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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC; GTL ENTERPRISES, LLC;

Plaintiffs,

vs.

CITY OF SAN JOSE,

Defendant.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. CITY ATTORNEY OF THE CITY OF SAN JOSE, and CITY OF SAN JOSE,

Counterclaimants,

v.

CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC; GTL ENTERPRISES, LLC; LOTUS GLASS, INC., ATOUR AMIRKHAS, an individual; GRACE AMIRKHAS, an individual; LOTUS SHIN, an individual; and DOES 1 through 50,

Counterdefendants.

Case No.: 5:18-cv-01919-BLF

**NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Date: October 31, 2019
Time: 9:00 a.m.

The Hon. Beth Labson Freeman

**NOTICE OF HEARING**

TO DEFENDANT/COUNTERCLAIMANTS AND THEIR ATTORNEY'S OF RECORD:

NOTICE IS HEREBY GIVEN that on October 31, 2019, at 9:00 a.m., or as soon thereafter as counsel may be heard by the Court, located at Robert F. Peckham Federal Building and United States Courthouse, 280 South 1st Street, Room 2112, San Jose, California, in the

courtroom of the Honorable Beth Labson Freeman, the Court will hold a hearing on this motion, by which Plaintiffs seek an order for partial summary judgment against Defendant. This Motion for Partial Summary Judgment, pursuant to Fed. R. Civ. P. 56 and Civil L.R. 56.

Plaintiffs/Counterdefendants CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC and GTL ENTERPRISES, LLC, and Counterdefendants LOTUS GLASS, INC., ATOUR AMIRKHAS, GRACE AMIRKHAS, and LOTUS SHIN (collectively "Citizens"), by and through their attorneys of record, brings this Motion for Partial Summary Judgment, pursuant to Fed. R. Civ. P. 56 and Civil L.R. 56. This Motion is made and supported by the following Memorandum of Points and Authorities, a concurrently filed Joint Statement of Undisputed Fact with attached exhibits, and the pleadings and papers on file herein.

Citizens seek summary judgment as to City's liability to Citizens derived from the unconstitutionality of the City's ordinance regulating the construction and display of signs.

Citizens seeks summary judgment as to the City's counterclaims, on the basis that the City's ordinance regulating the construction and display of signs is unconstitutional and cannot be enforced against Citizens' existing signs.

Citizens' certifies that the parties complied with the meet and confer requirements prior to the filing of this Motion.

Dated this 31st day of May, 2019.

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/s/ Frank C. Gilmore
FRANK C. GILMORE - NV Bar #10052
Attorneys for Plaintiffs/Counterdefendants

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Citizens seek partial summary judgment as to the City of San Jose's ("City") liability pursuant to the claims set forth in the First Amended Complaint (ECF 41); Citizens further seeks summary judgment as to the counterclaims asserted against them in the City's Amended Counterclaim (ECF 42). Citizens do not seek summary judgment as to damages, as Citizens intend to reserve their damages claims for trial, in the event liability against the City is established and the Court determines that damages are appropriate.

Citizens seek summary judgment as to their First Cause of Action because the Sign Ordinance bestows unfettered discretion on the City's official to approve or deny a variance to the Sign Ordinance, in violation of rights secured by the First Amendment to the United States Constitution. This unfettered discretion invalidates the City's entire sign permitting scheme.

Citizens seek summary judgment as to their Second Cause of Action because the Sign Ordinance subjects the exercise of Citizens' free speech rights to restrictions based on the content of the speech, or the identity of the speaker. Specifically, Citizens makes a facial (overbreadth) and as-applied challenge to the constitutionality of the various exemptions from the permitting requirement of the Sign Ordinance, as being content-based exemptions, which cannot pass strict scrutiny analysis. The City has the burden of proving that its content-based regulation of speech passes strict scrutiny, which it cannot do. The City must establish a compelling governmental interest for the content-based and speaker-based exemptions contained in the Sign Ordinance, and the City must establish with evidence that the restriction is narrowly tailored to advance that interest, which it cannot do. Defendant's Sign Ordinance thereby subjects Citizens to deprivation of their rights secured by the First Amendment to the United States Constitution, and the entire sign Ordinance must be invalidated.

Citizens seek summary judgment on their Third Claim for Relief, because the Sign

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Ordinance violates Citizens' right to equal protection. The Sign Ordinance provides that, "Signs erected by the City are exempt from permit requirements but shall comply with all other requirements of this Title . . ." This wholesale exemption for City-promoted speech is both speaker-based and content-based in violation of Plaintiff's First Amendment rights, as set forth in *Reed v. Town of Gilbert*, 576 US __, 135 S. Ct. 2218 (2015), and violates Citizens' right to equal protection as set forth in *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 984 (N.D. Cal. 2016).

Finally, Citizens seek summary judgment as to the City's counterclaims on that basis that the Sign Ordinance is not enforceable against them because of the unconstitutional restrictions on speech contained in the Sign Ordinance.

