurality). Here, as noted above, the City and Board stipulated that they possess no "documents . . . supporting [their] regulation of outdoor signs," nor any

[19] Sanctuary notes that in upholding the constitutionality of the supposedly content-neutral sign code, the district court hung its hat on the *content* of the mural—*e.g.*, that it "cites a website for more information" and "contains a slash through the words 'End Eminent Domain Abuse.'"

"studies, reports or memoranda" regarding whether the sign code provisions even "*affect* traffic safety . . . [or] aesthetics." (J.A. 349, 362 (emphasis added).)

"[T]he government must . . . proffer *something* showing that [its] restriction[s] actually serve[] a government interest." *Horina*, 538 F.3d at 633-34. Here, it proffered nothing. The sign code provisions, therefore, cannot be said to "serve a significant governmental interest." *Clark*, 468 U.S. at 293.

c. The Restrictions On Sanctuary's Mural Are Not Narrowly Tailored

But even if the district court was correct in concluding that the sign code provisions serve a significant governmental interest, the sign code provisions still fail intermediate scrutiny because the City and Board never proved that the regulations are narrowly tailored. A regulation is "narrowly tailored" for purposes of intermediate scrutiny if it: (1) "promotes a substantial government interest that would be achieved less effectively absent the regulation"; and (2) does not "burden substantially more speech than is necessary to further" that interest. *Ward*, 491 U.S. at 799 (internal quotation marks omitted). Here, neither requirement is satisfied.

As noted above, it is a matter of stipulated fact in this case that "[n]either the City nor Board of Adjustment possesses any . . . documents underlying, concerning, or supporting the[ir] regulation of outdoor signs," and that "[n]either the City nor the Board of Adjustment is aware of any studies, reports or

memoranda . . . regarding whether the City's restrictions on outdoor signs affect traffic safety . . . or aesthetics." (J.A. 349, 362.) If there is no evidence supporting the sign code provisions, and no evidence that those regulations have any effect whatsoever on the asserted interests in traffic safety and aesthetics, then the City and Board cannot possibly establish that those interests would be "achieved less effectively absent the regulation[s]." *Ward*, 491 U.S. at 781 (internal quotation marks and citation omitted).

The sign code provisions fail the narrow tailoring requirement for another reason: They "burden substantially more speech than is necessary," *id.*, because they "do[] not sufficiently match [the City and Board's] stated interest[s]." *Kuba*, 387 F.3d at 862 (internal quotation marks omitted). For example, the City and Board claim that traffic safety and aesthetics necessitate the permit requirement, 30-square-foot size limit, and "front line" restriction on Sanctuary's mural, yet they allow other items—for example, "works of art," "professional [or] civic symbols," "[s]igns in the nature of decorations," and signs to "advertise or identify construction, remodeling, rebuilding, development, sale, lease or rental"—to be erected *without* a permit and to be of *unlimited* size and location. *See* St. Louis, Mo., Rev. Code § 28.68.020(17)(d), (e); § 28.68.030(E), (M). This mismatch between the asserted interests and the restrictions the City and Board have applied to Sanctuary's mural makes clear the restrictions are not narrowly tailored.

If murals like Sanctuary's really are a threat to the City and Board's interests in traffic safety and aesthetics, then the City and Board should have been able to proffer *some* evidence establishing that threat and demonstrating that their regulations are narrowly-tailored to combat the threat. *See Pagan*, 492 F.3d at 777 ("[I]f the need for the regulation is as obvious as Glendale . . . believe[s] it to be, it seems that Glendale should be ideally positioned to provide *some* evidence of the need for its regulation—a task that Glendale has been entirely unwilling to undertake."). The City and Board, however, came forward with nothing.

d. The Restrictions On Sanctuary's Protest Mural Do Not Leave It With Ample And Adequate Alternatives

Even if the City's sign code provisions are deemed content-neutral and narrowly-tailored to serve a significant interest, they are still unconstitutional because they fail to "leave open ample alternative channels for communication of the information" Sanctuary seeks to convey. *Clark*, 468 U.S. at 293. It was the City and Board's burden "to show that [asserted] alternatives . . . are ample and adequate." *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1553 (7th Cir. 1986) (internal quotation marks omitted)), *aff'd*, 479 U.S. 1048 (1987). They made no such showing.

Rather, and notwithstanding the Supreme Court's admonition that a sign on one's own property is "an unusually cheap and convenient form of communication" that often has "no practical substitute," *City of Ladue v. Gilleo*,

512 U.S. 43, 57 (1994), the district court simply *assumed* that two particular alternatives to Sanctuary's mural would suffice: "a billboard in other zoned areas" of the city; and "handbills," which Sanctuary could "distribute . . . at City parks teeming with the masses during festive occasions." (J.A. 379-80.)

In finding these alternatives adequate, the district court simply ignored the Supreme Court's holding in *LaDue* that hand-billing or leafleting is not an adequate alternative to a sign on one's own property. As the Supreme Court explained, "Even for the affluent, the added costs in money or time of . . . handing out leaflets on the street . . . may make the difference between participating and not participating in some public debate." *Ladue*, 512 U.S. at 57.

Moreover, if handing out handbills or leaflets is not an adequate alternative to a sign on one's own property, then surely a costly billboard is not. That is especially true here. Sanctuary In The Ordinary is a non-profit, low-income housing provider, and Neighborhoods Enterprises is a self-supporting housing ministry. (J.A. 345-46; 358). The City and Board produced no evidence whatsoever that such a costly alternative was available to these organizations that serve the poor.

More fundamentally, however, a "billboard in other zoned areas" of the city or "handbill[ing] . . . at City parks" would deprive Sanctuary of the communicative impact of its mural, because the message of the mural is uniquely tied to the

property itself. The adequacy of an alternative often turns on *location*—the location in which the speaker *desires* to speak, as well as the location of the venue or medium that the government asserts is an adequate alternative. In *Ladue*, for example, the Supreme Court stressed the importance of location to message in holding there was no adequate alternative for a political protest sign on one's own property:

> 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. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . [T]he identity of the speaker is an important component of many attempts to persuade.

Ladue, 512 U.S. at 56-57.

This connection between location and message is similarly well illustrated by *Goward v. City of Minneapolis*, 456 N.W.2d 460 (Minn. Ct. App. 1990). There, a homeowner harmed by a city's zoning decision protested the decision by displaying signs in his yard that read, among other things, "Drive up the back alley & see what man's inhumanity to man has done to my home." *Id.* at 462. The city forced him to remove the signs because of an ordinance prohibiting certain lawn signs. The court struck down the ordinance for failure to leave open adequate alternatives:

> We think the messages contained on respondent's signs are so closely connected to their location that no adequate alternative means of communication exists. The signs invite passers by to look at the

> house, and to consider whether the city treated respondent in a humane fashion. The same message communicated any place other than the house would carry little impact.

Id. at 468. Numerous other cases similarly stress the importance of location to message. *E.g.*, *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (holding alternatives to "For Sale" signs were unsatisfactory because they were "less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold"); *Weinberg*, 310 F.3d at 1041-42 ("The United Center is a unique location for the sale of Weinberg's book, especially since the target market for his book is Blackhawk fans.").

As in each of these cases, the location of Sanctuary's mural (a building threatened with eminent domain abuse) is a critical component of the message itself ("End Eminent Domain Abuse"). Sanctuary placed the mural where it did precisely because the building was threatened with condemnation for private development: The City was actively trying to acquire the building for "redevelopment" when Sanctuary commissioned the mural, and, to this day, the building is under a "blight" declaration that grants the City the power to condemn it. (J.A. 214, 217, 220, 277-78, 289; *see also* Mo. Rev. Stat. § 99.420(4); § 99.320(3) & (10)(a); St. Louis, Mo., Ordinance 64831 § 8 & Ex. B § D(2) (Dec. 17, 1999).) Protesting the City's eminent domain abuse at the very site of—indeed, on the very object of—that abuse is the only adequate means of conveying

the message that such abuse is wrong. Protesting instead on an offsite billboard or at a city park, as the district court suggested, simply is not an adequate substitute.

The district court acknowledged the relevance of location to the message of Sanctuary's mural, but ultimately rejected its importance: "[Sanctuary's] argument that the sign should be on the premises rather than off site is extremely weakened by the fact [that Sanctuary] do[es] *not* live on the premises." (J.A. 379-80.) But Sanctuary In The Ordinary *owns* the premises, and eminent domain is government's "power . . . to acquire . . . property from unwilling *owners*." *Kelo v. New London*, 545 U.S. 469, 472 (2005). Location, therefore, was everything in this case.[20]

Moreover, "[t]he First Amendment protects [Sanctuary's] right not only to advocate [its] cause but also to select what [it] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Thus, an alternative will only be considered "ample" and "adequate" if it "is accessible and [capable of reaching] where the intended audience is expected to pass." *Students Against Apartheid Coal. v. O'Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987). Here, Sanctuary's message is to the city at large—even those citizens not necessarily seeking information regarding eminent domain abuse. To that end, the message is

[20] In any event, as noted above, Sanctuary displayed the mural with the consent of its residents, including Jackie Ingram, who was displaced by one of the City's earlier condemnations of Sanctuary property. (J.A. 217, 284.)

most effectively expressed by a large mural on the side of Sanctuary's property that is most visible to the public. *See Linmark*, 431 U.S. at 93 (noting alternatives may be inadequate if they "are less likely to reach persons not deliberately seeking [the] information").

The City and Board did not prove that their highly restrictive sign code provisions leave Sanctuary with adequate alternatives for effectively conveying its message and reaching its intended audience. The provisions are therefore unconstitutional.

C. THE SIGN CODE EFFECTS A PRIOR RESTRAINT ON SANCTUARY'S SPEECH IN VIOLATION OF THE U.S. AND MISSOURI CONSTITUTIONS

The City's sign code is unconstitutional for another reason: Its permit requirement effects an impermissible prior restraint on speech. A law that requires a permit to engage in speech will only be upheld if the permitting authority is "bounded by precise and clear standards." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 558 (1975); *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983). Here, the City's permitting requirement contains *no* standards—much less clear and precise ones.

Speech permit requirements that "plac[e] unbridled discretion in the hands of a government official or agency" raise the specter of censorship. *City of Lakewood v. Plain Dealer Publ'g Corp.*, 486 U.S. 750, 757 (1988); *see also Kiely*,

652 S.W.2d at 697-98. "To curtail that risk, 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." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotation marks omitted); *see also Kiely*, 652 S.W.2d at 698. "If the permit scheme" lacks such standards and instead "involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth*, 505 U.S. at 131 (internal quotation marks omitted).

Here, the City has divided regulated speech from unregulated speech and given itself the power to grant or deny permits on standards that are anything but "narrow, objective, and definite." The sign code exempts from its definition of "sign," and therefore from any regulation, such things as "[w]orks of art" and "civic symbols or crests." The code provides no definition of those terms, and the City and Board stipulated that there are no standards outside the code for determining whether they apply. (J.A. 350, 363-64.) Not surprisingly, when Sanctuary requested a determination as to whether its mural constituted a work of art or a civic crest or symbol, the City provided no explanation for its (implicit) determination that it constituted neither and was therefore a "sign."

This lack of "narrow, objective, and definite" standards is only compounded by the inherent vagueness of the term "art" itself. The question, "What is art?" has been described as "one of the most elusive of the traditional problems of human culture," Richard Wollheim, *Art and Its Objects* 1 (1980), and courts have found the term "works of art" inherently vague. *E.g.*, *Household Goods Carriers' Bureau v. ICC*, 584 F.2d 437, 440 (D.C. Cir. 1978).[21]

Nevertheless, the City has tasked its administrative staff and Planning Commission with reviewing potential "signs" and asking, "Is this art? Is this a civic symbol?" This consideration occurs with no guidance from the legislative authority of the City, and with no written policy on the part of the City's administrative staff. (J.A. 350, 363-63.) Instead, it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority"—things the Supreme Court has said are forbidden in the prior restraint context. *Forsyth*, 505 U.S. at 131.

[21] In this regard, the definition of "sign," with its exemptions for "art" and other undefined types of speech, is void for vagueness: It uses "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *Baugus v. Director of Revenue*, 878 S.W.2d 39, 41 (Mo. 1994) (same). The same is true of the limit on signs in Zone D to "[o]ne (1) sign for each front line of the premises." St. Louis, Mo., Rev. Code § 26.68.080(D). The term "front line" is undefined, and it is unclear whether the restriction means one sign *per* front line (*i.e.*, the *number* of signs is a function of the number of front lines); or one sign *on* each front line (*i.e.*, the *location* of signs is a function of the front line(s)).

In concluding otherwise, the district court engaged in reasoning that was utterly inconsistent with itself. For example:

- The court acknowledged that "the term 'art' has no definition in the Sign Code," yet concluded that the "denial of the permit was based solely on limitations specifically detailed in the [sign] code." (J.A. 381, 382.)

