IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC. Plaintiffs, v. VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation Defendant.	)	Case No. 14-cv-9851 Hon. Edmond E. Chang

PLAINTIFF'S COMBINED MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Leibundguth Storage & Van Service, Inc. ("Leibundguth") seeks to protect its four long-standing wall signs – including a sign painted directly on the back of its building facing the BNSF railway, which contributes to 15 to 20 percent of its revenue – from four onerous provisions of Defendant Village of Downers Grove's sign ordinance that threaten their existence: the prohibition on signs painted directly on a wall of a building; the size limit for wall signs along the BNSF railway; the limit on the total aggregate size of signs; and the limit on the number of wall signs.

These provisions violate Leibundguth's First Amendment rights. The Village's attempt to defend the ordinance by simply citing the process officials undertook in adopting it does not satisfy the Village's burden to show that the provisions of the sign ordinance are narrowly tailored to advance a government interest. Additionally, in the alternative, the Court should strike down the ordinance because its content-based distinctions render it unconstitutionally overbroad. Therefore, the Court should grant summary judgment in favor of Leibundguth.

LEGAL STANDARD

Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). The Court must view the evidence and draw inferences in the light most favorable to the nonmoving party, but, to defeat a motion for summary judgment, the nonmoving

party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

ARGUMENT

I. The challenged provisions of the sign ordinance do not advance traffic safety or aesthetics and are not narrowly tailored to serve those interests.

The restrictions that Leibundguth challenges are unconstitutional because they do not advance the interests the Village has invoked to justify them – traffic safety and aesthetics – and in any event are not narrowly tailored to serve those interests.

A. The restriction on signs painted directly on a wall does not advance traffic safety or aesthetics and is not narrowly tailored to serve those interests.

The prohibition on signs painted directly on a wall found in Section 9.020(P) of the sign ordinance (other than flags and murals, which are exempt (Resp. Def. SOF 6; Pl. SOF 33)) – hereafter referred to as the "painted sign ban" – violates the First Amendment because it is not narrowly tailored to serve any government interest.

The painted sign ban applies to both commercial and noncommercial signs. (Def. SOF 6; Pl. Resp. Def. SOF 6.) Accordingly, the Court must scrutinize it under the "time, place and manner" test of *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Under *Clark*, a government may impose "reasonable time, place, or manner restrictions" on speech if "they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Id.* The painted sign ban fails the *Clark* test

because it is not narrowly tailored to advance the two government interests the Village has cited to justify it: traffic safety and aesthetics.

First, the painted sign ban does not advance the Village's interest in traffic safety *at all*. As Leibundguth's expert has stated, academic research has found that signs that are readable and conspicuous do not pose a threat to traffic safety and that signs painted directly on a wall are no less readable or conspicuous than other wall signs. (Pl. SOF 43.) The Village has presented no evidence to the contrary.[1] Moreover, the report prepared for the Village Council when it adopted the painted sign ban did not provide any traffic safety reason for the prohibition. (Pl. SOF 35.)

Second, even if the Village could show that *some* painted signs threaten traffic safety – which it has not shown – the restriction still would not be narrowly tailored because banning painted signs altogether bans readable and conspicuous painted signs, which are not a threat to traffic safety. (Pl. SOF 43.) The restriction also is not narrowly tailored because it allows flags and murals painted on a building, (Pl. SOF 33), but prohibits painted signs, even though there is no reason to believe that painted flags and murals have a different effect on traffic safety than other types of signs. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions on speech can "diminish the credibility of the government's rationale for

[1] In its opening brief, the Village did not introduce its expert report or rely on its expert testimony, but even if it does so in response to this brief, the Village's expert is not qualified to testify as an expert on these issues, as Leibundguth explained in its Motion to Exclude Expert Testimony, (Dkt. 31), which the Court denied as premature. (Dkt. 34). Plaintiff preserves the arguments contained therein, which it will argue in reply should Defendant seek to introduce its expert witness.

restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored to serve a sufficiently important governmental interest).

Third, even if the painted sign ban advances the government interest in aesthetics – which the Village has not established – it is not narrowly tailored to do so. A Village staff report supporting the painted sign ban ordinance identified three aesthetic reasons for the ban: (1) painted wall signs require on-going maintenance; (2) paint on a wall of a building is subject to water damage; and (3) painted signs on a wall is usually permanent or hard to remove. (Def. SOF 5.) These purported justifications make no sense given that the Village allows painting on brick walls in general – just not when it takes the form of a sign. (Pl. SOF 32.) In fact, the Village instructed Leibundguth to remove its painted signs *by painting directly over them* with a solid color (Pl. SOF 19), even though the painted-over sign would, of course, still require on-going maintenance, still be subject to water damage, and still be permanent or difficult to remove. The Village also allows flags and murals to be painted on buildings, even though these too would present the same concerns about maintenance, water damage, and removal. (Def. SOF 5; Pl. SOF 33.)

The painted sign ban also is not narrowly tailored to serve the ordinance's only other purported justification for it – that allowing painted signs "would allow hand painted spray paint messages," which "would cripple the enforcement ability of the Village to eradicate graffiti." (Def. SOF 5.) If the Village has an aesthetic preference against spray-painted signs, then it could simply prohibit spray-painted signs in particular. And it could easily distinguish between graffiti – painting generally not

authorized by a property owner – and painted signs authorized by a property owner. The Village's purported anti-graffiti justification is also undermined by the ordinance's exemption for murals (Pl. SOF 33) – the type of sign that most closely resembles graffiti and might in some cases be aesthetically indistinguishable from graffiti.

For these reasons, the painted sign ban is not narrowly tailored to serve the Village's interests in aesthetics and traffic safety and cannot survive First Amendment scrutiny.

B. The restrictions on the size and number of signs do not advance traffic safety or aesthetics and are not narrowly tailored to serve those interests.

The restrictions on the size and number of commercial signs in Section 9.050 of the Village's sign ordinance also violate the First Amendment because they do not advance the Village's interests in traffic safety and aesthetics and are not narrowly tailored to serve those interests. In evaluating First Amendment challenges to restrictions on commercial speech, courts follow a four-part test that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, *447* U.S. 557, 566 (1980). The fourth prong requires "a means narrowly tailored to achieve the desired objective." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The Village has the burden of

affirmatively establishing that the sign ordinance's restrictions are justified by the final three prongs. *Id.*

1. Leibundguth's signs are truthful and not misleading.

Leibundguth prevails on the first prong of the *Central Hudson* test. Leibundguth's signs advertise a lawful activity for which it is licensed – moving and storage. (Pl. SOF 15.) Leibundguth's signs simply provide the name and phone number of the business and advertise its relationship with its long distance mover. (Pl. SOF 14.)

Incredibly, the Village maintains that the sign on the back wall of Leibundguth's building facing the BNSF railway is not truthful because it says "Wheaton World Wide Mov*ers*," not "Wheaton World Wide Mov*ing*," the official name of the company that provides long distance moving services for Leibundguth. (Def. Memo 16.)

That argument is simply absurd. The sign just uses an informal variation on the business's name that could not mislead anyone. There is no company called "Wheaton World Wide Movers" that a person could believe the sign refers to. A reasonable person who is aware of Wheaton World Wide Moving would recognize that the sign refers to that company.

Moreover, the Village has not disputed the sign's truthfulness until now. The Village did not raise the issue in its motion to dismiss or answer, and the Court, in its Memorandum Opinion and Order denying Defendant's motion to dismiss, stated that "[t]here is no dispute that Leibundguth's endangered signs are not misleading and do not concern anything illegal; they simply announce the company name and

phone number, as well as a partner-business's name." (Dkt. 29 at 19). Indeed, as shown above, the Village cannot reasonably dispute this.

2. The restrictions on the size and number of signs do not advance the interests in traffic safety and aesthetics and are not narrowly tailored to advance those interests.

Assuming for purposes of this motion that the Village prevails on the second prong of the *Hudson* test because courts have concluded that traffic safety and aesthetics are substantial governmental interests, the Village nonetheless fails on the third and fourth prongs because it has failed to meet is burden to show that its restrictions on the size and number of signs are narrowly tailored to serve those interests.[2] The Village cannot satisfy its burden "by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (citations omitted). In addition, regulations cannot directly advance a substantial interest where those restrictions are inconsistent and irrational. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190-94 (1999).

a. The restriction on the size of wall signs does not advance traffic safety or aesthetics and is not narrowly tailored to serve those interests.

The Village does not and cannot show that its severe limit on the total aggregate size of signs or the limit on the size of wall signs along the BNSF railway will directly advance its interest in traffic safety. Indeed, the evidence shows that

[2] As the Court has noted, the relevant questions in this case under *Central Hudson* are "whether the Village's sign ordinance pursues a substantial governmental interest and, if so, whether it is an appropriate fit to address that interest." (Dkt. 29 at 19-20.)

limiting the size of signs could have the opposite effect: a driver looking for a particular business (and thus its sign) will be more distracted and have a harder time finding the business if the signs are smaller, thus threatening traffic safety. (Pl. SOF 44.) Further, the limit on the size of wall signs along the BNSF railway does not advance the interest in traffic safety for the additional reason that drivers on roadways cannot see a sign that only faces the railway.[3]

Even if the size restrictions did advance the Village's interests in traffic safety or aesthetics, they still would fail First Amendment scrutiny because they are not narrowly tailored to serve either of those interests. This is evident from the Village's arbitrary exemption of some signs in determining a building's total sign area. *See Gilleo*, 512 U.S. at 52 (exemptions from speech restrictions may demonstrate that they are not narrowly tailored). For example, properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign that may not exceed 225 square feet, which does not count in calculating the lot's total sign area. (Pl. SOF 28.) Buildings of four stories or more are allowed one wall sign of 100 square feet or less on no more than three sides of the building, and these are not counted against the maximum allowable sign area. (Pl. SOF 28.) The Village also does not count a panel sign in a multi-tenant shopping center, window signs, or menu boards in

[3] The Village argues that Count III, which challenges the Section 9.050(C), is moot because the Village has recently amended Section 9.050(C)(5) to allow all lots with frontage along the BNSF railroad right-of-way (including Leibundguth) to display a wall sign on the building. (Def. Memo 15.) Section 9.050(C)(5) limits the size of a wall sign facing the BNSF railroad right-of-way. (Resp. Def. SOF 9.) Leibundguth's 400 square foot wall sign on the back of its building exceeds the size limit and Leibundguth's sign is still in violation of Section 9.050(C). (Resp. Def. SOF 9.) Leibundguth's challenge to Section 9.050(C)(5), therefore, is not moot.

calculating a building's sign area. (Pl. SOF 28.) And in November 2014, the Village Council approved a Planned Development Amendment to allow Art Van Furniture's building to have 990 square feet of signs – 690 square feet more than the ordinance allows. (Pl. SOF 39.) During the Village Council's discussion on whether to allow Art Van Furniture to have 990 square feet of signs, there was *no* discussion about the traffic safety consequences of allowing such a large amount of signage. The only discussion of aesthetics was the Mayor's comment that allowing the additional signage would improve the aesthetics of the Village.[4] (Pl. SOF 40.)

Similarly, the ordinance's limit on the size of signs along the BNSF railway is not narrowly tailored to serve the interests in traffic safety and aesthetics. Again, limitation on the size of signs that are not visible from a roadway cannot affect traffic safety. (Pl. SOF 44.) Even if the Village could argue that signs of a certain size along the BNSF could affect traffic safety because some are visible to drivers on a roadway – which it cannot because, as shown above, restricting the size of signs visible to drivers does not improve traffic safety (Pl. SOF 44) – the limitation would not be narrowly tailored because it restricts all signs along the BNSF railway, even those not visible to drivers on a roadway.

The size limitation on signs facing the railway also is not narrowly tailored to serve any aesthetic interest because it sets arbitrary limits based on a building's length rather than its wall's surface area and without regard for the readability of the signs. The ordinance allows the total square footage of a wall sign along the

[4] The Village is providing a tax incentive to Art Van Furniture, rebating 50% of the sales tax generated over 15 years. (Pl. SOF 41.) The sign on the back of Leibundguth's building accounts for about 15 to 20 percent of its revenue. (Pl. SOF 16.)

railroad to be 1.5 times the total length of a building along the railroad, with a maximum of 300 square feet for any such sign. (Pl. Resp. Def. SOF 6.) This arbitrarily treats buildings with the same amount of wall space differently: for example, a building with a wall facing the BNSF railway that is 100 feet long and 12 feet high is permitted a 150-square-foot wall sign, but a building with a wall facing the BNSF railway that is 50 feet long and 24 feet high is permitted only a 75-square-foot wall sign, even though both walls are the same square feet in area. The Village has presented no evidence to explain how a building's length, rather than its wall surface, should determine the size of any signs on that wall for aesthetic purposes and has therefore failed to show that the size restriction is narrowly tailored.

The ordinance also gives no regard to whether signs limited to its size restrictions will actually be readable by train passengers and thus serve their only purpose: to communicate information. The Village advances no evidence to show that a sign of 300 square feet or less would be readable to a train passenger. It has therefore failed to show that the restriction is narrowly tailored to serve the government interests in traffic safety and aesthetics.

To justify its restrictions, the Village cites four studies that it claims "report that limiting the size and number of signs can enhance traffic safety and aesthetics." (Def. Memo at 17.) Those studies, standing alone, are not admissible as evidence to support the Village's position because they are not supported by any expert report or testimony, and the Village therefore cannot use them to meet its burden or create

a genuine issue of material fact. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995); Fed. R. Evid. 803(18). The only admissible evidence on this point comes from Leibundguth's expert, who has refuted the Village's assertions, finding no evidence of a possible link between signs and traffic accidents in the individual academic studies over the past 60 years that have explicitly researched the issue. (Pl. SOF 45.)

Moreover, even if these studies were admissible, the Village would still fail to meet its burden because it has failed to explain how the *specific* size restrictions in its sign ordinance, including the aggregate size limits, enhance traffic safety or aesthetics – let alone how they are narrowly to do so in light of the ordinance's exemption of certain signs from its size limits. Indeed, it appears that these studies do not support the proposition that an aggregate size and number limit on signs is necessary to support traffic safety or aesthetics, but rather show, as Leibundguth's expert testified, that a sign's readability and conspicuousness are the relevant factors for determining its effect on traffic safety. (Def. SOF 34; Pl. SOF 43.)

Accordingly, the Village has failed to meet its burden to show that the restrictions on aggregate size and the size of wall signs along the railway advance the interests in traffic safety and aesthetics and are narrowly tailored.

b. The restriction on the number of wall signs does not advance traffic safety or aesthetics and is not narrowly tailored to serve those interests.

Similarly, limiting the number of wall signs does not advance the Village's interest in traffic safety because, as Leibundguth's expert has explained, academic

studies – which the Village has not refuted – show that sign proliferation does not cause driver distraction and that, to the contrary, business signs aid traffic safety by helping drivers find their destinations. (Pl. SOF 44.) Limiting the number of wall signs along a railway does not advance the government's interest in traffic safety because, again, signs that only face a railway do not affect drivers on a roadway. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 190 (inconsistent and irrational restrictions cannot directly advance a substantial interest).

Moreover, in any event, the limitation on the number of wall signs to one per tenant frontage of a roadway or railway is not narrowly tailored to serve a government interest in either traffic safety or aesthetics because the ordinance places no limits on other types of signs affixed to buildings. *See Gilleo*, 512 U.S. at 52 (exemptions from speech restrictions may demonstrate that they are not narrowly tailored). It places no limit on the number of window signs or shingle signs; allows multiple window signs; and, in addition to a wall sign, allows building owners to display a shingle sign or a monument sign, a menu board, a projecting sign, an awning sign, and an under-canopy sign. (Pl. SOF 29.) Additionally, as noted above, the Village Council recently adopted a Planned Development Amendment allowing Art Van Furniture to have: a sign on the east façade of the building with no frontage, where the ordinance prohibits any sign; two signs each on the north, south, and west façades of the building, where the ordinance only allows one sign per wall; seven wall signs in total instead of the three allowed under the ordinance. (Pl. SOF 39.)

The Village's allowance of various types of signs other than wall signs – and its special exception for at least one favored business – undermine the Village's claim that its limit on the number of wall signs serves the Village's interests in traffic safety and aesthetics, and it demonstrates that the sign ordinance is not narrowly tailored to serve those interests. The limitation on the number of wall signs therefore violates the First Amendment.

II. The Village is not entitled to "deference" as it asserts.

The Village's argument in support of its motion for summary judgment is fatally flawed because the Village incorrectly argues that its burden to justify its sign ordinance under the First Amendment is light and that the Court must show "deference" to its judgment. (Def. Memo. 9-13.) As discussed above, the Village's burden is not light: as stated in one of the cases the Village cites, the government "has the burden of satisfying the third and fourth steps of *Central Hudson*" and "must demonstrate a 'reasonable fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'" *Long Island Bd. of Realtors, Inc. v. Inc. Vill. of Massapequa Park*, 277 F.3d 622, 626-27 (2d Cir. 2002) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001)). Again, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770; *see also, e.g.*, *Pearson v. Edgar*, 153 F.3d 397, 401 (7th Cir. 1998).

Pearson makes clear that the Village *must provide evidence* to show that its restrictions advance a substantial government interest and that the Court should not simply defer to the Village. There, the Seventh Circuit struck down a state statute aimed at preventing the real estate practice of "blockbusting" under the First Amendment because the state failed to provide any evidence that "blockbusting" was actually a problem in Illinois and therefore failed to satisfy the third and fourth prongs of the *Central Hudson* test. *Id.* at 402. Additionally, the court found that the state failed to provide any evidence that real estate solicitation harms or threatens to harm residential privacy. *Id.* at 404. Thus, the restriction on real estate solicitation contained in the statute did not advance the state's interest in residential privacy in a narrowly tailored way. *Id.* The court explicitly stated that it would not defer to the legislative branch when the defendant fails to provide evidence of reasonable fit. *Id.*

Here, the Village fails to provide adequate evidence to meet its burden. It merely provides evidence of the process it undertook in adopting the sign ordinance – not evidence that the restrictions it has imposed are actually narrowly tailored to address an actual problem, as *Central Hudson* (and *Pearson*) require. To document the process it undertook, the Village has simply produced some 900 pages[5] without pointing to any specific document that shows that the restrictions advance its interests in traffic safety and aesthetics. So the Village has provided no basis at all

[5] Exhibit 1 to the Village's Motion containing this documentation is not pdf-searchable, as required by this Court's standing order, which makes searching for relevant portions of this 900 pages document extremely burdensome, especially when the Village has not cited specific pages supporting its claims.

for the Court to defer to its judgment. And for the reasons explained in Part II above, the Village cannot refute Leibundguth's evidence explaining why the challenged restrictions do not advance the interests in traffic safety. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 190.

The Village attempts to avoid its burden of affirmatively establishing that the sign ordinance's restrictions are narrowly tailored to serve a government interest by citing *Fox*, 492 U.S. at 478, for the proposition that the Supreme Court has "been loath to second-guess the Government's judgment" on whether the restriction burdens substantially more speech than is necessary. But *Fox* does not call for deference to legislative judgments where, as here, the government has not provided any evidence at all affirmatively establishing that the sign ordinance's restrictions do not burden substantially more speech than is necessary. To the contrary, *Fox* explicitly distinguished the rational basis test – which does not require the government to provide evidence of how a regulation advances a government interest – from the *Central Hudson* test, stating that in a commercial-speech case such as this one "the State bears the burden of justifying its restrictions [and] must affirmatively establish the reasonable fit we require." *Id.* at 480. The Village's reliance on 900-plus pages documenting its process of adopting the sign ordinance – without specific references to the discussions on the specific regulations, let alone actual evidence that the ordinance is narrowly tailored – does not meet that burden. And, indeed, as Leibundguth has explained, the undisputed evidence shows that the

restrictions are *not* narrowly tailored to serve the interests in traffic safety and aesthetics.

III. In addition and in the alternative, the sign ordinance is an unconstitutional content-based restriction on speech under *Reed v. Gilbert*.

Even if the Court does not find that the restrictions are unconstitutional under *Clark* and *Central Hudson*, it should still find the sign ordinance unconstitutional because it is content based and cannot survive the strict scrutiny that applies to content-based restriction on speech.

A. Leibundguth has standing to challenge the sign ordinance's content-based regulations under the overbreadth doctrine.

A plaintiff who principally attacks a regulation concerning its application to commercial speech nonetheless has standing to challenge the regulation as overbroad based on its application to noncommercial speech, even if the regulation is valid as applied to commercial speech. *Fox*, 492 U.S. at 481. In other words, a plaintiff who alleges that a restriction on protected speech is overbroad may challenge that restriction even if it might be constitutionally applied to him. *Id.* at 482-83. Such an overbreadth challenge enables a plaintiff who is itself unharmed by the defect in a statute to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others. *Id.* at 484. Where an overbreadth attack is successful, the statute is obviously invalid in all its applications. *Id.* at 483.

B. *Reed v. Gilbert* provides the definition of a content-based restriction.

Content-based restrictions on speech are presumptively unconstitutional and must be struck down unless the government proves that they are narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). A restriction on speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Id.* at 2227.

The Supreme Court's recent decision in *Reed* clarified that content-based restrictions encompass more than lower courts previously assumed. Before *Reed,* lower courts understood content discrimination to include only regulations that "restrict speech because of the ideas it conveys" or "because the government disapproves of its message." *Norton v. City of Springfield*, __ F.3d __, 2015 U.S. App. LEXIS 13861, at *3 (7th Cir. Aug. 7, 2015); *see also Cahaly v. Larosa*, __ F.3d __, 2015 U.S. App. LEXIS 13736, at *9 (4th Cir. Aug. 6, 2015) ("[*Reed's*] formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality . . . ."). After *Reed,* "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Norton,* 2015 U.S. App. LEXIS 13861, at *4.

Accordingly, in light of *Reed*, the Village's reliance on *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), for the proposition that a restriction is content based only if the government adopted it "because of disagreement with the message [the speech] conveys" (Def. Memo at 7) is misplaced. As Judge Manion noted in his concurring opinion in *Norton*, *Reed's* expansion of content-based discrimination

effectively overrules the courts' understanding of content-based discrimination under *Ward*. *Norton,* 2015 U.S. App. LEXIS 13861, at *3 (Manion, J., concurring).

C. The Village's sign ordinance is content based.

Like the ordinances struck down in *Reed* and *Norton*, the Village's sign ordinance imposes different restrictions on different signs depending on their content.

First, the Village places a content-based restriction on painted wall signs: it prohibits them generally, both commercial and noncommercial, but allows noncommercial murals and flags. (Sec. 9.020(P); Pl. SOF 33.) The Village attempts to justify this discrimination on the basis that flags and murals "are decorative, and do not convey constitutionally protected commercial or non-commercial speech" (Pl. SOF 33) – which is a false distinction because flags and murals, of course, do convey constitutionally protected speech. *See Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam) (flags are protected speech); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (artistic expression is protected speech); *N. Olmsted Chamber of Commerce v. City of N. Olmsted*, 86 F. Supp. 2d 755, 767 n.7 (N.D. Ohio 2000) (murals are protected speech). It may be true that flags and murals tend to communicate a different *type* of message than other painted wall signs – but that is precisely what makes the prohibition of those other signs a content-based restriction on speech. *See Reed*, 135 S. Ct. at 2226.

Second, the Village's restrictions on the size, location, and number of certain signs discriminates on the basis of content. The Village does not restrict the size,

location, or number of certain signs based upon their content, including governmental signs; temporary decorations and signs; noncommercial flags; and memorial signs and tablets. It also imposes special size restrictions on certain signs based upon their content:

- Street address signs are limited to four square feet. (Pl. SOF 21.)
- "No trespassing" signs are limited to two square feet. (Pl. SOF 22.)
- Political and noncommercial signs, which the ordinance defines to include home occupation signs, (Pl. SOF 31), are limited to a total of 12 square feet for all such signs per lot and may not be placed on the public right-of-way. (Pl. SOF 23.)
- Real estate signs are limited to 5.5 square feet in residential zones and 36 square feet in nonresidential zones but may not exceed 10 feet in height. Real estate signs are also limited in number and prohibited in the public right-of-way, except that open house signs are allowed only on Friday, Saturday, and Sunday at certain times. (Pl. SOF 24.)
- Garage sale, rummage sale, yard sale and estate sale signs may not exceed four square feet, and are allowed in the public right-of-way, except that such signs are allowed only on Friday, Saturday, and Sunday at certain times. (Pl. SOF 25.)
- Help wanted signs must not exceed two square feet and may only be placed on a window or door. (Pl. SOF 26.)

- Vehicle signs may not remain stationary for an extended period of time for the purpose of attracting attention to a business. (Pl. SOF 27.)

D. The sign ordinance restrictions cannot survive strict scrutiny.

Because these restrictions discriminate based on a sign's content, they "can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed*, 135 S.Ct. at 2231 (citation omitted). Government interests in traffic safety and aesthetics have never been held to be compelling. *See Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 737-38 (8th Cir. 2011); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005); *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998). Because the sign ordinance's painted sign ban and limitations on size and number of signs cannot survive strict scrutiny, they are unconstitutional and invalid in all of their applications, including against Leibundguth. *See Fox*, 492 U.S. at 481.

CONCLUSION

The restrictions prohibiting Leibundguth's longstanding signs cannot be justified by the Village's interests in traffic safety and aesthetics because the Village has failed to establish that they are narrowly tailored to advance those interests. Further, under the overbreadth doctrine, the sign ordinance is content based and fails strict scrutiny. Therefore, the Court should grant summary judgment in favor of Leibundguth and against the Village, allowing it to continue to display its signs.