

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. No. 5:09-CV-00504**

WILLIAM DAVID BOWDEN,)
)
 Plaintiff,)
)
v.)
)
TOWN OF CARY,)
)
 Defendant.)
_____)

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF’S
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY
INJUNCTION**

INTRODUCTION

The issue in this case is simple – Defendant Town of Cary is attempting to suppress core political speech directed at the Town, speech that is embarrassing to the Town, by resort to a draconian sign ordinance. The First Amendment is designed to protect citizens against exactly that type of abuse.

Plaintiff William David Bowden (“Mr. Bowden”), angry at Defendant Town of Cary (“Town of Cary” or “Town”) for its treatment of him in another matter, painted a protest sign on the side of his own house. The simple sign reads, “Screwed by the Town of Cary.” The Town, citing its sign ordinance, is now threatening to fine Mr. Bowden hundreds of dollars a day, starting tomorrow, if he does not remove the sign.

In defense of his constitutionally-protected right to free speech, Mr. Bowden has contemporaneously filed a Verified Complaint, a Motion for Temporary Restraining Order, and a Motion for Preliminary Injunction. Mr. Bowden seeks to prevent the Town of Cary from further abridging his First Amendment right of freedom of speech and to forestall the Town from: (1) penalizing him for the continued display of his protest sign; and/or (2) forcing him to paint over or otherwise remove the protest sign.

Accordingly, based on the following arguments and authorities, Mr. Bowden respectfully requests entry of a Temporary Restraining Order and Preliminary Injunction against the Town pursuant to Federal Rule of Civil Procedure 65. Mr. Bowden is entitled to this relief because, as demonstrated below: (1) he is likely to succeed on the merits; (2) immediate, irreparable harm is threatened; (3) the threat to Mr. Bowden outweighs any potential harm to the Town; and (4) the injunction is in the public interest.

BACKGROUND

For several years, Mr. Bowden has been engaged in a dispute with the Town of Cary over water runoff from a road project. Specifically, Mr. Bowden claims that the Town's repaving, and later widening, of Maynard Road have caused water runoff that has damaged his home. As part of the road-widening project, the Town built up the roadbed, raising it several feet where it passes Mr.

Bowden's house. Mr. Bowden has repeatedly complained to the Town about the changes to his property, which include forced relocation of his driveway and the disappearance of several feet of Mr. Bowden's front yard, as well as the removal of several trees.

As a result of what Mr. Bowden deems to be a lack of adequate resolution of the dispute, particularly with regard to continued water runoff and resulting water damage to his home, Mr. Bowden hired a sign painter to paint a protest sign on the front of his house on Friday, July 31, 2009. The protest sign states, "Screwed by The Town of Cary," in fluorescent orange letters. The letters range from about 14" tall to about 21" inches tall.

The Notices of Code Violations

On the same day that the sign was painted on Mr. Bowden's house, the Town of Cary hand-delivered to Mr. Bowden a "Notice of Zoning Violation." The July 31, 2009 notice states that Mr. Bowden's residence "is in violation of the Town of Cary Sign Ordinance Section 9.3.2(S), Residential Signs." Section 9.3.2(S) provides, in relevant part, that:

Residential signs shall be allowed, provided that:

- (1) **Such signs shall not exceed five square feet per side in area and 42 inches in height.**
- (2) There shall be not more than two residential signs on any site containing only a single dwelling unit.

Section 9.3.2(S) of the Sign Ordinance (emphasis added in Notice of Zoning Violation). No definition of a “Residential Sign” is provided in the July 31, 2009 Notice of Zoning Violation. Additionally, no definition of “Residential Sign” is provided anywhere in the Sign Ordinance.

In the July 31, 2009 Notice of Zoning Violation, the Town advised Mr. Bowden of the following:

Corrective Action Required: Please remove all non-compliant signage that is painted on the side of your house and bring your property into compliance as outlined in 9.3.2(S) of the LDO. Failure to bring your property into compliance within 72 hours of receipt of this notice may result in additional enforcement measures including the issuance of civil citations. Once the signage is removed, please contact Brent Reck, Town of Cary Zoning Compliance Supervisor at (919) 621-3254 to close this violation.