- The court acknowledged that the City has "no written policy . . . for use in determining if something is 'art,'" yet insisted that the determination involves "no discretion" on the part of City officials. (J.A. 364, 382.)

The City and Board are neither bridled in their discretion nor bounded by precise and clear standards in implementing the permit requirement. They therefore cannot meet their burden of justifying this prior restraint.

D. THE SIGN CODE'S DISCRIMINATORY TREATMENT OF SIGNS BASED ON GEOGRAPHIC ZONE VIOLATES THE EQUAL PROTECTION CLAUSE

Apart from violating free speech rights, the sign code violates the Equal Protection Clause by discriminating against Zone D property owners like Sanctuary in their display of political signs. The Equal Protection Clause prohibits such discrimination unless the City and Board can prove, at a minimum,[22] that the differential treatment is narrowly tailored to serve a substantial governmental interest. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (holding,

[22] Arguably the standard is even higher—namely, strict scrutiny. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 283 n.22 (3rd Cir. 2009) ("[C]ontent-based time, place, and manner regulations . . . call for strict scrutiny—whether viewed through the lens of First Amendment or Equal Protection doctrine.").

"under an equal protection analysis," that anti-picketing law's "discriminations among pickets must be tailored to serve a substantial governmental interest"); *see also id.* at 101-02. The City and Board cannot do so.

Sanctuary's building is located in "Zone D," where a sign permit is required and signs are limited to "thirty . . . square feet" and "[o]ne . . . for each front line of the premises." St. Louis, Mo., Rev. Code § 26.68.080(D) & (E). Property owners in Zones F through K, on the other hand, enjoy a specific "political sign" exemption that allows them to erect political signs without a permit and with *no* limits on size and location. St. Louis, Mo., Rev. Code § 26.68.050(C) & (E) ("Political signs in F through K districts").

Such discrimination is prohibited by the Equal Protection Clause. First, there is no evidence of any "substantial governmental interest" in regulating speech based on the geographic location of the speaker. Second, even if the City and Board could demonstrate a substantial interest, there is nothing in the record or on the face of the code that justifies regulating speech differently in different areas based on *content*. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) ("[U]nder the Equal Protection Clause, . . . [a] regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." (internal quotation marks and citation omitted)); *Mosley*, 408 U.S. at 102 (holding, "under the Equal Protection Clause," that ordinance's "discrimination . . . based on the

content of" expression "may not stand"). Unless they can show that political signs in Zone D are "clearly more disruptive" than political signs in Zones F through K, the City and Board cannot treat Zone D property owners differently. *Id.* at 100.

The district court, however, relieved the City and Board of their burden to prove that the sign code provisions are "tailored to serve a substantial governmental," concluding instead that the regulations are content-neutral and, therefore, subject only to rational basis review. (J.A. 380-81.) The court was wrong for two reasons. First, the discriminatory treatment of Zone D property owners is *not* content-neutral: Sections 26.68.050(C) & (E) establish differential treatment for "political signs" alone.

Second, even if those provisions *were* content-neutral, the court's decision to apply rational basis review was wrong: *Mosley* makes clear that "under an equal protection analysis," even content-neutral laws that discriminate in a manner impacting expression "must be tailored to serve a substantial governmental interest." *Mosley*, 408 U.S. at 99; *see also 7250 Corp. v. Bd. of County Comm'rs for Adams County*, 799 P.2d 917, 922-23 (Colo. 1990) (reviewing content-neutral regulations and holding that "the appropriate standard for equal protection purposes is neither the strict judicial scrutiny standard nor the rational basis test. Rather, the appropriate standard is an intermediate level of scrutiny which asks whether the legislative classification is narrowly tailored to serve a substantial

governmental interest.").[23] As already discussed, the City and Board did not meet this standard, and the discriminatory treatment of Zone D property owners therefore violates equal protection.[24]

E. THE DISTRICT COURT ERRED IN DECLINING TO ISSUE A WRIT OF CERTIORARI AND ENTER JUDGMENT FOR SANCTUARY ON ITS CLAIMS UNDER MO. REV. STAT. § 89.110

Finally, the district court erred in declining to issue a writ of certiorari and enter judgment for Sanctuary on its challenge under Mo. Rev. Stat. § 89.110, which provides for judicial review of "illegal" board of adjustment decisions. The bases of this challenge parallel the constitutional claims discussed above: Sanctuary alleged that the Board's decision was "illegal" because it relied on sign code provisions that violate the First Amendment, Equal Protection Clause, and Article I, section 8, of the Missouri Constitution.

Without explanation, however, the district court limited its review to whether there was "competent and substantial evidence" to support the Board's

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[23] Admittedly, courts are sometimes unclear on this issue. *See, e.g.*, *Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009) (holding that "where a law regulating speech is content-neutral," it "must survive, *at most*, an intermediate level of scrutiny" under the Equal Protection Clause (emphasis added)).

[24] Even if the rational basis test were appropriate, it is not satisfied here. While lenient, the rational basis test demands *some* basis for the discriminatory treatment of political signs based on geographic zone. Neither the district court nor the City and Board identified any such interest. There is none, and the sign code therefore violates equal protection even under this most deferential level of review.

determination that Sanctuary's mural "did not fall within the [sign] code's parameters of allowable signs, i.e., size and placement in Zone D." (J.A. 366, 369.) The court refused to consider the constitutionality of those "parameters." Such a cramped reading of the scope of a court's review under Section 89.110 is contrary to Missouri law.

"[T]the scope of judicial review of a board of adjustment includes, but is *not limited solely to*, a determination of whether the board's decision is supported by competent and substantial evidence upon the whole record. The other ground of review is the legality of the board's decision . . . ." *State v. Springfield*, 672 S.W.2d 349, 355 (Mo. Ct. App. 1984) (emphasis added; internal quotation marks omitted). This "includes the ability to resolve constitutional questions, including the challenge to the constitutionality of a city ordinance." *Platte Woods United Methodist Church v. City of Platte Woods*, 935 S.W.2d 735, 737 (Mo. Ct. App. 1996); *see also Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965) (holding ordinance unconstitutional as applied pursuant to Section 89.110); *Hart v. Board of Adjustment*, 616 S.W.2d 111, 116-17 (Mo. Ct. App. 1981) (holding that judicial review under Section 89.110 "includes constitutional questions" and, specifically, "testing the constitutionality of [an] ordinance").[25]

[25] *But see Normandy Sch. Dist. v. City of Pasadena Hills*, 70 S.W.3d 488, 492 (Mo. Ct. App. 2002) ("Certiorari under section 89.110 will not lie to review the exercise of legislative power through the challenge of the lawfulness of an ordinance.").

Thus, in resolving Sanctuary's Section 89.110 claims, the district court should have considered the sign code's constitutional infirmities. It refused to do so and, in that regard, it erred.[26]

VII. CONCLUSION

The district court erred in denying Sanctuary's motion for summary judgment and in granting summary judgment in favor of the City and Board. For the foregoing reasons, this Court should reverse the district court and enter judgment in favor of Sanctuary on each of its claims.

Respectfully submitted this 7th day of February, 2011.

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[26] Even assuming a court's consideration of Sanctuary's Section 89.110 claims is as limited as the district court concluded it was, judgment for the City and Board still is not appropriate. The City and Board proffered *no* evidence whatsoever to prove the mural is a "sign" rather than an exempted "[w]ork[] of art" or "civic symbol[] or crest[]," as Sanctuary specifically argued it was before the Board. (J.A. 269-71.) Nor did the Board provide any explanation—much less "competent and substantial evidence"—to support its conclusion that the mural is a sign.

CERTIFICATE OF COMPLIANCE AND VIRUS SCANNING

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,854 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionality spaced typeface in Microsoft Word for Windows XP in Times New Roman 14 pt. type.

3. The digital version of this Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28A(d) was scanned for viruses as it was being copied to a CD-ROM and the CD-ROM is free from viruses.

/s/ Michael E. Bindas
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Attorney for Plaintiffs/Appellants

Dated: February 7, 2011

CERTIFICATE OF FILING AND SERVICE

The undersigned attorney hereby certifies that on February 7, 2011, ten copies of Appellants' Brief (Corrected) and one digital version of Appellants' Brief (Corrected) on CD-ROM were sent by First-Class U.S. Mail, postage prepaid, to the Clerk of the U.S. Court of Appeals for the Eighth Circuit at the following address:

Thomas F. Eagleton Courthouse
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St. Louis, MO 63102

The undersigned attorney further certifies that on February 7, 2011, two copies of Appellants' Brief (Corrected) and one digital version of Appellants' Brief (Corrected) on CD-ROM were sent by First-Class U.S. Mail, postage prepaid, to the following attorneys:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington on February 7, 2011.

/s/ Michael E. Bindas
Michael E. Bindas

ADDENDUM TO BRIEF

District Court's March 29, 2010, Opinion, Memorandum and Order

District Court's March 29, 2010, Judgment

(Subjects of Appeal)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NEIGHBORHOOD ENTERPRISES, INC., et al.,	)	
Petitioners,	)	
vs.	)	Case No. 4:07CV1546 HEA
CITY OF ST. LOUIS, MISSOURI, et al.,	)	
Respondents,	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Cross Motions for Summary Judgment, [Doc. No's 61 and 63]. For the reasons set forth below, Respondents' Motion is granted; Petitioners' Motion is denied.

Introduction

Petitioners filed this Petition for Writ of Certiorari and Civil Rights Complaint for Injunctive Relief against the City of St. Louis, the St. Louis Board of Adjustment, the individual members of the Board of Adjustment, in their official capacity, and Mary Hart Burton, in her official capacity as the Zoning Administrator for the City. The Defendants remaining in this action are the City of St. Louis and the City of St. Louis Board of Adjustment.[1] This Petition/Complaint alleges that the

[1] Pursuant to the Court's dismissal of the individual members of the Board and Mary Hart Burton in its November 5, 2007 Order, Petitioners did not include them in their Amended Petition.

decision by the Board of Adjustment was illegal because the Board utilized a facially unconstitutional Zoning Code to limit Petitioners' Freedom of Speech in violation of the United States and Missouri Constitutions; the decision was unconstitutional as applied in violation of the United States and Missouri Constitutions; the decision was illegal because it was an illegal exercise of prior restraints, in violation of the United States and Missouri Constitutions; that the decision was illegal because it deprived Petitioners of equal protection under the law, in violation of the Fourteenth Amendment of the U.S. Constitution.

Petitioners also seek recovery pursuant to 42 U.S.C. § 1983 for alleged violations of their free speech rights under the U.S. and Missouri Constitutions and for violations of their due process rights under the U.S. and Missouri Constitutions.

Procedural Background[2]

On August 31, 2007, Respondents removed this action from the Circuit Court for the City of St. Louis, Missouri based on the Court's federal question jurisdiction. 28 U.S.C. § 1331. Respondents alleged in their Notice of Removal that the Petition

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The Court dismissed the St Louis Department of Public Safety, Division of Building and Inspection in its March 17, 2008 Order.

[2] The Court's Opinion, Memorandum and Order of November 5, 2007 sets out the facts alleged in Petitioners' Petition, and therefore all of the alleged facts will not be repeated herein.

raises particular federal questions which arise under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the U.S. Constitution. Specifically, the Notice set forth that

> Respondents are specifically accused of violating Petitioners' rights of free speech under the First Amendment to the U.S. Constitution, Petitioners' federal equal protection rights under the 14th Amendment of the Constitution, and pursuant to 42 U.S.C. § 1983, of acting under color of law to deprive Petitioners of their civil rights to due process under law.

The parties agree that the facts are not in dispute and resolution of this matter by summary judgment is appropriate. For the purposes of the Motions for Summary Judgment, the parties have submitted a Joint Statement of Uncontested Facts. Those facts are as follows:

Sanctuary In The Ordinary ("Sanctuary") is a tax-exempt, not-for-profit organization. Sanctuary's properties are managed by Neighborhood Enterprises, Inc. ("Neighborhood Enterprises"), a property management company. Neighborhood Enterprises describes itself as a "self-supporting housing ministry that manages rental housing mostly on the near south side of St. Louis."

Missouri Eminent Domain Abuse Coalition (MEDAC) is a civic organization concerned about eminent domain practices. Jim Roos is the founder of Sanctuary, founder of Neighborhood Enterprises, and coordinator and spokesperson for

MEDAC.

The City of St. Louis (the "City") is a Missouri municipal corporation organized under Missouri law.

Roos describes himself as a critic of the City's use of eminent domain for private development. Jim Roos and MEDAC, with tenant approval, commissioned a sign/mural[3] for the south side of 1806-08 S. 13th, a Sanctuary-owned building in the Near Southside Redevelopment Area. Roos described the sign/mural as a "poignant way . . . to make a statement." The sign/mural, which was completed in March 2007, contains the words "End Eminent Domain Abuse" inside a red circle and slash. The design of the sign/mural is similar to the design used by MEDAC in its literature, buttons, and other materials. The sign/mural is approximately 363 or 369 square feet in area. The sign/mural is visible from, among other areas, Interstates 44 and 55 and the Soulard neighborhood.

On April 10, 2007, the City's Division of Building and Inspection ("B&I") issued to Sanctuary, care of Neighborhood Enterprises, a citation declaring the sign/mural an "illegal sign." The citation explained that "[p]ermits must be acquired

[3] Respondents'/Defendants' position is that the object in issue is a sign. Petitioners/Plaintiffs refer to this object as a mural. For purposes of this document, and not for any determination as to legally proper terminology, the object is referred to herein as a "sign/mural."

for signs of this type" and gave instructions for how to go about obtaining a permit. Consistent with the instructions in B&I's April 10, 2007, citation, Sanctuary and Neighborhood Enterprises[4] filed a sign permit application with B&I on May 14, 2007.

On May 30, 2007, the City's Zoning Administrator sent Sanctuary a letter denying its sign permit application because it did not meet certain requirements of the City Zoning Code. The "Basis for Denial" accompanying the letter stated that the building on which the sign/mural was painted was zoned "D," or "Multiple Family Dwelling District," and identified, as the "applicable Zoning Code provisions": Section 26.68.010; Section 26.68.020(17), (20), (21), (22) & (24); and Section 26.68.080(A), (B), (D) & (E)(2) of the St. Louis City Revised Code.
A subsequent explanation of the Zoning Administrator's basis for denial, admitted at the Board of Adjustment hearing, stated: "Appellant has painted a wall sign on the building at this address. The wall face of the building on which the sign has been painted does not have street frontage as defined in the Zoning Code, and is therefore not entitled to signage. In the 'D' zoning district any signage can only be erected, altered and maintained for and by a conforming use and must be clearly incidental to

[4] Sanctuary and Neighborhood Enterprises will hereinafter be referred to collectively as "Sanctuary."

the operation of the conforming use; this property is assessed as a two-family dwelling. The maximum allowable square footage for any sign within this district is 30 sq. ft.; based on the diameter of the circular sign it is approximately 363 sq. ft. in area. Variances will be required in order to permit this sign." The May 30, 2007, letter denying Sanctuary's sign permit application stated that Sanctuary could appeal the denial to the City's Board of Adjustment, which Sanctuary did on June 5, 2007.

On July 11, 2007, the Board of Adjustment heard Sanctuary's appeal of the permit denial. At the hearing, Sanctuary's attorney argued, among other things, that: (I) Sanctuary's sign/mural does not require a permit because, as a "work of art" or a "civic symbol[] or crest[]," it is exempted from the Zoning Code's definition of "sign"; and, alternatively, (ii) the Zoning Code violates the free speech protections of the U.S. and Missouri Constitutions.

The Board of Adjustment ("Board") upheld the denial of the sign permit in an order filed on July 25, 2007. The Board's Findings of Fact stated that the "[p]roposed sign is in conflict with Sections 26.68.010, 26.68.020 and 26.68.080 of the Zoning Code of the City of St. Louis." The Board's "Conclusion of Law and Order" stated, in its entirety:

> The sign is located in Zone D, the multiple family dwelling district, and the sign is located on a residential building. The sign is substantially larger than the footage allowed by the Zoning Code and it is located on

> the side of the building in contravention to the requirements of the Zoning Code. Board Member Hitt made a motion to uphold the decision to deny the sign permit as the size and location of the sign were in violation of the Zoning Code.
>
> The above motion, made by George Hitt and seconded by Joe Klitzing was passed by a 4-0 vote of the Board, with Board member Caruso voting against.

Two of the City's justifications for restricting outdoor signs are traffic safety and aesthetics. Neither the City nor Board of Adjustment possesses any reports, studies, memoranda, or other documents underlying, concerning, or supporting the regulation of outdoor signs in Chapter 26.68 of the St. Louis Revised Code. Neither the City nor the Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect traffic safety. Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect the aesthetics of the City or surrounding neighborhood. Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect property values in the City. Neither the City nor Board of Adjustment is aware of any traffic incidents in which any driver involved cited or mentioned Sanctuary's sign/mural, or any "painted wall sign," as

contributing to such incident. Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda discussing the impact of Sanctuary's sign/ mural on the flow of traffic on any street or highway.

The City and Board of Adjustment have no internal memoranda or communications, and no communications to or from them, discussing the adoption or enforcement of the regulations of outdoor signs in Chapter 26.68 of the St. Louis Revised Code. The City and Board of Adjustment have no minutes or transcripts of any City Board of Aldermen meeting, including any committee or subcommittee of such Board, concerning or relating to the regulation of outdoor signs in Chapter 26.68 of the St. Louis Revised Code.

The St. Louis Zoning Code provides, "If for any reason it cannot be readily determined whether or not an object is a sign, the Community Development Commission shall make such determination." St. Louis, Mo., Rev. Code § 26.68.020(17). St. Louis, Mo., Ordinance 64687 (June 25, 1999) provides that "all functions and duties performed, or powers exercised prior to the effective date of this ordinance by personnel of the Community Development Commission pursuant to any City ordinance shall be performed by personnel of the Planning Commission as assigned by the Planning Commission." The City has no written policy other than Chapter 26.68 of the Revised Code of the City of St. Louis for use in

determining if a sign contains the "symbol[] or crest[]" of a civic organization as those terms are used in St. Louis Rev. Code § 26.68.020(17). The City has no written policy other than Chapter 26.68 of the Revised Code of the City of St. Louis for use in determining if something is "art" as that term is used in St. Louis Rev. Code § 26.68.020(17)(e).

The City's policies for implementing the provisions of the City Zoning Code's sign regulations are contained in Chapter 26.68 of the Revised Code of the City of St. Louis.

Discussion

Writ of Certiorari

In their Amended Petition, Petitioners' Petition for Writ of Certiorari requests this Court conduct a *de novo* administrative review of the Board of Adjustment decision. Count I of this Petition claims that the decisions were illegal because they utilized a facially unconstitutional zoning code to limit Petitioners' freedom of speech. Count II alleges that the decisions by the Division of Building and inspection and the Board of Adjustment were illegal because the Zoning Code is unconstitutional as applied. Count III alleges that the decisions by the Division of Building and inspection and the Board of Adjustment were illegal because they were an illegal exercise of prior restraints. In Count IV, Petitioners claim that the

decisions by the Division of Building and Inspection and the Board of Adjustment were illegal because they deprived Petitioners of equal protection under the law. These counts are all brought under § 89.110, RSMo.

Section 89.110 provides:

> Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, any neighborhood organization as defined in section 32.105, RSMo, representing such person or persons or any officer, department, board or bureau of the municipality, may present to the circuit court of the county or city in which the property affected is located a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board. Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take additional evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which a determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. Costs shall not be

> allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from. All issues in any proceedings under sections 89.080 to 89.110 shall have preference over all other civil actions and proceedings.

This Court's review of a zoning decision is limited. "'[N]either "this Court nor the [trial] [c]ourt may try the matter de novo or substitute our judgment for that of the administrative tribunal."' *Wolfner v. Bd. of Adjustment*, 672 S.W.2d 147, 150 (Mo.App.1984) (quoting *Stockwell v. Bd. of Zoning Adjustment*, 434 S.W.2d 785, 789 (Mo.App.1968))." *State ex rel. Karsch v. Camden County*, 2010 WL 299253, 1 (Mo.App. 2010). The Court does not reweigh the evidence. *Versatile Mgmt. Group v. Finke*, 252 S.W.3d 227, 233 (Mo.App.2008). This Court will not "disturb [the Board's] decision unless it is clearly contrary to the weight of the evidence." *Medusa Aggregates Co. v. City of Columbia*, 882 S.W.2d 223, 224 (Mo.App.1994). "The scope of review is limited to determination of 'whether the Board's action is supported by competent and substantial evidence[5] upon the whole record or whether it is arbitrary, capricious, unreasonable, unlawful, or in excess of

[5] "Substantial evidence is defined as 'competent evidence which, if believed, would have probative force upon the issues.' " *Windy Point Partners, L.L.C. v. Boone Cty. Comm'n.*, 100 S.W.3d 821, 825 (Mo.App.2003) (quoting *Ford Leasing Dev. Co. v. City of Ellisville*, 718 S.W.2d 228, 233 (Mo.App.1986)).

its jurisdiction.'" *Teefey*, 24 S.W.3d at 684 (quoting *Hutchens v. St. Louis Cty.*, 848 S.W.2d 616, 617 (Mo.App.1993)); *see also Moto, Inc. v. Bd. of Adjustment*, 88 S.W.3d 96, 99 (Mo.App.2002). "In determining whether substantial evidence existed to support the Board's decision, a reviewing court must view the evidence and reasonable inferences therefrom in a light most favorable to the decision. *Teefey*, 24 S.W.3d at 684. If the evidence would support either of two different, opposed findings, the Court is bound by the determination of the administrative agency. *Versatile*, 252 S.W.3d at 233. "A question of law is a matter for the independent judgment of the reviewing court." *Teefey*, 24 S.W.3d at 684. *Karsch*, 2010 WL 299253, at * 1.

In its conclusions the Board of Adjustment based its denial of the permit on the following: Petitioners sought a sign permit for the wall sign/mural. The sign is located in Zone D, the multiple family dwelling district; it is located on a residential building; and it is not located on the side of the building with frontage. Under the Zoning Code, a sign must conform to certain requirements as to size and placement. Based on the Zoning Code, because the sign in question was over the specified size and was placed on a side of the building without street frontage, the permit was denied.

These conclusions were rendered after the July 11, 2007 hearing. At that

hearing, testimony was presented. The Zoning Plan Examiner testified that the maximum square footage for a sign in this zoning district is thirty square feet, and that the architect's drawings of the sign indicated that it was 369 square feet. Further, the Examiner testified that the sign was not on the side of the building with street frontage.[6] Since the application came to the Zoning Plan Examiner as a sign application, he reviewed it as such.

Testimony was also heard from Petitioners. Counsel for Petitioners testified that the Office of the Zoning Administrator should have considered whether the object in question was a sign or a mural, despite the fact that the application did not specifically make this request. He further testified about his clients' beliefs that the object was art and that art is subjective to the eyes of the beholder and that it often makes a political statement. He believed that his clients should be exempt from the permit requirement because the message painted on the wall was art and not a sign. He stated that his legal argument was based on the First Amendment. He essentially argued that his clients' political speech through the painted wall was being hindered. He testified that his clients were requesting that Zoning consider whether the sign is a mural or a sign.

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[6] Although Petitioners argue that there is no requirement that signs front the street, the Code's provisions set forth the number of signs "per frontage." This limitation categorically requires street frontage.

Jim Roos also testified. Mr. Roos testified that the building is owned by Sanctuary in the Ordinary. He also testified that he believes that eminent domain is oppressive and violates his property rights under the Constitution.

Two other individuals testified. Mr. Peters testified that he believes residents have limited means to voice their opinion and defend themselves from eminent domain abuse. Mr. Patterson testified that the wall is not an advertisement, but a work of art and that he did not believe the painting to be a sign.

Based upon the above evidence, the Board of Adjustment concluded that the application for a sign permit should be denied. Petitioners sought a sign permit. Under the Zoning Code, a sign permit could not issue, since the object did not fall within the Code's parameters of allowable signs, i.e., size and placement in Zone D, multiple family dwelling district. The *raison d'etre* for the hearing was the review of the denial of the *sign permit*. Based on Petitioner's request, the Board of Adjustment reviewed the application as a sign permit. The denial of the permit was based solely on the Zoning Code which sets out certain requirements for the issuance of sign permits. Since the object did not satisfy those requirements, the Board denied the permit. The decision was based on the record before the Board at the hearing; it was neither arbitrary nor capricious; neither unreasonable or unlawful. Rather, it was simply a decision on the matter before it, *i.e.*, a review of the denial

of an application for a sign permit, based on the facts that the sign did not comply with the Code's sign restrictions. Under the standards of review for this Court, the Court is not at liberty to reweigh evidence or substitute its judgment for that of the Board of Adjustment. All reasonable inferences are to be found in favor of the decision. Because the Board of Adjustment was approaching the issue for what it was, an application for a sign permit, the Board properly analyzed the evidence and concluded that the evidence clearly established that Petitioners were not entitled to a sign permit for the wall design. The decision of the Board of Adjustment must, therefore be affirmed. Respondents are entitled to judgment as a matter of law on Petitioners' Petition for Writ of Certiorari.

Civil Rights Complaint

Petitioners' "Civil Rights Complaint" states that it is brought pursuant to the First and Fourteenth Amendments of the United States Constitution; Article I, section 8 of the Missouri Constitution; The Civil Rights Act of 1871, 42 U.S.C. § 1983; and Section 527.010 RSMo. Petitioners further state that they seek relief against the enforcement of the City Code's sign regulations and the practices and policies of the City that allegedly facially and as applied deny Petitioners the opportunity to engage in constitutionally protected communications. Counts I and IV claim that the City Zoning Code's Sign Regulations are facially invalid under the

U.S. Constitution and the Missouri Constitution, respectively. Counts II and V claim that the City Zoning Code's Sign Regulations are unconstitutional as applied under the U.S. Constitution and the Missouri Constitution, respectively. Counts III and VI allege Respondents exercised prior restraints in violation of Petitioners' Free Speech rights under the U.S. Constitution and the Missouri Constitution, respectively. Count VII claims Respondents deprived Petitioners of equal protection pursuant to the Fourteenth Amendment of the United States Constitution. Petitioners seek reversal of the Board of Adjustment denial of the permit; a declaration that the City Zoning Code's sign regulations violate the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Missouri Constitution on their face and as applied to Petitioners, a judgment declaring that the acts of the Division of Building and Inspection of the Board of Adjustment denying the sign permit application illegally violated the First and Fourteenth Amendments and Article I, section 8; a judgment declaring that the City Zoning Code's sign regulations violate the equal protection guarantees of the Fourteenth Amendment to the United States Constitution; a judgment permanently enjoining Respondents from enforcing the City Zoning Code's sign regulations generally and as against Petitioners in association with the mural at 1806-08 S. 13th Street, St. Louis, Missouri; nominal damages in the amount of $1.00; and attorneys'

fees and costs pursuant to 42 U.S.C. § 1988.

The bizarre curiosity in this case is Petitioners' efforts to muddy the judicial waters through their inconsistent terminology, presumably to avoid the restrictions and requirements of the Sign Code. The initial facts leading up to this matter establish that Petitioners, when advised that signs of the nature of Petitioners' "End Eminent Domain Abuse" required a permit, the proceeded to apply for a *sign* permit and attached two arguments as to why the *sign* permit application should be approved. They argued the design was not a sign under the definition of "sign" and that they had a constitutional right to display the *sign* because such activity was protected by the First Amendment to the U.S. Constitution and by the Missouri Constitution. Petitioners then switched to attempting to re-characterize the painting as exempt from the permit requirement as a work of art or a civic crest, objects which are *not signs*. Petitioners do, however, acknowledge that their "art" is akin to "No Smoking" *signs*. They state "also painted on the *sign*, in smaller black lettering, are the online addresses of two website where interested views of the mural can go for mor information about eminent domain abuse." (Emphasis added). Petitioners also argued that they had a constitutional right to display the *sign* irrespective of City Zoning Code sign regulations because the mural constitutes speech protected by the U.S. and Missouri Constitutions.

The common sense notion of "sign" is set out under the City Code. A sign "means any object or device or part thereof situated 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, symbols, fixtures, colors, motion illumination or projected images. Petitioners' designations notwithstanding, the painting at issue herein is the classic example of this common sense notion of sign. The painting is outside and is used to advertise, identify, direct and attract attention to what Petitioners believe is eminent domain abuse. It advertises online addresses for more information. It attracts attention to the perceived eminent domain abuse. It identifies Petitioners' issues with eminent domain practices of the City. This Court agrees with Petitioners that the painting is certainly political speech and is surely protected under the U.S. and Missouri Constitutions. Neither the definition of "sign" in the Code, (on 26.68.020(17)), nor the restrictions placed on signs, (Section 26.68.010)[7] infringe or impinge, facially or as applied to Petitioners, their

[7] Petitioners may only challenge those provisions of the Code which were actually applied to them. See, *Advantage Media, L.L.C. v. City of Eden Prairie* 456 F.3d 793, 796 -805 (8th Cir. 2006). *Advantage Media* affirms the general principle that in order to have standing to bring a First Amendment challenge a plaintiff must be contesting provisions upon which the restriction was based. See, e.g., *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Texas*, 421 F.3d 314, 323 (5th Cir.2005) (no standing to challenge ordinance that did not apply to plaintiff's activities); Furthermore, even if the Court were to find any of the sections applied to Petitioner as unconstitutional, the entire Code would not be subject to invalidation. *Elk Grove Unified School*

Constitutionally protected political speech .

Indeed, signs are a form of expression protected by the First Amendment. However, unlike oral speech, signs may be regulated under the police powers of a municipality because they "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs...." *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

To evaluate the constitutionality of a restriction upon speech imposed by a sign ordinance, the Court must first determine whether the restriction is content-based, and then apply the proper level of scrutiny based on that determination. *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400 (8th Cir.1995). A restriction on speech is content-based when the message conveyed determines whether the speech is subject to the restriction. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Petitioners argue that, because one must look to the sign to determine if it is a sign which is regulated as opposed to works of art, civic crests, etc., the regulation must be considered "content-based." At first blush the argument seems sound. However, the Court must consider the matter in more depth in light of applicable

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Diss.. V. Newdow, 542 U.S. 1, 11-12 (2004).

constitutional law.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)(internal citations and quotation marks omitted).

In *Turner Broadcasting*, the Supreme Court acknowledged that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task," and referenced its statement in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), wherein it had explained that the "principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (emphasis added).

In the instant case, the evidence does not support a finding that the restrictions prohibit signs in excess of thirty square feet in Zone D with frontage because the City favors or disfavors any message a citizen might want to convey by use of such

a sign. To the contrary, the evidence shows that as long as Petitioners comply with the restrictions, they are free to display any message they choose. This proof, in the Court's view, shows that the prohibition of 363 foot signs relates not to the content of Petitioners' message but, rather, to the method by which they wish to convey it.

This is not a constitutionally impermissible regulation. The City has a legitimate interest in controlling the non-communicative aspects of the medium of speech, as opposed to its communicative aspects. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). Petitioners argue that it is the message rather than the medium that is being controlled by these restrictions. They insist that, due to the limitations on the size of their sign, they cannot convey messages intended to reach the public. The message contained in the sign is conveyed to the public, however, albeit in a smaller version, if Petitioners comply with the restrictions. Thus, it does not follow that such size limitations amount to a content-based regulation of speech.

The Court must next determine whether plaintiff is being treated differently from others in terms of how the restrictions are applied. There is no evidence that the restrictions were applied to Petitioners and not others. Petitioners argue that crests and flags have no restrictions while signs containing political speech do. The first problem with this argument is that it attempts to compare apples to oranges. If

the facts showed that others were being permitted to have oversized signs on the sides of their buildings and Petitioners were not, Petitioner's argument would have merit. There are no facts which show that others were permitted oversized signs in Zone D area on parts of their buildings with no street frontage. This is simply not the case before the Court.