## II. FACTUAL BACKGROUND

The relevant factual background is set forth in the parties' Joint Statement of Undisputed Facts (hereinafter "JSOUF"), filed concurrently herewith.

## III. LAW

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); Fed. R. Civ. R. 56(e). All justifiable inferences must be viewed in the light most favorable to the nonmoving party. *Id*. Because no genuine dispute of material facts exist in this case with respect to liability, summary judgment is appropriate.

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## IV. ARGUMENT

### A. Summary Judgment on Citizens' First Claim for Relief Is Warranted Because the Code Confers Unfettered Discretion on the City Official to Grant or Deny Citizens' Right to Speak, Which Amounts to an Unconstitutional Prior Restraint.

The Sign Ordinance contains several unconstitutional elements which doom the entire permitting and regulation scheme. A primary failing of the Sign Ordinance is the vesting of unfettered discretion upon the City official to determine when, and under what circumstances, a variance of the permitting requirements of the Sign Ordinance can be granted. Where, as here, the City official is vested with such wide discretion to grant or deny the ability to display speech, the regulation is an illegal and unconstitutional prior restraint that renders the entire permitting scheme unenforceable.

#### *1. The Sign Ordinance Permitting Scheme and Variance Procedure.*

The Sign Ordinance and the Zoning Ordinance together regulate the right to construct and display signs within the City. The Sign Ordinance provides that "[n]o person shall erect, maintain or suffer, or cause to be erected, maintained or suffered, any sign except in strict conformity with this title." Sign Ordinance §23.02.820. Further, "[t]he erection of any sign in violation of this title shall be, and is hereby declared to be, unlawful and a public nuisance." Sign Ordinance §23.02.830. The Code explains that the administrative authority for the implementation of the Sign Ordinance on Citizens' Signs is vested in the City's Department of Planning, Building, and Code Enforcement ("Planning"). Sign Ordinance §23.02.870.[1]

Because Citizens' Signs display, among other types of speech, off-site commercial speech, the Signs are prohibited in the City. Sign Ordinance §23.02.1010(A)(12). Further, the Signs are

[1] References in the Code to "Director" refers "to the Director of the applicable administrative authority," in this case the Planning Director. Sign Ordinance §23.02.870(A).

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prohibited because they are visible from the freeway. Sign Ordinance §23.02.1010(A)(9). Because the Sign Ordinance prohibits Citizens' Signs, they are "illegal signs" under the Code. See Sign Ordinance §23.02.260 ("Illegal sign means and sign not in conformity with the [Sign Ordinance] and not a legal nonconforming sign"). Because the Signs are illegal signs under the Code, the City has notified Citizens of an impending Administrative Citation, which includes daily civil penalties and other potential penalties. See Exhibit 5 to JSOUF.

Any person wishing to display a legally constructed sign in the City must first obtain a sign permit, or be exempted from the sign permit requirement, as set forth in §23.02.1300(A). Citizens Signs are illegal signs because (1) Citizens did not apply for and obtain a sign permit for the construction of their Sign, (2) their Signs are not exempt from the permitting requirement, and (3) Citizens did not obtain a variance. The Sign Ordinance vests with the Planning Director (and the City Council) the right to grant a variance from the permitting and display requirements of the Sign Ordinance. Sign Ordinance §23.02.1370(B). The Sign Ordinance provides that the variances shall be obtained pursuant to Chapter 20.100 of the Zoning Ordinance, "except that the findings required for issuance of a sign variance shall be as set forth in this section." Sign Ordinance §23.02.1370(C). The Sign Ordinance provides that no variance shall be granted unless the Director finds that, among other things, "special circumstances uniquely applicable to the subject property" are present, and the conditions of the variance imposed by the Director: "a. Will not impair the utility or value of adjacent properties or the general welfare of the neighborhood; b. Will not impair the integrity and character of the zoning district or special sign zone in which the subject property is located; c. Will not materially add to visual clutter; and d. Will not create visual blight." Sign Ordinance §23.02.1370(D(2). No portion of the Code nor the Sign Ordinance attempt to define or give further guidance to the Director as to the terms and phrases, "general welfare of the neighborhood"; "integrity and character of the zoning district"; "visual clutter"; or "visual blight."

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***2. The Variance Procedure Constitutes an Illegal Prior Restraint Because It Vests the Planning Director with Unbridled Authority to Reject a Variance Application***.

The Sign Ordinance's variance procedure (Sign Ordinance §23.02.1370(D(2)) grants the Planning Director the authority to prevent an otherwise deserving applicant from displaying speech on the basis of the Director's own interpretation of the "general welfare of the neighborhood," the "integrity and character of the zoning district," "visual clutter," or "visual blight." The power given to the Planning Director under these undefined and amorphous terms mean that the Director has the right to reject or approve a variance application for essentially *any* reason the Director may desire. Where the Director gets to decide who can display speech and who cannot, the entire ordinance is infirm and cannot stand. Accordingly, the variance procedure is an illegal prior restraint, which requires that the entire Sign Ordinance scheme be deemed invalid.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. The Supreme Court in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), explained that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id*. at 150–51.

