

NORTH CAROLINA
COUNTY OF ONSLOW

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22-CVS-3264

Anthony L. Proctor, Sr.; Nicole Gonzalez;)
Octavius Raymond; The Spot Florida Style)
Seafood, LLC; The Cheesesteak Hustle LLC; and)
Noah and Isidore, L.L.C.,)

Plaintiffs,)

vs.)

City of Jacksonville; Mayor Sammy Phillips; and)
Councilmembers Jerry Bittner, Brian H. Jackson,)
Logan Sosa, Cindy Edwards, Robert Warden, and)
Angelia Washington, in)
their respective official capacities,)

Defendants.)

MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

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PRELIMINARY INJUNCTION

Plaintiffs move the Court pursuant to Civil Procedure Rule 65 for a preliminary injunction prohibiting Defendant City of Jacksonville from enforcing Section 4.3(C)(5)(12) of Jacksonville's Unified Development Ordinance (the "Signage Restrictions") until this Court has an opportunity to issue a final judgment on the merits.

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INTRODUCTION

Plaintiffs seek to vindicate and protect their constitutional free speech rights, so that they may use the same kinds of signs that the City of Jacksonville allows all other businesses to use. Although this case challenges several anti-competitive restrictions Jacksonville has placed on food truck operators, at the behest of brick-and-mortar restaurants, this motion concerns only one such restriction: Jacksonville’s uniquely severe restrictions on how food trucks can use signs to communicate with the public. *See* Jacksonville’s Unified Development Ordinance (“UDO”) § 4.3(C)(5)(12),¹ a true and correct copy of which is attached as Exhibit “A.” Plaintiffs allege that the Signage Restrictions violate their freedom of speech as protected by Article 1, Section 14 of the North Carolina Constitution. *See* Compl. ¶¶ 296–316.

This case is back at this Court on remand from the Court of Appeals. *See Proctor v. City of Jacksonville*, 910 S.E.2d 269 (N.C. Ct. App. 2024), a true and correct copy of which is attached as Exhibit “B.” After this Court granted Defendants’ Motion to Dismiss, Plaintiffs appealed, and the Court of Appeals reversed and remanded for all five of Plaintiffs’ claims. *See id.* at 271–72. In doing so, the Court of Appeals expressly agreed with all of Plaintiffs’ arguments—including for Plaintiffs’ commercial speech claim—and remanded for fact finding. *See Proctor*, 910 S.E.2d at 272, 279. In the words of the Court of Appeals: “State action regulating commercial speech [must] satisfy either strict scrutiny or intermediate scrutiny depending on whether the regulation is content-based or content-neutral, respectively.” *Id.* at 274. Because the Signage Restrictions are unconstitutional under either test, both of which place the entire burden on the government, and because the deprivation of Plaintiffs’ free speech rights constitutes per se irreparable injury, Plaintiffs respectfully request that

¹ *See also* Compl. ¶ 190 (defining the challenged “Signage Restrictions” by describing the entirety of the restrictions set forth at Section 4.3(C)(5)(12) of Jacksonville’s UDO). Unless otherwise stated, all subsequent references to a “Section” refers to the corresponding Section of Jacksonville’s Unified Development Ordinance.

this Court issue a preliminary injunction enjoining the Defendants from enforcing the Signage Restrictions pending the resolution of this case.

FACTUAL BACKGROUND

Plaintiffs are Jacksonville residents or business owners who either operate food trucks or would like to invite food trucks to operate on their private commercial property. *See* Compl. ¶¶ 12–14, 64, 68, 76, 87, 90. All are being impacted by the speech restrictions that Jacksonville only imposes on signs discussing food trucks. *See* Proctor Aff. ¶¶ 1–3, 32–34, 42, a true and correct copy of which is attached hereto as Exhibit “C”; Gonzalez Aff. ¶¶ 1–4, 19, a true and correct copy of which was attached hereto as Exhibit “D.”²

Plaintiff Anthony (“Tony”) Proctor is a food truck operator and Jacksonville resident. Exhibit C ¶ 2. When Tony operates his food truck in other jurisdictions, he uses a tall, feathered flag that is located more than 20 feet from his truck to advertise and alert potential customers to the location of his truck. *See id.* ¶ 18. These types of signs are commonly used by food trucks because they make it easier for drivers to find the food trucks, thereby improving both public safety and business. *Id.* ¶¶ 7–8. For this same reason, many other, non-food truck businesses in Jacksonville use these same signs. *Id.* ¶¶ 26–27; Exhibit D ¶¶ 15–18. Jacksonville expressly authorizes and approves of these signs for both general commercial and non-commercial use. *See* UDO § 5.12(E)(1)(8). The only subject for which these signs are not allowed is food trucks. *See* UDO § 4.3(C)(5)(12) (restricting food truck signage to one 5’ x 5’ “A” frame sign located within 20 feet of the truck). But for the challenged Signage Restrictions, Tony would use a tall, feathered flag positioned more than 20 feet away from his

² This brief will focus on Tony instead of Ray because Tony will purchase another food truck permit from Jacksonville if our motion is granted, *see* Exhibit C ¶ 43, but Ray will require more relief from this Court to purchase another food truck permit from Jacksonville.

food truck when operating in Jacksonville, just as he does in other towns, and just like many other types of Jacksonville businesses do today. Exhibit C ¶¶ 26–27, 33–34, 37, 43; Exhibit D ¶ 18.

Moreover, Tony would only use these signs on the private, commercially zoned property where he is allowed to operate and has been invited by the property owner. For example, one of the properties where Tony regularly operated his food truck in the past was at the New Beginnings Christian Center, at 699 Bell Fork Road, Jacksonville, NC 28540. Exhibit C ¶ 35. The church is located on private, commercially zoned property. Thus, although Jacksonville generally allows feathered flags on this property, Tony is unable to use such a sign when he is operating at the church simply because his sign is a food truck sign. *Compare* UDO § 5.12(E)(1)(8) (authorizing feathered flag signs for general commercial or non-commercial use), *with id.* § 4.3(C)(5)(12) (restricting food truck signage to a single 5' x 5' "A" frame sign placed within 20 feet of the food truck). Thus, whether a sign is permissible at 699 Bell Fork Road depends entirely on the sign's content. But for the Signage Restrictions, Tony would use a feathered flag sign to advertise his food truck when operating at the church, as he could do if he owned any business other than a food truck. Exhibit C ¶ 37.

Banning food trucks from using feathered flag signs is not the only unique restriction Jacksonville imposes on food truck signage, however. Unlike its treatment of other businesses, Jacksonville strictly limits food truck signage to a single 5' x 5' "A" frame sign that cannot be placed more than 20 feet away from the food truck. Exhibit C ¶¶ 9–12. And that's it. Aside from the one A-frame sign and the signage on the food truck itself, Jacksonville forbids food trucks from using any other signage. *See* UDO § 4.3(C)(5)(12). This, in practice, means that food trucks are categorically banned from using *effective* signage, given that any person who is close enough to see the solitary 5' x 5' sign "A" frame sign near the food truck will also be able to see the much larger food truck itself. No other Jacksonville business is subjected to such severe signage restrictions. *Compare* UDO § 5.12(N)(4) (permitting businesses generally to display a freestanding sign up to 35 feet tall); *id.*

§ 5.12(L) (authorizing more than one freestanding sign on a development in certain circumstances); *id.* § 5.12(O)(3) (permitting these signs to be illuminated subject to certain conditions); *id.* § 5.12(E)(1)(8) (permitting feathered flag signs up to 15 feet tall for general commercial use), *with id.* § 4.3(C)(5)(12) (restricting mobile food vendor signage to “one 5’ x 5’ “A” frame sign within 20 feet of the food truck/trailer/cart,” while expressly prohibiting food trucks from using “all other signage” other than that which is physically affixed to the food truck itself). Indeed, in the commercial zoning district where food trucks may operate, Jacksonville allows other businesses to use at least one freestanding sign up to 35 feet tall, in addition to at least one feathered flag sign that can be up to 15 feet tall and 5 feet wide.³ *See* UDO § 5.12(E)(1)(8), (N)(4).

This disparity is further highlighted by an additional provision forbidding food trucks from using any “[p]rogrammable electronic message center signs.” UDO § 4.3(C)(5)(12)(iii). This categorical ban on such signs means that Tony cannot use a modest, 32-inch TV as a digital menu on the side of his food truck, as he would do but for the Signage Restrictions. Exhibit C ¶¶ 40–42. Yet, Jacksonville allows other businesses, including brick-and-mortar restaurants, to use much larger, illuminated signs that display “automatically changeable copy, text, and graphics,” subject to certain restrictions. *See* UDO § 5.12(K)(2) (setting forth standards for a changeable copy sign when used as a freestanding sign); § 5.12(O)(3) (recognizing that changeable copy signs can be illuminated); § 9.4 (Definitions) (“Sign, Changeable Copy”) (defining a “Changeable Copy Sign” as “[a] sign ... that is devoted to and designed for ... automatically changeable copy, text and graphics.”). Billboard owners or operators, meanwhile, can display illuminated programmable electronic message signs that are up to 40 feet tall. *See* UDO § 5.12(M)(7) (permitting the owner or operator of a billboard to display LED-illuminated “[c]hangeable message signs” on a “digital display unit” under certain conditions). Jacksonville’s

³ Although the relevant subsection is confusingly labeled as “temporary” signs, UDO § 5.12(E)(1)(8)(v) expressly authorizes flags to be used for general commercial purposes for an “indefinite period[] of time,” subject only to certain size, number, and maintenance restrictions.

categorical ban on any “programmable electronic message” signs, however, appears to apply only to food trucks.

This means that Jacksonville has divided free speech rights into the categories of “haves” and “have nots.” All businesses, other than food trucks, have free speech and could use a feathered flag (as well as other signs that are even larger) to advertise their businesses, can place signs more than 20 feet away from their businesses, and can use electronic signs. The only “have nots” prohibited from engaging in these types of speech are the food trucks.

This distinction is illustrated by Plaintiff Nicole Gonzales, who owns and operates a general goods store called Northwoods Urban Farm. Exhibit D ¶¶ 2–4. Northwoods Urban Farm is located on Nichole’s own private, commercially zoned property that used to host a traditional brick-and-mortar restaurant. *Id.* at ¶¶ 4–5. Nicole would like to host food trucks on her property, including the food truck owned and operated by Plaintiff Tony. *Id.* at ¶¶ 7–8, 10–11. Although Nicole is allowed to use feathered flags to advertise her non-food truck businesses, Tony, when allowed on Nicole’s property, is forbidden from displaying the same type of feathered flag sign advertising his food truck. This is also true of all the other Jacksonville locations where Tony would like to operate. Exhibit C ¶¶ 9–14. Furthermore, Tony has recently opened a restaurant that sells the same food as his food truck and goes by the same name (“The Spot”). *Id.* ¶¶ 22–24. The restaurant is in a small strip mall, where the other businesses can and do display feathered flag signs. *Id.* ¶¶ 25–27. It presently does not make sense for Tony to operate the food truck in front of The Spot restaurant. *Id.* ¶ 28. However, if Tony were to operate his food truck at this location, he would not be allowed to use a feathered flag sign to advertise on behalf of the food truck, even though Jacksonville allows all other businesses to use feathered flag signs at that same location. *Id.* ¶¶ 26–28.

LEGAL STANDARD

This Court may enter a preliminary injunction pursuant to its inherent equitable powers and Rule 65 of the North Carolina Rules of Civil Procedure. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 406 (1983) (“We recognize that injunctive relief is equitable in nature.”); N.C. Gen. Stat. § 1A-1, Rule 65(a)–(d) (setting forth the requirements and procedures for those seeking a preliminary injunction); *see also* N.C. Gen. Stat. §§ 1-485 *et seq.* When determining whether to issue a preliminary injunction, a trial court engages in a “two stage process.” *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 15 (1993), *overruled on other grounds by Sharpe v. Worland*, 351 N.C. 159, 166 (1999). At stage one, the plaintiff must demonstrate that it is likely to succeed on the merits of its claim. *A.E.P.*, 308 N.C. at 401. To satisfy this requirement, the plaintiff need only show that “there is a reasonable likelihood that the plaintiff will prevail ... on the merits” of its claim. *Id.* at 404.

At stage two, the plaintiff must demonstrate that it is likely to suffer irreparable loss absent the issuance of the requested injunction or, alternatively, that issuance of the injunction is necessary to protect the plaintiff’s rights during litigation. *Id.* at 405. However, for free speech claims like the one here, a finding in Plaintiffs’ favor at stage one means that the Plaintiffs have automatically met the requirement for stage two. This is because the violation of free speech rights, for even minimal periods of time, “unquestionably constitutes irreparable injury.” *Kaplan*, 111 N.C. App. at 15 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)); *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 801 (4th Cir. 2018) (holding that the violation of constitutionally protected free speech rights is a “per se” irreparable injury (internal quotation omitted)).

Finally, although Plaintiffs’ free speech claim is brought pursuant to Article I, Section 14 of the North Carolina Constitution, North Carolina’s “appellate courts have held that the free speech protections contained in the federal and North Carolina constitutions are parallel and has addressed them as if their protections were equivalent.” *State v. Shackelford*, 264 N.C. App. 542, 552 (2019)

(internal quotation omitted); *see also* *Durham Cnty. Dep't of Soc. Servs. v. Wallace*, 295 N.C. App. 440, 450 (2024) (explaining that North Carolina's Free Speech Clauses "collectively mirror their federal counterpart in jurisprudence and enforcement"). Under this approach, the government always bears the entire burden of justifying its speech restriction, including at the preliminary injunction stage. *See Edenfield v. Fane*, 507 U.S. 761, 768, 770–71 (1993).

ARGUMENT

In its reversal and remand order, the Court of Appeals held that Plaintiffs have viably alleged that Jacksonville's food-truck-specific signage ban violates their free speech rights, as guaranteed under the North Carolina Constitution. *See Proctor*, 910 S.E.2d at 274. The Court of Appeals further held that Plaintiffs' free speech claim must now be analyzed under either strict scrutiny or intermediate scrutiny. *Id.* Consequently, the government now bears the entire evidentiary burden to justify its speech restriction, regardless of which test this Court ultimately applies. *See State v. Bishop*, 368 N.C. 869, 874 (2016) (holding that, under strict scrutiny, speech "restrictions are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (internal quotation omitted)); *Billups v. City of Charleston.*, 961 F.3d 673, 685 (4th Cir. 2020) ("The [government] bears the burden of proving that [its content-neutral speech restriction] survives intermediate scrutiny"); *see also Edenfield*, 507 U.S. at 770 ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." (internal marks and citation omitted)).

This Court must now determine whether the Signage Restrictions are content based or content neutral. *See Proctor*, 910 S.E.2d at 274. Content-based restrictions of speech are subject to strict scrutiny, whereas content-neutral restrictions are subject to intermediate scrutiny. *Id.* There are

three main ways a speech restriction will be considered content based.⁴ First, restrictions that discriminate based on the “subject matter” of the speech are content based. *Bishop*, 368 N.C. at 876 (holding that restrictions that define the regulated speech by its “particular subject matter” are content based and thus subject to strict scrutiny (internal quotation omitted)). Second, restrictions that discriminate based on the speaker are also content-based restrictions of speech. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir. 2005) (holding that speech restrictions that discriminate “based on the *speaker* ... are content based” (emphasis in original)); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (“[W]e have insisted that laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” (internal quotation omitted)). Third, a speech restriction will also be considered content based if the restriction “cannot be justified without reference to the content of the regulated speech.” *Bishop*, 368 N.C. at 875 n.2 (internal quotation omitted).

Here, the challenged Signage Restrictions are content-based restrictions of speech because they discriminate based on either subject matter, speaker, or both. Specifically, the regulations expressly apply only to “food vendor signage.” *See* UDO § 4.3(C)(5)(12) (“Food vendor signage is limited to:”). The term “food vendor,” meanwhile is defined to encompass food trucks while excluding traditional brick-and-mortar restaurants. *See* UDO § 9.4 (“Definitions”) (Food Vendor (mobile)) (“A food vendor is any type of motorized vehicle or mobile food unit which is temporarily parked or placed on privately owned property where food and or beverages are sold to the general public from a nonpermanent location.”). Thus, the regulations on their face either apply to signage about food trucks (subject matter) or the signage used by food truck operators (speakers), or

⁴ A fourth, additional way a speech restriction will be considered content based and therefore subject to strict scrutiny is if the restriction was “adopted by the government because of disagreement with the message the speech conveys.” *Bishop*, 368 N.C. at 875 n.2 (internal quotation omitted). In the event this Court determines that the Signage Restrictions are not content based via any of the three paths identified above, this Court should still hold that the Signage Restrictions are content based as they were only adopted because of Jacksonville’s disapproval of food truck signage and related messaging. *See* Compl. ¶¶ 122–24, 128, 130, 138–49, 309.

possibly both. Either way, the Signage Restrictions are therefore a content-based restriction of speech subject to strict scrutiny. *See Bishop*, 368 N.C. at 875 (explaining that there are “several paths [that] can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny” (emphasis in original)). Furthermore, because any justification for the Signage Restrictions must necessarily refer to the content of the regulated speech, the Signage Restrictions are therefore content based and subject to strict scrutiny for this additional, independent reason as well.

Strict scrutiny, meanwhile, requires Jacksonville to prove that its Signage Restrictions (1) serve a compelling interest and (2) are the “least restrictive means” of advancing that interest. *Bishop*, 368 N.C. at 877. As *Reed* makes clear, however, Jacksonville simply cannot meet this heavy burden. 576 U.S. at 171. Thus, because the challenged Signage Restrictions almost certainly fail constitutional scrutiny, and because the violation of constitutionally protected free speech rights, “for even minimal periods of time, unquestionably constitutes irreparable injury,” *Harris v. Matthews*, 361 N.C. 265, 270 (2007) (internal quotation omitted), this Court should therefore grant Plaintiffs’ motion and allow Tony to use the same kinds of commercial signage Jacksonville allows other businesses to use.

I. Plaintiffs’ Free Speech Claim Is Likely to Prevail on the Merits, as the Government Cannot Prove That an Otherwise Safe Sign Becomes Harmful When It Is Used to Advertise on Behalf of a Food Truck

Plaintiffs are likely to prevail on the merits of their free speech claim, as Jacksonville cannot prove that an otherwise safe and acceptable sign becomes dangerous and therefore intolerable when used as an advertisement for a food truck. It is undisputed that the ability to convey truthful information about one’s lawful business via commercial signs is protected by Article I, Section 14 of the North Carolina Constitution. *See Cumberland County v. E. Fed. Corp.*, 48 N.C. App. 518, 522 (1980) (holding that commercial signs are a form of commercial speech protected by the North Carolina Constitution’s Free Speech Clause). Indeed, the Court of Appeals in this case acknowledged as much

when it held that Plaintiffs' free speech claim must be analyzed under either strict or intermediate scrutiny. *Proctor*, 910 S.E.2d at 274. Yet, although Plaintiffs believe that the Signage Restrictions are a content-based restriction of speech subject to strict scrutiny, it is of no moment which test this Court ultimately applies to Plaintiffs' free speech claim, as Plaintiffs are likely to prevail under either test.

Strict and intermediate scrutiny are both “rigorous” and “demanding” forms of judicial review. *See Bishop*, 368 N.C. at 874. Crucially, the government bears the entire evidentiary burden to justify its speech restriction under both tests. *Edenfield*, 507 U.S. at 770. This remains true in the context of preliminary injunctions as well, because “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, once the movant has established a viable free speech claim, as the Plaintiffs have done here, *see Proctor*, 910 S.E.2d at 274, the burden shifts to the government to justify the constitutionality of its speech restriction. *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 n.5 (3d Cir. 2017), *as amended* (June 26, 2017) (holding that “the burdens at the preliminary injunction stage ... rest with the government” once the moving party has proven “that the law restricts protected speech and that it will suffer irreparable harm” (internal quotation omitted)); *Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 618 (D. Md. 2011) (holding that the burden rests with the government to “demonstrate that its [speech restrictions] satisfy the requisite level of scrutiny” in the context of a motion for preliminary injunction that seeks to enjoin those restrictions).

By treating food truck signage more harshly than commercial signage generally, the challenged restrictions definitionally restrict speech based on subject matter and are thereby a content-based restriction of speech subject to strict scrutiny. *See Reed*, 576 U.S. at 163–64, 169 (explaining that regulations of speech that define the “regulated speech by particular subject matter” are content based and therefore subject to strict scrutiny). The Signage Restrictions cannot satisfy the demanding standard of strict scrutiny and are thus unconstitutional. Moreover, even if this Court were to

determine that the Signage Restrictions are not subject-matter restrictions, but are instead content neutral and are therefore subject to intermediate scrutiny, the government is unlikely to meet its burdens under that test either. Plaintiffs are therefore likely to succeed on the merits of their free speech claim, and their motion for preliminary injunction should be granted.

A. The Signage Restrictions are Subject to Strict Scrutiny Because They Restrict Speech Based on Either Subject Matter or Speaker, or Both

Prohibiting food truck owners from displaying signs that other businesses can use is a content-based restriction of speech. In *Reed*, the United States Supreme Court set forth the test for determining whether a speech restriction is content based and therefore subject to strict scrutiny. 576 U.S. at 163–67; *accord Bishop*, 368 N.C. at 875–76. There are “*several* paths [that] can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny.” *Bishop*, 368 N.C. at 875 (emphasis in original). First, a regulation of speech is content based and therefore subject to strict scrutiny if the regulation, on its face, “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 576 U.S. at 163. The phrase “content based” is construed broadly and in accordance with its “commonsense meaning.” *Id.* Thus, a speech regulation is content based if it “discriminates,” facially or otherwise, “against the speech’s message, ideas, or subject matter.” *Wallace*, 295 N.C. App. at 452 (internal citation omitted).

The Signage Restrictions facially restrict speech based on subject matter and are therefore a content-based speech restriction subject to strict scrutiny. *See Bishop*, 368 N.C. at 876 (holding that a cyberbullying statute was content based on its face “because the statute defines regulated speech by its particular subject matter” (internal marks and citation omitted)). The opening line of the Signage Restrictions state that its restrictions apply only to “food vendor signage.” *See* UDO § 4.3(C)(5)(12) (“Food vendor signage is limited to:”). The term “food vendor,” meanwhile is defined to encompass food trucks while excluding traditional brick-and-mortar restaurants. *See* UDO § 9.4 (“Definitions”)

(Food Vendor (mobile)) (“A food vendor is any type of motorized vehicle or mobile food unit which is temporarily parked or placed on privately owned property where food and or beverages are sold to the general public from a nonpermanent location.”). Applying the “commonsense meaning” of the phrase “content based,” the Signage Restrictions are content based because whether the restrictions apply is determined entirely by the sign’s content or subject matter: signs that advertise on behalf of food trucks are restricted in places where signs that advertise on behalf of any other business are allowed. Thus, by limiting the signage of food trucks, and only food trucks, the Signage Restrictions, on their face, define the regulated speech by its particular subject matter. This makes the Signage Restrictions a content-based restriction of speech subject to strict scrutiny. *Bishop*, 368 N.C. at 876; *Reed*, 576 U.S. at 163.

Indeed, the Signage Restrictions’ explicit focus on content and subject matter stands in stark contrast to the content-neutral terms the City uses to describe its generally applicable signage regulations. *See* UDO § 5.12(G) (“Determining the Number of Signs”); *id.* § 5.12(H) (“Computation of Sign Area”); *id.* § 5.12(L) (“Number of Freestanding Signs”); *id.* § 5.12(M) (“Billboards”); *id.* § 5.12(N) (“Location and Height Requirements”). Regulations governing the number, location, and size of signs—without regard to the content or subject matter of the signs—are classic examples of content-neutral regulations. *State v. Shackelford*, 264 N.C. App. 542, 552 (2019) (explaining that content-neutral regulations are those that are “justified without reference to the content of the regulated speech” (internal quotation omitted)). Plaintiffs simply wish to be permitted to display signs that comply with all the generally applicable sign regulations that apply to other businesses. *See* UDO § 5.12 (“Signage”).⁵ Tony is unable to do so, however, because the Signage Restrictions set forth at Section

⁵ Although there are several constitutionally suspect content-based exemptions within Section 5.12, *see* UDO § 5.12(C)-(E) (exempting certain categories of signs from certain regulations based on the sign’s content), those provisions are not the focus of this case. Plaintiffs are instead referring only to the content-neutral aspects of Section 5.12 referenced above.

4.3(C)(5)(12) expressly forbid food trucks from using the kind of commercial signage Jacksonville generally allows all other businesses to use. That makes the Signage Restrictions content based and thus subject to strict scrutiny. *Reed*, 576 U.S. at 164 (holding that a speech restriction is “content based on its face” when the restriction applies based on “a sign’s message”).

Second, if the Signage Restrictions are construed such that the restrictions apply to signs owned and operated by food truck owners, rather than signs *about* food trucks, the restrictions are still subject to strict scrutiny because they discriminate “based on the speaker.” *Solantic*, 410 F.3d at 1265 (holding that speech restrictions that discriminate “based on the *speaker* ... are content based” (emphasis in original)). As the *Solantic* Court explained, “The Supreme Court has frequently condemned ... discrimination among different users of the same medium for expression, which is another form of content-based speech regulation.” *Id.* at 1266 (internal quotation omitted). In *Solantic*, the court considered a sign ordinance that regulated signs generally but then exempted public utilities and government agencies from those restrictions. *Id.* at 1265–66. The court held that sign code regulations “that pick and choose the *speakers* entitled to preferential treatment are no less content based than those that select among subjects or messages.” *Id.* at 1266 (emphasis in original). Here, Jacksonville is likewise picking and choosing the speakers entitled to preferential treatment, and its Signage Restrictions are therefore also a content-based restriction of speech.

The United States Supreme Court has expressly recognized *Solantic* as a decision that properly analyzed a sign ordinance consistent with modern federal First Amendment jurisprudence. *See Reed*, 576 U.S. at 173 (citing *Solantic* as an example of a lower court that was already analyzing sign laws consistent with the Court’s newly announced test); *see also Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (favorably citing *Solantic* and describing it as having applied “the same test articulated [by the United States Supreme Court] in *Reed* to a city sign code”). Federal First Amendment jurisprudence, meanwhile, informs the scope of the protections provided under North

Carolina's Free Speech Clause. *See State v. Petersilie*, 334 N.C. 169, 184 (1993) (adopting federal First Amendment jurisprudence "for the purpose of applying our State Constitution's Free Speech Clause" in that case). *Solantic* is thus an extremely persuasive authority here.

Third, the Signage Restrictions are also content based for the additional independent reason that they can only be justified by "reference to the content of the regulated speech." *Bishop*, 368 N.C. at 875 n.2 (quoting *Reed*, 576 U.S. at 164). Whether a sign that would otherwise comply with all the City's generally applicable size, location, and number requirements is permissible depends entirely on the sign's subject matter. Signs that advertise on behalf of businesses selling cigars, eggs, firewood, or any other product are allowed. A physically identical sign in the exact same location, however, is prohibited if the sign's function or purpose is to advertise on behalf of a food truck.

That the Signage Restrictions can only be justified by referencing food trucks, and Jacksonville's general hostility towards food trucks, can also be seen by considering how the City treats comparable businesses. Jacksonville classifies both food trucks and produce stands as accessory uses. *See* UDO § 4.3(C)(5) (designating food trucks as accessory uses); *id.* § 4.3(C)(11) (designating produce stands as accessory uses). Both food trucks and produce stands sell food to customers. Both food trucks and produce stands are also mobile, as both may operate in different locations on different days. In its regulations of produce stands, however, Jacksonville simply requires that produce stands be "subject to the sign standards in Section 5.12, *Signage*." UDO § 4.3(C)(11)(7). That is precisely the relief sought by Plaintiffs here. Food trucks, by contrast, are permitted to use only a single 5' by 5' "A" frame sign placed within 20 feet of the truck. *See* UDO § 4.3(C)(5)(12)(i). "All other signage is prohibited." UDO § 4.3(C)(5)(12)(iv). Indeed, Jacksonville even treats adult businesses more favorably than food trucks when it comes to signage. *Compare* UDO § 5.12(S)(2) (permitting adult businesses to display a freestanding sign up to 25 feet tall), *with id.* § 4.3(C)(5)(12) (limiting food trucks to one sign no more than 5 feet tall). Thus, because Jacksonville cannot justify its decision to impose uniquely

harsh restrictions on food truck signage without referring to the content of the regulated speech (food truck signage), the Signage Restrictions are therefore a content-based restriction of speech subject to strict scrutiny. *See Reed*, 576 U.S. at 164, 170 (“[W]e have insisted that laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”).

Jacksonville’s Signage Restrictions regulate speech based on subject matter and treat certain speakers more harshly than others. The restrictions are therefore a content-based restriction of speech subject to strict scrutiny.

B. The Signage Restrictions Fail Strict Scrutiny

The Signage Restrictions fail strict scrutiny. To satisfy strict scrutiny, “the State must show that the statute serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest.” *Bishop*, 368 N.C. at 876. To satisfy strict scrutiny’s narrow tailoring requirement, the restriction must be the “least restrictive means” of advancing the government’s compelling interest. *Id.* at 878. This is a “rigorous” and “demanding” standard. *Id.* at 874. In the words of the United States Supreme Court: “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011). Furthermore, the government bears the entire evidentiary burden of proving that its speech restriction satisfies all elements of the test. *See Reed*, 576 U.S. at 171 (explaining that strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”). If the government fails to meet its evidentiary burden for even a single step, it fails the test. *See id.*

To say that the government cannot meet its burdens here is an understatement. Jacksonville cannot meet any of its burdens, let alone all of them. First, Jacksonville cannot meet its initial burden to show that the Signage Restrictions further a compelling governmental interest. As a threshold

matter, “interests in aesthetics and traffic safety” are, as a matter of law, *not* compelling interests. *Cent. Radio*, 811 F.3d at 633. Instead, compelling governmental interests are vanishingly rare and involve momentous issues not present here like: (1) safeguarding national security by “barring the provision of material aid to foreign terrorist groups,” (2) preserving judicial integrity by preventing judges from “personally soliciting campaign contributions,” and (3) protecting voting rights by “upholding a buffer zone around election sites as a measure to safeguard the right to vote freely and effectively.” *Bishop*, 368 N.C. at 878. Jacksonville, in its Unified Development Ordinance, specifies precisely what interests the City’s signage regulations are designed to serve. The only possibly relevant interests here are (1) promoting the character of the area in which the signs are located, (2) prohibiting commercial signs in residential areas, (3) traffic safety, (4) preventing adverse community appearance and the overcrowding of land, and (5) protecting the economic value of the community by preventing “the unrestricted proliferation of signs.” *See* UDO § 5.12(A) (“Purpose”). All these interests can be classified as “interests in aesthetics and traffic safety.” *See Cent. Radio*, 811 F.3d at 633. Jacksonville’s stated interests for its signage regulations, therefore, are not compelling interests, and the Signage Restrictions fail step one.

Second, the Signage Restrictions also fail strict scrutiny for the independent reason that the restrictions are not narrowly tailored. To survive strict scrutiny’s narrow tailoring requirement, the government must prove that its speech restriction is “the least restrictive means of advancing the [government’s] compelling interest.” *Bishop*, 368 N.C. at 878; *see also Cent. Radio*, 811 F.3d at 633 (explaining that to satisfy strict scrutiny’s narrow tailoring requirement, “the government [must] prove that no ‘less restrictive alternative’ would serve its purpose”). Speech restrictions fail this requirement if they are either (a) “underinclusive” or (b) “overinclusive.” *Cent. Radio*, 811 F.3d at 633. Here, the challenged Signage Restrictions fail twice, as they are both underinclusive *and* overinclusive.

One of the independent reasons that the Signage Restrictions fail strict scrutiny is that they are “hopelessly underinclusive.” *Cent. Radio*, 811 F.3d at 634. A speech restriction is fatally underinclusive “when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Reed*, 576 U.S. at 172 (internal quotation omitted). Here, as it pertains to the “preservation of aesthetics, [food truck] signs are no greater an eyesore than [commercial signage generally.]” *Id.* Thus, the Signage Restrictions fail because Jacksonville “cannot claim that placing strict limits on [food truck] signs is necessary to beautify the Town while at the same time” exempting all other forms of commercial signs from those requirements. *Id.* In other words, Jacksonville must somehow explain why banning Tony from placing a 15-foot tall flag sign on Nicole’s private, commercially zoned property is the “least restrictive means” of serving a compelling interest, while also explaining why that compelling interest vanishes when a physically identical sign is displayed in the exact same location on behalf of a non-food truck business. Because Jacksonville “cannot do so,” its ordinance fails strict scrutiny for the same reason the ordinance at issue in *Reed* did. *See id.*

The Signage Restrictions also fail the narrow tailoring requirement for the additional independent reason that they are overinclusive. “A regulation is unconstitutionally overinclusive if it unnecessarily circumscribes protected expression.” *Cent. Radio*, 811 F.3d at 633 (internal marks and citation omitted). In addition to allowing non-food truck businesses to display a flag sign up to 15 feet tall and 5 feet wide, Jacksonville also allows non-food truck businesses to display a freestanding sign that may be up to 35 feet tall. *See* UDO § 5.12(E)(1)(8), (N)(4). These freestanding signs, moreover, can display “automatically changeable copy, text, and graphics.” *Id.* §§ 5.12(K)(2), 9.4 (Definitions, “Sign, Changeable Copy”). These signs may also be illuminated. *See id.* § 5.12(O)(3). Yet, Jacksonville, imposes a unique and categorical ban on food trucks from displaying *any* “[p]rogrammable electronic message center signs,” regardless of the sign’s size or location, which thus includes so-called signs that are physically affixed to the food truck itself. *See id.* § 4.3(C)(5)(12)(iii). The Signage Restrictions are

thus “seriously overinclusive” as they restrict protected speech far beyond what is necessary to serve any of the City’s stated aesthetic or traffic safety interests. *See id.* § 5.12(A). Indeed, the categorical ban set forth at Section 4.3(C)(5)(12)(iii) sweeps so broadly that it applies to things that are not even properly understood as signs, like the 32-inch TV that Tony would like to use as a digital *menu* for his food truck. Exhibit C ¶¶ 30–31. Because the Signage Restrictions “unnecessarily” circumscribe far more protected speech than is necessary to advance any of the City’s stated signage-related interests, the restrictions are overinclusive. *See Cabaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015) (holding that an anti-robocall statute was overinclusive and thus unconstitutional because it applied to political calls, as well as the “unwanted commercial calls” the government claimed the statute was designed to target).

Thus, the Signage Restrictions fail strict scrutiny and are therefore unconstitutional for each of the independently sufficient reasons set forth above.

C. The Signage Restrictions Also Fail Intermediate Scrutiny Because Jacksonville Cannot Prove That Banning Food Trucks from Using the Same Kind of Signs the City Allows All Other Businesses to Use Directly Advances an Important Government Interest in a Manner That Is No More Restrictive than Necessary

Even if the Signage Restrictions were considered content neutral and thus analyzed under intermediate scrutiny, they would still fail constitutional scrutiny because treating food truck signage more harshly than all other forms of commercial signage does not directly advance an important government interest in a manner that is no more restrictive than necessary. Under intermediate scrutiny, a speech restriction must directly advance “an important or substantial government interest,” and the restriction must be “no more restrictive than necessary to achieve that” important or substantial governmental interest. *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298 (2012). Although “less demanding” than strict scrutiny, intermediate scrutiny is “still [a] rigorous form of [] scrutiny” that requires the government to prove that its speech restriction satisfies all elements of the test. *Bishop*, 368 N.C. at 874–75. This means that, as it pertains to the restriction on lawful and truthful

commercial speech at issue here, Jacksonville must prove that the Signage Restrictions (1) serve “an important or substantial governmental interest,” (2) “direct[ly]” advance that important or substantial interest, and (3) are narrowly tailored, which means that the Signage Restrictions must be “no more restrictive than necessary to achieve that interest.” *Hest*, 366 N.C. at 298.

Importantly, as with strict scrutiny, the government bears the burden to prove all elements of this test. *See Bishop*, 368 N.C. at 874–76 (describing intermediate scrutiny as a “rigorous” form of scrutiny where the “government must prove” that its speech restriction is “narrowly tailored to serve a significant governmental interest”); *Billups v. City of Charleston*, 961 F.3d 673, 685 (4th Cir. 2020) (“The [government] bears the burden of proving that [its content-neutral speech restriction] survives intermediate scrutiny”); *see also Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (holding that, in the context of a preliminary injunction motion, the government still has “the burden to prove all [the] elements of” intermediate scrutiny). And as with strict scrutiny, *see supra*, the government cannot meet its evidentiary burdens under this test for multiple independent reasons.

First, the Signage Restrictions fail step one. Preventing one kind of business (food trucks) from using a sign that would be allowed if the sign was owned by any other business can only be explained by protectionism, which is not a constitutionally valid governmental interest. *See Proctor*, 910 S.E.2d at 276 (recognizing that economic protectionism is not a “permissible [governmental] purpose”); *see also* Compl. ¶¶ 309–14. To argue otherwise, the City would have to provide evidence demonstrating how, for example, a 15-foot-tall sign displayed on Plaintiff Nicole’s private, commercially zoned property is harmful when the owner of that sign is a food truck, but not harmful when that physically identical sign (or one that is even larger)—placed on the exact same location—is owned by a business other than a food truck. Moreover, because the Signage Restrictions infringe on Plaintiffs’ free speech rights, Jacksonville is not allowed to hypothesize. It must instead “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). Thus, Jacksonville must show that signs that comply with the City’s size and location requirements generally cause real and substantial harm in the real world if, and only if, those signs are owned by food truck operators.

The government cannot meet its burden here. Any differences between food trucks and other businesses cannot justify a singular and severe restriction on food truck owners’ ability to communicate with the public via commercial signage. The only possible justification for such differential treatment is the unconstitutional motivation of protectionism. Indeed, when discussing the food truck ordinance generally, which includes the challenged Signage Restrictions, several city officials explicitly stated that the ordinance was designed to prevent restaurants from having to compete with food trucks. *See* Compl. ¶¶ 122–24, 128, 130, 138–49.

Second, the government will not be able to meet its burden to prove that the Signage Restrictions advance its asserted interests in “a direct and material way.” *Edenfield*, 507 U.S. at 767. This requirement is “critical,” and courts treat it as such. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

A speech restriction does not “directly and materially” advance a governmental interest when the restriction serves a contrary purpose to the government’s overall “regulatory scheme.” *Coors Brewing*, 514 U.S. at 488. Thus, in *Coors Brewing*, the Court considered a federal statute that prohibited “beer labels from displaying alcohol content,” which was ostensibly designed to “prevent[] brewers from competing on the basis of alcohol strength.” *Id.* at 476, 485. Yet, the Court noted that, when it came to beer advertising generally, distinct from the narrow prohibition on beer *labels*, the federal government adopted “a contrary policy” that generally allowed beer companies to disclose alcohol content in their advertisements, if not on the beer label itself. *Id.* at 488. The net result of these conflicting policies was that “brewers remain[ed] free to disclose alcohol content in advertisements, but not on labels, in much of the country.” *Id.* The Court thus concluded that banning beer companies

from disclosing alcohol content on beer *labels* failed to “directly and materially advance” the government’s interest of preventing brewers from competing on alcohol strength, because the “failure to prohibit the disclosure of alcohol content in advertising ... makes no rational sense if the Government’s true aim is to suppress strength wars.” *Id.*

Similarly, the challenged Signage Restrictions are at odds with Jacksonville’s regulatory scheme concerning signage generally. As described *supra*, Jacksonville imposes uniquely severe signage restrictions on food trucks that, in practice, amount to a ban on effective signage. This conflicts with Jacksonville’s general policy regarding signage, however, which recognizes the importance of commercial signage and thus allows businesses other than food trucks to use a wide variety of signage. *See* UDO § 5.12 (“Signage”). Indeed, when it comes to signage, Jacksonville treats food trucks even more harshly than it treats “adult” businesses. *Compare* UDO § 5.12(S)(2) (permitting adult businesses to display a freestanding sign up to 25 feet tall), *with id.* § 4.3(C)(5)(12) (limiting food trucks to one sign no more than 5 feet tall). Moreover, Jacksonville allows produce stands—which are like food trucks in that both sell food in different locations on different days—to use all the various forms of signage permitted under the City’s general signage regulations. *See* UDO § 4.3(C)(11)(7). Thus, Jacksonville’s “regulatory scheme” as it pertains to signage reflects a recognition and approval of commercial signage generally. The singularly harsh restriction imposed on food trucks, however, “makes no rational sense if [Jacksonville’s] true aim is to” serve legitimate public health or safety needs related to signage. *Coors Brewing*, 514 U.S. at 488. Instead, the various “exemptions and inconsistencies” in Jacksonville’s regulatory scheme concerning signage “bring[s] into question the purpose of the” food-truck-specific signage ban and suggests that the ban’s true purpose is impermissible economic protectionism, rather than genuine public health or safety concerns related to signage *See id.* at 489.

Thus, because they are contrary to Jacksonville’s overall regulatory scheme concerning commercial signage, the Signage Restrictions, like the regulation at issue in *Coors Brewing*, do not

“directly and materially advance” any permissible government purpose and therefore fail intermediate scrutiny.

Third, the Signage Restrictions also fail intermediate scrutiny because they are not narrowly tailored, which requires that the Signage Restrictions must be “no more restrictive than necessary.” *Hest*, 366 N.C. at 298. The Signage Restrictions plainly fail that requirement. Indeed, while Jacksonville treats all businesses more favorably than food trucks when it comes to signage, it is particularly notable that even “adult” businesses are permitted to use more forms of commercial signage than food trucks. Although Jacksonville forbids Tony from displaying a single flag-style sign on Nicole’s private, commercially zoned property, Jacksonville permits adult businesses to display a ground sign up to 25 feet tall. *See* UDO § 5.12(S)(2) (permitting adult businesses to display one ground sign on any lot on which they are located provided that such sign does not exceed twenty-five feet in height). Yet, the very presence of these less restrictive alternatives demonstrates that the City could just as easily advance its interests “in a manner less intrusive to [Plaintiffs’ free speech rights],” which “indicates that [the challenged Signage Restrictions are] more extensive than necessary.” *See Rubin*, 514 U.S. at 491. In other words, the singular and discriminatory treatment of food trucks is itself compelling evidence that the Signage Restrictions are “more restrictive than necessary.” *Hest*, 366 N.C. at 298. This is an additional independent reason as to why the Signage Restrictions fail intermediate scrutiny and are thus unconstitutional.

As if that were not challenging enough, the narrow tailoring requirement also mandates that the government must “demonstrate that it actually tried or considered less-speech-restrictive alternatives” before enacting the speech-restricting law, and that the restriction was only enacted after the government determined that “such alternatives were inadequate to serve the government’s interest.” *Billups*, 961 F.3d at 688. Crucially, the “government’s burden in this regard is satisfied only when it presents actual evidence supporting its assertions.” *Id.* (internal quotation omitted).

Jacksonville almost certainly cannot meet this burden, however, as there is no evidence that the city ever tried or considered less-speech-restrictive alternatives. Instead, the Signage Restrictions seem to serve the same protectionist purpose of the food truck ordinances generally. *See* Compl. ¶¶ 122–24, 128, 130, 138–49. The Signage Restrictions thus fail intermediate scrutiny for this additional, independent reason and are therefore unconstitutional.

II. The Continued Denial of Plaintiffs’ Free Speech Rights Constitutes Irreparable Loss

The ongoing violation of Plaintiffs’ free speech rights constitutes a *per se* irreparable loss that justifies the issuance of a preliminary injunction. Plaintiffs have a constitutionally protected right to truthfully and accurately communicate with the public via commercial signs. *See Proctor*, 910 S.E.2d at 274; N.C. Const. art. I, § 14 (declaring that the “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained.”). As shown above, the challenged Signage Restrictions fail constitutional scrutiny, which means that the restrictions therefore violate Plaintiffs’ free speech rights. Both the North Carolina and U.S. Supreme Courts have repeatedly held that the loss of constitutionally protected speech rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Harris v. Matthews*, 361 N.C. 265, 270 (2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). Consequently, “injunctive relief [is] appropriate in situations in which [constitutionally protected free speech rights] were either threatened or in fact being impaired at the time relief was sought.” *Id.* (internal quotation omitted).

Here, Tony’s free speech rights are currently being impaired by the Signage Restrictions. *See* Exhibit C ¶¶ 33–34 (where Tony explains that he would use a “feathered flag more than 20 feet” from his food truck but for the Signage Restrictions). Moreover, once a plaintiff has shown a likelihood of success on the merits of a constitutional claim involving a “fundamental right,” that is, on its own, sufficient to establish irreparable harm in the context of a request for a preliminary injunction. *See Holmes v. Moore*, 270 N.C. App. 7, 35 (2020) (holding that plaintiffs established that “they are likely to

suffer irreparable harm” after demonstrating that their fundamental right to participate in elections on an equal basis was likely being violated). Accordingly, injunctive relief is appropriate to prevent the ongoing irreparable loss that Plaintiff Tony will continue to suffer absent an injunction that enjoins the Defendants from enforcing the Signage Restrictions.

III. Plaintiffs Respectfully Request that this Court Waive the Security Requirement

Plaintiffs respectfully request that this Court waive the security requirement set forth at Rule 65(c), which normally requires applicants seeking a preliminary injunction to first post a security bond. *See* N.C. Gen. Stat. § 1A-1, Rule 65(c). This Court has the discretion to waive that requirement, however. *Keith v. Day*, 60 N.C. App. 559, 562 (1983) (“[T]here are some instances when it is proper for no security to be required of a party seeking injunctive relief.”). Moreover, because “Rule 65(c) of the North Carolina Rules of Civil Procedure was adopted *verbatim* from the Federal Rules of Civil Procedure, [North Carolina courts] look to federal decisions interpreting this section for guidance.” *Id.* at 560–61. Federal courts routinely waive the security bond requirement in cases where a party seeks to enjoin unconstitutional governmental conduct, “because the defendants face little to no harm by being prohibited from enforcing a statute that is likely to be found unconstitutional.” *Planned Parenthood S. Atl. v. Stein*, 680 F. Supp. 3d 595, 600 (M.D.N.C. 2023); *see also Bernstein v. Sims*, 643 F. Supp. 3d 578, 589 (E.D.N.C. 2022) (determining that a “zero dollar bond is appropriate,” in part, because “of the important federal rights at issue in this case”). Thus, Plaintiffs respectfully request that the Court not require the security contemplated by Rule 65(c).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a preliminary injunction for the pendency of this lawsuit to allow Tony to use the same type of signs for his food truck as Jacksonville allows other businesses to use.

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