UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS K. JONES,	:	
Plaintiff	:	
v.	:	**C.A. No. 08-**
	:	
TOWN OF WEST WARWICK, by and through its Treasurer, **Malcolm A. Moore**, and **FRANK VENEZIA,** in his individual and official capacities as Acting Building Official for the Town of West Warwick,	:	
Defendants	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION

This action is brought by the Plaintiff, Thomas K. Jones, seeking declaratory and injunctive relief for acts and/or omissions of Defendant Town of West Warwick ("Town") and Defendant Frank Venezia, in his individual and official capacities as Town Acting Building Official ("Venezia"), in violation of Plaintiff's right to freedom of speech protected under the First and Fourteenth Amendments to the United States Constitution, actionable pursuant to 42 U.S.C. §1983, and under Article 1, §21 of the Rhode Island Constitution.

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff has filed a motion seeking temporary and preliminary injunctive relief to restrain and enjoin Defendants from enforcing section 5.10 of the Town Zoning Ordinance entitled "Signs" and subsection 3.74.11 ("Town sign ordinance"), so as to prohibit the erection and display of political signs, including but not limited to candidate campaign signs or issue signs, whether or not either is the subject of a pending ballot question or election or are considered "off-premises," or from subjecting the posting of any such signs to more stringent size or other limitations than that imposed on non-political signs. Plaintiff also seeks to specifically restrain and enjoin Defendants from enforcing or

attempting to enforce the Town sign ordinance with respect to any eight (8) foot by four (4) foot free standing political signs erected by the Plaintiff within the Town, whether relating to his candidacy or the Shipwreck Falls Water Park or any other issue or cause, or from in any way applying more stringent limitations on political signs erected by the Plaintiff than are applied to any other political signs posted within the Town.

II. SUMMARY

Plaintiff was and is a candidate for State Representative, District 27, which includes part of the Town of West Warwick, and an outspoken public opponent of the Water Park ("Water Park") designated to be constructed in the Town Business Park. On the last day of July 2008, Plaintiff purchased and erected numerous eight (8) foot by four (4) foot free standing signs at locations throughout the Town promoting his candidacy for office. He subsequently purchased and erected numerous similar signs at locations throughout the Town, critical of the proposed construction of the Water Park in the Town. In the last week of August, 2008, Plaintiff purchased and erected Water Park signs at various locations in the Town which included the following language: "Your kids cannot attend the water park unless you pay $350.00 for a hotel room." Following the erection of the foregoing signs, Plaintiff endured a relentless and patently unconstitutional effort by the Defendants to prohibit his display of signs in the Town critical of the Water Park or promoting his candidacy.

The Town sign ordinance which the Defendants were purportedly enforcing is facially unconstitutional because it imposes content-based limitations favoring non-political signs over political signs, including a ban on non-ballot question political issue or cause signs and durational limitations, which have uniformly been held to be unconstitutional. Moreover, the Town sign ordinance is also facially unconstitutionally vague or overbroad as it fails to provide reasonable notice of what conduct it prohibits and authorizes arbitrary and discriminatory

enforcement—which is precisely what has occurred in this case. Finally, the Town sign ordinance as-applied by the Defendants in selectively and adversely enforcing the same against the Plaintiff, while permitting the continued display, without citation or sanction, of numerous political signs of other candidates posted in the Town of the same or similar size as Plaintiff's signs, or which, in any event, exceeded the maximum size for a political sign under the ordinance, constitutes unconstitutional viewpoint and content-based discrimination in violation of Plaintiff's right to freedom of speech.

Accordingly, Plaintiff seeks and is entitled to the grant of a Temporary Restraining Order and Preliminary Injunctive Relief to restrain and enjoin Defendants from enforcing a facially unconstitutional sign ordinance against Plaintiff in a content and viewpoint based discriminatory manner.

III. MATERIAL FACTS

Chronology of Events

At all relevant times, Plaintiff was either a candidate in the Republican Party primary or a general election write-in candidate for State Representative, District 27, which includes parts of the Towns of Coventry and West Warwick and the City of Warwick. Complaint ("Comp.") at ¶6. Plaintiff also was and is an outspoken public opponent of the Water Park. *Id*. at ¶7. On July 31, 2008, Plaintiff purchased and erected numerous eight (8) foot by four (4) foot free standing signs at locations throughout the Town, including on his own property, promoting his candidacy in the Republican Party primary for the State Representative, District 27 seat ("campaign signs"). *Id*. at ¶8. Between the last week of August 2008 and September 4, 2008, Plaintiff purchased and erected numerous eight (8) foot by four (4) foot free standing signs at locations throughout the Town, including on his own property, critical of the proposed construction of the Water Park in the Town ("Water Park signs"). *Id*. at ¶9. On August 27, 2008, Plaintiff purchased and erected

Water Park signs at various locations in the Town which read, in pertinent part, "Your kids cannot attend the water park unless you pay $350.00 for a hotel room."

Up until the Plaintiff erected the "$350.00 hotel room" Water Park signs, there was never any complaint from the Defendants relative to the size, location of configuration of any of his signs. In fact, there were numerous other political signs posted in the Town at the time of the same or similar size. *Id*. at ¶22. At many, but not all, of the foregoing locations, the Plaintiff also purchased and erected campaign signs. *Id*. at ¶11.

The Water Park signs were erected by Plaintiff, in part, in response to claims made by certain candidates for political office in the Town who were publicly supporting construction of the Water Park, including Acting Town Council President Peter Calci. *Id*. at ¶13. On Sunday, August 31, 2008**,** Councilman Calci drove to the home of Antonio Lima, where one of the "$350.00 hotel room" Water Park signs was erected, and unsuccessfully attempted to persuade Mr. Lima to remove the sign. *Id*. at ¶14. On Tuesday, September 2, 2008, Plaintiff attended a meeting of the Town's Town Council. *Id*. at ¶15. Councilman Calci announced at the meeting that Plaintiff had to remove his Water Park signs and campaign signs because they purportedly exceeded the maximum size permitted under the Town Zoning Ordinance. *Id*. On Wednesday, September 3, 2008, Plaintiff was advised that Councilman Calci attempted to solicit a local business owner to complain to Defendant Venezia about the Water Park signs, so that the Plaintiff could be cited for a fine of $500.00 per day, per sign. *Id*. at ¶16. On Saturday, September 6, 2008, Plaintiff received a phone call from the Town Police Department, wherein a Town police officer advised Plaintiff that his campaign signs were purportedly in violation of the Town Zoning Ordinance and that Plaintiff or his attorney should contact the Town Acting Building Official. *Id*. at ¶17.

On Monday, September 8, 2008, Plaintiff, along with, on information and belief, all the other owners of properties on which a Water Park sign had been erected in the Town, received a written notice dated September 8, 2008 hand-delivered by Defendant Venezia, in his capacity as the Acting Town Building Official, notifying them that they were in purported violation of the Town sign ordinance. *Id*. at ¶18. Defendant Venezia is the Town official authorized and empowered to enforce the provisions of the Town Zoning Ordinance. *Id*. at ¶3. The foregoing September 8th notices read, in pertinent part, "**Specifically, the water park sign is too large**. We are asking that the sign be removed in 24 hours. A fine may be assessed under section 28 of the zoning ordinance." *Id*. at ¶19 (emphasis added).

Defendant Venezia confirmed that only owners of property where Plaintiff's Water Park signs were posted received the foregoing notices of violation. *Id*. at ¶21. At the time the foregoing September 8th notices were served there were at least 27 other locations in the Town, some in highly visible locations in the proximity of Town Hall, on which were erected political signs of the same or similar size as Plaintiff's Water Park signs and campaign signs, or which, in any event, exceeded the maximum size for a political sign under the Town sign ordinance. *Id*. at ¶22. Many of the property owners to whom the foregoing September 8th notices were sent contacted Plaintiff and expressed concern they would be fined by the Defendants and requested that Plaintiff remove his Water Park signs and campaign signs. *Id*. at ¶23. The demand for compliance within 24 hours of the foregoing September 8th notices coincided with the September 9, 2008 primary election scheduled in the Town the next day. *Id*. at ¶23. Typically, the minimum period of time within which to remedy a purported violation of the Town Zoning Ordinance involving a non-emergency or life threatening violation of the same or similar type is seven (7) to thirty (30) days, not twenty-four (24) hours. *Id*. at ¶25.

On September 8, 2008, the Rhode Island Affiliate of the American Civil Liberties Union ("RIACLU") faxed and mailed a letter to Defendant Venezia warning that the Town sign ordinance was vague, confusing, discriminated on the basis of content, and that it was therefore unconstitutional on its face, and any attempt to levy fines or enforce the ordinance provision would constitute a clear violation of the free speech rights of the subject property owners. *Id*. at ¶26. The foregoing letter also expressed concern that the Defendants were unconstitutionally selectively enforcing the Town sign ordinance by targeting only Plaintiff's Water Park signs and campaign signs. *Id*. at ¶27.

Notwithstanding the foregoing letter from the RIACLU, Defendants sent a subsequent written notice dated September 10, 2008 to Plaintiff, along with many of the other owners of properties on which a Water Park sign had been erected in the Town, once again claiming they were in purported violation of the Town sign ordinance, but now allowing seven (7) days within which to remove the signs—thus evidencing the fact that the September 8th notice mandating compliance within 24 hours was both unreasonable and extraordinary. *Id*. at ¶28. The foregoing September 10th notice of violation also provided, in pertinent part, in bold print as follows: "**Specifically, the water park sign on your property does not meet the dimensional requirements of the sign ordinance. The sign shall be removed."** *Id*. at ¶29. The September 10th notice of violation also threatened recipient property owners with a fine not exceeding $500.00 per day for each offense, for each day of violation. *Id*. at ¶30. On September 10, 2008, Plaintiff received information from a reliable source within the employ of the Town that the Defendants were planning to impose fines of $500.00 per day, per sign on Plaintiff and others to whom notices of violation had been sent. *Id*. at ¶32.

Although Plaintiff believed then, and still believes now, that the Defendants' demand that his Water Park signs and campaign signs be removed was unlawful and in violation of his right

to freedom of speech, as well as the rights of the property owners who granted him permission to erect the signs, Plaintiff removed all the signs he erected in the Town on September 10, 2008, in order to protect himself and innocent property owners from the risk of incurring fines. *Id*. at ¶33.

On September 14, 2008, Plaintiff sent a letter to Defendant Venezia expressing concern that, among other things, the Defendants were selectively enforcing the Town sign ordinance by targeting only Plaintiff's Water Park and campaign signs, while not enforcing the provision with respect to political signs of other candidates posted in the Town of the same or similar size as Plaintiff's signs, or which, in any event, exceeded the maximum size or the one sign per candidate or issue limit for political signs under the Town sign ordinance. *Id*. at ¶34. Enclosed in the foregoing September 14, 2008 letter, Plaintiff provided Defendant Venezia with a list of approximately 50 signs erected in the Town in violation of the Town sign ordinance, including approximately 27 political signs which exceeded the maximum size permitted under the Town sign ordinance, and demanded that the Defendants enforce the ordinance in a uniform and consistent manner. *Id*. at ¶35. Notwithstanding the foregoing complaint and demand, the Defendants have failed and publicly refused to uniformly and non-selectively enforce the Town sign ordinance. *Id*. at ¶36.

As a consequence, there are currently at <u>least 97 political signs posted within the Town which exceed the maximum size permitted under the Town sign ordinance</u>, including many of the same or similar size as Plaintiff's Water Park signs and campaign signs. *Id*. at ¶37.

Town Sign Ordinance

"Political signs" are defined in subsection 5.10.2 under section 5.10 of the Town Zoning Ordinance entitled "Signs" as follows:

> Any sign displayed so as to advise voters of a candidate or position in a forthcoming election. Each lot shall be allowed without permit one sign per candidate or issue, each sign not to exceed eight square feet. Off-premises political signs are prohibited. All political signs must be removed within seven days of the political election or event.

Subsection 3.74.11 of the Town Zoning Ordinance further defines a "political sign" as a "[t]emporary sign designating a candidate for elective office, or other matter on the ballot." *Id*. at ¶¶38-39.

Content-Based Regulation of Speech

The Town sign ordinance regulates political speech based on content and in a more restrictive manner than other types of speech, among other ways, as follows:

a. Limiting political signs to a maximum of eight (8) square feet in area, while permitting construction signs of up to thirty (30) square feet, directory signs of up to sixty (60) square feet, free standing signs of up to forty (40) square feet, real estate signs of up to thirty-two (32) square feet, subdivision estate signs of up to thirty-two (32) square feet, residential zone signs of up to twelve (12) square feet, and subdivision identification signs of up to sixteen (16) square feet.

b. Requiring the removal of political signs within seven (7) days of the political election to which they relate, while permitting almost all other types of signs, in particular, signs advertising commercial activities, to be permanent in nature.

c. Prohibiting signs which relate to political matters not the subject of a pending election or ballot question.

d. Prohibiting off-premises political signs, but permitting signs with non-political content to be displayed off premises on billboards, banners and the like. *Id*. at ¶40.

Town Sign Ordinance is Vague, Overbroad and Confusing

The Town sign ordinance is vague, overbroad and confusing, and chills the exercise of free speech by, among other things:

a. Permitting political signs of up to eight (8) square feet under the definition of "political sign" in subsection 5.10.2, but purporting to limit such signs under the definition of "residential sign" to only four (4) square feet.

b. Purporting to prohibit off-premises political signs, whereas there is typically no "premises" to which a ballot question political sign relates, while a candidate related political sign would appear to be technically "off-premises," and therefore prohibited everywhere but at the home or campaign headquarters of a candidate. *See also* subsection 5.10.5. (prohibiting all off-premises signs not expressly permitted). *Id*. at ¶41.

Accordingly, by failing to provide clear notice as to what is and is not permitted, members of the public are deterred from engaging in political speech by the potential of prosecution and the imposition of monetary penalties under the Town sign ordinance. *Id*. at ¶42.

Restrictions on Plaintiff's Free Speech

Plaintiff's right to freedom of expression was and continues to be substantially damaged and curtailed as a result of the conduct of Defendants, specifically the impairment of his ability to communicate both his political candidacy and his opposition to the Water Park to potential voters and members of the public generally. *Id*. at ¶44. The general election scheduled for November 4, 2008 is only a few weeks away, yet Plaintiff is unable to post within the Town, including on his own property, a) any of the forty-six (46) eight (8) foot by four (4) foot free standing Water Park signs and/or campaign signs he previously purchased, due to the

Defendants' foregoing selective enforcement action, or b) any other political signs of any size, insofar as he is uncertain as to what size of sign is and is not permitted. *Id*. at ¶45. In future elections, Plaintiff would also like and intends to erect and display signs at locations within the Town, including on his own property, to communicate, among other things, his candidacy for political office, his opposition to or support of various issues, and/or his support of or opposition to candidates for political office. *Id*. at ¶46. However, both the vague and confusing wording of the Town sign ordinance and the selective and arbitrary enforcement of the same by the Town have left the Plaintiff uncertain as to what is and is not permitted. *Id*. at ¶47. Accordingly, Plaintiff is reluctant to expend time and money to erect and display political signs of any size at locations within the Town, insofar as he faces potential prosecution and the imposition of monetary penalties under the Town's sign ordinance as well as the expenditure of additional time and money should he be cited for purportedly violating the ordinance and ordered to remove any signs erected. *Id*. at ¶48.

Unless Plaintiff is immediately permitted to erect and display his Water Park signs and campaign signs and thereby communicate his candidacy and position on the Water Park issue prior to the general election scheduled for November 4, 2008, he will be unable to reach and convey information to potential voters prior to the election. *Id*. at ¶80.

IV. ARGUMENT

The Importance of Political Signs

The Supreme Court has held that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[1] Communication by signs

[1] *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989).

and posters is virtually pure speech.[2] The Supreme Court has further held that residential signs are a form of unique expression entitled to the highest degree of protection under the Free Speech Clause of the First Amendment.[3] Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, insofar as, by their location, such signs can provide information about the identity of the "speaker."[4] A person who puts up a sign at his or her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.[5]

Many people do not have the time to actively participate in political campaigns, nor do they have the money to make substantial financial contributions to candidates or causes they support. Political signs are an unusually cheap and convenient form of communication that may have no practical substitute, by which people of modest means may become involved in political campaigns and show their support for a candidate or cause.[6] Political sign restrictions generally have the effect of favoring incumbents over challengers, since one of the major obstacles for any challenger in a political campaign is name recognition--something which the challenger usually lacks and an incumbent usually has. Political signs are a simple and inexpensive means for a

---

[2] *Arlington County Republican Comm. v. Arlington County, Virginia,* 983 F.2d 587, 593 (4th Cir. 1993)(citing *Baldwin v. Redwood,* 540 F.2d 1360, 1366 (9th Cir.1976), *cert. denied, sub nom., Leipzig v. Baldwin,* 431 U.S. 913 (1977)).

[3] *City of Ladue v. Gilleo,* 512 U.S. 43, 57-59 (1994); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981)("The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have placed a prominent role throughout American history, rallying support for political and social causes.")(internal citation and quotations omitted).

[4] *City of Ladue*, 512 U.S. at 56.

[5] *Id*. at 57.

[6] *Id.*

candidate without significant finances or name recognition to make his or her name known in the community.

Signs, such as the Water Park signs in the case at bar, "that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community."[7]

A. The Town Sign Ordinance Is An Unconstitutional Infringement On Free Speech On Its Face Because It Places More Stringent Limitations On Political Signs Than It Does On Non-Political Signs Based Solely On The Content Of The Message And Therefore Constitutes Prohibited Content-Based Discrimination.

The Town sign ordinance limiting the posting of political signs to those "designating a candidate for elective office or other matters on the ballot" amounts to a ban on signs expressing views on non-ballot political and social issues. The Town sign ordinance also grants more favorable treatment to commercial than non-commercial speech by permitting both larger and permanent non-political signs as well as "off premises" non-political signs. Finally, the ordinance places a durational limit requiring political signs to be removed within 7 days after the election to which they relate. All of the foregoing limitations constitute unconstitutional content-based discrimination.

Content-based discrimination exists where limitations on free speech are imposed based on the content of the message.[8] Content-based restrictions on free speech "must be subjected to the most exacting scrutiny."[9] Content discrimination in the regulation of the speech of private

---

[7] *Id.* at 54.

[8] *City of Cincinnati v. Discovery Network, Inc.* 507 U.S. 410 (1993)(restriction on speech is content-based when the message conveyed determines whether the speech is subject to restriction).

[9] *Burson v. Freeman*, 504 U.S. 191, 196, 198(1992)("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.").

citizens on private property is presumptively impermissible.[10] To survive strict scrutiny, a content-based restriction must serve a compelling governmental interest and must be narrowly drawn to achieve that purpose, such that it is the "least restrictive" alternative available.[11]

The Town's asserted interests in traffic safety, aesthetics, and property values cited in the Town sign ordinance, while not insignificant, have never been held to be compelling,[12] **and any such purported interest is belied by the fact that the Town sign ordinance permits larger, permanent, and off-premises non-political signs**. Moreover, the ban on non-ballot question

[10] *City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring). Indeed, as the First Circuit noted in *McGuire v. Reilly*, 260 F.3d 36, 42-43 (1st Cir. 2001):

> Governmental restrictions on the content of particular speech pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). As a general rule, therefore, the government cannot inhibit, suppress, or impose differential content-based burdens on speech. *Id.* at 641-42, 114 S.Ct. 2445. To provide maximum assurance that the government will not throw its weight on the scales of free expression, thereby "manipulat[ing] ... public debate through coercion rather than persuasion," *id.* at 641, 114 S.Ct. 2445, **courts presume content-based regulations to be unconstitutional.** *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir.1995). While courts theoretically will uphold such a regulation if it is **absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end**, *see, e.g., Boos v. Barry*, 485 U.S. 312, 321-29, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), **such regulations rarely survive constitutional scrutiny**. (Emphasis added).

[11] *Whitton v. City of Gladstone*, 54 F. 3d 1400, 1408 (8th Cir. 1995)(*quoting Ward v. Rock Against Racism*, 491 U.S. 781,798 n.6 (1989)).

[12] *Whitton*, 54 F.3d at 1408 ("[A] municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling."); *King Enterprises, Inc. v. Thomas Township*, 215 F. Supp. 2d 891, 911 (E.D. Mich. 2002) ("Although 'safety' and 'aesthetics' are substantial government interests, they are not compelling enough to justify content-based restriction on fully-protected, noncommercial speech.")(citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508, 514-515 (1981)); *Curry v. Prince George's County*, 33 F. Supp. 2d 447, 452 (D.Md. 1999) ("Again, while recognizing aesthetics and traffic safety to be significant government interests, none of these courts found those interests sufficiently compelling to pass the applicable strict scrutiny test."); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D.Md. 1996) (holding that interests in safeguarding historic heritage and fostering civic beauty are not compelling).; *see also*, cases cited *supra*, note 16.

political issues and causes is akin to constitutionally disfavored prior restraint, which has never been held to be constitutional, except in rare and extraordinary circumstances.[13]

As a matter of undisputed fact and well settled law, there can be no dispute that the ban on signs relating to non-ballot political issues or causes constitutes unconstitutional content based discrimination.[14] Similarly, the more favorable treatment accorded to commercial speech by permitting both larger and permanent non-political signs as well as "off premises" non-political signs constitutes unconstitutional content based discrimination.[15] Finally, the durational limit on the positing of political signs has been almost uniformly declared unconstitutional by the courts, including political sign challenges brought in the District of Rhode Island. *See Williams v. City of Warwick,* No. 01-194L (D.R.I)(consent judgment entered August 8, 2001)(Lagueux, J.)(enjoining enforcement of municipal sign ordinance which restricted posting of signs "political in nature" to no more than 60 days prior to election or referendum and 120 days total in any calendar year); *Thibodeau v. Town of Cumberland,* No. 88-0460T (D.R.I.)(consent judgment entered Nov. 15, 1988)(Torres, J.)(enjoining enforcement of municipal sign ordinance which

[13] It is well settled that "any prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971)(quoting *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968)). Prior restraints are particularly disfavored. *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 559 (1976)("A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."). Prior restraints have only been upheld in "exceptional cases." *Near v. Minnesota,* 283 U.S. 697, 716 (1931); *see also CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

[14] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 515 (1981)(quoting *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 447 U.S. 530, 538 (1980))("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.'").

[15] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 514-515 (U.S. 1981)(plurality opinion)(municipal billboard ordinance which impermissibly discriminated on basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages held unconstitutional violation of First Amendment on its face).

restricted posting of political signs to no more than 30 days prior and 14 after election for which they were erected).[16]

Accordingly, by imposing durational and size limitations on political signs greater than that placed on non-political signs and banning the posting of non-ballot question political content signs as well as off-premises political signs, the Town sign ordinance is a facially unconstitutional content-based infringement on freedom of speech.

---

[16] *See also Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1409 (8th Cir. 1995) (holding city code which limited display of political signs to thirty days before election and seven days after election constituted unconstitutional content based restriction); *Quinly v. City of Prairie Village*, 446 F. Supp. 1233 (D. Kan. 2006) (issuing preliminary injunction enjoining city's enforcement of ordinance mandating removal of election signs immediately following election, since plaintiff had substantial likelihood of success on merits of claim ordinance was unconstitutional); *McFadden v. City of Bridgeport*, 422 F. Supp. 2d 659 (N.D. W.Va. 2006) (finding ordinance limiting posting of political signs to thirty days prior to and 48 hours after election was unconstitutional); *Knoeffler v. Town of Mamakating*, 87 F.Supp.2d 322 , 326-27 (S.D.N.Y. 2000) (noting "residential signs are a form of expression entitled to the highest degree of protection by the Free Speech clause of the First Amendment," **and "durational limits on signs have been repeatedly declared unconstitutional."**); *Christensen v. City of Wheaton*, No. 99-C8426, 2000 WL 204225, at *3-4 (N.D. Ill. Feb. 16, 2000) (finding durational limits on posting of political signs unconstitutional because limits were content-based and not narrowly tailored); *Curry v. Prince George's County, MD*., 33 F.Supp.2d 447, 455-56 (M.D.Md. 1999) (holding ordinance placing durational limits on political campaign signs unconstitutional because such limits are "inconsistent with the 'venerable' status that the Supreme Court has accorded to individual speech emanating from an individual's private residence," **and interpreting holding in *City of Ladue* as prohibiting any durational limitations on posting of political signs**); *Outdoor Systems, Inc. v. City of Lenexa*, 67 F. Supp. 2d 1231 (D. Kan. 1999) (finding regulation requiring removal of political campaign signs seven days after election was unconstitutional); *Dimas v. Warren*, 939 F. Supp. 554 (E.D. Mich. 1996) (finding city ordinance limiting, *inter alia*, posting of election and opinion signs to forty-five days prior to election unconstitutional); *McCormack v. Twp. of Clinton*, 872 F.Supp. 1320, 1327 (D.N.J. 1994)(finding restrictive timeframe which limited placement of political signs to ten day days prior to and three days after election "an unconstitutional suppression of political speech."); *City of Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F.Supp. 52, 61 (N.D.Cal. 1982) (holding unconstitutional sixty day time limit on posting of political signs); *Orazio v. Town of North Hempstead*, 426 F.Supp. 1144, 1149 (E.D.N.Y. 1977) (**holding "no time limit on the display of pre-election political signs is constitutionally permissible under the First Amendment."**); *Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875, 882 (Ga. 1996) (declaring seven-week durational limitation on political signs unconstitutional); *City of Painesville Bldg. Dep't v. Dworken & Bernstein Co.*, 733 N.E.2d 1152, 1160 (Ohio 2000) (finding ordinance unconstitutional when applied to prohibit owner of private property from posting single political sign outside prescribed durational period); *Van v. Travel Info. Council*, 628 P.2d 1217, 1228 (Or. Ct. App. 1981) (holding unconstitutional 60 day limitation on erection of political signs). *Collier v. City of Tacoma*, 854 P.2d 1046, 1057 (Wash. 1993)(*en banc*) (holding restrictive time period of sixty days unconstitutional).

B. <u>The Town Sign Ordinance Is An Unconstitutional Infringement On Free Speech On Its Face Because It Is Vague, Confusing And Overbroad And Thereby Fails To Provide People Of Ordinary Intelligence A Reasonable Opportunity To Understand What Conduct It Prohibits And Authorizes Or Even Encourages Arbitrary And Discriminatory Enforcement.</u>

The Town sign ordinance purports to permit "political signs" up to a certain size in one section, while limiting them to a smaller size in another. It also purports to prohibit "off-premises" political signs, even though there is typically no "premises" to which a ballot question political sign relates and a literal reading would prohibit nearly all candidate related political signs. The Town sign ordinance is unconstitutionally vague, overbroad and confusing, and thereby chills the exercise of free speech.

An enactment, such as the Town sign ordinance, is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or authorizes or even encourages arbitrary and discriminatory enforcement.[17] To prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them.[18]

It is further well established in the area of freedom of expression that a vague or overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.[19] This exception from general standing rules is based on an appreciation that the very existence of

---

[17] *Chicago v. Morales,* 527 U.S. 41, 56-57 (1999); *see also Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them").

[18] *Grayned,* 408 U.S. at 108.

[19] *See Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 129 (1992); *accord City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 798-799, and n. 15 (1984); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987).

vague laws has the potential to chill the expressive activity of others not before the court,[20] insofar as the possibility of prosecution and the imposition of sanctions chills first amendment expression as people are intimidated into censoring their own speech.[21] A statute that allows arbitrary application is "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."[22] Courts may not constitutionally presume a decision-maker will act in good faith and adhere to standards absent from a provision's face nor write non-binding limits into an otherwise silent enactment.[23]

Where, as here, the Town sign ordinance purports to permit "political signs" up to a certain size in one section, while limiting them to a smaller size in another, and prohibits "off-premises" political signs, even though there is typically no "premises" to which a ballot question political sign relates and a literal reading would prohibit nearly all candidate related political signs, the ordinance is unconstitutionally vague and overbroad as it fails to provide reasonable notice of what conduct it prohibits and authorizes arbitrary and discriminatory enforcement.

C. <u>The Town Sign Ordinance As-Applied By The Defendants In Selectively And Adversely Enforcing The Same Against The Plaintiff Constitutes Unconstitutional Viewpoint And Content-Based Discrimination In Violation Of Plaintiff's Right To Freedom Of Speech.</u>

The Defendants took no action to enforce the purported 8 square foot political sign size limitation in the Town sign ordinance against Plaintiff until he posted the "$350 hotel room" Water Park Signs. The notices of violation issued by the Defendants **specifically targeted <u>only</u>**

---

[20] *Forsyth County,* 505 U.S. at 129; *accord New York v. Ferber*, 458 US. 747 (1982); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491,503 (1985).

[21] *City of Lakewood v. Plain Dealer Pub.* Co., 486 U.S. 750, 757 (1988).

[22] *Forsyth County,* 505 U.S. at 130 (quoting *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

[23] *City of Lakewood*, 486 U.S. at 770.

the Water Park signs, even though Plaintiff's campaign signs were of equal size. Moreover, **notices were only sent to owners of property where Plaintiff's Water Park signs were posted, even though there were numerous other political signs in excess of the maximum size limitation posted in the Town, some in highly visible places and in proximity to Town Hall.** Moreover, notwithstanding letters received from the RIACLU and the Plaintiff documenting and complaining about the foregoing discriminatory treatment, Defendants have failed and publicly refused to uniformly and non-selectively enforce the Town sign ordinance. **In fact, currently there are at least 97 political signs posted within the Town which exceed the maximum size permitted under the Town sign ordinance, including many of the same or similar size as Plaintiff's Water Park signs and campaign signs.**

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.[24] As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[25] "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[26] Any restriction on expressive activity because of its content undercuts the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[27]

By not once, but twice, issuing notices of violation to Plaintiff and the owners of property where Plaintiff's Water Park signs were posted, threatening them with fines of up to $500.00 per

[24] *Consolidated Edison Co*., 447 U.S. at 537.

[25] *Id.; Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), *and cases cited therein.*

[26] *Consolidated Edison Co*., 447 U.S. at 538.

[27] *Mosley*, 408 U.S. at 96 (citation and quotations omitted).

day, and demanding an unreasonably and extraordinarily brief period of only 24 hours within which to comply to the September 8th notice, while permitting the continued display, without citation or sanction, of at least 97 political signs of other candidates posted at locations in the Town of the same or similar size as Plaintiff's Water Park signs and campaign signs, or which, in any event, exceeded the maximum size or the one sign per candidate or issue limit for a political sign under the Town sign ordinance, the Defendants have engaged in unconstitutional viewpoint and content-based discrimination.

D. Plaintiff Has Satisfied All Elements Necessary To Establish His Right To The Issuance Of A Temporary Restraining Order And Preliminary Injunctive Relief Restraining And Enjoining The Defendants From Enforcing The Town Sign Ordinance And From Treating Any Signs Erected By Plaintiff In A Less Favorable Fashion Than Defendants Treat Any Other Political Signs Posted Within The Town.

A district court must weigh four factors in determining whether to issue a preliminary injunction: (1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, *i.e.*, the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect, if any, of the court's ruling on the public interest.[28] The likelihood of success is an essential and the most important prerequisite for the issuance of a temporary restraining order or preliminary injunction.[29]

[28] *Wine and Spirits Retailers, Inc. v. Rhode Island,* 418 F.3d 36, 46 (1st Cir. 2005)(citing *Bl(a)ck Tea Soc'y v. City of Boston,* 378 F.3d 8, 11 (1st Cir.2004)).

[29] *Wireless Servs., Inc. v. SprintCom, Inc.,* 287 F.3d 1, 9 (1st Cir.2002)("The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity."); *Weaver v. Henderson,* 984 F.2d 11, 12 (1st Cir.1993)(similar).

1. Likelihood of Success on the Merits

There can be no question but that, based on the record before this Court, the Plaintiff has established a compelling if not irrefutable showing of a likelihood of success on the merits.[30] As argued in detail above, the Town sign ordinance is facially unconstitutional because it imposes content-based limitations favoring non-political signs over political signs, including a ban on non-ballot question political issue or cause signs and durational limitations, which have uniformly been held to be unconstitutional. To put it another way, there is no reasonable probability that Defendants can establish a compelling governmental interest to justify such discriminatory treatment. Moreover, the Town sign ordinance is also facially unconstitutional because it permits "political signs" up to a certain size in one section, while limiting them to a smaller size in another, and prohibits "off-premises" political signs, even though there is typically no "premises" to which a ballot question political sign relates and a literal reading would prohibit nearly all candidate related political signs. The ordinance is therefore unconstitutionally vague or overbroad as it fails to provide reasonable notice of what conduct it prohibits and authorizes arbitrary and discriminatory enforcement—which is precisely what has occurred in this case.

Finally, there is compelling if not irrefutable evidence in the record—notwithstanding any self-serving rebuttal by the Defendants—that the Town sign ordinance as-applied by the Defendants in selectively and adversely enforcing the same against the Plaintiff, while permitting the continued display, without citation or sanction, of at least 97 political signs of other candidates posted in the Town, which exceed the maximum size for a political sign under the

[30] In order to obtain preliminary injunctive relief, a plaintiff need only establish a *prima facie* case, *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974), and need not prove it is certain to win, *Cuneo Press of New England, Inc. v. Watson*, 293 F.Supp. 112 (D.Mass.1968). However, the plaintiff must show some reasonable probability of success on the merits. *Gilbane Building Co. v. Cianci*, 117 R.I. 317, 319, 366 A.2d 154, 155 (1976); *Coolbeth*, 112 R.I. at 566, 313 A.2d at 661.

ordinance, constitutes unconstitutional viewpoint and content-based discrimination in violation of Plaintiff's right to freedom of speech.

2. Irreparable Harm

As set forth in detail above, the Defendants' actions in enforcing and threatening to enforce the Town sign ordinance constitute a violation of the Plaintiff's right to freedom of speech protected under the First and Fourteenth Amendments to the United States Constitution and Article 1, §21 of the Rhode Island Constitution. Plaintiff is currently in the untenable position of either refraining from protected speech or facing prosecution and the imposition of monetary sanctions for purported violation of the ordinance. In addition, because of the notices of violation issued by the Defendants, Plaintiff was asked by certain property owners to remove his signs. Accordingly, without judicial approval, it is inconceivable Plaintiff would even receive permission to re-erect signs at those locations. Moreover, unless Plaintiff is immediately permitted to erect and display his Water Park signs and campaign signs and thereby communicate his candidacy and position on the Water Park issue prior to the general election scheduled for November 4, 2008, he will be unable to reach and convey information to potential voters prior to the election—which is just weeks away. Adjudication of this dispute cannot await a trial on the merits without rendering such harm irreparable and moot.

In order to warrant the issuance of a temporary restraining order, the party seeking the order must demonstrate "irreparable injury" pursuant to Fed.R.Civ.P. 65(b).[31] Plaintiff has fulfilled this requirement in this case by "demonstrating that [his] First Amendment rights have

[31] *Cirelli v. Town of Johnston School Dist.*, 888 F.Supp. 13, 15-16 (D.R.I. 1995). The granting of injunctive relief is appropriate where the moving party has established that it is being threatened with some immediate irreparable injury for which no adequate remedy at law lies. *Paramount Office Supply Co. v. MacIsaac*, 524 A.2d 1099, 1102 (R.I. 1987).

very likely been violated."[32] The First Circuit has noted that "even a temporary restraint on expression may constitute irreparable injury."[33] Finally, the Supreme Court has authoritatively ruled that "[t]he loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[34]

3. Balance of Relevant Impositions

When considering the grant of preliminary injunctive relief, the court must balance the equities between the parties, that is, the relief which is sought must be weighed against the harm which would be visited upon the non-moving party if an injunction were to be granted.[35] Preliminary injunctive relief "should be granted where the injury which the defendant would suffer from its issuance is slight as compared with the damage which plaintiff would sustain from its refusal . . .."[36] For the reasons previously set forth above, Plaintiff will face material and irreparable harm if he is unable to erect and display his Water Park signs and campaign signs prior to the general election scheduled on November 4, 2008. Each day he is unable to communicate his message, he sustains irreparable harm. On the other hand, the Defendants would experience virtually no harm if they are restrained and enjoined from enforcing a facially unconstitutional sign ordinance against Plaintiff in a content and viewpoint based discriminatory manner, while permitting the continued display, without citation or sanction, of numerous political signs of other candidates posted in the Town, which exceed the maximum size permitted under the sign

---

[32] *Id.*

[33] *In the Matter of Providence Journal Co.,* 820 F.2d 1342, 1353 (1st Cir.1986)(citations omitted).

[34] *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *accord Cirelli,* 888 F.Supp. at 16.

[35] *In re State Employees Unions,* 587 A.2d 919, 925 (R.I. 1991)(trial court decision, Krause, J.); *Rhode Island Turnpike and Bridge Authority v. Cohen,* 433 A.2d 179, 182 (R.I. 1981).

[36] 42 Am. Jur. 2d, Injunctions, §57, pp. 800-801.

ordinance. Accordingly, on balance, the harm to the Defendant is essentially non-existent, while the harm to the Plaintiff if injunctive relief is not granted is substantial. Where as here, the "Defendants' chance of prevailing is somewhere between slight and nil . . . an injunction should issue to prevent this . . . harm from being perpetuated any further."[37]

4. Public Interest

In connection with a balancing of the equities, the court is obliged to consider, as an integral factor, the public interest. The public interest would not be adversely affected by the grant of injunctive relief. To the contrary, the important public interest in a wide open and robust political debate, free from governmental interference and manipulation, would be greatly served. Supreme Court precedent has been unwavering in its adherence to the bedrock principle that expression on public issues rests "on the highest rung of the hierarchy of First Amendment values,"[38] and thus that "debate on public issues should be uninhibited, robust, and wide-open."[39] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[40] In the context of this general proposition that freedom of expression about public affairs is sacred under the First Amendment, "the Supreme Court has made it clear that protected political speech goes far beyond abstract, intellectual argument about political theory to include vigorous debate about the qualifications and official conduct of public officials."[41]

---

[37] *Westenfelder v. Ferguson,* 998 F.Supp. 146, 158 (D.R.I. 1998).

[38] *Carey v. Brown,* 447 U.S. 455, 467 (1979).

[39] *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

[40] *Mills v. Alabama,* 384 U.S. 214, 218 (1966).

[41] *Providence Journal Co. v. Newton,* 723 F.Supp. 846, 851 (D.R.I. 1989)(citing *New York Times Co. v. Sullivan,* 376 U.S. at 268 and *Beauharnais v. Illinois,* 343 U.S. 250, 263-64 (1952)("public

V. CONCLUSION

WHEREFORE, for all the foregoing reasons, Plaintiff respectively prays that his Motion for Temporary Restraining Order and Preliminary Injunctive Relief be granted, and that this Court award Plaintiff the relief as prayed for therein, specifically:

1. That the Defendants be temporarily restrained and enjoined from enforcing the Town sign ordinance, specifically section 5.10 of the Town Zoning Ordinance entitled "Signs" and subsection 3.74.11, so as to prohibit the erection and display of political signs, including but not limited to candidate campaign signs or issue signs, whether or not either is the subject of a pending ballot question or election or are considered "off-premises," or from subjecting the posting of any such signs to more stringent size or other limitations than that imposed on non-political signs.
2. That the Defendants be temporarily restrained and enjoined from enforcing or attempting to enforce the Town sign ordinance with respect to any eight (8) foot by four (4) foot free standing political signs within the Town posted by the

---

men, are, as it were, public property" and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled")); *see also N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1962)(First Amendment protects "vigorous advocacy" no less than "abstract discussion"). Finally, the court in *Newton*, 723 F.Supp. at 851, noted as follows:

> Further, it is settled that open discussion of official conduct is accorded the broadest protection available in our political system notwithstanding the fact "that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 721. Indeed so sweeping is the protection accorded the citizen-critic of official conduct that a public official falsely maligned is barred from recovering damages for libel absent proof of actual malice, *id.*, 376 U.S. at 283, 84 S.Ct. at 727-28, on the theory that even erroneous political expression must be protected if freedom of speech is to have the "breathing space" that it needs to survive. *N.A.A.C.P. v. Button*, 371 U.S. at 433, 83 S.Ct. at 338.

Plaintiff, whether relating to his candidacy or the Shipwreck Falls Water Park or any other issue or cause.

3. That the Defendants be temporarily restrained and enjoined from in any way applying more stringent limitations on political signs erected by the Plaintiff, whether relating to his candidacy or the Shipwreck Falls Water Park or any other issue or cause, than are applied by Defendants to any other political signs posted within the Town.

4. That this Court grant Plaintiff such other and further temporary injunctive relief as it deems just and proper.

5. That this matter be assigned in a timely fashion for a hearing on Plaintiff's prayers for Preliminary Injunctive Relief.

Respectfully Submitted,
Plaintiff,
THOMAS K. JONES
By his attorneys,

Date: October ___, 2008

Richard A. Sinapi, Esq. (#2977)
American Civil Liberties Union, R.I. Affiliate
Sinapi, Formisano & Company, Ltd.
100 Midway Place, Suite 1
Cranston, RI 02920
Phone: (401) 944-9690; FAX: (401) 943-9040