The Ninth Circuit has repeatedly concluded that a regulation of expressive conduct (including speech) is an unconstitutional prior restraint if it "vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Kreisner v. City of San Diego*, 1 F.3d 775, 805 (9th Cir. 1993). An ordinance or regulation that makes the exercise of First Amendment rights "contingent upon the uncontrolled will of an official--as by requiring a

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permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint." *Epona v. Cty. of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017). "That is, absent definite and objective guiding standards, permit requirements present a threat of content-based, discriminatory enforcement." *Id*. "While permitting guidelines need not eliminate all official discretion, they must be sufficiently specific and objective so as to effectively place some limits on the authority of City officials to deny a permit." *Id*. "While prior restraints are not unconstitutional *per se*, any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). The prior restraint jurisprudence has long established that "an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

To determine if the Sign Ordinance confers "unbridled discretion" on the Planning Director with respect to the Sign Ordinance's permitting process, this Court must examine whether such ordinance "contains adequate standards to guide the official's decision and render it subject to effective judicial review." *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 798 (9th Cir.2008) (quoting *Thomas v. Chi. Park Dist*., 534 U.S. 316, 323 (2002). This Circuit has developed three factors to consider in assessing a facial challenge to a First Amendment permitting process: (1) whether limited and objective criteria sufficiently confine the permitting officials' discretion to grant or deny a permit; (2) whether officials are required to state the reasons for a permitting decision, so as to facilitate effective judicial review; and (3) whether such decision must be made within a reasonable time frame. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d

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1064, 1082-83 (9th Cir.2006). Citizens assert a facial challenge to the Sign Ordinance's permitting scheme as an unconstitutional prior restraint, because the Sign Ordinance cannot meet a single factor set forth in *GK Ltd* and its progeny. (ECF 41, ¶24).

a. Citizens Has Standing to Bring a Facial Challenge to the Code as an Illegal Prior Restraint.

First, it is important to establish that Citizens has standing to assert a facial attack on the City's Sign Ordinance for the reasons set forth in *Epona v. Cty. of Ventura*, 876 F.3d 1214, 1220-21 (9th Cir. 2017). In that case, the Ninth Circuit confirmed that "the Supreme Court permits facial challenges to prior restraints of protected expression for two reasons: (1) such restraints may have a chilling effect on protected speech because potential speakers may choose to self-censor rather than either acquire a license or risk sanction for speaking without one; and (2) where a regulation lacks clear standards for the issuance of a permit, an as-applied challenge may fail to provide sufficient protection against content-based censorship. *Id*. (citing *City of Lakewood*, 486 U.S. at 757–59. Thus, permitting schemes like the Sign Ordinance are subject to facial challenge if they "have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" that protected speech or conduct will be suppressed. *City of Lakewood*, 486 U.S. at 759. To prevail on their facial challenge, Citizens must show that there is nothing in the challenged provision to prevent the decisionmaker from exercising discretion in a manner that favors some speakers over others based on the content of their speech. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). The Variance Procedure vests with the Planning Director such wide discretion that he/she could grant or deny a variance based on the identity of the speaker or the content of their message, effectively censoring speech.

It is undisputed that Citizens did not apply for a sign permit prior to building their Signs and seeking relief in this Court. JSUF, ¶6. However, because this case involves the Sign

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Ordinance's permitting scheme which vests unbridled discretion in a City official over whether to deny or permit the display of speech, among other thing, Citizens has standing to assert a facial challenge to the Sign Ordinance without the necessity of first applying for, and being denied, a permit. *Gaudiya Vaishnava Soc. v. City & Cty. of San Francisco*, 952 F.2d 1059, 1062–63 (9th Cir. 1990)(citing *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750 (1988)).

Under *Lakewood*, "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.... The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." 486 U.S. at 759. An ordinance may be facially unconstitutional in one of two ways: (1) by seeking to prohibit such a broad range of protected activity that it is unconstitutionally overbroad; or (2) by being unconstitutional in every conceivable application and incapable of ever being applied in a valid manner because it is unconstitutionally vague or impermissibly restricts a protected activity. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1271 (9th Cir. 2017).

A regulation can be subject to a facial overbreadth challenge when "conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Citizens has clearly made this overbreadth facial challenge here. Citizens alleged that the Variance Procedure (§23.02.1370) amounts to an unconstitutional prior restraint by giving the Planning Director effectively standardless discretionary power to grant or deny variances to the sign ordinances. (ECF 41, ¶¶13-15). See *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006).

In order to maintain standing to bring an overbreadth challenge based on alleged unbridled discretion amounting to a prior restraint, Citizens must have standing under the Constitution's

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Article III "case and controversy requirement." Citizens must be able to show the "irreducible minimum" of "constitutional standing," meaning they must have: 1) an injury in fact that is "actual, concrete, and particularized," 2) a causal connection between defendant's conduct and the plaintiff's injury, and 3) a likelihood that the injury can be redressed by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 891 (9th Cir. 2007). Federal courts supplement this "constitutional standing" with the doctrine of "prudential standing," which requires Citizens' claims to be "sufficiently individualized to ensure effective judicial review." *Get Outdoors II*, 506 F.3d at 891.

