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CITIZENS FOR FREE AND EQUAL
JUSTICE, LLC, and GTL ENTERPRISES, LLC

**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;
ATOUR AMIRKHAS, an individual; GRACE
AMIRKHAS, an individual; and DOES 1 through
50,

Counterdefendants.

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

**SECOND AMENDED
COMPLAINT**

As and for their SECOND AMENDED COMPLAINT, Plaintiffs CITIZENS FOR
FREE SPEECH AND EQUAL JUSTICE, LLC and GTL ENTERPRISES, LLC, allege as
follows:

1. This action challenges provisions of the City of San Jose’s Municipal Code
 (“Code”) that unconstitutionally interfere with and unlawfully restrict the rights of

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Plaintiffs and others to free speech, equal protection, and due process of law under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs are making an as-applied, facial, and overbreadth challenge to the subject provisions. Plaintiffs seek declaratory and injunctive relief to prevent the City of San Jose from enforcing its unconstitutional sign regulations, and damages resulting from the chilling of Plaintiffs’ First Amendment protected activity. The City of San Jose has the burden to establish that its sign regulations are constitutional, and it cannot do so.

PARTIES

2. Plaintiff CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC (“Citizens”) is a California limited liability corporation qualified to do business in California.

3. Plaintiff GTL Enterprises, LLC (“GTL”) is a California Limited Liability Company doing business in the City of San Jose.

4. Defendant CITY OF SAN JOSE (“City”) is a charter city organized and existing pursuant to the laws of the State of California, and is a “person” subject to suit within the meaning of 42 U.S.C. § 1983. It is vested with the adoption of regulations and approval of signs within its geographic limits.

JURISDICTION

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Plaintiffs seek to redress a deprivation of free speech, equal protection, due process, and civil rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983. The City of San Jose has the burden to establish that its sign regulations are constitutional, and it cannot do so.

INTRADISTRICT ASSIGNMENT

6. Pursuant to Civil L.R. 3-2(c), this case shall be assigned to the San Jose

1 Division because the action arises in Santa Clara County. This Court is an appropriate
2 venue for this cause of action pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2).

3 Defendant is a charter city in Santa Clara County, the actions complained of took place
4 in this judicial district, evidence is maintained in this district, the property on which the
5 signs will be erected is in this district, and but for the unlawful regulations and practices
6 of Defendant, Plaintiffs would not be at risk of monetary fines and deprivation of
7 property.
8

9 **FACTS COMMON TO ALL CAUSES OF ACTION**

10 *Plaintiffs’ Signs and Structures*

11 7. Plaintiff GTL is the owner of a parcel of land located at 300 E. Gish, within
12 the City (the “Parcel 1”).

13 8. Plaintiff Citizens has entered into an agreement with GTL for the
14 construction and display of signs on the Parcel 1. Under the terms of the agreement
15 between Citizens and GTL, each will receive a portion of any proceeds earned from the
16 display of signs on the Parcel 1.
17

18 9. Pursuant to its agreement with GTL, Plaintiff Citizens has made
19 substantial capital outlays to purchase signs to display on the Parcel, as well as for
20 supporting structures for the signs. These expenditures have been made in reliance on
21 Plaintiffs’ right to use the signs on Parcel 1 to engage in both commercial and
22 noncommercial speech protected by the First Amendment to the United States
23 Constitution.
24

25 10. On or about December 10, 2018, Plaintiff Citizens began installing three
26 sign footings which they intend to use to support signs which will be leased to others for
27 the purpose of displaying political and other speech. These three footings now carry 12
28 electronic message centers and/or static signs stating viewpoints on important public

1 issues as well as commercial advertising. The speech on all such signs is protected
2 under the First and Fourteenth Amendments to the United States Constitution.

3 11. Plaintiff has entered into an agreement with Lotus Glass, Inc. (“Lotus”), for
4 the construction and display of signs the property known as 1120 North 10th Street, San
5 Jose, California (“Parcel 2”)(Parcel 1 and Parcel 2 shall be collectively referred to as the
6 “Parcels”). Under the terms of the agreement between Citizens and Lotus, each will
7 receive a portion of any proceeds earned from the display of signs on the Parcel 2.
8

9 12. Because no building permit for the erection of signs can be issued under
10 Code Section 1748.210 without a sign permit, and Plaintiffs cannot obtain a sign permit
11 under Code Section 23.02.505, it would have been futile for Plaintiffs to apply for a
12 building permit before erecting their signs.

13 13. If Plaintiffs are prevented from using their signs and structures for their
14 intended purpose of displaying constitutionally-protected commercial and
15 noncommercial speech, those signs and structures will have no remaining economically
16 viable use, and Plaintiffs’ investment in them will be lost.
17

18 14. On or about March 27, 2018, Plaintiff GTL received correspondence from
19 Defendant City’s Code Enforcement Inspector Manuel Duarte, alleging the installation of
20 a “digital display that is 3x the size of a billboard w/o permits” on Parcel 1. The
21 correspondence requested that the owner of the parcel contact Mr. Duarte “to arrange a
22 property inspection” and that failure to do so may require the City to “take further
23 enforcement action as appropriate.” The correspondence is attached hereto as **Exhibit**
24 **A**. This correspondence has chilled Plaintiffs’ speech, particularly as no speech has yet
25 been displayed.
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27 15. On January 10, 2019, Plaintiff GTL received a “Compliance Order” from
28 the City, alleging that Plaintiffs display of the signs on Parcel 1 constitute a violation of

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the San Jose Municipal Code. The City alleges that Plaintiffs display of signs on Parcel 1 violates Code Sections 20.100.010 B; 20.11.610 A1; 23.02.820 A; 23.02.1300; 24.01.130; 24.02.100.

16. The City alleges that Plaintiffs are required to obtain a valid site development permit prior to displaying their signs.

17. The City has threatened administrative action against Plaintiffs by contending that “FAILURE TO CORRECT ALL VIOLATIONS LISTED IN THIS ORDER, BEFORE THE COMPLIANCE DATE ABOVE, MAY RESULT IN ADMINISTRATIVE PENALTIES FAILURE TO CORRECT ALL VIOLATIONS LISTED IN THIS ORDER, BEFORE THE COMPLIANCE DATE ABOVE, MAY RESULT IN ADMINISTRATIVE PENALTIES.”

Defendant’s Sign Regulations

18. Defendant City regulates the display of signs within its jurisdiction in its Code, including the Sign Ordinance in Title 23 of the Code (“the Sign Ordinance”). Plaintiffs challenge every Code provision that affects the erection and display of signs, including, but not limited to: 23.02.1310 - Exemption from permit; 23.02.1370 - Sign variances.

19. Any person who wishes to display a sign in the City, other than an exempt sign, is required to first obtain a permit in accordance with the permitting process set out in the Sign Ordinance. The Sign Ordinance provides that only signs which conform to the regulations may be granted permits.

20. Additionally, before a structure may be erected on which to place a sign, a building permit for the structure must be obtained. In order to obtain such a building permit, the applicant must have a valid sign permit.

21. Code Section 23.02.1310 unjustifiably exempts many types of signs from

1 regulation under the Sign Ordinance. Some exemptions are based on the content of the
2 signs, and the Code provides a blanket exemption for signs erected by the City. Such
3 exempted signs may be placed in any district of the City, without a permit and without
4 being subject to the regulations with which other signs must comply. By exempting
5 signs displaying certain content from the permitting requirements of the Sign Ordinance,
6 the City engages in an illegal preference for some speakers and viewpoints over others.
7 These content and viewpoint-based exemptions render the City's limitations on signs
8 unconstitutional.
9

10 22. Plaintiffs make a facial (overbreadth) and as-applied challenge to the
11 constitutionality of the exemptions from the permitting requirement as being content-
12 based exemptions which cannot pass strict scrutiny analysis. The following
13 exemptions, among others, are being challenged by Plaintiffs:

- 14 a. Temporary Signs.
- 15 b. Safety or Directional Signs of four (4) square feet or less that are
16 not Programmable Electronic Signs.
- 17 c. Safety or Directional Signs regardless of size if erected by a public
18 entity or public utility.
- 19 d. Election Signs.
- 20 e. Flags displayed on flagpoles erected in conformance with all
21 applicable laws.
- 22 f. Required Signs as described in Section 23.02.1030.
- 23 g. Signage for residential uses where there are four (4) or fewer
24 residential occupancy units on the parcel.
- 25 h. Signs allowed on outdoor vending facilities under Section
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28 20.80.870 of Part 10 of Chapter 20.80 of Title 20 of this Code.

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- i. Signs allowed on recycling facilities by Sections 20.80.1130.B.5. and C.11. of Part 13 of Chapter 20.80 of Title 20 of this Code.
- j. Signs allowed on temporary trailers by Section 20.80.1740.6. of Part 18 of Chapter 20.80 of Title 20 of this Code.
- k. Signs erected by the City are exempt from permit requirements but shall comply with all other requirements of this Title, provided, however that signs erected on City owned land pursuant to Council Policy 6-4, shall comply with Council Policy 6-4, in lieu of the requirements of this Title.
- l. §23.02.1090 - Historic signs

23. The exemptions provided for in the Code are unconstitutionally under-inclusive and therefore violate Plaintiffs’ constitutional rights to equal protection because the exemptions apply to allow other citizens to display speech on signs without being subject to the provisions of the Sign Ordinance, while Plaintiffs are simultaneously denied the right to display speech on their signs throughout the City.

24. Plaintiffs make a facial and as-applied challenge to the constitutionality of the variance provisions of the Code as granting the City officials unfettered discretion in granting variances, in violation of the Constitution. The variance section, 23.02.1370, permits the director, and the planning commission authority to grant variances from the provisions of the Sign Ordinance.

25. The findings required for the issuance of a sign variance must include findings that a variance:

- 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. (§23.02.1370(D)(2))

26. The findings required of the City officials in determining whether or not to grant a variance vest the City official with unconstitutional unfettered discretion in determining whether to grant or deny a request for variance from provisions of the Sign Ordinance. Accordingly, the variance provisions of the Code are unconstitutional and render the entire sign permitting scheme under the Code unconstitutional.

Defendant's Sign Permitting Process

27. The City's permitting procedures for signs constitute an illegal prior restraint on speech.

28. Signs are a well-recognized form of speech protected by the First Amendment. The United States Supreme Court has recently provided cities with clear guidelines for the application of First Amendment principles to signs in *Reed v. Town of Gilbert*, 576 US ___, 135 S. Ct. 2218 (2015). Defendant City's sign regulations and permitting procedures violate these guidelines and conflict with a substantial body of First Amendment law.

29. Unless enjoined by this Court, Defendant City will apply the provisions of the Code to refuse to issue sign permits and building permits for Plaintiffs' signs and structures, and will proceed to remove the signs Plaintiffs have erected on the Parcels, all in violation of Plaintiffs' constitutional rights, thereby causing irreparable injury, as damages alone cannot fully compensate Plaintiffs for the ensuing harm. This threat of injury from continuous violations of Plaintiffs' free speech and equal protection rights requires temporary, preliminary, and permanent injunctive relief.

30. Because provisions of the Sign Ordinance comprise a prior restraint on

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speech and draw content-based and speaker-based distinctions, the Sign Ordinance is presumptively unconstitutional. Defendant bears the burden to show, under strict scrutiny, that its sign regulations are consistent with the First Amendment. (*Reed*, 135 S. Ct. at 2231.) Inasmuch as Defendant bears the burden of proof, Plaintiffs do not waive any issue.

31. On or about July 1, 2019, Plaintiff GTL ENTERPRISES, LLC, obtained its business tax certificate from the City. On or about July 5, 2019, Plaintiff CITIZENS FOR FREE SPEECH AND EQUAL JUSTICE, LLC obtained its business tax certificate from the City.

FIRST CAUSE OF ACTION
(FOR VIOLATION OF RIGHT OF FREE SPEECH UNDER THE UNITED STATES
CONSTITUTION: ILLEGAL PRIOR RESTRAINT)

32. Plaintiffs incorporate by reference all preceding paragraphs of this First Amended Complaint as though set forth herein in their entirety.

33. The City’s permitting process constitutes an illegal prior restraint, depriving Plaintiffs of rights secured by the First Amendment to the United States Constitution.

34. The variance section of the Code, 23.02.1370, permits the director, and the planning commission, authority to grant variances from the provisions of the Sign Ordinance.

35. The findings required of the City officials in determining whether or not to grant a variance vest the City official with unconstitutional unfettered discretion in determining whether to grant or deny a request for variance from provisions of the Sign Ordinance. Accordingly, the variance provisions of the Code are unconstitutional and render the entire sign permitting scheme under the Code unconstitutional.

36. It is well established that “in the area of free expression a licensing statute

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placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 2144, 100 L. Ed. 2d 771 (1988).

37. The deprivation of Plaintiffs' free speech rights is subject to action pursuant to 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION
(FOR VIOLATION OF RIGHT OF FREE SPEECH UNDER THE UNITED STATES CONSTITUTION: CONTENT-BASED SPEECH RESTRICTION)

38. Plaintiffs incorporate by reference all preceding paragraphs of this First Amended Complaint as though set forth herein in their entirety.

39. Defendant's Sign Ordinance as set forth herein subjects the exercise of Plaintiffs' free speech rights to restrictions based on the content of the speech, or the identity of the speaker. Defendant has the burden of proving the content-based regulation of speech passes strict scrutiny, which is to say, the City must establish a compelling justification for the content-based and speaker-based preferences contained in the Sign Ordinance; The City cannot provide such justification. The City also has the burden of proving that the Sign Ordinance is narrowly tailored to advance a compelling governmental interest, which it cannot do. Defendant's Sign Ordinance thereby subjects Plaintiffs to the deprivation of rights secured by the First Amendment to the United States Constitution.

40. The deprivation of Plaintiffs' free speech rights is subject to action pursuant to 42 U.S.C. § 1983.

THIRD CAUSE OF ACTION
(FOR VIOLATION OF RIGHT OF EQUAL PROTECTION UNDER THE CONSTITUTION OF THE UNITED STATES)

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41. Plaintiffs incorporate by reference all preceding paragraphs of this First Amended Complaint as though set forth herein in their entirety.

42. Defendant’s Sign Ordinance as set forth herein subjects Plaintiffs to the deprivation of equal protection rights secured by the Fourteenth Amendment to the United States Constitution.

43. 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 . . .”

44. 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, Reed v. Town of Gilbert*, 576 US ___, 135 S. Ct. 2218 (2015).

45. The deprivation of Plaintiffs’ equal protection rights is subject to action pursuant to 42 U.S.C. § 1983.

**FOURTH CAUSE OF ACTION
(FOR VIOLATION OF RIGHT OF DUE PROCESS UNDER THE UNITED STATES
CONSTITUTION)**

46. Plaintiffs incorporate by reference all preceding paragraphs of this First Amended Complaint as though set forth herein in their entirety.

47. Defendant’s Sign Ordinance, as set forth herein, subjects Plaintiffs to the deprivation of due process rights secured by the Fourteenth Amendment to the United States Constitution.

48. The deprivation of Plaintiffs’ due process rights is subject to action pursuant to 42 U.S.C. § 1983.

**FIFTH CAUSE OF ACTION
(FOR CIVIL RIGHTS VIOLATIONS)**

49. Plaintiffs incorporate by reference all preceding paragraphs of this First

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Amended Complaint as though set forth herein in their entirety.

50. This action is brought to vindicate Plaintiffs' civil rights under the United States Constitution pursuant to 42 U.S.C. § 1983.

51. As such, Plaintiffs are entitled to attorney's fees and costs, and expert fees pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment against Defendants:

1. For temporary, preliminary, and permanent injunctive relief barring the City and all its employees, agents, and attorneys from taking any action, directly or indirectly, to damage, destroy, or remove Plaintiffs' signs and supporting structures under authority of the Code;
2. For temporary, preliminary, and permanent injunctive relief barring the City and all its employees, agents, and attorneys from taking any action, directly or indirectly, to require Plaintiffs to remove their signs or structures;
3. Plaintiffs to obtain a sign permit under the Sign Ordinance before displaying Plaintiffs' signs or to obtain a sign permit in order to be entitled to a building permit for Plaintiffs' structures;
4. For declaratory relief declaring that Defendant's Sign Ordinance, facially and as-applied to Plaintiffs, violates the First, Fifth, and Fourteenth Amendments. No prior approval is required for Plaintiffs to post speech signs due to the Constitutional defects in the Sign Ordinance;
5. For additional actual, consequential, and other special damages in an amount according to proof at trial, but in excess of \$100,000.00;
6. For reasonable attorneys' fees pursuant to statute(s);

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7. For nominal, actual, and/or consequential damages according to proof;
8. For costs of suit; and,
9. For such other and further relief as the Court deems just, equitable, and proper.

Dated: August 6, 2019

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE, SBN 283859
Attorneys for Plaintiffs/Counterdefendants
CITIZENS FOR FREE AND EQUAL
JUSTICE, LLC, and GTL ENTERPRISES, LLC

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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 **SECOND AMENDED COMPLAINT** 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 6th day of August, 2019.

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