STATE OF MICHIGAN
IN DISTRICT COURT FOR THE COUNTY OF BARRY

CITY OF HASTINGS, Plaintiff,	Case No. 22-1299-ON
v.	HON. MICHAEL L. SCHIPPER
CHARLES J. HERTZLER, Defendant.	**DEFENDANT'S MOTION TO DISMISS**

Emily A. Rysberg (P74435) *Attorney for Plaintiff* Dickinson Wright PLLC 200 Ottawa Ave. NW, Ste 1000 Grand Rapids, MI 49503 616-458-1300	Daren A. Wiseley (P85220) *Attorney for Defendant* Wiseley Law, PLLC 41 ½ E. Bacon St. Hillsdale, MI 49242 517-234-4020

NOW COMES the Defendant, **CHARLES J. HERTZLER**, by and through his attorney, Daren A. Wiseley, and hereby requests that this Honorable Court grant his Motion to Dismiss the citation on the grounds that it violates his rights under the First and Fourteenth Amendments to the United States Constitution; Article I, § 5 of the Michigan Constitution; and for all the reasons stated in the attached brief which is fully incorporated herein by reference.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant his Motion to Dismiss, dismiss the citation against him with prejudice, and grant him all relief requested in the attached brief.

Dated: December 25, 2022

_____
Daren A. Wiseley (P85220)
WISELEY LAW, PLLC
Attorney for Charles Hertzler

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DIMSISS

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INTRODUCTION

The City of Hastings ("City") has enacted restrictions on residential signs that, among other things, impose quantity, size, and temporal restrictions depending on the content of the sign's message. Government signs, which include flags posted by private persons, for example, are permitted in unlimited numbers on private property, while property owners who wish to post nongovernmental messages of their choosing are limited to four temporary signs that must be wire framed. The City's Sign Ordinance only permits one nongovernment permanent sign and provides a definition for a temporary sign that is content-based and vague, and which puts property owners at risk of arbitrary enforcement. The City's Sign Ordinance also imposes limits on the size and quantity of residential signs that are unreasonably restrictive.

Charles J. Hertzler is a resident of the City of Hastings who has been politically active for many years and has placed signs on his property to express his political and ideological views. Mr. Hertzler was told he had to remove his signs because they did not conform to the City's restrictions and was threatened with fines if he did not take them down. The City of Hastings's restrictions on signs in residential districts are content-based regulations that fail strict scrutiny under the First Amendment to the United States Constitution and are unconstitutionally vague under the Fourteenth Amendment to the United States Constitution. Even if the challenged provisions are deemed content-neutral they do not satisfy intermediate scrutiny as they are not narrowly tailored to further a significant governmental interest, and do not leave open alternative channels of communication. This Honorable Court should dismiss the ordinance violation with prejudice to prevent the City of Hastings's Sign Ordinance from continuing to violate Mr. Hertzler's First and Fourteenth Amendment rights.

STATEMENT OF FACTS

Hastings City Code, Art. XI, § 90, *et seq.* ("Code"), the City's sign ordinance, purports to distinguish between different categories of signs and imposes different regulations depending on the type of sign. In residential districts, two general types of signs are authorized: permanent signs and temporary signs. The Code further specifies types of government, permanent, and temporary signs.

The distinction between a temporary and permanent sign is not clear as "temporary", defined under the Sign Ordinance, "means a sign installed for a limited period of time." Code § 90-961. "Permanent", "means a sign installed on a support structure which is not intended or designed to be moved or removed but to remain for an indefinite period of time. *Id.*

Each type of sign is subject to restrictions on quantity, size, and time when posted on residential property. The restrictions are as follows:

Type of Sign	**Quantity of Signs**	**Temporal Restrictions**	**Material Restrictions**	**Surface Area of Sign**
Government (applies to all types)	Unlimited	Unlimited	None	Unrestricted[1]
Ground Sign	One	Unlimited	None	Shall not exceed 32 square feet
Wire Sign	Four	"Temporary"	Attached to metal frame	Shall not exceed four square feet
Post Sign	One	Only if, and as long as, property is actively listed for sale	Attached to wood, metal, plastic, or other rigid posts	Shall not exceed eight square feet

[1] Except for banners, flags, and flutter flags which shall not exceed 20 square feet.

Charles Hertzler is a resident of Hastings, and he owns property in a residential district. Mr. Hertzler is politically active and expresses his political and ideological views by, among other things, displaying signs on his property, as is his right protected by the First Amendment to the United States Constitution and Article I, § 5 of the Michigan Constitution. During the summer of 2022, Mr. Hertzler placed wire framed signs in his yard in anticipation of the upcoming elections. The signs expressed support for various candidates running for election at the local, state, and federal level - including one for Mr. Hertzler's own campaign for Eighth District Barry County Commissioner.

In response to Mr. Hertzler's signs, he was threatened by the City for having "too many signs" on his property and told to take them down. Mr. Hertzler did not want to take any of the signs down, since there were more than just four candidates that he wished to express support for. Mr. Hertzler responded by asserting it was his Constitutional right to have these signs in his yard, and that he would not be taking any of them down.

On or around July 5, 2022, Frank Jesensek, the Code Compliance Officer for the City, issued Mr. Hertzler a citation for a purported violation of the City's sign ordinance, which regulates signs in the City's residential zoning district. The citation alleges "signs on property exceed permitted number of 4" as the grounds for the Code violation.

Mr. Hertzler denies responsibility for the alleged violation, because the relevant sections of the sign ordinance infringe upon his right to the freedom of speech and expression as protected by the Michigan and United States Constitutions, rendering them void *ab initio*. Mr. Hertzler also objects to the size restrictions, and limitation to only wire framed signs being permitted. While he would like to express his viewpoint year-round, limiting Mr. Hertzler to one

outdoor sign is particularly oppressive during a political election when he wishes to voice his support and opposition to a number of candidates and political issues. Even when Mr. Hertzler posts what he believes to be a temporary sign, he may be subjected to fines since he is unsure what constitutes "a limited period of time".

Mr. Hertzler also finds it intriguing that one of his political opponents in the Barry County Commissioner election, Dave Hatfield, had *plastic* framed signs in his yard, and yet faced no citation. Mr. Hatfield also lived in a residential district, subjecting him to the same restrictions as Mr. Hertzler, whereby only wire framed signs are permitted. A resident of Hastings turned in a complaint against Mr. Hatfield for the nonconforming signs, which should have resulted in the same citation Mr. Hertzler received. However, the City took no action against Mr. Hatfield; clearly, the Code, while deficient in its own right, is not being enforced equally.

ARGUMENT

The First Amendment to the United States Constitution prohibits the enactment of laws "abridging the freedom of speech," and the "usual rule [is] that governmental bodies may not prescribe the form or content of individual expression," *Cohen v. California*, 403 U.S. 15, 24 (1971). "The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Id.* The First Amendment, therefore, not only protects the right of individuals to express themselves freely, but it safeguards various methods of communication. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

"Just as the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner . . . so it does not permit municipalities to regulate methods of expression however, whenever and wherever they wish." *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005) (citing *Wheeler v. Comm'r of Highways, Comm'r. of Ky.*, 822 F.2d 586, 589 (6th Cir.1987)) (internal quotation marks omitted). In order to determine whether or not the municipal ordinances at issue impermissibly regulate speech in violation of the First Amendment, however, a court must first determine which level of scrutiny it should apply in weighing the City's interest in regulating speech against Defendant's interest in expression. When fundamental interests are limited by a legislative act, courts will apply the strictest level of scrutiny, and invalidate the law unless it is deemed necessary to serve a compelling government interest. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 199-200, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). Finally, the Supreme Court has also recognized some interests which, while not constituting fundamental interests triggering strict scrutiny, still must be examined under a heightened level of review. See, e.g., *Mcconnell v. F.E.C.*, 540 U.S. 93 (2003).

"[R]esidential signs have long been an important and distinct medium of expression," that provides "an unusually cheap and convenient form of communication." *City of Ladue v. Gilleo*, 512 U.S. 43, 55, 57 (1994). As a result, courts apply heightened scrutiny to sign ordinances that seek to regulate speech on private property. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, U.S. 135 S. Ct. 2218, 2226 (2015). Content-neutral laws, when applied to signs on private property, must satisfy intermediate scrutiny: the government may impose a "reasonable time, place, or manner restriction if it is 'narrowly

tailored to serve a significant governmental interest' and if it 'leave[s] open alternative channels of communication.'" *Wagner v. City of Garfield Heights, Ohio*, 577 F. App'x 488, 496 (6th Cir. 2014), cert. granted, judgment vacated on other grounds, 135 S. Ct. 2888 (2015) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). Finally, under the Fourteenth Amendment's due process clause, a law must be sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This is particularly important in the First Amendment context where vague statutes can have a chilling effect on the exercise of speech rights. *Id.* at 108-09. Several provisions in the City of Hastings's Sign Ordinance violate these principles and each is addressed in turn.

I. THE QUANTITY, SIZE, MATERIAL, AND TEMPORAL RESTRICTIONS THAT VARY DEPENDING ON THE SIGN TYPE, ARE CONTENT-BASED RESTRICTIONS THAT FAIL STRICT SCRUTINY

In *Reed*, the U.S. Supreme Court clarified what constitutes a content-based regulation. Laws are content-based if they cannot be "justified without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 2227. At issue in *Reed* was a town ordinance that applied different quantity, size, and time restrictions depending on the type of sign. *Id.* at 2224-25. The sign types included, "ideological signs," "political signs," and "temporal signs relating to a qualifying event," which served to direct people to an event. *Id.* The Court held that the ordinance, which drew distinctions based on the messages the signs conveyed, were content-based and did not survive strict scrutiny under the First Amendment, explaining that "a speech

regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter," and that speaker-based and event-based regulations "are all too often simply a means to control content." *Id.* at 2230-31.[2] In short, [if] some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey, [a] sign code [would be] undeniably a content-based restriction on speech." *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1266 (11th Cir. 2005).

a) The City's Sign Ordinance is Content-Based

The City's sign regulations are content based restrictions on First Amendment activity. While the City wishes to assume away this fact, looking to its Code, § 90-961's definition of a temporary sign, and the restrictions that rely on the definition, are content-based because determining the durational intent of the sign's creator, apart from looking at the material construction of the sign, requires examining the message of the sign itself. Certainly, a sign that reads, "Bake Sale, Today Only!" would easily be ascertained as a temporary sign while a sign that read "Jon Smith lives here" does not reveal any intent to be of limited duration. The definition's reliance on a the "appearance" of the sign, including the sign's message, to discern durational intent leaves the statute susceptible to discriminatory enforcement based on the content of its message, and it is presumptively unconstitutional and subject to strict scrutiny. See *Reed*, 135 S. Ct. at 2230-31. See also, *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404- 05 (8th

[2] See also *Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana*, F. Supp. 3d 2016 WL 2941329, at *8 (S.D. Ind. May 20, 2016), appeal docketed (finding Indianapolis sign ordinance's noncommercial sign regulations were content based where ordinance distinguished between noncommercial opinion signs, real estate signs, "temporary signs for grand openings and other city-recognized special events" in applying restrictions).

Cir. 1995) (finding sign regulations content-based where temporal limit imposed on political signs).

Sections 90-963 and 966's restrictions on authorized signs based on the type and function of the sign similarly requires enforcement officials to read the content of a sign to determine its category and is the "paradigmatic example of content-based discrimination." *Reed*, 135 S. Ct. at 2230; see also *Geft*, 2016 WL 2941329, at *7-8 (finding sign regulations based on "'function or purpose'" are content-based, as are "event-based" signs, where "they 'cannot be justified without reference to the content of the regulated speech.'") (quoting *Reed*, 135 S. Ct. at 2227).

Like the ordinances at issue in *Reed* and *Geft*, The Code "singles out specific subject matter for different treatment," *Reed*, 135 S. Ct. at 2230, and is presumptively unconstitutional unless it can survive strict scrutiny. See also *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) ("Even if this distinction is innocuous or eminently reasonable, it is still a content-based distinction because it singles out certain speech for differential treatment based on the idea expressed.") (internal citation omitted).

The sign ordinance further exempts certain signs based on content, "Directional, traffic warning and identification signs erected by a government agency when located within the street right-of-way" § 90-963(b), and "Flags of any nation, state, city, township, government, or government authorized agency" meanwhile all other flags are nonexempt, such as a fraternal, political, or religious affiliation. § 90-963(c). The Eleventh Circuit's decision in *Dimmitt v. City of Clearwater*, held that preference for government flags rendered sign ordinance content-based and invalidated the entire ordinance. 985 F.2d 1565(1993). Real estate signs also get special treatment based on their content. "During the time period where the property is actively listed for

sale, one temporary sign per parcel may consist of a post sign" (the only time a residential post sign is allowed). §90-971(b). These content-based restrictions will not satisfy strict scrutiny.

b) The City's Content-Based Restrictions will Not satisfy Strict Scrutiny

All of these provisions have at leat one thing in common – content-based discrimination. Each identifies particular types of signs on the basis of their content, and then creates rules specific only to those signs so identified. These provisions are content-based, and thus are subject to strict scrutiny. When applying strict scrutiny, the government bears the burden to justify its speech regulations. *Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). The City, in the instant case, asserts that the sign regulations are necessary because of aesthetic interests and public safety concerns, but these concerns are insufficient to survive strict scrutiny. Because these challenged provisions constitute facially content-based regulation of speech, they are subject to strict scrutiny and "could pass constitutional muster only if the City were able to demonstrate that the distinctions in regulations based on content 'further[ed] a compelling interest and [were] narrowly tailored to achieve that interest.'" *Geft*, 2016 WL 2941329, at *8 (quoting *Reed*, 135 S. Ct. at 2231) (alteration in original). It is not sufficient for the City to theorize a compelling interest. Instead, "[t]he [City] must specifically identify an 'actual problem' in need of solving." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000)). "Conclusory statement[s]" are not enough. *Playboy*, 529 U.S. at 822. And, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818.

Dimmitt v. City of Clearwater, 985 F.2d 1565(1993) is helpful in explaining why the City's aesthetic and safety concerns are insufficient to sustain the sign regulations. *Dimmitt* involved a local ordinance limiting the kind and number of flags which the plaintiff car dealership could display. *Id.* at 1568. The Eleventh Circuit held that the ordinance must withstand strict scrutiny, and the city responded by asserting its interests in "promoting aesthetics and in minimizing visual distractions to motorists." *Id.* at 1569. The entire ordinance was struck down. *Id.*

In the "Description and Purpose" to the Ordinance, the City proposes several justifications that are properly categorized as providing for traffic safety and preserving the aesthetic appeal of the City. See § 90-962(a). But even assuming the City's stated interests in traffic safety and aesthetics are compelling, the content-based distinctions do nothing to further those interests. There is no logical reason why an open house sign, for example, which can only be in the form of a wire framed sign, cause more aesthetic harm or traffic safety issues than would a real estate sign, which can be in the structure of a "post" sign. See *Reed*, 135 S. Ct. 2232 (finding "no reason to believe that directional signs [which have the greatest temporal restrictions] pose a greater threat to safety than do ideological or political signs"). Similarly, there is no reason why Mr. Hertzler's political campaign signs, which as temporary signs are limited in quantity to four, pose more aesthetic or traffic concerns than American flags, which as government signs, have no limit in quantity. See *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 633 (4th Cir. 2016) (holding sign code regulations that exempted "governmental or religious flags and emblems, but applied to private and secular flags and emblems" were content-based and failed strict scrutiny); *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) (holding sign ordinance exempting, among other things, "flags of

nations, states and cities" from sign regulations was a content-based regulation that failed strict scrutiny); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (holding that sign ordinance that exempted flags and insignia only of a "government, religious, charitable, fraternal, or other organization" and required a permit for all others was content-based regulation that failed strict scrutiny); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248–49 (9th Cir. 1988) (holding sign ordinance that exempted "[f]lags of the national or state government; or not more than three flags of nonprofit religious, charitable or fraternal organizations" was content-based and failed strict scrutiny). The distinctions are not narrowly drawn and serve no compelling interest. As a result, the City's citation must be dismissed.

II. THE CITY'S SIGN RESTRICTIONS ARE UNREASONABLE TIME, PLACE AND MANNER RESTRICTIONS THAT VIOLATE THE FIRST AMENDMENT

"[T]ime, place, and manner" restrictions on protected speech are valid only if they (1) regulate without regard to content; (2) "serve a significant governmental interest; and" (3) "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Even assuming, arguendo, that the City could prove that its sign regulations are content-neutral (which it cannot), the Regulations still must be found Unconstitutional as they do not satisfy the last requirement of *Ward.*

First, there is no rational reason why a permanent sign would pose more of a traffic concern or an aesthetic concern than temporary signs. The court in *Dills v. Cobb County, Georgia*, 593 F. Supp. 170, 174–75 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985), applying intermediate scrutiny to a content-neutral ordinance that imposed different setback requirements on portable signs than on permanent signs, came to the same conclusion. *Dills*, 593 F. Supp. at 172. Assuming the government's significant interest in traffic safety and aesthetics,

the court found "no real evidence that portable signs are any more dangerous than permanent signs" and no evidence "that would indicate that portable signs are any more displeasing to the eyes than permanent signs." *Id.* at 172, 174. An "ugly" sign is no less offensive "if it is permanently affixed to the ground." *Id.* at 174. Here, because the distinction between temporary and permanent signs is not narrowly tailored to any significant government interest, the City's complete ban on permanent nongovernmental signs fails intermediate scrutiny.

The Code's size and quantity limit on temporary signs similarly do not meet intermediate scrutiny. In *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587, 594–95 (4th Cir. 1993). for example, the Fourth Circuit struck down a two-sign per property limit holding that such a restriction was not narrowly tailored to the county's concern with aesthetics and traffic safety. The court found that the two-sign limit was particularly burdensome on political speech, where signs provide a homeowner a relatively cheap and convenient way to express their political views. *Id.* The court also found that there "were other less restrictive means" to promoting aesthetic and safety concerns, including design and condition regulations and setback requirements. *Id.* at 595. See also *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1076– 77 (3d Cir. 1994) (finding "the average homeowner may have few, if any, viable alternative avenues by which to communicate").

Similar to the ordinance at issue in *Arlington County Republican*, the Sign Ordinance's two-sign limit unduly burdens speech, particularly during an election when a property owner may wish to show support for multiple candidates and issues. Any potential rationale for a two-sign limit is also further undermined by the fact that the City allows an unlimited number of government signs on residential property, while limiting residents from posting two signs that

conveys a message of their choice. See, e.g., *City of Ladue*, 512 U.S. 43, 52 ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility avenues by which to communicate" of the government's rationale for restricting speech in the first place."). Mr. Hertzler is unduly burdened because he wished to express his support for more than four candidates in the 2022 election.

For similar reasons, there is no rational connection to aesthetics or safety regarding the size limitations. See *Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Florida,* 348 F.3d 1278, 1280 (11th Cir. 2003) (affirming the district court's severance of a provision limiting the maximum size of a "free speech" sign to four square feet, where the same ordinance had permitted political signs to be six square feet). The Sign Ordinance's quantity and size limitations on temporary signs fails intermediate scrutiny and is unconstitutional.

Additionally, the restrictions leave no viable alternative channels of communication, as pointed out in *Ladue*, "[R]esidential signs have long been an important and distinct medium of expression," that provides "an unusually cheap and convenient form of communication." 512 U.S. 43, 55, 57 (1994). These restrictions leave Mr. Hertzler with no alternative channels of communication.

Even if the Sign Regulations satisfied the *Ward* requirements, the Regulations would still not be permitted under a time, place, and manner analysis. As the Supreme Court and other courts have recognized, restrictions on speech "that allow arbitrary application [are] inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view*." Forsyth County*, 505

U.S. at 130-31; *Metromedia*, 453 U.S. at 515-16 (1981) ("We reject appellees' suggestion that the [sign] ordinance may be appropriately characterized as a reasonable 'time, place, and manner' restriction"); *International Union of Operating Eng'rs v. Village of Orland Park*, 139 F. Supp. 2d 950, 959-60 (N.D. Ill. 2001) ("IUOE") (finding a prior restraint incompatible with a time, place and manner analysis). The Sign Regulations contain impermissible grants of discretion, thus, the time, place, and manner analysis advocated by the City is not appropriate.

III. THE ORDINANCE'S DEFINITION OF A TEMPORARY SIGN IS UNCONSTITUTIONALLY VAGUE

In *Dep't of State v Michigan Education Ass'n*--NEA, 251 Mich App 110, 116; 650 NW2d 120 (2002), the Michigan Court of Appeals set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague. A statute may qualify as void for vagueness if:

(1) it is overbroad and impinges on First Amendment freedoms;

(2) it does not provide fair notice of the conduct it regulates; or,

(3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated. *Id.*

The City's Ordinance is void for all three reasons set out in *Dep't of State*, since the first and third way has already been discussed, *supra*, the second reason is discussed in this section.

Unless it is a government sign, a property sale sign, or less than 1.5 square feet in area or less, residential property owners in Hastings are limited to one permanent ground sign, and four temporary signs, defined as "a sign installed for a limited period of time." § 90-961. But the Sign Ordinance's definition of a temporary sign, is hopelessly vague and violates the due process

clause of the Fourteenth Amendment. "A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes." *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir. 1986) (citing *Grayned*, 408 U.S. at 108). This is in part to avoid "arbitrary and discriminatory enforcement" by government officers. *Grayned*, 408 U.S. at 108. "When First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), as amended on denial of reh'g (July 29, 1998).

The Sign Ordinance's definition of "temporary" is vague for two reasons. First, it does not specify what "limited period of time" means. § 90-961. There is no way for Mr. Hertzler to determine which of his signs are of "limited period of time" and fit this vague requirement and is at risk of violating the Code whenever he posts signs for any duration.

Second, the definition gives undue discretion to enforcement officers to discern whether the sign is "installed for a limited period of time." Sec. 90-961. In *Dills v. Cobb County, Georgia*, 593 F. Supp. 170, 174–75 (N.D. Ga. 1984), aff'd, 755 F.2d 1473 (11th Cir. 1985), for example, the court considered a similarly vague definition of a portable sign to include "any sign intended by either the sign owner or property owner to be a temporary sign." *Dills*, 593 F. Supp. at 175. The court held that "[t]he vagueness of the definition also causes constitutional problems" including how to "ascertain the intent of individual sign owners." *Id.* Ultimately, the court found that the definition of portable signs "is too vague to be constitutional because it could neither be enforced nor followed with any precision." *Id.* Similarly, in *Foti*, a municipality imposed a ban on signs on vehicles that "are parked to attract attention." *Foti*, 146 F.3d 629 at 638. The Ninth Circuit found the ordinance unconstitutionally vague because an enforcement officer must decipher "the driver's subjective intent," namely whether "the driver intends to

demonstrate or attract attention with a sign when parking a vehicle." *Id.* The court held that the officer would need to consider a "myriad of factors" in order to enforce the ban, including "the size, color, design, and shape of the signs," among other things, and that "[w]ith this range of factors to consider, there is the danger that a police officer might resort to enforcing the ordinance only against cars with signs whose messages the officer or the public dislikes." *Id.* at 639. The court ultimately found that the sign ordinance "'impermissibly delegates basic policy matters to police[ ] . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" *Id.* (quoting *Grayned*, 408 U.S. at 108-09). See also *Berger v. City of Seattle*, 569 F.3d 1029, 1047 (9th Cir. 2009) (finding permitting requirement for street performers where enforcement officials would be required "to decide whether a performer intended to 'attract a crowd,'" was unconstitutionally vague).

Here, as in *Foti* and *Dills*, the enforcement official must discern whether a residential sign "appears to be intended to be displayed for a limited period of time," Sec. 90-961., from a "myriad of factors," and leaves it subject to "ad hoc" and "arbitrary" enforcement, *Foti*, 146 F.3d at 639. Discerning how long Mr. Hertzler intends to post his signs simply from their appearance is impossible, yet it is a determination that could subject him to hundreds of dollars in fines. The Sign Ordinance's definition of a temporary sign is unconstitutionally vague, and the regulations based on this definition should be enjoined on this ground alone.

CONCLUSION

The City of Hastings's Sign Ordinance is an Unconstitutional Time, Place, Manner Restriction on the freedom of speech and expression as protected by the First Amendment to the United States Constitution. Even if this Court concluded otherwise, its time, place, manner restrictions do not satisfy intermediate scrutiny, and the ordinance itself is unconstitutionally

vague. Thus, the citation issued to Mr. Hertzler contrary to the United States Constitution renders it void.

WHEREFORE, Mr. Hertzler respectfully requests this Honorable Court dismiss the citation with prejudice, for all of the reasons stated above.

Respectfully Submitted,

Dated: December 25, 2022

_____
Daren A. Wiseley (P85220)
Wiseley Law, PLLC
Attorney for Charles Hertzler

STATE OF MICHIGAN
IN DISTRICT COURT FOR THE COUNTY OF BARRY

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via regular mail, first class, postage prepaid, to the following on this ____ of December 2022:

Emily A. Rysberg, *esq.*
200 Ottawa Ave. NW, Ste 1000
Grand Rapids, MI 49503

_____
Tina Stone
Paralegal
WISELEY LAW, PLLC