(Emphasis in original.) The notice also advises Mr. Bowden of the following:

The Town of Cary Sign Ordinance fine structure for illegal signs is as follows:

- One hundred dollars (\$100.00) **per sign**, per day for the first day of violation.
- Two hundred fifty dollars (\$250.00) **per sign**, per day for the second day of violation.
- Five hundred dollars (\$500.00) **per sign**, per day for the third day of violation, and for each day thereafter that the sign ordinance is being violated.

(Emphasis in original.)

On behalf of Mr. Bowden, Katherine Parker, counsel for the American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NCLF), sent a

letter to the Cary Town Attorney on August 4, 2009, expressing concern that several provisions of the Sign Ordinance, both on their face and as applied to Mr. Bowden, are unconstitutional under the First Amendment. Cary Town Attorney Christine Simpson responded to the ACLU-NCLF's letter on August 18, 2009. In that letter, Ms. Simpson noted that the Town was conducting a "comprehensive review of the Town's sign ordinance." Parker followed up on September 16, 2009 with an email describing additional constitutional concerns about various other provisions of the Sign Ordinance. In that email, Ms. Parker asked for an update regarding the issue with Mr. Bowden.

Between August and November 2009, Assistant Town Manager Mike Bajorek came to Mr. Bowden's house several times, asking Mr. Bowden, "What would it take for you to take the sign down?" Mr. Bowden explained that he had no intention of taking down the sign as long as the underlying dispute remained unresolved. Mr. Bowden explained, "I have finally gotten the Town's attention with my sign. If I take it down, the attention will go away." About a month ago, Mr. Bajorek arrived at Mr. Bowden's house once again, asking Mr. Bowden to remove the sign. Mr. Bowden stated, "What would you do if it was your house?" Mr. Bajorek left without providing a response.

The next communication from the Town came on November 12, 2009, in the form of another Notice of Zoning Violation. The November 12, 2009 notice

relies on entirely different provisions of the Sign Ordinance – Section 9.3.2(X)(2)(a)1, which concerns “Wall Signs – Residential/Institutional,” and 9.8.3(B), which concerns appropriate “Sign Colors.” Section 9.3.2(X)(2)(a)1 provides:

Wall signs shall be allowed on residential/institutional properties provided that:

- (a) Single-family residential units (either attached or detached) in zoning districts or planned developments designated for such use shall be permitted one wall sign, provided that
 - 1. Such sign shall not exceed two square feet in area.

Section 9.8.3(B) provides:

All signage shall utilize the same building colors as shown on an approved site plan, and may have one additional color not found on the site plan. The use of high intensity fluorescent pigments is prohibited.

The November 12, 2009 notice provides that “within seven days of your receipt of this notice, we need for you to support your community’s sign rules and take the required corrective action to remove the sign currently painted on your house.” The notice further provides, “Please understand that your failure to follow these LDO requirements will leave the Town with no other choice than to pursue additional enforcement measures including, but not limited to, issuing civil

citations – something we’re sure no one would like to see happen.” The notice included another summary of the applicable fines, as described above.

Attached to the copy of the notice sent to Katherine Parker of the ACLU was the Town’s policy statement regarding political signs. That policy statement recognizes that “[t]he Town has intentionally adopted extremely restrictive regulations on signs in both residential and nonresidential areas....” That policy statement also describes the Town’s desire to prevent certain “overly enthusiastic individual[s]” from expressing their messages too boldly.

As set forth more fully herein, the aforementioned provisions of the Sign Ordinance violate Mr. Bowden’s free speech rights under the United States and North Carolina Constitutions. Other provisions of the Sign Ordinance compound the problem with the above provisions, including, without limitation, Section 9.1.2(B)(4), which “prohibits all signs not expressly permitted by this chapter,” and Section 9.4, which sets out “prohibited signs,” which “include *but are not limited to*” those set forth in that Section. Furthermore, Section 9.2 exempts from the ordinance entirely certain signs based on content, including works of art and holiday decorations displayed between November 15 and January 15.

ARGUMENT

In deciding whether to issue a temporary restraining order or preliminary injunction, a court must consider (1) the likelihood that the plaintiff will succeed

on the merits; (2) the irreparable harm to the plaintiff if the preliminary injunction is denied; (3) the likelihood of harm to the defendant if the requested relief is granted; and (4) the public interest. *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254 (4th Cir. 2003) (internal quotations and citations omitted); *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589, 593 (4th Cir. 2004); *Jackson v. Leake*, 476 F. Supp.2d 515, 523 (E.D.N.C. 2006).

Mr. Bowden meets the criteria for issuance of a temporary restraining order and preliminary injunction. Regarding the last criterion – the public interest – it is a hoary principle that courts can and should intervene when the first of all the amendments is threatened. *See Lyle v. Brewer*, 73 F. Supp.2d 615, 629 (E.D. Va. 1999) (“[W]henver there is a possibility that constitutionally protected rights will be infringed by the chilling of free speech, the public interest weighs in favor of protecting the constitutional rights of the people.” (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

I. Mr. Bowden Is Likely to Succeed on the Merits.

A. The Sign Ordinance Burdens Core Political Speech on Private Property Based on Content and Cannot Survive Strict Scrutiny.

Courts have long held that noncommercial speech on private property is subject to the highest level of free speech protection. *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (holding that signs on residential property are “a venerable

means of communication that is both unique and important.”). As the Court stated in *Ladue*, “[a] special respect for individual liberty in the home has long been a part of our culture and law [citations omitted]; that principle has special resonance when the government seeks to constrain a person’s ability to *speak* there.” *Id.* at 58 (emphasis in original). North Carolina courts have made clear that the North Carolina Constitution imposes an even more stringent standard than the United States Constitution on government attempts to regulate speech. *E.g.*, *Corum v. Univ. of North Carolina*, 330 N.C. 761, 781-83, 413 S.E.2d 276, 289-90 (1992).

Moreover, the speech burdened in this case is core political speech that is directed at the very government entity seeking to suppress that speech. As noted by the Fourth Circuit, such core political speech enjoys heightened protection. *See Arlington County Repub. Committee v. Arlington County*, 983 F.2d 587, 593 (4th Cir. 1993) (noting that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection” (internal quotations and citations omitted)).

Most importantly, the Sign Ordinance and the Town’s enforcement of it against Mr. Bowden are content-based because the Sign Ordinance favors certain content over other content by providing complete exemptions to its restrictions for works of art, holiday decorations displayed between November 15 and January 15, and other categories of speech. Sign Ordinance § 9.2. Other federal courts

dealing with similar ordinances have recognized that such exceptions and classifications render the ordinances content-based. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir.2005) (faulting a sign ordinance’s content-based holiday decorations exemption because “a homeowner could plant a giant illuminated Santa Claus or a jack-o-lantern in his front yard, but not a figure of, say, the President or the Mayor. An illuminated reindeer would be permissible, whereas a less festive animal such as a dog would not.”); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1403-04 (8th Cir. 1995) (holding that sign ordinance was content-based due to differential treatment of political and commercial signage); *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1333 (M.D. Fla. 2009) (“Yet in concluding that the Painting and the Banner were subject to the permit requirement or spatial constraints, Defendant necessarily examined their content and determined that neither was art work, a holiday decoration, or any other sign exempted under the Code. The City then declined to extend protections to Plaintiffs’ First Amendment banner that would have been extended to a banner exclaiming ‘Happy Holidays.’”); *McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659, 663 (N.D.W.Va. 2006) (finding that sign ordinance was content-based “since the Ordinance’s temporal restrictions apply only to limited categories of signs based on what those signs say”); *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282, 293 (S.D.N.Y. 2002). In short, an ordinance

that provides specific exemptions that effectively discriminate on the basis of a sign's message, as is the case here, is content-based. *See City of Ladue*, 512 U.S. at 51 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-14 (1981)); *see also Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed therein are content-based.”); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 435 (4th Cir. 2007).

Consequently, the Sign Ordinance provision at issue, and the Town's demand that Mr. Bowden remove his sign, are content-driven restrictions on protected speech. Such content-based restrictions are presumed impermissible and must survive strict scrutiny. *E.g., Texas v. Johnson*, 491 U.S. 397, 412, 413 (1989) (holding that where conduct is restricted *because of* the message expressed, the regulation must survive the most exacting scrutiny); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding that content-based restriction on noncommercial speech must be “necessary to serve a compelling state interest”).

To survive strict scrutiny, the Town must demonstrate that the Sign Ordinance, and its application to Mr. Bowden, are necessary to serve a compelling government interest and that they are narrowly drawn to achieve that end. *E.g.,*

Goulart v. Meadows, 345 F.3d 239, 248 (4th Cir. 2003). The requirement that a restriction on speech be narrowly drawn requires the regulation to be the “least restrictive” alternative available. *E.g.*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

The Town of Cary can provide no evidence to demonstrate that its Sign Ordinance, and its application to Mr. Bowden, are narrowly tailored to serve a compelling state interest and are the least restrictive alternatives available. Presumably the asserted interests are traffic flow and safety and ensuring a consistent and pleasing aesthetic scheme. Neither is “compelling,” particularly the latter. *E.g.*, *Complete Angler*, 607 F. Supp. 2d at 1334 (“While interests in aesthetics and traffic safety may be substantial, they are not per se so compelling as to justify content-based restrictions on signs.”) Moreover, the Sign Ordinance and its application are not narrowly tailored to those interests. Critically, regarding the alleged traffic concerns, Mr. Bowden is aware of no evidence that traffic has been impeded or rendered unsafe by his sign, as explained below.

B. Even if Subject to Intermediate Scrutiny, the Sign Ordinance and its Application to Mr. Bowden are Unconstitutional

Even if this Court were to find that the Sign Ordinance provisions at issue in this case and their application to Mr. Bowden were content neutral, the restrictions still do not survive intermediate scrutiny. To justify a content-neutral regulation, the government must demonstrate that the regulation has been

narrowly tailored to serve a significant government interest and that it has left open “ample alternative channels of communication.” *E.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

In order for a regulation to be “narrowly tailored” under intermediate scrutiny, the government does not have to have eliminated all less restrictive alternatives. Nevertheless, the regulation must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478-79 (1989) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Rather, what is required is a “fit” between the objective of the regulation and the means chosen to accomplish that objective. The “fit” need not be perfect, but it must be reasonable; that is to say, the objective and the means must be “in proportion.” *Fox*, 492 U.S. at 480; *Arlington County Repub. Committee*, 983 F.2d at 595.

While traffic flow and safety and aesthetic concerns may be substantial government interests, the government must be able to demonstrate “specific aesthetic and traffic problems” arising from the sign or signs at issue. *Arlington County Repub. Committee*, 983 F.2d at 594. In this case, Mr. Bowden is aware of no such specific problems. Perhaps most importantly, he is aware of no accidents or specific traffic impediments or other traffic problems, aside from the occasional (intended) glances from passers-by. And it seems axiomatic that a government

cannot justify a prohibition or limitation of speech based merely on the fact that too many people are listening to or reading that speech; if the Town asserts merely that many people are looking at Mr. Bowden's sign, without showing that there are specific traffic problems, then it has shown only that Mr. Bowden's speech is effective and should be protected. The First Amendment would be hoist on its own petard if "too many listeners" were a basis for prohibiting speech.

Additionally, any attempt by the Town to justify its stringent size restriction as furthering an interest in traffic safety is undermined by its willingness to allow larger signs of different classifications, such as agricultural signs (sixteen square feet in area (§ 9.3.2(B)(4)); directory signs (sixteen square feet in area (§ 9.3.2(G)(1)); and menu boards (forty-two square feet in area (§ 9.3.2(N)(1)). Motorists see such signs just down the street from Mr. Bowden, yet apparently the Town does not believe that such signs pose a traffic hazard.

When it comes to aesthetic concerns, the only such concern would appear to be the content of Mr. Bowden's message, including possibly the assertion that his message is "offensive." But that is not only an unspecific concern, it is impermissible. *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971) (in protecting the right to wear a jacket stating "Fuck the Draft," noting that "offensive" language is protected and that "one man's vulgarity is another man's lyric"). And here, of course, Mr. Bowden's message is not profane or silly or

“needlessly” offensive – it is a direct political statement against his government. Certainly the Town cannot justify its action based on some gauzy “aesthetic” standard that could disallow any disliked speech.

Furthermore, the Town’s desire to promote aesthetics is also undercut by its permitting of the larger signs noted above. It seems strange that the Town of Cary actually provides more protection for commercial signs, whether distracting or “ugly,” than it does for core political speech at a person’s own home. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 562-63 (1980) (explaining that commercial speech receives less protection than other types of speech, especially political speech).

Finally, even if Mr. Bowden had not raised a substantial question as to whether the Sign Ordinance and its application to him were narrowly tailored to further an important government interest, the Town’s actions would still be unconstitutional because they do not leave open ample alternative means of communication. Any size restriction that renders residential signs unreadable by passersby – on foot or in a vehicle – is functionally indistinguishable from an absolute ban on residential signs. *See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (“The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.” (internal quotations and citations

omitted)); *see State v. Miller*, 416 A.2d 821, 828 (N.J. 1980) (“The size limits [on residential signs], if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech.”). Even if a sign is readable upon close inspection if a motorist or pedestrian happens to notice it, the message from a large sign that is easily visible is obviously quite different from the message from a small sign that may not attract nearly as many viewers and just doesn’t project the same punch. *E.g., Verrilli v. Concord*, 548 F.2d 262, 265 (9th Cir. 1977) (striking down an ordinance that restricted temporary signs to four square feet and stating that limitations on the size of temporary residential signs may only be upheld if they are not “so restrictive as to foreclose an effective exercise of First Amendment rights.”); *City of Coeur D’Alene*, 262 F.3d 856, 866 (9th Cir. 2001) (“If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication.”) (internal quotations omitted); *Miller*, 416 A.2d at 828 (analyzing the impact of sign dimensions).

Furthermore, it is important to note that residential signs are a particularly important medium of communication. *Ladue*, 512 U.S. at 54 (recognizing that residential signs are a “unique and important” form of communication). This is because:

[r]esidential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have *no practical substitute*. Even 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 or not participating in some public debate.

Id. at 57 (emphasis added) (internal citations omitted). Notably, residential signs are especially important if they “react to a local happening or express a view on a controversial issue” because they “both reflect and animate change in the life of the community.” *See id.* at 54.

Here, the Sign Ordinance allows Mr. Bowden to put up a two-square-foot wall sign (not in fluorescent letters). But such a wall sign – indeed, even a sign that is twice that size – is functionally unreadable by passersby, whether on foot or in cars. It is true that Mr. Bowden can put up other signs to express his message in addition to the two square feet that the Town allows for his wall sign. For example, he can put up two five-square-foot “residential signs” – each about 27” by 27”. Sign Ordinance § 9.3.2(S). But none of these alternatives provide an adequate avenue for Mr. Bowden to express his views. A 27” x 27” sign is barely visible, if at all, from the road, and in any event it would convert Mr. Bowden’s message into something vastly different than what it currently is. Furthermore, it makes no sense to consider the fact that Mr. Bowden can put up two such signs,

unless the Town would allow him to stitch them together to create a larger sign (unclear, but doubtful). That is, allowing someone to put up ten one-square-foot signs is not the same as allowing someone to put up one ten-square-foot sign.

In the end, the Town of Cary's goal is clear: to avoid the "unseemly" nature of signs like Mr. Bowden's. To do so, it has crafted an ordinance that effectively neuters the power of such signs. In short, if the Sign Ordinance allows it, it's largely ineffective. So it is no surprise that the Sign Ordinance provides Mr. Bowden with no real alternatives for his speech.

C. Several Other Provisions of the Sign Ordinance Compound the Problem and are Invalid

In addition to the aforementioned provisions of the Sign Ordinance that violate Mr. Bowden's free speech rights, other provisions of the Sign Ordinance compound the problem and are invalid. Section 9.1.2(B)(4), for example, "prohibits all signs not expressly permitted by this chapter;" Section 9.4, which sets out "prohibited signs," states that such signs "include *but are not limited to*" those set forth in that Section. These provisions, both of which are implicated in this case, are unconstitutionally vague and overbroad and therefore invalid. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (discussing First Amendment overbreadth).

Likewise, the Sign Ordinance vests unlimited discretion in the Town to determine what is a "work of art" and therefore exempt from the ordinance. In

this case, it is entirely possible that Mr. Bowden’s sign is a “work of art” – depending on who gets to decide, of course. Indeed, it seems a difficult if not impossible task to meaningfully distinguish between a sign like Mr. Bowden’s and visual “art.” (For that very reason, Mr. Bowden has alleged in the alternative that his sign is a work of art.) The First Amendment does not allow such “unbridled discretion” to be placed in a government official, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) – a sort of First Amendment corollary of the criminal rule of lenity, albeit one that does not even allow ambiguity in the first place.

II. Absent Injunctive Relief, Mr. Bowden Will Suffer Immediate, Irreparable Harm

Mr. Bowden seeks to vindicate his rights under the First Amendment, rights that rank among the most fundamental in our society. Each day that Mr. Bowden is threatened with, or especially levied with, ever-growing fines for failing to remove the sign is a day that his constitutional rights are denied. *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *accord id.* at 374-75 (Stewart, J., concurring); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) (“Violations of first amendment rights constitute per se irreparable injury.”); *Lytle v. Brewer*, 73 F. Supp.2d 615, 620 (E.D. Va. 1999) (citing *Elrod* for the proposition that “[i]t is clearly established that a loss of First

Amendment rights, even temporarily, constitutes irreparable injury”). Specifically, courts have held that any (ultimately impermissible) chill on free speech constitutes an injury and violation of the First Amendment. *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392 (1988) (“the alleged danger of [the challenged statute] is, in large measure, one of self-censorship; a harm that can be realized even without” enforcement); *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) (stating that “constitutional violations may arise from the deterrent, or ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights”). The imposition or threatened imposition of fines constitutes an obvious chill on speech. *E.g.*, *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (noting that the fear of civil penalties can be as inhibiting of speech as the threat of criminal prosecution); *Imaginary Images, Inc. v. Evans*, 593 F. Supp. 2d 848, 862 (E.D. Va. 2008) (“Further, Plaintiffs may face the threat of civil penalties for violation of these challenged statutes [pertaining to speech], which clearly constitutes irreparable harm.”).¹

The Town has made it clear that it will begin assessing hundreds of dollars in fines each day, beginning today,² if Mr. Bowden does not comply with the

¹ Many of these cases also discuss standing. As explained in those cases, a litigant like Mr. Bowden who is threatened with enforcement of an ordinance that allegedly violates his First Amendment rights has standing.

² The Town’s Notice of Zoning Violation of November 12 stated that enforcement would begin on November 19, but counsel for the Town agreed with the undersigned to delay enforcement for one day while this case was discussed. The Town has

Town's demands. Case law is clear that this threat chills Mr. Bowden's and others' speech and constitutes an injury; if fines are actually levied, that is all the more true.

III. There is Little or No Harm to the Town if Relief is Granted

Unlike the threatened injury to Mr. Bowden, who risks losing fundamental constitutional rights, any potential harm that injunctive relief might cause the Town is trivial. Mr. Bowden's protest sign poses no public threat, other than continued embarrassment to the Town. The sign has been up for almost four months, and the Town has only now decided to enforce the Sign Ordinance. Even if the Town ultimately prevails in this lawsuit, it can begin levying fines then – fines that will accrue rapidly and almost certainly have their intended effect immediately.

IV. The Public Interest Favors Issuance of an Injunction

The public interest favors issuance of an injunction because it is always in the public interest to prevent the violation of a party's protected First Amendment rights. *E.g.*, Lytle, 73 F. Supp.2d at 629 (“[W]henver there is a possibility that constitutionally protected rights will be infringed by the chilling of free speech, the public interest weighs in favor of protecting the constitutional rights of the people.” (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). In other words, First

suggested in correspondence that Mr. Bowden's ability to file an appeal of a Notice of Zoning Violation renders any harm not immediate or irreparable, but the case law about the chilling effect is obviously to the contrary.

Amendment cases like this one present the classic case for issuance of an injunction.

V. Bond Should be Minimal

If the Court grants relief and sets a bond, Mr. Bowden respectfully requests that he be required to post only a minimal cash bond. Federal Rule of Civil Procedure 65(c) requires that the party seeking the preliminary injunction give security “in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined.” The Fourth Circuit has held that the rule requiring bond is mandatory and cannot be waived. *Md. Dep’t of Human Res. v. U.S. Dep’t of Agric.*, 976 F.2d 1462, 1483 (4th Cir.1992). However, the Court has discretion to set the bond at a minimal amount that the Court considers to be proper. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999) (providing that a nominal bond suffices where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it). Because Mr. Bowden seeks to vindicate his fundamental right of free speech under the First Amendment and the North Carolina Constitution, this case implicates the public interest and the balance of hardships tips sharply in favor of Mr. Bowden. Defendant will suffer no monetary harm from being enjoined.

CONCLUSION

Mr. Bowden respectfully requests that this Court enter a Temporary Restraining Order and a Preliminary Injunction, as set forth in the accompanying motions and Verified Complaint.

Respectfully submitted this 19th day of November, 2009.

s/ Mark R. Sigmon

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