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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiffs,

v.

CITY OF SAN JOSE,

Defendant.

AND RELATED COUNTERCLAIM.

Case Number: 5:18-cv-01919-BLF

DEFENDANT CITY OF SAN JOSE'S REPLY TO PLAINTIFFS AND COUNTER-DEFENDANTS' OMNIBUS REPLY RE MOTION FOR SUMMARY JUDGMENT

Date: September 18, 2019
Time: 9:00 a.m.
Judge: Hon. Beth Labson Freeman

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I. INTRODUCTION

This reply responds to the brief Plaintiffs and Counter-Defendants (collectively "Plaintiffs") filed in opposition to the City's motion for summary judgment and as the reply in support of their motion for partial summary judgment.

First, Plaintiffs have misconstrued the City's variance application process and the controlling case law. They argue that Code section 23.02.1370 grants City officials unfettered discretion in determining whether to grant or deny variance applications and that City officials are not required to put any of their findings in writing, a point directly contradicted by not only the plain language of Code sections 23.02.1370.D.1. and 23.02.1370.D.2., but also by the City's practice, demonstrated by the exemplar variance application decisions attached to this reply.

Further, Plaintiffs readily admit in their brief that the majority of the exemption provisions of San Jose Municipal Code section 23.02.1310 are constitutional, thus contradicting the allegations in their Second Amendment Complaint filed on August 6, 2019 that all of the exemption provisions in 23.02.1310 are unconstitutional. Plaintiffs nevertheless continue to assert that *Reed* controls the Court's analysis as to all of the exemptions, despite controlling case law decided after *Reed* which articulates different standards of judicial review for commercial speech, non-commercial speech, and speech occurring on City-owned property. In any event, the exemption provisions survive the appropriate level of judicial scrutiny, as articulated in the City's opening brief and described in further detail herein.

Regarding Plaintiffs' equal protection claim, they have not been unfairly singled out by the City. They argue that it is *solely* the permitting requirement of the City's Sign Code that makes Citizens' signs illegal, as the City need not obtain a permit for signs located on City-owned property. In addition to failing to mention the fact that signs erected by the City, except those erected on City-owned property pursuant to Council Policy 6-4, must comply with all other requirements of the Sign Code, Plaintiffs also neglect to mention that their signs are illegal for many other reasons, including the fact that it is unsafe and violative of both state law and the Municipal Code to erect large programmable electronic sign(s) right next to a busy highway.

Finally, while Plaintiffs assert both a due process claim and a 42 U.S.C. section 1983 claim

against the City, Plaintiffs have effectively conceded that both of these claims are without merit. They did not address either of these claims in any of their briefing, nor did they refute the arguments of the City.

The undisputed material facts establish that the challenged provisions of the City's Sign Code do not violate the First Amendment, the equal protection clause, and the due process clause. Moreover, the City has not violated Plaintiffs' civil rights under 42 U.S.C. section 1983. The City therefore respectfully requests judgment in its favor.

II. ARGUMENT

A. Plaintiffs have misstated the City's variance requirements.

1. The Director and Planning Commission must make specific factual findings in writing before a decision on a variance application.

Plaintiffs' primary argument regarding the Code's variance procedures is that the City decision makers that review variance applications are not required to put their findings in writing. (*See* Plaintiffs' Omnibus Reply at 7.) Plaintiffs are mistaken. Section 23.02.1370.D.1 expressly requires specific findings. For example, it reads that "[n]either the director nor the planning commission on appeal shall grant a sign variance unless **it is found that**" the property is unable to display signs due to certain unique circumstances, such as those resulting from its surroundings. (JSUF, Exh. 7 at 34 - SJMC § 23.02.1370.D.1.) (emphasis added) The Director, or the Planning Commission on appeal, must also make specific findings that the at-issue sign variance will not impair the utility or value of adjacent properties or the general welfare of the neighborhood; will not impair the integrity and character of the zoning district or special sign zone in which the subject property is located; will not materially add to visual clutter; and will not create visual blight. (JSUF, Exh. 7 at 34 - SJMC § 23.02.1370.D.2.)

The City has interpreted this language as requiring written findings. The City's interpretation of its own Municipal Code is entitled to great weight. *See, e.g., Turtle Island Restoration Network v. U.S. Dept. of Commerce,* 878 F.3d 725, 733 (9th Cir. 2017) (referencing that courts are required to give controlling weight to an agency's interpretations of its own regulations or

laws). The City has been applying that interpretation when making decisions on variance applications. *See, e.g. Request for Judicial Notice*, Exhibits A & B. As examples, the City provides two certified decisions on variance applications issued on August 31, 2016 and March 8, 2017. Both are written decisions issued by the Director, each containing a discussion of the relevant sign requirements, why the at-issue sign violates those requirements, and a lengthy analysis as to whether the variance application is granted or denied. Both variance decisions extensively analyze the factors listed in Municipal Code section 23.03.1370, subparts D.1 and D.2, in writing. *See* Request for Judicial Notice, Exhibit A at 3-4 & Exhibit B at 2-4. Therefore, based on the specific requirements in the Code, and the variance decisions attached as exhibits, it is evident that the City requires decision makers to make written findings regarding variance applications.

2. Plaintiffs' case law does not apply because the City's variance requirements are different.

To support their "unbridled discretion" argument, Plaintiffs first cite to a non-precedential decision from the Central District of California, *Weaver v. City of Montebello*, 370 F.Supp.3d 1130 (C.D. Cal. 2019).

In *Weaver*, the court relied on *Epona v. City of Ventura,* 876 F.3d 1214, 1222 (9th Cir. 2017), to preliminarily enjoin a denial of a conditional use permit application. The *Weaver* court held that the permitting process was unconstitutional because the City of Montebello's requirements included *both* "abstract language" and a permitting process that lacked "any requirement that officials provide some evidence to support the conclusion that a particular structure or sign is detrimental to the community." *Id.* at 1135.

Similarly, in *Epona,* the permitting scheme was found unconstitutional because the scheme lacked *both* definite and objective standards for granting permits *and* failed to provide any limitation on the time period within which a permit had to be approved or denied. *Epona*, 876 F.3d at 1221.

Here, in contrast, as described above, the Director, and the Planning Commission on appeal, must make specific factual findings in writing in support of the factors specified in section 23.02.1370 subparts D.1 and D.2 before issuing a decision on a variance application. *Epona* and *Weaver* are therefore distinguishable.

And unlike in *Epona*, permit applications at the City must be decided within a reasonable time frame. In the City's motion for summary judgment, Part D, Section 3 (entitled "Challenged application decisions must be reviewed within a reasonable time frame"), the City indicated that the California Permit Streamlining Act, California Government Code section 65920 (the "Act"), governs the time requirements for decisions on permit applications. Plaintiffs concede the applicability of the Act, as they should, given the plain language of the Act which indicates that it applies to "all public agencies, including charter cities." (Cal. Gov't Code §65921.)

The *Epona* court discussed *Desert Outdoor Advertising, Inc. v. City of Oakland,* 506 F.3d 798 (9th Cir. 2007), and addressed permitting guidelines that "f[ell] somewhere between the abstract standards invalidated in *Moreno Valley* and the more explicit criteria and procedural requirements upheld in *G.K. Limited Travel." Epona*, 876 F.3d at 1223. *Moreno Valley* struck down an ordinance under which, prior to granting a permit, officials were required 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." *Desert Outdoor Advertising, Inc. v. City of Moreno Valley,* 103 F.3d 814, 818-819 (9th Cir. 1996). The abstract language of the ordinance in *Desert Outdoor Advertising, Inc.*, 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.' " *Id*. at 819.

In contrast, in *G.K. Limited Travel*, the permitting scheme was upheld because the relevant terms were defined (including phrases such as "surrounding environment" and "compatibility"), and permitting officials were required to "state the reasons for [each] decision to either grant or deny a permit so as to facilitate effective review." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082-1083 (9th Cir. 2006).

San Jose's permitting process is similar to that in *Desert Outdoor Advertising, Inc. v. City of Oakland*. While the San Jose Municipal Code does not define "welfare of the neighborhood" or "visual blight", it does require the Director to make specific factual findings (section

23.02.1370.D.1 and 23.02.1370.D.2); affected parties have the right to appeal (section 23.02.1370.C, referring to the appeal procedures in sections 20.100.240, 20.100.250, and 20.100.260); and challenged application decisions must be reviewed within a reasonable time frame (see discussion regarding the Act, *supra*). In upholding the City of Oakland's permitting scheme, the *Desert Outdoor Advertising* court held that while the procedure's requirements were "somewhat elastic" and required "reasonable discretion to be exercised by the permitting authority," they nevertheless contained "appropriate standards cabining the [City's] discretion." *Desert Outdoor Advertising, Inc.,* 506 F.3d at 807. San Jose's variance process is lawful for similar reasons.

Plaintiffs also argue that conditional use permits and variances are similar, and that the law guiding the granting or denial of conditional use permits is also relevant to the law regarding variances. (Plaintiffs' Omnibus Reply at 6.) If that is so, then numerous state court conditional use permit decisions addressing alleged "unbridled discretion" by government officials who denied conditional use permits based on codes with purportedly broad terms can provide guidance to the Court in this case. For example, in *Tustin Heights Association v. Orange County,* 170 Cal.App.2d 619, 634 (1959), the court upheld a conditional use permit issued based on a code with the phrases "integrity and character of the district," "utility and value of adjacent property," and the "general welfare of the neighborhood," where the permitting official was also required to document his findings in writing prior to the issuance of a decision. The *Tustin Heights Association* court noted:

> The courts of this state have repeatedly upheld zoning ordinances containing provisions governing conditional use permits and variance permits similar to the ordinance before us….the essential requirement of due process is **met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made**. Such a discretion is not arbitrary or so unguided as to invalidate the statute or ordinance.

Id. at 635 (emphasis added). Similar here, the Director, and the Planning Commission on appeal, are required to determine and specify facts before making a decision, thus solidifying the constitutionality of San Jose Municipal Code section 23.02.1370.

B. The City's exemption provisions comport with the First Amendment

1. Plaintiffs now admit that the majority of the City's exemption provisions are constitutional.

Plaintiffs' Second Amended Complaint alleges that all of the exemption provisions in Code section 23.02.1310 are unconstitutional (*see* SAC ¶¶ 21-22). Plaintiffs' initial Motion for Summary Judgment, though, limited its challenge to "signs erected by the City, Flags, Historic Signs, and Signage for Residential Uses." (Plaintiffs' Motion at 17). Now, in their omnibus reply, Plaintiffs state that "[t]he City is correct that Citizens does not challenge all the exemptions. Citizens agrees that not all of the exemptions are improperly content-based." (Plaintiffs' Omnibus Reply at 10.) But Plaintiffs interject unnecessary uncertainty by failing to indicate in their omnibus reply which specific exemption provisions in section 23.02.1310 they challenge, thus leaving the City to guess as to which exemptions are not 'improperly-content-based" and which are purportedly unconstitutional. The City can only presume that Plaintiffs are only challenging "signs erected by the City", "election signs", "flags displayed on flagpoles" and "signs for residential uses", as these are the only exemption provisions that Plaintiffs mention in their omnibus reply. (*See* Plaintiffs' Omnibus Reply at 11.)

2. Each exemption meets the applicable standard of judicial review.

As indicated above, Plaintiffs admit that they are not challenging every exemption of San Jose Municipal Code section 23.02.1310. Because the City is moving for summary judgment on all of Plaintiffs' claims, the City addressed all exemptions raised in the Complaint in the City's opening brief on this motion. For additional clarity, the City addresses each exemption below, with a brief summary as to why it is constitutional.

i. Temporary signs, window signs, signs on outdoor vending facilities, signs on recycling facilities, signs on temporary trailers

Plaintiffs do not challenge the exemption for temporary signs (SJMC § 23.02.1310.A.1.), window signs (SJMC § 23.02.1310.A.5.), signs on outdoor vending facilities (SJMC § 23.02.1310.A.9.), and signs on temporary trailers (SJMC § 23.02.1310.A.11.). All of these exemptions are content-neutral time, place, or manner restrictions because the exemptions have nothing to do with the content of the message, but only regulate where the message may be placed or for how long that message may be placed. *See., e.g., Ruffino v. City of Puyallup,* 377 F.Supp.3d 1205, 1213 (W.D. Wa. Mar. 29, 2019). Because these provisions are content-neutral time, place, or

manner restrictions, they need only survive intermediate scrutiny. *Frisby v. Schultz,* 487 U.S. 474, 480-81 (1988). For the reasons identified in the City's motion for summary judgment at page 21, the exemption provisions survive intermediate scrutiny.

ii. Safety or directional signs of four feet or less that are not programmable electronic signs; safety or directional signs regardless of size if erected by a public entity or public utility

Again, Plaintiffs do not challenge the exemptions for safety or directional signs of four feet or less that are not programmable electronic signs (SJMC § 23.02.1310.A.2.) or safety or directional signs regardless of size if erected by a public entity or public utility (SJMC § 23.02.1310.A.3). "Safety or Directional sign[s]" are defined in the Municipal Code to mean: (a) a sign used by a public agency or public utility and necessary for the safety and welfare of the public; (b) a sign displayed for safety purposes; or (c) a sign which solely directs vehicular and/or pedestrian traffic. SJMC § 23.02.480. Even if these exemptions are deemed to be content-based, the City's overwhelming compelling interests in ensuring the safety of its citizens ensures that these exemption provisions would survive even a strict scrutiny analysis. *See., e.g., Foti v. City of Menlo Park,* 146 F.3d 629, 637 (9th Cir. 1998) (discussing that "it is difficult to imagine that the City would not have a compelling interest" in traffic and safety signs sufficient to withstand a strict scrutiny analysis). This makes sense because the City should be allowed to place stop signs or other similar traffic signs to regulate traffic and safety within San Jose.

iii. Exemption only from permits for signs erected by the City

Plaintiffs challenge the exemption for signs erected by the City (SJMC § 23.02.1310.B). Contrary to Plaintiffs' argument, the City's exemption for signs erected by the City is not a broad public entity exception like in *Citizens for Free Speech, LLC v. County of Alameda,* 194 F.Supp.3d 968 (N.D. Cal. 2016). In that case, the government speakers did not have to comply with any of the permitting requirements of the county's sign code. *Id.* at 982. This is not the case in San Jose. Section 23.02.1310.B. reads: "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." (JSUF, Exh. 7 at 31-32 - SJMC §23.02.1310.B) Under section 23.02.1310.B, therefore, signs erected by the City that are not erected under Council Policy 6-4 cannot display offsite commercial speech, cannot be billboards, and are subject to the same substantive restrictions as signs displayed by anyone else.

And for signs falling under Council-Policy 6-4, only a few select City-owned properties are exempted from both the substantive and permitting requirements of the Code (JSUF, Exhibit 9 at 3). Thus, section 23.02.1310.B. is distinguishable from *Citizens for Free Speech, LLC v. County of Alameda* because the City's permitting exemption for signs erected by the City does not contain a broad public entity exemption.

Moreover, for restrictions on speech occurring on government-owned property, the City is allowed to enact content-based restrictions as long as those restrictions have not created a public forum. *Amalgamated Transit Union Local 1015 v. Spokane Transit Authority,* 929 F.3d 643, 651 (9th Cir. 2019). A traditional public forum is a place "that has traditionally been available for public expression," such as a public park. *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 976 (9th Cir. 1998). Non-public fora, on the other hand, are areas that the City has not previously opened up to public communications. *Id.* Plaintiffs assert no facts which could support an argument that the City created a public forum or that any of the City-owned sites referred to in City Council Policy 6-4 are areas that have traditionally been available for public expression. The sites are for "signs, including billboards, programmable electronic signs, and signs displaying off-site commercial speech, on City-owned land." (JSUF ¶14, Exh. 9 at 2.) Because no public forum has been created, the City is allowed to have content-based restrictions for signs on City-owned property without violating *Reed*.

Further, while Council Policy 6-4 exempts a small set of City-owned properties from the off-site commercial advertising ban, the City does not violate the First Amendment by exempting its own property from a ban that otherwise applies to off-site commercial advertising. *Lamar Central Outdoor Advertising v. City of Los Angeles,* 245 Cal.App.4th 610, 632 (2016) (discussing that the court considered binding federal precedent when reaching this conclusion).

iv. Election signs and flags

Plaintiffs challenge the exemption for election signs (SJMC § 23.02.1310.A.4.) and flags (SJMC 23.02.1310.A.6.). Election signs and flags are both non-commercial speech. For example, San Jose Municipal Code section 23.02.200 defines flags as "a banner that is the emblem of a government entity." The City's substitution clause, San Jose Municipal Code section 23.02.1190, ensures that these exemption sections are constitutional. Under Code section 23.02.1190, any non-commercial message may be placed on any sign that the Sign Code would otherwise allow ("A protected non-commercial message of any type may be substituted, in whole or in part, for the message displayed on any sign which is already legal or legal nonconforming without consideration of message content.") Courts have repeatedly found that a substitution clause ensures that exemption provisions affecting non-commercial speech are content-neutral and thus subject to intermediate scrutiny. *See, e.g., Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 611 (9th Cir. 1993) ("These codes, by including substitution clauses, fit within the increasingly exacting parameters of our free speech jurisprudence."); *Citizens for Free Speech, LLC v. County of Alameda*, 62 F.Supp.3d 1129, 1139 (N.D. Cal. Aug. 5, 2014) ("the majority of billboard ordinances that courts have held to be neutral towards non-commercial speech have contained what is referred to as a 'substitution clause.'"). As explained in the City's motion for summary judgment beginning at page 21, the exemptions meet intermediate scrutiny because the City's regulation of signs furthers an important or substantial government interest in ensuring the safety and aesthetics of the city, they are narrowly tailored to these interests, and alternative means of communication are left open because other non-sign based forms of communication are left open.

v. Signage for residential uses; signs required by law

Plaintiffs challenge the exemption for signage for residential uses (SJMC § 23.02.1310.A.8.). Plaintiffs do not challenge the exemption for signs required by law (SJMC § 23.02.1310.A.7.). Both of these exemption provisions, though, are similar because neither is content- nor speaker-based because each has nothing to do with the content of the sign or who the speaker is. Under Municipal Code section 23.02.1310.A.8, for example, a person could put up a "For Rent" or "For Sale" sign on their single occupancy home without needing to apply for a permit.

The City does not require a permit and the "For Rent" sign (or any other commercial or non-commercial sign) would be allowed, as long as that sign did not violate any other section of the Municipal Code. Similarly, certain signs are required by the state or federal Government. For example, a Proposition 65 cancer warning sign may be required to be placed at a restaurant in San Jose under California state law. The restaurant need not apply for a sign permit from the City for that Proposition 65 sign because California law requires that the restaurant have that sign. Again, because both exemption provisions are content- and speaker-neutral, they must only meet intermediate scrutiny, which they do for the reasons explained *supra* and in the City's motion for summary judgment.

vi. Historic signs

Plaintiffs also indicate that they are challenging the City's regulation of historic signs. But the City's historic signs are not exempted under the Code. (*See* SJMC § 23.02.1310.) Historic signs are subject to permitting under section 23.02.1090, which allows reconstruction and relocation of historic signs for the purpose of preserving important historic resources. SJMC § 23.02.1090. The "historic sign" definition in section 23.02.255 shows that regulation of such signs is not based on content or speaker but on the value of the historic resource. SJMC 23.02.255. Therefore, Plaintiffs' challenge is without merit.

C. The challenged provisions do not violate the equal protection clause.

Plaintiffs arguments on the equal protection clause are also meritless. Plaintiffs argue that it is *solely* the permitting requirement of the Sign Code that makes Citizens' signs illegal, and thus they are treated differently than the City because signs erected on City-owned property under Council Policy 6-4 are not subject to the permitting requirement (*See* Plaintiffs' Omnibus Reply at 16.) This argument fails for two reasons.

First, as indicated in Exhibit 5 to the Joint Statement of Undisputed Facts ("Warning Notice"), Plaintiffs' signs are illegal for numerous reasons, including for violating San Jose Municipal Code section 23.02.820 ("Conformity Required"), which provides that "no person shall erect, maintain or suffer, or cause to be erected, maintained, or suffered, any sign except in strict conformity with this title." SJMC § 23.02.820. "This title" refers to the entire Title 23 of the Code.

Plaintiffs' signs are not in strict conformance with several sections of Title 23, including, but not limited to: section 23.02.1010 (signs visible from a freeway); 23.02.1010.A.5 (programmable electronic signs); 23.04.035 (prohibition on freeway signs on the Subject Property). Common sense indicates that it is not safe to have large blinking electronic billboards right next to a highway in a crowded area. *See* JSUF Exh. 2, pictures of Plaintiffs' signs. Plaintiffs' signs are not disallowed solely because of their lack of a permit, but for many other reasons related to the welfare and safety of the City's residents. These reasons were specified in the compliance order served on Plaintiffs. (JSUF Exh. 6, referencing SJMC § 23.02.820A, which requires all signs to be in conformance with all provisions of Title 23).

Plaintiffs argue that the City's preference for its own commercial speech to that of Citizens' commercial speech violates the equal protection clause (Plaintiffs' Omnibus Reply at 16). As explained above, for restrictions on speech occurring on government-owned property, the City is allowed to have content-based restrictions favoring its own commercial interests as long as those restrictions have not created a public forum. *Amalgamated Transit Union Local 1015,* 929 F.3d at 651. Plaintiffs cite *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), in support of their position. In that case, though, the Court did not consider exemptions for speech occurring on government-owned property, making the holding of this case inapposite to the facts here. *Id.* at 519.

D. Plaintiffs fail to address the City's due process arguments.

Plaintiffs incorrectly label section F of their omnibus reply as "Citizens' due process claim has merit and must be granted." (Plaintiffs' omnibus reply at 15). That section only refers to the City's equal protection arguments. *See id.* Plaintiffs do not address the City's due process arguments anywhere in their omnibus reply. In their opening brief, Plaintiffs also did not set forth any arguments or analysis as to how the City purportedly violated their due process rights. Because Plaintiffs did not address anywhere the alleged violations of the Due Process Clause, the City's summary judgment motion on this claim should be granted.

E. Plaintiffs fail to address the City's 42 U.S.C. section 1983 arguments.

For the reasons identified immediately above, the City's motion as to Plaintiffs' 42 U.S.C. section 1983 claim should also be granted. Plaintiffs do not address the City's section 1983

arguments anywhere in their omnibus reply, nor did they did set forth any arguments or analysis in their opening brief as to how the City purportedly violated their civil rights.

F. Any unconstitutional provisions could be severed.

Plaintiffs, through both their Second Amended Complaint and their motion for summary judgment, have only challenged the variance and exemption provisions of the Code. Notably, Plaintiffs have not challenged those Code provisions that actually make Plaintiffs' signs illegal. These provisions include the City's ban on offsite commercial speech (SJMC § 23.02.1010.A.12), location limits on programmable electronic signs (SJMC § 23.02.1010.A.5), freeway facing signs (SJMC § 23.02.1010.A.9), and signs that violate state law (SJMC § 23.02.1180). The numerous violations by Plaintiffs signs are evident from the photographs of Plaintiffs' signs, attached to the Joint Statement of Undisputed Facts. (JSUF, Exhibit 2). Even if Plaintiffs' argument regarding severance has merit (which the City disputes), Plaintiffs' signs are still illegal under the Code.

Plaintiffs' main argument regarding severance is that *Ballen v. City of Redmond,* 466 F.3d 736, 745 (9th Cir. 2006), controls. In *Ballen*, though, the court was concerned with the fact that those displaying the now non-exempt signs would be subject to "civil and criminal sanctions" by the City of Redmond. *Id.* at 745. This wouldn't be the case in the City. Plaintiffs erroneously conclude that if the content-based exemptions were severed from the Code, all residential signs, flags, election signs, and signs erected by the City would become illegal signs subjecting sign owners to civil penalties. (*See* Plaintiff's Omnibus Reply at 17.) On the contrary, these types of signs would continue to be legal in San Jose, as long as they meet the remaining requirements for display of signs in the City, just like any other types of signs. For example, if the exemption provision relating to political signs were found invalid, a political sign could still be displayed in San Jose as long as it meets the requirements for the other applicable sections of Title 23, such as height and width.

G. As Citizens and GTL are the only parties challenging constitutionality of the City's Sign Code, they are the only relevant parties to the present motion.

Plaintiffs Citizens and GTL are the only parties challenging the constitutionality of the City's Sign Code. Plaintiffs, and not the counter-defendants, are challenging the City's Sign Code in all of the claims asserted against the City in the Second Amended Complaint. The remaining parties

(Lotus Glass, Inc., Atour Amirkhas, Grace Amirkhas, and Lotus Shin) are solely in this case as counter-defendants for their violations of the City's Sign Code and were brought into this case by the City mandatory counterclaim. The only challenge as to the constitutionality of the City's Sign Code comes from Plaintiffs. Because the briefing only addresses the constitutionality of the City's Sign Code (and not whether any of the cross-defendants violated any specific ordinance), the Court should only decide the motion on behalf of Citizens and GTL. If Lotus Glass, Inc., Atour Amirkhas, Grace Amirkhas, and Lotus Shin wanted to challenge the City's Sign Code, then they should have included themselves as Plaintiffs, which they failed to do.

H. Plaintiffs recognized that they did not have standing to pursue their constitutional claims and sought business licenses immediately after the City filed its motion for summary judgment.

Finally, recognizing that they failed to obtain a business license to lawfully conduct business within the City of San Jose before filing their initial complaint, Plaintiffs sought leave to amend their First Amended Complaint to include an allegation that they obtained business tax certificates from the City in July 2019. (Second Amended Complaint at ¶ 31.) The City stipulated to the filing of Plaintiffs' Second Amended Complaint for both judicial efficiency and also because Plaintiffs agreed to waive all attorneys' fees and damages that may have accrued before the filing of the Second Amended Complaint. After the Court's entry of order on the parties' stipulation [Dkt. No. 62], Plaintiffs filed their Second Amended Complaint on August 6, 2019 [Dkt. No. 63]. Plaintiffs' lack of standing has therefore been mooted by their obtaining of the required City business licenses and the filing of the Second Amended Complaint.

III. CONCLUSION

The challenged Sign Code provisions are constitutional under the First Amendment, the equal protection clause, and the due process clause. Moreover, the City has not violated Plaintiffs' civil rights under 42 U.S.C. section 1983. The City respectfully requests that the Court grant the City's motion and deny Plaintiffs' motion.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: August 23, 2019

By: /s/Wesley Klimczak
Wesley Klimczak, Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE