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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

CARL and ELIZABETH FEARS, a married couple; and FEARS FITNESS, INC., d/b/a Got Muscle Health Club, a California corporation, Plaintiffs, v. CITY OF SACRAMENTO, a California municipal corporation, Defendant.	No. _____ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs CARL and ELIZABETH FEARS (the "Fears") and FEARS FITNESS, INC., d/b/a Got Muscle Health Club ("Got Muscle") (together, "Plaintiffs") respectfully request a hearing on, and the issuance of, a preliminary injunction pursuant to Federal Rules of Civil Procedure 65 and Eastern District Local Rule 231(d)(3). Plaintiffs intend to present oral testimony and anticipate two and a half hours for the hearing.

I. INTRODUCTION

This case concerns the First Amendment right of the Fears to use signs to advertise their business, a health club. The City of Sacramento (the "City") municipal codes (specifically sections 15.148 *et seq.* (hereinafter the "Sign Code") ban the Fears' sandwich board sign and window signs, advertising their health club, but would allow the same signs in the same location if they displayed different content.

The Ninth Circuit struck down an almost identical sign code in *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006). As in *Ballen*, the City only allows signs that carry certain kinds of messages; if the Fears used a sandwich board to advertise real estate or to promote an event for a nonprofit group, the Fears would not be subject to prosecution. Under *Ballen*, the City's Sign Code is likely unconstitutional. In fact, since *Ballen*, the City's burden to justify the Sign Code has only become more difficult. A recent Supreme Court decision, *Sorrell v. IMS Health, Inc.* 131 S. Ct. 2653 (2011), clarifies that the Sign Code is subject to strict scrutiny, an insurmountable burden here.

The City's Sign Code violates the First Amendment and Plaintiffs respectfully request that this Court immediately enjoin the City's enforcement of the Sign Code against them until the Court can decide this case on the merits.

II. FACTS

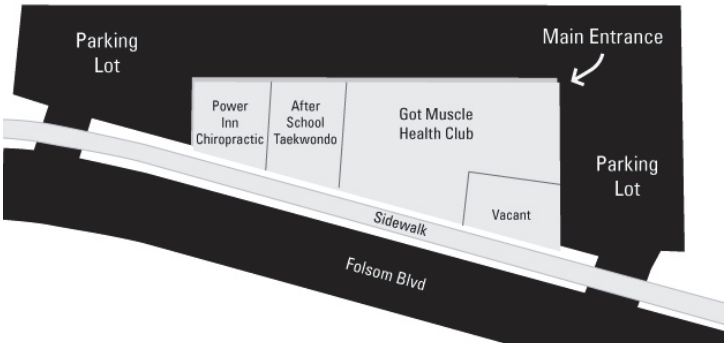
A. Plaintiffs: Carl And Elizabeth Fears And The Got Muscle Health Club.

Carl and Elizabeth Fears are married and have owned and operated the "Got Muscle Health Club" in Sacramento for the last four years. The Fears market the gym as "old school," with few frills but intense workouts and a supportive environment. Mr. and Mrs. Fears are both competitive body builders.

They teach group exercise classes, offer personal training, and form close relationships with their clients. They regularly work 16-hour days to keep their gym running. Carl Fears ("C.F.") Decl. ¶¶ 7-9.

B. Plaintiffs Need Signs To Advertise.

Plaintiffs' ability to effectively advertise Got Muscle is essential to its success. They lease a building in a quasi-industrial area at 8280 Folsom Boulevard, along with two other tenants. Plaintiffs chose that building because its front faces Folsom Boulevard, a four-lane highway with both vehicle and pedestrian traffic. From the front, however, the gym has tinted windows and looks like a generic office building. The actual client entrance is in the back of the building facing a parking lot. Without advertising in the front, most passersby would likely never realize the gym existed. C.F. Decl. ¶¶ 14–15.



For the last four years, Plaintiffs have relied on signs in the front of their business to attract walk-ins. These signs include a sandwich board sign and window signs. The sandwich board, also known as an A-frame sign, states, "Got Muscle/ It's old school" and is six-square feet on each side. Plaintiffs placed it in front of the gym next to the sidewalk, positioned so that it faced traffic on Folsom Boulevard. Plaintiffs also display several signs along their multiple large windows. Some of these signs advertise the gym generally while others advertise the gym's time-limited deals. All of Plaintiffs' signs are truthful and professionally made. C.F. Decl. ¶ 17.

The A-frame sign was the most effective. Whenever Plaintiffs displayed it, they estimate that approximately five to six new people would walk into the gym per day. Walk-ins would often comment that they didn't know the gym was there until they saw the sign. C.F. Decl. ¶ 24.

C. The City Enforces Its Sign Code Against Plaintiffs.

Plaintiffs displayed their sandwich board sign without interference for four years. But in November 2012, the City issued them a violation notice under its Sign Code. C.F. Decl. ¶ 30.

A code enforcer from the City's Community Development Department, Pamela Maestas, gave the violation notice to Mr. Fears while he was working. She said she had received a complaint about Got Muscle's signs and that some of Got Muscle's signs were illegal, including its A-frame sign.[1] She said that if Got Muscle continued displaying the A-frame, the City would fine the Fears $900 a day. C.F. Decl. ¶ 29. Afterward, Ms. Maestas called the Fears to again warn them about their signs. The Fears continued to display their A-frame sign, but less frequently. C.F. Decl. ¶ 37.

In April and May, Ms. Maestas twice called the Fears' landlord, again threatened a $900 daily fine unless all illegal signs were removed from the outside the gym. In response, the Fears stopped displaying their A-frame on May 7, 2013. Most of the Fears' window signs also violate the code, but Ms. Maestas did not mention them, so the Fears have left these up while fearing prosecution. C.F. Decl. ¶¶ 37–43. The Fears would ordinarily use additional window signs and banners to advertise discounts in the coming months, but the Fears will not do so. C.F. Decl. ¶¶ 44-45.

Since the Fears stopped displaying their A-frame, the Fears estimate that they only received approximately three walk-ins per week, as opposed to the five to six walk-ins *per day* with the sign. The Fears are concerned that this reduction will mean that they will not be able to afford their current space and may have to move to a smaller location. *Id.* ¶¶ 40–41.

D. The City's Sign Code.

The City's Sign Code prohibits Got Muscle's A-frame sign as well as the majority of their other signs. Got Muscle is only allowed two signs on its building and only if Got Muscle first obtains permits for them. The Fears are allowed a third sign on their window, but at a size too small to be visible to

[1] Ms. Maestas also told the Fears that their two signs posted into the ground with wooden stakes were illegal, as well as their mannequin holding a sign. The Fears do not challenge these restrictions here.

passersby on the sidewalk and road. If their signs displayed different content, however, the Fears could display all of them and not have to obtain permits.

1. The City's Sign Code Bans Got Muscle's A-Frame Sign And Prohibits Plaintiffs From Having A Detached Sign.

Plaintiffs' A-frame is prohibited under a Sign Code section that purports to ban, among other things, "A-frame and portable signs of any nature" and "[c]anvas signs and banners." Sacramento, Cal. City Code ("Sign Code") § 15.148.670.

Got Muscle is also prohibited from having any other sign that faces traffic. In Got Muscle's zoning district, the C-2 commercial zone, each property is only allowed one "detached" sign, meaning a sign permanently embedded into the ground with a concrete foundation. *Id*. §15.148.160(A)(1). While these signs are much more expensive than A-frames, they can be similarly positioned to be perpendicular to the road. But as another tenant on the property already has a detached sign, the Sign Code prohibits Got Muscle from having one. *See* C.F. Decl. ¶ 32.

2. The City's Sign Code Bans Most Of Got Muscle's Window Signs.

In the C-2 zone, the Sign Code only allows each business two signs "attached" to their building, (Sign Code § 15.148.160(A)(2)), and only if the business first receives a sign permit for each (id. at 15.148.030-090). Under the code, Got Muscle's two attached signs could total 270 square feet because Got Muscle has 90 square feet of street frontage. *See* Elizabeth Fears ("E.F.") Decl. ¶ 6.

Got Muscle currently uses seven signs attached to its windows that are visible to passersby. They total 157 square feet. One sign hangs over the front of the building, and identifies it as the "Got Muscle Health Club." Another sign directs clients to the back entrance. The other five signs advertise the gym's services and time-limited discounts. *Id.* ¶¶ 7–16, 18, Exs. A–D.

Thus, five of Got Muscle's window signs are illegal, while two much larger signs with double the square footage and with the same content—would be legal.

3. The Other Permitted Signs Would Be Too Small To Be Visible To Passersby.

The Sign Code also restricts each business in the C-2 zone to two "permanent window signs" that cannot "exceed a maximum sign area of four square feet." Sign Code § 15.148.910. These must be "painted on or otherwise displayed from the inside surface" of a window. *Id*. As Got Muscle's building is set back from the road and its windows are all tinted, a sign under this provision would be too small to be visible through its window to passersby. *See* E.F. Decl. ¶ 17.

In fact, Plaintiffs currently use the maximum allowed signage under this provision with a four-square foot sign that advertises their Facebook page. It is not visible to the road, and is only visible to those inside the gym and those standing directly in front of the window. E.F. Decl. ¶ 17, Ex. D.

4. The City Would Allow Plaintiffs' Signs If They Contained Different Content.

The Sign Code exempts multiple types of signs from all of the code's provisions based on content. Sign Code § 15.148.600. The content-based exemptions include:

- "one real estate sign…located entirely within the property to which the sign applies…not exceeding six square feet…removed within seven days after the sale, rental, or lease has been accomplished,"
- "The flags, emblems, or insignias of any nation or political subdivision,"
- "Religious symbols…or identification emblems of religious orders or historical agencies…[not exceeding] four square feet…and placed flat against a building,"
- "temporary signs not exceeding four square feet in area pertaining to drives or events of civic, philanthropic, educational or religious organizations, provided that such signs are posted only during such drive or no more than thirty (30) days before such an event and are removed no more than fifteen (15) days after such an event," and
- "political or campaign signs," provided they cannot be erected earlier than 90 days prior to an election and are removed 15 days after. In commercial zones, political signs can total an aggregate 50 square feet" and otherwise have no quantity limit.

Id. Except for the exemption for religious and historical symbols, all these exemptions apply to those signs banned in Sign Code section 15.148.670, including its ban on A-frame signs.

These exemptions also apply to the sign permit requirement. Moreover, except for real estate signs, all of the above exemptions are free from the two-attached-sign limit imposed by Sign Code

section 15.148.160(A)(2). Therefore, if Got Muscle's A-frame and window signs contained this exempted content, Plaintiffs could display all of them and could do so without a permit.

5. Sign Code Penalty for Violation.

A violation of the Sign Code constitutes a public nuisance. Sign Code § 15.148.1160. The City may, after issuing an order, impose a penalty of not less than $100 and not more than $999.99, as well as attorneys' fees and costs. Sacramento City Code § 1.28.010(C)(3)(d) and .040(A). Each day a violation occurs is a separate violation. *Id.* at § 1.28.010(C)(3).

E. The City Arbitrarily Enforces The Sign Code.

Although the City has aggressively enforced the Sign Code against Plaintiffs' A-frame sign, it rarely enforces it otherwise.

The City's encounter with Got Muscle highlights the City's arbitrary enforcement policy. The City's code official, Ms. Maestas, told Mr. Fears she was giving him a violation notice because she had received a complaint about his signs. In addition, Ms. Maestas also told Mr. Fears he should remove a nearby sign advertising a Taekwondo studio, as it also violated the Sign Code. Mr. Fears told the official that was not his sign and that it was instead owned by a neighbor. Ms. Maestas then told Mr. Fears she would not cite the studio because she was only concerned about Got Muscle's signs. C.F. Decl. ¶ 32.

Moreover, along the three blocks on either side of Folsom Boulevard of Got Muscle, there are hundreds of A-frames, banners, flags, signs exceeding the Sign Code's quantity restrictions, and other illegal signs. There are also many illegal signs throughout the City. E.F. Decl. ¶¶ 21–28, Exs. E–K.

In May 2013, Chief City Code Enforcement Manager Ron O'Connor told CBS News that they are only enforcing the code against the Fears because the City received a complaint against their signs. Mr. O'Connor stated to CBS News that "If we stopped at every A-frame sign, we wouldn't get 10 blocks from our office ever. We have other issues. We prioritize everything by health and safety issues, and A-frame signs are pretty low on the list." E.F. Decl. ¶¶ 19–20.

III. ARGUMENT

A preliminary injunction is necessary. The City has threatened Plaintiffs with hundreds of dollars in fines per day if they continue to use their A-frame sign. The Ninth Circuit has already invalidated a similar sign code in *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006), after the district court granted a preliminary injunction against it. *See Ballen v. City of Redmond*, No. C03-2580P, 2004 U.S. Dist. LEXIS 31358 (W.D. Wash. June 15, 2004). The same result is warranted here.

Plaintiffs are entitled to a preliminary injunction if they can show they meet either one of two tests. The *Winter* test requires Plaintiffs to show: (1) they are "likely to succeed on the merits"; (2) they are "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips" in Plaintiffs' favor; and (4) "an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, Plaintiffs can meet the "serious questions test." There, Plaintiffs can establish *Winter*'s first and third prongs by raising serious questions going to the merits of the case and that the balance of hardships tips sharply in their favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

Plaintiffs bear only the initial burden of making a colorable claim that their First Amendment rights are threatened or have already been infringed. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). At that point the burden shifts to the government to justify the restriction. *Id.* The moving party thus has the burden of establishing the elements of injunctive relief and the government has the burden of justifying its restriction on speech. *See id.*

Here, Plaintiffs establish "serious questions" about the Sign Code's validity and are likely to succeed on the merits. Part A.1 discusses how the Ninth Circuit's *Ballen* decision found an almost identical sign code unconstitutional. Like in *Ballen*, the City's Sign Code is riddled with exemptions and is far too underinclusive and poorly tailored to survive scrutiny. *See* 466 F.3d at 743–745. Part A.2 shows that since *Ballen* was decided, the applicable standard has become even more rigorous under *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

Plaintiffs also meet the other factors for a preliminary injunction. The loss of First Amendment freedoms is an irreparable injury *per se*. And in contrast to the harm Plaintiffs are suffering, temporarily enjoining the Sign Code would have minimal impact on the City, especially given its lackadaisical enforcement and admission that its sign restrictions are a "low priority." Enjoining the code also serves the public interest by protecting free expression and providing consumers with valuable information about the goods and services available to them.

Finally, Plaintiffs requests that this Court waive the bond requirement because this is a constitutional case and no money damages are at stake.

A. Plaintiffs Are Likely To Succeed On The Merits.

The Sign Code's multiple exemptions and severe restrictions show it is not narrowly tailored. In fact, the Ninth Circuit struck down an almost identical sign code in *Ballen*, 466 F.3d at 736. And since *Ballen* was decided, the Supreme Court has heightened the government's burden to justify laws like the Sign Code. Under *Sorrell v. IMS Health, Inc.*, it is subject to strict scrutiny because it is content-based. 131 S. Ct. 2653 (2011).

1. The Code Likely Fails Scrutiny Under *Central Hudson* And *Ballen.*

The Fears' signs are commercial speech that proposes a commercial transaction. *See, e.g.*, *Ballen*, 466 F.3d at 741–742 (2006). At the very least, such speech is protected by the *Central Hudson* test. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

Under this test, the court considers whether: (i) the speech concerns a lawful activity and is not misleading; (ii) the asserted governmental interest is substantial; (iii) the regulation directly advances the governmental interest asserted; and (iv) the regulation is not more extensive than is necessary to serve that interest. *Id.* at 563–564. The government has the burden of affirmatively establishing that the Sign Code meets each of these elements. *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996). If the City fails one factor, it loses.

Here, the Fears' satisfy the first prong of *Central Hudson*. Personal training and exercise are lawful activities and the Fears' signs do not contain any misleading information—the services advertised are available to the public under the terms and conditions set out. The City must then prove the last three prongs of the test to justify its sign restrictions.

While the City can meet the second prong, the City fails the last two.

a. The City Can Only Establish *Central Hudson*'s Second Prong.

Courts consider the City's purported justifications—to further public safety and aesthetics—to be substantial government interests. *See Ballen*, 466 U.S. at 742.[2]

b. The City Likely Cannot Show the Sign Restrictions are Narrowly Tailored.

Plaintiffs first turn to *Central Hudson*'s fourth prong because it is the prong under which the Ninth Circuit decided *Ballen*. Like in *Ballen*, the Sign Code's exemptions make its restrictions underinclusive and the restrictions' severity show they are more extensive than necessary.

To survive the fourth prong, the government must show the code is "narrowly tailored to achieve the desired objective," has a "reasonable fit" with its objectives, and that it is "no more extensive than necessary." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825, 829 (9th Cir. 2013) (citations omitted).

Exemptions to laws restricting speech show the law is not narrowly tailored and instead "diminish[s] the credibility of the government's rationale for restricting speech in the first place." *Id.* at 824 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)). That is what *Ballen* found when the City of Redmond's portable sign ban exempted real estate signs, temporary window signs, and kiosk signs. As the Court stated, the city "failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs." *Ballen*, 466 F.3d at 743. The Court concluded the sign code was fatally underinclusive.

[2] Plaintiffs do not concede that the City's stated purpose in its Sign Code is its actual purpose and may challenge it after discovery. Plaintiffs also do not concede that traffic safety and aesthetics can justify the violation of First Amendment rights. Nonetheless, here Plaintiffs assume that the code sets out the City's purpose and that it is substantial.

Here, there is similarly no indication that the City's exemptions for real estate signs, temporary event signs for non-profits, and other exemptions would be any "less a threat to vehicular and pedestrian safety" than other signs and attached signs, including Got Muscle's signs. *See id*. For instance, Got Muscle could display the same exact sign, in the same location, if it advertised its building for rent instead of advertising the gym itself.

Similarly, Got Muscle could have multiple signs on its building featuring, for example, a baseball game for its local little league, the American flag, a political candidate, or the symbols of a religious faith—but it can only have two signs on its building promoting its business. Not only are the signs the City allows not any safer than the prohibited ones, there is no evidence that they are more aesthetically pleasing.

In addition, codes that ban a whole category of signs are fatally overinclusive when they could have accomplished their objectives with "less restrictive alternatives." *See id.* at 744; *Horizon Outdoor, LLC v. City of Industry*, 228 F. Supp. 2d 1113, 1127 (C.D. Cal. 2002) (enjoining ban on off-premises signs near highway); *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076, 1081 (C.D. Cal. 2000) (enjoining ban on for-sale signs on cars parked in the public street). As the courts emphasized in *Ballen*, *Horizon Outdoor*, and *Burkow*, a ban casts too wide of a net, prohibiting many individual signs that in themselves present no "visual blight or create a safety hazard." *Horizon Outdoor*, 228 F. Supp. 2d at 1127; *see also Ballen*, 466 F.3d at 744; *Burkow,* 119 F. Supp at 1081. Cities must instead use narrower and more speech-friendly methods to accomplish their objectives.

Here, the City's sign bans are even more extensive than those in *Ballen*, *Horizon Outdoor*, and *Burkow.* The City bans not just portable signs, but also banners, flags and other temporary signage. And

the City does not just restrict these signs on cars or near highways, but throughout the City. The City also limits the signs that businesses *can* have to only two attached signs.

The government must show as well that its law is necessary. In *Valle Del Sol,* the Ninth Circuit found the city failed to show why it had to restrict speech to accomplish its traffic safety goals as opposed to "enforcing or enacting similar kinds of speech-neutral traffic safety regulations." 709 F.3d at 827. There, the Court struck down a city's ban on soliciting employment from stopped cars. The Court found that if the city was concerned about solicitors or their prospective employees disrupting traffic, the city could have simply enacted a law prohibiting stopped cars from obstructing traffic and enforced their existing law on jaywalking. The city instead chose to unnecessarily restrict speech by targeting employment solicitations – that overinclusiveness made the law unconstitutional. *Id.* at 826–827.

As in *Valle Del Sol*, the City could instead address its interests with laws that do not suppress speech. For instance, the City could simply enforce its provision prohibiting signs that are objectively a "traffic hazard," meaning signs that obstruct drivers' view of the road, could be confused with traffic signs, or otherwise "mislead" traffic. Sign Code § 15.148.620. The City could additionally require signs to be kept in good repair to protect aesthetics.

Moreover, a commercial speech regulation must leave "satisfactory" alternatives for businesses to advertise. In *Burkow*, the plaintiff argued that his car sign was "the least expensive and most effective method for him to sell his car…" 119 F. Supp. 2d at 1082. The court noted that the city did not refute this claim, contributing to the city's failure to carry its burden under *Central Hudson*'s last prong. *Id.* at 1081–1082 (C.D. Cal. 2000) (granting preliminary injunction). Similarly, Got Muscle's evidence shows that an A-frame sign is the least expensive and most effective method for it to recruit clients. C.F. Decl. ¶ 19. Academic studies likewise support the view that signs facing traffic are much more detectible and legible to drivers, even when they are smaller than signs parallel to traffic.[3] Yet the City prohibits Got

[3] *See, e.g.*, Philip M. Garvey et al., *Real World On-Premise Sign Visibility: The Impact of the Driving Task on Sign Detection and Legibility*, U.S. Sign Council (2002), *available at* http://www.westford-

Muscle from having any signs facing traffic; it may only have two signs attached to its building and must keep the majority of its large windows empty. These are not satisfactory alternatives. Indeed, the City's restrictions and permit requirement effectively prevent small businesses from using any type of temporary advertising, including advertising time-limited deals.

The City cannot satisfy its burden to show that its sign restrictions are narrowly tailored and cannot survive the *Central Hudson* test. Plaintiffs' claims are thus likely to prevail.

c. The City Cannot Satisfy *Central Hudson*'s Third Prong Because It Likely Cannot Provide Genuine Evidence Showing the Sign Code Directly Advances Its Interests.

In *Ballen*, when the Ninth Circuit found the sign code failed *Central Hudson*'s fourth prong, it concluded the sign code was unconstitutional and that proceeding to the third prong was unnecessary. 466 F.3d at 742. Here, the City cannot meet its burden under the third prong either, providing an additional reason that Plaintiffs are likely to prevail.

Under *Central Hudson*'s third prong, it is not enough for the City to claim that banning portable signs and restricting attached signs directly serves the City's safety and aesthetic interests—the City must prove it with genuine evidence. It cannot use "mere speculation or conjecture," but rather must use actual evidence to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane,* 507 U.S. 761, 770–71 (1993). This genuine evidence requirement applies at the preliminary-injunction stage. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1147 (9th Cir. 1998).

District courts have routinely held that municipal governments have failed this requirement when trying to defend their sign codes, including at the preliminary injunction stage. In *Horizon Outdoor*, the Central District of California granted a preliminary injunction against a sign code's ban on placing new billboards near highways after the city failed to "cite to any reports or studies or other evidence

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ma.gov/Pages/Government/TownDepartments/BoardsandCommittees/WestfordMA_Planning/S0453A916.18/USSCReal%20World%20On-Premise%20Sign%20Visibility.pdf.

indicating that the ban actually serves" its safety and aesthetic interests. *Horizon Outdoor*, 228 F. Supp. 2d at 1126–1127 (applying *Central Hudson*). Instead, all the city provided was a city official's conclusory affidavit, which fell far from satisfying *Edenfield*'s evidence requirement. *Id*. Similarly, in *Burkow*, the court granted a preliminary injunction against a ban on for-sale signs on cars parked on public streets. 119 F. Supp. 2d at 1082. The court found that "the City has presented no studies or even anecdotal evidence, and 'not even Plaintiff's own conduct suggests that Defendant's concerns are justified.'" *Id.* at 1080 (citation omitted). The Sixth Circuit struck down a nearly identical law for the same reason. *Pagan v. Fruchey,* 492 F.3d 766, 773 (6th Cir. 2006) (finding conclusory official's affidavit was insufficient for the government to meet its burden).

Here, like in *Horizon Outdoor*, *Burkow* and *Pagan*, it is unlikely the City will be able to provide genuine evidence that its sign restrictions directly advance its safety interests. For instance, the City has already publically admitted that A-frames are "pretty low on the list" of safety concerns and that it accordingly has allowed them to become prevalent throughout the City. E.F. Decl. ¶¶ 20–28. The City's nonchalant attitude is not surprising; academic studies show that sign proliferation does not cause driver distraction and that, to the contrary, business signs aid traffic safety by helping drivers find their destinations. As one group of experts summarized, "[p]erhaps no myth about signs has enjoyed a greater level of acceptance than the myth that business signs cause traffic accidents."[4] There is also no evidence that Got Muscle's particular signs are a hazard. Got Muscle has displayed their signs for approximately four years without incident. C.F. Decl. ¶ 18. The City is only enforcing its sign restrictions against Got Muscle because someone complained, not because the signs caused an accident.

[4] U.S. Small Business Administration, *The Signage Sourcebook: A Signage Handbook* 11–35, 420 (2003) (citing several studies in support). *The Signage Sourcebook* continues that, "the fact is that no reputable study on traffic safety has ever pegged sign proliferation as a problem—on the contrary, sign deficiency is often cited in studies as contributing negatively to traffic safety, particularly in the case of older drivers." *Id.* at 421; Charles R. Taylor et al., *On-Premise Signs as Storefront Marketing Devices and Systems* §§ 6.6-6.8 (2005) (citing several studies in support).

Moreover, the City cannot credibly argue that its sign restrictions directly and materially advance the City's aesthetic interests. Illegal A-frames, portable signs, and attached signs are rampant near Got Muscle and throughout the City. *See* E.F. Decl. ¶¶ 21–28.

The City thus cannot show is sign restrictions pass *Central Hudson*'s third prong.

2. The Code Is Content-Based and Is Thus Unconstitutional Under *Sorrell.*

If the Court finds, as it should, that a preliminary injunction is warranted under *Ballen* and the *Central Hudson* line of cases, then this Court needs not go further. If however, this Court finds that *these cases* are not dispositive, its analysis cannot stop there. The governing test is now even stricter than it was in *Ballen* in 2006. The Supreme Court recently clarified that laws that make content-based distinctions among commercial speech are subject to strict-scrutiny. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). The City's Sign Code is content-based, and there is not a realistic possibility that the City can meet this demanding standard.

Before *Sorrell*, courts typically reviewed laws regulating commercial speech under *Central Hudson*, regardless of whether the laws were content-based or content-neutral. In *Sorrell*, the Supreme Court clarified that laws that restricted commercial speech by treating some content differently than others are subject to strict scrutiny. Other courts have followed suit.

Sorrell involved a challenge to a Vermont law, "Act 80," that banned the purchase, sale, and use of doctors' drug prescription information for marketing purposes. Vermont passed Act 80 to curb "detailing," where pharmaceutical salespeople buy doctors' history of drug prescriptions from data-mining companies and use it to tailor their sales pitches to specific doctors. *Sorrell*, 131 S. Ct. at 2659–61. The state believed detailing violated doctors' privacy, exposed them to aggressive sales tactics, and raised health-care costs through the increased use of brand-name drugs. *Id.* at 2668. But Act 80 allowed the use of prescription data for any non-marketing purpose, like health care research and patient education. *See id*. at 2660–61.

The Supreme Court found Act 80 was content-based and thus subject to strict scrutiny. The Court has long considered sales pitches, advertising and other marketing to be protected speech. As Act 80 freely allowed the use of the data for every purpose but "marketing," the Court found Act 80 was content-based. 131 S. Ct. at 2663. The Court thus decided Act 80 was subject to "heightened scrutiny," meaning strict scrutiny.[5] *Id*. at 2664 ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."). The Court ultimately applied *Central Hudson* analysis because it found the law could not even pass this less rigorous standard. *Id.* at 2667. But the Court's finding that the law was ultimately subject to "a stricter form of judicial scrutiny" is an important directive for courts in future commercial speech cases. *Id.*

While the Ninth Circuit has not yet applied *Sorrell*, other courts have. The Second Circuit recently applied heightened scrutiny under *Sorrell* to a content-based advertising restriction on pharmaceutical drugs. *United States v. Caronia*, 703 F.3d 149, 164–65 (2d Cir. 2012). The court found the law failed both heightened scrutiny and *Central Hudson*. *Id.* at 164. District courts have similarly used *Sorrell*'s heightened scrutiny to enjoin or strike down content-based restrictions on commercial speech. *See Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1377, 1379 (S.D. Fla. 2011) (granting preliminary injunction after applying "strict scrutiny"); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328, 1331 (M.D. Fla. 2011) (applying "heightened judicial scrutiny" to several content-based ordinances, which regulated both plaintiffs' commercial and noncommercial speech, and granting preliminary injunction in part); *see also 1-800-411-Pain Referral Serv., LLC v. Tollefson*, No. 12-3034, 2012 U.S. Dist. LEXIS 182499 (D. Minn. Dec. 28, 2012) (applying "heightened judicial scrutiny" to content-based law).

[5] The context in which the Court discussed "heightened scrutiny" reveals that the Court meant "strict scrutiny." This is evident in part because the Court said that "commercial speech is no exception" to content-based analysis for noncommercial speech. 131 S. Ct. at 2664. As the Supreme Court applies strict scrutiny to content-based restrictions on non-commercial speech, *see United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000), it follows that the Court intends that strict scrutiny apply to content-based distinctions on commercial speech as well.

If this Court finds that the City's Sign Code is likely to survive *Central Hudson*, then this Court should apply strict scrutiny under *Sorrell* because the code is content-based.

a. The City's Sign Code Is Content-Based.

A law is content-based "if the regulation, by its very terms, singles out particular content for differential treatment." *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). The City's Sign Code does exactly that. It exempts real estate signs, government symbols and flags, religious symbols, emblems of historic groups, political campaign signs, and temporary signs for nonprofit organizations from its ban on portable signs as well as its permit requirement. Most of these exemptions apply to the sign code's two-attached-sign limit as well.

The Ninth Circuit and other courts have already found several of the identical exemptions contained in the City's Sign Code to be content-based. In *Ballen*, the city cited a bagel store owner after his employee advertised the store by wearing a sandwich board, violating the city's ban on portable signs. *Ballen v. City of Redmond*, 466 F. 3d 736 (9th Cir. 2006). The city's ban had several exemptions, including for political signs, construction signs, celebration displays, major land use action notices, and real estate signs. Although the Court ultimately applied *Central Hudson* analysis under pre-*Sorrell* jurisprudence, the Court found that these exemptions were "all content based." *Id.* at. 743.

The Ninth Circuit was particularly concerned with the exemption for real estate signs. As the Court stated, "the City has protected outdoor signage displayed by the powerful real estate industry from an Ordinance that unfairly restricts the First Amendment rights of, among others, a lone bagel shop owner." *Id.* at 743. Similarly, the Ninth Circuit in *Foti v. City of Menlo Park* found a ban on posting signs on public property content-based when it had exemptions for "open house" real estate signs and public informational signs. 146 F.3d 629, 636 (9th Cir. 1998). Like in *Ballen* and *Foti*, the City's Sign Code also exempts real estate signs from its ban on portable signs.

Courts have found exemptions similar to the City's other exemptions, to be content-based as well.[6] Here, like in *Ballen*, Got Muscle could display an A-frame in front of its building advertising its space for rent, but it could not have the same A-frame in the same location, advertising its gym. Similarly, Got Muscle could have multiple window signs promoting a nonprofit group's event, a political candidate, a government or religious symbol, or a historical group's emblem. "Thus, by any commonsense understanding of the term," the City's sign restrictions are content-based. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (finding city's ban on commercial handbill dispensers but not newspaper racks to be a content-based restriction). The Court must thus review the City's Sign Code under strict scrutiny.

b. The City's Sign Code Cannot Survive Strict Scrutiny.

Strict scrutiny requires the City to show its restrictions are narrowly tailored to advance a compelling government interest. *U. S. v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

The Ninth Circuit and multiple other courts have already determined that traffic safety and aesthetics are substantial, but not compelling, interests. *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 737-738 (8th Cir. 2011) ("[A] municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.") And as discussed in Section A.1.b, the sign restrictions are not narrowly tailored, but are instead both over-and-underinclusive.

[6] *See, e.g.*, *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248–49 (9th Cir. 1988) (finding ordinance was content-based when it had exceptions for, *inter alia*, government signs, memorial plaques, and certain government and organizational flags); *G.K., Ltd. Travel v. City of Lake Oswego*, No. 02-1147-KI, 2004 U.S. Dist. LEXIS 6984 (D. Or. Mar. 29, 2004) (finding sign code exemption for temporary signs for nonprofit groups' charitable events content-based) (this issue not appealed in 436 F.3d 1064, (9th Cir. 2006); *see also*, *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 739 (8th Cir. 2011) (finding sign code's exemptions for "[f]lags of nations, states and cities, fraternal, religious and civic organization" and "[n]ational, state, religious, fraternal, professional and civic symbols or crests" to be content based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263–64 (11th Cir. 2005) (finding sign code exemptions for governmental identification signs and informational signs, flags and insignia of government, religious, charitable and fraternal organizations, and holiday decorations to be content-based); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569 (11th Cir. 1993) (finding government flags exemption to be content-based); *Clear Channel Outdoor, Inc. v. Town of Windham*, 352 F. Supp. 2d 297, 301, 309–10 (N.D.N.Y. 2005) (finding content-based exemptions for "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").

The restrictions cannot survive strict scrutiny and Plaintiffs' claims are likely to prevail.

B. Plaintiffs Will Suffer An Irreparable Injury Without Immediate Relief, And The Balance of the Equities And The Public Interest Favor A Preliminary Injunction.

The Sign Code deprives Plaintiffs of free speech and the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

In contrast to this harm, the City will suffer no injury if the Plaintiffs resume using their A-frame sign and continue displaying their window signs. Plaintiffs have already used these signs for almost four years without incident. Enjoining an ordinance that the City rarely enforces will cause little harm, if any.

Moreover, courts have "consistently recognized the 'significant public interest' in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (citing *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (collecting cases across the circuits for this proposition)). The public has a particular interest in receiving commercial speech. As the Supreme Court repeatedly notes, consumers have a strong interest "in the free flow of commercial information" and "that interest may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate." *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748, 763 (1976).

C. The Court Should Waive The Bond Requirement Because This Is A First Amendment Case With No Money At Stake.

Federal Rule of Civil Procedure 65(c) provides that a preliminary injunction may be issued only if the applicant gives security in an amount determined by the court. District courts have discretion over whether to require the posting of security, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), and courts have specifically found it appropriate to waive the bond requirement when "the injunction is sought to vindicate constitutional rights and the public interest." *Mercer, Mercer Co. v. County of Humboldt*, No. C08-4098 SI, 2008 U.S. Dist. LEXIS 80866, *4 (N.D. Cal. Sept. 22, 2008).

This case falls in this exception. This case seeks to vindicate Plaintiffs' free speech rights and a preliminary injunction poses no financial risk to the City. Accordingly, Plaintiff respectfully request that this Court waive the bond requirement or, alternatively, set bond in the nominal amount of $1.

IV. CONCLUSION

Plaintiffs respectfully request that that this Court temporarily enjoin the City's enforcement against Plaintiffs of the Sign Code's ban on A-frames in section 15.148.670, the Sign Code's limits on attached signs in section 15.148.160(A)(2), and the permit requirement in sections 15.148.030-15.148.090.

Respectfully submitted this 13th day of August, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was dispatched to a third party process server for service to the following Defendant:

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