

No. 10-1937

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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NEIGHBORHOOD ENTERPRISES, INC., SANCTUARY IN THE ORDINARY,  
and JIM ROOS,

Plaintiffs/Appellants,

v.

CITY OF ST. LOUIS and ST. LOUIS BOARD OF ADJUSTMENT,

Defendants/Appellees.

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Appeal from the United States District Court for the Eastern District of Missouri  
(St. Louis)-Honorable Henry Edward Autrey, District Court Judge

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**APPELLANTS' REPLY BRIEF**

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Michael E. Bindas  
William R. Maurer  
INSTITUTE FOR JUSTICE  
101 Yesler Way, Suite 603  
Seattle, WA 98104  
Telephone: (206) 341-9300

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## I. INTRODUCTION

The arguments of the City and amici cannot save the sign code provisions at issue in this case. First, Sanctuary has standing to challenge the constitutionality of the provisions, including the code’s definition of “sign” and permit requirement. Second, notwithstanding the City and amici’s arguments to the contrary, the provisions are content-based. As such, they are subject to strict scrutiny, which they do not withstand. Finally, even if intermediate scrutiny is applied, the provisions fail.

## II. ARGUMENT

### A. Sanctuary Has Standing To Bring Its Constitutional Challenges

The City contends that it never had to apply the sign code’s permit requirement and “sign” definition to Sanctuary’s mural because Sanctuary affirmatively requested a sign permit. According to the City, Sanctuary therefore lacks standing to challenge those provisions. *See* Appellees’ Br. 20-27.

The City’s argument contradicts law and fact. Sanctuary requested a permit because the City instructed it to do so, as the City has stipulated. (J.A. 347, 359-60.) Regardless, a plaintiff may challenge the constitutionality of a speech permitting requirement “whether or not he applied for” a permit. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

Moreover, the City's argument contravenes the record. The size and "front line" restrictions, which the City acknowledges it applied to Sanctuary's mural, were applied because the City and Board concluded the mural was a "sign" under the code. The City's zoning examiner testified that he applied the definition of "sign" in deciding whether to grant or deny a permit, and he specifically "determined that the object in question fit the City's meaning of a sign, as defined by the Zoning Code." (J.A. 59, 265-66; *see also* J.A. 59 ("Mr. Lordi testified that he was able to determine, based on the Zoning Code, that the object was a sign . . .").) The Board likewise concluded the mural was a "sign" (J.A. 59), even though Sanctuary's counsel specifically argued that, as a "work of art" or "civic symbol or crest," it was exempt from the definition. (J.A. 269-72). To suggest the City did not apply the definition to Sanctuary defies the facts.

The City also errs in suggesting that, in resolving the constitutionality of the sign code provisions applied to Sanctuary, this Court may not consider the interplay between those provisions and others in the code. In examining the constitutionality of the provisions applied, this Court must "tak[e] into account other provisions that may affect the constitutionality of those provisions." *Café Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1278-79 (11th Cir. 2004). For example, in considering the constitutionality of the permit requirement, this Court must consider the fourteen categories of speech that Section 26.68.030

specifically exempts from that requirement. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1275 (11th Cir. 2006) (“[Plaintiff] has suffered constitutional injury from the governmental exemption; [Plaintiff] must either comply with the permitting scheme or face prosecution, while government-sponsored festival promoters need not comply at all.”).

Moreover, the unconstitutionality of the “sign” definition infects all of Chapter 26.68, because all of its regulations pertain to “signs.” *See Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) (“Because the entire ordinance is bottomed on this definition, it is unconstitutional.”); *Lusk v. Village of Cold Spring*, 418 F. Supp. 2d 314, 324 & n.1 (S.D.N.Y. 2005) (“[B]ecause Chapter 134 defines the word ‘sign’ as it does, the regulations on the posting of ‘signs’ set forth in that Chapter are unconstitutional, and plaintiff is entitled to an injunction against the enforcement of Chapter 134 in its entirety.”), *rev’d in part on other grounds*, 475 F.3d 480 (2d Cir. 2007).<sup>1</sup>

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<sup>1</sup> Severing the exemptions from the definition in hopes of saving Chapter 26.68 is not an option. First, severance would result in greater restrictions on speech, creating additional constitutional problems. *See Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1072-73 (3rd Cir. 1994). Second, severance would flout the protection that the Board of Aldermen intended to provide the exempted categories of speech. *See Clear Channel Outdoor, Inc. v. Town Board*, 352 F. Supp. 2d 297, 311 (N.D.N.Y. 2005). Finally, severance would make persons currently engaged in exempted speech indispensable parties to this litigation whom the City has not joined. *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006).

**B. The Sign Code Provisions Are Content-Based And Subject To Strict Scrutiny**

The Supreme Court has consistently held that regulations like the City’s, which on their face regulate speech based on its subject matter, are content-based and subject to strict scrutiny. Recently, for example, the Court held that “the First Amendment stands against attempts to disfavor certain subjects,” *Citizens United v. FEC*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 898 (2010), and that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *United States v. Stevens*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1577, 1584 (2010) (internal quotation marks and citation omitted). This Court has made the same point, most recently holding that a “restriction [that] depends wholly upon the subject matter of the speech for its invocation” is content-based and “triggers . . . strict scrutiny.” *Wersal v. Sexton*, \_\_\_ F.3d \_\_\_, 2010 WL 2945171, at \*8 (8th Cir. July 29, 2010) (internal quotation marks and citations omitted).

Nevertheless, the City and amici offer various arguments why the sign code should be considered content-neutral. Their efforts fail.

**1. A Law That, On Its Face, Discriminates Based On Content Is Content-Based, Regardless Of The Government’s Motive And Proffered Justification**

Selectively invoking language from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the City and amici argue that the sign code provisions should be

considered content-neutral because (1) they were not adopted “because of disagreement with the message [Sanctuary’s mural] conveys”; and (2) they are “justified without reference to the content of the regulated speech.” *See, e.g.*, Amici’s Br. 8-9, 13; Appellees’ Br. 37.<sup>2</sup> In its own words, the Supreme Court has “expressly rejected” these arguments. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993).

First, there is no merit to the assertion that the sign code provisions are content-neutral because they were not adopted out of disagreement with Sanctuary’s message. The Supreme Court has held that where, as here, an ordinance on its face discriminates based on content, neither the absence of a censorial motive nor the assertion of a content-neutral purpose will save it:

[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

*Turner Broadcasting Sys., Inc. v. FCC.*, 512 U.S. 622, 642-43 (1994) (alteration in original; citations omitted); *see also Discovery Network*, 507 U.S. at 429 (rejecting the argument “that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.” (omission

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<sup>2</sup> The City also argues that only viewpoint-based regulations are subject to strict scrutiny. *See Appellees’ Br. 42-43*. This argument has been soundly rejected. *See Appellants’ Br. 30-34*.

in original; internal quotation marks and citation omitted)). Where “the very basis for the regulation is the difference in content between” permitted speech and restricted speech, “the *mens rea* of the city” is irrelevant. *Id.*

Equally unavailing is the assertion that the sign code provisions must be viewed as content-neutral because the City has proffered content-neutral justifications for them. Cincinnati made the same argument in defending its newsrack regulation in *Discovery Network*, and the Supreme Court rejected it:

The city contends that the interests in safety and esthetics . . . are entirely unrelated to the content of respondents’ publications. Thus, the argument goes, the *justification* for the regulation is content neutral.

The argument is unpersuasive because the very basis for the regulation is the difference in content . . . Under the city’s newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is “content based.”

*Discovery Network*, 507 U.S. at 429-30).

This Court made the same point in *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995): “[E]ven if we agree with the City . . . that its restriction is ‘justified’ by its interest in maintaining traffic safety and preserving aesthetic beauty, we still must ask whether the regulation *accomplishes* the stated purpose in a content-neutral manner.” *Id.* at 1406. Here, although the City claims its size and “front line” regulations are “justified” by interests in traffic safety and aesthetics, it

exempts numerous categories from those regulations based solely on content. The City does not accomplish its stated purpose in a content-neutral manner and the sign code provisions are therefore content-based.

## **2. *Hill* And Its Progeny Offer No Support To The City**

The amici argue that *Hill v. Colorado*, 530 U.S. 703 (2000), “clarified” the “concept of content-neutrality” to support their view that a content-neutral justification and motive can overcome content-based discrimination in a law’s text. *See* Br. Amici. 1, 10-11. *Hill* did no such thing. Rather, it adhered to the Court’s longstanding holding that “[r]egulation of the subject matter of messages . . . is . . . an objectionable form of content-based regulation,” and that a law which, on its face, references subject matter is content-based, regardless of the justification and motive asserted. *See id.* at 723. Thus, in finding the protest buffer statute at issue in the case content-neutral, the Court emphasized that “the statutory language makes no reference to the content of the speech,” “places no restrictions on . . . any subject matter that may be discussed,” and “allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints.” *Id.* at 719, 723, 734 (internal quotation marks and citation omitted).

In fact, this Court recently cited *Hill* for the proposition that “[t]he plain meaning of the text controls” in determining whether a speech restriction is content-neutral or content-based. *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th

Cir. 2008); *see also id.* (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it . . . .” (omission in original; quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring))). The plain meaning of the text controls here, and the text of the sign code plainly “reference[s] . . . the content of the speech.” *Hill*, 530 U.S. at 719.

The five post-*Hill* decisions of this Court cited by the amici do not serve them any better. Three turned on the fact that the challenged laws, like the statute at issue in *Hill* and unlike the City’s sign code, were neutral on their face and made no reference to the content of the regulated speech. *See Veneklas v. City of Fargo*, 248 F.3d 738, 744-45 (8th Cir. 2001) (per curiam) (upholding picketing ordinance because it “regulates nothing other than the particular location of where one may picket . . . [and] does not speak to which types of picketing are prohibited”); *Thorburn v. Austin*, 231 F.3d 1114, 1117 (8th Cir. 2000) (upholding picketing ordinance because it “applies equally to anyone engaged in focused picketing without regard to his message”); *Frye v. Kansas City Police Dep’t*, 375 F.3d 785, 790-91 (8th Cir. 2004) (upholding loitering ordinance enforcement because it “allow[ed] every speaker to engage freely in any expressive activity communicating all messages and viewpoints” (alteration in original; quoting *Hill*, 530 U.S. at 734)).

The fourth case, *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005), is equally unavailing. It concerned the constitutionality of a do-not-call statute, which the Court viewed as content-neutral even though it “*appear[ed]* to make a subject matter distinction between advocacy and solicitation.” *Id.* at 596-97 (emphasis added).<sup>3</sup> As the Court explained, the statute was aimed at the invasiveness of unwanted telephone calls: because “solicitation may reasonably be viewed as more invasive than advocacy,” the Court determined, the statute merely “distinguishes between speech activities likely to produce the consequences that it seeks to prevent and speech activities unlikely to have those consequences.” *Id.* at 596-97. Here, on the other hand, the distinctions the sign code draws are based solely on content and there are no safety or aesthetic differences between restricted and exempted speech.

Finally, *La Tour v. City of Fayetteville*, 442 F.3d 1094 (8th Cir. 2006), is a panel decision with three separate opinions, including a dissent. It upheld a city’s policy of not enforcing a facially neutral ban on flashing signs against time-and-temperature signs. The two opinions comprising the majority separately stated that exempting time-and-temperature signs was “justified without reference to the

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<sup>3</sup> To the extent the opinion suggests that actual distinctions based on subject matter may be treated as content-neutral, it contradicts this Court’s recent holding that a “restriction [that] depends wholly upon the subject matter of the speech for its invocation” is content-based and “triggers . . . strict scrutiny.” *Wersal*, 2010 WL 2945171, at \*8 (internal quotation marks and citations omitted).

content of the regulated speech.” *Id.* at 1097 (Melloy, J.); *see also id.* at 1098 (Colloton, J., concurring in judgment). The concurring opinion also emphasized the supposedly “de minimis” nature of a time-and-temperature exception. *Id.* at 1099 (Colloton, J., concurring in judgment). The dissent, on the other hand, maintained that “a city’s policy of allowing some blinking or flashing signs to display as content the time and temperature, but prohibiting other blinking or flashing signs that display different content (e.g., ‘Dow Up 16’ or . . . ‘Choose Life’) can only be based upon or enforced by specific reference to the regulated speech.” *Id.* at 1100 (Hansen, J., dissenting).

*La Tour* has never been cited by this Court or the district courts within its jurisdiction. It is in obvious tension with this Court’s subsequent holding that the “plain meaning of the [statute’s] text controls” the content-neutrality determination, *Phelps-Roper*, 545 F.3d at 691, and its earlier holding that, “even if we agree . . . that [a] restriction is ‘justified’ by its interest in maintaining traffic safety and preserving aesthetic beauty, we still must ask whether the regulation *accomplishes* the stated purpose in a content-neutral manner.” *Whitton*, 54 F.3d at 1406. Moreover, as discussed below, the concurrence’s focus on the “de minimis” nature of the time-and-temperature exception conflicts with the Supreme Court’s decision in *Metromedia*, which rejected the “de minimis” doctrine—including,

specifically, the notion of a “de minimis” exemption for time-and-temperature signs. *See Metromedia v. City of San Diego*, 453 U.S. 490, 519 (1981) (plurality).<sup>4</sup>

But even if a single exception for time-and-temperature signs could be considered content-neutral, the sign code here is permeated by content-based provisions, many of which—for example, the “works of art” exemption—pose great risk of subjective enforcement. Moreover, many of the code’s content-based provisions impose greater restrictions on core political speech than they impose on other forms of non-commercial, and even commercial, speech. For example, non-election-related political signs (*e.g.*, signs protesting eminent domain abuse) require a permit, while election-related political signs and some thirteen other categories of non-commercial and commercial signs require no permit. *See St. Louis, Mo.*, Rev. Code § 26.68.030. In short, the content-based nature of the sign code is far worse in kind and degree than the single time-and-temperature exception at issue in *La Tour*.<sup>5</sup>

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<sup>4</sup> The amici invite this Court to ignore the *Metromedia* plurality opinion and follow the dissent. *See* Br. Amici 7-8. This Court, however, has already adopted the plurality position. *See Gilleo v. City of Ladue*, 986 F.2d 1180, 1182 (8th Cir. 1993), *judgment aff’d*, 512 U.S. 43 (1994); *see also Whitton*, 54 F.3d at 1404-05.

<sup>5</sup> To support their contention that a court may ignore the content-based text of a statute so long as the government proffers a content-neutral motive and justification, the amici cite a few cases from other jurisdictions. Nearly all are decisions from the Eleventh Circuit or its district courts and pre-date that circuit’s decision in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005). To the extent they conflict with *Solantic*, they are no longer good law. The

### 3. There Is No “De Minimis” Exception For Content-Based Regulations

The City and amici assert that any content-based discrimination in the exemptions to the definition of “sign” is “de minimis,” or “insubstantial,” and may be “ignored.” Amici’s Br. 2, 7; Appellees’ Br. 44. Case law is clear, however, that just as government may not defend a restriction on speech by arguing that the restriction is “de minimis,” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001), so may it not defend content-based discrimination by arguing that the discrimination is “de minimis.” *Metromedia*, 453 U.S. at 519 (plurality) (“Except to imply that the favored categories are for some reason *de minimis* in a constitutional sense, his dissent fails to explain why San Diego should not be held to have violated this concept of First Amendment neutrality.”).

Allowing judges to make a case by case determination that content discrimination is *de minimis* risks allowing judges’ subconscious judgments about the worth of particular speech to affect whether they

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other cases are likewise unavailing. *Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990), was distinguished and substantially limited by *Covenant Media of Ill., L.L.C. v. City of Des Plaines*, 391 F. Supp. 2d 682 (N.D. Ill. 2005), where the court held that an exemption for “government flags” and “corporate flags” was content-based. *Id.* at 690-92. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421 (4th Cir. 2007), and *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009), are at odds with the overwhelming body of case law from this and other courts holding sign code provisions like the City’s unconstitutional. Moreover, *H.D.V.-Greektown* is difficult to reconcile with the Sixth Circuit’s *en banc* holding that “any regulation that requires reference to the content of speech to determine its applicability is inherently content-based.” *Pagan v. Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007) (*en banc*).

deem a limitation on speech to be permissible. . . . [W]e cannot permit content discrimination just because our intuition is that it is de minimis.

*Rappa*, 18 F.3d at 1064-1068.

Moreover, it is absurd to suggest that core political speech, such as a protest of eminent domain abuse, may be regulated more restrictively than speech that is absolved of regulation because it falls within a supposedly “de minimis” exemption. The First Amendment, after all, “affords the broadest protection” to “[d]iscussion of public issues.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).<sup>6</sup>

#### **4. The Secondary Effects Doctrine Does Not Apply**

The City argues that even if the sign code provisions are content-based, they should nevertheless be treated as content-neutral under the secondary effects doctrine. *See* Appellees’ Br. 32-33, 45-46. The City insists the provisions are “justified by a desire to eliminate a ‘secondary effect,’” which it alternately describes as “big, visually obtrusive signs in the City’s residential areas,” and “large, conspicuous signs which would offend any notion of aesthetic.” *See* Appellees’ Br. 32-33, 46. The argument is unpersuasive.

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<sup>6</sup> The supposedly “de minimis” exemption for “works of art” is particularly problematic, as it contravenes the Supreme Court’s recent holding that “[m]ost of what we say to one another lacks . . . artistic value . . . , but it is still sheltered from government regulation.” *Stevens*, 130 S. Ct. at 1591 (internal quotation marks omitted).

First, the secondary effects doctrine is limited. The Supreme Court has never extended it to regulation of political speech. *See Rappa*, 18 F.3d at 1069. Moreover, in the case relied upon by the City for its argument, this Court expressed “doubt” about whether the doctrine extends to regulation of “political signs on private property,” assumed only “arguendo” that it did, then concluded that it could not save the sign regulations at issue. *Ladue*, 986 F.2d at 1183 & n.6.

But even if secondary effects doctrine could be applied to restrictions on political speech, “the required evidence usually consists of careful expert studies establishing the claimed effects; mere anecdotes and impressions of residents or town officials presumably would not be sufficient.” *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm’rs*, 802 F. Supp. 1223, 1233 (D.N.J. 1992). To apply the doctrine here, the City would have to proffer evidence demonstrating that a mural reading “End Eminent Domain Abuse” poses harmful secondary effects that a mural of the same size and location carrying a permitted message does not pose. *See Discovery Network*, 507 U.S. at 430 (refusing to apply doctrine because “there are no secondary effects attributable to respondent publishers’ newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks”). The absence of such evidence in *Ladue* prompted this Court to reject the doctrine in that case: “Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the

permitted signs. Stated in other words, the prohibited signs are no more associated with the particular ‘secondary effects’ than many of the permitted signs.” *Ladue*, 986 F.2d at 1183; *see also Whitton*, 54 F.3d at 1407. The same is true here.

#### **5. The Sign Code’s Exemptions Render It Impermissibly Content-Based**

The City next attempts to distinguish the numerous cases cited by Sanctuary that hold sign code provisions similar or identical to the City’s unconstitutionally content-based. The City is unsuccessful.

The City’s attempt to distinguish *Lusk*, 418 F. Supp. 2d 314, misreads the case. The City claims the village “conceded at the District Court level that its sign code was unconstitutional,” and that “the court accepted the village’s concession of . . . . unconstitutionality as the law of the case.” Appellees’ Br. 39-40. Although the village did concede the unconstitutionality of a different portion of its code, it did not concede the unconstitutionality of the chapter that regulated signs on private property and that exempted, from its definition of “sign,” the “flag, badge or insignia of any governmental agency or any civic, charitable religious, patriotic, fraternal or similar organization.” *Id.* at 321-22. The village vigorously defended that chapter and lost: the court struck down the entire chapter because of the content-based definition of “sign,” *id.* at 324 & n.1, and the village did not appeal

that holding. *See Lusk*, 475 F.3d at 484. The City’s attempt to distinguish *Lusk* therefore fails.

The City is also unsuccessful in attempting to distinguish *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326 (M.D. Fla. 2009). The City notes that, there, “the property owner did not apply to the City of Clearwater for a sign permit, as Appellants did in the instant case.” Appellees’ Br. 47. That is a distinction without a difference. *Complete Angler* clearly held that that an exemption for “art work” was impermissibly content-based and precluded enforcement of permit and size restrictions against the property owners’ mural. *Id.* at 1333-35.

The City’s attempts to distinguish other cases relied on by Sanctuary are equally unavailing; the City merely observes that the cases concerned different types of signs or restrictions than those at issue here—*e.g.*, “portable signs,” “signs placed on moving vehicles,” and “durational limits for political signs.” *See* Appellees’ Br. 40-41 & n.21. But Sanctuary did not cite these cases because of the specific restrictions or types of signs they involved. It cited them because, in each case, the court concluded that exemptions identical in character to those at issue here were constitutionally fatal. Such exemptions are content-based and subject to strict scrutiny regardless of the type of regulations to which they pertain. *See Solantic*, 410 F.3d at 1256 n.6 (“The problem is with the *character of the*

*enumerated categories*, not with the scope of the exemption. Thus, if . . . the exemptions are content based and fail strict scrutiny, the sign code would be unconstitutional regardless of whether the exemptions are from all of its regulations or from the permit requirement only.”).

The cases cited by Sanctuary make clear that the sign code provisions are content-based and, therefore, subject to strict scrutiny.<sup>7</sup>

### **C. The Sign Code Provisions Fail Strict Scrutiny**

Because the sign code is content-based, it must withstand strict scrutiny to survive. It does not.

The City asserts that “government interests of traffic safety and aesthetics” are “compelling.” Appellees’ Br. 32. It offers not a single case in support of that assertion, and for good reason: the argument has been uniformly rejected by this and other courts. *See Whitton*, 54 F.3d at 1408.

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<sup>7</sup> The City offers a few cases of its own for the proposition that its exemptions do not render the sign code content-based. *See* Appellees’ Br. 41-44. Those cases gain the City nothing. The first, *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), was distinguished and substantially limited by *Solantic*, 410 F.3d at 1263 n.12, and *Café Erotica of Fla.*, 360 F.3d at 1286 n.15. In the second case, *Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. Ct. App. 1994), the court upheld quantity and durational restrictions on political signs, but only because virtually identical restrictions were imposed on other signs, whether commercial or non-commercial, *id.* at 247; here, on the other hand, signs bearing certain favored content are either exempted from regulation entirely (because they are not even considered “signs”), or they are subject to more lenient restrictions than is Sanctuary’s mural (*e.g.*, they have no permit requirement). *See* Appellants’ Br. 20-29. Regarding *Scadron*, 734 F. Supp. 1437, *see supra* note 5.

Similarly, the City does not attempt to prove that its sign code provisions meet the narrow tailoring test for strict scrutiny, which requires that a regulation be the “least-restrictive alternative” for achieving the asserted interest and “actually advance[] the . . . interest.” *Republican Party of Minn. v. White*, 416 F.3d 738, 752 (8th Cir. 2005) (en banc). Rather, it claims it is “not required” to “prove that its interests in safety and aesthetics [a]re, in fact, furthered” by its regulations, because “common sense and experience are adequate,” and “putting the burden of justifying their regulations on the government . . . is not the current trend.” Appellees’ Br. 31 n.13, 32.

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Here, the City has not proved that the sign code provisions are the “least-restrictive alternative” for achieving its asserted interests and that they “actually advance[]” those interests. *White*, 416 F.3d at 752. Moreover, by failing to adequately brief the issue, it has waived any claim to the contrary. *See U.S. v. Froom*, \_\_\_ F.3d \_\_\_, 2010 WL 3062736, at \*5 n.2 (8th Cir. Aug. 6, 2010).

#### **D. The City’s Sign Code Provisions Fail Intermediate Scrutiny**

Even assuming the sign code provisions are content-neutral, they are still unconstitutional. Such regulations are only valid if they are “narrowly tailored to

serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The sign code does not meet that standard.

### **1. The City Bears The Burden Of Proving Its Regulations Survive Intermediate Scrutiny**

As with strict scrutiny, it is the government’s burden to demonstrate that a regulation satisfies intermediate scrutiny. *Watchtower Bible and Tract Soc’y of N.Y, Inc. v. Village of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring). Relying primarily on two cases, the City nevertheless maintains that “common sense” satisfies this burden. *See* Appellees’ Br. 31-32 & n.13. Neither case supports the City.

In the first, *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005), the Sixth Circuit made clear that government may “not merely rely on ‘speculation or conjecture’” to support an ordinance, but rather ““must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”” *Id.* at 823 (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 51 U.S. 136, 143 (1994)). Two years later, the same court, en banc, made the point more directly:

Instead of actual evidence of harm, appellees ask us to adopt a standard of “obviousness” or “common sense,” under which we uphold a speech regulation in the absence of evidence of concrete harm so long as common sense clearly indicates that a particular speech regulation will directly advance the government’s asserted

interest. The difficulty with this proposition, however, is that the standard established by the Supreme Court depends neither on obviousness nor common sense. [It] requires *some* evidence to establish that a speech regulation addresses actual harms with some basis in fact.

*Pagan*, 492 F.3d at 774 (citation and footnote omitted).

The other case the City invokes, *Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997), fares no better. Although *Ackerley* did relax the evidentiary showing that Seattle had to make to support certain content-neutral billboard regulations, it did so only because “substantially similar” regulations were already upheld in *Metromedia*. *Id.* at 1099. In fact, *Ackerley* noted the many Supreme Court cases since *Metromedia* that have demanded greater evidentiary showings from the government. *Id.* at 1099 & n.6. Here, on the other hand, the sign code provisions are not “substantially similar” to regulations that have previously been upheld. On the contrary, they are substantially similar (in some cases, identical) to sign code provisions that repeatedly have been struck down. *See* Appellants’ Br. 23-29.

## **2. The Regulations Do Not Serve a Significant Governmental Interest**

The City has not shown that its regulations “serve a significant governmental interest.” *Clark*, 468 U.S. at 293. Although its asserted interests in traffic safety and aesthetics may be “significant,” the City has proffered no evidence to show

that Sanctuary's mural threatens those interests, or that the regulations further them. Rather, the City assumes that "[t]he practical concerns of signs . . . going up on a whim, without any oversight, are obvious." Appellees' Br. 30. This does not satisfy the City's burden.

"[M]erely invoking interests . . . is insufficient. The [City] must also show that the proposed communicative activity endangers those interests." *Kuba v. I-A Agric. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004). Here, the City has proffered nothing to substantiate the purported problems with Sanctuary's mural. It has instead conceded that it is not aware of "any studies, reports or memoranda discussing the impact of Sanctuary's [mural] on the flow of traffic," or of "any traffic incidents in which any driver . . . mentioned Sanctuary's [mural], or any 'painted wall sign,' as contributing to [the] incident." (J.A. 349-50, 362-63.) In other words, the supposed "concerns" with the mural are nothing more than unsupported conjecture, which is "*verboden* in the First Amendment context." *Horina v. Granite City*, 538 F.3d 624, 633 (7th Cir. 2008).

But even if there were evidence that Sanctuary's mural threatens the City's interests, the City has failed to "produce 'objective evidence' showing that [its] restrictions serve[] th[ose] interests." *Id.* at 634. Rather, it conceded that it is not aware of any studies, reports or memoranda addressing whether its restrictions even affect safety and aesthetics, and that it possesses no documentation

“supporting the regulation of outdoor signs in Chapter 26.68.” (J.A. 349, 362.)

“[T]he government must . . . proffer *something* showing that the restriction actually serves a government interest,” *Horina*, 538 F.3d at 633-34, but here it proffered nothing.

### **3. The Regulations Are Not Narrowly Tailored**

The sign code provisions are not “narrowly tailored to serve” the City’s asserted interests because the provisions “do[] not ‘sufficiently match’ the stated interest[s],” *Kuba*, 387 F.3d at 862, and because the City has not shown that those interests “would be achieved less effectively absent the regulation[s].” *Ward*, 491 U.S. at 799 (internal quotation marks omitted); *see also* Appellants’ Br. 43-45.

The City’ reply brief does not rebut these points.

The City first claims that Sanctuary’s mural “is simply too big, regardless of what it says.” Appellees’ Br. 34. But the City does not explain why a mural of the same size, in the same location, would have been perfectly permissible if it was instead deemed a “work[] of art,” a “professional [or] civic symbol[],” a “[s]ign[] in the nature of [a] decoration,” or a sign to “advertise or identify construction, remodeling, rebuilding, development, sale, lease or rental”—all of which do not require a permit and may be of unlimited size and location. *See* St. Louis, Mo., Rev. Code § 28.68.020(17)(D), (E); *id.* § 28.68.030(E), (M).

The City next cites *Prime Media*, 398 F.3d 814, for the proposition that the regulations neither “prohibit too much speech” nor “restrict too little.” *See* Appellees’ Br. 34 (internal quotation marks and citation omitted). *Prime Media* is inapposite. There, the ordinance imposed size and height restrictions that applied equally to all billboards, without exception. Here, on the other hand, the City’s sign regulations are riddled with exemptions that undermine the purported justification for prohibiting Sanctuary’s mural. In fact, *Prime Media* expressly recognized that exemptions such as the City’s can be constitutionally fatal because they may “undermine the credibility of the government’s explanation for restricting speech at all.” *Id.* at 822.

#### **4. The Regulations Do Not Leave Open Ample and Adequate Alternatives**

Finally, the City has not shown that its regulations “leave open ample alternative channels for communication of the information” Sanctuary seeks to convey. *Clark*, 468 U.S. at 293. Relying on the dissent from this Court’s opinion in *Whitton*, the City suggests that Sanctuary “can distribute handbills, make telephone solicitations, give speeches, hold rallies and run advertisements on the radio, television or in print.” Appellees’ Br. 49 (citing *Whitton*, 54 F.3d at 1411-12 (Fagg, J., dissenting)). The City ignores the Supreme Court’s holding that, “[e]ven for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one’s house

with a handheld sign may make the difference between participating and not participating in some public debate.” *Ladue*, 512 U.S. at 57. The Court’s point is particularly relevant for Sanctuary In The Ordinary, a non-profit, low-income housing ministry, and Neighborhood Enterprises, a self-supporting housing ministry.

The City also ignores the Supreme Court’s holding that displaying a sign from one’s own property “often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.” *Id.* at 56. That point is especially salient here, because the location of Sanctuary’s mural (a building threatened with eminent domain abuse) is a critical component of the message itself (“End Eminent Domain Abuse”). A protest of eminent domain abuse by any of the alternative means suggested by the City would not be an adequate substitute for a protest at the very site of—indeed, on the very object of—that abuse. *Goward v. Minneapolis*, 456 N.W.2d 460, 468 (Minn. Ct. App. 1990) (“We think the messages contained on respondent’s signs are so closely connected to their location that no adequate alternative means of communication exists.”); *see also* Appellants’ Br. 45-50.<sup>8</sup>

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<sup>8</sup> Attempting to downplay the importance of Sanctuary’s message, the City suggests that its 1999 “blight” study and Ordinance 64831 may no longer threaten Sanctuary’s property. Specifically, it notes a Missouri statute that imposes a five-year timeframe on condemnation actions within blighted areas and suggests that Sanctuary’s property “arguably” is no longer threatened. *See* Appellees’ Br. 50

The only other case the City cites in support of its contention that Sanctuary has ample alternatives for its message is *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006), which held that an ordinance restricting pole signs left open ample alternatives. In so holding, however, the court emphasized that, unlike in *Ladue*, the plaintiffs had not explained why pole signs were ““unique and important,”” or why other available signs “would not effectively serve plaintiffs’ communicative interests.” *Id.* at 1075 n.8 (quoting *Ladue*, 512 U.S. at 54). Here, by contrast, Sanctuary’s mural—particularly its location—is even more “unique and important” to its message than was the sign at issue in *Ladue*.

#### **E. The Sign Code Effects An Unconstitutional Prior Restraint**

The sign code’s permit requirement lacks the “narrow, objective, and definite standards” required by the Constitution. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotation marks and citation omitted). Among other thing, the code does not define the various items it exempts from the permit requirement, such as “works of art” and “civic symbols or

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n.34. The statute, however, makes blight determinations renewable “for successive five-year periods,” Mo. Rev. Stat. § 523.274.2, and “does not prevent the condemning authority from relying on blight studies that are older than five years.” *Allright Properties, Inc. v. Tax Increment Financing Comm’n*, 240 S.W.3d 777, 782 (Mo. Ct. App. 2007). In fact, it was 2007 when the City notified Sanctuary that it intended to acquire Sanctuary’s property. (J.A. 220.).

crests,” and the City has no standards outside the code for determining when those terms apply. (J.A. 350, 363-64.)

The City nevertheless maintains that it was “bound by the clear terms of the Sign Code,” and that “[t]here is absolutely no ‘unbridled discretion’ on the City’s or Board of Adjustment’s part.” Appellees’ Br. 52. The City offers no factual or legal support for the proposition that terms such as “art” can be clear in the absence of definition, or that discretion can be bridled in the absence of standards. Its unsupported and conclusory assertions do not meet its burden of proving that the permit requirement contains the “narrow, objective, and definite standards” required of a valid speech permitting scheme. *See Vandeenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir. 2005) (rejecting, “out of hand,” litigant’s “conclusory assertion” for which he “provide[d] no analysis of the relevant law or facts”).

**F. The Sign Code’s Differential Treatment Of Signs Based On Geographic Zone And Content Violates The Equal Protection Clause**

Responding to Sanctuary’s argument that the sign code discriminates against Zone D property owners by restricting the political signs they may display, while allowing property owners in Zones F through K to display political signs of unlimited size and location, the City maintains that “[s]trict scrutiny is inappropriate . . . where a law regulating speech is content-neutral.” Appellees’ Br. 56. Here, however, strict scrutiny is warranted, because Sections 26.68.050(C)

& (E) are content-based: they establish differential treatment for political signs alone. *See Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009).

But even if this Court applies the intermediate scrutiny the City urges, the discriminatory treatment of Zone D property owners still fails because it is not narrowly tailored to serve a substantial governmental interest. *See Police Dept. v. Mosley*, 408 U.S. 92, 99 (1972). The City cites no authority for its assertion that it has a “substantial interest” in treating residential property owners more restrictively than property owners in other zoning districts or that political signs in Zone D are “clearly more disruptive” than political signs in Zones F through K. *Id.* at 100.

**G. The City Was Not Entitled To Judgment On Sanctuary’s Section 89.110 Claims**

The City incorrectly suggests that because there is “competent and substantial evidence to support” the Board’s decision denying a sign permit, this Court must reject Sanctuary’s Section 89.110 claims. *See Appellees’ Br. 18.* Missouri courts have rejected such a narrow scope of review in Section 89.110 cases.

“[T]he scope of judicial review of a board of adjustment includes, but is not limited solely to, a determination of whether the board’s decision is supported by competent and substantial evidence upon the whole record.” *State v. Springfield*, 672 S.W.2d 349, 355 (Mo. Ct. App. 1984) (internal quotation marks omitted).

Although there is some authority to the contrary, it is generally understood that Section 89.110 review “includes the ability to resolve constitutional questions, including the challenge to the constitutionality of a city ordinance.” *Platte Woods United Methodist Church v. City of Platte Woods*, 935 S.W.2d 735, 737 (Mo. Ct. App. 1996). Thus, in addressing Sanctuary’s Section 89.110 claims, this Court must consider the sign code’s constitutional infirmities. Those infirmities require judgment for Sanctuary.

#### **H. The City Was Not Entitled To Judgment On Sanctuary’s Declaratory Judgment Act Claims**

Finally, the City is incorrect in its contention that it is entitled to judgment on Sanctuary’s Declaratory Judgment Act claims. The City asserts that those claims are “superfluous and duplicative of” Sanctuary’s claims under 42 U.S.C. § 1983 and Section 89.110. *See* Appellees’ Br. 56. They are not.

There is no overlap between the Declaratory Judgment Act and Section 1983 claims: the former assert violations of the Missouri Constitution; the latter, of the U.S. Constitution.

Likewise, Sanctuary’s Declaratory Judgment Act claims are not redundant of its Section 89.110 claims. When a party seeks review of a board of adjustment’s permit denial and the constitutionality of the ordinance on which it was based, the appropriate procedure under Missouri law is a petition pleading claims under Section 89.110, for a writ of certiorari and judicial review of the denial; and the

Declaratory Judgment Act, for declaratory and injunctive relief concerning the constitutionality of the underlying ordinance. *See St. John's Evangelical Lutheran Church v. Ellisville*, 122 S.W.3d 635, 640 (Mo. Ct. App. 2003).

### **III. CONCLUSION**

For the foregoing reasons, this Court should reverse the district court and enter judgment for Sanctuary.

Respectfully submitted August 19, 2010.

INSTITUTE FOR JUSTICE

/s/ Michael E. Bindas  
Michael E. Bindas, WSBA No. 31590  
William R. Maurer, WSBA No. 25451  
101 Yesler Way, Suite 603  
Seattle, Washington 98104  
(206) 341-9300  
*Attorneys for Plaintiffs/Appellants*

## **CERTIFICATE OF COMPLIANCE AND VIRUS SCANNING**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionality spaced typeface in Microsoft Word for Windows XP in Times New Roman 14 pt. type.
3. The digital version of this Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28A(d) was scanned for viruses as it was being copied to a CD-ROM and the CD-ROM is free from viruses.

/s/ Michael E. Bindas  
Michael E. Bindas  
Attorney for Plaintiffs/Appellants

Dated: August 19, 2010

## CERTIFICATE OF FILING AND SERVICE

The undersigned attorney hereby certifies that on August 19, 2010, ten copies of Appellants' Reply Brief and one digital version of Appellants' Reply Brief on CD-ROM were sent by First-Class U.S. Mail, postage prepaid, to the Clerk of the U.S. Court of Appeals for the Eighth Circuit at the following address:

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The undersigned attorney further certifies that on August 19, 2010, two copies of Appellants' Reply Brief and one digital version of Appellants' Reply Brief on CD-ROM were sent by First-Class U.S. Mail, postage prepaid, to the following attorneys:

Matt Moak  
Robert M. Hibbs  
City of St. Louis Law Department  
1520 Market Street  
Room 4025  
St. Louis, MO 63103  
*Attorneys for Defendants/Appellees*

William D. Britton  
Rogers Towers, P.A.  
1301 Riverplace Boulevard, Suite 1500  
Jacksonville, FL 32207-1811  
*Attorneys for Amici Scenic America, Inc., Scenic Missouri, Inc., and  
International Municipal Lawyers Association*

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington on August 19, 2010.

/s/ Michael E. Bindas  
Michael E. Bindas