The evidence does not support a conclusion that the City-by allowing flags crests, works of art-is favoring or disfavoring any message. Flags and crests and works of art are not ideas or viewpoints about which citizens might debate and disagree. Because civic crests, works of art and flags are not the "stuff" of public debate, there is no danger that the City-by exempting them from other categories of signs-will "give one side of a debatable public question an advantage in expressing its views to the people" or "through the combined operation of a general speech restriction and its exemptions ... seek to select the permissible subjects for public debate and thereby to control the search for political truth." *City of Ladue, supra* (internal citations and quotation marks omitted). There is no risk of censorship (either by favoring or disfavoring content). The Eighth Circuit has held "that an ordinance is content-neutral if it is 'justified without reference to the content of the regulated speech.'" *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1220 (8th Cir.1997), (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791

(1989)). Respondents' desire to promote traffic safety is in no way tied to the content of the signs it seeks to regulate. The Court, therefore, concludes that the restrictions are not content-based regulations of speech in violation of constitutionally protected rights.

Because the regulation is content-neutral, it is constitutional if it "is 'narrowly tailored to serve a significant governmental interest, and ... leaves open ample alternative channels for communication of the information.' " *United States v. Nenninger*, 351 F.3d 340, 345-46 (8th Cir.2003) (quoting *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The interests expressed by the City are aesthetics and traffic safety. These are significant governmental interests. *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). To be narrowly tailored, the regulation does not have to be the least restrictive means of furthering the City's interest. *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir.2000); *Pursley v. City of Fayetteville, Ark.*, 820 F.2d 951 (8th Cir.1987). Petitioners argue that their sign does not pose any different aesthetic or safety considerations than works of art. While this might show that Petitioners disagree with the Respondent's conclusions concerning aesthetics and safety considerations, it does not convince the Court that the City's stated reasons for its enaction of the restrictions are either false or unreasonable. Petitioner's sign contains small print

which cites a website for more information. It may well be that travelers would become distracted attempting to record that website. Moreover, the figure painted on the wall contains a slash through the words "End Eminent Domain Abuse." Like the website citation, travelers may become distracted trying to ascertain what was written underneath the slash. With regard to the aesthetic consideration, Petitioner's sign is more in tune with a billboard than a flag or crest. Surrounding neighbors and passers-by may find a billboard sized painting on the side of a residential building aesthetically displeasing. "[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats of expression." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984). In light of these considerations, the Court concludes that both the aesthetic and traffic safety rationales are sound, and that the prohibition is narrowly tailored to prevent the traffic risks and to promote the aesthetic considerations that motivated the passage of the size and placement restrictions.

The Court also finds that there are ample alternative channels for Petitioners to communicate their political message aside from painting a 363 foot sign on the side of a residential building. Petitioners are free to place an appropriate sized sign in the front of the building. Likewise, Petitioners can secure a billboard in other zoned areas with the same message. Petitioner's argument that the sign should be

on the premises rather than off site is extremely weakened by the fact Petitioners do *not* live on the premises. Petitioners can also distribute handbills (even at City parks teeming with the masses during festive occasions) containing information on their organization and their beliefs, to name a few alternatives. The Court finds that there are ample avenues which Petitioners may traverse to publicize their ideas or opinions without the use of 363 foot paintings on the side of a building in the Zoned D area. Because the Court has found that restrictions are content-neutral and meet the requirements of *Thorburn* and *Pursley*, Petitioners' First Amendment facial and "as applied" challenges must, and do, fail.

Petitioners also claim the restrictions violate the Equal Protection Clause of the Fourteenth Amendment. The purpose of the Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, (2000) (citations omitted). Equal protection analysis "requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

Because the restrictions are content-neutral, it does not "impermissibly interfere[ ] with the exercise of a fundamental right." Nor is there either allegation or evidence that Petitioners are members of a "suspect class." Strict scrutiny is therefore not required in connection with Petitioners' Equal Protection argument. There is no evidence of intentional or arbitrary discrimination. The City has advanced rational bases for the restrictions. Plaintiff's Equal Protection challenge to the Sign Ordinance fails.

Petitioners challenge the Sign Code as a prior restraint of their First Amendment rights. The Supreme Court has set out two definitions of a prior restraint: an ordinance that vests unbridled discretion in the licensor, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), or an ordinance that does not impose adequate time limits on the relevant public officials, *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Petitioners have established neither. The latter definition is inapplicable here since there is no argument regarding time limits on the relevant officials. Rather, Petitioners' prior restraint argument is based on their argument that the object in question is art. In arguing that the term "art" has no definition in the Sign Code, therefore it lacks the "narrow, objective, and definite standards to guide" the permitting authority, *Forsyth County v. Nationalist*

Movement, 505 U.S. 123, 131 (1992) Petitioners' argument once again fails to recognize the limitations upon which the denial was based. Claiming that the wall design object is "a work of art" does not make it so. Petitioners' wall design falls squarely within the Code's definition of "sign." The denial of the permit was based solely on the limitations specifically detailed in the Code. The deciding officials had no discretion under the Code in denying the permit. The wall design exceeded the size requirement and placement requirement and as such, the permit was denied.

Based upon the foregoing conclusions that neither the U.S. Constitution nor the Missouri Constitutions were violated, nor that Petitioners' Equal Protection rights were violated, Petitioners request for declaratory relief under 527.010 RSMo must be denied.

Conclusion

The decision affirming the denial of Petitioners' sign permit was not arbitrary, capricious, unreasonable, unlawful, or in excess of the Board of Adjustment's jurisdiction. The decision must therefore be affirmed.

The restrictions placed on signs in the Sign Code withstand scrutiny under Petitioners' constitutional challenges with respect to the denial of their sign permit. Respondents' are therefore entitled to judgment as a matter of law.

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Summary Judgment, [Doc. 61] is **GRANTED**.

IT IS FURTHER ORDERED that Petitioners' Motion for Summary Judgment, [Doc. No. 63] is **DENIED**.

A separate judgment is entered this same date.

Dated this 29th day of March, 2010.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NEIGHBORHOOD ENTERPRISES, INC., et al.,	)	
Petitioners,	)	
vs.	)	Case No. 4:07CV1546 HEA
CITY OF ST. LOUIS, MISSOURI, et al.,	)	
Respondents,	)	

JUDGMENT

In accordance with the Opinion, Memorandum and Order dated this same date

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Summary Judgment is entered in favor Respondents and against Petitioners.

Dated this 29th day of March, 2010.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE