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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

PLAINTIFFS' AND COUNTER-DEFENDANTS' OMNIBUS REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

The Hon. Beth Labson Freeman

Plaintiffs CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC; GTL ENTERPRISES, LLC, and Counter-Defendants LOTUS GLASS, INC., ATOUR AMIRKHAS,

an individual; GRACE AMIRKHAS, an individual; LOTUS SHIN (Collectively "Citizens"), hereby bring their omnibus Reply in support of Motion for Summary Judgment [ECF 54], and Opposition to Defendants' Cross-Motion for Summary Judgment [ECF 56]. This omnibus filing is made and supported by the following Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the concurrently filed Stipulation for Leave to File Second Amended Complaint, the Amended Joint Statement of Undisputed Fact, and pleadings and papers on file herein.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In response to Citizens' Motion for Summary Judgment ("Motion") [ECF 54], as argued in the City's Cross-Motion for Summary Judgment ("Cross-Motion") [ECF56], the City of San Jose ("City") effectively concedes that the San Jose Municipal Code ("Code") explicitly favors City-owned signs to those built by Citizens, but contends that the exception is not so broad as to render the billboard ban unconstitutionally underinclusive. The City then claims the Sign Ordinance is content-neutral, ignoring the Supreme Court explanation of what constitutes content-based regulation of speech. The City then effectively concedes that the variance procedure contains broad and ambiguous standards, giving the City official almost exclusive authority to determine what is in the "general welfare of the neighborhood;" notwithstanding the boundless standards, the City contends it is nevertheless acceptable because of an adequate documentation and judicial review process under an outdated and arguably overruled test from *G.K Ltd v. City of Lake Oswego*.

For reasons set forth in Plaintiffs' Motion, and the Reply points and authorities below, the City's arguments are unavailing. In essence, the City's entire argument boils down to its contention that the Code's content-based regulation of speech meets intermediate scrutiny analysis because the City has a substantial interest in maintaining safety and ensuring aesthetics of the community and adequate channels have been left open for commiunication. However, despite its best effort to defend an indefensible sign permitting scheme, the breadth and depth of unconstitutional provisions render the entire Code unenforceable, and it must be stricken. Citizens are entitled to summary judgment and permanent injunctive relief.

II. ARGUMENT

A. Plaintiffs and Counter-Defendants Were Permitted to Seek Summary Judgment as to the Enforceability of the Code.

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The City contends that Counter-defendants were not proper parties to the Motion because, according to the City, the Court "only wanted briefing on the causes of action asserted by Plaintiffs." (See City's Cross-Motion and Opposition, ECF 56, p. 10:3-4) (hereinafter "Cross-Motion"). The City clearly mis-understood the Court's instruction. The Court was careful to instruct the parties that the summary judgment briefing should be limited to only those claims which raised the constitutional questions giving rise to this Court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1983. The Court did not want the parties to brief the substance of the administrative citations under California State Law and the City's Nuisance Abatement Procedures. The reason for this was obvious. If this Court were to deem Citizens' constitutional challenges meritless, thereby upholding the enforceability of the Code, then Plaintiff's claims would be entirely dismissed. This Court would then appropriately decline to exercise pendant jurisdiction as to the City's administrative nuisance abatement claims, and those claims would be litigated through the City's administrative process.

The Motion did not raise any of the issues that would be litigated in the City's administrative abatement action. Rather, the Motion raised only those claims dealing directly with the unconstitutionality of the Code under 42 U.S.C. §1983. Counter-defendants were also movants because if this Court were to deem the Code invalid and unenforceable, then the City's administrative claims against them (and Citizens) would be moot. For this reason, the Plaintiffs and Counter-Defendants were all entitled to seek relief under the Motion. The City's contention to the contrary is meritless.

B. The City's "Form Over Substance" Business Tax Argument Should Not Deprive Plaintiffs and Counter-Defendants of Article III Standing; Even so, the Parties Have Stipulated To Leave to File a Second Amended Complaint Evidencing Possession of the Business Tax Certificate.

The City contends that Citizens lack standing to assert their facial claims because they

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have not paid the City's business tax. (Cross Motion, p. 10). This argument, in addition to elevating form over substance, should be rejected. First, the City did not contend that Counter-defendant Lotus Glass, Inc., lacked standing for having failed to pay the City's "Business Tax." Accordingly, even if the City's standing argument had merit, Lotus Glass, Inc., has standing to challenge the Code because it has paid the Business Tax. See **EXHIBIT 1** to the concurrently filed Request for Judicial Notice.

Second, the City has not alleged that Counter-Defendants Art and Grace Amirkhas or Lotus Shin, are required to pay the business tax or that either of them has conducted business within the City. Accordingly, even if the City's standing argument is correct, Counter-defendants Art and Grace Amirkhas and Lotus Shin have standing to challenge the Code which provides the basis for the City's threat of administrative action (See First Amended Complaint, ECF 41, ¶¶15-17).

Third, the City has misstated its business tax scheme to make it appear as though it is a "business license" scheme, when in fact it is not. The City has argued that Code Section 4.76.170 requires any person doing business in the City to "obtain a license before doing so." (Cross-Motion, p. 11:24). The City then contends that "once a business tax certificate is obtained, a business license will be issued." (*Id*. at p.11:25). These are both false and misleading statements about the City's business tax scheme. The scheme which the City cites is "Part 2" of Chapter 4.76, entitled "Business Tax." See **EXHIBIT 2** to the concurrently filed Request for Judicial Notice. Contrary to the City's assertions, nowhere in Chapter 4.76 makes a reference to the business tax as a "license." Accordingly, the City incorrectly contends, citing Section 4.76.180, that payment of the business tax results in issuance of a "business license." Rather, the payment of the tax entitles the payor to acquire a "business tax certificate," which is "required pursuant to the taxing power of the city solely for the purpose of obtaining revenue and are not regulatory permit fees." §4.76.170(B). Thus, this is not a business licensing scheme at all, but a tax that is

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levied on all income-producing businesses within the City, unlike the business license scheme cited by the City in *Herson v. City of Reno*, 622 Fed.Appx. 635, 636 (9th Cir. 2015). To further establish that the City's scheme is a tax and not a license, Section 4.76.290 provides that any business failing to pay the tax shall simply be required to pay penalties and interest on the amount due. Lastly, nowhere in "Part 2" of Chapter 4.76 does the Code provide that the failure to pay the business tax deprives the business of the right to continue to operate. Rather, the Code provides that "if any person has failed to apply for and secure a valid business tax certificate, the business tax due shall be that amount due and payable from the first date on which the person was engaged in business in the city, together with applicable penalties and interest calculated in accordance with Subsection A., above." §4.76.290(E). Accordingly, the City's business tax scheme does not require that Citizens cease doing business until their business tax is paid. The scheme merely requires that Citizens pay the tax with penalties and fines in order to be in compliance with the scheme. For these reasons, Citizens are not deprived of standing to present their facial challenges to the Code.

1. Even if the Tax Scheme Operates as a "Business License," Both Plaintiffs Have Paid the Tax and Obtained the Certificate; The Amended Pleading Will Cure the Standing Deficiency.

Even if this Court concluded that the business tax scheme is actually a business license prohibiting Plaintiffs from maintaining standing to challenge the Code, then Plaintiffs have cured that failing by paying the tax and obtaining the tax certificate. See **EXHIBIT 3** to concurrently filed Request for Judicial Notice.

Although it is generally held that standing is to be determined as of the filing of the complaint, this Circuit permits standing deficiencies to be cured by way of amended pleading under Rule 15(d), which "permits a supplemental pleading to correct a defective complaint and circumvents the needless formality and expense of instituting a new action when events occurring

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after the original filing indicated a right to relief." *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015) (citing WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1505, pgs. 262–63). In that case, the Ninth Circuit upheld the district court's order permitting a plaintiff to amend its pleading after it was discovered that the plaintiff lacked standing because it had failed to secure assignments of certain claims it had asserted in its original complaint. Once the plaintiff secured the assignments – after the complaint had already been filed – the standing deficiency had been cured and the plaintiff was permitted to continue to pursue its claims. *Id*. at 1044-45. The Ninth Circuit agreed, holding that "a lack of subject-matter jurisdiction should be treated like any other defect for purposes of defining the proper scope of supplemental pleading." *Id*.

Just prior to the filing of this Memorandum, the parties filed a Stipulation for Leave to File Second Amended Complaint, along with a proposed order. The sole change to the pleading is to include allegations related to Citizens' acquisition of the business tax certificate, in response to the City's Cross-Motion. The parties have agreed that filing the Second Amended Complaint has cured the standing deficiency and that efficiency and judicial economy favors an amended pleading over dismissal of the action and an identical new filing.

Thus, while Citizens does not concede that the business tax certificate is a necessary predicate to standing, with the Court's Order approving the Stipulation for Leave to File Second Amended Complaint, the City's argument has been mooted.

C. Under the Totality of Circumstances, the Variance Procedure Clearly Offers The City Official Unbridled Discretion as to Who Can Display Signs.

The City concedes that the Code's Variance Procedure, (§23.02.1370(D)(2)) grants the Planning Director the authority to decide who is entitled to a variance based on the Director's own interpretation of what constitutes: "general welfare of the neighborhood;" "integrity and character of the zoning district;" "visual clutter;" or "visual blight." (Cross-Motion, p. 14:19-22). The City

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defends these amorphous standards on the basis that the Code requires these findings to be "thoroughly documented," and subject to a timely appeal. *Id*. at p. 14. The City's arguments cannot save the Variance Procedure, which is clearly an unconstitutional prior restraint. Further, the City misunderstands the measure of this Court's review of the "totality of the circumstances" related to the Variance Procedure and applies a three-part test from *G.K. Ltd*., that no longer appears to be good law under *Epona*.

A few months ago, Judge Dolly Gee of the Central District of California, entered her order in the case of *Weaver v. City of Montebello*, 370 F. Supp. 3d 1130 (C.D. Cal. 2019), granting a preliminary injunction to a plaintiff seeking to enjoin enforcement of an ordinance regulating the issuance of conditional use permits for a tattoo parlor. In many respects, conditional use permitting and variance schemes are similar. Both types of schemes provide alternative means of securing the right to an expressive activity notwithstanding the existing law, and they both give government officials some measure of control in issuing the CUP or permit. Judge Gee's rendition of the current Ninth Circuit law on prior restraints is spot-on. Citing directly to her order helps clarify the confusion the City has brought into the prior restraint analysis. Judge Gee explains that:

> In *Epona [v. City of Ventura, 876 F.3d 1214, 1222 (9th Cir. 2017)]*, the Ninth Circuit fixed guideposts for district courts evaluating a prior restraint's constitutionality. On one end of the spectrum, the Ninth Circuit has held unconstitutional a law that: (1) included only "abstract language," such as requirements that structures may 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"; and (2) lacked "any requirement that officials provide some evidence to support the conclusion that a particular structure or sign is detrimental to the community." On the other end, the Ninth Circuit has approved of a city's "sign code" that:

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> (1) used abstract terms, but provided specific definitions for those terms elsewhere in the code; and (2) "provided additional safeguards by requiring that officials render application decisions within a limited time period and state the reasons for [each] decision to either grant or deny a permit so as to facilitate effective review." It then recognized that some cases may fall between these two data points and emphasized that "neither the provision of specific guidelines nor a requirement of specific factual findings is necessarily determinative of whether a statute confers excess discretion." Accordingly, instead of wrestling to fit novel circumstances within bright line rules, courts should look to the totality of the factors to assess whether an ordinance "contains adequate safeguards to protect against official abuse.

Id. at 1135-36 (internal citations omitted).

As Citizens contended in their Motion, this court is to evaluate the totality of factors, as set forth in *Epona*, to determine if the City's Variance Procedure contains "narrow, objective, and definite standards to guide the licensing authority." *Epona*, 876 F.3d at 1222. The three-part test set forth in *G.K. Ltd*, is no longer good law under *Epona*. Clearly the City's Variance Procedure does meet the standards of *Epona*.

1. The City Inserts Concepts and Words Into the Variance Procedure That Do Not Exist.

The City first contends that because the Variance Procedure is "thoroughly documented," the Planning Director's discretion is cabined. In support of that contention, the City alleges that the Variance Procedure, §23.03.1370(D)(1), requires the Director to make "specific findings." (Cross-Motion, p. 14:13), and that the specific findings "must be made in writing for mailing to the applicant." *Id*. The fact is that the Code does not say what the City says it does.

First, nowhere in the Variance Procedure does it require "specific findings" from the Director. Indeed, the Procedure permits the Director to deny a variance based on unspecific

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criteria, like "welfare of the neighborhood" or "visual blight." §23.02.1370(D)(2). The Procedure contains no provision which requires the Director to *expressly explain* what factual considerations the Director examined in determining how an applicant's proposed sign does or does not advance the "welfare of the neighborhood." The City argues that "specific findings" are required, but the Variance Procedure is entirely devoid of any such requirement for specific findings. The only requirement is that the Director issue the variance "unless it is found" that the sign creates visual blight or will not impair the welfare of the neighborhood militates. There is no express requirement that a decision be explained, that the Director write down her/his findings, or that the applicant even be given *any* basis for the decision. Contrary to the City's arguments, there is no requirement for "specific findings" found anywhere in the Variance Procedure.

Second, the City contends that because the findings must be in writing that the process is adequately documented. (Cross-Motion, p. 14:24-25). Again, this is an element of the outdated and likely overruled test from *G.K. Ltd*. Even so, this contention adds words and concepts which cannot be found in the actual Code. When a decision has been made whether to grant or deny a variance application, §20.100.210(B) requires only that, "The director shall mail a copy of the decision to the applicant at the addresses shown for such purpose on the application." Nothing in the Code requires the Director to thoroughly explain the decision in writing, or even to give her/his basis therefore. Rather, the Code simply requires a mailing to the applicant which could be stamped "Denied" or "Approved." The Code requires nothing more.

To elucidate what the City's Variance Procedure *actually* requires, a hypothetical is beneficial. If Plaintiff were to apply for a variance for its Signs, the Director could, without a hearing, decide in her/his own mind that the Signs create visual blight and/or visual clutter, notwithstanding the fact that Plaintiffs' signs are in a more industrial area of the City. Even if all the other requirements of the variance application process were met, the Director could then mail a postcard to Plaintiffs declaring that the application had been "Denied." Nothing more is required

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from the Director under this Variance Procedure. Under this hypothetical, the Director has almost unlimited discretion to apply a personal viewpoint as to general welfare and blight. These terms are not further defined in the Code. Nothing in this entire Variance Procedure prevents the Director from using "general welfare" as a pretext to allowing the Director's preferred speakers to display signs, while denying the Director's non-preferred speakers or speech. It is not hard to fathom that Plaintiffs, who have been very vocal in their criticism of the City government, could be denied a variance on the pretext of blight. The question is not whether the City actually *will* use these boundless standards to censor speech, but whether the Code provides the possibility of such censorship occurring. See *Reed v. Town of Gilbert, Ariz*., 135 S. Ct. 2218, 2229, 192 L. Ed. 2d 236 (2015) ("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."

Even if the City has an adequate appeal process, under the totality of circumstances, there is simply no justification for giving the Director nearly *carte blanche* authority to decide who gets to build signs and who does not. 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, and without ever having to justify the decision with explicit findings. Where the Director gets to decide who can display speech and who cannot, the entire ordinance is infirm and cannot stand under *Epona*. Accordingly, the variance procedure is an illegal prior restraint, which requires that the entire Sign Ordinance scheme be deemed invalid.

D. <u>The City's Sign Code Exemptions are Unquestionably Content-Based</u>.

It should be noted at the outset of this argument that the City has presented two different versions of the certified Sign Ordinance for this Court's consideration. The City presented its version of the Sign Ordinance in the Statement of Undisputed Facts ("SOUF"), Exhibits 7 and 8 9

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[ECF 55-2], but then an entirely different version of the Sign Ordinance was presented in the City's Request for Judicial Notice [ECF 57]. While the majority of the differences between the two different versions are immaterial to this action, the Sign Ordinance section dealing with the "Exemptions," is incongruent. Plaintiffs briefed their Motion based on the version of the Code located in the SOUF. Yet, the more recent version of the "Exemptions" section in the City's request for Judicial Notice is even more content-based than the former. See ECF 57-1, §23.02.1310. In the recent certified version of the Sign Ordinance, the Exemptions include an unlimited and unproscribed exemption for "Signs erected by the City." *Id*. at §23.02.1310(4). In reality, both versions of the Sign Ordinance the City proffers are content-based and unconstitutional, so it does not change the analysis. However, in the version of the Sign Ordinance included in the Request for Judicial Notice [ECF 57-1], the City contends that the accurate version of the Code entirely exempts the City's signs from the permit requirement and the billboard ban. Plaintiffs will focus this Reply on the most recent version of the certified Code, found in ECF 57-1.

It is established that the City bans all billboards and signs displaying off-site commercial speech. Sign Ordinance §23.02.1010. The City admits that the Sign Ordinance provides exemptions from the permitting requirement for certain types of signs. (Cross-Motion, p. 7:13-20). The City is correct that Citizens does not challenge all the exemptions. Citizens agrees that not all of the exemptions are improperly content-based. However, because the City maintains so many content-based exemptions from the Sign Ordinance, the ban on billboards is unconstitutionally underinclusive because the exemptions cannot possibly be furthering a stated governmental interest. See *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904–05 (9th Cir. 2009).

The City does not appear to understand what qualities in its Sign Ordinance render it content-based, as opposed to content-neutral. The City seems to argue that an exemption for

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"political signs" is not content-based because it does not express a viewpoint on which political views it favors and which it disfavors, and is therefore content-neutral. In promoting this argument, the City cites inapplicable and overruled Ninth Circuit precedent for determining when an exemption is content-based. This lack of understanding can no longer be justified in light of *Reed*. As explained in the Motion, *Reed* was asked to examine whether certain exemptions from a sign code were content-based.

The proper analysis for determining whether an exemption is content-based now comes from *Reed*. Reed explains that "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* 135 S. Ct. at 2227. As stated in the Motion, the easy test for determining whether an exemption is content-based is whether the City official has to read the message to determine if the exemption applies. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014). *Reed* confirms this is the proper test.

The City's argument fails for two reasons. First, it is not the City's stated viewpoint on a particular topic or subject matter that renders it content-based. While there are cases from this Circuit which have, in the past, intimated that "viewpoint neutrality" is acceptable, those cases are all now overruled by *Reed*. The same argument made by the town in *Reed* was easily and summarily dispensed with. The Town argued that because their exemptions "d[o] 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, forever dispensing with "viewpoint neutrality" explained 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. Just as the town's exemptions ideological signs and political signs was deemed content-based, so are the City's exemptions for "signs erected by the City," "Election Signs", "Any other flags displayed on flagpoles" and "signs for residential uses.

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Second, the only means whereby a City official can determine if a sign is exempt from the permitting requirement is to actually read the sign and determine if the message is exempt. For example, Plaintiffs' signs intermittently display commercial advertisements among Plaintiffs' own political speech (Compare SOUF [ECF 55-1] Exhibit 2, pp. SJ22-36 with SOUF, Exhibit 2, pp. SJ38). Ostensibly, under Sign Ordinance §23.02.1310(5), Plaintiffs' election signs are exempt from the permitting requirement. However, after that eight-second political segment is transitioned to an advertisement for Morris & Sons Towing, the sign is now illegal under the Code. The only distinction between the exempt eight-second segment and the illegal eight-second segment is the content of the message that the City official must read to determine whether it is illegal or exempt. *Reed* undoubtedly confirms that this distinction, drawn exclusively on the content of the message, renders the exemptions content-based. *Reed* at 2227 ("Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.") Because each of the highlighted exemptions are distinctions drawn entirely on their content – or the identity of the speaker – they are content-based and the exemptions are subject to strict scrutiny.

1. The "Substitution Clause" Does Not Render a Content-Based Sign Ordinance Content-Neutral.

The City argues that the existence of the "Substitution Clause" (§23.02.1190) "ensures that the challenged exemptions to the City's Sign Code are content-neutral." (Cross-Motion, p. 20:11-12) (incorrectly cited as §23.*01*.1190). The Substitution Clause is inapposite to the analysis and has no bearing on the constitutionality of the Sign Ordinance.

The Substitution Clause provides merely that any legal or legal nonconforming sign may substitute whatever message appears on that sign for any non-commercial message without the requirement for a permit from the City. These Substitution Clauses arose from the holding of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519, 101 S. Ct. 2882, 2898, 69 L. Ed. 2d 800

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(1981), where San Diego "chose to favor certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others" like non-commercial speech. The Substitution Clause prevents such preference by permitting non-commercial speech to be displayed anywhere commercial speech is permitted. But, this substitution has no bearing on an otherwise content-based regulation of speech. The City bans billboards but permits "Election Signs." Because Citizens' billboards are banned (neither legal nor legal nonconforming), the Substitution Clause has no bearing whatsoever on their Signs. Nor does the right of a legal sign-owner to convert his commercial message ("Buy Hamburgers Here") to a non-commercial message ("re-elect the Mayor") render the "election sign" exemption from content-based to content-neutral. This argument is a red herring and should be disregarded.

E. The City Incorrectly Applies Intermediate Scrutiny to the Content-Based Exemptions.

The City does not adequately address Citizens' argument that speaker-based discrimination is now unconstitutional. (Motion, pp. 14-15, 20). This acts as a concession that the argument has merit. Rather than analyze Reed for its clarification of the speaker-based strict scrutiny requirements, the City relies heavily on G.*K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082-83 (9th Cir.2006), to support the proposition that the exemptions are not content-based and therefore intermediate scrutiny should apply. However, after *Reed*, *G.K. Ltd* no longer remains good law. See *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 983 (N.D. Cal. 2016) (citing *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir.2016) ("The Supreme Court has recently provided authoritative direction for differentiating between content-neutral and content-based enactments. See *Reed*, 135 S.Ct. at 2226–27"). The test for content-neutrality under *G.K. Ltd*., has been expressly overruled by Reed, which now explains that both content and speaker-based regulations have the potential to offend the constitution and are subject to strict scrutiny.

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As set forth in the Motion, *Reed* explains that "[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." *Reed* at 2230. Thus, the content-based exemptions and speaker-based exemptions are subject to strict scrutiny.

1. The City Provides No Evidence That the Exemptions Meet a Compelling Interest.

It is undisputed that it is the City's burden to demonstrate that the Sign Ordinance's differentiation between Election Signs, Signs Erected by the City, and other types of signs, such as Plaintiffs' signs, "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 135 S. Ct. at 2231. The City's burden must be met by a presentation of *evidence* establishing a compelling interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 428, (2006) ("The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion") (applying strict scrutiny in a Free Exercise case). The City has offered no evidence whatsoever, and therefore cannot *demonstrate* any such interest. Thus, even if this Court were to apply intermediate scrutiny, the City would still be required to submit evidence that the means it intends to achieve through the exemptions are in furtherance of such an interest. The City has not done so, and can therefore meet no burden.

Even if the Court did not require actual evidence to support the City's argument that "traffic safety and aesthetics of a city are important or substantial governmental interests," the City has no hope of meeting its burden. (Cross-Motion, p. 21:15). This Circuit has never held that traffic safety and aesthetics are compelling governmental interests. Indeed, *Reed* did not even have to determine if such interests were compelling because the Court immediately concluded that such interests were so "hopelessly underinclusive," in reference to whether the exemptions were narrowly tailored. *Reed*, 135 S. Ct. at 2231. Here, the City does not contend that traffic safety and

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aesthetics are compelling interests, only "substantial interests." Thus, because strict scrutiny applies, the City's burden cannot be met.

2. The Exemptions Are Not Narrowly Tailored.

The City justifies the content-based exemptions in furtherance of only traffic safety and aesthetics. In light of only these two considerations, it is impossible that the City could justify the total ban on billboards while permitting exemptions which can have no hope of furthering traffic safety and aesthetics. There is no restriction on the number of "Signs erected by the City." There is no restriction on the number of "Election Signs" that could be erected throughout the City. As in *Reed*, the City cannot contend that "Election Signs" or City-signs are "no greater an eyesore," than Citizens' Signs. *Id*. at 2231. (citing *Discovery Network*, 507 U.S., at 425). Yet the Code "allows unlimited proliferation" of City-signs and election Signs while banning Citizens' signs. The City "cannot claim that placing strict limits on [Citizens] is necessary to beautify the [City] while at the same time allowing unlimited numbers of other types of signs that create the same problem." *Id*.

F. <u>Citizens' Due Process Claim Has Merit and Must Be Granted</u>.

The City acknowledges that an exemption for government speech was deemed to violate rights to equal protection in *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 986 (N.D. Cal. 2016). There, Judge Charles Breyer deemed the exemption for "Official public signs," to be content based and unjustifiable under *Reed,* violating Citizens' rights to equal protection. The rationale in that opinion applies squarely to this case. The City attempts to distinguish that case, but its attempts fall short.

The City contends that *Alameda* is inapplicable because in that case the County was given a wholesale exemption from the Code, whereas here, the City is still subject to the height and zie provisions of the Sign Ordinance, just not the permitting requirements. (Cross-Motion, p. 26:1-6). This argument fails. In both this case and in *Alameda*, the government banned billboards. This

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ban prevents the construction of signs to display speech. In this case, the ban prevents people like Citizens' from obtaining a Sign Permit, which is a necessary requirement of obtaining a building permit to erect a sign. It is the permitting requirement of the Sign Code (§23.02.1300) that makes Citizens' Signs illegal, as explained by the City in the "Warning Notice" and "Compliance Order" served on Citizens by the City, not the height or size of the Signs. (SOUF, ECF 55-1, Exhibits 6, 7). The City admits that "Signs erected by the City" are not subject to the permitting requirement. Accordingly, the City's signs are not subject to the ban, while Citizens' Signs are. This distinction, drawn on the identity of the speaker, is what violates Citizens' right to equal protection.

The City's second argument, that Policy 6-4 (which does not appear in the City's latest certified version of the Sign Ordinance §23.02.1310 [ECF 57-1]) is not content-based and therefore subject to intermediate scrutiny fares no better under *Reed*. Clearly, the exemption is subject to strict scrutiny as a speaker-based regulation favoring one speaker over another. "[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 135 S. Ct. at 2223 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497). Here, the City concedes that it prefers its own commercial speech to that of Citizens' commercial or non-commercial speech. The City's alleged Policy 6-4 exemption for commercial speech actually favors the City's commercial speech over Citizens' illegal Signs which display non-commercial speech. Laws favoring commercial speech over non-commercial speech were deemed unconstitutional in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519, 101 S. Ct. 2882, 2898, 69 L. Ed. 2d 800 (1981).

In short, the City's Sign Ordinance does not regulate purely commercial speech. If it was purely a commercial speech regulation, then the City might be able to argue that intermediate scrutiny applied. Indeed, if Citizens were merely challenging the ban on off-site commercial

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signs, then the City might be able to argue, notwithstanding *Reed* that the Central Hudson intermediate scrutiny test should apply. However, the City has not just regulated commercial speech. It regulates all signs, including Citizens' non-commercial speech signs. The City is not subject to the same regulations of its non-commercial or commercial speech that Citizens is. Therefore, as in Alameda, "It is readily apparent that the [City's] preference for [signs erected by the City] reflects a preference for that content," in violation of Citizens' rights to equal protection. *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 984 (N.D. Cal. 2016).

G. The City's Severance Argument Fails.

The City contends that this Court can merely strike from the Sign Ordinance those content-based provisions and that the Code can remain intact. (Cross-Motion, p.29). In their Motion, Citizens explained why this cannot happen, citing *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006). The City did not address Citizens' *Ballen* arguments. In that case, the Ninth Circuit was faced with the same question as to whether it could sever infirm sections of the Code. Here, as in *Ballen*, no such severance is possible. Severing the content-based exemptions from the Code would render residential signs, flags, election signs, and signs erected by the City all illegal signs, and would make the Sign Ordinance more restrictive on speech, not less so. Severance is not an option here. The Code must be invalidated.

III. 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 2nd day of August, 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 **PLAINTIFFS' AND COUNTER-DEFENDANTS' OMNIBUS REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** 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 2nd day of August, 2019.

/s/ Mary Carroll Davis
Employee of Robison, Sharp, Sullivan & Brust

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