However, like here, prudential standing issues are not applicable to cases involving First Amendment freedom of expression. See *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992) ("It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable."). Citizens' overbreadth challenge "operates as a narrow exception permitting the lawsuit to proceed on the basis of 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' " *Id*. (quoting *Broadrick*, 413 U.S. at 612). Accordingly, because Citizens is subject to the Sign Code requiring a permit to conduct expressive activity – by displaying speech on signs – Citizens has standing to facially challenge the Variance Procedure as vesting unbridled discretion in a government official without having applied for the license or permit. See *City of Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 755-56 (1988). Put simply, "facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020 (9th Cir. 2009). This is so because of "the evil inherent in a licensing system. The power of the licensor ... is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters

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of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, at 97 (1940).

b. The Variance Procedure in the Sign Ordinance Does Not Provide Limited and Objective Criteria.

The City's Variance Procedure, which determines who is eligible to display signs notwithstanding the restrictions in the Code, are far more subjective, opaque, and ambiguous than those which have been previously invalidated in the Ninth Circuit. For example, in *Epona*, 876 F.3d at 1222, the Ninth Circuit examined Ventura County's standards for granting a farmer a conditional use permit ("CUP") to conduct a commercial wedding on his farmland. The County had denied an application by the farmer for a CUP due to complaints from the farmer's neighbors. *Id*. at 1218. One of the findings that the County officials reached in denying the application was that, "[t]he venue has the potential to be detrimental to the *public interest, health, safety, convenience, or welfare*." *Id*. (emphasis added). The farmer sought relief in the district court and sought an injunction, which the district court denied. The Ninth Circuit, on appeal, reversed. The Ninth Circuit reiterated the holding of *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996). In *Moreno Valley*, the court struck down a sign ordinance which required the city official, in reviewing a sign permit application, to find that a structure or sign would not "have a harmful effect upon the health or welfare of the general public" or be "detrimental to the welfare of the general public ... [or] to the aesthetic quality of the community or the surrounding land uses." *Id*. at 818-19. The court found that, "[t]he abstract language of the ordinance, paired with the lack of any requirement that officials provide some evidence to support the conclusion that a particular structure or sign is detrimental to the community, impermissibly granted officials unbridled discretion in determining whether a particular structure or sign [would] be harmful to the community's health, welfare, or 'aesthetic quality.'" *Epona*, 876 F.3d at 1222

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(9th Cir. 2017)(citing *Moreno Valley*, 103 F.3d at 819-19). Importantly, as with the Sign Ordinance variance procedure (Sign Ordinance §23.02.1370(D(2)), in *Epona* the permitting official had to be satisfied that every condition had been or would be met. *Id*. at 1224. "Thus, if one condition confers an impermissible degree of discretion, the specificity of a separate condition will not save the scheme." *Id*.

In *Epona*, the Ninth Circuit was troubled conditions like "not [ ] detrimental to the public interest, health, safety, convenience, or welfare;" that must be satisfied to acquire a CUP. The court compared these to the standards in *Moreno Valley*, where "the terms [were] not defined elsewhere by a limited and objective set of criteria." *Id*. at 1224. The court was "particularly concerned about the combination of abstract language, and the lack of a requirement that permitting officials support their decision with objective evidence," and invalidated the scheme as conferring unfettered discretion on the County official. *Id*.

The Variance Procedure in the Sign Ordinance is far more abstract and undefined that the scheme struck down in *Epona*. Here, the Planning Director can deny a variance simply by concluding that the "general welfare of the neighborhood" would not be served by display of a sign. This wide latitude gives the Director effective *carte blanche* authority to grant and deny variances based on his/her own personal conclusions as to the "welfare" of a particular neighborhood. For example, the Director may conclude that a variance application to construct a sign displaying the words "Impeach the Mayor" may impair the integrity and character of the neighborhood near City Hall, whilst simultaneously concluding that a variance application desiring to display "Support Pay Raises For City Officials" does not. Nothing in the Sign Ordinance or the Variance Procedure prohibits the Director from making such subjective determinations. Moreover, as explained below, the Director is not even required to make express factual findings to support his subjective determinations.

Even if the City asserts a pure motive, and offers a pledge to apply the standards

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evenhandedly, the scheme cannot stand. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them. *Reed v. Town of Gilbert, Ariz*., 135 S. Ct. 2218, 2229, 192 L. Ed. 2d 236 (2015).

The City's Planning Director has the discretion to deny Citizens a sign variance on the basis that Citizens' proposed political speech may "impair the general welfare of the neighborhood." "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 757.

c. The Variance Procedure Does Not Require The Director to Make Express Factual Findings in Denying a Variance, and Does Not Have Time Limits To Approve or Deny an Application.

Another failing of the Variance Procedure is that it does not require the Director to make express factual findings to support a variance decision. In *Epona,* the CUP ordinance required the County official to make "specific factual findings" to support an adverse decision, whereas here the Director is not obligated to make factual findings supporting the basis for the granting or denial of a variance. See Sign Ordinance §23.02.1370(D)(2). Essentially, the Sign Ordinance permits the Director to deny a variance application and never advise the applicant as to the underlying factual basis for the approval or denial, in contravention of the holdings of *Epona*., which requires the Court to "look to the totality of the factors to assess whether an ordinance contains adequate safeguards to protect against official abuse." *Epona*, 876 F.3d at 1225.

Moreover, neither the sign permit application nor the variance procedure have time limits for the Director to approve or deny a permit application or variance application. See Sign

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Ordinance §23.02.1340 (sign permit applications); §23.02.1370 (variance applications). In *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court identified procedural safeguards that must be present to ensure a prior restraint does not run afoul of the constitution. *Id*. at 58–59. The requirement is that the official "will, within a specified brief period, either issue a license or go to court," *id*. at 59, because "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion," *FW/PBS*, 493 U.S. at 227.

Appropriate standards to cabin discretion of the city officials allow courts quickly and easily to determine whether the Director is discriminating against disfavored speech. Without standards, granting or denying permits on pretext is far too easy, making it impossible to ascertain whether the Director is permitting favorable speech like "Pay Raises for City Officials", and suppressing unfavorable, like "Impeach the Mayor." *City of Lakewood*, 486 U.S. at 758; *Epona*, 876 F.3d at 1221 ("where a regulation lacks clear standards for the issuance of a permit, an as-applied challenge may fail to provide sufficient protection against content-based censorship").

Thus, the Sign Ordinance fails to satisfy any of the three factors the Court must consider in determining whether the Sign Ordinance presents an illegal prior restraint. Based on *City of Lakewood, Epona,* and *Moreno Valley*, there can be little doubt that the Sign Ordinance's permitting scheme constitutes an illegal and unconstitutional prior restraint and must be stricken.

**B. The Sign Ordinance Violates Citizens' Right to Equal Protection Because The City's Signs Are Exempt from the Sign Ordinance and Are Permitted to Display Off-Site Commercial Speech Without the Same Restrictions Applicable to Citizens**.

As set forth above, the Sign Ordinance exempts from the permit requirement, "Signs erected by the City." Sign Ordinance §23.02.1310. City-owned signs are regulated by "Council Policy 6-4, in lieu of the requirements of the [Sign Ordinance]." Sign Ordinance §23.02.1310(B). See JSOUF Ex. 9. Council Policy 6-4 has paved the way for the City to construct and display off-

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site commercial signs on its property as a means of generating revenue, while the Sign Ordinance expressly prohibits Citizens from displaying non-commercial and commercial speech on their Signs.

Council Policy 6-4 actually expressly states a goal of "removing existing barriers to off-site commercial advertising on City-owned [sites] that could allow: (1) new off-site advertising on City-owned sites throughout the City." JSOUF, Ex. 9, pp.1-2. The Purpose behind Policy 6-4 is "to provide guidance regarding the implementation of a program that may allow Signs, including Billboards, Programmable Electronic Signs and Signs displaying Off-site Commercial Speech, on City-owned land; and to confirm the City's continued interest in regulating Signs on City-owned land to promote an aesthetically pleasing environment." *Id*. Further, the stated Policy is to, among other things: (1) "allow the future use of billboards and signs displaying off-site commercial speech on city-owned land" and (2) "generate revenue for the City, including revenue to support City-owned facilities, programs, or services. . . ." *Id*. at p. 2.

In other words, the City has exempted itself from the permitting requirement of the Sign Ordinance, has expressly permitted itself to display off-site advertising on its own land, and is doing so under the express policy of generating revenue to support its own desires. Meanwhile, Citizens is restricted from building off-premises commercial signs, and is precluded from generating revenue from selling advertising on its Signs. Indeed, the City has commenced civil, administrative proceedings against Citizens for doing exactly what the City is doing. There could hardly be another example of a more preferential treatment of one speaker (the City) over another (Citizens). This preference presents a speaker-based regulation of speech that violates Citizens' right to free speech and equal protection under the laws.

It is now established that speaker-based discrimination offends the Constitution. *Reed*, 576 at 2230 ("[T]he fact that a distinction is speaker based does not, as the [9th Cir.] Court of Appeals seemed to believe, automatically render the distinction content neutral.").

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The case of *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002), provides that this Court should "apply strict scrutiny if the governmental enactment . . . burdens the exercise of a fundamental right. . . . If the ordinance does not concern . . . a fundamental right, we apply rational basis review and simply ask whether the ordinance 'is rationally-related to a legitimate governmental interest." Because the Sign Ordinance regulates who can display speech, Citizens' fundamental rights are implicated by the fact that the City gets preferential treatment over other speakers under the Sign Ordinance. As set forth below, the exemption for "signs erected by the City" is unquestionably a content-based regulation. See *Foti*, 146 F.3d at 636.

Because the Sign Ordinance clearly prefers the speech contained on the "Signs erected by the City," over other speakers, the Sign Ordinance contains content-based exemptions. In *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 986 (N.D. Cal. 2016), the court struck down Alameda County's exemption for "Official public signs," on the grounds that it was obviously content-based under *Reed*, and the County could not justify the exemption under strict scrutiny review. The court reiterated that strict scrutiny of preference for "official public signs" over other signs required the County to demonstrate "that the distinction between public signs and non-public signs 'furthers a compelling government interest and is narrowly tailored to that end.'" *Id*. at 986 (quoting *Reed*, 135 S.Ct. at 2231). The County was not able to make such a showing. *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S.Ct. 1656, 1666, (2015) (it is the "rare case[ ] in which a speech regulation withstands strict scrutiny"). The court explained that "[s]etting aside the question of a compelling government interest, the public sign preference here fails because '[a]llowing the government to build any signs without any restrictions,' while including a variety of different restrictions for different permitted signs, is the antithesis of narrow tailoring." *Id*. (quoting *Reed*, at 2239 (Kagan, J., concurring) ("the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test....").

The exemption for "signs erected by the City" fares even worse under strict scrutiny than

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did Alameda County's seemingly innocuous "public signs" exemption. First, it is the City's burden to establish that this exemption "furthers a compelling government interest and is narrowly tailored to that end." See *Reed*, 135 S. Ct. at 2231. This exemption is far more egregious than those struck down in *Foti*, 146 F.3d at 637 (9th Cir. 1998). There can simply be no compelling governmental interest that is served by the City exempting itself from the ban on off-site advertising. Nor can this exemption be narrowly tailored, as set forth below.

Further, the City cannot show how this wholesale exemption does not establish the underinclusiveness of the total ban on off-site advertising under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 565 (1980)* and *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S. Ct. 2038, 2043, 129 L. Ed. 2d 36 (1994). Where, as here, the exemption "from an otherwise permissible regulation of speech [e.g. the total ban] may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people," it is unconstitutionally underinclusve." *Ladue*, 512 U.S. at 51.

Additionally, as the Ninth Circuit explained in *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904–05 (9th Cir. 2009), exemptions like this are underinclusive where a total ban "in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages or because they may diminish the credibility of the government's rationale for restricting speech in the first place."

**C. <u>The Sign Ordinance Contains Content-Based and Speaker Based Exemptions to the Permitting Requirement of the Sign Code That Cannot Withstand Strict Scrutiny</u>.**

Citizens alleged that the Sign Ordinance contains content and speaker-based regulation of speech. (ECF 41, ¶11-13). The most extreme example of the content-based and speaker-based regulation of signs is found in the "Exemptions" section of the Sign Ordinance, §23.02.1310.

All persons wishing to display a sign in the City must obtain a permit to do so, unless the sign is exempted from the permitting requirement. Sign Ordinance §23.04.1010. The Sign

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Ordinance exempts certain types of signs from the requirement to obtain a sign permit prior to constructing and displaying a sign. The Sign Ordinance provides that, "[t]he following Signs shall comply with all other requirements of this Title but are exempted from the permit requirements of Section 23.02.1300 . . ." Sign Ordinance §23.02.1310. The exempt signs include: "4. Election Signs; 6. U.S. Flags; any other Flags displayed on flagpoles erected in conformance with all applicable laws; 8. Signage for residential uses where there are four (4) or fewer residential occupancy units on the parcel"; "B. Signs erected by the City" and "Historic signs" (§23.02.1090).

These exemptions are all unquestionably content or speaker-based regulations which cannot pass strict scrutiny and must be invalidated. And, because invalidating the Exemptions renders the Sign Ordinance *more* restrictive on speech, it cannot be severed from the Sign Ordinance, and the whole permitting scheme must be invalidated and unenforceable to remove Citizens' Signs.

***1. Content-Based Regulation of Speech is Subject to Strict Scrutiny.***

"Content-based regulations are presumptively unconstitutional." *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998). These Sign Ordinance exemptions are unquestionably content-based exemptions. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). The test for determining whether a sign code is content-based is whether the enforcement official has to read the message to determine if the exemption applies. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) ("The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred") (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S.Ct. 3106 (1984). The *Reed* decision cements this conclusion as constitutionally sound. As the Court explains:

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> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

*Reed*, 135 S. Ct. at 2227.

In *Reed*, the Town of Gilbert had cited a church for placing temporary signs throughout the town advertising the church's weekly services. The Town's sign code contained exemptions to the permitting requirements which are very similar to Reno's. *Id*. at 2224. For example, the Town exempted, among 19 other types of signs, "Temporary Directional Signs", "Political Signs", and "Ideological Signs," which were all defined in the Town's ordinance. The church sued the Town and the case eventually landed in the Supreme Court after two unsuccessful appeals to the Ninth Circuit. The Supreme Court definitively ruled on the issue of facially content-based regulation of speech, overruling the two prior published opinions of the Ninth Circuit. The Supreme Court found that the exemptions in the Town's code was unquestionably content-based regulation of speech. In a solitary powerful paragraph that clarified a decade worth of incorrect Ninth Circuit jurisprudence on the subject, the Court explained:

> The restrictions in the Sign Code that apply to any given sign *thus depend entirely on the communicative content of the sign*. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. **On its face, the Sign Code is a content-based regulation of speech**. We thus have

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> no need to consider the government's justifications or Purposes for enacting the Code to determine whether it is subject to strict scrutiny.

*Id*. at 2227 (emphasis added).

The Court squarely rejected each of the Town's (and the Circuit Court's) reasons for determining that the regulation was not content-based. The Court dismissed the argument originating from *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989), which the Town contended made the exemptions content neutral – even if they draw distinctions based on the communicative content – provided that the Town can justify the distinctions without reference to the content. *Reed*, 135 S. Ct. at 2228. The Court clarified this misunderstood portion of the *Ward* opinion and stated that, as here, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id*. (citing *Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 429, 113 S.Ct. 1505 (1993). "In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*. It is now well-settled that the determination of content-based v. content-neutral is made "*before* turning to the law's justification or purpose." Id. (emphasis in original).

The Court then rejected the Town's second content-neutral defense. The Town argued that because an exemption "does not mention any idea or viewpoint, let alone single one out for differential treatment" the ordinance was not content-based because "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." *Reed* at 2229. The Court also rejected this argument, holding that "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. The Court correctly explains that an exemption which allows for a certain "subject matter for differential treatment" is content-based even if the restriction does not target differing opinions within that subject matter. *Id*. Under the

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Town's example, ideological signs are given different treatment than political signs, which are treated differently than messages announcing assembly of like-minded persons. This is "a paradigmatic example" of content-based discrimination. *Id*.

Finally, the Court dispelled a long-standing, *but wholly incorrect*, theme from the Ninth Circuit regarding the "speaker-based" content neutrality concept. The Ninth Circuit had previously held, in upholding the Town's ordinance, that the Town's exemptions were not distinctions based on content but on "who is speaking through the sign and whether and when an event is occurring." *Id*. The Court first rejected this argument because the Town's exemptions were not actually speaker-based. The subject matter of each exemption applied regardless of who was promoting the message. *Id*. Moreover, "the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral." *Id*. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content . . . we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id*. The same rationale applies for "event-based" signs. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.

Here, the Exemptions single out exemptions for signs bearing particular messages: "signs erected by the City" Flags, Historic Signs, and "Signage for Residential Uses." These types of exemptions may seem on the surface to be appropriate ways to regulate signs, but the cases have established that content neutrality is an essential means of protecting the freedom of speech even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *Id*. at 2231.

Just as in *Reed*, the City's exemptions are unquestionably content-based, and deserve the same treatment as those in the Town of Gilbert. The City entirely exempts from the Sign

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Ordinance "Signs erected by the City," Flags, Historic Signs, and "Signage for Residential Uses." These distinctions are *entirely* drawn on the content of the message. In other words, a flag installed by the City reading "Re-elect the Mayor" is exempt from the permitting requirement, while a Sign displayed on Parcel 1 which implores the public to "Vote Your Conscience on Election Day" is prohibited by the Sign Ordinance. The only distinction between Citizens' political message – which is restricted by the Sign Ordinance – and the City's flag promoting the Mayor (which is exempt from the permitting requirement) is the *content* of the message. The City's enforcement official must read the message of each sign to determine if the message is subject to the Code or exempt. Accordingly, the exemptions are content-based.

**D. Content-Based Restrictions On Speech Are Presumptively Invalid and Subject to Strict Scrutiny; The City Cannot Meet the Burden to Prove that the Exemptions are Narrowly Tailored to Meet a Compelling Governmental Interest**.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226 (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992)). Because the City's Sign Ordinance is facially content-based, "those provisions can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id*. at 2231. Thus, it is the City's burden to demonstrate that the Sign Ordinance's differentiation between exempted signs – "signs erected by the City", flags, residential signs, -- and other non-exempt signs, like Citizens' Signs, furthers a compelling governmental interest and is narrowly tailored to that end. *Id*. As in *Reed*, the City cannot come close to meeting its burden. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (it is the "rare case[] in which a speech regulation withstands strict scrutiny"). Such is the case here.

***1. The City Has No Compelling Interest To Exempt Content-Based Signs***.

The City cannot provide a compelling governmental interest that is furthered by the

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exemptions as they are presently written. Primary among them is the exemption for "signs erected by the City." Just as the "directional signs" exemption in *Reed* failed to pass the "laugh test" for governmental interest, so does the City's exemptions for "signs erected by the City." There is no compelling governmental interest furthered by exempting these signs and restricting all others.

Ostensibly, the City will offer esthetics, safety, reducing blight and clutter, and others as the compelling governmental interest. There does not appear to be any binding authority which expressly concludes that such an interest is compelling. Courts typically accept, for the sake of argument, that such an interest is compelling and then strike the ordinance for not being narrowly tailored – see *Reed* 135 S. Ct. at 2223 ("Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety . . ."); *Neighborhood Enter., Inc. v. City of St. Louis*, 644 F.3d 728, 737-38 (8th Cir. 2011)("municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.") It is likely here, as in *Reed*, that the City will proffer "preserving the Town's aesthetic appeal and traffic safety" as the compelling governmental interest. *Id*. at 2231. Even assuming these were compelling governmental interests, such exemptions would be "hopelessly underinclusive." *Id*. Just as in *Reed*, the City cannot hope to explain why a proliferation of City-owned off-site signs "comprehensively address community aesthetic concerns about visual clutter and visual blight in the environment" (Sign Ordinance ¶23.02.800), or that the exempted City-owned signs, flags, residential signs or historic signs are "no greater an eyesore" than other signs subject to the permitting requirement. *Id*. The analysis is not whether these types of exemptions will actually result in proliferation; the question is simply whether such proliferation is possible under the Code. *City of Ladue*, 512 U.S. at 46–47 Clearly, the answer is yes.

***2. The Exemptions are Not Narrowly Tailored.***

The City cannot show that the exemptions for the City to display off-site commercial speech to generate revenue is narrowly tailored to actually further a compelling interests in

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aesthetics and safety. *State University of New York v. Fox*, 492 U.S. 469, 479 (1989). "This narrow tailoring requirement means . . . that the factual situation demonstrates a real need for the government to act to protect its interests." *Johnson v. Minneapolis Park & Rec. Bd.*, 729 F.3d 1094, 1099 (8th Cir. 2013). Allowing the City to develop and build numerous signs, while simultaneously maintaining restrictions for permitted signs is the antithesis of narrow tailoring. See *Reed*, 135 S. Ct. at 2231–32. If the City wished to promote aesthetics and safety, it would ban *all* off-site commercial signs, and not exempt only those owned by the City. Quite simply, the exemption for "signs erected by the City" is content-based, and is not narrowly tailored to further a compelling governmental interest. The exemptions result in an unconstitutional Sign Ordinance and must be struck down.

**E. The Invalid Portions of the Sign Ordinance Cannot Be Severed From the Code.**

The Sign Ordinance does not address severability of an infirm section from the entire Code. Accordingly, there is no ability for the City to argue that the permitting scheme should remain intact while the constitutionally infirm provisions are severed. Even if a severance provision was to be found, with regard to the particular provisions at issue in this case, severance is not an appropriate remedy to save the sign permitting scheme.

As set forth in *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006), if unconstitutional exemptions are severed from the sign code, all currently exempt sign owners who were conforming within the Sign Ordinance would be immediately deemed to be non-conforming under the severance, and "would subject activity that is currently authorized by the legislature to civil and criminal sanctions, would impermissibly restrict speech that is protected by a strict level of scrutiny, i.e., political speech, and would make those protected by the exemptions indispensable parties to this proceeding." *Id.* For example, all signs erected "for residential purposes" are exempt from the permitting requirement. If that exemption were severed, all residential purpose

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signs would be illegal under the Sign Ordinance and all residential sign owners would be indispensable parties to this case. See *Id*.

Further, simply severing the infirm exemptions would actually result in making the Sign Ordinance *more* restrictive on speech, which the courts have been unwilling to do in constitutional cases. Severing the unconstitutional exemptions of the Sign Ordinance would make the Code more restrictive on speech, thereby defeating the stated purpose of the sign regulation to begin with. §23.02.800 ("Signs are an important and necessary means of communication . . . The regulation of signs in the City of San José also is intended to be content neutral wherever required and to provide adequate opportunity for the presentation of messages of many varieties.") Accordingly, severance does not save the ordinance. The whole sign permitting scheme must be deemed invalid and unenforceable.

## V. CONCLUSION

In light of the foregoing, Citizens seek summary judgment as to liability of their First, Second, and Third Causes of Action, and summary judgment as to the enforceability of the Sign Ordinance as alleged in the City's Counterclaims.

DATED: This 31st day of May, 2019.

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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that on this date I caused to be served a true copy of **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on all parties to this action by the method(s) indicated below:

____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

RICHARD DOYLE, City Attorney
NORA FRIMANN, Assistant City Attorney
MARGO LASKOWSKA, Sr. Deputy City Attorney
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, California 95113-1905

_X__ by using the Court's CM/ECF Electronic Notification System addressed to:

RICHARD DOYLE, City Attorney
NORA FRIMANN, Assistant City Attorney
MARGO LASKOWSKA, Sr. Deputy City Attorney
E-Mail Address: cao.main@sanjoseca.gov

____ by placing an original or true copy thereof in a sealed envelope for personal delivery/hand delivery of original addressed to:

____ by facsimile (fax) addressed to:

____ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 31st day of May, 2019.

/s/ Leslie M. Lucero
Employee of Robison, Sharp, Sullivan & Brust

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