UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN O. MATSON,	:	
Plaintiff	:	
v.	:	**C.A. No. 10-**
	:	
TOWN OF NORTH KINGSTOWN, by and through its Treasurer, **Patricia Sunderland,** and **GARY TEDESCHI,** in his individual and official capacities as the Building Official and Zoning Enforcement Officer for the Town of North Kingstown,	:	
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, John O. Matson, seeking declaratory and injunctive relief for acts and/or omissions of Defendant Town of North Kingstown ("Town") and Defendant Gary Tedeschi, in his individual and official capacities as Town Building Official and Zoning Enforcement Officer ("Tedeschi"), 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 certain provisions of the Town Zoning Ordinance, specifically, Article X, entitled "Signs" ("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 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 temporarily restrain and enjoined Defendants from enforcing or attempting to enforce the Town Sign Ordinance with respect to any four (4) foot by six (6) foot or similarly-sized political signs within the Town posted by the Plaintiff, whether relating to his candidacy or any other issue or cause and whether or not affixed, in whole or in part, to a tree or portion thereof.

II. SUMMARY

Plaintiff was and is an independent candidate for the United States Congress in the Second District of Rhode Island. On or about August of 2010, he purchased and erected numerous campaign signs slightly less than four (4) feet by six (6) feet at various locations throughout the Town ("signs"). On or about the end of September 2010, the Plaintiff received two (2) Notices of Violation from Defendant Tedeschi claiming that six (6) of his signs were in purported violation of the Town Zoning Ordinance, either because they were "political signs" which exceeded the maximum size in a residential or non-residential zone and/or were affixed, in whole or in part, to a tree on the premises. To avoid the potential imposition of a fine of not more than $100.00 per day for each violation, the Plaintiff removed the foregoing six (6) signs. Subsequently, the Plaintiff notified the Defendants that the Town Sign Ordinance discriminated on the basis of content and was therefore unconstitutional, and unsuccessfully attempted to obtain assurance from the Town that it would not attempt to enforce the Town Sign Ordinance against the Plaintiff's signs if he were to re-erect them.

The Plaintiff's low budget, independent campaign for public office is almost totally self-funded. He has minimal resources with which to wage a campaign. Campaign signs are the primary medium by which the Plaintiff communicates his candidacy to potential voters. With the general election less than two (2) weeks away, he has nowhere to turn except to the Court to obtain relief from this infringement on his participation in the democratic process as a candidate.

The Town Sign Ordinance more favorable treatment of non-political speech, by permitting both larger and permanent non-political signs, is constitutionally impermissible content-based discrimination. In addition, the Town Sign Ordinance's apparent ban on the display of signs which relate to political matters not the subject of a pending election or ballot question without a permit, while exempting signs relating to various business, religious, public, and/or holiday purposes, amounts to a prior restraint on signs expressing views on non-ballot political and social issues and also constitutes impermissible content-based discrimination. Because the Town Sign Ordinance imposes size and durational limitations on political signs greater than that placed on non-political signs and bans the posting of non-ballot question political and social content signs without a permit, it infringes on freedom of speech based on content and is therefore unconstitutional on its face.

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 in violation of the Plaintiff's right to freedom of speech.

III. MATERIAL FACTS

A. Chronology of Events

As stated previously, Plaintiff was and is an independent candidate for the United States Congress in the Second District of Rhode Island. Verified Complaint ("Comp.") at ¶7. On or about August of 2010, Plaintiff purchased and erected numerous political campaign signs slightly less than four (4) feet by six (6) feet at various locations throughout the Town ("signs"). *Id.* at ¶8. All of Plaintiff's signs were safely and securely affixed at each location. *Id.* at ¶9. Certain signs were affixed, in whole or in part, to trees situated on the site. *Id.* at ¶10. Plaintiff obtained permission in advance from the owners of any private properties on which the foregoing signs were erected. *Id.* at ¶11.

On or about September 25, 2010, Plaintiff received by mail a Notice of Violation dated September 24, 2010 notifying him that five (5) of his signs were in purported violation of the Town Zoning Ordinance, specifically, Article X, entitled "Signs" ("Town Sign Ordinance"), Sec. 21-243. *Id.* at ¶12. The foregoing September 24th notice provided, in pertinent part, that each of the signs were in violation because they were "[p]olitical signs larger than twenty (20) square feet . . . in non-residential zones" or "larger than six (6) square feet in residential zones" or "posted on trees, utility poles, traffic or regulating signs . . .." *Id.* at ¶13. Subsequently, Plaintiff received by mail a second Notice of Violation dated September 27, 2010 notifying him that one (1) of his signs purportedly violated the Town Sign Ordinance because it was a "[p]olitical sign[] larger than six (6) square feet in [a] residential zone[]." *Id.* at ¶14.

Plaintiff has previously campaigned for political office on numerous occasions and has erected signs of similar size and affixed them in the same or similar fashion in various locations in the Town. *Id.* at ¶16. Nevertheless, the Plaintiff never received a Notice of Violation from the Town in previous years. *Id.* at ¶17. There were and currently are numerous political signs of other candidates of similar or larger sizes in both residential and non-residential zones, some affixed in the same or similar fashion, situated in various locations in the Town. *Id.* at ¶18. On information and belief, the Defendants have not issued Notices of Violation with respect to all the foregoing non-conforming signs of other political candidates. *Id.* at ¶19.

Both the erector of the sign and owner of the property on which it is erected are subject to a fine of not more than $100.00 per day, plus reasonable court costs, for each violation of the Town Sign Ordinance, which is not abated within ten (10) working days after receiving notice of the violation. Town Sign Ordinance, Sec. 21-252. *Id.* at ¶20. Although Plaintiff believed that the Notices of Violation issued by the Defendants were 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, on or about October 10, 2010, Plaintiff removed all his signs cited by the Defendants in order to protect himself and innocent property owners from the risk of incurring fines. *Id.* at ¶21.

On or about October 12, 2010, the Rhode Island Affiliate of the American Civil Liberties Union ("RIACLU") faxed and mailed a letter to Defendant Tedeschi warning that the Town sign ordinance, among other things, discriminated on the basis of content and was therefore unconstitutional. *Id.* at ¶22. With the general election less than thirty (30) days away at the time, the foregoing letter requested that the Town acknowledge in writing that it would not attempt to enforce the Town Sign Ordinance against the Plaintiff's signs if he were to re-erect them. *Id.* at ¶23. Notwithstanding the foregoing warning letter from the RIACLU, Defendants sent a response letter dated October 12, 2010 denying that the Town Sign Ordinance discriminated against political signs and offering no relief to Plaintiff. *Id.* at ¶24.

With the exception of a few hundred dollars in donations, the Plaintiff's independent campaign for public office is self-financed, with a budget less than five thousand ($5,000.00) dollars. *Id.* at ¶25. Campaign signs are the primary medium by which the Plaintiff communicates his candidacy to potential voters. *Id.* at ¶26.

B. Town Sign Ordinance

Section 21-243 of the Town Zoning Ordinance provides as follows:

> The following signs shall be allowed in any zoning district without the necessity of obtaining a sign permit.. . .
>
> (10) Political and preelection signs erected no more than 60 days prior to the designated election day, and the signs shall be removed within ten days after the election. The candidate for office or a designee shall have the responsibility for the removal of signs advertising the candidacy. The size of such signs shall be restricted to six square feet in a residential zone and 20 square feet in a nonresidential zone. No signs may be posted on trees, utility poles, traffic or regulating signs of any nature.

Comp. at ¶27.

C. 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. **Size**. Limiting political signs to (i) a maximum of six (6) square feet in a residential zone, and (ii) twenty (20) square feet in a non-residential zone, while permitting, among other things, (iii) in a business or industrial district, non-political signs of up to fifty (50) square feet, and (iv) in any district, memorial and directory signs not exceeding eight (8) square feet; construction or contractor signs not exceeding nine (9) square feet; signs identifying churches and places of worship, bulletin boards for public or religious institutions, and development/subdivision signs not exceeding fifteen (15) square feet; service station signs not exceeding thirty (30) square feet; pennants, banners and decorative flags, when associated with events of religious, public or charitable organizations and holiday signs ***of any size***.

b. **Duration**. Limiting the display of political signs to no more than sixty (60) days prior to the designated election day and requiring their removal within ten (10) days after the 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. **Prior Restraint**. Prohibiting signs which relate to political matters not the subject of a pending election or ballot question without a permit, while exempting signs relating to various business, religious, public, and/or holiday purposes.

Comp. at ¶28.

D. 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 his political candidacy to potential voters and members of the public generally. *Id.* ¶74. The general election scheduled for November 2, 2010 is less than two weeks away, yet Plaintiff is unable to post within the Town any of the numerous approximately four foot (4) by six foot (6) signs he has purchased, insofar as he faces the potential imposition of substantial monetary fines. *Id.* ¶75. In future elections, Plaintiff would also like and intends to erect and display signs at locations within the Town, to communicate, among other things, his candidacy for political office, his opposition to or support of various issues, and/or his opposition to or support of candidates for political office, in sizes and for durations in excess of the limits imposed by the Town Sign Ordinance. *Id.* ¶76. Nevertheless, Plaintiff is reluctant to expend time and money to erect and display his signs 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.* ¶77.

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 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

[1] *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.").

[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)).

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

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[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.*

A. The Town Sign Ordinance Is Unconstitutional 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 accords more favorable treatment to non-political than political speech by permitting both larger and permanent non-political signs. In addition, the Town Sign Ordinance bans the display of signs which relate to political matters not the subject of a pending election or ballot question without a permit, while exempting signs relating to various business, religious, public, and/or holiday purposes. Finally, the Town Sign Ordinance bans the posting of political signs on trees, while permitting a property owner to do virtually anything else to a tree on his or her property, except use it to engage in constitutionally protected speech. All of the foregoing limitations constitute unconstitutional content based discrimination.[7]

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 citizens on private property is presumptively impermissible.[10] To survive strict scrutiny, a

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[7] *See Vono v. Lewis,* 594 F.Supp.2d 189, 204 (D.R.I. 2009)(Smith, J.)(A governmental determination that "the communication of commercial information is of greater value than the communication of . . . political speech, the most highly prized category of speech, . . . inverts the First Amendment's hierarchy.").

[8] C*ity 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).

[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

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] Governmental limitations on speech "rarely survive strict scrutiny."[12] 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,[13] **and any such purported interest is belied by the fact that the Town Sign Ordinance permits larger and permanent non-political signs**.

As a matter of undisputed fact and well settled law, there can be no dispute that the more favorable treatment accorded to commercial speech by permitting both larger and permanent non-political signs constitutes unconstitutional content based discrimination.[14] Similarly, the

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> 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] *McGuire v. Reilly*, 260 F.3d 36, 443 (1st Cir. 2001).

[13] *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.

[14] *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

ban on signs relating to non-ballot political issues or causes without a permit 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, typically on content based grounds, including political sign challenges brought in the District of Rhode Island. *See Jones v. Town of West Warwick,* C.A. No. 08-375ML (D.R.I.)(consent judgment entered Aug. 24, 2009)(Lisi, J.)(enjoining enforcement of municipal sign ordinance which, among other things, required the removal of political signs within seven (7) days after election for which they were erected); *Williams v. City of Warwick,* C.A. 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,* C.A. No. 88-0460T (D.R.I.)(consent judgment entered Nov. 15, 1988)(Torres,

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permitting on-site commercial speech while broadly prohibiting noncommercial messages held unconstitutional violation of First Amendment on its face); *Vono v. Lewis,* 594 F.Supp.2d 189, 203-205 (D.R.I. 2009)(Smith, J.)(Rhode Island Outdoor Advertising Act and implementing rules violated First Amendment since they imposed content-based restrictions on noncommercial speech and preferred commercial speech to noncommercial speech); *see also* cases cited, *infra*, note 16.

[15] The First Amendment's hostility to content-based regulation of speech extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 537 (1980). 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." [15] *Id.; Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), *and cases cited therein.* "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, 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.'"). 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." *Mosley*, 408 U.S. at 96 (citation and quotations omitted).

J.)(enjoining enforcement of municipal sign ordinance which restricted posting of political signs to no more than 30 days prior and 14 days after election for which they were erected).[16]

Accordingly, insofar as the Town Sign Ordinance imposes size and durational limitations on political signs greater than that placed on non-political signs, and bans the posting of non-ballot question political and social content signs without a permit, it impermissibly infringes on freedom of speech based on content and is therefore unconstitutional on its face.

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[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. 2d. 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. The Town Sign Ordinance Is Unconstitutionally Infirm, Either As A Content Based Ban On Certain Political And Social Speech Or As An Unlawful Prior Restraint Of Speech.

The Town Sign Ordinance either bans non-ballot question political and social content signs (*see* Sec. 21-242 (definition of "sign")) or requires prior Town approval and issuance of a permit (*see* Sec. 21-245 ("Permit Procedure")) or special use permit (*see* Sec. 21-251 ("Special Use Permits" required for "off-premises signs")). This is so because neither type of sign falls within the exemptions under Sec. 21-243, including the political sign exemption, which appears to require some relationship to an election (*see* Sec. 21-243 (10)(political sign exemption)). In either case, the Town Sign Ordinance is unconstitutionally infirm, either as a content based ban on certain political and social speech or as an unlawful prior restraint of speech.

Restrictions which foreclose an entire medium of expression, even where content and viewpoint neutral, have been struck down as unconstitutional on numerous occasions because "the danger they pose to the freedom of speech is readily apparent by eliminating a common means of speaking."[17] "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[18] Generally, there is a "heavy presumption" against the validity of a prior restraint.[19]

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[17] *City of Ladue*, 521 U.S. at 55, *and cases cited therein.*

[18] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

[19] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); *see also Thomas v. Chicago Park District,* 534 U.S. 316, 320 (2002) (The First Amendment "prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the 'evils' of the printing press in 16th-and 17[th]-century England.").

Licensing schemes impose a prior restraint on speech insofar as they entail a ban on speech "at least for the time."[20] "[A licensing or permitting] scheme that fails to set reasonable time limits on the decision-maker creates the risk of indefinitely suppressing permissible speech," and is therefore constitutionally impermissible.[21] To satisfy this requirement, an ordinance must contain two procedural safeguards: (1) a requirement that permitting decisions are made within a specified time period,[22] and (2) the availability of prompt judicial review to correct erroneous denials.[23] A valid prior restraint also may not place "unbridled discretion" in the hands of a government official.[24] A prior restraint that fails to place limits on the time frame within which a license or permit decision must be made is an unconstitutional impairment of freedom of speech.[25]

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[20] *See Neb. Press Ass'n,* 427 U.S. at 559 ("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.") (citing Alexander Bickel, *The Morality of Consent* 61 (1975) ("Even if they are ultimately lifted they cause irremediable loss-a loss in the immediacy, the impact, of speech.... A criminal statute chills, prior restraints freeze.")); *Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[21] S*ee FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 227 (1990) (plurality opinion).

[22] S*ee FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 226-27 (1990) (plurality opinion) (citing *Freedman v. Maryland,* 380 U.S. 51, 59 (1965)).

[23] *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1362-63 (11th Cir.1999)(citation omitted); *see also Freedman v. Maryland,* 380 U.S. 51, 58-59.

[24] *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225-26 (1990) (plurality opinion)(quoting *City of Lakewood,* 486 U.S. at 757); *see also Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358, 1361 (11th Cir.1999) ("licensing schemes commonly contain two defects: discretion and the opportunity for delay").

[25] *See Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965) (holding that, when private speech requires a prior license from a government agency, this license must either be issued or denied "within a specified brief period"); *Lusk v. Village of Cold Spring,* 475 F.3d 480, 487 (2nd Cir. 2007) (invalidating ordinance regulating signs on prior restraint grounds due to failure to provide for timely issuance of sign permit); *see also FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 226 (1990) ("[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible."); *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 771-72 (1988) ("[W]e cannot agree that newspaper publishers can wait indefinitely for a permit only because there will always be news to

The Town Sign Ordinance does not provide any time frame within which an application for a sign permit or special use permit must be determined. The only judicial appeal from a denial of a permit under the Town Sign Ordinance, if any, is pursuant to R.I.G.L. §45-24-69, which does not provide any limitation on the time frame within which a judicial determination must be made. Accordingly, the Town Sign Ordinance either imposes an unconstitutional ban on non-ballot question political and social content signs or an invalid prior restraint in violation of the Plaintiff's right to freedom of expression.[26]

C. The Town Sign Ordinance Ban On Posting Signs On Trees Is Not Substantially Justified By Its Stated Purposes, Particularly In Light Of The Numerous Unregulated Uses To Which They May Be Put, And Therefore Constitutes An Arbitrary Impairment Of A Medium Of Communication That Impermissibly Infringes Constitutionally Protected Speech.

Although the Town Sign Ordinance bans the posting of both political signs (Sec. 21-243 (10)) and non-political signs (Sec. 21-244 (7)) on trees, such a limitation nevertheless impermissibly infringes upon freedom of expression.[27] Such a limitation on speech, to the extent it applies to a property owner's own property, cannot be justified by the stated purposes in the Town Sign Ordinance to promote safety, aesthetics, and property values. This is so because the Town permits a property owner to do virtually anything else to a tree on his or her property—cut

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report.... [A] paper needs public access at a particular time; eventual access would come 'too little and too late.' ")(quoting *Freedman,* 380 U.S. at 57)).

[26] *Lusk v. Village of Cold Spring,* 475 F.3d 480, 492 (2nd Cir. 2007) ("Where, as here, a property owner wishes to take a public position on a pressing public issue, for example, or on the qualifications of a candidate for public office in an imminent election, the time required to obtain approval may prevent the property owner from doing so until after the public issue is settled or the election is over. Such belated approval is of little consolation to Lusk and those like him in this regard, and of little use to their neighbors or the political process.").

[27] The Town Sign Ordinance nevertheless still discriminates between political and non-political signs, treating the former less favorably by banning the posting of political signs on "trees, utility poles, traffic or regulating signs of any nature" (Sec. 21-243 (10)) while banning only non-political signs "affixed to utility poles and trees" (Sec. 21-244 (5)).

it down, prune it, paint it, decorate it garishly, attach a hammock to it, or build a tree house in it; everything except use it to engage in constitutionally protected speech. **"**Despite the expressly neutral intent, a more exacting review reveals" that the Defendants are only materially limiting a property owner's use of a tree when it is being used as a means of free expression.[28]

Accordingly, the Town Sign Ordinance ban on posting signs on trees is not substantially justified by its stated purposes, particularly in light of the numerous unregulated uses to which they may be put. The limitation therefore constitutes an arbitrary impairment of a "venerable medium for expressing political, social and commercial ideas" that impermissibly infringes constitutionally protected speech.[29]

D. Plaintiff Has Established All Elements Required For The Issuance Of A Temporary Restraining Order And Preliminary Injunctive Relief

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.[30] The likelihood of success is an essential and the most important prerequisite for the issuance of a temporary restraining order or preliminary injunction.[31]

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[28] *Vono v. Lewis*, 594 F.Supp.2d 189, 200(D.R.I. 2009)(Smith, J.).

[29] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981); *Cf. City of Ladue*, 521 U.S. at 55, *and cases cited therein.*

[30] *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)).

[31] *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.[32] 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 durational limitations which have been uniformly held to be unconstitutional, and a ban on non-ballot question political issue or cause signs without a permit. 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 imposes an unreasonable prior restraint on the exercise of political speech, insofar as it provides for a permitting scheme that does not limit the time frame within which an application must be determined or provide for the availability of prompt judicial review to correct erroneous denials. Finally, the Town Sign Ordinance imposes a ban on posting signs on trees that is not substantially justified by its stated purposes, particularly in light of the numerous unregulated uses to which trees may be put, and therefore arbitrarily and unconstitutionally impairs a medium for protected 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

[32] 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.

position of either refraining from protected speech or facing prosecution and the imposition of monetary sanctions for purported violation of the Town Sign Ordinance. Accordingly, without judicial approval, Plaintiff will not and cannot re-erect the signs he removed or install signs at new sites in the Town. Moreover, unless Plaintiff is immediately permitted to erect and display his signs and thereby communicate his candidacy prior to the general election scheduled for November 2, 2010, he will be unable to reach and convey information to potential voters in the Town prior to the election—***which is less than two weeks away.*** Adjudication of this dispute cannot await a trial on the merits without rendering such harm irreparable.

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).[33] Plaintiff has fulfilled this requirement in this case by "demonstrating that [his] First Amendment rights have very likely been violated."[34] The First Circuit has noted that "even a temporary restraint on expression may constitute irreparable injury."[35] 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."[36]

3. Balance of Relevant Impositions

When considering the grant of preliminary injunctive relief, a court must balance the equities between the parties, that is, the relief which is sought must be weighed against the harm

[33] *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).

[34] *Id.*

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

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

which would be visited upon the non-moving party if an injunction were to be granted.[37] 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 . . .."[38]

For the reasons previously set forth above, Plaintiff will face material and irreparable harm if he is unable to erect and display his signs prior to the general election scheduled on November 2, 2010. 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. Accordingly, on balance, the harm to the Defendants 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."[39]

4. Public Interest

In connection with a balancing of the equities, a 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. The public has no interest in enforcing an unconstitutional ordinance.[40]

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[37] *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).

[38] 42 Am. Jur. 2d, Injunctions, §57, pp. 800-801.

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

[40] *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261 (11th Cir. 2006)(granting preliminary and permanent injunction enjoining city's sign ordinance which violated the First Amendment by impermissibly favoring commercial speech to the detriment of noncommercial speech); *see also Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) (noting that "[t]he public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional"); *see also Joelner v. Vill. of Washington*

Moreover, 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,"[41] and thus that "debate on public issues should be uninhibited, robust, and wide-open."[42] "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."[43]

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.

Plaintiff, **John O. Matson**
By his attorneys,

Date: October ___, 2010

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

Park, 378 F.3d 613, 620 (7th Cir.2004) (noting that "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties" (internal quotation marks omitted)); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir.1987) (finding that the public's interest is in prevention of enforcement of ordinances which may be unconstitutional").

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

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

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